

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **French**

No.: **ICC-01/05-01/08**
Date: **20 September 2010**

THE APPEALS CHAMBER

Before: Judge Anita Ušacka, Presiding Judge
Judge Sang-Hyung 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***

**Confidential
Including one Confidential Annex A**

**Defence Response to the Observations of the Central African Republic of 13
September 2010**

Source: Defence Team for Mr Jean-Pierre Bemba Gombo

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

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I. Procedural History

1. The Defence submitted its Notice of Appeal on 2 June 2010,¹ followed by an application for an extension of the time-limit, which was subsequently granted.
2. On 27 July 2010, in accordance with regulation 64(2) of the Regulations of the Court, the Defence for Mr Jean-Pierre Bemba Gombo ("the Accused") filed a document in support of its appeal ("the Appeal") against the *Decision on the Admissibility and Abuse of Process Challenge* rendered on 24 June 2010² ("the Impugned Decision").
3. The Defence set out four grounds in support of this appeal, asserting the following:
4. That Trial Chamber III made an error of law when it held that the decision of the Bangui Senior Investigating Judge [*Doyen des Juges d'Instruction de Bangui*] of 16 September 2004 was not a final decision **not to** prosecute the Accused ("**the First Ground of Appeal**");
5. That Trial Chamber III made a procedural error when it dismissed the Application by the Defence to supply evidence from an expert in the law of the Central African Republic ("**the Second Ground of Appeal**");
6. That Trial Chamber III made a procedural error and an error of law in admitting into evidence and accepting the testimony of the Representative of the Central African Republic in respect of the "inability" to prosecute the Accused ("**the Third Ground of Appeal**").
7. That Trial Chamber III made a procedural error and an error of law in holding that the application for annulment [*pourvoi en cassation*] lodged by the Defence with the Court of Cassation of the Central African Republic was an abuse of process, even though the application complied with the forms and time-limits prescribed by the national law of the Central African Republic in this regard ("**the Fourth Ground of Appeal**").

¹ ICC-01/05-01/08-804.

² ICC-01/05-01/08-802.

8. On 13 September 2010, the distinguished Representative of the CAR submitted his observations on the document in support of the appeal lodged by the Accused.
9. The Defence Team for the Accused, Mr Jean-Pierre Bemba Gombo, hereby submits its response to the observations of the CAR.

II. Observations

10. For the sake of clarity, the Defence sets out its observations in the order submitted by the distinguished Representative of the CAR.
11. It should be stated *in limine* that, as regards paragraphs 12 and 13 of the observations submitted by said Representative, in the Defence's view these are irrelevant in the present case: the issue of the admissibility of a case may be submitted to the court for consideration more than once, in accordance with the conditions set out in article 19 of the Statute.
12. Furthermore, it was not the place of the CAR, which is not a party to the proceedings, to pass judgement on the timing and appropriateness of raising the issue of admissibility.

a) As to the First Ground of Appeal (Was the Investigating Judge's Order of 16 September 2004 final?)

13. Paragraphs 16 to 24 of the observations by the CAR are also irrelevant: the Defence has never stated that, under procedural law in the CAR, the Investigating Judge is required to comply with the findings of the Prosecution, notwithstanding that the Senior Investigating Judge himself stated the opposite:
"[TRANSLATION] ... because the problem is that we work in collaboration with the Prosecution. In the Public Prosecutor's Submissions there was no question of committing Bemba for trial. I cannot disregard this."³
14. Rather, the Defence argued that, since the Prosecutor had concluded that there was no evidence against the Accused, the Investigating Judge was, under those particular circumstances, obliged to accept this finding.

³ CAR-OTP-0010-0188, EVD-P-02788.

15. One thing is clear in any event: both the Bangui Prosecutor and the Investigating Judge reached the same conclusion: that there was no incriminating evidence against the Accused.
16. Thus the doctrinal discussion by the Representative of the CAR in paragraphs 16 to 22 is totally irrelevant.
17. By contrast, what does appear to be extremely helpful is the fact that the Representative of the CAR concurs with the Defence in accepting that an order dismissing the charges [*ordonnance de non-lieu*] which has not been appealed has the force of *res judicata*.⁴
18. That the Prosecutor is entitled to lodge an appeal against a decision which accords with his submissions is one thing.
19. Whether there actually was an appeal in the present case is quite another.
20. The Defence submits in this regard that the appeal against the order dismissing the charges did not concern the Accused.
21. Because the Bangui Prosecutor's Office admits, in its testimony registered in the record of the case, that it had appealed because the order had discharged certain individuals targeted by the investigation, inter alia Mr Ziguele.⁵ This is confirmed by the Prosecutor's submission originating the appeal [*réquisitoire introductif d'appel*] of 22 October 2004.⁶
22. Because the Prosecution itself acknowledges that the Accused was not a subject of that appeal.⁷
23. Because, in the appeal proceedings, the hierarchically superior prosecutor in Bangui reiterated his opposition to the Accused being prosecuted.⁸
24. Because, lastly, and most importantly, the Accused was not notified of the appeal, as required under article 99(i) of the Code of Criminal Procedure of the CAR.

⁴ See para. 24 and art. 91 of the CAR Code of Criminal Procedure: [TRANSLATION] "If the Investigating Judge is of the opinion that the act constitutes 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 [*inculpé*], an order for the dismissal of the case shall be issued and, if under arrest, that person shall be released."

⁵ EVD-P-0009-CAR-OTP-0005-0116 para. 84.

⁶ ICC-01/05-01/08-770 Conf. Anx2 10/5/210-5/12 RHT.

⁷ ICC-01/05-01/08-T22, Eng., p. 63, line 12.

⁸ CAR-OTP-0019-0189 and CAR-OTP-0062-0203.

25. In this regard, the Defence respectfully recalls its submission that, even if a valid appeal had been lodged by the Principal Public Prosecutor of the Bangui Appeals Chamber [*Procureur Général de la Chambre d'Appel de Bangui*] (which is disputed), the appeal would be invalid, since it was not notified to the Accused, or that, in any event, such failure to notify would raise a presumption that no appeal had been lodged.
26. This argument is supported by the expert opinion ("Expert Opinion") which the Defence sought in vain to have heard by the Trial Chamber.⁹
27. Whilst criticising the Defence for making purely factual claims with no legal basis, Trial Chamber III at the same time, unfairly, denied it leave¹⁰ to submit an expert opinion, an irreproachable impartial source which would have explained to the Court the consequences of a failure to notify an appeal.
28. As a result, if the other grounds for appeal were to be dismissed, the Defence respectfully reiterates its request whereby it calls upon the Honourable Appeals Chamber to order Trial Chamber III to reconsider the consequences of failure to notify an appeal, on the basis of an Expert Opinion.
29. According to the statements in the report by the expert whom the Defence seeks to have heard, failure to notify the defendant of his appeal also raises the presumption that the defendant was not the subject of the appeal.
30. In this regard the Defence notes the silence of the Representative of the CAR on this crucial issue, which is linked to the consequences of the failure to notify the appeal.

⁹ Expert Opinion appended as Confidential Annex A.

¹⁰ Trial Chamber III refused to admit the Expert Opinion in its oral decision rendered on the same day as the hearings on the admissibility challenge, on 27 April 2010. The Defence did not appeal that oral decision, believing it to form an integral part of the overall consideration by Trial Chamber III of the admissibility challenge, and thus subject to the appeal from the Trial Chamber's final decision. However, if the Appeals Chamber is of the view that this decision should have been the subject of a separate appeal, the Defence respectfully requests an extension to the time-limit for filing its appeal pursuant to regulation 35(2) of the Regulations of the Court and, moreover, seeks leave under regulation 62 of the Regulations of the Court to submit the Expert Opinion as additional evidence. The extension of the time-limit and the submission of additional evidence are both justified in the interests of justice, so that the Defence's desire not to overburden the Court with an interlocutory appeal from the oral decision of Trial Chamber III should not be regarded as a procedural ground for dismissing the Defence's substantive appeal.

31. In lieu of any observation, there is rather a reference, in extremely discourteous terms, to the Defence's "bad faith" (sic) in allegedly travestying the submissions of 24 November 2004, which are claimed to seek the discharge of the Accused only in respect of the financial crimes.
32. It is, however, apparent from the order for partial dismissal of the charges and committal for trial [*Ordonnance de non-lieu partiel et de renvoi*], as well as from the Public Prosecutor's submissions of 17 August 2004, that the Accused was never prosecuted for financial crimes at first instance, and therefore could not be prosecuted at appeal level.
33. If, as the distinguished Representative of the CAR maintains, the Bangui Principal Public Prosecutor's submissions of 24 November 2004 were dictated by diplomatic considerations and only related to the economic crimes, then, as the Defence argued before the Trial Chamber, what should rather have been made was a "nolle prosequi" submission [*Réquisitoire de Non-informé*] under article 47 of the CAR Code of Criminal Procedure, as the Defence had contended without being contradicted by any of the parties.¹¹
34. Manifestly, it is rather the Representative of the CAR who is seeking to misrepresent the arguments of the Principal Public Prosecutor's Office, which clearly called for the Accused to be dismissed from the case.

b. As to the Second Ground of Appeal (expert evidence on the notification of documents and of the Appeal)

35. The Defence notes that the Representative of the CAR has nothing useful to say which might allow the Honourable Appeals Chamber to reach a decision regarding the consequences of the failure to notify documents and decisions to the Accused, in accordance with articles 193(f) and 194 of the Code of Criminal Procedure of the CAR.

¹¹ ICC-01/05-01/08-T22-ENG CT WT 27-04-2010 55/71 EA T p. 55 lines 10 to 25 and p. 56 lines 1 to 7.

36. It follows that he accepts the legal conclusions of the Expert and of the Defence in its “Defence Response to the Observations of the Central African Republic of 7 May 2010” in paragraphs 24 to 37, in which it was submitted that the proceedings were a nullity.¹²
37. The Defence further notes that the Representative of the CAR offers no clarification whatever to the Honourable Appeals Chamber in regard to the issue of expert evidence.
38. It should be recalled that the CAR is not a party to these proceedings; it is a third party which has been called upon to submit its views on the operation of its domestic law.
39. It therefore has no authority to determine whether the Defence was entitled to seek expert evidence, except to submit an observation regarding domestic law on this issue.
40. Any criticism regarding the basis for the Second Ground of Appeal is rather a matter for the Prosecution, but not for this third party.

c. As to the Third Ground of Appeal: Inability of the CAR

41. The Defence submits that the “poverty” of the CAR as a matter of “common knowledge”, as alleged by its Representative, is not a relevant criterion under article 17(3) of the Statute for purposes of determining inability.
42. The Defence has indeed already had occasion amply to demonstrate that the legal apparatus of the CAR is not in a state of disintegration, and nor was it at the time of the facts, but rather that it remains functional, including for criminal cases, which are regularly carried through to completion, a fact which the Representative of the Central African Republic also does not deny.
43. The claim that the Central African State was or would be unavailable to obtain the accused, or the necessary evidence and testimony, or otherwise to carry out its proceedings, does not stand up to scrutiny. It will be recalled that the Central African Republic has in the past conducted criminal prosecutions on a larger scale involving its former Emperor, Jean Bedel Bokassa, who stood trial

¹² ICC-01/05-01/08-776-Conf-tENG-14/05/2010.

and was given a lengthy prison sentence, served in the country under maximum security conditions, even though at the time the State of the CAR had no greater financial or human resources.

44. Lastly, it should be noted that the response of the CAR ignores the causal link which, according to article 17(3) of the Rome Statute, must be proven between the disintegration of the national legal system and the inability to obtain the accused or otherwise to conduct credible judicial proceedings. Even if the CAR has been genuinely unable to conduct a trial for war crimes against the Accused (which is denied), this is certainly not due to the collapse or unavailability of its national judicial system. That the national judicial system is functional has been amply demonstrated by the fact that the domestic authorities were able to conduct a complex case involving misappropriation of funds against Ange-Félix Patassé and others.

d. As to the Fourth Ground of Appeal

45. The distinguished Representative of the CAR contends that he has never admitted that the application for annulment [*pourvoi en cassation*] lodged by the Accused had a suspensive effect on the decision of the Indictments Chamber of the Bangui Court of Appeal of 16/12/2004.¹³

46. To demonstrate the contrary, the Defence recalls the observations of the CAR dated 7/05/2010, whereby it clearly accepted the appeal's suspensive effect:

“[TRANSLATION] *Under article 21 of the Organic Law on the Organisation and Functioning of the Court of Cassation of the Central African Republic, 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.*

¹³ ICC-01/05-01/08-881-Conf-Anx2 13/9/2009, para. 79.

*The appeal which the accused claims to have lodged against the Indictments Chamber's judgment is an appeal in a criminal matter."*¹⁴

47. The Defence then cites the stipulations of articles 21, 61 and 64 of Organic Law No. 95/0011 on the Organisation and Functioning of the Court of Cassation of the Central African Republic which provide [TRANSLATION]:

- a. that the time limit and applications to have a decision set aside are suspensive in criminal matters (article 21);
- b. that the time limit only starts to run **when the decision is notified** (article 61);
- c. that, 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** (article 64).

48. The Defence thus vigorously argues that the application for annulment by the Accused against the judgment of the Indictments Chamber of the Bangui Appeals Court is suspensive of the judgment rendered by said Court on 16/12/2004.

49. The distinguished Representative of the CAR states, however, that the suspension does not apply to the decision in question because it concerns only a judicial measure of a purely administrative nature, regarding the severance of the proceedings.

50. This observation is misconceived, given that the distinguished Representative of the CAR confuses the concept of the **suspensive effect** of an appeal with the concept of the **admissibility** of said appeal.

51. Even on the assumption that the application for annulment was directed against that part of the decision ordering the severance of the proceedings (which was not the case), said application for annulment would still retain its suspensive effect, unless and until the judges of the Court of Cassation were to

¹⁴ ICC-01/05-01/08-770-Conf-Anx1 10/05/2010, paras. 44-45 (07/05/2010).

declare the application inadmissible on the ground that it is directed against a purely preliminary decision.

52. However, that is clearly not the case here.

53. The Decision of the Indictments Chamber of the Bangui Appeals Court that is sought to be annulled is in two parts, as indicated by its title: one is preliminary and orders the severance of the proceedings and the second is interlocutory, ordering the referral of the case.

54. It is the latter limb of the decision which was the subject of the application to the Court of Cassation by the Accused.

55. The argument of the CAR is in any case contradicted by a prior ruling of that same Court of Cassation of the CAR and **against the same decision**.

56. Said Court of Cassation had in fact declared admissible an application for annulment by the Principal Public Prosecutor against that decision, and had declared it to be partially well-founded.¹⁵

57. At no time was it stated in the introductory part [*qualités*] of the judgment of the Court of Cassation that the application by the Principal Public Prosecutor involved a judicial measure of a purely administrative nature, and that it was thus neither admissible nor had any suspensive effect.

58. In addition to the arguments referred to above, the distinguished CAR Representative notes that, in any event, whether or not the judgment of 16 September 2004 was suspended would have no bearing on the seisin of the case by the International Criminal Court, which followed a referral by the government of the CAR.

59. This view is totally misconceived, given that:

- (i) The Prosecution stated at the time, **despite the fact that the case had already been referred to the International Criminal Court by the government of the Central African Republic**, that the opening of an investigation by the ICC into the situation in the CAR was subject to

¹⁵ ICC-01/05-01/08-758-Conf-Anx2E of 19/04/2010.

“proceedings which have taken place at national level in CAR. Some are still in progress”.¹⁶

- (ii) The principle of complementarity means that a case cannot be prosecuted concurrently by the ICC and the national courts; the former has to give way to the latter.
- (iii) To decide on the admissibility of the case in light of article 17(a)(b), the International Criminal Court is required to await the outcome of the decision by the CAR Court of Cassation; the case would be inadmissible if the Court of Cassation were to set aside the judgment of the Bangui Appeals Court, since the decision to dismiss the charges would remain in force and article 17(a)(b) would thus apply.

60. Trial Chamber III, in holding as it did that the application for annulment by the Accused constituted an abuse of process even though he was never notified of the referral judgment, or of the appeal by the Principal Public Prosecutor, as required by the mandatory texts of the CAR, which thus meant that the Accused's defence rights had been violated, has given the Defence a nagging, uncomfortable sense that the abuse of process cited in the Impugned Decision was merely a pretext to circumvent the suspensive effect of applications to the Court of Cassation.

Request for confidentiality

- 61. The Defence requests that this submission be classified as confidential, available only to the Prosecution and the Defence, given that it refers to certain witnesses and to testimony by them which is not yet public.
- 62. The Defence intends to file subsequently a redacted version of this submission.

¹⁶ CAR-OTP-0004-0923-EVD-P-02152 in FIDH report No. 457/October 2006.

FOR ALL OF THESE REASONS:

- a) The Defence Team for the Accused, Jean-Pierre Bemba, respectfully calls upon the Honourable Appeals Chamber to convene an oral hearing to allow it to develop the arguments contained herein.
- b) Thereafter, the Honourable Appeals Chamber will be asked to uphold the first and third grounds of appeal, and accordingly to set aside the Impugned Decision and hence to rule that the case against the Accused is inadmissible.
- c) In the alternative, the Defence will respectfully call upon the Honourable Appeals Chamber to uphold the Second ground of appeal, and to refer the case back to Trial Chamber III with a view to re-examination of the issue of admissibility once it has been given the opportunity to submit evidence and testimony from an expert in the law of criminal procedure of the Central African Republic.

[signed]

Aimé Kilolo Musamba

Associate Counsel

[signed]

Nkwebe Liriss

Lead Counsel

Dated this 20 September 2010

At The Hague, The Netherlands