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TRIAL CHAMBER III

Before: Judge Adrian Fulford, President
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

**Submissions by the Legal Representative on the supplementary information
provided by the Central African Republic on national law**

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. 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 the «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, and subsequently a public redacted version was filed by the Defence.¹

2. On 1 April 2010, the Principal Counsel for the Office of Public Counsel for Victims, as Legal Representative in the Case,² (the “Legal Representative”), submitted its “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”.³ On 16 April 2010, the Legal Representative filed a Corrigendum to the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2)(a) of the Rome Statute with

¹ 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; 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-Red3, 09 April 2010.

² The Office filed its Response on behalf of 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.

³ See the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-742, 01 April 2010. Due to a major Outlook breakdown on 1 April 2010, this document was notified by Court Management – Court Records on the next working day of 6 April 2010.

102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted” (the “Response”).⁴

3. On 27 April 2010, the Chamber held a hearing on the admissibility challenge brought by the Defence for Mr Bemba (the “Hearing”), wherein it asked the representatives of the Central African Republic (the “CAR”) who were present at the Hearing to provide supplementary information on the following two assertions made by the Defence: 1) when there is a dismissal of a criminal matter by an investigating judge in the CAR, there is an obligation, pursuant to articles “85(b)” (*sic*) and 193(f) of the 1962 provisions of the “*Code de Procédure Pénale*”, to notify the dismissal to the person to whom the investigation pertained within forty-eight hours, otherwise the decision is annulled;⁵ 2) in any relevant appellate proceedings in a case, there is an automatic stay of proceedings for criminal matters.⁶ It is important to note that, although Defence Counsel referred to article 85(b) of said law, he actually quoted from article 95(b) therein. The Chamber requested that the CAR representatives submit written submissions on these two points by 7 May 2010, the Prosecution and Legal Representatives to respond thereto by 11 May 2010, and the Defence to respond to all submissions by 14 May 2010.⁷

4. Therefore, the Legal Representative hereby submits the following observations on the above-mentioned issues pertaining to CAR procedural law.

⁴ See the “Corrigendum to the “Response by the Legal Representative of Victims to the Defence’s Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-756, 16 April 2010, and No. ICC-01/05-01/08-742-Corr. In the present filing, references to the OPCV arguments in response to the Defence’s Admissibility Motion are taken from the latter citation.

⁵ See the Transcripts of the Hearing of 27 April 2010, (Trial Chamber III), No. ICC-01/05-01/08-T-22-ENG ET WT, p. 64, lines 13-19, *citing* the arguments made by Counsel for the Defence on p. 46, lines 3-18.

⁶ *Idem*, lines 20-22.

⁷ *Idem*, p. 65, lines 20-25.

II. The Defence's interpretation of article 95(b) of the CAR "*Code de Procédure Pénale*" runs counter to the literal and logical reading of said article as a whole

5. Analysing article 95(b) of the "*Code de Procédure Pénale*"⁸, as cited by the Defence, it states that "[n]otification de cette ordonnance de renvoi sera faite dans le plus bref délai à peine de nullité à l'accusé et à son conseil ainsi que la faculté d'en faire appel dans un délai de 48 heures à compter de la notification.» According to the Defence's argument presented at the Hearing, this sub-section of article 95 stands for the proposition that an order of dismissal, or "*ordonnance de non-lieu*", by an investigating judge must be notified to the person concerned as soon as possible, on pain of a nullity of said order, and that such notification must be made to the person concerned and his/her counsel within 48 hours.⁹

6. The Legal Representative notes that when subsection (b) of article 95 is read in conjunction with subsection (a), it is clear that the Defence's assertions take article 95(b) out of its proper context. Indeed, article 95(a) states that, "[s]i le Juge d'Instruction estime que le fait est de nature à être puni de peines criminelles et que la prévention est suffisamment établie, il renverra l'inculpé devant la Cour Criminelle et décernera contre lui une ordonnance de prise de corps.» When both subsections are read together, it is evident that article 95 is addressing situations in which the investigative judge determines that there are sufficient facts to establish that a crime has been committed and that the person concerned should be committed before the criminal court. It is only in this situation, and not when the order is one of dismissal, that the article mandates that notification of the order by the investigative judge be notified to the person concerned and his/her counsel, on pain of nullity.

7. The above-mentioned analysis of article 95, aside from being the most literal, at-face value interpretation thereof, actually makes logical sense. If the facts

⁸ See the CAR "*Code de Procédure Penale*", No. 61/265, 15 January 1962.

⁹ See *supra* note 8, p. 46, lines 3-11.

supporting potential charges brought against a person are found by an investigative judge to be preliminarily substantiated, and the former's liberty is going to be taken away, then it makes sense from a procedural due process standpoint to notify the said person and his/her counsel within a brief time limit of this finding in order to give them notice and an opportunity to appeal, with the penalty that if said notification is not complied with, the decision will be annulled. On the other hand, if the decision taken by the investigative judge is that the person that is the subject of an investigation will not be charged or committed before a criminal court, why would such decision be under threat of being annulled if said person is not informed thereof? Who would such a remedy (the annulment of the dismissal) penalise, but for the person who would otherwise have benefited from such dismissal? Indeed, even the Defence, during its oral arguments at the Hearing, conceded that it is the prosecutor and the prosecutor alone who is expected to appeal an order dismissing the investigation within the 48 hour time limit.¹⁰

8. Clearly, then, the contradictory and illogical interpretation of article 95(b) by the Defence should be rejected by the Chamber in whole, as being contrary to the express wording of said article, when read in its entirety.

III. Article 193(f) of the CAR "*Code de Procédure Pénale*" is irrelevant to the issue of notification of orders of dismissal given by the investigative judge

9. At the Hearing, the Defence also cited article 193(f) of the CAR "*Code de Procédure Pénale*" for the proposition that notification to the person of interest of the order of dismissal given by the investigative judge should have taken place within 48 hours of said order, or the decision would stand as annulled.¹¹ Article 193(f) states that citations to appear before a CAR jurisdiction against persons who reside abroad

¹⁰ *Idem*, p. 52, lines 23-25.

¹¹ *Idem*, p. 46, lines 13-17.

shall be forwarded to the competent authorities through the State Prosecutor, the Public Prosecutor, the Minister of Justice and the Minister of External Relations.¹²

10. Similarly to the arguments raised above with regard to article 95(b), the Legal Representative submits that the reference by the Defence to article 193(f) is inapposite to the issues that must be considered by this Chamber in relation to the specific questions sought answered by it during the Hearing. The fact that article 193(f) deals with notification of citations to appear before a CAR jurisdiction against an accused who lives outside of the country does nothing to shed light on the question of whether the lack of notification of an order of dismissal in effect renders said dismissal null and void.

11. In addition, the CAR national authorities point out in their written observations filed on the above-mentioned question, that there exists no legal text in the CAR laws which requires that a decision of joining or severance that is merely of an administrative nature should be notified to those persons to which it relates.¹³ Therefore, the Legal Representative again submits that the Defence has not established that notification is a requirement in order to validate the decisions that were taken by the “*Chambre d’Accusation*” and the “*Cour de Cassation*” in the CAR.

IV. The issues of notification to the Accused or the appeal of the order of dismissal by the CAR investigative judge have no legal effect on the analysis of whether the Case against him is inadmissible before the Court pursuant to article 17(1)(b) or (c) of the Rome Statute

12. More importantly, the Legal Representative respectfully submits that the issues of whether or not the Accused received notification of the order of dismissal,

¹² See *supra* note 11, article 193(f).

¹³ See Conf. Annex 1 of the “Transmission by the Registrar of Submissions made by the Authorities of the Central African Republic pursuant to the Oral Order of the Hearing held on the 27 April 2010”, No. ICC-01/05-01/08-770, 10 May 2010.

or whether said order was appealed or not to a higher CAR court, are both irrelevant for purposes of the Defence's admissibility challenge. As argued at length in the Legal Representative's Response, the Defence has not proven that the CAR national authorities made a decision not to prosecute the Accused within their territory, as the Appeals Chamber Decision in the *Katanga/Ngudjolo Chui* Case interpreted article 17(1)(b) of the Rome Statute,¹⁴ or that the principle of *ne bis in idem*, pursuant to article 17(1)(c) of the Statute, applies to bar the admissibility of the Case against the Accused before the Court.¹⁵

13. In particular, and regarding article 17(1)(b) of the Statute, the Legal Representative recalled in its Response that the Appeals Chamber found that, "[i]f 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."¹⁶ As far as the *ne bis in idem* principle is concerned, the Legal Representative has also previously pointed out that international law jurisprudence cited in her Response, as well as the legislative history of article 20(3) of the Rome Statute dealing with said principle, "leave no doubt that [its] scope [...] 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, [...], 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."¹⁷ The fact that the order of dismissal by the CAR investigative judge may or may not have been appealed is of no legal consequence to the application of the *ne bis in idem* principle, since said order was not rendered on the merits of the case against the Accused in the CAR; that is, it was a

¹⁴ See *supra* note 4, paras. 63-64.

¹⁵ *Idem*, paras. 43-56.

¹⁶ *Idem*, par. 64.

¹⁷ *Idem*, par. 56.

procedural dismissal and not a determination of whether the Accused was substantively guilty or innocent on the charges eventually brought against him.¹⁸

V. The filing recently made by the Accused before the “*Chambre d’Accusation*” in the CAR does not have any suspensive effect on the ongoing proceedings against the Accused before the Court

14. At the Hearing, Defence Counsel cited articles 21 and 64 from the CAR law governing the “*Cour de Cassation*”¹⁹ in order to argue that challenges before that national court have suspensive effect in, *inter alia*, criminal matters.²⁰ On 8 April 2010, the law firm Ouadda-Djale had filed a “*recours en rétractation*” before the “*Cour de Cassation*” on behalf of the Accused;²¹ yet on 19 April 2010, said challenge was withdrawn, citing a previous “*pourvoi*” that had been filed before the “*Chambre d’Accusation*” of the Appeals Chamber in Bangui on 16 April 2010 against that court’s decision,²² to recommend that Mr Bemba be prosecuted before the International Criminal Court.²³ It is therefore not clear why the Defence for the Accused cited CAR law at the Hearing pertaining to the suspensive effect of challenges brought before the “*Cour de Cassation*”, when there is currently no challenge pending directly before that court.

¹⁸ According to the written observations made by the CAR authorities, an appeal was filed on 17 September 2004 by the Public Minister of Justice against the entire order by the investigative judge concerning Mr Bemba and others, including the order of dismissal in favor of the Accused by said judge. See *supra* note 16, par. 17.

¹⁹ See the “*Loi Organique No. 95.0011 portant organisation et fonctionnement de la Cour de Cassation*”, 1995-1996.

²⁰ See *supra* note 8, p. 46, lines 23-25, p. 47, lines 1-7.

²¹ See Annex C of the “*Requête de la Défense aux fins d’informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine*”, No. ICC-01/05-01/08-751, 13 April 2010.

²² See Conf Annex 2 of the “*Registrar’s transmission of documents transmitted by the Central African Republic*”, No. ICC-01/05-01/08-765-Conf, 26 April 2010.

²³ See the “*Arrêt d’infirmerie 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.

15. Be that as it may, in their written observations, the CAR national authorities emphasise that, due to the fact that the decision of severance by the «*Chambre d'Accusation*» of the Appeals Chamber in Bangui was purely an administrative one that concerned the Accused only indirectly, said decision is not one which can be challenged by way of «*recours*», as the Accused has most recently sought to do.²⁴ Therefore, the Legal Representative submits that said filing by the Accused should not in any way affect the proceedings currently undergoing before this Court, since, according to the CAR national authorities, it will have no effect whatsoever in the national courts themselves.

16. Finally, the Legal Representative respectfully submits that the Defence's attempts to file, at the very last minute, challenges to national law proceedings which, by all accounts, including that of the CAR national authorities, ended back in 2004 when the national proceedings against the Accused were severed from those proceedings pending against co-defendants so that the Accused could be prosecuted before the International Criminal Court, is simply a delay tactic conducted in bad faith, and as such, should be wholly rejected by this Chamber.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Chamber to take into account the present observations.



Paolina Massidda
Principal Counsel

Dated this 11 May 2010

At The Hague, The Netherlands

²⁴ See *supra* note 16, par. 47.