

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Kuniko Ozaki, Judge Christine Van den Wyngaert
7 and Judge Chile Eboe-Osuji
8 Status Conference
9 Monday, 11 June 2012
10 (The hearing starts in open session at 9.03 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE OZAKI: Good morning everyone. And I would like to
15 welcome parties and participants and Mr Sang to this first status conference of this
16 case.
17 Before starting the conference, I think everyone has learned a helicopter crash
18 recently, and on behalf of the Chamber I would like to express our sincere
19 condolences to all victims and their families.
20 Now, may I ask parties and participants to introduce your team for the record,
21 starting with Prosecution.
22 MS DARQUES-LANE: Good morning, your Honours. I'm Florence Darques-Lane,
23 appearing for the Prosecution today. Together with me on my left is Lucio Garcia,
24 trial lawyer; behind me is Lara Renton, assistant trial lawyer; and Grace Goh, our case
25 manager. Thank you.

1 PRESIDING JUDGE OZAKI: Thank you. Defence team for Mr Ruto, please.

2 Could you please introduce your team.

3 MR HOOPER: Yes, sorry. I was distracted for a moment. Yes. My name is

4 David Hooper and I co-defend, together with Mr Kioko Kilukumi, who sits next to

5 me, in the case of William Ruto, and we are assisted by our case manager who is Judi

6 Mionki, who sits at the end of the row here.

7 Before I sit down, can I just thank the Court for its expression of condolences in

8 respect of the death yesterday of Mr George Saitoti, the Minister of Security in Kenya,

9 together with the five others who accompanied him in the helicopter. He was a

10 colleague of Mr Ruto, a potential witness in this case in fact, and obviously a loss to

11 the Kenyan people.

12 May I also express generally on behalf of the Defence our regrets and concern

13 learning of the detention on Melinda Taylor and others in Libya in the course of their

14 work, and we hope that that is speedily resolved. Thank you.

15 PRESIDING JUDGE OZAKI: Thank you very much, Mr Hooper. And thank you

16 very much for the kind words for the Court. Defence team for Mr Sang, please.

17 MR KIGEN-KATWA: Your Honours, my name is Katwa Kigen. I am counsel for

18 Mr Sang, and together with me is Mr Sang himself, Logan Hambrick, Kimutai Bosek

19 and Philemon Koech. Thank you very much.

20 PRESIDING JUDGE OZAKI: Thank you very much. Legal representative of

21 victims.

22 MS CHANA: May it please, your Honours. My name is Sureta Chana and I

23 represent 327 victims, but in fact it is now 326 victims because one victim died on 24

24 March, 2011, 2012, sorry. I'm assisted by my case manager Ms Mariana Pena.

25 Thank you.

1 PRESIDING JUDGE OZAKI: Thank you very much. Registry team, please.

2 MS DAHURON-JACOBY: (Interpretation) Good morning, your Honours. Today
3 for the Registry I'm here, Charlotte Dahuron-Jacoby, Court Management Service;
4 Pieter Vanaverbeke, legal co-ordinator; and Shakhnoza Abdullaeva, who is
5 representing VWU.

6 PRESIDING JUDGE OZAKI: Thank you very much. At today's status conference,
7 the charges will not be read to the accused, but pursuant to Article 64(8)(a) this will
8 be done at the commencement of the trial on the merits.

9 Now, let's go into the agenda items of this status conference. First of all, start date of
10 trial. According to Rule 132, the Trial Chamber must set the date of trial. The
11 Prosecution submits that the start date of the trial depends on, and I quote, "The
12 Court's ability to protect witnesses as well as co-operation with the Court's process by
13 the accused and the Government of Kenya," unquote.

14 Apart from the protection of witnesses, the Prosecution does not identify any other
15 facts that could delay the commencement of trial.

16 Now, questions to the Prosecution: First, can the Chamber assume that the
17 Prosecution is ready for trial and that fulfilling disclosure obligations and lifting
18 redactions are the only actions that it needs to take at this stage? And question
19 number 2: Can you explain how much time you anticipate will be required to
20 resolve any witness protection issues in order to be ready for trial?

21 MS DARQUES-LANE: Your Honour, in answer to your first question, we have a
22 pool of witnesses that we have -- we are interviewing. There's important protection
23 issues involving the selection of witnesses, and we'll go into that in more details this
24 afternoon.

25 Regarding the date of trial, in answer to the Defence's submission, Rule 32 -- 132

1 applies and, according to such, it is for the Trial Chamber to set the trial date
2 regardless of the dates of elections.
3 Both Defence teams have submitted that trial dates should be for March 2013. The
4 Prosecution has no objection to setting the trial date at such time. However, if it is
5 set at such time, we would ask that a written undertaking from the accused be
6 produced so that regardless of the results of the elections they would appear for trial.
7 And regarding the disclosure position taken by the Defence, which is to have all of
8 the Prosecution's material disclosed four months before the beginning of trial, the
9 Prosecution objects to having such a large time between the end of disclosure and the
10 beginning of trial for protection issues that we'll go into when we discuss disclosure
11 in more details and protection issues this afternoon.

12 PRESIDING JUDGE OZAKI: Thank you very much. One clarification:
13 Prosecution mentioned that Prosecution is still interviewing witnesses. What could
14 it mean? I presume, the Chamber presumes, that at this point, after several months
15 since confirmation of the charges, Prosecution has already completed its
16 investigation?

17 (Prosecution counsel confer)

18 MS DARQUES-LANE: Your Honour, the Prosecution still has the same witnesses
19 that we had at the confirmation hearing. However, because of the situation in
20 Kenya, and because of specific incidents in relation to some of these witnesses, we are
21 in the process of interviewing other witnesses at this stage and we will discuss these
22 issues further this afternoon.

23 PRESIDING JUDGE OZAKI: Thank you very much. Before hearing responses
24 from the Defence on this issue of trial date, the Chamber would like to address
25 related agenda items, which Prosecution also mentioned right now; namely,

1 disclosure and redactions.

2 The Prosecution already in its written submission has indicated that due to witness
3 security concerns some incriminatory material has not yet been disclosed to the
4 Defence and that the disclosure of the remainder of this evidence depends on the final
5 selection of witnesses.

6 As for the selection of witnesses, the Chamber will set a dead-line for the Prosecution
7 to file its final witness list in due course.

8 As for the disclosure of incriminatory material, the Prosecution just mentions that
9 four months before the start of the trial is too early, but concerning also the
10 substantive preparation on the part of the Prosecution for the trial, by what date does
11 Prosecution anticipate being able to complete the disclosure of incriminatory
12 material?

13 (Prosecution counsel confer)

14 MS DARQUES-LANE: With your permission, your Honour, I am conferring with
15 my colleagues.

16 (Prosecution counsel confer)

17 MS DARQUES-LANE: In answer to your question, your Honour --

18 PRESIDING JUDGE OZAKI: Yes, please.

19 MS DARQUES-LANE: -- the Prosecution will be able to finalise disclosure in the
20 first quarter of next year.

21 PRESIDING JUDGE OZAKI: Okay. Well, concerning the redactions to the
22 identities of witnesses who will testify at trial, the Prosecution has also suggested that
23 a staged approach should apply to the lifting of redactions to the identities of
24 testifying witnesses, in its filing paragraph -- in its filing 417, paragraphs 16 and 17.
25 For those witnesses who are part of the Court's protection programme, it is proposed

1 that the redactions should be lifted 60 days before the start of trial, whereas
2 redactions to the identities of testifying witnesses who are not part of the Court's
3 protection programme would be lifted 30 days before the start of the trial and/or in
4 exceptional circumstances 30 days before the start of the witness's testimony.

5 Now, question for both Defence teams: How do you react to this suggestion by the
6 Prosecution?

7 MR HOOPER: Dealing with item (C) on your agenda, Madam President, on behalf
8 of William Ruto, our reaction is that we don't object to the Prosecution's proposal,
9 that the identity of witnesses who fall into the category of witnesses who are part of
10 the Court's protection programme should be lifted in principle only 60 days before
11 the start of the trial.

12 However, as with the other categories, we hope that the Prosecution could see their
13 way with some of the witnesses to revealing identity earlier than that.

14 Secondly, in respect of those witnesses testifying who are not part of the Court's
15 protection programme, the Prosecution have asked that, in principle, their identities
16 should be not revealed until 30 days before the start of trial. And again the
17 Defence has no objection to that and, again, subject to the same caveat as I've just
18 expressed.

19 And then we come to an exceptional situation where, as the Prosecution express it,
20 where it is justified by security concerns, particular to an individual witness, that the
21 Prosecution should be permitted to make an application to the Chamber for the
22 witness's identity to be disclosed 30 days prior to the start of his or her testimony.

23 We would stress, first of all, that such a situation should be wholly exceptional.

24 Secondly, we're concerned at the limit of 30 days. We think it should be at the very
25 least almost 45 days before the start of such an exceptional witness's testimony. And

1 part of the reason for that is that, of course, when you're in trial you've got fewer
2 facilities to dedicate to investigation and matters like that, so it interferes with the
3 work that you're doing during the process of the trial, and one of the general matters
4 that needs to be taken into account when assessing a Prosecution application of that
5 kind is the significance of the witness and the witness's relationship with other
6 witnesses, because the witness doesn't stand in isolation and unless you know the
7 identity of the witness it's difficult in fact to perhaps cross-examine other witnesses
8 and question other witnesses about facts and the personality of the witness whose
9 identity is being withheld.

10 And, finally, in respect of this issue of identity of witnesses, it is of course a much
11 larger feature than just the name of a person. All the redactions in the case have
12 tended to be redactions that go to identification of the witness, and they have been
13 quite excessive in the pre-trial stage and the pre-confirmation stage. So, for example,
14 we even have dates of meetings that have been redacted in case the date of the
15 meeting triggers knowledge of the identification of the witness.

16 Apart from the over-sensitivity that we feel that's been demonstrated in this regard
17 by the Prosecution in seeking redactions, we're concerned that the massive redactions
18 that presently exist, which are justified on the basis of otherwise the identity of a
19 witness would be revealed, will be maintained. And we hope they're not
20 maintained to the level that they are at the moment because, frankly, we cannot do
21 the investigations that are necessary with the degree of redaction that we presently
22 have.

23 I'm not going to go into individual situations at the moment, and indeed it would be
24 a waste of time because we don't yet know which witnesses the Prosecution are going
25 to use in trial.

1 We don't know whether they are going to maintain the witnesses that they presented
2 at confirmation, or whether they are going to abandon those, or some of those
3 witnesses, and what new witnesses they might have in mind because clearly, from
4 what's been said this morning, a long road for them to go if disclosure, final
5 disclosure, cannot take place until the early part of next year.

6 So our concern is though this issue of rolling disclosure in principle is acceptable, the
7 extent of it worries us in terms of the extent of redactions that would be the product
8 of that. And that's our only concern. Thank you, Madam President.

9 PRESIDING JUDGE OZAKI: Thank you very much, Mr Hooper. Mr Kigen-Katwa.

10 MR KIGEN-KATWA: Your Honours, on our part, we have no objection to the first
11 two categories being the 60-days' disclosure prior to the hearing in respect to
12 protected witnesses and to the 30 days prior to hearing in respect to unprotected
13 witnesses. We would only request that in presentation of that aspect, the
14 Prosecution to represent to the Court as to whether the respective witnesses are
15 comfortable with a disclosure of their identities earlier than those dates, the 60 days
16 and 30 days, and if the witnesses have no objection, we would be happy to have the
17 disclosure made earlier.

18 In respect to the disclosure 30 days to the date of testimony by the respective
19 witnesses, we in the first instance adopt entirely the observations made by the team
20 for Mr Ruto and, in addition, we pray on our part specifically that 30 days is far too
21 short and we would propose on our part 45 days.

22 Secondly, we pray that the issue of the time within which to make the disclosure
23 should be closely supervised by the Court in terms of, first of all, the criteria as to
24 whether or not such witness needs protection up to 30 days before he testifies or
25 otherwise and, secondly, whether the date can be made more elastic and be disclosed

1 earlier than the 30 days.

2 We make this observation because the disclosure that was made at the period of the
3 confirmation included redactions on very fundamental issues like the dates of the
4 meetings which go to the root of the case and we pray that the fundamentality of
5 some of those redactions be closely supervised by the Court.

6 Lastly, we pray that the Court do reserve for us the option to apply for an
7 adjournment in the event a disclosure is made in the course of trial that necessitates,
8 number one, an (indiscernible) on our part, and secondly, an investigation of the
9 issues raised. The reason being that if the disclosure is made in the course of the
10 hearing, and it is too fundamental, we would need time to analyse it, short of which
11 we would not be able to conduct the hearing without adequate time, and so we
12 would pray that will be an option for us to seek an adjournment (indiscernible)
13 afternoon as well. Thank you very much, your Honours.

14 PRESIDING JUDGE OZAKI: Thank you very much, Mr Kigen-Katwa.

15 JUDGE EBOE-OSUJI: Question for the Prosecution, just for my own purposes, to be
16 sure that I understand what you are proposing: When you say witnesses who are
17 not within the protection programme of the Court, I understand that to be those who
18 are not protected witnesses? If that is -- if that is my understanding and it is correct,
19 I would like to understand why unprotected witnesses would need a longer
20 period -- sorry, protected witnesses would need a longer period -- have their
21 identities disclosed for a longer period of time than unprotected witnesses; is that the
22 intention?

23 MS DARQUES-LANE: Your Honour, in answer to your question, my colleague
24 Lara Renton will respond.

25 MS RENTON: Your Honours, perhaps we weren't clear in our submissions, but

1 the witnesses who don't form part of the ICCP for whom we would want disclosure
2 30 days prior to trial are not, for example, witnesses that don't have protection issues.
3 If I could use the example of expert witnesses, for example, we would disclose their
4 identities without any issue, but it's witnesses who still have issues of security and
5 protection but for whatever reason aren't part of the Court's official protection
6 programme. So it may be that they didn't want to become a part of the protection
7 programme, but there are still concerns between the Prosecution and perhaps VWU
8 as to their personal protection. That's why we think they need -- there should be a
9 shorter time between the disclosure of their identity and the start of trial. There are,
10 as I said, still protection issues, they are simply not part of the official Court's
11 protection programme.

12 PRESIDING JUDGE OZAKI: Thank you very much. Another clarification from the
13 Chamber: The Prosecution said most likely the Prosecution can complete the
14 disclosure of incriminatory material in the first quarter of next year. Do I
15 understand correctly that -- well, I have to confess that the -- this time-frame is
16 much -- how do you say? Not as early as we anticipated?
17 Do I understand correctly that the only reason for this delay of disclosure of
18 incriminatory material is protection of the witnesses?
19 (Prosecution counsel confer)

20 MS DARQUES-LANE: Your Honour, the protection of witnesses and the
21 management of witnesses are core reasons for the date set for disclosure and, for
22 these reasons, we are interviewing witnesses in Kenya.

23 PRESIDING JUDGE OZAKI: Thank you very much. Another clarification is - for
24 Prosecution - is can you identify roughly how many witnesses fall in the category of
25 unprotected witnesses who have security issues?

1 (Prosecution counsel confer)

2 MS DARQUES-LANE: Your Honour, in answer to your question, we cannot
3 estimate at this time the precise number of witnesses that are not subject to
4 non-protection. Thank you.

5 MS CHANA: Madam President, if I may come in here?

6 PRESIDING JUDGE OZAKI: Yes.

7 MS CHANA: I think it is important that the Court hear the views of the victims in
8 respect of the date of the trial. As I have said in my motion, that I haven't been able
9 to consult them of late, and they haven't been able to consult me either, but I do know
10 that the victims' concern is that they want the date of the trial as quickly as possible
11 because it also then impacts on their reparations. A lot of them are not very well,
12 and they also have a perception that in the local courts in Kenya the delay of
13 proceedings is something which is normally done to frustrate justice.
14 So those are the views of the victims, although I understand personally that this is a
15 matter for the Defence, and the Prosecution, and I understand the reasons why the
16 Prosecution is saying that, and the Defence have agreed that the trial should start, but
17 I think it's important that their views in respect of what they feel a speedy trial
18 because they have been in this condition for -- since the post-election violence, which
19 is about four, five years, and I think there is a lot of impatience on the part of people
20 who are still suffering and living amongst these communities. Thank you for
21 allowing me to put that in. Thank you, your Honour.

22 PRESIDING JUDGE OZAKI: Thank you very much for your submission, Ms Chana.
23 Well, as for the disclosure of incriminatory material, the Chamber of course, after the
24 ex parte hearing this afternoon, will rule on this issue in a written decision.
25 Now I would like to turn to another issue with consequences for the trial start date,

1 which is the disclosure of exculpatory material. In this regard, the Chamber notes
2 that the Defence for Mr Ruto had suggested that the Prosecution should provide the
3 Defence with details of the system it uses to identify potentially exculpatory material.
4 In this regard, the Chamber assumes that all potentially exculpatory information will
5 be disclosed to the Defence.

6 The Prosecution submits that since the hearing on the confirmation of the charges, the
7 Prosecution has collected additional materials that may be disclosable pursuant to
8 Article 67(2) and Rule 77, and it is in the process of reviewing them for the purpose of
9 disclosure.

10 May I ask the Prosecution: What is the expected time-frame for this disclosure?

11 (Prosecution counsel confer)

12 MS RENTON: Your Honours, if I may address you on this point, we have identified
13 some materials to be disclosed pursuant to Article 67(2). There are a number of
14 materials, approximately 120, that we have identified that are ready to be disclosed.
15 Some of these can be disclosed unredacted as soon as practicable. A number of them
16 would require some limited redactions to the names of staff members of the OTP, and
17 some of them would require some more extensive redactions which may take some
18 more time, depending on the redactions and disclosure regime that your Honours
19 ultimately decide to adopt moving forward.

20 So, obviously, these -- some of these can happen fairly quickly, but we recognise that
21 identification and disclosure of potential exculpatory materials is ongoing, so as we
22 review more and more materials it may be that we identify some information that
23 that has to be disclosed, and the time-frame on that may take a little bit longer, but
24 certainly we have some amount of materials that we can provide relatively quickly.

25 On the point that your Honours raised, the Defence for Mr Ruto requesting details of

1 this system that the Prosecution uses to identify PEXO, in previous cases we've
2 provided these categories to the Defence and we have no objection to doing so in this
3 instance. Thank you.

4 PRESIDING JUDGE OZAKI: Thank you very much. As for time-frame, the
5 Prosecution said that it is relatively quickly. Can you be more specific?

6 MS RENTON: Of course. In terms of the materials that can be disclosed
7 unredacted, we could give this easily within the next couple of weeks, if not earlier
8 than that. As I said, any materials that the Prosecution determines may require
9 some redactions, would depend on the redactions regime that your Honours adopt,
10 and the timing of that. So we're at your convenience.

11 PRESIDING JUDGE OZAKI: Thank you very much. Do the Defence teams have
12 any outstanding concern as regards the disclosure of exculpatory material on top of
13 what you have already submitted in writing?

14 MR HOOPER: No, Madam President. Thank you.

15 MR KIGEN-KATWA: None on our part (indiscernible).

16 PRESIDING JUDGE OZAKI: Thank you very much. The Chamber would like to
17 emphasise again that the Prosecution must disclose all exculpatory material known to
18 it at this time as soon as possible.

19 Next is redactions proposal. The Prosecution has proposed a system for dealing
20 with redactions in its filing 417 at paragraphs 19 to 23, which the Chamber is ready to
21 consider. Just one clarification for this system: May I understand correctly that this
22 new system will not be applied to redactions previously approved by the Pre-Trial
23 Chamber or should it be applied?

24 MS RENTON: Your Honours, we would actually propose that redactions
25 previously applied do fall within the new proposal. We hope that this proposal

1 would certainly streamline, save your Honours a considerable amount of time and
2 resources, and also provide materials in a much quicker fashion to the Defence, and
3 this would also apply in terms of redactions. If your Honours were minded to
4 consider an inter partes redaction regime such as we have proposed, the lifting of
5 currently applied redactions could also be incorporated into that. And as we noted
6 in our filing, we do consider that the redactions currently applied are still -- should
7 still be maintained, because the circumstances justifying those haven't changed but, of
8 course, as and when those circumstances do change we would propose that we can
9 lift them and redisclose the materials to the Defence and that could be an inter partes
10 process as well. So it would apply to new redactions, but also to currently existing
11 redactions.

12 PRESIDING JUDGE OZAKI: Thank you very much. Okay. The Chamber would
13 like to give the Defence teams the opportunity to respond to this Prosecution's
14 proposal on redaction regime.

15 MR HOOPER: Yes, Madam President. The Defence are strongly against this
16 proposal. First of all, we acknowledge the judicial time that Chamber's supervision
17 demands of the Judges, where the Judges in fact supervise the nature and extent of
18 redactions. It is, we recognise, a substantial burden on you, the Judges, but it has
19 been part of the strengths of this Court so far that the Judges have been prepared to in
20 fact assume that burden and to supervise the applications by the Prosecution for what
21 is and what must remain to be an exceptional matter of redacting. It is, after all, an
22 extreme exception.

23 And there's a balance that has to be struck between the primary motive, protection of
24 witnesses, and the interests of course of the individual accused, which is linked of
25 course to the extent to which he can effectively prepare himself or herself for trial,

1 and the extent in which effective investigations of witnesses can take place.

2 We're very concerned at this suggestion from the Prosecution that they do the
3 redactions and that then, quote, "if it appears to the Defence that any redactions are
4 improper then the Defence can raise it."

5 It's difficult to see how the Defence are going to be ever placed in a position whether
6 they'll know whether redactions are proper or improper, in practice. That is not, in
7 fact, a criterion that the Defence will ever be in a position to apply effectively.

8 I'm also concerned to hear that the Prosecution take the view that redactions that
9 were made for the course of the pre-confirmation process in the confirmation hearing
10 should be maintained. As the Appeal Chamber has said, it is obvious that it is
11 permissible, quote, "to withhold the disclosure of certain information from the
12 Defence prior to the hearing - confirmation hearing - to confirm the charges that
13 could not be withheld prior to the trial."

14 The significant change of circumstances that has taken place is that this case has been
15 confirmed, and we are now in that significant period prior to trial when the
16 Prosecution requires disclosure and when the criterion, in fact, has changed. And so
17 all that material needs to be looked at again.

18 The Prosecution, quote, "both the Katanga case and the Gbagbo case, in respect of its
19 submission that this kind of procedure has been adopted before," the references are
20 wholly misplaced.

21 If we look at the Katanga decision in respect of this, for example, what we find is first
22 of all both in respect of Gbagbo and in respect of the Katanga case that's quoted and
23 relied on by the Prosecution, that these were cases at their pre-confirmation stage and,
24 therefore, that fall within the wider ambit that was touched on in the Appeal
25 Chamber and recognised by each of those Pre-Trial Chambers; that is, the different

1 position and situation that exists pre-confirmation.

2 Secondly, the particular Katanga filing that was referred to, and is referred to by the

3 Prosecution, that's filing 1547 in the Katanga case, that was a pre-confirmation

4 decision by the Single Judge. And what had happened there was that the

5 Prosecution had informed the Single Judge that it had identified 47 documents on

6 which it did not intend to rely on at the confirmation hearing, that nevertheless

7 should be disclosed to the Defence pursuant to Article 67 or Rule 77, and finally, that

8 required a large number of redactions.

9 And in order to go through that process, it was recognised that it was going to slow

10 up the process, the pre-confirmation process, and put off the confirmation date, and

11 the Defence accepted in those circumstances, as the Prosecution weren't going to rely

12 on those documents, that the Prosecution could itself redact and could serve.

13 So there's been no case that we know of, or that's been identified by the Prosecution,

14 where this proposal or anything like it has ever been put into effect at this stage, the

15 pre-trial stage. Instead, what the Chambers have done consistently is assume the

16 burden and made the Prosecution justify their requests for redactions.

17 As far as judicial time and economy is concerned, perhaps the better answer, judging

18 by what we've seen later when it's unredacted, has formed the basis of redactions

19 requested by the Prosecution, is that the Prosecution take more time and care in

20 identifying those matters that truly need to be redacted, and not the rather broad

21 approach that they take at the moment which of course leads to excessive time being

22 spent by Judges in having to assess a particular basis on which redactions are

23 justified.

24 So we are strongly opposed to it. We are strongly in support of the Judges

25 continuing to have control of the redaction process. We consider that it is wholly in

1 the interests of the accused that that process is maintained. Thank you, Madam
2 President.

3 PRESIDING JUDGE OZAKI: Thank you very much. Mr Kigen-Katwa?

4 MR KIGEN-KATWA: Your Honours, the Prosecution in their submissions have
5 indicated that they would like to consult with the Defence in respect of their
6 redactions. On our part, in principle, we have no objection to consultations and we
7 have made that indication. That invitation of consultation should not be construed
8 to be an admission of any aspect of the redactions until we consult and agree on the
9 details.

10 Secondly, we are strongly opposed to redactions being kept at the level that was
11 adopted in the confirmation stage. We contend that it was too much and it went
12 into the fundamentals of the case.

13 Your Honours, we will pray that the standard adopted for purposes of redactions be
14 applied in this case, being that every time the Prosecution wants a redaction they
15 should justify it to your Honours and, secondly, it should be determined on
16 case-to-case basis. We say this because all the cases they have referred to relate to
17 confirmation stage and on that aspect we wish to emphasise the fact that at
18 confirmation stage the standard of proof is very different from the standard of proof
19 that applies to the main hearing.

20 We also submit and pray that the Court adopts all the decisions made at the hearing
21 stage, being that the need for redactions be reviewed from time to time, and we
22 submit that this justification to hold the view that time as a reason for the need
23 to -- for the Court to reconsider whether the redactions applied in the confirmation
24 stage should still apply.

25 Lastly, all the cases that have been relied on by the Prosecution we submit, as the

1 Ruto team submitted, apply to issues of confirmation stage, not the main hearing, and
2 their attempt, the Prosecution's attempt, has no precedent or supporting law. Thank
3 you, your Honours.

4 PRESIDING JUDGE OZAKI: Thank you very much. Prosecution, please.

5 MS DARQUES-LANE: Thank you, your Honour. I will just make one or two
6 points regarding our proposal for streamlining a system that's been very onerous on
7 Chambers in the past. And what we propose, in our submission at paragraph 21, in
8 fact answers a lot of the concerns of the Defence. What we propose is that the
9 Chamber first will rule on the categories of information that may generally be
10 redacted prior to disclosure, and it's only when we have these rulings from the
11 Chamber that we'll apply them.

12 And I just want to refresh my colleagues' recollection regarding the Katanga case. It
13 is true that at pre-trial the Single Judge was reviewing all of the redaction process.
14 However, at trial, Judge Cotte accepted this inter partes process, and it was during
15 the cross-examination of Witness 250, it's at T-105 in the English transcript, pages 3
16 and 4, lines 23, and at page 14 it goes on to line 6.

17 So I think the reference there will show that the Chamber, the Trial Chamber, had
18 accepted this approach to redactions. Thank you, your Honour.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 JUDGE EBOE-OSUJI: Question for Mr Hooper. I'm trying to understand the extent
21 of your objection to the proposal from the Prosecution. Are you saying where there
22 were some agreed criterion that the Judges have reviewed and said, all right,
23 redactions may be done on the basis of those criterion? And the Prosecution takes a
24 particular document and said "We are redacting on the basis of such criterion" and
25 then supplies a log that indicates what they've done. Are you saying that's not good

1 enough?

2 MR HOOPER: No, it's not good enough because one just has to think of the actual
3 process. If we only look at some of the statements, or rather interviews that have
4 taken place in respect of witnesses served on the -- at the confirmation stage in this
5 case, and look at the extent of the redactions in those which are being sought to be
6 maintained, these aren't a -- these aren't the occasional blobs of blacking redactions
7 that we occasionally see; these are page after page after page.

8 So what are we going to get? We'll get a document with extensive redactions, we'll
9 look at it, and then we're going to get some criterion that's been exercised allegedly
10 by the Prosecution, and that criterion would be, for example, might be expressed as
11 "may reveal the identity of the witness." I suspect very much we're going to end up
12 with something rather bland like that. They won't be able to tell us often very much
13 more than that. We just won't be in a position to judge it.

14 What is the appropriate position here, and it's the one that's being exercised here with
15 the exception of that Rule 77 statement that's just been referred to in relation to
16 transcript 105, was in fact that the Prosecution know the criterion that the Court's
17 looking to be applied. It's for them to apply it. They apply it to a document, they
18 do it we hope with sufficient diligence and economy, that it's not too extensive.
19 They present that document one assumes to a Judge in order for that Judge to be able
20 to determine whether in his or her view that degree of redaction is necessary. That's
21 the appropriate process.

22 I'm fearful that if we leave these criterion solely in the hands of the Prosecutor, with
23 the very best will in the world, they will exceed the remit. As it is, we are
24 confronted with statements that are so substantially redacted that we can only of
25 course hope and expect Judges, when it comes to this stage, would be scrutinising

1 those redactions in order to see them through the Defence eyes and needs.

2 JUDGE EBOE-OSUJI: But I do not understand that the Prosecution's proposal has
3 the effect of leaving it all to the discretion of the Prosecution to do the redaction as it
4 please. That the Judges will still have the proprietary role over it, in the sense that
5 there may be instances where other system may work, and there may be instances
6 where the Defence may say, "No, that's not good enough, let's go to the Judges."

7 MR HOOPER: Yes. Well, we've come often from different systems into this Court,
8 and from the Defence point of view we laud this system. We feel it's one that gives
9 us confidence in redactions taking place. We've all been confronted by redactions in
10 other courts that have been manifestly excessive and unnecessary. This is a
11 particular restraint on the Prosecution to impose what is, after all, an exceptional
12 process. All the cases referring to redactions emphasise repeatedly the fact that it is
13 an exceptional process, and it's an exceptional process that needs to be justified.
14 So, for example, the Chamber may agree categories of information that may generally
15 be redacted prior to disclosure. That's necessarily going to be, in our view, a rather
16 bland definition necessarily because every statement's different, the content of it is
17 different, and to get a general list of things -- what is this list?

18 Then the Prosecution applies that criterion. Fine, that's the process we agree should
19 take place and does take place. Now we say it's for the Prosecution to show the
20 Judges what they've done, and for the Judges themselves to mark it as appropriate or
21 not. That's the safeguard. Take that safeguard away and what have we got?

22 What we'll get is merely a redaction and some statement as to the basis for it. As I
23 say, it may indicate or reveal, or will indicate the identity of the witness. Well, I've
24 seen cases where they redacted the fact that six chickens were killed because that
25 might have revealed the identity of the witness.

1 We've got a case here with witnesses, where they say they have attended meetings
2 where the honourable Ruto addressed people and said things he shouldn't have said.
3 The date of the meeting, the place of the meeting is redacted. Why? Because it
4 might identify the witness. So these are the kinds of things that need to be at this
5 stage judicially reviewed. It's an active process. If there is a way to cut out the time
6 that I know you, the Judges, get inflicted upon in order to carry out this exercise, we'd
7 warmly embrace it so long as that judicial function remained.

8 At the moment, it's being extracted. There's no doubt about that, it's being extracted
9 and replaced by a general prescription of what the Prosecution should do.

10 JUDGE EBOE-OSUJI: Thank you.

11 PRESIDING JUDGE OZAKI: Thank you very much. Now having listened to the
12 submissions, the extensive submissions of the parties, the Chamber would still like to
13 extend another invitation for consultation, if I can borrow the wording of
14 Mr Kigen-Katwa.

15 The Chamber would like the parties and the Registry to liaise in order, if possible, to
16 find a middle ground or compromise, or common ground or whatever, to -- for
17 redaction proposal, and this proposal ideally to be submitted for the Chamber's
18 review by 3 July of this year.

19 (Trial Chamber confers)

20 PRESIDING JUDGE OZAKI: Now, having dealt with disclosure and redaction
21 issues, I think everyone in this courtroom became a little bit, just a little bit wiser
22 about the possible date of trial.

23 Now, may I ask both parties that if they can be a little bit more specific as to a
24 possible trial date, starting from the Prosecution, in order just to conclude this part of
25 the status conference?

1 MS DARQUES-LANE: Your Honour, the Prosecution has no objection to starting
2 after March 2013.

3 PRESIDING JUDGE OZAKI: Thank you very much. Mr Hooper?

4 MR HOOPER: We would concur with that lack of objection, if I can put it like that.
5 March, mid-March or so of next year. And in respect of any written undertaking to
6 attend, certainly no objection to that, but it will be unnecessary. Both the accused, as
7 you know, voluntarily attended this Court both before any summons was issued, in
8 the case of Mr Ruto, and both of course afterwards the initial appearance and
9 subsequently of course for the week or so of confirmation hearing. They are -- and
10 given their word in any event to abide by all rulings of the Court and particularly of
11 course all rulings relating to attendance.

12 PRESIDING JUDGE OZAKI: Thank you.

13 MR KIGEN-KATWA: Your Honours, on the part of Mr Sang, who is present in
14 Court, in the first instance he is categorical that he has no objection to making the
15 undertaking that the Prosecution is asking for. An unqualified undertaking.
16 Your Honours, on the issue of the date, we take notice of the fact that the Prosecution
17 say they will be able to complete their disclosure at the close of the first quarter of the
18 next year. As submitted in our filing, we would request for a period after their
19 complete disclosure to do our investigation and to prepare witnesses, and subject to
20 that, your Honours, we have no objection to a date being taken after March as
21 suggested by Prosecution. Thank you, your Honours.

22 PRESIDING JUDGE OZAKI: Thank you very much.

23 (Trial Chamber confers)

24 PRESIDING JUDGE OZAKI: Thank you very much. The Chamber plans to issue
25 an order on the schedule for trial along with the relevant disclosure dead-lines before

1 the start of the summer recess.

2 The next agenda item is languages to be used at trial. The Prosecution and both
3 Defence teams have helpfully given an indication of the languages spoken by the
4 witnesses that may testify at trial.

5 One clarification for the Prosecution: The Prosecution mentioned French as a
6 language to be used during the trial. Is it because the Prosecution intend to call
7 French-speaking witnesses or just because French is one of the working languages of
8 the Court?

9 MS DARQUES-LANE: Your Honour, at this stage, we don't have witnesses who are
10 French speakers. French is one of the working languages of this trial section, and we
11 may be addressing the Court in French. Thank you.

12 PRESIDING JUDGE OZAKI: Thank you very much.

13 JUDGE EBOE-OSUJI: But is it the case that every member of the Prosecution team
14 does speak English?

15 MS DARQUES-LANE: We all do speak English. Some of us express ourselves
16 better in French than in English, and I happen to be one of them.

17 JUDGE EBOE-OSUJI: Thank you.

18 PRESIDING JUDGE OZAKI: Thank you. May I ask the Registry team how much
19 time will be needed to provide translation and interpretation services for the
20 languages indicated by the Prosecution, which are Swahili, Kikuyu and Kalenjin?

21 MR VANAVERBEKE: Good morning, Madam President. With regards to your
22 question, the Registry stresses that it is very important to know the exact number of
23 witnesses and the specific language they speak, because it all depends on the
24 language and the number of witnesses, for example in Kalenjin or Luo or other rare
25 languages, with all due respect.

1 It's depending on the time of the mode of interpretation, either consecutive or
2 simultaneous. There's no problem for simultaneous translation in Swahili, for
3 French and English, but for the other languages it might be that it was consecutive as
4 it was in the Katanga case for Alur and other languages, but that consecutive
5 interpretation adds about 30 per cent to the time -- of time to the testimony of the
6 witness because it's not simultaneous, it's consecutive. Thank you. And we would
7 need I think at least three to four months to quickly prepare before -- to provide the
8 services.

9 PRESIDING JUDGE OZAKI: Thank you very much for this indication. I ask, of
10 course, the Prosecution to liaise closely with the Registry to ensure that all necessary
11 preparations are made and significant problems, of course, should be communicated
12 to the Chamber at an early stage.

13 MR KIGEN-KATWA: With your permission?

14 PRESIDING JUDGE OZAKI: Yes.

15 MR KIGEN-KATWA: Your Honours, my client has a peculiar detail in respect to the
16 translation, and I request for permission to make reference to it?

17 Your Honours, my client belongs to -- my client's -- the case against my client is
18 hinged mainly on what he is said to have communicated in radio broadcast. That
19 broadcast was made in Kalenjin, but we would like to emphasise especially for
20 purposes of the Prosecution -- for the purposes of the Registry, that the Nandi -- the
21 Kalenjin has ten sub-tribes and my client, he's a Nandi, and that in the course of the
22 Registry's endeavours to get a translator, the fact of him having allegedly
23 communicated do entail acquiring or procuring a person who speaks in the specific
24 sub-dialect in Kalenjin of Nandi. Thank you, your Honours.

25 PRESIDING JUDGE OZAKI: Thank you very much. The Defence for Mr Sang has

1 also requested in its written submission for the disclosure of the qualification of the
2 interpreters and also the necessity of materials to be translated into English and an
3 interpreter/translator paid by the Court to translate potential exhibits in advance.

4 The Defence for Mr Sang should address these issues, together with the point he just
5 raised, to the Registry please and if there is any substantive questions which the
6 Registry cannot deal with maybe the Registry can then address to the Chamber.

7 MR KIGEN-KATWA: We are most obliged, your Honours.

8 PRESIDING JUDGE OZAKI: The next item is objections to the conduct of the
9 proceedings. The Defence for Mr Sang submits that it may raise preliminary issues
10 under Rule 134(2).

11 May I ask the Defence for Mr Sang to be a little bit more specific as to these
12 preliminary issues that you may raise?

13 MR KIGEN-KATWA: Your Honours, pursuant to subsequent consultation and
14 taking instructions, I have instructions to indicate to the Chamber that we have
15 absolutely no issue to raise under that head.

16 PRESIDING JUDGE OZAKI: Thank you very much. The next issue is legal
17 re-characterisation of facts. The Prosecution submits that it intends to make an
18 application for legal re-characterisation of certain facts. Can you clarify, Prosecution,
19 what aspects of the confirmation decision do you have in mind? Is it something to
20 do with contextual elements, crime or criminal responsibility?

21 MS DARQUES-LANE: The short answer is, the individual criminal responsibility
22 for the accused, Mr Ruto. As your Honours are well aware Regulation 55(2) is a
23 notice provision, and our application for the formal notice to be given to the parties
24 and participants is what we're submitting today.

25 Now, Regulation 55 notice is very different from amending the charges and, basically,

1 Regulation 55(2) tells us that when there's a mere possibility that certain facts, that the
2 legal characterisation of certain facts may change, now, when that possibility arises,
3 then it triggers the Chamber's notice to the parties and participants of such.

4 And Prosecution's submission is that we're not changing our mode of liability that we
5 argued in our Document Containing the Charges and that have been confirmed by
6 the confirmation decision. Our position has been and remains that indirect
7 co-perpetration under Article 25(3)(a) is the proper legal characterisation of Mr Ruto's
8 individual criminal responsibility. In fact, the Pre-Trial Chamber agreed with this
9 position and it remains unchanged.

10 Now, what we would like to submit, and this is the basis of our application, is that
11 indirect perpetration is not the sole legal theory that can be used to characterise
12 Mr Ruto's individual responsibility. In our view, the facts support that another form
13 of individual criminal responsibility, such as 25(3)(d) could also apply, and because of
14 that possibility the notice requirement under Regulation 55(2) is triggered.

15 This is, of course, totally different from an amendment of the charges. The counts
16 that are pled in the DCC are the same, the facts are the same and the mode of liability
17 remains the same. So there's no alteration to the charges or the counts that we've
18 already pled.

19 In fact, we have complied with Regulation 52, which governs the requirements of the
20 Document Containing the Charges so, in short, all we're doing here is arguing that
21 there is a possibility that a different form of liability could be -- could be used in this
22 case and for that reason, when multiple legal characterisations are possible, then the
23 Chamber must give notice of this fact to the parties and participants.

24 Thank you, your Honour.

25 PRESIDING JUDGE OZAKI: Thank you very much.

1 JUDGE EBOE-OSUJI: Madam Prosecutor, you say that it's very different from -- that
2 legal re-characterisation is very different from the charges, but the fact that you can
3 see a need for legal re-characterisation so far ahead of the commencement of the trial,
4 doesn't that tell you that maybe you might take another look at the charges? I'm
5 not -- just asking a question.

6 The reason I ask is this: There are certain jurisdictions in which what you see with
7 legal re-characterisation here is no different from what happens in some places where
8 in the course of the trial certain evidence had been called and the rules or the code of
9 procedure, criminal procedure in those places, would then permit an amendment of
10 indictment in order to make the indictment to conform with the evidence that are led
11 in Court.

12 Is that very different from what we're looking at here?

13 MS DARQUES-LANE: It is indeed very different, your Honour. In fact, we have
14 pled 25(3(d) in our summons application. The charges are the same, the facts are the
15 same, and it's a very different situation because we're not substituting the facts or the
16 mode of liability, or the charges, and that's why this is very different from the
17 amendment of an indictment at the ICTY, for instance. This is not a new charge.
18 So, and just to sum up, what we're dealing with here is actually just a notice
19 requirement for the Chamber, when there's a mere possibility that legal
20 characterisation of facts may change. Thank you, your Honour.

21 JUDGE EBOE-OSUJI: Thank you.

22 PRESIDING JUDGE OZAKI: Judge Van den Wyngaert.

23 JUDGE VAN DEN WYNGAERT: Thank you, Prosecutor. My question is whether
24 what you're asking us, de facto, doesn't amount to a request for alternative charges?

25 MS DARQUES-LANE: No, your Honour, it isn't. And with your permission, we'd

1 like to make a written submission to provide more details to the Chamber if need be.

2 PRESIDING JUDGE OZAKI: Thank you very much. The Chamber does appreciate
3 your written submission. Do Defence teams want to respond to this issue?

4 MR HOOPER: Very briefly. It's interesting, because in a way I think what the
5 Prosecution are doing is not putting us on notice but putting the Chamber on notice
6 because it's the Chamber's power to alter, possibly alter, the as it were crystallised
7 substance of the confirmation decision.

8 Our only concern is that in the Prosecution's submissions for today's hearing, that
9 they very appropriately raise this possibility, and we're grateful for that, and they say
10 in terms of their application should there be one, because they will be indirectly of
11 course invoking the Chamber's power, it is not their authority or power, the
12 application will be made well in advance of trial, and we would just like the
13 Chamber to consider in fact determining what criterion should be applied thereto
14 expressed well in advance of trial. We would have thought at least four months
15 would be realistic.

16 Now, this may be of course tied in, and is tied in, with the matter that the Chamber's
17 asked us to address and given us at the moment a dead-line of 25 June, and that is to
18 make submissions, the parties to make submissions, on modes of liability. And we'd
19 invite the Chamber to consider whether in the circumstances now it would not be
20 more appropriate not to enter that discussion at the moment but to delay it until one
21 way or the other the Prosecution have come themselves to a settled view as to what
22 their position is in respect to that matter because, of course, it directly concerns that.
23 And as they are giving it deep thought, perhaps we can all save ourselves what
24 would otherwise be a theoretical exercise and instead, and again within a proper
25 distance and time before the trial, the matters raised then we can fruitfully make

1 submissions in respect of it. Thank you.

2 JUDGE EBOE-OSUJI: Are you saying to delay the submissions on the Article 24
3 order that the Chamber made until the Prosecution would have done what he wants
4 to do here, or are you saying to delay the discussion regarding 25 now today?

5 MR HOOPER: We -- yes, today. We have at the moment a dead-line of making
6 submissions in respect of modes of liability that arise under Article 25 and to submit
7 those to the Chamber by 25 June. Given what's just been said, given that then if the
8 Prosecution begin to, as it were, draw this matter again to the Chamber's attention,
9 for the Chamber to decide whether it would be appropriate to change the legal
10 characterisation, perhaps that would be a debate better reserved for that moment
11 rather than next week.

12 PRESIDING JUDGE OZAKI: Mr Kigen-Katwa?

13 MR KIGEN-KATWA: Your Honours, on our part, we wish to notice, for avoidance
14 of doubt, that the Prosecution have highlighted that this issue would relate to the case
15 again as to Mr Ruto and not Mr Sang.

16 Secondly, your Honours, it is our view that this is such a fundamental issue, matters
17 that may not be directly on Mr Sang's case, it affects us because it informs the date
18 within which the trial may be conducted. And we pray that the Court takes it into
19 its hands and prescribe a time within which the Prosecution is to make up its mind in
20 two issues.

21 The filing by the Prosecution states in the second sentence that under Regulation 55(2)
22 that certain facts may be subject to legal re-characterisation. In the submission by
23 the Prosecution they also are not being categorical whether they intend to seek
24 re-characterisation. And, your Honours, we pray that the Prosecution be obliged to
25 make up their mind whether or not they intend to and that a time-frame be given to

1 them within which to do well in advance of preparation for hearing, so that we all
2 know what we are to encounter and prepare ourselves adequately for defence.

3 Thank you, your Honours.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 (Trial Chamber confers)

6 PRESIDING JUDGE OZAKI: Well, about the submission on this issue from the
7 Prosecution, can Prosecution submit your written filing together with the one we
8 asked on interpretation of law of the modes of individual criminal responsibility?

9 The dead-line is 25 June.

10 MS DARQUES-LANE: Regarding this issue, we've already approached the
11 Defence and have reached an agreement with the Defence that because the issue of
12 indirect co-perpetration is going to be addressed in the Katanga judgment, it is best to
13 wait until the judgment is rendered for us to make our submission, and the
14 Defence on this issue is in agreement with us. Thank you.

15 (Trial Chamber confers)

16 PRESIDING JUDGE OZAKI: Well, it is fortunate that we have one of the Katanga
17 Judges here in this Chamber, so the Chamber will consider about the possible
18 dead-line and will communicate to the parties in due course.

19 MR HOOPER: Can I just add one caveat to that? We can see the sense of that but it
20 still, whatever the decision might be, would be a decision of a Trial Chamber and
21 would be subject to appeal by either side. And so to take this particular position
22 logically to its conclusion, you'd have to add a little time element for one side or the
23 other to exercise the point or re-address the point before the Appeal Chamber, which
24 isn't the fastest operating Appeal Chamber, and so it's going to be perhaps a -- it may
25 be a difficulty, it depends on the time-line that you decide in terms of trial.

1 Thank you.

2 PRESIDING JUDGE OZAKI: Thank you very much. The next agenda item is
3 Post-Confirmation Document Containing the Charges. As you know, other Trial
4 Chambers at this Court have required the Prosecution to file an updated
5 Post-Confirmation Document Containing the Charges reflecting the charges as
6 confirmed by the Pre-Trial Chamber.

7 The Chamber would like to hear submissions from the Defence on this issue.

8 MR HOOPER: It didn't form part of our submissions of matters to be considered
9 today, nor did it form part of the original Chamber's agenda, and I dare say that was
10 because we all assumed, as we did, that the Prosecution were going about this task in
11 the light of the confirmation decision. There's a very good reason, of course, as we
12 all know, why in fact the Prosecution need to re-address their position and inform
13 both the Chamber and most significantly the particular accused as to exactly what he
14 faces and on what evidence in the light of the confirmation. It's particularly
15 relevant in this case because of the way in which the confirmation Chamber has made
16 its decision, and specified the charges, and specialised -- they specified the -- there's
17 four charges, but each one in fact breaks down into three particular crimes, so you've
18 got 12 charges that need, in fact, enumerating one to 12, as far as Mr Ruto is
19 concerned, in order for those matters to be addressed in the course of the trial.
20 That's the very simple issue.

21 But the other issues involve of course the departure of one of the accused originally
22 charged, a suspect, Mr Kosgey, and where that fits into the case. We've got the issue
23 that's been raised today. We've got the fact that the Prosecution do not know what
24 witnesses they are going to call at the moment and, therefore, consequently they don't
25 know what -- the evidence that they are going to call.

1 And, of course, while the facts can no longer be amended as far as the confirmation
2 charge is concerned, the confirmation decision is concerned, that's crystallised the
3 facts, the evidence in respect of the facts can be added to and altered. And so it
4 becomes very important for the accused to know what he's -- what he's faced -- faced
5 with.

6 So what we need is, I think in terms of the Katanga case, it became known as the
7 summary of the charges. So we had a document, which was the Document
8 Containing the Charges, and then we've got a document called the "Summary
9 Containing the Charges." I don't need to review either the contents of that or the
10 reasons, cogent reasons, that provided for its need by the Trial Chamber. They are
11 all set out and you will see it in the decision on the filing of a summary of the charges
12 in that case. It's filing 1547, and it's set -- it's set out there.

13 In that case, of course, we also had another document which again seems to sail
14 under various names but essentially that the name I think boils down to the in-depth
15 analysis charge. To some extent, the in-depth analysis chart has proved less useful,
16 ran I think to 1300 pages in the Katanga case, less useful because it's such a confusing
17 point of reference. But on the other hand, it does have utility inasmuch as it clearly
18 gives the Chamber the opportunity to see exactly the way in which the Prosecution
19 anchors its case in high detail.

20 But it seems to us, the document, the new document to be called into existence,
21 reflecting the confirmation decision, or called the "Summary of the Charges," is a
22 document that should in fact in detail indicate the Prosecution case in such a way that
23 all its evidence that it relies on is clearly related there to the charges, and in a way
24 which is understandable to the individual accused himself with assistance, of course,
25 of his lawyers and advisers and is a clear guide to the Chamber as to what the

1 Prosecution case is.

2 So, yes, absolutely essential tool for all the very good reasons that are provided by the
3 various courts that have adopted that process. Thank you.

4 PRESIDING JUDGE OZAKI: Thank you very much. Mr Kigen-Katwa?

5 MR KIGEN-KATWA: Your Honours, on our part, we did not raise the issue of the
6 document containing charges in our filings, and we also notice that it was not
7 referred to in the filings by the other parties, and it is because we also laboured under
8 the expectation that the Prosecution would take the initiative of making the filing.
9 We, on our part, in terms of proactively responding to the issue, wish to adopt the
10 position that the Court made in the case of Bemba, being that the filing should be
11 made the final way in which the Pre-Trial Chamber has described to them. Further,
12 we pray that the detail of how the amended document containing charges should be
13 lodged should conform, we submit, to the format that was suggested in the Bemba
14 case being to include footnotes and paragraphs of the confirmation decision. That's
15 all, your Honours.

16 PRESIDING JUDGE OZAKI: Thank you very much. Prosecution, any view on
17 this?

18 MS DARQUES-LANE: No. On the issue of the amended DCC, we share the
19 position taken with the Defence. We don't have any objections to citing the
20 confirmation hearing when appropriate, and also citing when there may be a
21 discrepancy between what the Prosecution pleaded and what the Pre-Trial
22 Chamber found in footnotes.

23 I thank also my colleague from the Defence, Mr Hooper, who reminded us of what
24 the in-depth analysis chart did not do, which was it did not - and I think it was in the
25 Chamber's view - did not really answer a lot of the concerns that both the

1 Defence and the Chamber had at the time. It was a very voluminous document, it
2 was very onerous on the Prosecution, and it reflected at the eve of trial what was at
3 pre-trial.

4 And clearly, at pre-confirmation, what witnesses state in their statements may vary
5 from what they will come and testify, and their testimony at trial is what will make
6 the evidence of the record.

7 Furthermore, the in-depth analysis chart had to be updated when lifting of redactions
8 proceeded which can only be done manually. Therefore, the Chamber realised that
9 the chart served -- did not serve the purpose it was intended to originally serve, and
10 with that in mind requested the parties to present a summary of charges.

11 So I just wanted to stress from the Prosecution's side that we do agree with the
12 Defence that the in-depth analysis chart did not serve the purpose it had intended to
13 and should not be relied upon.

14 Thank you.

15 PRESIDING JUDGE OZAKI: Thank you very much. As for the amended
16 Document Containing the Charges, if the Chamber decides to request the submission
17 of this document, when do you anticipate you can submit that kind of document?

18 MS DARQUES-LANE: There again, I think there's an agreement from both sides.
19 My colleague just mentioned the Bemba case, and I think in the Bemba case
20 Chamber gave a month for the Prosecution to submit such document, and we submit,
21 we request the same time.

22 Thank you, your Honour.

23 PRESIDING JUDGE OZAKI: Thank you very much. The Chamber will decide on
24 this issue in due course.

25 MS CHANA: Madam President, if I may, there is a matter which I had raised at the

1 pre-trial proceedings about including in the charges other criminal conduct such as
2 destruction of property, looting and physical injuries. All the victims talk about this
3 is what happened to them. If you look at the charges as drafted by the Prosecution
4 at the pre-trial stage, this context is not reflected as a specific charge. Now I think
5 the time might be ripe to ask the Prosecution, as they are now amending their charges,
6 to charge -- I see your Honour shaking her head.

7 JUDGE VAN DEN WYNGAERT: They are not amending the charges, they are just
8 making a new document that reflects what has been confirmed by the Pre-Trial
9 Chamber. This Trial Chamber is seized by the decision of the Pre-Trial Chamber,
10 and it cannot go beyond the facts that have been accepted and confirmed by the
11 Pre-Trial Chamber, so it could not extend the charges.

12 MS CHANA: That's precisely what I mean. These facts have been accepted by the
13 Pre-Trial Chamber, because if you look at the decision, they make references to this
14 conduct in no less than at least 20 times, and I can give you the page numbers which
15 are written here - I don't want to take too much of your time - so this is what we
16 would call the Regulation 55 where you, your Chambers, your Honours of your own
17 initiative, can re-characterise these facts because that is the evidence which has
18 been -- which is before the Court and not only that, the Defence witnesses themselves
19 came to Court and they all agreed that this conduct actually happened. It is
20 actually -- it was on an agreed basis. And my clients are very concerned that this
21 additional conduct, or this conduct which has already been subject matter of the
22 evidence, is specifically comes -- is referred to in the charges because it will affect it at
23 the reparation stage as to the -- because the charges as set out now, is only forcible
24 transfer and persecution. This is a matter that the Trial Chamber, the Pre-Trial
25 Chamber, invited us to address, which we did at some length, but in the decision

1 there was no real mention of the submissions that we had made other than to say that
2 this conduct is pleaded.

3 They also invited me to have consultations with the Prosecution whether they would
4 amend their charges, and the Prosecution said they are not going to do that. But I
5 invite this Chamber, under your power under Regulation 55 or any other power, to
6 ensure that this criminal conduct, where the victims themselves say that they suffered
7 on the ground, because it was not only for simple transfer or persecution, it was also
8 looting, burning and personal injuries.

9 And I foreshadow, perhaps, an application in that regard at the moment - things are
10 not quite clear, I haven't been able to see my clients - but this is an issue that I had
11 raised and I think it was pertinent to bring it to your attention at this stage. Thank
12 you, your Honour.

13 PRESIDING JUDGE OZAKI: Thank you very much, Ms Chana. As Judge Van den
14 Wyngaert rightly mentioned, the document we are now talking about is
15 post-confirmation Document Containing the Charges, which correctly reflects the
16 confirmed charges and nothing more. But in any case, the Chamber will decide on
17 this issue, and will issue an order in due course including its possible format and
18 dead-line.

19 The next agenda item is definition of "organisational policy." The Defence of
20 Mr Sang submits that the parties should file written submissions on the legal
21 definition of "organisational policy." Similarly, the Defence for Mr Ruto submits that
22 the definition of "organisational policy" should be indicated by the Trial Chamber at
23 an early stage.

24 Do you have any response to these arguments, Prosecution?

25 MR GARCIA: Your Honours, Lucio Garcia for the Prosecution, in regards to this

1 specific question. What the Defence is basically asking the Chamber in this case is to
2 decide on the definition of "organisational policy" in a sort of vacuum, because we
3 haven't started obviously the trial proper, so the Prosecution's response in regards to
4 these requests from the Defence is that respectfully submitted to the Chamber it isn't
5 necessary at this stage for the parties to submit written applications regarding what is
6 the definition of "organisational policy."

7 Now, as I've just mentioned, obviously there's this whole question of deciding,
8 interpreting legal questions, and the Prosecution is of the firm view that when the
9 Chamber should decide these issues is during the trial proper when considering the
10 merits of the case, when there are facts to consider with and in regards to the legal
11 question of what is or not, or if the Prosecution has fulfilled its burden as to the
12 question of organisational policy.

13 Now, there's a second question as well, and it's probably something -- and it's
14 something that I feel emanates from the written submissions of the Defence in this
15 case, the fact that they are highlighting in a certain way that they could be prejudiced
16 by the fact that the Chamber does not decide on this matter before the start of the trial
17 proper.

18 Now, what the Prosecution submits to the Chamber in this regard is that there is no
19 prejudice for the Defence for the following reasons: This whole question of
20 organisational policy has already been dealt with. It's already been dealt with by the
21 Pre-Trial Chamber on its decision on Article 15 on 31 March 2010. Basically in this
22 decision, and I just make reference to paragraphs 83 and following, page 34, the
23 Pre-Trial Chamber discussed at length what the definition of "organisational policy"
24 would be, distinguishing obviously between organisation and policy. There was a
25 dissenting opinion as well.

1 Afterwards, at the confirmation hearing itself, the Chamber endorsed the definition
2 that it had given of "organisational policy" on its decision on Article 15. So what the
3 Prosecution is saying, basically, your Honours, is that this question has been
4 canvassed already previously. The majority has decided on it. There is a definition
5 which has been accepted already. So the Defence is on notice as to what are the
6 possible interpretations that can be given to this term.

7 The Defence has spoken about a liberal expansive definition and then there is this
8 restrictive definition that has been spoken about and alluded to in the dissent of the
9 Judge. So basically, both positions have been canvassed in the past. The fact that
10 the Pre-Trial Chamber has already decided on this matter on various occasions leads
11 the Prosecution to suggest and to submit to this Chamber respectfully that it is
12 absolutely not necessary at this point and at this stage of the proceedings, and we
13 mustn't forget that the trial proper hasn't started, to decide on this matter in a
14 vacuum.

15 What the Defence would have the Chamber do, respectfully submitted, is to decide
16 this question without the relevant facts that need to be taken into consideration, and
17 to have the Chamber fulfil a role which I would qualify as one of an advisory nature,
18 advising the specific Defence teams on what the state of the law is.

19 Both Defence teams are represented by able Defence lawyers who know the state of
20 the law and, therefore, written submissions on this matter at this point of the
21 proceedings are not necessary.

22 Respectfully submitted, your Honours.

23 PRESIDING JUDGE OZAKI: Thank you very much. Any response from the
24 Defence teams?

25 MR HOOPER: Well, we're entirely in the Chamber's hands in respect of this matter.

1 The Pre-Trial Chamber's definition was, of course, that non-state actors may be
2 qualified as an organisation within Article 7(2)(a) of the Statute on the grounds that
3 the organisation has the capability to perform acts which infringe on basic human
4 values. That's the criterion that was applied. It was criterion that was sharply
5 dissented from by the third and dissenting Judge, Judge Kaul. It was the argument
6 advanced at the Pre-Trial Chamber by this Defence, that the Pre-Trial Chamber had
7 adopted in error a new liberal interpretation of "organisation," organisational policy,"
8 which was inconsistent with the intention of the drafters of the Rome Statute and
9 inconsistent with customary international law.

10 So there's -- there's the division. It's been a judicial division as well, and even
11 though this point perhaps could have been dealt with recently in the Appeal
12 Chamber, it wasn't. And so we're at the outset of a trial, where "organisation," it's
13 definition, is central to the case, and we have two differing interpretations of the
14 criterion of that.

15 And bearing the marked difference between the two, the Defence merely sought to
16 draw that to the attention of the Chamber and to invite the Chamber to consider
17 whether it was a profitable exercise, vacuum or not, to consider the arguments there
18 which I suppose logically would have left -- may by one side or the other again have
19 led to an Appeal Chamber consideration prior to trial and it's entirely a matter for the
20 Chamber.

21 Thank you.

22 PRESIDING JUDGE OZAKI: Thank you very much.

23 MR KIGEN-KATWA: On our part, your Honour, we submit that contrary to what
24 the Prosecution is saying, being that our motion and our request on this issue is in a
25 vacuum, we submit that it isn't true that it is in a vacuum; we contend that the context

1 and the circumstances of this case warrant the need to make that definition clear up
2 front.

3 We also submit that unlike what the Prosecution has said, the Defence would suffer a
4 prejudice if that definition is not determined. We make this observation because
5 up to the time the Pre-Trial Chamber made its decision, the definition of
6 "organisational policy" was fairly clear and traditional, and the Pre-Trial
7 Chamber was the first one to break off that consistent interpretation.

8 Your Honours, we highlight the fact that the issue was so substantial that, number 1,
9 there was a dissent in the Pre-Trial Chamber in making a decision on that issue
10 between the definition given by the majority in the Pre-Trial Chamber and the
11 traditional definition given by the dissenting Judge.

12 We also submit that it was of such adequate magnitude that the Appeal
13 Chamber elected not to determine it and to place it in your hands. And we pray that
14 you will take up the prescription by the Appeal Chamber and have that issue
15 determined to enable us, as we submitted in our filing, to know the contours of the
16 charges, to enable us to know the contours of the charges, and to adequately prepare.
17 We lastly submit, your Honours, that the issue we have raised in respect to this issue
18 is in all respects similar to the issues raised by the Prosecution in terms of modes of
19 liability. And if they were to be entertained on their motion on modes of liability,
20 then there's adequate merit to allow us to have this issue of organisational policy to
21 be determined upon.

22 We thank you, your Honours.

23 PRESIDING JUDGE OZAKI: Thank you very much. Unfortunately, the tape is at
24 the end, so we have to suspend now. So we will rise now and come back at 11.30 to
25 this same courtroom.

1 Thank you very much.

2 THE COURT USHER: All rise.

3 (Recess taken at 10.59 a.m.)

4 (Upon resuming in open session at 11.33 a.m.)

5 THE COURT USHER: All rise.

6 Please be seated.

7 PRESIDING JUDGE OZAKI: Welcome back everybody. I think we are now at the
8 end of the last agenda item on -- sorry, on the definition of "organisational policy."

9 And I understand Judge Eboe-Osuji would like to question.

10 JUDGE EBOE-OSUJI: A question, a neutral question, to both Defence counsel and
11 Prosecution, the same question flipped around in different ways. Mr Hooper and
12 Mr Katwa, are we not bound to follow the definition of the majority of Pre-Trial
13 Chamber on the matter, and I flip the same question to the Prosecution, are we bound
14 to follow the definition supplied by the majority?

15 MR HOOPER: We would argue not, because of the way in which the definitions are,
16 so we're going from the broader definition to the narrow one, so the advantage is not
17 a prejudice to the accused.

18 MR GARCIA: Your Honour, in response to the question, the Prosecution would
19 submit that the decision by the PTC Chamber is a precedent on which the Trial
20 Chamber can rely on for the purposes of the trial. So there's a majority decision, the
21 Chamber, the Trial Chamber, can rely on that decision as a relevant and obviously
22 valid precedent.

23 JUDGE EBOE-OSUJI: But we're not bound by it, is that what you are saying? We
24 can rely on it but not bound?

25 MR GARCIA: I would say in response to that question that the Chamber, the Trial

1 Chamber can rely on it, exactly.

2 MR KIGEN-KATWA: With your permission, your Honours, it is our contention that
3 this Court is not bound by it, and we observe that the Appeal Chamber, when the
4 issue was presented to it, first of all did not make a decision, categorical decision, that
5 the definition by the Pre-Trial Chamber was adequate or conclusive. It very
6 consciously and deliberately referred it to you, and that act of referring it to you was
7 an acknowledgement that it is a substantial issue. And, secondly, that it was such a
8 substantial issue that should have been allowed to be determined by this Trial
9 Chamber, and enjoy an option for appeal to the appellate court, instead of the
10 appellate court deciding. We submit that it is not binding, and we are very grateful
11 to the Prosecution that they also acknowledge that it doesn't bind you.

12 PRESIDING JUDGE OZAKI: Thank you very much. Thank you very much for all
13 the submissions, and at this stage, the Chamber will take note of all those very
14 interesting submissions on this issue.

15 Now we have exhausted the list of agenda items which we notified beforehand, but
16 the Chamber have a couple of issues to address. First of all, the Chamber notes that
17 the Prosecution proposed to submit applications for in-court protective measures ten
18 days before the start of the witness's evidence. My question to the Registry is: Do
19 you have any comments on this proposal, ten days before the start of the witness
20 evidence?

21 MR VANAVERBEKE: No comments.

22 PRESIDING JUDGE OZAKI: Thank you very much. The next issue is the
23 participation of victims in the trial. With regards to the participation of victims in
24 this trial, the Chamber will request submissions in order to issue a decision on this
25 matter in due course. So we are not dealing with this issue, that's why we are not

1 dealing with this issue in this status conference.

2 Concerning the protocol to be adopted for contacts with the opposing parties'

3 witnesses, and also for communicating non-public information to members of the

4 public, the Chamber will not hear submissions on this issue today, but the parties and

5 the legal representative of victims are directed to jointly consult with the Registry

6 with a view to coming up with a workable protocol. The Registry is then to file a

7 report to the Chamber with a draft protocol for the Chamber's consideration by

8 4 July.

9 eCourt protocol. A decision on the eCourt protocol applicable in this case will be

10 issued in due course. However, the Chamber would like to state now that material

11 disclosed inter partes should not be assigned EVD numbers. Additionally, the

12 Chamber should not receive Article 67(2) and Rule 77 material, but should only have

13 access to incriminatory material in Ringtail.

14 The next issue is email communications. All email communications directed to the

15 Chamber should use the address "Trial Chamber V communications" which will copy

16 the message to the legal team advising the Judges. So the address is "Trial

17 Chamber V communications."

18 The Chamber does not need to be included on exchanges between the parties and the

19 participants. However, all parties and the participants should be copied on any

20 email communications with the Chambers unless there is a specific justification for

21 doing otherwise.

22 Emails to the Chamber should not contain any substantive issues. All requests

23 should be submitted in proper filings. Exceptionally, requests can be made by email

24 only if the matter requires urgent attention in circumstances in which the only way to

25 bring it to the attention of the Chamber within an actionable time-frame is by email.

1 The Defence for Mr Ruto requests information on the Prosecution's intermediaries
2 and exculpatory material from the Muthaura and Kenyatta case. It is contained
3 in -- the request is contained in filing 416, paragraphs 20 and 21. This issue is a
4 matter that should be dealt with inter partes at this stage.

5 The Chamber has received the most recent filing, 420, from the legal representative
6 pursuant to Regulation 83(4) as well as the response from the Registry, 424, and will
7 issue a written decision on this application.

8 Those are the additional announcements from the Chamber. Is there any requests
9 from the floor? If not, this is the end of this first status conference of this case, and
10 I would like to thank all the parties and participants for very valuable help. Thank
11 you very much.

12 THE COURT USHER: All rise.

13 (The hearing ends in open session at 11.45 a.m.)