Cour Pénale Internationale

International Criminal Court

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No.: **ICC-01/05-01/08 OA3**
Date: **17 August 2010**

APPEALS CHAMBER

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC
IN THE CASE OF

THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO

Public Redacted Version

Prosecution's Response to «Document in Support of the Defence Appeal Against the Decision of Trial Chamber III of 24 June 2010 *Decision on the Admissibility and Abuse of Process Challenge* »

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor

Counsel for the Defence
Mr Nkwebe Liriss
Mr Aimé Kilolo-Musamba

Legal Representatives of Victims
Ms Marie-Edith Douzima Lawson

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massida

The Office of Public Counsel for the Defence

States Representatives
Competent authorities of
the Central African Republic

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. On 24 June 2010, Trial Chamber III issued the "Decision on the Admissibility and Abuse of Process Challenge" (the "Decision"). In the Decision, the Chamber dismissed the challenge to the admissibility of the case and the abuse of process challenge presented by the Defence for Jean-Pierre Bemba Gombo ("the Appellant").
2. The Appellant requests that the Appeals Chamber overturn the Decision and declare that the case against the Appellant is inadmissible; or, in the alternative, that it find that the Trial Chamber committed procedural errors and remand the case for a new determination on admissibility.
3. None of the arguments advanced by the Appellant show the existence of error invalidating the Decision. The Trial Chamber correctly held that there is no extant investigation or prosecution in the CAR under Article 17(1)(a). Rather, the domestic proceedings against the Appellant were halted because the judicial authorities and State representatives referred the case to and sought the prosecution of the Appellant before the ICC. Based on these grounds the Trial Chamber found that the case is admissible before this Court under the terms of Article 17(1).
4. The Appellant's main contention is that the case is inadmissible under Article 17(1)(b) since, allegedly, there was a decision on the merits that dismissed the charges against him, and which was not subject to a valid appeal. This assertion is based on an incorrect and selective reading of the CAR proceedings. In addition, the Appellant advances three additional grounds that relate to findings made by the Chamber which were not determinative of the issue of admissibility. Hence, following the jurisprudence of this Chamber they should be dismissed *in limine*. In any event, should the Chamber entertain these arguments, the Prosecution demonstrates below how the Trial Chamber correctly applied the relevant

provisions and rightly exercised its discretion on evidentiary issues and in matters of trial management.[1]

II. Procedural Background

5. On 18 December 2004, the Government of the CAR referred the situation in the CAR to the Prosecutor of the ICC.[2] In June 2005, the Prosecution received detailed information from the CAR judicial authorities of the crimes allegedly committed and relevant information related to national proceedings.[3] On 22 May 2007, the Prosecutor announced the decision to open an investigation into the situation in the CAR.[4]

6. On 9 May 2008, the Prosecutor filed its Application under Article 58 ("Arrest Warrant Application")[5] requesting, *inter alia*, a warrant of arrest for the Appellant. On 23 May 2008 Pre-Trial Chamber III issued an arrest warrant and on 24 May 2008,[6] the Appellant was arrested in the Kingdom of Belgium.

7. On 10 June 2008, PTC III issued a new warrant of arrest to replace the 23 May warrant.[7] In the accompanying decision, PTC III also made an initial *sua sponte* assessment of admissibility, whereby it found the case admissible as "[…] it would appear that the CAR judicial authorities abandoned any attempt to prosecute Mr Jean-Pierre Bemba for the crimes referred to in the Prosecutor's Application, on the ground that he enjoyed immunity by virtue of his status as Vice-President of the DRC[...]."[8]

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[1] Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Prosecution files this document confidentially due to references to information that is contained in a witnesses' statement. There are no additional reasons for maintaining this classification. A public redacted version is being filed separately.
[2] ICC-01/05-16-US-Exp-Anx1A, transferred to the Case under the reference ICC-01/05-01/08-29-Conf-Anx1A.
[3] ICC-01/05-16-US-Exp-Anx1B, transferred to the Case under the reference ICC-01/05-01/08-29-Conf-Anx1B.
[4] http://www.icc-cpi.int, Press and Media, Press Releases (2007)ICC-OTP-20070522-220, "Prosecutor opens investigation in the Central African Republic".
[5] ICC-01/05-01/08-26-US-Exp.
[6] ICC-01/05-01/08-1.
[7] ICC-01/05-01/08-15.
[8] ICC-01/05-01/08-14-tENG, paras.21,22.

8. On 3 July 2008, the Appellant was surrendered to the seat of the Court and he made his first appearance on 4 July 2008.[9]

9. On 15 June 2009, PTC II confirmed most of the charges against the Appellant.[10] In its Confirmation Decision, PTC II also assessed admissibility, reiterating the conclusion in the 10 June 2008 Decision.[11]

10. On 25 February 2010, the Defence submitted its Motion challenging the admissibility of the case pursuant to Articles 17 and 19(2)(a) of the Statute ("Admissibility Challenge").[12] The Defence argued that the case against the Appellant was inadmissible on multiple grounds and requested a stay of proceedings on the grounds of abuse of process.

11. On 8 March 2010, the Chamber held a status conference to establish the procedure to be followed on the Defence Admissibility Challenge pursuant to Rule 58(2). It instructed the parties and participants, including the CAR and DRC authorities, to file their observations on the defence application. It also scheduled a hearing for oral submissions for 27 April 2010 ("Admissibility Hearing"); and it postponed the start of the trial to 5 July 2010.[13]

12. On 29 March 2010, the Prosecution[14] and one of the legal representatives of victims filed their responses to the Challenge.[15] The OPCV filed its observations on 1 April 2010.[16] The Defence replied on 14 April 2010.[17]

13. On 13 and 19 April 2010, the Defence filed applications informing the Trial Chamber of developments in the legal proceedings in the CAR, and in particular that the Appellants counsel in Bangui had filed several motions against CAR

[9] ICC-01/05-01/08-T-3-ENG.
[10] ICC-01/05-01/08-424.
[11] ICC-01/05-01/08-424, paras.25-26.
[12] ICC-01/05-01/08-704.
[13] ICC-01/05-01/08-T-20-CONF-ENG.
[14] ICC-01/05-01/08-739 ("Prosecution's Response to the Defence Admissibility Challenge").
[15] ICC-01/05-01/08-740-tEng.
[16] ICC-01/05-01/08-742-Corr.
[17] ICC-01/05-01/08-752-Corr-tEng.

judicial decisions that had allegedly never been served on him. The Defence requested that these applications form part of its Admissibility Challenge.[18]

14. On 19 April 2010, the Registrar notified the observations of the CAR and the DRC.[19] On 23 April 2010, the Prosecution and the OPCV respectively filed their responses to the Defence's applications of 13 and 19 April 2010 on developments in the judicial proceedings in the CAR.[20]

15. Also on 23 April 2010 the Defence requested leave to file a report from an expert on criminal procedure in the CAR, who could also give evidence on 27 April 2010 during the Admissibility Hearing, if the Chamber deemed it appropriate.[21] On 26 April 2010 the Prosecution and the OPCV opposed this application.[22]

16. In the Admissibility Hearing of 27 April 2010, the parties and the legal representatives of participating victims made oral observations on the Challenge to Admissibility and related issues. The Chamber dismissed the Defence request for an expert report on the basis that the interpretation of the law of criminal procedure in the CAR did not necessitate calling an expert witness, and could be addressed satisfactorily in counsel's submissions.[23]

17. At the Hearing, the Chamber identified two matters raised by the Defence to be addressed by the CAR authorities by way of written submissions.[24] The CAR authorities responded on 7 May 2010,[25] and submitted that (i) the Bangui Prosecutor appealed against the Order of 16 September 2004 (or Order for Partial Dismissal) in its entirety – thus including the dismissal of the charges against the Appellant;[26] (ii) according to the applicable provisions there was no obligation to notify the Appellant of this Order, or the Appeal Judgment of 16 December 2004

[18] ICC-01/05-01/08-751 and ICC-01/05-01/08-757.
[19] ICC-01/05-01/08-758-Anx2A, ICC-01/05-01/08-758-Anx2B and ICC-01/05-01/08-758-Conf-Anx3 (CAR); and ICC-01/05-01/08-758-Conf-Anx1 (DRC).
[20] ICC-01/05-01/08-761; ICC-01/05-01/08-759.
[21] ICC-01/05-01/08-760.
[22] ICC-01/05-01/08-763, and ICC-01/05-01/08-762.
[23] T-22, p.2,lns.7-15 ; p.70,lns.5-21.
[24] T-22, p.66.
[25] ICC-01/05-01/08-770, with annexes 1,2,3.
[26] ICC-01/05-01/08-770-Anx.1,partII.

which related to measures of judicial administration;[27] and therefore (iii) the appeal that the Appellant has lodged against the Appeal Judgment of 16 December 2004 of the Indictment Chamber of the Bangui Court of Appeal has no suspensive effect as he has no right to appeal against a decision of judicial administration.[28]

18. The Prosecution and the OPCV filed responses on 11 May 2010.[29] The Defence responded to the CAR's, the Prosecution's, and OPCV's observations on 14 May 2010.[30]

19. On 24 June 2010, the Trial Chamber issued its "Decision on the Admissibility and Abuse of Process Challenges" ("the Decision"). It found that the case was admissible before the Court and that there had been no material irregularity or impropriety in the proceedings and therefore the abuse of process challenge was without foundation.[31]

20. On 28 June 2010 the Defence appealed the Decision pursuant to Article 82(1)(a) and Rule 154(1).[32] On 5 July 2010, it applied for the suspension of the current proceedings before Trial Chamber III pending the Appeals Chamber's decision on the merits of this appeal.[33]

21. On 7 July 2010 the Trial Chamber vacated the trial date and fixed a status conference for 30 August 2010 when the Chamber will hear, *inter alia*, submissions on re-fixing the trial date. It noted that it was in the interest of justice for this challenge to be resolved prior to the commencement of trial.[34]

22. On 8 July the Prosecution opposed the Defence's request to suspend the proceedings,[35] and on 9 July 2010 the Appeals Chamber denied it on the basis that

[27] ICC-01/05-01/08-770-Anx.1,partIII.
[28] ICC-01/05-01/08-770-Anx.1,partIV.
[29] ICC-01/05-01/08-774; ICC-01/05-01/08-773.
[30] ICC-01/05-01/08-776-Red2-tENG.
[31] ICC-01/05-01/08-802.
[32] ICC-01/05-0l/08-804OA3-Corr2-tENG; the Accused filed two corrigenda on 28 and 29 June 2010 respectively (ICC-01/05-01/08-804OA3-Corr and ICC-01/05-0l/08-804-Corr2-tENG).
[33] ICC-01/05-01/08-809OA3.
[34] ICC-01/05-01/08-811.
[35] ICC-01/05-01/08-814OA3.

good cause had not been shown and that the Defence had failed to include the request in its notice of appeal.[36]

23. On 26 July the Defence filed its Document in Support of its appeal against the Trial Chamber III's Decision on Admissibility and Abuse of Process.[37] The following day it filed a corrigendum ("Appeal Brief").[38]

III. Statement of facts

(i) The CAR judicial proceedings

24. In June 2003, the *Procureur de la République de Bangui* commenced investigations into incidents occurring in the CAR between 26 October 2002 and 15 March 2003, the events that form the basis of the charges pending in this Court. He ended his investigations in May 2004.[39]

25. On 28 August 2004, the Public Prosecutor of the Tribunal de Grande Instance de Bangui applied to the investigating judge for the Appellant to be exonerated of the offences concerning the incidents in the CAR between October 2002 and 15 March 2003 ("*Réquisitoire de non-lieu partiel*" or "Request for Partial Dismissal").[40]

26. On 16 September 2004, the *doyen des juges d'instruction* (Senior Investigating Judge) issued an "*Ordonnance de non-lieu partiel et de renvoi devant la Cour Criminelle*" ("Order for Partial Dismissal" or "Order of 16 September 2004").[41] While acknowledging that the Appellant was the head of the M*ouvement de Libération du*

[36] ICC-01/05-01/08-817OA3.
[37] ICC-01/05-01/08-841-ConfOA3.
[38] ICC-01/05-01/08-841-Conf-CorrOA3. The same day it filed a public redacted version (ICC-01/05-01/08-841-Corr-RedOA3). The Appeals Chamber had granted the Defence an extension of 10 days to file its appeal (ICC-01/05-01/08-827OA3). The Prosecution notes that the Appellant's changes constitute more than "typographical errors" that, according to the Appeals Chamber, can be corrected in a corrigendum. (ICC-01/05-01/08-631OA2, para.38). It also failed to identify all changes in its Explanatory Note, such as in para.46. The Prosecution did not oppose these changes as they do not alter the substance of the filing.
[39] ICC-01/05-01/08-739, para.13.
[40] ICC-01/05-01/08-721-Anx26 (CAR-OTP-0004-0065 to 0112); CAR-OTP-0019-0087 to 0134; English translation CAR-OTP-0061-0094 to 0130.
[41] CAR-OTP-0019-0137 to 0164. ICC-01/05-01/08-721-Conf-Exp-Anx16.

Congo ("MLC"), the investigating judge decided not to pursue charges against him because (a) he was at the time of the investigation one of the four vice-presidents of DRC and, accordingly, enjoyed immunity,[42] and (b) from the preliminary investigation "it is apparent […] that there is insufficient incriminating evidence against [the Appellant]".[43] In addition, while the charges against the Appellant and other accused were dismissed, the judge referred the case against *Mr. Patassé* and other accused to the *Cour Criminelle.*[44]

27. On 17 September 2004, the "*Premier Substitut du Procureur de la République"* ("Deputy Prosecutor") on behalf of the "*Ministère Public*" brought an appeal before the *Tribunal de Grande Instance* as regards all accused against the Order of 16 September 2004 ("*Acte d'Appel*" or "Notice of Appeal").[45]

28. On 23 November 2004, the First Advocate-General of the Bangui Court of Appeal filed additional submissions in the Bangui Court of Appeal requesting a partial amendment to the Order of 16 September 2004, namely to commit all the accused for trial before the domestic *Cour Criminelle* ("*Réquisitoire Supplétif*").[46] The First Advocate-General specifically referred to the Appellant and indicated that it had been established that he was complicit in crimes committed by his troops (the "*Banyamulengués*").[47] The Trial Chamber noted that this application should not be confused with a prior one dated 22 November 2004 ("*Réquisitoire Introductif*") that referred to another accused whose charges had also been dismissed in the Order.[48]

29. On 24 November 2004 the *Procureur Général près la Cour d'Appel de Bangui* (Public Prosecutor of the Bangui Court of Appeal) requested the Bangui Court of Appeal to refer the crimes that entailed "serious harm to life and physical integrity" (or "blood crimes") to the ICC, urging that "most of those crimes fall under the ICC

[42] CAR-OTP-0019-0137 to 0164 at 0147; ICC-01/05-01/08-758-Anx2C.
[43] CAR-OTP-0019-0137 to 0164 at 0161, 0162 and 0164; ICC-01/05-01/08-758-Anx2C.
[44] CAR-OTP-0019-0137 to 0164 at 0164; ICC-01/05-01/08-758-Anx2C.
[45] ICC-01/05-01/08-770-Anx2, p.3.
[46] ICC-01/05-01/08-770-Anx2, pp.8-10.
[47] ICC-01/05-01/08-770-Anx2, p.9. The *Réquisitoire Supplétif* indicates with respect to Bemba that "*Qu'on ne saurait lui accorder le benefice d'un non-lieu*".
[48] ICC-01/05-01/08-770-Anx2, pp.5-6 ; CAR-0TP-0019-0165.

jurisdiction". The "embezzlement of public funds" or "economic crimes" would be referred to the *Cour Criminelle.*[49]

30. Several oral hearings ("*Audiences"*) took place on 24 November, 6 December and 16 December before the Indictment Chamber of the Bangui Court of Appeal.[50]

31. On 6 December 2004, *de facto* President Bozize appointed a CAR representative (Goungaye Wanfiyo) to the ICC and instructed him to refer the situation to the Court, as provided for in Article 14 of the Statute.[51] On 22 December 2004 Wanfiyo delivered a referral to the ICC (dated 18 December).[52]

32. On 11 December 2004, Wanfiyo sent a letter to the Bangui Court of Appeal informing that he had been authorised to submit a request for referral to the ICC, including the case of *Mr. Patassé* and others, requesting that the "blood crimes" be severed from the economic crimes, and only the latter should be tried before the national courts. He further pointed out that "should the ICC initiate an investigation, it would be carried out by the means that the CAR lacks".[53]

33. On 16 December 2004, the *Chambre d'Accusation* of the *Cour d'Appel* (Indictment Chamber of the Bangui Court of Appeal) issued its Appeal Judgment, ordering the separation of the proceedings regarding the blood crimes (where the Appellant is expressly mentioned) and stating that they should be dealt with before the ICC. It referred the remaining economic crimes to the domestic *Cour Criminelle.*[54] The extract of the record related to the hearing of that day reflects (in a summarised form) the Judgment.[55]

34. On 20 December 2004, the 2nd Advocate-General at the Bangui Court of Appeal filed a notice of Appeal against the Appeal Judgment of 16 December 2004.[56]

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[49]CAR-OTP-0019-0167, ICC-01/05-01/08-721-Anx17, p.1.
[50] See section C below.
[51] ICC-01/05-01/08-29-Conf-Anx1A, p.3.
[52] Ibid., pp.1-2.
[53] CAR-OTP-0019-0169 to 0170.
[54] ICC-01/05-01/08-721-Conf-Exp-Anx18; CAR-OTP-0004-0148 to 0166; English Translation CAR-OTP-0061-0030 to 0043 ("Appeal Judgment of 16 December 2004").
[55] CAR-OTP-0062-0203 to 0205, at 0204.
[56] CAR-OTP-0019-0199.

35. On 11 April 2006, the *Cour de Cassation* confirmed the Appeal Judgment of 16 December 2004 and concluded that the Central African judiciary lacked the capacity to conduct a genuine investigation and prosecution and that international judicial cooperation, including specifically referring the case to the ICC, was the only way to fight against impunity.[57]

(ii) The Defence's recent filings in the CAR courts

36. In April 2010, the Appellant's lawyer in the CAR filed a variety of motions against the principal CAR judicial decisions arguing that they had never been served on the Appellant: first, the Appellant contested the Appeals Judgment of 16 December 2004 ("*Opposition*")[58] and, second, he submitted a "*recours en retraction*" (appeal),[59] and "*pourvoi en cassation*" ("*Pourvoi*") against the *Cour de Cassation* Judgment of 11 April 2006.[60] While the *Recours* was subsequently withdrawn,[61] the Appellant filed a brief in support of the *Pourvoi* on 15 May 2010.[62]

37. On 21 May 2010 the Indictment Chamber held that the "Opposition" against the Appeals Judgment of 16 December 2004 was inadmissible given that the Appellant failed to tender any written brief in support of his application.[63] Thus, the only remaining application is the *Pourvoi* against the *Cour de Cassation* Judgment of 11 April 2006.

[57] ICC-01/05-01/08-721-Conf-Exp-Anx20; CAR-OTP-0019-0258 to 0261; English Translation CAR-OTP-0061-0023 to 0027 ("*Cour de Cassation* Judgment of 11 April 2006").
[58] ICC-01/05-01/08-751-AnxA.
[59] ICC-01/05-01/08-751-AnxC.
[60] ICC-01/05-01/08-757-AnxA.
[61] ICC-01/05-01/08-765-Anx2.
[62] ICC-01/05-01/08-795-Conf-AnxA-tENG.
[63] ICC-01/05-01/08-790-Anx1-tENG. The Indictment Chamber provided further arguments when it dismissed the Opposition. See Decision, para.19 where the Trial Chamber provides a summary of them.

(iii) Disclosure of the Record of Oral Hearings before the Indictment Chamber of the Bangui Court of Appeal

38. In his Response to the CAR Observations on 14 May 2010 the Appellant referred to an extract of a record reproducing a hearing of 6 December 2004 before the Indictment Chamber of the Bangui Court of Appeal.[64] As the document appeared to be incomplete and after being advised by the Chamber,[65] the Prosecution requested and obtained from the CAR a complete version of such record.[66]

39. The Prosecution provided the document to the Chamber on 23 June 2010 (the day before the Appealed Decision was issued) and uploaded it into e-court; however, the Chamber did not consider it.[67]

IV. Argument

A. The Trial Chamber's Decision

40. The Trial Chamber found that "there is no extant investigation or prosecution in the CAR" under Article 17(1)(a).[68] It also found that the CAR actively sought the prosecution of the Appellant before the ICC:[69] the decision by the national appellate courts that the case should be referred to the ICC (Appeal Judgment of 16 December 2004 by the Indictment Chamber of the Bangui Court of Appeal, confirmed by the *Cour de Cassation* Judgment of 14 April 2006 and "determinative of the national proceedings")[70] was matched by the official referral of the State

[64] ICC-01/05-01/08-776-Red, para.48.
[65] Email of the Chamber's Legal Officer to the Prosecution dated 27 May 2010.
[66] Email of the Prosecution to the same Chamber's Legal Officer dated 23 June 2010, reproduced by the Appellant in fn.14 of its Appeal Brief. The Prosecution notes that both documents do not fully match. While the first (and incomplete document) refers to the hearing of 6 December 2004, it partially reproduces the hearing of 16 December 2004 (See CAR-OTP-0019-0189 to 0190). The second document reproduces the hearings of 24 November and 16 December 2004 (CAR-OTP-0062-0203 to 0205).
[67] Decision, para.10. See email from the Chamber's Legal Officer to the Prosecution dated 25 June, where she informs the OTP representative that she only saw the email that same day, and note that the Prosecution should have copied the email to another legal officer.
[68] Decision, paras.237-238;261(i).
[69] Decision, para.261.
[70] Decision, para.235. The Trial Chamber stated that this court is "the final appellate court in the CAR for these purposes"; see Decision, para.228.

representative to the ICC Prosecutor (18 December 2004).[71] Hence, as none of these decisions by the national courts and the State constitute "a decision not to prosecute" within the meaning of Article 17(1)(b),[72] the case against the Appellant is admissible before the Court. This conclusion is in full compliance with this Chamber's jurisprudence.[73]

41. Although it was not necessary for the purposes of its determination, for the sake of completeness, the Trial Chamber also examined unwillingness and inability under Articles 17(2) and (3),[74] and reached several findings pertaining to those elements. The Chamber found that, while the CAR was not unwilling within the terms of Article 17(2) to investigate or prosecute the Appellant,[75] it was "unavailable" to effectively investigate or try him for the purposes of Article 17(3) considering the submissions of the State authorities and the observations of the *Cour de Cassation* which noted, *inter alia,* the lack of resources to handle a case of these characteristics.[76] The Trial Chamber clarified that under Article 17(1)(a) and (b) it is the State's unwillingness or inability to carry out the investigation or prosecution that is relevant – not the national courts' determination.[77] The Trial Chamber further found that the Appellant had not been tried for the conduct which is the subject of this case, as the Order of 16 September 2004 was not a final decision on the merits nor was the Senior Investigative Judge the competent organ to "try" the Appellant for the purposes of Article 17(1)(c).[78]

42. Finally, the Chamber found that the Appellant's recent filings before the CAR judiciary, and his request for suspensive effect of the referral of the case against him, constituted an abuse of the Chamber's process as the Appellant failed to explain their tardiness.[79] In any event, even if the Appellant's filings had suspensive effect at the national level, this would be deemed irrelevant for the

[71] Decision, para.241.
[72] Decision,para.242.
[73] Decision, para.240, quoting ICC-01/04-01/07-14970A8, para.83. See also para.85.
[74] Decision, para.243. ICC-01/04-01/07-1497OA8, para.78.
[75] Decision, para.243.
[76] Decision, paras.245-246.
[77] Decision, para.247.
[78] Decision, paras.248,261(iii).
[79] Decision, para.231.

purposes of the Chamber's decision under Article 17(1), since the CAR authorities were promoting the trial of the Appellant by this Court. In addition, the Chamber emphasized that the ultimate determination on these matters lies with the ICC.[80]

43. It also rejected the abuse of process challenge, concluding that the Prosecution did not engage in incomplete disclosure and that there was no other material irregularity or impropriety in the proceedings.[81] Specifically addressing the Appellant's allegations that the Prosecution failed to provide full and timely disclosure of materials relevant to the admissibility determination, the Chamber found that "there is no evidence [that] the prosecution is in breach of its responsibilities" and "the main national judicial decisions relevant to this matter were all disclosed on 3 October 2008";[82] "[a]ccordingly, the defence has at all material times been aware of the relevant judicial proceedings".[83]

B. Overview of the Appeal

44. The Appellant argues that the Trial Chamber committed four errors when it found that the case was admissible.[84] First, he argues that the Trial Chamber erred in law when it found that the Order of 16 September 2004 was not a final decision not to prosecute the Appellant within the terms of Article 17(1)(b) (First Ground of Appeal).[85] It submits that, *inter alia*, the CAR prosecutor's appeal from the Order contest the dismissal of charges against persons other than the Appellant, but that as to the Appellant himself the 16 September Order was a final determination on the merits.[86] Second, the Appellant argues that the Trial Chamber made a procedural error when it rejected his last-minute request to call a CAR legal expert (Second Ground of Appeal), who would have provided evidence to establish whether the CAR judicial authorities had the obligation to notify the Appellant of

[80] Decision, para.247.
[81] Decision, paras.250-260,262.
[82] Decision, para.215.
[83] Decision, para.216. See also paras.44-55.
[84] Hence, the Appellant only appeals the Chamber's findings on admissibility, and not those findings related to its abuse of process motion (also dismissed by the Trial Chamber).
[85] Appeal Brief, para.5(a).
[86] Ibid., paras.11-12.

the Appeals Judgments of 16 December 2004.[87] He further submits that the Trial Chamber made two mixed legal and procedural errors when it accepted the CAR submissions on their inability to prosecute him (Third Ground of Appeal),[88] and when it found "abusive" the Appellant's recent filings before the CAR judiciary and their purported suspensive effect of the national decisions (Fourth Ground of Appeal).[89]

45. The Appellant requests the Appeals Chamber to allow the First and Third Grounds of Appeal, to reverse the Trial Chamber's decision and to find the case inadmissible. In the alternative, and if this Chamber allows the Second and Fourth Grounds, the Appellant requests the Appeals Chamber to remand the case for a new determination of its admissibility. He also requests that the Appeals Chamber hold a hearing "to expand on the submissions contained in [his Appeal Brief]".[90]

C. Overview of the Prosecution's Response

46. The Trial Chamber made no error when it found that the case was admissible before this Court. With respect to the First Ground, the Prosecution demonstrates below that the Trial Chamber correctly found that the Order for Partial Dismissal of 16 September 2004 was subject to a valid appeal against its entirety, including the dismissal of charges against the Appellant. The remaining grounds should be dismissed *in limine* following the applicable jurisprudence of this Appeals Chamber as they raise purported procedural errors that do not have any material impact on the final decision on admissibility.[91]

47. However, in the event that the Chamber considers that those grounds should be considered, the Appellant fails to demonstrate any error in the Chamber's reasoning and findings: the Trial Chamber correctly exercised its discretion on

[87] *Ibid.*, para.5(b).
[88] *Ibid.*, para.5(c).
[89] *Ibid.*, para.5(d).
[90] Appeal Brief, para.44.
[91] See ICC-02/04-01/05-408OA3, para.51.

evidentiary matters under Article 69 to conclude that a report from an expert on CAR law would not materially assist it (Second Ground). Also, the Chamber did not err when it found that the CAR judiciary was "unavailable": the Appellant advances a wrong interpretation of inability under Article 17(3) and fails to acknowledge the second scenario foreseen in this provision, namely that of "unavailability" (Third Ground). Finally, the Trial Chamber correctly exercised its discretion under Article 64(2) when it characterized as abusive the recent filings before the CAR judiciary and the Appellant's submissions that they have a suspensive effect on the referral of the case to the ICC (Fourth Ground).

First Ground: The Trial Chamber correctly found that the Order of 16 September 2004 did not constitute a "decision not to prosecute" within the terms of Article 17(1)(b)

48. The core of the Appellant's argument is that the Order of 16 September 2004 for Partial Dismissal was "a final decision pertaining to the merits of the case which was not subsequently amended by a valid appeal",[92] and that the Appellant was illegally included in the Appeals Judgment of 16 December 2004 because of a request from the Counsel for the President.[93]

49. The Prosecution firstly notes that the Appellant wrongly characterizes this error as an error of law; rather it constitutes an alleged error of fact. In such circumstances the Appeals Chamber will apply a standard of reasonableness and will only substitute its own findings for those of the Trial Chamber when it is demonstrated that no reasonable Chamber could have reached the challenged conclusion.[94] The Appellant fails to meet this burden. In fact, he had already advanced this proposition before the Trial Chamber without success:[95] the Trial Chamber correctly found that the dismissal of the charges by the Senior

[92] Appeal Brief, para.8.
[93] *Ibid.*, para.20.
[94] *Prosecutor v. Haradinaj*, IT-04-84-A, 19 July 2010, Appeal Judgment, para. 12.
[95] Defence Admissibility Challenge, paras.126-127; Defence Admissibility Reply, paras.24-26,33,97,105. The Trial Chamber was mindful of these arguments, see Decision, paras.83-84,86,88-89. See also T-22, p.58, lns.17-24, p.59, lns.21-23; p.60, lns.16-22.

Investigating Judge on the two grounds of diplomatic immunity and insufficient incriminating evidence "was not a final decision on the merits of the case" as it was the object of a "*prima facie* valid appeal as regard all accused".[96] The Chamber noted that the *Cour de Cassation* Judgment of 11 April 2006 is determinative of the national judicial proceedings, and that there was no evidence of material impropriety or irregularity in the national proceedings.[97] None of the arguments advanced by the Appellant below affect the Chamber's reasoning and findings.

(i) *The appeal proceedings against the Order of 16 September 2004 included the dismissal of charges against the Appellant*

50. The Appellant advances several arguments to support his proposition that the appeal proceedings against the Order did not include the dismissal of charges against him. First, he submits that the Trial Chamber failed to consider the Order of 16 September 2004 in light of the Request for Partial Dismissal of 28 August 2004 filed by the Bangui Public Prosecutor that preceded it. According to the Appellant, the terms of the Request (which only cited insufficiency of evidence as a ground when it requested the dismissal of the charges against the Appellant) were binding on the Senior Investigating Judge.[98] This argument is unsupported and is legally incorrect: the CAR code on criminal procedure does not impose this obligation on the investigating judge; to the contrary, it indicates that the latter may decide *proprio motu* to close an investigation based on its own assessment ("if [he/she] is of the opinion").[99] The source of the CAR code, the French code on criminal procedure and the relevant jurisprudence, are also clear in this regard; the French *Cour de Cassation* has stated that the investigating judge "is never

[96] Decision, para.222.
[97] Decision, para.235.
[98] Appeal Brief, para.8.
[99] Article 91(a) of the 1962 CAR Code on Criminal Procedure (applicable at the relevant time period): *«Si le Juge d'Instruction est d'avis que le fait ne présente ni crime, ni délit, ni contravention ou qu'il n'existe pas de charges suffisantes contre l'inculpé, il déclarera par ordonnance qu'il n'y a pas lieu à poursuivre et si l'inculpé avait été arrêté, il sera remis en liberté »* (ICC-01/05-01/08-770-Anx3).

bound by the submissions of the public prosecutor and decides independently on the assessment of information".[100]

51. The Appellant further argues that the Public Prosecutor's Request for Partial Dismissal was the result of a "meticulous investigation" with a "comprehensive consideration of the case against the Accused"[101] and that the Public Prosecutor only intended to appeal the part of the Order that dismissed the charges against other high-ranking CAR figures.[102] According to the Appellant, it would illogical that the same prosecutor who requested the dismissal of the charges against him would seek to appeal the dismissal Order the day after it was issued.[103] The Appellant then quotes paragraph 88 of the statement given by the Public Prosecutor, where he indicated that he appealed the Order because high-ranking figures targeted in the investigation had been cleared, "*such as* [REDACTED]".[104]

52. This assertion must however be placed in the context, and read in light of other portions of the statement that also provide further explanations of the overall proceedings.[105] For instance, in paragraph 80 of his statement the Public Prosecutor explained that the principal reasons underpinning his Request for Partial Dismissal of 28 August with respect to the Appellant were [REDACTED].[106] In addition, he highlighted the lack of a preliminary investigation and the deficiencies in the investigations that led to the Order due to, *inter alia*, lack of resources.[107] Most importantly, he clarified that he did not deal with all the appeal proceedings: [REDACTED]. This explains why he subsequent submissions on these appeal proceedings (*Réquisitoire Indicatif* of 22 November; *Réquisitoire Supplétif* of 23 November, and the final *Réquisitoire* of 24 November) were signed not by him, but by higher officials, the Principal Public Prosecutor or

[100] See Decision of the *Cour de Cassation*, 25 September 1824, on Article 176 of the French Code on Criminal Procedure and the flexibility or leeway given to the investigating judge. As the Appellant acknowledged, the CAR legislation largely stems from French law (T-22,p.56, lns.20-22).
[101] Appeal Brief, para.9.
[102] *Ibid*., paras.11-12.
[103] *Ibid*., para.10.
[104] Appeal Brief, para.11 (emphasis added).
[105] CAR-OT-0005-0099 to 0118; English Translation is CAR-OTP-0049-0363 to 0379 ("Statement of the Bangui Public Prosecutor").
[106] *Ibid*., para.80. In paragraph 81 he further adds that [REDACTED].
[107] *Ibid.*, paras.19-20,87.

the First Advocate-General, who requested the continuation of the proceedings against all accused who had been cleared in the Order (including the Appellant).[108]

53. The Appellant presents additional arguments that misrepresent the filings before the domestic courts. In particular, he refers to the *Réquisitoire Indicatif* of 22 November, where the Principal Public Prosecutor (*Procuréur Général)* requested that the proceedings continue against another accused whose charges were also dismissed in the Order, suggesting that the request did not refer to the Appellant. However, this argument fails to acknowledge that the subsequent submission filed the next day (*Réquisitoire Supplétif*) expressly referred to the Appellant and to the fact that the appeal also encompassed the dismissal of the charges against him ("*qu'on ne saurait lui accorder le benefice d'un non-lieu*").[109]

54. The Trial Chamber was mindful of the different submissions in the appeal proceedings and correctly listed and considered them in its Decision.[110] Indeed, the Trial Chamber distinguished between the first Notice of Appeal (filed by the Bangui Deputy Prosecutor on 17 September) and the subsequent submissions on appeal (*Réquisitoire Introductif* of 22 November; *Réquisitoire Supplétif* of 23 November and the final *Réquisitoire* of 24 November) filed by either the Principal Public Prosecutor or the First Advocate-General. The Trial Chamber was also careful to distinguish between the *Réquisitoire Introductif* (quoted by the Appellant and which referred to another accused whose charges had been dismissed in the Order); and the *Réquisitoire Supplétif* that expressly referred to the Appellant.[111]

55. Nor would the Trial Chamber have been bound by the Prosecution's incorrect statement in its Response to the Admissibility Challenge that the 22 November 2004 appeal against the Order for Partial Dismissal did not also appeal the

[108] Decision, para.222.
[109] Réquisitoire Supplétif, page 2. ICC-01/05-01/08-770-Anx.2, p.9. Notably, the Appellant refers to the *Réquisitoire Supplétif* in another section of his brief, see Appeal Brief, para. 17, thereby showing that he is fully aware of its existence and content.
[110] Decision, paras.5-10, see fn.11; 220-226.
[111] Decision, para.8, see in particular fn.11.

dismissal of the charges against the Appellant;[112] at the time the Prosecution did not have the additional 23 November and 24 November *Réquisitoires* cited above, which clarified that the dismissal of charges against the Appellant were also subject to appeal.[113] The Trial Chamber did have those documents at the time of the Decision, and after considering all relevant material it reached the correct factual conclusions.

(ii) The record of the hearings before the Indictment Chamber of the Bangui Court of Appeal does not disturb the Chamber's final determination on the admissibility of the case

56. The Appellant further argues that the Chamber did not consider a document that he qualifies as "vital", namely, a record or minutes that reproduce extracts or summaries of several oral hearings before the Indictment Chamber of the Bangui Court of Appeal, in particular those of 24 November and 16 December 2004.[114] This document was not considered by the Trial Chamber when it issued its Decision as one page was missing.[115]

57. The Appellant quotes an extract from the hearing that took place on 24 November 2004 where the *Ministère Public* appeared to request that all the accused cited in its *Réquisitoire* be tried before the (domestic) *Cour Criminelle* with the exception of the Appellant due to his status as Vice President of the DRC.[116] According to the Appellant, these minutes confirm his proposition that the appeal against the Order of 16 September 2004 did not include the dismissal of the charges against him.[117]

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[112] *A contrario*, Appeal Brief, para.13, referring to the question of Judge Fulford to Counsel for the Prosecution in the Admissibility Hearing (T-22, p.63,ln.11 to p.64,ln.5). The Prosecution made such assertion in its Response to the Defence Admissibility Challenge, para.15, in light of the statement of the Bangui Public Prosecutor *only*. The Prosecution also added that this was irrelevant as the final judgments determinative of the CAR proceedings,16 December 2004 and 11 April 2006, did refer to the Appellant.

[113] ICC-01/05-01/08-770-Anx2 (*Réquisitoire Introductif* and *Supplé tif*) and ICC-01/05-01/08-721-Anx.17 (*Réquisitoire* of 24 November 2004).

[114] Appeal Brief, paras.14,16.

[115] Decision,para.10. See paras.38-39 above.

[116] Record of Oral Hearing, p.1.

[117] Appeal Brief, paras.17-20. The Appellant further submits that and the *Réquisitoire Supplétif* of 23 November lacked any "legal basis".

58. As he has done previously, the Appellant takes this document out of context and disregards other filings that clearly indicate that the appeal was lodged against the Order (and all the accused included therein) in its entirety. Indeed, the minutes of this hearing should be read together with the *Réquisitoires* of 22 and 23 of November (*Indicatif* and *Supplétif*, mentioned above) and the *Réquisitoire* of 24 November. In the latter document, dated the same day of the hearing, the Public Prosecutor requested the severance of the economic crimes (or embezzlement of public funds) from the crimes committed against persons, indicating that while the former should be tried before the domestic *Cour Criminelle*, the latter should be referred to the ICC.[118]

59. This is further corroborated by the terms of the Appeals Judgment of 16 December 2004:[119] the Appeal Court ordered the severance of the "blood crimes" (and expressly refers to the Appellant), and stated that these crimes fall within the jurisdiction of the ICC, while referring the "economic crimes" - that do not include the Appellant -- to the domestic *Cour Criminelle.*[120] In light of this, the minutes of 24 November quoted by the Appellant clearly must be read to refer only to the economic crimes to be tried before the *Cour Criminelle,* which did not include the Appellant, but not to those crimes that were referred to the ICC. Thus, had the Trial Chamber considered this document in its Decision, it would not have had an impact on its final determination on the admissibility of the case.[121]

60. In sum, the Appellant fails to demonstrate that the Chamber erred when it found that the Order of 16 September 2004 was appealed against all accused and thus was not a final decision relieving the Appellant of criminal responsibility on the merits.[122]

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[118] CAR-OTP-0019-0167. ICC-01/05-01/08-721-Anx.17,p.1.
[119] See also the hearing held on 16 December 2004, which is also reproduced in the record. CAR-OTP-0062-0203 at p.2.
[120] Appeal Judgment of 16 December 2004, pp.12-13 (English Translation-CAR-OTP-0061-0042 to 0043).
[121] *Prosecutor v. Milosevic*, IT-98-29/1-A, 12 November 2009, Appeal Judgment, para.17(ii) ("Milosevic Appeal Judgment").
[122] Decision, para. 222.

Second Ground: The Trial Chamber correctly exercised its discretion when it refused to entertain submissions from an expert on CAR Law

61. On 24 April 2010, the Appellant requested the Trial Chamber to admit into evidence a statement of an expert on CAR law, and to allow him, if necessary, to present submissions during the Admissibility Hearing of 27 April 2010.[123] At the beginning of the hearing, the Trial Chamber denied the Appellant's application as it found that "[i]n our judgment, this is, at most, a factual issue which can and should be addressed by counsel in their submissions, if they wish to deal with the point during the course of today's arguments. This is not something which is, in our view, going to be materially assisted by the Court […]".[124] Counsel for the Appellant addressed these matters and submitted that the CAR judicial authorities had the obligation to notify the Appellant of the Appeals Judgments of 16 December 2004.[125] Considering the novelty of these arguments, the Chamber gave the CAR authorities the opportunity to respond in written form, and to the Appellant to reply.[126] The Appellant then revisited its request for an expert in CAR law.[127] The Chamber indicated that it had already ruled – and rejected – the Appellant's request. It also noted that the CAR authorities were only responding to a concrete and novel issue that the Appellant itself had brought up for the first time during the hearing, and the Appellant would have the right to reply. The Chamber added that the Appellant failed to provide a statement of the expert, as it had announced in his application, so the Chamber was unaware of the detail and extent of his purported submissions.[128]

62. According to the Appellant, the above ruling of the Chamber constitutes a procedural error which had an impact on the Chamber's determination on whether there was an obligation to notify "the Bangui appeal notices and

[123] ICC-01/05-01/08-760.
[124] T-22,p.2,lns.7-15.
[125] T-22,p.46, ln.25 to p.47, ln.18.
[126] T-22, p.66, lns.3-12, 16 to p.67, ln.13.
[127] T-22, p.69, lns.18-25.
[128] T-22, p.70, lns.5-23. The Chamber recalled again that the Appellant had failed to indicate the kind and detail of evidence that the expert could provide.

decisions, and the consequences of a failure to notify".[129] In addition, the Appellant was purportedly placed on an unequal position *vis-à-vis* the CAR authorities, and the Chamber reached erroneous "legal conclusions" because it blindly endorsed the CAR submissions.[130]

(i) This ground should be dismissed in limine: the alleged error does not affect the Trial Chamber's determination on the admissibility of the case

63. The Appeals Chamber has allowed parties to rely on procedural errors as the basis for impugning a decision on admissibility if this error may materially affect the impugned decision.[131] However, the Appellant fails to demonstrate how the Chamber's alleged misreading of the CAR provisions impacted on its ruling regarding the admissibility of the case.[132]

64. In addition, and as the Trial Chamber noted, once a situation is referred to the ICC, it is for the Chambers of this Court to rule on all matters related to admissibility.[133] Hence, even if the *Cour d'Appel* decision affirming the cessation of domestic proceedings against the Appellant were to be nullified because the Appellant did not receive timely notice of the Appeals Judgment of 16 December 2004, that would not affect the Chamber's findings on admissibility, namely that the CAR proceedings were halted because the CAR authorities sought (and are still seeking) to have this case tried before the ICC.

65. Thus, considering the lack of impact of the purported error in the Decision, this ground should be dismissed *in limine*. However, and in the event that the Chamber considers that the alleged error may have an impact on the Trial Chamber's determination on admissibility, the Prosecution submits that the

[129] Appeal Brief, paras.22-23, referring to Decision, paras.232-233.
[130] Appeal Brief, paras.22,24-25.
[131] ICC-02/04-01/05-408OA3,paras.47-48, 51.
[132] *Ibid*., para. 51.
[133] Decision on the admissibility of the case under Article 19(1) of the Statute, 10 March 2009, ICC-02/04-01/05-377, paras. 45, 51.

Appellant shows no error in the Chamber's decision rejecting the proposed expert evidence.

(ii) The Trial Chamber correctly exercised its discretion when it denied the Appellant's application

66. The Trial Chamber's decision falls within the purview of its discretionary powers to decide on the admissibility of evidence and whether the evidence in question is necessary for the establishment of the truth. Chambers of this Court are awarded a significant degree of discretion in making this type of decisions under Articles 64(9) and 69(3) and (4).[134] In addition, the Appeals Chamber has repeatedly indicated that it will interfere with discretionary decisions only under limited conditions.[135]

67. The Appellant fails to show any error in the Chamber's process or reasoning.[136] The Chamber correctly noted that the CAR proceedings constituted a matter of fact that could be addressed by counsel in the hearing. In fact, the Appellant availed himself of this opportunity and raised the issues of notification of the CAR decisions in his submission. Subsequently, the Appellant responded to the CAR observations with a lengthy document where he set out in detail his position.[137] It is worth noting that at no time during the hearing on 27 April 2010 and before the filing of its Appeal Brief on 26 July 2010 did the Appellant express any difficulties with this process or indicate the negative consequences that he now alleges. Nor did the Appellant seek any relief from the Trial or the Appeals Chamber in relation to this particular issue. The Prosecution further notes that nothing prevented the Appellant from consulting with the expert to prepare its oral or written submissions.

[134] ICC-01/04-01/06-1399,para.24.
[135] ICC-01/04-01/07-2259OA10, para.34 ; ICC-02/04-01/05-408OA3, para.80.
[136] ICC-01/04-01/06-1399,para.25: TCI indicated that the party seeking to introduce the evidence has the burden to challenge the chamber's decision.
[137] ICC-01/05-01/08-776-Red2-tEng.

68. In addition, the Chamber indicated in clear terms that it did not see how the report of an expert could materially assist the Chamber,[138] in particular, as the Appellant had failed to explain in advance the "kind of evidence or the detail of the evidence that an expert can give".[139] On these grounds, and considering that the relevance and probative value of the evidence are factors to consider before deciding on its admissibility,[140] the Chamber correctly exercised its discretion when it refused the admission of an expert report at that stage of the proceedings.[141]

(iii) The Trial Chamber considered the submissions of the Appellant on the purported obligation to notify the CAR decisions to the Accused

69. The Appellant further argues that because he was not allowed to introduce the expert report, he was placed "in a situation of inequality of arms" *vis-à-vis* the CAR authorities, and the Chamber blindly endorsed the latter's submissions. As a result, the Chamber reached erroneous "legal conclusions" on "whether there was an obligation to notify the Accused of the Bangui appeal notices and decisions and the consequences of the failure to thus notify".[142] According to the Appellant, the Chamber reached such findings in paragraph 233 of the Decision, where it found that the provisions relied upon by the Appellant were not relevant to decisions of higher courts when acting in an appellate capacity, and that they did not indicate that proceedings are nullified if an accused is not notified.[143]

70. The Appellant's arguments are without merit. First, the Prosecution notes that the CAR authorities are not parties in the case, which already casts doubt as to the appropriateness of the Appellant's claim of an alleged "inequality of arms". More importantly, at no time was the Appellant placed in a disadvantageous position

[138] T-22, p.2, lns.11-12.
[139] T-22, p.70, lns.17-21.
[140] ICC-01/04-01/06-1399,paras.27-28.
[141] The Prosecution also notes that Article 64(2) allows the chambers to control the conduct of parties and participants and to ensure that such conduct does not cause undue delay. ICC-01/04-01/07-2259OA10, para.53.
[142] Appeal Brief, para.22.
[143] Appeal Brief, paras.23-24.

with respect to the CAR authorities or the Prosecution, nor did the Trial Chamber disregard his submissions. The Appellant provided detailed submissions on all relevant issues, both at the Admissibility Hearing and in written form. Indeed, the Appellant was the party who initially raised the issue of the supposed obligation of the CAR judiciary to notify him of the Appeals Judgment of 16 December 2004 in the Admissibility Hearing.[144] It then replied in writing to the CAR observations in response.[145]

71. Also, the fact that the Chamber rejected the Appellant's request does not mean that it did not consider his arguments. To the contrary, the Chamber stated in its Decision that it had reached its conclusions "based on the submissions relied on and developed during the course of this application".[146] First, the Chamber noted that the CAR authorities had initially conceded "(although the concession was later withdrawn)" that "the two appellate decisions should have been communicated to the accused" but there were not mechanisms for transmitting them to the Appellant who was at the time the Vice-President of the DRC. [147] However, even if the obligation existed, the failure to notify the Appellant did not invalidate the relevant decisions or proceedings.[148] The Chamber then addressed the Appellant's arguments to the contrary: the Chamber noted that the two provisions cited by the Appellant (Article 95(a) and (b) of the CAR Code of Criminal Procedure) "relate to the committal of an accused for trial by the investigating judge and they are not relevant to decisions of the higher courts when acting in an appellate capacity". It added that the Indictment Chamber was acting in its appellate capacity and "no provision similar to Article 95(b) has been cited that indicates that appellate proceedings are nullified if the accused is not notified of a relevant decision". The Chamber also addressed the other provisions relied by the Appellant orally and in his written submissions and found that "Article 111(e) […] relates to committal decisions to the *Cour Criminelle*" and "is

[144] T-22, pp.46-63.
[145] ICC-01/05-01/08-776-Red2,tENG.
[146] Decision, para.233.
[147] Decision, para.232.
[148] Decision, para.233.

not accompanied by a provision indicating that the proceedings will be nullified if the accused is not notified"; and that Article 193(f) "which relates to notification of summonses to those living abroad – is irrelevant".[149] Hence, the Chamber carefully considered every submission from the Appellant.

72. In addition, the Trial Chamber stressed that "[it] has not attempted […] to provide a definitive interpretation of the criminal law of the CAR".[150] Indeed, the extent and application of the CAR provisions elicited by parties and participants "is, at most, a factual issue".[151] Thus, the Trial Chamber did not draw "legal conclusions" as the Appellant submits;[152] rather, it merely considered the provisions put forward by all the parties and participants, and concluded whether they were applicable to the facts of the case on the basis of a plain reading of their text.

Third Ground: The Trial Chamber correctly found that the CAR authorities are unable to investigate and prosecute the case

73. The Appellant argues that the Chamber made an error of law with respect to the test adopted to determine the inability of the CAR, and a procedural error with regard to the factors that the Chamber considered to determine that the CAR was unable to prosecute domestically a case such as the instant one. The Appellant's submissions are predicated on a reading of Article 17(3) that erroneously considers as cumulative the two scenarios of inability listed in the provision ("total or substantial collapse" and "unavailability").

74. It must be stressed from the outset that the Chamber's findings on the admissibility of the case are not based on the inability of the CAR authorities to prosecute the Appellant, but on the halting of the domestic proceedings against him, as well as on the CAR's evinced intention to try him before the ICC.[153] The Chamber only ruled on the inability of the CAR authorities "for the sake of

[149] Decision, para.233.
[150] Decision, para.233.
[151] T-22, p.2, ln.7.
[152] Appeal Brief, paras.23-24.
[153] Decision, para.243.

completeness".[154] Thus, even considering (but not conceding) that the Chamber erred on the applicable test and factors when it found that the CAR was unable to prosecute the Appellant, this would not disturb the Chamber's findings on the admissibility of the case. Since the Appellant fails to show how his argument with respect to inability would impact on and invalidate the Impugned Decision, his submissions with respect to the Third Ground of Appeal should be dismissed *in limine*.

75. In any event, and for the purposes of a complete analysis of arguments before the Appeals Chamber, the Prosecution addresses the Appellant's arguments below and demonstrates how the Trial Chamber correctly found that the CAR judiciary is "unavailable" to try the case against the Accused.

(i) The Trial Chamber applied the correct test to determine the inability of the CAR

76. According to the Appellant, "inability" within the terms of Article 17(3) requires a "total or substantial collapse" of [the CAR's] national judicial system and should include "a notion akin to the disintegration of domestic judicial institutions".[155] The Appellant therefore rehearses before this Chamber the same interpretation of "inability" that it had put forward before the Trial Chamber and the latter rejected.[156] "Total or substantial collapse" is one element of inability, but it is not the only one. The Appellant omits the alternative scenario foreseen in Article 17(3) – that of "unavailability" – related to the particular obstacles for prosecution.[157] Unavailability may include instances where the judiciary authorities exist and are generally functional but cannot deal with a specific case for legal or factual

[154] *Ibid*., paras.243, 245-247.
[155] Appeal Brief, paras.29-30.
[156] Admissibility Challenge, para.75ff; Decision, para.246.
[157] J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 155-158; Mohamed El Zeidy, The Principle of Complementarity in International Criminal Law (2008), 226-228; Markus Benzing, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', 7 Max Planck Yearbook of United Nations Law (2003), 614; Federica Gioia, 'State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court', 19 LJIL (2006), 1095–1123.

reasons, such as a sheer capacity overload[158] or lack of sufficient human and financial resources.

77. Since Appellant's interpretation of the Statute is incomplete and thus incorrect, the Chamber's rejection of his mistaken proposition does not constitute error. Rather, the Third Ground of Appeal should also be summarily dismissed.[159] In addition, it is clear on this record that the Trial Chamber considered the right factors when it found that the CAR authorities were unavailable to try the case against the Accused.

(ii) The Trial Chamber considered the correct factors to determine inability of the CAR

78. The Appellant further argues that the Trial Chamber considered erroneous factors to find the CAR judiciary unable to carry out investigations and prosecutions against him. In particular, he disputes the Chamber's reliance on "the complexity of [the] trial"[160] and the "difficulties related to budgetary and human resources".[161] The Appellant submits that the CAR is able to try the case considering the "plethora of hearings", "the profusion of measures and documents from the proceedings in Bangui", and the fact that the OTP awaited for the decision of the *Court of Cassation* before initiating an investigation into the situation.[162] He further argues that the Chamber should have required Counsel for CAR to demonstrate the alleged financial deficiencies of its judiciary.[163]

79. These submissions are a result of the Appellant's wrong interpretation of Article 17(3): in the same manner that the Appellant fails to acknowledge that the inability of a State can be predicated by its "unavailability", he also fails to

[158] Benzing, M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', 7 Max Planck Yearbook of United Nations Law (2003), 614.
[159] Dragomir Milosevic Appeals Judgment, para.17 (vii).
[160] Here the Appellant wrongly submits that the Chamber deemed the trial complex *exclusively* because of the Accused's "history and affiliations". See Appeal Brief, para.28. In the Decision, para.246, the Chamber only noted that the Accused's affiliations may make more difficult the implementation of protective measures as this has been considered by the CAR authorities as a major obstacle to ensure his appearance at trial. However, the Chamber also refer to the fact "trials of this kind […] involve lengthy live testimony and substantial presentation and consideration of documentary evidence […]".
[161] Appeal Brief, para.30.
[162] Appeal Brief, paras.30-32.
[163] Appeal Brief, para.27.

identify the factors that are relevant to its determination, such as the lack of human and financial resources to try a case of these characteristics and complexity as well as practical problems such as political instability and military insurgencies.[164] Commentators to the Rome Statute have referred to factors of this kind when defining the concept of "unavailability".[165]

80. The Appellant also takes issue with the Chamber's reliance on the submissions from the representatives of the CAR government – without requiring material evidence - which exposed the practical difficulties that its judiciary encountered and the instability prevailing in the country to explain the inability of its institutions to try the case.[166] The Chamber found that those submissions were "determinative of this issue", as "the relevant unwillingness or inability *is that of the State* (as opposed to the judges of the national courts, although the latter's views can be a material consideration)".[167] The Chamber also correctly indicated that it had no reason to doubt the State's clear submissions. In addition, it noted that those submissions were matched by the observations of the *Cour de Cassation,* in its Judgment of 11 April 2006, that pointed to the lack of investigative resources and judicial capacity.[168] Hence, the "cumulative effect" of the submissions of the CAR representatives and the evidence cited above leaves no doubt that the CAR "national judicial system is 'unavailable', because it does not have the capacity to handle these proceedings".[169]

81. The Appellant submits that investigatory steps were undertaken by the CAR judiciary. However he disregards the deficiency and incompleteness of these investigative proceedings, which were affected by the lack of resources and the

[164] Decision, paras.245-246.
[165] Benzing, M, 'The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity', 7 Max Planck Yearbook of United Nations Law (2003), 614; J Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 155.
[166] Appeal Brief, para.29.
[167] Decision, para.246(Emphasis added). See also para.247: "under Article 17(1)(a) and (b) of the Statute, as regards unwillingness or inability, it is not the national court's determination as to whether or not they are unwilling or unable genuinely to carry out the investigation or prosecution, but the State's unwillingness or inability, that is relevant. Whilst the State can not doubt take into consideration relevant observations made by the judiciary, it is not bound by them".
[168] Decision, para.246 citing the Prosecution Response to the Admissibility Challenge (ICC-01/05-739,para.62).
[169] *Ibid*.

difficulties voiced by the *Cour de Cassation*, the State authorities and the Bangui Public Prosecutor. The facts, however, are undeniable: there was no preliminary investigation, the investigative magistrate did not conduct any investigation in the field and was also not able to conduct interviews with insiders of the MLC, and there has not been any meaningful progress since the Senior Investigating Judge had charged the Appellant.[170]

Fourth Ground: The Trial Chamber correctly found that the Appellant's filings before the CAR judiciary constitute an abuse of process

82. The Appellant submits that the Chamber erred when it characterised as abusive his recent filings (April 2010) before the CAR judiciary, and his submission that they had suspensive effect on the decisions referring the Appellant to the ICC.

(i) This ground should be dismissed in limine as the filings of the Accused before the CAR judiciary have no impact on the Chamber's findings on admissibility

83. The Appellant fails to advance any argument as to how this confined ruling of the Chamber, if erroneous, would impact on its findings regarding the admissibility of the case.[171] This is particularly relevant as the Chamber expressly stated that even if the *Pourvoi en Cassation* (the only filing pending before the CAR judiciary) had suspensive effect under the CAR provisions, this would be irrelevant *vis-à-vis* the Chamber's determination under Article 17(1). The CAR authorities expressly stated their intent that the ICC, and not the CAR authorities, prosecute the Appellant. Moreover, it must be stressed that the ultimate determination on matters of admissibility is made by the ICC.[172]

84. As a result, the Fourth Ground of Appeal should be dismissed *in limine*. However, should the Appeals Chamber find that this purported error may impact on the

[170] *Ibid*.
[171] ICC-02/04-01/05-408OA3,paras.47-48,51.
[172] Decision, para.247.

Chamber's Decision on admissibility, the Prosecution demonstrates below that the Chamber correctly exercised its discretion when it found that the Appellant's filings were abusive.

(ii) The Trial Chamber correctly exercised its discretion under Article 64(2)

85. The Chamber correctly exercised its discretion under Article 64(2) when it found that the Appellant's filings before the CAR judiciary (in particular the only outstanding motion, the *Pourvoi* before the *Cour de Cassation*),[173] and his claim that his appeal effectively suspends the Judgment of 16 December 2004 constituted an abuse of process of this Court.[174] The Chamber reasoned that Appellant failed to justify the lateness of his filings, which were presented six years after the Appeals Judgment of the Bangui Indictment Chamber, four years after the *Cour de Cassation* Judgment, and almost two years after the Prosecution disclosed to the Appellant the relevant national decisions, and almost on the eve of the admissibility hearing. The timing of the applications in the CAR also appeared to be an attempt to impede the Chamber's timely consideration of the admissibility challenge, since the Appellant could not reasonably expect that the *Cour de Cassation* would resolve the *Pourvoi* before the Trial Chamber issued its decision on admissibility.[175]

86. The reasoning of the Chamber shows no error and complies with the jurisprudence of the Appeals Chamber, which acknowledged the Chambers' power to regulate the conduct of parties and participants under Article 64(2) to ensure that their conduct does not cause, *inter alia*, undue delay to the proceedings.[176] As the Appeals Chamber noted, "parties must submit motions that

[173] As indicated above this appeal against the Appeals Judgment of 14 December 2004 is the only still pending. However, the CAR authorities in its Observations (ICC-01/05-01/08-770-Anx.1, partIV) seem to submit that no appeal is permitted against this decision of judicial administration.
[174] Decision, para.231.
[175] *Ibid*.
[176] ICC-01/04-01/07-2259OA10, paras.40,53. While the Appellant seems to focus on the Chamber's obligation to ensure a fair trial (fn.36) it forgets that the duties of the Chamber are broader. See in this regard ICC-01/04-01/07-2259OA10, para.47: "Expeditiousness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the

have repercussions on the conduct of the trial in 'a timely manner'", meaning that "parties must act within a reasonable time". What is reasonable and unreasonable depends on the circumstances of each case, and requires a judicious balancing of all the competing interests.[177] The Chamber followed this approach and noted that "the [Appellant] has at all material times been aware of the relevant judicial proceedings"[178] and could, at the very least, have more timely pursued these remedies in the CAR following the 3 October 2008 disclosure by the Prosecution (i.e., 18 months before he made his CAR filings) of the relevant decisions.[179]

87. The Chamber also sought submissions from parties and participants on the matter so its decision would be rendered in an informed fashion and with due regard to the rights of the Appellant.[180] Even in those submissions the Appellant provided no proper explanation for such tardiness. It is in his Appeal Brief where the Appellant for the first time refers to a supposed late disclosure by the Prosecution, financial problems, and acts of persecution and harassment to which Counsel for the Appellant in the CAR is allegedly being subjected.[181] However, the Chamber has already ruled that the Prosecution was at no fault on matters of disclose,[182] and that the "[Appellant's] complaints about material nondisclosure as regards the admissibility challenge are essentially speculative".[183] Nor had the Appellant informed the Chamber that financial issues were impeding the filings of these appeals. In addition, there is no evidence that the Appellant's Counsel in CAR had been "harassed" during the 18 month interval between disclosure by the Prosecution and legal action in the CAR by the Appellant; the allegations instead concern events that allegedly occurred in May 2010 and were reported to the

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accused. For this reason, article 64(2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious".
[177] *Ibid*,paras.54,40.
[178] Decision, para.216
[179] Decision, paras.231,46,210,216.
[180] T-22,p.66; Appeal Brief, paras.33-35 (fn.27). The Prosecution however notes that the Appellant's references to the transcript of the Admissibility Hearing (fns.28-29) appear to be incorrect as do not support the Appellant's submissions in paragraphs 34-35.
[181] Appeal Brief, paras.39-41.
[182] Decision, para.216.
[183] *Ibid.*

Chamber approximately a week before the Decision was delivered.[184] It is manifestly unfair to fault the Trial Chamber for failing to consider factual explanations and justifications that were not timely presented to it.

88. The Appellant's remaining submissions on this Ground are incorrect and misrepresent questions posed by the Chamber and submissions advanced by the CAR authorities.[185] In particular, the fact that the Chamber enquired on the existence of "stay of proceedings for criminal matters"[186] does not necessary entail that the Chamber saw "as fundamental" the Appellant's *Pourvoi* with respect to the "decision to transfer the case against the Accused to the ICC" as the Appellant submits.[187] Rather, the Chamber noted that a new issue had been raised by the Appellant in the course of the Admissibility Hearing and wanted to hear submissions from the CAR authorities in response. This is a legitimate course of action to render an informed decision, and should not be read as an indication that the issue presented was fundamental and decisive.

89. In addition, and contrary to the Appellant's submissions, the CAR authorities have never conceded that the Appellant's *Pourvoi* would have suspensive effect in the instant case. Although they acknowledged that appeals to the *Cour de Cassation* on criminal matters have suspensive effect, they clarified that this scenario does not apply to the Appellant's *Pourvoi*. The Car authorities added that the Appellant lacked standing to appeal the 16 December 2004 Appeals Judgment as it "was a measure relating solely to judicial administration" and did not concern the Appellant directly.[188]

90. Finally, even in the case that the CAR authorities would decide to resume the proceedings against the Appellant, he can always resort to Article 19(4) that allows for challenges to the admissibility of the case, once the trial has started and with leave of the Court, based on Article 17(1)(c).

[184] Decision, para.43.
[185] Appeal Brief, paras.33-37.
[186] T-22, p.66.
[187] Appeal Brief, para.36.
[188] ICC-01/05-01/08-770-Anx1-tENG, part IV, para.47.

The Appellant's Request for an Oral Hearing

91. The Prosecution considers that the Appellant has failed to show that an oral hearing "to expand on the submissions" contained in the Appeal Brief would be helpful in this case.[189] First, the Appellant does not provide any reasons in support of his request. Second, the issues before this Chamber are clearly delimitated, the Trial Chamber's careful decision sets out all the facts and legal issues in clear detail, and the Appellant had ample opportunity to elaborate on its submissions in its Appeal Brief considering that the page limit is 100 pages,[190] and that it was granted an extension of the time limit to file the brief.[191]

V. Relief Requested

92. For the reasons set out above, the Prosecution requests that the Appeals Chamber dismiss all Grounds of Appeal and uphold the Trial Chamber's finding that the case against the Appellant is admissible.

Luis Moreno-Ocampo, Prosecutor

Dated this 17th day of August 2010

At The Hague, The Netherlands

[189] Appeal Brief, para.44.
[190] ICC-01/04-01/06-717 OA4.
[191] ICC-01/05-01/08-827 OA3.