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Date: **29 March 2010**

TRIAL CHAMBER III

Before: Judge Adrian Fulford, Presiding Judge
Judge Elisabeth Odio Benito
Judge Joyce Aluoch

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

Public Document

**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**

Source: The Legal Representative of Victims a/0271/08, a/0272/08, a/0273/08, a/0275/08, a/0277/08, a/283/08, a/0284/08, a/0285/08, a/0286/08, a/0287/08, a/0288/08, a/289/08, a/0290/08, a/0294/08, a/0390/08, a/391/08, a/393/08, a/394/08, a/0395/08, a/0396/08, a/0468/08, a/0469/08, a/0470/08, a/0471/08, a/0472/08, a/0473/08, a/0474/08, a/0475/08, a/0476/08, a/0477/08, a/0478/08, a/0479/08, a/0480/08, a/0481/08.

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

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I – Introduction

1. On 21 December 2004, the Government of the Central African Republic (CAR) submitted the situation in the Central African Republic to the Office of the Prosecutor of the International Criminal Court (ICC).
2. On 11 April 2006, the *Cour de Cassation* of the CAR rendered a judgment referring the situation in the CAR to the ICC.
3. On 23 May 2008, the Pre-Trial Chamber issued a warrant of arrest for Jean Pierre Bemba for three war crimes and five crimes against humanity.
4. On 24 May 2008, Jean Pierre Bemba was arrested in Brussels.
5. On 3 July 2008, Jean Pierre Bemba was transferred to the Scheveningen detention centre in The Hague.
6. On 12 December 2008, 54 victims were granted leave to participate in the proceedings.
7. From 12 to 15 January 2009, the hearing on the confirmation of the charges against Jean Pierre Bemba was held at the ICC.
8. On 15 June 2009, the Pre-Trial Chamber confirmed two counts of crimes against humanity and three counts of war crimes against Jean Pierre Bemba.
9. On 14 August 2009, the single judge of the Pre-Trial Chamber decided to grant conditionally the application for interim release of Jean Pierre Bemba.
10. On 2 December 2009, the Appeals Chamber set aside the decision on the interim release of Jean Pierre Bemba.

11. The Trial Chamber scheduled the commencement date of the trial in the case of *The Prosecutor v. Jean Pierre Bemba* for 27 April 2010.

12. On 8 December 2009, the Trial Chamber dismissed a further application for Jean Pierre Bemba's release.

13. On 25 February 2010, the Defence submitted an application challenging the admissibility of the case pursuant to articles 17 and 19(2)(a) of the Rome Statute.

14. On 19 March 2010, the Registrar of the Court transmitted a summary of the application to the Legal Representatives of the Victims, informing them that Trial Chamber III invited them to submit their written observations by 29 March 2010.

The application submitted by the Defence for Jean Pierre Bemba states the following grounds for the challenge to the admissibility of the case:

- the principle of complementarity;
- the *ne bis in idem* principle;
- the lack of the requisite level of gravity.

15. The Defence contends, firstly, that the principle of complementarity based on admissibility criteria have not been met and, secondly, that the instant case is not admissible before the Court due to the fact that genuine, identical proceedings were conducted and closed by a final decision of the judicial authorities of the Central African Republic (CAR) and that the latter had not declined their jurisdiction to try the case.¹

II – The complementarity principle

16. The Legal Representative of the Victims² submits that the crimes with which Mr Jean Pierre Bemba (the accused) is charged do clearly fall under the jurisdiction of

¹ Cf. Defence submission of 25 February 2010, ICC-01/05-01/08-727, pp. 2-3.

² See above.

the International Criminal Court pursuant to article 5 of the Rome Statute, and this is not challenged by the Defence.³

17. Under article 13 of the Rome Statute, the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14.

18. Contrary to the Defence's argument that, since the case was subject to an investigation by the Central African State, it must be found to be inadmissible by the Court pursuant to article 17, it should be noted that article 17(1)(b) allows a case to be deemed admissible by the Court if the decision of the State not to prosecute the person concerned resulted from the unwillingness or inability of that State genuinely to prosecute, which applies here.

19. It can be seen from the grounds of the *Cour de Cassation* judgment⁴ that the CAR judicial authorities are unable genuinely to investigate or prosecute these persons and that international cooperation therefore remains the only means of preventing their impunity.

20. Similarly, article 17(3) is not restricted only to situations where all or a substantial part of the judiciary has collapsed in order to determine inability on the part of the State concerned. Such inability may also be demonstrated by the State's unwillingness to arrest the accused, to gather the necessary evidence and testimony or to otherwise genuinely conduct proceedings.

³ In September 2009, Counsel for the Defence decided not to appeal against the charges confirmed by Pre-Trial Chamber III against the accused.

⁴ C. Cass. of the CAR of 11 April 2006, *Ministère publique v. Ange Felix Patassé et al.* (including the accused).

21. In this case, the *Cour de Cassation*⁵ did in fact state that the accused, along with several others, was the subject of an arrest warrant, but that remains the only action taken by the courts of the CAR, since those persons were never questioned, nor was any genuine effort made to look for them. Furthermore, the *Cour de Cassation* confirmed the national courts' inability to arrest the accused and the others, who are all outside the national territory.

22. In response to the Defence's claims that, at the time of the Pre-Trial Chamber's issuance of a warrant of arrest for the accused,⁶ the reasons cited by the CAR judiciary to explain its inability to initiate proceedings against Jean Pierre Bemba no longer applied, the Legal Representative observes that the Defence provides no evidence of this whatsoever. On the contrary, those reasons remain valid today, and can be expanded to include the lack of appropriate infrastructure in the case and, until 2010,⁷ the absence of legislation to implement the Rome Statute at national level.

23. Accordingly, the CAR cannot reopen the investigations and proceedings against the accused, and still less so with judicial cooperation from the Kingdom of Belgium or the Portuguese Republic, with which it has no judicial agreements.

III – The *ne bis in idem* principle

24. The Representative of the Victims submits that an analysis of the proceedings undertaken in the CAR discloses no evidence that a *res judicata* decision dismissing the case had been rendered in favour of the accused.

25. The Order for Dismissal of the Case [*ordonnance de non-lieu*] of the Senior Investigating Judge of the Bangui *Tribunal de Grande Instance* dated 16 September 2004 did not finally close the criminal proceedings against the accused and others,

⁵ *Op. cit.*

⁶ The warrant of arrest was issued on 23 May 2008. The accused was actually arrested on 24 May 2008.

⁷ Law No. 10.001 of 6 January 2010 on the Criminal Code of the Central African Republic, Official Journal of the CAR, 15 January 2010.

since on 17 September 2004 it was appealed on all of its provisions by the Public Prosecutor of said court to the Indictment Chamber of the Bangui Court of Appeal, which partially set aside the Order.

26. The judgment of the Indictment Chamber ordering that the proceedings be severed was subject to an appeal before the *Cour de Cassation* and it was this higher court which issued the final decision,⁸ since the judgments of the *Cour de Cassation* of the Central African Republic are not susceptible of appeal.⁹

27. In its judgment, the *Cour de Cassation* clearly removed the case from the jurisdiction of the national courts and referred it to the International Criminal Court. Accordingly, the *ne bis in idem* principle cannot apply.

IV – The level of gravity of the case

28. The Defence submits that the facts with which Jean Pierre Bemba is charged do not attain the required level of gravity to justify the proceedings against him before the ICC¹⁰ under articles 1, 5(1) and 17(4) of the Rome Statute.

29. The Legal Representative of the Victims submits that article 1 on the establishment of the Court confers upon it jurisdiction to try persons for the most serious crimes, which are set out under article 5 as the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

30. Jean Pierre Bemba was prosecuted for three (3) counts of crimes against humanity and five (5) counts of war crimes, which are among the most serious crimes falling under the ICC's jurisdiction.

⁸ *Op. cit.* Judgment of 11 April 2006.

⁹ Cf. Article 47 of Organic Law No. 95.0011 of 23 December 1995 on the Organisation and Operation of the *Cour de Cassation*.

¹⁰ *Op. cit.*, No. 135.

31. After the confirmation hearing, by decision of the Pre-Trial Chamber dated 15 June 2009, five (5) of those charges were confirmed against him on account of his command responsibility.

32. That decision on the confirmation of charges was notified to the Defence, but the Defence made no appeal against it. It even stated that it was ready to go to trial. Indeed it could hardly be otherwise, since at the confirmation hearing the Defence did not dispute the gravity of the crimes, but sought to exculpate the accused by arguing that the MLC troops placed at the disposal of the Government of the Central African Republic in accordance with regional agreements had remained under the authority of that government.

For all these reasons, the Legal Representative of the above-mentioned victims respectfully requests Trial Chamber III kindly to take account of all of these observations, and purely and simply to dismiss the Defence application as being without merit and to rule that the criminal proceedings instituted against the accused by the ICC are admissible.

[signed]

Ms Marie Edith DOUZIMA-LAWSON

Dated this 29 March 2010,
At Bangui