

1 International Criminal Court

2 Trial Chamber III

3 Presiding Judge Adrian Fulford, Judge Elisabeth Odio Benito and Judge Joyce

4 Aluoch

5 Situation in the Central African Republic - ICC-01/05-01/08

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

7 Status Conference

8 Tuesday, 8 December 2009

9 (The hearing starts at 10.02 a.m.)

10 (Open session)

11 THE COURT USHER: All rise. The International Criminal Court is now in session.

12 Please be seated.

13 PRESIDING JUDGE FULFORD: Good morning. This is a status conference in the case
14 of the Prosecutor v. Jean-Pierre Bemba Gombo. We have issued an agenda for today's hearing,
15 we propose to follow that agenda and the first item on it is a review of the accused's
16 detention.

17 Very shortly indeed, by way of introduction, given the Appeals Chamber's decision
18 of 2 December, which essentially reversed the Pre-Trial Chamber's decision of 14 August
19 2009, it seems to us certainly on a preliminary basis that the operative decision for
20 today's review is that of the Pre-Trial Chamber of 14 April 2009. And, given the terms
21 of the Appeals Chamber's decision of 2 December, the issue on which we should focus at
22 this review is whether or not there has been a change in circumstances since 14 April
23 which should cause us to modify the decision of 14 April 2009.

24 So, put shortly, rather than a repetition of the points that have been made
25 to this Court before - and by "this Court" I mean the Pre-Trial and the Appeals Chamber

1 and this Chamber - is whether anything new has arisen since 14 April that necessitates
2 a modification of Mr Bemba's detention.

3 That's our proposed approach, and we immediately invite submissions from the
4 Defence, first of all, as to whether it is submitted that that approach is wrong and,
5 if it is not submitted it's wrong, whether there are any changes in circumstance which
6 we should take into account. Yes.

7 MR LIRISS: (Interpretation) Mr President, your Honours, we agree with the
8 approach that you have adopted. To that end we refer specifically to the decision handed
9 down by the Appeals Chamber on 2 August; which decision defines the principle of the
10 change of circumstances.

11 In paragraph 1 the Appeals Chamber states, "Changes in the circumstances involve
12 either a modification of all the facts of the preliminary detention, or a new fact which
13 convinces the Chamber that a modification of its prior decision is necessary."

14 The Defence submits that there are three facts which are of a nature to convince
15 the Chamber to modify the detention decision. However, the Defence would like to recall
16 that it is not incumbent on the accused to establish that he should not be maintained
17 in detention, but it is up to the Prosecution to prove that the accused must be kept
18 in detention. That being the case, the Defence -- the Prosecution has the obligation
19 to put forward not only concrete and specific arguments, but also all the grounds for
20 the decision to keep the accused in detention.

21 The first element that we will like to draw your attention to is as follows.
22 All the decisions that have been handed down so far and which have denied the provisional
23 release of Mr Jean-Pierre Bemba Gombo refer to the reasons laid down in the arrest warrant.
24 As you are well aware, on 9 May 2008 the Office of the Prosecutor applied to Pre-Trial
25 Chamber III for the issuing of an arrest warrant. On 21 May of the same year, that application

1 was rejected by Pre-Trial Chamber III and demanded that the Prosecution should produce
2 new elements.

3 However, two days later the Prosecutor filed an urgent application in which
4 they pointed out that information in their possession indicated that Mr Jean-Pierre Bemba
5 was appearing to abscond and that there was public information to the effect that he
6 was preparing to return to Congo. The Chamber, on the basis of Article 92 of the Statute,
7 decided to issue the warrant.

8 Mr President, your Honours, what was precisely that information that was referred
9 to? What was the nature of that information? Who provided that information and why is
10 it that the information in question was provided only on that day and in what way was
11 that information new?

12 Please allow me to point out that, in order to indicate that Mr Jean-Pierre
13 Bemba could not claim that he was aware that an investigation was ongoing, or that a
14 warrant was issued against him, the Prosecutor had produced an interview of our client
15 on the Al Jazeera network. In that interview, Mr Bemba stated that he was not aware of
16 any investigation being carried out about him.

17 The Prosecutor produced his information to indicate that he was right in stating
18 that Mr Bemba was aware of that investigation and of the arrest. And so, if the Prosecutor
19 is convinced that Mr Bemba was not aware of either the investigation or the warrant,
20 it cannot be concluded that he was preparing to abscond. It is either one of two things:
21 Either he was not aware, and so we cannot talk of -- about preparation to abscond, or
22 he was aware and our argument that he was preparing to voluntarily produce himself would
23 then be relevant.

24 So, what was the Prosecutor's information? It was public knowledge, and we
25 are going to produce documents to support this, that after having escaped two attempts

1 on his life, Mr Bemba found himself in Portugal, with his family, where he owns a building
2 and where that family is settled.

3 Following that, the international community, in its desire to support
4 democratisation in the DRC, had initiated negotiations between the Congolese government,
5 represented by the speaker of the parliament and Mr Bemba. The European Commissioner
6 For Development, Mr Louis Michel, was using his good offices to facilitate those negotiations,
7 and this was three or four months prior to the issue -- the issuing of the warrant. An
8 agreement could have been reached, except that Mr Bemba was asking for new conditions,
9 for additional conditions.

10 How is it possible, on the basis of public information, to try to manipulate
11 or extract a judicial decision by claiming that this was absolutely new information?
12 How was it possible to convince the Bench that the return of Mr Bemba, that is within
13 the framework of an international agreement to his country, was an attempt to abscond?

14 In April 2008, while waiting for his children to go on long holidays, Mr Bemba
15 bought air tickets for the United States, and those were return tickets. He is not a
16 resident of the United States. He has gone there several times, and that was ever since
17 2004. That is the date on which the Prosecutor announced the commencement of the
18 investigation.

19 Would it be the United States which would be the country, based on the information
20 that the Prosecutor used, that the Prosecutor would claim that Mr Bemba was preparing
21 to abscond to a country that was not a signatory to the Rome Statute? In any case, Mr Bemba's
22 agenda was well known. He had been invited to Germany for a series of conferences, but
23 the Prosecutor claimed to the Chamber that, thus far, no one was aware of Mr Bemba's
24 next destination.

25 What we are making here are -- we are taking into account the arguments of the

1 Prosecutor before the Pre-Trial Chamber, because we were never informed of that information
2 before. The European Court of Human Rights stipulates that all materials that support
3 the preventive arrest of a suspect should be disclosed to the Defence. And because the
4 Defence can never control the legality of the detention, and if the materials are not
5 disclosed - are not disclosed to the Defence - as was the case, the Judges would -- should
6 reject the application for a violation of the principle of the adversarial system.

7 During the provisional release hearing of June, we requested that the Prosecution
8 should produce that information, but in vain. No later than four days ago we once again
9 requested, and in writing, that that information be placed at our disposal, including
10 the sources and all the metadatas. It was only yesterday that the Prosecution responded
11 to us and said that "We cannot provide that to you at this point." And what are the reasons
12 for this? Is this information that does not exist in reality? Is it information that
13 falls under the provision that requires that the authorisation of the source should be
14 acquired before providing that information? That is not the case, because it was asked
15 that the Prosecution should verify in his archives whether any information existed that
16 could only be provided with the authorisation of the source. The Prosecutor answered,
17 "No."

18 So, what is this information? What are the sources that cannot be disclosed
19 to us? It is for that reason that we very respectfully apply to the Chamber that the
20 Prosecutor should be ordered to produce this information that constituted the basis for
21 the arrest warrant and, at the very least, the Prosecutor should produce that information.
22 And if that is not possible, you should set aside the elements based on the attempt to
23 abscond which was provided on the basis of the so-called information.

24 The Defence submits that, in the absence of the production of this
25 information - that is, if it exists - this would mean that the Judges responsible for

1 issuing the arrest warrant received incomplete information and distorted information
2 and that the decision of the Judge issuing the arrest warrant -- well, I'm trying to
3 look for the correct word to indicate that this decision was based on information that
4 was improbable or -- and that was not cross-checked and, that being the case, any arrest
5 warrant that is based on such information by itself constitute new information because
6 this arrest warrant itself is based on Article 92.

7 Mr President, your Honours, during the last status hearing, status conference,
8 you handed down orders defining the various procedures and the various disclosure protocols.
9 You ordered the Prosecutor to complete his disclosures on 30 November at the latest.
10 You even gave him the possibility, if he wanted an extension of the deadline, to do so
11 as early as possible. However, at the time of -- at the time that deadline expired, the
12 Prosecutor has just applied for an extension of that deadline, claiming that he wishes
13 to use it to produce new evidentiary materials, because he says that the witnesses were
14 not available after four years of investigations.

15 PRESIDING JUDGE FULFORD: Mr Liriss, I am going to interrupt you a second. If
16 you are going to mount an argument based on the Prosecution's application of 30 November
17 to add further materials, you needn't trouble with it, for reasons that we are shortly
18 going to make clear, but you will soon realise that there is nothing in that application
19 that needs to trouble you.

20 MR LIRISS: (Interpretation) Thank you, Mr President.

21 There is a third point, and this relates to the financial resources of Mr Bemba.
22 In its decision of 2 December the Appeals Chamber Judge pointed out that the possession
23 of significant financial resources was considered as a reason to indicate that there
24 could be intimidation of witnesses and there would be a risk of the accused absconding.
25 This decision was handed down on the 2nd. I do not challenge that decision but we have

1 arrived at this conclusion that, before the Judge handed down that decision, he did not
2 bear in mind, or he was not aware of your own decisions stating that regarding the financial
3 resources of Mr Bemba, if those resources actually existed, they are not currently available
4 and this is because the financial resources were one of the causes for the keeping of
5 Mr Bemba in detention. A judicial decision has indicated that these resources are not
6 available and that notice, that judicial notice, would normally involve or imply a change
7 of circumstances.

8 Mr President, your Honours, in his decision of 2 December, the Appeals Judge
9 stated that a decision to keep in detention or release provisionally should specify the
10 conditions that make provisional release possible, identify the host country and establish
11 that that country or state would be in a position to comply or have the conditions respected.

12 We had proposed to the Pre-Trial Chamber a certain number of States that I do
13 not want to mention here. And today, we would like to add Senegal, Morocco, and given
14 the current situation of Mr Bemba -- and in fact, the third country was Denmark, and
15 then there is also Ireland.

16 Let us look at what happened in the case of Mr Abu Garda. The Registry deployed
17 efforts to set up the necessary arrangements with the State or States concerned to make
18 it possible for Mr Abu Garda, who is suspected of similar crimes, to be able to stay
19 free. As you know, the alleged seriousness of the crimes cannot in and of themselves
20 be a cause for detention, and the Prosecution demonstrated that in the case of Abu Garda.

21 The only difference between the two is that Mr Abu Garda is free, because of
22 the mere decision of the Prosecution, and Mr Bemba is being held in detention because
23 of another decision that was taken at the discretion of the Prosecutor. I would remind
24 you of the provisions of Article 21 of the Statute. In the application of statutory
25 provisions, there can be no discrimination based on race, gender, religion, resources.

1 Thus it is possible, since it was done with Mr Abu Garda, you could order the Registrar
 2 before your decision to identify the States among the ones we have just named, verify
 3 the conditions under which such States would possibly be in agreement, and provide the
 4 necessary guarantees to these States. Because if you do not free Mr Bemba today, you
 5 will not free him before two or three years, which means he will be held in preventive
 6 detention for five years, and that would be a violation of the rule that provides for
 7 the general principle of detention being the exception, not the general rule.

8 Mr President, your Honours, possibly holding an *ex parte* status conference,
 9 and the Court could have such a meeting with those States, and perhaps in the presence
 10 of the Registrar, I am making this point because of all the States, all the States that
 11 we have turned to, (Expunged)

12 (Expunged)

13 (Expunged)

14 (Expunged). And I do hope that the Chamber has

15 all the decisions at their disposal, and all the answers from these various States so
 16 that consequently, on the basis of observation, written observations that we will be
 17 submitting, you will be able to discuss these matters with all the States and determine
 18 which one would be in a position to host Mr Bemba, which host -- which country would
 19 be able to ensure or enforce the various guarantees and conditions, other than the States
 20 that I mentioned.

21 If ever -- if that were truly impossible, send him back to the Congo; it is
 22 his country. He is not facing prosecution there. We have a document from the President
 23 of the Senate that states that he still enjoys parliamentary immunity there.

24 The Prosecution has told us that at the ICTY, all the accused who were released,
 25 were released to their countries, into the countries where the Prosecution was conducting

1 investigations, and those States guaranteed the safety of witnesses and victims.

2 Mr President, the Congo is a country where the Prosecution is conducting
3 investigations. There are witnesses there. If you read the list of witnesses, some have
4 personal guarantees because of their very identity. Furthermore, the United Nations -- well,
5 there is the UN mission to the Congo; that could ensure the safety of Mr Bemba and his
6 return for the trial.

7 Pursuant to Article 30 of the constitution of the RDC, it is not possible, it
8 is not required for such authorisation to be requested of the state of the Congo for
9 nationals to return to that land. Thus, there you have it. These are our arguments regarding
10 the new facts, the changing circumstances for -- and for these reasons, with all due
11 respect, we are asking you to not take into account information that led to the issuance
12 to the warrant of arrest because it was not disclosed, or you require that that information
13 be produced so that its validity and relevance can be assessed. We said that there was
14 a new fact because of the decision of the appellate judge who said that financial
15 considerations were not a relevant criterion and the new fact is that your Chamber has
16 seen that the resources are not available.

17 You were asked regarding the determination of the State that would host Mr Bemba,
18 and I have just made that point.

19 Mr President, your Honours, I thank you.

20 PRESIDING JUDGE FULFORD: Thank you very much, Mr Liriss. That was extremely
21 clear. For the Prosecution, who is dealing with this matter? Ms Kneuer?

22 MS KNEUER: Good morning, Mr President, your Honours. Today Mr Yillah will
23 present for the Prosecution.

24 PRESIDING JUDGE FULFORD: Good. Thank you. Yes.

25 MR YILLAH: Thank you very much, Mr President, your Honours.

1 PRESIDING JUDGE FULFORD: I am going to interrupt just for a moment straightaway
2 to indicate some particular areas of interest which I would ask you to address, given
3 the submissions we've just heard, so not to deflect you from what you would otherwise
4 say, but to ask you to add these elements in, please:

5 The first is, there has been considerable emphasis laid on the facts that were
6 relied on for the purposes of the arrest warrant, and certain facts that then underpinned
7 an allegation that the accused was about to flee. Now, I am sure you will want to address
8 that suggestion in any event, but the particular question I would ask you to look at
9 is this, and you may want to take a moment to discuss it with your team after I finish
10 the questions:

11 Is whether either of those matters have been referred to in the decisions of
12 the Pre-Trial Chamber when Mr Bemba's detention has been ordered because, look, reading
13 the Single Judge's decision of 14 April 2009, I, at the moment, can find no reference
14 to the facts that underpinned the arrest warrant or the allegation that at about that
15 time, shortly afterwards, the accused was, it was alleged, thinking of fleeing. So it
16 would be helpful to have some assistance as to whether that issue has ever materially
17 affected the decisions that have been made to retain the accused in custody.

18 Secondly, it has been argued that the Appeals Chamber, in its recent decision,
19 has made reference to the considerable - or what is said to be the considerable - financial
20 resources of the accused. However, again, looking at the Single Judge's decision of 14
21 April this year, although she makes reference to that point in paragraph 46, on a first
22 reading on my part, it seems to me that she indicates that she doesn't place very significant
23 weight to that element. And indeed, midway through the paragraph, we find the following
24 quotation: "The Single Judge wishes to point out that a decision on continued detention
25 is not generally made with reference to one sole element," and that was a reference back

1 to the alleged wealth of the accused.

2 And then, finally, it is said that there is an element of discrimination between
3 the position of this accused and Mr Abu Garda, and we would be grateful for your submissions
4 as to whether or not a decision in Mr Abu Garda's case is in any way relevant to a decision -- to
5 the decision that we have to make in relation to Mr Bemba.

6 Now, I am sorry to have interrupted you right at the beginning of your submissions.
7 I will undertake to try and keep quiet from now on, but your assistance with those matters
8 would be helpful. And if you want to take a moment to discuss those three issues with
9 other members of your team, please, take your time.

10 MR YILLAH: Mr President, your Honours, the Prosecution would be grateful to
11 have a few minutes to discuss these matters with the team.

12 PRESIDING JUDGE FULFORD: Well, see how you get on with us remaining on the
13 Bench. If it becomes -- if you think it looks like it would be helpful to have a few
14 minutes for us to rise, just indicate and we will leave Court. But have a preliminary
15 discussion now and see how long you need.

16 MR YILLAH: Very well, your Honour.
17 (Defence counsel confer)

18 MR YILLAH: Mr President, your Honours, the Prosecution requests a few minutes
19 and we would respectfully ask the Chamber to rise so that we have a mature submission
20 on the issue relating to Abu Garda.

21 PRESIDING JUDGE FULFORD: We welcome mature submissions. So, we will give you
22 some time, particularly given this has been dealt with by way of oral submissions rather
23 than you having had forewarning of the points that were going to be raised by the Defence.
24 We will sit again at 11 o'clock, unless we get a message from you asking for longer than
25 that.

1 MR YILLAH: We are grateful, your Honour.

2 PRESIDING JUDGE FULFORD: Thank you very much.

3 THE COURT USHER: All rise.

4 (Recess taken at 10.45 a.m.)

5 (Upon resuming at 11.02 a.m.)

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

7 PRESIDING JUDGE FULFORD: Yes.

8 MR YILLAH: Mr President, your Honours, thank you very much for the break. The
9 Prosecution is grateful.

10 Mr President, the Prosecution proposes to approach the issues raised as follows,
11 subject to your Honours' approval: First, that we make our submissions on whether the
12 conditions underlying the detention of the accused have changed; second, that we
13 specifically respond to the issues raised by the accused; and third, that we respond
14 to the questions raised by your Honours.

15 Mr President, your Honours, the Prosecution requests that the Chamber maintains
16 the continued detention of the accused because the conditions justifying continued detention
17 continue to be met. These conditions have not changed since the review of 14 April 2009,
18 and the Prosecution submits that in these circumstances the continued detention of the
19 accused be maintained.

20 What are these conditions? Firstly, your Honour, the Single Judge determined
21 that the detention -- or the continued detention of the accused is necessary to ensure
22 his appearance at trial. Now, the Prosecution would point out that since 14 April, the
23 only changed circumstance has been the decision confirming the charges issued by Pre-Trial
24 Chamber II. In the Prosecution's submission and as confirmed by the Appeals Chamber in
25 its judgment of 2 December 2009, the confirmation decision increased the likelihood and

1 provided further incentive that the accused would abscond if released, given both the
2 gravity of the charges and the possibility of a lengthy sentence if convicted.

3 Two, the Single Judge determined that the detention of the accused is necessary
4 to ensure that he does not obstruct or endanger investigations or court proceedings.
5 In reaching this conclusion, the Single Judge considered the accused's international
6 contact, his political and professional position, and maintained that his financial
7 situation -- I refer specifically to paragraph 45 here, that his financial situation
8 had not changed and, therefore, releasing the accused would enable him to evade the course
9 of justice. In view of the Prosecution's submissions, your Honours, the Prosecution
10 requests your Honours to maintain the continued detention of the accused.

11 Now I shall proceed to respond to the specific issues raised by the Defence.
12 Firstly, your Honours, the Defence has exceeded the scope of your Honours' instructions
13 this morning. If I recall correctly - and I stand guided here, your Honours - your
14 instructions were to address whether there has been any change in the circumstances or
15 conditions underlying the 14 April 2009 decision. And, in our submission, the Defence
16 has exceeded the scope of your Honours' instructions, and on those bases, their request
17 should be rejected.

18 Secondly, your Honours, all the issues raised by the Defence - and I stand guided
19 here by the records - have been litigated and ruled upon. Your Honour, again, I refer -- I
20 refer your Honour to instructions. We are guided by the records. Your instructions this
21 morning were to address whether there has been any change in the underlying conditions.
22 We submit, the Prosecution submits, that there has been no change in these conditions
23 and that the Defence has failed to make a showing that these conditions have changed.
24 What the Defence essentially has sought to do is to re-litigate issues preceding the
25 14 April 2009 decision which a competent Chamber has ruled upon. And I would dare submit

1 that for reasons of judicial comity, that I refer to your Honour's judgment or decision
2 on the status of decisions of Pre-Trial Chamber before Trial Chamber in the Lubanga case,
3 where your Honour said that the Trial Chamber would not interfere with decisions of the
4 Pre-Trial Chamber except if it were necessary to do so.

5 And what we are discussing here, your Honour, is not the legality of the accused's
6 arrest, as the Defence would have you believe. Essentially, your instructions are to
7 discuss whether there has been any change in the conditions that motivated the conclusions
8 reached by the Single Judge in her 14 April 2009 decision.

9 Throughout the Defence's submission, I stand guided by the records. The
10 Prosecution has not heard a discussion of those conditions, and the Defence has failed
11 to make a showing as to whether there has been a change in any of those conditions that
12 would warrant a modification of the accused's detention.

13 Secondly, your Honour, the Defence has made extensive reference to filing number
14 28, which is the Prosecution's request for provisional arrest. And, in particular, they
15 have said that they requested the Prosecution to disclose the source of its information
16 contained in paragraph 4 and 5, which specified that if arrest is not effected, the accused
17 would leave a certain territory.

18 Your Honours, firstly, I submit -- the Prosecution submits that this is not
19 a relevant consideration for a review of the 14 April 2009 decision. That is not a matter
20 that was discussed by the Single Judge in the 14 April 2009 decision. Secondly, the
21 Prosecution -- the Defence is submitting that it requests a disclosure of the information
22 which led the Prosecution to reach that conclusion. They have failed to demonstrate,
23 your Honours, what is the relevance of this information. The Prosecution depends on the
24 cooperation of entities to provide information to Chambers to effect issues such as arrest.

25 Despite the fact that the Defence has failed to make a showing that the information

1 is not relevant to discussion of whether there has been a change in the considerations
2 of 14 April 2009, the Prosecution submits that any such information is the subject matter
3 of an *ex parte* proceedings on the basis of Rule 81(2) of the Rules of Procedure and Evidence
4 because it pertains to information from sources relating to its ongoing investigations.

5 And thirdly, your Honours, we are not discussing here, as the Defence would
6 have you believe, the legality of the accused's arrest. That has been ruled upon by the
7 Pre-Trial Chamber. Now, the Defence has made extensive reference to filing number 28.
8 Essentially, what this filing requests is not the arrest based on the arrest warrant
9 application submitted to the Chamber but, rather, the timing of effecting an arrest.

10 And I heard the Defence submit this morning that the Judges of Pre-Trial Chamber
11 II rejected the Prosecution's application. That is an incorrect position. What the Judges
12 requested was further information relating to the Prosecution's arrest warrant application.

13 Now, I -- to put the record straight, your Honours, that was -- that is the
14 procedural history of the application that the Defence is referring to. Since we are
15 not discussing the legality of the accused's arrest, the Prosecution submits that on
16 that basis the Defence's request be dismissed.

17 Also, your Honours, the Defence submitted that regarding the accused's financial
18 resources, they have made extensive submissions as to how that may have changed. Now,
19 in the Prosecution's submission, the Prosecution would refer your Honours to the pertinent
20 parts of the Appeals Chamber's decision or judgment of 2 April 2009 -- 2 December 2009.
21 What the Appeals Chamber concluded and which the Prosecution submits here is that the
22 Defence should make a full and frank disclosure of all information pertaining to its
23 financial resources, to enable a relevant Chamber to determine whether there has been
24 a material -- or there has been some change in the accused's financial situation. In
25 the absence of such detailed information, the Prosecution submits that there has been

1 no change in the accused's financial situation and, therefore, the continued detention
2 of the accused should be maintained.

3 PRESIDING JUDGE FULFORD: Just on that point, and counsel for either the
4 Prosecution or the Defence can tell me if I am wrong in this, but as I understand the
5 approach of the Appeals Chamber, which is really set out at paragraph 74 of the decision,
6 all the Appeals Chamber says is that the financial status of Mr Bemba is a relevant factor.

7 MR YILLAH: Absolutely.

8 PRESIDING JUDGE FULFORD: And it, in essence, or rather the Chamber in essence,
9 goes no further than that. But if I have missed some relevant detail, I am sure either
10 you or Mr Liriss will correct me.

11 MR YILLAH: Your Honour is correct, save that the Prosecution would add that
12 the Appeals Chamber stated that in the view of the Appeals Chamber the Pre-Trial Chamber,
13 in omitting to make a finding on Mr Bemba's financial situation, disregarded a relevant
14 factor that it previously considered to be important, and thus the Pre-Trial Chamber
15 erred. And the Prosecution stands by this submission: That on the basis of the limited
16 information canvassed by the Defence before your Honours, it is insufficient for your
17 Honours to make a factual finding that the financial situation of the accused has changed.
18 If the accused is seeking interim release, it should make full and frank disclosure of
19 all relevant information pertaining to his financial situation to enable your Honours
20 assess fairly whether interim release should be granted.

21 PRESIDING JUDGE FULFORD: Well, you must be careful with that, Mr Yillah, because
22 I think the Defence will say that, particularly in relation to the application for legal
23 assistance from the Court, the accused has made full and frank disclosure of his financial
24 position to the Court. So I would caution you against relying too heavily on a suggestion
25 that the accused has failed to discharge that obligation, given the fact that he has

1 provided details to the Court which, as I understand it, at present are not criticised.

2 MR YILLAH: The Prosecution takes the cue from the Bench. Also, your Honours,
3 just last two points raised by the Defence: The Defence also mentioned that the accused
4 would -- would have surrendered had he been given the opportunity or would have made
5 himself available. Your Honours, I believe, as your Honour is aware, this is a consideration
6 that was -- the Appeals Chamber gave consideration to this issue in its Appeals judgment
7 of 2 December 2009.

8 And what the Prosecution would say is that, based on the facts canvassed by
9 the Defence here, the Defence has not made a sufficient showing that that would have
10 been the case. But that said, your Honours, the pertinent considerations, the Prosecution
11 would conclude by the following remarks: That the pertinent considerations as to whether
12 your Honours should grant interim release is whether the conditions stipulated under
13 Article 58(1) continue to be met.

14 If your Honours are satisfied that the continued -- that any of these conditions
15 continue to be met, the Prosecution respectfully submits that your Honour maintains the
16 continued detention of the accused. And on the basis of the evidence provided by the
17 Defence here this morning, the Prosecution respectfully submits that the Defence has
18 failed to make a showing that any of the considerations mentioned by the Single Judge
19 in the 14 April 2009 decision has changed, that may warrant a modification of the accused's
20 detention.

21 And now, with respect to the issues raised by your Honours, the Prosecution
22 will first address the comparison between this accused and Mr Abu Garda. Your Honours,
23 in the Prosecution's submission, this issue is irrelevant to the matters under consideration
24 by this Chamber. How is it irrelevant? Your Honour's instruction to the parties this
25 morning was to determine whether any of the conditions underlying the 14 April 2009 decision

1 have changed. Given that the Single Judge did not address this issue in that decision,
2 the Prosecution submits that it is irrelevant and your Honours should, accordingly, dismiss
3 the Defence's request on this basis.

4 Secondly, treatment of defendants and accused person is a matter which falls
5 squarely within the discretion of the Prosecutor on the basis of available information.
6 This discretion is not unfettered, your Honours; it is one that is subject to judicial
7 review. And as your Honours might have seen in the procedural history raised by the Defence
8 this morning, the Prosecution's arrest warrant application was subject to a judicial
9 review by a competent Chamber. The Chamber looked at the Prosecution's application and
10 said: We request further information. Also, on the Prosecution's application for
11 provisional arrest was subject to a judicial review by a competent Chamber.

12 Thirdly, the Prosecution submits that the comparison between Abu Garda and this
13 accused does not -- that the comparison has no basis in determining the legality of the
14 accused's arrest. It is not a pertinent consideration stipulated under Article 58(1)
15 of the Statute. That will be the Prosecution's submission on those issues -- the first
16 issue.

17 On the second issue, I believe the Prosecution has also addressed you on the
18 financial situation. Subject to any comments, or any area to be covered, that would be
19 the Prosecution's submission.

20 PRESIDING JUDGE FULFORD: Very clear, Mr Yillah. Thank you very much, indeed.
21 Anything by way of reply, Mr Liriss?

22 MR LIRISS: (Interpretation) With your leave, I have two brief comments to make,
23 and Mr Kilolo will then follow up. Mr President, the decision of 14 April refers expressly
24 to the warrant of arrest. The decision of 14 April indicates that the conditions that
25 prevailed at the time of the issuing of the warrant of arrest have not changed. It refers --

1 PRESIDING JUDGE FULFORD: Well, Mr Liriss, could you take us, please, to the
2 relevant part of the decision where this is set out. It would be, if this is to be contended,
3 I would like to see exactly how it's dealt with in the 14 April decision.

4 MR LIRISS: (Interpretation) We are referring to paragraphs 1, 2 and 45, and
5 specifically referring to the specific decision, prior decision which referred to the
6 arrest warrant.

7 PRESIDING JUDGE FULFORD: Thank you.

8 MR LIRISS: (Interpretation) So it is relevant that today we decide, as we still
9 do not have in our possession the prevailing information underlying the issuing of the
10 warrant of arrest - notably, his likelihood of absconding - you are not in a position
11 to decide that this request was underpinned by anything objective at all.

12 Secondly, I believe that the Office of the Prosecutor has misunderstood me.
13 I never said, or I never said today that Mr Bemba was preparing to appear. What I was
14 saying was that the OTP is contesting the fact that he was preparing himself to appear
15 because he was not aware of the opening of an investigation, nor was he aware of the
16 issuing of an arrest warrant. That is where I -- the fact -- the allegations that he
17 was preparing to abscond are no longer founded.

18 One more observation, Mr President, with your leave: The OTP should not content
19 itself with vague allegations. The conditions continue to apply. He has international
20 contacts and, as such, nothing has changed. But then identify who these contacts are.
21 Where are they? What type of contacts are they? And why is it that if he has international
22 contacts, they will be in cahoots in his preparation to abscond. That is what they need
23 to identify.

24 And Mr Kilolo will follow-up with what I have just said.

25 MR KILOLO: Thank you.

1 PRESIDING JUDGE FULFORD: I am going to interrupt. We are delighted to see the
2 Defence well represented this morning and, indeed, I want to welcome the new member of
3 the Defence team, who has not been seen here before. You are very welcome, sir.

4 However, bearing in mind the need to ensure that our proceedings do not become
5 unduly lengthy, we do not encourage a procedure whereby, either in the first round of
6 submissions or by way of reply, one counsel for a team make submissions, then followed
7 by another. It will stretch these proceedings until the end of time if we adopt that
8 procedure.

9 Now, Mr Kilolo, on this occasion, given that I haven't given this indication
10 before, is there anything that you really need to add to that said by Mr Liriss, which
11 is new and which isn't going to involve repetition of what has been said already? Could
12 you have a quick word with Mr Liriss, please, to make sure that second submissions are
13 really going to be necessary in these circumstances.

14 (Defence counsel confer)

15 PRESIDING JUDGE FULFORD: Yes, Mr Kilolo?

16 MR KILOLO: (Interpretation) Thank you, Mr President. I shall limit my
17 intervention to one essential point which was raised in the Appeals Chamber decision
18 and also by the OTP. This is notably the question as to whether the existence of the
19 confirmation of charges decision would come into play and whether it would give rise
20 to the likelihood of him absconding.

21 I would like to draw your attention to paragraph 105 of the decision of 2 December
22 2009 which was rendered by the Appeals Chamber. This paragraph is of import because it
23 gives you the full legal background which might assist you in taking your decision. The
24 Appeals Chamber specifies that you will have to take a decision upon the basis of Article
25 58; notably, to either release immediately under no conditions whatsoever the accused,

1 or to release the accused under certain conditions. And what is of importance here is
2 that the decision also specifies that were the release of the accused to give rise to
3 any risk of absconding, then the Chamber, in line with Rule 119 of the Rules of Procedure
4 and Evidence, would be able to examine the appropriate conditions and procedures in order
5 to diminish or eliminate the risk of absconding.

6 I believe that this is important because when we talk about risks we have to
7 bear in mind that, of course, the jurisprudence and the Statute does not necessarily
8 suggest that we eliminate them entirely, but that we diminish them or reduce them
9 significantly.

10 Now, I would like directly, with regard to this issue, to refer to the jurisprudence,
11 the jurisprudence which talked of the length of the sentence and the fact that this does
12 not necessarily implicate the rejection or dismissal of our request for release. And
13 this cannot be opposed in an abstract manner, to the extent that all accused before the
14 International Criminal Court all run the risk or all face a lengthy sentence, and I would
15 request that you refer to jurisprudence and notably a number of decisions which were
16 in keeping with this. And rather than name them all or list them, we would like to submit
17 them to you in writing and state the existence of all this abundant jurisprudence in
18 our written submission.

19 PRESIDING JUDGE FULFORD: We are going to deliver an oral decision in a matter
20 of a few minutes, Mr Kilolo. You have had warning of today's hearing. You have had warning
21 of the subject matter of it. We are not going to entertain any further written submissions
22 in those circumstances. A decision needs to be made by 11 December. So if there is any
23 jurisprudence that you wish to rely on, you are going to have to take us to the detail
24 of it now.

25 MR KILOLO: (Interpretation) Thank you, Mr President. I would like to draw

1 your attention to case law in the case Prosecutor v Boskovski. This was a decision on
2 motion for provisional release on 8 July 2005, paragraph 15.

3 PRESIDING JUDGE FULFORD: Now, Mr Kilolo, have you got copies of that decision
4 for our consideration? If you want this Chamber to consider decisions of other tribunals
5 or, indeed, of this tribunal, you must produce the copies in Court so that we are in
6 a position to read them and fully understand what the Judges have said. I am afraid we
7 are not prepared to entertain references to decisions in counsel's submissions without
8 us being provided with the underlying documents. Now, if you haven't got the decisions
9 in paper form in your hand now, I am afraid you are going to have to move on to your
10 next point.

11 MR KILOLO: (Interpretation) If you feel that we can produce those elements
12 to you before 4.00 p.m. this afternoon, Mr President, we will be able to do so.

13 PRESIDING JUDGE FULFORD: I'm sorry, Mr Kilolo. There has been ample notice
14 of today's hearing. You have been given a proper opportunity to put your house in order
15 so that you can make such submissions as you wish. Now is your moment. If you don't
16 have those authorities with you, I am afraid you are going to have to move on to your
17 next point.

18 MR KILOLO: (Interpretation) Very well, Mr President. I would simply want to
19 draw your attention to the fact which relates to jurisprudence to the effect that the --

20 PRESIDING JUDGE FULFORD: No, no, Mr Kilolo, we are not going to have submissions
21 based on the jurisprudence of this tribunal or other tribunals if the cases you are relying
22 on have not been put before us, because we would not be in a position to make an informed
23 decision as to whether or not your submissions are, in fact, justified or not. So, if
24 you don't have the decisions with you, please move on to the next area of evidence. And
25 I think this is your final point.

1 MR KILOLO: (Interpretation) Well, that was the only point that I wanted to
2 expand on, and I would simply want to request that you refer to this paragraph 105 of
3 the Appeals Chamber.

4 I would like to conclude by drawing your attention to Article 86 of the Rome
5 Statute which stipulates that the States have an obligation to provide all forms of assistance
6 to the Court. And I am mentioning this because my learned colleague mentioned to you
7 the various States that are being considered, and the Appeals Chamber actually said that
8 the Chamber had an obligation to seek the opinion of the various countries.

9 It seems to me that it is important to draw your attention to the fact that
10 in this case we should refrain from finding ourselves in this situation where certain
11 States exonerate themselves from certain obligations because of political reasons; for
12 example, Mr Bemba is possibly opposed to the current regime in the DRC, and this could
13 mean that some States are embarrassed for political reasons and, therefore, decide to
14 free themselves or release themselves from their obligations.

15 And let me end by referring to Article 30 of the Congolese constitution, which
16 stipulates that no Congolese national can be prevented from entering the territory of
17 the Democratic Republic of the Congo. In reality, on the issue of knowing whether the
18 Congo accepts to take in Mr Bemba in its territory, that issue would not arise in the
19 specific case of Congo, because this is a country of which he is a national. And with
20 regard to security, we believe that Congo has also the obligation to provide security
21 for Mr Bemba, not only as a national but because of his capacity as a sitting senator.
22 Thank you.

23 PRESIDING JUDGE FULFORD: Thank you, Mr Kilolo. And I'm sorry I interrupted
24 you.

25 (Pause in proceedings)

1 PRESIDING JUDGE FULFORD: I want to thank counsel for the submissions on that
 2 issue. We have to give the stenographers and the interpreters a break. We've been sitting
 3 now for one and a half hours; although, of course, there was a short break in the middle
 4 of that time; but nonetheless, we have got to allow a half-hour break at this stage.
 5 So, we will rise now and sit at precisely five past 12.00. Thank you very much.

6 THE COURT USHER: All rise.

7 (Recess taken at 11.37 a.m.)

8 (Upon resuming at 12.04 p.m.)

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

10 PRESIDING JUDGE FULFORD: The Statute refers only to review by the Pre-Trial
 11 Chamber. However, under Article 61(11) of the Statute, the Trial Chamber "may exercise
 12 any function of the Pre-Trial Chamber that is relevant and capable of application" in
 13 the trial proceedings.

14 The Trial Chamber considers it appropriate, in fairness to the accused, that
 15 his detention is reviewed by the Chamber under Articles 58(1) and 60 of the Statute and
 16 Rule 118(2) of the Rules of Procedure and Evidence during the entirety of the pre-trial
 17 proceedings before the Court.

18 A similar approach was taken by Trial Chamber I in the case of the Prosecutor
 19 v. Thomas Lubanga Dyilo. On this basis, the accused's next review should occur before
 20 11 December 2009; and hence, the Chamber's consideration of this issue today.

21 On 15 June 2009, the Pre-Trial Chamber confirmed charges against the accused
 22 and found sufficient grounds to believe that Mr Bemba is criminally responsible under
 23 Article 28(a) of the Statute for crimes against humanity and war crimes.

24 The Chamber does not intend to rehearse the complicated history to the accused's
 25 detention in this short oral decision, because this has been comprehensively set out

1 by the Appeals Division in its recent judgment overturning the Pre-Trial Chamber's decision
2 on interim release. (2 December 2009, document 633).

3 What are the key factors to be taken into consideration in this decision? Most
4 fundamentally, the deprivation of an individual's liberty is to be approached as the
5 exception that needs sustainably to be justified, and remanding the accused in custody
6 is not to be treated in any sense as the rule.

7 The arrest and confinement of the accused are governed by Articles 58 and 60
8 of the Statute; and particularly, pre-trial detention can be justified to ensure the
9 individual's appearance at trial, to ensure he does not obstruct or endanger the
10 investigation or the Court proceedings, or to prevent him committing crimes within the
11 jurisdiction of the Court arising out of the same circumstances as the case which the
12 Chamber is considering.

13 Particularly given the terms of the Appeals Chamber's decision on 2 December
14 2009, to order the release of the accused at this stage the Chamber would need to identify
15 either a change in some or all of the facts underlying the previous decision on detention
16 or a new fact satisfying the Chamber that a modification of the Pre-Trial Chamber's last
17 decision ordering the detention of the accused is necessary (paragraphs 57 to 60 of document
18 633).

19 The Chamber stresses that in its view the decision of 14 April 2009 is the relevant
20 operative decision in this regard, rather than the decision of 14 August 2009 (document
21 475) because the latter decision was overturned on appeal.

22 Three suggested material changes have been identified by counsel on behalf of
23 the accused: First, it is suggested that all of the previous decisions on detention by
24 the Pre-Trial Chamber have referred to the reasons relied on in the materials founding
25 the arrest warrant (the Pre-Trial Chamber, we are told, ordered additional information

1 in this regard on 21 May 2008). Thereafter, counsel for the accused submits that the
2 Prosecution alleged that Mr Bemba was preparing and intending to flee, and information,
3 it is said, was provided to the Chamber which the Defence now questions.

4 Counsel suggests that the accused was, in fact, ignorant of any investigation
5 being carried out by the Office of the Prosecutor; and therefore, it is argued this morning
6 that the claim that he was intending to flee was inadequately founded when that matter
7 was raised before the Pre-Trial Chamber. Counsel refers to the accused's presence in
8 Portugal at the relevant time, following attempts on his life, and it is brought to our
9 attention that he had bought tickets to the United States of America; and as a result,
10 it is argued that this would not constitute a sensible destination for him to travel
11 to if he was attempting to escape justice. Finally, in this regard, the Chamber is told
12 that the accused had been invited to Germany to attend a conference.

13 In our judgment, even if there was a lack of information provided to the Defence
14 on this issue, or even if there was incorrect information provided to the Pre-Trial Chamber
15 at the relevant stage in these proceedings, neither of those two factors would invalidate
16 any of the reasons underpinning the Pre-Trial Chamber's decision on the issue of detention
17 as issued on 14 April 2009.

18 We have looked carefully at that decision and we have invited counsel to direct
19 our attention to any relevant parts in it, and although Mr Liriss has identified three
20 particular paragraphs (1,2 and 45), on close reading the Single Judge did not rely on
21 any of the information which the Defence submits this morning supported the arrest warrant,
22 or the allegation that is said to have followed shortly afterwards that the accused was
23 intending to flee.

24 Therefore, given that this decision is, in essence, a review of the decision
25 of 14 April, with the Chamber today having the responsibility of seeing whether there

1 have been any material changes since then, we do not consider that any of the arguments
2 advanced on behalf of the accused on this issue amount to a material change in circumstances.

3 Second, it is said that the Appeals Chamber has made observations on the accused's
4 access to funding which are potentially in conflict with the decision of this Chamber
5 that the accused lacks the means to fund his defence. There are two points that need
6 to be made on that submission. First, the Appeals Chamber in its decision indicated not
7 that the accused had a particular level of funds, but instead indicated that this is
8 a matter that should have been properly addressed by the Single Judge if it was to be
9 said that there had been a material change in circumstances.

10 Secondly, in paragraph 46 of the decision of 14 April 2009, the Single Judge
11 indicated that she was not placing any particular weight on that issue. Instead, she
12 observed that it was one of the factors that she intended to take into consideration.

13 Critically, it needs to be observed that the Single Judge indicated in her decision,
14 in paragraph 46, that she had specifically taken into account the Defence argument that
15 the accused has no financial means because this Court has ordered the seizure of his
16 bank assets and property. This means that the position before us is markedly similar
17 to the position before the Single Judge on 14 April 2009 and, accordingly, there has
18 been no material change in circumstances.

19 Finally, as part of the three elements which are relied on this morning by counsel
20 for Mr Bemba, it is suggested that the Court should look at the difference of treatment
21 between, on the one hand, Mr Abu Garda and, on the other, Mr Bemba, and we are urged
22 to conclude that a discriminatory decision has been made to Mr Bemba's disadvantage.

23 In our judgment, our decision today on this issue in this case has to be reached
24 on the facts of this case. The decision in another case is irrelevant, unless that other
25 case is nearly identical on its facts to the present matter. No analysis has been put

1 before us that would justify a conclusion that because the material circumstances are
2 so similar between the two cases, it is necessary for us to reach a similar decision
3 on detention as was reached by the Pre-Trial Chamber as regards Mr Abu Garda. These decisions
4 are quintessentially based on the individual facts in the particular trial.

5 It has also been suggested that further work can be undertaken to find States
6 Parties who would, or may be, prepared to, receive Mr Bemba prior to trial if the Chamber
7 orders his release. In our judgment, the possibility that there may be States who are
8 prepared to receive him is an irrelevant consideration if the decision of this Chamber
9 is that there has been no material change since 14 April 2009, and that, we stress, is
10 our conclusion.

11 Therefore, in our judgment, the fact that there may be other countries who would
12 be prepared to receive Mr Bemba is not a relevant matter that should be taken into
13 consideration given our overall conclusion that the decision of the Pre-Trial Chamber
14 should be upheld because, as we say, there has been no material change in circumstances.

15 It follows that, as just indicated, the status quo ante will be upheld. We
16 additionally observe that the trial date was set on 5 November 2009 as 27 April 2010
17 and, as has already been indicated, serious charges have been confirmed against the accused.

18 Finally, the Chamber notes the following three matters. First, the Appeals
19 Chamber reiterated at paragraph 67 that the gravity of the charges is a factor in assessing
20 the risk of an individual absconding. Furthermore, the Appeals Chamber set out approvingly
21 that the Pre-Trial Chamber in its decision granting conditional release had acknowledged
22 that, even on the basis of the confirmed charges, the accused if convicted may receive
23 an overall lengthy sentence.

24 Second, the accused has a notable political and professional position, and his
25 international contacts and ties, in our judgment, militate in favour of continued detention.

1 A theme of the pre-trial decisions on detention has been that, given his international
2 contacts, his general financial background and the network and resources available to
3 him, he may well abscond. In this regard, see paragraph 72 of document 633.

4 Although monies are not necessarily immediately available to fund this accused's
5 defence (as this Chamber has found in an earlier decision), given his general contacts
6 and his position prior to his arrest, the Chamber considers that he would have access
7 to funds if he wished to flee. He is a man who has had considerable power and influence
8 and it is a proper inference that he could easily find financial support to flee.

9 Third, although the accused is able to mount arguments concerning his personal
10 circumstances - for instance, his offer to cooperate with any court-approved regime on
11 release, his continued political engagement, his family ties, his good behaviour whilst
12 in detention - these have all been considered as relevant factors during earlier reviews
13 of his detention, and accordingly none of them constitutes a material change in
14 circumstances.

15 On this review of detention under Article 60(3), the Chamber is of the view
16 that no changed circumstances require a modification of the decision of 14 April 2009
17 and Mr Bemba will, therefore, remain in custody.

18 We now turn to the prosecution's request to add and disclose additional evidence
19 to be relied on at trial beyond 30 November 2009.

20 During the first status conference before the Trial Chamber on 7 October 2009,
21 the Judges asked the Prosecution if they were ready for trial and counsel replied
22 unequivocally, "Yes, the Prosecution is ready." (T-14, p.9, lines 8 - 10). I asked lead
23 counsel if that answer was meant seriously and the Court received a one-word answer:
24 "yes" (T-14, p.9, lines 11-12).

25 There then immediately followed the following exchange:

1 "PRESIDING JUDGE FULFORD: The evidence on which you rely has been served and
2 filed and there is nothing outstanding which the Prosecution intends to introduce on
3 which it is going to rely. Is that the position?

4 "MS KNEUER: The position is that, as I said, the Prosecution is ready. However,
5 we can anticipate to conclude the disclosure of the material that we are intending to
6 rely on during trial will be concluded by the end of November 2009."

7 "The Court then gave the Prosecution until 4 p.m. on 9 October 2009 to set out
8 a summary of the unserved evidence, the issues the outstanding material goes to and an
9 explanation as to why it has not been filed to date (see T-14, p.9, line 23 - page 10,
10 line 1). This was filed on 9 October 2009 (document 552).

11 The Chamber set 30 November as the cut-off date for disclosure in the following way.
12 On 7 October 2009, at page 15 of the transcript, I am recorded as saying:

13 "We now need to deal with any outstanding issues in relation to disclosure.
14 We have dealt to the extent that we need to with the Prosecution's incriminating case
15 in the sense that any outstanding material has got to be dealt with in the way that I
16 have already identified."

17 And that was a reference to the section at page 9 that we have just referred
18 to. The Court then set an identical deadline for disclosure of any exculpatory or Rule 77
19 materials by 4 p.m. on 30 November 2009 after Prosecution counsel indicated that they
20 were capable of concluding their review and disclosure of this material by that date
21 (see pages 15 and 16). The Court left this topic of disclosure, (albeit at this stage
22 focussing on exculpatory material) by saying:

23 "You have until 4 p.m. on Monday, 30 November to complete that exercise. If
24 it becomes clear that you are going to be unable to fulfil that obligation, we are not
25 to be told 30 minutes before the deadline expires. You are to notify the Chamber sufficiently

1 in advance so there can be a hearing so that we can resolve the issue."

1 On 4 November 2009 (document 590), the Chamber set out at paragraph 7:

2 "Against the background of Articles 64(3)(c), and 67 of the Statute and Rules 76
3 and 77 of the Rules and to ensure they are properly implemented, the Chamber reiterates
4 the direction given during the status conference on 7 October 2009 that the Prosecution
5 must effect its disclosure obligations in their entirety by 16.00 on 30 November 2009,
6 subject to paragraph 6 above. If the prosecution is unable to comply with this order,
7 it is to set out the reasons in writing by way of a filing, sufficiently in advance of
8 that date to enable the Chamber to resolve the issue, including by way of a hearing,
9 before the deadline expires."

10 Thereafter, the prosecution seemingly set about discharging its disclosure
11 obligations by filing material with the court, and we need not set out the various separate
12 items that were provided to the accused, save to note specifically that on 6 November
13 2009 the prosecution filed its summary of the outstanding materials (document 599) and
14 on 10 November 2009 the prosecution communicated its incriminatory evidence, or rather
15 outstanding elements of it, in document 605.

16 However, on 30 November 2009, the prosecution, 10 minutes before the deadline
17 was due to expire, filed this Request for Authorisation to Add and Disclose Additional
18 Evidence to be relied on at trial beyond 30 November 2009 (document 626). In a 13-page
19 submission, the Prosecution failed at any stage to refer to or address the final part
20 of the court's order, namely that the prosecution was to apply in advance of the expiry
21 of the deadline for an extension, setting out reasons and giving time for a hearing to
22 resolve the issue. No reasons have been provided, and, as we have just rehearsed, the
23 prosecution filed the submission 10 minutes before the end of the deadline for service
24 of all of its outstanding evidence.

25 The Prosecution sets out a number of matters on which it now relies, that can

1 be summarised as follows:

2 i) other judicial systems allow "Rolling disclosure" or disclosure three months
3 before trial (paragraph 4); the Prosecution does not seek rolling disclosure in this
4 instance, but merely the opportunity to serve its evidence well in advance of the trial
5 (paragraph 23);

6 ii) the Appeals Chamber has recognised the right of the prosecution to continue
7 its investigations beyond the confirmation stage (paragraphs 18 to 20);

8 iii) the prosecution is in the process of re-interviewing two witnesses, taking
9 into account the charges confirmed by the Pre-Trial Chamber (paragraphs 5 and 25);

10 iv) the prosecution is seeking to access material in the possession of the
11 Registry and it is in the process of receiving additional information from cooperation
12 requests (paragraph 6);

13 v) all of the outstanding evidence will be submitted three months before the
14 beginning of the trial (paragraph 7);

15 vi) the new evidence will not materially affect the expeditiousness of the
16 trial (paragraph 8);

17 vii) the Chamber has the power to extend deadlines for good cause, see regulation
18 35(2) of the Regulations of the Court cited in paragraph 21, along with certain jurisprudence
19 from the Lubanga case set out in paragraph 22;

20 viii) along with the request to be permitted to re-interview two witnesses
21 on the changed mode of liability, the prosecution seeks to interview three witnesses
22 who only became available recently and "to access information collected by the Registry
23 and to receive other material" (paragraph 25); and

24 ix) the prosecution submits that the new material is highly relevant and
25 probative of the issues in the case (paragraph 26).

1 The Prosecution in a confidential Annex A lists eight items or areas of evidence
2 which it brings to the attention of the Chamber. Without in any way undermining the
3 confidentiality that attaches properly to that document, the Chamber makes the following
4 observations:

5 Source 1. Although the individual referred to in this regard has recently moved
6 country from a non-State Party to a State Party, no justification has been provided for
7 the lack of contact with him to date. On the basis of the material provided to us, it
8 appears that the Prosecution has always been aware of his potential relevance to this
9 case.

10 Source 2. The Prosecution has attempted to interview this witness, but we are
11 told that for reasons beyond its control the interviews have been postponed. However,
12 no details have been provided of these difficulties and no mention was made of them at
13 any stage until the filing of 30 November 2009. Furthermore, no details have been provided
14 of this witness's anticipated testimony on the issues that have been identified.

15 Source 3. The Prosecution submits that it has had a number of logistical and
16 cooperation problems as regards re-interviewing this witness since the confirmation
17 decision, all based on factors beyond its control. With this source, the Chamber repeats
18 all of its observations as regards source 2.

19 Source 4. Again, the Prosecution submits it has experienced a number of
20 cooperation and logistical problems in relation to interviewing this witness, although
21 no details of these difficulties have been provided. Moreover, although the interview,
22 we are told, is scheduled for December 2009, no indications have been given as to whether
23 or not in fact this will take place.

24 Source 5. The Chamber is told that the Prosecution discovered this witness
25 after 4 November 2009, but no explanation has been given as to why the issue was not

1 raised until 10 to 4.00 in the afternoon of 30 November 2009. Although it is said that
2 an interview is scheduled for December 2009, on the information provided there is no
3 certainty that this will ever take place.

4 Source 6. No explanation has been provided as to why Prosecution enquiries
5 had not been made at a far earlier stage to locate and investigate the files referred
6 to. In the judgment of the Chamber, the Prosecution should have developed a strategy
7 that would have ensured that this material was unearthed considerably earlier.

8 Source 7. Although it is suggested that the Prosecution came into possession
9 of this item after 4 November 2009, no details are provided of the circumstances in which
10 the Prosecution located it, or why the matter was not raised with the Chamber until the
11 very last moment.

12 Source 8. Although the Prosecution has been dependent on the cooperation of
13 a State Party as regards these documents, no details are provided as to when the Prosecution
14 was told that the 20 or so pieces of evidence had been uncovered. The Prosecution has
15 failed to address substantively its seemingly dilatory approach to this application as
16 regards source 8.

17 In the view of the Chamber, this is an unimpressive history. The case was referred
18 on 22 December 2004 and the investigation was opened by a decision of the Prosecutor
19 on 22 May 2007. The warrant of arrest for the accused was applied for on 9 May 2008 and
20 the accused has been in the Court's detention since 3 July 2008.

21 The Prosecution has been aware of the changes to the case that have been the
22 result of the decision of the confirmation of charges (15 June 2009), now nearly six
23 months ago.

24 The Trial Chamber was told on 7 October 2009, without reservation, that the
25 Prosecution was ready for trial and that all of the outstanding materials would be disclosed

1 by 30 November 2009.

2 Orally and in writing the Chamber stressed that 30 November was the cut-off,
3 the deadline, for the Prosecution to satisfy the entirety of its disclosure obligations.
4 Additionally, the Prosecution has been told twice that any application to vary that deadline
5 was to be made sufficiently in advance to enable the Chamber to entertain submissions
6 during a hearing.

7 The Prosecution has chosen not to address that latter and important aspect of
8 our order in any way in this application. Indeed, it has simply made no reference to
9 it and has accordingly provided no justification for the late filing, save by providing
10 the generally inadequate information set out in annex A.

11 Finally, the details of the history to, and the difficulties with, the additional
12 eight sources which the Prosecution wishes to rely on reveal a picture that is partial
13 and incomplete and the Prosecution has failed to provide in each instance a sufficiently
14 compelling or explicable basis for the Chamber to allow this application.

15 Whilst the Chamber recognises that in appropriate circumstances its
16 case-management decisions can be varied, given the extensive problems experienced by
17 the Defence over funding it is, in our judgment, critical that the accused has sufficient
18 time to prepare for a trial which will commence in just over four months' time. An important
19 element of that case preparation, particularly in these adverse circumstances, is that
20 he has certainty as to the case and the evidence he is to meet.

21 In conclusion, therefore, insufficient information has been provided on the
22 circumstances of each of the eight sources and no submissions have been made on the wholesale
23 breach of the Chamber's order on 7 October and 4 November 2009. Bearing in mind the statutory
24 responsibility to ensure the accused receives a fair trial, this application is refused.

25 It only remains for us to add that in the circumstances the Defence application

1 for reclassification of the Prosecution's application filed on 3 December 2009 (document
2 635) is now wholly otiose and no longer requires a separate ruling.

3 That concludes the first two items on our agenda for today's status conference.
4 There are two outstanding issues and, if there is time, an *ex parte* hearing to be held.
5 Given that it is now quarter to 1.00 and the canteen at this Court closes at 2, in order
6 to protect the human rights of counsel appearing before us, we think it is only fair
7 and reasonable if we break now so that you, to say nothing of the Judges, have an opportunity
8 of getting some luncheon. Therefore, we will rise now and sit at - an exceedingly long
9 lunch I am told is necessary - quarter past 2.00. We will sit again then.

10 THE COURT USHER: All rise.

11 (Luncheon recess taken at 12.46 p.m.)

12 (Upon resuming at 2.17 p.m.)

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

14 PRESIDING JUDGE FULFORD: First of all, I am told that, by a slip of the tongue
15 during the course of our oral ruling on the Prosecution's request to add and disclose
16 additional evidence, I referred to the investigation having been opened by the Pre-Trial
17 Chamber's decision on 22 May. Of course, that was a prosecutorial decision on 22 May,
18 and the perfected version of the transcript will be altered so as to reflect the true
19 position.

20 We turn next to the issue of the clarification of EVD numbers to various documents
21 in the eCourt system and particularly relating to translations. Summarising the problem,
22 the Prosecution has most helpfully been providing English translations of the witness
23 statements. A problem has arisen as to how they should be recorded in that, as we understand
24 it, translations are not currently provided with EVD numbers and this has led to errors
25 in the way they are handled, which we need not describe in any detail. They are clearly

1 only a record of other evidence and they are a recording in a different language of that
2 other evidence, and a decision needs to be made on whether or not they should be assigned
3 EVD numbers.

4 There has been at least one filing on this issue and by that we refer to the
5 Prosecution's filing of 28 October 2009 (document 577).

6 Now, what is the answer, please, to this? Should the translations be given
7 EVD numbers, or should some other solution be found? Ms Kneuer?

8 MR YILLAH: Mr President, your Honours, the Prosecution is of the opinion that
9 translations should not be assigned a separate EVD number. The solution that the Prosecution
10 proposes is that translations be assigned the same EVD number of the original document,
11 to ensure simple referencing and to avoid confusion during courtroom proceedings. If
12 the Prosecution's submission is accepted, Court Management Section will be required to
13 link the translation to the original document in the eCourt system. The Prosecution believes
14 that this simple solution would avoid confusion in courtroom proceedings. Thank you.

15 PRESIDING JUDGE FULFORD: Gloriously succinct. Thank you.

16 Mr Liriss.

17 MR LIRISS: (Interpretation) I agree with the Prosecution, your Honour.

18 PRESIDING JUDGE FULFORD: Thank you. Anything from the -- from those
19 representing the victims?

20 MS YAZJI: Your Honour, we don't have any specific observations.

21 PRESIDING JUDGE FULFORD: Thank you. Ms. Dahuron.

22 MS DAHURON-JACOBY: (Interpretation) Your Honour, I believe that there are two
23 separate issues here. The first is the principle of assigning an EVD code to translations
24 which, from our point of view, is not directly related to the establishment of a link
25 between the original and the translation. The protocol that is in effect appended to

1 a document - 55 in this case - states that the party that registers evidence has to indicate
2 in the field the document type, whether it is a translation or not, and then it is translated
3 where there is a relation that is established by the party that submits the evidence,
4 a link between the original and the appendix.

5 The protocol provides that evidence is to be provided in this way within the
6 Ringtail system. The errors that occurred in the past are due to the fact that in this
7 very -- in this group of evidence, an error was made and the field was not filled out
8 properly and so we were not in a position to determine that it was a translation. So,
9 there you have it.

10 Secondly, with regard to the proposal to give the same code as the original,
11 you would need a suffix that would allow us to identify whether or not it was English
12 or French translation, thereby allowing us to create a distinction between the original
13 and the translation.

14 PRESIDING JUDGE FULFORD: Well, the solution seems to be easy then. The same
15 EVD number, but with a suffix in the way that Ms Dahuron has just indicated and - and
16 this will mainly fall on the shoulders of the Prosecution, given that these are translation
17 of witness statements certainly at this stage - you will need to ensure that you enter
18 into the relevant box or relevant field that this is a translation of another document
19 and presumably appropriately identifying that other document.

20 Now, Ms Dahuron, if what I have just said is complied with, does that, as it
21 were, as you understand it, cover the issue?

22 MS DAHURON-JACOBY: Yes, your Honour, it does. We would then have to look back
23 at the pre-trial evidence if we have to re-number, or that's linked to how you will deal
24 with the evidence admitted in pre-trial stage at the trial stage, but that is a different
25 issue.

1 PRESIDING JUDGE FULFORD: Right.

2 Can I ask the Prosecution, please, to liaise with the Registry to find a solution
3 to the material that comes within this category that has been filed to date so that,
4 if they have been inappropriately designated and dealt with, there can be a retroactive
5 correction. And I see nods, so I assume that will be done. Good. Thank you very much,
6 indeed.

7 The second issue that arises relates to the eCourt protocol. The Office of
8 Public Counsel For Victims, the legal representative of victims and the Prosecution all
9 advocate using the system or protocol adopted in Trial Chamber II as regards the use
10 of the eCourt system. And for this we refer to an email of 4 December 2009, which was
11 sent by principal counsel for the OPCV to my legal officer, along with filing 588 at
12 paragraph 16.

13 It is important to observe that the development of the protocol by Trial Chamber
14 II has been built on the work of the Bemba pre-trial and the Lubanga trial protocols
15 and, as we understand it, there is, if not complete consensus, at least a widely held
16 view that Trial Chamber II's approach is the most efficacious.

17 In paragraphs 10 to 15 of the Prosecution's filing of 4 November - and this
18 is document 588 to which I have just referred - the Prosecution helpfully sets out what
19 it considers to be the main differences between the Pre-Trial Chamber Bemba protocol
20 and the Trial Chamber II Katanga protocol. They are extensive and I don't intend to rehearse
21 them now, but I give that reference for everyone's assistance.

22 However, the, Prosecution at paragraph 9 of their filing of 4 November, sets
23 out further possible developments to the protocol. In reality, there are suggestions
24 being made as to how Trial Chamber II's approach could be yet further improved.

25 Now, it may be that the Court has now reached the stage at which it needs to

1 try to unify its practice between Chambers and between divisions. We now have a considerable
 2 amount of experience of the eCourt protocol operating pre-trial, trial and in the appeals
 3 divisions, and I therefore make a suggestion on which I would ask for assistance that
 4 instead of this Trial Chamber, on its own motion yet again varying the protocol, we instead
 5 attempt to see whether between the divisions and between the Chambers we can achieve,
 6 at least for the moment, a comprehensive protocol which can be applied court-wide.

7 Now, that is the suggestion. Prosecution, if you want to take a moment to discuss
 8 this amongst yourselves, please avail yourself of the opportunity.

9 MR YILLAH: Mr President, your Honours, the Prosecution's view accords with
 10 the Bench that there should be one unified protocol before all Chambers of this Court.

11 PRESIDING JUDGE FULFORD: Mr Liriss?

12 MR LIRISS: (Interpretation) Mr President, your Honours, the Defence is ready
 13 to adapt to all amendments to the situation.

14 MS YAZJI: Yes, your Honour, we are in agreement with the Prosecution as long
 15 as the victim's interests are always taken into account in the eCourt protocol.

16 PRESIDING JUDGE FULFORD: They most assuredly will be.

17 MS YAZJI: Thank you.

18 PRESIDING JUDGE FULFORD: Now, Ms Dahuron, I think I saw you nodding in agreement
 19 whilst I was making that proposal. If you are in agreement, an issue is: Who should
 20 take responsibility for achieving consensus court-wide?

21 MS DAHURON-JACOBY: (Interpretation) Mr President, first of all the Registry
 22 is in favour of this proposal, and as to who will be taking the decision I believe that
 23 the preparation of a unified protocol is down to the Registry and then that it would
 24 submit it for approval to the various divisions within the Chambers and then according
 25 to your instructions.

1 PRESIDING JUDGE FULFORD: Ms Dahuron, we are grateful to you for that offer.
2 We ask you, therefore, to - if it is agreeable - for you to work on the basis of the
3 protocol adopted currently by Trial Chamber II, and to the extent that you think it is
4 appropriate, incorporating the additional changes that have been proposed by the Prosecution
5 in their filing. I want to make it clear that you are not in your draft obliged necessarily
6 to incorporate those changes, but if you think that they are useful please do so.

7 We will say that if there are to be any other suggested variations on Trial
8 Chamber II's proposals they must be filed by 4 p.m. on Friday of next week with this
9 Chamber.

10 Once you have your draft, given this has originated in this Chamber, before
11 you circulate it court-wide could you please file it with the Judges of this Chamber
12 only so that we can approve the draft before it is disseminated generally?

13 Good. We are not going to set a timeline on this, but we know that the Registry
14 will approach this work expeditiously.

15 That then brings us to the final issue which is that of Sango translation and
16 interpretation issues. We can take this relatively briefly. The Office of the Prosecution
17 has submitted in its filing of 3 November 2009, which is document 585, that Sango is
18 widely spoken in the Central African Republic, and is the preferred language of many
19 Prosecution witnesses. It is suggested, however, that most of the Prosecution witnesses
20 are unable to read Sango.

21 This has become an official language of the CAR and we are informed that a group
22 of academics have been standardising the language and implementing a particular way and
23 which it is to be written. That said, the Prosecution contends that the average Sango
24 speaker is probably unaware of this new writing system.

25 In all the circumstances, the Prosecution suggests first that there needs to

1 be simultaneous interpretation of witness statements written in Sango during the
 2 familiarisation process and, second, that there will need to be Sango interpreters for
 3 those who speak the language, and who would prefer to give their evidence in that language.

4 The legal representative of victims in a joint response - this is a filing on
 5 24 November 2009, document 611 - sets out agreement as to the prevalence of Sango in
 6 the CAR and suggests that the influence of French has effectively turned it into a form
 7 of Creole. It is said, therefore, that the language that is used can differ from the
 8 official written form of the language.

9 Therefore, the legal representatives of victims urge the Registry to put in
 10 place facilities to enable simultaneous translation of witness statements and other relevant
 11 documents for the familiarisation process and that witnesses who need or wish to speak
 12 in Sango during their evidence should be able to do so because interpreters have been
 13 provided.

14 Finally, it is brought to our attention that if participating victims are permitted
 15 to give evidence, there may be a need for Sango interpretation at that stage.

16 So, there is effectively a joint application from the Prosecution and the
 17 representatives of victims for the steps that I have just outlined.

18 Mr Liriss, is there anything that the Defence would wish to say on this?

19 MR LIRISS: (Interpretation) No, Mr President.

20 PRESIDING JUDGE FULFORD: Thank you very much. Ms Dahuron, before we make an
 21 order that will bankrupt the Court because of the cost, is there any resistance on the
 22 part of the Registry to there being interpretation in the way that I have just described?

23 MS DAHURON-JACOBY: (Interpretation) Mr President, we have researched the
 24 matter in terms of how much time it would take to put a team in place and also the associated
 25 costs and to date I have no information as to the fact the budget would be out of control

1 and therefore unacceptable.

2 PRESIDING JUDGE FULFORD: Well, my earlier remark was to an extent a deliberately
3 flippant one. There appears to be a clear need for Sango interpretation and, if it is
4 to be said that the Court is unable to finance Sango interpretation, then some other
5 proposals are going to have to be made by the Registry to enable the Prosecution's witnesses
6 to testify before this Court, to say nothing of participating victims and potentially
7 any witnesses who give evidence on behalf of the accused.

8 So, Ms Dahuron, we will proceed on the basis that the Registry has now been
9 informed that these steps are necessary and unless and until we receive any filing from
10 the Registry indicating that this is realistically an impossibility, we will assume that
11 these steps are going to be implemented and the appropriate arrangements are to be put
12 in place.

13 So, if the Registry wishes to persuade us to adopt another course, you are going
14 to have to do so sufficiently in advance of the trial to enable other sensible steps
15 to be taken. Is that acceptable?

16 MS DAHURON-JACOBY: (Interpretation) Yes, Mr President.

17 PRESIDING JUDGE FULFORD: Now, I am not sure who from the Prosecution will wish
18 to deal with this, and not least because they have not been put on the agenda - I do
19 not expect any form of substantive response, may I make clear - but there are two issues
20 that we very gently wish to raise.

21 The Prosecution has provided - and speaking entirely for myself I have found
22 it extremely helpful - a Prosecution summary of presentation of evidence, which has given
23 us some quite in-depth analysis of how the Prosecution puts its case.

24 In addition, the Prosecution has earlier provided at the request of the Pre-Trial
25 Chamber what has been called an in-depth analysis chart. There are really two questions,

1 either for a general indication now or by the end of the week, for a written indication
2 as to the Prosecution's position.

3 The in-depth analysis chart is now somewhat out-of-date given that the evidence
4 relied on by the Prosecution has varied to an extent since it was prepared. We don't
5 wish to make an unreasonable or onerous request of the Prosecution, but it seems to us
6 at the moment, on a preliminary basis, it would be helpful to the Chamber and helpful
7 to the accused if the in-depth analysis chart was brought up to date. And, since a very
8 considerable amount of work has already gone into it, we ask whether it would be unreasonable
9 for us now to request that this is brought up to date by, shall we say, mid-January?
10 That is question one.

11 Question two is that the summary of presentation of evidence, which I repeat
12 I found extremely helpful, doesn't refer to each and every one of the witnesses that
13 the Prosecution proposes to rely on and, without asking for a major piece of revision,
14 again on a preliminary basis, it seems to us that it would be helpful if even by short
15 reference each of the witnesses who haven't been referred to, and each of the major pieces
16 of documentary evidence which the Prosecution relies on could, as it were, be slotted
17 in at the appropriate stage, or appropriate place, within that document, so that with
18 both of them we have a very thorough overview as to how the Prosecution puts its case.

19 Now, please take a moment now to see whether you can respond immediately, or
20 whether you would wish to reflect on it and give us an answer by the end of the week.

21 MR YILLAH: Thank you very much, Mr President, your Honours. The Prosecution
22 would first address the second issue raised on the summary presentation of evidence.
23 The Prosecution believes that your Honour's request is reasonable and it is achievable
24 within the time frame of mid-January on updating all the evidence for the summary presentation
25 of evidence.

1 On the first issue relating to the in-depth analysis chart, the Prosecution would
2 respectfully ask that your Honours granted time to reflect for mature submissions on
3 this issue.

4 PRESIDING JUDGE FULFORD: Well, you most certainly can have that time. Thank
5 you. We will give the Prosecution until 4 p.m. on Friday, if that is sufficient, to put
6 in any observations. If it is not convenient, obviously if you decide that you can do
7 it by mid-January, then there is no need to put in a filing, but if there are going to
8 be difficulties then could you set those difficulties out in a submission by 4 p.m. on
9 Friday. Can I have a date, please, of Friday, mid-January. 11 January, good. We will
10 say Friday the 15th for both documents, Friday, 15 January. Yes, do come back.

11 MR YILLAH: Yes, I apologise to intervene.

12 PRESIDING JUDGE FULFORD: Certainly.

13 MR YILLAH: It is in relation to your Honour's order on the date for submission.
14 Given the issues - the importance of the issues - to be addressed in an in-depth analysis
15 chart, the Prosecution respectfully would request your Honour to extend the time limit
16 to Tuesday to file submissions on any difficulty, or whether it would achieve this.

17 PRESIDING JUDGE FULFORD: Certainly.

18 MR YILLAH: Thank you very much.

19 PRESIDING JUDGE FULFORD: Certainly. We will say Tuesday of next week then for
20 that filing, 4 p.m. We will say, for the moment, Friday 15 January at 4 p.m. for both
21 documents if there is no difficulty with both. If on mature reflection you need more
22 time, then please put in an application before 4 p.m. on Friday 15 January giving sufficient
23 time for us to be able to deal with it before the time expires.

24 The final matter is this. The Prosecution, again most helpfully, on 4 November
25 has provided the Chamber with the second amended document containing the charges. Again,

1 it is detailed and we are grateful for it. We simply want to put everyone on notice that - and
2 really this is to give an opportunity for counsel to reflect on the matter in advance - in
3 our view there is at least a possibility that there are discrepancies between the decision
4 confirming the charges issued by Pre-Trial Chamber II on 15 June and this second amended
5 document containing the charges.

6 What the Chamber is proposing to do is to provide a memorandum for everyone
7 in the case, including of course the participating victims, in which we will highlight
8 at least some of what we believe to be the difficulties by way of discrepancy and we
9 will then set a timeline for submissions on the issue, because it really I think is the
10 more desirable position that issues such as this are resolved prior to the commencement
11 of the trial, rather than being left until the end of the trial. Any difficulties with
12 the charges should really be resolved in advance, so this is no more than notification
13 to everyone that there may well be a memorandum from us to that effect.

14 I have said finally already, but I am going to say finally again, two administrative
15 matters. First, the Trial Chamber is moving floors on Friday and we are apparently barred
16 from the Court, so please do not file submissions for which you expect an answer on Friday
17 unless they are emergencies which absolutely have to be dealt with on Friday.

18 Second, the Judges are intending to take a vacation during the course of the
19 judicial recess, so we will only deal during the recess with matters that truly justify
20 being dealt with during the course of the vacation. So, please don't make filings expecting
21 answers from the Judges on matters that are really not very important.

22 Now, anything from anyone else before we rise so that we can have in half-an-hour's
23 time the *ex parte* hearing with the Prosecution only? No.

24 Good. We thank all counsel for their attendance today and we wish you an enjoyable
25 break. We will rise now and sit *ex parte* with the Prosecution only at 20 past 3.00.

1 THE COURT USHER: All rise.
2 (The hearing ends at 2.51 p.m.)