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Date: **23 April 2010**

**TRIAL CHAMBER III**

**Before:** Judge Adrian Fulford, President  
Judge Elizabeth Odio Benito  
Judge Joyce Aluoch

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

**Public Document**

**Response by the Legal Representative to the Defence's First and Second Requests  
in order to inform the Chamber of new developments in the judicial proceedings  
in the Central African Republic**

**Source:** Office of Public Counsel for Victims

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

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**Detention Section**

**Victims Participation and Reparations  
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## I. Procedural Background

1. On 25 February 2010, the Defence submitted a “Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2)(a) du Statut de Rome”, (the «Admissibility Motion» or the «Motion» ) of which a public redacted version was filed on 02 March 2010. Pursuant to the Trial Chamber’s subsequent instruction, said Motion was reclassified as confidential, and subsequently a public redacted version was filed by the Defence.<sup>1</sup>

2. On 1 April 2010, the Principal Counsel for the Office of Public Counsel for Victims, as Legal Representative in the Case,<sup>2</sup> (the “Legal Representative”), submitted its “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted” (the “Response”).<sup>3</sup> On 16 April 2010, the Legal Representative filed a Corrigendum to the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a)

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<sup>1</sup> See the “Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2) (a) du Statut de Rome”, No. ICC-01/05-01/08-704-Red2-Conf, 02 March 2010; See the “Requête en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2) (a) du Statut de Rome”, No. ICC-01/05-01/08-704-Red3, 09 April 2010.

<sup>2</sup> The Office filed its Response on behalf of a/0278/08, a/0279/08, a/0291/08, a/0292/08, a/0293/08, a/0296/08, a/0297/08, a/0298/08, a/0455/08, a/0457/08, a/0458/08, a/0459/08, a/0460/08, a/0461/08, a/0462/08, a/0463/08, a/0464/08, a/0465/08, a/0466/08 et a/0467/08, already authorised to participate at trial, and of applicants a/0280/08; a/0456/08; a/0541/08 to a/0543/08; a/0546/08 to a/0552/08; a/0555/08 to a/0557/08; a/0559/08; a/0560/08; a/0511/08 to a/0517/08; a/0562/08 to a/0573/08; a/0574/08 to a/0579/08; a/0582/08 to a/00606/08; a/0624/08; a/0625/08; a/0001/10 to a/0025/10; a/0129/09 to a/0141/09; a/0427/09; a/0428/09; a/0429/09; a/0430/09; a/0431/09 to a/0433/09; a/0651/09 to a/0653/09; a/0661/09 to a/0668/09; a/0155/10; a/0156/10; a/0160/10; a/0162/10 to a/0215/10; a/0297/10 to a/0332/10; as well as on behalf of 178 individuals having filed a request for participation and not having yet been assigned a VPRS number, and on behalf of those victims who have communicated with the Court, pursuant to rule 59(3) of the Rules of Procedure and Evidence.

<sup>3</sup> See the “Response by the Legal Representative of Victims to the Defence's Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-742, 01 April 2010. Due to a major Outlook breakdown on 1 April 2010, this document was notified by Court Management – Court Records on the next working day of 6 April 2010.

of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”.<sup>4</sup>

3. On 13 April 2010, the Defence filed a “*Requête de la Défense aux fins d’informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine*» (the Defence’s First Request).<sup>5</sup> On 19 April 2010, the Defence filed yet a second «*Deuxième Requête de la Défense aux fins d’informer la Chambre de Première Instance III d’un nouveau développement de procédure judiciaire intervenu en République Centrafricaine en date du 16 Avril 2010*» (the «Defence’s Second Request»).

4. On 19 April 2010, the Registrar filed the transmission of the responses to the summary of the Defence’s Admissibility Motion from the Central African Republic (the “CAR”) and the Democratic Republic of Congo (the “DRC”).<sup>7</sup>

5. The Legal Representative hereby submits the following observations regarding the Defence’s First and Second Requests.

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<sup>4</sup> See the “Corrigendum to the “Response by the Legal Representative of Victims to the Defence’s Challenge on Admissibility of the Case pursuant to articles 17 et 19 (2) (a) of the Rome Statute with 102 Annexes Confidential ex parte OPCV only and same Annexes Public Redacted”, No. ICC-01/05-01/08-756, 16 April 2010, and No. ICC-01/05-01/08-742-Corr. In the present filing, references to the OPCV arguments in response to the Defence’s Admissibility Motion are taken from the latter citation.

<sup>5</sup> See the “*Requête de la Défense aux fins d’informer la Chambre de Première Instance III de nouveaux développements de procédure judiciaire intervenus en République Centrafricaine* », No. ICC-01/05-01/08-751, 13 April 2010.

<sup>6</sup> See the «*Deuxième Requête de la Défense aux fins d’informer la Chambre de Première Instance III d’un nouveau développement de procédure judiciaire intervenu en République Centrafricaine en date du 16 Avril 2010*», No. ICC-01/05-01/08-757, 19 April 2010.

<sup>7</sup> See the “Registrar’s transmission of the responses to the summary of the “Requete en vue de contester la recevabilité de l’Affaire conformément aux articles 17 et 19(2)(a) du Statute de Rome » from the Central African Republic and the Democratic Republic of Congo”, No. ICC-01/05-01/08-758-Conf., 19 April 2010.

**II. The Defence does not provide any legal basis for the contention that the recent filings before the CAR courts are allowable or will lead to new proceedings**

6. In its First Request, the Defence notified the Chamber that, after consulting with a local law firm in the CAR, a "*Recours en opposition*" was filed against the decision rendered by the "*Chambre d'accusation*" and a "*Requête en retraction*" was filed against the decision rendered by the "*Cour de Cassation*",<sup>8</sup> both instances having determined that they will not prosecute the Accused for the crimes allegedly committed in the CAR.<sup>9</sup>

7. The Legal Representative argues that in accordance with the CAR legislation, said claims are inadmissible and, in any events, that the Defence has not provided any legal basis for filing such claims at this late stage of the proceedings. Indeed, pursuant to article 84 of the Constitution of the CAR, the decisions of the "*Cour de Cassation*" are not appealable.<sup>10</sup> Being that this is the highest judicial authority in the CAR, it is unclear why counsel would choose to file any kind of review motion before a lower tribunal, such as the "*Chambre d'accusation*", since it is the decision by the "*Cour de Cassation*" that is final and binding on the fact that the CAR authorities will not proceed against the Accused and that the matter falls within the jurisdiction of the Court.

8. Moreover, according to article 47 of the "*Loi organique*" number 95.0011 of 23 December 2005, which was attached as Annex C to the Defence's Second Request, a

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<sup>8</sup> See *supra* note 5, paras. 7-8.

<sup>9</sup> See the «Arrêt d'information partielle de non lieu, de disjonction et de renvoi devant la Cour Criminelle, de la Chambre d'Accusation N021 du 16 Decembre 2004», (Chambre d'Accusation), CAR-OTP-0004-0148, EVD-P-02749, 16 December 2004, p. 18; See the «Arrêt du 11 avril 2006 de la Chambre Criminelle de la Cour de Cassation; Affaire Etat Centrafricain c. Ange Felix Patassé et Autres» (Cour de Cassation), CAR-OTP-0019-0258, EVD-P-01327, 11 April 2006, p. 3.

<sup>10</sup> See the «Journal Officiel de la République Centrafricaine, Décret No. 04.392 du 27 décembre 2004, Portant Promulgation de la Constitution de la République Centrafricaine, Édition Spéciale, Janvier 2006.

*“recours en retraction” can be filed only in the following three cases: « un recours en rétractation peut être exercé : contre les décisions qui ont été rendues sur pièces fausses ; si la partie a été condamnée faute de représenter une pièce décisive retenue par son adversaire ; si la décision est intervenue sans qu’en aient été observées les dispositions relatives à la formation de jugement, à la lecture de l’arrêt en audience publique et aux énonciations de l’arrêt ».*<sup>11</sup>

9. In this respect, the Defence has failed to raise and prove in said *“recours”* any of the grounds listed under article 47 for which such recourse can allegedly be brought before the *“Cour de Cassation”*. The only ground mentioned by the Defence is that the Accused never received notice of the decision by said tribunal,<sup>12</sup> but again, the Defence does not provide any evidence thereof. Therefore, apart for the fact that it seems that such claims are inadmissible before the CAR judicial authorities, the Defence has failed to demonstrate that either filing registered before the courts in the CAR have a proper legal basis. The Legal Representative also notes that even if the Defence could prove that the Accused never received notice of the decision, it has not provided any reasonable ground for filing such claims so late in the proceedings. It can indeed reasonably be argued that the Accused was well aware of such fact since the beginning of his transfer at the Court.

10. This approach seems to be espoused by the CAR authorities which, in their observations to the Admissibility Motion address, among other matters, the First and Second Requests by the Defence, emphasising that the *“Cour de Cassation”* does not have jurisdiction to rule on the merits of either the opposition or retraction motions filed by the Accused in the CAR.<sup>13</sup> In this respect, the Legal Representative respectfully submits that the CAR authorities should be requested to elaborate on the matter at the hearing scheduled for the 27<sup>th</sup> April 2010.

<sup>11</sup> See *supra* note 6, Annex C (Article 47).

<sup>12</sup> See *supra* note 5, par. 7.

<sup>13</sup> See *supra* note 7, Conf-Anx2B, p.13.

11. Furthermore, and as also remarked by the CAR national authorities in their observations, the Defence contradicts itself in that it has previously argued in its Admissibility Motion that the CAR prosecution of the Accused had been started and terminated with a final decision by the courts, thereby constituting *ne bis in idem*, while it now, through these new filings, claims that the proceedings against him are still ongoing.<sup>14</sup> If the principle of *ne bis in idem* prevented the Case before the Court from being admissible because the proceedings against the Accused had been finalised to the point that *res judicata* had attached, then no new “developments” in said proceedings could arguably take place. If, on the other hand, said proceedings are at the current time still ongoing, as the Defence alleges, then the Accused was never “tried by another court” pursuant to article 20(3) of the Rome Statute. The fact that the Defence is simultaneously arguing both these positions dilutes each one’s soundness.

12. In light of the above, the Legal Representative submits that the recent filings by the Defence before the CAR courts as purely a delay tactic, and one which is seeking to abuse said recourse for that purpose. The Legal Representative further submits that this tactic is perceived by victims as a further impediment to their legitimate right to the establishment of the truth and to justice. Victims further reiterated their concern in relation to the inability of the CAR authorities to properly prosecute the Accused.

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<sup>14</sup> *Idem*, p. 12.

**III. The recently filed “*Recours en Retraction*” and “*Recours en opposition*” before the CAR courts do not change the legal or factual circumstances rendering the Case admissible before the Court**

13. Even if, assuming for argument’s sake, the recent filings before the CAR courts were properly filed under some legal basis which the Defence has neglected to present to the Chamber, the Legal Representative submits that these would not in any way affect the analysis that this Chamber must engage in order to determine the issue of admissibility. As previously argued by the Legal Representative in her Response to the Defence’s Motion, the judgment by the “*Cour de Cassation*” does not render the Case against the Accused inadmissible since, in light of the *ne bis in idem* principle, said judgment was not rendered on the merits of the criminal allegations made against the Accused at the national level.<sup>15</sup> The judgment is rather of a procedural nature, and not rendered on the merits of the allegations against the Accused, instead referring him to the Court for prosecution. As such, the judgment does not have *res judicata* effect.<sup>16</sup> It is, however, a final decision by the highest court in the CAR, and as such, it is highly unlikely that the latter will “retract” itself on the matter.<sup>17</sup> Be that as it may, and until it does, the Defence’s arguments that a mere filing by a party justifies dismissing the Case before the Court as inadmissible are baseless.

14. A mere filing by a party with the registry before a court or chamber does not equate to a significant “development” in the advancement of the proceedings

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<sup>15</sup> See *supra* note 4, paras. 39-56.

<sup>16</sup> *Idem*, paras. 42, 47-48.

<sup>17</sup> See BORE (J.) & BORE (A.), *La Cassation en Matière Pénale*, Dalloz, 2<sup>nd</sup> ed., 2004, p. 147.36. «Lorsqu’elle statue au fond sur l’opposition, la chambre criminelle se montre particulièrement discrète et se borne souvent à énoncer ‘qu’il n’est produit aucun moyen ou argument de nature à déterminer la chambre criminelle à rétracter son arrêt initial’ [...], ce qui ne veut dire qu’aucun d’eux n’est assez fort pour déterminer la Cour suprême à revenir sur son arrêt. La Cour suprême répugne manifestement, non seulement à se déjuger, ce qui pourrait compromettre l’autorité de sa jurisprudence, mais encore à argumenter pour justifier la solution qu’elle a adoptée dans l’exercice de son pouvoir juridictionnel. »



therein, if any, as the Defence contends, nor does it represent a determination by either the judicial or national authorities to commence the prosecution of an accused within their jurisdiction. Indeed, the French legal definition for the term “*rétraction*” points out that

[C]e n’est pas l’acte d’opposition qui met le premier jugement à néant, mais la décision que prend le juge s’il décide de la “rétracter” après que la procédure ait été menée contradictoirement.<sup>18</sup>

15. The Legal Representative submits, moreover, that the Chamber should not at this stage engage in any substantive analysis as to the documents purportedly filed in Bangui (CAR) by the Defence, without any further action in response being taken by the CAR judiciary; to do so at a juncture where the proceedings against him have been terminated since the final decision by the “*Cour de Cassation*” in 2006<sup>19</sup> would be premature and unnecessary to the determination *sub-judice* of the admissibility challenge.

#### **IV. The Defence has failed to provide any evidence that the judiciary of the CAR was unduly influenced by the letter sent by attorney Mr Goungaye Wanfiyo**

16. In its Second Request, the Defence raises another, allegedly new development, in that it recently became aware of a letter sent by Mr Nganatouwa Goungaye Wanfiyo (“Mr Goungaye”) to the President of the “*Cour Criminelle*” in Bangui (CAR) in 2004, wherein Mr Goungaye, on behalf of President Bozizé, suggested a separation of the Case against Patassé and others and remarked that the Court should initiate an investigation.<sup>20</sup> The Legal Representative submits that this letter does not reveal any new information to the Chamber that would affect, one way or another, its

<sup>18</sup> See the Lexique Juridique for the word “Retracter”, available at the following address: <http://www.juritravail.com/lexique/retracter.html> (last visited 20 April 2010).

<sup>19</sup> See *supra* note 9, p. 3.

<sup>20</sup> See the letter sent to Jean Noël Bangue from Nganatouwa Goungaye Wanfiyo, CAR-OTP-0019-0169, 11 December 2004.

consideration of the relevant legal criteria in order to determine whether the Case against the Accused is inadmissible before the Court. According to the Defence, this letter shows that the referral of the Accused to the Court for prosecution was influenced by improper political motivations.<sup>21</sup> Yet, the Defence fails to establish this serious accusation against the CAR judicial authorities with any kind of evidence.

17. The CAR national authorities have a right, under article 14 of the Rome Statute, to refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed. The letter referenced by the Defence and sent to the President of the “*Cour Criminelle*” in Bangui (CAR) is just that, a letter. There is nothing inherently illicit about it, and it does not prove that, had it not been sent, the judicial authorities in the CAR would not have reached the same decision to refer the Accused to the Court for prosecution. The motive for the desired referral and expressed in said letter was that the Court disposed of means to conduct an investigation on the allegations of “*crimes de sang*” against Mr Bemba which, according to said letter, the CAR lacked.<sup>22</sup>

18. The allegation by the Defence that the judicial authorities’ imputed impartiality in deciding proceedings before them was improperly influenced by this letter is not supported by any evidence, and said inference cannot be made *ipso facto* from the letter itself. Moreover, the decision by both the “*Chambre d’Accusation*”<sup>23</sup>, and in “*pourvoi*”, the “*Cour de Cassation*”<sup>24</sup>, to recommend that the Accused be referred to the Court was not in any way unreasonable or unjustified, in light of the fact that the lower criminal court (“*juges d’instruction*”) had already decided that due to diplomatic immunity, the case against Mr Bemba could not proceed forward in the CAR.<sup>25</sup>

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<sup>21</sup> See *supra* note 6, paras. 9-10.

<sup>22</sup> See *supra* note 20.

<sup>23</sup> See *supra* note 9, p. 18.

<sup>24</sup> See *supra* note 9, p. 3.

<sup>25</sup> See the «Ordonnance de non lieu partiel et de renvoi devant la cour criminelle» (Doyen de Juges d’Instruction), 16 September 2004, CAR-OTP-0019-0137, EVD-P-01319, p. 11.

19. Furthermore, the Legal Representative submits that political innuendos do not in any way bear on the legal criteria that must be applied by the Court in order to decide on the Defence's admissibility challenge pursuant to article 19 of the Rome Statute, and as such, do not have any place in these proceedings and are irrelevant Defence arguments. As Trial Chamber II pointed out in its Decision on the admissibility challenge presented by the Defence in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui Case*, "[t]he Chamber is not in a position to ascertain the real motives of a State which expresses its unwillingness to prosecute a particular case. A State may, without breaching the complementarity principle, refer a situation concerning its territory to the Court if it considers it opportune to do so, just as it may decide not to carry out an investigation or prosecution of a particular case."<sup>26</sup>

**FOR THE FOREGOING REASONS**, the Legal Representative respectfully requests that the Chamber dismiss the First and Second Requests by the Defence as unfounded.



**Paolina Massidda**  
**Principal Counsel**

Dated this 23 April 2010

At The Hague, The Netherlands

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<sup>26</sup> See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)", (Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 16 June 2009.