

1 International Criminal Court

2 Trial Chamber III - Courtroom 1

3 Presiding Judge Adrian Fulford

4 Judge Elizabeth Odio Benito and Judge Joyce Aluoch

5 Situation in the Central African Republic -

6 ICC-01/05-01/08

7 In the case of The Prosecutor v. Jean-Pierre Bemba Gombo

8 Status Conference Hearing

9 Tuesday, 27 April 2010

10 (The hearing starts at 9.45 a.m.)

11 THE COURT OFFICER: All rise. The International Criminal
12 Court is now in session. Please be seated.

13 PRESIDING JUDGE FULFORD: Good morning. We want to welcome
14 everyone to this hearing and, in particular, we would wish to extend
15 our welcome to the Minister of Justice from the Central African Republic,
16 together with two senior officials from that country.

17 The first issue that we intend to deal with is the application
18 by the Defence to call an expert witness on criminal procedure in the
19 Central African Republic. This is Document 760 dated 24 April 2010,
20 which is opposed by the Prosecution in this case. In essence, the
21 Defence have highlighted what they suggest is a contradiction that
22 exists between the observations of the government of the Central African
23 Republic dated 19 April 2010 and what was set out earlier in a letter
24 from the authorities of that country to the United Nations Security
25 Council on 1 August 2008.

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1 Counsel, in submissions for the accused, argue that it is
2 necessary that there is an independent expert with appropriate
3 understanding of the judicial system of the Central African Republic
4 to identify what is suggested to be an objective and impartial position
5 that is to be discovered between the two contradictory positions which
6 it is suggested exists.

7 In our judgment, this is, at most, a factual issue which
8 is not susceptible to expert legal opinion. This is an issue which
9 can and should be addressed by counsel in their submissions, if they
10 wish to deal with the point during the course of today's arguments.
11 This is not something which is, in our view, going to be materially
12 assisted by the Court allowing an expert to give evidence on the issue.

13 We add that we were told that, at the latest, the relevant
14 statement would be provided to the Court by the close of play yesterday,
15 and as far as we understand the position, nothing so far has been filed.

16 The proposal that we make for today's hearing is that the
17 authorities from the Central African Republic will be given the
18 opportunity to address the Court first, and we understand that Mr Bizon
19 will be taking the floor for those purposes. Although, of course,
20 it is up to counsel to develop submissions in the way that they consider
21 best, we do highlight the questions which were circulated by the Bench
22 some days ago, and we would particularly ask for counsel's assistance
23 with the matters that were raised in writing by us. There are a number
24 of issues that we set out which we are of the view would assist the
25 Court in its final decision if they are capable of being answered.

1 Once the representatives of the Central African Republic
2 have completed their submission, we'll then hear from the Prosecution,
3 from the legal representatives of victims, to the extent that there
4 is anything to be added and, finally, we will hear from the Defence.
5 We remind everyone that for this hearing we have, save for the authorities
6 of the Central African Republic, imposed a time limit on counsel's
7 submissions.

8 There are two final questions which we would ask counsel
9 to bear in mind when making their submissions. The first is whether
10 the Defence application of 16 April 2010 against the Appeals Chamber
11 decision of 16 December 2004 has the effect of suspending that decision,
12 or does the decision remain in force at least until the Appeals Chamber
13 itself has resolved the matter? We ask the question against the
14 background of the Defence submission that its application of 16 April
15 2010 has automatic suspensive effect. And if counsel is able to help
16 us on that issue, we would be grateful.

17 We remark that it may be that the decision of 16 December
18 2004 was a decision on a procedural issue, rather than on the merits
19 of the case. And so, if that observation is correct - of course we
20 haven't resolved that issue - but if that observation is correct, does
21 the Defence application have the automatic effect of suspending what
22 is a procedural decision? That's the first question.

23 Question two is, in a sense, much easier. Does anyone have
24 a copy of the appeal notice lodged by the public prosecutor at the
25 Bangui regional court on 17 September 2004? It may be that my personal

1 researches have been deficient in that regard, but amongst all of the
2 papers in the case that I have looked at, I have been unable to find
3 a copy of the 17 September 2004 document.

4 Enough from me. We turn then to the submissions of counsel
5 from the Central African Republic and, Mr Bizon, we would be grateful
6 if you -- of course, you're entitled to supplement your original
7 submissions in any way you wish, but in particular, as I say, we would
8 be grateful for your assistance on at least some of the questions that
9 we have posed. Thank you very much.

10 MR BIZON: (Interpretation) Yes. I'd like to thank you,
11 Mr President.

12 The intervention of the part of the CAR will be done in two
13 parts. We shall be two to intervene; myself and Mr Bria, who is the
14 public Prosecutor with the Bangui Court of Appeal. I shall intervene
15 on the application filed by the Defence for Mr Bemba concerning the
16 admissibility of the criminal procedures before Mr Bemba before this
17 Court -- against Mr Bemba before this Court. And then Mr Bria will
18 intervene in order to respond to the written questions that we have
19 received, that we received last night. I'd like to thank you.

20 We are before you today, ladies and gentlemen of the Court,
21 because the Defence for Mr Bemba believed that it was necessary to
22 raise a challenge to the admissibility of the proceedings launched
23 against him before this Court. In order to contend the admissibility
24 challenge, he would like to advance three arguments.

25 Firstly, that the principal of complementarity and the

1 criteria thereof have not been verified in this case. And secondly,
2 that the ne bis in idem principle has not been respected. And thirdly,
3 that the acts he is prosecuted for or charged with have not reached
4 the requisite level of gravity in respect of the statutory provisions
5 for him to be prosecuted before this Court.

6 I shall not dwell on the proceedings and the events that
7 have led to him being brought before this Court because these facts
8 are a matter of common knowledge, but I would like to attack or submit
9 on the points of law.

10 Firstly, the principle of complementarity. What does this
11 principle actually mean? Well, the principle of complementarity, as
12 defined by the Rome Statute, would have it that the member states have
13 the prime responsibility of prosecuting the offences under the Rome
14 Statute and that the Court only intervene in a subsidiary manner.

15 Now, Mr Bemba claims that you are substituting yourself for
16 the CAR and that this principle, as such -- and that the criteria have
17 not been verified in this case. There is no discussion with regard
18 to the fact that the International Criminal Court has the jurisdiction
19 to prosecute crimes under the Rome Statute which were allegedly
20 committed within the territory of the Central African Republic.
21 Because the CAR has or is a party to this Statute and the events occurred
22 on the territory of the CAR, and it is indeed the government of the
23 CAR that referred this to your Court, there is no contestation by the
24 Defence with regard to this matter.

25 Now, the question that is at hand today is whether the Central

1 African Republic has the willingness and the ability to prosecute Mr
2 Jean-Pierre Bemba Gombo before the Central African Republic courts
3 and within the territory of the CAR. Now, we could say that there
4 was such a willingness at the outset when, in the year 2003, the Central
5 African Republic, via the public Prosecutor at the Tribunal De Grande
6 Instance in Bangui, instituted proceedings and seized the
7 investigating judge with a request to open investigations on the subject
8 of Mr Bemba. However, this willingness came to a stop at this level
9 and it did not go any further than that. The investigating judge was
10 not able to listen to what Mr Bemba had to say because he was out
11 of the territory of the Central African Republic at the time. In
12 addition to this fact, at the time when the investigating judge of
13 the CAR was to open his investigation, Mr Bemba had been appointed
14 vice-president of the CAR -- of the DRC --

15 THE INTERPRETER: Correction of the interpreter -- the DRC.

16 MR BIZON: (Interpretation) And at that moment in time he
17 was not able to continue his investigations as such. He then issued
18 an order of dismissal of the case, and in so doing he indicated
19 that Mr Bemba, as vice-president, was -- or benefitted from
20 presidential immunity and he could not be prosecuted as such.

21 So there was an appeal lodged against this decision, and
22 this decision was then referred to the indictment chamber of the Bangui
23 appeals court. At this level we are only talking about procedure here.
24 The case has not yet been examined on the merits.

25 The indictment chamber of the court of appeal in Bangui at

1 the time handed down a decision of severance of cases because there
2 were a certain number of crimes that had been committed. You had economy
3 crimes and there were also crimes that had to do with the integrity
4 of individuals and persons. With respect to crimes that related to
5 human dignity, the Court opted for severance of these crimes and that
6 such crimes ought to be referred to the International Criminal Court.

7 Following a decision of the indictment chamber of the court
8 of appeal of Bangui, the public Prosecutor in that court appealed against
9 the decision. And before the Court of Cassation could issue a decision,
10 the government of the Central African Republic referred the matter
11 to the International Criminal Court requesting the court to initiate
12 proceedings. I am raising this point because the Defence had raised
13 it in its filing, stating that the government of the Central African
14 Republic did not wait for the decision of the Court of Cassation before
15 referring the matter to the Court.

16 I would like to say that when the Prosecutor appealed the
17 decision, his appeal related to the financial aspects of this file.
18 So the government at the time had no reason to wait for the Court of
19 Cassation to hand down a decision before making a referral to the
20 International Criminal Court. Also, at that time, even if the
21 government had to wait, the government had to make a choice at that
22 point in time, and the choice was to refer the case in its entirety
23 to the International Criminal Court. And the Court of Cassation, later
24 on in its decision, confirmed the position that had been adopted by
25 the indictment chamber. So when the government of the Central African

1 Republic decided to seize the International Criminal Court, it
2 therefore gave up its willingness to prosecute Mr Bemba with respect
3 to these crimes.

4 So with respect to the willingness of the CAR, I think that
5 question does not arise. If, in the year 2003, in August and in September,
6 that willingness was clearly manifest, well, from the time that the
7 International Criminal Court was seized, it became clear that the CAR
8 had made a decision of relinquishing its willingness to prosecute Mr
9 Jean-Pierre Bemba on the territory of the Central African Republic.

10 Now, let's talk about ability. Does or did the CAR have
11 the ability, really, to prosecute Mr Bemba successfully? I think that
12 the government of the Central African Republic drew the requisite
13 conclusions, because the courts that were supposed to handle these
14 proceedings issued decisions stating clearly that they were unable
15 to successfully carry through these proceedings. You had the judgment
16 of the court of appeal. You also had the judgment of Court of Cassation.
17 The two judgments stated clearly that the legal institutions of the
18 CAR did not have the capacity to successfully prosecute. They did
19 not have the ability to carry out proceedings of this nature and,
20 to be able to do this, we have to have the requisite human resources
21 to handle a case of this nature.

22 Now, when you look at the cases that are pending before the
23 courts of the CAR, you find that we have a shortage of judges to handle
24 the work load. The reports and the investigations carried out by human
25 rights institutions, the FIDH, the Central African Legal Human Rights,

1 clearly show that there is a serious shortage of manpower.
2 We also need financial and material resources to be able to organise
3 a case of this stature. The budget allocated to the Ministry of Justice
4 for this year is ridiculous, ridiculously insignificant, and this
5 budget cannot enable us to handle a case of this nature.

6 There is also another obstacle to the organisation of a case
7 against Mr Bemba on the territory of the Central African Republic.
8 Today we have victims on the territory of the Central African Republic
9 who experienced the events; that is, they felt them in their bodies,
10 in their hearts.

11 Now, just imagine, there were family heads who were forced
12 to watch the rape of their wives and children in public. Just imagine
13 a situation where we had such persons today seeing Mr Bemba being judged
14 on the territory of the Central African Republic. Those rapes, those
15 acts were committed on a large scale.

16 Another point to bear in mind is, that today the MLC is still
17 operating, and MLC militia -- militiamen are still operating on the
18 territory of the Democratic Republic of Congo. And the territory
19 controlled by the militiamen of the MLC is on the border of the Central
20 African Republic. Today the Central African Republic is located
21 between various hotspots of tension. You have Darfur. You have the
22 rebellion in Chad. You have the MLC rebellion, which is still raging
23 in the DRC.

24 Under these conditions, therefore, and from the security
25 standpoint, it is impossible at this point in time to organise a trial

1 against Mr Bemba on the territory of the Central African Republic.
2 There is also another obstacle, a legal obstacle. Mr Bemba is being
3 prosecuted before your Honourable Court for crimes which are defined
4 in Article 5 of the Rome Statute. There is a general principle involved
5 which is found in the Rome Statute - and which is found in most penal
6 codes of modern states - and that principle is that of non-retroactivity.
7 You can only apply a law -- you can apply law only to events that
8 occurred after the enactment of the law.

9 In the Central African Republic, the acts for which Mr Bemba
10 is being prosecuted, well, there was no legislation that covered those
11 acts at the time that Mr Bemba was referred to this Court. It was
12 only on 6 January 2010 that a new penal code was enacted, and Articles
13 150 to 160 of that penal code criminalises the conduct -- or this conduct.

14 Article 2 of the same penal code also makes provision for
15 the principle of non-retroactivity of the law. And so the provisions
16 of this new penal code cannot be applied to acts that were committed
17 prior to the enactment of this penal code. Those are the obstacles
18 which we face today and which make it such that it's difficult for
19 us to try Mr Bemba on the territory of the Central African Republic.

20 I would now like to return to the facts alleged by Mr Bemba
21 when he stated that -- when the Prosecutor initiated his proceedings,
22 Mr Bemba was not yet -- or was no longer enjoying the immunity that
23 he had been enjoying prior to the institution of the proceedings.

24 When the Central African Republic referred the matter to
25 the ICC, it was not a joke. We referred the matter to the ICC because,

1 at that point in time, the Central African Republic was not able to
2 initiate proceedings. And there is another principle in law, which
3 is that of withdrawal. In other words, the Central African Republic
4 withdrew from handling this case, and so we cannot revisit the case
5 again. We cannot take it up again.

6 That said, I would like to make you understand that the
7 arguments raised by the Defence do not stand up to analysis. And those
8 arguments ought to be put aside with respect to the points which I've
9 just raised.

10 The second point that was raised relates to the principle
11 of ne bis in idem. This principle, which -- states that no one can
12 be tried for the same conduct twice. In the instant case, can we say
13 that Mr Bemba has already been tried? For this principle to be
14 applicable, this would mean that a decision had been handed down and
15 which means that Mr Bemba has been tried and a final determination
16 taken.

17 When Mr Bemba filed his challenge to admissibility, and while
18 the Court was sending observations to the various parties, the Defence
19 sent another filing stating that there had been a new development,
20 that they had filed an application -- well, they filed this application.
21 It means that -- it is because a final decision had not yet been taken.
22 So, I think there's a contradiction in the position which is being
23 adopted by the Defence and this makes clear the non-validity of the
24 arguments which have been raised by the Defence team.

25 I also believe that the Defence has had enough time to make

1 you understand that there has been another new development, and it
2 is that they have withdrawn from the appeal for the vocational review
3 of the judgment which they filed to the Court of Appeal. And so, we
4 really don't know what exactly -- on what position they are adopting
5 at this point in time. And so, the problem that arises at this juncture
6 is whether a judgment was handed down and whether that judgment was
7 followed.

8 The Defence has been talking about the order that was issued
9 by the investigating judge, and they state that that order indicated
10 that the charges against Mr Bemba were dismissed. And so they feel
11 that this means that the proceedings against Mr Bemba were concluded
12 and that there was nothing much to do later on after that.

13 I think you have to read the order that was issued by the
14 investigating judge. I said earlier that in the arguments raised by
15 the judge, the judge stated that before arriving at his conclusion,
16 he stated that Mr Bemba was covered by immunity; meaning, that no
17 proceedings could not be instituted against him. So no proceedings
18 were actually instituted against him.

19 There is no decision, no legal decision - therefore, court
20 judgment - that was issued against him because no proceedings were
21 instituted because of his immunity. There was a preliminary
22 investigation, but that investigation could not be concluded. And
23 so the proceedings instituted against him did not run to their logical
24 conclusion.

25 Today I think that the Defence has become aware of the

1 vacuousness of this argument, and that is why they are applying for
2 this decision for revocation of the judgment -- or review of the judgment.
3 In any case, that is an issue which we are going to discuss before
4 the courts in the Central African Republic.

5 But you have to understand, that the provisions which apply
6 to the court of cassation do not make allowance for such an application
7 for review or a vocational review of a judgment. Well, you would
8 understand, ladies and gentlemen of the Court, that this argument does
9 not stand up to analysis.

10 Another point that the Defence team is going to tell you
11 about relates to the threshold of gravity of the acts for which Mr Bemba
12 is being prosecuted. I think we can talk about anything here, but
13 we should at least have a certain amount of respect for humanity, for
14 people.

15 When you take girls, you take boys under the age of 15 and
16 you sodomize them before their parents in public, now, if you don't
17 think that this is a serious crime, then I begin to wonder what's
18 happening to mankind. If acts of rape against old women, committed
19 against old women in public do not constitute serious crimes, then
20 I begin to wonder; I begin to wonder what has become of the morals
21 of our society today.

22 I think that today's society cannot -- cannot tolerate the
23 impunity, impunity from such acts. And it is because of this that
24 the International Criminal Court was set up. And on this point, I
25 believe that by raising these issues the Defence is trying to make

1 us understand that these issues are not serious enough. I think the
2 Court has to focus on the merits of this case in order to determine
3 whether these crimes attain the requisite level or threshold of gravity.
4 We cannot at this procedural stage of an admissibility challenge just
5 say that these acts do not attain the requisite threshold of gravity.

6 That said, your Honour, I believe that this is merely a
7 delaying tactic on the part of the Defence. And when the Defence talks
8 about an abuse of process, it is my belief that it is rather the Defence
9 team that is engaging in an abuse of process because they really have
10 to come up with the appropriate arguments in order to support their
11 case.

12 And I have the impression that the arguments that they've
13 been coming up with are light weight and I would even dare to say are
14 open to a lot of criticism. I think that when my colleague takes the
15 floor, he's going to say more on the abuse of process. But personally,
16 I believe that Mr Bemba benefitted from all the guarantees in place
17 before he was brought here, and I am confident that the trial that
18 is going to be started in the days ahead will be a fair trial and that
19 the Court is going to be even-handed in this case as it has been doing
20 hitherto.

21 Thank you. And I will allow Mr Bria now to answer the
22 questions which you sent to us yesterday; and if there are any other
23 issues which I have to address, I will be glad to take them. Thank
24 you.

25 PRESIDING JUDGE FULFORD: Mr Bizon, thank you very much,

1 indeed. That was extremely clear. Just before we -- just before we
2 give the floor to your colleague Mr Bria, just one question from me.

3 Before the investigating judge - indeed, when the
4 investigating judge made his decision on 16 September 2004 - there
5 appeared to have been two notable findings, amongst others. The first
6 was, when he was addressing the criminal responsibility of Mr Patassé
7 and Mr Bemba, you're absolutely right. He found that in Mr Bemba's
8 case, he enjoyed diplomatic immunity; and consequently, he could not
9 be prosecuted. In the English translation, we find that at page 10.

10 Later, there was an order for the dismissal of charges as
11 well, and it is framed as a conclusion that, following the preliminary
12 investigation, there is insufficient incriminating evidence against
13 Mr Bemba and others. So there was seemingly that additional finding
14 as well.

15 I wondered if there's any more assistance that you can give
16 us as to how we should approach that second conclusion. What in law,
17 in your submission, is the effect of the conclusion that there was
18 insufficient incriminating evidence? You'll understand, of course,
19 that the Defence say that it amounts to the dismissal of the case against
20 the accused on its merits; effectively, an acquittal. I just wondered
21 if there's any more help that you could provide us on that point, please.

22 MRBIZON: (Interpretation) Thankyou, your Honour. Well,
23 following the law of the Central African Republic, we call that a
24 contradiction of grounds. In other words, there is no logic between
25 the grounds and the conclusion. If the decision had stayed at that

1 level, we would have understood. However, it happened that the decision
2 was referred to a higher court. And so, this means that the decision
3 is -- no longer has legal force. It was reformulated in its entirety.

4 Another thing you have to understand is, that there were
5 two types of crimes, two different types of crimes that were brought
6 before the investigating judge. You had economic and financial crimes
7 and you had -- that's on the one hand. And you also had what we call
8 "blood crimes" that relate to the dignity of humans. So this
9 contradiction could have stemmed from that fact.

10 If there had not been a decision issued by a higher court,
11 the investigating judge would have been asked to interpret his decision;
12 but at this juncture, the problem does not arise because a higher court
13 had given a ruling which settled the matter. And so this question
14 is no longer valid today. I hope I have answered your question.

15 PRESIDING JUDGE FULFORD: Yes. That's extremely clear.
16 Thank you very much. And, of course, we have noted that on appeal
17 on that -- on appeal on 16 December 2004, there was - certainly in
18 part - an annulment of the investigating judge's decision which - subject,
19 of course, to anything that Mr Liriss says - would seem to support
20 the observation you've just made. Thank you very much, indeed. Good.

21 If we could then hear from your colleague Mr Bria in relation
22 to the other issues. Thank you very much.

23 MR BRIA: (Interpretation) Thank you, your Honour. As you
24 said, my name is Bria. I am the public prosecutor for the Court of
25 Appeal in Bangui. Before I answer the various questions, I would like

1 to ask you, your Honour, what the methodology is. Should I read the
2 questions and give you the answers or do you prefer that the Bench
3 puts the question to me and I answer?

4 PRESIDING JUDGE FULFORD: I'll leave it to you, Mr Bria.
5 If you could read the questions and then provide the answer. Thank
6 you very much.

7 MR BRIA: (Interpretation) Thank you, your Honour. Well,
8 in that case I believe I will read the questions and I provide the
9 answers.

10 Well, your Honour, yesterday when we arrived, the ICC
11 provided us with a questionnaire, and you requested the delegation
12 of the CAR to provide answers to the questions. On the list that was
13 provided to us, we found 12 questions and we are going to attempt to
14 answer these 12 questions.

15 In the first question you ask: When were proceedings
16 officially started against Jean-Pierre Bemba Gombo in the Central
17 African Republic and when was the arrest warrant issued?

18 Well, to answer that question, I would like to say that
19 proceedings were initiated in the year 2003 against Ange-Felix Patassé
20 and 15 others persons, including Jean-Pierre Bemba. This means
21 therefore that there was not a single proceeding against Mr Bemba alone.
22 There were proceedings instituted against Jean-Pierre Bemba,
23 Ange-Felix Patassé, and 14 other individuals.

24 Well, during his preliminary examination, the investigating
25 judge issued warrants of arrest against certain individuals who were

1 not on the territory of the CAR or who, well, basically were out of
2 the country, and these individuals included Mr Patassé and Mr Bemba.
3 When the investigating judge concluded by issuing an order dismissing
4 the case, then the warrants of arrest issued against these individuals
5 were cancelled. And when his decision was appealed, the warrants of
6 arrest that were issued were no longer valid because an order dismissing
7 the charges had already been issued in favour of Mr Bemba. And so
8 the warrant of arrest that was issued against him was no longer valid.

9 In your second question you ask: How many warrants of arrest
10 were issued in the proceedings and against whom? I think I have already
11 answered that question, which is related to the first question.

12 Third question: Which national decisions, if any, were
13 notified to Mr Bemba? You are referring to the order for partial
14 dismissal, the decision from the Court of Appeal of 16 December 2004,
15 and the decision of the Court of Cassation of 11 April 2006. The various
16 decisions made against Bemba could not be notified to him by legal
17 means. The state lawyer referred to it earlier. He was vice-president
18 of a sovereign state.

19 And the second problem that arose was that there is no legal
20 cooperation agreement between the CAR and the Democratic Republic of
21 Congo, and so there wasn't any procedure that could be used to inform
22 Mr Bemba of the various decisions. Could we have written to the
23 President of the Republic to ask him to transmit the judicial decisions
24 to Mr Bemba, who was his Vice-President? No, I don't think so.

25 PRESIDING JUDGE FULFORD: Mr. Bria, can I just ask you a

1 question about that. One can ready understand the practical problems.
2 I'm curious as to whether there is a legal obligation on the judicial
3 authorities to formally serve decisions of this kind on an accused.
4 Certainly, from the jurisdiction which I come from, there isn't any
5 legal requirement of that kind, but I would be interested if you're
6 able to help on that issue.

7 MR BRIA: (Interpretation) Yes, in the CAR legislation
8 there are provisions with regard to the notification of various legal
9 notices, but the conditions have to be met in order to apply these
10 provisions effectively,. There are some provisions that say that
11 individuals have to be informed of decisions, various interested
12 parties have to be informed of decisions. But it was impossible for
13 the authorities of the Central African Republic to tell Mr Bemba of
14 these different decisions.

15 PRESIDING JUDGE FULFORD: Sorry to press it, but one final
16 point then. If I take it from your answer that, put generally, there
17 is a requirement of notification, what is the consequence if
18 notification doesn't take place? Now, it may be it doesn't take place
19 for a good reason or a bad reason. You would say here a good reason
20 because it was impossible to notify Mr Bemba. But, either way, if
21 there isn't notification, does that have the consequence of somehow
22 invalidating the decision that the court has made?

23 MR BRIA: (Interpretation) Thank you, your Honour. In
24 terms of notification, I do not believe that any sanctions exist that
25 would result in nullity.. If there were any sanctions, it would just

1 pertain to the act of notifying but not the entire procedure itself.

2 Secondly, if there is no notification, that could lead to
3 some extension in time, some delays.

4 Fourth question: Is there a possibility of the case being reopened
5 against Bemba? Does the filing of remedies by the Defence in the CAR
6 on 6, 8 and 16 April before the Cour d'Appel and the Cour De Cassation
7 have the effect of reopening investigations by the prosecution? Could
8 this lead to prosecution for blood crimes before the national courts?

9 In answer to this question we shall say that no proceedings
10 launched against Mr Bemba have been stayed or discontinued before any
11 court in the CAR. So, one cannot talk about reopening or opening an
12 investigation. The CAR has completely withdrawn from the proceedings.
13 There isn't a single case file against Bemba in any jurisdiction
14 whatsoever in the Central African Republic. And so we think that as
15 the ICC has been seized of the matter, it will of course proceed with
16 it, but the public prosecution service will not be able to reopen the
17 case. The second reason, as explained by the state legal representative,
18 is the principle of non-retroactivity. The crimes were committed at
19 a time when war crimes were not part of the CAR body of law. No offence
20 was committed. Your Court was created to solve this type of situation
21 where there were serious crimes that often did not exist in the
22 legislations of States which ratified the Treaty of Rome. All of the
23 states were asked to incorporate these offences within their body of
24 national law and the Central African Republic did so in 2010.

25 In 2002-2003 there was no text whatsoever. Even if Bemba

1 had been committed to trial before a court, this court would have declared
2 that it did not have jurisdiction, or would not have prosecuted Mr
3 Bemba because the crimes committed were not part of its body of law.
4 And so we can't reopen the case against Bemba because of this principle
5 of non-retroactivity.

6 The fifth question you asked was: Did CAR authorities discuss the
7 issue of admissibility with the prosecution? Was there written
8 communication on this? I think you are referring to the ICC Prosecutor;
9 is that correct, your Honour? It is the OTP of the ICC, ah.

10 Well, I would answer 'no' to that question. We were not in
11 contact, to the extent that we received some documents and it was your
12 Chamber who was asking for your observations, but we didn't have
13 any contact whatsoever with the OTP.

14 Sixth question: In the request for further information of
15 the public prosecutor before the Appeals Chamber on 24 November 2004
16 and in the decision by the Appeals Chamber on 16 December 2004, the
17 case is stated to be against Patassé and others. Who are the others
18 referred to in these documents? I don't know. You have the order, the
19 dismissal order, that the Defence is relying on but in that order you
20 will see the list of the 15 other people involved and you will also
21 see in the request for additional information that was given to the
22 investigating judges by the public prosecutor in the case that there
23 is a list of people.

24 PRESIDING JUDGE FULFORD: So, put simply, it's those people
25 that we see listed in the investigating judge's decision.

1 MR BRIA: (Interpretation) Exactly.

2 PRESIDING JUDGE FULFORD: Fine.

3 MR BRIA: (Interpretation) Seventh question: Are
4 proceedings currently underway against Patassé and anyone else included
5 in the initial charging document? If so, could proceedings also be
6 reinstituted against Jean- Pierre Bemba?

7 As I said earlier, there are no proceedings against
8 Mr Patassé or the others that were mentioned. They were tried on
9 economic -- they were tried for economic crimes for which they were
10 charged in the proceedings involving Mr Bemba where severance occurred.,
11 So, the only case opened in the Central African Republic, dealt with
12 economic crimes, that is, embezzlement of public funds, forgery and
13 use of forgeries, et cetera. The Accused were tried in absentia, other
14 people, were present. There were convictions, for which amnesty was
15 granted and I think that was about a year ago or a year and a half.
16 And so right now there are no proceedings underway against Jean-Pierre
17 Bemba before any Central African Republic court. They have withdrawn
18 from proceedings against Bemba. And with regard to reopening a case
19 against him, we can't reopen a "Bemba case", in quotes, before our
20 courts because at the time the crimes were committed there was no
21 criminal body of law in place in this regard.

22 Eighth question: Would the CAR authorities be willing or
23 able, as defined in the Rome Statute, to take up the case again? I
24 could use the same arguments that I just mentioned and also repeat
25 those that were made by the state legal representative. So I won't

1 dwell on this.

2 Ninth question: Is the appeal of 17 September 2004 concerned
3 only with Bemba himself, or just with the Banyamulengue, or with both?
4 Well, the appeal was lodged for the entire matter, so Patassé, Bemba,
5 the Banyamulengue. It was for everyone. It's not just for some and
6 not others. No, it was for all of them.

7 Number ten: On what grounds did the general prosecutor file
8 a "pourvoi en cassation" on 20 December 2004 against the Appeals Chamber
9 decision on 16 December 2004? The legal grounds are not specified
10 in the notice of appeal of 20 December 2004. I think you will find
11 the answer to that in our first submissions, point 4. They show the
12 grounds for the notice of appeal of the Prosecutor.

13 Eleventh question: In the submissions of the CAR on 19 April
14 2010, it is mentioned that the CAR authorities have passed a law on
15 6 January 2010 incorporating in the CAR penal codes the crimes under
16 Article 5 of the Rome Statute. What are the relevant provisions of
17 the CAR national penal code? Please supply copies.

18 Our lawyer has given you a copy of the articles that were
19 quoted earlier, but the CAR has taken all of the text of Article 5
20 of the Rome Statute.

21 Last question: When are the Appeals Chamber and the Cour
22 de Cassation likely to issue their respective decisions on the
23 opposition lodged on 6 April 2010 by Mr Bemba against the Appeals Chamber
24 decision on 16 December 2004 on the request for review of April 8,
25 2010, against the judgment of the Cour de Cassation on 11 April 2006

1 and on the notice of appeal lodged on 16 April 2010 by the Defence
2 for Mr Bemba?

3 Your Honour, that really is an aberration. Different methods
4 are used to appeal one decision. We are getting mixed up here. An
5 opposition is lodged, a review and revocation of the judgment is
6 requested ...and an appeal is being lodged against one and the same
7 decision. I was wondering whether there was any logic that was followed
8 in the Defence's approach?. The hearing of the indictment chamber
9 in respect of the opposition was due to be held on 21 April 2010. Curiously,
10 on the day before the hearing, Counsel for Jean-Pierre Bemba made a
11 written submission requesting for the hearing to be postponed for 2
12 weeks. He filed his appeal. There wasn't one conclusion whatsoever that
13 was submitted. There was just a letter filed, saying that they object
14 to the order, and for ten days there were absolutely no submissions
15 up until today. There hasn't been any conclusion filed whatsoever
16 to justify in support of his opposition lodged with the indictment
17 chamber, and I would say that they are using delaying tactics here.
18 They are also resorting to an application for revocation and review
19 of judgment before the court of cassation, and two days before the
20 court of cassation hearing they approach this same court to request
21 a withdrawal of the application. They are now pursuing the matter
22 on appeal. Why all these attempts? If they are in possession of arguments,
23 they should pursue one path of action in order to request the variation
24 of various decisions issued.

25 We feel that all of these are just delaying tactics, your

1 Honour, and so I think that I have answered the series of questions
2 that were given to us when we arrived here in The Hague. Thank you
3 very much.

4 PRESIDING JUDGE FULFORD: Thank you very much indeed. One
5 point of clarification, please. In relation to question 5, I just
6 want to make sure that there's full understanding of what was meant
7 by the question. The Bench is referring really to the stage in 2003
8 and 2004 rather than the more recent period, and we were interested
9 in knowing whether there were any formal or informal discussions between
10 the authorities of the Central African Republic and the Office of the
11 Prosecutor here in The Hague on the subject of admissibility back in
12 2003/2004.

13 MR BRIA: (Interpretation) I'm sorry, I didn't get the
14 interpretation.

15 PRESIDING JUDGE FULFORD: Let me put the question again.
16 I'm going back to question 5, and I just wanted to ensure that there
17 was no misunderstanding as to the question. The Chamber is interested
18 in whether, back in 2003, 2004, there were discussions between the
19 authorities of the Central African Republic and the Office of the
20 Prosecutor in The Hague about the issue of admissibility, whether
21 formally or informally. Are you able to help us as to whether or not
22 there were discussions back at that stage about the admissibility
23 of the case?

24 MR BRIA: (Interpretation) The application for
25 admissibility, there was no direct contact with the OTP. There were

1 just different observations, different written communications that
2 we shared with the Court.

3 PRESIDING JUDGE FULFORD: Fine. That's very clear. Thank
4 you very much indeed for those submissions.

5 Ms. Kneuer, we'll give the interpreters and transcribers
6 a break in ten minutes, but why don't you start now and we'll break
7 off, as I say, in a little while.

8 MS KNEUER: Mr President, your Honours, the Prosecution had
9 prepared its submission in two parts: the one addressing factual issues
10 and the other one legal matters. After listening to the CAR authority
11 representatives, I have to admit there is nothing to add on the factual
12 side from the Prosecution, and the Prosecution does not want to waste
13 the time of the Court to be repetitive.

14 Keeping in mind our position that the case is admissible
15 and the challenge by the Defence should be dismissed, I would like
16 to turn over now to my colleague, Mr Rastan, Rod Rastan, to address
17 a few legal matters.

18 PRESIDING JUDGE FULFORD: Admirably brief, Ms. Kneuer.
19 Thank you very much indeed. Yes.

20 MR RASTAN: Thank you, your Honour. I'll try to be brief,
21 and you have our written submissions on all the relevant issues. A
22 number of additional observations were brought up by the Defence in
23 its reply, so we thought we could also take the opportunity to briefly
24 touch upon those. But, again, the distinguished representatives of
25 the Central African Republic have addressed in the course of their

1 submissions a number of the legal arguments put forward by the Defence,
2 so we will not need to labour much further on that.

3 In terms of the first heading of the Defence's challenge
4 in relation to 17(1)(b), I think it's been established quite clearly
5 in the written submissions that we have presented, as well at those
6 of the OPCV, that indeed the investigation being referred to in this
7 context must have been completed.

8 This is an investigation which has reached an assessment
9 on the merits of whether there is a sufficient basis to proceed with
10 the prosecution; one that has been abandoned for technical reasons,
11 that has not been resolved on the merits, is not a decision within -- is
12 not a decision on the merits of the investigation within the meaning
13 of 17(1)(b).

14 Moreover, as the Central African Republic authorities have
15 just pointed out, they noted that no procedures had actually been
16 instituted in relation to Jean-Pierre Bemba and that the proceedings
17 did not run to their logical conclusion. To that respect, we would
18 also concur with the submissions of the principal counsel of OPCV that
19 the requirements of 17(1)(b) -- I'm being told to speak more slowly.

20 The requirements of 17(1)(b) require two things: That a
21 decision has been taken in relation to both the investigation and
22 that the -- there's been a decision that -- not to prosecute. And
23 again, we don't find that in the record.

24 And then, finally, my last submission in relation to 17(1)(b),
25 in its most recent reply the Defence appears to suggest that a decision

1 taken on an investigation within the scope of 17(1)(b) would also fall
2 within the scope of ne bis in idem. Thereby, it appears that the Defence
3 wants us -- wants the Chamber to conflict the very two different concepts
4 dealt in different limbs of Article 17.

5 As mentioned just briefly by the distinguished
6 representatives of the Central African Republic, they said that they
7 could not proceed against Jean-Pierre Bemba today not because of ne
8 bis in idem, but because they lacked the necessary legislation and
9 because of the principle of non-retroactivity. And their position
10 is not a dissemination, again, on the merits or the quality of any
11 investigative acts taken out in the past, but rather an observation
12 on procedure.

13 Am I going at a good pace?

14 PRESIDING JUDGE FULFORD: I hear no complaints coming over
15 the airwaves, Mr Rastan, so I think you're doing well. Silence is
16 a good sign in that regard.

17 Do you have any submissions on the proceedings before the
18 courts in the Central African Republic; and in particular, the point
19 that's made that -- by the Defence that there was a final decision
20 by the investigating judge that has then been the subject of what is,
21 as I understand it, described as being an unlawful appeal?

22 It's suggested that the appellate decisions are -- were
23 improperly brought, have no proper effect, and that therefore - so
24 it is submitted - we should work on the basis that there has been a
25 decision on the merits, effectively acquitting the accused. Does the

1 Prosecution have a position on this?

2 MR RASTAN: Well, of course, I would defer to the expertise
3 of the representatives of the Central African Republic in terms of
4 the applicability of their own law. But as far as we can understand
5 that particular point raised in the Defence's reply, they appear to
6 distinguish two different types of the non-lieu decision, suggesting
7 that one relates to lack of evidence, which can always be revisited
8 should additional evidence be uncovered at a later stage. So, it does
9 not have res judicata effect.

10 And another type of decision which appears to have res
11 judicata effect where the act does not constitute a criminal offence
12 or is otherwise time-barred or amnestied.

13 Now, there appears to be two ways in which the Defence is
14 suggesting that this is problematic in terms of the procedure followed:
15 One, in relation to the act not constituted in a criminal offence,
16 well, as mentioned by the representatives from the Central African
17 Republic, at this stage they would have to apply the law retroactively.
18 And the non-existence of criminal legislation would have the effect
19 again of being a matter of procedure. It is not a decision on the
20 merits or whether or not the person bears criminal responsibility.
21 On the issue of whether or not they are saying that perhaps because
22 the individual enjoyed immunity, therefore there was no basis to
23 proceed - and that is some type of a non-lieu decision that has res
24 judicata effect - I think we could recall the passage which the Defence
25 cites in its own challenge.

1 This is the finding of the International Court of Justice
2 in the Congo versus Belgium decision. I won't belabour this, but just
3 one paragraph which I think is very pertinent; and as I mentioned,
4 the Defence has cited itself.

5 The Court of Justice European -- the International Court
6 of Justice in that decision emphasises that immunity from jurisdiction
7 by an incumbent minister for foreign affairs does not mean that they
8 enjoy impunity in respect of any crime they may have committed
9 irrespective of their gravity.

10 Immunity from criminal jurisdiction and individual criminal
11 responsibility are quite separate concepts. And they go on to say,
12 while jurisdictional immunity is procedural in nature, criminal
13 responsibility is a question of substantive law.

14 So, again, the fact that Jean-Pierre Bemba may have enjoyed
15 State immunity in his capacity as the Vice-President of the DRC for
16 that period, would not appear to fall within the scope of any type
17 of res judicata decision. And the Defence appears to itself concede
18 this in its own submissions when it asks the Court to wonder why the
19 authorities of the Central African Republic did not reconstitute
20 proceedings once the immunity had fallen away.

21 So, this is how we understand it: We believe that the second category
22 of non-lieu decisions that are distinguished by the Defence actually
23 have no bearing on ne bis in idem and, therefore, cannot be relied
24 upon to support an argument of inadmissibility.

25 Very briefly, in relation to whether or not there are any

1 proceedings that fall within the scope of Article 17(1)(a) and (b),
2 as you have had the opportunity to read in our submissions, we have
3 characterised the current situation as one of inactivity.

4 Clearly, there are no current proceedings against
5 Jean-Pierre Bemba as confirmed by the Central African Republic. And
6 as the Appeals Chamber has guided us in its decision in the Katanga
7 case on admissibility, the Appeals Chamber made it quite clear that
8 in relation to admissibility's determination, it must be made in
9 relation to the facts as they exist at the time of the challenge; the
10 issue being, whether or not the case is admissible, not was admissible.

11 THE INTERPRETER: Mr President, could counsel please be
12 requested to slow down? Thank you.

13 PRESIDING JUDGE FULFORD: There is a request to slow down.
14 I wasn't aware that you were speaking too quickly, actually, but perhaps
15 we've been sitting for long enough before the break. It may be the
16 most merciful thing would be for us to take the break now, Mr Rastan.
17 Sorry to interrupt your flow.

18 One thing to reflect on over the adjournment, if you will:
19 When one's looking at the time, at the point in time at which one should
20 consider the matter - and you've just reminded us of what the Appeals
21 Chamber said in Katanga, that it's the facts as they are at the time
22 of the challenge - is it the time that the challenge is made, so the
23 moment when the Defence application is put in, or is it when the Chamber
24 comes to make its decision on the challenge? So could you reflect
25 on that and provide us hopefully with an answer after the break?

1 Thank you all very much. We'll now give the interpreters
2 and stenographers a break, and we will sit again at half-past-11.

3 THE COURT USHER: All rise.

4 (Recess taken at 10.58 a.m.)

5 (Upon resuming at 11.30 a.m.)

6 THE COURT USHER: All rise. Please be seated.

7 PRESIDING JUDGE FULFORD: Yes, Mr Rastan.

8 MRRASTAN: Thank you, your Honour. Before the break -- I'll
9 try to endeavour to speak slowly. Before the break the question was
10 put in relation to the finding of the observation by the Appeals Chamber
11 that an admissibility challenge and a determination on that challenge
12 must be made on the basis of the facts as they exist at the time. And
13 your question was: Does that apply at the moment the challenge is
14 made or during the procedure in which that challenge is being considered?

15 Our position would be that it is while the procedure is in
16 process, not only at the time of the challenge itself. And that also
17 seems to be supported by the specific wording of the Appeals Chamber,
18 which I'll read it in full in order not to mischaracterise the judgment.
19 This is paragraph 56 of the Appeals Chamber's judgment in the Katanga
20 case on admissibility.

21 "The Appeals Chamber says, "The statute indicates that the
22 admissibility of a case must be determined on the basis of the facts
23 at the time of the proceedings on the admissibility challenge."

24 PRESIDING JUDGE FULFORD: Right. So do we take it that
25 that's up to the point when the Chamber makes its decision?

1 MR RASTAN: Yes. Yes, we believe that it would start from
2 the moment the challenge was lodged up until such time as your Honours
3 would take a decision on that challenge.

4 PRESIDING JUDGE FULFORD: Very clear, thank you.

5 MR RASTAN: Now I'll move on briefly. I don't think that
6 we will need more than another 10 minutes perhaps just to recap a number
7 of other legal observations.

8 So we've already -- the Prosecution has already put forward
9 its position that we do not believe that we are within the remit of
10 Article 17(1)(b). However, for the sake of argument, should the Chamber
11 consider that the current facts alleged do fall within the scope of
12 Article 17(1)(b), as we submitted in writing, we would argue that any
13 decision taken within the scope of Article 17(1)(b) was in any event
14 vitiated by the inability of the CAR authorities to genuinely prosecute
15 the case.

16 The reasons tending to show such inability have been ably
17 set out by the distinguished representatives of the Central African
18 Republic so I will not labor them further. And we have also set them
19 out in writing.

20 A question related to the argument about inability has been
21 raised by the Defence, both in its initial submission and in its reply.
22 So, by your leave, I will just quickly touch on that.

23 The Defence suggests that in terms of inability, the two
24 criteria set out in Article 17(3), namely, total or substantial collapse
25 or unavailability, are cumulative, not alternative. And they cite

1 in support John Holmes in the Roy-Lee commentary, page 49. The
2 authority cited by the Defence in fact does not support the point it
3 is making, and neither does a plain reading of the law.

4 What the Statute requires is that there must be a finding
5 either of total or substantial collapse or unavailability of a state's
6 judicial system which must have resulted in the state's inability to
7 either be unable to obtain the accused, collect the necessary evidence
8 and testimony, or otherwise carry out its proceedings. So, the nexus
9 that is required is between one of the two conditions, collapse or
10 unavailability, with one of the three specified results. And as stated
11 earlier, we believe that the unavailability of the CAR judicial system
12 resulted in the several obstacles mentioned in our submissions.

13 In relation to the arguments on ne bis in idem, also there
14 we do not seek to reiterate the submissions we have submitted in writing
15 ourselves as well as by the principal counsel, the OPCV as well as
16 the authorities who are here today. But clearly, against the wishes
17 of the Defence, there appears to be no doubt as to the meaning of ne
18 bis in idem. It is a principle that's well established in all legal
19 systems. There is only variation in the labelling of how it's referred
20 to. But, of course, this is not the place to engage into a doctrinal
21 analysis into the meaning and purpose of ne bis in idem. We'd be happy
22 to engage in that, if necessary, but I don't think that is required.

23 And then lastly in terms of gravity. The scale, nature,
24 manner, manner of commission, and the impact of the crimes alleged
25 all tend to show the gravity of the case. Again, there is no need

1 to do a listing of the facts that we have presented in our filing.
2 Suffice to recall that the Pre-Trial Chamber in its confirmation
3 decision found that there are substantial grounds to believe that the
4 crimes occurred pursuant to widespread systematic acts in paragraph
5 72 of its decision on the confirmation of charges, as well as in relation
6 to war crimes it made a preliminary finding of substantial grounds
7 in relation to the large-scale commission of the crimes in paragraph
8 212. And, again, the submissions of the distinguished representatives
9 of the Central African Republic.

10 And then finally, the Defence's argument in relation to modes
11 of liability are clearly without merit. They have been rejected in
12 the past by the Pre-Trial Chamber as lacking foundation. And as we
13 have argued, the status of a commander may in fact incur a more aggravated
14 sentence, given both the duty and trust which a commander bears, and
15 findings of previous tribunals, including at the international level,
16 that have held that, in fact, failure by commanders to observe those
17 duties and to punish perpetrators have been held to, in fact, deserve
18 a heavier sentence than subordinates who commit the crime because the
19 commander's acts convey the impression of tolerance or approval of
20 the crimes by their subordinates.

21 At that point, your Honour, I would like to stop, unless there are
22 any specific questions you would wish to pose.

23 PRESIDING JUDGE FULFORD: None at all. Thank you very much
24 indeed.

25 MR RASTAN: Thank you very much.

1 MS MASSIDDA: (Interpretation) Thank you, Mr President,
2 your Honours. I shall limit my intervention to a number of minutes.
3 What is more, the Office of the Prosecutor has taken the opportunity
4 of reiterating my written applications; and then we shall broach a
5 number of procedural issues in the Central African Republic. I would
6 merely like to inform the Chamber, Mr President, that subsequent to
7 our written submissions, the legal representative received yet more
8 observations on the part of the victims on the question of admissibility.

9 Now, those observations have -- or some observations have
10 been included in our written submissions but I would like to come back
11 on two essential points: First and foremost, that the victims would
12 like the proceedings to be held before the International Criminal Court,
13 essentially, because they have two fears; notably, one of security
14 with regard to their well-being were the proceedings to be held on
15 the Central African Republic -- in the Central African Republic. Also,
16 the proximity of the CAR with the DRC where MLC militia, as Mr Bizon
17 said earlier this morning, are still to be found and are still active.

18 Secondly, because the victims deem that the CAR does not
19 have the human and financial resources to be able to conclude the
20 proceedings against Mr Bemba on the territory. This has also been
21 explained this morning by the legal representative of the CAR during
22 the hearing.

23 Now, the second wish, Mr President, your Honours, on the
24 part of the victims, is that the proceedings be conducted in The Hague
25 and that they commence as soon as possible. They have been waiting

1 for this since the year 2003 and they have a right to an expeditious
2 justice. They have all voiced this desire with their legal
3 representatives, and I would like to reiterate this desire today.

4 I would like to thank you and hand the floor to Counsel Douzima
5 with regard to a number of procedural issues in the CAR.

6 PRESIDING JUDGE FULFORD: Thank you, Ms Massidda. In terms
7 of expeditious justice, of course, there is a trial date set for July,
8 which fortunately it's not too far hence. Yes.

9 MS DOUZIMA: (Interpretation) I thank you, Mr President.

10 Mr President, your Honours, I shall be very brief in my
11 submissions because I do not want to be yet more regal than the king
12 himself.

13 I shall first and foremost answer your questions, notably
14 with regard to whether the Defence application dated 16 April 2010
15 challenging the appeal court decision of 16 December 2004 has a
16 suspensive effect or not. I shall quite simply complete or complement
17 what the CAR authorities have just exposed to the Court.

18 First and foremost, I would like to say, Mr President, that
19 this judgment on the part of the indictment chamber of the appeal court
20 was a result of the investigating judge's order. This part on the
21 investigating judge, Mr President, well, I would like to say that
22 this order was made under the law of 1962, which established the criminal
23 procedure or the code of criminal procedure in the CAR. Now, the new
24 criminal code of the CAR dates back to January, 2010, however.

25 In the former penal code or criminal code under the auspices

1 of which this order was issued, the investigating judge is in charge
2 with providing information solely. He does not determine
3 upon -- provide a determination upon the case. He provides information
4 solely, and it is this information contained in this order provided
5 by the investigating judge that was the subject of an appeal on the
6 part of the public prosecutor and which gave rise to this judgment
7 on the part of the indictment chamber of the appeals court. And this
8 judgment today - a few days ago - is the object of the appeal lodged
9 by the Defence. This is merely to say, Mr President, that we are still
10 in this framework, in this procedural framework. And I would like
11 to reiterate what was said on the other side of the courtroom, that
12 these are not decisions on the merits of the case.

13 Now, with regard to its appeal, Mr President, the Defence
14 contended that it was appealing to the Court of Cassation
15 based -- founding its arguments on the organic law of 2005 organising
16 the Court of Cassation; that is to say, notably Articles 19, 20, 21,
17 et cetera, and 23. 19 -- Article 19 of this law states that all parties
18 can, before the Court of Cassation, defend themselves. And you heard
19 the principal public prosecutor with the Court of Appeal earlier on
20 saying that the Defence -- well, that he had promised to file a motion
21 and, to date, has not done so. Because in the notice of appeal the
22 Defence says as follows: "We are appealing to the Court of Cassation
23 against this judgment on grounds of matters of law that will be exposed
24 in a motion within the time limits established in law."

25 Now, this organic law states that a brief or motion is not

1 obligatory in terms of criminal procedure. However, if it is the
2 appellant who requests to be able to file a brief or motion, they need
3 to do so within a specific timeframe.

4 The Defence clearly stated that it was intending to file
5 a brief or application in order to underpin its appeal. Not only did
6 it not do so, but the Court of Cassation organised a hearing and, two days
7 before the hearing, the Defence requested that this hearing be
8 postponed.

9 Now, Mr President, I understand why on the side of the CAR
10 authorities they are claiming that this is delaying tactics, and I
11 do believe, Mr President, that, indeed, they are delaying matters.
12 Not only did they not file the brief that they intended to file, but
13 they no longer want a hearing to be held.

14 So, in order, Mr President, to answer your question, to the
15 extent that the investigating judge did not hand down a decision on
16 the merits of the case, and this decision was in fact the object of
17 this judgment on the part of the indictment chamber of the appeal court,
18 well, Mr President, this decision -- the appeal lodged by the Defence
19 does not have a suspensive effect.

20 And what is more, Mr President, in the legislation of the
21 CAR, it is said that after the Court of Cassation, well, one tends
22 to hit a wall. What does this mean precisely? It is this same decision
23 on the part of the indictment chamber of the Court of Appeal that
24 was actually the object of the appeal by the public prosecution service
25 before the Court of Cassation which in its judgment of the -- of December

1 of 2006 issued a decision that then became definitive. And this same
2 decision said that the Central African Republic courts are unable
3 to commit to trial Mr Jean-Pierre Bemba.

4 I'm not going to make mention of the other defendants involved
5 in this case, to the extent as it was mentioned earlier. We're talking
6 about the procedure as a whole. Crimes were committed, blood crimes
7 and economic crimes, which are within the remit, therefore, of this
8 procedure.

9 I would like to broach the issue of complementarity, as we
10 said earlier in our observations. The Court of Cassation clearly stated
11 that the CAR Court of Cassation, which is the last resort, says that
12 the CAR is unable to truly lead investigations and prosecute and,
13 therefore, that international cooperation is the only way to combat
14 impunity in the matter.

15 The Court of Cassation went on to add that the warrants of
16 arrest that were issued are the only matters to have been undertaken
17 by the Central African Republic courts because those people were never
18 actually the subject of proceedings, nor were in-depth research carried
19 out on them.

20 Now, the representative -- legal representative of the CAR
21 said how it was that the CAR was unable to conduct investigations.
22 But I would also like to add, Mr President, that the infrastructures,
23 in addition to other facts that he raised here, well, the CAR does
24 not really have a detention facility able to take in prisoners. So
25 you will agree with me, Mr President, when I say that, in addition

1 to this problem of infrastructure and the implementation law that
2 did not exist at the time, notably, the problem of retroactivity that
3 is one of the principles contained in the Statute, the Rome Statute,
4 it is therefore not possible to say today that the CAR courts have
5 the jurisdiction. So, from the analysis of the proceedings undertaken
6 in the CAR, there is no decision that has really established a res
7 judicata in the matter so -- for Mr Bemba to say that there was a
8 decision dismissing his case.

9 I would like to hark back to the idea, Mr President, that
10 the CAR does not have, in view of the decision of the Court of Cassation,
11 does not have the -- was not able to seize the International Criminal
12 Court. Well, I would like to say that there is no text, Mr President,
13 that requires of the CAR authorities to wait for a national judicial
14 decision in order to seize the Court.

15 As I have just shown, there is none, and we were still at
16 the procedure stage or the stage of proceedings.

17 Now, if this is so, Mr President, it was incumbent upon the
18 Court to decide whether to open - to decide upon the opportunity of
19 accepting the appeal from the CAR Government with regard to this dossier.
20 And the Court, after having led these investigations, it was only in
21 the year 2007, May 2007 that the Office of the Prosecutor
22 decided to open an investigation in the CAR.

23 So, this was after the decision, some time after the decision
24 of the court of cassation dated 2006, which clearly stated that the
25 CAR was unable to properly conduct proceedings against Mr Bemba.

1 In substance, Mr President, these are the observations that
2 I wanted to bring before the Trial Chamber with regard to what has
3 been said. And I thank you.

4 PRESIDING JUDGE FULFORD: Thank you very much, indeed, Ms
5 Douzima, which I -- for what I think were your first submissions before
6 the Chamber, unless I'm mistaken.

7 Two points that I'm going to ask you to deal with; not now,
8 but in due course - if you're able to - simply by providing an email
9 to the legal adviser to the division and, of course, copying everyone
10 else, and it may be Ms Massidda will be interested in this, also.

11 The first is, you have made a submission that under the
12 relevant criminal code the investigating judge provides information
13 only and is, in fact, unable to resolve the substantive issue; therefore,
14 suggesting, as I understand it, that it simply would have been impossible
15 for the investigating judge to have made a decision on the merits of
16 the case.

17 Now, if I've correctly understood your submission, if that
18 is set out at any particular -- in any particular provision in the
19 relevant code, can you please simply send us the relevant part of the
20 code? We're not asking for additional submissions; simply for the
21 provision which underpins that representation.

22 Secondly, you submitted in definite terms that the current appellate
23 proceedings brought within the last few days by the -- on behalf of
24 the accused do not have suspensive effect in relation to any of the
25 decisions that were made by either of the appellate courts. Again,

1 if there is any part of the relevant code which deals with that in
2 terms, could you please copy it for us and include it in an email
3 to be provided by 4 p.m. tomorrow afternoon, please. Thank you very
4 much.

5 Now, Mr Liriss, I think the time has worked extremely well.
6 We have, without objection, limited all counsel to -- I'm going to
7 turn to you in a moment, Mr Liriss. I can see that the representative
8 of the CAR wants to say something. What I was going to conclude by
9 saying was, that we're now 12 o'clock. We'll be sitting until 1. And
10 so, that in fact gives you the allotted time for your submissions,
11 but I'll turn to you in a moment after the additional representation
12 is made. Yes, sir.

13 MR BIZON: (Interpretation) Yes. I apologize. Can I be
14 heard? Very well. I would like to come back on one issue; notably,
15 a question that you put at an earlier stage with regard -- and the
16 Prosecutor responded to this question. The question of notification,
17 notably.

18 I would like to talk about this issue. The obligation to
19 notify does exist with regard to the parties to a proceedings. Now,
20 in our situation, investigating judge has deemed that there was no
21 base for criminal proceedings against Mr Jean-Pierre Bemba. So, this
22 means that if there are no proceedings, he is not party to the proceedings;
23 and no notification can be made to him, because there is no obligation
24 of notification, as such.

25 It is as if I were to walk out into the street and I said,

1 well, you know, the ICC is not prosecuting you. This has no -- this
2 makes no sense whatsoever, Mr President. There is no obligation,
3 therefore, no notification obligation except to somebody who is party
4 to proceedings.

5 Now, when the investigating judge said that no proceedings
6 would be instituted, and when the chamber of the appeals court said
7 that, for these offences, there are no grounds upon which to institute
8 proceedings and that the case should be referred to the criminal court,
9 there is no procedure in this regard within the CAR. So, even the
10 appeals that are being lodged today, well, what are they appealing
11 against precisely? It is with a view to saying 'you have said that
12 there were no proceedings against us and we are coming to tell you
13 that you must prosecute us.' This is completely illogical. This is
14 what I wanted to specify, and that's what I wanted to insist upon,
15 Mr President.

16 JUDGE ALUOCH: But have you been served with anything, any
17 documents at all? I'm just asking you, have you been served with any
18 documents as the government lawyer in respect of what has been filed
19 by the Defence in CAR?

20 MR BIZON: (Interpretation) Well, with respect to the
21 documents that were given to me, I only received a letter from a local
22 lawyer who represents the interests of Mr Bemba, and the letter states
23 that he is appealing against a judgment of the indictment Chamber.

24 And this is impossible from the legal and technical
25 standpoint, because the decision was referred to a higher court; that

1 is, the court of cassation and as a result the case was withdrawn
2 from the court. And so, if there is any challenge, the Court cannot
3 come back on its decision.

4 So, the only documents I have received is a letter stating
5 Mr Bemba's opposition and appeal for a revocation and review of the
6 judgement without any substantive arguments supporting the point. And
7 recently - that is, last night - I heard that the lawyer who is based
8 there on this port in Bangui wrote to withdraw, withdraw from this
9 appeal. I hope that answers the question you put to me.

10 PRESIDING JUDGE FULFORD: Thank you very much.

11 Logically, I understand the point in relation to the decision
12 of the investigating judge in that if he has found that there's no
13 basis to proceed, then it could be argued that there's nothing to notify.

14 However, it might be said that a different situation applies
15 once the indictments' chamber has annulled or purported to annul the
16 decision of the investigating judge, sever the indictment and ordered
17 that the case be referred to the International Criminal Court. Now,
18 it may be said that at that point there is something to notify because
19 there's been a decision made against the accused's interests.

20 Do you have any submissions to make on what the obligation
21 is of the judicial authorities in relation to notifying Mr Bemba of
22 that decision; namely, severing the indictment and referring his case
23 to the ICC?

24 MR BIZON: (Interpretation) To the best of my knowledge,
25 there are no provisions governing that. However, this is an issue

1 of pure logic. Once a decision is taken by the indicting chamber stating
2 that there is no basis to prosecute Mr Bemba at the national level,
3 well, if the national authorities of the Central African Republic
4 did not take note of this decision and did not refer the matter to
5 the ICC, well, then the situation would have ended there.

6 And at that juncture, the Court would not be under obligation
7 to send a notification to Mr Bemba. The Court wasn't under any
8 obligation to inform Mr Bemba that proceedings had been dropped against
9 him. In fact the decision handed down by the indictment chamber amounts
10 to precisely that, notably that in the Central African Republic no
11 proceedings can be instituted against Mr Bemba in respect of the offences
12 charged. He is therefore not party to any proceedings whatsoever. Thank
13 you.

14 PRESIDING JUDGE FULFORD: Thank you very much. Yes?

15 MR RASTAN: Just one observation on the last comment
16 regarding the referral. We just want you to know, of course, that
17 whereas States refer a situation, they do so in relation to the situation
18 as a whole, not a case. Therefore, the referral cannot, in and of
19 itself, have been said to prejudice the accused in any way.

20 PRESIDING JUDGE FULFORD: Yes. Yes, absolutely. Yes.
21 Good. Mr Liriss.

22 MR LIRISS: (Interpretation) Mr President, your Honours,
23 before I talk about the essential points, I wish to make a few
24 clarifications with respect to the questions which you asked.

25 Should the decision of the judge of the indictment chamber

1 be notified; that is, the decision which recommitted Mr Bemba to trial?
2 I was waiting for an answer to be given by the experts on CAR law.
3 Since they have not given any answer, I am going to provide an answer
4 by reading the law of 1962, the law under which the decision was taken.
5 And I am going to read Article 95(b), notification of the order to
6 refer the case. And we are talking about the order of referral issued
7 by the indictment chamber.

8 And I read: The notification shall be done within the
9 shortest time possible under pain of nullity; that this notification
10 shall be made to the accused, to the accused's counsel, and with the
11 associated right to appeal within 48 hours from the time of notification.

12 I am going to read to you something else, since we were told
13 that notification was impossible. I am going to read Article 193(f)
14 of the CAR law. The summons - this notification which serves as a summons
15 and notification, this summons regarding individuals domiciled abroad,
16 shall be forwarded to the competent authorities through the principal
17 public prosecutor, the public prosecutor, the Minister of Justice
18 and the Minister of Foreign Affairs. I wish to conclude this matter.

19 Another point was raised as well, and that had to do with
20 a possible stay of proceedings following the lodging of an appeal.
21 I am reading the law pertaining to the organization and operation of
22 the Court of Cassation. And I'm referring to Article 21, thereof.

23 The time limit for filing challenges to the court of cassation
24 and for acting upon such challenges will have suspensive effect only
25 in the following areas: with regard to the status of an individual,

1 or when there are interlocutory civil proceedings to decide on the
2 authenticity of a document, in the case of land registration
3 and when we are dealing with criminal matters. I will read it again,
4 Article 64.

5 During the time limit for the appeal to the court of cassation,
6 and if an appeal has been lodged - right up to the time when the court
7 of cassation hands down its judgment - there is a stay of the contested
8 judgment. In the instant case, the judgment from the indictment chamber
9 which was not notified. So I wanted to address these two matters in
10 the shortest way possible.

11 Now, let us now tend to the situation and look at it frankly.
12 Your Honours, I live in a country which is particularly hot. It is
13 so hot that when I come here, I do not forget to bring a coat with
14 me. I do not know anything about the seasons in this country. Well,
15 I tell myself that maybe it's going to snow or that maybe it's going
16 to be very cold. And when I arrive here and I find that we are actually
17 in summer, sometimes most of the clothes I bring remain in my suitcase
18 and I have to buy other clothes which are more suitable.

19 And I tell myself, that there is a very high probability
20 that it's not going to rain. The rule of probability which we studied
21 when we were learning about genetics states that in a range of
22 possibilities there is a high probability of the probable.

23 One of your compatriots stated the following, your Honour,
24 Mr President. I don't know if I'm going to pronounce his name poorly,
25 but I do know what he said, and this was an eminent British Judge,

1 Lord Denning. On this matter, he stated, it is indeed more probable
2 that it's not going to rain.

3 In the instance case, it is highly probable - in fact, more
4 probable - that this case is inadmissible. The only evidence we have
5 to bring before you is based on the scale of probabilities. The
6 Prosecution has said that we need to have irrefutable proof, convincing
7 proof. That's the American theory.

8 Well, let's assume that we had to argue this point before
9 the judges of the Pre-Trial Chamber. If that were to happen, then
10 what would be requested as evidence would be reasonable grounds to
11 believe. The standard of proof for the Prosecution would be reasonable
12 grounds to believe, and this is a lower threshold to the threshold
13 that is required of us, because they are asking us to provide convincing
14 and irrefutable evidence.

15 Your Honours, I am not asking you to be certain that this
16 case is inadmissible. I am not asking you to be convinced that this
17 case is inadmissible. I am asking you to verify on the basis of the
18 range of probabilities whether this case is admissible. And in the
19 instant case, I do state that it is inadmissible.

20 The Defence does not have the privileges that the Prosecution
21 has of calling the authorities of the Central African Republic to meet
22 with them in an air-conditioned room to discuss about this case. That
23 is what happened, indeed. But you have to remember where we are coming
24 from. We told you with respect to the abuse of process that there
25 were some -- there was some proof, some prima facie evidence.

1 However, since 13 April we have irrefutable proof,
2 irrefutable proof of the interference of the authorities - political
3 authorities, I mean - in this case, especially with respect to the
4 sending of Mr Bemba to appear before the ICC. We are going to revisit
5 that point later on.

6 Now, with respect to evidence, therefore, your Honours, we
7 are appealing, to you to rely on the principle of probability; that
8 is, the balance of probabilities.

9 Well, your Honours, you see, I am very embarrassed. I have
10 three parties against me, and they do not agree with each other on
11 a number of points, and so I will like to start by responding to what
12 was said by the honourable representatives of the Central African
13 Republic and I will follow the logic which they tried to develop here
14 before the Court.

15 Now, on the issue of complementarity, my learned colleague
16 Maître Bizon was -- or got totally lost in his arguments. He talked
17 about Article 12(2). We did not challenge that issue.

18 Our position is the following: Our application is based
19 on Article 17(1)(b) and (c), period. We are not asking for Mr Bemba
20 to be tried in the Central African Republic. God forbid. Our challenge
21 is based solely on Article 17(1)(b) and (c). And so, all the issues
22 that they mentioned on ability really do not concern us, and I'm going
23 to explain this further.

24 First of all, the legal representative of the CAR who
25 considers us to be adversaries - because that's the term he used - you

1 must understand that the CAR is not a party in this case. We are not
2 in conflict with you.

3 Well, with respect to willingness, I note with satisfaction
4 that, contrary to what the Prosecution is saying, the CAR has clearly
5 stated that they are willing to prosecute. There's no doubt about
6 that. That is what is written in their document. What they lack is
7 the ability to do so. But the question that comes to mind is the following:
8 Is this a matter that is still relevant for us still? And I will tell
9 you -- I will explain to you why it is no longer relevant.

10 Well, they talked about a new law. They say they have a
11 new law and, therefore, the principle of non-retroactivity has to apply.
12 I think we should dismiss that offhand. The most important thing here
13 is not the legal characterisation of the conduct. What is important
14 here, what is relevant is that that conduct should be punished.

15 Whether the conduct is punished under a characterisation
16 given by the ICC war crime in this case or under a characterization
17 of -- the characterisation of murder in accordance with national law,
18 the fact remains that it is the same conduct which is going to be punished.
19 So, retroactivity really doesn't apply here.

20 I think my learned colleague got mixed up in his arguments.
21 In our filing, we said that nothing should stop a State from adopting
22 the same nomenclature and the same structures as the ICC. The most
23 important thing here should be punishment of the same conduct.

24 Now, let's turn to the real problems here. Mr President,
25 your Honours, in the legislation of French speaking countries,

1 investigations do not have the same remit as they do in English speaking
2 countries.

3 In France and in other countries that inherited the French
4 body of law, there are two types of jurisdictions: You have
5 prosecutorial jurisdictions and trial jurisdictions. Courts and
6 tribunals are trial jurisdictions; and the public prosecution services
7 are bodies responsible for prosecution.

8 Now, in public prosecution services, there are three organs
9 that are involved: You have what we call the judicial police, which
10 works under the control, under the orders of the public prosecutor.
11 You have the public prosecution service which initiates prosecutions
12 and which also initiates investigations.

13 And if the service feels that an investigation should be
14 initiated, then it files an application to the investigating judge
15 requesting for the authorisation to initiate an investigation. In
16 that case, the investigating judge starts his examination. He uses
17 the police. He issues warrants of arrests. And he may also order
18 that suspect to be released.

19 The investigating judge conducts all the investigations
20 necessary. He interviews witnesses and other persons involved. And
21 when the investigating judge concludes his investigation, he sends
22 the file to the public prosecutor so that the public prosecutor can
23 make a final -- or adopt a final position on the basis of the information
24 sent by the investigating judge.

25 And on the basis of that information, he would apply for

1 investigations against Mr "X" or Mr "Y"; he would apply for dismissal
2 of the case against Mr "A" or Mr "B". This is different from the
3 discontinuance of proceedings, which is a decision taken by the
4 prosecutor himself without any investigation being led. So, withdrawal
5 of proceedings would not work. However, the decision -- or his
6 application is then sent
7 to the examining magistrate and the examining magistrate on the basis
8 of that application then issues court orders, and these court orders
9 are legal decisions, they are court decisions, regardless of what
10 anybody says.

11 He could either ask for Mr "X" or Mr "Y" to be committed
12 for trial within a criminal court or before a judge determining upon
13 minor offences -- before a judge entertaining jurisdiction, whatever
14 the case may be -- or he issues an order dismissing the case, and these
15 decisions can be appealed against a legal decision. A court decision
16 which cannot be appealed cannot simply be qualified or characterised
17 as a decision which does not have res judicata. These are decisions
18 that can be appealed before the judges of the indictment chamber. Is
19 that the case in the Central African Republic? Yes.

20 Part 1: Exercise of the public action. I would like to
21 request you to read Articles 11 right up to Article 114; so many articles
22 and just explaining how the procedure is conducted.

23 When an investigating judge sits with a court officer and
24 it takes a decision, you cannot tell me that the decision is not a
25 court decision, it's not a legal decision. When a judge issues an

1 order and that order can have an impact on the individual, then that
2 order should be notified within 48 hours so that the individual can
3 appeal the order or appeal the decision. And the Prosecutor also has
4 48 hours to appeal against the decision, but he has to appeal after
5 the decision has been issued.

6 When an order is issued dismissing a case and when the
7 Prosecutor cannot appeal -- does not appeal because he alone is expected
8 to appeal within the time-limit of 48 hours, now, what would you make
9 of such an order dismissing a case against which no appeal was launched?

10 The first sanction applicable under the penal code of the
11 Central African Republic is the following: If the investigating judge
12 believes that the act is neither a crime, an offense, or that there
13 are not sufficient charges against the accused, then the judge is going
14 to issue an order stating that there is no need to prosecute the person
15 in question. And the consequence is that if the person concerned were
16 arrested, then that person would be released. Even if -- well, the
17 second consequence of this is that, in the case of the emergence of
18 new information, new facts, an investigation cannot be conducted unless
19 an application is filed to that end by the Prosecutor.

20 Thirdly, any property seized on the basis of that information
21 would be given back to the persons concerned.

22 The fourth consequence is that the person who initiated the
23 case could be prosecuted for providing false information. And lastly,
24 any proceedings which have been concluded with an order dismissing
25 the case are filed in the records of the court under -- and this is

1 pursuant to Article 96. Yet we are being told that this was not a
2 court decision. What indeed happened?

3 On 28 August the prosecutor issued a decision – let us say
4 a further application - enabling the investigating judge to conclude
5 his examination. That application, which is 48 pages long, states
6 the following: On the responsibility of Jean-Pierre Bemba, the facts
7 state - I repeat, the facts state - that although he provided the
8 troops -- he made the troops available, he was not responsible for
9 their deployment.

10 Consequently - consequently - there are no sufficient charges against
11 Mr Bemba and he should be exonerated.

12 Based on that decision, on 28 August 2004, the investigating
13 judge also closed his investigation. What did the investigating judge
14 then decide?

15 I hope I'm not speaking too quickly, your Honour.

16 The investigating judge first looked at the application filed
17 stating: "given the application for a dismissal of the case and referral
18 made by the prosecutor on 7 August..." that is the first document that
19 was referred to. Then given Articles 91(a) and 95(a) of the code of
20 criminal procedures, Article 91(a) says that if there are insufficient
21 charges, an order for dismissal will be put forward.

22 In the document it says that he was not able to hear from
23 Mr Jean-Pierre Bemba and that indeed he has diplomatic immunity which
24 means that, in any case, he should be exonerated. In fact, he concludes,
25 and these are the grounds for his conclusion -- in his conclusion he

1 says that given that -- given that there are not sufficient facts to
2 lay charges, consequently, that the case against Mr Bemba and three
3 other people should be dismissed.

4 The grounds of the appeal for dismissal is indeed based on
5 the application for dismissal filed by the prosecutor, and this refers
6 as well to Article 91(a) that says that there are insufficient charges,
7 and also that is mentioned in the terms. And what I'm saying is even
8 more true, that is, that he should be exonerated because
9 he did have diplomatic immunity. The experts from the Central African
10 Republic working with me know what had to be done.

11 And pursuant to Article 47, if I'm not mistaken, an order
12 had to be given not to investigate. "The principal public prosecutor
13 cannot order the investigating judge not to investigate unless the
14 facts can legally lead to criminal proceedings." That provision is
15 repeated in the section pertaining to the participation of a private
16 individual.

17 But French jurisprudence that I have filed, and am filing,
18 clearly indicates the following: The argument based on the refusal
19 to prosecute subsequent to an order not to investigate, because the
20 person concerned enjoys diplomatic immunity, is well founded. French
21 doctrine tells us, and I will quote it because Central African Republic
22 legislation stems quite simply from French law. In our applications
23 we did a comparative study of legal instruments in the Central African
24 Republic and those of France, and in these documents it says that the
25 provisions of Article 90, that is to say those referring to a claim

1 for damages by a private individual, also apply to the initial
2 application filed by the public prosecution services. Had that been
3 based on immunity, there would have been an order not to investigate. And
4 if there was diplomatic immunity, why was an arrest warrant issued
5 against him? It is just today that we have found out that there was
6 an arrest warrant out for him. Did nobody take diplomatic immunity
7 into account?

8 Mr President, your Honour, based on the order for dismissal
9 that was rendered by the investigating judge, the public prosecution
10 service, which had itself requested this, if it had not been in
11 agreement, it should
12 have appealed the decision within 48 hours. And the prosecution says
13 under paragraph 15, in its answer to our application, that, indeed,
14 the public prosecution service did appeal, except with regard to the
15 provision pertaining to the dismissal of the case against Mr Bemba.

16 Since the public prosecution service did not appeal, what
17 are the consequences of this? What are the consequences of that? Let
18 me quote 112 of the CAR legislation. The indictment chamber -- because,
19 in fact, the public prosecution service appealed a number of provisions
20 -- and some parties who had been committed for trial lodged an appeal.
21 And so we have ended up in a situation where some defendants have lodged
22 an appeal. And the public prosecutor also appealed the fact that other
23 defendants were not committed to trial, but that the dismissal of the
24 clients' case was not up for appeal.

25 This situation is resolved by Article 11:

1 “The indictment chamber dealing with an appeal lodged by
2 one of the defendants against the order issued by the investigating
3 judge, as set out under Article 95, shall make a determination with
4 regard to all the defendants. It could make a determination with regard
5 to Mr Bemba, that is true. And with regard to all of the counts in
6 the proceedings, it goes on to state that: even if they have not been
7 noted by the investigating judge, whatever the case the order dismissing
8 the case which was not appealed remains valid.

9 Where does all this come from? Why is it that despite this
10 text, in the absence of an appeal, when this decision was considered
11 res judicata, that finally the indictment chamber deemed it appropriate
12 to recommit, as the Prosecution says, the Accused to trial.

13 On 13 April, after all of the applications that were made
14 to the Pre-Trial Chamber and despite the protests of the Prosecution
15 who guaranteed us that all of the disclosures had been made, we finally
16 received an answer as to what actually happened.

17 A certain Goungaye who is not party to the proceedings, a
18 lawyer for most of the victims, an adviser to Bozizé, and with his
19 own mandate, and had no business getting involved in judicial matters,
20 wrote to the President of the Court to ask - and the Prosecution says
21 to suggest - but in fact it was to impose the political views under
22 which Mr Bemba should be reintroduced, and this is despite all of the
23 legal texts that exist, and he should be committed to trial before
24 the International Criminal Court like all the others.

25 Mr. Bizon, who is a lawyer, says that there was no challenge

1 to the procedure, that it was carried out in a proper and fair manner.
2 Can he tell me today, -and look me straight in the eye and say that
3 such a procedure is standard in the Central African Republic?

4 He who marched in protest, not too long ago - I know about
5 that, my friend - against political meddling in judicial affairs, and
6 when we say that it is an abuse of process, he tells us "there is no
7 abuse, everything was done legally". When there is a decision made
8 to dismiss a case and that it has the force of res judicata the CAR
9 code states the following: You cannot reopen the case unless there
10 are new charges.

11 Your Honour, Honourable Judges, what is a new charge?
12 According to the doctrine and case law, new charges can be defined
13 as follows: New charges are statements by witnesses, minutes and
14 exhibits which would not have been submitted to the investigating
15 judge and they must be -- they're either to reinforce charges which
16 may have been deemed too weak or to inform of new developments associated
17 with the facts that are of use in the establishment of the truth. When
18 the facts upon which the subsequent prosecution is based are identical
19 from both a legal and material viewpoint to those on which the order
20 for dismissal was based, proceedings are deemed inadmissible.

21 In this particular case, the case was not reopened based
22 on new charges. The matter was closed because there was an order for
23 dismissal that was not appealed, that was not challenged. I challenge
24 - the Defence challenges - all of the parties to produce not a notice
25 of appeal, because in the notice of appeal you do not mention the grounds,

1 mention is merely made of grounds that will be developed in a subsequent
2 application. We would like to see the initial application of the
3 Prosecutor saying that it had appealed the decision against Bemba,
4 but the Prosecution has said that there was no appeal to the order
5 for dismissal.

6 Honourable Judges, let's just say for one moment - just for
7 one moment - that the order was based on the fact that Mr Bemba enjoyed
8 diplomatic immunity. This rendered the issue res judicata. He no longer
9 came under attack. Was this issue revisited in respect of internal
10 CAR legislation? And if you look at the legislation, it says when there
11 are new charges, the investigating judge cannot proceed unless new
12 information is provided by the prosecution. That is just a subsidiary
13 point. And that is why - and we have to be very clear here - through
14 his counsel in Central Africa, our client has challenged these decisions.
15 Not to have an influence here, no. Not
16 for us to challenge you based on Article 17 (1) (a), no. Not to say
17 that we want this case to be tried in the CAR, god forbid! It's simply
18 to show that the proceedings against our client were rendered ultra
19 vires; that's it.

20 Henceforth, since Article 17(1)(a) and (b) is in force, there
21 was indeed an investigation, and I explained to you what is understood
22 by investigation. A decision was made not to prosecute. That decision
23 was made when the CAR had the willingness to prosecute, as counsel
24 has just said, but proceedings cannot be reopened. And for its image
25 and in the interest of justice, the Court or rather the Chamber must

1 rely solely on the legal instruments of the CAR to consider that a
2 decision was taken on the merits. There were over 350 records of
3 proceedings in the case, which the Prosecutor sent to us. If this
4 Chamber decides that the order for dismissal does not constitute a
5 decision not to prosecute, as defined under Article 17(b), well then
6 the matter should be considered *res judicata*. That is when we can invoke
7 the *ne bis in idem*.

8 A number of decisions in case law have been put forward in
9 our applications. We have quoted cases from Belgium, France and
10 Switzerland that indicate that a non-impugned decision for dismissal
11 renders the issue *res judicata*. We have said that even in terms of
12 the law before the Court, the principle of *ne bis in idem* would apply
13 in the event of a dismissal. We told you that the European Court of
14 Human Rights applies the *ne bis in idem* when there is an order for
15 dismissal and even sometimes on the simple basis of a legal arrangement,
16 which I think is quite common in English law, between the Prosecutor
17 and the accused.

18 Mr President, perhaps I was a bit long-winded, but I will end by saying
19 the following. To my left, I think it was well understood that the
20 Defence for Mr Bemba does not want to go back to CAR. We are not
21 particularly interested in Article 17(a). We need to set the record
22 straight. When they claim that there was an MLC rebellion in the –Congo
23 – I don't know, I live there, and yet it is outsiders who inform me
24 about what is going on there. And may I... may I inform all parties
25 representing the victims and the CAR, that Mr Bemba's case is based

1 on legal instruments and nothing else, and in the CAR on the legal
2 instruments of the country. The applications and appeals that he is
3 making are not based solely on 17(1)(a). It is simply -- Mr Bemba
4 is simply trying to restore his rights in the eyes of the CAR.

5 Mr President, I'd like to thank you.

6 PRESIDING JUDGE FULFORD: Thank you very much. Mr Liriss,
7 I think Judge Aluoch has a question for you.

8 JUDGE ALUOCH: Can I just take you back to the stage at which
9 you started making your submissions, please? Now, you quoted certain
10 articles from the 1962 law which established the criminal procedure
11 in Central African Republic. You quoted Article 95, I think Articles
12 93 or 193, and then submitted -- and still proceedings following a
13 lodging of appeal, Article 21, having a suspensive effect.

14 Now, that was very different from what Ms Douzima
15 submitted -- also submitted on the same law where she did submit an
16 appeal does not have a suspensive effect. Please, can you provide
17 just these articles that you are relying on on this point, please?
18 Because we do not have them. This Article 21, Article 85, Article
19 193, just on this point, because your submissions and her submissions
20 are so different, and maybe we could get it from the text itself.
21 Thank you.

22 MR LIRISS: (Interpretation) We disclosed the texts. But
23 I was talking about two different texts. The suspensive effect,
24 Articles 21, 64 and 61 are on the legislation pertaining to the
25 organization and operation of the Court of Cassation, not the code

1 of criminal procedures. Article 21, Article 64 on the suspensive effect
2 is on the legislation pertaining to the organization and operation
3 of the Court of Cassation. Consequently, if my learned colleague has
4 referred to another text on the Court of Cassation that says something
5 else, well, you have to ask her the question.

6 I don't know if I answered your question.

7 JUDGE ALUOCH: She did not actually quote any text.
8 Articles quoted were from you, Mr Liriss. She did not quote any article.
9 But it's okay. I leave it at that.

10 MR LIRISS: (Interpretation) All right. Thank you.

11 PRESIDING JUDGE FULFORD: Thank you very much, Mr Liriss.

12 Ms Kneuer, there's a question for which we need a very careful
13 answer. Paragraph 15 of your principal submissions on 29 March - and
14 this, perhaps unsurprisingly, has been referred to by Mr Liriss more
15 than once in his submissions - addressed the appeal and the
16 missing -- what is certainly for me the missing document of 17 December
17 2004.

18 Now, what you have set out in the last sentence is this:
19 The appeal, namely the appeal from the investigating judge, did not
20 cover the part of his ruling whereby no charges against Bemba would
21 be filed. Now, on what is that assertion based? Because when you
22 then go to the decision of the indictments chamber, what one finds
23 there is simply reference to an appeal being lodged by the public
24 prosecutor at the Bangui regional court. And the indictments chamber
25 goes on to quash, apparently, or to annul, apparently, the relevant

1 part of the investigating judge's decision against Mr Bemba.

2 Now, where, then, does that last sentence in your submission
3 come from? On what basis do you say that the appeal did not cover
4 the investigating judge's ruling whereby no charges against Bemba would
5 be filed? Because the appeals chamber appears to deal with that.

6 MS KNEUER: Your Honour, to give you an accurate response,
7 I suggest that we respond to your question after lunch.

8 PRESIDING JUDGE FULFORD: Right. Well, I'm -- at the moment
9 the submissions are closed, Ms Kneuer. We've got through the order.
10 I'm somewhat reluctant to convene again just to answer a question.

11 On that point - and it must be limited to that point - what
12 is your basis for the assertion in the last sentence? Please set that
13 out in an email to the legal adviser to the division copying everyone
14 else. We don't want any submissions, all right? Just simply what
15 the underpinnings are.

16 And we take it from the silence to the question that I put
17 at the beginning that no one - and I assume this includes the
18 representatives from the Central African Republic - that no one has
19 a copy of that appeal document of 17 September 2004. And certainly,
20 if anybody within the next 48 hours manages to locate that document,
21 please, can it be sent, by fax or any other method, to the legal adviser
22 to the division?

23 Mr Liriss, I see your hand's up. Do you have an answer to
24 this conundrum?

25 MRLIRISS: (Interpretation) Your Honour, please. I would

1 like to clarify that in the CAR proceedings when there is an appeal,
2 the notice of appeal is quite simply a document from the court officer
3 saying that an appeal has been lodged.

4 Now, one has to find out or establish what the grounds are,
5 and it is the application underpinning this notice of appeal that
6 establishes that. So if we produced you with a notice of appeal,
7 you -- the conundrum will not be solved as such.

8 PRESIDING JUDGE FULFORD: Right. Well, that is extremely
9 helpful. Do I take it, therefore, Mr Liriss, that what one needs to
10 look for is what is set out in the application of 24 November 2004,
11 which is signed by the public Prosecutor? Does that constitute the
12 grounds that support the 17 September notice of appeal?

13 MR LIRISS: (Interpretation) No, I do not believe so.
14 Because with regard to this application, or in this application we
15 do not see the grounds upon which the Prosecutor is saying that the
16 decision does not concern Mr Bemba.

17 PRESIDING JUDGE FULFORD: Right. Same question then, but
18 slightly differently formulated.
19 It would seem, therefore, if Mr Liriss is right, that the document
20 itself of 17 September isn't going to help us. But what we also do
21 not seem to have, unless I've missed it, are the grounds. Now, is
22 that right? Yes. Good. If anybody, therefore, has a copy of the
23 grounds that support the application of 17 September 2004, we would
24 be very grateful for sight of them. And we are assuming that neither
25 the Defence nor the Prosecution nor the legal representatives of victims

1 have that document, but it needs to be looked for, please, given the
2 extent of the emphasis that has been laid on it.

3 Now, the next point that I want to raise is for consideration
4 by the representatives from the Central African Republic.

5 During the course of Mr Liriss's submissions there has been
6 particular focus on two things that I'm going to highlight. First,
7 it is suggested that if there is a dismissal of a case by an investigating
8 judge, there is an obligation to notify the dismissal within 48 hours
9 on pain of a nullity being the result if that doesn't happen. And
10 as I understood it, Mr Liriss referred to the 1962 provisions and,
11 in particular, Article 95(b) and, in the event of notification being
12 impossible, Article 193(f).

13 The second matter was it is suggested that in the relevant
14 appellate proceedings in a criminal cause there is an automatic stay
15 of proceedings for criminal matters.

16 Now, those are two very specific contentions that have been
17 advanced by Mr Liriss, based on particular provisions that were then
18 in force, as we're told. Is this something, Mr Bizon, that you would
19 wish to reply to, either orally now or in writing in due course, given
20 that both of those submissions by Mr Liriss are very much at odds
21 with the submissions that you put forward earlier?

22 MR BIZON: (Interpretation) Mr President, I would suggest
23 that I briefly respond to this, and I would request the authorization
24 of the Court to provide written submissions on these two points, if
25 the Court -- with the Court's leave, that is.

1 PRESIDING JUDGE FULFORD: You can, given that this has arisen,
2 really, only in this detail for the first time during the course of
3 today's hearing. We would limit you, please, Mr Bizon, to those points.
4 Otherwise this will expand out of control. And we will, of course,
5 give Mr Liriss the opportunity of responding in due course.

6 If I was to ask you to provide us with your submissions on
7 that point by 4 p.m. on Friday of this week, would that give you long
8 enough, Mr Bizon?

9 MR BIZON: (Interpretation) Friday is a bit short notice
10 for me, in view of the fact that I do not have all the elements of
11 reply at my disposal.

12 PRESIDING JUDGE FULFORD: Friday a week, 7 May?

13 MR BIZON: (Interpretation) Yes, 7 May would be perfect.

14 PRESIDING JUDGE FULFORD: Do so, please. And then we will
15 say that -- thank you very much, Mr Bizon. Those will be filed, then,
16 by 7 May. We will give the Prosecution and legal representatives until
17 4 p.m. on Tuesday the 11th to respond, and the Defence to respond to
18 all submissions by Friday, 14 May, on this limited point in relation
19 to the provisions that I read out a few moments ago.

20 Thank you very much, Mr Bizon.

21 In a moment, Mr Liriss, in a moment.

22 Thank you, Mr Bizon. Was there something else you wanted
23 to say?

24 MR BIZON: (Interpretation) Not at all. I just wanted to
25 make a brief observation, but in view of the fact that you have allowed

1 me to address the Trial Chamber in writing, then I think that that
2 will suffice.

3 PRESIDING JUDGE FULFORD: Thank you very much then.

4 During the course of the submissions by Mr Bria there was
5 reference to what appeared to be a numbered paragraph 4 of the written
6 submissions from the authorities of the Central African Republic. We
7 only have one document, effectively, from the authorities of the CAR,
8 which is the document of 16 April 2010, which is unnumbered. And so,
9 Mr Bria, we were slightly nervous that you are referring to a different
10 set of submissions which have numbered paragraphs.

11 Now, if that's the case, that is a document that we have
12 never seen and I think, seeing Mr Bemba himself nod his head, nor has
13 he. Is there, in fact, another set of submissions which you're relying
14 on which we haven't seen?

15 MR BRIA: (Interpretation) I wouldn't say that that was
16 correct. I believe that this information was provided to the legal
17 representative of the State, and he did make mention of them and took
18 them into account, but we could always provide you with this document,
19 if you like.

20 PRESIDING JUDGE FULFORD: We're going to be rising in a moment.
21 When we do, can I ask you, please, to liaise with the legal adviser
22 to the division, so that we can make sure that everybody has got the
23 correct documentation. It's obviously important that everybody has
24 seen a copy of the various submissions that have been made and relied
25 on.

1 Just give me a moment.

2 (Pause in proceedings)

3 I want to thank everyone involved in this hearing for some
4 extremely focussed and well-argued submissions that have enabled us
5 to address what is a relatively complicated issue extremely
6 expeditiously and helpfully. Most particularly, I want to thank the
7 delegation from the Central African Republic for the assistance that
8 they've provided and for the personal attendance before us of the
9 Minister of Justice. Your presence here today is acknowledged, of
10 course, and we are very grateful for it.

11 That, then, concludes this hearing in relation to the
12 admissibility challenge. And without committing ourselves to a
13 particular deadline, we will, of course, try to issue a decision on
14 this important issue as soon as we possibly can. We will rise now.

15 THE COURT USHER: All rise.

16 PRESIDING JUDGE FULFORD: Sorry. Mr Liriss, I forgot. You
17 had another matter to raise. Yes.

18 MR LIRISS: (Interpretation) Mr President, I just wanted
19 to request your leave, because in view -- well, the questions that
20 are going to be sent to us are matters of law, and please allow that
21 we also provide the opinion of an expert in Central African law; that
22 is to say, that we shall give - in addition to our response - the
23 opinion of an expert in Central African Republic law. Unless, with
24 your leave of course, I transmit this to the Court so that all the
25 parties can see it and that they then respond, taking into account

1 this information. And so, of course, we will still have the adversarial
2 matter in hand, and I shall do so this afternoon.

3 PRESIDING JUDGE FULFORD: Thank you, Mr Liriss.

4 (Trial Chamber III confers)

5 PRESIDING JUDGE FULFORD: Mr Liriss, thank you for your
6 application. On the main issue in relation to expert evidence on this
7 point, we have already ruled; and all we have requested are particular
8 focussed submissions from the representatives of the Central African
9 Republic as regards to separate sets of provisions that you relied
10 on in detail during the course of your submissions.

11 Given that the representatives have not had an opportunity
12 of researching and investigating those in advance, because they had
13 not had warning of them, we have exceptionally granted time for them
14 to address those particular issues in writing during the timeframe
15 that we have established; and you will have a right of reply, again
16 within the timeframe that we have established.

17 There is no need for us to add to this by permitting expert
18 evidence to be given by a witness, particularly given that - although
19 we have been alerted to this possibility - no material has been received
20 at all from the Defence as to the kind of evidence or the detail of
21 the evidence that an expert can give. So the application is refused,
22 and we simply wish for the particular focussed submissions on the
23 issues that I identified a few moments ago. Good.

24 Thank you all very much. We will rise.

25 THE COURT USHER: All rise.

1 (The hearing ends at 1.15 p.m.)

2 CORRECTIONS REPORT

3 The English transcript has been revised and corrected by the Court
4 Interpretation and Translation Section.

5 Due to a large amount of corrections, these have been implemented
6 directly into the transcript