

ANNEX 2

B

**INTERNATIONAL CRIMINAL COURT
TRIAL CHAMBER III**

**IN THE CASE OF: THE PROSECUTOR v. Jean Pierre BEMBA GOMBO
(ICC-01/05-01/08)**

**OBSERVATIONS ON THE MOTION CHALLENGING
THE ADMISSIBILITY OF THE CASE**

ON BEHALF OF: The State of the Central African Republic **Mr Bizon**
VERSUS: Jean Pierre BEMBA GOMBO **Mr Kilolo**

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MAY IT PLEASE THE COURT

I. SUMMARY OF Mr Jean Pierre BEMBA GOMBO's APPLICATION

Mr Jean Pierre Bamba Gombo has seen fit to submit a motion challenging the admissibility of the proceedings against him before Trial Chamber III of the International Criminal Court. He respectfully calls upon this honourable Chamber:

- To declare the criminal proceedings against him inadmissible;
- To order all proceedings against him to be stayed or annulled on the ground of abuse of process.

He submits arguments in support of the motion based on:

- the complementarity principle;
- the “*ne bis in idem*” principle; and
- the fact that the requisite degree of gravity is not met.

In the presentation of the facts of the case and the subsequent arguments, the State of the Central African Republic will show that this motion is unfounded and in any case simply an attempt to delay the proceedings.

II. REMINDER OF THE FACTUAL BACKGROUND TO THE CASE

On 28 May 2001, a section of the CAR armed forces attempted to overthrow the government of President Ange Félix PATASSÉ. The coup, for which former President André KOLINGBA claimed responsibility, failed and a sizeable proportion of the armed forces of the CAR (FACA) deserted. The few remaining loyal troops were demotivated as a result of delays in paying their salaries and discrimination between them and members of the *Unité de Sécurité Présidentielle* (Presidential Security Unit).

On 26 October 2001, a presidential decree removed General François BOZIZÉ from his position as FACA Chief of Defence Staff, and on 3 November 2001 a warrant of arrest was issued against him on the ground that he was allegedly planning a coup at the same time as the failed coup attempt by General KOLINGBA.

A number of NCOs and other ranks took up the cause of General BOZIZÉ, opposed his forcible arrest, rebelled and withdrew with him to the northern region of the CAR, on the border with Chad.

On 25 October 2002, General BOZIZÉ's troops managed to enter Bangui, where they were involved in heavy fighting for several days against the *Unité de Sécurité Présidentielle* (USP), supported by Abdoulaye Miskine's militiamen and French private security operatives led by Paul Barril.

Faced with the threat of his government being overthrown, President Ange Félix PATASSÉ called on Jean Pierre BEMBA GOMBO to provide reinforcements to defend him. In response to President Ange Félix PATASSÉ's request, Jean Pierre BEMBA GOMBO sent mercenaries to support the counter-offensive against General BOZIZÉ's troops.

Jean Pierre BEMBA's men, whose numbers were estimated at 1,500 and who were identifiable by their footwear (basketball or plastic boots) and the language they spoke (Lingala), entered the fray on 28 October 2002.

Accounts by victims and witnesses to the events show that the mercenaries sent by Jean Pierre BEMBA, known as Banyamulenge, became notorious for acts of humiliation, torture and murder against both the civilian population and FACA troops.

More specifically, the Banyamulenge executed civilians on a massive and systematic scale. They also raped women, men, children and the elderly. These acts were perpetrated in public, with the aim of intimidating and terrorising civilians accused of colluding with General BOZIZÉ's rebel troops.

Acts of violence by Jean Pierre Bemba's mercenaries (murder, torture, rape, pillaging) occurred in the northern districts of Bangui (Miskine, Fouh, Boy-Rabe, PK 12), and in the towns of Begoua, Mongoumba, Bossangoa, Bozoum and Sibut, from October 2002 to 15 March 2003, the date on which General François BOZIZÉ took power.

Investigations by human rights organisations and reports published in this regard amply demonstrate the serious and substantial human rights violations perpetrated by the Banyamulenge on civilian populations in the CAR during the period in question.¹

It should be noted that, at the same time as Mr Jean Pierre BEMBA was responding to the request from CAR president Ange Félix PATASSÉ in October 2002, his own troops were involved in a battle in the Democratic Republic of the Congo to seize control of the town of Mambassa and the surrounding villages.

During this operation, dubbed "*Effacer le tableau*" ("Wipe the slate clean"), elements from Jean Pierre BEMBA's MLC also indulged in serious human rights violations: the rape of young girls and women between the ages of 12 and 25, pillaging, torture, murder and cannibalism.

As part of the peace process under the Pretoria Agreement, Mr Jean Pierre BEMBA was appointed Vice-President of the transitional government of the Democratic Republic of the Congo.

By an application [*réquisitoire*] of 22 August 2003, and a supplemental application [*réquisitoire supplétif*] of 5 September 2003, the Public Prosecutor [*Procureur de la République*] of the Bangui *Tribunal de grande instance* [Regional Court] asked the Senior Investigating Judge [*Doyen des juges d'instruction*] of that court for an investigation to be

¹ Cf. the FIDH investigation reports on the CAR:

- FIDH report No 355: "War Crimes in the Central African Republic", published on 24/02/03: http://www.fidh.org/IMG/pdf/FIDH_Report_WarCrimes_in_CAR_English_Feb2003.pdf.
- FIDH report No 382: "*Quelle justice pour les victimes de crimes de guerre*", published on 27/02/04: http://www.fidh.org/IMG/article_PDF/article_a697.pdf.
- FIDH report No 410, "The political transition closes against a backdrop of impunity – How will the International Criminal Court respond?", published on 04/03/05: http://www.fidh.org/IMG/article_PDF/article_a2275.pdf.
- FIDH report No 457: "Forgotten, stigmatised: double suffering of victims of international crimes", published on 12/10/06: http://www.fidh.org/IMG/article_PDF/article_a3721.pdf.

opened against Ange Félix Patassé, Jean Pierre Bemba, Paul Barril, Abdoulaye Miskine and other co-perpetrators or accomplices regarding :

- Violation of the internal and external security of the State;
- Collusion with foreign powers;
- Complicity in acts of premeditated murder, fatal wounding, arbitrary arrest, detention and false imprisonment, theft, rape, pillaging, destruction of property, malicious wounding, misappropriation of public funds and immovable property belonging to the State;
- Premeditated crimes accompanied by torture and abuse;
- Rape with torture.

In an Order dated 16 September 2004, the Investigating Judge ruled that Ange Félix Patassé, Abdoulaye Miskine, Paul Barril, Victor Ndoubabe, Michel Banguet-Tandet, Lazare Dokoula and Simon Pierre Kouloumba should be committed for trial before the *Cour criminelle*. He further ruled that the charges against Jean Pierre Bemba, Pierre Angoa, Gabriel Edouard Koyambonou, Ferdinand Bombayake and Martin Ziguéle should be dismissed.²

On 17 September 2003, the Public Prosecutor filed an appeal against the Order of the Senior Investigating Judge.

In a judgment dated 16 December 2004, the Indictments Chamber [*Chambre d'accusation*] partially set aside the Order of the Senior Investigating Judge and, ruling afresh, ordered that the proceedings be severed in the case of the blood crimes, murders, rapes, destruction of movable and immovable property, pillaging and other crimes related to the events of 2002 of which Ange Félix Patassé, Jean Pierre Bemba and his men, Paul Barril, Martin Koumtamadj, Lionel Gan-Befio and others stood accused. The Indictments Chamber held that these crimes were war crimes falling within the jurisdiction of the International Criminal Court in The Hague.³

On 20 December 2004, the Principal Public Prosecutor's Office [*Parquet général*] of the Bangui Appeals Court [*Cour d'appel*] filed an application [*pourvoi*] for the judgment of the Indictments Chamber to be set aside.

On 22 December 2004, the State of the Central African Republic seized the International Criminal Court of a request under article 14(1) of the Rome Statute referring to it the situation in respect of crimes within the Court's jurisdiction committed throughout the territory of the CAR since 1 July 2002.

On 7 January 2005, the Prosecutor of the International Criminal Court made public the referral by the State of the Central African Republic.

On 11 April 2006, the Court of Cassation of the Central African Republic dismissed the application by the Principal Public Prosecutor's Office to have the judgment of the Indictments Chamber of the Bangui Appeals Court set aside, and confirmed that only the International Criminal Court had the necessary jurisdiction to rule on the serious crimes committed in the Central African Republic since 1 February 2002.⁴

² Document No 1.

³ Document No 2.

⁴ Document No 3.

On 22 May 2007, the ICC Prosecutor announced the opening of an investigation into the situation in relation to the serious crimes committed in the Central African Republic between October 2002 and March 2003.

On 9 May 2008 the Prosecutor of the ICC filed an application with the present Chamber of the Court for a warrant of arrest to be issued against Mr Jean Pierre Bemba.

On 24 May 2008, Jean Pierre Bemba was arrested in Brussels and on 3 July 2008 he was transferred to the ICC Detention Centre in The Hague.

The hearing for his initial appearance before this Chamber took place in July 2008. The trial was due to commence on 27 April 2010. As Jean Pierre Bemba has submitted a motion challenging the admissibility of the case, the Chamber will hold a status conference on this matter.

III. DISCUSSION

The jurisdiction of the International Criminal Court to try war crimes and crimes against humanity perpetrated on the territory of the Central African Republic or by a national of that country

In submitting that the proceedings against him are inadmissible, Mr Jean Pierre Bemba contends that the complementarity test provided for in the Rome Statute allowing the jurisdiction of the ICC to be invoked is not met. In his view, the jurisdiction of the ICC complements national jurisdiction but does not replace it. He argues that the requirements of article 12(2)(a) and (b) of the Statute are not satisfied in the present case.

A correct reading of the provisions of article 12 of the Statute shows that the issue here is rather that of acceptance, and more specifically whether the State of the Central African Republic is a party to the Rome Statute, which is a pre-condition for the exercise of the ICC's jurisdiction.

Article 12(1) of the Rome Statute provides: “A State which becomes a party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”

The Central African Republic ratified the Statute of the International Criminal Court in October 2001, and in doing so it accepted the jurisdiction of the Court with respect to the crimes referred to in article 5 of the Statute.

The ICC Statute has been in force since 1 July 2002.

The ICC has the necessary jurisdiction to try war crimes and crimes against humanity committed on CAR territory or by a national of the country after 1 July 2002.

Article 12(2)(a) and (b) cited by Mr Jean Pierre Bemba provide:

“In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

- (a) *The State on the territory of which the conduct in question occurred, or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
- (b) *The State of which the person accused of the crime is a national.”*

Article 13, to which article 12(2) refers, for its part states:

“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;*
- (b) *A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or*
- (c) *The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”*

Article 14(1) of the ICC Statute provides: *“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”*

The State of the Central African Republic is a Party to the ICC Statute.

The conduct in question in the current proceedings took place on the territory of the State of the Central African Republic.

The case was referred to the ICC Prosecutor by the State of the Central African Republic. That referral complies with the provisions of article 14(1) of the ICC Statute.

The pre-conditions for the ICC to exercise its jurisdiction in accordance with a combined reading of articles 12, 13 and 14 of the Rome Statute are met.

The arguments submitted by Mr Jean Pierre Bemba regarding the requirements laid down by article 12 of the Statute are without merit, and accordingly it behoves the Court to dismiss them.

The complementarity principle: ability of the State of the Central African Republic to prosecute and try Jean Pierre Bemba

The Preamble to the ICC Statute lays down the principle of complementarity, providing on the one hand that *“it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”* and, on the other, that *“the International Criminal Court [...] shall be complementary to national criminal jurisdictions”*. It follows from this principle of complementarity that primary responsibility for prosecuting and trying international crimes lies with national courts, with the International Criminal Court only intervening in a subsidiary capacity.

In accordance with this principle, even if the ICC has the jurisdiction to take cognisance of a situation, it can find it to be inadmissible and thus relinquish jurisdiction if it becomes aware that investigations and prosecutions in the same matter have been initiated by national courts with the necessary jurisdiction in that regard. This is the argument advanced by Mr Jean Pierre Bemba in support of his claim that the proceedings initiated against him by the Prosecutor are inadmissible. In his view, the tests of inadmissibility set out in article 17(1)(b) are satisfied in the present case, because it has been the subject of effective and genuine investigations and proceedings in the Central African Republic. He further considers that the condition of inability, which is required in order to render the case admissible under article 17(3), has not been met.

Article 17 of the Rome Statute lays down the criteria governing the complementarity principle and sets out in the following terms the grounds on which a case may be held to be admissible by the Court notwithstanding the conduct of investigations and proceedings at national level:

“1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, **unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;***
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, **unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;***
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;*
- (d) The case is not of sufficient gravity to justify further action by the Court.*

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.*

*3. In order to determine inability in a particular case, the Court shall consider whether, **due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.**”*

This honourable Chamber must therefore examine the criteria for admissibility of the proceedings before it against Mr Jean Pierre Bemba by reference to the principle of complementarity in light of the ability of the State of the Central African Republic to prosecute and try him in an effective and genuine fashion.

The issue is thus to determine whether the State of the Central African Republic is able and willing genuinely to carry out the investigation and prosecution of Mr Jean Pierre Bemba.

As regards willingness to investigate and prosecute Mr Bemba, there can be no doubt that the State of the Central African Republic has demonstrated this. Thus, by his initial and supplemental applications of 22 August and 5 September 2003, the Public Prosecutor referred the case to the Senior Investigating Judge for the purposes of a judicial investigation involving, inter alia, Mr Jean Pierre Bemba.

It should be noted, however, that even if the State of the Central African Republic had been able to carry out these proceedings, which was not the case as will be seen hereafter, it did not have the ability to try Mr Jean Pierre Bemba for the crimes set out in article 5 of the Statute. At the time when the CAR authorities instituted proceedings against him, there was no offence in the CAR criminal code corresponding to those covered by article 5 of the Rome Statute. It is true that, since 6 January 2010, the new CAR criminal code has provided for these offences; however, by virtue of the principle of non-retroactivity laid down in article 2 of the code, those offences cannot be applied to the conduct for which Mr Jean Pierre Bemba is being prosecuted.

As regards the ability of the courts in the Central African Republic to investigate and prosecute Mr Jean Pierre Bemba, both the Order issued by the Senior Investigating Judge of the Bangui *Tribunal de grande instance* and the judgments rendered by the Indictments Chamber of the Bangui Appeals Court and the Court of Cassation were more than eloquent in this regard.

Before arriving at the conclusion “[TRANSLATION] *that it is apparent from the preliminary investigation that there is insufficient incriminating evidence against Jean Pierre Bemba, Angoa Pierre, Koyambonou Gabriel Jean-Edouard, Bombayeke Ferdinand, Ziguele Martin, Befio-Gan Lionel*” and “*that they should all be dismissed from the proceedings and that those detained under a custody warrant must be released, provided they are not detained on other grounds*”, the Investigating Judge states the following:

“[TRANSLATION] *Regarding the criminal responsibility of Ange Félix Patassé and Jean Pierre Bemba*

Considering that Ange Félix Patassé stands accused of the crimes of treason, collusion with foreign powers, complicity in premeditated murder, fatal wounding, rape, pillaging, destruction of movable and immovable property, arbitrary detention and false imprisonment, malicious wounding, concealment of bodies, misappropriation of public funds and forgery.

*Considering that, since, of the two above-named individuals, the first is still at large and the second is Vice-President in the Democratic Republic of the Congo, **these persons could not be questioned, nor could they file any defence brief in the record of the proceedings;***

Considering that it has been established that Mr Jean Pierre Bemba, who at the time of the events in question was the leader of the rebel group known as the MLC and resident in Gbadolite, and who is charged in these proceedings with complicity in the crimes of premeditated murder, rape, theft and others committed by his fighters in the Central African Republic, has been appointed Vice-President of the Democratic Republic of the Congo; and

that, accordingly, he enjoys diplomatic immunity; that, consequently, he cannot be prosecuted on these charges.”⁵

The Indictments Chamber of the Bangui Appeals Court, in its judgment of 16 December 2004, ruled that the blood crimes, murders, rapes, destruction of movable and immovable property, pillaging and other crimes associated with the events of 2002 were within the jurisdiction of the ICC.

The Court of Cassation, in its judgment of 11 April 2006, is more eloquent on the inability of the CAR legal system to conduct the proceedings in question. In its view, “[TRANSLATION] *seeking out perpetrators of crimes and making them stand trial in the criminal courts to account for their actions is a duty which no State can shirk; it is established that this calls for genuine proceedings. Considering that, in the proceedings against Ange-Félix Patassé et al, the Senior Investigating Judge did indeed charge the persons concerned on account of the acts of which they stand accused and issued warrants of arrest against them, but that these remain the only actions taken, inasmuch as these persons have not been questioned or seriously sought out.*”

The Court goes on to note that “[TRANSLATION] *the inability of the CAR justice system genuinely to investigate or prosecute the persons in question is clear [...] The fact that the Senior Judge nonetheless referred individuals to the CAR Cour criminelle all of whom are outside national territory is a reflection of this powerlessness and a de facto embodiment of those persons’ impunity.*”

The Court accordingly concludes that “[TRANSLATION] *recourse to international cooperation remains in this case the sole means of averting impunity. Considering that the CAR has ratified the Treaty of Rome establishing the International Criminal Court, which offers the possibility of seeking out and punishing the perpetrators of the most serious crimes of concern to the international community as a whole in place of States which are unable genuinely to investigate or prosecute. That the Senior Investigating Judge erred in not seeing fit to avail himself of this option.*”

Mr Bemba maintains that his temporary immunity and his geographical remoteness had never represented an obstacle to the willingness of the CAR authorities to prosecute him, that the fact that an international arrest warrant was issued by them against Ange Félix Patassé, even though he was residing outside of Bangui, was evidence of this, and also showed that the CAR courts were operating effectively.

Let us be realistic here. It is one thing to have the will to conduct investigations; it is quite another to have the capacity to carry them out.

The CAR judicial authorities did indeed issue warrants of arrest for Jean Pierre Bemba Gombo and Ange Félix Patassé. However, the facts show quite clearly that they were unable to carry out the proceedings thus instituted. Mr Ange Félix Patassé, who was living in Lomé, was never troubled and yet Togo, where he was in exile, has ratified the Rome Statute. Similarly, it proved impossible to arrest Jean Pierre Bemba, who was living in the DRC, where he was Vice-President, notwithstanding the warrant of arrest issued against him by the Senior Investigating Judge. In both these cases the CAR justice system, and indeed the State

⁵ Document No 1.

of the Central African Republic, had no means of forcing the authorities in Togo and the DRC to extradite Ange Félix Patassé and Jean Pierre Bemba Gombo.

In its report No. 382 published in February 2004, the FIDH points out that: “[TRANSLATION] *the lack of means, the risk of obstacles to the independence and impartiality of judges, as well as the conditions of insecurity and the failure to prosecute war crimes, indicate that the CAR judicial system is not in a position to conduct the necessary investigations and prosecutions involving the alleged perpetrators of war crimes*”.⁶

There is no doubt that, from both a technical and a financial point of view, the Government of the Central African Republic was unable to carry out the investigations and proceedings instituted by it against Jean Pierre Bemba *et al*, and that it is still today not in a position to do so.

From a technical point of view, as pointed out by FIDH in its report No. 502 of July 2008, numerous obstacles prevented investigations and prosecutions from being conducted: most of the accused were not on CAR territory; investigations were virtually confined to crimes committed in Bangui and the surrounding area; no forensic resources were used; there were no investigations on the ground, no reconstructions were carried out, next to no material evidence was gathered, and so on.⁷

From a financial point of view, the Government of the Central African Republic is not in a position to bear the costs involved in trying Jean Pierre Bemba. The total amount allocated to the Ministry of Justice in the national budget for 2010 amply demonstrates this.

Mr Bemba further contends that when the ICC Prosecutor officially opened his investigation in the CAR he no longer had immunity, which meant that the CAR authorities could have resumed their investigations and proceedings against him prior to the Prosecutor opening his investigation. He concludes that the real reason that the CAR courts relinquished jurisdiction was a desire not to damage at that point the sensitive diplomatic relations between the CAR and the DRC.

Another dose of realism is needed here. The Central African Republic did not refer the case to the ICC simply for the fun of it. It has already been clearly shown that, both at the time of the referral and at the present time, the CAR judicial system was and still is in no position to investigate and prosecute the accused. This has been stated in decisions rendered by the highest courts in the land, namely the Indictments Chamber of the Bangui Appeals Court and the CAR Court of Cassation. It is in light of these decisions, whereby the CAR courts declared themselves unable to investigate and prosecute Mr Bemba, that the Government of the Central African Republic referred the situation to the ICC.

Furthermore, when Mr Jean Pierre Bemba alleges that the CAR courts relinquished jurisdiction not because of their inability to conduct the investigations and proceedings but because they did not wish to damage diplomatic relations between the CAR and the DRC, what he is saying is that the CAR authorities did not have the will to investigate and

⁶ FIDH report No. 382: “*Quelle justice pour les victimes de crimes de guerre*”, published on 27/02/04: http://www.fidh.org/IMG/article_PDF/article_a697.pdf.

⁷ Report No. 502 dated July 2008 by the FIDH’s Legal Action Group (LAG): “FIDH and the situation in the Central African Republic before the International Criminal Court. The case of Jean-Pierre Bemba Gombo”: <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>.

prosecute him. However, the provisions of article 17 of the Statute make it quite clear that the fact that a “*State is unwilling*”, or has shown “*unwillingness*”, genuinely to conduct proceedings establishes the admissibility of such proceedings before the ICC.

The “*ne bis in idem*” principle

This Latin maxim, which means “not the same thing twice”, expresses the principle whereby an accused who has been tried (whether acquitted or convicted) by a decision not susceptible of appeal cannot be prosecuted again on account of the same act.

According to Mr Bemba, in light of the provisions of article 17(1)(c) of the Rome Statute, the present case is not admissible because real and genuine proceedings were conducted, and terminated by a final decision. And if the view were to be taken that he was still respondent in proceedings before the Bangui Appeals Court, neither that court nor any superior court [*cour d’assise*] has refused jurisdiction.

It should be noted that on 13 April of this year, having received the observations of the Office of the Prosecutor, as well as those of one of the Legal Representatives of the Victims and of the Office of Public Counsel for Victims, regarding his challenge to admissibility, Mr Bemba filed an application with this honourable Chamber informing it of new developments in judicial proceedings in the Central African Republic.

He submits that the decisions of the Indictments Chamber of the Bangui Appeals Court, as well as that of the CAR Court of Cassation, were rendered against him by default and were never notified; that he has filed an application under the CAR Code of Criminal Procedure for review and annulment [*opposition*] of the decision of the Indictments Chamber, as well as an application for revocation [*rétractation*] of the decision of the Court of Cassation.

According to Mr Bemba, these various applications seek to have the Court of Cassation revoke its judgment and to find that his current situation entitles the CAR courts to retain their jurisdiction to try this case and to resume the proceedings against him on an adversarial basis.

He concludes that these applications constitute new evidence in support of his challenge to the admissibility of the case in relation to both the “*ne bis in idem*” and the complementarity principles.

It should be noted here that this latest submission clearly demonstrates the emptiness of the artificial arguments relied on by the accused in support of his challenge to admissibility.

To argue the “*ne bis in idem*” principle, Mr Bemba maintained that real and genuine proceedings had been conducted, and had been terminated by a final decision in his regard. He now submits that he has filed applications for review and revocation of the decisions rendered in the course of those proceedings.

Mr Bemba needs to show some rigour, and to make up his mind what he wants.

Article 17(1)(c) provides: “*Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:*

[...] (c) *The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.*”

Article 20 of the Statute sets out the “*ne bis in idem*” rule, and lays down the criteria for its application, in the following terms:

“1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

A combined reading of these provisions demonstrates that the “*ne bis in idem*” rule only applies in the case of an act having resulted in a decision to convict or acquit which has acquired the force of *res judicata*, in other words which is final and not susceptible of appeal.

In the present case, the dismissal Order by the Senior Investigating Judge was appealed and reversed by the Indictments Chamber of the Bangui Appeals Court. The Court of Cassation also endorsed the reversal of the dismissal Order. It should be recalled in particular that the Court stated quite categorically that the CAR courts were unable to investigate and prosecute Mr Bemba.

Notwithstanding that this honourable Chamber does not have jurisdiction to rule on the merits of the applications for review and revocation filed by the accused before the CAR courts, it should be noted that those applications simply amount to a delaying tactic and an abuse of process. Furthermore, the sound reasons for which the CAR courts relinquished jurisdiction and called for international cooperation to conduct the investigations and proceedings in the present case have not changed and remain valid, and hence, without entering into a debate on the admissibility and merits of those applications, it should be noted that they cannot succeed.

The gravity test

The accused claims that his responsibility as a military leader is not, in present circumstances, serious enough to warrant his prosecution by the ICC.

The serious violations of human rights and international humanitarian law, namely acts of violence against the civilian population, torture and ill-treatment, rape and other acts of sexual violence committed by the “Banyamulenge” from October 2002 to March 2003, were common knowledge.

The “Banyamulenge” were under the control of Jean Pierre Bemba, who, as their superior, exercised effective authority over them.

Mr Bemba was present on CAR territory on several occasions, including at the locations where the acts of violence were committed. As a result, he was aware of the crimes committed by his subordinates. He himself declared on *Radio France Interne* (RFI) that he was aware of the existence of such crimes. However, he neither prevented them nor effectively punished them. The result was that he encouraged and even facilitated the commission of these crimes against the civilian population of the CAR.

The degree of gravity of his responsibility is thus not in any doubt.

The abuse of process

Finally, Mr Bemba contends that the current proceedings against him represent an abuse of process, in that some of the evidence was not disclosed to him, that the proceedings have a political purpose and that the means whereby he was surrendered to the Court were illegal.

With regard to the failure to disclose evidence, this involves reports of meetings and discussions with the CAR authorities. However, pursuant to article 81(1) of the Rules of Procedure and Evidence: “*Reports or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure.*”

With regard to the political motives which allegedly underpin the current proceedings, the only point worthy of note is that at the present time Mr Bemba plays no part in the political scene in his country, the DRC. Furthermore, neither the CAR authorities nor this Court have any political interest in relation to Mr Bemba.

Finally, the accused was surrendered to the Court following proper proceedings before the Belgian legal authorities.

In light of these observations and of any other grounds to be inferred, substituted or additionally provided of the Court’s own motion, including at the public hearing,

The State of the Central African Republic respectfully requests this Honourable Chamber to admit its submissions;

And, upholding them,

To find and declare that in the present case:

- the complementarity principle has been respected;
- the “*ne bis idem*” principle has not been infringed;
- the degree of gravity of Mr Jean Pierre Bemba’s responsibility has been established.

And accordingly,

To dismiss as unfounded the motion challenging the admissibility of the case submitted by Mr Jean Pierre Bemba Gombo;

To find and declare that the International Criminal Court has the necessary jurisdiction to investigate and prosecute Mr Bemba Gombo.

SUBJECT TO ALL RESERVATIONS AND WITHOUT PREJUDICE.
IN WITNESS WHEREOF.

Done at Bangui, 16 April 2010

For the Central African Republic

[signed]
[official stamp]

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