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THE APPEALS CHAMBER

Before: Judge Anita Ušacka, President
 Judge Sang-Hyun Song
 Judge Akua Kuenyehia
 Judge Erkki Kourula
 Judge Daniel David Ntanda Nsereko

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

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

Public Document

Observations of the OPCV as Legal Representative to the Defence's document in support of the Appeal against Trial Chamber III's "Decision on the Admissibility and Abuse of Process Challenge" of 24 June 2010

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Fabricio Guariglia

Counsel for the Defence

Mr Nkwebe Liriss
Mr Aime Kilolo Musamba

Legal Representatives of the Victims

Ms Marie-Edith Douzima Lawson
Ms Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Maria Victoria Yazji

**The Office of Public Counsel for the
Defence**

States' Representatives
Central African Republic

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 25 February 2010, the Defence of Mr Bemba (the “Defence”) filed an application challenging the admissibility of the case pursuant to articles 17 and 19(2) of the Rome Statute,¹ subsequently filing a *Corrigendum* on 1 March 2010.²

2. On 8 March 2010, the Trial Chamber (the “Trial Chamber” or “Chamber”) held a status conference in order to establish the procedure to be followed on the Defence’s admissibility challenge pursuant to rule 58(2) of the Rules of Procedure and Evidence (the “Rules”). The Trial Chamber instructed the parties and participants, including the authorities of the Central African Republic (the “CAR”) and of the Democratic Republic of Congo (the “DRC”), to file their observations thereto, and it scheduled a hearing for oral submissions on the matter for 27 April 2010.³ As a result thereof, the Chamber postponed the start of the trial to 5 July 2010.⁴

3. On 15 March 2010, the Defence filed certain documents referred to in the footnotes to its document challenging the admissibility of the case.⁵

4. On 26 March 2010, the Registrar filed a report informing that it had sent to the victims who had communicated with the Court or to their legal representatives, as well as to the CAR and DRC authorities, the summary of the challenge of admissibility, pursuant to rule 59(2) of the Rules.⁶

¹ See the “Application Challenging the Admissibility of the Case pursuant to Articles 17 and 19(2)(a) of the Rome Statute”, No. ICC-01/05-01/08-704-Conf., 25 February 2010.

² See the “Corrigendum Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19 (2)(a) du Statut de Rome”, No. ICC-01/05-01/08-704-Conf-Corr, 1 March 2010.

³ See the Transcript of hearing on 8 March 2010 (Trial Chamber III), No. ICC-01/05-01/08-T-20-Red-ENG WT2, p. 10, lines 22-24.

⁴ *Idem*, p. 15, lines 2-5.

⁵ See the “Communication par la Défense des copies de documents référenciés dans les notes de bas de pages de sa requête en contestation de la recevabilité”, No. ICC-01/05-01/08-721, 15 March 2010.

⁶ See the “Registrar’s report on the notification of the summary of the “Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome” to the Central

5. On 29 March 2010, the Prosecution⁷ and Ms Douzima⁸, one of the legal representatives of victims, filed their responses to the challenge of admissibility.

6. On 1 April 2010, the Office of Public Counsel for Victims (the “OPCV”), as Legal Representative of victims, having obtained an extension of the original deadline, filed its observations on the challenge to admissibility.⁹

7. On 13 April 2010, the Defence filed an application informing the Trial Chamber of developments in the legal proceedings against the Accused in the CAR, and particularly that Mr Bemba’s counsel there had filed several motions against the CAR judicial decisions, which had allegedly never been notified to the Accused.¹⁰

8. On 14 April 2010, the Defence filed its response to the Prosecution and the Legal representatives’ observations to the challenge of admissibility.¹¹

9. On 19 April 2010, the Defence filed a second application informing the Trial Chamber of further developments in the proceedings in the CAR.¹²

African Republic, the Democratic Republic of Congo and the Legal representatives of victims”, No. ICC-01/05-01/08-737-Conf with 2 confidential annexes, 26 March 2010.

⁷ See the “Prosecution’s Response to Motion Challenging the Admissibility of the Case by the Defence for Jean-Pierre Bemba Gombo pursuant to Articles 17 and 19(2)(a) of the Rome Statute”, No. ICC-01/05-01/08-739, 29 March 2010.

⁸ See the “Observations de la Représentante légale des victimes à la requête de la Défense en vue de contester la recevabilité de l’affaire conformément aux: articles 17 et 19(2) (a) du Statut de Rome”, No. ICC-01/05-01/08-740, 30 March 2010.

⁹ See the “Response by the Legal Representative of Victims to the Defence’s Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential *ex parte* OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-742, 1 April 2010. A corrigendum was filed on 16 April 2010 (No. ICC-01/05-01/08-742-Corr).

¹⁰ See the “Requête de la Défense aux fins d’informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine”, No. ICC-01/05-01/08-751, 13 April 2010.

¹¹ See the “Réplique de la Défense aux observations du Procureur et de Représentants légaux des victimes sur la requête en contestation de la recevabilité de l’Affaire”, No. ICC-01/05-01/08-752, 14 April 2010; See also the “Corrigendum Réplique de la Défense aux observations du Procureur et de Représentants légaux des victimes sur la requête en contestation de la recevabilité de l’Affaire”, No. ICC-01/05-01/08-752-Corr- with 3 public annexes, 15 April 2010.

10. Also on 19 April 2010, the Registrar filed the observations of the CAR¹³ and the DRC¹⁴ to the summary of the challenge of admissibility.

11. On 23 April 2010, the Prosecution¹⁵ and the OPCV¹⁶ filed their responses to the Defence first and second applications of 13 and 19 April 2010 on developments in the judicial proceedings in the CAR.

12. On 23 April 2010, the Defence also requested leave to file a report from an expert on criminal procedure in the CAR, who could potentially give evidence on 27 April 2010 at the admissibility hearing.¹⁷

13. On 27 April 2010, the Chamber held a hearing during which the CAR authorities, the parties and the legal representatives of victims, submitted their oral observations on the challenge of admissibility and related issues. The Trial Chamber dismissed the Defence Request for an expert witness.¹⁸

¹² See the "Second Defence Application Informing Trial Chamber III of a Further Development on 16 April 2010 in Judicial Proceedings in the Central African Republic", No. ICC-01/05-01/08-757, 19 April 2010.

¹³ See the "Registrar's transmission of the responses to the summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" from the Central African Republic and the Democratic Republic of Congo", No. ICC-01/05-01/05-758-Anx2B.

¹⁴ See the "Registrar's transmission of the responses to the summary of the "Requête en vue de contester la recevabilité de l'Affaire conformément aux articles 17 et 19 (2) (a) du Statut de Rome" from the Central African Republic and the Democratic Republic of Congo", No. ICC-01/05-01/05-758, No. ICC-01/05-01/05-758-Anx1.

¹⁵ See the "Prosecution's Consolidated Response to the Defence Applications of 13 and 19 April 2010 Informing the Chamber of New Procedural Developments in the Central African Republic", No. ICC-01/08-01/05-761, 23 April 2010.

¹⁶ See the "Response by the Legal Representative to the Defence's First and Second Requests in order to inform the Chamber of new developments in the judicial proceedings in the Central African Republic", No. ICC-01/05-01/08-759, 23 April 2010.

¹⁷ See the "Requête de la Défense aux fins de faire intervenir un témoin-Expert en Droit de Procédure Pénale de la République Centrafricaine", No. ICC-01/08-01/05-760, 23 April 2010.

¹⁸ See the Transcript of hearing on 27 April 2010, (Trial Chamber III), No. ICC-01/05-01/08-T-22-ENG CT WT, p. 2, lines 7-15.

14. On 11 June 2010, the Defence filed in the record of the case the brief it had filed in support of the *Pourvoi* against the Bangui Appeals Judgment of 16 December 2004.¹⁹

15. On 17 June 2010, the Defence filed its “Deuxième requête de la Défense en vue d’informer la Chambre de Première Instance III sur l’état de la Procédure en République Centrafricaine”.²⁰

16. On 24 June 2010, the Trial Chamber issued its Decision on the Admissibility and Abuse of Process Challenges, finding that the case against the Accused is admissible and that there was no abuse of process (the “Impugned Decision”).²¹

17. On 28 June 2010, the Defence filed an appeal against the Impugned Decision.²² On 30 June 2010, the Defence filed a *Corrigendum* to said appeal.²³

18. On 5 July 2010, the Appeals Chamber issued its Decision on the Presiding Judge in the Appeal against the Impugned Decision.²⁴

19. On 5 July 2010, the Defence filed a request for suspensive effect of the Impugned Decision.²⁵ On 6 July 2010, the Appeals Chamber issued an Order on the

¹⁹ See the “Defence Submission to Inform Trial Chamber III of the Status of the Proceedings in the Central African Republic”, No. ICC-01/05-01/08-795-tENG, and No. ICC-01/05-08-795-ConfAnxA-tENG, 11 June 2010.

²⁰ See the “Deuxième requête de la Défense en vue d’informer la Chambre de Première Instance III sur l’état de la Procédure en République Centrafricaine”, No. ICC-01/05-01/08-799 with 2 annexes, 17 June 2010.

²¹ See the “Decision on the Admissibility and Abuse of Process Challenges”, (Trial Chamber III), No. ICC-01/05-01/08-802, 24 June 2010.

²² See the “Acte d’Appel de la Defense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée ‘Decision on the Admissibility and Abuse of Process Challenge’”, No. ICC-01/05-01/08-804, 28 June 2010.

²³ See the “Corrigendum Acte d’Appel de la Defense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée ‘Decision on the Admissibility and Abuse of Process Challenge’”, No. ICC-01/05-01/08-804-Corr2, 30 June 2010.

²⁴ See the “Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III entitled “Decision on the Admissibility and Abuse of Process Challenges”, (Appeals Chamber), No. ICC-01/05-01/08-808, 05 July 2010.

filing of a response by the Prosecution to the application by the Accused for suspensive effect.²⁶ On 8 July 2010, the Prosecution filed said response.²⁷

20. On 9 July 2010, the Appeals Chamber issued its decision on the request by the Defence for suspensive effect, rejecting said request.²⁸

21. On 12 July 2010, the Appeals Chamber gave written instructions concerning the submission of observations by the Legal Representatives of victims and the CAR authorities.²⁹

22. On 13 July 2010, the Defence filed a request seeking an extension of time for filing the document in support of the Appeal until 21 days after its receipt of a French translation of the Impugned Decision.³⁰ On that same date, the Appeals Chamber issued an order, giving the Prosecution until 14 July 2010 to file a response to said request.³¹ On the latter date, the Prosecution filed its response.³²

²⁵ See the “Demande de l’effet suspensif relatif à l’Acte d’Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée ‘Decision on the Admissibility and Abuse of Process Challenge’”, No. ICC-01/05-01/08-809, 5 July 2010.

²⁶ See the “Order on the filing of a response by the Prosecutor to Mr Bemba’s application for suspensive effect”, (Appeals Chamber), No. ICC-01/05-01/08-810, 06 July 2010.

²⁷ See the “Prosecution’s response to Defence request for suspensive effect of the Defence appeal against the Decision on Admissibility and Abuse of Process”, No. ICC-01/05-01/08-814, 08 July 2010.

²⁸ See the “Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, (Appeals Chamber), No. ICC-01/05-01/08-817, 09 July 2010, par. 12.

²⁹ See the “Instructions relatives à la soumission d’observations en vertu de l’article 19-3 du Statut de Rome et de la règle 59-3 du Règlement de procédure et de preuve”, (Appeals Chamber), No. ICC-01/05-01/08-818, 12 July 2010.

³⁰ See the “Requête de la Défense aux fins d’obtenir l’extension de délai”, No. ICC-01/05-01/08-820, 13 July 2010, par. 8.

³¹ See the “Order on the filing of a response by the Prosecutor to Mr Bemba’s ‘Requête de la Défense aux fins d’obtenir l’extension de délai’”, (Appeals Chamber), No. ICC-01/05-01/08-822, 13 July 2010, p. 3.

³² See the “Prosecution’s response to Defence request for extension of time to file its document in support of the Defence appeal against the ‘Decision on the Admissibility and Abuse of Process Challenges’”, No. ICC-01/05-01/08-823, 14 July 2010.

23. On 15 July 2010, the Appeals Chamber extended the time limit for the filing of Mr Bemba's document in support of the Appeal to 26 July 2010.³³

24. On 26 July 2010, the Defence filed its document in support of the Appeal of the Impugned Decision.³⁴ On that same date, it filed a *Corrigendum* to that filing with an explicative note of the corrections made attached as an Annex,³⁵ and it also filed a public redacted version of said *Corrigendum* (the "Document in support of the Appeal").³⁶

25. On 17 August 2010 the Prosecution filed its "Response to 'Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 *Decision on the Admissibility and Abuse of Process Challenge*'" (the Prosecution's Response").³⁷

26. The Principal Counsel of the OPCV, as Legal Representative of victims,³⁸ hereby files her observations on the Document in support of the Appeal.

³³ See the "Decision on the request for an extension of the time limit", (Appeals Chamber), No. ICC-01/05-01/08-827, 15 July 2010, par. 11.

³⁴ See the "Mémoire à l'Appui de l'Appel de la Defense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée 'Decision on the Admissibility and Abuse of Process Challenge'", No. ICC-01/05-01/08-841-Conf, 26 July 2010.

³⁵ See the "Corrigendum Mémoire à l'Appui de l'Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée 'Decision on the Admissibility and Abuse of Process Challenge'", No. ICC-01/05-01/08-841-Conf-Corr & No. ICC-01/05-01/08-841-Conf-Corr-Anx.

³⁶ See the "Corrigendum Mémoire à l'Appui de l'Appel de la Défense contre la décision de la Chambre de Première Instance III du 24 Juin 2010 intitulée 'Decision on the Admissibility and Abuse of Process Challenge'", No. ICC-01/05-01/08-841-Corr-Red, 27 July 2010.

³⁷ See the Prosecution filed its "Response to 'Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 *Decision on the Admissibility and Abuse of Process Challenge*'", No. ICC-01/05-01/08-855-Conf, 17 August 2010.

³⁸ For the purposes of this proceedings, the Office represents the following victims already authorized to participate in the case a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08, a/0467/08, a/0511/08, a/0512/08, a/0513/08, a/0515/08, a/0516/08, a/0562/08, a/0563/08, a/0564/08, a/0565/08, a/0566/08, a/0567/08, a/0568/08, a/0569/08, a/0570/08, a/0571/08, a/0572/08, a/0590/08, a/0598/08, a/0130/09, a/0131/09, a/0132/09, a/0133/09, a/0134/09, a/0135/09, a/0136/09, a/0137/09, a/0138/09, a/0139/09, a/0141/09, a/0427/09, a/0432/09, a/0651/09, a/0652/09 and a/0653/09, as well as a total of 950 applicants.

27. As a preliminary observation, the Legal Representative agrees with the arguments put forward by the Prosecution in its Response.

II. The Accused has never been tried before the CAR courts for purposes of article 17(1)(c) of the Rome Statute

28. The Defence's first ground on appeal is that Trial Chamber III committed an error of law in finding that the 16 September 2004 decision by the Senior Investigating Judge of the "*Tribunal de Grande Instance de Bangui*" in Bangui, CAR, was not a final decision not to prosecute the Accused³⁹ because the request for an order of dismissal submitted by the local prosecutor against Mr Bemba was founded on grounds of insufficiency of evidence.⁴⁰ Although not expressly stated anywhere in its Document in support of the Appeal, the Defence presumably raises this issue in support of its previously-made argument that the principle of *ne bis in idem* under article 17(1)(c) of the Rome Statute renders the case inadmissible. The crux of the Defence's analysis for this proposition centers on the claim that the order of dismissal of the charges against the Accused was final because it was never appealed to a higher court in the CAR.⁴¹

29. The facts, however, contradict the Defence's assessment of the 2004 appellate procedure in Bangui, CAR, involving the Accused. As Trial Chamber III rightly pointed out,⁴² the appeal launched before the Bangui Court of Appeals indeed included the 16 September 2004 order of dismissal against the Accused.⁴³

³⁹ See *supra* note 36, par. 7.

⁴⁰ *Idem*, paras. 9-11.

⁴¹ *Idem*, paras. 8-11.

⁴² See *supra* note 21, par. 222.

⁴³ See the "Transmission by the Registrar of Submissions made by the Authorities of the Central African Republic pursuant to the Oral Order of the Hearing held on the 27 April 2010", No. ICC-01/05-01/08-770-Anx2, 16 June 2010, pp. 1-3, 8-10.

30. All the more importantly, the Defence's arguments on this issue, the Legal Representative submits, are wholly irrelevant for the purpose of determining whether the referenced order by the Investigating Judges was final in terms of the *ne bis in idem* principle. As the Legal Representative previously argued in her Response to the Defence's Challenge to Admissibility, "[t]his principle applies only in cases where final judgments on the merits of the case have been rendered at trial, such as definitive acquittals or convictions, and does not apply to interlocutory decisions or discontinued prosecutions due to lack of evidence or other premature termination of criminal proceedings that do not possess the "res judicata" effect."⁴⁴

31. The principle of *ne bis in idem* has been consistently interpreted in this manner in international humanitarian, human rights and criminal law, as discussed at length in the Legal Representative's Response,⁴⁵ but the Legal Representative would like to reiterate herein some examples of such application found in the field of international criminal law, such as in the case of *Prosecutor v. Dusko Tadić* before the International Criminal Tribunal for former Yugoslavia ("ICTY"), wherein the Defence asserted that *ne bis in idem* prohibited the trial at the ICTY against the accused, since one had already begun in Germany where he was first arrested.⁴⁶ The trial chamber acknowledged that the German authorities had issued an indictment against the accused before they decided to defer the case to the ICTY, but that the referral of the case to said court had occurred before any trial of the accused in Germany on the same charges.⁴⁷ Specifically, the trial chamber found that, "[w]hile the proceedings may have passed beyond the purely investigative phase, it is undisputed that the accused had not

⁴⁴ See the "Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted", No. ICC-01/05-01/08-742-Corr, 16 April 2010, par. 42, citing ONGENA (T.) & WYNGAERT (C.) in CASSESE (A.), GAETA (P.) & JONES (J. R.W.D) (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, p. 713.

⁴⁵ *Idem*, paras. 44-48.

⁴⁶ See the ICTY, *Prosecutor v. Dusko Tadić*, "Decision on the Defence Motion on the Principle of non bis in idem", Trial Chamber, Case No. IT-94-1-T, 14 November 1995, paras. 4-7.

⁴⁷ *Idem*, par. 8.

*been tried in the full sense; he was neither convicted nor acquitted by the German Court.”*⁴⁸ Because the accused was not the subject as yet of a judgment on the merits on any of the charges for which he had been indicted, the chamber found that he had not yet been “tried” for purposes of the *non bis in idem* principle.⁴⁹

32. As previously argued by the Legal Representative:

*This holding in the Tadic case was later approvingly followed by the appeals chamber of the ICTR in Prosecutor v. Laurent Semanza, where, similarly, the appeals chamber held that that “[t]he non bis in idem principle applies only where a person has effectively already been tried. The term ‘tried’ implies that proceedings in the national Court constituted a trial for the acts covered by the indictment brought against the Accused by the Tribunal and at the end of which trial a final judgement is rendered.”*⁵⁰

33. Furthermore, the drafting of article 20(3) of the Rome Statute closely followed the approach discussed above. At the time of the debates by the Ad Hoc Committee over the Draft Statute, several delegates, including those from the United States, the Netherlands and Finland, argued that the *ne bis in idem* principle “[s]hould apply only when a judgment has been reached”,⁵¹ “[n]ot [when] proceedings [are] discontinued for merely technical reasons”.⁵² In fact, the President of the ICTY presented the *Tadić* case

⁴⁸ *Ibid.*

⁴⁹ *Idem*, paras. 9-12.

⁵⁰ See *supra* note 44, par. 51, citing ICTR, *Prosecutor v. Laurent Semanza*, Decision, Appeals Chamber, Case No. ICTR-97-20-A, 31 May 2000, par. 74.

⁵¹ See *supra* note 44, par. 53, citing the U.S. Non-Paper on Rules of Investigation, Procedure, and Evidence for the International Criminal Court, 21 August 1995, pp. 18-19. This document is available at the following address: <http://www.legal-tools.org/en/doc/9d2452/> (last visited on 22 March 2010).

⁵² *Idem*, citing the Statement by the delegation of Finland, “Ne bis in idem”, 2 April 1996, p. 2. This document is available at the following address: <http://www.legal-tools.org/en/doc/d2f10d/> (last visited on 22 March 2010).

law discussed above to the Preparatory Committee as a contribution to the development of article 20 of the Rome Statute.⁵³

34. Based on the foregoing legal analysis, the Legal Representative submits that the Defence's focus on whether or not the order of dismissal by the investigative judges in Bangui, CAR, was final or appealed is wholly irrelevant to the determination of whether Mr Bemba was previously "tried" for the charges he now faces before this Court. Even assuming, *arguendo*, that such order of dismissal had not been appealed, as the Defence contends, the Legal Representative argues that this would make no difference whatever in the legal analysis of whether the Accused was tried on the merits of the case against him in the CAR, since there is no dispute as to the fact that there never was a judgment rendered as to his guilt or innocence for the allegations brought against him before the national authorities. Anything short of such judgment is not a "trial" for purposes of article 20(3) of the Rome Statute, as consistently interpreted by the article's legislative history, the international criminal law jurisprudence and the practice of the Court.

III. The Trial Chamber did not err in rejecting the Defence's request to present evidence from an expert witness in CAR procedural law at the admissibility hearing

35. The second ground on appeal raised by the Defence involves the Trial Chamber's refusal to allow the Defence to submit the report and potential testimony of an expert on criminal procedure in the CAR to testify at the scheduled hearing on admissibility.⁵⁴ According to the Defence, such refusal by the Trial Chamber constituted an error of law and procedure in that the Defence was thus not able to present expert opinion on whether there was an obligation to notify the Accused of

⁵³ *Ibidem*, citing the Memorandum of the International Criminal Tribunal for the Former Yugoslavia, "Definition of Crimes and General Principles of Criminal Law as Reflected in the International Tribunal's Jurisprudence", 22 March 1996, pp. 3-4.

⁵⁴ See *supra* note 36, paras. 21-22.

the appellate decisions in the CAR, and what legal consequences result from such lack of notification.⁵⁵ In the Defence's opinion, this amounted to an inequality of arms *vis a vis* the representatives from the CAR, who did testify at the admissibility hearing.⁵⁶

36. It is important to highlight that the reasons argued by the Defence in its written request to call an expert witness on CAR procedural law involved attempting, via said expert, to resolve an alleged contradiction between the April 2010 observations made by the CAR government and a letter from said authorities to the United Nations Security Council dated 1 August 2008.⁵⁷ Rightly so, the Trial Chamber found that such purported difference of opinion was a factual, not legal, issue, and that an expert report or testimony on CAR criminal procedure would not assist the Chamber in resolving that issue, if needed.⁵⁸ It was on this basis that the Chamber rejected the Defence's request, and therefore the Legal Representative submits that the Chamber was correct in characterising the alleged contradiction of opinions by CAR governmental authorities as only factual in nature, thereby finding no legal basis upon which to grant the Defence's request. Furthermore, the Trial Chamber also pointed out in its ruling on the Defence's request, that the Defence had failed, as of the date of the admissibility hearing and as previously proposed, to submit the written report by its chosen expert witness beforehand for the consideration of the Chamber, and the other participants.⁵⁹

37. Additionally, the Legal Representative believes that an important distinction must be drawn between the role of the CAR national representatives who participated at the admissibility hearing and the role of a potential expert witness

⁵⁵ *Ibid.*

⁵⁶ *Idem*, par. 25.

⁵⁷ See the "Requête de la Défense aux fins de faire intervenir un témoin-Expert en Droit de Procédure Pénale de la République Centrafricaine", No. ICC-01/05-01/08-760, 23 April 2010, paras. 3-4.

⁵⁸ See the Transcript of hearing of 27 April 2010, (Trial Chamber III), No. ICC-01/05-01/08-T-22-ENG CT WT, p. 2, lines 1-12.

⁵⁹ *Idem*, lines 13-15.

called by one party or the other to testify on the criminal procedural law in the CAR. As to the former, the CAR authorities are *prima facie* neutral, governmental agents who were summoned to appear by the Chamber before the Court, not to testify on behalf of one party or the other, but to aid the Chamber in understanding the facts, and in this case, certain points of CAR procedural law, pertaining to the criminal investigation of the Accused in the CAR during 2003-2004.

38. The Defence, through its request to introduce the report of an expert witness on CAR procedural law, and to potentially call him as a witness for the Defence, had already pre-selected such witness without prior consultation with the other participants, had presumably contacted him in advance for this purpose, and was therefore seeking to introduce his report and testimony as Defence evidence.⁶⁰ The Legal Representative argues that such a witness does not qualify as an independent expert, since he or she has not been selected, pre-approved and consulted with by all parties and participants, thereby violating the well-established rules set out by the various Chambers of the Court for common instruction on expert witnesses. Based on the foregoing, the Trial Chamber did not err in rejecting the Defence's request to call an expert witness for the admissibility hearing.

IV. The Defence's third ground on appeal is not an issue properly before the Appeals Chamber, and should thus be rejected *in limine*

39. The Defence's third ground on appeal concerns the Trial Chamber's analysis of article 17(1)(b) of the Rome Statute, and in particular, the portion relating to the inability of the CAR to genuinely prosecute.⁶¹

40. However, the Trial Chamber's ruling regarding article 17(1)(b) of the Statute does not rest upon an examination of the CAR's ability, or lack thereof, to prosecute the Accused. As the Trial Chamber explained, and the Appeals Chamber has

⁶¹ See *supra* note 36, par. 27.

previously held⁶², that article contains two cumulative elements for a case to be inadmissible: the case must have already been investigated and the relevant State must have decided not to prosecute.⁶³ Since the Trial Chamber found that the case was investigated, but that the CAR had not decided not to prosecute, as the term was interpreted by the Appeals Chamber, it found that the case was admissible under this article and that it was thus not required to examine the additional prongs of unwillingness or inability of said article.⁶⁴

41. Indeed, the Appeals Chamber has repeatedly required that, for a successful appeal, the error raised by an appellant must have materially affected the impugned decision.⁶⁵ If the chamber in question does not base its decision on the alleged error, then the Appeals Chamber has determined that ruling on the matter “[w]ould be tantamount to rendering advisory opinions on issues that are not properly before it.”⁶⁶ Therefore, the fact that the Trial Chamber engaged in an in-depth analysis of article 17(1)(b) of the Statute without legal necessity to do so, and simply “[f]or the sake of completeness”⁶⁷, does not render the issue of the ability of the CAR to prosecute the Accused an issue that is subject to appellate review by the Appeals Chamber. As

⁶² See the “Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case”, (Appeals Chamber), No. ICC-01/04-01/07-1497, 25 September 2009, par. 82.

⁶³ See *supra* note 21, par. 240.

⁶⁴ *Idem*, par. 243.

⁶⁵ See *supra* note 62, par. 37; See also the “Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58””, (Appeals Chamber), No. ICC-01/04-169, 13 July 2006, par. 84; See the “Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence””, (Appeals Chamber), No. ICC-01/04-01/06-568, 13 October 2006, par. 74; See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the release of Thomas Lubanga Dyilo”” (Appeals Chamber), No. ICC-01/04-01/06-1487, 21 October 2008, par. 44; See the Judgment on the appeals of the Defence against the decisions entitled “Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06” of Pre-Trial Chamber II”, (Appeals Chamber), No. ICC-02/04-179, 23 February 2009, par. 40.

⁶⁶ See *supra* note 62, par. 38.

⁶⁷ See *supra* note 21, par. 243.

such, the Legal Representative submits that the Defence's third reason for appeal should be rejected *in limine*.

V. The issue of whether recent filings before the CAR courts had suspensive effect on national proceedings does not affect the legal analysis of whether the case is admissible before this Court

42. The last ground on appeal raised by the Defence challenges the Trial Chamber's characterisation of the April 2010 filings on behalf of Mr Bemba before the Bangui courts as an "*abuse of this court's process*"⁶⁸, and labels such characterisation and the refusal to consider the suspensive effect of said filings on the previous national decisions concerning the Accused as procedural error.⁶⁹

43. On this issue, the Legal Representative highlights that, even if the Trial Chamber had agreed with the Defence's assertions that such recent appellate filings had suspensive effect on the 2004 and 2006 decisions by the Bangui Court of Appeals and the *Cour de Cassation*, such a determination would not have affected the legal conclusions on admissibility drawn by the Chamber pursuant to article 17 of the Rome Statute.

44. For, if indeed such filings had in some way "reopened" the 2004 criminal investigation/proceedings conducted against the Accused in the CAR, thereby causing a suspensive effect of the applicability of previous national decisions recommending the prosecution of the Accused before this Court, this would have done nothing but *undermine* the Defence's arguments raised in its admissibility challenge pursuant to article 17(1)(b) and (c) of the Statute, by way of which the Defence tried to establish either that 1) the case *had been* investigated already and the State had decided *not to prosecute* (article 17(1)(b)) or 2) that the Accused *had already*

⁶⁸ See *supra* note 21, par. 231.

⁶⁹ See *supra* note 36, paras. 5(d), 42.

been tried for the same conduct, in violation of article 20(3) (article 17(1)(c)). The Legal Representative submits that both of these arguments are directly undercut if indeed the criminal proceedings against the Accused in the CAR had been reinitiated by said recent filings, and had in this sense still been “pending” before said national courts.

45. Since the Defence failed to raise a challenge of admissibility pursuant to article 17(1)(a) (the case is being investigated or prosecuted by a State which has jurisdiction over it), this is not an issue that is before the Appeals Chamber for resolution, and therefore it should not be considered, since the Defence itself never considered it in its challenge. Although the Trial Chamber also briefly addressed article 17(1)(a) of the Statute in the Impugned Decision, it stressed that it was only doing so for the sake of being thorough, and that the Defence had only founded its admissibility challenge on articles 17(1) (b), (c), and (d) of the Rome Statute.⁷⁰ Indeed, as the Trial Chamber pointed out, it is the Defence who carries the evidential burden of proof when raising challenges of admissibility.⁷¹

46. Therefore, whether or not the recent filings had suspensive effect is not an issue upon which the legal analysis conducted by the Trial Chamber hinges, and as such, it is irrelevant to the legal criteria that should be considered by the Appeals Chamber in determining whether the Trial Chamber committed reversible error in its decision. Furthermore, it was within the Trial Chamber’s discretion to characterise such late maneuvers by the Defence as abusive, and again, doing so does not affect the legal analysis conducted by the Chamber in determining that the case is admissible.

⁷⁰ See *supra* note 21, par. 236.

⁷¹ *Idem*, par. 204.

FOR THE FOREGOING REASONS, the Legal Representative respectfully requests the Appeals Chamber to reject the Defence Document in support of the Appeal on all grounds and to confirm the Trial Chamber's Decision on the Admissibility and Abuse of Process Challenges.

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

Paolina Massidda
Principal Counsel

Dated this 30 of August 2010

At The Hague, The Netherlands