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TRIAL CHAMBER III

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

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

**Public document
with three public annexes**

**Corrigendum to Defence Reply to the Observations of the Prosecutor and of Legal
Representatives of the Victims on the Application Challenging the Admissibility of
the Case**

Source: Mr Jean-Pierre Bemba Gombo's Defence Team

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

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1. Introduction

1. The Defence for Mr Jean Pierre Bemba Gombo ("the Accused") very respectfully submits its reply to the responses of the Prosecution ("Prosecution's Response") and of the Legal Representatives of the Victims to its application challenging the admissibility of the case and seeking a stay of the proceedings against the Accused on the ground of abuse of process.

2. The Defence would, however, state that, even though it does not address here certain arguments made by the Prosecution and the Legal Representatives of the Victims, that does not imply that it considers them to be valid. The Defence respectfully reserves the right to address all of the arguments previously set forth in its application challenging the admissibility of the case and any other outstanding issues at the hearing initially scheduled for 28 and 29 April 2010.

2. Appropriate time to raise the challenge to admissibility

3. The Defence does not intend to address the arguments of the Office of Public Counsel for Victims ("OPCV") concerning the timing of its challenge to admissibility, and refers to its previous submissions on the matter. It does, however, take note of the fact that the Prosecution itself made no objection to the time chosen by the Defence to challenge the admissibility of the case. Furthermore, the previous decision of Trial Chamber II cited by the OPCV at footnote 37 of its observations was not upheld by the Appeals Chamber and therefore does not constitute a binding precedent.

3. Burden of proof

4. The Defence wishes to express its disagreement with the Prosecution's attempt to redefine the conventional standard of proof in international criminal proceedings in situations where, for various reasons, the burden of proof of an alleged fact is placed on the Defence. The argument favouring the "balance of probabilities" standard is widespread, both in legal commentary and in precedents of the International Criminal Tribunal for the former Yugoslavia.

5. In his book *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, Professor Schabas is of the opinion that:

Generally, it should be presumed that the balance of probabilities standard applies to issues of evidence other than the ultimate question of guilt or innocence, unless there is some special provision.¹

6. Furthermore, in *Delalic et al.*, the International Criminal Tribunal for the former Yugoslavia held the following:

As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.²

4. Burden of proof threshold

(1) The Prosecutor's arguments are unconvincing and even contradictory.

7. The Prosecutor contends that the applicable standard of proof to challenge the admissibility of a case or to establish abuse of process is "clear and convincing evidence". Yet:

a. No basis exists in the ICC's case law

8. The Appeals Chamber held the following in relation to the thesis of abuse of process:

Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute,⁸¹ the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety.⁸²³

9. Accordingly, the Chamber cannot impose a burden of proof on the Defence that is contrary to the principle enshrined in article 67(1)(i) that the accused cannot "have imposed on him or her any reversal of the burden of proof". Hence, the

¹ Schabas, *The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone*, p. 465.

² IT-96-21-A, 20 February 2001, para. 590.

³ ICC, Appeals Chamber, *The Prosecutor v. T. Lubanga Dyilo, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006*, ICC-01/04-01/06-772, 14 December 2006, para. 37.

Accused's right to a fair trial could not be respected if a higher burden of proof were imposed on him.

10. Furthermore, the Appeals Chamber has never imposed as high an evidentiary threshold in relation to an admissibility challenge as that which the Prosecutor would like to be applied ("clear and convincing evidence"). In *Katanga*, the Appeals Chamber at no point mentioned a lack of evidence or strict standard of proof for the evidence brought by the Defence. It simply stated that "the Court will determine the admissibility on the basis of facts as they present themselves".⁴

b. The Prosecutor cannot group a claim of abuse of process under the same head as a challenge to admissibility.

11. The Prosecutor does not provide any justification for treating a claim of abuse of process on the same footing as a challenge to admissibility. He simply states that, "in challenges to the Court's continuing jurisdiction, whether based on admissibility under article 19 of the Statute or on claimed abuse of process, the appropriate standard of proof is 'clear and convincing evidence'". He does not submit any evidence to explain how the standard of proof must be the same in both procedures. This is doubtless because there is nothing to support the existence of such a standard under either procedure, but also, and above all, because to assimilate them is an artificial exercise: each of the two procedures involves discrete objectives and circumstances.

c. The quotation from the C.K. Hall article in the work edited by O. Triffterer is taken out of context and does not apply here.

12. Admittedly, the author does say that "the burden of proof of demonstrating the inadmissibility of a case should fall on the person or State making the challenge",⁵ but the issue at stake here is whether the burden of proof must be as

⁴ ICC-01/04-01/07-1497, para. 111.

⁵ C.K. Hall, "Article 19", in *Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), 2nd ed., para. 7, p. 644.

heavy as the Prosecutor contends. The author states that the evidentiary threshold required to challenge the admissibility of a case must be “a preponderance of the evidence” or “a clear and convincing standard”, having explained that it is particularly important to impose the burden of proof on States making challenges to admissibility pursuant to article 17(a) and (b), since those States will have most of the information relevant to the determination in their possession.⁶ The author adds: “another general principle of law is that when the matters in issue are exclusively or largely within the exclusive knowledge of one party, the burden of proof may be regarded as resting on that party to provide a satisfactory and convincing explanation”. Some pages later, the author expands on his previous commentary on article 19(2) and confirms that his statement must be read in this light:

In accordance with the general principle of law that the party making allegations concerning a matter in dispute has the burden of proof, the Prosecutor would often have the burden of proof regarding jurisdiction and admissibility. However, in many instances the State or person concerned would have the exclusive, or almost exclusive, knowledge of the matters at issue and, therefore, the burden would appropriately fall upon the State or person under the equally important general principle of law that when the matters in issue are exclusively or largely within the exclusive knowledge of one party, the burden of proof may be regarded as resting on that party to provide a satisfactory and convincing explanation.⁷

13. Clearly, this author’s statement as to the appropriate evidentiary threshold cannot be applied to the Defence here. The Accused obviously does not have exclusive possession of the information about the proceedings against him in the CAR. Quite the contrary, as his repeated applications to the Office of the Prosecutor to obtain all of the documents relating to the matter show. Conversely, if there is any one party with exclusive possession of the information concerning the admissibility of the case before the Court, that is in fact the Office of the Prosecutor. If we follow the reasoning of the author of this commentary on which the Prosecutor has relied, it is the Prosecutor to whom the author’s test applies. Moreover, this is consistent with the letter and spirit of the Rome Statute, which places the burden of proof upon the Prosecutor and enshrines the presumption of innocence.

⁶ Idem. para. 7, p. 645.

⁷ Ibid., para. 18, p. 652.

14. Furthermore, a principle that is valid for a State is not automatically valid for an accused person. The right of the accused to challenge the admissibility of a case must necessarily be broader, since it is his or her fate that is at stake. During the negotiations on the Rome Statute, the possibility for an accused person to challenge the jurisdiction of the Court and the admissibility of a case received substantial support. During the negotiations, this possibility was moreover extended to include suspects.⁸

15. Furthermore, it is highly likely that C.K. Hall was inspired by international human rights law, where the State is generally the respondent. However, the mechanisms and principles adopted in that branch of international law are not directly applicable and transposable to international criminal law, where an individual is the defendant. The Trial Chamber of the ICTY in *Kunarac* clearly distinguished these two branches of the law. It underscored the “crucial structural differences” which exist between international human rights law and international humanitarian law: not only, “in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral”, but in particular, “that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.”⁹

⁸ J. T. Holmes, “The principle of complementarity”, in *The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, p. 61.

⁹ ICTY, Trial Chamber, *Prosecutor v. Kunarac et al.*, Judgement, IT-96-23-T & IT-96-23/1-T, 22 February 2001: “In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law.¹¹⁷⁴ In particular, when referring to definitions which have been given in the context of human rights law, the Trial Chamber will have to consider two crucial structural differences between these two bodies of law:

(i) Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

d. The national and regional case law on which the Prosecutor relies is not pertinent here. On the contrary, it confirms that the burden of proof lies with the Prosecutor in a criminal trial.

16. The Prosecutor does not explain how this standard of proof which has been adopted in “some cases”¹⁰ in the United Kingdom, in assessments of applications for refugee status in Canada,¹¹ in consideration of the charges by the Inter-American Court of Human Rights in the *Valesques Rodrigues* case,¹² or in a limited number of American civil cases (such as in a case concerning the involuntary commitment of an accused person to a psychiatric hospital¹³ or the dispute over the expulsion of an illegal alien¹⁴) could be transposable to a challenge to the admissibility of a case before the International Criminal Court.

17. The issue of the admissibility of cases before the International Criminal Court is in fact a novel and *sui generis* one, which means that the examples cited by the Prosecutor in support of his argument carry very little conviction. Furthermore, they

In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violation of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defence to the perpetrator.¹¹⁷⁵ Moreover, international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents.

[...](ii) Secondly, that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences. 471. The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law. The Trial Chamber now turns more specifically to the definition of the crime of torture.”

See also the judgment of the Inter-American Court of Human Rights in *Velasquez Rodriguez* which also stresses the difference distinction between international human rights law and domestic criminal law.

¹⁰ ICC-01/05-01/08-739, footnote 58.

¹¹ *Idem*.

¹² *Ibid.*, para. 45 and footnote 61.

¹³ *Ibid.*, footnote 63.

¹⁴ *Ibid.*, footnote 64.

tend rather to demonstrate the need to protect the rights of the accused or the applicant in all circumstances and in all types of dispute.

18. In *Velasques Rodriguez*, the Inter-American Court of Human Rights explained why it accepted a lower evidentiary threshold in holding Honduras responsible. In essence, it held that Honduras's failure to lead evidence as to the merits of the case¹⁵ did not permit the court to reject the evidence led by the complainant. However, the court stressed that:

The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.¹⁶

19. This is how the court justified adopting a lower standard of proof than that applicable in national judicial proceedings. This judgment is therefore irrelevant in the instant case in several respects: it does not establish a standard applicable to criminal proceedings, and it lays down a less rigorous, not more rigorous, standard than that normally applied in national criminal law. Furthermore, indirectly, in its judgment the court restates the requirements of criminal proceedings against an individual rather than those against a State.

20. The Prosecutor relies on the judgment *In re Winship* of the United States Supreme Court to justify raising the applicable standard of proof. Yet in that case, the Supreme Court actually reasserted the need to ensure that the same safeguards derived from the right to a fair trial are applied to all proceedings and all accused persons.¹⁷ In fact, the court held that juveniles, like adults, can be convicted only if the evidence brought against them is proved beyond any reasonable doubt.

¹⁵ *Velasquez Rodriguez* Case, Judgment of July 29, 1988, Inter-Am. Ct.H.R. (Ser. C) No. 4 (1988), para. 137.

¹⁶ *Id.*, para. 134.

¹⁷ US Supreme Court, *In re Winship*, 397 U.S. 358 (1970).

Accordingly, that judgment reasserts the presumption of innocence and the strictness of the obligation which is placed on the prosecution, not the accused.

21. The other judgment of the United States Supreme Court cited by the Prosecutor, dating from 1970, is no more convincing in relation to the instant case. In that case, the Supreme Court allowed the standard of proof required to decide on a person's involuntary commitment to a psychiatric hospital to be lowered. The Supreme Court, however, stressed that this lowering of the standard was acceptable, since the decision was for the benefit of the appellant. Furthermore, the court recalled in its judgment the difference between civil and criminal proceedings.¹⁸

22. Irrespective of what the Prosecutor may say, this Court is dealing here with criminal proceedings. Admittedly, the issue currently in dispute is specific in nature, but it is an integral part of the criminal proceedings brought against Mr Bemba.

23. Accordingly, the case law on which the Prosecutor relies in order to justify applying a different standard to the admissibility challenge is unconvincing. Furthermore, it provides additional evidence to show that, if a strict test for the admissibility of evidence must be applied, this can only be where it is in the accused's favour.

4. Admissibility

24. The Defence first of all wishes to express its opinion on a recurrent theme in the Prosecution's Response, which contends that the various arguments raised in support of the admissibility challenge are internally contradictory. The Defence rejects this assertion and, for purposes of clarity, presents the logical structure of its arguments as follows:

- (1) The instant case before the ICC is inadmissible, given that the judicial authorities of the CAR had conducted an exhaustive investigation into the

¹⁸ US Supreme Court, *Addington v. Texas*, 441 U.S. 418 (1979).

same charges against the Accused and had decided, by means of an *ordonnance de non-lieu* [order dismissing the charges], not to prosecute him.¹⁹

- (2) The *ordonnance de non-lieu* is a concept specific to criminal proceedings in a large number of countries influenced by the Romano-Germanic system (French civil law). In the instant case, the *ordonnance de non-lieu* was the result of a decision taken by the investigating judge upon application of the prosecutor, both of whom were investigating the merits of the case, and had the effect of definitively terminating the prosecution.
- (3) The *ordonnance de non-lieu* also had the effect of rendering the case against the Accused *res judicata*, since it was never appealed in accordance with the Code of Criminal Procedure of the Central African Republic,²⁰ and hence acquired *res judicata* authority.
- (4) The *ne bis in idem* principle as laid down in article 20(3) of the Rome Statute does not require evidence that the person concerned had previously been charged and then acquitted. In these circumstances, should Trial Chamber III determine that the *ordonnance de non-lieu* cannot be considered to be a decision “not to prosecute”, the Defence contends that the *bona fide* initiation of investigations into the Accused is sufficient evidence of the fact that he “had already been tried”, and hence that it should find the case inadmissible before the ICC under the *ne bis in idem* principle.

25. For reasons that will be stated below, the case against the Accused in the Central African Republic was reopened *ultra vires*, in total violation of the procedure established by the Code of Criminal Procedure of the CAR for appealing an *ordonnance de non-lieu*. It was in fact only during the challenge to the admissibility of the case before the ICC that the Accused first became aware of the aforementioned

¹⁹ Article 17(1)(b) of the Rome Statute.

²⁰ See Annex A: CAR Code of Criminal Procedure.

unlawfulness of the proceedings undertaken by the Indictments Chamber [*Chambre d'Accusation*] of the Bangui Court of Appeals.

6. The assertion that a State may refer a case to the ICC and relinquish national jurisdiction

26. The Defence submits that the CAR authorities had never genuinely “relinquished” or “abandoned” their prerogatives of jurisdiction for the *Bemba* case in favour of the International Criminal Court. As indicated above, the judicial authorities of the CAR who had dealt with the case and decided not to prosecute later artificially exhumed it at the behest of the CAR executive through its representative, Mr Goungaye Wanfiyo, thanks to a judgment of the Indictments Chamber of 16 December 2004 reviewing a decision that had never been submitted for its consideration.

27. In stating that the CAR authorities had “relinquished” jurisdiction over the *Bemba* case, the Prosecution is seeking to re-categorise the case as being a situation of “inactivity” of a State, in order to plead the admissibility of the case on the basis of the precedent set by the Appeals Chamber of the ICC in *Katanga*.

28. Citing that ICC Appeals Chamber judgment in *Katanga*, the Prosecution notes²¹ that the Court retains a discretion not to accept a State referral pursuant to article 33.

29. Accordingly, even if the Chamber were to find that the CAR authorities “had abandoned” their jurisdiction over the *Bemba* case (which is disputed by the Defence), the Defence would respectfully request that the Chamber exercise its discretion to dismiss the CAR’s referral on the ground that the referral was vitiated by considerations of a purely political nature, in flagrant breach of its domestic law.

²¹ ICC-01/05-01/08-739+Anxs, Prosecution’s Response, para. 47.

7. The argument that the Chamber need not reach inability to investigate or prosecute, given the established inactivity by the CAR authorities.

30. The truth of the matter is that, following exhaustive and detailed investigation, the Public Prosecutor [*Procureur de la République*] and the Investigating Judge both came to the conclusion that, in addition to the considerations related to diplomatic immunity, there was also insufficient evidence of the Accused's direct or indirect participation in the commission of the crimes ascribed to him.

31. The factual reality described above demonstrates that the *Bemba* case is manifestly different from that considered by the Appeals Chamber of the ICC in the *Katanga* case, in which the DRC authorities had never opened investigations into the events in Bogoro.²²

32. It was only after the Prosecutor announced that he was opening an investigation into the latter (the events in Bogoro) that the DRC authorities declined to exercise jurisdiction over the case with the specific aim of referring the *Katanga* case to the International Criminal Court.

33. In the instant case, the decision of the Judge and Prosecutor to terminate the proceedings by a decision to dismiss the charges cannot be described as inactivity. The case in the CAR was addressed on the merits, closed and settled in accordance with national laws on an application by the Public Prosecutor's Office [*Ministère Public*] addressed to the Investigating Judge. But it was resurrected—as the Prosecution admits—at the “suggestion”²³ of Bozizé's representative, Mr Goungaye Wanfiyo. It should be pointed out that in the Romano-Germanic system, and

²² ICC-01/04-01/07-1007, in which the Office of the Prosecutor gives an overview of the complete lack of any domestic investigations into events in Bogoro and its correspondence with the military prosecuting authorities of the DRC.

²³ Prosecutor's Response, para. 18: “On 11 December 2004, Wanfiyo sent a letter to the President of the *Cour Criminelle* in Bangui ‘suggesting’ the separation of the case. In his letter, he pointed out that ‘should the ICC initiate an investigation, it would be carried out by the means that the CAR lacks’.”

accordingly in Central African law, public prosecutions are conducted jointly by the Public Prosecutor's Office and the Investigating Judge.²⁴

34. In summary, the Defence disputes the Prosecution's claim that the two-step approach outlined in the Appeals Decision was ignored.²⁵ The Defence shares the Prosecution's view that the Court is obliged first to assess the existence of local proceedings, and that it is only afterwards that it can consider the issue of willingness or inability. Contrary to the Prosecution's assertion, no criminal proceedings existed *ab initio* in the *Katanga* case – whereas in the *Bemba* case proceedings were conducted, investigated and closed by a decision to dismiss the charges, all in a *bona fide* manner.²⁶

8. The argument that the case is otherwise admissible under article 17.

35. With a view to forestalling a decision by the Chamber indicating that the CAR judicial authorities had taken a decision based on the merits, concluding that there was no cause to prosecute the Accused, the Prosecution claims that such decision was, in any event, vitiated by a genuine inability to prosecute the case fully.²⁷ In this regard, the Defence reiterates its previous argument that article 17(3) of the Rome Statute defines the concept of "inability" very precisely. Any consideration apart from "total or substantial collapse" of the national judicial system is irrelevant.

36. Furthermore, failure to prove a causal link between such collapse or unavailability of the national judicial system and the inability to conduct meaningful legal proceedings will also result in the case being inadmissible. Insecurity on the

²⁴ See Annex A: articles 22 and 33 of the (new) Code of Criminal Procedure of the Central African Republic.

²⁵ LCDH was affiliated to FIDH which, in its first report on the alleged atrocities in the CAR, "When the Elephants Fight, the Grass Suffers", singled out the Accused for special mention.

²⁶ Contrary to the submission in para. 95 of the Prosecutor's response, there is no conflict with the abuse of process argument. The Defence maintains that, until Mr Goungaye Wanfiyo became involved on behalf of the CAR executive authorities, the judicial – but unjudicious – proceedings had, however, been conducted fairly. The Defence does not doubt the integrity of the decision taken by the Prosecutor of the Central African Republic and the Investigating Judge.

²⁷ ICC-01/05-01/08-739+Anxs, Prosecutor's Response, para. 61.

ground, the presence of vital witnesses on foreign territory and diplomatic immunity can indeed constitute “legal and practical obstacles”²⁸ to an effective investigation and prosecution, but they do not constitute proof of a judicial system that is “totally or substantially collapsed” or “unavailable”, as is required by the Rome Statute.

37. In any event, nowhere in the Central African criminal case file is it indicated that insecurity on the ground or the presence of vital witnesses abroad constituted an obstacle which had the effect of preventing the Central African judicial system from prosecuting the case: in reality, these are simply unfounded assertions by the Prosecution, which are unsupported by evidence. Furthermore, on the subject of immunity, not only does immunity no longer apply, but in addition it did not prevent the Indictments Chamber from renewing the charges against the Accused.

38. The Central African judicial system was and still is functioning; between 2002 and 2010 without interruption, numerous decisions were taken at the conclusion of judicial proceedings in criminal cases, as is shown by the statistics of the Bangui Court of Appeals.²⁹

39. Moreover, infrastructures are in place for conducting proceedings in Bangui, as the Office of the Prosecutor argued in support of its request to conduct hearings *in situ*.³⁰

8. (1) In any event, article 17(3) (inability of the State) is not applicable in this case.

a. *It is for the Court and not the State to establish inability*

40. The wording of article 17(3) of the Statute is very clear and leaves no doubt that it is for the Court to “determine inability in a particular case”; and in order to

²⁸ ICC-01/05-01/08-739+Anxs, Prosecutor’s Response, para. 62.

²⁹ See Annex C.

³⁰ ICC-01/05-01/08-555, paras. 2 and 3.

make this determination, it “shall consider” whether the two criteria laid down in that provision are met.

41. The Pre-Trial Chamber in the *Kony* case came to a similar decision on the issue of admissibility and stated the following:

Once the jurisdiction of the Court is triggered, it is for the latter and not for any national judicial authorities to interpret and apply the provisions governing the complementarity regime and to make a binding determination on the admissibility of a given case. This flows first and foremost from the wording of the chapeau of article 17, which states that “the Court shall determine that a case is inadmissible...”³¹

42. Consequently, it was not for the Central African Republic to declare itself unable to prosecute or try the Accused, but for the Trial Chamber to assess its ability in this regard.

b. *Inability of a State may only be found in exceptional circumstances*

43. Inability of a State may only be invoked in exceptional circumstances and cannot be relied on in the instant case with regard to the CAR, as judicial developments in that country have shown.

44. As H. Olosolo notes, “the notion of ‘inability’ covers only very exceptional scenarios, such as those where there is no central government or where exceptional circumstances such as civil wars or natural disasters lead to the total or substantial collapse of the administration of justice”.³²

³¹ ICC, Pre-Trial Chamber, *The Prosecutor v. Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05, 10 March 2009, para. 45.

³² H. Olosolo, *The triggering procedure of the International Criminal Court*, Martinus Nijhoff, 2005, p. 154. See also: S.A. Williams, “Article 17 – Issues of admissibility”, in *Commentary on the Rome Statute of the International Criminal Court*, O. Triffterer (ed.), Beck, 2008, p. 623.

45. Furthermore, the two criteria set out in article 17(3) are cumulative and not alternative.³³ Accordingly, it is not only the collapse of the judicial system which has to be proved, but also the State's inability to arrest the accused or to investigate.

9. The argument that the Decision to Dismiss the Charges implied that the case had never been examined on the merits.

9 (1). Application of the *ne bis in idem* principle in the event of a decision to dismiss the charges

a. Article 17(1)(b): a case is inadmissible where it has already been investigated and the State has decided not to prosecute (unless the State is unwilling or unable to do so)

46. It is clear from the wording of article 17(1) that, if a State has issued a decision not to prosecute a person, that decision will in itself prevent the ICC from exercising its jurisdiction over that person unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute the person concerned. The statement of express exceptions in article 17(1)(b) moreover prevents the Court from declaring a case admissible in circumstances where the decision not to institute judicial proceedings was motivated by factors other than those expressly indicated in article 17(1)(b).³⁴

47. In this connection, it should be noted that the final text of the Statute deleted suggestions to include a stipulation that the decision not to prosecute "was taken by that State when it had knowledge of all the facts mentioned in the submission of the

³³ J. T. Holmes, "The principle of complementarity", in *The International Criminal Court – The making of the Rome Statute*, R. Lee (ed.), Kluwer Law International, 1999, p. 49: "these two criteria were added to create the test for the Court in determining inability. Both criteria must be met for the Court to determine admissibility in this regard. The State must be unable to obtain an accused or key evidence and testimony, and its inability to do so must relate to the partial or total collapse of its judicial system."

³⁴ The Defence refers to the principle of *expressio unius est exclusio alterius* – "the express inclusion of certain criteria excludes other criteria which are not included": *The Prosecutor v. Delalic*, Decision On The Prosecution's Motion For An Order Requiring Advance Disclosure Of Witnesses By The Defence, 4 February 1998, paragraph 31.

Prosecution”;³⁵ consequently, in accordance with the text of the Statute, the circumstance that the ICC Prosecutor may have alleged additional facts is not relevant if the basic conduct remained the same.

48. The drafting history of the Statute also shows that the States Parties were of the view that the ICC should maintain a presumption against admissibility, particularly in cases where the national authorities had rendered a decision not to prosecute: “the observation was made that the commentary to the preamble clearly envisaged a very high threshold for exceptions to national jurisdiction and that the International Law Commission only expected the international criminal court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts. It was further stressed that the exercise of national jurisdiction encompassed decisions not to prosecute.”³⁶

49. Article 20(3) (*Ne bis in idem*) must also be interpreted in a way that accords with article 17(1)(b). In that regard, the preparatory proposals and drafts for the text of article 20 (*Ne bis in idem*) expressly include a reference to the Court not being able to exercise jurisdiction in circumstances where:

The acts mentioned in the submission to the Court are still being investigated by a State and the investigation is not manifestly intended to relieve the person concerned of criminal responsibility;

The acts mentioned in the submission to the Court have already been duly investigated by a State and the decision not to institute proceedings was taken by that State when it had knowledge of all the facts mentioned in the submission and the decision was not motivated by a manifest willingness to relieve the persons concerned of any criminal responsibility.³⁷

³⁵ See, for example, the proposal put forward in M. C. Bassiouni, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute Vol. II, (Transnational Publishers, 2005), page 170.

³⁶ M. C. Bassiouni, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute Vol. II, (Transnational Publishers, 2005), page 121. See also on page 150, “A number of delegations stressed that the principle of complementarity should create a strong presumption in favour of national jurisdiction [...]”.

³⁷ A/51/22 Vol. II page 202, cited in Bassiouni, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute Vol. II, (Transnational Publishers, 2005), pages 168-169.

50. That text was deleted due to the fact that the relevant guarantee of the rights of the accused had already been addressed by an equivalent provision in the text concerning admissibility, in particular the provision that the case is inadmissible if the national authority had rendered a decision not to prosecute.³⁸ Article 17(1)(b) thus embodies a separate and additional ground for “*ne bis in idem*” in respect of the decision not to prosecute.

b. Under the law applicable by the Court, the *ne bis in idem* principle is applicable even in the event of national proceedings for “ordinary” crimes as opposed to so-called “international” crimes

51. The ICC Statute has a more flexible approach concerning definitions of crimes in positive national laws. States are under no obligation to incorporate the substantive criminal law of the Statute into national law.³⁹ A difference between the definition of a crime under national law and the definition contained in the ICC Statute does not in itself constitute grounds for preventing a State from commencing judicial proceedings. Of course, if the proceedings were not conducted impartially or independently, the ICC would be justified in taking up the case.⁴⁰

52. In any event, where a State prosecutes a person for ordinary crimes, it is not necessarily using trial and prosecution as a means of protecting the Accused from international criminal liability. The CAR commenced prosecution of the acts in question as ordinary crimes, and if those proceedings were conducted properly, there was accordingly no failure to prosecute the individual concerned. Prosecutions for ordinary crimes are also prosecutions which can be considered as effective national proceedings that preclude the possibility of trying the same conduct twice. Prosecutions for ordinary crimes do not amount to sham trials if the most serious

³⁸ Bassiouni, The Legislative History of the International Criminal Court: An Article-by-Article Evolution of the Statute Vol.II, (Transnational Publishers, 2005), pages 168-169.

³⁹ They are only encouraged to do so (see Article 17 of the Rome Statute).

⁴⁰ Julio Bacio Terracino, ‘National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC’, *Journal of International Criminal Justice* 5 (2007), p. 438.

crimes continue to be punished. They could only be considered as sham trials if a charge manifestly does not correspond to the conduct in question.⁴¹

c. Commentary on article 20: importance of national law in the matter

53. The Prosecutor refers to the commentary on article 20. The authors of that commentary envisaged two interpretations, allowing the Court to make the final choice. The fact remains that they conclude that the Court must examine national law before making a ruling and, in the instant case, the law of criminal procedure of the CAR, and that of France from which it drew inspiration.

54. The Defence refers to the legal commentary on this subject as set out in O.

Triffter's book:

In contrast to paragraphs 1 and 2, both referring to "convicted or acquitted by the Court", paragraph 3 provides *ne bis in idem* for a person who "has been tried by another court". The different wording suggests a deviating interpretation of this notion, taking into account not only another court's final decision on the merits of the case, an acquittal or a conviction, but also other decisions terminating criminal proceedings. With reference to interpreting the clause in conformity with the notion of complementarity, it was proposed that a *bona fide* effort by national authorities to prosecute would suffice in order to bar the ICC from exercising jurisdiction. A national decision not to proceed because of insufficient evidence or because prosecution would not serve the interest of justice would suffice. (...)

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 *litera* (c) could be helpful. (...)

However, the view that "convicted or acquitted" and "has been tried" differ in substance is not uncontested. This alternative interpretation has also been voiced and is supported by the drafting process, which seems to have used the two notions interchangeably. (...)

Whether the Court's jurisdiction will be precluded on grounds of *ne bis in idem* will depend on its interpretation of the notion "has been tried". The ICC will need to carefully scrutinize the national decision in question, also taking due account of domestic provisions regarding *ne bis in idem* (article 21, para. 1 *lit. c*)."⁴²

In contrast to paragraph 2 referring to "convicted or acquitted by the Court", in this paragraph a *bona fide* effort by national authorities to prosecute would suffice in order to bar the ICC from exercising jurisdiction. A national decision not to proceed because of insufficient evidence or because prosecution would not serve the interest of justice would suffice. From the wording of the paragraph it is clear that such a

⁴¹ Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, Journal of International Criminal Justice 5 (2007), pp. 437-438.

⁴² Immi Tallgren and A. Reisinger Coracini, "Article 20", in Commentary on the Rome Statue of the International Criminal Court, O. Triffterer (ed.), 2nd ed., paras. 34-35, pp. 689-691.

national decision, not amounting to a conviction or acquittal, must be subject to the same criteria, the negligence of which will lead to the application of the exception.”⁴³

c. (i). French law: application of the *ne bis in idem* principle to *ordonnances de non-lieu*
(1) Ordonnances de non-lieu carry res judicata authority

55. Under article 177 of the French Code of Criminal Procedure (“FCCP”), “[TRANSLATION] [i]f the investigating authority considers that the facts constitute neither a serious criminal offence [*crime*], a lesser offence [*délit*], or a petty offence [*contravention*], or if the perpetrator has remained unidentified, or if there is insufficient evidence against the person under judicial examination, the said authority shall make an order ruling that there is no cause to prosecute.”

56. According to P. Chambon and C. Guéry, “[TRANSLATION] the authority of *res judicata* attaches to orders for dismissal of charges rendered by investigating jurisdictions. But such decisions rule only on the existence of sufficient evidence to justify prosecution. Accordingly, they do not carry any authority as to the nature or characterisation of the facts. The decision which closed the investigation and terminated the prosecution can only be revisited and disputed if the evidence has changed since the time when it was assessed. That is why the *res judicata* authority of decisions for the dismissal of charges that have become final is only provisional, and ends if new evidence comes to light.”⁴⁴

57. The authority of *res judicata* attaches to the order or judgment for the dismissal of charges only under certain conditions.

58. First, the order or judgment must be final: the time limits for appeals must have expired.

59. Next, the grounds for the decision must be examined very closely. If the dismissal of charges is based on the fact that the act being prosecuted does not

⁴³ Immi Talgren, “Article 20”, in Commentary on the Rome Statue of the International Criminal Court, O. Triffterer (ed.), First ed., para. 26, p. 431.

⁴⁴ P. Chambon and C. Guéry, *Droit et pratique de l’instruction préparatoire*, Dalloz, 2007, §215-12.

constitute a criminal offence, and is not punishable, or that it has been amnestied or become time-barred, the new evidence is ineffective, since the public proceedings are time-barred, and that bar is effective *erga omnes* (*crim.* 16 July 1932). On the other hand, where the order and judgment for dismissal are in fact on the grounds of insufficient evidence, the judicial investigation can be resumed if new evidence comes to light.

(2). The non bis in idem rule and resumption of a judicial investigation on new evidence

60. Under article 188 of the Code of Criminal Procedure, “[TRANSLATION] [t]he person under judicial examination, in respect of whom the investigating authorities have ruled there that was no cause to prosecute, may not be investigated in relation to the same facts unless new evidence appears.”

61. In other words, the investigating chamber cannot charge a person on account of acts which have been the subject of a final dismissal order (*jurisprudence: crim.* 3 May 1856).

62. Thus, according to the *ne bis in idem* rule as set out in article 368 of the Code of Criminal Procedure, “[TRANSLATION] [n]o person lawfully acquitted may be re-arrested or re-accused on account of the same facts, even under a different characterisation.”

c. (ii). Law of Criminal Procedure of the CAR

63. Article 115 of the CAR Code of Criminal Procedure provides that:

[TRANSLATION] if the Investigating Judge is of the view that the act constitutes neither a serious criminal offence (*crime*), a lesser offence (*délit*), or a petty offence (*contravention*), or that there is insufficient evidence against the person charged, the Judge shall make an order that there is no cause to prosecute, and if the person charged is under arrest, he or she shall be released. (Compare this text with article 177 of the French Code of Criminal Procedure, para. 60)⁴⁵

⁴⁵ See Annex A.

64. Under article 116 of the CAR Code of Criminal Procedure:

[TRANSLATION] *Ordonnances de non-lieu partiel* [Orders for Partial Dismissal] can be made during the judicial investigation in accordance with the aforementioned procedure. In the event of new evidence appearing, the judicial investigation can only be resumed at the request of the Public Prosecutor's Office. (Compare article 188 of the French Code of Criminal Procedure, para. 65)⁴⁶

65. Article 143 of the CAR Code of Criminal Procedure provides:

[TRANSLATION] An accused person, in respect of whom it has been decided that there is no cause for committal for trial, to whatever court, may no longer be investigated in connection with the same facts, unless new evidence comes to light that could lead to new factual developments relevant to "the discovery of the truth". (cf. article 188 of the French Code of Criminal Procedure, para. 65)⁴⁷

66. Article 141 of the CAR Code of Criminal Procedure decrees that:

[TRANSLATION] if the Indictments Chamber is seized of an appeal by a person charged in respect of an order for committal for trial issued against him or her, that Chamber is obliged to rule in respect of all of the persons charged in the same proceedings and on all the charges resulting from the proceedings, even if these were not raised by the Investigating Judge. **However, an order for the dismissal of charges against which there has been no appeal shall remain final.**⁴⁸

67. These provisions enshrine the close relationship between the French Law of Criminal Procedure and that of the CAR.

68. Accordingly, the principles set out in the above paragraphs are generally applicable in this section.

69. In particular, the argument that *ne bis in idem* founded on *res judicata* is also applicable to orders for the dismissal of charges is enshrined in the aforementioned article 141 of the CAR Code of Criminal Procedure.

9. (2). The decisions in the cases of *Tadic* at the ICTY and *Semanza* at the ICTR invoked by the Representatives of the Victims in relation to *ne bis in idem* are not transposable to our case

70. First, the provisions and legal framework of the ICTY and the ICTR on the one hand, and the ICC on the other, cannot be placed on the same footing. The ICTY and

⁴⁶ Idem.

⁴⁷ Idem.

⁴⁸ See Annex A.

the ICTR both exercise primacy of jurisdiction over national courts, while the principle of complementarity takes precedence in the law of the ICC. For this reason, the Statutes of the ICTY and ICTR do not have a provision equivalent to article 17 of the Rome Statute. The scope of their provisions relating to the *ne bis in idem* principle is therefore, by definition, completely different.

71. Furthermore, article 10 of the ICTY Statute and article 9 of the ICTR Statute relating to *ne bis in idem*⁴⁹ are not worded in the same way as article 20 of the Rome Statute. Bearing in mind that each article of the Rome Statute was the subject of lengthy and considered negotiations before being adopted, it cannot be argued that these differences are purely a matter of chance. Article 17(1)(b) states clearly that a case is inadmissible where it has already “been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned”. Article 9 of the ICTR Statute and article 10 of the ICTY Statute do not contain any

⁴⁹ ICTR Statute:

Article 9: *Non bis in idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
 - a) The act for which he or she was tried was characterised as an ordinary crime; or b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

ICTY Statute:

Article 10

Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
 - a) the act for which he or she was tried was characterized as an ordinary crime; or
 - b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

equivalent provision. The negotiators and drafters of the Rome Statute thus clearly and deliberately set their Statute apart from those of the ad hoc international tribunals.

72. Furthermore, the circumstances of the *Tadic* and *Semanza* cases do not in any way resemble those of the instant case:

73. In the *Tadic* case, the Defence submitted a motion founded on the *ne bis in idem* principle. Proceedings against the accused were in effect underway in Germany at the time he was transferred to the ICTY. The Chamber held that the *ne bis in idem* principle had not been violated because the accused had not been tried in Germany.⁵⁰

74. In contrast to the present case, the accused was the subject of ongoing proceedings, initiated by an indictment, at the time when the ICTY made the transfer request. The proceedings in Germany had not therefore reached the point where a decision on the evidence had been taken, or rather the decision taken by the German Prosecutor was to issue an indictment against the accused; this was not the case in the present proceedings against Mr Bemba.

75. In the *Semanza* case, the Appeals Chamber dismissed a Defence motion founded on unlawfulness, in which it maintained that proceedings had already been initiated against the accused in Cameroon. The Chamber refused the motion on the grounds that the Yaoundé Court of Appeal had ruled only on the extradition request filed by the Rwandan government and not on the charges retained against the accused by the Tribunal.

76. It is true that the Chamber states that: “[t]he *non bis in idem* principle applies only where a person has effectively already been tried. The term “tried” implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial

⁵⁰ *Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of Non-bis-in-idem, Case No. IT-94-1-T, ICTY Trial Chamber, 14 November 1995, <http://www.icty.org/x/cases/tadic/tdec/en/951114.pdf>

a final judgement is rendered.”⁵¹ But, footnotes 97 and 99 refer to the decision in the *Tadic* case cited above. Accordingly, the Appeals Chamber’s interpretation of that decision is over-hasty: it is not only a “trial” that can constitute a “final judgement”; a decision to dismiss charges for lack of evidence also constitutes a final decision under many national laws, including those of the CAR.

77. The law as identified by the Chamber in that case can only be read in the light of the decision in the *Tadic* case and of the reality of many national laws. Furthermore, the circumstances of the *Semanza* case are different from those of the instant case: the Accused has been the subject of an investigation and of a decision to dismiss the charges in respect of “[TRANSLATION] acts constituting serious violations of international humanitarian law”, which are the same as those for which he is being prosecuted before this Court.

78. In conclusion, even if the circumstances of those cases were close to those in the instant case, the findings of the judges of the ICTY and of the ICTR would not be transposable before this Court. In effect, the provisions relating to the principle of *ne bis in idem* in the Statutes of the ICTY and ICTR on the one hand, and of the ICC on the other, are totally different. This is due to the fact that the exercise of jurisdiction of the international criminal tribunals and that of the ICC in relation to States have opposing objectives.

9.(3).The European Court of Justice applied the principle of *ne bis in idem* in relation to decisions analogous to a dismissal order

79. In February 2003, the European Court of Justice had to rule on the application of article 54 of the Convention Implementing the Schengen Agreement. Article 54 incorporates the principle of *ne bis in idem*. The Court found that an agreement

⁵¹ *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement of the Appeals Chamber, 31 May 2000, para. 74.

between an accused and the Public Prosecutor amounted to a final decision in the two cases before it, and that the principle of *ne bis in idem* was therefore applicable.⁵²

80. Based on all of the foregoing, the Defence submits with the greatest respect that the provision for *ne bis in idem*, as set out in article 20(3) of the Rome Statute, has not been settled at the ICC, and that its application does not necessarily require a “prior” final determination as to “the merits of the case”. It is indeed not without relevance that the terms of articles 20(1) and 20(2) appear to refer specifically to crimes for which an accused “has been convicted or acquitted”, thereby implying prior proceedings on the merits of the case. However, article 20(3) makes no reference to crimes for which an accused “has been convicted or acquitted” and merely confines itself to stating “[n]o person who has been tried ...”.⁵³

81. Accordingly, the Defence suggests that article 20(3) was specifically intended as a “catch-all” provision to cover other means of terminating cases without the need for a determination as to the merits (for example, amnesty, settlement of a prosecution, etc.). Contrary to the Prosecution assertion, the Defence reiterates that

⁵²ECJ, Judgment of the Court in joined cases number C-187/01 and C-385/01, 11 February 2003 (1) :

“26. It is clear from the wording of Article 54 of the CISA that a person may not be prosecuted in a Member State for the same acts as those in respect of which his case has been ‘finally disposed of’ in another Member State.

27. A procedure whereby further prosecution is barred, such as those at issue in the main actions, is a procedure by which the prosecuting authority, on which national law confers power for that purpose, decides to discontinue criminal proceedings against an accused once he has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the prosecuting authority.

28. Therefore, it should be noted, first, that in such procedures, the prosecution is discontinued by the decision of an authority required to play a part in the administration of criminal justice in the national legal system concerned.

29. Second, a procedure of this kind, whose effects as laid down by the applicable national law are dependent upon the accused's undertaking to perform certain obligations prescribed by the Public Prosecutor, penalises the unlawful conduct which the accused is alleged to have committed.”

⁵³ Cf. Triffterer, O, “Commentary on the Rome Statute of the International Criminal Court”, p. 683, para. 22 which states that the drafters of the Statute intended the words “has been convicted or acquitted” to exclude those cases in which proceedings terminated before judgment. Conversely, where the words “has been convicted or acquitted” are absent, as is the case for article 20(3), the principle must be understood as covering those cases in which proceedings terminated before the issuance of a final judgment.

the above viewpoint is wholly supported by the principal and authoritative commentary on the Rome Statute by Triffterer:

In contrast to paragraphs 1 and 2, both referring to “convicted or acquitted by the Court”, paragraph 3 provides *ne bis in idem* for a person who “has been tried by another court”. The different wording suggests a deviating interpretation of this notion, taking into account not only another court’s final decision on the merits of the **case but also other decisions terminating criminal proceedings**. With reference to interpreting the clause in conformity with the notion of complementarity, it was proposed that a bona fide effort by national authorities to prosecute would suffice in order to bar the ICC from exercising jurisdiction. **A national decision not to proceed because of insufficient evidence or because prosecution would not serve the interests of justice would suffice...**⁵⁴

82. Nevertheless, even if the view were to be taken that a prior and exhaustive consideration of the merits of the case is indeed a necessary prerequisite for the application of the *ne bis in idem* principle, the Defence refers the honourable Trial Chamber once more to the recitals setting out the reasoning in the Public Prosecutor’s submission recommending dismissal of the charges [*réquisitoire de non-lieu*], from which it is apparent that the merits of the case, including the presumed responsibility of the Accused for the perpetration of crimes, were considered, and that the available evidence was found to be insufficient even to constitute *prima facie* proof.⁵⁵

83. It should be noted, as stated above, that the law of the Central African Republic, in accordance with article 114 of the Code of Criminal Procedure applicable at the time (**now** article 143) stipulates that a dismissal order terminates the prosecution, which can only resume in response to a specific request from the prosecuting authorities and under stringent conditions.⁵⁶

⁵⁴ Triffterer, O, page. 689, paragraphs 34-35.

⁵⁵ Cf. Article 91(a) of the CAR Code of Criminal Procedure: “[TRANSLATION] If the investigating judge is of the opinion that the acts constitute neither a serious criminal offence [*crime*], a lesser offence, [*délit*], or a petty offence [*contravention*], **or if there is insufficient evidence against the person charged**, an order for the dismissal of the charges shall be issued and, if under arrest, that person shall be released.”

⁵⁶ See Annexes A and B.

10. Gravity

84. It was not the Defence's contention that the lack of precision in respect of the charges per se renders the case inadmissible. Nevertheless, it maintains that the appropriate standard for assessing the gravity of a case is the evidence as confirmed by the Pre-Trial Chamber and not as presented by the Prosecution in its response. The charges as confirmed by the Pre-Trial Chamber are not presented in the exaggerated terms used by the Prosecution. Analysis of the gravity of a case cannot be dissociated from the manner in which it was confirmed.

85. It goes without saying that there is a significant difference in terms of gravity between an individual who plans or orders various atrocities and one whose alleged negligent control over his subordinates entails an increased risk of atrocities being committed. The Defence submits that the Accused falls into the latter scenario and that the alleged mode of commission is of insufficient gravity to constitute a violation of command responsibility and justify referral to the International Criminal Court by the Prosecution.

86. The Defence finds support for the above submission in the work of Professor William Schabas:

Case law of the International Criminal Tribunal for the former Yugoslavia shows that in the relatively rare cases where offenders are convicted on the basis of command responsibility, the sentences have been relatively low, indicating that they were not of comparable gravity to those involving intentional criminal conduct.

The Prosecutor has declined to prosecute cases of wilful killing (see, for example, his February 2006 statement on Iraq) because the number of victims was not large enough. An explanation as to why a negligent commander, whose troops commit atrocities but where no causal connection is established with the failings of the commander, is of higher than wilful killers would be appreciated. I would be inclined to the view that if it cannot be proven that Bemba actually ordered or otherwise was involved in the direct commission of the crimes, then the Court might direct its attention elsewhere.

This is not to dispute that Bemba may be guilty in accordance with article 28 of the Statute. But maybe his case isn't high enough on the Richter scale of gravity if the Prosecutor can only prove negligence.⁵⁷

11. The argument that there has been no abuse of process

87. Contrary to the Prosecution assertion,⁵⁸ the Defence is not pleading abuse of process in order to bolster its challenge to the admissibility of the case. Abuse of process is submitted as an entirely separate argument and has been maintained throughout the challenge to admissibility simply for reasons of convenience, since these two challenges have the same consequence: a stay of the proceedings against the Accused.

88. Once again, the Defence refers to the two categories of “abuse of process” identified in *R v. Horseferry Magistrates ex. p. Bennett*:⁵⁹ (1) where it will be impossible to give the Accused a fair trial; or (2) where it offends the court’s sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. The Defence argues that, unlike the first category – which was the basis for suspending proceedings in the Lubanga case – the second category is intended to protect the integrity of the judicial proceedings as a whole, as well as, in particular, the institutions responsible for upholding the law.

89. The Defence respectfully submits that the inability to guarantee a fair trial is the sole form of prejudice recognised by the abuse of process doctrine, and the need to prove this is stipulated in the first category above. Where the conduct of an executive or judicial authority constitutes an offence to “the court’s sense of justice and propriety”, it may be concluded that prejudice is inherent in the offending conduct and need not be proved as a separate element. An appropriate example

⁵⁷Schabas, “Command responsibility at the International Criminal Court”

<http://humanrightsdoctorate.blogspot.com/2009/05/command-responsibility-at-international.html> .

⁵⁸ Response of the Prosecutor, paras. 83 and 84.

⁵⁹ [1994] 1 AC 42, 74 *per* Lord Lowry.

would be that of the transfer of a suspect to a country by subterfuge for the purpose of circumventing lawful extradition procedures.

90. In such a situation, even though the suspect may indeed be guaranteed a fair trial, the proceedings must nonetheless be conducted as a means of keeping the executive under control, given the inherent prejudice caused to the integrity of the judicial process.

91. In any event, and as will be reiterated in these submissions, the Defence considers that it has demonstrated in sufficient detail the prejudice caused to the Accused (particularly the violation of the fundamental right whereby no person may be removed from his or her natural judge) as a result of the conduct both of the Prosecution and of the CAR and DRC executive authorities, and which the Prosecution endorsed – doubtless unintentionally.

12. Abuse of process: failure to disclose the relevant evidence

92. The Defence maintains its assertion that the Prosecution statements on the issue of disclosure suggest that the relevant material had not been registered. On this point, the Defence would refer the Trial Chamber to its *Decision on the defence application for additional disclosure relating to a challenge on admissibility*,⁶⁰ where it stated:

There is no sustainable basis that has been identified for the Chamber's consideration that the prosecution has failed to reveal any parts of the proces-verbaux, and particularly of meetings that are material to the accused's admissibility challenge. The prosecution has stated unequivocally that it is not in possession of any minutes of meetings or correspondence with the CAR or the DRC that concern this admissibility challenge.⁶¹

93. In its most recent statements on the matter, the Prosecution admitted that it had taken notes of various meetings with the CAR authorities, but that these notes were not relevant to the issue of admissibility and that, in any event, they constitute

⁶⁰ Ibid at para. 26.

⁶¹ Ibid at para. 26.

internal notes subject to disclosure under rule 81(1) of the Rules of Procedure and Evidence.⁶²

94. The Defence has to concede that no contemporaneous notes of specific relevance to admissibility were taken during the November 2005 mission. Its criticism relates, rather, to the failure to keep such written records, whereas the purpose of this particular mission was to conduct an analysis of admissibility with a view to initiating an investigation. The Defence finds it inconceivable that the Prosecution neglected to discuss issues of complementarity during its missions to the CAR judicial authorities.⁶³

95. The failure to take contemporaneous notes of these meetings caused serious and irreversible prejudice to the Defence, in that it now has no means of verifying for itself which members of the CAR judicial authorities the Prosecution met,⁶⁴ the subject-matter addressed at those meetings and the factors which influenced the CAR judicial authorities' eventual decision to transfer the case to The Hague.

13. Abuse of process: the argument that the Prosecution has performed its obligations in an impartial manner

96. The Defence has provided sufficient evidence to indicate that the victims were encouraged by sources linked to the CAR authorities to lodge complaints against the Accused.⁶⁵ In addition, the Defence has put forward the opinions of an objective NGO and of President Kagame of Rwanda to the effect that Joseph Kabila had planned to eliminate the Accused from the Congolese political scene.⁶⁶ In such circumstances, the e-mail correspondence from an influential member of the CAR

⁶² Response of the Prosecutor at para. 88.

⁶³ ICC-01/05-7 at para. 16

⁶⁴ Whether for example they included members of the *Cour de Cassation*, who were still deliberating on the matter at the time.

⁶⁵ Defence Application, at para. 179; the participation of OCODEFAD and Ms Bernadette Sayo Nzale.

⁶⁶ Defence Application at paras. 175 and 176.

executive to Kabila's representatives regarding the outcome of the case against the Accused before the CAR Court of Cassation cannot be viewed as innocent.⁶⁷

97. In this regard, the Defence suggests that Trial Chamber III carefully scrutinise the terms of the letter from Mr Goungaye Wanfiyo, who, on the basis of the mandate conferred upon him by Bozizé, gave the President of the *Cour Criminelle* precise instructions on how that Court should decide the matter. From the terms of that decision,⁶⁸ it is apparent that the instructions received from Bozizé via Mr Gouganye Wanfiyo were scrupulously and slavishly followed.

98. The Defence respectfully draws the attention of the distinguished Chamber to the fact that this letter⁶⁹ was only disclosed to it on Thursday 13 April 2010, and that it intends to file a separate application in this regard.

99. As President and member of the *Ligue Centrafricaine des droits de l'homme* [Central African Human Rights League], which is affiliated to FIDH, Mr Goungaye Wanfiyo had for long been targeting the Accused as one of those most responsible for the crimes allegedly perpetrated in the CAR.

100. The Defence maintains that the revival by the Indictments Chamber of the charges against the Accused, notwithstanding an order for their dismissal against which no appeal had been entered, was unlawful under the provisions of the Code of Criminal Procedure in force at the time.⁷⁰

101. According to the French specialists in procedural law, who were central to the drafting of the CAR Code of Criminal Procedure, "[TRANSLATION] the Indictments

⁶⁷ Defence application at para. 178.

⁶⁸ EVD-P-02749, ERN: CAR-OTP-0004-0148 to 0166.

⁶⁹ CAR-OTP-0019-0169.

⁷⁰ See Annex B: articles 92(b), 109, 112, 141 and 143 of the Law of 15 January 1962 on the Code of Criminal Procedure.

Chamber is seized only to the extent of the appeal entered, and only in relation to the points addressed by that appeal".⁷¹

102. In this regard, those same authors recall the judgment of the French Court of Cassation quashing a decision of the Indictments Chamber, which had dismissed the defendant's plea and sent him for trial before the *tribunal correctionnel* without having heard him, notwithstanding the fact that the Investigating Judge had issued an order for dismissal of the charges.⁷²

103. The Indictments Chamber had no *proprio motu* power to address the Senior Investigating Judge's decision to dismiss the charges, in the absence of a Notice of Appeal [*acte d'appel*] by the Prosecutor specifically directed at that decision.

104. Rather, it is the Notice of Appeal which refers the matter to the appellate jurisdiction and delineates the scope of its seisin, in accordance with the maxim "*tantum devolutum, quantum appellatum*".⁷³

⁷¹ Gaston Stefani and G. Levasseur, "*Procédure Pénale*", 20th ed., Dalloz, p. 754.

⁷² Stefani and Levasseur, op. cit. No. 669 (footnote 2).

⁷³ 1. The Notice of Appeal, which defines the scope of the appeal and circumscribes it (*Crim.* 30 January 1973, *Bull.* No. 48) is not to be confused with the Appeal Document [*requête d'appel*], which sets out the grounds of appeal (article 504, Code of Criminal Procedure); *Crim.* 26 March 1974, *Bull.* No. 128. For the principle that the scope of the appeal [*effet dévolutif*] is circumscribed by the terms of the *acte d'appel*, see *Crim.* 22 July 1981, *Bull.* No. 235; *Crim.* 19 November 1985, *Bull.* No. 360; *Crim.* 12 December 1988, *Bull.* No. 417; *Crim.* 21 January 1991, *Bull.* No. 35 (a summons to appear is simply a summons).

2. *Crim.* 7 March 1989, *Bull.* No. 106.

3. The *Cour d'appel* can rule only on those operative parts of the decision which have been referred to it through the *acte d'appel*: *Crim.* 7 April 1976, *Bull.* No. 104; *Crim.* 2 March 1976, *Bull.* No. 75. Nor can it, solely on the basis of an appeal entered by an accused, a civil defendant or civil complainant or an insurer, worsen the position of the appellant (article 515 (2) Code of Criminal Procedure, Law of 8 July 1983). However it may not introduce restrictions that are not contained in the *acte d'appel*: *Crim.* 12 December 1988, *Bull.* No. 417.

4. *Crim.* 6 May 1964, IV. 85; Pau 10 February 1976, D. 1976, IR 339

(Court of Cassation of Belgium, 28 October 1946, *Pasicrisie*, 1946, I, p. 387 and Court of Cassation of Belgium, 1947, *Pasicrisie*, 1947, I, p.46.) Thus an appeal by one defendant does not have the effect of referring proceedings against a co-defendant to the *Cour d'appel*. (Court of Cassation of Belgium, 3 November 1947, *Pasicrisie*, 1947, I, p. 458). Similarly, an appeal by the Prosecution confined to certain operative parts of the impugned decision does not have the effect of bringing the original prosecution as such before the appellate court. The case before the appellate court is confined to the terms of the *acte d'appel* and that court is not seized of the criminal proceedings in their entirety.

105. The Defence accordingly argues that, in these circumstances, to reintroduce the charges of war crimes against the Accused was to act *ultra vires*, not only on account of the violation of CAR law but also because such action arose out of the inappropriate interference of Mr Goungaye Wanfiyo, Bozizé's representative, who, as conceded by the Prosecution, had sought to have the case transferred to the ICC by the President of the Bangui Court.⁷⁴

106. In this regard, the very active role played by Goungaye and Bernadette Sayo (Chair of OCODEFAD, an association to which the majority of victims are affiliated), is set out in greater detail in a document which the Prosecution itself has provided.⁷⁵

107. The revival by the Indictments Chamber of the Bangui Appeals Court of the charges against the Accused – when an appeal against the order to dismiss them was time-barred – was effected without prior notification to the Accused, thereby completely depriving him of his fundamental and internationally recognised right to be heard.

108. The Defence vigorously contends that it is **not** alleging that the Prosecutor maliciously abused his powers and obligations. Nevertheless, the Defence submits that the Prosecution, as well as the State's referral procedure, were exploited by foreign interests for the purpose of pursuing a purely political agenda to the detriment of the Accused.

109. The Defence does, however, therefore contend that, taken together, all of the above-mentioned factors tend to demonstrate that, on the balance of probabilities, there was an offence against the "sense of justice and propriety" of the Court, as a result of which the proceedings should be stayed.

(Court of Cassation of Belgium, 5 September 1984, *Pasicrisie*, 1985, I, p.15 and Court of Cassation of Belgium, 18 September 1984, *Pasicrisie*, 1985, I, p. 85).

⁷⁴ ICC-01/05-01/08-739+Anxs, paragraph 18 of the Prosecutor's observations of 29 March 2010.

⁷⁵ Rapes committed by the Banyamulenge; machinations of the French secret services with the collusion of the *Ligue centrafricaine des Droits de l'Homme*, CAR-OTP-0030-0145 to 0149).

14. Abuse of process: the unlawful arrest

110. The Prosecution rightly notes that the Trial Chamber decided that the issue of the legality of the Accused's arrest was irrelevant to the application or consideration of rule 118(2) of the Rules of Procedure and Evidence.⁷⁶ However, the legality of the Accused's arrest and any violation of his fundamental rights are relevant to the issue of whether the proceedings must be stayed.

111. The Defence cannot deny that it was forced to "speculate" on the nature of the confidential information underpinning the application for the provisional arrest of the Accused. This is a logical consequence of its being denied access to the said information. However, for the reasons set out in the Defence Application, the Defence submits that the short space of time between this confidential information and the Pre-Trial Chamber's decision to adjourn⁷⁷ the issuance of an arrest warrant raises serious issues about the identity of the information providers and their motives. The Defence reiterates its submission that the failure to disclose this information requires that Trial Chamber III review it for the purpose of satisfying itself regarding an assessment of the credibility of their sources.

Conclusion

112. For all the above-mentioned reasons, the Defence respectfully requests Trial Chamber III to declare the case against the Accused inadmissible and/or to order a stay of the proceedings on the ground of abuse of process.

⁷⁶ Response of the Prosecutor at para. 101.

⁷⁷ The Defence admits that the initial application for a warrant of arrest was not – semantically speaking – "rejected". The Pre-Trial Chamber was, however, not able to issue a warrant of arrest until the Prosecutor had added further information to it.

[signed]

Aimé Kilolo Musamba
Associate Counsel

[signed]

Nkwebe Liriss
Lead Counsel

Dated this 14 April 2010

At The Hague, The Netherlands