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No.: **ICC-01/05-01/08**
Date: **14 May 2010**

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

Defence Response to the Observations of the Central African Republic of 7 May 2010 and of the other Parties

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:

The Office of the Prosecutor
Fatou Bensouda
Petra Kneuer

Counsel for the Defence
Nkwebe Liriss
Aimé Kilolo Musamba

Legal Representatives of the Victims
Marie-Edith Douzima Lawson

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Paolina Massida

The Office of Public Counsel for the Defence
Xavier-Jean Keïta

States' Representatives
Central African Republic

Amicus Curiae

REGISTRY

Registrar and Deputy Registrar
Silvana Arbia and Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Defence for Mr Jean-Pierre Bemba Gombo ("the Accused") hereby files its response to the observations of the CAR of 7 May 2010.[1]

2. On 27 May 2010, the Trial Chamber held a status conference during which it addressed submissions on the Defence challenge to the admissibility of the case against the Accused. At the close of that hearing, the Trial Chamber ordered the representative of the CAR to file further observations with respect to the two following questions:

i. Is there a legal obligation to notify a decision to dismiss the charges on penalty of nullity?

ii. Does the appeal have a suspensive effect on the impugned decision.[2]

3. **As regards the first question**, the Defence respectfully observes that the submission of Lead Counsel Nkwebe Liriss was not correctly translated into English. This technical incident, we believe, unfortunately led the Honourable Trial Chamber to formulate a question that does not correctly reflect the Defence submission. For the purpose of clarifying the question, the correct French version is provided below:

> *Monsieur le Président, honorables juges, avant d'aborder les questions essentielles, j'aimerais apporter des précisions sur la question... les questions que vous avez posées.*
>
> *Doit-on notifier la décision du juge de la chambre d'accusation* ***<u>qui remet M. Bemba dans les liens de la prévention</u> ?*** *J'attendais des réponses adéquates de la part de la... des praticiens du droit centrafricain. Comme il n'y en a pas eu, je vous les donne en lisant le texte centrafricain — la loi de 1962, sous l'empire de laquelle la décision fut prise. C'est l'article 85-B : Notification de cette* ***<u>ordonnance de renvoi</u>*** *— l'ordonnance de renvoi prise par la chambre d'accusation — sera faite*

[1] ICC-01/05-01/08-770-Conf and confidential annexes 1,2 & 3.
[2] ICC-01-05-01-08-T-22-ENG ET WT RM T of 27-04-2010, p. 64, lines 13-22.

> *dans le plus bref délai, à peine de nullité, à l'accusé, à son conseil, ainsi que la faculté d'en faire appel dans un délai de quarante- huit heures à compter de la notification*.[3]

4. The incorrect English translation, however, read as follows:

> Mr President, your Honours, before I talk about the essential points, I wish to make a few clarifications with respect to the questions which you asked. Should the decision of the judge of the indictment chamber be notified; that is, the decision **which related to the charges against Mr Bemba**? I was waiting for an answer to be given by the experts on CAR law. Since they have not given any answer, I am going to provide an answer by reading the law of 1962, the law under which the decision was taken. And I am going to read Article 85(b), notification of the order to **dismiss the case**. And we are talking about the order issued by the indictment chamber. And I read: The notification shall be done within the shortest time possible under pain of nullity; that this notification shall be made to the accused, to the accused's counsel, and the notification has to be done within a time limit of 48 hours.[4]

5. A comparison of the two texts reveals that the correct French version refers to notification of a decision confirming charges against an accused and committing him for trial before the *Cour criminelle*. In that case, there is no dispute among the Parties and Participants that, under the 1962 Code of Criminal Procedure,[5] failure to provide notification to an accused within 48 hours of a decision that charges are to be brought against that person, and that he or she is accordingly "**committed for trial**", must have the effect of invalidating that decision.

6. In this regard, the Representative of the Victims displays regrettable confusion by assimilating a "decision to commit for trial" to a "decision to dismiss the charges".

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[3] ICC-01-05-01-08-T-22-FRA ET WT RM T of 27-04-2010, page 42 lines 9 to 19.
[4] ICC-01-05-01-08-T-22-ENG ET WT RM T page 45, lines 22 to 25; page 46 lines 1 to 11.
[5] ICC-01/05-01/08-752-AnxB of 14 April 2010.

7. As its names indicates, a decision to "commit for trial" commits the defendant for trial before a criminal court when the investigating authorities have found that there is sufficient evidence against that person.

8. By contrast, where such authorities consider that there is insufficient evidence, they issue an order to dismiss the charges.

9. These two terms ("committal for trial" and "dismissal of the charges") do not therefore relate to the same legal situation.

10. Accordingly, the Defence agrees that a decision to dismiss the charges need not be notified.

11. On the other hand, all decisions to "commit for trial" require such notification.

12. **As regards the second question,** the same error of interpretation is apparent.

13. The French version of the transcript states that the suspensive effect referred to by Lead Counsel in his submission relates to *pourvoi en cassation* [appeal on points of law to the Court of Cassation] and not *appel* [appeal against a lower court decision on both law and facts].

> *Me Nkwebe Liriss: Une question a été soulevée :* ***celle de la suspension éventuelle des procédures à la suite d'un pourvoi en cassation****. Je regarde la loi portant organisation et fonctionnement de la Cour de Cassation, spécialement en son article 21: Les délais de recours et l'exercice du recours* ***en cassation ne sont suspensifs*** *que dans les cas suivants : matière d'état des personnes, quant il y a faux incident, en matière d'immatriculation foncière et en matière pénale.*
>
> *Je relis encore l'article 60…64 : Pendant les délais du* ***recours en cassation****, et s'il y a eu recours, jusqu'au prononcé de l'arrêt de la Cour de cassation, il est sursis à l'exécution de l'arrêt attaqué.* [6]

[6] ICC-01-05-01-08-T-22-FRA ET WT RM T of 27-04-2010, page 43, lines 1 to 9.

> *Me Nkwebe Liriss: nous avons transmis les textes, mais j'ai parlé de deux textes différents. L'effet suspensif, Madame, les articles 21, 64 et 62 sur la loi portant organisation et fonctionnement, la loi portant organisation et fonctionnement de la cour de cassation, pas le code de procédure pénale. L'article 21, l'article 64, sur* ***l'effet suspensif, c'est sur la loi portant organisation et compétence de la Cour de cassation****.*[7]
>
> [TRANSLATION] Mr Nkwebe Liriss: A question has been raised: that of **the possible stay in proceedings as a result of a *pourvoi en cassation* [appeal on points of law to the Court of Cassation]**. I am looking at the Law on the Organisation and Functioning of the Court of Cassation, in particular article 21: the time limit for an appeal to the Court of Cassation and the **appeal itself are suspensive only** in the following cases: in matters of personal status; where there is a challenge to the authenticity of a document; in property registration matters; in criminal matters.
>
> I will read article 60…64 again: Pending the expiry of the time limits for applications to have a decision set aside, and, where an application has been lodged, until the Court of Cassation has rendered its decision, enforcement of the contested decision shall be stayed.
>
> Mr Nkwebe Liriss: we have provided the texts, but I was talking about two different texts. The suspensive effect, Madam, articles 21, 64 and 62 of the Law on the Organisation and Functioning, the Law on the Organisation and Functioning of the Court of Cassation, not the Code of Criminal Procedure. Article 21, article 64**, on the suspensive effect, that's in the Law on the Organisation and Jurisdiction of the Court of Cassation**.

14. It was thus indeed the suspension of the decision of the *Chambre d'Accusation* [Indictments Chamber] of the Bangui Appeals Court (referring the Accused to the ICC) as a result of the appeal to the Court of Cassation that was the point at issue.

15. Thus, in reality, the Defence had instead argued that:

- There is a legal obligation to notify the Decision of the Judge of the Indictments Chamber to bring charges against the Accused (or decision to **commit for trial**).[8]

[7] Idem, page 55, lines 13 to 17.
[8] ICC-01-05-01-08-T-22-FRA ET WT RM T of 27-04-2010, page 42, lines 9 to 19.

– The *cassation* procedure results in the automatic suspension of an impugned decision, which in the present case is the decision of the Indictments Chamber referring the Accused to the ICC.[9]

16. In order to make its Reply more readily comprehensible, the Defence will first address these issues, before responding to the submissions of the Legal Representatives of the Victims and the CAR authorities.

II. DEFENCE RESPONSES TO THE CHAMBER'S QUESTIONS

1. THE DECISION PARTIALLY SETTING ASIDE THE DISMISSAL OF THE CHARGES AND ORDERING THE SEVERANCE OF THE PROCEEDINGS AND COMMITTAL FOR TRIAL BEFORE THE *COUR CRIMINELLE*, SHOULD HAVE BEEN NOTIFIED TO THE ACCUSED AND HIS COUNSEL, FAILING WHICH IT WAS NULL AND VOID

17. In general, any judicial decision which adversely affects a person must be notified to that person, so that he or she can exercise their right of appeal, failing which the universal principle of due process will be violated.

18. This principle finds support in Central African criminal procedure in articles 111(e) and 113(b), as follows:

> [TRANSLATION] Article 111(e): Where the act constitutes a *crime* [serious criminal offence] under the Law and the Court finds sufficient evidence, it shall order committal [of the case] for trial before the *Cour Criminelle* and issue an *ordonnance de prise de corps* [custody order]. **This decision shall be notified to the accused and his or her counsel and the accused shall be provided with a copy thereof**.
>
> Article 113(a and b): Decisions shall be signed by the President and the Registrar within three days of their issuance. Particulars shall be given of the Prosecutor's submissions and of the name of each of the judges.
>
> **Notification of decisions of the *Chambre d'Accusation*, where applicable, shall be effected by the Principal Public Prosecutor [*Procureur Général*]**.

[9] ICC-01-05-01-08-T-22-FRA ET WT RM T of 27-04-2010, page 43, lines 1-9.

19. Under article 194(a) of the Code of Criminal Procedure of the Central African Republic, said notification (or service) must be effected in accordance with article 193(f) in the case of persons residing abroad.

20. Article 194(a) of the Code of Criminal Procedure of the Central African Republic (CPP-RCA) provides:

> [TRANSLATION] Article 194(a): Service of judicial decisions shall be effected in the same manner as summonses of the *Ministère Public* [Public Prosecution Service].

21. Article 193(f), which pertains to summonses from the *Ministère Public*, provides:

> [TRANSLATION] Article 193(f): A summons to appear concerning a person residing abroad shall be addressed to the competent authorities through the *Procureur de la République* [Public Prosecutor], the *Procureur Général* [Principal Public Prosecutor], the Minister of Justice and the Minister of Foreign Affairs.

22. While it is true, as the participants point out, that article 193 (a) to (f) concerns summonses to appear, it is also the case that these provisions must be read in conjunction with article 194, which relates to service of judicial decisions.

23. It follows from the foregoing that the argument based on the Accused's absence from Central African territory has no relevance in justifying the lack of notification, particularly since there was and still is a DRC embassy in Bangui.

24. As far as the Indictments Chamber is concerned, there is no express penalty for failure to notify a decision that formally charges a defendant and commits that person to trial before the appropriate court.

25. The Defence submits, however, that the penalty is, *mutatis mutandi*, the same as the nullity applicable in such circumstances in relation to orders for

committal for trial, as set out in article 95(a) and (b) of the CAR Code of Criminal Procedure .

> [TRANSLATION] Article 95 (a): If the Investigating Judge considers that the act is punishable as a serious crime and that there are sufficient grounds for prosecution, he or she shall commit the person charged [*inculpé*] for trial before the *Cour Criminelle* and issue an *ordonnance de prise de corps* [custody order] in respect of that person.
>
> Article 95(b) : Notification of such committal for trial shall, **on penalty of nullity**, be given as soon as possible to the accused and his or her counsel, as well as the right to appeal the order within 48 hours of notification. A copy of the order shall be given to the accused.

26. It should be borne in mind that the Indictments Chamber exercises the same powers of prosecution and investigation as the investigating judge in relation to whom it serves as the appellate body.

27. Articles 109 and 111(a) and (e) which define the role of the Indictments Chamber are instructive in this regard:

> [TRANSLATION] Article 109: The judges (of the Indictments Chamber) may **conduct further enquiries and**, where appropriate, **order** new investigations and designate one of them to undertake these, either in person or by delegating responsibility therefor. **For this purpose**, that judge **shall have all those powers of the investigating judge set out in articles 53 to 74**, as well as that of issuing warrants. The case file shall then be transmitted to the Principal Public Prosecutor, who must file submissions within five days.
>
> Article 111(a): Where the impugned order is set aside, the procedure shall be as follows:…….
>
> Article 111(e): Where the act constitutes a serious criminal offence under the law and the Court finds sufficient evidence, committal for trial before the *Cour Criminelle* shall be ordered and a custody order issued. This decision shall be notified to the accused and his or her counsel, and the accused shall be provided with a copy thereof.

28. It should be noted that article 111(e), which applies to committal decisions of the Indictments Chamber, is drafted in similar terms to those of article 95(a), which concerns orders of the investigating judge.

> [TRANSLATION] If the investigating judge considers that the act is punishable as a serious crime and that there are sufficient grounds for prosecution, he or she shall commit the person charged [*inculpé*] for trial before the *Cour Criminelle* and issue an *ordonnance de prise de corps* [custody order] for that person.

29. In any event, it was not necessary for article 111(e) of the Code of Criminal Procedure to state expressly that failure to notify a decision of the Court of Appeals (Indictments Chamber) renders the proceedings null. That is self-evident.

30. In effect, nullity follows from the fact that failure to notify directly violates the rights of the defence, since such failure deprives the accused of the right to pursue the legal remedies available, particularly the right to file a submission in the appeal proceedings, which resulted in the decision of the Court of Cassation of 11 April 2006.[10]

31. Article 200 (a) and (d) of the Code of Criminal Procedure provides:

> [TRANSLATION] (a) - **Except in the case of nullity causing direct prejudice to the rights of the defence**, no ground for nullity shall be accepted unless expressly provided for by law, raised by the parties and such as to have adversely affected the party raising it.
>
> (b) - These provisions are applicable **to all steps in criminal proceedings**.

32. It is worth recalling that the rights of the defence are the specific rights to which a person is entitled in order to defend him or herself during criminal proceedings.

33. The rights of the defence apply both to the *enquête* [police investigation] and to the *instruction* [pre-trial investigation] stage or trial phase, and at all levels of jurisdiction:

[10] EVP-P-01327, CAR-OTP-0019-0258 to 0261.

– Everyone shall be entitled to a hearing by an independent and impartial tribunal within a reasonable time.

– Every accused person must have adequate time and facilities for the preparation of his of her defence and to communicate with counsel of his or her own choosing.

– Everyone must be able to defend him or herself, either in person or through the assistance of counsel.

34. Alternatively, the sanction would then be that a decision of the Indictments Chamber which was not notified is not enforceable under articles 219(a) of the previous CPP-RCA and 276(1) of the new CPP-RCA.

> [TRANSLATION] Article 219(a): Enforcement upon application by the Public Prosecutor's Office is effected once the decision has become **final**.
>
> Article 276 (1): Enforcement is effected once the decision has become **final**.

35. A decision is only final when appeals have become time-barred. However, time only starts to run **upon service** of the decision. Hence, as long as a decision has not been notified, it is not enforceable.

36. From all the foregoing, it must be concluded that the decision of the Indictments Chamber of 17 December 2004 referring the Accused to the ICC is invalid, or in any event not yet enforceable in respect of the Accused on account of failure to notify.

37. Accordingly, the Order for Dismissal of the Charges in favour of the Accused is still in effect.

2. THE APPEAL TO THE COURT OF CASSATION FILED BY THE ACCUSED ON 16 APRIL 2010[11] *IPSO FACTO* STAYS THE DECISION OF 17 DECEMBER 2004[12] REFERRING HIM TO THE ICC

38. As expressly acknowledged by the CAR representatives in paragraph 44 of their Response,[13] the time limit and the appeal to the Court of Cassation have suspensive effect in criminal cases in accordance with article 21 of the Organic Law on the Organisation and Functioning of the Court of Cassation.

39. The **automatic** suspensive effect is supported by articles 61(1) and 64(1) of that same Law:

> [TRANSLATION] Article 61(1): For all of the parties, with the exception of the Public Prosecutor's Office, the time limit for lodging a challenge to decisions of the Indictments Chamber, in cases capable of being so challenged, **only starts to run on the day that they are notified** of such decisions at the request of the Chief Prosecutor of the Appeals Court.
>
> Article 64(1): Pending the expiry of the time limits for applications to have a decision set aside, and, where an application has been lodged, until the Court of Cassation has rendered its decision, **enforcement of the contested decision shall be stayed**.

40. Even if the Chamber were not to accept the argument that the decision setting aside the Order for Dismissal of the Charges is invalid or not enforceable, that decision is in any event stayed as a result of the appeal to the Court of Cassation of 16 April 2010.[14] **III. RESPONSES TO THE ARGUMENTS OF THE CAR AUTHORITIES**

1. The Appeal of the CAR Public Prosecutor

41. As the Defence indicated during its presentation at the hearing of 27 April 2010, it is the ***réquisitoire introductif*** [initial appeal submission]

[11] ICC-01/05-01/08-757-AnxA.
[12] EVD-P-02749, CAR-OTP-0004-0148.
[13] ICC-01/05-01/08-770-Conf-Anx1 10-05-2010 9/10 RH T.
[14] ICC-01/05-01/08-757-AnxA.

which sets out the **grounds** of appeal in the event that they are not indicated in the notice of appeal.[15]

42. This Honourable Trial Chamber itself noted that the grounds of appeal were absent from the record of the case.[16]

43. This is an important issue, given that, pursuant to article 160(b) of the Code of Criminal Procedure of the CAR, the court dealing with the appeal cannot rule *ultra petita*:

> [TRANSLATION] Article 160(b): The Appeals Court can rule **only on those provisions (grounds) of the judgment in respect of which a formal appeal has been filed**.

44. Furthermore, article 112 of the Code of Criminal Procedure of the CAR prohibits the appellate body from revisiting an order dismissing the charges which has not been appealed:

> [TRANSLATION] Article 112: The Indictments Chamber dealing with the appeal of one of the persons charged against an order of the Investigating Judge under article 95 shall rule with respect to all of the persons charged in the same proceedings and on all of the charges resulting from the proceedings, even if they were not addressed by the Investigating Judge. **However, an order dismissing the charges which has not been appealed shall remain final**.

45. It appears from the documents annexed to the Response of the representatives of the CAR that the **initial appeal submission of 23 November 2004**, which sets out the grounds of appeal, indicates that the appeal was brought against that part of the order which acquitted [REDACTED], given that the MLC troops were under his orders.[17]

46. [REDACTED] [REDACTED]

[15] ICC-01-05-01-08-T-22-ENG ET WT 27-04-2010 p. 58, lines 13 to 14.
[16] ICC-01-05-01-08-T-22-ENG ET WT 27-04-2010, p. 62, line 25 to p. 63, line 1.
[17] Appeal submission of 22 October 2004, ICC-01/05-01/08-770-Conf-Anx2.

[REDACTED].[18]

47. Said appeal submission also accords with the document read out at the hearing of the Indictments Chamber on 6 December 2004, when the case was deliberated.[19]

48. Hence the representative of the CAR cannot rely on the ***réquisitoire supplétif*** [additional appeal submission] of 23 November 2004,[20] which extended the initial grounds of appeal, outside the 48-hour time limit for an appeal to be lodged (article 99(f)(i) of the CAR Code of Criminal Procedure). If we follow this reasoning, we then find that the *post factum* oral presentation of 6 December 2004[21] again restricted the grounds, reducing them to those stated in the initial appeal submission, thereby excluding from the appeal the provisions of the order dismissing the charges against Mr Jean Pierre Bemba Gombo.

49. One provision of CAR law which would support the argument that the appeal did not relate to the dismissal of the charges against the Accused is article 99(i) of the CAR Code of Criminal Procedure:
"[TRANSLATION] <u>Article 99(i)</u>: ... He (the Principal Public Prosecutor) shall notify his appeal…."

50. In effect, this obligation to notify the appeal allows the parties against whom the appeal is taken to exercise their rights of defence by submitting a

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[18] EVD-P-00098, CAR-OTP-0005-0099 (at page CAR-OTP-0005-0116, para. 89), confirmed by the Office of the Prosecutor's e-mail to the Chamber: "Prosecution's Response to the Chamber's question at today's status conference" of 27 April 2010 at 17:26.
[19] EVD-P-04119, CAR-OTP-0019-0189 or ICC-01/05-01/08-721-Conf-Exp-Anx17 of 16 March 2010.
[20] ICC-01/05-01/08-770-Conf-Anx2 10-05-2010 8/12 RH T.
[21] EVD-P-04119, CAR-OTP-0019-0189 or ICC-01/05-01/08-721-Conf-Exp-Anx17 of 16 March 2010.

written brief in accordance with article 104 of the CAR Code of Criminal Procedure, which provides:

"[TRANSLATION] Article 104: The civil complainant, the person charged and the witnesses shall not appear. **The civil complainant and the person charged may submit a written brief**."

51. It follows, *a contrario*, that the Principal Public Prosecutor is not obliged to notify his appeal to a party which is not concerned by that appeal.

52. Since the Public Prosecutor's Office did not notify its appeal to the Accused, it must be inferred that that appeal did not concern the dismissal of the charges against him.

53. The representative of the CAR notes, quite correctly, the close relationship between the law governing the criminal procedure of his country and that of France, and to this end he quotes the work of Professor Bernard Bouloc.

54. Bouloc states the following in this regard:

> [TRANSLATION] Questioning a defendant is an indispensable part of the preliminary investigation procedure (unless the suspect is at large); the Judge cannot close his investigation without having done so, **unless he issues an order dismissing the charges**. **In this respect, our procedure differs from the British procedure, which is adversarial even at the investigation stage, and prohibits questioning of a defendant who pleads not guilty;** the latter is not obliged to provide a statement regarding the facts, for fear that he would thereby be led to make statements which could be used against him.
>
> The French procedure, on the other hand, considers that questioning the person being investigated is a normal action and that his participation is particularly helpful in the determination of the truth, although any lack of honesty on his part does not lay him open to any criminal penalty. Nevertheless, the judge cannot force him to make statements, since, under article 14 of the United Nations Covenant, a person cannot be made to incriminate himself. Furthermore, article 116(4) of the Code of Criminal Procedure states that, at the person's first appearance before the judge, the latter must inform him of his right to remain silent. In any event, the defendant is permitted to remain silent during questioning. In any event, the questioning gives the defendant an opportunity to

> put forward his point of view and to organise his defence with greater freedom; accordingly, he has the right to insist that he be questioned as part of the investigation being undertaken against him.[22]

55. In this connection, the author cites the judgment of the French Court of Cassation, which set aside a decision of the Indictments Chamber overruling the Investigating Judge's order which had dismissed the charges, and ordering that the case be referred to the *Cour Criminelle* without the defendant having been questioned.[23]

56. Thus the appeal of the Bangui Public Prosecutor did not concern the order dismissing the charges, and the subsequent extension of the grounds of the appeal against said order – which was lodged out of time and without the Accused having been notified of it and questioned – does not in any way change the fact that he "has been tried" in respect of the dismissal of charges.

57. Moreover, such extension supports the Defence's thesis concerning the abuse of process as a result of Goungaye's improper conduct on Bozizé's orders.[24]

58. Both the previous and current versions of the CAR Code of Criminal Procedure indicate that such a violation of the rights of the defence is a ground of nullity.[25]

59. At this critical juncture, it is important to note that Annex 2 to the observations of the CAR[26] contains <u>three</u> documents which were never disclosed. The Defence did not have a prior opportunity either to verify their

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[22] B. Bouloc, "*Procédure Pénale*", Dalloz, 20th edition, Paris, Cedex 14, no. 669.
[23] Crim. 27 Dec. 18960, JCP 1964 II. 13543 in Bouloc "op. cit. footnote 2, page 209".
[24] CAR-OTP-0019-0169 to 0170, disclosed to the Defence by the Office of the Prosecutor on 13 April 2010.
[25] Article 200 of the CAR Code of Criminal Procedure of 1962 and article 125 of the CAR Code of Criminal Procedure of 2010.
[26] ICC-01/05-01/08-770-Conf-Anx2 10-05-2010 1/12 RH T.

authenticity or to cite them in its submissions. The Chamber will recall that, at the hearing of 27 April 2010, neither the Prosecution nor the representatives of the CAR acknowledged that those documents existed and that they were in their possession. For reasons which will be clarified below, the Prosecution's failure to obtain those documents, make them public and vouch for their authenticity is particularly unfortunate; the Chamber will recall the Defence's repeated requests throughout the last nine months seeking to obtain a comprehensive copy of the archives of the case in the Bangui courts.

60. Those documents do, however, have the merit of clearly showing that the CAR authorities had never considered diplomatic immunity to be an obstacle to prosecuting the Accused. The First Advocate General of the Bangui Appeals Court stated the following in exceptionally unequivocal terms in his additional appeal submission of 23 November 2004:

> [REDACTED]
> [REDACTED]
> [REDACTED]
> [REDACTED].[27]

61. This removes all doubt as to whether the Advocate General acknowledged that the guilt of the Accused had indeed been proven and that there were no grounds for issuing an order dismissing the charges. No reference is made to diplomatic immunity. Rather, everything indicates that the CAR authorities trusted the Investigating Judge to have issued a properly informed decision entirely based on evidence entailing the termination of the prosecution. After all, how could it be said in all good faith that the resources for conducting an appropriate investigation were so minimal – as alleged by the CAR authorities – if, at the outcome of the investigation, the Accused's guilt had been irrefutably established?

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[27] ICC-01/05-01/08-770-Conf-Anx2 10-05-2010 9/12 RH T.

62. Be that as it may, the transcript of the hearing at the Bangui Appeals Court of 6 December 2004[28] – while paradoxically reintroducing the concept of diplomatic immunity – removes any doubt as to the fact that, **until 11 December 2004 at the latest,** (the date of Goungaye's intervention with the President of the Court[29]), the judicial authorities of the CAR had categorically excluded the Accused from the appeals proceedings.

63. This argument is supported by the oral submission by the Second Advocate General, [REDACTED], as set out in the formal record of the hearing:

> [TRANSLATION] For this case (in accordance with the terms of my presentation, and to commit all of the other accused persons for trial before the *Cour Criminelle*, **except for Mr MBEMBA** [emphasis added] in view of his status as the Vice-President of the Democratic Republic of the Congo.[30]

64. Accordingly, the Defence reiterates its stance that the order dismissing the charges was a decision based on facts which indicated that the prosecution should be terminated, on the assumption that the investigation had been carried out in good faith. This is not merely "more likely than ever" on the balance of probabilities, but completely obvious from the information which has recently been made public. As the Prosecution concedes, the appeal did not initially concern the dismissal of the charges against the Accused, who was "reincorporated" – out of time and without any prior notification whatsoever – only after Mr Goungaye Wangio's political interference.

[28] EVD-P-04119, CAR-OTP-0019-0189 or ICC-01/05-01/08-721-Conf-Exp-Anx17 of 16 March 2010.
[29] CAR-OTP-0019-0169 to 0170, disclosed to the Defence by the Office of the Prosecutor on 13 April 2010.
[30] EVD-P-04119, CAR-OTP-0019-0189 or ICC-01/05-01/08-721-Conf-Exp-Anx17 of 16 March 2010.

2. <u>The obligation to notify the orders of the investigating judges</u>

65. The Defence concedes that an order dismissing the charges, which does not adversely affect any person, is not included in the category of decisions for which notification is mandatory.

66. However, as stated above, notification was mandatory for the judgment of the Indictments Chamber, likewise the appeal by the Public Prosecutor, on the assumption that that appeal concerned the dismissal of the charges against the Accused (*quod non*).

67. Furthermore, the Defence submits that, in its observations, it meant to refer to article 95(b) even though the reference was to article 85.

68. Accordingly, the observations of the representative of the CAR in paragraphs 24 to 41 do not come within the terms of the Defence's observations.[31]

3. <u>Suspensive effect of the appeal to the Court of Cassation</u>

69. The Defence notes that the representative of the CAR does not challenge the suspensive effect of the appeal to the Court of Cassation.

70. Nevertheless, he denies that the Accused had the right to bring such appeal, on the ground that it was lodged against a decision of a purely administrative nature.

71. The Defence submits that it is not for this Honourable Chamber to decide on the validity or admissibility of the appeal to the Court of Cassation brought by the Accused.

[31] ICC-01/05-01/08-770-Conf-Anx1.

72. The Defence nonetheless notes that, pursuant to article 61 of the Organic Law on the Organisation and Functioning of the Court of Cassation in the CAR, judgments of the Indictments Chamber are appealable to the Court of Cassation.[32]

73. Furthermore, the Defence respectfully draws the Chamber's attention to the inconsistency in the CAR representative's argument, since that same judgment had previously been the subject of an appeal by the Principal Public Prosecutor to the Court of Cassation, which then ruled on the merits of the appeal and did not indicate that said judgment constituted a simple administrative measure.

74. Quite the contrary: the Court of Cassation found the appeal to be admissible and partially quashed said judgment.[33]

IV. RESPONSES TO THE LEGAL REPRESENTATIVES OF THE VICTIMS

75. Since the Representatives of the victims concurred with the arguments of the CAR, the above submissions apply also to them.

76. Nevertheless, it should be noted that, in her written response submitted to the Court on the suspensive effect of the appeal to the Court of Cassation and on the role of the Investigating Judge, one of the Legal Representatives of the Victims submitted that (1) pursuant to article 60 of the organic law on the Court of Cassation, the appeal brought by the Accused in the CAR was inadmissible and (2) the Investigating Judge's role is only to investigate and he cannot issue substantive decisions.

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[32] ICC-01/05-01/08-757-AnxC 19-04-2010 1/23 EO T.
[33] ICC-01/05-01/08-758-Conf-Anx2E 19-04-2010 2/5 RHT.
ICC-01/05-01/08-739 29-03-2010 paras. 20 and 22.
EVD-P-01327, CAR-OTP-0019-0258 or ICC-01/05-01/08-721-Conf-Exp-Anx20 of 16 March 2010.

77. Those arguments are misconceived.

78. As stated above, it is not for the ICC or this Honourable Trial Chamber III to decide on the admissibility or otherwise of an appeal brought before the Court of Cassation of the CAR.

79. As to the powers of the Investigating Judge, these are broadly defined in articles 27 to 29 and 41 to 114 of the CAR Code of Criminal Procedure, including the Indictments Chamber, which is the corresponding appeal jurisdiction.

80. In French law, "*information*" ("investigation") is the precise equivalent of "*enquête*" ("investigat[ion]") in article 17(1)(b) of the Rome Statute:

> [TRANSLATION] The investigation procedure involves referring a case to an investigating judge who will conduct an **in-depth** investigation (see next chapter) before deciding whether or not there is cause to bring the suspect before a trial court.[34]

81. It is interesting to note that, during this "investigation", the Investigating Judge has both **investigating powers** and **judicial powers**.[35]

82. Article 43(a) of the CAR Code of Criminal Procedure provides that: "[TRANSLATION] The Investigating Judge shall undertake, in accordance with the law, any investigative actions he deems necessary for the determination of the truth."

83. This provision is embodied in article 52 of the new CAR Code of Criminal Procedure.

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[34] Bouloc, *op. cit.* no. 619.
[35] Bouloc, *op. cit.* no. 659 *et seq*.

84. It is an exact replica of the text of article 81 of the French Code of Criminal Procedure.

85. Professor Bouloc, who was quoted by the representative of the CAR, made the following commentary on this provision:

> [TRANSLATION] This wording is extremely broad: it implies that the Investigating Judge's mandate is to uncover the truth, both as to the facts and to the personal background of the perpetrators, and both as to aspects in favour of the person charged and those which are unfavourable to him. It is with this in mind that the Investigating Judge is **vested with several important powers**, which he exercises either himself or via his deputies, or which he may delegate. [36]

86. The author states the following in relation to the investigating judge's **judicial powers**:

> [TRANSLATION] In addition to his investigative powers, which are focused on discovering the truth, the Investigating Judge also has judicial powers – powers of judicial decision in relation to the investigation (*supra*, no. 459); during the preliminary investigation phase, he must take decisions on any incidental issues that may arise, **and he must rule whether or not there is sufficient incriminating evidence against the person being investigated to warrant his appearance before a trial court. Accordingly, he constitutes the first-instance judicial authority in relation to the investigation, the second-instance authority being the Investigations Chamber**.[37]

FOR ALL THESE REASONS,

It behoves Trial Chamber III to declare the case against the Accused to be inadmissible and/or to order a stay of the proceedings on the ground of abuse of process.

[signed]	[signed]
Aimé Kilolo Musamba	Nkwebe Liriss
Associate Counsel	Lead Counsel

[36] Bouloc, *op. cit*. no. 659.
[37] Bouloc, *op. cit*. no. 787.

Dated this 14 May 2010
At The Hague, The Netherlands