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TRIAL CHAMBER III

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO***

Public Redacted Version

**Application Challenging the Admissibility of the Case pursuant to Articles 17 and
19(2)(a) of the Rome Statute**

Source: Defence Team for Mr Jean-Pierre Bemba Gombo

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

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I. Introduction

1. Pursuant to article 19(2)(a) of the Rome Statute establishing the International Criminal Court (“ICC”), Jean-Pierre Bemba (“the Accused”), by this application, challenges the admissibility of the Prosecution’s case, on grounds based on the principle of complementarity, the principles of “*ne bis in idem*” and the lack of the requisite gravity. Within this same connection, the Accused further asserts that there has been an abuse of process against him.

Thus:

Regarding admissibility:

- a) Effective investigations had been conducted into the allegations brought against the Accused in this case by the Central African Republic (“CAR”), which has jurisdiction over the said allegations;¹

The CAR authorities had launched effective proceedings against the Accused for those same allegations.²

The CAR authorities have always demonstrated unswerving willingness, and their courts have the required ability to carry out prosecutions based on the said allegations.

- b) The case lacks the requisite gravity to justify action by the Court.³

Regarding abuse of process:

2. Furthermore, and in the alternative, it will be put forward that the national criminal proceedings brought against the former President of the CAR, Ange Félix Patassé (“Patassé”), had been designed to guarantee the outcome of the election,

¹ Article 17(1)(b) of the Rome Statute.

² Article 17(1)(c) of the Rome Statute, *ne bis in idem*.

³ Article 17(1)(d) of the Rome Statute.

without any significant opposition by rival candidate General François Bozizé (“Bozizé”). The Accused’s involvement in those proceedings and the subsequent referral of the case (including certain legal proceedings brought deliberately by the political authorities in the CAR) before the International Criminal Court were thus tainted by political considerations and the proceedings thereby constitute an abuse of process.

3. The Accused will further argue that the Office of the Prosecutor of the ICC inappropriately engaged in negotiations with Bozizé’s government and the judicial authorities of the CAR regarding issues of complementarity, even though legal proceedings before the CAR national courts had not been exhausted.

4. It will also be argued that the government of President Joseph Kabila (“Kabila”) in the Democratic Republic of the Congo (“DRC”) had collaborated with the Bozizé government and so facilitate the referral of the situation to the ICC, pursuant to article 14(1) of the Rome Statute.

II. Admissibility of the present application

5. The Defence notes the decision of Trial Chamber II in the *Germain Katanga* case, which provides an indication of the time limits which must be respected for the purposes of an application challenging the admissibility of a case.

6. The Defence submits, however, that this decision cannot be applied to the present case.

7. The Defence filed an application before the Pre-Trial Chamber on 22 July 2009⁴ requesting that it order the Office of the Prosecutor to disclose the evidence relating to admissibility.

⁴ ICC-01/05-01/08-458.

8. The Prosecution objected to the said application, stating that it had “thoroughly reviewed all documents in its possession or control, including the CAR and DRC collections, and [had] fully discharged its disclosure obligations between November 2008 and December 2008”.⁵

9. On 18 December 2009, the Pre-Trial Chamber issued a decision stating that the Defence no longer had *locus standi* to raise a challenge to admissibility of the case at Pre-Trial level and that it should do so before the Presidency or the Trial Chamber.⁶

10. On 5 October 2009, the Defence submitted a new application for the disclosure of evidence relating to admissibility before Trial Chamber III.⁷ During the status conference of 7 October 2009, the issue of admissibility was briefly discussed, insofar as it was on the agenda of Trial Chamber III.

11. The Defence reminded the Chamber of its intention to raise a challenge to admissibility from the perspective of complementarity and the gravity of the facts.⁸ At no point during the aforementioned status conference did the Prosecutor refer to the *Katanga* case as a ground to challenge the Defence’s position on the admissibility of the present case:

PRESIDING JUDGE FULFORD:[...] There then arises the second question as to which Chamber, pre-trial or trial, should deal with the substantive application which will follow Mr. Kilolo’s application for disclosure. Given that there has been some jurisprudence from the Katanga Chamber on this issue, does the Prosecution see any difficulties in us dealing with that preliminary issue after disclosure; namely whether we should be seized of it or should we send it back to the Pre-Trial Chamber for their determination?

Ms. KNEUER: Your Honour, the Prosecution does not have objections that the Trial Chamber deals with this issue.⁹

12. At this stage, the Defence recalls the Prosecutor’s response to its application for disclosure of 22 July 2009, which proved to be incorrect. Moreover, another

⁵ ICC-01/05-01/08-474, para. 9.

⁶ ICC-01/05-01/08-529.

⁷ ICC-01/05-01/08-542.

⁸ ICC-01/05-01/08-T-14-ENG, p. 31, line 18.

⁹ ICC-01/05-01/08-T-14-ENG ET, p. 33, line 3.

precedent flows from Trial Chamber III's decision of 14 December 2009,¹⁰ ordering the Office of the Prosecutor to disclose additional information relating to admissibility by 18 December 2009 at the latest. It follows that the Defence was not in a position to complete its work on the challenge to admissibility before the winter judicial recess period.

13. For all the abovementioned reasons, the Defence submits to the Chamber that any attempt on the part of the Prosecution to allege that the Defence is barred from challenging the admissibility of the present case must not be taken into account.

14. The Defence submits that, despite the finding stating that Mr Katanga's Defence Team filed its application on the challenge to admissibility at an inappropriate time, Trial Chamber II nonetheless considered all the Defence's substantive arguments for the following two reasons:

- a) there were valid reasons to believe that: "the Defence was never aware that it was filing the Motion out of time and that it was not its intention to do so";
- b) the Trial Chamber's opinion that: "the position adopted by the Pre-Trial Chamber at the *ex parte* hearings may even have led the Defence to believe that a challenge, based on any of the grounds set out in article 17(1), could be brought under article 19 of the Statute after the confirmation of charges".¹¹

15. In the present circumstances, even if, in the more than unlikely event, it were considered that the Defence filed its application challenging admissibility at an inappropriate time, it would be fair and appropriate to grant Mr Bemba's Defence Team the same consideration as was granted to Mr Katanga's Defence Team.

¹⁰ ICC-01/05-01/08-655.

¹¹ ICC-01/04-01/07-1213-tENG at paras. 56 and 58.

16. It should be noted that the decision on the challenge to admissibility in the *Katanga* case was issued by Pre-Trial Chamber II on 16 June 2009, that is, one day after the date of the confirmation of charges decision in the *Bemba* case. It follows that the Defence Team could not be informed beforehand of the ICC's position, albeit non-binding, requiring that it challenge admissibility before the decision on the confirmation charges was issued.

III. Factual and procedural background

17. On 3 October 2001, Patassé's government ratified the Rome Statute and the CAR thus became a State Party to the International Criminal Court.¹²

18. On 25 October 2002, Bozizé launched a rebel movement against Patassé's legitimate and democratically elected government.¹³

19. On 15 March 2003, Bozizé successfully carried out a coup d'état against Patassé who was outside the country and thus forced to go into exile in Togo.¹⁴ Immediately after seizing power, Bozizé suspended the constitution of the CAR, which had been in force since 1995, and within one week appointed Mr Abel Goumba as Prime Minister of a transitional government.¹⁵

20. On 3 April 2003, Bozizé created an interim parliament and appointed the President of the *Ligue centrafricaine des droits de l'homme* [Central African Human Rights League] President of the said Council.¹⁶

¹² <http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/Central+African+Republic.htm>.

¹³ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p. 4.

¹⁴ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.5.

¹⁵ <http://www.irinnews.org/Report.aspx?ReportId=42925>.

¹⁶ FIDH, "Quelle justice pour les victimes de crime de guerre" p. 40, www.afrique-express.com/archive/CENTRACE/rca/recapol/27?...., *Afrique Express* No. 272 dated 17/06/2003.

21. On 23 April 2003, Bozizé granted amnesty to all persons convicted on 26 August 2003 of participating in the failed coup d'état of 28 May 2001 led by André Kolingba against Patassé.¹⁷

22. On 30 June 2003, the *Procureur-Général* [public prosecutor] of Bangui launched an investigation against Patassé for corruption.¹⁸

23. On 19 August 2003, the investigation was widened to include crimes against humanity and genocide.¹⁹

24. [REDACTED], [REDACTED], [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] Patassé, who was living in exile in Lomé, Togo. Patassé was accused of corruption, rape and murder during the fighting during Bozizé's attempted coup d'état of 25 October 2002.²⁰

25. [REDACTED], [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED], [REDACTED] an international arrest warrant for Ange Félix Patassé.²¹

26. [REDACTED], the [REDACTED] [REDACTED] ("[REDACTED] [REDACTED]") [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED]. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].²² [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED]

¹⁷ Order 03.003; cf. <http://www.icj.org/IMG/CAR.pdf> and Weekly Round-Up, IRINCEA-171: 25 Apr 03; <http://idh.cidi.org:8080/humanitarian/irin/ceafrika/03a/ixl15.html><http://idh.cidi.org:8080/humanitarian/irin/ceafrika/03a/ixl15.html>.

¹⁸ <http://www.fidh.org/IMG/pdf/Rca382f.pdf>, p.14.

¹⁹ <http://www.fidh.org/IMG/pdf/rca410tf.pdf>, p. 28.

²⁰ EVD-P-02903, CAR-OTP-0019-0048, [REDACTED], p.12.

²¹ EVD-P-02873, ERN: CAR-OTP-0004-0022 to 0031.

²² [REDACTED], p.12.

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].²³

27. [REDACTED], [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].²⁴ [REDACTED], [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED] [REDACTED].

28. On 16 September 2004, the senior investigating judge acquitted the Accused by an “*ordonnance de non-lieu*” [order for dismissal of the case]. Furthermore, the senior investigating judge via an “*ordonnance de renvoi*” [order for committal for trial], submitted the case against Patassé and others to the CAR criminal courts for trial,²⁵ with the exception of the Accused because of insufficient evidence against him.

29. On 17 September 2004, the public prosecutor of Bangui made known his intention to appeal the order for dismissal of the case and the order for committal for trial issued by the senior investigating judge.²⁶

30. On 24 November 2004, the public prosecutor of Bangui filed before the Indictment Chamber of the *Cour d’Appel* of Bangui (“*Cour d’Appel*”) [Appeals Court] his appeal against the *ordonnances de non lieu partiel et de renvoi* [order for partial dismissal of the case and committal for trial].

31. On 5 December 2004, a new constitution was approved by referendum in the Central African Republic.

32. On 6 December 2004, Mr Bozizé officially appointed Mr Nganatouwa Goungaye Wanfiyo (“Goungaye Wanfiyo”), former president and member of the

²³ ICC-01/05-01/08-669-Conf-Exp-AnxB, [REDACTED] [REDACTED] [REDACTED]:
[REDACTED] [REDACTED], [REDACTED].

²⁴ CAR-OTP-0004-0065,EVD-P-00006.

²⁵ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.12.

²⁶ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.12.

Ligue centrafricaine des droits de l'homme, as his legal representative for the purposes of State referral pursuant to article 14(1) of the Rome Statute.²⁷

33. On 7 December 2004, Bozizé signed a decree setting the date of 30 January 2005 as the date for the presidential and parliamentary elections.²⁸

34. On 13 December 2004, Mr Bozizé announced that he would run in the presidential election as an independent candidate.²⁹

35. On 16 December 2004, the Appeals Court partially upheld the public prosecutor's appeal. In this decision, the Appeals Court declared that the *crimes de sang* [murder and similar crimes] "were a matter for the International Criminal Court".³⁰

36. On 18 December 2004, Mr Goungaye Wanfiyo seized the Prosecutor of the International Criminal Court ("ICC") on behalf of Bozizé and the government of the Central African Republic, requesting that he initiate investigations into the crimes against humanity and war crimes committed by Patassé, the Accused and Martin Koumtamadji (also known as Abdoulaye Miskine).³¹ This action was initiated even though the criminal proceedings were still ongoing before the Central African Republic courts.

37. On 20 December 2004, the CAR *Ministère Public* [public prosecution service] appealed to the *Cour de Cassation* against the decision of the Appeals Court, maintaining that only the ICC was able to adjudicate the allegations brought against Patassé and the Accused.³²

²⁷ ICC-01/05-01/08-29-Conf-Anx1A, p.3.

²⁸ <http://www.irinnews.org/Report.aspx?ReportId=52396>.

²⁹ <http://www.irinnews.org/Report.aspx?ReportId=52396>.

³⁰ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.12.

³¹ ICC-01/05-01/08-29-Conf-Anx1A, pp.1-2.

³² CAR-OTP-0019-0199, EVD-P-04127; <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.12.

38. On 21 December 2004, Bozizé's government submitted the situation in the CAR to the Prosecutor of the ICC ("the Prosecutor"), without waiting until the national judicial authorities had ruled on the issue still being deliberated before the *Cour de Cassation*.

39. On 30 December 2004, the *Cour Constitutionnelle Transitoire* [Transitional Constitutional Court] of Bangui invalidated Patassé's presidential candidacy.³³

40. On 7 January 2005, the Prosecutor acknowledged receipt of a letter from the Central African Republic government submitting the situation of the crimes falling under the jurisdiction of the Court committed anywhere on the territory of the CAR since 1 July 2002, the date of entry into force of the Rome Statute.³⁴

41. On 19 January 2005, the Presidency of the ICC published a *Decision assigning the Situation in the Central African Republic to Pre-Trial Chamber III*.³⁵

42. On 2 April 2006, the Prosecutor went on mission to Kinshasa and, in the course of his visit, met the President of the Democratic Republic of the Congo ("DRC"), Joseph Kabila.³⁶

43. On 11 April 2006, the Central African Republic *Cour de Cassation* issued its decision on the appeal of 20 December 2004, stating, *inter alia*, that recourse to

³³ Observer mission report on the presidential and legislative elections of 13 March and 8 May in the Central African Republic, http://democratie.francophonie.org/IMG/pdf/RCA_RMO1303_08052005.pdf, p.9: "[TRANSLATION] The crisis resulting from the dispute caused by the invalidation of candidacies (7 out of 12) for the presidential election, as decided by the Transitional Constitutional Court on 30/12/2004, was resolved following negotiations led by President Omar BONGO ONDIMBA and the resulting *Libreville Accord* of 22 January 2005.

In an attempt to continue the electoral process, the parties agreed on: [...] the validation of all candidacies for the presidential election, with the exception of the candidacy of the former President of the Republic, Ange-Félix PATASSE, who is subject to legal proceeding before the Central African Republic courts".

³⁴ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p.13.

³⁵ ICC-01/05-1.

³⁶ ICC-CPI-20060410-131.

“international cooperation” was the only means to prevent impunity for the crimes allegedly committed in the CAR.³⁷

44. On 21 April 2006, the Central African Republic Minister for Foreign Affairs and political associate of Bozizé, Karim Mackassoua, wrote to the people working with President Kabila to request a meeting between them and Mr Goungaye Wanfiyo. Karim Mackassoua informed his contacts in the DRC of the developments in the case against the Accused at the ICC³⁸ and sought financial assistance on behalf of Mr Goungaye Wanfiyo to purchase plane tickets.

45. On 30 July 2006, Jean Pierre Bemba ran for President of the DRC, standing on behalf of the *Mouvement pour la Libération du Congo* (“MLC”).

46. On 20 August 2006, the provisional results indicated that he had received approximately 20% of the vote, coming second to Joseph Kabila, who had received approximately 40%. On the same day, members of Joseph Kabila’s Republican Guard attacked the MLC radio and television stations. An armed conflict ensued.

47. On 21 August 2006, the violence reached a climax when Kabila’s Republican Guard besieged the residence of the Accused, subjecting him to artillery fire, even though a number of dignitaries and ambassadors, including the then head of MONUC, were at his home at the time. They were all obliged to take refuge in the cellars of the residence until the Spanish and Uruguayan UN peacekeeping forces managed to evacuate them to a safer place.

48. On 27 September 2006, in order to put pressure on the Court, an application was filed with the Registry of the ICC on behalf of the Central African Republic

³⁷ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>

³⁸: Bemba Case: “La Ligue Centrafricaine des droits de l’homme instrumentalisée par Kinshasa”, <http://www.congoindependant.com/article.php?articleid=3644>; CAR-DEF-0001-0821, EVD-D01-00037.

government, requesting information on the alleged failure of the Office of the Prosecutor to decide whether to initiate investigations within a reasonable time.³⁹

49. On 27 November 2006, Pre-Trial Chamber III ordered the Office of the Prosecutor to provide clarification on the status of its analysis of the situation in the CAR.⁴⁰

50. On 15 December 2006, the Office of the Prosecutor filed a report with Pre-Trial Chamber III in which it explained that it had not stalled for time in carrying out its analysis of the situation in the CAR.⁴¹

51. On 22 March 2007, fighting broke out between forces loyal to Kabila and those loyal to the Accused. In its report entitled 'We will crush you', the NGO Human Rights Watch relates that the pursued aim of the fighting was the physical elimination of the Accused.⁴²

52. On 11 April 2007, the Accused left the DRC for Europe where he lived peacefully in Portugal and in Belgium until his arrest.⁴³

53. On 22 May 2007, the Prosecutor announced that he had opened an investigation in the CAR.⁴⁴

54. On 9 May 2008, the Prosecutor sought a warrant of arrest for the Accused.⁴⁵

55. On 23 May 2008, the Office of the Prosecutor filed an *ex parte* application for the provisional arrest of the Accused, in accordance with article 92 of the Rome

³⁹ ICC-01/05-5-Conf; "[REDACTED]".

⁴⁰ ICC-01/05-6.

⁴¹ ICC-01/05-7.

⁴² <http://www.hrw.org/en/node/76188/section/6>: In November 2007 Minister of the Interior Denis Kalume told Human Rights Watch that 'neutralizing Bemba' had not meant assassinating him. But another person close to Kabila explained that Kabila's supporters understood the risk that Bemba could be killed in such operations. He said, 'Some hardliners desired just such an outcome'.

⁴³ <http://www.congoplanet.com/article.jsp?id=4526802>.

⁴⁴ ICC-OTP-20070522-220.

⁴⁵ ICC-01/05-01/08-26.

Statute. The Prosecutor justified this application using references to information allegedly indicating that the Accused intended to leave Schengen territory for an unknown destination.⁴⁶

56. On 10 June 2008, Pre-Trial Chamber III issued its *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*⁴⁷ and found that the case against the Accused was admissible without prejudice to any motions challenging jurisdiction brought in accordance with article 19 of the Statute.

57. On 1 August 2008, Bozizé wrote to the Secretary-General of the United Nations, Mr Ban Ki-Moon, requesting that the United Nations intervene in any possible ICC investigations into the crimes in the north of the country, in accordance with article 16 of the Rome Statute of the ICC, given that the Central African Republic courts were able to exercise their jurisdiction.⁴⁸

IV: Inadmissibility of the case

A. Complementarity.

a) Legal basis

Preamble to the Rome Statute:

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.

The first paragraph of article 1 of the Rome Statute:

[The Court] shall be complementary to national criminal jurisdictions.

b) Concept

58. The Defence suggests that the concept of “complementarity” in the ICC context is understood to be a complement to rather than a substitute for the exercise

⁴⁶ ICC-01/05-01/08-28 (after reclassification).

⁴⁷ ICC-01/05-01/08-14.

⁴⁸ <http://www.lindependant-cf.com/Quand-Francois-Bozize-veut-s-assurer-a-lui-meme-et-a-ses-sbi-resu-ne-impunit-totale-a414.html>.

of national criminal jurisdiction. Stated otherwise, only when national criminal proceedings are manifestly deficient should the ICC be seized and invested with the responsibility for ensuring that serious atrocity crimes do not remain unpunished.

59. The preamble to the Rome Statute states that sovereign States have the duty to prosecute international crimes in their national courts.⁴⁹ It is only when States which are signatories to the Rome Statute decline or are unable to discharge this obligation, that the International Criminal Court, meeting the jurisdiction criteria of article 12(2)(a) and (b) of the Rome Statute, may be permitted to overcome this deficiency pursuant to article 14.

60. Moreover, the Defence proposes that the mechanism used in the situation in the CAR to trigger the jurisdiction of the ICC, as prescribed by article 14(1) of the Rome Statute, should be exercised with the utmost independence and free from the influence of the Office of the Prosecutor. Any collusion with the Office of the Prosecutor in effecting the referral by a State would be inconsistent with the aforementioned statutory provision.

61. Furthermore, article 15(1) of the Rome Statute confers *proprio motu* powers on the Prosecutor and this method alone of initiating an investigation must be used when he chooses to activate the jurisdiction of the Court.

62. In any event, the explicit terms of the Rome Statute and a study of its drafting history do not lend support to the view that a State has the authorisation to self-refer as a result of its own shortcomings or inability.⁵⁰

63. Such a practice – called “self-referral”⁵¹ – has its roots in the “uncontested admissibility”⁵² doctrine which was developed by the Office of the Prosecutor. Yet,

⁴⁹ “**Recalling** that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes ...”

⁵⁰ See Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts” (*Complémentarité en Pratique : Quelques réflexions peu flatteuses*) at p. 3, 23 June 2007.

⁵¹ “self-referral”.

there is not the slightest reference thereto in the *travaux préparatoires* of the Rome Statute.

64. During the first two years of its existence, the Office of the Prosecutor commissioned an expert study on the issue of complementarity. The concept of “uncontested admissibility”, whereby a State pays lip service to upholding its obligation to prosecute, is one of the results of this research. A broader consultation resulted in this same subject being expanded upon, it being argued that the admissibility criteria could be viewed as the outcome of a “consensual division of labour” in the best interests of justice. Such a scenario could, for example, be contemplated when a State, ravaged by conflict, is unable to investigate or prosecute the most responsible person.

65. It is of relevance to point out that the very fact that the Office of the Prosecutor has contemplated novel applications of the complementarity doctrine, constitutes itself an argument in favour of the contention that the doctrines of “uncontested admissibility” and “self-referral” were not included in the original drafting intent behind the Rome Statute.

66. In any event, the Defence asserts that the experts who were previously commissioned by the Office of the Prosecutor were attempting to find a mechanism to combat impunity and expand the beneficial role of the ICC. However, these same experts wholly neglected the possibility for abuse inherent in the practice of “self-referral” and the adverse effect on the requisite neutrality of the Prosecutor. It will be argued that nowhere is this as manifest as in the case against the Accused, Bemba.

67. Firstly, by requesting a referral under article 14(1) of the Rome Statute, the Prosecutor can deliberately act to avoid review by the Pre-Trial Chamber, which is the inevitable consequence of the exercise of the *proprio motu* powers under article 15(1) and a vital safeguard against unfounded investigations.

⁵² “uncontested admissibility”.

68. Secondly, by promoting “self-referral”, the Prosecutor is putting himself at risk of manipulation by transient governments which, having seized power in a coup d’état, could exploit the ICC to eliminate their old enemies.

c) Objections

69. Under article 17(1) (b) of the Rome Statute, having regard to paragraph 10 of the Preamble and article 1, a case is considered inadmissible, where the case has been investigated by a State which has jurisdiction over it and that State decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.

70. The Defence contends that these criteria have been met in this case:

[TRANSLATION] The case has been investigated by a Central African State which has jurisdiction over it.

71. By way of preliminary comment, the case set out in the most recently amended Document Containing the Charges⁵³ is based precisely on the same allegations as those which were the subject of the committal for trial by the CAR *Cour de Cassation*.

72. If one may be permitted to borrow an expression from the *Reasons for the Oral Decision on the Challenging of the Admissibility of the Case* in the *Germain Katanga Mathieu Ngudjolo* case,⁵⁴ the “same conduct” test⁵⁵ has to a great extent been met by these identical allegations constituting the basis for the charges against the Accused under both national and international law. The identical nature of the allegations was, moreover, explicitly acknowledged by Pre-Trial Chamber III in its *Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean Pierre Bemba Gombo* of 10 June 2008:

⁵³ ICC-01/05-01/08-593-Conf-ex parte-Anx A; 4 November 2009.

⁵⁴ ICC-01/04-01/07-1213-tENG, 16 June 2009.

⁵⁵ Trial Chamber II in the case against *Katanga & Ngudjolo* found it unnecessary to rule on the issue of whether or not a lower standard than that of the “same conduct” test would be appropriate in cases of challenges to admissibility.

The Chamber considers that the circumstances in the instant case justify it in ruling on the admissibility of the case, and finds that there is no reason to conclude that Mr Jean Pierre Bemba's case is not admissible, particularly since there is nothing to indicate that he is already being prosecuted at national level for crimes referred to in the Prosecutor's Application. On the contrary, it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean Pierre Bemba for the crimes referred to in the Prosecutor's Application [emphasis added], on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC⁵⁶.

Accordingly, on the basis of the evidence and information provided by the Prosecutor, the Chamber finds the case concerning Mr Jean Pierre Bemba admissible. This decision does not in any way prejudge any decision on the admissibility of the case which might subsequently be rendered under article 19 of the Statute.⁵⁷

73. It is therefore well established that the case was the subject of effective and genuine investigations and prosecution in the CAR.

74. Accordingly, the first criterion set out in article 17(1) (b) has been established:

The State has decided not to prosecute the person concerned, "unless the decision resulted from [(i)] the unwillingness or "[(ii)] inability of the State genuinely to "prosecute".

(i) Inability to prosecute

75. The "inability to prosecute" referred to in article 17(3) of the Statute requires evidence of a "total or substantial collapse or unavailability" of the national judicial system.

76. However, in the instant case, no cessation of activities was ever decreed with respect to the Central African Republic judicial system, which was and is in a position to obtain the Accused by way of an international arrest warrant or voluntary appearance by means of an ordinary summons, and is fully capable of gathering evidence and concluding the criminal proceedings already started in the Central African Republic prior to the referral to the International Criminal Court.

⁵⁶ ICC-01/05-01/08-14-at para. 21.

⁵⁷ ICC-01/05-01/08-14-at para. 22.

77. Article 17(3) of the Statute is articulated in precise terms and leaves no room for other definitions of the term “inability”. The Rome Statute did not envisage that diplomatic immunity, which by definition is temporary, or the presence of the suspect, to be specific the Accused, outside of the territorial jurisdiction of the Central African Republic, should be taken into account in assessing the “inability to prosecute” criterion.

78. In effect, the Rome Statute indicates that the only form of “inability” contemplated is the disintegration of national judicial systems:

The negotiation of Article 17(3) was less contentious than defining the concept of unwillingness, largely because inability is a more objective, fact-driven notion. The absence of a functioning prosecutor’s office or a court system are facts which either exist or do not and therefore lend themselves to less subjective interpretation.

79. It is important to note that at the time when the Pre-Trial Chamber issued the warrant for his arrest, the reasons given by the Central African judicial authorities for their “inability” to prosecute the Accused no longer existed. The same holds true for 22 May 2007 when the Prosecutor announced the official initiation of an investigation into the situation in the Central African Republic. The Defence respectfully refers the Trial Chamber to the Document Containing the Charges which states the following:⁵⁸

In June 2003, BEMBA became one of four DRC vice-presidents in the DRC Transitional Government.

In the fall of 2006, BEMBA ran in the Congolese presidential election, and was defeated. On 22 and 23 March 2007, BEMBA’s personal guards and the Governmental Forces entered into a deadly clash. Twenty days later, BEMBA left the country for Portugal, and lived in exile until his arrest.

80. At the time he went into exile and the Office of the Prosecutor officially opened its investigation into the CAR, as well as at the time the warrant of arrest was issued in May 2008, Mr Jean Pierre Bemba Gombo no longer held an office covered by diplomatic immunity in the Democratic Republic of the Congo under international law, nor did he live in hiding to the extent that it would have been impossible to issue an international arrest warrant.

⁵⁸ ICC-01/05-01/08-169-Conf-Anx2B paras. 6-7.

81. At that stage and even before the Prosecutor announced the commencement of his investigations on 22 May 2007, the CAR authorities had the option to reopen their investigations and prosecution of the Accused with the full judicial cooperation of the Kingdom of Belgium or the Republic of Portugal. However, the Central African authorities chose not to take such a line for purely political reasons.

82. Well-informed observers have not failed to highlight this, for example as follows:

Political nature of referral before the International Criminal Court. The referral of the situation in the CAR to the ICC has clear political implications. It happened barely one year after President Francois Bozize took over power. This sudden co-operation raises many questions when one considers that states perceive the intervention of international courts with apprehension. One therefore needs to know whether the choice of the CAR authorities was driven by a genuine concern to do justice to victims and bring back peace and security or whether it was a means of legitimizing power wrested by force.⁵⁹

83. [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. [REDACTED] [REDACTED], it was the *Parquet* [prosecuting authorities] – whose organs report to the government – which had requested that the case be dropped, so as not to create a diplomatic incident with the DRC [REDACTED] [REDACTED], [REDACTED] [REDACTED] [REDACTED]:

[TRANSLATION]

[REDACTED]: [REDACTED] – [REDACTED] – [REDACTED] [REDACTED]?
 [REDACTED]: [REDACTED], [REDACTED] [REDACTED] [REDACTED]
 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].
 [REDACTED] [REDACTED] [...].
 [REDACTED]: [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED]?
 [REDACTED] [REDACTED] [REDACTED].
 [REDACTED]: [REDACTED] [REDACTED] [REDACTED]?
 [REDACTED]: [REDACTED] [REDACTED] [REDACTED]. [REDACTED]
 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].
 [REDACTED], [REDACTED], [REDACTED] [REDACTED] [...] [REDACTED]

⁵⁹ Peace and Security in Central Africa; The Role of International Justice; http://www.iss.co.za/dynamic/administration/file_manager/file_links/M155CHAP5.PDF?link_id=3987&slink_id=7057&link_type=12&slink_type=13&tmpl_id=3.

[REDACTED]. [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED]. [REDACTED] [REDACTED] with the [REDACTED]. [...].
 [REDACTED] [REDACTED] [REDACTED] [REDACTED].⁶⁰
 “[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].
 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].”⁶¹

84. Following the dismissal of the case, the public prosecution service of the Central African Republic entered an appeal before the Appeals Court of Bangui. The appeal, however, did not concern the Accused who was not a co-defendant therein. Moreover, at an oral hearing held on 6 December 2004, the Court’s official transcript reported the [REDACTED] as having stated the following:

[TRANSLATION] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED], [REDACTED] [REDACTED] [REDACTED] [REDACTED]
 [REDACTED] [REDACTED].⁶²

85. However, on 16 December 2004, the [REDACTED], [REDACTED], issued the decision referring the case against the Accused, and Patassé *et al* to the ICC for murder and other crimes.

86. An appeal on points of law was entered against that decision of the Appeals Court of Bangui and, in a decision which was far from rational, the CAR *Cour de Cassation* reiterated the inability to obtain evidence and the presence of the Accused outside the geographic jurisdiction as grounds for the referral to the ICC.

87. It should be emphasised that the CAR *Cour de Cassation* articulates the grounds in terms of “inability” and not “unwillingness” to prosecute.

88. The Defence vigorously contends that even if such an inability were to exist – which, as proven above, is not the case – it would in no way be connected to the

⁶⁰ CAR-OTP-0010-0188.

⁶¹ Ibid.

⁶² CAR-OTP-0010-0189.

inadequacy of the national judicial authorities. Rather, the contrary appears to have been the case.⁶³

89. As demonstrated above, the inability to obtain the Accused was not the real reason for the withdrawal of the case from the CAR courts, but rather a time-limited desire not to harm, at that particular moment, the delicate nature of the diplomatic relations between the CAR and the DRC.

90. The inability to obtain the Accused was therefore not the real reason for the withdrawal of the case from the CAR courts.

91. Moreover, the large number of investigative steps which were taken as part of the Bangui case⁶⁴ and the fact that the Office of the Prosecutor conceded that he was awaiting a decision by the *Cour de Cassation* before proceeding with an investigation into the Situation, confirm the fact that the Central African Republic judicial system was far from collapse and was operating in a perfectly effective and efficient manner.

92. It is appropriate to take into account the doctrine, as highlighted by Professor William Schabas, who concurs in relation to the ability of the Central African Republic courts to hear and determine the situation brought before the International Criminal Court:

As for the Central African Republic, perhaps less is known about this situation, and there has not yet been any meaningful judicial activity of the [International Criminal] Court. It is curious, to say the least, that the Prosecutor would rely upon the decision of the Cour de cassation as authority for the inability of the country's judicial system to

⁶³ See also FIDH Report No. 382, February 2004; “*Quelle justice pour les victimes de crimes de guerre*” [“What justice for the victims of war crimes”], <http://www.fidh.org/IMG/pdf/Rca382f.pdf>: “[TRANSLATION] On 17 November [2003], the mission travelled to the *Tribunal* and the Appeals Court of Bangui where, in any event, the judges were sitting, the lawyers pleading and the prosecutors receiving complaints. A witchcraft trial was taking place in a courtroom. So, the capital's courts appeared to be working. Therefore, there was no total collapse of the judicial system, which is the criterion under article 17(3) of the Statute of the Court that could justify the national courts referring to the ICC those cases over which it has jurisdiction. However, the majority of the *tribunaux de grande instance* are still not operational in the north of the country. At the time of the mission, the judges assigned to these regions were still not travelling there as a result of the insecurity.”

⁶⁴ More than 203 statements from victims, ICC-01/05-01/08/-669-Conf-Exp-Anx B, [REDACTED] [REDACTED]. See also the disclosures on admissibility of 12 October 2009 and 18 December 2009, ICC-01/05-01/08-659 + Conf-Exp-AnxA.

proceed with the prosecutions. After all, if the *Cour de cassation* is the source of reliable judicial determination, doesn't that tend to prove the opposite, that is, that the courts of the country are functional?⁶⁵

93. The fact that the CAR authorities had issued an international arrest against Patassé and tried him in absentia solely for economic crimes, is indeed a clear indication that the Central African Republic courts were able to operate adequately.⁶⁶

94. Moreover, it should not be neglected that at the time when prosecution of the Accused was abandoned, his co-accused, Patassé, was committed for trial before the Bangui courts on the same charges. Since Patassé was also residing outside the CAR at the same time, there therefore is no substance to the argument that physical presence outside the Court's geographical implied an inability to prosecute or the abandonment of prosecution.

95. In conclusion, were the Accused's diplomatic immunity to be considered a procedural obstacle, it would, however, constitute only a temporary obstacle. The Accused did not continue to enjoy such immunity and the Central African Republic authorities were not unable to prosecute in the future. This is stated with sufficient clarity in the judgment of the International Court of Justice in the case of *DR Congo v.*

Belgium:

The Court emphasizes, however, that the **immunity** from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy **impunity** in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances...

...after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State

⁶⁵ "Complementarity in Practice: Creative Solution or a Trap for the Court?", William A. Schabas in *The International Criminal Court and National Jurisdictions*, Mauro Politi & Federico Gioia.

⁶⁶ EVD-P-02873, ERN: CAR-OTP-0004-0022 to 0031.

may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.”⁶⁷

96. The criterion relating to inability for establishing admissibility has therefore not been met.

(ii) Unwillingness to prosecute

97. Pre-Trial Chamber III erred in holding that the Central African authorities had “abandoned any attempt” to prosecute and inferring “unwillingness” therefrom.⁶⁸

98. It should be noted that the Central African Republic authorities themselves have never referred to unwillingness. They have always claimed “inability”⁶⁹ which means that the present debate on complementarity is a discussion about the Central African Republic authorities’ ability rather than willingness.

99. The Defence considers that Pre-Trial Chamber II’s erroneous assessment of the Central African Republic authorities’ willingness to initiate and bring the prosecution in the CAR to a successful conclusion has critical consequences for the outcome of the case brought against the Accused. In fact, the Central African Republic judicial authorities had conducted proceedings in a regular fashion up until the order for dismissal of the case for insufficient evidence, even though diplomatic reasons, at the very least, also dictated the stay or temporary interruption of criminal proceedings against the Accused for the limited time period when he was still Vice President of the DRC.

100. It is apparent that temporary immunity or geographical distance of the Accused never prevailed over the Central African Republic authorities’ continuing willingness to prosecute him.

⁶⁷ Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), 14 February 2002 at para. 60.

⁶⁸ ICC-01/05-01/08-14-tENG at para. 21.

⁶⁹ CAR-OTP-0004-0495.

101. Of interest is the fact that out of the three situations submitted by the Prosecutor of the International Criminal Court pursuant to article 14(1) of the Rome Statute, the situation in the CAR alone was submitted exclusively on the basis of an “inability” to prosecute.

102. In the two other pending situations, the ICC had found them to be admissible on the basis of deliberate inaction of the State with the consequence that there was no need at all to review the legal requirement of “inability”:

With respect to the Uganda and Democratic Republic of Congo situations resulting from ‘self-referral’ now pending before the International Criminal Court, the issue is actually unwillingness, not inability. Uganda, in particular, has simply preferred to hand the prosecutions over to the Court. Its referral did not allege that the national courts were unable to prosecute. Everything would indicate, in fact, that Uganda has one of Africa’s better criminal justice systems, and that its courts are more than able to prosecute the leaders of the Lord’s Resistance Army.

With respect to the Democratic Republic of Congo, it may well have been unable to undertake prosecution when the self-referral was submitted to the Court, in early 2004. But in the Lubanga decision, the above-cited sentence of the Pre-Trial Chamber invoking the compatibility of complementarity with the self-referral is accompanied by another sentence explaining that this was the case at the time of the self-referral and that it was a result of inability, not unwillingness. The Pre-Trial Chamber went on to note that the situation in the national justice system had evolved in the nearly two years since the self-referral, and that Congolese courts might well now be in a position to undertake prosecution.⁷⁰

The case of the situation in Uganda:

103. The situation in Uganda was brought before the ICC by means of a State referral on 16 December 2003. In the issuance of warrants of arrest against the leaders of the LRA, the Court determined admissibility on the basis of a letter from the Ugandan Government which stated that “the ICC is the most appropriate and effective forum” to deal with those responsible for the atrocities and that the Ugandan Government “does not intend to conduct national proceedings” against them.

⁷⁰ <http://www.isrci.org/Papers/2007/Schabas.pdf>; Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts” at p. 23 June 2007. See also ICC-01/04-01-01/06-8-US-Corr, para. 36.

104. In the context of reconciliation processes initiated between the Ugandan Government and the LRA which contemplated the establishment of a special division of the High Court of Uganda to try atrocity crimes, Pre-Trial Chamber II reviewed the issue of admissibility and held that:

... Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains therefore the same as at the time of the issuance of the Warrants, that is one of total inaction on the part of the relevant national authorities; accordingly, there is no reason for the Chamber to review the positive determination of the admissibility of the Case made at that stage.⁷¹

The case of the situation in the Democratic Republic of the Congo:

105. The Democratic Republic of the Congo (“DRC”) made a similar statement to that of Uganda upon making a self-referral on 3 March 2004.

106. Although it referred to the inaction or intentional non-intervention on the part of the authorities as the reason for the referral, in the case against *Thomas Lubanga Dyilo*, the Court found that in the absence of prosecution at a national level and any future intention to start such a prosecution, admissibility was established without the need to consider the criterion of “inability”:

[...] no State with jurisdiction over the case against Mr Thomas Lubanga Dyilo is acting, or has acted, in relation to such case. Accordingly, in the absence of any acting State, the Chamber need not make any analysis of unwillingness or inability.⁷²

107. More recently, in a decision issued on 25 September 2009 in the *Germain Katanga* case, the ICC Appeals Chamber held that “inaction” on the part of a State having jurisdiction renders a case inadmissible under article 17(1) (d) of the Rome Statute.⁷³ In that case, in which the matter of inability was not at issue, the Appeals Chamber made the explicit finding that no legal proceedings had been brought.

108. However, in the present case against the Accused, prior to the referral to the International Criminal Court, the Central African State initiated an investigation

⁷¹ ICC-02/04-01/05-377.

⁷² ICC-01/04-01/06-8, para. 40.

⁷³ ICC-01/04-01/07-1497.

which was undertaken by the Bangui Prosecutor. Following this investigation, a pre-trial investigation was conducted under the supervision of the senior investigating judge of Bangui, and the Central African State, as the State with jurisdiction over the case, took action by initiating criminal proceedings against the Accused.

109. Accordingly, it can be concluded from the foregoing that the criteria relating to unwillingness or inability to prosecute under article 17(1) (b) of the Statute for establishing the admissibility of the case have not been met.

d) Remarks

110. Any informed observer would be rightly astonished that the Prosecution, which had conducted several preparatory missions for the opening of an investigation in the CAR well before the referral of the situation by that State's authorities, did not choose to make use of the procedure in the option available to it under article 15 of the Statute.

111. The Appeals Chamber decision in the *Germain Katanga* case is relevant to this case in that it explicitly acknowledges that previous judicial decisions on the issue of complementarity may be subject to change:

Generally speaking, the admissibility of a case must be determined on the basis of the facts as they exist at the time of the proceedings concerning the admissibility challenge. This is because the admissibility of a case under article 17 (1) (a), (b) and (c) of the Statute depends primarily on the investigative and prosecutorial activities of States having jurisdiction. These activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa. Article 19 (10) of the Statute gives the Prosecutor the right to submit a request for a review of a previous decision that a case is inadmissible if he or she is satisfied "that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17." This right of the Prosecutor would be meaningless if the admissibility of a case would always have to be determined on the basis of the factual situation at the time the warrant of arrest is issued. Thus, the provision is clear evidence that the Statute assumes that the factual situation on the basis of which the admissibility of a case is established is not necessarily static, but ambulatory. Furthermore, the chapeau of article 17 (1) of the Statute indicates that the admissibility of a case must be determined on the basis of the facts at the time of the proceedings on the

admissibility challenge. The chapeau requires the Court to determine whether or not the case is inadmissible, and not whether it was inadmissible⁷⁴

112. Lastly, without being explicitly opposed to the issue of self-referrals and instead conceding that they may, on the contrary, be of some value, the Appeals Chamber was, nevertheless, insightful on the need for the Court to retain a certain amount of discretion:

Be this as it may, however, the Appeals Chamber is mindful that the Court, acting under the relevant provisions of the Statute and depending on the circumstances of each case, may decide not to act upon a State's relinquishment of jurisdiction in favour of the Court.⁷⁵

113. In any event, if the situation was previously unclear, the circumstances have now undergone such change that a finding of unwillingness would be considered entirely erroneous and a finding of inability can no longer be in any way defended. There is no better illustration of this than Bozizé's personal letter to the Secretary-General of the United Nations dated 1 August 2008, in an attempt to prevent an investigation by the ICC into matters in which he would have been a potential suspect:

[TRANSLATION] Any implementation of the terms of the letter from the Prosecutor of the International Criminal Court risks jeopardising the Comprehensive Agreement, were any of the combatants to be arrested on these charges. The Government has resolved to turn the page once and for all in the interests of national reconciliation and peace.

Sir, your commitment to global peace and security allows us to request, in accordance with Article 16 of the Rome Statute, that you intercede with the United Nations Security Council for the adoption of a resolution to the effect that Central African Republic courts retain jurisdiction over the events covering the periods taken into account by the amnesty laws.⁷⁶

114. This letter highlights the dubious nature of the assertion that the Accused could not be prosecuted and makes it clear that, for the purposes of article 17(3) of the Rome Statute, there was never any "total or substantial collapse or unavailability" of the national Central African Republic judicial system.

⁷⁴ ICC-01/04-01/07-1497 at para. 56.

⁷⁵ ICC-01/04-01/07-1497 para 85.

⁷⁶ EVD-P-04080, ERN: CAR-OTP-0057-0062, EVD.

B. “Ne bis in idem”

115. Article 17(1)(c) of the Rome Statute states that, “A case is inadmissible where [...] the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.”

116. According to article 20, “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.”

117. In the case under consideration, and as indicated above, there is no doubt that the legal grounds stated in the most recently amended version of the Document Containing the Charges (“the Document Containing the Charges”)⁷⁷ are based on exactly the same allegations as those which were the subject of the referral by the *Cour de Cassation* of the CAR.

118. In paragraph 68 of its present application, the Defence, recalling the Katanga and Ngudjolo case, indicated that the “same conduct” test had been amply satisfied between the charges brought against the Accused by the CAR courts and those before the International Criminal Court, and the fact that the allegations were identical had been explicitly acknowledged by Pre-Trial Chamber III in its Decision on the Prosecutor’s Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo of 10 June 2008:⁷⁸

⁷⁷ ICC-01/05-01/08-593-Conf-ex parte-Anx A; 4 November 2009.

⁷⁸ ICC-01/05-01/08-14-tENG, para. 22.

119. Furthermore, on 5 October 2009, having announced its intention to challenge the admissibility of the case, the Defence requested the Chamber to order the Office of the Prosecutor to disclose the evidence relating to the judicial proceedings in the CAR.

120. Subsequently, on 12 October 2009 and 18 December 2009, the Office of the Prosecutor disclosed several documents relating to the criminal proceedings against the Accused in the CAR.

121. An examination of the procedural measures undertaken in Bangui shows unambiguously that the Central African Republic judicial authorities conducted investigations through to their completion, resulting in the application for partial dismissal of the case by the Prosecutor's Office in Bangui.⁷⁹

122. The [REDACTED] requested that the charges against the Accused be set aside, having satisfied himself that there was insufficient evidence available. This can be seen in the application for dismissal of the case) of 28 August 2004. In this application, the [REDACTED] states the following:

[TRANSLATION] The criminal responsibility of Jean-Pierre Bemba

Considering that Jean-Pierre Bemba is accused of complicity in premeditated murder, causing fatal bodily injury, rape, pillaging, destruction of property, theft, concealment of property and bodies, wounding with intent to harm, and arbitrary arrest and imprisonment;

Considering that it has been shown that Jean-Pierre Bemba travelled on several occasions to Central African Republic territory during and after the events of 25 October 2002 and that purportedly he even held meetings with some of his men; it should be pointed out that so far there has been no proof of his direct participation in the commission of the acts perpetrated by these men; that, while it is not in dispute that he sent his troops at the request of Mr Ange-Félix Patassé, he remains unconnected with their deployment in the field; that he should be exonerated;⁸⁰

123. In his statement submitted to the Office of the Prosecutor, [REDACTED] provided additional information on the reasons why he had requested dismissal of the case against the Accused:

⁷⁹ EVD-P-00006, ERN CAR-OTP-0004-0085.

⁸⁰ EVD-P-00006, CAR-OTP-0004-0084 to CAR-OTP-0004-0085; CAR-OTP-0004-0112.

[TRANSLATION] [...]. We did not think it a good idea to get stuck with that, and to interfere in the political transition process in the Congo, which was on the right track with some kind of reconciliation between the opposing parties in the conflict. In the institutions of transition in the Congo, Bemba held the position of Vice President. I think he can be charged with complicity in the crimes committed in the Central African Republic but not direct participation in the material sense. In our view, once outside the limits of the national legal system, namely the Central African Republic courts, the way is clear, and he must be prosecuted by the international courts, since he cannot claim that he was not associated with what his troops did.⁸¹

124. Although submitted on the ground of inability, the Defence maintains that [REDACTED]'s request is based on a lack of evidence, as he himself states:

[TRANSLATION] there has been no proof of his direct participation in the commission of the acts perpetrated by these men;

and as shown in his arguments:

[TRANSLATION] Considering that the information does not produce sufficient evidence against Jean-Pierre Bemba ... not subject to statutory limitation, to charge him with having wilfully killed several individuals....committed several cases of rape against young girls under the age of 14 and against adult women,....pillaged and destroyed ... in Bangui and in several provincial towns in the Central African Republic ... That he should be exonerated.⁸²

125. [REDACTED]'s intention, as expressed in the application for dismissal of the case, was to put an end to the entire judicial proceedings against the Accused in the CAR. Mindful that this situation might make the case inadmissible before the ICC, the investigators of the Office of the Prosecutor attempted to remedy the situation by seeking to obtain from [REDACTED] a statement to the effect that the Accused had failed in his duties regarding command responsibility.

126. In the light of the aforementioned evidence, the senior investigating judge's order for the partial dismissal of the case against the Accused⁸³ constitutes *res judicata*. That decision brought to a definitive close the criminal proceedings against the Accused in relation to the acts for which he is currently being prosecuted at the International Criminal Court.

⁸¹ CAR-OTP-0005-0115.

⁸² CAR-OTP-0004-0107.

⁸³ <http://www.fidh.org/IMG/pdf/CPIaffbemba502ang2008.pdf>, p. 12.

127. The Office of the Prosecutor of the International Criminal Court has not submitted any notice of appeal against the said order for the partial dismissal of the case. Nor can the appeal lodged by the Bangui Prosecutor be invoked, since it did not relate to the Accused. It is clear therefore that the senior investigating judge's order has never been challenged before the Appeals Court in as far as it set aside the charges against the Accused. Accordingly, in the absence of an appeal against that order, there could have been no transfer of jurisdiction to the Bangui Appeals Court of the charges brought against the Accused, which had been set aside definitively by the senior investigating judge.

128. Conversely, were it to be considered that the Accused was indeed a respondent before the Bangui Appeals Court, neither it nor even the *Cour de Cassation* have raised any objections to the competence or jurisdiction of the Central African Republic's judiciary to deal with this case. Nor has there ever been a court order removing jurisdiction from the Central African Republic courts, which were and remain lawfully seized of this case.

129. The political decision by the Central African Republic government to refer the case to the ICC violated the principle of the separation of executive and judicial powers. Accordingly, the International Criminal Court cannot be deemed to be lawfully seized on the basis of such a political decision to refer or to remove jurisdiction, which was taken in violation of this fundamental principle of the rule of law.

130. There is also cause to consider the legal opinion developed on the "*ne bis in idem*" principle in the work by Otto Triffterer entitled "*Commentary on the Rome Statute of the International Criminal Court*":

To clarify which court decisions, other than acquittals or convictions, may fall under the notion "has been tried", a closer look at Article 17 where the same notion is used in *littera* (c) could be helpful. It is assumed that the three situations described in article 17 *lit* (a) to (c) cover a State's complete range of activities with regard to criminal procedure from the opening of an investigation until the final judgment, leaving no loopholes. Ongoing criminal procedures at whatever stage fall under

litera (a) ("is being investigated or prosecuted"). Litera (b) covers situations where a procedure has come to an end ("has been investigated ... and ... decided not to prosecute"). The wording suggests that e.g. a decision not to proceed to trial falls under litera (b). Litera (c) therefore deals with procedures that have been terminated after reaching the trial stage. In this regards, the transfer of the decision-making competence from the prosecuting authority to the judicial organ has been identified as the decisive element. Following this approach, any Court decision terminating proceedings according to the respective domestic criminal procedural law would fall under the notion "has been tried". This suggestion seems plausible under article 20 as well as under article 17. It has further been suggested that a national decision is to be regarded as final even before all possible remedies are exhausted.

...

Whatever approach the Court will follow, it is clear that the ICC will be barred from exercising jurisdiction as soon as the national authorities will undertake a bona fide effort to prosecute."⁸⁴

131. In this case, there is no suggestion that the Central African Republic judicial authorities [REDACTED] and [REDACTED] (who are [REDACTED]) did anything other than make a real and genuine effort to initiate proceedings against the Accused. Consequently, in the absence of an appeal against the decision to dismiss the case against the Accused, this case is therefore inadmissible under articles 17(1)(c) and 20(3), by virtue of the fact that genuine and real proceedings were conducted and closed by a definitive decision.

C. The case does not reach the requisite level of gravity to be dealt with by the International Criminal Court

132. Article 1 of the Statute states that: "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for **the most serious** crimes of international concern [...]"

133. Article 5(1) of the Statute states that: "The jurisdiction of the Court shall be limited to the **most serious** crimes of concern to the international community as a whole. [...]"

⁸⁴ Immi Tallgren/Astrid Reisinger Coracini; "Ne bis in idem"; Triffterer, O; *Commentary on the Rome Statute of the International Criminal Court*, pp. 689-690.

134. According to article 17(1)(d) of the Statute: “Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court.”

135. The Defence claims that certain elements of the Document Containing the Charges are incomplete because they lack precision and, as a consequence, artificially increase the gravity of the Prosecution’s arguments. These tersely drafted elements suggest that an incalculable number of crimes were perpetrated in addition to those specifically charged involving identifiable victims. For example, in the count alleging the perpetration of crimes against humanity, the following wording, *inter alia*, is used to define the civilian victims:

Civilian men, women and children in the Central African Republic include, but are not limited to...

136. The Accused maintains that he is not able to defend himself against such accusations because they are imprecise. He cannot identify his accusers or know the circumstances in which the perpetration of the said unspecific crimes was purportedly brought to his attention, which would have made it possible for him to exercise one or other form of the duty “to prevent or punish”.

137. Before even discussing whether he approved of such acts, which would have to be proven at trial, the number of crimes of importance in this case, aside from the poorly worded charges, is extremely low and barely meets the standard of gravity set by the Prosecutor himself in his response of 3 February 2006 to the communications received concerning Iraq:

The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as willful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of willful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have

resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.
Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.⁸⁵

138. In the “Policy Paper on the Interests of Justice” dated September 2007, the Prosecutor named the factors he would consider in assessing whether a case met the required threshold of gravity:

The Rome Statute was created to address the most serious crimes of concern to the international community. In order for a case to be admissible, not only do the crimes have to be within the jurisdiction of the Court, but they must also meet the higher threshold of being of “sufficient gravity to justify further action” of the Court in terms of Article 17(1)(d).
In determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact.⁸⁶

139. Even though the Appeals Chamber rejected the requirements of “systematic or large-scale conduct causing social alarm” and “prior conduct” as obligatory indicators of gravity, there have been no positive directions on the matter in the case law of the International Criminal Court.⁸⁷

140. Furthermore, while not providing a conclusive response on this matter, Professor Schabas has suggested that the factors for admissibility based on gravity could include crimes committed in the context of a war of aggression or by the government of a State (as opposed to a rebel faction).⁸⁸

141. This line of argument is all the more striking in the present case, where the presumed bias operated by the Office of the Prosecutor in exercising its discretionary power to commence a prosecution against the Accused is accentuated by the curious failure to date on the part of the Prosecutor to undertake a serious investigation

⁸⁵ www.icc.cpi.int/Menus/ICC/Structure+of+the+Cour/Office+Presecutor/Comm-and-Ref/Iraq/.

⁸⁶ www.icc.cpi.int/NR/rdonlyres/772C95c9-F54D-4321-BF09-73422BB23528.

⁸⁷ ICC-01/04-169, 23 September 2009. In the light of the fact that the judgment was rendered at the *ex parte* request of the Prosecution, the Appeals Chamber positively refused to rule on the matter of gravity in the absence of substantive submissions by the participants.

⁸⁸ <http://www.isrcl.org/papers/2007/Schabas.pdf>; Schabas, “‘Complementarity in Practice’: Some Uncomplimentary Thoughts”, p. 25.

against Patassé,⁸⁹ or even against Bozizé for the crimes his forces committed during the coup d'état and to whom he subsequently granted amnesty.

142. The Defence maintains that “the mode of responsibility” – responsibility as military commander – does not under the present circumstances meet the requisite level of gravity to justify prosecution by the ICC.⁹⁰

143. One must not lose sight of the fact that the mode of responsibility with which the Accused was originally charged was “co-perpetration” pursuant to article 25 of the Rome Statute. This mode of responsibility suggests direct, shared perpetration of the criminal activity – a mode of criminal activity which is far more serious than failure to prevent or punish. This argument is justified by the fact that the subjective element of “co-perpetration” requires proof of “criminal intent”, while the subjective

⁸⁹ ⁵¹ <http://www.iwpr.net/EN-acr-f-353191>, ICC Deputy Prosecutor Fatou Bensouda to IWPR: “Patassé was, no doubt, a very important actor in the CAR situation in 2002-2003 and he was the one who invited the MLC troops to the CAR. But this is not enough. The fact there is no arrest warrant for Patassé is because we don't have the evidence. We are driven by the evidence and the evidence alone.”

⁹⁰ [...]”Roberta Arnold in OTTO TRIFFTERER: “Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, Articles by Articles-, Margin No 135, p 842: “Mere failure to control the subordinates does not per se bring into play this charge. The conclusion, therefore, should be that the commander will not be liable in this case, since command responsibility is not a crime per se, but a mere form or participation into another crime. Participation is always to be considered accessory to the primary conduct, so that a participant cannot be charged more severely than the primary perpetrator.

Roberta Arnold in OTTO TRIFFTERER: “Commentary on the Rome Statute of the International Criminal Court: Observers’ notes, Articles by Articles-, Margin No 90, p 827: “[...] **since command responsibility is not included in the catalogue of crimes contained in article 5 and specified in articles 6-8 of the Statute, it cannot be considered as crime per se. Command responsibility is a principle** which, as such, is contained in Part III of the Statute on general principles of criminal law under article 28, and not Part II on jurisdiction, Admissibility and Applicable law. Therefore, even though in some jurisdictions command responsibility may be considered as an offence per se, indicating a superior’s liability for the mere fact of having failed to properly supervise his/her subordinates, **the ICC Statute considers it only as a form or participation to the crimes enlisted under article 5.** [...] Therefore, the first clarification to be made with regard to the phrasing “any of the crimes within the jurisdiction of the court” is that **subordinates must have committed** a crime falling within ICC’s jurisdiction.”

element required for breach of command responsibility can be met simply by proving negligence.⁹¹

144. In the present case, Pre-Trial Chamber II found in its decision confirming the charges that the Accused knew that certain crimes had been perpetrated, but did not do enough, within his material ability, to repress or punish them.⁹² The Accused, who strenuously denies a breach of command responsibility, maintains however that “not doing enough” to prevent the acts committed by others is by far a less serious “form of perpetration” than ordering or committing criminal acts.

145. Furthermore, in choosing command responsibility as the mode of responsibility to argue at trial, the Pre-Trial Chamber insisted on the need to establish a link of “causality” between the alleged failure of command on the part of the Accused and the crimes allegedly committed by his subordinates. The crimes brought to the attention of that Chamber were confirmed, not because there was a direct causal link between the failure of command and their perpetration, but because the failure of command had “increased the risk” of commission of the crimes:

The Chamber also considers that since article 28(a) of the Statute does not elaborate on the level of causality required, a possible way to determine the level of causality would be to apply a “but for test”, in the sense that, but for the superior's failure to fulfil his duty to take reasonable and necessary measures to prevent crimes, those crimes would not have been committed by his forces. However, contrary to the visible and material effect of a positive act, the effect of an omission cannot be empirically determined with certainty. In other words, it would not be practical to predict exactly what would have happened if a commander had fulfilled his obligation to prevent crimes. There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute.”⁹³

⁹¹ ICC-01/05-01/08-424, para. 432. “The ‘should have known’ standard requires the superior to ‘ha[ve] merely been negligent in failing to acquire knowledge’ of his subordinates’ illegal conduct”.

⁹² Ibid., para. 501.

⁹³ ICC-01/05-01/08-424, para. 425.

146. The objective gravity of the case is thus further lessened by the fact that the alleged crimes are the consequence of an “increased risk” resulting from the failure to act and not the direct cause of such an omission. One could argue, according to the first scenario, as found by the Pre-Trial Chamber, that while it increased the risk of criminal conduct, the alleged failure of command did not make this same criminal conduct inevitable.

147. The Defence further suggests that the gravity of the alleged failure of command responsibility should be assessed within the context of the period of military operations relating to this case. The military campaign, for which the Accused is held responsible, was conducted within the space of five months. If it is supposed, for example, that the Accused was indeed responsible for a failure of command responsibility, then the brevity of this failure should also be a relevant factor in determining the gravity of the case.

148. The Defence stresses that its aforementioned argument should not be interpreted as rendering the concept of command responsibility inappropriate as a mode of responsibility at the ICC.

149. In fact, command responsibility plays a crucial role in cases where it can be demonstrated that a commander had or should have had specific knowledge of a quantifiable and objectively verifiable series of crimes of atrocity. This is not however the case here, where it cannot be proven that the Accused ever knew about the specific incidents referred to in the decision confirming the charges⁹⁴ or, at best, had been informed, even through hearsay, of the evidence relating to the perpetration of residual crimes against an undefined number of unidentifiable victims.

⁹⁴ ICC-01/05-01/08-424.

V. Abuse of process

150. In what is now a landmark ruling in the United Kingdom, in *R v. Horseferry Road Magistrates' Court, ex p. Bennet*, two elements of the doctrine of “abuse of process” were identified:

[...] [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible [...] to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.⁹⁵

151. In the case against *Thomas Lubanga*, the Appeals Chamber of the ICC adopted that viewpoint in the following terms:

The doctrine of abuse of process had ab initio a human rights dimension in that causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as 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.

Where the breaches of the rights of process of the accused are such as to 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. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a Court: “to see to the protection of individual fundamental right which is the particular territory of the courts [...]” Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice.

152. It must be stressed that the guilt or innocence of the Accused is generally irrelevant to the consideration of whether or not to apply the “abuse of process” doctrine. As this doctrine is designed to protect the integrity of the judicial process, the only relevant issue is whether the alleged abusive conduct of the CAR and DRC authorities and of the Prosecutor places the Accused in a position where he will not receive a fair trial, or even whether the fact that he is being prosecuted, regardless of the merits of such prosecution, is contrary to the principles of justice and ethics.

⁹⁵ [1994 1 AC 42, 74 by Lord Lowry.

153. In the instant case, the Accused submits three grounds constituting an abuse of process which require a stay of the proceedings:

- a. the Office of the Prosecutor's failure to disclose the evidence pertaining to its contact with members of the CAR government and judiciary which might shed light on the issue of complementarity;
- b. the abuse of the judicial process for political purposes; and
- c. the unlawful means by which the Accused was surrendered to the Court.

a) Failure to disclose the relevant evidence pertaining to the issue of complementarity

154. In a report to Pre-Trial Chamber II dated 15 December 2006, the Office of the Prosecutor acknowledged that, during an investigation mission in the CAR in November 2005, it had met with a number of persons, including the local judiciary, in order to verify the status of the legal proceedings at national level:

In November 2005, the OTP sent a mission of four representatives to Bangui for the purposes of further developing preliminary analysis, focussing in particular on collecting additional information on the conduct of the national proceedings prior to the referral. The mission held meetings with representatives from the CAR Government and the CAR judiciary, [emphasis added] members of non-governmental organizations, as well as representatives from international organizations and diplomatic missions. The mission was informed, inter alia, that a final decision on national criminal proceedings was pending before the Cour de Cassation of the CAR. This decision was necessary before a determination could be made on the issue of admissibility.⁹⁶

155. In a report dated 27 September 2006 annexed to the request for information to the Government of the CAR, [REDACTED] confirms not only that the four "analysts" from the Office of the Prosecutor met with the CAR judicial authorities in order to

⁹⁶ ICC-01/05-07 at para. 16; 15 December 2006.

consult on matters related to complementarity, but also that they had received information:

In November 2005, a mission of the Office of the Prosecutor of the International Criminal Court composed of four analysts travelled to Bangui in the Central African Republic to meet the judicial and political authorities of the country, and to verify the conditions for the application of the principle of complementarity and the conditions for cooperation of the Central African State.

After obtaining supplementary information, the mission concluded that the file seemed very serious and that the analysts would continue their study pending the decision of the Central African Court of Cassation.⁹⁷

156. In a written response to Pre-Trial Chamber II, the Office of the Prosecutor contended that it had disclosed in full all materials which it believed were relevant to the issue of admissibility.⁹⁸

157. The Defence submitted a further request to the Office of the Prosecutor by e-mail of 24 September 2009, reiterating its previous request. Subsequently, in a filing dated 5 October 2009, it broadened its application for disclosure to include the Prosecutor's notification in accordance with article 18 and the complete record of the criminal proceedings in the CAR concerning the case against the Accused.⁹⁹

158. On 12 October 2009, the Prosecution filed an additional response to the Defence's disclosure application, stating that:

The Prosecution is not in possession of minutes related to meetings, or correspondences exchanged, with the CAR or DRC authorities, which record any facts that are relevant to the issue of the admissibility of the case against Jean-Pierre Bemba Gombo before the International Criminal Court.¹⁰⁰

159. It should be noted that the Prosecution did not deny the Defence's contention that such minutes, if they existed, would be among the investigative materials subject to disclosure.

⁹⁷ ICC-01/05-7-Anx1.

⁹⁸ ICC-01/05-01/08-474.

⁹⁹ ICC-01/05-01/08-542.

¹⁰⁰ ICC-01/05-01/08-556 at para. 11.

160. In any event, the Defence draws attention to the incongruity arising from the Prosecution's response of 12 October 2009 compared with its report of 15 December 2006 to the Pre-Trial Chamber, in which the Prosecution gave a detailed account of its activities in the CAR in November 2005. Accordingly, the only reasonable conclusion that can be drawn is that the Office of the Prosecutor held a series of meetings pertaining to the situation of the criminal proceedings in the CAR without taking any notes whatsoever.

161. The Defence strongly believes that the Office of the Prosecutor's meetings in November 2005 on the status of the judicial proceedings at national level are basically investigative procedures. By their very nature, the content – even if verbal – of such meetings is relevant to the issue of admissibility and, accordingly, is material which is indispensable to the preparation of the defence case. The Office of the Prosecutor was duty bound to keep an accurate record of the November 2005 mission, especially in order to allow transparency in subsequent disclosure, in accordance with rule 77 of the Rules of Procedure and Evidence.

162. Furthermore, it is suggested that a report of such meetings should have been not only in writing but also contemporaneous. In fact, the lack of a contemporaneous report dating from the time of the said mission to Bangui by the Office of the Prosecutor is an impediment to the Defence since it cannot assess the veracity of the conclusions which might be drawn by the Prosecution in the current proceedings in relation to the CAR Government's unwillingness or inability to prosecute.

163. As an institution with residual jurisdiction to deal with crimes of atrocities committed even in the most developed countries in the world, the Office of the Prosecutor is obligated to adopt the highest standards of investigation. To this end and with all due respect, the Defence requests the Trial Chamber to refer to the procedures adopted in the United Kingdom to retain material from investigations, as indicated in the code of practice promulgated under Section 23(1) of the Criminal Procedure and Investigations Act 1996:

If material which may be relevant to the investigation consists of information which is not recorded in any form, the officer in charge of an investigation must ensure that it is recorded in a durable or retrievable form (whether in writing, on video or audio tape, or on computer disk) [...]
[...]

Where information which may be relevant is obtained, it must be recorded at the time it is obtained or as soon as practicable after that time. This includes, for example, information obtained in house-to-house enquiries, although the requirement to record information promptly does not require an investigator to take a statement from a potential witness where it would not otherwise be taken.¹⁰¹

164. The Accused suggests that the manner in which members of the Office of the Prosecutor met with organs of the CAR judiciary and discussed with them matters relating to the issue of admissibility was highly inappropriate. At the time of the said mission, an appeal on the issue of referral was pending before the *Cour de Cassation*, the competent court in the CAR, and for a future interested party such as the Office of the Prosecutor to discuss the case *ex parte* and unofficially with members of a State organ responsible for issuing the final decision on the case at national level unquestionably gives rise to an appearance of bias.

165. Initiating such active contacts with the national judicial authorities is not recommended by the aforementioned expert report nor provided for under the Rules of Procedure and Evidence. Paragraph 38 of the expert report entitled “The Principle of Complementarity in Practice”¹⁰² advises the Office of the Prosecutor on how to obtain information pertaining to admissibility from “official sources”.

166. While it is true that contact with the executive power of a State (whether the Ministry of Justice or other organs) appears among the steps to be followed, direct contact with the judiciary is not listed among the recommended procedures.

¹⁰¹ Disclosure Code of Practice - Preamble, Introduction, Definitions, General responsibilities, Recording of information, Retention of material, Preparation of material for prosecutor:
<http://209.85.229.132/search?q=cache:v36w-m0ltZQI:law.jrank.org/pages/20173/Disclosure-Code-Practice.html+the+duty+to+record+investigative+procedures+disclosure+criminal&cd=1&hl=iw&ct=clnk&gl=il#ixzz0Y8hSXafQ>.

¹⁰² <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>.

167. The huge irregularity of the Prosecution's contact with the judiciary precisely at the time the proceedings were underway is further aggravated by the fact that there is no contemporaneous report which would refute the Accused's concerns that the Office of the Prosecutor took advantage of its meetings with the judicial organs of the CAR Government in order to "advise them" on how to proceed with a "fruitful" referral to the ICC.

168. It has been acknowledged, at both national¹⁰³ and international level, that a failure to disclose evidence is likely to give rise to an allegation of abuse of process. In the case against *Thomas Lubanga Dyilo*,¹⁰⁴ failure to disclose evidence was found to deprive the accused of the right to a fair trial. In that case, the risk of resultant prejudice was proven on the basis of the Prosecution's acknowledgment that some parts of the materials not disclosed were exculpatory.

169. In the present case, where the issue concerns a failure to constitute evidence (as opposed to a failure to disclose evidence), there is no way of knowing whether the information which should have been disclosed to the Accused was essential to his defence.

170. Accordingly, the same prejudice arises here, resulting in the Accused's being deprived of the ability to mount his defence while benefiting from the entire range of information to which he should be entitled. The potential for the aforementioned prejudice is greater still in view of the problematic personality of Bozizé, his interest

¹⁰³ c.f. *R v. Birmingham & Others* (1992) Crim. LR 117, where failure to disclose evidentiary materials which could not be reconstituted led to an end to the proceedings; and on the other hand, *R v. Altaf Hussain* (1994) 158 JP 602, where the alleged abuse of process was not established because, under the circumstances, there were other means of ensuring a fair trial. See also: *R v. Felham Magistrates Court ex parte Ebrahim* and *Mouat v. DPP* [2001] 2 Cr App R 23, where the Court contemplated the approach to be adopted when an application to stay the proceedings is based on the unavailability of a video recording alleged to contain relevant material. If, under the circumstances, there was no duty to retain that material prior to the Defence seeking its retention, there can be no question of a subsequent trial being unfair on that basis. If there was a failure to comply with the obligation to obtain or retain the relevant material, it must be decided whether or not the Defence has shown, on the balance of probabilities, that the lack of the relevant material would be seriously prejudicial to the accused, to the extent that a fair trial would be impossible.

¹⁰⁴ ICC-01/04-01/06-1401.

in having the case against Patassé referred to the ICC, and his apparent collaboration with Kabila, as alleged below.

b) Abuse of legal process for political purposes

171. As indicated in the factual background set out in this application, the proceedings against Patassé were initiated almost at the same time as the electoral process organised in the CAR in late 2004. While his government was clearing the way for him to be elected unchallenged by prosecuting his former rival, Bozizé was simultaneously rewarding his former allies by granting an amnesty:

With this in mind, on 23 April 2003, President Bozizé granted an amnesty by order to all the perpetrators of the failed putsch of May 2001, including former President Kolingba in power from 1981 to 1993 who was reinstated subsequently as an army general [...]

[...] On 15 September 2003, the National Dialogue, which comprised the majority of parties (47) and Central African politicians and whose main aim was national reconciliation, began work. These sessions, welcomed by the international community, aimed at putting an end to the divisions that had plunged this country into a cycle of political-military troubles [...]

[...] The current Central African President, François Bozizé, also asked for pardon from the delegates for the “misdemeanours” of the former rebellion that had brought him to power on 15 March 2003. “As in any uprising situation, our struggle for freedom involved serious misdemeanours committed (...), in particular “by those who gave themselves resolutely to the service of a noble cause”. Proclaiming himself a “Man, that is to say, capable of mistakes”, Bozizé asked “from the bottom of his heart (...) for pardon from the Central African Republic and from Central Africans”, in the hope that this could “help appease hearts and heal the scars”.¹⁰⁵

172. Therefore, it is clear that the decision to initiate judicial proceedings against Patassé and hence his fellow defendant, the Accused, resulted from a politically motivated exercise. The human rights NGO FIDH agrees with this evaluation of the situation:

[TRANSLATION] In fact, since he came to power, Bozizé’s only interest in relation to the Central African Republic justice system has been to prosecute high-ranking

¹⁰⁵ FIDH Report 457, October 2006, Central African Republic: *Forgotten, stigmatised, the double suffering of victims of international crimes*, at p. 28.

members of the previous government – the highest-ranking of whom is the former president, Ange-Félix Patassé. The hurried proceedings against him appear to be a convenient way for Bozizé to eliminate his main political opponent from the presidential elections. Although this objective was reached [...], registering the “case of Patassé et al” on the docket of the *Cour criminelle de Bangui* in December 2004 was to produce a legal outcome inconsistent with the right of the victims of the international crimes committed during General Bozizé’s coup to receive an effective remedy.¹⁰⁶

173. It is hard to ignore the fact that the CAR Public Prosecutor found that there was no evidence to hold the Accused responsible for the crimes alleged and that the case was subsequently appealed – apparently to circumvent the *ne bis in idem* principle, and subsequently to artificially prompt his surrender to The Hague.

174. The Defence very respectfully requests the honourable Trial Chamber III not to overlook the part the DRC authorities played in the Accused’s effective surrender to the ICC. The violence in 2006 and subsequently in March 2007 between the forces loyal to President Joseph Kabila and those loyal to the Accused gave Kabila every reason not to exercise jurisdiction over the crimes the Accused is alleged to have committed in the CAR when the former received notification of the ICC investigation under article 18(1) of the Rome Statute.

175. For Kabila, surrendering the Accused to The Hague was the perfect solution to prevent the prospect of a future electoral challenge by his political enemy or of his appointment as the spokesperson for the opposition, a position which, under Congolese law, has the rank of Prime Minister. In its report entitled “We Will Crush You”, the NGO Human Rights Watch referred to a political manoeuvre attributable to the Accused’s opponents:

In Kinshasa the ICC investigation was widely interpreted as focusing solely on alleged crimes by Bemba and his combatants. Before and during the election campaign, Kabila’s supporters called Bemba a “war criminal” and talked about complaints they had filed against him at the ICC for his conduct in Congo. [...]

[...] Bemba’s arrest coincided with the final stages of electing an opposition “spokesperson” in the National Assembly. Under pressure from donor governments,

¹⁰⁶ FIDH Report 410, February 2005, Central African Republic: *Fin de la transition politique sur fond d’impunité* [The political transition closes against a backdrop of impunity], at p. 26.

Kabila had agreed in mid-2007 to a law guaranteeing and defining the role of the opposition, including the creation of a new position of “spokesperson”, to be elected by opposition parliamentarians and to serve as the effective leader of the opposition. The MLC, as the largest political group in the opposition, had put Bemba forward as their candidate and it was widely believed that he would be elected. Bemba hoped that his selection as spokesperson of the opposition would facilitate his return to Congo.

Bemba's arrest just as he was considering a return to Congo was widely interpreted by the MLC and other opposition groups as a move orchestrated by Kabila, and his international backers, to remove his rival and weaken the opposition.¹⁰⁷

176. The Rwandan President Kagame, who is a player in the politics of the DRC (and a major one at that), rightly or wrongly adopts the following point of view:

[TRANSLATION] In fact, I have thought of something else concerning the situation in the Congo: whether for [...] Bemba [...], there has always been a tendency to want to remove people who bother President Kabila [...]. First of all, that doesn't completely solve the problems, but also this is a case where international justice is being used for political ends[...] When Bemba was arrested in Brussels, I thought that that was a new pledge the Belgians were making to Kabila, in exchange for something else. When I see how the International Court is being used as a political tool, I tell myself that I was right not to recognise it when it was founded in 2002; I thought it would become a tool to be used against us. [...] ¹⁰⁸

177. As indicated in the factual and procedural background of this application, the Prosecutor met Kabila on 2 April 2006, approximately one week prior to the judgment from the *Cour de Cassation* of the CAR referring the case to trial. It is not unreasonable to suppose that either the Prosecutor or other members of his Office discussed the issue of complementarity in the CAR with the DRC authorities, and that they inquired about whether or not the Congolese authorities intended to exercise jurisdiction. Hence the Defence has a persistent need to know whether such discussions could really have taken place without any record being made.

178. The Defence's concerns about the fact that the DRC played no less innocent a part in facilitating the Accused's transfer are compounded by the fact that it has prima facie evidence to support its assertion that [REDACTED] ([REDACTED] *Ligue Centrafricaine des Droits de l'Homme* (LCDH))¹⁰⁹ who chaired Bozizé's transition

¹⁰⁷ Human Rights Watch: “We Will Crush You”: <http://www.hrw.org/en/node/76188/section/6>.

¹⁰⁸ <http://blogs.lesoir.be/colette-braeckman/2008/09/06/le-president-kagame-a-coeur-ouvert>

¹⁰⁹ A human rights NGO in the Central African Republic.

parliament, and as Bozizé's legal adviser) was in direct personal contact with members of Kabila's government on 21 July 2006 – less than a week and a half after the judgment of the *Cour de Cassation* of the CAR.¹¹⁰

179. Furthermore, it is submitted that such contact was not innocent, but rather part of an ongoing plan whereby victims would be actively encouraged by the governmental authorities to file complaints against the Accused and the MLC troops.¹¹¹

180. The Defence respectfully requests the honourable Trial Chamber to refer to the precedent of the United Kingdom Privy Council in *Sharma v. Brown–Anotine and others*,¹¹² where it was decided that the courts are justified in challenging a decision to prosecute on the basis of political concerns rather than of an objective view of the considerations by the public prosecution service:

The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high or dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed.

181. As stated above, the Defence has presented an admissible argument that the Office of the Prosecutor held back material from its investigations relating to its

¹¹⁰ *Affaire Bmba: La Ligue Centafricaine des Droits de l'Homme instrumentalisée par Kinshasa*:

<http://www.congoindependant.com/article.php?articleid=3644>.

CAR-DEF-0001-0821; (confirmation hearing) EVD-D01-00037 e-mail from [REDACTED] to [REDACTED], [REDACTED] and [REDACTED], 21 July 2006, where it is alleged that greetings had been passed on to President Kabila and the recipients had been identified by the Pre-Trial Chamber as eminent members of the DRC government.

¹¹¹ c.f. ICC-01/05-01/08-450; Aprodec, “*Demande d'autorisation d'intervenir comme Amicus Curiae dans l'Affaire du Procureur C. Jean-Pierre Bemba Gombo, en vertu de la Règle 103 du Règlement de Procédure et de Preuve de la Cour*”; “[TRANSLATION] There is no lack of evidence of the allegiance of the Organisation for Compassion and Development of Families in Distress, Ocodefad, to the former rebel François Bozizé Yangouvanda, the current President of the Central African Republic. Among Ocodefad's members are some several thousand women alleged to be victims of various acts of violence, including rape and torture. In fact, the NGO's effective Chair, Ms Bernadette Sayo Nzale, was appointed as a minister in François Bozizé Yangouvanda's government several times. In this regard, in a letter dated 6 May 2009, the International Federation for Human Rights (FIDH) suspended Ocodefad for six months because of Ms Bernadette Sayo Nzale's dual role as both a minister in Bozizé's government and Chair of Ocodefad.”

¹¹² [2007] 1 WLR 780, at para. 14

meetings with the governmental authorities of the CAR and with judicial authorities, many of whom were suspended and dismissed immediately after Bozizé's ascent to power.¹¹³ When this state of affairs is combined with an appearance of bias in the exercise of the Prosecutor's discretion, the Accused suggests that a stay of the proceedings should be ordered.

182. The Accused indicates that he need not prove actual bias, but only the appearance of bias. This is well illustrated in case law:

[...] there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.¹¹⁴

183. Likewise, where the fairness of the actions and decisions of an executive authority is subject to judicial scrutiny, the same test should apply.

184. Accordingly, the Defence's cumulative concerns, including those related to the part played by [REDACTED] and biased local NGOs involved in suspect dealings with victims, would lead a reasonable observer to detect a real level of bias. Hence it is for the Prosecution to prove beyond reasonable doubt that this appearance of bias is false, which will undoubtedly be difficult for it, since it failed to prepare a contemporaneous report of its discussions with Bozizé's government, and will

¹¹³ c.f.; <http://www.icj.org/IMG/CAR.pdf>; *Attacks on Justice – Central African Republic*; "After a coup d'état in March 2003, General Bozizé established a transitional government until general elections to be held in March 2005. A new Constitution was adopted by referendum in December 2004, following a September 2003 National Dialogue and the October 2003 creation of a Truth and Reconciliation Commission. The judiciary is ineffective, unaccountable, corrupt and dependent on the executive."

¹¹⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 at para. 49, quoting *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-A, Judgement, 1 June 2001 at para. 203.

therefore be unable to prove whether or not it asked questions relevant enough to allay the Defence's concerns.

185. Such apparent bias, which cannot be dissipated, may also constitute an abuse of process, since it runs counter both to the spirit of justice and to propriety and ethics.

186. By way of conclusion on this point, the Defence considers that Trial Chamber III must exercise its power to stay the proceedings. The substantive merits of the investigation are irrelevant; the decisive principle is respect for the primacy of law in an international context and the issue of whether the Office of the Prosecutor is entitled to take advantage of the unacceptable conduct of the Central African Republic executive, which abused national and international criminal proceedings in order to remove political opponents from the scene. To allow such bias would be prejudicial to the fairness of the trial in accordance with international legal standards, and would bring the International Criminal Court into disrepute.

c). Unlawful means used to surrender the Accused to the Court

187. The Accused respectfully reminds the Chamber that, on 21 May 2008, Pre-Trial Chamber III dismissed the Prosecution's first application dated 9 May 2008 for the issuance of a warrant of arrest for the Accused.

188. Pre-Trial Chamber III justified this dismissal on the basis that the Prosecution was required to submit additional information about various aspects of its arguments. Strangely enough, without providing any of the required information whatsoever and only two days later, that is, on 23 May 2008, the Prosecution sought and obtained a provisional arrest warrant for the Accused pursuant to article 92 of the Rome Statute. The following day, that warrant was executed in the Kingdom of Belgium and the Accused was placed in detention pending trial.

189. The Prosecution justified the provisional warrant of arrest on the basis of information it had allegedly received that the Accused was preparing to flee. The Defence has continuously sought the disclosure of this information – by applying both in writing to the Office of the Prosecutor and orally to the distinguished Trial Chamber.¹¹⁵

190. The Accused has always vehemently denied the Prosecution's allegation that he was preparing to flee. His return ticket to the United States during the summer months of 2008 and the fact that his children were enrolled in Belgian schools constitute compelling evidence of the fact that he had no intention whatsoever consistent with the Prosecution's allegations.

191. With this in mind, the Prosecution's refusal thus far to disclose the information it possesses raises several issues.

192. Disclosure of the content and source of this information and the date on which it was received is in fact of paramount importance. If this information was in the Prosecutor's possession on 21 May 2008, when he filed his first application for a warrant of arrest, one would be entitled to ask why he deemed it inappropriate to bring the information to the attention of the Pre-Trial Chamber – especially if the risk of flight was as imminent as he alleged.

193. If, however, the information was received after 21 May 2008, it cannot be ruled out that the Prosecution's refusal to disclose the information is based on a suspicion that it was conceived or provided specifically and at the "right" time solely for purposes of short-circuiting or speeding up the normal procedures governing surrender to the International Criminal Court or of circumventing the fact that the Pre-Trial Chamber declined to issue a warrant of arrest.

¹¹⁵ Status conference of 8 December 2009, ICC-01/05-01/08-T-18-CONF-ENG ET 08-12-2009.

194. Such a situation seems certain; if the information was provided by foreign secret services – especially those with an interest in the arrest and criminal proceedings, the Prosecution will never be able to guarantee that it is accurate or genuine.

195. The Prosecutor's refusal to disclose to the Defence the information underpinning his eagerness suddenly and at all costs to secure the Accused's detention pursuant to article 92 of the Rome Statute, after having failed to obtain it on 9 May 2008 on the basis of article 58, creates a feeling of injustice, if not a sentiment that the justice system is being exploited for political ends.

196. This suspicion has not thus far been dispelled and must therefore be taken into account as a further ground for abuse of process. In fact, it was recognised in a British precedent that when it seems that the authority actively colluded to impede the legal proceedings for extradition, this may constitute an abuse of process.¹¹⁶

VI. Irreparability of the abuse of process

197. The Defence contends that its submission on abuse of process is perfectly well-founded, given that the resultant procedural shortcomings are so serious as to be irreparable. In this respect, the Defence draws the attention of the Trial Chamber to the judgment on appeal in *The Prosecutor v. Jean-Paul Akayesu*:

[...] an order staying proceedings on the ground of abuse of process [...] should never be made where there were other ways of achieving a fair hearing of the case, still less where there was no evidence of prejudice to the defendant.¹¹⁷

¹¹⁶ c.f. R v Horseferry Road Magistrates Court ex parte Bennett [1993] 3 All ER 138 and R v Mullen [1999] Cr App R 143.

¹¹⁷ ICTR 96-4-A; 1 June 2001 at paras. 339 & 340.

198. The Defence submits that all of the aforementioned abuses of process vitiate the entire ongoing proceedings, to such an extent that a fair trial is no longer possible.

199. The fact that the Prosecutor held back evidence or rather that he failed to use an available medium to make a record of his meetings with the national political and judicial authorities cannot be remedied. This is causing the Accused irreparable harm, since he will never know whether the information which should have been disclosed to him was material to his defence. Hence it is impossible for him to mount his defence in possession of the entire range of information to which an accused should be entitled, which contravenes article 6 of the European Convention on Human Rights.

200. Furthermore, the political interference in the case gives rise to the objective fear that Prosecution witnesses, the majority of whom are subordinates to political opponents of Mr Jean-Pierre Bemba Gombo, were pressurised into giving evidence for the Prosecution.¹¹⁸

VII. Burden and standard of proof

201. Although there are no provisions in the Rome Statute pertaining to the burden of proof for admissibility, the Defence acknowledges that it must provide evidence of the allegations it submitted under the *onus probandi actori incumbit* principle.

¹¹⁸ [REDACTED], [REDACTED], states that Kabila's government asked him to come and testify in the case: CAR-OTP-0057-0008: [TRANSLATION: "Inv.: [...] Did you tell anyone that you were meeting us today? Wit.: Not apart from my hierarchy: the Head of State, the Defence Minister, the Justice Minister and the Chief of Staff"; CAR-OTP-0057-0010: [TRANSLATION] "Wit.: I agree to my statement being transmitted to the Democratic Republic of the Congo. For any other State though, the Head of State would have to agree"; [REDACTED] states that Kabila's government put pressure on witnesses giving evidence that is not agreeable to 'Joseph' Kabila who is not a friend of 'Jean Pierre' Bemba (EVD-P-03194 Page 7: CAR-OTP-0048-0111); [REDACTED], [REDACTED], states that he was ordered by his government to give evidence. He words it as follows: "[TRANSLATION] My government asked me to come and meet with you. I was put forward by my government because I was actually in Bangui during the events. [...] I am doing what my government wants me to do, which is to give evidence about what I heard and what I saw." (EVD-P-03182 Page 5: CAR-OTP-0038-0039). It can no longer be remedied, other than by rejecting all witnesses who were subordinate to the Accused's political opponents, which would render the Prosecutor's case devoid of any substance.

Moreover, this principle is consistent with an expert opinion commissioned by the Office of the Prosecutor of the ICC:

In accordance with normal principles for assigning burdens of proof, the initial burden of proving the existence or non-existence of an investigation or prosecution would be on the party raising the issue (for example, by seeking authorisation or bringing a challenge). Thus, the burden can fall on the Prosecutor: for example, in a request for authorisation for investigation (Art 15(3)); application to proceed despite State notification (Art. 18(2) or (3)); or request for review of inadmissibility decision (Art 19(10)). The burden can also fall on the accused or person sought, or on interested States, where they are the ones raising the issue, for example under Art. 19(2)[...]¹¹⁹

202. International case law recognises that the burden of proof falls on the Defence if it alleges an abuse of process:

It is the opinion of the Appeals Chamber that the burden of showing that there has been an abuse of process rests with the accused. Establishing such abuse will depend on all the circumstances of the case. The Appeals Chamber finds that it is, however, more important that the accused show that he had suffered prejudice.¹²⁰

203. However, as is usually the case when the burden of proof lies with the accused, the appropriate standard of proof is the balance of probabilities. The Trial Chamber is once again referred to the same general policy document commissioned by the Office of the Prosecutor:

As the issue in complementarity is one of admissibility before a particular forum, rather than the objective and subjective elements of a particular crime, the appropriate burden is the simple balance of probabilities, rather than any higher standard such as “proof beyond a reasonable doubt”.¹²¹

204. Lord Nicholls of Birkenhead defined the “balance of probability” test as follows:

The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not.¹²²

¹¹⁹ <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf>; “Informal expert paper: The principle of complementarity in practice”.

¹²⁰ *The Prosecutor v. Jean-Paul Akayesu*, ICTR 96-4-A, 1 June 2001 (Appeals Chamber), paras. 339 and 340.

¹²¹ *Ibid*, footnote 21.

¹²² *In Re H (minors) (sexual abuse)* 1996 1 All E. R. 1 to 16.

205. This test is not a difficult standard to fulfil, and the Prosecution suggests that applying it to its application legitimately implies that the legal issues raised therein will be decided in its favour.

VIII. Confidentiality

206. This application frequently refers to confidential documents and reveals the identity of certain witnesses. Accordingly, the Defence requests that it remain confidential, available only to it and to the Prosecution. However, the Defence proposes that a public redacted version should be made available.

FOR ALL THESE REASONS,

207. The Defence respectfully requests the honourable Trial Chamber III to grant this application and to declare that it has merit;

And accordingly to:

- a) Convene a hearing, should the Chamber deem it appropriate, in order for the Defence to present its oral submissions;
- b) Rule that the criminal proceedings brought against the Accused are inadmissible;
- c) Order that any proceedings brought against the Accused be stayed or discontinued on the ground of abuse of process;
- d) Invite the parties to a hearing to discuss the implications of the admissibility, in the event that the Chamber finds that no abuse of process exists.

[signed]

Aimé Kilolo Musamba

Associate Counsel

[signed]

Nkwebe Liriss

Lead Counsel

Dated this 25 February 2010

At The Hague, The Netherlands