

Annex A



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Date: **1 April 2010**

TRIAL CHAMBER III

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

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

Public Document

**Response by the Legal Representative of Victims to the Defence's Challenge on
Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute
with 102 Annexes Confidential *ex parte* OPCV only
and same Annexes Public Redacted**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL BACKGROUND

1. Via a letter dated 18 December 2004, the authorities of the Central African Republic (the “CAR”) referred to the Prosecution of the International Criminal Court (“the Court”) the situation of crimes against humanity and war crimes allegedly committed in the CAR since 1 July 2002 and falling within the jurisdiction of said Court.¹

2. On 9 May 2008, the Prosecution submitted the “Prosecutor’s Application for Warrant of Arrest under Article 58” before the then Pre-Trial Chamber III now Pre-Trial Chamber II (the “Pre-Trial Chamber”), whereby it sought the issuance of a warrant of arrest against Jean-Pierre Bemba Gombo (“Mr Bemba” or the “Accused”).²

3. On 23 May 2008, the Pre-Trial Chamber issued a Warrant of Arrest against Mr Bemba,³ and said warrant was executed by the authorities of the Kingdom of Belgium, who arrested him on 24 May 2008.⁴

4. On 10 June 2008, the Pre-Trial Chamber issued its “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo”.⁵

¹ See the “Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo”, (Pre-Trial Chamber III), No. ICC-01/05-01/08-14-tENG, 10 June 2008, par. 1, *citing* Annex No. ICC-01/05-16-US-Exp-Anx1-A.

² See the «Prosecutor’s Application for Warrant of Arrest under Article 58”, No. ICC-01/05-01/08-26-Red, 09 May 2008.

³ See the “Warrant of Arrest for Jean Pierre Bemba Gombo”, (Pre-Trial Chamber III), No. ICC-01/05-01/08-1-tENG, 23 May 2008.

⁴ Following the arrest of the Accused, Pre-Trial Chamber III decided to unseal the Warrant of Arrest. See the “Decision to Unseal the Warrant of Arrest for Mr Jean-Pierre Bemba Gombo” (Pre-Trial Chamber III), No. ICC-01/05-01/08-5-tENG, 24 May 2008. After receiving supplementary information by the Prosecution, the Pre-Trial Chamber, on 10 June 2008, issued a new Warrant of Arrest replacing the 23 May 2008 Warrant previously issued against the Accused, and adding to the crimes already set out in said Warrant two further counts of murder, as a crime against humanity and a war crime. See the “Warrant of Arrest for Jean-Pierre Bemba Gombo replacing the Warrant of Arrest issued on 23 May 2008”, (Pre-Trial Chamber III), No. ICC-01/05-01/08-15-tENG, 10 June 2008, par. 10.

⁵ See *supra* note 1.

5. On 15 June 2009, the Pre-Trial Chamber rendered a Decision confirming the charges against the Accused under article 28(a) of the Rome Statute for two counts of crimes against humanity and three counts of war crimes, and thereafter committed him to trial.⁶

6. On 22 July 2009, the Defence filed a request before the Pre-Trial Chamber seeking the disclosure by the Prosecution of documents and correspondence to and from the authorities of the CAR and pertaining to the issue of the Case's admissibility before the Court.⁷

7. On 13 August 2009, the Prosecution responded to the Defence's request cited above by asserting that it had already discharged all its disclosure obligations concerning the issue of admissibility.⁸

8. In a Decision rendered on 18 September 2009, the Single Judge of the Pre-Trial Chamber ruled that, since the Chamber had already confirmed some of the charges brought against the Accused, the Defence had no more *locus standi* to challenge the admissibility of the Case at the pre-trial stage, and therefore dismissed the Defence's 22 July 2009 request for disclosure of documents as moot.⁹

⁶ See the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo" (Pre-Trial Chamber II), No. ICC-01/05-01/08-424, 15 June 2009.

⁷ See the "Requête aux fins de divulgation des éléments pertinents relatifs à l'admissibilité", No. ICC-01/05-01/458, 22 July 2009, par. 7.

⁸ See the "Prosecution's Response to Defence "Requête aux fins de divulgation des éléments pertinents relatifs à l'admissibilité" dated 22 July 2009», No. ICC-01/05-01/08-474, 13 August 2009, par. 9.

⁹ See the "Decision on the "Requête aux fins de divulgation des éléments pertinents relatifs à l'admissibilité" (Pre-Trial Chamber II, Single Judge), No. ICC-01/05-01/08-529, 18 September 2009, par. 14.

9. On 18 September 2009, the Presidency constituted Trial Chamber III (the “Trial Chamber” or the “Chamber”) and transferred the full record of the proceedings against the Accused to said Chamber.¹⁰

10. On 06 October 2009, the Defence filed another request seeking disclosure from the Prosecution of relevant correspondence between the Prosecution and CAR and the Democratic Republic of the Congo (the “DRC”) authorities, the *procès-verbaux* of meetings with national authorities, internal documents, and national court records pertaining to the question of admissibility.¹¹

11. On 12 October 2009, the Prosecution submitted its "Prosecution's Response to Defence 'Requête Aux Fins De Divulgateion' dated 5 October 2009 and Request for a Rule 87(3)(b) Order", wherein, except for one document disclosed pursuant to rule 77 of the Rules of Procedure and Evidence, the Prosecution maintained that it had disclosed all the evidence in its possession relevant to the admissibility of the Case.¹² On that date, the Prosecution also filed a Communication of documents with an attached confidential annex containing a list of disclosed material obtained by the Prosecution from the CAR authorities and provided to the Defence that same day.¹³

12. On 02 December 2009, the Trial Chamber issued the "Decision on the defence application for additional disclosure relating to a challenge on admissibility", refusing the entirety of the Defence's application to obtain additional disclosure by the Prosecution of material in view of an impending admissibility challenge, except for the categories of (1) any relevant correspondence, and (2) the entire dossier on the

¹⁰ See the “Decision constituting Trial Chamber III and referring to it the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*”, (Presidency), No. ICC-01/05-01/08-534, 18 September 2009.

¹¹ See the “Requête aux fins de Divulgateion», No. ICC-01/05-01/08-542, 06 October 2009, par. 12.

¹² See the “Prosecution's Response to Defence "Requête Aux Fins De Divulgateion" dated 5 October 2009 and Request for a Rule 87(3)(b) Order”, No. ICC-01/05-01/08-556, 12 October 2009, par. 12.

¹³ See the “Prosecution's Communication of documents disclosed to the Defence on 9 October 2009 pursuant to Paragraph 12 (c) of the Defence “Requête aux fins de Divulgateion” dated 5 October 2009 and request for non-disclosure order”, & Conf. Anx. A, No. ICC-01/05-01/08-554, 12 October 2009, par. 2.

criminal proceedings before the national criminal courts in Bangui, CAR, both of which were to form the basis of a future *ex parte*, prosecution-only status conference.¹⁴

13. On 09 December 2009, the Trial Chamber issued the “Decision on the Observations on legal representation of unrepresented applicants”¹⁵, wherein it held, *inter alia*, that the Office of Public Counsel for Victims (the “Office” or “OPCV”) shall continue to represent a) the victim applicants it currently represents until the Chamber issues a decision on their application to participate, and b) those victim applicants who have not chosen a legal representative until a decision is made on their application to participate.¹⁶ The Chamber further held that Mrs Douzima Lawson shall continue to represent the victims she represented during the confirmation of charges phase of the case.¹⁷

14. On 14 December 2009, the Trial Chamber rendered a second Decision ordering the Prosecution to disclose to the Defence additional correspondence and court documents from criminal proceedings in Bangui, CAR, due to their relevance in relation to the possible Defence challenge to admissibility.¹⁸

15. On 22 February 2010, the Trial Chamber issued a decision on continuous participation, wherein it held, *inter alia*, that the 54 individuals who were granted the

¹⁴ See the “Decision on the defence application for additional disclosure relating to a challenge on admissibility”, No. ICC-01/05-01/08-632, (Trial Chamber III), 02 December 2009, par. 36.

¹⁵ See the “Decision on the Observations on legal representation of unrepresented applicants”, (Trial Chamber III), No. ICC-01/05-01/08-651, 09 December 2009. Pursuant to Trial Chamber III's instruction, dated 28 January 2010, this document was reclassified as “Public”.

¹⁶ *Idem*, p. 10.

¹⁷ *Idem*, p. 11. Of the applicants granted the status of victims authorised to participate in the pre-trial stage, victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 & a/0467/08 are represented by the Office as Legal Representative.

¹⁸ See the “Second decision on disclosure relating to an admissibility challenge”, (Trial Chamber III), No. ICC-01/05-01/08-655, dated 14 December 2009 and filed on 15 December 2009, paras. 16, 19, & 20.

status of victim at the pre-trial stage shall continue to participate in the proceedings at the trial stage, unless there is an objection for good cause based on new material.¹⁹

16. On 25 February 2010, the Defence submitted a “*Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2)(a) du Statut de Rome*” (the “Admissibility Motion” or “Motion”), of which a public redacted version was filed on 02 March 2010. Pursuant to the Trial Chamber’s subsequent instruction, said Motion was reclassified as confidential.²⁰

17. At the Status Conference of 08 March 2010, the Trial Chamber ordered that the Legal Representatives of Victims be provided with a suitably-redacted copy of the Admissibility Motion, together with the references to all of the relevant documents described therein, unless there are well-founded security reasons for not providing them such material.²¹ The Trial Chamber also ordered, *inter alia*, that the Legal Representatives file their observations on the Motion by 29 March, 2010.²²

18. On 23 March 2010 the Principal Counsel of the OPCV, as Legal Representative of a group of victims (the “Legal Representative”), filed an application to extend the time limit for the submissions of observations on the admissibility proceedings until 1 April 2010²³. The Prosecution and the Defence responded to such application on 25 March 2010.²⁴

¹⁹ See the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants”, No. ICC-01/08-01/05-699, 22 February 2010, p. 21.

²⁰ See the “*Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2)(a) du Statut de Rome*”, No. ICC-01/05-01/08-704-Red2-Conf, 02 March 2010.

²¹ See the Transcript of the Status Conference of 08 March 2010 (Trial Chamber III), No. ICC-01/05-01/08-T-20-Red-ENG, p. 4, lines 9-15, and p. 6, lines 4-14.

²² *Idem*, p. 7, lines 5-14.

²³ See the “Application of the Legal Representative to extend the time limit for the submission of observations with regard to the admissibility proceedings”, No. ICC-01/05-01/08-732, 23 March 2010.

²⁴ See the “Prosecution’s Response to the Legal Representative’s Application for an extension of the time limit for the submission of observations with regard to the admissibility proceedings”, No. ICC-01/05-

19. On 26 March 2010, the Registrar filed a report on the notification of a summary of the Defence's Admissibility Motion to the CAR and the DRC and the Legal Representatives of Victims, pursuant to rule 59 (1) and (2) of the Rules of Procedure and Evidence.²⁵

20. On 29 March 2010 at a Status Conference, the Trial Chamber granted the request by the Legal Representative for an extension of time limit to 1 April 2010 to file a response to the Defence's Admissibility Motion.²⁶

21. On 29 March 2010, the Prosecution filed the "Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute".²⁷ Ms Douzima-Lawson also filed her submission on behalf of victims she represents²⁸.

22. On 31 March 2010, the Legal Representative received from the Prosecution additional documents related to the admissibility challenge and quoted in its response to the Admissibility Motion. Due to the late receipt of such documents, the Legal Representative is unable to rely upon them for the purposes of the present submission

01/08-735, 25 March 2010, and the "Réponse de la Défense à la requête d'extension de délai introduite par le Bureau du Conseil Public pour les Victimes », No. ICC-01/05-01/08-734, 25 March 2010.

²⁵ See the "Registrar's report on the notification of the summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" to the Central African Republic, the Democratic Republic of Congo and the Legal representatives of victims", No. ICC-01/05-01/08-737-Conf, 26 March 2010.

²⁶ See the Transcript of the Status Conference of 29 March 2010, (Trial Chamber III), No. ICC-01/05-01/08-T-21-ENG ET, p. 28, line 4 to p. 30, line 10.

²⁷ See the "Prosecution's Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute", No. ICC-01/05-01/08-739 29-03-2010.

²⁸ See the « Observations de la Représentante légale des victimes à la requête de la Défense en vue de contester la recevabilité de l'affaire conformément aux articles 17 et 19(2)(a) du Statut de Rome », No. ICC-01/05-01/08-740, 29 March 2010.

and therefore she will address any issue pertaining to said documents during the hearing to be held on 27 April 2010.

23. Therefore, the Legal Representative submits the following observations on the Admissibility Motion on behalf of victims a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08, already authorised to participate at trial, and of applicants a/0280/08; a/0456/08; a/0541/08 to a/0543/08; a/0546/08 to a/0552/08; a/0555/08 to a/0557/08; a/0559/08; a/0560/08; a/0511/08 to a/0517/08; a/0562/08 to a/0573/08; a/0574/08 to a/0579/08; a/0582/08 to a/00606/08; a/0624/08; a/0625/08; a/0001/10 to a/0025/10; a/0129/09 to a/0141/09; a/0427/09; a/0428/09; a/0429/09; a/0430/09; a/0431/09 to a/0433/09; a/0651/09 to a/0653/09; a/0661/09 to a/0668/09; a/0155/10; a/0156/10; a/0160/10; a/0162/10 to a/0215/10; a/0297/10 to a/0332/10; as well as on behalf of 178 individuals having filed a request for participation and not having yet been assigned a VPRS number, and on behalf of those victims who have communicated with the Court, pursuant to rule 59(3) of the Rules of Procedure and Evidence.

II. PRELIMINARY MATTERS

A. The Admissibility Motion should be heard by the Trial Chamber

24. The Presiding Judge of the Trial Chamber stated at the hearing of 7 October 2009 that, on a preliminary basis, the Trial Chamber should determine the question “*as to which Chamber, pre-trial or trial, should deal with the substantive application*” of the Defence’s admissibility challenge, and that such issue would be examined following observations by the parties.²⁹ Although no such timetable was set for the parties’

²⁹ See the Transcript of the Hearing of 7 October 2009, (Trial Chamber III), No. ICC-01/05-01/08-T-14-ENG ET, p. 32, line 25 – p. 33 line 21.

submissions, the Legal Representative would like to address this preliminary question in her Response.

25. Article 64 of the Rome Statute sets out the functions and powers of the Trial Chambers of the Court. In particular, article 64(4) states that:

The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.

26. Looking back at the legislative history of the Rome Statute for guidance on the interpretation of article 64(4), “[this paragraph] *was intended to give some flexibility to the Trial Chamber with regard to issues that might more appropriately be dealt with by the Pre-Trial Chamber. Such issues included questions of whether evidence was obtained in accordance with any warrants issued by the Pre-Trial Chamber.*”³⁰ Other commentators have pointed out that “[i]t *may appear in certain circumstances that the pre-trial stage must be completed and the Pre-Trial Chamber is better placed to do so than the Trial Chamber. In other circumstances, it is more effective for the Trial Chamber itself to exercise the prerogatives of the Pre-Trial Chamber. This is a matter of assessing the imperatives of sound administration of justice. [...] The functions, powers, and prerogatives of the Pre-Trial Chamber are mentioned in several articles of the Statute, in particular Articles 56, 57, 58, 60, and 61. Essentially, the Pre-Trial Chamber monitors and facilitates through the orders it possesses, the power to issue the investigations conducted by the Prosecutor, issue arrest warrants against the accused, conduct adequate procedures in the event of arrest, and prepare the public trial. If pre-trial procedure is efficient, the trial itself will run more easily and speedily.*”³¹

³⁰ See BEHRENS (H.J.) “The Trial Proceedings” in LEE (R.S.), *The International Criminal Court - The Making of the Rome Statute, Issues, Negotiations, Results*, Hague/London/Boston, Kluwer Law International, 1999, p. 240.

³¹ See TERRIER (F.) “Powers of Trial Chamber”, in CASSESE (A.), GAETA (P.) & JONES (J. R.W.D)(eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, pp. 1269-1270.

27. Furthermore, the drafters of the Rome Statute resolved to create pre-trial chambers and entrusted the power to settle admissibility challenges with the pre-trial chambers prior to the commencement of the trial since “[t]here had been general agreement that such matters should be referred to the Pre-Trial Chamber during the pre-trial stage and to the Trial Chamber after the charges had been confirmed.”³² Consequently, the proposal of the Preparatory Committee, which had been formulated in 1997 stated that “[p]rior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber”; Said proposal was well received by the Rome Conference.³³ During the debates, the phrase “the confirmation of the indictment” was changed to “the confirmation of the charges” in the paragraph and the final texts were incorporated into article 19 without any controversy.³⁴

28. Providing further support for the conclusion that the trial chamber is the appropriate judicial body to rule on admissibility challenges, rule 60 of the Rules of Procedure and Evidence is very specific in stating that:

³² See Statement of Mr Holmes, Coordinator of the Committee of the Whole, Summary Record of the 11th Meeting, Committee of the Whole (22 June 1998), UN Doc. A/CONF.183/C.1/SR.11, 20 November 1998, par. 21, p. 6.

³³ See the Working Group on Procedural Matters, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1997/WG.4/DP.5, 5 December 1997, p. 2. Rolling text (Article 36), WG on Procedural Matters, 9 December 1997, p. 2. See also the Report of the Working Group on Procedural Matters, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1997/WG.4/CRP.11, 11 December 1997, p. 8. See also the Decisions Taken By the Preparatory Committee at Its Session Held from 1 to 12 December 1997 Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1997/L.9/Rev.1, 18 December 1997, p. 29. See also the Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/L.13, 4 February 1998, p. 45. See also the Draft Statute for the International Criminal Court, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/1998/CRP.8, 2 April 1998, p. 36. See also the Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 44 and Working Paper on Article 17, Committee of the Whole, UN Doc. A/CONF.183/C.1/L.60, 10 July 1998, p. 2.

³⁴ See the Working Paper on Article 17, Committee of the Whole, UN Doc. A/CONF.183/C.1/L.60/Rev.1, 14 July 1998, p. 2 and United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Vol. I, Final documents, UN Doc. A/CONF.183/13, p. 13.

Rule 60. Competent organ to receive challenges

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

29. In light of aforementioned, it is submitted that the combined provisions of articles 19(6), 64(4) of the Rome Statute and rule 60 of the Rules of Procedure and Evidence, when read in conjunction with each other and their legislative history, do not in fact allow the Trial Chamber to refer admissibility challenges back to the Pre-Trial Chamber as one of the “*preliminary issues*.” As a result, the Trial Chamber is the appropriate chamber to rule on the issue of the admissibility of the Case at this stage of the proceedings.

B) The Admissibility Motion was filed outside the allowable time limit pursuant to the applicable texts and jurisprudence of the Court

30. The Legal Representative argues, as a preliminary matter, that the Admissibility Motion is inadmissible because it was submitted outside the allowable time limit pursuant to the provisions of the applicable texts of the Court.

31. In accordance with article 19(4) of the Rome Statute, the admissibility of the case or the jurisdiction of the Court “[m]ay be challenged only once by any person or State referred to in paragraph 2 [of the same provision]. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1(c)” .

32. There is direct, on-point jurisprudence from the Court addressing the *in limine litis* issue of the time frame within which an admissibility challenge must be brought by the defence under article 19 of the Rome Statute. Specifically, Trial Chamber II in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (the “Katanga/Ngudjolo Chui Case”), held that the drafters’ intended definition of the phrase “commencement of the trial” for purposes of article 19(4) of the Statute meant that:

after the confirmation of charges, only challenges based on article 17(1)(c) of the Statute are allowed. The possibility of only bringing challenges based on the alleged violation of the ne bis in idem principle at this stage of the proceedings is explained by the fact that it is only when the charges are confirmed that it is possible to determine whether the case falls within the scope of article 20 of the Statute. Any other challenge to admissibility, whether stemming from the protection of the sovereign right of States to investigate and prosecute in cases of crimes committed by their nationals or in their territory, or from the sufficient gravity of the case, must be made before the confirmation of charges. In other words, it is mandatory for challenges to admissibility based on articles 17(1)(a), (b) or (d) of the Statute to be made before the end of the pre-trial phase.³⁵

33. Specifically, Trial Chamber II described a three-phase approach in respect of challenges to admissibility: a first phase, which runs until the decision on the confirmation of charges is filed, during which time all types of challenges as specified in article 19 of the Rome Statute are admissible; a second phase, running from the filing of the confirmation of charges decision to the constitution of the trial chamber, during which time only challenges based on the *ne bis in idem* principle are allowed; and a third phase, after the constitution of the trial chamber, in which challenges to

³⁵ See the “Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)”, (Trial Chamber II), No. ICC-01/04-01/07-1213-t-ENG, 16 June 2009, par. 47.

admissibility, even if based only on the *ne bis in idem* principle, are permissible solely under exceptional circumstances and with leave of the Trial Chamber.³⁶

34. As a result of the provisions of article 19 of the Rome Statute as interpreted by this jurisprudence,³⁷ and before filing its Admissibility Motion before the Trial Chamber, the Defence should have first of all sought leave to challenge the admissibility of the Case at the trial stage, and in the event that the Chamber had granted leave, demonstrated to the latter that there were “exceptional circumstances” for the Defence’s delay in filing said Motion. Even upon satisfying both prongs mentioned above, the Defence’s admissibility challenge should have still been limited to claims under article 17(1)(c) of the Statute. The Defence’s failure to comply with the procedural requirements as set out in article 19(4) of the Rome Statute, as interpreted by Trial Chamber II militates in favour of rejecting the Admissibility Motion on its face *in limine litis*.

35. Even assuming, *arguendo*, that the Defence had timely asked for leave of the Trial Chamber to file the Admissibility Motion, the Legal Representative submits that any arguments made by the Defence of “exceptional circumstances” would have been deficient. Firstly, the initial request for disclosure of documents which the Defence filed in relation to an admissibility challenge, and upon which the Defence heavily relies to argue that it could not file the challenge prior to obtaining said documents, was itself filed late, on 22 July 2009³⁸ to be precise, and a whole month after the issuance of the Decision on the confirmation of charges. Therefore, even the first Defence request for disclosure of documents was itself conspicuously filed outside of the time limit prescribed by article 19(4) of the Rome Statute. Had an admissibility

³⁶ *Idem*, par. 49.

³⁷ Although Trial Chamber II’s Decision was confirmed on appeal, the Appeals Chamber did not consider it necessary to determine the merits of the Appellant’s claims that the Trial Chamber erred in finding that the challenge to admissibility was filed out of time. See the “the Judgment on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, (Appeals Chamber), No. ICC-01/04-01/07-1497, 25 September 2009, par. 38.

³⁸ See *supra* note 7.

challenge been raised at that point in time, it would have been too late to base it on any grounds except for *ne bis in idem* principle under article 17(1)(c) of the Rome Statute.

36. Secondly, and although the Legal Representative is cognisant of the fact that this Chamber partially granted the Defence's request for divulgation by the Prosecution of certain documents pertaining to admissibility well into the trial stage,³⁹ the judicial decisions rendered by the Bangui, CAR judiciary and which the Defence sought to obtain from the Prosecution are presumably legally accessible to the counsel of the Accused who represented him in such proceedings, as well as to the Accused himself. Even if said previous counsel are not the same as counsel currently representing Mr Bemba before the Court, the latter are in a position to obtain said documents from former counsel, and their own client has a legal right to obtain copies thereof. As the OPCV has previously argued in the *Katanga/Ngudjolo Chui* Case⁴⁰ and as the Defence concedes in its Admissibility Motion,⁴¹ it is the Defence who has the burden of proof, or *onus probandi actori incumbit*, with regard to challenges to admissibility of a case before the Court. As such, it was incumbent upon it, and not the Prosecution, to obtain said judicial decisions from the CAR criminal records registry in order to demonstrate to the Chamber that its admissibility challenge is well-founded. Hence, the Defence's argument that it was not in possession of all relevant documents in order to timely file an admissibility challenge does not constitute "exceptional circumstances" so as to excuse the Defence's delay in filing its Admissibility Motion, which was neither filed prior to the confirmation of charges Decision issued on 15 June 2009, nor prior to the constitution of the Trial Chamber, approximately three months later.⁴²

³⁹ See *supra* note 18.

⁴⁰ See the "Observations of the OPCV on the Defence for Germain Katanga's Motion Challenging the Admissibility of the Case with one Confidential ex parte OPCV only Annex and three Public Annexes", No. ICC-01/04-01/07-1082, 29 April 2009, par. 21.

⁴¹ See *supra* note 20, par. 201.

⁴² See *supra* notes 6 and 10.

37. Another reason given by the Defence for its failure to file its Admissibility Motion on time is that it could not have been aware of the jurisprudence concerning the timing of admissibility challenges set forth by Trial Chamber II in the *Katanga/Ngudjolo Chui* Case, since the Decision on the latter was not rendered until a day after the confirmation of charges Decision was issued in this Case.⁴³ Notwithstanding, the Defence should have been aware of the provisions of article 19(4) of the Rome Statute. As is well-established in national and international criminal law, ignorance of the law is never a defense. Trial Chamber II's jurisprudence on this issue was not a change in the law *per se* so as to not apply to the accused retroactively, but rather it was a judicial interpretation of already existing law, which is legally binding at all times upon all parties and participants who practice before the Court. Thus, "unawareness" of the existing pertinent law governing criminal proceedings is not an argument with any legal basis. Furthermore, the Defence's reasons still fail to provide an explanation as to why it did not file its Admissibility Motion shortly after Trial Chamber II's Decision on admissibility was filed, but instead waited another eight months to do so, thus precluding itself, the Legal Representative submits, from presenting any challenge on admissibility unless leave is granted by this Chamber, and only if exceptional circumstances are shown. As a result of the above, the Legal Representative requests that the Chamber dismiss *in limine litis* the Defence's Admissibility Motion as being filed outside the permissible time limit.

38. Should the Chamber find that the Defence's Admissibility Motion is admissible, the Legal Representative submits the following observations on the substantive issues raised by the Defence.

⁴³ See *supra* note 20, par. 16.

III. THE PRINCIPLE OF *NE BIS IN IDEM* DOES NOT RENDER THE CASE AGAINST THE ACCUSED INADMISSIBLE BEFORE THE COURT

39. Even if the Chamber is not inclined to dismiss the entirety of the Defence's Admissibility Motion on the arguments presented above, the Legal Representative respectfully submits that the Chamber should nevertheless only consider the merits of the Defence's arguments on the issue of *ne bis in idem* pursuant to article 17(1)(c) of the Rome Statute, since it is clear that, at the trial stage, only this type of challenge on admissibility is allowed.⁴⁴

40. Turning to an analysis of article 17(1)(c) of the Rome Statute, which is invoked by the Defence in its Admissibility Motion as being a ground for declaring the Case against the Accused as inadmissible, the provision states that a case is inadmissible if "[t]he person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3". Article 20(3) of the Statute, in turn, states that:

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

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or*
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.*

41. In the event that the *chapeau* of article 20(3) of the Rome Statute is not fulfilled - that is, if the person concerned has not been tried by another court for the same

⁴⁴ See *supra* note 35.

conduct - then subsections (a) and (b) are not relevant to the analysis and no further inquiry into the national proceedings needs to be conducted to determine that the principle of *ne bis in idem* does not apply. The Legal Representative respectfully submits that this is the scenario present in this Case.

42. *Ne bis in idem* is Latin for “not twice the same”, and the principle is closely connected to the other age-old principle of “*res judicata*”, which is Latin for “a thing adjudicated” or an issue that has been definitely settled by judicial decision.⁴⁵ *Ne bis in idem* prohibits double prosecutions or punishments for the same acts for which an accused has already been tried or punished.⁴⁶ Significantly to the issue at hand, this principle applies only in cases where final judgments on the merits of the case have been rendered at trial, such as definitive acquittals or convictions, and does not apply to interlocutory decisions or discontinued prosecutions due to lack of evidence or other premature termination of criminal proceedings that do not possess the “*res judicata*” effect.⁴⁷

43. Application of the *ne bis in idem* principle in the manner described above is well-settled in international humanitarian, human rights and criminal law. While the terminology used to refer to the principle may slightly vary amongst the different instruments cited below, it is clear that they all share a common thread: the concept of *ne bis in idem* requires that the conduct of prior judicial proceedings result in a final judgment on the merits of the case, such as an acquittal or conviction, for the principle to apply.

44. The earliest reference to *ne bis in idem* in international humanitarian law appears in the 1929 Geneva Convention on the Treatment of Prisoners of War, which

⁴⁵ See GARNER (B.A.) (Ed.), *Black’s Law Dictionary*, West Publishing Company, St. Paul, 2000, p. 1052.

⁴⁶ See BALLENTINE (J.A.) *A Law Dictionary – “Words, Terms, Abbreviations, and Phrases Which Are Peculiar to the Law and of Those Which Have A Peculiar Meaning in the Law”*, The Law Book Exchange, Clark, NJ, USA, 2005, p. 332.

⁴⁷ See ONGENA (T.) & WYNGAERT (C.) in CASSESE (A.), GAETA (P.) & JONES (J. R.W.D)(eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 713.

prohibited punishing protected persons more than once for the same act or on the same charge,⁴⁸ said prohibition by and large being reproduced in the 1949 Geneva Conventions III and IV.⁴⁹ The 1977 Protocol Additional I to the Geneva Conventions further elaborated on the principle's application and stated that "*no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure.*"⁵⁰ According to the authoritative guide provided by the International Committee of the Red Cross (the "ICRC"), the intention behind the above-mentioned provision was to prevent a defendant from being "*subjected to a second trial, after the courts of another Party to the conflict or another State have already tried him on the same charges and he has been acquitted or, if he was convicted, has already served his sentence.*"⁵¹ (Emphasis added).

45. The ICRC Commentary reveals that the above provision was drawn from article 14(7) of the International Covenant on Civil and Political Rights,⁵² (the "Covenant") the latter having formally introduced the *ne bis in idem* principle as one of the fair trial guarantees in the international human rights field of law.⁵³ Article 14(7) states that "[n]o one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country", and the Human Rights Committee clarified that the provision "*prohibits*

⁴⁸ See Article 52, Geneva Convention relative to the Treatment of Prisoners of War, 118 LNTS 343, 27 July 1929.

⁴⁹ See Article 86, "*Non bis in idem*", Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 UNTS 135, 12 August 1949. See also PICTET (J.S.) (Ed.), *Commentary on the Geneva Convention III relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 427 The ICRC commented that article 86 "*embodies a well-known legal principle and its inclusion was approved 'unanimously without comment'*"; See also Article 117, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949.

⁵⁰ See Article 75(4)(h), Protocol Additional I to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977.

⁵¹ See SANDOZ (y.), SWINARSKI (C.) and ZIMMERMANN (B.) (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, p. 884.

⁵² *Ibid.*

⁵³ See article 14(7), International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966.

bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence;”⁵⁴ “The prohibition [...] is not at issue if a higher court quashes a conviction and orders a retrial. Furthermore, it does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal.⁵⁵

46. The case of *David Alberto Cámpora Schweizer v. Uruguay* is illustrative of the application of article 14(7) of the Covenant, in that the Human Rights Committee affirmed that the criminal proceedings initiated against David Cámpora in 1971 had not been formally concluded at first instance until the military tribunal pronounced its judgment much later, in 1980, and as such, article 14(7) was not violated since the latter only applies if a person is tried again for an offence for which he has already been finally convicted or acquitted.⁵⁶

47. A later instrument of international human rights law incorporating the *ne bis in idem* principle is the American Convention on Human Rights of 1969, which states that “[a]n accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.”⁵⁷ (Emphasis added). In the case of *Garcia v. Peru*, the Inter-American Commission for Human Rights interpreted this provision as follows:

The language used by the Convention, i.e., ‘accused person acquitted’ implies that someone who, having been charged with a crime, has been exonerated from

⁵⁴ See the Human Rights Committee, General Comment No. 32, Article 14 - Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, par. 54-57.

⁵⁵ *Ibid.* See also the Human Rights Committee, *Marieta Terán Jijón v. Ecuador*, Communication No. 277/1988, UN Doc. CCPR/C/44/D/277/1988 at 76 (1992).

⁵⁶ See the Human Rights Committee, *David Alberto Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, UN Doc. CCPR/C/OP/2 at 90 (1990), par. 18.2. See also the case of *Mirtha Ira Bueno Hidalgo v. Peru*, where the United Nations Working Group on Arbitrary Detention found that “the case at hand does not involve an infringement of the principle non bis in idem, as the communication appears to maintain. In reality, there was only one trial, as the trial which the communication refers to as a “new trial”, as opposed to a “first trial”, did not result in a final acquittal: the acquitted was revoked and a continuation of the trial ordered, eventually resulting in a conviction.” See the UN Working Group on Arbitrary Detention, *Mirtha Ira Bueno Hidalgo v. Peru*, UN Doc. E/CN.4/2001/14/Add.1 at 73 (2000), p. 2.

⁵⁷ See Article 8 (4), American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123, 22 November 1969.

*all criminal responsibility, since he has been acquitted because his innocence has been demonstrated, because his guilt has not been proven, or because it has been determined that the acts of which he is accused are not defined as crimes. [...] In this context, 'judgment' should be interpreted as any procedural act that is fundamentally jurisdictional in nature, and 'non-appealable judgment' as expressing the exercise of jurisdiction that acquires the immutability and incontestability of res judicata.*⁵⁸

48. Similarly, Protocol No. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention"), adopted in 1984, also embraces *ne bis in idem* guarantees in its article 4, which states that "[n]o one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."⁵⁹ According to the Explanatory Report on the European Convention, "the principle established in [article 4] applies [when there has been] a final decision [and] a decision is final 'if, according to the traditional expression, it has acquired the force of res judicata. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.'

⁵⁸ See the Inter-American Commission for Human Rights, *García v. Peru*, Case 11.006, Report No. 1/95, OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 71 (1995), Report N 1/95, Case 11.006, Peru, 17 February 1995. See also Inter-American Court of Human Rights, *La Cantuta v. Perú*, Separate Opinion of Judge Sergio García Ramírez to the Judgment of November 29, 2006 (Merits, Reparations, and Costs), par. 9. Honourable Judge Ramírez noted that "[t]he Inter-American Court –as has also been the case with other international and domestic courts– has laid down certain criteria regarding res judicata and the related principle of ne bis in idem. Res judicata and the principle of ne bis in idem support legal certainty and entail guarantees that are of major importance to all citizens and, specifically, to defendants. However, res judicata involves a judgment carrying that effect: definition of a right, immutability, finality. The guarantee of ne bis in idem is based on that assumption: the prohibition of a new trial based on the same facts that were the subject-matter of a judgment that has the authority of a final judgment (not open to appeal)."

⁵⁹ See the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS. 117, 22 November 1984.

*It follows therefore that a judgment by default is not considered as final as long as the domestic law allows the proceedings to be taken up again.”*⁶⁰

49. In the field of international criminal law, the principle of *ne bis in idem* has developed in similarly uniform fashion as in international humanitarian law, as can be evidenced, for example, from articles 10 and 9 of the Statutes of the International Criminal Tribunal for Former Yugoslavia (the “ICTY”) and the International Criminal Tribunal for Rwanda (the “ICTR”), respectively, both of which provide that no person shall be tried before a national court for acts violating international humanitarian law and for which he or she has already been tried by the International Tribunal.⁶¹

50. The case of *Prosecutor v. Dusko Tadic* before the ICTY is a good example of the application of this principle in international criminal law. The Defence asserted in that case that a trial against the accused had already begun in Germany where he was first arrested, and that therefore *non bis in idem*, as the principle was referred to, precluded his later prosecution at the ICTY.⁶² Although the trial chamber acknowledged that the German authorities had issued an indictment against the accused before they decided to defer the case to the ICTY, it held the deferral of the case to that court took place well before any trial of the accused in Germany on the same charges.⁶³ As such, the trial chamber found that, “*while the proceedings may have passed beyond the purely investigative phase, it is undisputed that the accused had not been tried in the full sense; he was neither convicted nor acquitted by the German Court.*”⁶⁴ In further discussing this principle, the chamber pointed out that the proceedings which had been commenced against the accused in Germany did not constitute a trial, and that the Statute’s *ne bis*

⁶⁰ See the Explanatory Report of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, paras. 22, 26, and 29. This report is available at the following address: <http://conventions.coe.int/Treaty/EN/Reports/HTML/117.htm> (last visited on 22 March 2010).

⁶¹ See the Statute of the ICTY, UN Doc. S/RES/827 (1993), and the Statute of the ICTR, UN Doc. S/RES/955 (1994).

⁶² See the ICTY, *Prosecutor v. Dusko Tadic*, “Decision on the Defence Motion on the Principle of non bis in idem”, Trial Chamber, Case No. IT-94-1-T, 14 November 1995, paras. 4-7.

⁶³ *Idem*, par. 8.

⁶⁴ *Ibid.*

in idem provision applies only to cases where an accused had already been tried. Since the accused was not the subject as yet of a judgment on the merits on any of the charges for which he had been indicted, the chamber found that he had not yet been “tried” for purposes of the *non bis in idem* principle.⁶⁵

51. This holding in the *Tadic* case was later approvingly followed by the appeals chamber of the ICTR in *Prosecutor v. Laurent Semanza*, where, similarly, the appeals chamber held that that “[t]he non bis in idem principle applies only where a person has effectively already been tried. The term ‘tried’ implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a final judgement is rendered.”⁶⁶

52. With such consistently uniform interpretation of the *ne bis in idem* principle in international law, it is not surprising that the drafting of article 20(3) of the Rome Statute closely followed the approach developed by the conventions and instruments discussed above. In 1994, the International Law Commission developed the first draft of article 20, then article 42 of the Rome Statute, and the commentary thereto explained that:

(3) *The non bis in idem principle applies both to cases where an accused person has been first tried by the International Criminal Court, and a subsequent trial is proposed before another court, and to the converse situation of a person*

⁶⁵ *Idem*, paras. 9-12.

⁶⁶ See ICTR, *Prosecutor v. Laurent Semanza*, Decision, Appeals Chamber, Case No. ICTR-97-20-A, 31 May 2000, par. 74, citing *Prosecutor v. Dusko Tadic*, “Decision on the Defence Motion on the Principle of non bis in idem”, *supra* note 56, paras. 911, 24, 22. See also ICTR, *Prosecutor v. Alfred Musema*, “Decision on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Alfred Musema”, (Trial Chamber), Case No. ICTR-96-5-D, 12 March 1996, p. 4; See also ICTR, *Prosecutor v. Theoneste Bagosora*, “Decision on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Criminal Tribunal for Rwanda in the Matter of Theoneste Bagosora”, (Trial Chamber), Case No. ICTR-96-7-D, 17 May 1996, p. 4. See also ICTR, *Prosecutor v. Joseph Nzabirinda*, “Sentencing Judgement”, Case No. ICTR-2001-77-T, 23 February 2007, paras. 45-47. See also the ICTY, *Prosecutor v. Radovan Karadzic*, “Decision on the Accused’s Motion for Finding of Non-Bis-In-Idem, Trial Chamber”, Case No. IT-95-5/18-T, 16 November 2009, paras. 10-13.

*already tried before some other court and subsequently accused of a crime under the Statute. In both situations, the principle only applies where the first court actually exercised jurisdiction and made a determination on the merits with respect to the particular acts constituting the crime, and where there was a sufficient measure of identity between the crimes which were the subject of the successive trials.*⁶⁷ (Emphasis added).

53. At the time of the debates by the Ad Hoc Committee over the Draft Statute, several delegates, including those from the United States, the Netherlands and Finland, noted that the *ne bis in idem* principle should apply only when a judgment has been reached,⁶⁸ “not [when] proceedings [are] discontinued for merely technical reasons,”⁶⁹ and further “should not be construed in such a way as to permit criminals to escape any procedure.”⁷⁰ In fact, the President of the ICTY presented the *Tadic* case law discussed above to the Preparatory Committee as a contribution to the development of article 20 of the Rome Statute.⁷¹

54. In summary, article 20(3) of the Rome Statute preserved in intact form the traditional concept of *ne bis in idem*, except in those cases where the Statute specifically

⁶⁷ See the Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/10, p. 117-118. See also the Report of the International Law Commission on the work of its forty-fifth session, UN Doc. A/48/10, pp. 120-121.

⁶⁸ See the U.S. Non-Paper on Rules of Investigation, Procedure, and Evidence for the International Criminal Court, 21 August 1995, pp. 18-19. This document is available at the following address: <http://www.legal-tools.org/en/doc/9d2452/> (last visited on 22 March 2010).

⁶⁹ See the Statement by the delegation of Finland, “Ne bis in idem”, 2 April 1996, p. 2. This document is available at the following address: <http://www.legal-tools.org/en/doc/d2f10d/> (last visited on 22 March 2010).

⁷⁰ See Report of the Preparatory Committee on the Establishment of an International Criminal Court Volume I (Proceedings of the Preparatory Committee during March-April and August 1996), UN Doc. A/51/22, 13 September 1996, p. 39.

⁷¹ See the Memorandum of the International Criminal Tribunal for the Former Yugoslavia, “Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal’s Jurisprudence”, 22 March 1996, pp. 3-4. The Memorandum states that: *Prohibition against Double Jeopardy (Non-bis-in-idem) 28. So far, only Trial Chamber II [in the Tadic case] has addressed this question. It ruled that an investigation proceeding by a national authority leading to an indictment already filed against the accused has not progressed so far that the accused has actually been tried as that term is used in the Statute.”* P. 15. This document is available at the following address: <http://www.coalitionfortheicc.org/documents/Memorandum.pdf>.

mandates the exercise of jurisdiction by the Court over a case notwithstanding prior proceedings in a State.⁷² Schabas further commented that “[t]he test as to whether the national trial proceedings were legitimate is slightly different from the ‘unable or unwilling genuinely’ standard of Article 17, which applies with respect to pending or completed investigations and pending prosecutions. If a domestic trial has already been completed, the judgment is a bar to prosecution by the Court except in the case of sham proceedings.”⁷³

55. Moreover, article 20(3) of the Rome Statute itself has served as a model for other criminal courts having jurisdiction over crimes of genocide, war crimes and crimes against humanity, such as the Special Panels for Serious Crimes of East Timor, which were established by the United Nations in 1999. Indeed, said court has ruled that the language used for the *ne bis in idem* principle contained in Section 11 of its constitutive instrument⁷⁴ is substantially the same as the one found in article 20 of the Rome Statute, and that the concept only applies at the time of trial, not before.⁷⁵ In yet another decision, the Special Panels held that a court’s previous order, which had dismissed the case against the accused due to defects in the indictment, was “*not a judgment of acquittal rendered after trial, but a decision taken in camera without trial*”, and thus the *ne bis in idem* principle did not bar the later prosecution before the Special Panels.⁷⁶

⁷² See the Report of the Informal Group on Judicial Cooperation and Enforcement, Preparatory Committee on the Establishment of an International Criminal Court, UN Doc. A/AC.249/CRP.17, 27 August 1996, p. 29.

⁷³ See SCHABAS (W.A.), *An Introduction to the International Criminal Court*, Cambridge University Press, Third Edition, 2007, p. 192.

⁷⁴ See the United Nations Transitional Administration in East Timor, UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UN Doc. UNTAET/REG/2000/15, 6 June 2000.

⁷⁵ See the Special Panels for Serious Crimes, *The Deputy General Prosecutor for Serious Crimes v. Wiranto et al*, Legal Ruling Concerning the Applicability of Ne Bis In Idem at the Arrest Warrant Stage of the Proceedings, Case No. 05/2003, 5 May 2005, par. 19. This decision is available at the following address: <http://socrates.berkeley.edu/~warcrime/ET-Docs/CE-SPSC%20Interlocutory%20and%20Post-Trial%20Decisions/2003/05-2003%20Decision%20Ne%20bis%20in%20idem.pdf> (last visited on 23 March 2010).

⁷⁶ See the Special Panels for Serious Crimes, *The Deputy General Prosecutor for Serious Crimes v. Francisco Pedro & Apolinario dos Santos*, Court Decision on Defense Motion to Partially Dismiss the Indictment, Case 1/2001, 11 February 2005, p. 2. This decision is available at the following address: <http://socrates.berkeley.edu/~warcrime/ET-Docs/CE-SPSC%20Interlocutory%20and%20Post-Trial%20Decisions/2003/05-2003%20Decision%20Ne%20bis%20in%20idem.pdf>

56. The above analysis of instruments and jurisprudence of international law, as well as the explicit wording and legislative history of article 20(3) of the Rome Statute, leave no doubt that the scope of the *ne bis in idem* principle in criminal law is confined to situations where trial proceedings result in a judgment that goes to the merits of the innocence or guilt of the accused, such as a conviction or acquittal. Any proceedings short of that, the Legal Representative submits, are not sufficient to trigger an inquiry into subsections (a) or (b) of article 20(3), since the case was not “*tried by another court*”, as the meaning of that phrase has been widely and uniformly interpreted in international law.

IV. THE FACTS SHOW THAT THE CAR CRIMINAL PROCEEDINGS AGAINST THE ACCUSED WERE PREMATURELY ABANDONED BEFORE A JUDGMENT WAS RENDERED ON THE MERITS OF HIS INNOCENCE OR GUILT AT TRIAL

57. The facts alleged by the Defence in support of its *ne bis in idem* arguments arise out of the criminal investigation conducted against the Accused in Bangui, CAR for allegedly the same conduct as the charges he currently faces before the Court. The Defence highlights that in August 2004, the charges brought in Bangui, CAR pursuant to a warrant of arrest issued against the Accused were sought dismissed for lack of evidence.⁷⁷ In essence, the Defence argues that the order granting said request of “*non-lieu partiel*”, or partial discharge, and issued by the “*doyen des juges d’instruction*” put an end to the case against the Accused in the CAR for the same allegations constituting the current charges against him before the Court, and thus that the principle of *ne bis in idem* prohibits his prosecution by the latter.⁷⁸

[Trial%20Decisions/2001/01-2001%20Decision%20on%20Motion%20to%20Partially%20Dismiss%20Indictment.pdf](#) (last visited on 23 March 2010).

⁷⁷ See *supra* note 20, par. 122.

⁷⁸ *Idem*, paras. 126-127.

58. Notwithstanding the Defence's interpretation of the facts, the Pre-Trial Chamber reached a much different conclusion upon applying its discretionary power in June 2008 to review the admissibility of the Case against the Accused in its Decision on the Prosecutor's application for a warrant of arrest.⁷⁹ After taking into account original and supplementary information provided by the Prosecutor,⁸⁰ not only did the Pre-Trial Chamber find that there was nothing indicating that the Accused had already been tried at the national level, but quite contrarily, the Pre-Trial Chamber ruled 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.*"⁸¹

59. Indeed, the "*Ordonnance de non-lieu partiel*" issued by the "*doyen des juges d'instruction*" held the diplomatic immunity of the Accused as the reason for discharge of the charges against him.⁸² The Pre-Trial Chamber held that this constituted abandonment before completion of the prosecution against him by the national authorities,⁸³ and not a final disposition of the case on the merits, as the Defence claims. As the Legal Representative previously argued, the bar from double prosecution imposed by the *ne bis in idem* principle necessitates the precondition of the existence of a judgment on the merits of the innocence or guilt of the accused, such as one resulting in a conviction or acquittal. Clearly, a mere dismissal of charges by a lower-level court due to the diplomatic immunity of an accused is not in any way the equivalent of nor has the necessary non-appealable judicial impact of a final judgment rendered at trial on the merits of the charges brought against him or her. Therefore,

⁷⁹ See the "Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo", (Pre-Trial Chamber III), No. ICC-01/05-01/08-14-tENG, 10 June 2008, par. 21.

⁸⁰ See the "Prosecutor's Submission on Further Information and Materials", No. ICC-01/05-01/08-29-Red, filed 15 December 2009.

⁸¹ See *supra* note 1, par. 21.

⁸² See the «*Ordonnance de non lieu partiel et de renvoi devant la cour criminelle*» (Doyen de Judges d'Instruction), 16 September 2004, CAR-OTP-0019-0137, EVD-P-01319, p. 11; See also the Report of the FIDH Legal Action Group (LAG), FIDH and the situation in the Central African Republic before the International Criminal Court, The case of Jean-Pierre Bemba Gombo, FIDH, July 2008 - N°502a, available at the following address: <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p. 12 (last visited 19 March 2010).

⁸³ See *supra* note 1.

the Legal Representative respectfully submits that the facts argued by the Defence in its Admissibility Motion do not support a dismissal of this Case before the Court based on the principle of *ne bis in idem* pursuant to article 17(1)(c) of the Rome Statute.

V. ARTICLE 17(1)(b) OF THE STATUTE DOES NOT RENDER THE CASE INADMISSIBLE BEFORE THE COURT SINCE THE CAR AUTHORITIES NEVER DECIDED NOT TO PROSECUTE THE ACCUSED

60. The Legal Representative would like to reiterate her previous argument that, even if the Chamber is inclined to consider the Defence's admissibility challenge without first requiring it to show exceptional circumstances pursuant to article 19(4) of the Statute, the only ground for which the Defence can raise an admissibility challenge at the trial stage is under article 17(1)(c) of the Rome Statute. However, for the sake of thoroughness, the Legal Representative will address the Defence's substantive arguments in its Admissibility Motion based on article 17(1)(b) of the Rome Statute.

61. According to the Defence, the Case before the Court is inadmissible pursuant to article 17(1)(b) of the Rome Statute because there was a previous investigation by the Bangui, CAR authorities into the same conduct comprising the current charges against the Accused before the Court, the national authorities decided not to prosecute the Accused, and there was no real incapacity or unwillingness to prosecute him, but only a willingness that was circumscribed in time so as not to harm the delicate nature of the then-existing diplomatic relations between the CAR and the DRC.⁸⁴

62. Article 17(1)(b) of the Rome Statute states that:

⁸⁴ See *supra* note 20, paras. 69-89.

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

[...]

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

63. The Legal Representative submits that the facts *sub-judice* make it unnecessary to look beyond the first part of sub-paragraph (b) of article 17(1), since the CAR authorities never decided not to prosecute the Accused. According to the Appeals Chamber Decision on the defence's admissibility challenge in the *Katanga/Ngudjolo Chui* Case, article 17(1)(b) of the Rome Statute "*comprises two cumulative elements that have to be fulfilled for a case to be inadmissible: the case must have been investigated, and the State having jurisdiction must have 'decided not to prosecute'.*"⁸⁵ It is only when and if a State having jurisdiction has decided not to prosecute that one must next look to sub-paragraphs (a) and (b) of article 17(1)(b) to examine the questions of inability and unwillingness.⁸⁶

64. In analysing the relevant facts in the *Katanga/Ngudjolo Chui* Case, the Appeals Chamber made the following conclusions:

Although [...] the Auditeur Général decided to close domestic proceedings against the Appellant, this decision was not a decision not to prosecute in terms of article 17(1)(b) of the statute. It was, rather, a decision to surrender the Appellant to the Court and to close domestic investigations against him as a result of that surrender. The thrust of this decision was not that the Appellant

⁸⁵ See *supra* note 37, par. 82.

⁸⁶ *Idem*, par. 78.

should not be prosecuted, but that he should be prosecuted, albeit before the International Criminal Court.

[...]

If the decision of a State to close an investigation because of the suspect's surrender to the Court were considered to be a 'decision not to prosecute', the peculiar, if not absurd, result would be that because of the surrender of a suspect to the Court, the case would become inadmissible. In such scenario, neither the state nor the ICC would exercise jurisdiction over the alleged crimes, defeating the purpose of the Rome Statute. Thus, a 'decision not to prosecute' in terms of article 17(1)(b) of the Statute does not cover decision of a State to close judicial proceedings against a suspect because of his or her surrender to the ICC.⁸⁷

65. Analogously, the “*chambre d'accusation*” of the appeals chamber in Bangui, CAR and later as a result of a “*pourvoi*”, the “*cour de cassation*”, both ordered a severance of the national proceedings so that the Accused, among others, could be referred to the Court for prosecution, with the “*cour de cassation*” noting that the warrants of arrest against the Accused and others had been the only concrete actions taken in the proceedings and that the national authorities had not conducted a serious investigation into the charges alleged.⁸⁸ Indeed, the situation in the CAR was referred to the Prosecution of the Court by the CAR national authorities in December 2004 for investigation into war crimes and crimes against humanity allegedly committed by the Accused and others.⁸⁹

⁸⁷ *Idem*, paras. 82-83.

⁸⁸ See the «Arrêt d'infirmité partielle de non lieu, de disjonction et de renvoi devant la Cour Criminelle, de la Chambre d'Accusation N021 du 16 Decembre 2004 », (Chambre d'Accusation), CAR-OTP-0004-0148, EVD-P-02749, 16 December 2004; See the «Arrêt du 11 avril 2006 de la Chambre Criminelle de la Cour de Cassation; *Affaire Etat Centrafricain c. Ange Félix Patassé et Autres*» (Cour de Cassation), CAR-OTP-0019-0258, EVD-P-01327, 11 April 2006, p. 3.

⁸⁹ See *supra* note 1, par. 1.

66. The Defence's arguments concerning the ability and willingness of the CAR authorities to investigate and prosecute the Accused are therefore irrelevant, since such elements do not come into play in an analysis of article 17(1)(b) of the Statute unless a State has investigated a case and has then made the decision not to prosecute, a scenario which is not supported by the facts in this Case; quite to the contrary, there is ample evidence to the effect that the highest judicial bodies, such as the "*cour de cassation*", as well as the CAR national government all intended for the Accused to be prosecuted at the international level by the Court for the alleged crimes committed in that country. Therefore, the Legal Representative respectfully submits that the Admissibility Motion should likewise be dismissed on this ground.

VI. THE DEFENCE'S CLAIMS THAT THE CASE IS NOT OF SUFFICIENT GRAVITY TO JUSTIFY ACTION BY THE COURT ARE WHOLLY UNFOUNDED

67. The Legal Representative would like to reiterate her previous argument that, even if the Chamber is inclined to consider the Defence's admissibility challenge without first requiring it to show exceptional circumstances pursuant to article 19(4) of the Statute, the only ground for which the Defence can raise an admissibility challenge at the trial stage is under article 17(1)(c). However, for the sake of thoroughness, the Legal Representative will address the Defence's substantive arguments in its Admissibility Motion based on insufficient gravity of the charges pursuant to article 17(1)(d) of the Statute.

68. With respect to the criteria to be considered when determining the gravity of charges in a case for purposes of admissibility, the Appeals Chamber in the Situation of the DRC has rejected applying a rigidly-fixed definition of what constitutes sufficiently grave charges.⁹⁰ The Defence's contention that the number of crimes alleged in this Case barely satisfies the standard for gravity of charges is therefore

⁹⁰ See the "Judgement on the Prosecutor's appeal against the decision of the Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58" (Appeals Chamber), No. ICC-01/04-169, 23 September 2008, par. 33.

inapposite. Moreover, such a claim is directly contradicted by the Prosecution's allegations about the crimes perpetrated by the troops controlled by the Accused, allegations which were found by the Pre-Trial Chamber to be substantiated in its Decision on the confirmation of charges.⁹¹ In particular, the Pre-Trial Chamber agreed with the following version of the facts presented by the Prosecution during the confirmation of charges hearing:

*(...) the MLC troops perpetrated mass rapes, mass looting and killings against the CAR civilian population in specific locations as they advanced in, and retreated out of the CAR. These locations include but are not limited to Bangui - PK 12, Boy- Rabé, Fou (also written as Fouh) - Mongoumba, Bossangoa, Damara, Bossembélé, Sibut, Bozoum and Bossempélé. (...) The MLC troops committed the crimes alleged in Counts 1, 3 and 7 by targeting a large number of civilian victims.*⁹²

69. The above description of the scope, scale and nature of the crimes allegedly committed by the troops controlled by the Accused can hardly be said to be "extremely weak" or not amounting to grave crimes, as the Defence argues,⁹³ but rather, said crimes fall squarely within the genre of criminal offenses which have consistently been viewed as having sufficient gravity to be brought before the Court for prosecution.

70. The Defence's arguments on the gravity of the charges against the Accused additionally rest on the assumption that the mode of liability under article 28(a) of the Statute and for which the Pre-Trial Chamber confirmed the charges against the Accused⁹⁴ is somehow linked to the gravity of the charges he faces before the Court.⁹⁵

⁹¹ See *supra* note 6, par. 117.

⁹² *Idem*, par. 116, citing the "Prosecution's Submission of Amended Document Containing the Charges, Amended List of Evidence and Amended In-Depth Analysis Chart of Incriminatory Evidence", Annex 3, No. ICC-01/05-01/08-395-Anx3, paras. 38 and 40.

⁹³ See *supra* note 20, par. 137.

⁹⁴ See *supra* note 6.

Such assumption is not only incorrect, but it flies in the face of the clearly separate nature of these two elements of the Rome Statute.

71. *A fortiori*, the fact that the Pre-Trial Chamber confirmed a mode of liability for the Accused based on article 28(a) of the Rome Statute cannot in and of itself be a reason to invoke insufficiency of gravity of the charges against him as grounds for inadmissibility; to maintain otherwise, as the Defence attempts to do, would render said article meaningless and would have the paradoxical effect of rendering any crimes which otherwise fall within the jurisdiction of the Court inadmissible under article 17(1)(d) of the Rome Statute if they are confirmed under the mode of liability for commanders and other superiors prescribed under article 28 of the Rome Statute. This could never have been the intended result of the drafters of the Rome Statute, and such argument is therefore completely devoid of merit. Therefore, and for the reasons mentioned above, the Legal Representative submits that the Defence has failed to establish that the Case against the Accused is inadmissible due to the lack of gravity of the charges brought against him by the Prosecution.

VII. THE ABUSE OF PROCESS ALLEGATIONS BY THE DEFENCE LACK ANY EVIDENTIARY FOUNDATION AND ARE NOT SUFFICIENTLY EGREGIOUS TO CONSTITUTE A DEROGATION OF THE JUDICIAL PROCESS SO AS TO REBUT THE PROSECUTORIAL PRESUMPTION OF REGULARITY

72. Finally, the Defence raises allegations of abuse of process in its Admissibility Motion and maintains that the proceedings against the Accused should also be dismissed on this basis, having rendered impossible the ability of the Accused to have a fair trial before the Court.⁹⁵ The Defence's claims are based on the following allegations: 1) that the Prosecution retained evidence by not recording the content of meetings with political and judicial CAR authorities, such information being essential

⁹⁵ See *supra* note 20, paras. 142-145.

⁹⁶ See *supra* note 20, par. 198.

to the Defence's case and 2) that political interferences in the Case present a risk that the Prosecution witnesses may have been pressured by political adversaries of the Accused to testify against him before the Court.⁹⁷

73. As the Defence concedes⁹⁸, and as is well established by international criminal law jurisprudence, the burden of showing that there has been an abuse of process in criminal proceedings rests with the accused,⁹⁹ and the minimum evidentiary threshold that is necessary to prove such allegations is that of "*prima facie*" evidence.¹⁰⁰

74. Since abuse of process is considered to be "*a very serious allegation*",¹⁰¹ not every human rights violation falls within the purview of the abuse of process doctrine; such violations must instead be sufficiently grave to reach "*a certain threshold level to constitute an abuse of process.*"¹⁰² The jurisprudence by international criminal law tribunals has consistently held that such threshold level is only met when the human rights of the Accused are violated in a "*serious and egregious [manner, which] would*

⁹⁷ *Idem*, paras. 199-200.

⁹⁸ *Ibidem*, par. 202.

⁹⁹ See the ICTR, *Prosecutor v. Jean-Paul Akayesu*, (Appeals Chamber), Appeals Judgment, Case No. ICTR-96-4-T, 1 June 2001, par. 340.

¹⁰⁰ See the ICTR, *Prosecutor v. Pauline Nyiramasuhuko*, Decision on Defence Motion for A Stay of Proceedings and Abuse of Process, (Trial Chamber), Case No. ICTR-97-21-T, 20 February 2004, par. 25. The Chamber dismissed the Defence motion alleging abuse of process since the Defence failed to give "*even a prima facie evidence of the Accused's prejudice.*"

¹⁰¹ See the SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao*, Decision on Defence Motion Seeking a Stay of the Indictment and Dismissal of All Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently), (Trial Chamber), Case No. SCSL-04-15-T, 6 December 2007, par. 18.

¹⁰² See the SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts, (Trial Chamber), Case No. SCSL-04-16-PT, 31 March 2004. The Chamber held that "*the rights of the accused must reach a certain threshold level to constitute an abuse of process. A finding of impropriety on the part of one party may, however, contribute to the ultimate finding that a violation of the rights of an accused has reached a threshold as to undermine the integrity of the proceedings.*" par. 26. See also ICTY, *Prosecutor v. Juvénal Kajelijeli*, (Appeals Chamber), Appeals Judgment, Case No. ICTR-98-44A-A, 23 May 2005. The Appeals Chamber held that "*the Appellant's rights were in fact violated during his initial arrest and detention prior to his initial appearance. However, even if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction.*" Par. 206, p.71.

prove detrimental to the court's integrity."¹⁰³ Some examples of what constitutes "serious and egregious" violations of human rights of an accused according to this jurisprudence include cases where an accused is very seriously mistreated, as when he or she is subjected to inhuman, cruel or degrading treatment or torture, before being handed over to the tribunal or court,¹⁰⁴ when the accused is subjected to "brutal" or "shocking" treatments,¹⁰⁵ or when he or she is illegally detained for nearly eight years under an invalid law that was applied retroactively.¹⁰⁶ The Special Court for Sierra Leone has also held that the prejudice of an alleged abuse of process violation upon the integrity of the judicial process is of paramount importance in the analysis thereof, since "the focus is less on the interests of the parties [but] more on the integrity of judicial decision making as a whole."¹⁰⁷

75. The Appeals Chamber in *The Prosecutor v. Thomas Lubanga Dyilo* (the "Lubanga Case") has held that admissibility is the only ground contemplated by the Statute pursuant to which the Court may validly refrain from assuming or exercising jurisdiction in a case, abuse of process not being listed among the grounds for

¹⁰³ See the ICTY, *Prosecutor v. Juvénal Kajelijeli*, (Appeals Chamber), Appeals Judgment, Case No. ICTR-98-44A-A, 23 May 2005, par. 206, citing *ICTR, Prosecutor v. Jean-Bosco Barayagwiza*, (Appeals Chamber), Decision, Case No. ICTR-97-19-DP, 3 November 1999, par. 74.

¹⁰⁴ *Ibid*, citing the ICTY, *Prosecutor v. Dragan Nikolić*, "Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal", (Trial Chamber), Case No. IT-94-AR72, 9 October 2002, para. 114, affirmed by *Prosecutor v. Dragan Nikolić*, "Decision on Interlocutory Appeal Concerning Legality of Arrest", (Appeals Chamber), Case No. IT-94-2-AR73, 5 June 2003, paras. 28-30. See also the ICTY, *Prosecutor v. Slobodan Milosevic*, Decision on Preliminary Motions, (Trial Chamber), 8 November 2001, par. 48-51.

¹⁰⁵ See the ICTY, *Le Procureur c/ Mile Mrksic, Miroslav Radic, Veselin Sljivancanin, Slavko Dokmanovic*, Décision relative à la requête aux fins de mise en liberté déposée par l'accusé Slavko Dokmanovic, (Trial Chamber), 22 October 1997, par. 75.

¹⁰⁶ See the ECCC, *Co-Prosecutors v. Kaing Guek Eav alias "Duch"*, Decision on the Request for Release, (Trial Chamber), Case File No. 001/18-07-2007/ECCC/TC, 15 June 2009. The ECCC held that "[t]he accused has been illegally detained nearly eight years under invalid provisions as the law relied by the judicial authorities were applied retroactively in violation of the rights of the accused under domestic and international law (his internationally recognized right to trial within a reasonable time and detention in accordance with the law)", paras. 19 - 21.

¹⁰⁷ See the SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, "Written Reasons for the Trial Chamber's Oral Decision on the Defence Motion on Abuse of Process due to the Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity as to Several Counts", (Trial Chamber), Case No. SCSL-04-16-PT, 31 March 2004, par. 26.

relinquishing jurisdiction under article 17 of the Statute.¹⁰⁸ However, the Appeals Chamber acknowledged that when *“breaches of the rights of the accused [...] make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.”*¹⁰⁹

76. The Appeals Chamber has likewise set a high bar similar to the one described in the jurisprudence of other international criminal tribunals for the kinds of violations that may constitute an abuse of process. It remarked that valid claims of abuse of process should *“signif[y] derogation from the judicial process evidenced by the facts and circumstances”*,¹¹⁰ such as when there is *“delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.”*¹¹¹ The Appeals Chamber emphasised that *“[n]ot every infraction of the law or breach of the rights of the accused in the process of bringing him/her to justice will justify stay of proceedings. The illegal conduct must be such as to make it otiose, repugnant to the rule of law to put the accused on trial.”*¹¹²

77. Additionally, and without at least a *prima facie* showing of the types of egregious and serious human rights violations described above, the allegations of abuse of process will not be sufficient to rebut the “presumption of regularity” accorded to the prosecution. In this context, the Special Court for Sierra Leone has held that:

neither the lawful exercise of the powers of the Prosecutor to bring an indictment which is based upon the alleged commission of crimes within the jurisdiction of the Special Court for Sierra Leone nor the approval of such an

¹⁰⁸ See the “Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006”, (Appeals Chamber), No. ICC-01/04-01/06-772 AO4, 14 December 2006, par. 34.

¹⁰⁹ *Idem*, par. 39.

¹¹⁰ *Idem*, par. 27.

¹¹¹ *Idem*, par. 36.

¹¹² *Idem*, par. 30.

*indictment by an Judge of the Special Court in accordance with the Statute and Rules would, and indeed could, constitute an abuse of process. The veiled suggestion that the designated Judge may have contributed to the alleged abuse of process is objectionable, particularly when there is no evidence put forward to rebut the presumption of regularity. Counsel is admonished that such submissions, depending on the facts and circumstances, may well border on contempt of court.*¹¹³

78. The ICTR has further held that when an accused raises mere allegations that are “not supported by any evidence [...] [t]he prosecutorial functions under the Statute are presumed to be exercised regularly.”¹¹⁴ Yet other national supreme courts have likewise held that such presumption “cannot be weakened by mere challenge, whether expressly or by necessary implication”, and further that “impermissible speculation no more amounts to evidence to satisfy the preliminary evidential burden in the present circumstances than it may serve to require the submission of a defence to or its consideration by the trier of fact in another [...]”.¹¹⁵

79. The Defence’s claims of abuse of process allegedly causing prejudice to the Accused are not supported by a scintilla of evidence, thereby failing to satisfy the requisite *prima facie* standard of proof. Indeed, the Defence’s section on abuse of process in its Admissibility Motion does not provide any details or material in support of the alleged facts underlying such grounds for dismissal of the Case against the Accused. It merely makes general accusations and speculates as to theoretical prejudices to the Accused without providing any factual or legal basis thereof. In a

¹¹³ See *supra* note 107, par. 30.

¹¹⁴ See the ICTR, *Prosecutor v. André Rwamakuba*, Decision on Defence Motion for Stay of Proceedings, (Trial Chamber), Case No. ICTR-98-44C-PT, 3 June 2005, par. 41, citing the ICTY, *Prosecutor v. Delalic et al.*, (Appeals Chamber), Appeals Judgment, 20 February 2001, par. 611; the ICTR, *Prosecutor v. Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, (Trial Chamber), Case No. ICTR-98-44-PT, 14 February 2005, par. 28.

¹¹⁵ See the Ontario Supreme Court, *R. v. Kapoor*, Docket: Doc. No. RE 692/89, 9 November 1989, par. 76. See also the British Columbia Supreme Court, *R. v. McCreery*, Docket: Smithers 12343TC, 27 November 1996.

similar vein, the Defence does not cite any evidence in support of its contention that Prosecution witnesses against the Accused have been influenced by political foes of the latter.

80. Even assuming, for argument's sake, that some evidence had been presented by the Defence in support of these allegations, the extensive international criminal law jurisprudence previously analysed dictates that such allegations would not raise to the level of "egregious" and "serious" conduct constituting abuse of process, nor are sufficiently grave to rebut the presumption accorded to the Prosecution that its functions under the Statute have been exercised regularly. Therefore, the Legal Representative submits that the Defence's abuse of process challenge should be summarily dismissed for lacking factual and legal basis.

VIII. VIEWS AND CONCERNS OF THE VICTIMS ON THE ADMISSIBILITY OF THE CASE AGAINST THE ACCUSED BEFORE THE COURT

81. Victims of the atrocities committed in the CAR have a right to truth and to justice. As put forward by the Single Judge in her "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case," *"when [the victim's right to truth] is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth."*¹¹⁶ Moreover, the victims' rights to justice, namely, to *"have those who victimised them prosecuted, tried convicted, and subject to a certain punishment,"*¹¹⁷ is to be differentiated from the victims' right to reparations.

¹¹⁶ See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case", (Pre-Trial Chamber I, Single Judge), 15 May 2008, No. ICC-01/04-01/07-474, par. 34.

¹¹⁷ *Idem*, par. 37.

82. Victims in the CAR, through local non-governmental organisations assisting them, have already expressed support for the role of the Court in addressing the most serious crimes, as well as satisfaction and hope as a result of the transfer of Mr Bemba to the Court.

83. Regarding the specific views of victims represented by the Legal Representative, she has directly provided most of them with an explanation on the admissibility proceedings. To this end, a written explanation and a questionnaire were distributed to victims in order to gather their views and concerns in the most efficient and expedited way. The Legal Representative has collected the observations of 117 victims in written form. The Legal Representative also had the opportunity to receive observations by telephone. These observations are also incorporated in the present Response. A total of 200 victims have expressed their views and concerns in relation to the admissibility challenge.

84. Said observations are annexed to the present submission as Annexes 1 to 102. Annexes are filed as Confidential *ex parte* OPCV only since they contain information which could lead to the identification of the persons concerned. Annexes are also filed in a public redacted version - in which information which may lead to the identification of the persons concerned have been expunged – for notification to the Prosecution, the Defence, the CAR and DRC authorities.

85. The Legal Representative hereby provides a summary of the main views and concerns of the victims.

86. In relation to the specific issue at stake of national proceedings held in the CAR, victims have emphasised that the CAR judiciary does not dispose of adequate resources, financial and legal, to conduct a trial against Mr Bemba for the grave war crimes and crimes against humanity of which he is accused. Moreover, they point out that the country's judicial system is lacking in sufficient number of judges, judicial

assistants, work facilities, and even prisons, thereby rendering it an inefficient forum on which to hold such a complex prosecution. By way of example, some victims remark that the national justice system cannot financially handle simpler legal claims, such as those pertaining to civil servant salaries, pensions, and stocks; they thus do not consider that a prosecution of such grave crimes against the Accused could be effectively carried out in the CAR.

87. Victim a/0296/08 in particular has provided specific observations referenced in Annex 102 attached to this Response. This Victim states that the CAR could not afford to launch a trial against the Accused due to the deficient state in which the country's economy was left after the civil war of 2002. Even if the CAR's economy improved, the Victim states that the 2010 budget assigned to the Ministry of Justice is 1.715.762.000 FCFA, only 393.850.000 FCFA of which is allocated to judiciary matters. In addition, Victim a/0296/08 also remarks that the Rome Statute was not incorporated into national law in the CAR until very recently, in January of 2010, and that, even at present, only one magistrate has received formal training in the legal texts of the Court, in 2009. Therefore, this Victim concludes that the CAR did not have the capacity to pursue a prosecution against the Accused, and that the referral of the matter to the Court was appropriate and justified. Concerning the issue raised by the Defence of the gravity of the charges brought by the Court against the Accused, Victim a/0296/08 states that, considering all the reports attesting to the gravity of the types of crimes allegedly committed by the Accused against civilians in the CAR, the Defence's arguments on this issue are contemptuous *vis a vis* the large number of victims who hope to achieve a fair and equitable reparations for their suffering.

88. The victims voiced several concerns and they all favour an international trial since, according to them, it is the only way for the world to know what happened to them and to ensure impartiality of the proceedings. Indeed, victims have doubts as to the impartiality of national courts and their ability to properly administer justice, and

they further believe that the Court is the only one able to prosecute the main perpetrators due to its lack of political influence or interests in the CAR.

89. Victims also argued that the case should not be tried in the CAR because it entails serious crimes which the national jurisdiction is not equipped to deal with. Moreover, they expressed concerns as to the possibility of participating in an effective way in the national proceedings, since they consider that the national legislation does not provide enough guarantees for their participation and for subsequent reparations. Victims think that national authorities cannot provide for the security of victims who will participate in the national proceedings and therefore, most of them will not be encouraged to participate.

90. Finally, some victims have indicated that they tried to activate a criminal proceeding for the events that occurred in the CAR between October 2002 and March 2003. However, no action was taken by the national judicial authorities in this respect. Due to the limited time to file the present Response, the Legal Representative has not been able to collect the relevant documents to be annexed to her observations. Should she be in possession of said documents, the Legal Representative, with the leave of the Chamber, will file them for purposes of the hearing to be held on 27 April 2010.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests that the Trial Chamber dismiss *in limine* the Defence's Motion challenging the admissibility of the Case against the Accused before the Court.

In the alternative, the Legal Representative requests the Trial Chamber to dismiss the Defence's Motion on all grounds.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

**Paolina Massidda
Principal Counsel**

Dated this 1 April 2010

At The Hague, The Netherlands