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TRIAL CHAMBER III

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

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

Public Document

**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**

Source: The Office of the Prosecutor

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

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I. Introduction

1. On 25 February 2010, the Defence submitted its motion (“Defence Motion”) challenging the admissibility of the case pursuant to Articles 17 and 19(2)(a) of the Rome Statute (“Statute”). The Office of the Prosecutor (“Prosecution”) hereby files its response and submits that the case is admissible under the relevant provisions of the Statute.

2. First, the Prosecution agrees with the Defence that, because trial has not commenced, the Defence is not time-barred from raising an admissibility challenge. The Prosecution also agrees that the Defence bears the burden of proof, and suggests that the appropriate standard of proof - given the seriousness of the matter presented - should be “clear and convincing evidence”. However, whether the facts alleged are assessed under that standard or a lesser “balance of probabilities/preponderance of the evidence” standard urged by the Defence, the facts do not support the admissibility challenges.

3. On the admissibility challenges, it is beyond dispute that the Central African Republic (“CAR”) authorities are not pursuing a case against Mr Jean-Pierre Bemba (“the Accused”). Instead, the situation is one of national “inactivity,” which supports this Court’s exercise of jurisdiction. Though there was an early initiation of an investigation, there was no final resolution, or even a termination of the investigation, based on the merits. Instead, the authorities abandoned an attempt to prosecute the Accused on other grounds, including that he enjoyed immunity by virtue of his status as Vice-President of the Democratic Republic of the Congo (“DRC”) and the perceived inability of the system to gather evidence or secure the Accused’s arrest and conviction.

4. The Accused's challenge to admissibility on the ground that the crimes do not meet the requisite gravity is also meritless. The scale, nature, manner and impact are all relevant factors, and when applied here to the war crimes and crimes against humanity confirmed against the Accused they justify the intervention of the Court. In addition, the Statute does not assign lesser gravity to responsibility predicated upon command authority; and the Court has already dismissed such arguments in the context of the Accused's application for interim release.

5. The Accused incorporates other challenges in the admissibility filing that are inappropriately raised as part of a jurisdictional challenge. His claim of abuse of process is not an admissibility claim, and the remedy he seeks - a stay of the proceedings - is not an admissibility remedy. The claim is also factually and legally incorrect. The Defence fails to demonstrate any breach on the rights of the Accused that would deem the proceedings unfair or would impair its defence thus justifying a stay of proceedings. The Prosecution has not withheld any information from the Accused pertinent to the admissibility issue. The alleged activities of the CAR and DRC authorities and the motivation of CAR for referring the situation, if true, are not relevant as the Prosecution conducts its own independent and impartial investigation and ultimately decides whether to bring charges and what charges to bring. Nor did the Prosecution violate the Accused's rights in seeking his provisional arrest, and he cannot identify any prejudice to his case sufficient to require a permanent stay of the proceedings.

II. Procedural background

6. On 18 December 2004, the Government of the CAR referred the situation in the CAR to the Prosecution.¹ In June 2005, the Prosecution received detailed information from the CAR judicial authorities of the crimes allegedly committed and

¹ ICC-01/05-16-US-Exp-Anx1A, transferred to the Case under the reference ICC-01/05-01/08-29-Conf-Anx1A.

relevant information related to national proceedings.² On 22 May 2007, the Prosecutor announced the decision to open an investigation into the situation in the CAR.³

7. On 9 May 2008, the Prosecution filed its Application with Annexes (“Arrest Warrant Application”)⁴ under Article 58 of the Statute requesting, *inter alia*, a warrant of arrest for the Accused. On 23 May 2008 Pre-Trial Chamber (“PTC III”) issued an arrest warrant and on 24 May 2008,⁵ the Accused was arrested in the Kingdom of Belgium.

8. On 10 June 2008, PTC III issued a new warrant of arrest to replace the 23 May 2008 warrant.⁶ In the accompanying decision, PTC III also made an initial *sua sponte* assessment of admissibility. It concluded that:

“The Chamber considers that the circumstances in the instant case justify it in ruling on the admissibility of the case, and finds that there is no reason to conclude that Mr Jean-Pierre Bemba’s case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for the crimes referred to in the Prosecutor’s Application. On the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor’s Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC. Accordingly, on the basis of the evidence and

² ICC-01/05-16-US-Exp-Anx1B, transferred to the Case under the reference ICC-01/05-01/08-29-Conf-Anx1B.

³ <http://www.icc-cpi.int>, [Press and Media](#), [Press Releases \(2007\)](#) ICC-OTP-20070522-220, “Prosecutor opens investigation in the Central African Republic”.

⁴ ICC-01/05-01/08-26-US-Exp, Transferred from the situation (ICC-01/05-13-US-Exp) to the case pursuant to decision ICC-01/05-01/08-20 - Prosecutor's Application for Warrant of Arrest under Article 58.

⁵ ICC-01/05-01/08-1.

⁶ ICC-01/05-01/08-15.

information provided by the Prosecutor, the Chamber finds the case concerning Mr Jean-Pierre Bemba admissible [...].”⁷

9. On 3 July 2008, the Accused was surrendered to the seat of the Court and he made his first appearance on 4 July 2008.⁸

10. On 15 June 2009, PTC II confirmed most of the charges.⁹ In its Confirmation Decision, PTC II also assessed admissibility, reiterating the conclusion in the 10 June 2008 Decision:

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

11. The case was sent to the Trial Chamber (“TC”) on 18 September 2009. At the first status conference on 7 October 2009, Trial Chamber III (“Chamber”) raised the issue whether it could entertain a defence challenge to admissibility in light of TC II’s decision in *Katanga* that admissibility challenges had to be raised before the PTC. The Prosecution indicated its disagreement with the *Katanga* reasoning and did not object to the Chamber’s consideration of the issue of admissibility.¹¹

⁷ ICC-01/05-01/08-14-tENG, paras. 21, 22.

⁸ ICC-01/05-01/08-T-3-ENG ET.

⁹ ICC-01/05-01/08-424, (“Confirmation Decision”). Note that the case had been assigned to PTC III. On 19 March 2009, PTC III was merged with PTC II and the situation in the CAR was reassigned to PTC II.

¹⁰ ICC-01/05-01/08-424, paras. 25-26.

¹¹ ICC-01/05-01/08-T-14-ENG ET, p. 33, lines 3-9 and lines 10-11.

12. On 25 February 2010, the Defence submitted its Motion challenging the admissibility of the case pursuant to Articles 17 and 19(2)(a) of the Statute.¹² The Chamber decided that the CAR and DRC authorities be notified of a summary of the Defence Motion and informed that they may submit any observations they may have by 19 April 2010.¹³

III. Statement of facts

A. The CAR judicial proceedings

13. In June 2003, the *Procureur de la République de Bangui* commenced investigations into incidents occurring in the CAR between 26 October 2002 and 15 March 2003, the events that form the basis of the charges pending in this Court. He ended his investigations in May 2004.¹⁴

14. On 16 September 2004, the *doyen des juges d'instruction* (investigating judge) issued his *ordonnance*¹⁵ and filed charges, including against Patasse and Miskine, and ordered their referral to the *Cour Criminelle*.¹⁶ While acknowledging allegations of the Accused's presence before and after his group committed crimes, the investigating judge decided not to also pursue charges against the Accused because he was at the

¹² ICC-01/05-01/08-704.

¹³ ICC-01/05-01/08-T-14-ENG ET, p.2, line 7-13.

¹⁴ FIDH, Février 2005, Rapport n° 410 « Mission Internationale d'Enquête République Centrafricaine, Fin de la transition politique sur fond d'impunité, Quelle réponse apportera la Cour pénale Internationale ? », CAR-OTP-0004-0732, EVD-P-02097.

¹⁵ Ordonnance de non lieu partiel et de renvoi devant la cour criminelle, 16 September 2004, CAR-OTP-0019-0137, EVD-P-01319.

¹⁶ FIDH, February 2005, Rapport n° 410 « Mission Internationale d'Enquête République centrafricaine, Fin de la transition politique sur fond d'impunité, Quelle réponse apportera la Cour pénale internationale ? », CAR-OTP-0004-0732, EVD-P-02097, Togo, where Patasse is in exile, ignored the international arrest warrant. The Investigating Judge also sent requests for international cooperation pertaining to economic crimes, but they were refused for unrelated reasons. Togo, where Patasse is in exile, ignored the international arrest warrant. The Investigating Judge also sent requests for international cooperation pertaining to economic crimes, but they were refused for unrelated reasons.

time of the investigation one of the four vice-presidents of DRC and, accordingly, enjoyed immunity.¹⁷

15. On 17 September 2004, the *Procureur de la République* brought an appeal on some aspects of the Investigating Judge's decision to the *Chambre d'Accusation de la Cour d'Appel* de Bangui.¹⁸ The appeal did not cover the part of the Investigating Judge's ruling whereby no charges against Bemba would be filed.

16. On 24 November 2004 the *Procureur Général près la Cour d'Appel de Bangui* (national prosecutor) requested the *Cour d'Appel* to refer the "blood crimes" - offences affecting persons - to the ICC, urging that "most of those crimes fall under the ICC jurisdiction". The "economic crimes" would be referred to the *Cour Criminelle*.¹⁹

17. On 6 December 2004, *de facto* President Bozize appointed a CAR representative (Goungaye Wanfiyo) to the ICC and instructed him to refer the situation to the Court, as provided for in Article 14 of the Statute.²⁰ On 22 December 2004 Wanfiyo delivered a referral to the ICC (dated 18 December).²¹

18. On 11 December 2004, Wanfiyo sent a letter to the President of the *Cour Criminelle* in Bangui "suggesting" the separation of the case. In his letter, he pointed out that "should the ICC initiate an investigation, it would be carried out by the means that the CAR lacks".²²

¹⁷ Ordonnance de non lieu partiel et de renvoi devant la cour criminelle, 16 September 2004, CAR-OTP-0019-0137, EVD-P-01319, p. 11.

¹⁸ Statement of CAR-OTP-WWWW-0006, CAR-OTP-0005-0099, EVD-P-00098 at 0116

¹⁹ Réquisitoire du Procureur Général près la Cour d'Appel de Bangui, 24 November 2004, CAR-OTP-0019-0167, EVD-P-04117.

²⁰ ICC-01/05-01/08-29-Conf-Anx1A at page 3.

²¹ Ibid at pages 1 and 2.

²² CAR-OTP-0019-0169.

19. On 16 December 2004, the *Chambre d'Accusation* of the *Cour d'Appel* ordered the separation of the proceedings regarding the blood crimes, stating that those should be dealt with before the ICC. In its decision, the Chamber d'Accusation of the *Cour d'Appel* re-included charges against the Accused.²³ It referred the remaining proceedings for economic crimes to the *Cour Criminelle*.

20. On 20 December 2004, the *Procureur Général* appealed to the *Cour de Cassation* the 16 December decision of the *Chambre d'Accusation* that decided the separation of the proceedings and the referral to the ICC.²⁴

21. On 22 December 2004, the *Cour Criminelle* – in accordance with the referral of the *Chambre d'Accusation* – opened the proceeding against Patasse *et al.* for economic crimes. The judges of the *Cour Criminelle* immediately adjourned the proceedings because the referral of the *Chambre* was under appeal. The proceeding against Patasse *et al.* was suspended until the *Cour de Cassation* ruled on the appeal of the *Procureur Général*.

22. On 11 April 2006, the *Cour de Cassation* issued its decision. On the separation of the proceedings and the referral to the ICC, the *Cour de Cassation* concluded that the Central African judiciary lacked the capacity to conduct an investigation or prosecution and that international judicial cooperation, including specifically referring the case to the ICC, was the only way to fight against impunity.²⁵

23. On 22 May 2007 the Prosecutor announced his decision to open an investigation. In the letter of notification to all States Parties under Article 18 of the

²³ Arrêt d'information partielle de non lieu, de disjonction et de renvoi devant la Cour criminelle, de la Chambre d'Accusation, N021, 16 December 2004, CAR-OTP-0004-0148., EVD-P-02749.

²⁴ Pourvoi du Ministère Public contre l'Arrêt de la Chambre d'Accusation rendu le 16 Décembre 2004, CAR-OTP-0019-0199, EVD-P-04127.

²⁵ Arrêt du 11 avril 2006 de la Chambre criminelle de la Cour de Cassation, CAR-OTP-0019-0258, EVD-P-01327, at 0260-0261.

Statute, the Prosecutor stated his intent to investigate crimes allegedly committed in the territory of the CAR, noting in particular the large scale occurrence of acts of rape, killing, looting, destruction and other crimes against civilian populations. The letter stated that in light of an analysis of the available information, including information regarding national proceedings, the Prosecutor had determined that the admissibility criteria under Article 53(1)(b) of the Statute were satisfied and that there were no reasons not to proceed under Article 53(1)(c) of the Statute. In accordance with Article 18(2) of the Statute, the Prosecutor invited States Parties to inform the Court whether they were investigating, or had investigated, their nationals or others within their jurisdiction with respect to criminal acts committed in the territory of the CAR. No State responded.²⁶

24. Since the commencement of its investigations, the Prosecution has maintained communication with the authorities of the CAR, by submitting requests for assistance and cooperation in connection with its investigations. The CAR Authorities never indicated to the Prosecution that they seek to challenge the admissibility of the case on any of the grounds canvassed by the Defence, or for any other reason.

B. The Prosecution's disclosure to the Defence of admissibility materials

25. The allegations of lack of disclosure brought by the Defence are immaterial in the context of the challenge to the admissibility of this case.²⁷ The Prosecution will nonetheless describe the manner in which disclosure of admissibility materials was effected before the Pre-Trial and Trial Chambers. The Prosecution also attaches, as

²⁶ ICC-01/05-01/08-556-Conf-AnxA.

²⁷ See paras. 26-35 below.

Annex B to this submission, a list of material relevant to admissibility, disclosed to the Defence during this period.

1. Disclosure while the case was before the PTC

26. On 31 July 2008, PTC III issued its “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure Between the Parties”.²⁸ Pursuant to this decision, the Prosecution disclosed to the Defence the vast majority of its evidence, including information relevant to admissibility.²⁹

27. On 1 December 2008, the Prosecution further disclosed to the Defence more documents relevant to the admissibility of the case.³⁰ These included documents which were provided by the CAR Government, such as the referral, “*Demande de renvoi devant la Cour Pénale Internationale en application des articles 13 et 14 du Statut de Rome*”,³¹ and the supporting report, “*Saisine de la Cour pénale internationale par l’Etat Centrafricain d’un renvoi en application des articles 13 et 14 du Statut de Rome*”.³²

²⁸ ICC-01/05-01/08-55.

²⁹ Pre Confirmation PEXO package 1, 01 October 2008, ICC-01/05-01/08-0133; Pre Confirmation INCRIM package 1, 01 October 2008, ICC-01/05-01/08-0132; Pre Confirmation INCRIM package 2, 03 October 2008, ICC-01/05-01/08-0139; Pre Confirmation Rule 77 package 1, 2, 3 and 4, 03 October 2008, ICC-01/05-01/08-0138; Pre Confirmation Rule 77 package 5, 16 October 2008, ICC-01/05-01/08-0160; Pre confirmation PEXO package 2, 16 October 2008, ICC-01/05-01/08-0161; Pre Confirmation Rule 77 package 5, ICC-01/05-01/08-0160; Pre Confirmation INCRIM package 3, 17 October 2008, ICC-01/05-01/08-0171; Pre confirmation INCRIM, package 4, 22 October 2008, ICC-01/05-01/08-0181; Pre Confirmation INCRIM, package 5, 23 October 2008, ICC-01/05-01/08-0186; Pre Confirmation PEXO, package 3, 30 October 2008, ICC-01/05-01/08-0197; Pre Confirmation Rule 77 package 6, 30 October 2008, ICC-01/05-01/08-0198; Pre Confirmation Rule 77 package 7, 4 November 2008, ICC-01/05-01/08-0210; Pre Confirmation INCRIM package 6, 05 November 2008, ICC-01/05-01/08-0213; Pre Confirmation INCRIM package 7, 7 November 2008, ICC-01/05-01/08-0229; Pre Confirmation PEXO package 4, 12 November 2008, ICC-01/05-01/08-0243; Pre Confirmation Rule 77 package 8, 12 November 2008, ICC-01/05-01/08-0244; Pre Confirmation INCRIM package 8, 20 November 2008, ICC-01/05-01/08-0266; Pre Confirmation INCRIM package.

³⁰ “Decision on re-classification and unsealing of certain documents”, ICC-01/05-01/08-301.

³¹ This document was attached as Annex 19 to the Defence filing ICC-01/05-01/08-721, which contained a list of documents referred to in the Defence Application (ICC-01/05-01/08-704-CONF-EXP) as requested by the Chamber.

³² See ICC-01/05-01/08-301, “Decision on re-classification and unsealing of certain documents”: ICC-01/05-01/08-29-Conf-Anx1A and ICC-01/05-01/08-29-Conf-Anx1B.

28. On 18 September 2009, the Presidency constituted the Chamber and referred to it the case against the Accused.³³

2. Disclosure after the case was assigned to the Chamber

29. On 22 September 2009, the Defence requested the disclosure of documents relevant to admissibility that had not been previously disclosed by the Prosecution.³⁴

30. On 29 September 2009, the Prosecution informed the Defence that it had disclosed all documents relevant to admissibility and asked the Defence to be more specific as to what documents it was actually requesting.³⁵

31. On 5 October 2009, the Defence filed its “*Requête Aux Fins De Divulgation*”,³⁶ providing further specificity to its previous general request for disclosure of documents bearing on admissibility. In particular the Defence requested the complete dossier related to proceedings before the national criminal courts, the Prosecutor’s notification to the DRC in accordance with Article 18 of the Statute, and any response received.³⁷

32. On 12 October 2009, the Prosecution disclosed documents to the Defence under Rule 77 of the Rules of procedure and evidence (“Rules”).³⁸ Amongst the disclosures were documents contained in the dossier related to proceedings before the CAR national criminal courts.³⁹ The Prosecution also disclosed the letter sent to

³³ ICC-01/05-01/08-534.

³⁴ Letter of Mr. Kilolo to the Prosecution, entitled “Demande de divulgation des éléments du dossier répressif”, dated 22 September 2009, attached hereto as Annex C to this submission.

³⁵ Prosecution’s letter to Mr. Kilolo, dated 29 September 2009, attached as Annex D to this submission.

³⁶ ICC-01/05-01/08-542

³⁷ ICC-01/05-01/08-542, paragraph 12.

³⁸ ICC-01/05-01/08-554 -Conf-AnxA.

³⁹ CAR-OTP-0004-0022, EVD-P-02873; CAR-OTP-0004-0052, EVD-P-03108; CAR-OTP-0004-0054, EVD-P-02598; CAR-OTP-0004-0062, EVD-P-02842; CAR-OTP-0004-0063, EVD-P-03070; CAR-OTP-0004-00148, EVD-P-02749; CAR-OTP-0004-0177, EVD-P-02979; CAR-OTP-0004-0216, EVD-P-03024; CAR-OTP-0019-0045, EVD-P-02780; CAR-OTP-0019-0048, EVD-P-02903; CAR-OTP-0019-0050, EVD-P-02503; CAR-OTP-

the DRC authorities and other States Parties informing them of the Prosecutor's decision to commence an investigation into the situation in the CAR, and informed the Defence that the DRC did not respond.

33. On 8 December 2009, the Prosecution provided the Chamber with other documents from the CAR dossier that it did not consider relevant to admissibility.⁴⁰ After considering these documents, the Chamber, on 14 December 2010, ordered that the Prosecution disclose those documents together with other decisions from the CAR national dossier that were not previously disclosed.⁴¹ On 18 December 2010, the Prosecution disclosed those materials⁴² and all other documents received from the CAR national authorities, regardless whether they were factually relevant to the admissibility of the case.⁴³

IV. Prosecution's submissions

A. The TC has the statutory authority to consider the admissibility challenge

34. Article 19(4) of the Statute provides, in pertinent part, that "[c]hallenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c)." TC II concluded

0019-0055, EVD-P-02638; CAR-OTP-0019-0062, EVD-P-03143; CAR-OTP-0019-0064, EVD-P-02551; CAR-OTP-0019-0066, EVD-P-02691; CAR-OTP-0019-0069, EVD-P-02991; CAR-OTP-0019-0072, EVD-P-02593; CAR-OTP-0019-0075, EVD-P-02911; CAR-OTP-0019-0077, EVD-P-03056; CAR-OTP-0019-0085, EVD-P-02459; CAR-OTP-0019-0205, EVD-P-02960; CAR-OTP-0019-0228, EVD-P-03099; CAR-OTP-0019-0230, EVD-P-02683; CAR-OTP-0019-0240, EVD-P-02839; CAR-OTP-0019-0245, EVD-P-03152; CAR-OTP-0019-0248, EVD-P-02744; CAR-OTP-0019-0255, EVD-P-02881; CAR-OTP-0030-0104, EVD-P-02476.

⁴⁰ ICC-01/05-01/08-T-19-CONF-EXP-ENG, page 2, lines 14 to 18.

⁴¹ ICC-01/05-01/08-655, para. 20.

⁴² ICC-01/05-01/08-659.

⁴³ ICC-01/05-01/08-659.

that, for purposes of Article 19(4) of the Statute, transfer of the case from the PTC to the TC constitutes the commencement of the trial.⁴⁴

35. The Defence argues that the analysis by TC II is not binding and asks this Chamber not to follow it. Alternatively, it argues that, even if the admissibility challenge should have been brought before the case was transferred to the Chamber, the Defence has good cause for bringing the challenge out of time because the Prosecution caused delay by failing to make timely disclosures of documents relevant to admissibility.

36. As the Appeals Chamber made clear, it agreed with the Prosecution's submission that TC II's construction of Article 19(4) of the Statute is *obiter dicta*.⁴⁵ As such, it is not binding on other TCs.

37. The Prosecution agrees with the Defence that this Chamber need not follow TC II. That Chamber determined that there is no single event that constitutes the "commencement of trial", that the term has different meanings in different sections of the Statute, and that for purposes of admissibility challenges the commencement of trial occurs when the TC takes the case.⁴⁶ For clarity and uniformity, the Prosecution would urge a single definition of the phrase, which would eliminate confusion as to which event might constitute the commencement of trial. As to what that triggering event may be, the Prosecution submits that TC I's approach in

⁴⁴ Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), 16 June 2009, ICC-01/04-01/07-1213-tENG, para. 49.

⁴⁵ 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, para. 38.

⁴⁶ "...it is impossible to generally and definitively choose either of the two conceptions that may define the expression "commencement of trial" and apply it uniformly to all the provisions of the Statute...The co-existence of several meanings for the expression "commencement of trial" which may be recognised in this case is thus simply the consequence of a labourious harmonisation process of all the work carried out, in several languages moreover, at these diplomatic conferences. As a result, the Chamber considers that the meaning of the expression "commencement of the trial" must be determined in light of the provision to be applied, based on a logical interpretation which gives full effect to the said provision and adheres to the intent

Lubanga is consistent with the Statute as a whole: "...the true opening the trial [is] when opening statements, if any, are made prior to the calling of witnesses."⁴⁷

38. Accordingly, the Prosecution does not oppose the Defence request that the Chamber deem the admissibility challenge to be timely filed.⁴⁸

B. The burden and standard of proof

39. The Defence correctly acknowledges that it bears the burden of proof of demonstrating the inadmissibility of the case and abuse of process following the *onus probandi actori incumbit* principle.⁴⁹ This principle requires that the party making the challenge and putting forward allegations has the burden to prove them.⁵⁰

40. It urges that the standard by which this burden is to be discharged is the "balance of probabilities" (ie. the Court must be satisfied that the Defence assertions are more likely true than not, a standard approximately equivalent to "preponderance of the evidence")⁵¹ and quotes as the only supporting authority an extract of an informal expert paper of complementarity - which was prepared as a reflection paper for the consideration of the Prosecutor and does not constitute an Office policy.⁵²

⁴⁷ ICC-01/04-01/06-1084, para. 39.

⁴⁸ Since, in its view, the filing is not out of time, the Defence argument that the Prosecution is responsible for the Defence's late filing is irrelevant. That said, the Prosecution disputes the factual predicate for that argument. The record, set out above and in the Addendum to this filing, demonstrates that in 2008 the Prosecution disclosed to the Defence the information necessary for it to make an admissibility argument before the case was transferred to the Trial Chamber.

⁴⁹ Defence Motion, para. 201.

⁵⁰ See Hall C.K., *Challenges to the jurisdiction of the Court* in Triffterer, O., "Commentary on the Rome Statute of the International Criminal Court", Second Edition, p.645, [7].

⁵¹ The standard of "balance of probabilities" is also known as "preponderance of the evidence". While British jurisprudence uses the former term, the latter is preferred by the United State courts. The definition of the standard clearly indicates so: "preponderance of the evidence, that is, evidence showing, as a whole, that the fact sought to be proved is more probable than not [...]". See Cassese, A., "International Criminal Law", (Oxford University Press, 2003), p. 426.

⁵² Informal expert paper on the principle of complementarity in practice (2003), page 2. Finally, the Prosecution notes that the informal expert paper is not binding on the Prosecution.

41. The Statute does not articulate the required standard of proof for challenges under Article 19. However, Triffterer, has indicated that “the standard of proof under article 19 para. 2 for a State or the person concerned to demonstrate inadmissibility should be a preponderance of the evidence or clear and convincing standard rather than simply a *prima facie* case or beyond a reasonable doubt, which is applicable to questions of guilt or innocence in a criminal case.”⁵³

42. The Prosecution submits that, regardless of the standard – balance of probabilities/preponderance of the evidence or a higher standard of clear and convincing evidence – the Accused has failed to meet his burden. As the undisputed facts show, there was no serious investigation or prosecution of the Accused; there was never a national determination of the Accused’s guilt on the merits; the authorities of the CAR referred the case to the Court because of their lack of capacity to undertake this case; those same authorities have never claimed that they are able and willing to investigate and prosecute; and there has been no abuse of process.

43. The Prosecution also submits that in challenges to the Court’s continuing jurisdiction, whether based on admissibility under Article 19 of the Statute or on claimed abuse of process, the appropriate standard of proof is “clear and convincing evidence.”⁵⁴ The clear and convincing standard requires that the party or participant making the assertions “is capable of establishing the truth of the allegations in a convincing manner”⁵⁵ and that the Court satisfies itself “that the claim is well founded in fact and law” and that “the facts on which it (the claim) is based are

⁵³ See Hall C.K., Challenges to the jurisdiction of the Court in Triffterer, O., “Commentary on the Rome Statute of the International Criminal Court”, Second Edition, p.645, [7].

⁵⁴ Amerasinghe, C.F, Standard of Proof in “Evidence in International Litigation” (Martinus Nijhoff Publishers, Leiden/ Boston, 2005), p. 239. This standard is also referred as “Proof in a Convincing manner” or “as proof by ‘clear, convincing and satisfactory’, ‘clear, cogent and convincing’ and ‘clear, unequivocal, satisfactory and convincing’ evidence”. See Redmayne, M., “Standards of Proof in Civil Litigation”, The Modern Law Review Limited 1999 (MLR 62:2), referring to William Strong, McCormick on Evidence 4th ed (St Paul, Minn: West Publishing Co, 1992), p. 441.

⁵⁵ Amerasinghe, C.F, Standard of Proof in “Evidence in International Litigation” (Martinus Nijhoff Publishers, Leiden/ Boston, 2005), p. 239.

supported by convincing evidence.”⁵⁶ The evidence need not point to absolute certainty as such, but must be convincing. Therefore, this standard is lower than “proof beyond a reasonable doubt” but higher than “proof on the preponderance of evidence.”⁵⁷

44. In urging a “clear and convincing evidence” standard, the Prosecution is mindful that national courts may apply a “preponderance of the evidence” or “balance of probabilities” test to ordinary non-criminal issues. However, national and international tribunals also recognize that it may be appropriate, with respect to issues or challenges that have sufficiently significant consequences, to apply a higher standard.⁵⁸ As a national high court explained, the applicable standard of proof reflects “the degree of confidence our society thinks [the factfinder] should have in the correctness of factual conclusions for a particular type of adjudication.”⁵⁹

45. Applications that seek to terminate or stay proceedings before the Court may result in persons charged with the most serious crimes of concern to the international community being granted immunity for those crimes. Given the significance of this result, the Prosecution submits that such applications should be judged against an appropriately high standard.⁶⁰ International tribunals and domestic jurisdictions (in

⁵⁶ *Ibid*, pp. 240-241, quoting the ICJ *Nicaragua Case*.

⁵⁷ *Ibid*. p. 239.

⁵⁸ See Mirfield P., “*How many standards of proof are there?*” in *Law Quarterly Review*, 2009, p.31. This author explains that many of the multiple jurisdictions in the US have resort to a third intermediate standard requiring “clear and convincing” evidence in civil cases with grave allegations or severe potential consequences or for some policy reasons. In England, the same approach has also been adopted *de facto* in some cases. See pp. 36-37 referring to *R. v Mental Health Review Tribunal (Northern Region)* [2005]EWCA Civ 1605;[2006] Q.B. 468 at [62]. Also in Canada clear and convincing evidence has been required to applicants requesting status of refugee. See *Ward v. Canada*, [1993] 2 S.C.R. 689, para. 57.

⁵⁹ In *re Winship*, 397 U.S.358, 370 (Harlan, J., concurring). Also, “Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.” See *Addington v. Texas*, 441 U.S. 427 [99 S.Ct. 1804, 1808, 60 L.Ed.2d 323] (1979).

⁶⁰ To the extent that the Defence also suggests that the Accused cannot be held to anything but the lowest standard, it provides no support for that claim and, in the Prosecution’s view, it is incorrect. As demonstrated in the text, the correct measure of the standard of proof considers and balances the interests at stake. See Defence Motion, para. 203. Triffterer, moreover, makes clear that the standard would apply regardless whether the admissibility challenge is made by the Accused or a State. See Hall C.K., *Challenges to the jurisdiction of the*

non-criminal cases) support this approach by applying the higher standard of clear and convincing evidence when serious allegations and consequences are at issue.⁶¹ For instance, in the *Velasques Rodrigues* Case, the IACHR referred to the “seriousness of the charge” when it required for convincing evidence to establish the truth of the allegations.⁶² A national high court has deemed this standard applicable in civil cases “to protect particularly important individual interests;”⁶³ and several national high courts have applied it, *inter alia*, in deportation, denaturalization and immigration cases, considering the drastic consequences of decisions in those proceedings.⁶⁴

C. Admissibility

46. The Defence argues that the case against the Accused is inadmissible under multiple, and at times internally inconsistent, theories. The Defence argues that the case: (1) is inadmissible under Article 17(1)(b) of the Statute because the CAR judicial authorities investigated and then decided not to prosecute him;⁶⁵ (2) is inadmissible under Article 17(1)(c) of the Statute because the CAR judicial authorities’ dismissal constituted, in effect, a completion of the prosecution against him;⁶⁶ (3) is inadmissible because, notwithstanding the absence of an investigation or prosecution, the CAR authorities were not unable or unwilling genuinely to

Court in Triffterer, O., “Commentary on the Rome Statute of the International Criminal Court”, Second Edition, p.645, [7].

⁶¹ See the IACHR, *Velasquez Rodriguez* Case, p. 135, quoted in Amerasinghe, C.F, *Standard of Proof in “Evidence in International Litigation”* (Martinus Nijhoff Publishers, Leiden/ Boston, 2005), p. 239.

⁶² *Ibid.*

⁶³ See Supreme Court of United States, *Addington v. Texas*, 441 U.S. 424 [99 S.Ct. 1804, 1808, 60 L.Ed.2d 323] (1979). In that case the defendant was mentally ill and required hospitalization for his own welfare and protection as well as for the protection of others. In addition, the United States Court of Appeals, Federal Circuit confirmed in *Price v. Symsek et al.*, 988 F.2d 1187, [1191] (Fed. Cir. 1993) that “[the] ‘clear and convincing’ standard [is] reserved to protect particularly important interests in a limited number of civil cases.”

⁶⁴ See *Woodby v. INS*, 385 U.S. 487, 488, 286 [87 S.Ct. 483, 488, 17 L.Ed.2d 362] (1966); and *Chaunt v. United States*, 364 U.S. 353 [81 S.Ct. 147, 149, 5 L.Ed.2d 120] (1960), where the US Supreme Court noted the consequences drastic of being expelled from a country or losing the citizenship, respectively. The Supreme Court of Canada stated in *Ward v. Canada*, [1993] 2 S.C.R. 689, para.57, that an applicant for Convention refugee status had to provide clear and convincing evidence of an State’s inability to protect him (the State of his nationality or citizenship).

⁶⁵ Defence Motion, paras. 1, 67-74, 81, 83 and 89.

⁶⁶ Defence Motion, paras. 1 and 115-131.,

prosecute; and (4) is inadmissible under Article 17(1)(d) of the Statute because the case is not of sufficient gravity to justify this Court's involvement.⁶⁷

1. A State may refer a case to the ICC and relinquish national jurisdiction

47. The Defence contends that "self-referral" of the situation by the CAR Authorities violates that States' obligations to prosecute offenses and is therefore inconsistent with the Statute.⁶⁸ As upheld by the Appeals Chamber, while the preamble to the Statute recalls the duty of States to exercise their criminal jurisdiction over international crimes, the Statute does not prevent a State from relinquishing its jurisdiction in favour of the Court.⁶⁹ Moreover, the Appeals Chamber observed that, a general prohibition against self-referrals is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction.⁷⁰ Finally, it noted that the Court retains the discretion to decline to accept to exercise jurisdiction on the basis of a State referral.⁷¹

48. The Defence also contends that the manner of the referral by the CAR authorities tainted the independent action by the Prosecution and/or that the Prosecution influenced the CAR authorities.⁷² The Prosecution notes that the Office's determination to open an investigation is based on the available facts and evidence, the factors set out in the Statute and Rules, the Regulations of the Office of the Prosecutor, and its prosecutorial strategy.⁷³ The Prosecutor's duty of independence

⁶⁷ Defence Motion, paras. 1 and 132-149.,

⁶⁸ Ibid para 62.

⁶⁹ ICC-01/04-01/07-1497, para. 85.

⁷⁰ A "general prohibition of a relinquishment of jurisdiction in favour of the Court is not a suitable tool for fostering compliance by States with the duty to exercise criminal jurisdiction [as] the Court does not have the power to order States to open investigations or prosecutions domestically." It then concluded that it is purely speculative to assume that a State that has refrained from investigating or prosecuting a suspect would do so if the ICC rules the case inadmissible. OA8, para. 86.

⁷¹ ICC-01/04-01/07-1497, paras 85-86.

⁷² Defence Motion para 60-68.

⁷³ Prosecutorial Strategy 2009-2012 (1 February 2010); Report on Prosecutorial Strategy (14 September 2006); Paper on some policy issues before the Office of the Prosecutor (September 2003).

goes beyond not seeking or acting on instructions: it means that the process is not influenced by the presumed or known wishes of any internal or external source. The selection process, moreover, is not affected by the triggering procedure. The way a situation is brought to the attention of the Office whether by a State, the Security Council or pursuant to Article 15 of the Statute, does not determine whether an investigation will be opened or the manner in which cases are selected for prosecution. In addition, where a referral is accompanied by supporting documentation that identifies or implies guidance as to the identity potential perpetrators, such information has no bearing on the case selection process and does not limit the conduct of the Office's own independent investigations.

49. In the CAR situation, and contrary to the Defence's assertion that the CAR authorities influenced the Prosecutor,⁷⁴ the Prosecution spent 30 months to conduct its preliminary examination of the situation, during which time it challenged the authority of the PTC and the CAR Authorities to seek information relating to the status of its own independent process.

50. The Defence contention that the triggering procedure purportedly avoided a review by the PTC, which would have been required had the Prosecutor determined to investigate *proprio motu*, is also without merit, is not based on the Statute and misconstrues the review role of the PTC.⁷⁵ The PTC has no role in authorizing the opening of the investigations when a State refers a situation. However it has significant oversight in other aspects including its role of authorizing the issuance of a summons to appear or warrant of arrest, and later in determining whether there are substantial grounds warranting confirmation of the charges.⁷⁶

⁷⁴ See ICC-01/05-6, and Prosecution's response ICC-01/05-7.

⁷⁵ Defence Motion para 67.

⁷⁶ See Defence Motion para 67-68.

2. The Chamber need not reach inability to investigate or prosecute, given the established inactivity by the CAR Authorities.

51. The Defence's admissibility challenge is contrary to the uncontested facts that demonstrate that; (1) the Accused was not tried; (2) the CAR proceedings were not terminated on the ground that prosecution was unwarranted. Though the national prosecutor initiated an investigation, the investigating judge *declined* to pursue a case against the Accused on the ground that as a high Government official in the DRC he was immune from prosecution abroad. On appeal, that decision was upheld but on a different ground: that the national authorities lacked the capacity to handle the case and the matter should be referred to the ICC. When taken on appeal to the *Cour de Cassation*, that court agreed specifically that the CAR judiciary lacked the capacity to investigate or prosecute the case and that referral to the ICC was the only alternative. Moreover, the CAR Government in the meantime had referred the situation to the Prosecutor of this Court and has never subsequently undertaken a national case against the Accused.

52. Thus, notwithstanding the arguments raised by the Accused, this case presents a situation of inactivity – there was no actual prosecution in the past nor, more importantly, at the present time, and no claim otherwise by the relevant State. The Defence implicitly concedes as much, acknowledging that the CAR authorities deliberately relinquished their interest in prosecuting when they relinquished jurisdiction over the case (though contending that they did so for impermissible reasons and should have renewed its efforts once the Accused no longer had a potential claim of immunity).⁷⁷

53. The Appeals Chamber has explained that State inactivity is a basis for a finding of admissibility and the exercise of jurisdiction by this Court, subject to an

⁷⁷ Defence Motion, paras. 81-81, 89, 94-95.

assessment of gravity. Where a State remains inactive in relation to a particular case, the question of unwillingness and inability does not arise.⁷⁸ As the Chamber summarized (emphasis added):

“Under article 17 (1) (a) and (b) of the Statute, the question of unwillingness or inability has to be considered only (1) when there are, *at the time of the proceedings in respect of an admissibility challenge*, domestic investigations or prosecutions that could render the case inadmissible before the Court, or (2) *when there have been such investigations and the State having jurisdiction has decided not to prosecute the person concerned*. Inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute.”⁷⁹

54. Nor has the Appeals Chamber suggested that only legitimate reasons will justify a finding of inactivity. Even if, as the Accused suggests, the CAR authorities chose inactivity and referred the case to this Court for improper motives, the fact remains that the “State is not investigating or prosecuting”. That is the very definition of inactivity.

55. The Defence arguments in this regard fail to adequately appreciate the two-step approach outlined by the Appeals Chamber: first, the Court shall assess the existence of relevant national proceedings, and second, only if proceedings exist, it shall assess unwillingness and inability.⁸⁰ This failure is reflected in the flawed Defence contention that the ICC may intervene “only in cases where States that are

⁷⁸ ICC-01/04-01/07-1497 OA8, para 78. The Prosecution recalls, moreover, that the Appeals Chamber has stated that it is not for the Court to determine the motivations of that State, nor can it force a State to investigate or prosecute; *ibid*, para 85-86. That the CAR authorities could have, but chose not to, initiate proceedings against the Accused after he lost his immunity is irrelevant in the instant case.

⁷⁹ ICC-01/04-01/07-1497 OA8, paras. 1 and 2 (emphasis added)..

⁸⁰ *Ibid*, para 78.

signatories to the Rome Statute refuse or are unable to carry out this duty [to prosecute international crimes]”.⁸¹ The Court does not have to establish domestic inability or unwillingness in order for a case to proceed. As noted above, an absence of relevant domestic proceedings will satisfy admissibility requirements, subject to an assessment of gravity.

56. If there is inactivity, it is also irrelevant whether the State’s judicial system may be willing or able to investigate or prosecute other cases.⁸² Admissibility does not constitute a judgment on the national justice system as a whole.

3. The case is admissible under Article 17 of the Statute

57. As described in more detail below, the Prosecution submits that :

- (i) the CAR authorities did not conduct proceedings against the Accused that resulted in a determination that he was not criminally liable, and in abandoning all potential domestic proceedings against the Accused the CAR authorities did not make a decision on the merits “not to prosecute” within the meaning of Article 17(1)(b) of the Statute; even if the Chamber consider that the CAR authorities took a decision within the meaning of Article 17(1)(b) of the Statute, this was vitiated by domestic inability genuinely to prosecute the case;
- (ii) the CAR Authorities did not take steps that are equivalent of a prior trial of the Accused within the meaning of Article 17(1)(c) of the Statute; and

⁸¹Defence Motion para 59. The Defence’s statement also fails to properly reflect that the complementarity regime under article 17 applies to all States with jurisdiction irrespective of whether they are parties to the Statute or not. Under article 17, the question is whether the case is or has been being investigated or prosecuted “by a State” not “by a State Party”.

⁸² Defence Motion para 91-94. As the Prosecution submitted in the *Katanga* case, Rule 51 provides an express and limited role for the Court to consider a State’s investigation and prosecution of similar conduct. National cases regarding similar conduct are only relevant to provide the context in which the Court determines whether national proceedings regarding the case before it are genuine. The investigation of other conduct, albeit similar, cannot establish that the State is both able and willing to prosecute this case.

(iii) the case satisfies the gravity threshold pursuant to article 17(1)(d) of the Statute.

a. The CAR authorities' decision was not a resolution on the merits within the meaning of Article 17(1)(b) of the Statute

58. The Prosecution submits that the abandoning by the CAR authorities of proceedings against the Accused did not amount to a reasoned decision not to prosecute based on the merits of the case, within the meaning of Article 17(1)(b) of the Statute. The domestic investigations against the Accused for the crimes which form the subject matter of the case before the Court were preliminary and were terminated at an early stage. In fact, the Defence quotes and relies on the senior examining judge, who described the decision to terminate all proceedings involving the Accused and explained that “the investigations to establish his possible liability were not really conducted in any depth” (emphasis added).⁸³

59. In the Prosecution's submission, the CAR authorities appear to have abandoned proceedings primarily due to difficulties that arose during the course of investigations, including the limited prospects for securing the arrest and appearance of the Accused because of the immunity he enjoyed at the time.⁸⁴ As the PTC observed “*it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean Pierre Bemba ...*”.⁸⁵ The Defence disputes this explanation. Nonetheless, regardless of the reason, the case was in fact abandoned.

60. Article 17(1)(b) of the Statute deals with the situation where a State, having completed investigations, assesses that the evidence examined provides an

⁸³ Application, para. 83, quoting CAR-OTP-WWWW-0009.

⁸⁴ Statement of CAR-OTP-WWWW-0006 : CAR-OTP-0005-0099 at 0115.

⁸⁵ ICC-01/05-01/08-14-tENG, para. 21.

insufficient basis to warrant a particular prosecution.⁸⁶ As commentators have pointed out, for the purpose of Article 17(1)(b) of the Statute the investigations in question must have been *completed*.⁸⁷ Where a State initiated an investigation, but was unable to complete it and consequently decided to discontinue it, the case has been abandoned, not resolved on the merits.⁸⁸

61. Should the Chamber considers that the CAR authorities took a decision not to prosecute within the meaning of Article 17(1)(b) of the Statute, the Prosecution submits that this was, in any event, vitiated by the inability of the CAR Authorities to genuinely prosecute the case.

62. As indicated by the *Cour de Cassation* in its ruling of 11 April 2006, the CAR authorities faced a number of legal and practical challenges in proceeding against the Accused. Notable among these was the significant legal bar against domestic proceedings in CAR because of the Accused's personal immunity (as the Vice-President of the DRC).⁸⁹ Other obstacles included security concerns and the difficulty in collecting the necessary evidence: the investigative magistrate conducted no investigation in the field in relation to the allegations against the Accused because, due to security concerns, he was unable to visit alleged crime scenes and affected localities outside of Bangui.⁹⁰ Moreover, although the investigative magistrate interviewed *Forces Armées Centrafricaines* ("FACA") insiders and CAR officials, he was unable to conduct interviews with *Mouvement de Libération du Congo* ("MLC") insiders in the DRC. The power of the Accused at the time was also seen by the CAR authorities as a major obstacle to his appearance before its courts.⁹¹

⁸⁶ Unless this results from the unwillingness or inability to genuinely prosecute, see section X below.

⁸⁷ J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 117-118.

⁸⁸ *Supra*.

⁸⁹ Arrêt du 11 avril 2006 de la Chambre Criminelle de la Cour de Cassation: CAR-OTP-0258 at 0258..

⁹⁰ Statement of CAR-OTP-WWWW-0009: CAR-OTP-0010-0107 at 0111-0112

⁹¹ See Prosecutor v. Germain Katanga et al., ICC-01/04-01/07-1497.

63. For the purpose of inability, the Defence in its submissions does not address the practical obstacles to prosecution, but instead focuses exclusively on the concept of collapse.⁹² Article 17(3) of the Statute, however, characterises two separate situations: collapse and unavailability.⁹³

64. The unavailability of the CAR national judicial system that resulted from the obstacles referred to in paragraph 64, above, rendered the authorities unable genuinely to prosecute the case within the meaning of Article 17(1)(b) of the Statute. As the *Cour de Cassation* emphasized in its decision of 11 April 2006, the CAR judiciary was not capable of conducting genuine investigations and prosecutions, and this inability was particularly emphasised in the case of suspects dwelling outside the territory of CAR.⁹⁴

65. The Defence contends that the facts do not demonstrate genuine inability or unwillingness. It contends that the “inability” was predicated on immunity, a temporary barrier that subsequently dissipated. It also states that the CAR authorities continued to express willingness to prosecute the Accused and cannot therefore be deemed to have been unwilling genuinely to prosecute.⁹⁵ The Defence contrasts the present case with the domestic inactivity arising from other cases before the Court.⁹⁶ In that regard, the Defence also argues that PTC III erred in holding that the CAR authorities had abandoned any attempt to prosecute and in inferring “unwillingness” therefrom.⁹⁷ And it contends that a letter by President Bozize to the

⁹² Defence Motion para. 75 et seq.

⁹³ Kleffner (2008), 155-158; Mohamed El Zeidy, *The Principle of Complementarity in International Criminal Law* (2008), 226-228; Markus Benzing, ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity’, 7 *Max Planck Yearbook of United Nations Law* (2003), 614; Informal Expert Paper, para 49; Federica Gioia, ‘State Sovereignty, Jurisdiction, and ‘Modern’ International Law: The Principle of Complementarity in the International Criminal Court’, 19 *LJIL* (2006), 1095-1123.

⁹⁴ Arrêt de la Cour de Cassation du 11 avril 2006 dans l’affaire Etat Centrafricain contre Ange-Félix PATASSE et autres suite au pourvoi du 20 décembre 2004 : CAR-OTP-0019-0258.

⁹⁵ Defence Motion paras 100, 109.

⁹⁶ Defence Motion para 101-108.

⁹⁷ Defence Motion paras 95 et seq. Fix cites

United Nations Secretary-General in August 2008 established the State's ability and willingness.⁹⁸

66. These contentions are meritless. The Prosecution firstly observes the fact that the CAR authorities, whether the Government or the judiciary, may have characterised the situation as one of inability does not bind this Chamber's independent assessment of admissibility.⁹⁹ Once a situation is referred to the ICC, it is for Chambers of this Court to rule on all matters related to admissibility.¹⁰⁰ Nor is the Defence factually correct in interpreting the PTC III decision.¹⁰¹ That Chamber did not characterise the situation as one of unwillingness, it made a factual observation that domestic proceedings were abandoned without assessing whether this arose from unwillingness or inability.¹⁰² Finally, the letter of President Bozize, which notably was not directed at the Prosecutor or the Court itself, suggested that ICC investigations into events other than the charged events in this case could affect reconciliation efforts. Contrary to the Defence claim, that letter does not reflect either an inability or willingness of the CAR Authorities to genuinely prosecute the Accused in a national proceeding. The Prosecution recalls that to date, there has been no admissibility challenge by a State pursuant to Article 19 of the Statute.

67. Finally, the Prosecution notes that the Defence elsewhere asserts that the CAR judiciary was rendered "ineffective, unaccountable, corrupt, and dependent on the executive" following General Bozize's ascension.¹⁰³ This assertion, though based on political accusations, nonetheless substantiates that the judiciary at the time was unable to genuinely proceed against the Accused.

⁹⁸ Defence Motion para. 113-114.

⁹⁹ Defence Motion para 87 *et seq.*

¹⁰⁰ Decision on the admissibility of the case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, paras. 45, 51.

¹⁰¹ Defence Motion para 97

¹⁰² ICC-01/05-01/08-14-tENG, paras. 21-22.

¹⁰³ Defence Motion, para. 181 and n. 113 (citation in footnote).

b. The Accused was never tried before the CAR authorities

68. As article 17(1)(c) of the Statute provides, a case before the ICC is rendered inadmissible where 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” (emphasis added). As described in the statement of facts above, the Accused was not formally charged, let alone tried.¹⁰⁴ Nor is a trial by this Court barred under the *ne bis in idem* principle, which requires a prior judgment on the issue on conviction or acquittal. Consequently, the case is not inadmissible pursuant to Article 17(1)(c) of the Statute. Indeed, the Defence concedes as much – according to its own application, “the Principal State Prosecutor in the CAR observed that there was no evidence to hold the Accused liable for the alleged crimes [and thus that charges should not be brought] and that the case was subsequently appealed – apparently in order to circumvent the *ne bis in idem* principle [...]”.¹⁰⁵

69. Nonetheless, the Defence appears to assert that the Accused already has been tried in the CAR, through a strained construction of the Statute. In support of that strained construction, the Defence misrepresents in paragraph 130 of its challenge the authorities advanced to support its assertion.

70. Tallgren and Reisinger Coracini, in the Triffterer Commentary, note two possible interpretations of the phrase “has been tried” in Articles 17(1)(c) and 20(3) of the Statute. One interpretation suggests that Article 17(1)(c) of the Statute deals with proceedings that were terminated after reaching the trial stage, including any decision taken by the Court after decision-making competence was transferred from the prosecuting authority.¹⁰⁶ An alternative reading, supported by the drafting

¹⁰⁴ See paragraph 14 above.

¹⁰⁵ Defence Motion, para. 173.

¹⁰⁶ Immi Tallgren/ Astrid Reisinger Coracini, ‘Ne bis in idem’, in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article (2nd Edition, 2008), 689-690.

history, indicates that the terms “convicted or acquitted” and “has been tried” are used interchangeably,¹⁰⁷ to apply to situations where national courts have made a determination on the merits.¹⁰⁸ It explained that this reasoning continued throughout negotiations leading up to Rome, with the ultimate difference in wording between the subparagraphs in Article 17(1)(c) and Article 20(1)(3) of the Statute emerging as an inadvertent feature of the drafting process.¹⁰⁹ As such, the authors conclude that it will be for the Court to determine the appropriate approach.¹¹⁰ The final passage quoted from the above authors in paragraph 130 of the Defence’s challenge is also presented in a misleading manner in support of its argument.¹¹¹

71. The Prosecution notes that neither interpretation would result in a finding that this Accused “has been tried” in CAR proceedings.

72. The strain in the Defence’s argument is also apparent from their internal inconsistency. The Defence initially asserts that the decision of the senior investigating judge in partially dismissing the case against the Accused constitutes *res judicata* in that it brought to a definitive close the criminal proceedings against the

¹⁰⁷ *Ibid*, 690-691.

¹⁰⁸ As the authors note, the 1994 Draft Statute presented by the International Law Commission (ILC) used the wording “has [already] been tried” to define the *bis* with regard to both national decisions and those of the ICC. The accompanying commentary of the ILC explains that it meant to regulate situations where national courts have “made a determination on the merits”. The ILC noted that with respect to the ICC either an acquittal or conviction should be regarded as a final decision barring subsequent prosecution. The report of the 1996 Preparatory Committee for the Establishment of an International Criminal Court also emphasised that the protection “should apply only to *res iudicata* and not to proceedings discontinued for technical reasons”. *ibid*; *Report of the International Law Commission on its work on its forty-sixth session*, 49 U.N. GAOR, Supp. No. 10, U.N. Doc. A/49/10 (1994) (1994 ILC Draft Statute and Commentary), p.118; 1996 Preparatory Committee 1, p.39 para 170.

¹⁰⁹ Tallgren/ Reisinger Coracini, p.691.

¹¹⁰ *Ibid*.

¹¹¹ The relevant passage from the Triffterer Commentary reads: “Whatever approach the Court will follow, it is clear that the ICC will be barred from exercising jurisdiction as soon as the national authorities will undertake a *bona fide* effort to prosecute. This follows from the rules of admissibility implementing the principle of complementarity in article 17. Whether the Court’s jurisdiction will be precluded on grounds of *ne bis in idem* will depend on its interpretation on the notion of “has been tried”. The ICC will need to carefully scrutinize the national decision in question, also taking due account of domestic provisions regarding *ne bis in idem* (article 21, para. 1 *lit. c*).”; *ibid*. As can be seen, read in context, the first sentence describes the complementarity scheme under article 17(1)(a)-(c) in general; while the third sentence addresses *ne bis in idem*, for which the authors note the need for judicial interpretation. Other commentators also support the notion that article 17(1)(c) and article 20(3) refer to final national decisions on the merits;

Accused in relation to the acts for which he is currently being prosecuted by the Court.¹¹² At the same time, the Defence argues that the CAR Authorities should have recommenced proceeding against the Accused after he lost immunity.¹¹³ If *ne bis in idem* deals with *res judicata* decisions, as the Defence asserts, how can a decision that does not bind the CAR Authorities bind the ICC for the purpose of article 17(1)(c) of the Statute?

c. The case is of sufficient gravity to justify further action by the Court

73. The Statute does not define the term gravity for the purpose of admissibility. However, the Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the preventive or deterrent role of the Court.¹¹⁴

74. In addressing the gravity of the case, the Defence presents four main arguments relating to: (1) the specificity of the charges; (2) the criteria for the assessment of gravity, including the Prosecution's case selection process; (3) the mode of liability; and (4) the insufficient evidence to establish that the Accused is criminally responsible.

75. Contrary to the Defence submission,¹¹⁵ the pending charges - war crimes (three counts, charging rape, murder, and pillaging) and crimes against humanity (two counts, charging rape and murder) - amply meet the gravity test in Article 19 of the Statute.

¹¹² Defence Motion, para.126

¹¹³ Ibid, paras. 80-81.

¹¹⁴ ICC-01/04-169, paras. 69-79.

¹¹⁵ Defence Motion, paras. 132-149.

76. The Defence first contends that the vagueness in the allegations – particularly, the failure of the charging documents to name all the victims and identify all the specific criminal events – both artificially inflates the gravity of the case and reflects that the charges lack sufficient gravity.¹¹⁶ As a threshold matter, this vagueness challenge is inappropriately linked to the admissibility challenge. The Appeals Chamber has confirmed that “a challenge to admissibility under article 19(2)(a) of the Statute is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process. [...] Unless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible.”¹¹⁷ It is also not necessary for the Chamber to consider these in tandem; indeed, the Accused has separately raised vagueness in another application pending before the Chamber.¹¹⁸

77. This claim also wrongly assumes that the failure to establish the identity of any specific victim, or the specific number or location of each crime, is pertinent to the issue. In fact, “the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters.”¹¹⁹ It is that sheer scale, moreover, that also substantiates that the case presents charges of sufficient gravity to be considered by this Court.¹²⁰

¹¹⁶ Defence Motion, para. 135 and 137.

¹¹⁷ ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 113. (See also below in the section dealing with Abuse of Process).

¹¹⁸ Both the Defence and the Prosecution have filed on this issue and is pending before the Chamber. See; Defence’s filing- ICC-01/05-01/08-694+Conf-Exp-AnxA, and the Prosecution’s Response, ICC-01/05-01/08-731 filed on 22 March 2010. The Prosecution incorporates herein its response contained in its filing.

¹¹⁹ See *Natelic Appeals Judgment*, para. 24; see also *Prosecutor v. Kupreskic et al.*, IT-95-16-A, Appeal Judgment, 23 October 2001, para. 89. See further *Prosecutor v. Ntakirutimana*, ICTR-96-10: 2: ICTR-96-17, Appeal Judgment, 13 December 2004, in which the Appeals Chamber pointed out that “the inability to identify victims is reconcilable with the right of the accused to know the material facts of the charges against him because, in such circumstances, the accused’s ability to prepare an effective defence to the charges does not depend on knowing the identity of every single alleged victim. The Appeals Chamber recalls the situation is different, however, when the Prosecution seeks to prove that the accused personally killed or harmed a particular individual. [...] [T]he Prosecution cannot simultaneously argue that the accused killed a named individual yet claim the “sheer scale” of the crime made it impossible to identify that individual in the indictment. Quite the contrary: the Prosecution’s obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual.”(paras. 73-74).

¹²⁰ That is not to agree with the Defence position that gravity should be assessed exclusively in terms of magnitude of scale. Other factors are also important: as Pre-Trial Chamber I in the *Abu Garda* case confirmed

78. The Defence also claims that the charges do not meet appropriate criteria for assessing gravity. The Prosecution has developed a set of factors to guide its assessment of gravity based on the Statute and the Rules,¹²¹ its policy and strategy documents, decisions of the Court, and the jurisprudence and practice of other national and international courts and tribunals. These factors are assessed jointly, with no fixed weight assigned to each. They include both quantitative and qualitative considerations, and offer guidance for exercise of the Prosecutor's discretionary assessment.¹²² As stated in the Regulations 29 of the Regulations of the Office of the Prosecutor, factors relevant in assessing gravity include their scale, nature, manner of their commission, and their impact.¹²³ These same factors are reflected in the Office's policy paper on the interests of justice, to which the Defence refers in its submissions.¹²⁴

79. The following non-exhaustive recitation of facts demonstrates the gravity of the crimes alleged based on the above-identified criteria. First, the crimes occurred in the most densely populated areas of the CAR (Bangui, Mungoumba, Bossembele, Damara, Bossemptele and Bozoum). Second, they occurred over an extended period of time: although the most intense fighting and the greatest volume of atrocities, at least in Bangui, occurred during the first two to three weeks, the conflict continued for five months throughout the country. Third, the scale and number of victims were substantial: the crimes included a large number of sexual abuses, killings of civilians, and widespread looting;¹²⁵ one source identifies 789 victims, among them 293 victims

that in assessing the gravity of a case 'the issues of the nature, manner and impact of the [alleged] attack are critical'. It also concurred that the gravity of a given case should not be assessed only from a quantitative perspective, but also in view of the qualitative dimension. *Prosecutor v. Bahar Idriss ABU GARDA*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, para. 31.

¹²¹ See e.g. the factors set out in Article 78(1) and Rule 145 for determining the gravity of the crime and the individual circumstances of the convicted person for the separate purpose of sentencing.

¹²² *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 31.

¹²³ Regulation 29(2), Regulations of the Office of the Prosecutor.

¹²⁴ Defence para 138; Policy Paper on the Interests of Justice (ICC-OTP 2007), p.5.

¹²⁵ Amnesty International, *The Central African Republic, Five Months of War against Women*, 10 November 2004, CAR-OTP-0011-0503 at 0507 -EVD-P-00045; Radio France international (RFI), 18 February 2003, CAR-

of rape (among 533 victims of rape and other forms of physical violence) and 256 victims of pillaging and destruction of property;¹²⁶ another witness estimates almost 1000 victims, mostly of rape offenses, and he also described open and regular looting.¹²⁷ The manner of commission was also particularly brutal and cruel: for example, civilian men, women and children as young as 11 were raped and sodomized in their homes, schools, fields and openly in public places; sexual violations occurred at gunpoint, in front of family members who themselves were forced to watch at gunpoint; victims were raped by multiple perpetrators; civilians were killed when they tried to resist pillaging or to protect/defend themselves and their family members.¹²⁸ And the crimes had substantial, wide-ranging, and lasting impact on the victims and the community: among other effects, civilians contracted HIV; persons were psychologically traumatized by the attacks they suffered or witnessed; some women are now unable to conceive; victims are stigmatized within their community; families lost loved ones; wanton lootings impoverished many people. Finally, the crimes charged were systematic, widespread, severe, and cause for great concern within the international community.

80. The Defence also argues that, notwithstanding that liability under a theory of command responsibility is provided in the Statute, that mode of liability renders the case insufficiently grave under the Statute. The PTC explicitly and correctly rejected this argument.¹²⁹ Additionally, the Accused's status as a commander could be considered an aggravating factor in reaching an appropriate sentence.¹³⁰ A position of authority gives rise to both duty and trust which, if broken or abused, would tend to

OTP-0031-0120, Track 01: 1.20-2.50 -EVD-P-02165; Radio France international (RFI), 5 December 2002, CAR-OTP-0031-0099, Track 01: 00:28-01:16, 02:10-03:10, 03:55- 09:10 -EVD-P-02258.

¹²⁶ Projet CAF/02/004, Assistance Humanitaire aux Femmes et Filles victimes de viols et de violences inhérents aux conflits armés du 25 Octobre 2002, Rapport d'activités 25 Novembre 2002 au 31 Décembre 2003, CAR-OTP-0030-0002 at 0013, 0020 -EVD-P-00078.

¹²⁷ Statement of CAR-OTP-WWWW-0006, CAR-OTP-0005-0099 at 0103 -EVD-P-00098.

¹²⁸ EVD-P-02359, CAR-OTP-0007-0500 at 0514 and EVD-P-00045, CAR-OTP-0011-0503 at 0511.

¹²⁹ ICC-01/05-01/08-475, para 48.

¹³⁰ ICC-01/05-01/08-431, para 9.

aggravate the sentence.¹³¹ Commanders who fail in their duties to prevent the crime or to punish the perpetrators have also been held to deserve a heavier sentence than the subordinates who committed the crime, because the commanders' acts convey the impression of tolerance/approval of crimes by their subordinates.¹³²

81. Finally, the Defence appears to contest the finding that there is sufficient reliable evidence to justify a criminal trial, suggesting that the Pre-Trial Chamber's findings with respect to the Accused's responsibility are flawed or inaccurate. Gravity for purposes of determining the jurisdictional question of admissibility is an issue wholly separate from sufficiency of the evidence to determine criminal liability. Substantive arguments on the nature of the Accused' criminal responsibility go to the merits of the case, which will be resolved at trial. They cannot be predetermined at this stage of the proceedings as part of a challenge to the admissibility of the case.

D. Abuse of process

82. The Defence further requests stay of proceedings on the grounds of abuse of process. The Defence argues that the rights of the Accused were impaired as a result of: (1) the failure by the Prosecution to disclose evidence to his contacts with members of the Government and the judiciary of the CAR which could allegedly shed some light on the issue of complementarity;¹³³ (2) abuse of process for political purposes;¹³⁴ and (3) illegal means by which the Accused was handed over to the Court.¹³⁵ The alleged violations, according to the Defence, have so breached the integrity of the proceedings that it is impossible for the Accused to receive a fair trial,

¹³¹ Prosecutor v. Jean Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, 4 September 1998; Prosecutor v. Jean Paul Akayesu, Case No. ICTR-96-4-T, Sentence, 2 October 1998. Prosecutor v. Clement Kayishema and Obed Ruzindana, Sentence, Case No. ICTR-95-I-T, 21 May 1999 at p. 15.

¹³² Prosecutor v. Tihomir Blaskic, Judgment, Case No. IT-95-14-T, 3 March 2000, at p. 789. The Prosecution also refers to conclusions reached by PTC II in its Confirmation Decision.

¹³³ Defence Motion, paras. 154-170.

¹³⁴ *Ibid*, paras. 171-186.

¹³⁵ *Ibid*, paras. 187-196.

and they are so offensive to the world community's sense of justice that they must require termination of the proceedings.¹³⁶

83. The Defence includes this claim under Article 19(2)(a) of the Statute – i.e. as part of the challenge to the admissibility of the case.¹³⁷ In so doing the Defence ignores the Appeals Chamber's statement that violations of the rights of the Accused in the course of the prosecutorial process can only be raised in the context of an admissibility challenge *if they are relevant to the criteria under Article 17*: "a challenge to admissibility under article 19(2)(a) of the Statute is not the mechanism under which to raise alleged violations of the rights of the accused in the course of the prosecutorial process. [...] [U]nless alleged prejudices and violations are relevant to the criteria of article 17 of the Statute, they cannot render a case inadmissible."¹³⁸

84. On the merits, the Prosecution submits that none of the grounds is relevant for the purposes of determining the admissibility of the case as they do not address any issue within the purview of Articles 17 and 19 of the Statute.¹³⁹ The first ground (ie. the alleged lack of disclosure) is an issue that must be - and has been - litigated separately. Similarly, the purported political reasons behind the CAR's referral (second ground) and the Defence's lack of knowledge of the sources informing the request for provisional arrest (third ground) are not relevant to determine the admissibility of the case. Put another way, even if the Defence were correct, neither factor can render the case inadmissible. As substantive challenges to admissibility,

¹³⁶ Defence Motion, paras. 150-152.

¹³⁷ Defence Motion, para. 1.

¹³⁸ ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 113. Procedural errors can also be raised in the context of an admissibility challenge as long as they "affect [...] the ruling regarding the admissibility of the case." See *Prosecutor v Kony et al.*, 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, ICC-02/04-01/05-408 OA3, 16 September 2009, paras. 47,51.

¹³⁹ In the Kony ruling cited above, the Appeals Chamber examined alleged procedural defects of a decision entered under Article 19 as part of its review functions. This is not the case here, since (a) no decision has been made, and (b) the Trial Chamber has no corrective functions.

therefore, these claims are improperly brought and should, on that procedural basis, be dismissed.

85. Even assuming the propriety of including these issues within the instant admissibility filing, the Defence fails to demonstrate how any of these purported violations breached the rights of the Accused and even less how they have made it impossible for the Accused to have a fair trial, including the ability to prepare his defence. Consistent with the Appeals Chambers jurisprudence, absent such fundamental and irreparable unfairness, a stay of proceedings on the ground of abuse of process cannot be granted.¹⁴⁰

1. The Prosecution has disclosed all material relevant to the admissibility of the case

86. The Defence argues that lack of disclosure of information related to a mission conducted by ICC representatives in CAR in November 2005 - four months after the CAR authorities first referred the case - prejudiced the Accused by undermining the preparation of his challenge to admissibility.¹⁴¹ The mission took place in the context of the preliminary examination of the situation. No official investigation had started yet, and the Prosecution informed the Chamber that the mission was conducted “for the purposes of further developing preliminary analysis, focusing in particular on collecting additional information on the conduct of the national proceedings prior to the referral”.¹⁴² It also argues that it was improper for Prosecution delegates to meet with CAR judicial authorities to discuss admissibility before the CAR courts had

¹⁴⁰ A contrario, Defence Motion, para. 199. See *Prosecutor v. Lubanga*, Judgment on Jurisdiction Appeal, ICC-01/04-01/06-772 OA4, 14 December 2006, para. 37, 39; see also *Prosecutor v. Lubanga*, Reasons for the Decision on the “demande de suspension”, ICC-01/04-01/06-844 OA8, 9 March 2007, para. 10.

¹⁴¹ Defence Motion, para. 170.

¹⁴² ICC-01/05-7, para.16.

finally resolved the pending appeals and that such actions are not provided in the Statute or sanctioned by outside expert opinion.¹⁴³

87. The crux of the complaint is that the Prosecution has the obligation (and had the obligation in 2005) to contemporaneously record its meetings even before an investigation is opened,¹⁴⁴ yet no mission report on the November 2005 meeting was prepared. That failure to prepare, and then disclose, the information constitutes abuse of process. The Defence further argues that the Prosecution conceded that records of the mission would be part of the investigation material to be disclosed.¹⁴⁵

88. First, and as a legal matter, the Prosecution is required to disclose information that would be material to the preparation of the Defence, but that does not include internal work product. In connection with the November 2005 mission, notes were taken and a mission report was subsequently prepared. Both the notes and the report constitute internal work product that is not subject to disclosure within the terms of Rule 81(1) of the Rules. Rule 81(1) of the Rules is unequivocal – work product materials “*are not subject to disclosure*”. This principle has, moreover, been confirmed in guidance offered by this Chamber¹⁴⁶ and TC I.¹⁴⁷ In addition, minutes should be

¹⁴³ Defence Motion, paras. 164-167.

¹⁴⁴ Defence Motion, paras. 160-163. Such obligation, according to the Defence, would be consistent with some States’ national legislation, particularly referring to the British Criminal Procedure and Investigations Act 1996, which the Defence suggests should be considered in the instant case.

¹⁴⁵ Defence Motion, para. 159.

¹⁴⁶ This Trial Chamber ruled upon the Defence’s request for “material internal documents” that “reports, memoranda or other internal documents prepared by a party [...] in connection with the investigation or preparation of the case are not subject to disclosure” under Rule 81(2). See ICC-01/05-01/08-632, 02 December 2009, para. 34.

¹⁴⁷ See “Redacted Decision on the ‘Prosecution’s Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information’ of 5 December 2008”, ICC/01/04-01/06-1924-Anx2, 2 June 2009, para. 31. Trial Chamber I granted certain redactions after explaining that internal work product under Rule 81(1): “includes, inter alia, the legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of investigation. The Chamber further ensured that the relevant material was limited only to internal documents of the prosecution, and redactions were only authorised if the information was not of a kind that required disclosure under the Statute. It is to be stressed that the material covered by this provision can be entire documents or parts thereof.” Pre-Trial Chamber I also stated that: “[I]nformation relating to Prosecution’s screening objectives and techniques of investigation” were “to be considered as an internal information prepared by the Prosecution in connection with its investigation in the present case.” See ICC-01/04-01/07-568, 9 June 2008, paras. 31-37). Similarly, “the conclusions and the recommendations made by the investigators of the Office of the Prosecutor at the end of the

distinguished from unofficial hand written notes: while minutes constitute a formal record of meetings or proceedings,¹⁴⁸ notes do not reproduce *verbatim* those meetings and generally contain additional information related, *inter alia*, to the preparation of a case thus not being subject to disclosure pursuant to Rule 81(1).¹⁴⁹

89. Nonetheless, though the internal notes and memoranda themselves “are not subject to disclosure”, all relevant factual information stemming from the meeting that bears on admissibility has been disclosed to the Defence, including: (1) the dossier on the proceedings initiated before the Bangui criminal courts and; (2) the Prosecution’s report pursuant to the PTC III’s decision requesting information on the status of the preliminary examination of the CAR situation.¹⁵⁰

90. Second, the Prosecution never stated or conceded that any recorded material resulting from that pre-investigation mission would be part of the investigation.¹⁵¹ What the Defence construes as non-denial, and presumably therefore acquiescence, was not agreement with the Defence position, it was simply a factual response that the Prosecution did not possess minutes or correspondence that constituted a record of facts relevant to the issue of admissibility.¹⁵² Indeed, the Prosecution informed the Chamber that the mission was conducted “for the purposes of further developing preliminary analysis, focusing in particular on collecting additional information on the conduct of the national proceedings prior to the referral.”¹⁵³

interviews with the relevant witnesses” were protected. See ICC-01/04-01/07-249, 5 March 2008, paras. 46-49; ICC-01/04-01/07-361, 3 April 2008, paras. 50-53.

¹⁴⁸ Minutes are defined as “1. Memoranda or notes of a transaction or proceedings. 2 Parliamentary law. The formal record of a deliberative assembly’s proceedings, approved (as corrected, if necessary) by the assembly – Also termed *journal*; *record*; *report*”; or “1 a summarized record of the points discussed at a meeting. 2 an official memorandum”. See Black’s Law Dictionary, p. 1018; and Oxford English Dictionary (http://www.askoxford.com/concise_oed/minute_3?view=uk), respectively.

¹⁴⁹ See ICC-01/05-01/08-632, 02 December 2009, para. 34.

¹⁵⁰ ICC-01/05-7, 15 December 2006.

¹⁵¹ See Defence Motion, para. 159.

¹⁵² Defence Motion, para. 158.

¹⁵³ ICC-01/05-7, para.16.

91. Third, it was entirely fitting that representatives of the Prosecution performed this preliminary examination and assessed relevant information in order to determine whether a reasonable basis existed to proceed with an investigation.¹⁵⁴ Meetings with relevant judiciary authorities were not only a sensible course of action but rather formed part of the Prosecution's duty to properly ascertain the admissibility of the case - or lack thereof - before the Court.

92. Finally, the domestic authorities referred to by the Defence to argue that failure to disclose evidence entails abuse of process and unfair trial differ from and are not applicable to the instant case.¹⁵⁵ The *Lubanga* decision cited to support the same proposition also deals with a different scenario: the non-disclosure of potentially exculpatory materials covered by agreements entered into pursuant to Article 54(3)(e) of the Statute.¹⁵⁶

2. The Prosecutor has performed its obligations in an impartial manner

93. The Defence argues that the domestic proceedings against Patasse and the Accused were "the result of a politically motivated exercise"¹⁵⁷ and that the DRC authorities saw the surrender of the Accused to The Hague as a way to neutralize a political opponent.¹⁵⁸ It further suggests that the DRC authorities were "part of a

¹⁵⁴ The Prosecution followed the procedures set out in the Annex of the Policy Paper, as indicated in paragraph 8 of the Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the CAR, ICC-01/05-7. Section 3 of the Regulations of the Office of the Prosecutor regulate (in line with the Annex) the "Preliminary examination and evaluation of information" preceding any official investigation (Section 4). These regulations were adopted on 23 April 2009 pursuant to Article 42(2), and Rule 9..

¹⁵⁵ Defence Motion, para. 168, fn. 103: *R v. Birmingham & Others* and *R v. Felham Magistrates Court ex part Ebrahim and Mouat v DPP* refer to cases where the evidence requested by the defence (video tapes) had disappeared or were not seized. In the *R v. Altaf Hussain case*, the proceedings were not stayed as there were alternatives to achieve a fair trial. In this instant case, no evidence has been lost or not seized and no prejudice has been caused to the Accused.

¹⁵⁶ *Prosecutor v Lubanga*, 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, ICC-01/04-01/06-1401. See Defence Motion, para. 168, fn. 104.

¹⁵⁷ Defence Motion, paras. 171-172.

¹⁵⁸ Defence Motion, paras. 174-175.

project in progress” with Patasse, that victims were encouraged to lodge complaints against the Accused and the MLC troops,¹⁵⁹ that the Prosecutor should not have met with CAR judicial authorities,¹⁶⁰ and that the Prosecutor personally visited the DRC (following the indictment of Thomas Lubanga).¹⁶¹ These factors together, the Defence argues, suggest impermissible conduct by the Prosecution, including its participation in a political scheme to prosecute the Accused, and the creation of an appearance of bias.¹⁶²

94. These submissions lack any substantive foundation and have no relevance to the proceeding before the Court. The Defence also fails to demonstrate any resulting irremediable prejudice that would deprive the Accused of a fair trial.

95. At the same time, the Defence claim on abuse of process in collusion with the CAR authorities contradicts its substantive admissibility argument. It initially submits that national proceedings initiated against the Accused were not genuine (and were rather motivated for political purposes),¹⁶³ but then argues that the national authorities facilitated the referral of what was in fact a genuine case to the ICC when terminating the proceedings.¹⁶⁴ First, if the domestic proceedings were indeed not legitimate the case is admissible before the Court pursuant to Article 17(1)(b) of the Statute. If, on the other hand, CAR and DRC wanted the Accused to be prosecuted in the ICC and for that reason chose not to proceed against him,¹⁶⁵ the argument thus is that the countries that could and should have exercised jurisdiction refused to do so for political reasons. That too is precisely why the ICC was created –

¹⁵⁹ *Ibid.*, paras. 178-179.

¹⁶⁰ *Ibid.*, para. 164

¹⁶¹ In addition, the visit of the Prosecutor and Deputy Prosecutor to the DRC after the surrender of Thomas Lubanga was in the public domain. See:

<http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2006/icc%20prosecutor%20and%20deputy%20prosecutor%20visit%20kinshasa> (*A contrario*, para. 177).

¹⁶² *Ibid.*, paras. 177, 180-185.

¹⁶³ See Defence Motion, paras. 171-172.

¹⁶⁴ Defence Motion, para. 179.

¹⁶⁵ Defence Motion, paras. 171-177.

to eliminate the likelihood of impunity and enforce the rule of law where the national authorities choose not to act. Accordingly, when the Prosecution steps in to fill the gap, that does not create an “appearance of bias”, it is instead the Prosecution performing its role.

96. The remainder of the argument consists primarily of allegations without any proper foundation.¹⁶⁶ At no point does the Defence explain how the Prosecution infringed its statutory obligations once it started the investigation in May 2007, or how it acted in a manner indicating partiality before that date.¹⁶⁷ There is no evidence to support allegations of “concerted action” leading to an improper conduct between the Prosecution and the CAR or DRC authorities to refer the case and prosecute the Accused before the Court.¹⁶⁸ The Appeals Chamber affirmed that “[m]ere knowledge on the part of the Prosecutor of investigations carried out by [domestic] authorities is no proof of involvement on his part in the way they were conducted or the means including detention used for the purpose.”¹⁶⁹

¹⁶⁶ The Prosecution recalls that counsels “shall maintain a high level of competence in the law applicable before the Court”, and “shall not deceive or knowingly mislead the Court” being “personally responsible for the conduct and presentation of the client’s case.” See Code of Professional Conduct for Counsel, Article 7(2) on the “Professional conduct of counsel”, and Article 24 (3) and (2), “Duties toward the Court”, respectively.

¹⁶⁷ The ICTR authorities cited in footnote 114 do not bear any resemblance to the instant case. In addition, the Defence allegations of bias were dismissed by the Appeals Chamber in both cases. In particular, in *Akayesu* Appeals Judgment, the Appeals Chamber dismissed the Defence ground of appeal due to the vague terms of the arguments advanced and to the fact that “at no time does Akayesu explain why Judge Kama would have wanted to protect the Witness under examination and why he believed her in advance. Therefore, the Appeals Chamber cannot address such serious allegations in the absence of any supporting argument.” The Appeals Chamber further notes that the Judge’s impugned comments should have been placed in their proper context (see paras. 204-205).

¹⁶⁸ *A contrario*, Defence Motion, para. 196. The facts and the legal transgressions described in the authorities cited do not bear any resemblance to the current case, therefore those findings cannot be extrapolated to it: in the *C.f.R. v Horseferry Road Magistrates Court ex parte Bennet*, the defendant had been brought back to the United Kingdom in deliberate disregard of the available extradition process and in breach of international law and the domestic law of the State where he had been found. In *R v Mullen* the defendant had also been subject to an unlawful extradition. However, it is noteworthy that in the last case the Court stated that not all infringements would result into a suspension of the proceedings as the seriousness of the crime could outweigh the breach: “nothing in this judgment should be taken to suggest that there may not be cases [...] in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant’s presence within the jurisdiction.”

¹⁶⁹ ICC-01/04-01/06-772 OA4, 14 December 2006, para. 42.

97. Second, the suggestion that the CAR authorities inappropriately renounced to its jurisdiction in favor of the Court, even if true, is largely irrelevant as it is not for the Court to determine the motivations behind a referral nor can the Court force a State to investigate or prosecute.

98. In addition, as the Appeals Chamber has affirmed, not all relinquishments of domestic jurisdiction will trigger the jurisdiction of the Court.¹⁷⁰ The Statute sets out strict requirements and control checks to ensure that only the most heinous and severe crimes within the jurisdiction of the Court and admissible under article 17 will be investigated; and arrest warrant will be requested and issued against the suspect/s person/s; and the charges confirmed before reaching the trial stage.¹⁷¹ The domestic authority cited by the Defence in paragraph 180 supports this proposition.¹⁷²

3. The Accused was lawfully surrendered to the Court

99. The Defence again misrepresents the facts of the case¹⁷³ and speculates on the information presented by the Prosecutor to request a provisional arrest of the Accused pursuant to Article 92 of the Statute.¹⁷⁴

100. First, contrary to the Defence suggestion, ¹⁷⁵ PTC III did not reject the Prosecution's application for issuance of an arrest warrant. It asked for additional information.¹⁷⁶ It then granted the application, on 10 June 2008.¹⁷⁷

¹⁷⁰ *Ibid.*, para. 85.

¹⁷¹ See an explanation on the different evidentiary thresholds at the arrest warrant and confirmation of charges stage in the "Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-73-OA, 3 February 2010, para. 30.

¹⁷² The Defence selectively quoted an extract of the *Sharma v. Brown-Antoine and others*, while disregarding other principles set out in the same authority. In particular, it was stated that: "police officers and prosecutors engaged in the investigation of alleged offences and the initiation of prosecutions [have the duty] to exercise an independent, objective, professional judgment on the facts of each case". In the instant case, the Office of the Prosecutor and the Chambers of this Court have ensured that the statutory provisions before reaching the trial stage have been met.

¹⁷³ Defence Motion, paras. 187-188.

¹⁷⁴ Defence Motion, paras. 189-196.

101. Second, the claim that the provisional arrest request was ill-founded was raised in the PTC¹⁷⁸ and before this Chamber, in the context of detention, and was deemed irrelevant.¹⁷⁹ The same principles (lack of relevance) apply in the instant motion challenging the admissibility of the case and in seeking a permanent stay of the proceedings.

102. On the merits, the Defence does not demonstrate any irregularity in the provisional arrest of the Accused and his subsequent transfer from Belgium a couple of weeks later, much less ensuing prejudice that would render the proceedings unfair. For that reason, the Prosecution further submits that, absent a showing of a proper entitlement or legitimate purpose, the Defence has no right to the disclosure of the sources of the information underlying the application for provisional arrest. Such information does not fall within the purview of Article 67(2) of the Statute or Rule 77 of the Rules. Further, the Prosecution sources are ordinarily covered by Rule 81(2) of the Rules, as their disclosure would affect the Prosecution's further or ongoing investigations.¹⁸⁰

V. Conclusion

¹⁷⁵ Defence Motion, paras. 187-188.

¹⁷⁶ Decision requesting additional information in respect of Prosecution's Application for Warrant of Arrest under Article 58, ICC-01/05-01/08-27, 21 May 2008, reclassified as public pursuant to Decision ICC-0A/05-01/08-20.

¹⁷⁷ Pre-Trial Chamber III, ICC-01/05-01/08-14-tENG. As well as a new warrant of arrest entirely replacing the one issued on 23 May 2008: "Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issue on 23 May 2008", ICC-01/05-01/08-15- tENG.

¹⁷⁸ The Prosecution provided to the Pre-Trial Chamber the arguments supporting its application under Article 92 in an ex-parte hearing on 23 May 2008 (ICC-01/05-T-1-ENG ET WT 23-05-2008)..

¹⁷⁹ The Defence acknowledges this in its Motion, fn. 115. See the Prosecution's submissions in ICC-01/05-01/08-T-18-Red-ENG, p. 13, lines 18-25; p. 14 and p. 15, lines. 1-16. The Chamber stated: "even if there was a lack of information provided to the Defence on this issue, or even if there was incorrect information provided to the Pre-Trial Chamber at the relevant stage in these proceedings, neither of those two factors would invalidate any of the reasons underpinning the Pre-Trial Chamber's decision on the issue of detention as issued on 14 April 2009". ICC-01/05-01/08-T-18-Red-ENG, p. 26, lines 13-17.

¹⁸⁰ ICC-01/05-01/08-T-18-Red-ENG, p. 15, lines 1-4.

103. For all the above-explained reasons, the Prosecution respectfully requests that the Chamber dismiss the Defence Challenge to Admissibility and declare that the case against the Accused is admissible.



Luis Moreno-Ocampo, Prosecutor

Dated this 29th Day of March 2010

At The Hague, The Netherlands