

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/05-01/08 OA 3**

**Date: 19 October 2010**

**THE APPEALS CHAMBER**

**Before:**  
**Judge Anita Ušacka, Presiding Judge**  
**Judge Sang-Hyun Song**  
**Judge Akua Kuenyehia**  
**Judge Erkki Kourula**  
**Judge Daniel David Ntanda Nsereko**

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

**IN THE CASE OF THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO**

**Public document**

**Judgment**

**on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled "Decision on the Admissibility and Abuse of Process Challenges"**



**Judgment 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  
Mr Fabricio Guariglia

**Counsel for the Defence**

Mr Liriss Nkwebe  
Mr Aimé Kilolo-Musamba

**Legal Representatives of Victims**

Ms Marie-Edith Douzima Lawson

**The Office of Public Counsel for Victims**

Ms Paolina Massida

**States Representatives**

The Government of the Central African  
Republic

**REGISTRY**

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**Registrar**

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the Admissibility and Abuse of Process Challenges” of 24 June 2010 (ICC-01/05-01/08-802),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

The “Decision on the Admissibility and Abuse of Process Challenges” is confirmed. The appeal is dismissed.

## REASONS

### I. KEY FINDING

1. The Trial Chamber did not err when it determined that there was no decision not to prosecute within the meaning of article 17 (1) (b) of the Statute. When a Trial Chamber is presented with the question of whether the outcome of domestic judicial proceedings was a decision not to prosecute in terms of article 17 (1) (b) of the Statute, the Trial Chamber should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise.

### II. PROCEDURAL HISTORY

#### A. Proceedings before the Trial Chamber

2. On 25 February 2010, Mr Jean-Pierre Bemba Gombo (hereinafter: “Mr Bemba”) formally challenged the admissibility of the case in a filing submitted to Trial Chamber III (hereinafter: “Trial Chamber”) entitled “Application Challenging



the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute”<sup>1</sup> (hereinafter: “Admissibility Application”).

3. On 29 March 2010, the Prosecutor filed the “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”<sup>2</sup> (hereinafter: “Prosecutor’s Response to Admissibility Application”). The same day, one of the legal representatives of the victims participating in the proceedings filed the “Observations of the Legal Representative of the Victims on the Defence Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute”.<sup>3</sup> On 1 April 2010, the Office of Public Counsel for Victims acting as counsel for victims (hereinafter: “Victims”) filed its response to the Admissibility Application, entitled “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”.<sup>4</sup>

4. On 14 April 2010, Mr Bemba filed the “Réplique de la Défense aux observations du Procureur et de [sic] Représentants légaux des victimes sur la requête en contestation de la recevabilité de l’Affaire”.<sup>5</sup>

5. On 19 April 2010, the Registrar submitted the observations from the Central African Republic (hereinafter: “CAR”) and the Democratic Republic of Congo (hereinafter: “DRC”).<sup>6</sup>

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<sup>1</sup> ICC-01/05-01/08-704-Conf-Exp-tENG; for a public redacted version *see* ICC-01/05-01/08-704-Red3-tENG. A corrigendum to the Admissibility Application was filed on 1 March 2010: “Corrigendum à la 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-Conf-Corr. All references herein are to the public redacted version.

<sup>2</sup> ICC-01/05-01/08-739.

<sup>3</sup> ICC-01/05-01/08-740-tENG.

<sup>4</sup> ICC-01/05-01/08-742-Corr. The corrigendum was filed on 16 April 2010 and contains a corrected version of the Victims’ Response. *See* “Corrigendum to the ‘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”, 16 April 2010, ICC-01/05-01/08-756 (corrected version is in Annex A).

<sup>5</sup> ICC-01/05-01/08-752. A corrigendum was filed on 14 April 2010 and contains a corrected version that document, *see* “Corrigendum to Defence Reply to the Observations of the Prosecutor and of Legal Representatives of the Victims on the Application Challenging the Admissibility of the Case”, ICC-01/05-01/08-752-Corr-tENG.

6. A status conference was held on 27 April 2010, during which issues raised in the Admissibility Application were discussed.<sup>7</sup>

7. On 10 May 2010, the Registrar filed the CAR's additional submissions following the status conference<sup>8</sup> (hereinafter: "Additional Observations of the Central African Republic"). On 11 May 2010, the legal representatives of the victims<sup>9</sup> and the Prosecutor<sup>10</sup> filed their respective submissions and, on 14 May 2010, Mr Bemba responded to the submissions of the CAR, the legal representatives of the victims and the Prosecutor.<sup>11</sup>

8. On 24 June 2010, the Trial Chamber rendered the "Decision on the Admissibility and Abuse of Process Challenges"<sup>12</sup> (hereinafter: "Impugned Decision"), holding that the case against Mr Bemba before the International Criminal Court (hereinafter: "ICC") is admissible and rejecting the Admissibility Application *in toto*.<sup>13</sup>

## **B. Proceedings before the Appeals Chamber**

9. On 28 June 2010, Mr Bemba filed the notice of appeal.<sup>14</sup>

10. On 5 July 2010, Mr Bemba filed the "Demande de l'effet suspensif relatif à l'Acte d'Appel de la Défense contre la décision de la Chambre de Première Instance

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<sup>6</sup> "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 Statute de Rome' from the Central African Republic and the Democratic Republic of Congo", 19 April 2010, ICC-01/05-01/08-758-Conf.

<sup>7</sup> ICC-01/05-01/08-T-22-ENG.

<sup>8</sup> Additional Observations of the Central African Republic.

<sup>9</sup> "Submissions by the Legal Representative on the supplementary information provided by the Central African Republic on national law", ICC-01/05-01/08-773.

<sup>10</sup> "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 27 April 2010", ICC-01/05-01/08-774.

<sup>11</sup> "Defence Response to the Observations of the Central African Republic of 7 May 2010 and of the other Parties", ICC-01/05-01/08-776-Conf-tENG; for a public redacted version *see* ICC-01/05-01/08-776-Red2-tENG. All references herein are to the public redacted version.

<sup>12</sup> ICC-01/05-01/08-802.

<sup>13</sup> Impugned Decision, paras 261-262.

<sup>14</sup> "Acte d'Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée 'Decision on the Admissibility and Abuse of Process Challenge'", ICC-01/05-01/08-804. On 30 June 2010, Mr Bemba filed a corrected version of the notice of appeal, entitled "Corrigendum to Defence Notice of Appeal Against the Decision of Trial Chamber III of 24 June 2010 entitled Decision on the Admissibility and Abuse of Process Challenge", ICC-01/05-01/08-804-Corr-tENG.

III du 24 Juin 2010 intitulée ‘*Decision on the Admissibility and Abuse of Process Challenge*’<sup>15</sup> (hereinafter: “Request for Suspensive Effect”).

11. On 8 July 2010, the Prosecutor filed the “Prosecution’s response to Defence request for suspensive effect of the Defence appeal against the Decision on Admissibility and Abuse of Process”.<sup>16</sup> On 9 July 2010, the Appeals Chamber rendered its decision rejecting Mr Bemba’s Request for Suspensive Effect.<sup>17</sup>

12. On 26 July 2010, Mr Bemba filed his document in support of the appeal,<sup>18</sup> and on 30 July 2010, he filed a “Corrigendum to Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 Entitled Decision on the Admissibility and Abuse of Process Challenge”<sup>19</sup> (hereinafter: “Document in Support of the Appeal”).

13. On 17 August 2010, the Prosecutor filed the “Prosecution’s Response to «Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 *Decision on the Admissibility and Abuse of Process Challenge* [sic] »”<sup>20</sup> (hereinafter: “Response to the Document in Support of the Appeal”).

14. On 30 August 2010, the Victims filed the “Observations of the OPCV as Legal Representative to the Defence’s document in support of the Appeal against Trial Chamber III’s ‘Decision on the Admissibility and Abuse of Process Challenge [sic]’ of 24 June 2010”<sup>21</sup> (hereinafter: “Observations of the Victims”).

15. On 13 September 2010, the CAR submitted the “Brief by the State of the Central African Republic in Response to the Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 on the

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<sup>15</sup> ICC-01/05-01/08-809.

<sup>16</sup> ICC-01/05-01/08-814.

<sup>17</sup> “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on Admissibility and Abuse of Process Challenges’”, ICC-01/05-01/08-808.

<sup>18</sup> “Mémoire à l’Appui de l’Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée ‘Decision on the Admissibility and Abuse of Process Challenge’”, ICC-01/05-01/08-841-Conf.

<sup>19</sup> ICC-01/05-01/08-841-Conf-Corr-tENG; for a public redacted version in French, see ICC-01/05-01/08-841-Corr-Red. All references herein are to the publicly available information in the English corrigendum.

<sup>20</sup> ICC-01/05-01/08-855-Conf; for a public redacted version, see ICC-01/05-01/08-855-Red. All references herein are to the public redacted version.

<sup>21</sup> ICC-01/05-01/08-867.

Admissibility and Abuse of Process Challenge”<sup>22</sup> (hereinafter: “Observations of the Central African Republic”).

16. On 16 September 2010, the Prosecutor filed the “Prosecution’s Response to the Observations of the Central African Republic on the appeal proceedings against Trial Chamber III’s ‘Decision on the Admissibility and Abuse of Process Challenges’”<sup>23</sup> (hereinafter: “Prosecutor’s Response”) only addressing “the most relevant submissions dealing with the factual aspects of the case and the applicable provisions of the CAR legislation”.<sup>24</sup>

17. On 20 September 2010, Mr Bemba filed the “Defence Response to the Observations of the Central African Republic of 13 September 2010”<sup>25</sup> (hereinafter: “Mr Bemba’s Response”).

18. On 24 September 2010, the Prosecutor filed the “Prosecution’s motion to reject the Defence’s requests for presentation of additional evidence and extension of time limit”<sup>26</sup> (hereinafter: “Prosecutor’s Response to Mr Bemba’s Requests”).

19. On 1 October 2010, Mr Bemba filed the “Defence Response to the Prosecution’s Application entitled: ‘Prosecution’s Motion to Reject the Defence’s Request for Presentation of Additional Evidence and Extension of Time Limit’ of 24 September 2010”<sup>27</sup> (hereinafter: “Mr Bemba’s Response to the Prosecutor’s Response”).

20. On 8 October 2010, the Appeals Chamber issued the “Order on the classification of documents”.<sup>28</sup>

21. On 11 October 2010, the Prosecutor filed the “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, with confidential annexes A, C and D, and public annex B.<sup>29</sup>

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<sup>22</sup> “The Registrar’s transmission of the observations of the Central African Republic pursuant to the Appeals Chamber’s «Decision on the Central African Republic’s request for an extension of the time limit » (ICC-01/05-01/08-878) dated 8 September 2010”, ICC-01/05-01/08-881-Anx2.

<sup>23</sup> ICC-01/05-01/08-885.

<sup>24</sup> Prosecutor’s Response, para. 3.

<sup>25</sup> ICC-01/05-01/08-889-Conf-tENG; for a public redacted version in French, see ICC-01/05-01/08-889-Red. All references herein are to the publicly available information in the English translation.

<sup>26</sup> ICC-01/05-01/08-901.

<sup>27</sup> ICC-01/05-01/08-917-tENG.

<sup>28</sup> ICC-01/05-01/08-931.

22. On 14 October 2010, the Appeals Chamber issued the “Order on the reasons for the classification of documents”.<sup>30</sup>

23. On 14 October 2010, the Prosecutor filed the “Prosecution’s Response to the Appeals Chamber Order on the reasons for the classification of documents”, with confidential annex A.<sup>31</sup>

### III. PRELIMINARY ISSUES

#### A. Request for an Oral Hearing

24. At paragraph 44 of the Document in Support of the Appeal, Mr Bemba requests an oral hearing to allow him to expand on his submissions. In response, the Prosecutor argues that the Appeals Chamber should reject the request, as, *inter alia*, Mr Bemba has not provided any reasons to support it.<sup>32</sup>

25. Pursuant to rule 156 (3) of the Rules of Procedure and Evidence, “[t]he appeal proceedings shall be in writing unless the Appeals Chamber decides to convene a hearing”. It is thus within the Appeals Chamber’s discretion to decide whether it should convene a hearing. In the view of the Appeals Chamber, Mr Bemba has not advanced any reasons why the Appeals Chamber should depart from the above-mentioned rule that the appeals proceedings shall be in writing. The Appeals Chamber therefore rejects Mr Bemba’s request for an oral hearing.

#### B. Requests made in footnote 10 of Mr Bemba’s Response

26. In footnote 10 of Mr Bemba’s Response, he makes the following requests:

Trial Chamber III refused to admit the Expert Opinion in its oral decision rendered on the same day as the hearings on the admissibility challenge, on 27 April 2010. The Defence did not appeal that oral decision, believing it to form an integral part of the overall consideration by Trial Chamber III of the admissibility challenge, and thus subject to the appeal from the Trial Chamber’s final decision. However, if the Appeals Chamber is of the view that this decision should have been the subject of a separate appeal, the Defence respectfully requests an extension to the time-limit for filing its appeal pursuant to regulation 35(2) of the Regulations of the Court and, moreover, seeks leave

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<sup>29</sup> ICC-01/05-01/08-944.

<sup>30</sup> ICC-01/05-01/08-948.

<sup>31</sup> ICC-01/05-01/08-951.

<sup>32</sup> Response to the Document in Support of the Appeal, para. 91.



under regulation 62 of the Regulations of the Court to submit the Expert Opinion as additional evidence. The extension of the time-limit and the submission of additional evidence are both justified in the interests of justice, so that the Defence's desire not to overburden the Court with an interlocutory appeal from the oral decision of Trial Chamber III should not be regarded as a procedural ground for dismissing the Defence's substantive appeal.

27. In Annex A of Mr Bemba's Response, he appends a list of the positions that Mr Bemba's proposed expert, Mr Edouard Frank, has held in the CAR judiciary and Government. The list is signed by the Director General of the Judicial Service of the CAR Ministry of Justice. Mr Bemba also appends in the same annex the opinion of Mr Frank, signed by Mr Frank on 27 July 2010, (hereinafter: "Expert Report") on the question of whether under CAR law, the appeal by the prosecution against a decision of *non-lieu* of an investigating judge must be notified to the person concerned.

28. In the Prosecutor's Response to Mr Bemba's Requests, the Prosecutor urges the Appeals Chamber to reject *in limine* both the request to extend the time limit and the request to submit the Expert Report as additional evidence.<sup>33</sup> He argues that the Appeals Chamber does not have the authority to grant a "post-hoc extension of time" and that regulation 62 of the Regulations of the Court is inapplicable since the Expert Report was available to Mr Bemba and could have been submitted to the Trial Chamber.<sup>34</sup> The Prosecutor further requests that Annex A be removed from the record of the appellate proceedings or, in the alternative, that he be given appropriate time to respond to the annex.<sup>35</sup>

29. For the reasons provided below, the Appeals Chamber rejects Mr Bemba's requests, disregards the Expert Report and rejects Mr Bemba's Response to the Prosecutor's Response.

30. As a preliminary matter, the Appeals Chamber notes that the requests by Mr Bemba are made in footnote 10 of Mr Bemba's Response to the Observations of the Central African Republic. The Appeals Chamber disapproves of this practice, as such requests should not be made in a party's response to another filing or in a footnote.<sup>36</sup>

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<sup>33</sup> Prosecutor's Response to Mr Bemba's Requests, para. 2.

<sup>34</sup> Prosecutor's Response to Mr Bemba's Requests, para. 2.

<sup>35</sup> Prosecutor's Response to Mr Bemba's Requests, para. 20.

<sup>36</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the re-filing of the document in support of the appeal", 22 July 2008, ICC-01/04-01/06-1445 (OA 13), para. 6.

In addition, the Appeals Chamber, with a view to ensuring the expeditiousness of the proceedings, disapproves of a party making requests of this type in a final submission of the appellate proceedings.

31. Concerning the substance of Mr Bemba's requests, the Appeals Chamber notes that the oral decision of the Trial Chamber of 27 April 2010 to reject expert evidence could have been appealed, if at all, only under article 82 (1) (d) of the Statute, which requires leave of the Trial Chamber. Under rule 155 (1) of the Rules of Procedure and Evidence, Mr Bemba would have had to file an application for leave to appeal *before the Trial Chamber* within five days of being notified of that decision. Leaving aside the question of whether the time limit under rule 155 (1) of the Rules of Procedure and Evidence may be extended under regulation 35 (2) of the Regulations of the Court, it is evident that any such request should be made, if at all, to the Trial Chamber. Thus, the request for an extension of the time limit is rejected, as it is improperly submitted before the Appeals Chamber.

32. Concerning Mr Bemba's second request, the Appeals Chamber recalls that, as his second ground of appeal, Mr Bemba argues that the Trial Chamber made a procedural error by refusing to allow the submission of evidence by Mr Bemba's expert, which is attached to Mr Bemba's Response as Annex A. As will be explained further below,<sup>37</sup> Mr Bemba may appeal an alleged procedural error before the Appeals Chamber. However, to allow the submission of the Expert Report as additional evidence on appeal would, in effect, circumvent the oral decision of the Trial Chamber which rejected Mr Bemba's application. Leaving aside the question of whether regulation 62 of the Regulations of the Court, which provides for the possibility of additional evidence to be presented before the Appeals Chamber,<sup>38</sup> applies to appeals under article 82 (1) (b) of the Statute,<sup>39</sup> the Appeals Chamber notes that Mr Bemba does not claim that the Expert Report was unavailable in the proceedings before the Trial Chamber.<sup>40</sup> In light of the above, the Appeals Chamber

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<sup>37</sup> See below, para. 101.

<sup>38</sup> See *contra*, Mr Bemba's Response to the Prosecutor's Response, para. 6 in which Mr Bemba states that his aim was not that the Expert Report be submitted before the Appeals Chamber, but before the Trial Chamber.

<sup>39</sup> See *Prosecutor v. Thomas Lubanga Dyilo*, "Decision on the Prosecutor's 'Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur''", 12 September 2006, ICC-01/04-01/06-424 (OA 3), paras 5-6.

<sup>40</sup> See regulation 62 (1) (b) of the Regulations of the Court.

rejects the request for permission to present additional evidence on appeal and disregards the Expert Report.

33. The Appeals Chamber considers that the Prosecutor's Response to Mr Bemba's Requests was properly filed as a response, because, as noted previously, Mr Bemba should not have made his request in his own response to the Observations of the Central African Republic. Concerning the Prosecutor's submissions to remove the Expert Report from the record of the appellate proceedings, the Appeals Chamber observes that it has rejected Mr Bemba's request to present the Expert Report as evidence and disregarded the Expert Report. Thus, there is no need to remove the Expert Report from the record. The Appeals Chamber accordingly rejects the Prosecutor's request in this regard.

34. Finally, the Appeals Chamber rejects Mr Bemba's Response to the Prosecutor's Response pursuant to regulation 24 (4) of the Regulation of the Court, which provides that a response may not be filed to any document which is itself a response.

#### IV. MERITS

##### A. First ground of appeal

35. In his first ground of appeal, Mr Bemba argues that the Trial Chamber "erred in law in finding that the decision of the Senior Investigating Judge of Bangui dated 16 September 2004 was not a final decision **not** to prosecute [Mr Bemba]".<sup>41</sup>

##### 1. Relevant procedural history

36. In 2003, the *Procureur de la République près le Tribunal de Grande Instance de Bangui* (hereinafter: "Public Prosecutor of Bangui Regional Court") initiated an investigation concerning the events which form the basis of the charges currently before the ICC in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.<sup>42</sup>

37. On 28 August 2004, the Public Prosecutor of Bangui Regional Court submitted the results of the investigation (hereinafter: "Public Prosecutor's Application of 28 August 2004"), which concerned numerous individuals, including Mr Bemba, to the

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<sup>41</sup> Document in Support of the Appeal, para. 5 (a).

<sup>42</sup> "Prosecution's Response to Appeals Chamber Order on the Classification of Documents", 11 October 2010, ICC-01/05-01/08-944-Conf-AnxA, para. 18; also filed as CAR-OTP-0005-0099 to 0118 and EVD-P-04260. See also Impugned Decision, para. 218.

*Doyen des Juges d'Instruction près le Tribunal de Grande Instance de Bangui* (hereinafter: "Senior Investigating Judge").<sup>43</sup> After concluding his investigation, the Public Prosecutor of Bangui Regional Court found that, *inter alia*, Mr Bemba had provided the CAR's former President, Mr Ange-Felix Patassé (hereinafter: "Mr Patassé"), with approximately one thousand of his troops who were thereafter integrated into Mr Patassé's army.<sup>44</sup> However, the Public Prosecutor of Bangui Regional Court concluded that there was insufficient evidence that Mr Bemba either participated in the crimes perpetrated by his troops or that he was aware of how the troops were used on the ground.<sup>45</sup> The Public Prosecutor of Bangui Regional Court therefore recommended a termination of the proceedings against Mr Bemba.<sup>46</sup>

38. On 16 September 2004, the Senior Investigating Judge issued the "Ordonnance de Non Lieu Partiel et de Renvoi devant la Cour Criminelle" (hereinafter: "Order of 16 September 2004"), concluding that Mr Bemba's prosecution was barred by diplomatic immunity.<sup>47</sup> In addition, in the operative part of the order, the Senior Investigating Judge dismissed the charges against Mr Bemba and other persons due to insufficient evidence.<sup>48</sup>

39. On 17 September 2004, the *Ministère Public* represented by the *1er Substitut du Procureur de la République près le Tribunal de Grande Instance de Bangui* filed an "Acte d'Appel"<sup>49</sup> (hereinafter: "Notice of Appeal of 17 September 2004") before the *Tribunal de Grande Instance* of Bangui against the Order of 16 September 2004. The

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<sup>43</sup> "Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité", 15 March 2010, ICC-01/05-01/08-721-Anx26; also filed as CAR-OTP-0004-0065 and English translation CAR-OTP-0061-0094 to 0130. All references herein are to ICC-01/05-01/08-721-Anx26.

<sup>44</sup> Regional Public Prosecutor's Application of 28 August 2004, pp. 5-6.

<sup>45</sup> Regional Public Prosecutor's Application of 28 August 2004, p. 21.

<sup>46</sup> Regional Public Prosecutor's Application of 28 August 2004, pp. 43-44.

<sup>47</sup> "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-01/05-01/08-758-Anx2C, p. 11; also filed as "Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité", 15 March 2010, ICC-01/05-01/08-721-Conf-Exp-Anx16, as CAR-OTP-0019-0137 to 0164, and as EVD-P-01319. A draft English translation was provided to the judges. All references herein are to ICC-01/05-01/08-758-Anx2C.

<sup>48</sup> Order of 16 September 2004, pp. 25-26.

<sup>49</sup> Additional Observations of the Central African Republic, ICC-01/05-01/08-770-Anx2-tENG, p. 3; also filed as "Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité", 15 March 2010, ICC-01/05-01/08-721-Conf-Exp-Anx17.

appeal was subsequently heard by the *Chambre d'Accusation de la Cour d'Appel de Bangui* (hereinafter: "Court of Appeal of Bangui").

40. After the Notice of Appeal of 17 September 2004 was filed, representatives from the *Parquet Général* (hereinafter: "Principal Public Prosecutor's Office") made several written and oral submissions in respect of the appeal, as follows:

- a. On 23 November 2004, in a written submission entitled "Réquisitoire Supplétif aux Fins de Saisine de la Chambre d'Accusation", the Principal Public Prosecutor's Office represented by *1<sup>o</sup> Avocat Général* argued, *inter alia*, that, in respect of Mr Bemba, his complicity in the crimes of his troops had been indisputably established and that it was not possible to permit the charges against him to be dismissed. The Principal Public Prosecutor's Office requested therefore that the Order of 16 September 2004 be partially reversed and requested that the Court of Appeal of Bangui order the committal of all of the accused for trial before the *Cour Criminelle*;<sup>50</sup>
- b. On 24 November 2004, in a written submission entitled "Réquisitoire", the Principal Public Prosecutor's Office represented by the *Procureur Général* requested that the Court of Appeal of Bangui hold that the offences affecting persons, referred to as "blood crimes" (*crimes de sang*), should be tried by the ICC and that the economic crimes should be tried by the *Cour Criminelle*;<sup>51</sup>
- c. On the same day, 24 November 2004, according to the "Notes d'Audience" (hereinafter: "Notes d'Audience of 24 November 2004"), a summary of the oral proceedings, the *Ministère Public*, represented by the *2<sup>ème</sup> Avocat Général*, argued "[a]s regards these proceedings, the Court should comply with the terms of our submission, and commit all the other accused persons for trial before the *Cour Criminelle*,

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<sup>50</sup> Additional Observations of the Central African Republic, ICC-01/05-01/08-770-Anx2-tENG, pp. 9-10.

<sup>51</sup> Additional Observations of the Central African Republic, ICC-01/05-01/08-770-Anx2-tENG, p. 12.

except for Mr Bemba [emphasis added], given his status as Vice President of the DRC”;<sup>52</sup>

- d. On 6 December 2004, the Court of Appeal of Bangui apparently convened another oral hearing in respect of the appeal, but there appears to be a page or pages missing from the Notes d’Audience disclosed by the (ICC) Prosecutor. On the first page of the incomplete document it appears that the *2ème Avocat Général* argued at the oral hearing on 6 December 2004 that “[i]n this case (in accordance with the terms of my submissions, and to commit all of the other accused persons for trial before the *Cour Criminelle*, except for Mr MBEMBA [sic] in view of his status, since he is Vice-President of the Democratic Republic of Congo”.<sup>53</sup>

41. On 11 December 2004, counsel acting on behalf of CAR President François Bozizé sent a letter to the *Président de la Cour Criminelle* in Bangui requesting that the *Cour Criminelle* refer the war crimes committed on CAR territory in 2002 to the ICC.<sup>54</sup> The letter proposed that the *Cour Criminelle* should sever the proceedings, and

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<sup>52</sup> Document in Support of the Appeal, para. 18. The document from which this quote originates was filed in the “Prosecution’s Response to the Appeals Chamber Order on the reasons for the classification of documents”, 14 October 2010, ICC-01/05-01/08-951-Conf-AnxA, p. 1. This is the document which Mr Bemba argues the Trial Chamber did not take into account in the Impugned Decision, because it was not uploaded into Ringtail by the Prosecution until 24-hours before the Impugned Decision was rendered, *see* Document in Support of the Appeal, para. 14.

<sup>53</sup> “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, 11 October 2010, ICC-01/05-01/08-944-AnxB, *Notes d’Audience*, 6 December 2004, p. 1; also filed as ICC-01/05-01/08-721-Anx17, CAR-OTP-0019-0189 to 0190, and EVD-P-04119. A draft translation was provided for the Judges. The open parenthesis, without a closed parenthesis, is in both the original and draft translation. *See* also Impugned Decision, para. 10, where the Trial Chamber indicated that it did not take this document into account because of the page of the document which was missing. The original French text of the quoted excerpt is as follows: “*Pour ce dossier (à respecter les termes de mon réquisitoire, et renvoyer tous les autres accusés devant la Cour Criminelle, sauf Mr MBEMBA [sic] compte tenu de son statut, car étant le Vice-Président de la République Démocratique du CONGO*”. The Prosecutor submits in the “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, ICC-01/05-01/08-944, fn. 16, that this document is the same as ICC-01/05-01/08-951-Conf-AnxA, *supra* at paragraph 38 (c). The Appeals Chamber notes, however, that although the content of the two documents is similar, the actual text in the documents is slightly different, and the documents appear to refer to hearings held on different dates (24 November 2004 and 6 December 2004).

<sup>54</sup> “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, 11 October 2010, ICC-01/05-01/08-944-Conf-AnxC; also filed as CAR-OTP-0019-0169, EVD-P-04119 and English translation CAR-OTP-0061-0133. This information is paraphrased by the Trial Chamber in the Impugned Decision, para. 11.

refer the crimes of rape, murder, destruction of movable and immovable property and pillaging to the ICC.<sup>55</sup>

42. On 16 December 2004, the Court of Appeal of Bangui rendered its judgment on the appeal<sup>56</sup> (hereinafter: “Judgment of 16 December 2004”), partially annulling the Order of 16 September 2004 and making a fresh ruling (*statuant à nouveau*) on the merits of the case that the charges against Mr Bemba and other persons must be upheld and that the “blood crimes” (*crimes de sang*) for which Mr Bemba and other persons stood accused should be severed from the economic crimes and should be submitted to the competent authorities in order to be referred to the ICC.<sup>57</sup>

43. On 20 December 2004, the Principal Public Prosecutor’s Office filed an “Acte de Pourvoi” to the *Chambre Criminelle de la Cour de Cassation* (hereinafter: “Court of Cassation”), the CAR’s highest court.<sup>58</sup>

44. On 7 January 2005, the ICC Prosecutor received a letter from counsel authorised by the CAR President François Bozizé to refer the situation in the CAR to the ICC. The letter specifically requested the ICC Prosecutor “to open an investigation into this situation with a view to determining whether Mr Ange Felix PATASSE, Mr Jean-Pierre BEMBA [and others] can be accused” of the crimes listed therein.<sup>59</sup>

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<sup>55</sup> “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, 11 October 2010, ICC-01/05-01/08-944-Conf-AnxC; also filed as CAR-OTP-0019-0169, EVD-P-04119 and English translation CAR-OTP-0061-0133. This information is also paraphrased by the Trial Chamber in the Impugned Decision, para. 11.

<sup>56</sup> “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-01/05-01/08-758-Anx2D, which contains the “Arrêt d’Information Partielle de non lieu, de disjonction et de renvoi devant la cour criminelle, de la chambre d’Accusation N° 021 du 16 Décembre 2004”; also filed as ICC-01/05-01/08-721-Conf-Exp-Anx18, CAR-OTP-0004-0148 to 0166, CAR-OTP-0019-0171 to 0188, EVD-P-02749, and English translation CAR-OTP-0061-0030 to 0043. All references herein are to ICC-01/05-01/08-758-Anx2D.

<sup>57</sup> Judgment of 16 December 2004, pp. 10 and 16-17.

<sup>58</sup> “Prosecution’s Response to Appeals Chamber Order on the Classification of Documents”, 11 October 2010, ICC-01/05-01/08-944-Conf-AnxD; also filed as CAR-OTP-0019-0199 and EVD-P-04127. The *Acte de Pourvoi* was filed with the court which issued the impugned decision (the Court of Appeal of Bangui), but heard by the Court of Cassation. The Judges received a draft translation of this document. This information is paraphrased by the Trial Chamber in the Impugned Decision, para. 13.

<sup>59</sup> “Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité”, 15 March 2010, ICC-01/05-01/08-721-Anx19, p. 2; also filed as ICC-01/05-01/08-29-Conf-Anx1A and CAR-OTP-0001-0135. The original French text of the quoted excerpt is as follows: “ouvrir une enquête sur cette situation en vue de déterminer si

45. On 11 April 2006, the Court of Cassation rendered its judgment (hereinafter: “Judgment of 11 April 2006”) on the appeal of the Principal Public Prosecutor’s Office against the Judgment of 16 December 2004.<sup>60</sup> The Court of Cassation found that the appeal was admissible as to form.<sup>61</sup> The Court of Cassation held that “there can be no doubt that the Central African judicial services are unable genuinely to investigate or prosecute”<sup>62</sup> in the proceedings against Mr Patassé, Mr Bemba and others. It made this finding, in part, because these persons were outside of the country, and therefore the CAR judiciary was powerless with respect to them, a situation which the Court of Cassation concluded was a “*de facto* embodiment of their impunity”.<sup>63</sup> The Court of Cassation therefore held that “recourse to international cooperation remains in this case the sole means of averting such impunity”<sup>64</sup> and as such, in its view, the Senior Investigating Judge erred in not availing himself of this option.<sup>65</sup> The Court of Cassation also found that in referring these individuals, including Mr Bemba, to the ICC, the Court of Appeal of Bangui had “applied the law in due fashion”.<sup>66</sup>

## 2. *Relevant part of the Impugned Decision*

46. Concerning the criteria under article 17 (1) (b) of the Statute, the Trial Chamber found that the events which form the basis of the charges in the case of the *Prosecutor v. Jean Pierre Bemba Gombo* had been investigated by a State which has jurisdiction over it, namely the CAR.<sup>67</sup> The Trial Chamber also observed that, in the Order of 16 September 2004, the Senior Investigating Judge (i) determined that the accused could not be prosecuted because he was Vice-President of the DRC and accordingly enjoyed diplomatic immunity, and (ii) “simultaneously purported to dismiss the charges

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*Monsieur Ange Felix PATASSE, Monsieur Jean-Pierre BEMBA [ou d'autres personnes] peuvent être accusés de ces crimes”.*

<sup>60</sup> Judgment of 11 April 2006, ICC-01/05-01/08-758-Anx2E; also filed as ICC-01/05-01/08-721-Conf-Exp-Anx20, CAR-OTP-0019-0261, EVD-P-01327, and English translation CAR-OTP-0061-0022. All references herein are to ICC-01/05-01/08-758-Anx2E.

<sup>61</sup> Judgment of 11 April 2006, p. 5.

<sup>62</sup> Judgment of 11 April 2006, p. 3. The original French text of the quoted excerpt is as follows: “*Que l’incapacité des services judiciaires Centrafricains à mener véritablement à bien l’enquête ou les poursuites les concernant ne fait pas de doute”.*

<sup>63</sup> Judgment of 11 April 2006, p. 3. The original French text of the quoted excerpt is as follows: “*consacre de fait l’impunité”.*

<sup>64</sup> Judgment of 11 April 2006, p. 3. The original French text of the quoted excerpt is as follows: “*le recours à la Coopération Internationale reste dans ce cas le seul moyen d’empêcher cette impunité”.*

<sup>65</sup> Judgment of 11 April 2006, p. 3.

<sup>66</sup> Judgment of 11 April 2006, p. 4. The original French text of the quoted excerpt is as follows: “*a fait une saine application de la loi”.*

<sup>67</sup> Impugned Decision, para. 218.



against the accused [...] on the basis of insufficient evidence”.<sup>68</sup> However, the Trial Chamber concluded that the Order of 16 September 2004 “was not a final decision on the merits of the case because on the following day, 17 September 2004, the Deputy Prosecutor [...] entered a *prima facie* valid appeal as regards all accused”.<sup>69</sup> In the view of the Trial Chamber, “once his dismissal decision had been set aside, decisions were taken by the appellate courts [...] which brought the national proceedings to a halt”.<sup>70</sup> The Trial Chamber further concluded that neither of the subsequent appellate judgments were decisions not to prosecute within the meaning of article 17 (1) (b) of the Statute, because “[t]hey were, instead, decisions closing the proceedings in the CAR [...] that approximately coincided with the referral to the ICC”.<sup>71</sup>

47. The Trial Chamber concisely summarised its decision in relation to this ground of appeal as follows:

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 [...].<sup>72</sup>

### 3. Document in Support of the Appeal

48. Mr Bemba argues that the Senior Investigating Judge's Order of 16 September 2004 was a final decision on the merits of the case “which was not subsequently amended by a valid appeal” and therefore constitutes a decision not to prosecute.<sup>73</sup>

49. In support of this assertion, Mr Bemba avers that the Trial Chamber erred in failing to properly consider the importance of the Public Prosecutor of Bangui Regional Court's Application of 28 August 2004.<sup>74</sup> He argues that the Order of 16 September 2004 should be read in conjunction with the Public Prosecutor of Bangui

<sup>68</sup> Impugned Decision, para. 221.

<sup>69</sup> Impugned Decision, para. 222.

<sup>70</sup> Impugned Decision, para. 240.

<sup>71</sup> Impugned Decision, para. 242.

<sup>72</sup> Impugned Decision, para. 261.

<sup>73</sup> Document in Support of the Appeal, para. 7.

<sup>74</sup> Document in Support of the Appeal, para. 10.

Regional Court's Application of 28 August 2004, in which the Public Prosecutor recommended dismissal of the charges against Mr Bemba. Mr Bemba further argues that the "Senior Investigating Judge was in fact under an obligation to concur with [his] submission".<sup>75</sup> In this respect, Mr Bemba emphasises that the Public Prosecutor of Bangui Regional Court's finding that there was insufficient evidence against Mr Bemba was the result of a meticulous investigation and that the purpose of his application was to terminate the proceedings against Mr Bemba.<sup>76</sup>

50. In addition, Mr Bemba argues that the Trial Chamber erred in deciding that a *prima facie* valid appeal was entered against the Order of 16 September 2004 and pertaining to all of the accused.<sup>77</sup> Mr Bemba supports this assertion by arguing firstly that the Public Prosecutor of Bangui Regional Court never intended to appeal the part of the Order that dismissed the charges against Mr Bemba, and secondly that Mr Bemba's name was not included in the notice of appeal.<sup>78</sup>

51. Finally, Mr Bemba argues that the Trial Chamber erred in failing to consider a "vital document",<sup>79</sup> namely the Notes d'Audience of 24 November 2004, a record of the oral hearings held before the Court of Appeal of Bangui, which Mr Bemba submits provides additional support for his argument that CAR prosecuting authorities "made a conscious decision not to prosecute the Accused".<sup>80</sup> Mr Bemba acknowledges that the Principal Public Prosecutor's Office filed additional submissions in relation to the appeal, purporting to reverse the findings of the Senior Investigating Judge's Order of 16 September 2004 in relation to Mr Bemba, but argues that the Court of Appeal of Bangui upheld the charges against Mr Bemba "with no legal basis and in the absence of any appeal".<sup>81</sup> In addition, Mr Bemba argues that the record of the oral hearing indicates that the Principal Public Prosecutor's Office diverged from its previous request for a dismissal,<sup>82</sup> and that it was only after the "inappropriate interference" by the President of the CAR that Mr

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<sup>75</sup> Document in Support of the Appeal, para. 8.

<sup>76</sup> Document in Support of the Appeal, paras 9-10.

<sup>77</sup> Document in Support of the Appeal, para. 13.

<sup>78</sup> Document in Support of the Appeal, paras 11-13.

<sup>79</sup> Document in Support of the Appeal, para. 14, referring to the Notes d'Audience of 24 November 2004.

<sup>80</sup> Document in Support of the Appeal, para. 14.

<sup>81</sup> Document in Support of the Appeal, para. 17.

<sup>82</sup> Document in Support of the Appeal, para. 19.

Bemba was “re-included, *ultra vires*, in the Bangui Appeals Court’s judgment of 16 December 2004”.<sup>83</sup>

#### 4. *Response to the Document in Support of the Appeal*

52. The Prosecutor argues that the Trial Chamber correctly decided that the Order of 16 September 2004 was not a decision not to prosecute within the meaning of article 17 (1) (b) of the Statute, because it was validly appealed.<sup>84</sup> In this respect, he concurs with the reasoning of the Trial Chamber that the Judgment of 11 April 2006 from the Court of Cassation is “determinative of the national judicial proceedings”.<sup>85</sup>

53. In particular, the Prosecutor argues that Mr Bemba is incorrect in asserting that the Senior Investigating Judge was bound by the recommendations made by the Public Prosecutor of Bangui Regional Court, and states that this assertion is not supported by the CAR Criminal Code.<sup>86</sup> The Prosecutor argues that Mr Bemba takes out of context both the oral statements made by the Public Prosecutor of Bangui Regional Court concerning his reasons for filing the Notice of Appeal of 17 September 2004<sup>87</sup> and the written submissions of the Principal Public Prosecutor’s Office on the appeal against the Order of 16 September 2004.<sup>88</sup>

54. The Prosecutor also submits that the record of the hearings before the Court of Appeal of Bangui does not disturb the Trial Chamber’s determination that the case is admissible,<sup>89</sup> because in the view of the Prosecutor, Mr Bemba “disregards other filings that clearly indicate that the appeal was lodged against the Order [...] in its entirety”.<sup>90</sup>

#### 5. *Observations of the Victims*

55. The Victims indicate that their understanding is that Mr Bemba argues that the Trial Chamber erred in deciding that the Order of 16 September 2004 was not a final decision on the merits in respect of article 17 (1) (c) of the Statute.<sup>91</sup> In their view, this

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<sup>83</sup> Document in Support of the Appeal, para. 20.

<sup>84</sup> Response to the Document in Support of the Appeal, p. 16.

<sup>85</sup> Response to the Document in Support of the Appeal, para. 49.

<sup>86</sup> Response to the Document in Support of the Appeal, paras 51-52.

<sup>87</sup> Response to the Document in Support of the Appeal, para. 52.

<sup>88</sup> Response to the Document in Support of the Appeal, paras 52-53.

<sup>89</sup> Response to the Document in Support of the Appeal, paras 56-57.

<sup>90</sup> Response to the Document in Support of the Appeal, para. 58.

<sup>91</sup> Observations of the Victims, para. 28.

argument is without merit, because the Trial Chamber rightly determined that the appeal launched before the Court of Appeal of Bangui included the part of the order dismissing the charges against Mr Bemba.<sup>92</sup> The Victims also argue that the Order of 16 September 2004 cannot be considered a decision for which the principle of *ne bis in idem* would apply, because this principle only applies where final judgments on the merits of the case have been rendered at trial.<sup>93</sup> In the view of the Victims, whether the Order of 16 September 2004 had been appealed is “wholly irrelevant” because, in any event, it cannot be considered a final decision on the merits of the case, within the meaning of article 17 (1) (c) of the Statute.<sup>94</sup>

#### 6. *Observations of the Central African Republic*

56. The CAR submits that no provision of the CAR Code of Criminal Procedure obligates an investigating judge to follow the submissions of the public prosecutor.<sup>95</sup> The CAR notes that the Order of 16 September 2004 would have been final only if it had not been appealed or confirmed on appeal by a higher court. However, the CAR submits that the Order of 16 September 2004 was validly appealed.<sup>96</sup> The CAR further argues that the appeal concerned the entire Order of 16 September 2004, including the part of that order dismissing the charges against Mr Bemba,<sup>97</sup> because (i) the Notice of Appeal of 17 September 2004 referred to the entire Order of 16 September 2004<sup>98</sup> and (ii) the written submissions by the Principal Public Prosecutor’s Office also make clear that the appeal was lodged against the entire Order.<sup>99</sup>

57. The CAR submits that it follows from the three written submissions of the Principal Public Prosecutor’s Office before the Bangui Court of Appeal that the Principal Public Prosecutor’s Office had requested (i) the reversal of the Order of 16 September 2004 to the extent that it closed the case against Mr Bemba and (ii) the severance of the economic crimes from the “blood crimes”, the latter to be judged by

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<sup>92</sup> Observations of the Victims, para. 29.

<sup>93</sup> Observations of the Victims, para. 30.

<sup>94</sup> Observations of the Victims, para. 34.

<sup>95</sup> Observations of the Central African Republic, para. 19.

<sup>96</sup> Observations of the Central African Republic, para. 24.

<sup>97</sup> Observations of the Central African Republic, paras 30-33.

<sup>98</sup> Observations of the Central African Republic, paras 32-33.

<sup>99</sup> Observations of the Central African Republic, paras 36-37.

the ICC.<sup>100</sup> The CAR submits that when the *Ministère Public* requested at the oral hearing of 24 November 2004 that Mr Bemba should not be referred to the *Cour Criminelle* in light of his position as Vice-President of the DRC, this request concerned only the economic crimes.<sup>101</sup> Therefore, the Trial Chamber correctly concluded that there was no decision not to prosecute Mr Bemba in the CAR.<sup>102</sup> The CAR also recalls that it has clearly expressed its wish to see Mr Bemba held accountable for the serious human rights violations committed on the territory of the CAR.<sup>103</sup>

#### 7. *Prosecutor's Response*

58. The Prosecutor reiterates that the appeal proceedings against the Order of 16 September 2004 included the dismissal of the charges against Mr Bemba.<sup>104</sup> In the view of the Prosecutor, the appeal concerned the *entire* Order of 16 September 2004 and all of the accused persons.<sup>105</sup> The Prosecutor argues that the CAR's observations support his contention that Mr Bemba takes out of context the summary of the oral hearing of 24 November 2004, and that, at the hearing, the *Ministère Public* was only referring to economic crimes for which Mr Bemba was not charged. Thus, in the view of the Prosecutor, even if the Trial Chamber had considered the Notes d'Audience of 24 November 2004, it would not have materially affected the outcome of the Impugned Decision.<sup>106</sup>

#### 8. *Mr Bemba's Response*

59. Mr Bemba reiterates that, because the Public Prosecutor of Bangui Regional Court concluded that there was no evidence against Mr Bemba, the Investigating Judge was obliged to follow the submissions of the Public Prosecutor of Bangui Regional Court.<sup>107</sup> However, he also acknowledges that, in any event, both concluded that there was insufficient evidence against Mr Bemba.<sup>108</sup>

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<sup>100</sup> Observations of the Central African Republic, paras 45-47.

<sup>101</sup> Observations of the Central African Republic, para. 48.

<sup>102</sup> Observations of the Central African Republic, para. 49.

<sup>103</sup> Observations of the Central African Republic, para. 43.

<sup>104</sup> Prosecutor's Response, paras 4-6.

<sup>105</sup> Prosecutor's Response, para. 5.

<sup>106</sup> Prosecutor's Response, para. 6.

<sup>107</sup> Mr Bemba's Response, para. 14.

<sup>108</sup> Mr Bemba's Response, para. 15.

60. Mr Bemba asserts that the submissions of the CAR support his argument that an order for dismissal of charges, not challenged by an appeal, is a final decision.<sup>109</sup> Thus, Mr Bemba reiterates that the appeal lodged against the Order of 16 September 2004 did not concern him.<sup>110</sup> To support this submission, he notes that the Public Prosecutor of Bangui Regional Court stated that an appeal against the Order of 16 September 2004 had been filed because certain persons had been excluded from the investigation,<sup>111</sup> which in Mr Bemba's view was also supported by the "Réquisitoire" filed by the Principal Public Prosecutor's Office on 22 October 2004.<sup>112</sup>

61. Finally, Mr Bemba argues that if the oral submissions of the *Ministère Public* of 24 November 2004 before the Court of Appeal of Bangui to close the case against Mr Bemba in light of his status as Vice-President of the DRC were related only to the part of the case concerning the economic crimes, it should have requested a "Réquisition de Non-Informé" pursuant to article 47 of the CAR Code of Criminal Procedure.<sup>113</sup>

## 9. *Determination by the Appeals Chamber*

### (a) **Alleged error and standard of review**

62. Mr Bemba does not expressly identify whether the error he alleges is an error of law, an error of fact, or a procedural error. In support of this ground of appeal, Mr Bemba argues that the Trial Chamber accorded insufficient weight to some facts<sup>114</sup> or failed to take into account relevant facts.<sup>115</sup> Thus, the Appeals Chamber considers that Mr Bemba is alleging errors of fact.

63. The Appeals Chamber has previously held that it may justifiably interfere with a *sub judice* decision "if the findings of the [Chamber] are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the sub judice

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<sup>109</sup> Mr Bemba's Response, para. 17.

<sup>110</sup> Mr Bemba's Response, para. 20.

<sup>111</sup> Mr Bemba's Response, para. 21.

<sup>112</sup> Mr Bemba's Response, para. 21.

<sup>113</sup> Mr Bemba's Response, para. 33.

<sup>114</sup> See Document in Support of the Appeal, para. 13.

<sup>115</sup> See Document in Support of the Appeal, para. 14.

issues”.<sup>116</sup> The Appeals Chamber considers that this standard of review is equally applicable when reviewing a decision on the admissibility of a case.

64. Thus, in light of Mr Bemba’s submissions on appeal, the Appeals Chamber will determine whether Mr Bemba has demonstrated that the Trial Chamber committed an error of fact by misappreciating facts, disregarding relevant facts, or taking into account facts extraneous to the *sub judice* issues.

#### (b) Merits of the First Ground of Appeal

65. The first ground of appeal is whether the Trial Chamber erred “in finding that the decision of the Senior Investigating Judge of Bangui dated 16 September 2004 was not a final decision **not** to prosecute the Accused”.<sup>117</sup> Although Mr Bemba does not expressly indicate in the Document in Support of the Appeal whether this ground of appeal arises under article 17 (1) (b) or (c) of the Statute, the Appeals Chamber notes that Mr Bemba’s arguments concerning the ground of appeal are related to whether the “CAR authorities had made a conscious decision not to prosecute”.<sup>118</sup> Thus, the Appeals Chamber is of the view that this ground of appeal should be analysed with reference to the Trial Chamber’s conclusions in the Impugned Decision concerning article 17 (1) (b) of the Statute.

66. At the outset, it should be underlined that the issue before the Trial Chamber was whether the judicial proceedings in the case of *État Centrafricain c. Ange-Félix Patassé, et al.* resulted in a decision not to prosecute Mr Bemba in terms of article 17 (1) (b) of the Statute, which could have rendered the case inadmissible before this Court. It was *not* the role of the Trial Chamber to review the decisions of the CAR courts to decide whether those courts applied CAR law correctly. In the view of the Appeals Chamber, when a Trial Chamber must determine the status of domestic

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<sup>116</sup> *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, ICC-01/04-01/07-572 (OA 4), para. 25. This same standard was also applied in *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled ‘Decision on application for interim release’”, 16 December 2008, ICC-01/05-01/08-323 (OA), para. 52. See also *Prosecutor v. Jean-Pierre Bemba Gombo*, “Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II’s ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic and the Republic of South Africa’”, 2 December 2009, ICC-01/05-01/08-631-Red (OA 2), para. 61.

<sup>117</sup> Document in Support of the Appeal, para. 5.

<sup>118</sup> Document in Support of the Appeal, para. 14.

judicial proceedings, it should accept *prima facie* the validity and effect of the decisions of domestic courts, unless presented with compelling evidence indicating otherwise.

67. The Trial Chamber had before it three decisions of the CAR courts concerning the case *État Centrafricain c. Ange-Félix Patassé, et al.* The first was the Order of 16 September 2004 by the Senior Investigating Judge, which dismissed the charges against Mr Bemba. The second was the Judgment of 16 December 2004 from the Court of Appeal of Bangui, which partially annulled the Order of 16 September 2004, and specifically determined that the charges against Mr Bemba “must be upheld”.<sup>119</sup> The third was the Judgment of 11 April 2006 of the Court of Cassation which partially quashed (*casse partiellement l’arrêt*) the Court of Appeals of Bangui’s Judgment, but *not* the part concerning Mr Bemba. Regarding Mr Bemba, the Court of Cassation affirmed<sup>120</sup> the Judgment of 16 December 2004 insofar as it (i) determined that the charges against Mr Bemba should be upheld and (ii) directed that the “Prosecution Service”<sup>121</sup> (*Ministère Public*) should submit the matter to the competent authority within the CAR in order to seize the ICC.<sup>122</sup>

68. Mr Bemba argues that the purpose of the Public Prosecutor of Bangui Regional Court’s application for dismissal of the charges was “to terminate the proceedings against [Mr Bemba]”.<sup>123</sup> Mr Bemba is correct in this regard; the application of the Public Prosecutor of Bangui Regional Court does indicate that this was his recommendation.<sup>124</sup> Yet in the judicial process which ensued, neither the Court of Appeal of Bangui nor the Court of Cassation agreed that the prosecution against Mr Bemba should end; instead, both determined that charges which had been dismissed by the Senior Investigating Judge against Mr Bemba should be upheld, and simultaneously submitted the matter to the competent authority in order for the matter to be referred to the ICC.<sup>125</sup> Thus, in the view of the Appeals Chamber, Mr Bemba has not demonstrated that the Trial Chamber erred with respect to its reliance on the

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<sup>119</sup> Judgment of 16 December 2004, p. 7.

<sup>120</sup> With reference to this part of the Judgment of 16 December 2004, the Court of Cassation states that the Court of Appeal of Bangui “applied the law in due fashion”, p. 4.

<sup>121</sup> Judgment of 16 December 2004, p. 7.

<sup>122</sup> Judgment of 11 April 2006, p. 4.

<sup>123</sup> Document in Support of the Appeal, para. 10.

<sup>124</sup> Regional Public Prosecutor’s Application of 28 August 2004, pp. 4, 15 and 31.

<sup>125</sup> Judgment of 16 December 2004, p. 7; Judgment of 11 April 2006, pp. 3-4.



judgments of the Court of Appeal of Bangui and the Court of Cassation in determining that there was no decision not to prosecute within the meaning of article 17 (1) (b) of the Statute.

69. Mr Bemba also avers that the Trial Chamber erred in failing to accord sufficient weight to the Public Prosecutor's Application of 28 August 2004 to dismiss the charges against Mr Bemba. He argues that the "Senior Investigating Judge was in fact under an obligation to concur with the submission of the [Public Prosecutor of Bangui Regional Court]" which recommended dismissal because of insufficient evidence.<sup>126</sup> However, the Appeals Chamber observes, as Mr Bemba later acknowledges,<sup>127</sup> that the Senior Investigating Judge did in fact concur with the Public Prosecutor of Bangui Regional Court's application, and dismissed the charges against Mr Bemba.<sup>128</sup>

70. Mr Bemba also argues that the Order of 16 September 2004 was not subsequently modified by a *valid* appeal.<sup>129</sup> The Appeals Chamber is not convinced by this argument. The Court of Appeals of Bangui expressly acknowledged in its Judgment of 16 December 2004 that "the Public Prosecutor's appeal was registered on 17 September 2004 after the final decision was taken and was therefore made within the time-limit prescribed by the law; that it should be deemed admissible as to the form".<sup>130</sup> The Appeals Chamber also observes that there is no indication in either the Judgment of 16 December 2004 or the Judgment of 10 April 2006 that the Court of Appeal of Bangui or the Court of Cassation considered that the appeals brought by the Public Prosecutor's Office were invalid. Thus, the Trial Chamber was correct in observing that the appeal registered on 17 September 2004 was a "*prima facie* valid appeal".<sup>131</sup>

71. As to whether the part of the Order of 16 September 2004 which dismissed the charges against Mr Bemba was *modified* by the appeal, Mr Bemba points out that he

<sup>126</sup> Document in Support of the Appeal, para. 8.

<sup>127</sup> Mr Bemba's Response, para. 15.

<sup>128</sup> While the Senior Investigating Judge stated that Mr Bemba "enjoys diplomatic immunity" in the section of the Order related to Mr Bemba's criminal responsibility, he ultimately held that there was insufficient incriminating evidence against Mr Bemba. Order of 16 September 2004, pp. 10, 22 and 26.

<sup>129</sup> Document in Support of the Appeal, para. 7.

<sup>130</sup> Judgment of 16 December 2004, p. 2. The original French text of the quoted excerpt is as follows: "*l'appel de Monsieur le Procureur de la République, enregistré le 17 Septembre 2004 suite au règlement définitif de la procédure est intervenu dans les délais prescrits par la Loi; qu'il convient de le déclarer recevable en la forme*".

<sup>131</sup> See Impugned Decision, para. 222.

was not specifically named in the Notice of Appeal of 17 September 2004.<sup>132</sup> However, Mr Bemba's submission in this regard does not clarify the matter, because none of the suspects is specifically named in the Notice of Appeal. In addition, the Appeals Chamber notes that the CAR representatives made the following submissions during the status conference before the Trial Chamber:

Is the appeal of 17 September 2004 concerned only with Bemba himself, or just with the Banyamulengue [Mr Bemba's men], or with both? Well, the appeal was lodged for the entire matter, so Patassé, Bemba, the Banyamulengue. It was for everyone. It's not just for some and not others. No, it was for all of them.<sup>133</sup>

Thereafter, in written submissions before the Trial Chamber, the CAR submitted:

It must be emphasised that it is apparent from the notice of appeal prepared by the Registrar that the Prosecutor appealed against both **the order for the partial dismissal of charges and the order for committal for trial before the Cour Criminelle: in other words, the Prosecutor's appeal related to the order of the Investigating Judge in its entirety, including the order for the dismissal of the charges against the accused, Jean Pierre Bemba.**<sup>134</sup>

Thus, the Appeals Chamber finds that Mr Bemba's argument that the Trial Chamber erred in not according sufficient weight to the fact that Mr Bemba was not named in the Notice of Appeal is without merit.

72. In addition, Mr Bemba submits that the Trial Chamber's decision was the result of an error insofar as it was unable to consider a "vital document" relevant to the proceedings in the CAR courts.<sup>135</sup> The document was the Notes d'Audience of 24 November 2004 of the Court of Appeal of Bangui, in which a summary of the Principal Public Prosecutor's Office oral submission at the hearing indicates that it requested that the charges against all of the accused, *except Mr Bemba*, should be upheld.<sup>136</sup> In response, the (ICC) Prosecutor contends that Mr Bemba took this "document out of context and disregard[ed] other filings that clearly indicate[d] that the appeal was lodged against the Order (and all the accused included therein) in its

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<sup>132</sup> Additional Observations of the Central African Republic, ICC-01/05-01/08-770-Anx2, p. 3.

<sup>133</sup> ICC-01/05-01/08-T-22-ENG, p. 23, lines 2-6.

<sup>134</sup> Additional Observations of the Central African Republic, para. 17.

<sup>135</sup> Document in Support of the Appeal, para. 14, which cites the Notes d'Audience of 24 November 2004, p. 1.

<sup>136</sup> Notes d'Audience of 24 November 2004, p. 1. *See also* Document in Support of the Appeal, para. 18.

entirety”.<sup>137</sup> The CAR submits that the Principal Public Prosecutor’s oral submissions were only related to financial offences for which Mr Bemba was not charged.<sup>138</sup>

73. Despite the parties’ and participants’ submissions concerning the context in which the Notes d’Audience of 24 November 2004 should be understood, the Appeals Chamber finds that even if the Trial Chamber had been able<sup>139</sup> to consider this document, it would not have impacted the factual conclusions reached in the Impugned Decision. This is because, firstly, given the numerous submissions of the Principal Public Prosecutor’s Office concerning the appeal, the Trial Chamber would not have exclusively relied on the Notes d’Audience of 24 November 2004 to determine the subject matter of the appeal. Secondly, the Notes d’Audience of 24 November 2004 is a summary of the Public Prosecutor Office’s oral submissions, and as such, it would have been reasonable for the Trial Chamber to place greater weight on the Office’s written submissions.<sup>140</sup> Thirdly, the Judgment of 16 December 2004, indicates *prima facie* that regardless of what were the written or oral submissions of the Principal Public Prosecutor’s Office before the Court of Appeal of Bangui, the Court of Appeal itself understood that the appeal included the part of the Order of 16 September 2004 which dismissed the charges against Mr Bemba, because it specifically determined that the charges against him must be upheld.<sup>141</sup> Notably, this judgment was confirmed by the Court of Cassation on 11 April 2006, which held that “in altering the Senior Judge’s decision to refer [...] Jean-Pierre BEMBA and his men [...] to the Criminal Court and to direct the Prosecution Service to submit the matter to the competent authority and thereby seize the International Criminal Court, [the Court of Appeal of Bangui] applied the law in due fashion”.<sup>142</sup> For these reasons, the Appeals Chamber finds that the Notes d’Audience of 24 November 2004 is not

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<sup>137</sup> Prosecutor’s Response to the Document in Support of the Appeal, para. 58.

<sup>138</sup> Observations of the Central African Republic, para. 48.

<sup>139</sup> Document in Support of the Appeal, para. 14.

<sup>140</sup> See section IV (A) (1) above, para. 40.

<sup>141</sup> In making a “fresh ruling” the Court of Appeal of Bangui then ordered the severance of the proceedings concerning the “*crimes de sang*” (blood crimes) and simultaneously directed the Prosecution to submit the matter to the competent authority at the ICC. See Judgment of 16 December 2004, p. 12.

<sup>142</sup> Judgment of 11 April 2006, at pp. 3-4. The original French text of the quoted excerpt is as follows: “*en reformant la décision de renvoi devant la cour criminelle de [...] Jean Pierre BEMBA et ses hommes [...] et en renvoyant le ministère public à mieux se pourvoir aux fins de la saine [sic] de la Cour Pénale Internationale, la Chambre d’Accusation de la cour d’Appel a fait une saine application de la loi*”.

determinative. Therefore, the Trial Chamber's inability to consider the document did not result in an error in the conclusions it reached in the Impugned Decision.

74. In sum, there is nothing to indicate that the Trial Chamber erred in its determination that there was no decision not to prosecute within the meaning of article 17 (1) (b) of the Statute. In the view of the Appeals Chamber, the Trial Chamber correctly relied on the judgments of the Court of Appeal of Bangui and the Court of Cassation as indicating *prima facie* the current status of the judicial proceedings in the case of *État Centrafricain c. Ange-Félix Patassé, et al.* These appellate decisions were also not decisions not to prosecute within the meaning of article 17 (1) (b) of the Statute. As the Appeals Chamber previously held in similar circumstances:

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.<sup>143</sup> [Footnotes omitted.]

75. For these reasons, the Appeals Chamber determines that no error has been identified in relation to the first ground of appeal and, accordingly, dismisses the first ground of appeal.

## **B. Second Ground of Appeal**

76. In the second ground of appeal, Mr Bemba argues that the Trial Chamber "committed a procedural error in dismissing [Mr Bemba's] application to bring evidence from an expert in the law of the Central African Republic".<sup>144</sup>

### *1. Relevant procedural history*

77. On 12 February 2010, the Trial Chamber rendered the "Decision on the procedures to be adopted for instructing expert witnesses" which set out the procedure

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<sup>143</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "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 (OA8), para. 83.

<sup>144</sup> Document in Support of the Appeal, para. 5 (b).



concerning expert witnesses and instructed the parties and participants on the modalities for calling expert witnesses.<sup>145</sup>

78. On 29 March 2010, at a status conference, the Trial Chamber gave further guidance to the parties and participants concerning the procedure and deadlines for submitting expert evidence.<sup>146</sup>

79. On 23 April 2010, Mr Bemba submitted an urgent request for leave to submit an expert opinion on CAR law in relation to the admissibility of the case<sup>147</sup> (hereinafter: “Request”). In his Request, Mr Bemba referred to what he considered to be a contradiction in the submissions of the representatives of the CAR concerning whether the CAR legislation would allow the CAR courts to try persons for crimes similar to those listed in article 5 of the Statute.<sup>148</sup> Mr Bemba argued that this was one of the reasons that he requested the testimony of an independent expert on the CAR judicial system.<sup>149</sup>

80. On 26 April 2010, the Prosecutor<sup>150</sup> and the Victims<sup>151</sup> filed their respective responses opposing the Request.

81. On 27 April 2010, the Trial Chamber held a status conference during which the parties and participants made submissions on the Admissibility Application and other related issues.<sup>152</sup> At the beginning of the status conference, the Trial Chamber dismissed the Request because, in the Trial Chamber’s view, the matter on which Mr Bemba requested to submit expert evidence was a factual issue that did not require

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<sup>145</sup> ICC-01/05-01/08-695.

<sup>146</sup> ICC-01/05-01/08-T-21-ENG, p. 20, line 7, to p. 21, line 15.

<sup>147</sup> “Requête de la Défense aux fins de faire intervenir un témoin-Expert en Droit de Procédure Pénale de la République Centrafricaine”, ICC-01/05-01/08-760. Mr Bemba requested leave to submit an expert report and to call the expert to testify during the status conference of 27-28 April 2010, if necessary.

<sup>148</sup> Request, paras 3-4.

<sup>149</sup> Request, para. 5.

<sup>150</sup> “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’”, ICC-01/05-01/08-763.

<sup>151</sup> “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’”, ICC-01/05-01/08-762.

<sup>152</sup> ICC-01/05-01/08-T-22-ENG (hereinafter: “Status Conference”).

expert legal opinion.<sup>153</sup> The Trial Chamber further held that the submission of expert evidence would not materially assist the Court in deciding the issue.<sup>154</sup>

82. In his oral submissions at the end of the status conference, Mr Bemba made a second request to submit expert evidence on CAR law.<sup>155</sup> The Trial Chamber rejected this second request by stating that (i) it had already ruled on the main issue in relation to expert evidence, (ii) it had only requested focused submissions from the CAR representatives on specific legal issues that Mr Bemba relied on in his submissions, (iii) there was no need for an expert to add to these submissions, and (iv) no material had been received from Mr Bemba that detailed the kind of evidence the expert would present.<sup>156</sup>

### 2. *Relevant part of the Impugned Decision*

83. The Trial Chamber recalled at paragraph 37 of the Impugned Decision that, at the status conference, Mr Bemba's Request to submit expert evidence "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".<sup>157</sup> The Trial Chamber also recalled that, during the status conference, it requested that the CAR representatives address two issues, namely: "(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 of proceedings".<sup>158</sup> The Trial Chamber recalled that the CAR filed its submissions in response to the Trial Chamber's questions and the Prosecutor, the Victims and Mr Bemba subsequently responded to the submissions of the CAR.<sup>159</sup>

### 3. *Document in Support of the Appeal*

84. Mr Bemba submits that during the status conference held on 27 April 2010 the Trial Chamber committed a procedural error in rejecting his request to submit expert

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<sup>153</sup> Status Conference, p. 2, lines 7-15. The Trial Chamber also noted that Mr Bemba did not provide the expert report by 26 April 2010 as promised.

<sup>154</sup> Status Conference, p. 2, lines 11-12.

<sup>155</sup> Status Conference, p. 69, line 18, to p. 70, line 2.

<sup>156</sup> Status Conference, p. 70, lines 5-24.

<sup>157</sup> Impugned Decision, para. 37.

<sup>158</sup> Impugned Decision, para. 37.

<sup>159</sup> Impugned Decision, paras 38-40.

evidence on CAR law which “substantially affected the soundness of the deliberations and vitiated the subsequent conclusions of Trial Chamber III - particularly on the issue of whether there was an obligation to notify the Accused of the Bangui appeal notices and decisions and the consequences of the failure to thus notify”.<sup>160</sup>

85. Mr Bemba contends that the Trial Chamber accepted what he says were the erroneous submissions of the CAR representatives, who submitted that, according to the CAR Code of Criminal Procedure applicable at the time of the facts, failure to notify Mr Bemba of the relevant appeal notices and decisions did not invalidate them.<sup>161</sup>

86. Mr Bemba points out that, while the Trial Chamber rejected his proposed expert on the basis that the issues presented required only a factual analysis, the Trial Chamber actually made legal conclusions, for example, in deciding that article 111 (e) and 193 (f) of the former CAR Code of Criminal Procedure were inapplicable and irrelevant, respectively.<sup>162</sup> In addition, the Trial Chamber’s analysis in paragraph 233 of the Impugned Decision which stated that, *inter alia*, “no provision similar to Article 95(b) [of the CAR Code of Criminal Procedure] has been cited that indicates that appellate proceedings are nullified if the accused is not notified of a relevant decision”, in Mr Bemba’s view, was also not solely based on a factual analysis.<sup>163</sup>

87. Mr Bemba concludes that the Trial Chamber put him in a situation of inequality of arms *vis-à-vis* the CAR by giving greater weight to its submissions “solely on the basis of a presumption of their expertise in local law” and in denying his Request to submit rebutting evidence from his proposed expert.<sup>164</sup>

#### 4. *Response to the Document in Support of the Appeal*

88. The Prosecutor submits that the second ground of appeal should be dismissed *in limine* because Mr Bemba fails to demonstrate how the Trial Chamber’s alleged

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<sup>160</sup> Document in Support of the Appeal, para. 22.

<sup>161</sup> Document in Support of the Appeal, para. 22.

<sup>162</sup> Document in Support of the Appeal, para. 24.

<sup>163</sup> Document in Support of the Appeal, para. 23.

<sup>164</sup> Document in Support of the Appeal, para. 25.

misreading of the relevant CAR provisions affected the conclusions it reached in the Impugned Decision.<sup>165</sup>

89. In the alternative, the Prosecutor argues that the Trial Chamber correctly exercised its discretion, pursuant to articles 64 (9), 69 (3) and 69 (4) of the Statute in rejecting Mr Bemba's request to submit expert evidence.<sup>166</sup> The Prosecutor further submits that the Trial Chamber correctly decided that the "CAR proceedings constituted a matter of fact that could be addressed by counsel in the hearing" and notes that Mr Bemba fully set out his position in response to the CAR submissions on the issue of notification of the CAR decisions.<sup>167</sup> The Prosecutor also argues that nothing precluded Mr Bemba from consulting an expert to prepare his oral or written submissions.<sup>168</sup> The Prosecutor recalls that the Trial Chamber clearly indicated that an expert report would not materially assist the Chamber.<sup>169</sup>

90. The Prosecutor further argues that Mr Bemba was not "placed in a disadvantageous position with respect to the CAR authorities or the Prosecution" since Mr Bemba provided detailed submissions on the relevant issues.<sup>170</sup> The Prosecutor submits that the fact that the Trial Chamber rejected Mr Bemba's request to submit expert evidence does not mean that it failed to address Mr Bemba's arguments; rather, the Prosecutor asserts that the Trial Chamber carefully addressed every submission from Mr Bemba.<sup>171</sup>

91. The Prosecutor avers that the Trial Chamber did not draw "legal conclusions" pertaining to the interpretation of the criminal law of the CAR as Mr Bemba contends, but instead that it considered the provisions put forward by the parties and participants and "concluded whether they were applicable to the facts of the case on the basis of a plain reading of their text".<sup>172</sup>

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<sup>165</sup> Response to the Document in Support of the Appeal, para. 63.

<sup>166</sup> Response to the Document in Support of the Appeal, paras 66, 68.

<sup>167</sup> Response to the Document in Support of the Appeal, para. 67.

<sup>168</sup> Response to the Document in Support of the Appeal, para. 67.

<sup>169</sup> Response to the Document in Support of the Appeal, para. 68.

<sup>170</sup> Response to the Document in Support of the Appeal, para. 70.

<sup>171</sup> Response to the Document in Support of the Appeal, para. 71.

<sup>172</sup> Response to the Document in Support of the Appeal, para. 72.



### 5. *Observations of the Victims*

92. The Victims largely agree with the Prosecutor's submissions in the Response to the Document in Support of the Appeal<sup>173</sup> and submit that the Trial Chamber did not err in rejecting Mr Bemba's request to submit expert evidence.<sup>174</sup>

93. The Victims emphasise that Mr Bemba's written request to call an expert witness involved attempting to "resolve an alleged contradiction between the April 2010 observations made by the CAR government and a letter from said authorities to the United Nations Security Council dated 1 August 2008".<sup>175</sup> The Victims submit that the Trial Chamber rejected Mr Bemba's request to call an expert witness on the basis that the expert testimony would not assist the Chamber in resolving this factual issue.<sup>176</sup> The Victims also recall that the Trial Chamber pointed out that Mr Bemba had failed to submit the written report, as previously proposed, as of the date of the status conference held on 27 April 2010.<sup>177</sup>

94. The Victims submit that there is an important distinction between the role of an expert witness called by one of the parties and submissions from the CAR authorities, who are "*prima facie* neutral" and were summoned to appear before the Trial Chamber.<sup>178</sup> The Victims further argue that Mr Bemba's proposed expert does not qualify as an independent expert given that "he or she has not been selected, pre-approved and consulted with by all the parties and participants".<sup>179</sup>

### 6. *Observations of the Central African Republic*

95. The CAR notes that Mr Bemba filed his Request only three days prior to the status conference held on 27 April 2010<sup>180</sup> and that he does not point to any specific procedural rule that the Trial Chamber would have violated in rejecting his Request.<sup>181</sup> The CAR submits that the only violation of a procedural rule that one may

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<sup>173</sup> Observations of the Victims, para. 27.

<sup>174</sup> Observations of the Victims, para. 38.

<sup>175</sup> Observations of the Victims, para. 36.

<sup>176</sup> Observations of the Victims, para. 36.

<sup>177</sup> Observations of the Victims, para. 36.

<sup>178</sup> Observations of the Victims, para. 37.

<sup>179</sup> Observations of the Victims, para. 38.

<sup>180</sup> Observations of the Central African Republic, para. 54.

<sup>181</sup> Observations of the Central African Republic, para. 53.

identify is Mr Bemba's failure to submit the Request within a timeframe that would have allowed the participants to prepare.<sup>182</sup>

96. The CAR also notes that during the status conference held on 27 April 2010, Mr Bemba made submissions on the alleged obligation to notify him of the notices of appeal and of the decisions taken thereupon, as well as on the consequences of a failure to do so.<sup>183</sup> The CAR submits that it is reasonable to suspect that the submissions of the proposed expert witness would have been the same as Mr Bemba's submissions at the status conference.<sup>184</sup> The CAR further notes that Mr Bemba had a second opportunity to submit observations to the Trial Chamber, by way of written reply to the CAR's submissions.<sup>185</sup> The CAR argues that since Mr Bemba had two occasions to submit his observations, whereas the CAR only presented its submissions once, Mr Bemba cannot claim that he was put in a situation of inequality *vis-à-vis* the CAR.<sup>186</sup>

97. The CAR submits that, in ruling on the relevance and admissibility of Mr Bemba's proposed expert evidence, the Trial Chamber acted within its discretionary authority to decide on the relevance and admissibility of evidence pursuant to articles 64 (9) (a) and 69 (4) of the Statute.<sup>187</sup>

#### 7. *Mr Bemba's Response*

98. Mr Bemba submits that the CAR "has nothing useful to say" on the consequences, under the CAR Code of Criminal Procedure, of a failure to notify him of the notices of appeal and of the decisions taken thereupon.<sup>188</sup> In his view, the CAR therefore accepts the legal conclusions of Mr Bemba and his expert on this issue.<sup>189</sup>

99. Mr Bemba further submits that the CAR is called upon to make observations on the application of CAR law, but should not make submissions on the question of

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<sup>182</sup> Observations of the Central African Republic, para. 56.

<sup>183</sup> Observations of the Central African Republic, para. 57.

<sup>184</sup> Observations of the Central African Republic, para. 57.

<sup>185</sup> Observations of the Central African Republic, para. 58.

<sup>186</sup> Observations of the Central African Republic, paras 58-59.

<sup>187</sup> Observations of the Central African Republic, paras 60-61.

<sup>188</sup> Mr Bemba's Response, para. 35.

<sup>189</sup> Mr Bemba's Response, para. 36.

whether the Trial Chamber should have allowed Mr Bemba's proposed expert evidence.<sup>190</sup>

#### 8. *Determination by the Appeals Chamber*

100. In support of this ground of appeal, Mr Bemba essentially argues that the oral decisions, rendered on 27 April 2010 and rejecting his Request, amounted to a procedural error which "vitiating the subsequent conclusions of Trial Chamber III - particularly on the issue of whether there was an obligation to notify [him] of the Bangui appeal notices and decisions and the consequences of the failure to thus notify".<sup>191</sup>

101. The Appeals Chamber recalls that the decisions rejecting Mr Bemba's Request were taken during the status conference<sup>192</sup> in the proceedings leading up to the Impugned Decision. Thus, Mr Bemba is raising a ground of appeal which arises out of these preliminary proceedings and not the Impugned Decision itself. However, the Appeals Chamber has previously held that "Counsel for the Defence is entitled to rely on procedural errors as the basis for impugning the [...] Chamber's decision; his failure to attack its findings on admissibility does not *per se* render the appeal inadmissible".<sup>193</sup> Thus Mr Bemba is entitled to raise a procedural issue as a ground of appeal.

102. The Appeals Chamber has also held that "an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision".<sup>194</sup> The Prosecutor submits that Mr Bemba failed to demonstrate how the Trial Chamber's alleged misreading of CAR law materially affected its decision regarding the admissibility of the case,<sup>195</sup> arguing that the second ground of appeal should be dismissed *in limine*.<sup>196</sup>

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<sup>190</sup> Mr Bemba's Response, paras 37-40.

<sup>191</sup> Document in Support of the Appeal, para. 22.

<sup>192</sup> Status Conference, p. 2, lines 7-15.

<sup>193</sup> *Prosecutor v. Joseph Kony and others*, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408 (OA 3) (hereinafter: "Judgment in *Kony* OA 3"), para. 47.

<sup>194</sup> Judgment in *Kony* OA 3, para. 48.

<sup>195</sup> Response to the Document in Support of the Appeal, para. 63.

<sup>196</sup> Response to the Document in Support of the Appeal, para. 65.

103. The Appeals Chamber is persuaded by the Prosecutor's arguments in this regard, as Mr Bemba has not indicated why the decision of the Trial Chamber to reject his Request was an error. Furthermore, Mr Bemba has not set out with sufficient precision how the Impugned Decision was materially affected by the alleged procedural error. For example, in the Document in Support of the Appeal, Mr Bemba neither indicates how the proposed expert evidence would have deviated from the Trial Chamber's purportedly erroneous reading of the relevant provisions of CAR law, nor demonstrates how the Trial Chamber would have reached a different conclusion regarding the admissibility of the case had it considered the testimony of an expert.

104. In light of the above, the Appeals Chamber concludes that Mr Bemba fails to meet the minimum requirements for a consideration of the merits of this ground of appeal and accordingly dismisses the second ground of appeal.

### **C. Third Ground of Appeal**

105. In the third ground of appeal, Mr Bemba argues that in its discussion of the additional factors of article 17 (1) (b) of the Statute, namely whether a State's decision not to prosecute resulted from the "unwillingness or inability of the State genuinely to prosecute", the Trial Chamber erred in law in "holding that the factors described at paragraph 245 of the Impugned Decision met the 'inability' test, and, in addition, committed a procedural error in accepting these factors as decisive, given that they were not adequately supported by the evidence".<sup>197</sup>

106. In the Impugned Decision, the Trial Chamber reasoned 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".<sup>198</sup> In their responses, the Prosecutor,<sup>199</sup> the Victims<sup>200</sup> and the CAR<sup>201</sup> point out that the Trial Chamber's conclusions in respect of inability were only "for the sake of

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<sup>197</sup> Document in Support of the Appeal, para. 27.

<sup>198</sup> Impugned Decision, para. 245.

<sup>199</sup> Response to the Document in Support of the Appeal, para. 74.

<sup>200</sup> Observations of the Victims, para. 41.

<sup>201</sup> Observations of the Central African Republic, para. 75.

completeness”<sup>202</sup>, and as such, Mr Bemba fails to show how the alleged error materially affects the Impugned Decision.

107. As the Appeals Chamber has previously held, it is only once it has been established that there was a decision not to prosecute within the meaning of article 17 (1) (b) of the Statute that the question arises whether the decision resulted from the unwillingness or inability of the State genuinely to prosecute:

[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse.<sup>203</sup>

108. The Appeals Chamber has also previously declined to consider a ground of appeal relating to unwillingness and inability when it did not find that the “initial questions” of article 17 (1) (b) of the Statute were answered in the affirmative:

As has been explained in relation to the third ground of appeal, the question of unwillingness or inability does not arise in the present case, because, at the time of the admissibility challenge, there were no domestic investigations or prosecutions against the Appellant; nor did the Congolese authorities, after investigation, decide not to prosecute him. For that reason, the Appeals Chamber sees no need to address the Appellant’s arguments under the fourth ground of appeal.<sup>204</sup>

109. Thus, the Appeals Chamber determines that it need not analyse the merits of the third ground of appeal since it has concluded that the Trial Chamber did not err in deciding that there has not been a decision not to prosecute Mr Bemba within the meaning of article 17 (1) (b) of the Statute.

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<sup>202</sup> Impugned Decision, para. 243.

<sup>203</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “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 (OA 8), (hereinafter: “Judgment in *Katanga* OA 8”), para. 78.

<sup>204</sup> Judgment in *Katanga* OA 8, para 97.

## D. Fourth Ground of Appeal

110. In the fourth ground of appeal, Mr Bemba argues that the Trial Chamber erred in considering his recent submissions before the Court of Appeal of Bangui and the Court of Cassation as an “abuse of this court’s process”.<sup>205</sup>

### 1. Relevant procedural history

111. On 13 April 2010<sup>206</sup> and 19 April 2010<sup>207</sup> Mr Bemba informed the Trial Chamber of three filings initiating judicial proceedings in the CAR. These filings were:

- a. The “Opposition”<sup>208</sup> filed on 6 April 2010 before the Court of Appeal of Bangui in which Mr Bemba requested the review and annulment of the Judgment of 16 December 2004 rendered by the Court of Appeal of Bangui. On 3 June 2010, the Court of Appeal of Bangui dismissed Mr Bemba’s “Opposition” as inadmissible;<sup>209</sup>
- b. The “Recours en Retraction”<sup>210</sup> filed on 8 April 2010 before the Court of Cassation in which Mr Bemba requested the “revocation of the decision handed down on 11 April 2006 by the Criminal Chamber of the Court of Cassation in the case brought against him by the State of the Central African Republic”.<sup>211</sup> On 19 April 2010, Mr Bemba withdrew his “Recours en Retraction”.<sup>212</sup>

<sup>205</sup> Impugned Decision, para. 231.

<sup>206</sup> “Defence Application Informing Trial Chamber III of New Developments in Judicial Proceedings in the Central African Republic”, ICC-01/05-01/08-751-tENG.

<sup>207</sup> “Second Defence Application Informing Trial Chamber III of a Further Development on 16 April 2010 in Judicial Proceedings in the Central African Republic”, ICC-01/05-01/08-757-tENG.

<sup>208</sup> “Defence Application Informing Trial Chamber III of New Developments in Judicial Proceedings in the Central African Republic”, ICC-01/05-01/08-751-AnxA-tENG.

<sup>209</sup> “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”, 10 June 2010, ICC-01/05-01/08-790-Anx1-tENG.

<sup>210</sup> “Defence Application Informing Trial Chamber III of New Developments in Judicial Proceedings in the Central African Republic”, 13 April 2010, ICC-01/05-01/08-751-AnxC-tENG.

<sup>211</sup> “Defence Application Informing Trial Chamber III of New Developments in Judicial Proceedings in the Central African Republic”, 13 April 2010, ICC-01/05-01/08-751-AnxC-tENG.

<sup>212</sup> “Registrar’s transmission of documents transmitted by the Central African Republic”, ICC-01/05-01/08-765-Anx2.

- c. The “*Pourvoi en Cassation*” filed on 16 April 2010<sup>213</sup> (hereinafter: “*Pourvoi en Cassation*”) in which Mr Bemba requested the reversal of the Judgment of 16 December 2004 on the basis of “the relevant articles of Organic Law No. 95.0011 of 23 December 2005 on the Organisation and Functioning of the Court of Cassation, in particular articles 19, 20, 21, 23 *et seq.*, [...] against the impugned decision in its entirety, on grounds that will be duly set out in a separate brief within the time limits prescribed by law”.<sup>214</sup>

112. On 23 April 2010, the Victims and the Prosecutor filed responses to the notification of the submission of the above filings.<sup>215</sup>

113. At the status conference held on 27 April 2010, the Trial Chamber requested that the CAR authorities provide additional submissions on two questions on CAR criminal procedure, namely: “(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 of proceedings”.<sup>216</sup>

114. On 10 May 2010, the Registrar transmitted the CAR’s submissions on these questions.<sup>217</sup> On 11 May 2010, the Victims<sup>218</sup> and the Prosecutor<sup>219</sup> filed their respective submissions and, on 14 May 2010, Mr Bemba responded to the submissions of the CAR, the Victims and the Prosecutor.<sup>220</sup>

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<sup>213</sup> “Second Defence Application Informing Trial Chamber III of a Further Development on 16 April 2010 in Judicial Proceedings in the Central African Republic”, ICC-01/05-01/08-757-AnxA-tENG.

<sup>214</sup> “Second Defence Application Informing Trial Chamber III of a Further Development on 16 April 2010 in Judicial Proceedings in the Central African Republic”, ICC-01/05-01/08-757-AnxA-tENG.

<sup>215</sup> “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”, ICC-01/05-01/08-759; “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”, ICC-01/05-01/08-761.

<sup>216</sup> See Impugned Decision, para. 37. See also, Status Conference, p. 66, line 5, to p. 67, line 16.

<sup>217</sup> Additional Observations of the Central African Republic, ICC-01/05-01/08-770.

<sup>218</sup> “Submissions by the Legal Representative on the supplementary information provided by the Central African Republic on national law”, ICC-01/05-01/08-773.

<sup>219</sup> “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 27 April 2010”, ICC-01/05-01/08-774.

<sup>220</sup> “Defence Response to the Observations of the Central African Republic of 7 May 2010 and of the other Parties”, ICC-01/05-01/08-776-Conf-tENG; for a public redacted version, see ICC-01/05-01/08-776-Red2-tENG.

## 2. *Relevant part of Impugned Decision*

115. In respect of Mr Bemba's arguments concerning the suggested suspensive effect on certain judgments of the CAR courts because of his recent filings before the Court of Appeal of Bangui and the Court of Cassation, the Trial Chamber observed that the motions were filed in CAR courts approximately four years after the judgment of the Court of Cassation was delivered and more than two years after these national decisions were disclosed by the Prosecutor to the accused.<sup>221</sup> The Trial Chamber concluded that no sufficient or acceptable explanation had been provided for these "extremely late filings".<sup>222</sup> For these reasons, the Trial Chamber declined to take them into consideration because it considered the filings to constitute "an abuse of this court's process".<sup>223</sup>

## 3. *Document in Support of the Appeal*

116. In the fourth ground of appeal, Mr Bemba argues that the Trial Chamber "committed a procedural error and an error of law in finding that the application [*pourvoi*] lodged by the Defence with the Court of Cassation in accordance with the forms and time-limits prescribed by the applicable procedural law in the Central African Republic was an abuse of process".<sup>224</sup>

117. Mr Bemba submits that, he argued before the Trial Chamber that under CAR law, filing a *Pourvoi en Cassation* has suspensive effect on the decision of the CAR courts to refer Mr Bemba's case to the ICC.<sup>225</sup> Mr Bemba alleges that these submissions were also accepted by the CAR. He further submits that the Trial Chamber improperly evaded this issue by deciding that he committed an abuse of process in submitting the *Pourvoi en Cassation* at a late date,<sup>226</sup> despite his belief that the Trial Chamber actually perceived the issue of suspensive effect of the 2010 filings before CAR courts to be "fundamental", given that it revisited this question on three occasions.<sup>227</sup>

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<sup>221</sup> Impugned Decision, para. 231.

<sup>222</sup> Impugned Decision, para. 231.

<sup>223</sup> Impugned Decision, para. 231.

<sup>224</sup> Document in Support of the Appeal, para. 5 (d).

<sup>225</sup> Document in Support of the Appeal, para. 37.

<sup>226</sup> Document in Support of the Appeal, para. 38.

<sup>227</sup> Document in Support of the Appeal, para. 36.



118. In Mr Bemba's view, he "was not time-barred" from filing the application with the Court of Cassation since he was not notified of the Judgment of 16 December 2004 delivered by the Court of Appeal of Bangui.<sup>228</sup> Mr Bemba alleges that his financial difficulties, and harassment and persecution against his defence counsel prevented him from conducting investigations into the proceedings in the CAR.<sup>229</sup>

119. Mr Bemba concludes that the Trial Chamber's finding that his pursuit of a remedy before the CAR courts was an abuse of process – instead of deciding on the merits of his submissions concerning suspensive effect – affected the fair and expeditious conduct of the proceedings.<sup>230</sup>

#### 4. *Response to the Document in Support of the Appeal*

120. The Prosecutor submits that Mr Bemba failed to advance any arguments as to how the ruling of the Trial Chamber regarding the alleged suspensive effect of the *Pourvoi en Cassation*, if erroneous, would affect its decision on the admissibility of the case.<sup>231</sup> The Prosecutor recalls that the Trial Chamber stated that even if the *Pourvoi en Cassation* "had suspensive effect under the CAR provisions, this would be irrelevant *vis-à-vis* the Chamber's determination under Article 17(1)".<sup>232</sup> The Prosecutor thus submits that the fourth ground of appeal should be dismissed *in limine*.<sup>233</sup>

121. Alternatively, the Prosecutor submits that the Trial Chamber correctly exercised its discretion under article 64 (2) of the Statute in concluding that Mr Bemba's filings before the CAR judiciary constituted an abuse of this Court's process on the basis that Mr Bemba "failed to justify the lateness of his filings".<sup>234</sup>

122. The Prosecutor further argues that the Trial Chamber sought submissions from the parties and participants on the matter "so its decision would be rendered in an informed fashion"<sup>235</sup> and that Mr Bemba only referred in the Document in Support of the Appeal to the alleged late disclosure by the prosecution, alleged acts of

<sup>228</sup> Document in Support of the Appeal, para. 41.

<sup>229</sup> Document in Support of the Appeal, paras 40-41.

<sup>230</sup> Document in Support of the Appeal, para. 42.

<sup>231</sup> Response to the Document in Support of the Appeal, para. 83.

<sup>232</sup> Response to the Document in Support of the Appeal, para. 83.

<sup>233</sup> Response to the Document in Support of the Appeal, para. 84.

<sup>234</sup> Response to the Document in Support of the Appeal, para. 85.

<sup>235</sup> Response to the Document in Support of the Appeal, para. 87.

persecution and harassment against his counsel and alleged financial difficulties.<sup>236</sup> Thus, the Prosecutor argues that “[i]t is manifestly unfair to fault the Trial Chamber for failing to consider factual explanations and justifications that were not timely presented to it”.<sup>237</sup>

123. The Prosecutor further submits that Mr Bemba misrepresented the questions posed by the Trial Chamber and argues that, contrary to Mr Bemba’s contentions, the CAR never accepted that the Pourvoi en Cassation “would have suspensive effect in the instant case”.<sup>238</sup>

#### 5. *Observations of the Victims*

124. The Victims submit that even if the Trial Chamber had agreed that the recent appellate filings had suspensive effect on the 2004 and 2006 decisions by the Bangui Court of Appeals and the Court of Cassation, this determination would not have affected the conclusions the Trial Chamber reached pursuant to article 17 of the Statute.<sup>239</sup>

125. The Victims further submit that the alleged suspensive effect of recent filings in the CAR is not an issue upon which the Trial Chamber’s legal analysis hinges, and that it was within the Trial Chamber’s discretion to characterise Mr Bemba’s “late maneuvers” as abusive.<sup>240</sup> On this basis, the Victims submit that the alleged suspensive effect of Mr Bemba’s recent filings “is irrelevant to the legal criteria that should be considered by the Appeals Chamber in determining whether the Trial Chamber committed [a] reversible error in its decision”.<sup>241</sup>

#### 6. *Observations of the Central African Republic*

126. The CAR submits that, contrary to Mr Bemba’s arguments, it never admitted that the Pourvoi en Cassation filed by Mr Bemba had suspensive effect on the Court of Appeal of Bangui’s Judgment of 16 December 2004. Rather, the CAR recalls that it submitted before the Trial Chamber that the Pourvoi en Cassation filed by Mr Bemba

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<sup>236</sup> Response to the Document in Support of the Appeal, para. 87.

<sup>237</sup> Response to the Document in Support of the Appeal, para. 87.

<sup>238</sup> Response to the Document in Support of the Appeal, paras 88-89.

<sup>239</sup> Observations of the Victims, para. 43.

<sup>240</sup> Observations of the Victims, para. 46.

<sup>241</sup> Observations of the Victims, para. 46.

did not have suspensive effect, because the Judgment of 16 December 2004 was solely related to judicial administration and was a judgment against which Mr Bemba had no right of appeal.<sup>242</sup> The CAR further notes that the case was referred to the ICC by way of an act of State of the CAR and not by way of the judgment of the Court of Appeal of Bangui. For that reason, the alleged suspension of the latter judgment had no impact on the referral of the case to the ICC.<sup>243</sup>

127. As to the alleged persecution and harassment of Mr Bemba's counsel in the CAR, the CAR submits that until Mr Bemba's first filing before the CAR's judiciary in April 2010, he had not hired any counsel to ensure his defence in the CAR.<sup>244</sup> The CAR notes that in the Order of 16 September 2004, the Senior Investigating Judge indicated that Mr Bemba was not represented and that no brief was filed on his behalf.<sup>245</sup> Thus, the CAR submits that Mr Bemba's allegations concerning the persecution and harassment of his counsel are unsubstantiated.<sup>246</sup>

#### 7. *Prosecutor's Response*

128. The Prosecutor submits that Mr Bemba's filings before the CAR courts do not affect the referral of the case to the ICC.<sup>247</sup> The Prosecutor notes that the Observations of the Central African Republic indicate that the CAR authorities never conceded that the Pourvoi en Cassation had suspensive effect on the Court of Appeal of Bangui's judgment, since the latter "was a decision on matters of judicial administration against which [Mr Bemba] lack[ed] legal standing to appeal".<sup>248</sup>

#### 8. *Mr Bemba's Response*

129. Mr Bemba reiterates his argument that the CAR admitted, in its observations of 7 May 2010, that the Pourvoi en Cassation filed by Mr Bemba suspended the Court of Appeal of Bangui's Judgment of 16 December 2004.<sup>249</sup> To support this submission,

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<sup>242</sup> Observations of the Central African Republic, para. 79.

<sup>243</sup> Observations of the Central African Republic, para. 80.

<sup>244</sup> Observations of the Central African Republic, para. 82.

<sup>245</sup> Observations of the Central African Republic, para. 82.

<sup>246</sup> Observations of the Central African Republic, para. 82.

<sup>247</sup> Prosecutor's Response, p. 5.

<sup>248</sup> Prosecutor's Response, para. 7.

<sup>249</sup> Mr Bemba's Response, paras 45-46.

Mr Bemba refers to several provisions of CAR Law Nr. 95/0011 on the organisation and functioning of the Court of Cassation.<sup>250</sup>

130. Mr Bemba further argues that the CAR is confusing the concepts of suspensive effect and admissibility of a motion when submitting that the Pourvoi en Cassation would not have suspensive effect, because the Judgment of 16 December 2004 was solely related to judicial administration.<sup>251</sup> Mr Bemba submits that the Judgment of 16 December 2004 has a preliminary part, which ordered severance, and an interlocutory part, which ordered referral, and that only the latter part of the Judgment of 16 December 2004 was the subject of the Pourvoi en Cassation.<sup>252</sup>

131. Mr Bemba further submits that the argument of the CAR that the Judgment of 16 December 2004 could not be appealed is contradicted by the fact that the Court of Cassation held that the appeal brought by the Principal Public Prosecutor's Office against that same decision was admissible and should be partially upheld.<sup>253</sup> Mr Bemba submits that there is no indication in the Judgment of 11 April 2004 that the appeal was directed against a matter of judicial administration.<sup>254</sup>

132. Mr Bemba further argues that the suspension of the Judgment of 16 December 2004 would impact the referral of the case to the ICC, because (i) the initiation of an ICC investigation in the CAR depended on the national proceedings in the CAR; (ii) the complementarity principle would preclude a case from being judged both at the ICC and national jurisdictions at the same time; and (iii) the ICC must await judgment from the Court of Cassation before deciding on the admissibility of the case pursuant to article 17 (a) and (b) of the Statute, because if the Cassation Court reverses the Court of Appeal of Bangui's judgment, the Order of 16 September 2004 dismissing the charges against Mr Bemba and would be in force. In that case, article 17(1) (a) and (b) of the Statute would apply.<sup>255</sup>

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<sup>250</sup> Mr Bemba's Response, para. 48.

<sup>251</sup> Mr Bemba's Response, paras 49-50.

<sup>252</sup> Mr Bemba's Response, paras 53-54.

<sup>253</sup> Mr Bemba's Response, paras 55-56.

<sup>254</sup> Mr Bemba's Response, paras 56-57.

<sup>255</sup> Mr Bemba's Response, para. 59.

### 9. Determination by the Appeals Chamber

133. As noted previously, in determining the admissibility of a ground of appeal, the Appeals Chamber has held that “an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision”.<sup>256</sup> In the fourth ground of appeal, Mr Bemba argues that the Trial Chamber committed an error in finding that the *Pourvoi en Cassation* lodged in April 2010 before the Court of Cassation was an abuse of this Court’s process. In the view of the Appeals Chamber, Mr Bemba fails to meet the minimum requirements for consideration of the merits of this ground of appeal, because he does not indicate in the Document in Support of the Appeal how the alleged error materially affected the Impugned Decision.

134. Mr Bemba alleges in the Document in Support of the Appeal that the Trial Chamber erred in procedure and in law in concluding that the filing of the *Pourvoi en Cassation* “so late”<sup>257</sup> was an abuse of this Court’s process.<sup>258</sup> The Appeals Chamber notes that, in the Impugned Decision, the Trial Chamber does not elaborate further on the concept of an abuse of process or on what basis it was applied.<sup>259</sup> Nevertheless, the Appeals Chamber finds that Mr Bemba does not connect the alleged error to the Trial Chamber’s decision on the admissibility of the case. In other words, Mr Bemba does not advance any arguments in the Document in Support of the Appeal to indicate how the outcome of the Impugned Decision would have been different if the Trial Chamber had considered his argument concerning the alleged suspensive effect of the *Pourvoi en Cassation*. Mr Bemba merely states that the alleged error “significantly

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<sup>256</sup> Judgment in *Kony* OA 3, para. 48.

<sup>257</sup> Impugned Decision, para. 231.

<sup>258</sup> Document in Support of the Appeal, para. 5 (d).

<sup>259</sup> See on these questions e.g. Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘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’”, 21 October 2008, ICC-01/04-01/06-1486 (OA 13), para. 29: “The Appeals Chamber determined that the doctrine of abuse of process, as practised in common law jurisdictions, finds no application as such under the Statute. But to the extent it aims to stem breaches of fundamental principles of justice, it is endorsed by the Statute as a means of protecting the individual from violations of his/her fundamental rights and in order to ensure a fair trial that earmarks the parameters of the administration of justice”; see also Appeals Chamber, *Prosecutor v. Thomas Lubanga Dyilo*, “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 (OA 4), paras 26-35.

affected the fair and expeditious conduct of the current proceedings”.<sup>260</sup> The remainder of his submissions in relation to this ground of appeal concern the importance the Trial Chamber previously accorded to this issue,<sup>261</sup> and the difficulties the Defence team faced which prevented it from filing the *Pourvoi en Cassation* sooner,<sup>262</sup> *but not* that the alleged error materially affected the outcome of the Impugned Decision.

135. In light of the above, the Appeals Chamber concludes that Mr Bemba fails to meet the minimum requirements for consideration of the merits and accordingly dismisses the fourth ground of appeal.

## V. APPROPRIATE RELIEF

136. On an appeal pursuant to article 82 (1) (a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158 (1) of the Rules of Procedure and Evidence). In the present case, no error in the Impugned Decision has been identified. The Appeals Chamber therefore confirms the Impugned Decision and dismisses the appeal.

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



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**Judge Anita Ušacka**  
**Presiding Judge**

Dated this 19<sup>th</sup> day of October 2010

At The Hague, The Netherlands

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<sup>260</sup> Document in Support of the Appeal, para. 42.

<sup>261</sup> Document in Support of the Appeal, paras 33-38.

<sup>262</sup> Document in Support of the Appeal, paras 39-41.