1 International Criminal Court
2 Trial Chamber III - Courtroom 2
3 Presiding Judge Adrian Fulford, Judge Elizabeth Odio
4 Benito and Judge Joyce Aluoch
5 Situation in the Central African Republic -
6 ICC-01/05-01/08
7 In the case of The Prosecutor v. Jean-Pierre Bemba
8 Gombo
9 Status Conference
10 Monday, 29 March 2010
11 (The hearing starts at 2.30 p.m.)
12 (Open session)
13 THE COURT USHER: All rise. The International
14 Criminal Court is now in session. Please be seated.
15 PRESIDING JUDGE FULFORD: Good afternoon. We're
16 extremely grateful to all counsel for their attendance at fairly
17 short notice for this status conference which we felt it was
18 necessary to hold before the short Easter recess.
19 Ms Kneuer, the first issue on which we would like your
20 assistance, please, is we must resolve the issue of the joint
21 instruction of expert witnesses, and you will be aware of the
22 Defence filing of 26 February 2010. Much of your position on
23 this, I suspect, one can divine fairly readily, but that's not
24 to put you off making submissions. Are there any particular
25 observations that you wish to make as regards the Defence

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1 objection, essentially, to the position that you've adopted?
2 MS KNEUER: Mr President, your Honours. Yes, indeed,
3 the Prosecution would like to make brief observations, and I
4 invite my colleague, Mr Scaliotti, to do so, with your leave.
5 PRESIDING JUDGE FULFORD: Yes, thank you.
6 MR SCALIOTTI: Mr President, your Honours, I will
7 address very shortly the Prosecution's arguments on the
8 Defence's objections to the proposed expert witnesses by the
9 Prosecution.
10 Mr President, your Honours, the Prosecution requests
11 the Chamber to respectfully dismiss the Defence objections on
12 the following grounds. First of all, the Prosecution's view is
13 that the Defence has interpreted Regulation 44 incorrectly in
14 that it submits that prior inclusion of experts in the list of
15 experts is a prerequisite for the experts' eligibility to
16 testify and give their opinions before the Court.
17 Second, the Prosecution reiterates that its proposed
18 expert witnesses possess sufficient expertise and recognise
19 competence in the fields for which they have respectively --
20 they have been respectively proposed.
21 Third, the subject matter on which the opinions of the
22 expert are sought are matters of technical nature, as such,
23 requiring specific technical knowledge. The expert testimony,
24 if accepted, in the Prosecution's view, will assist greatly the
25 Chamber in the proper evaluation of the factual evidence that

1 will be presented during the trial.
2 And finally, the Prosecution would like to highlight
3 that it has complied with the jurisprudence of Trial Chamber I
4 on the procedure for instructing expert witnesses. And, of
5 course, I am referring here to decision number 1069.
6 Now, Mr President, with your permission, I can
7 articulate and expand a bit more on these five arguments that I
8 have just listed. And I'll try to be really concise.
9 First of all, the argument that, based on
10 Regulation 44, prior inclusion of the expert in the list
11 maintained by the Registrar is a prerequisite for the
12 eligibility of experts. The Prosecution strongly disagrees with
13 this interpretation which, in our view, is not supported by the
14 text of Regulation 44(1). Actually, the regulation does not
15 suggest in any way, in our view, that prior inclusion is a
16 prerequisite for retention and consideration of the experts.
17 Going to the text, the regulation simply says that the
18 Registrar shall create and maintain a list of experts accessible
19 at all times to all organs of the Court and to all participants.
20 Therefore, it does not suggest that parties and participants are
21 bound only by that list while selecting expert to give opinions
22 before the Court. On the contrary, the regulation simply states
23 that such a list is accessible at all times to all organs and
24 participants.
25 The Prosecution's reading of this provision is also

1 supported, in our view, by the jurisprudence of Trial Chamber I
2 in the Lubanga case and, in fact, the Chamber allowed parties
3 and participants in that case to rely on experts which were not
4 included on that list. And I also notice on this regard that
5 the Defence, in a previous submission on the expert witnesses,
6 agreed to the applicability of this jurisprudence before this
7 Chamber.
8 PRESIDING JUDGE FULFORD: Just a question on this.
9 You may well be right that it is not an absolute pre-condition.
10 Do you accept as a matter of convenience that it is useful to
11 have experts included in the list because that does provide a
12 degree of monitoring of the experts and a way of ensuring that
13 they are appropriately qualified individuals? Do you accept
14 that proposition?
15 MR SCALIOTTI: Yes, Mr President, in the sense that --
16 and this was one of my following points -- that, in fact, the
17 Prosecution fully accepts the fact that, based on the
18 jurisprudence and on the decisions on the procedure to be
19 applied for instructing expert witnesses, the experts must apply
20 for inclusion in that list. So, as soon as they are identified
21 by the Prosecution, they have to apply for inclusion in that
22 list, and this is what the Prosecution has done in accordance
23 with the jurisprudence. So all of the four proposed expert
24 witnesses have been instructed to apply, and they can also
25 report that they actually applied for inclusion.

1 At the same time, I can also - just for the sake of
2 completeness, I can also say that the Prosecution first of all
3 consulted with the list maintained by the Registrar but, after
4 review, it came to the conclusion that the names included in
5 that list were not sufficient and, for that reason, the
6 Prosecution consulted other witnesses which were not included in
7 that list.
8 PRESIDING JUDGE FULFORD: Just following it through;
9 what do you suggest are the consequences if the application is
10 made to go on the list and, for some reason, the Registrar
11 refuses to include a proposed witness on the list? Do you
12 submit that nonetheless the witness can still be called, or, is
13 then that something -- is that something that should then be
14 reviewed by the Chamber to establish whether or not the witness
15 is, in fact, an appropriate person to be called?
16 MR SCALIOTTI: Yes, Mr President, that's the
17 Prosecution's submission.
18 PRESIDING JUDGE FULFORD: Right.
19 MR SCALIOTTI: The second option, I would say. Yes.
20 In that case we would like to have the Chamber reviewing the
21 application and the qualification of that expert.
22 PRESIDING JUDGE FULFORD: Right, very clear. Yes,
23 thank you.
24 MR SCALIOTTI: Now I think I can move to the second
25 argument, which is more in detail: the expertise and

1 qualification of the expert witnesses that the Prosecution has
2 proposed.
3 Very briefly, even in this regard. The first expert
4 witness is Lieutenant-General Opande, who has extensive
5 scholarly and professional military expertise. Therefore, the
6 Prosecution believes that this expert will be able to provide
7 specialised knowledge on military issues, particularly in
8 relation to command and control in non-governmental military
9 groups such as the MLC.
10 The expertise of this witness was actually recognised
11 before international tribunals and courts, particularly the
12 Special Court for Sierra Leone and this Court, as the witness
13 testified respectively as an expert and as an overview witness.
14 On gender crimes, the expert proposed by the
15 Prosecution is Dr Nowrojee. Even in this case the Prosecution
16 submits that Dr Nowrojee possesses sufficient expertise and
17 recognised competence in the field of gender crimes. Once
18 again, this expertise has been recognised and accepted before
19 International Criminal Tribunals. This is a fact that Defence
20 is not denying, but the Defence is challenging this expert on
21 two different grounds: On the fact that the opinion would be of
22 a speculative nature, and second, that the expert would not be
23 impartial.
24 Now, on the first argument the Prosecution's view is
25 that at this stage it's quite premature to discuss and to submit

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1 that the opinion might be of a speculative nature for the very
2 simple reason that so far no instructions were given to the
3 expert, and the instructions are actually the avenue, the
4 appropriate avenue, to determine the specific areas in which the
5 opinion has to be given. Therefore, through the instructions
6 any area of speculation might be avoided. Therefore, in our
7 view, prior to forming instructions for the expert, the Defence
8 cannot be in a position to allege that the opinion would be of a
9 speculative nature.
10 With regard to the second ground, the alleged lack of
11 neutrality, the Defence argues that this expert has a personal
12 agenda, and the Defence referred to an opinion which was
13 published with regard to Prosecution of gender crimes. In the
14 Prosecution's view, these allegations were not demonstrated. In
15 other words, there is no demonstration whatsoever about this
16 lack of neutrality from that piece referred to by the Defence.
17 The simple fact that an opinion acknowledging the
18 rights of victims of sexual violence or arguing against the
19 failure to prosecute sexual crimes cannot be seen, in our view,
20 as a ground to challenge the impartiality of the witness.
21 Furthermore, this position is also quite in accordance with ICC
22 general principles which, of course, aim at protecting victims,
23 particularly of sexual violence.
24 It should also be highlighted that Trial Chamber I has
25 invited the Special Representative of the Secretary-General for

1 Children in Armed Conflict to provide her expertise on the use
2 of child soldiers. Therefore, despite the fact that this
3 witness, this expert, had a specific mandate and can have the
4 daily work just on that issue of the use of children in armed
5 conflict, that was not seen as a reason to disqualify the expert
6 and to allege that she had no sufficient impartiality to provide
7 her opinion and be of assistance to the Court.
8 The third expert is Dr Adeyinka M. Akinsulure-Smith
9 and this expert is proposed on post-traumatic stress disorder
10 for victims of gender crimes. In this case the Defence did not
11 object to the expert's qualification, but raised concerns about
12 the value of this expertise to the case. The Prosecution's view
13 is that understanding the circumstances affecting the testimony
14 of a witness is a fundamental element for the proper evaluation
15 of this evidence. As such, the implications of post-traumatic
16 stress disorder on witnesses who directly or indirectly suffered
17 from sexual crimes are essential to assist the Chamber in
18 understanding the circumstances in which testimonies are given.
19 The last proposed expert witness is Professor William
20 Samarin. The Defence acknowledges the expertise of this expert.
21 The Defence also acknowledges the importance of the issue of
22 language to this case being an identifying feature of the
23 perpetrators. The Prosecution submits that the distinction
24 between the languages spoken in the region where crimes were
25 committed is a technical and important element to this case

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1 which can benefit either party. The proposed expert, in our
2 view, will assist the Chamber in understanding a technical issue
3 of different languages spoken in the CAR; an issue which cannot
4 be resolved on the facts adduced by witnesses, as suggested by
5 the Defence. Therefore, we insist that this expert witness
6 should be introduced at trial.
7 Just a final -- finally, a few general remarks. The
8 subject matters on which expert opinions are proposed are
9 clearly matters of -- areas of technical knowledge which can
10 assist greatly the Chamber for the proper evaluation and
11 understanding of the factual evidence that will be presented at
12 trial. In other words, all the opinions do not fall within the
13 purview of witnesses of facts.
14 Finally, the Prosecution also, as I've already stated,
15 reiterates that it has complied with the jurisprudence of Trial
16 Chamber I, particularly decision 1069, and the directions of the
17 Chamber. And I make reference here to the fact that all the
18 expert witnesses were instructed to apply, and they have
19 actually applied for inclusion in the list maintained by the
20 Registrar.
21 Mr President, your Honour, thank you for your
22 attention.
23 PRESIDING JUDGE FULFORD: Very helpful. Thank you
24 very much, indeed.
25 Mr Liriss, we, of course, have very much in mind your

1 principal submissions as set out comprehensively on 26 February,
2 so we really don't need to trouble you to rehearse those matters
3 again. The Chamber has reflected long and hard on them, but, of
4 course, you must have an opportunity, if you wish, to deal with
5 the specific issues raised by counsel for the Prosecution this
6 afternoon. And is there anything additionally that you would
7 wish to say on those matters?
8 MR LIRISS: (Interpretation) Yes, your Honours. First
9 of all, I think it's the Prosecution that is erroneously
10 interpreting Regulation 44. We cannot appoint an expert and
11 then have that expert put on the list.
12 If we read the text, it reads "experts shall be
13 included on such a list after they state that they have
14 expertise in a given area". The authority responsible for
15 double-checking the expert is the Registry. The Registry even
16 has authority to refuse inclusion. And those who are not
17 satisfied can appeal to the Presidency. By saying that we
18 choose experts who will then be registered on the list would be
19 to put the cart before the horse, as it were. The Registry
20 should be able to double-check and see whether these individuals
21 are, indeed, experts. They should, first and foremost, be
22 proposed to the Registry before they are included on a list and
23 proposed to the court. The Defence believes that the
24 interpretation of this clause by the Prosecution is erroneous.
25 Now, talking about the various witnesses, let's take

1 Mr Opande. When I read his curriculum vitae, I do not see it
2 mentioned anywhere that this military expert has acted or has
3 any competence or specific knowledge of the type of armed
4 conflict that pitched the MLC, the Central African Republic
5 army, against the rebellion. I do not see that stated anywhere.
6 Now -- now, if you take a look at his CV, you will
7 find that he has been to Namibia. At the time he went there it
8 was to supervise elections, I believe. He has been to
9 Mozambique to supervise disarmament between the FRELIMO and the
10 opposing party. I think he has also been to Kenya, to the
11 military headquarters, and he has been a witness at the Sierra
12 Leone trials. How can he, therefore, come to give an opinion on
13 the issue of control and command on the basis of this
14 information?
15 Now, the expert Binaifer. The idea here is not to
16 know whether or, rather, how we can use sexual atrocities as
17 weapons of war. That issue does not arise. And it's not even
18 evident from the decision confirming the charges, namely, that
19 sexual violence was used as a weapon of war. What is she going
20 to tell us here?
21 Will her testimony give us elements that can enable us
22 to assess the facts and to weigh pertinently the accusations
23 which are being brought against my client? Well, let's admit
24 that there was rape, hypothetically. What is she going to tell
25 us? What new thing is she going to tell us? The use of rape as

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1 a weapon of war; is that relevant in this case? No.
2 Let's move on to the specialist on traumatology, that
3 is, Akinsulure-Smith. I have read that expert's CV. This is an
4 expert who has been everywhere in the world. However, the
5 questions that we are going to put to this expert is not whether
6 he knows what post-stress trauma is, because we do know about
7 that. We know that it exists. The question that we are going
8 to put to her is whether she examined such-and-such a victim to
9 be able to determine that loss of memory is due to such trauma.
10 Well, what's happening here?
11 The Prosecution is trying to fill some shortcomings by
12 saying that if certain witnesses cannot remember the date it is
13 because of trauma. If we are going to discuss trauma in
14 general, that's fine, but they cannot talk about the trauma for
15 each of these witnesses because the witnesses were not examined
16 individually.
17 Now, let's move on to the language expert, Samarin. I
18 read his CV, which is 50 pages long. He has been all over in
19 the world, but he has never set foot in the Congo. Whereas he
20 is being expected to say that there is a difference in
21 intonation between Lingala, Sango, French, but he has never been
22 there. What does he know about Lingala?
23 All he has studied relates to Sango exclusively. We
24 do not challenge his expertise on the Sango language. What we
25 challenge is something else. We rather challenge his saying

1 that those who speak Lingala are not all Congolese. What we
2 challenge is saying that any person who speaks French badly is
3 necessarily from the Congo.
4 Now, let's look at page 40 of his CV. He says he
5 wrote a book to show that the Sango language has a Belgium
6 origin. Sango is a language spoken in the Central African
7 Republic. Belgium has never exercised any colonial power over
8 the Central African Republic.
9 On page 48, he talks about the Belgium origin of the
10 Sango language. In fact I doubt his expertise, because he knows
11 only one language. He doesn't know the other languages. He
12 doesn't know Lingala, for example.
13 I think I have touched on all the witnesses; that is
14 all the so-called experts, your Honour. Your Honours, with all
15 due respect, the Defence appeals to you to reject all these
16 experts for the reasons which I have just outlined.
17 PRESIDING JUDGE FULFORD: Thank you.
18 (Trial Chamber confers)
19 PRESIDING JUDGE FULFORD:
20 1. During the status conference of 7 October 2009,
21 this Chamber requested that the Office of the Prosecutor
22 identifies the experts that it intends to rely upon at trial and
23 liaises with the Defence regarding the possibility of joint
24 instructions for any expert witnesses.
25 2. On 9 October 2009, the Prosecution filed notice of

1 its intention to rely upon expert witnesses and specified the
2 different subject matters on which the proposed experts would
3 testify (document 548).
4 3. On 28 January 2010, the Prosecution filed the
5 "Prosecution's Request for Approval of its Proposed Experts and
6 Joint Instructions by the Prosecution and Legal
7 Representatives", whereby it submitted to the Chamber the names
8 of three expert witnesses whom the Prosecution and the legal
9 representatives had agreed to instruct jointly, along with the
10 curriculum vitae for each expert witness (document 681).
11 The list then comprised:
12 (i) Lieutenant-General Daniel Opande as a military
13 expert;
14 (ii) Dr Binaifer Nowrojee as an expert on gender crime
15 and sexual violence as a tool of war; and
16 (iii) Dr Adeyinka M. Akinsulure-Smith as an expert on
17 gender crime focusing on post-traumatic stress disorder.
18 4. Our order at the end of the decision on the
19 procedures to be adopted for instructing expert witnesses of 12
20 February 2010 (document 695) was as follows:
21 "13. For these reasons, the Chamber hereby orders the
22 following:
23 (i) the Prosecution is to provide the Defence with the
24 name and curriculum vitae of the socio-linguistic expert
25 witness, if possible with the agreement of the legal

1 representatives, no later than 16.00 on 19 February 2010;
2 (ii) the Defence is to file its observations on all
3 the proposed expert witnesses, by no later than 16.00 on 26
4 February 2010;
5 (iii) the joint experts are to be jointly instructed;
6 (iv) if the parties cannot agree joint instructions,
7 the joint experts are to be given separate instructions, wholly
8 or in part;
9 (v) the parties shall only instruct separate experts
10 after that proposed course has been raised in a timely manner
11 with the Chamber;
12 (vi) to the extent that victims are participating on
13 an issue or as regards evidence which is to be the subject of
14 expert evidence, they are to be given an opportunity to
15 contribute to the expert's instructions (jointly with the
16 parties or separately);
17 (vii) whenever an expert is to be instructed jointly,
18 the instructions to the expert should be filed with the Chamber
19 at an early stage;
20 (viii) counsel must ensure that for those experts who
21 are not on the list of experts, they have applied to include
22 their names on the list, and the Chamber is to receive
23 confirmation of this step by way of email to the legal adviser
24 to the Trial Division."
25 5. On 19 February 2010, at 15.35 hours, the

1 prosecution communicated via email to the Defence the name and
2 curriculum vitae of a proposed socio-linguistic expert,
3 Professor William Samarin (see document 705). The Chamber is
4 asked to maintain his curriculum vitae as a confidential
5 document for reasons of privacy.
6 6. On 26 February 2010, the Defence filed the Defence
7 Observations on the Experts Proposed by the Prosecution. The
8 Defence submissions in summary are as follows:
9 (i) with the possible exception of military expertise,
10 none of the experts have relevance to the case. However, we
11 note that during the course of his submissions orally before us
12 this afternoon, Mr Liriss developed that argument, in that he
13 suggested that, as regards Lieutenant-General Opande, there is
14 nothing to indicate that he has specific competence or knowledge
15 of the relevant issues in this case;
16 (ii) in any event, the proposed joint experts do not
17 appear on the list of experts (maintained under Regulation 44 of
18 the Regulations of the Court);
19 (iii) any jointly instructed expert should be taken
20 from the list of experts created by the Registrar;
21 (iv) since the proposed experts do not appear on the
22 Registry's list, a substantive Defence response is premature;
23 but in any event
24 (v) as regards Lieutenant-General Opande, the Defence
25 "strongly" objects to evidence being called on the issue of

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1 command and control that existed in the MLC and it is suggested
2 that any conclusions on this issue should only be drawn from the
3 general facts of the case; further, in these written submissions
4 it was argued that there is no reason to believe that
5 Lieutenant-General Opande has particular expertise that is
6 greater than that of other military officials. As we have just
7 observed, Mr Liriss suggests today that the general is
8 insufficiently qualified to give evidence on these issues;
9 (vi) turning to Dr Binaifer Nowrojee, the Defence
10 suggests that the use of sexual violence as a tool of war is not
11 a recognised field of expertise and that it is impermissible for
12 the Prosecution to introduce evidence as to the motivation of
13 the alleged perpetrators: it is suggested that this would be
14 based on speculation and the evidence would be highly
15 prejudicial in nature. The Defence notes that proposed evidence
16 of this kind was rejected in the Karemera case before the
17 International Criminal Tribunal for Rwanda. However, the
18 Defence accepts in its written submissions that Dr Nowrojee has
19 given evidence in other trials before international criminal
20 tribunals, but it is suggested that she is tainted as having a
21 "prosecutorial standpoint." Accordingly, she is opposed by the
22 Defence on the basis of a lack of impartiality or neutrality.
23 In his oral submissions before the Chamber today,
24 Mr Liriss questioned root and branch the utility for the Chamber
25 in investigating issues such as sexual atrocities as a weapon of

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1 war within the context of the charges brought against this
2 accused;
3 (vii) the Defence objects to the use of Dr Adeyinka M.
4 Akinsulure-Smith as an expert on the issue of psychological
5 trauma, particularly for the purposes of demonstrating a link
6 between post-traumatic stress disorder and memory difficulties.
7 It is submitted that this evidence should be given by the
8 witnesses in question, since the reasons for memory loss are
9 potentially manifold.
10 Again, in elaboration of his written submissions,
11 Mr Liriss orally suggests that a fundamental objection to this
12 witness giving evidence during this trial is that he has not
13 examined any of the relevant witnesses in relation to whom
14 memory loss may be an issue;
15 (vii) although the Defence accepts that Professor
16 Samarin has expertise in the field of linguistics, it suggests
17 that the Prosecution is merely attempting to remedy the
18 deficiencies in its case which result from "weak investigation".
19 The Defence suggests that the ability of individuals to
20 distinguish between the relevant languages is something that
21 differs from person-to-person and that this issue should be
22 addressed by the various witnesses as to fact. It is submitted
23 that any expert will only speculate, and given that language is
24 a critical issue in the case (it may identify the perpetrators),
25 this expert should not be permitted to give evidence.

1 Again, in a substantial development to his submissions
2 this afternoon, Mr Liriss submits that Professor Samarin has
3 insufficient professional expertise of the relevant languages in
4 order to provide expert evidence in this case. It is submitted
5 that the language, or the languages, of which he does have
6 expertise will not be of assistance to the Court in this trial.
7 The Prosecution this afternoon orally responded to the
8 Defence written submissions. Essentially, four points were made
9 by counsel.
10 First, the Prosecution submits that it is not a
11 requirement of Regulation 44 of the Regulations of the Court in
12 order for an expert witness to be jointly instructed that he or
13 she has been accepted on to the Registry's list.
14 Counsel submits that it is sufficient that an
15 application has been made that has not been rejected by the
16 Registrar, although it is acknowledged that if in due course the
17 Registrar declines to place the individual on the list of
18 experts, then the Chamber will need to review the issue to
19 decide whether or not, notwithstanding the refusal, the expert
20 can give evidence, or whether somebody else needs to be
21 instructed in his or her place.
22 Second, and put generally, counsel submits that each
23 of the experts are appropriately qualified.
24 Third, that they each can give evidence on technical
25 matters on which the Chamber will be assisted because the

1 technical matters that they will each address fall outside of
2 the knowledge of the witnesses as to fact who will be giving
3 evidence in this trial.
4 Fourth and finally, the Prosecution prays in aid the
5 approach of Trial Chamber I as regards the instruction of
6 experts, and we are referred particularly to decision 1069.
7 The Chamber is of the view that the Prosecution's
8 approach to Regulation 44 is correct. At the stage of
9 instructing joint experts, it is necessary that an application
10 should have been made for the expert to be included in the
11 Registrar's list but it is not necessary for the application to
12 be included in the list to have been resolved.
13 Resolution of the application is clearly necessary
14 before the individual testifies but, at this stage, that is not
15 a requirement. Should at any stage the Registrar refuse to
16 include a proposed expert, whether they are to be instructed
17 jointly or by one party alone, it will be necessary to bring the
18 matter before the Chamber so that we can resolve the issue.
19 Turning to the four proposed experts that the
20 Prosecution suggests should be jointly instructed, the Chamber
21 is of the view that:
22 (i) The Prosecution has, notwithstanding Mr Liriss'
23 submissions, appropriately selected Lieutenant-General Opande as
24 an expert on the issue of command and control within the MLC.
25 This question, in our view is susceptible to investigation from

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1 a number of different perspectives and evidence is admissible
2 from, first, the witnesses as to fact who will be called in the
3 case and, second, from an expert or experts who, on the basis of
4 the facts that are otherwise before the Chamber, can express an
5 expert's view as to how command and control operated within the
6 MLC. The way that groups such as this operate (indeed, the way
7 in which many organisations function) is a subject that is
8 readily susceptible to expert analysis and, in our judgment,
9 given his curriculum vitae, the general has self-evident
10 qualifications to fulfil this role.
11 The fact that others could also give evidence as
12 regards this area is essentially irrelevant: the question is
13 whether or not he has been appropriately selected, and in our
14 view he has the necessary background and profile and he should
15 be jointly instructed.
16 (ii) Contrary to the Defence contentions,
17 Dr Binaifer Nowrojee is an acknowledged expert on the use of
18 sexual violence as a tool of war, and evidence of this kind has
19 been given in other war crimes trials.
20 In our judgment, hearing evidence on this issue will
21 assist us in arriving at a full understanding of the relevant
22 factual matrix in this case and to an understanding of the
23 nature of the charge or charges brought against the accused.
24 Dr Nowrojee has extensive experience, not only as regards sexual
25 violence in armed conflict but also as to the relationship

1 between these crimes and international justice. (Namely, her
2 previous experience with the ICTR and the Truth and
3 Reconciliation Commission of Sierra Leone: see her curriculum
4 vitae and the expert's application form submitted to the Court
5 and the Prosecution's filing document 681).
6 She gave evidence before the ICTR as an expert witness
7 and in one case, when deciding on the admissibility of her
8 expertise, the judges of that court concluded that "Dr Nowrojee
9 is an expert in the field of sexual violence in Rwanda, and her
10 testimony will assist the Chamber in better understanding and
11 evaluating the evidence presented by factual witnesses." (Case
12 ICTR-99-50-T, Decision on the Admissibility of the Expert
13 Testimony of Dr Binaifer Nowrojee, 8 July 2005 paragraph 9).
14 The fact that she has been instructed as a Prosecution
15 witness in the past is not a reason for suggesting that she
16 lacks the detachment and independence necessary to appear as an
17 expert, and her published comments as to the need to prosecute
18 sexual crimes when the evidence justifying this course exists,
19 cannot sustainably be utilised as a basis for suggesting she is
20 a partial or a biased witness. Her comments on this issue and
21 her evidence in previous trials do not lead to the conclusion
22 that she will give evidence that lacks objectivity and balance.
23 This witness also, in our view, should be jointly instructed.
24 (iii) Dr Adeyinka M. Akinsulure-Smith is an
25 acknowledged expert on the issue of psychological trauma. She

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1 has extensive experience as a clinical psychologist and has
2 previously worked with survivors of torture and has published
3 material relating to survivors of crimes in Africa (particularly
4 as regards the victims of sexual violence and torture: see her
5 curriculum vitae and the expert's application form submitted to
6 the Court and the Prosecution's document 681).
7 She will be able to discuss the links that may exist
8 between post-traumatic stress disorder and memory difficulties.
9 This evidence will contribute to the overall factual matrix on
10 this issue and the Chamber will undoubtedly consider the
11 circumstances of each relevant witness, bearing in mind that the
12 reasons for memory loss are varied.
13 A fact-specific determination will need to be made in
14 each relevant instance, which may be appropriately informed by
15 the expert evidence that has been given on the subject,
16 irrespective of whether or not the expert has personally carried
17 out an examination of, or interviewed, the witness in question
18 who is or may be suffering from memory loss. The Chamber notes
19 that a similar expert was instructed by Trial Chamber I in the
20 case of The Prosecutor v Thomas Lubanga Dyilo, who gave expert
21 testimony on post-traumatic stress disorder and on victims who
22 have experienced trauma. (See ICC-01/04-01/06-1729 for the
23 expert report and to Transcript 166 for her trial evidence).
24 (iv) It was at one time accepted that
25 Professor Samarin has sufficient expertise in the field of

1 linguistics to give evidence in this case, although that is
2 challenged this afternoon. But, notwithstanding those
3 objections, the Chamber is of the view that evidence from this
4 witness can contribute to our investigation of the language or
5 languages used by perpetrators in this case. As with other
6 witnesses discussed earlier in this decision, this evidence will
7 contribute to the overall factual matrix on this issue, and the
8 Chamber will undoubtedly consider the circumstances of each
9 relevant witness and the evidence that they give, bearing in
10 mind that the ability of individuals to distinguish languages is
11 something that may differ from person to person. A
12 fact-specific determination will need to be made in each
13 relevant instance, which may be appropriately informed by the
14 expert evidence from Professor Samarin that is to be given on
15 this subject. In our judgment, his knowledge of languages
16 generally entitles him to assist this Chamber with the languages
17 that it will be considering during the course of this trial.
18 This witness also, in our judgment, should be jointly
19 instructed.
20 We next address the "Prosecution's Communication of
21 documents disclosed to the Defence on 18 December 2009, pursuant
22 to the 'Second decision on disclosure relating to an
23 admissibility challenge' dated 14 December 2009" (document 659).
24 In our decision of 14 December 2009, the Chamber
25 ordered the Office of the Prosecutor to disclose the judicial

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1 decisions of the national criminal courts in Bangui as
2 identified in paragraph 19 of the decision, together with any
3 other decisions in the possession of the Prosecution which
4 concern the crimes committed during the 2002 to 2003 conflict.
5 The Chamber put the matter thus:
6 "19. On the issue of additional disclosure from the
7 dossier of the criminal proceedings before the national criminal
8 courts in Bangui, the Chamber has compared this additional
9 information with the list of the documents already disclosed to
10 the Defence on 12 October 2009. The Chamber is of the view that
11 the Prosecution provided the court with additional documents
12 previously undisclosed to the Defence, namely, the extract of an
13 appellate decision before the Chambre d'Accusation of the Appeal
14 Court of Bangui, dated 17 December 2009 and the acte de pourvoi
15 dated 22 December 2004. The Chamber notes in addition that the
16 first instance decision taken by an investigative judge on 16
17 September 2004 was disclosed to the Defence on 3 October 2008.
18 20. The Chamber considers that the judicial decisions
19 requested by the Defence should be disclosed in their entirety
20 because the national criminal proceedings concern the crimes
21 committed during the 2002 to 2003 conflict in the CAR and, thus,
22 are of potential relevance to the admissibility challenge.
23 Therefore, the Chamber orders disclosure of the previous
24 material referred to the previous paragraph by 18 December 2009,
25 16.00, together with any other decisions in the possession of

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1 the Prosecution which concern the crimes committed during the
2 2002 to 2003 conflict."
3 The Office of the Prosecutor, in accordance with that
4 decision, notified Trial Chamber III of its disclosure on 18
5 December 2009, to the Defence team of 74 documents amounting to
6 129 pages of information relating to judicial proceedings from
7 the CAR. The documents were all apparently disclosed pursuant
8 to the Chamber's order, which we have just rehearsed.
9 The material consists of items specifically ordered to
10 be disclosed by the Chamber; and they include decisions, formal
11 notification of decisions and other judicial documents received
12 from the CAR authorities.
13 On 22 December 2009, the Defence filed its
14 observations on this disclosure (document 663). The Defence
15 asserted that the Prosecution had deliberately disclosed more
16 material than was required by the second decision and that it
17 included additional incriminatory material to circumvent the
18 Chamber's orders requiring disclosure by the Prosecution by 30
19 November 2009. The Defence identified only 18 documents out of
20 the 74 documents disclosed by the Prosecution on 18 December as
21 meeting the Chamber's criteria for disclosure. The Defence,
22 therefore, requested the Chamber: (i) not to take into
23 consideration any materials that it submits exceeds the decision
24 of the 14 December 2009 and, (ii), to order the Prosecution not
25 to rely on these materials.

1 The Prosecution's position on the Defence contention
2 is set out in document 667 of 13 January 2010:
3 "4. The Prosecution disagrees with the Defence
4 assertion that the Prosecution intended to circumvent the
5 Chamber's orders barring the inclusion of additional
6 incriminatory evidence. Contrary to the Defence assumption, the
7 Prosecution did not classify the contested documents as
8 incriminatory, and it does not intend to rely on them as
9 affirmative evidence of guilt at the upcoming criminal trial.
10 5. Rather, the Prosecution disclosed the documents to
11 the Defence as Rule 77 material to assist the Defence in its
12 preparation to an admissibility challenge. The contested
13 documents are all part of the dossier before the national
14 criminal courts in Bangui. They were disclosed to enable the
15 Defence to view the relevant documents in their proper context.
16 6. Because the Prosecution did not and does not
17 intend to rely on the contested documents as incriminatory
18 evidence, the Defence's second request is unnecessary."
19 Given that undertaking by the Prosecution, there is no
20 need for the Chamber to review in this decision the individual
21 documents separately or, indeed, to make any order at all. This
22 material, whether or not it strictly exceeds the Chamber's order
23 of 14 December 2009, has been provided to the Defence simply to
24 assist in their preparation of the admissibility challenge; it
25 will not form part of the Prosecution case; and accordingly any

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1 order would be otiose. To the extent that it has any purpose in
2 this trial, it is simply made available to the Defence for its
3 preparation.
4 We turn next to our ruling on the OPCV's request for
5 an extension of time, document 732.
6 By filing 732, Principal Counsel of the OPCV requests
7 an extension of time limit of three days in order to file the
8 victims' observations on the accused's challenge to the
9 admissibility of the case.
10 She submits that, should her application be granted,
11 she will file her observations on 1 April 2010, rather than on
12 29 March 2010, as originally ordered by the Chamber at the last
13 status conference.
14 At paragraphs 8 to 12 of the application, counsel sets
15 out that a mission by the OPCV is currently taking place in the
16 Central African Republic that is due to end on 29 March. She
17 informs the Chamber that the summary of the Defence application
18 on admissibility of the case has been distributed to 250
19 individuals, in order for them to provide instructions to the
20 OPCV. She details the problems she is encountering in the field
21 as regards establishing contact with those who may wish to
22 respond (e.g. their remote locations; the problems of language
23 and the need for interpreters and translations; and the problems
24 with the flow of documentation). Once back from her mission,
25 the relevant documents will need to be scanned and sent to the

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1 parties in a redacted form, in order to protect any identifying
2 information which has been made the subject of some kind of
3 protective order.
4 Counsel reminds the Chamber that under Regulation
5 35(2) of the Regulations of the Court, the Chamber may extend
6 the time limit if the applicant shows good cause.
7 The Defence responded on 25 March 2010, document 734,
8 and submits that the various matters raised by the OPCV are not
9 valid reasons justifying an extension of the deadline, because,
10 it is suggested, the Defence motion challenging admissibility is
11 based on legal arguments concerning the principles of
12 complementarity, ne bis in idem, and abuse of process. It is
13 suggested that these principles require legal analysis from
14 counsel that does not require input by way of factual matters
15 from the victims that the OPCV represents. It is argued,
16 essentially, that the admissibility challenge is a matter for
17 the lawyers alone.
18 The Chamber considers that the Defence has advanced an
19 incorrect understanding of the role of victims. Notwithstanding
20 the matters of law that the Chamber will have to determine on
21 the admissibility challenge, the victims are entitled to be
22 consulted, particularly given the consequences for them if the
23 accused is successful on his challenge as regards admissibility.
24 The victims are entitled to be informed of the impending hearing
25 and the issues that will be raised, and they are entitled to

1 express their views and concerns to their lawyers so these can
2 be put before the Chamber, if appropriate.
3 Given that Principal Counsel has experienced undoubted
4 difficulties in the field, which we have just rehearsed, and
5 given the extremely modest nature of the application, an
6 extension of three days only, as has already been indicated to
7 Principal Counsel, the request is granted.
8 Therefore, the OPCV has the additional time, namely,
9 to 1 April, to file submissions. The Defence time limit for a
10 response is extended, in turn, from 7 to 9 April at 16.00 hours.
11 We turn next to some directions on e-mail
12 communications.
13 Over the last few weeks, email traffic, either
14 directed to the Chamber through the Legal Adviser to the
15 Division or to one of the Legal Officers to the Division, has
16 increased dramatically. Some of the emails are appropriately
17 directed to the Chamber. However, the Chamber does not need to
18 receive copies of exchanges which are essentially communications
19 between the parties, the participants and the Registry.
20 As a result of the approach currently taken, the
21 Chamber is receiving an excessive and unnecessary number of
22 emails and more thought and greater care needs to be taken
23 before we are sent emails, or are copied into the email
24 exchanges between the parties, the participants and the
25 Registry. Most particularly, copying emails to the Chamber

1 should not be used as a device for putting pressure on the other
2 party and, in all the circumstances, we issue the following
3 directions:
4 1. The Chamber should generally only receive emails
5 that are addressed directly to it for a specific purpose.
6 2. Disclosure and similar difficulties should be
7 addressed inter partes. The Chamber should only become involved
8 if a solution is unachievable. In particular, the Defence has
9 copied the Chamber on its requests for disclosure and
10 translations that have been sent either to the Prosecution, or
11 to the Registry. These, certainly at this stage, appear to be
12 purely inter partes issues and those communications should not
13 have been copied to the Chamber.
14 3. Generally, requests should be made by way of
15 filings with the Registry. In exceptional circumstances,
16 requests can be made by email if the matter is urgent and needs
17 immediate attention.
18 4. Emails should be sent usually within regular
19 working hours and they will not be dealt with out of hours, save
20 in exceptional circumstances.
21 5. If possible the Chamber should be asked to provide
22 guidance, in particular by the Registry, only after consultation
23 with the relevant party or parties and the participants. If an
24 issue has been, wholly or in part, considered by the Chamber on
25 an earlier occasion, a full transcript reference (including the

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1 relevant pages) should be provided.

2 We next address the issue of late filings and issue a

3 direction:

4 This direction addresses the late response of the

5 Defence to the 86 victims' applications. Although the Defence

6 informed the Chamber by email shortly before 16.00 on 16 March

7 2010 (viz the deadline for its response) that it was

8 encountering technical problems and indicated that it would file

9 a separate application for an extension of time, no such

10 application was ever filed. Instead, the response that was

11 filed on 17 March at 15.38 (i.e. 24 hours later) only refers to

12 the technical problems and the fact that the Chamber was

13 informed, and the author failed to apply for an extension. This

14 is not the correct procedure, and we remind the Defence -

15 indeed, we remind everyone in court - of the requirements of

16 Regulation 35 which must be strictly adhered to in the future:

17 an email informing the Chamber of difficulties is not a valid

18 application for an extension, although it is no doubt sensible

19 to warn the Chamber in this way. On future occasions, should

20 this be repeated, the filing may well not be taken into

21 consideration. However, on this occasion we waive the

22 irregularity.

23 We turn next to the issue of the review of the

24 accused's detention. We have received written submissions and,

25 of course, we do not invite counsel in any way to repeat matters

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1 that have been very fully set out for our benefit in writing in
2 a most helpful manner.
3 What we do particularly wish to address are two
4 matters raised on behalf of this accused; the first of which is
5 a suggested request to the Kingdom of Belgium for a copy of a
6 report into the conditions of the accused's interim release.
7 What we wish to bring to the attention of counsel are
8 the observations of the Single Judge on 14 August 2009 (filing
9 475) in which she set out that, when the accused was authorised
10 for a period to attend his father's funeral ceremony, the
11 Registrar was informed that: the accused cooperated fully with
12 the Court and the national authorities of the Kingdom of The
13 Netherlands and the Kingdom of Belgium; that he respected all
14 the conditions set by the Single Judge; and returned to the seat
15 of the Court in compliance with the Single Judge's order.
16 Mr Liriss, given that the Single Judge accepted
17 unequivocally that the accused entirely complied with the
18 stipulations that were imposed as regards that short-term
19 release, is there anything additional that we could possibly
20 learn from a report from the Kingdom of Belgium? Yes,
21 Mr Kilolo.
22 MR KILOLO-MUSAMBA: (Interpretation) Thank you, your
23 Honour. Well, you have to know that in actual fact the report
24 that the Belgium authorities issued on 8 July for the release of
25 Mr Bemba focused on two aspects.

1 The first aspect related to the manifest willingness
2 of Mr Jean-Pierre Bemba to cooperate with the Court. That issue
3 has already been addressed.
4 However, there is a second aspect, and that aspect
5 relates to the capacity of the Belgian State to ensure
6 compliance with the conditions that are set out by your Court
7 with respect to the release of Mr Bemba. It is on this second
8 aspect, therefore, that it could be interesting for you to see
9 exactly how in practical terms Belgium was able to ensure
10 compliance with the conditions that were set out.
11 Why do I say so? I say so because the Appeals
12 Chamber, in its decision of 2 December, felt that Mr Jean-Pierre
13 Bemba in the decision of 14 August, when mention was made of his
14 willingness to cooperate, the Appeals Chamber stated that
15 Mr Jean-Pierre Bemba did not have a choice. He had no other
16 choice but to cooperate, or to respect the conditions, because
17 there was a police mechanism in place on a permanent basis and
18 that the number of people he could interact with was limited.
19 In our observations, therefore, we are asking that the
20 same conditions should be applied if a decision is taken by you
21 to release Mr Bemba, so that could be an additional indication
22 so we see how Belgium was able to ensure compliance with those
23 conditions.
24 PRESIDING JUDGE FULFORD: I assume, Mr Kilolo, that
25 this is not a report from the Kingdom of Belgium that you have

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1 seen yourself. You are inviting us to obtain that report from
2 the Kingdom so that we can take it into consideration; is that
3 correct?
4 MR KILOLO-MUSAMBA: (Interpretation) Your Honour, I
5 had some contact with the Belgian official who was in charge of
6 Mr Bemba's security and the compliance with the conditions. It
7 is Mr Dubuisson's service that for practical reasons gave me the
8 contact information of that official, who indeed confirmed that
9 he had submitted a report and that the report was quite
10 edifying. I tried to obtain the report because I felt that it
11 would be relevant for you, but he said, unless you go through
12 the Court's cooperation mechanism, you may not be able to have
13 this report because it is an internal report that I submitted
14 directly to the Ministry of Justice.
15 PRESIDING JUDGE FULFORD: Thank you. Mr Kilolo, the
16 second as it were new issue that was raised that we wanted to
17 give you the opportunity of dealing with was -- and I am not
18 sure exactly what you had in mind, but it was the issue of a
19 possible Host State. Now, is there something additional that
20 you wish to say to us on that subject that hasn't been set out
21 in writing?
22 MR KILOLO-MUSAMBA: (Interpretation) Thank you, your
23 Honour. Indeed, on that point we believe that it would be
24 interesting on the basis of the jurisprudence of the ICTY --
25 well, I have a judgment here which I could submit now. I could

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1 submit a copy of that document. I have it right here. We also
2 have an electronic version of the judgment.
3 In the judgment there is a very clear indication that
4 in order to decide on the possibility of a release we have to
5 avoid the risk of abscondment, or obstruction of the
6 investigation, and for that reason you can try to see whether a
7 State -- within the framework of a status conference we could
8 have a dialogue with States like Belgium, Portugal, The
9 Netherlands, the Congo, and may I also add the UN mission in the
10 Congo, MONUC, and we put the question to them clearly whether
11 they are ready to guarantee that Mr Bemba would appear at trial
12 if he is released, so that they can tell us whether they can
13 ensure compliance with all the conditions for such release.
14 So, this was a case that concerned Mr Lahi Brahimaj, I
15 think, and it's an ICC (sic) judgment of 14 December 2007. We
16 find that a decision for release was taken for this individual,
17 and in his case we find that the Court directly interviewed the
18 UN mission in Kosovo, asking them, or interviewing them, on
19 their capacity - their effective capacity - to ensure permanent
20 surveillance of this individual if he was released, and the
21 Court also requested whether they had the material capacity to
22 ensure that all the conditions for the release will be complied
23 with.
24 So, we believe that we cannot do things differently in
25 this case. It is only through an exchange with a certain number

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1 of States that this can be done - a certain number of States and
2 MONUC - and any discussion would quite edifying. That is why we
3 believe that it would be appropriate to hold a status conference
4 before you make any determination on release. Thank you.
5 PRESIDING JUDGE FULFORD: So you are this afternoon,
6 Mr Kilolo, suggesting for the first time that there should be a
7 specific status conference involving a number of different
8 States in which we explore with them the possibility of them
9 hosting, as it were, the accused should we be minded to release
10 him; is that right?
11 MR KILOLO-MUSAMBA: (Interpretation) Your Honour, it's
12 not the first time - I think this is even put down in writing in
13 our last observations - on a possible release of Mr Jean-Pierre
14 Bemba. The only new element here which I've just added on the
15 basis of this jurisprudence which, with your permission, I can
16 file to the Chamber, is the fact that we can also make that
17 request to the UN mission in the Congo, MONUC, as was the case
18 for the UN mission in Kosovo.
19 PRESIDING JUDGE FULFORD: Thank you very much. Do you
20 want to respond on this at all, Ms Kneuer?
21 MS KNEUER: Thank you, Mr President, your Honours.
22 Very briefly from the Prosecution, two observations on the
23 request to the Kingdom of Belgium to receive a copy of the
24 report as well as to possible Host States.
25 First, the Prosecution does not oppose the Defence

1 request with regard to the report from the Kingdom of Belgium.
2 However, if the Chamber would rule in favour of the Defence, the
3 Prosecution would be appreciative if it could receive a copy of
4 such a document.
5 On the same issue, the Prosecution submits most
6 importantly that the accused's behaviour during the short period
7 of so-called interim release is not a relevant factor,
8 consideration, under Article 58(1). Indeed, it is factually
9 incorrect to characterise this period as interim release, since
10 the accused has not in fact been released from custody; rather,
11 it was a short period where he was transferred, his custody,
12 from the detention centre to a standing retinue of armed police.
13 And I also would like to direction your Honours to the Appeals
14 Chamber's decision 631 dated 2 December 2009, paragraph 83, in
15 which the Appeals Chamber confirmed that the accused's
16 authorised attendance at his father's funeral is not a relevant
17 factor.
18 With regard to the possible Host State, the
19 Prosecution would like to refer to the jurisprudence of the
20 Appeals Chamber's decision, in particular, that only after the
21 Chamber makes a determination as to whether the conditions under
22 Article 58(1) are not met, only in that case interim release
23 becomes relevant. So, the two-tiered approach means for the
24 Prosecution that, first, there needs to be a decision from the
25 Chamber that the conditions are not met to further proceed and,

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1 as the Prosecution submitted in its written observations, there
2 are no such circumstances triggering a change or modification by
3 the prior ruling of the Chamber.
4 PRESIDING JUDGE FULFORD: Very clear. Thank you very
5 much indeed.
6 Mr Kilolo, since this affects the liberty of your
7 client, exceptionally we do give you the opportunities of
8 raising any fresh matters with us or anything by way of a reply
9 to Ms Kneuer in relation to what she's just said, but as I said
10 at the outset, please don't rehearse the matters that have been
11 very clearly set out already in your written submissions. So,
12 anything else by way of final oral submissions that you want to
13 bring to our attention.
14 MR LIRISS: (Interpretation) Thank you, Your Honour.
15 I'll try to be brief. Now, I have five new observations to
16 provide by way of additional information and in response to
17 remarks made by my learned friend.
18 First of all, I would like to submit a judgment from
19 the International Criminal Tribunal for the Former Yugoslavia in
20 the case of Halilovic. And this is an important ruling because,
21 in actual fact, it was a similar case, similar to the one of
22 Mr Bemba. This person was being prosecuted as a hierarchical
23 leader for a number of atrocious crimes and massacres when this
24 person was allegedly working as a commander of the Territorial
25 Defence Forces in Bosnia Herzegovina.

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1 Why am I raising this? Well, because, in the final
2 analysis, when he was released in 2006, a ruling of confirmation
3 of charges had been issued despite the seriousness of the
4 charges and the fear of a long prison term. He was released,
5 and I do think that this is an important aspect that would allow
6 us to have additional clarity and, furthermore, the fact there
7 was a confirmation of charges should not in and of itself be
8 seen as the first main motive that would be an obstacle to
9 release.
10 It is true that it is an item that calls one's
11 attention, but I think other objective facts need to be set out
12 that would confirm that -- whether a person should not be
13 released or, in the case of others such as Mr Bemba, facts that
14 would indicate that the level of risk, even in terms of a
15 hypothetical fear of a long prison term, that the risks are
16 limited. So I wanted to make that particular point. No doubt,
17 in a few moments you will instruct us whether we should file a
18 copy of the ruling or, rather, you would prefer an electronic
19 version.
20 Second observation: We will be filing - with regard
21 to the professional and political situation of Mr Bemba - we
22 will be filing the bylaws of -- rather, the constitution of the
23 MLC. Ever since Mr Bemba was deprived of his freedom in July
24 2008 in The Hague, the congress of the MLC has met since that
25 time and has made a number of amendments to the constitution,

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1 and it may be of use. We have a version, only an electronic
2 version, and no doubt we will be in a position to issue this
3 document which is not currently in the case record, and this
4 will allow you to understand on what basis today Mr -- pardon
5 me, the infamous so-called professional or political influence
6 of Mr Bemba has been considerably diminished given this new
7 situation, the attributions or the prerogatives of the MLC that
8 are currently being exercised by the secretary-general of that
9 party. So we will be filing that document.
10 Also with regard to the political and professional
11 situation of Mr Bemba, the other important aspect that I would
12 like to draw your attention to is the fact that you will see in
13 the various reports that you have obtained from the Registry and
14 which are available - and we will see whether an additional
15 report will be provided from the Registry - but what is quite
16 constant and what is beyond the shadow of any doubt is that,
17 with regard to Mr Bemba's telephone calls to members of the
18 political party, it appears that he is no longer in contact on a
19 regular basis with those responsible now for the MLC, and thus
20 you will see that his influence is no longer the same. Things
21 have been changed, and the last visit, for example, he had from
22 the general secretary of the MLC, the person who is currently
23 serving as president of the party, goes back seven months. It
24 was in October 2009.
25 So, no doubt that was recorded in the various visitor

1 logs at the detention centre. And I don't think it's necessary,
2 really, to remind people that all the parliamentary or political
3 issues related to the MLC as a political party are matters that
4 are being dealt with on a daily basis. And it can be seen that
5 with regard to -- from the Registrar and its records, we will
6 see that there is perhaps one call per month from the MLC. The
7 MLC is no longer calling once a day. These are additional signs
8 that will show you that the political and professional situation
9 of Mr Bemba is no longer the same.
10 Thirdly, the financial resources of Mr Bemba. Very
11 quickly, I'd just like to make two points. First of all, an
12 expectation with regard -- from the Prosecution. The Prosecutor
13 has finished his disclosure requirements. And so we have a file
14 that is available and we are all supposed to be able to find the
15 various relevant materials or facts that may be alleged, any
16 incriminating items, or items that would argue in favour of his
17 continued detention, but we do not have information regarding
18 the financial resources. The file that has been provided today
19 which we have reviewed, we do not see, we have not found any
20 sign of a source of financing. The only source of financing
21 that we have seen, perhaps, for Mr Bemba is the financial
22 institution from which -- certain accounts from which monies
23 have been freed up for paying the Defence team.
24 Now, today, no other source of monies has been shown
25 in the Prosecution's files, so the only financial institution --

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1 and I believe you already wrote that Mr Bemba is no longer in a
2 position to have access to money from that institution or from
3 the -- judging from European standards, he has no longer any
4 possibility of gaining access to financial resources from any
5 other financial institution in Europe, and that's an important
6 consideration, particularly in any response we may hear from the
7 Prosecution. We can provide the reference number for that
8 particular point and we can show the source of the monies.
9 Now, justice cannot be rendered on the basis of mere
10 speculations; it has to be rendered on the basis of facts.
11 Now, we have to consider the level of financing. In
12 the appellate decision, we saw that Mr Bemba is very, very
13 closely attached to his family, and that in and of itself was
14 not enough to allow for his release but, in any event, the
15 appellate chamber did see in its ruling of 2 December that it
16 would be useful for the judge who will be ruling on this matter
17 to look at the need -- considering the financial resources, the
18 need to provide not only him but also with his entire family,
19 including five children. So, when we have to look at the amount
20 of money that would be required, we would have to multiply by
21 seven.
22 So, what is there from the Prosecution that would
23 indicate that Mr Bemba could gain access to money for himself
24 but, furthermore, as well, also money for six other people? So
25 given that new item, namely, the letter from the financial

1 institution, but we have heard nothing, utter silence.
2 The other aspect is the question to be asked. After
3 all we are talking about leaks, but what about the destination
4 of these leaks? In today's issue of Le Monde, I believe of the
5 -- mention was made of 152 countries. Now, there may have been
6 some gratuitous allegations from the OTP but where is the
7 specific information? With reference numbers? What signs are
8 there of any possible place that or country that my client could
9 flee to? There are 152 countries that have signed the Rome
10 Statute so obviously he will not be fleeing to any of them.
11 Now Mr Bemba, and this was recognised on 2 December by
12 the appellate --
13 PRESIDING JUDGE FULFORD: I am going to interrupt.
14 Most if not all of what you have been submitting over the last
15 five or ten minutes should have been included in your written
16 submissions on release. What we are asking for are matters
17 that, essentially by their very nature because they've arisen
18 late, you wish to add or to supplement, add to or to supplement
19 your original submissions to us, not to set out, as it were,
20 substantive points that should have been raised earlier in your
21 written submissions.
22 Now, you can give us the headlines of these points but
23 you are not to take up the kind of time now on issues that
24 should have been put in writing some days or weeks ago.
25 MR KILOLO-MUSAMBA: (Interpretation) Thank you, your

1 Honour. I will restrict my comments to the remaining comments
2 and what this is about.
3 Well, the financial resources, the financial resources
4 of my client and the whole issue of access, Mr Bemba's access to
5 financial resources, and also the inheritance after the passing
6 of his father.
7 Now, there is the Code of Family Law in the Congo and
8 we do have that document --
9 PRESIDING JUDGE FULFORD: Mr Kilolo, this should have
10 been set out in your written submissions. You are now taking
11 the opportunity to deal orally with matters that should have
12 been dealt with in writing some time ago.
13 Now, can you please summarise these very briefly, and
14 then bring your submissions to a close, please.
15 THE INTERPRETER: Message from the English booth. If
16 Mr Kilolo could be encouraged to slow down.
17 MR KILOLO-MUSAMBA: (Interpretation) I will conclude
18 in just a few moments. All this to say that today I did file
19 the Congolese Code of Family Law that will show you the
20 procedure that relates to the disposal of an inheritance and
21 that takes from five to ten years. So if Mr Bemba were to be
22 released for a limited period of time while the application is
23 being dealt with, in any event, the estate certainly would not
24 have been dealt with and so this problem of financial resources
25 would not be there.

1 And also to conclude, I would also like to draw your
2 attention to the jurisprudence, Lahi Brahimaj from the ICTY
3 which I mentioned earlier and which will be filed.
4 All this to say, there is a true possibility here, in
5 light of this ruling, to free my client for a limited period of
6 time and, also to conclude, I would wish to file the ruling,
7 pardon me, the resolution from the UN Security Council, which
8 indeed provided a specific mandate to MONUC, the United Nations
9 Mission in the Congo, and this is Resolution 1291 of February
10 2001, 24 February 2001, and it's a very important resolution.
11 It was reiterated in a similar manner --
12 PRESIDING JUDGE FULFORD: Mr Kilolo, this should have
13 been filed with your written submissions. It's completely
14 unacceptable that having been given the opportunity of doing
15 this in writing we are now provided at this late stage with a
16 whole range of new substantive arguments which includes the
17 jurisprudence from other tribunals, which includes elements of
18 Congolese law, and material from the United Nations.
19 Now, you can put in the documents. The extent to
20 which we are prepared to include them in this review of
21 detention is a matter that we will consider outside of this
22 Chamber. But, in future, this kind of material must be filed in
23 advance, in writing in the proper way, and not dealt with by way
24 of ex tempore oral submissions. Thank you very much indeed for
25 your assistance.

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1 MR KILOLO-MUSAMBA: (Interpretation) Thank you.
2 PRESIDING JUDGE FULFORD: Now, I am going to turn to
3 the final issues on the agenda. As regards certain outstanding
4 written decisions which the Chamber has to hand down before the
5 start of the trial, we simply need to indicate that some, we
6 hope, will be delivered this week, and those that are not
7 delivered by close of play on Thursday will be, we anticipate,
8 delivered by Friday, 29 April.
9 Next, we need to address the redacted version of the
10 Defence admissibility application. This is now in final form
11 for public distribution, save that it needs for the observations
12 of the Victims and Witnesses Unit to be included. Those
13 observations have been communicated to the Defence. We
14 instruct, therefore, the Defence to provide a final version of
15 the public document which is to be sent to the Prosecution and
16 the Victims and Witnesses Unit by 4 p.m. on Wednesday afternoon,
17 and they are to respond to the Chamber by midday on Thursday, as
18 to whether or not they are in agreement with this final version
19 of the admissibility application.
20 Once we have received their indications that it is in
21 proper form then we will give an instruction by email that the
22 public version is to be issued.
23 So the Defence responsibility first, to incorporate
24 the Victims and Witnesses Unit's observations to be sent to the
25 Prosecution and the Victims and Witnesses Unit so that they can

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1 respond, and if there are any difficulties in relation to the
2 Victims and Witnesses Unit's response that I have just referred
3 to, we ask counsel to raise this with the legal adviser to the
4 Chamber, to the Division, as soon as we rise.
5 Finally, we need to deliver a short decision on the
6 late service of exonerating evidence. It is necessary for us to
7 address an issue relevant to the "Prosecution's communication of
8 potential exonerating evidence disclosed to the Defence on 1
9 March 2010", filed on 2 March 2010 (document 711) in which the
10 Chamber was notified that the Prosecution had disclosed ten
11 items as potentially exonerating evidence to the Defence on 1
12 March.
13 The Defence filed observations in response on 5 March
14 2010 (document 717) in which it objected to this disclosure
15 highlighting that Witness 40 is currently on the Prosecution's
16 witness list.
17 It is suggested that he is clearly central to the
18 Prosecution's case, given he is to give evidence on the command
19 structure and control of the MLC and RCA troops, as detailed in
20 the Prosecution's updated summary of presentation of evidence,
21 document 717.
22 The Defence observes that the ten items of exonerating
23 evidence that have been disclosed, comprising 191 pages, were
24 obtained between 9 and 12 December 2009, and it is suggested
25 that no explanation has been provided by the Prosecution for

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1 their late disclosure (viz after 30 November 2009 deadline).
2 Further, the Defence submits that the Prosecution has
3 not explained why the further interview with Witness 40 was not
4 mentioned in the Prosecution's second application to add
5 evidence when it appears that this information was gathered
6 during the same visit to Africa that concerned the three
7 witnesses addressed in that application.
8 The Defence suggests that this late disclosure may
9 potentially cause an unjustifiable delay pursuant to Article
10 60(4) of the Statute and the Defence requests that the accused
11 is exempted from bearing the costs resulting from delays caused
12 by the Prosecution failing in its obligations.
13 During the status conference on 2 October 2009 the
14 Chamber set 30 November 2009 as the cut-off date for disclosure
15 of the Prosecution's incriminating case and for disclosure of
16 any exculpatory materials under Article 67(2) of the Rome
17 Statute all materials covered by Rule 77 of the Rules of
18 Procedure and Evidence, after Prosecution counsel indicated that
19 she was able to conclude the review and disclosure of this
20 material by that date.
21 In its written order of 4 November 2009 (document 590)
22 at paragraph 7 the Chamber stated:
23 "Against the background of Article 64(3)(c) and 67 of
24 the Statute, and Rules 76 and 77 of the Rules and to ensure they
25 are properly implemented the Chamber reiterates the direction

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1 given during the status conference on 7 October 2009 that the
2 Prosecution must effect its disclosure obligations in their
3 entirety by 1600 on 30 November 2009 [...] If the Prosecution is
4 unable to comply with this order it is to set out the reasons in
5 writing by way of a filing sufficiently in advance of that date
6 to enable the Chamber to resolve the issue including by way of a
7 hearing before the deadline expires."
8 The Prosecution served these ten items of exonerating
9 evidence without providing any explanation as to why the
10 material is provided late and in breach of the orders we have
11 just rehearsed.
12 Although Witness 40 is clearly potentially of
13 importance in this case it is critical to observe that the ten
14 items of evidence provided by the Prosecution are exonerating
15 rather than incriminating in nature and, therefore, they should
16 be of use to the Defence in preparing its case.
17 Although we deprecate the late service of this
18 material, particularly given the lack of any explanation,
19 nonetheless no suggestion has been advanced that the Defence
20 will be unable to utilise it for the purpose of the Defence case
21 in a trial that is now to commence at the beginning of July.
22 Accordingly, we underline that in future any
23 exonerating material that the Prosecution seeks to serve late
24 must be filed with an accompanying explanation as to why it was
25 not provided before 30 November 2009. Furthermore, in future,

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1 if the Defence objects to the late service of any material in
2 this category it is to indicate in a filing the nature and the
3 extent of any prejudice to the accused that is occasioned by the
4 late service.
5 In light of the observations above, it is unnecessary
6 for the Chamber to make any further orders.
7 We were informed today that there are particular
8 issues that have arisen between the Prosecution and the Defence
9 in relation to the issue of language in which the Prosecution
10 must disclose evidence to the Defence. Those submissions must
11 be set out, please, in a conventional filing which we will
12 address in the usual way when the Prosecution has been given an
13 opportunity to respond.
14 We have only two or three minutes left before the
15 tapes expire. Those are the matters that we had intended to
16 raise and deal with during the course of this status conference.
17 Is there anything else of substance which anybody else wishes to
18 raise? Thank you. Ms Kneuer? No. Mr Kilolo?
19 Thank you all very much indeed for your attendance.
20 That concludes this hearing.
21 (The hearing ends at 4.26 p.m.)

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