

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of the Prosecutor v. Francis Kirimi Muthaura
5 and Uhuru Muigai Kenyatta - ICC-01/09-02/11
6 Presiding Judge Kuniko Ozaki, Judge Christine Van den Wyngaert
7 and Judge Chile Eboe-Osuji
8 Status Conference
9 Tuesday, 12 June 2012
10 (The hearing starts in open session at 11.04 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 welcome
15 parties and participants as well as Mr Muthaura to the first status conference of this case.
16 May I start by asking parties and participants for the record to introduce their teams,
17 starting with Prosecution?
18 MS ADEBOYEJO: Thank you, Madam President, your Honours. My name is Adesola
19 Adeboyejo, I'm a trial lawyer in the Office of the Prosecutor; and with me for the Office of
20 the Prosecution this morning is Mr Sam Lowery to my left; Ms Olivia Struyven right
21 behind me; and beside her is Ms Desiree Lurf; and Ms Shamiso Mbizvo, who is with JCCD;
22 and last, but not least, is our case manager, Ms Ramu Bittaye. Thank you, your Honour.
23 MR KHAN: May it please your Honours, good morning. Ambassador Muthaura sits
24 behind, on the table behind, and he's represented by Mr Essa Faal, Mr Kennedy Ogeto,
25 Shyamala Alagendra, all of counsel. Mr Anand Shah. And right at the back Mr John

1 Modin, trial support. Your Honours, my name is Karim Khan, QC.

2 MR KAY: I'm Steven Kay of Queens Counsel. To my left sits Gillian Higgins; to my
3 right, Mr Desterio Oyatsi; and behind me Mr Benjamin Joyes. Thank you.

4 MR ANYA: Good morning, Madam President. Good morning, your Honours. My
5 name is Morris Anyah. I represent the victims in this case. To my left is my case
6 manager, Ms Anushka Sehmi; and behind sits my legal assistant, Ms Rebecca Mori.
7 Thank you.

8 MS DAHURON-JACOBY: (Overlapping speakers) ...

9 MR KHAN: Your Honour, I do apologise. Madam President, perhaps your
10 microphone could be --

11 PRESIDING JUDGE OZAKI: Yes.

12 MR KHAN: I'm grateful.

13 PRESIDING JUDGE OZAKI: Yes, thank you very much. Registry then, please.

14 MS DAHURON-JACOBY: (Interpretation) For the Registry, there is Shakhnoza
15 Abdullaeva, legal officer at VWU; Pieter Vanaverbeke, legal co-ordinator in the Court
16 Services Section; and myself Charlotte Dahuron-Jacoby, Chief of CMS.

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

20 Now I would like to go into the agenda items of this status conference. First agenda item
21 is starting date of trial. According to Rule 132, the Trial Chamber must set the date of
22 trial. The Prosecution submits in its filing 428 that the start date of the trial depends on
23 the Court's ability to protect witnesses as well as co-operation with the Court's processes
24 by the accused and the Government of Kenya. Apart from the protection of witnesses,
25 the Prosecution does not identify any facts that could delay the commencement of the

1 trial.

2 So two questions for the Prosecution: Can the Chamber assume that the Prosecution is
3 ready for trial and that a fulfilment of disclosure obligations and lifting of redactions are
4 the only actions that it needs to take at this stage?

5 And the second question is: How much time you anticipate we will require to resolve
6 any witness protection issues in order to be ready, really ready for trial?

7 MS ADEBOYEJO: Thank you, Madam President, your Honours. With regards to the
8 first question that your Honours have put before us, yesterday at the status conference of
9 the Kenya 1 sister case the Defence had proposed a date in March 2013 and the
10 Prosecution did not object to this application.

11 We do propose, your Honours, that a date for trial should be synchronised as closely as
12 possible between both cases. So, your Honours, we would answer to the question of
13 whether or not we are ready to proceed for trial that -- at the end of this year would be a
14 very ambitious time-line because we have witness security concerns and disclosure issues,
15 which I will get into in a minute, but we want to start trial as expeditiously as possible
16 and we want to provide a realistic time-line in order to avoid us having to come back to
17 the Chamber for an extension of time.

18 With regards to disclosure, I can go into details, your Honour, right away with regards to
19 the disclosure time-lines, the volume of disclosure that we expect to provide and how
20 soon we expect that we will provide disclosure.

21 Your Honours, we are well aware of our obligations to provide disclosure as
22 expeditiously as possible. We anticipate the disclosure process will be ongoing and will
23 be provided on a rolling basis, taking into cognizance the security concerns of our
24 witnesses.

25 Your Honours, we are prepared right now to provide information on how we propose to

1 provide disclosure. If I may proceed, your Honour?

2 PRESIDING JUDGE OZAKI: Yes.

3 MS ADEBOYEJO: The first category of disclosure we intend to provide relates to
4 materials for which we intend to provide disclosure immediately. Of the items received
5 after the last disclosure, on 21 September 2011, a first set of approximately 20 items has
6 been identified that can be disclosed immediately because no redactions are required to
7 content or metadata. This group, your Honours, concerns Rule 77 and PEXO materials.
8 The second category, your Honours, are materials for which we will require redactions
9 but which cannot be disclosed until the protocol on redactions is finalised between the
10 parties and ruled upon by this Chamber.
11 Your Honours, for this category, we have approximately 680 items which are
12 witness-related materials that have been identified for disclosure but need redactions first.
13 Once the redaction protocol is finalised with the Defence, and the Chamber has had the
14 chance to consider it, the redactions can be implemented and the materials disclosed
15 promptly.
16 The good news, your Honours, is that my friends on the other side of the table have
17 agreed with us on the need for a more streamlined and simplified regime and discussions
18 have already begun in this regard.
19 The 680-odd items I've referred to comprise approximately 2,290 pages and relate to seven
20 witnesses. These materials include 76 interview transcripts/statements totalling
21 approximately 1,400 pages from the interviews of five witnesses, as well as other
22 witness-related documents, totalling approximately 355 documents and 644 pages.
23 As a further breakdown, your Honours, the 680-odd documents I referred to includes 250
24 Rule 77 materials, such as items regarding witness-related expenses. These
25 approximately 250 documents total approximately 276 pages.

1 Your Honours, although the process of applying redactions is time-consuming and
2 cumbersome, as it requires our utmost diligence, the Prosecution intends to disclose those
3 materials as soon as practicable after the redaction system has been approved. We
4 intend to start with witness materials that may pertain to contents of an exculpatory
5 nature or may be materials that will be relevant for the preparation of the Defence.
6 In addition, your Honours, some interviews have been conducted pursuant to Article 55(2)
7 since confirmation, and these are still being transcribed, and these concerns the transcripts
8 of six witness interviews which should result in an estimated 1,650 pages of transcript.
9 Your Honours, on top of the 680-odd items for disclosure after redactions, and the 20
10 items I referred to which are ready for immediate disclosure, Prosecution has a third
11 category for possible disclosure for which further review is necessary.
12 These are another approximately 560 items in our possession that are in the process of
13 being reviewed, and may or may not be the subject of disclosure. These materials are, for
14 the most part, open-source materials, and the breakdown for these will be approximately
15 450 items comprising approximately 2,200 pages and 26 audio video files. These do not
16 relate to witnesses and, once they've been reviewed, any items identified as being subject
17 to disclosure will be promptly disclosed subject to any discrete redactions that may be
18 needed and the finalisation of the redaction protocol.
19 In addition, your Honours, and given that disclosure is an ongoing obligation, we will
20 continue to review these materials and the materials obtained prior to the confirmation
21 hearing to ensure that all of those documents subject to disclosure have in fact been
22 disclosed. To the extent that further materials subject to disclosure are identified during
23 this process, they will be disclosed promptly.
24 Your Honours, maybe I should also add that we also have witnesses we intend to call but
25 who have ongoing security issues we need to resolve before they can safely be called as

1 trial witnesses. This, your Honours, has been a long and ongoing process and we're
2 hoping that it can be finalised by the end of this calendar year.

3 Your Honours, we also have another category of individuals who we wish to call as
4 witnesses at trial and for whom their willingness to testify and their security is still being
5 determined.

6 Your Honours their willingness is determined -- or is dependent, sorry, on their
7 individual circumstances and we're working through the issues with these individuals
8 which we hope to be resolved by the end of the year.

9 Your Honours, we also have a third category of witnesses that we believe we should talk
10 to in the light of our duty to investigate exculpatory materials. We have been in contact
11 with some of these individuals for quite a long while now and we're making concerted
12 efforts to talk to them. We're hopeful that for these we can finalise the process by the end
13 of this year.

14 Finally, your Honours, we have also requested a number of State Parties to assist in the
15 context of state co-operation to provide us with information we are not able to obtain
16 ourselves. Some have responded with the relevant information and we are in the
17 process of working through to ensure that we obtained the information necessary in order
18 to meet our statutory obligations.

19 Your Honours, unless you have any further questions, these will be my responses.

20 PRESIDING JUDGE OZAKI: Thank you very much for this very detailed explanation.

21 As for the date of trial, the Prosecution mentioned that the date for -- this date should be
22 synchronised with the date of trial for the other case, whether or not the Prosecution is
23 ready.

24 For the Chamber, the most important thing is whether or not the Prosecution is ready, so
25 that's the information we very much value, and also if the Prosecution is very keen to

1 synchronise the date for trial, is there any reason why the Prosecution, any specific reason
2 why the Prosecution want it to be synchronised? Maybe you can answer to this issue of
3 synchronising.

4 MS ADEBOYEJO: Well, your Honours, I can provide further details on this, especially
5 because we are going to be discussing at the ex parte session more on the issue of witness
6 security.

7 I only -- the Prosecution had only suggested this because this was the practice that had
8 been adopted by the Pre-Trial Chamber, because it was cognisant of the security issues
9 that were peculiar to these two sister cases; and because they were aware of that, they had
10 as much as possible tried to take this into account when they heard, for example, the
11 confirmation hearings and when the confirmation decision was issued. That's what has
12 influenced the Prosecution suggestion.

13 PRESIDING JUDGE OZAKI: So may I understand correctly the reason for the
14 Prosecution to prefer the synchronised date for trial is mainly for security reasons; am I
15 right?

16 MS ADEBOYEJO: Yes, your Honours, because we -- we, as much as possible, want to
17 avoid a situation where there are tensions that could arise, because a particular case is
18 moving faster than the other, or one is started and the other one hasn't, in view of the
19 realities in the country, in the State of Kenya.

20 PRESIDING JUDGE OZAKI: Thank you very much. Well, before hearing submissions
21 from the Defence on the date of the trial itself, the Chamber would like to further address
22 the issue of disclosure and redactions which has very close connection to the date of trial.
23 The Prosecution mentioned about 680 materials, which the Prosecution are ready to
24 disclose as soon as possible once the protocol on redactions has been set. That means the
25 Prosecution can disclose those materials immediately after the redaction résumé has

1 been -- will be set?

2 MS ADEBOYEJO: Your Honours, it's a process that we anticipate, as we said earlier, that
3 would be ongoing, once we are agreed with regards to the regime; then we will, in
4 accordance with our obligation, begin the process of disclosure, once we've agreed with
5 our learned friends and the Chamber is agreed on the protocol as well, has approved the
6 protocol. Yes, your Honour.

7 PRESIDING JUDGE OZAKI: Well, what --

8 MS ADEBOYEJO: I'm sorry, your Honour. I just wanted to add that, of course, this
9 would also be taken into cognizance, the witness security issues that may arise, but we
10 will bring this to the attention of the Chamber if need be.

11 PRESIDING JUDGE OZAKI: And you also mentioned 560 items, which Prosecution is
12 now reviewing. What the Chamber -- what the Chamber would like to have is an
13 approximate time-line for all disclosure of exculpatory materials. As for witnesses, you
14 mentioned about the end of this year. When do you think the Prosecution can disclose
15 the bulk, or 90 per cent, of exculpatory materials? Will it be the end of this year, or later
16 than that or even before?

17 MS ADEBOYEJO: I will take your first question, Madam President. With regards to the
18 560 items in our possession, because they are still in the process of being reviewed, we
19 cannot make a determination until the review process is completed. Once the review
20 process is completed, which we hope would be done within the next month, we will
21 communicate immediately to our friends on the other side both materials that are of an
22 incriminatory or exculpatory nature as well as the materials that fall under Rule 77. It's
23 because the processes -- the materials are still being reviewed. That's the short answer,
24 your Honour.

25 And with regards to the witnesses that were referred to, in order for us to be able to

1 provide information on the identities of these witnesses, your Honours, we need to take
2 into cognizance issues regarding the protection and protective measures for these
3 witnesses.

4 As I said earlier we will discuss this in further detail during the ex parte session but we
5 are aware that, based on our proposal for the 60, 30, 30 time-line of disclosure, that is what
6 will govern the time-line in which we would make information on the identities of
7 witnesses available to our friends on the other side.

8 PRESIDING JUDGE OZAKI: Regarding the witnesses you intend to call, the Chamber
9 understands that you cannot -- you cannot disclose what kind of witnesses you are calling,
10 it all depends on the security issues, but can the Prosecution give the Chamber the idea of
11 approximate number of witnesses it intends to call?

12 MS ADEBOYEJO: Certainly, Madam President. Prosecution is looking at a figure of
13 between 25 to 35 witnesses, your Honours.

14 PRESIDING JUDGE OZAKI: Thank you very much. And the Prosecution has just
15 referred to the staged approach about the lifting of redactions to the identity of witnesses,
16 which Prosecution actually mentioned in its written submission 428; that is, the redactions
17 to the identity of testifying witnesses who are part of the Court protection programme
18 would be lifted 60 days before the start of the trial, while redactions to the identity of
19 testifying witnesses who are not part of the protection programme would be lifted 30 days
20 before the trial and, in exceptional circumstances, 30 days before the start of witness
21 testimony; am I right?

22 MS ADEBOYEJO: Yes, your Honour, that's our proposal.

23 PRESIDING JUDGE OZAKI: Thank you very much.

24 Now, I would like to ask both Defence teams: The Chamber would like to hear from
25 Defence teams regarding the -- this suggestion by the Prosecution for staged disclosure

1 proposal of identities of the witnesses.

2 The Defence team do not need to repeat what they have already submitted in writing, but
3 if there are any additional submissions the Chamber would like to hear it.

4 MR KHAN: Madam President, your Honours, I'm grateful. Perhaps with your leave,
5 before I wrest that issue, we can finish the issue that has already been discussed in the
6 agenda and the start date for trial.

7 In light of that, what will help my submissions is an answer to your Honour's question to
8 the Prosecution, the very simple question: Are they ready for trial? Your Honour, once
9 they've answered that question from the Bench, with your leave, I would make further
10 submissions.

11 PRESIDING JUDGE OZAKI: Thank you very much, Mr Khan. I think the question is
12 very pertinent, ma'am. Prosecution, please.

13 MS ADEBOYEJO: Your Honours, I don't think that we have obfuscated in any way.
14 We've made it quite clear that in order for us to -- we're not saying that -- in order for us to
15 be fully ready, we have to, first of all, sort out the issue of disclosure of the redactions of
16 name, there has to be redaction protocol. All of these measures have to be in place.
17 We have to discuss the very pertinent issue of our witness security and witness security
18 concerns, and it's when all of those matters have been sorted out that we can meaningfully,
19 I would say, discuss the trial date. But we have given a proposal in response to the
20 question by your Honours as to what would be the date that we propose.

21 (Trial Chamber confers)

22 PRESIDING JUDGE OZAKI: Thank you very much. That brings me back to my very
23 first question, that is: Except for proving disclosure obligations and lifting redactions,
24 the Prosecution is ready for trial or not?

25 MS ADEBOYEJO: And the issue of witness security; that's the third leg, your Honours.

1 Apart from those issues being resolved, we are ready for trial.

2 PRESIDING JUDGE OZAKI: Thank you very much. Judge Eboe-Osuji.

3 JUDGE EBOE-OSUJI: It's a point that the Prosecution is not ready now for trial, but the
4 Prosecution will be ready after the end of the year?

5 MS ADEBOYEJO: In accordance with the position that has been advanced by
6 Prosecution in our sister case yesterday, we have also made our submissions in the light
7 that for the reasons that we've already discussed we believe that it is best that the two
8 cases are synchronised. So even though we are -- could be ready for trial at the end of
9 this year, for the reasons that we will go into further details when we discuss at the ex
10 parte session, we believe this the cases should be synchronised. That would be my
11 response, your Honour.

12 PRESIDING JUDGE OZAKI: Thank you very much. May I now return the floor to
13 Mr Khan.

14 MR KHAN: Madam President, I'm most grateful. I thought for a fleeting moment we
15 were getting some clarity and I understood that my learned friends were saying that
16 absent witness protection issues, absent disclosure rulings from the Bench, they are
17 trial-ready. That's what I understood the position to be.

18 The reason I say for a "fleeting moment" is, in answer to the last question from the learned
19 Judge, my learned friends have mixed apples and oranges because it seems that the delay
20 is linked to a policy argument that was raised by the Prosecution in a different case
21 yesterday, when they said that they wanted to make this the twin of Kenya case number 1
22 and somehow matters should be synchronised.

23 Your Honours, I would like to get further clarity on this issue. Have I understood the
24 Prosecution's position to be that absent witness protection concerns, and absent disclosure
25 rulings from the Bench, they are trial-ready now? Now, your Honour, that clarification

1 on this critical issue would be much appreciated and I am sure it will inform all parties'
2 discussions to make this status conference meaningful.

3 PRESIDING JUDGE OZAKI: Mr Khan, I think Prosecution may be not absolutely clear,
4 but relatively clear, if I may say so. What I understood from what Prosecution said is
5 that they are ready, except for their disclosure obligations and security concerns issue, and
6 the only reason why they referred to this synchronisation with other trial again it's
7 something to do with witness security and disclosure. Am I right, Prosecution?

8 MS ADEBOYEJO: Yes, your Honour. Your Honour is in line with our submissions in
9 this regard, that our primary -- we can be ready at the end of this year but we have issues
10 of disclosure, of redactions, of witness security which we're going to go into further
11 details about and finally because we believe that, as a policy, it is best that the two cases
12 are synchronised. That's our position, your Honour.

13 PRESIDING JUDGE OZAKI: Thank you very much. Well, in any case, the Chamber
14 has to make a decision and will issue a decision in this respect in due course. So now I
15 would really like Mr Khan to respond to the original question.

16 MR KHAN: Madam President, I will do that but if I may just put forward the Defence
17 position: Our position is that we want a trial as soon as possible, without delay.
18 Ambassador Muthaura, who sits behind me, is 65 years of age. After the confirmation
19 decision, after more than three decades serving the Republic of Kenya as a diplomat and
20 then as head of the public service, he stepped down. And in this part of his life, in
21 retirement, he wishes to remove this stain that this case has spilt on his character as soon
22 as possible.

23 Your Honours, it is not good enough in the respectful submission of the Defence for the
24 Prosecution to hide behind perceived policy issues, policy concerns. It is the position,
25 Madam President, your Honours, that these policy concerns, these policy imperatives

1 cannot trump the legal statutory right that Ambassador Muthaura has for a fair and
2 expeditious trial.

3 Your Honours, already we've had reference to what happened in case number 1. This
4 case is free-standing, and the right of Ambassador Muthaura to a fair and expeditious trial
5 is a matter that we'd ask the Bench to give the most careful attention to when assessing the
6 appropriate period for trial.

7 Your Honour, if I can say so, it's our position, Madam President, your Honours, that it
8 should be within the wit and ability of the Prosecution to make full disclosure within
9 two months.

10 And, your Honour, I'd ask before the Prosecution respond, that the Bench needs to look at
11 this matter in entirety. This case did not start today. Your Honours have heard the
12 protestation by the Prosecution that they will comply with their statutory obligations.
13 Now, your Honours, I always assume good faith but actions speak louder than words.
14 The cold, un rebuttable reality is that we have not received a scrap of evidence from the
15 party opposite for more than nine months. Not one piece of evidence, exculpatory,
16 incriminatory or otherwise, has not been served by the party opposite for more than nine
17 months. That is a remarkable and lamentable turn of events, in our respectful
18 submission.

19 Your Honour, I would ask you to look at this idea of synchronisation. Whilst the ex
20 parte proceedings have a very proper and indeed necessary place in judicial proceedings,
21 they are not a licence, of course, to keep the Defence in the dark.

22 Your Honour, my learned friend has articulated perceived policy concerns. Your
23 Honours, I don't see why those policy imperatives cannot be put forward in an inter
24 partes hearing without the necessity of revealing the names or identities of protected
25 witnesses. We say that these policy imperative, the attempt at synchronisation, if it has

1 the effect of delaying this case should be given short shrift.

2 And, your Honours, we would ask for an early date so that this matter can be closely
3 looked into by the Bench and so that the merits of the Prosecution allegations can be
4 finally determined as soon as possible.

5 Your Honour, in relation to another aspect of point A of the agenda, and we've heard
6 quite a bit about it, I do put with the greatest of respect the Trial Chamber on notice that
7 what we have perceived is a constant stream of press reports, public utterances in Court,
8 statements from the Prosecutor in a whole variety of alleging witness intimidation and
9 the like.

10 Now, your Honour, in assessing -- and we say, of course, there are always in every case
11 legitimate protection issues, but for reasons that will become apparent as we proceed in
12 this matter we say that it is also being fanned as a cloak, as an excuse, to delay disclosure.

13 And, your Honours, are very well aware that disclosure to the Defence is not the same
14 thing as disclosure to members of the public. We are bound as members of the Bar by
15 professional ethics and, your Honours, when we receive information confidentially,
16 definitely I can say, our team do not disclose it publicly. Some of your Honours have the
17 opportunity of my learned friend, Steven Kay, QC, appearing before you in previous
18 cases.

19 But, your Honours, as members of the Bar, we would ask that a margin of deference be
20 given to us as professionals, bound by a code of conduct, and the Prosecution must not
21 conflate disclosure to the public with disclosure to the Defence.

22 Now, your Honour, the reason -- your Honours' careful scrutiny is needed in this matter
23 and, your Honour, I am going to go into some detail on point A but I will not speak so
24 much in relation to the other matters of the agenda just so you know the structure of my
25 submissions. This really for us is a very critical issue.

1 Your Honour, already we have evidence that many, many Prosecution witnesses, who
2 hide behind Court-ordered protection, are going to the press and revealing their identities
3 to newspapers and journalists.

4 Your Honours, we have a litany -- and I can just give you a few for the record. Your
5 Honour --

6 PRESIDING JUDGE OZAKI: Mr Khan, I'm sorry to interrupt you, but we have
7 rather -- this is a status conference, and we have rather limited time, and I understand that
8 you have a lot to say, but I would rather like to stick to the proceedings of this status
9 conference.

10 And as for the policy issue you mentioned, I'm not sure what you mean by "policy issue,"
11 but if you referred to the witness protection it is not only policy; and the Chamber has a
12 duty under the statute to deal with protection issue.

13 And also -- and, of course, the Chamber is very, very aware of the right of the accused,
14 and that's -- that is exactly the reason why the Chamber would like to hear all submissions
15 and then would like to make a balanced, well-informed decision. And I would also like
16 to remind Mr Khan that you don't need to repeat what you have already submitted in
17 writing.

18 And I would like to stress again that the Chamber will make a decision about the date of
19 trial based on the written submissions, and based on concrete suggestions and responses
20 from both Prosecution and Defences during this status conference.

21 So I would not like to limit what you would like to say, but I would be very grateful that
22 you first respond to what -- to my original question, which is the Defence responds to the
23 proposal by the Prosecution on the staged lifting of -- staged disclosure of identities of the
24 witnesses. Thank you very much.

25 MR KHAN: Madam President, I'm most grateful for your guidance, and I apologise

1 perhaps if I failed to be understood.

2 The submission regarding policy considerations had nothing to do with Article 68 but was
3 simply the policy regarding synchronisation, so just to clarify that.

4 Regarding -- and, your Honour, there are matters perhaps at the end I do need to address
5 you on, particularly as the Prosecution have touched upon disclosure, and also there
6 appears to be an ex parte afterwards. I think the Defence should be allowed to put what
7 we say are relevant and indeed critical matters to the attention of the Bench which are
8 relevant to those issues. Now, your Honours, I would ask perhaps at the end for time to
9 address you on that with the leave of the Bench.

10 In relation to rolling disclosure, the Defence have no objection to rolling as long as the
11 rolling takes no longer than two months. We say that if the Prosecution are trial-ready,
12 they can disclose quickly.

13 Now, your Honours, the Prosecution have already said, in relation to the issue of --
14 JUDGE EBOE-OSUJI: Mr Khan, one second please. When you said you have no
15 difficulty with rolling, provided it's done with a window of two months, what do we
16 understand by "rolling"? Do we mean rolling relative to the start of the trial date or
17 rolling relative to the appearance of the witness to testify?

18 MR KHAN: I'm grateful, your Honour. These most serious allegations were publicly
19 announced in Christmas 2010 against Ambassador Muthaura. We want a trial as soon as
20 possible. For that to happen, we want disclosure as soon as possible.

21 The Prosecution have given no reason at all, never mind a valid reason, as to why they
22 have not given a jot in the last nine months. Your Honours, our concern to put it very
23 simply is that we want a trial without any delay at all. With that overriding objective for
24 the Defence, we say that the Bench can just design a disclosure regime but that regime
25 should not countenance delay.

1 For example, your Honours, when -- I don't know if that answers the question.

2 JUDGE EBOE-OSUJI: No. I was -- just a specific point, so that we can all be speaking
3 the same language. So when you say "rolling disclosure," you have no difficulty with
4 that, if it is done with a window, if it allows two months.

5 People understand "rolling" differently. Some people might think "rolling" is rolling up
6 to the point of the commencement of trial, in which case it's not really rolling, but
7 "rolling" could also mean you time it, the disclosure of the identity, to the appearance of
8 the witness so that it moves. Which one do you mean by "rolling"?

9 MR KHAN: Your Honour, the former. I think let me drop the term "rolling."

10 JUDGE EBOE-OSUJI: I think you've answered. Thank you.

11 MR KHAN: Let me move -- perhaps it's not helpful to ape the Prosecution language
12 regarding rolling.

13 Your Honours, we want disclosure as soon as possible; we want it without delay; we want
14 it before trial; and we want it in order that a clear line be drawn by the Bench, with the
15 exception of exceptional reasons, where we know what the target is and so we know how
16 to prepare and investigate accordingly.

17 So, your Honours, disclosure before trial, without delay. That's the answer I believe to
18 this question from Madam President.

19 Madam President, have I answered it or are there other matters to be raised?

20 PRESIDING JUDGE OZAKI: I think you have answered all.

21 JUDGE EBOE-OSUJI: One more question for you before you leave this subject. You
22 also mentioned that, in view of your client's age, and the hanging power of this trial over
23 him, that you want trial as soon as possible. Are we able to get from you an indication of
24 the time you have in mind; in specific terms, that is.

25 MR KHAN: Well, your Honour, if we had disclosure yesterday, assuming it's the same

1 as was disclosed to us at the confirmation hearing, these 12 witnesses, we could have a
2 trial within a very short space of time. I mean, we'd be happy to have a trial by the
3 summer. By the summer.

4 Your Honour --

5 JUDGE EBOE-OSUJI: This summer or next one?

6 MR KHAN: Yes, your Honour, this summer. You know, perhaps call it September. I
7 mean, of course, we don't know in all candour what's been withheld, we don't know
8 what's been redacted from the -- by the Pre-Trial Chamber.

9 We need to look at the names, as we put in our filing, Madam President. I don't want to
10 repeat myself, but as we put in the filing we do in this case have grave concerns about the
11 veracity of Prosecution witnesses. We believe witnesses have been bought and have
12 been got at and, your Honours, we've discussed that in filings before the Pre-Trial
13 Chamber. So that would require time not only to investigate the allegations but the
14 antecedes of the character --

15 PRESIDING JUDGE OZAKI: Mr Khan, sorry to interrupt again, could you speak a little
16 bit more slowly for the sake of interpretation?

17 MR KHAN: I will.

18 JUDGE EBOE-OSUJI: In any event, I think you've answered my question.

19 MR KHAN: Yes, I'm most grateful.

20 PRESIDING JUDGE OZAKI: Thank you very much, Mr Khan.

21 MR KAY: Thank you, Madam President.

22 Shall I deal with your question first on the so-called "rolling disclosure," but what it means
23 is 60 days before trial we get the name of a protected witness, 30 days before trial a
24 witness who is not protected but in respect of whom there are security concerns and then
25 30 days before a witness appears in Court we get a discrete category of individuals

1 named.

2 With all due respect, I see that as being a recipe for disaster. And my experience in
3 international cases has taught me that the withholding of names and identities is such a
4 significant factor in preventing genuine and rightful defence investigations that it can
5 hinder the interests of justice. And I'll just refer the Court to Witness L in the case of
6 Tadic in 1996 and the trouble that caused, which ultimately unwound a phoney witness
7 and caused the Court much concern.

8 I am putting my cards on the table here. From what we saw at the confirmation hearing,
9 I don't know how familiar your Honours are with the contents of the evidence of the
10 various parties from the confirmation process, but there is a clear and obvious position
11 whereby the Defence challenge the integrity, honesty and truthfulness of key Prosecution
12 witnesses.

13 Now, their evidence was disclosed a very short stage, 30 days before the confirmation
14 hearing, and we only had 15 days to deal with it. In those 15 days we achieved a lot, but
15 I am very concerned that the funneling of disclosure in material aspects creates upon the
16 Defence a pressure point that should not be within the proceedings.

17 The identity of people is very important as to who they are and whether their story is
18 truthful or not. And I am very concerned that we do not repeat the situation we were
19 faced with in the confirmation of charges, whereby we had a very short period of time to
20 respond. The Court had preset confirmation hearing dates, and we were stuck with a
21 pre-written agenda.

22 Now, for my part, I do not see why witnesses have to be subject to a delayed form of
23 identity disclosure when we are bound by the Code of Conduct, we are bound by the
24 jurisprudence of the Court; and not only that, some of these witnesses are not even within
25 the jurisdiction of Kenya, as we've been able to freely read within the press, and having

1 these delays hinder our ability to investigate the case.

2 So, for my part, submitting on behalf of my Chamber, we do not like it. I'm opposed to it.

3 And I think the Court should have a very careful thought about going down that line,

4 because once it does it's creating inherent problems within the system that may hinder the

5 interests of justice. Those are my observations on that matter.

6 So far as trial date is concerned, and I believe, Madam President, you wanted us to

7 respond to issues that have been raised this morning, I took it from the Prosecution that in

8 fact they're not ready but they'd be ready by the end of the year, in answer to your

9 Honour Judge Chile's question. That was the position I got from the Prosecutor.

10 In those circumstances, if we acknowledge their state of preparation, and how far they

11 have to go in terms of putting their case together, that is a reality with which we are faced.

12 We want to avoid having problems with a case that is not well-prepared, having delayed

13 disclosure, that then causes us difficulty in our case preparation.

14 We're very mindful of the Statute, where it says that sufficient time should be given to the

15 Defence for preparation, and that is something that we wish to stress as being a key

16 interest, as we've really put in our filing, in relation to our submissions.

17 The synchronisation issue, as raised by the Prosecutor, is a matter that I can understand

18 reading between the lines from the Prosecutor. Kenya 1 in fact happens first in time and

19 Kenya 2 is a situation that follows after Kenya 1. I can see grounds for thinking that if

20 you start before Kenya 1 with Kenya 2, you could be putting horses before carts, or carts

21 before horses, I'm never quite sure which way around it is, but one of those metaphors.

22 And there is a degree of sense in having that issue taken on board by the Trial Chamber

23 because it could cause a problem in the sense that Kenya 2 has to go into lengthy

24 explanations concerning issues in Kenya 1, which might be unnecessary for us to do

25 without the synchronisation described by the Prosecutor and I hope the Bench

1 understands that. That can cause our case production, if you like, to be changed
2 considerably if issues are being dealt with elsewhere, the Bench is seized of the matter and,
3 therefore, we do not have to go through further issues in an attempt to explain the
4 background to the case.

5 In relation to the overall disclosure regime, I echo the words of my learned friend, early is
6 far better than late. Drips and drabs are not very helpful, and having last-minute
7 disclosure is extremely unhelpful indeed. We just want to be able to prepare our case,
8 and the Court can take it, if it has an idea about events concerning the confirmation of
9 charges hearing, that this was a totally challenged Prosecution. Those are my
10 observations.

11 PRESIDING JUDGE OZAKI: Thank you very much.

12 Several clarifications to what Mr Kay has just said. You said that the Defence wanted to
13 have enough preparation time. Apparently, Mr Khan is quite ready to go immediately
14 afterwards the -- immediately go to the hearing afterwards -- immediately, sorry.

15 Mr Khan is ready to go to the trial immediately after disclosure.

16 How about you? You need -- do you have any time-frame in mind? How many
17 months do you need after disclosure?

18 MR KAY: Well, we haven't seen it yet. That's the problem, and that's the point we
19 make in our filing, that it's very difficult to say. And I repeat: What we did at
20 confirmation, with the most significance tranche of the Prosecution case, was within 15
21 days. And we have much more work to do, in my view, to present the true picture to
22 this Court. We want to look very carefully at these witnesses. Their claims have not
23 been investigated by the Prosecutor; it's quite clear from the evidence at the confirmation
24 of charges.

25 We were able to go a degree of the journey for that hearing, but we must be able to take all

1 these matters into consideration fully when we are free of redactions; and that's a matter
2 I'll address your Honours on later, as I believe it's further on the agenda, as to the system
3 of redactions, but there are whole blanked out pages here that are obviously clues that can
4 help us in the preparation of our case because they go further to the identities of the
5 witnesses.

6 In submissions at the confirmation of charges hearing, the Court will recollect that we
7 believed we knew the identity of two witnesses, number 11 and 12, because they'd been
8 involved in various means and ways of their behaviour and conduct towards us before
9 they went to see the Prosecution. So there is a lot to be done there, and we want to make
10 sure that that is done.

11 So my plea is just for adequate time, and I don't know that until I've received what is
12 within the Prosecution's domain.

13 PRESIDING JUDGE OZAKI: Thank you very much. The next clarification I'd like to
14 have is: With regards to the suggestion by the Prosecution for synchronising with the
15 other case, the Prosecution mentioned the security concern. Well, actually, Prosecution
16 said it is because of the security concern that they want this synchronisation; but on the
17 other hand, what I understand -- understood from your submission is that the Defence
18 also want this synchronisation with the other case not because of security concern, but
19 because of their own reason, which is the -- in accordance with the chronology of the
20 events on the ground.

21 MR KAY: Absolutely correct. The narrative of the case is important, and it takes a
22 journey some six months before these events occur.

23 The Prosecution case is that Kenya 1 then started, Kenya 2 later happened, and that's a
24 very important issue within these proceedings. And it would be, in my submission, if
25 something not Prosecution had mentioned but, if I was prosecuting this case, I would be

1 ensuring that the narrative was before your Honours, rather than putting part 2 before
2 part 1, as I can see that a case would gradually go into directions that it had no need to go
3 into, if it had been properly put together in the way as described by the Prosecution with
4 this synchronisation.

5 I'm not enamoured of synchronisation, but the fact of the matter is Kenya 1 needs to be
6 considered first because it's important for the factual matrix.

7 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

8 JUDGE EBOE-OSUJI: Two questions for you, Mr Kay: First of all, from your written
9 submissions, you indicated that you -- that there are some clear challenges, you said, to
10 the reliability and integrity of some of the Prosecution witnesses. Would the presence of
11 such clear challenges have been apparent from the materials already disclosed?

12 MR KAY: Not disclosed by the Prosecution, but disclosed by the Defence. And again, I
13 don't know how far your Honours have had or time to get into the document.

14 JUDGE EBOE-OSUJI: I think that's enough, you've got that. A second question is for
15 you, and perhaps Mr Khan as well, if that is what you said about disclosure.
16 You've, of course, implicated your own professional integrity in the disclosure regime by
17 saying you are professionals and that needs to count. Are you then prepared to accept,
18 sir, an arrangement where the disclosure is made to you alone with the requirement that it
19 not be revealed to your client? That's for both of you.

20 MR KAY: That's a very --

21 PRESIDING JUDGE OZAKI: I'm sorry to interrupt, Mr Kay. Again, I would like
22 to -- not just the Defence teams, but also the Bench as well as Prosecution, that for the sake
23 of interpretation you have to wait a few seconds before answering any question or making
24 any questions. Thank you.

25 MR KAY: That's a question that any Defence counsel immediately can answer. You

1 can't disclose to me without me disclosing to my client.

2 JUDGE EBOE-OSUJI: Thank you.

3 MR KHAN: And, Madam President, I think the question's also invited comments from
4 the Defence for Ambassador Muthaura.

5 Your Honour, that's correct. Information that we have we have to share with the client,
6 but the client is also policed by all the conditions that have been imposed by the Pre-Trial
7 Chamber upon which his liberty depends. So, in fact, there is a very immediate and a
8 very real controlling mechanism on Ambassador Muthaura himself; namely, his liberty.
9 And, your Honour, in light of that, we do say our submissions stand.

10 PRESIDING JUDGE OZAKI: Thank you very much.

11 MR ANYA: Madam President, with leave of the Chamber --

12 PRESIDING JUDGE OZAKI: Yes?

13 MR ANYA: -- I wonder if you would grant me leave to state the victims' position in
14 respect to the start date for the trial?

15 PRESIDING JUDGE OZAKI: Yes, please.

16 MR ANYA: Thank you, Madam President. We have made our position known in a
17 written filing with the Chamber on 28 May this year, and that position remains, but I wish
18 to amplify on the basis for that position in light of the submissions made by the
19 Prosecution as well as both Defence teams in Court today.

20 Our position is that a trial should be set to commence in this case at any time from now
21 until 9 March 2013. 9 March is symbolic to the extent that it would mark one year since
22 Pre-Trial Chamber II denied the respective applications by the Defence for leave to appeal
23 the confirmation of charges decision.

24 We have listened this morning to the Prosecution and the issues that they have to deal
25 with. 680 items are said to need redactions. We appreciate that.

1 The Prosecution also has its obligations under Article 77 to provide exculpatory
2 information to the Defence, and that's significant for purposes of the Defence. We
3 appreciate that as well.

4 But be that as it may, this is a case still that implicates 25 to 35 witnesses as said by the
5 Prosecution. It is not a particularly large number of witnesses. And, indeed, the
6 documentary evidence in question, comparatively speaking to other cases, is not
7 extremely voluminous.

8 But the other issues I'm sure the Prosecution is grappling with, and the indication that
9 they would be ready for trial after the end of this year is a positive one, but the victims are
10 of the view that it is now an approximately four-and-a-half years since the events that led
11 to the charges in this case occurred. That is a significant amount of time.

12 In the particular light of the Rome Statute, which Article 75 calls for reparations, you
13 know, this is a sequence or chronology that requires the trial and guilt or innocence to be
14 determined before consideration may be given to reparations. And so that's a factor that
15 is of importance to the victims.

16 Now, in this regard, on this particular issue, we are in unison with the submissions for the
17 Ambassador Muthaura; and that is, the sooner the trial starts the better for everyone.

18 The obligation ultimately lies with the Court, vis-à-vis obligations under Article 64(2), to
19 guarantee that the trial is both fair and expeditious, with full respects for the rights of the
20 accused and, significantly, with due regards for the protection of victims and witnesses.

21 So we stand by our written submissions, despite the observations made by the parties
22 today, and we implore the Court to indeed set a trial date that occurs within one year of
23 the denial of leave to appeal the confirmation decision. I thank you.

24 PRESIDING JUDGE OZAKI: Thank you very much.

25 One issue about the -- well, the Chamber, in any case, will rule on this issue of disclosure

1 of exculpatory material in a written decision, but the Chamber would like to touch upon
2 one more disclosure issue, which is disclosure of exculpatory material. The Prosecution
3 has already mentioned about this issue, but the Chamber would just like to be quite sure
4 what we have in this regard.

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

9 I presume that those materials are included in the materials which you mentioned
10 already?

11 MS ADEBOYEJO: That is exactly right, your Honour, it's -- they're included in the
12 figures that I had given at the start of my submissions with regards to the 680-odd items.
13 And because we are in the process of having our reviews, it would not be possible for us
14 to give exact figures right now with regards to those that are -- that fall within the ambit of
15 Article 67(2), but certainly we would be disclosing those as promptly as possible.
16 However, I can say categorically that with regards to the 20 items in the first category
17 which we are ready to disclose immediately, those actually fall within the ambit of Article
18 67(2) and some of them are Rule 77 materials.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 Does -- do the Defence teams have anything to say specifically relating to exculpatory
21 disclosure, exculpatory materials, in addition to what they said in written submission?

22 MR KHAN: Yes, Madam President, very briefly.

23 It seems from our understanding that the Prosecution say that that exculpatory material
24 has not been disclosed in the absence of a protocol.

25 It is our submission that nothing will prevent the Prosecution making such redactions as

1 they think appropriate and, as a courtesy, serving it on the Defence even prior to the
2 necessary judicial oversight where your Honours would be mandated to look at the
3 legality and appropriateness of the redactions put in place.

4 Something is always better than nothing and, your Honours, I would ask that the
5 Prosecution do that, even absent the necessary Court orders and the necessary judicial
6 oversight for the redaction process.

7 Your Honour, with that in mind, the exculpatory evidence would be welcome without
8 any delay whatsoever.

9 PRESIDING JUDGE OZAKI: Thank you very much. I, of course, understand that
10 the -- and would like to emphasise again, although I'm sure Prosecution already knows,
11 that the Prosecution must disclose all exculpatory material known to it at this time as soon
12 as possible.

13 And this is a very good key to our next issue, which is redaction. The Prosecution has
14 proposed a system for dealing with redactions in its submission 428, at paragraphs 19 to
15 23, which the Chamber is ready to consider.

16 Now, a question for both Defence teams -- sorry, 22 to 23.

17 The Chamber would like to have the views from the Defence teams on this specific
18 suggestion on redactions by the Prosecution. Mr Kay or Mr Khan, please.

19 MR KHAN: Madam President, it follows nicely, perhaps neatly, from the previous
20 discussion. The proposal has been put forward regarding redactions, and I want to be
21 quite clear that the Bench understands what our position is.

22 Our position is that the Prosecution should be entitled, given their responsibilities, to
23 redact at first instance information and give it to us without delay, and they can also give
24 an explanation to us as to the reason for that redaction; but ultimately, the case law of this
25 Court, as we understand it, and the necessary safeguards do require judicial oversight of

1 this process.

2 It will, with the best will in the world, be difficult for the Defence to make persuasive
3 arguments on an issue-by-issue basis without having the unredacted document. And so
4 your Honours' oversight is necessary, but -- and is indeed essential for the redactions to be
5 kept as limited as necessary. The presumption must be in favour of disclosure. That
6 should be the norm. In exceptional circumstances, for witness protection, redactions
7 may be necessary.

8 Now, your Honours, the Prosecution have said that it's an arduous process, it is indeed,
9 but it is really one of the critical processes for us to get a fair trial. And, your Honours,
10 we do come back to the point that the simple code that has been put forward by the
11 Prosecution is helpful to us, but it's no substitute for your Honours who are seized of the
12 matters to decide what is necessary and appropriate. If you bear with me one moment.
13 Your Honours, my learned friend has told me as well, if I wasn't clear, that the
14 Prosecution need to apply always to the Bench for the legality of the redactions put
15 forward, but all we're saying is it can be done perhaps a little bit later. Judicial orders
16 can't be used as a device -- or awaiting judicial orders can't be used as a device to not give
17 us what the Prosecution can. I hope that's clear. I'm grateful.

18 PRESIDING JUDGE OZAKI: Thank you very much. Mr Kay.

19 MR KAY: Yes, I'm grateful, Madam President. The system which has been proposed of
20 disclosure to Defence first with redactions, we have no issue with, and then the Bench
21 becomes seized if there is a dispute later on. That seems to me a more timely way of
22 getting it to us without it being jammed before your Honours, and your Honours may be
23 having to read materials that you don't eventually need to read.
24 What I'm concerned with is the method of tagging, with just putting A, B, C, D and having
25 a code. My experience has been that this causes the whole blocking out of pages because

1 thought is not actually being given sufficiently to the justification of the reason. And in
2 my experience a schedule which has a properly reasoned argument as to why this
3 sentence, this word, or even this page is blocked, and thereby justified in a written form,
4 causes the author of the document to concentrate more clearly on his task.

5 I have found that tagging causes blocking out in a general way which really works to the
6 disadvantage of reasoned proceedings; but when a person is given the task and has to
7 justify it, with an argument in a box, they may see that that one word is the word that
8 needs to come out, rather than the whole paragraph.

9 And the Court may find that the issue becomes less burdensome if people have to apply
10 their minds to it in such a reasoned way, and that is what I would commend to the Court.

11 Thank you.

12 PRESIDING JUDGE OZAKI: Thank you very much for your very concrete submission.

13 Well, the Chamber is fully aware of the difficulties involved in this redaction issue, but
14 nevertheless let's try. The Chamber directs the parties and the Registry to liaise in order
15 to find a common ground, if there is any, with a view to creating a draft redaction
16 proposal to be submitted for the Chamber's review by 3 July.

17 (Trial Chamber confers)

18 PRESIDING JUDGE OZAKI: So just to conclude the discussion related to the start date
19 of trial and disclosure and redaction, the Chamber plans to issue an order on the schedule
20 for trial along with the relevant disclosure dead-lines before the start of the summer
21 recess.

22 The next agenda item is languages. The Prosecution and the Defence have given an
23 indication of the languages to be spoken by the witnesses that may testify at trial, and the
24 legal representative also has provided this information concerning victims he may seek
25 authorisation to call.

1 One clarification from Prosecution: Prosecution mentioned French as a language to be
2 used during trial. Is it because the Prosecution intends to call French-speaking witnesses
3 or just because French is one of the working languages of the Court?

4 MS ADEBOYEJO: Your Honours, my friend, Ms Struyven, will respond to these issues.

5 MS STRUYVEN: Madam President, your Honours, it is not because we believe one of
6 our witnesses would testify in French and which is because it's a working language of the
7 Court; and if I may add, we believe at this stage that no members of the trial team will
8 make submissions in French.

9 PRESIDING JUDGE OZAKI: Thank you very much. Now, I would like to ask the
10 Registry representative: How much time do you need to provide translation and
11 interpretation services for the languages indicated by the Prosecution, which are Swahili,
12 Kikuyu and Kalenjin?

13 MR VANAVERBEKE: Madam President, your Honours, the Registry would like to
14 submit that it would at least need four months to prepare for the interpretation services to
15 be provided, for the languages in this case, and we would like to stress again that it is of
16 the utmost importance to know well in advance the number of witnesses and their
17 languages that they would speak, as it has implications as to the preparation time; more in
18 the detail, it's about consecutive interpretation or simultaneous interpretation.
19 Consecutive interpretation will add about 30 per cent more time to the length of testimony.
20 We would only make a simultaneous interpretation booth, which will cost more time, six
21 months, if the number of witnesses that would testify in one certain language is of a high
22 number.

23 Thank you.

24 PRESIDING JUDGE OZAKI: Thank you very much. I would like to ask the
25 Prosecution to liaise closely with the Registry, to ensure that all necessary preparations are

1 made, and if there are any significant problems they should be communicated to the
2 Chamber at an early stage.

3 Next item is objections to the conduct of the proceedings under Rule 134(2). On this
4 point, the Chamber notes that none of the parties have raised any objections to the
5 conduct of the proceedings since the confirmation hearing. Therefore, the Chamber
6 assumes that proceedings will not be delayed unless entirely new, unforeseen issues arise.

7 Next, legal re-characterisation of facts. The Prosecution submits that it intends to make
8 an application for legal re-characterisation of certain facts. Can the Prosecution clarify
9 what aspects of the confirmation decision it has in mind?

10 MS ADEBOYEJO: Yes, Madam President, your Honours. My colleague, Sam Lowery,
11 will be speaking to these points.

12 MR LOWERY: Thank you, your Honours, Madam President. Sam Lowery for the
13 Prosecution.

14 This issue was previewed to a degree yesterday, so I will try not to rehash old ground and
15 be as brief as possible. The application in this case will be similar to the one that will be
16 filed in the Ruto and Sang case. It will also be different. The difference is as follows:
17 In the application in this case we will also be addressing certain of the crimes charged,
18 and we will also be addressing the mode of liability pled in relation to both accused as
19 opposed to what you heard yesterday in the Kenya 1 case.

20 I want to make one point of clarification so that the nature of our application is crystalline
21 and clear to the Chamber. And I need to do that by telling you what we are not asking
22 for. We are not asking for the Chamber at this stage to actually re-characterise any facts
23 pled in the document containing the charges. We are not asking the Chamber to invoke
24 Regulation 55(1) for this purpose.

25 What we're suggesting to the Chamber is something different and it's as follows: We are

1 suggesting that, based on the factual record now before the Chamber, and that factual
2 record is the facts as pled in the indictment and the evidence presented at confirmation
3 and relied upon in the confirmation decision, based on that factual record there is a
4 possibility that down the track in the course of the trial the Chamber may well decide to
5 invoke its power under Regulation 55(1) to re-characterise the facts. That's important
6 because Regulation 55(2) places the Chamber under a certain duty when that situation
7 arises, as it does here, and that duty is to provide the parties with notice that these issues
8 might come up later. A Regulation 55(1) re-characterisation may arise later in the
9 proceedings. And what we're saying now is based on the specific facts of this case.
10 There is a possibility that in relation to certain of the crimes charged, and the mode of
11 liability charged in relation to both accused, those facts may fall into more than one legal
12 characterisation.

13 We have charged them in the way we think most adequately expresses the crimes that
14 were committed and the responsibility of the two accused. But the reality is, in this case,
15 it's not the only way to categorise those crimes and as a result our position, our reading of
16 Regulation 55, is that the Chamber is required, given this reality, to give notice that
17 Regulation 55(1) may, down the track, in the course of the proceedings be invoked by the
18 Chamber to re-characterise, to engage in a legal re-characterisation of the facts that we
19 have pled. That will be the nature of our application, your Honours.

20 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

21 JUDGE EBOE-OSUJI: Mr Lowery, to what extent then would what you are proposing to
22 do engage the charging document and the need to possibly revisit it?

23 MR LOWERY: Thank you, your Honour. Obviously you can't divorce the two issues of
24 what the charges are in the charging document and how those -- how the facts pled may
25 be characterised. But what we are suggesting to the Chamber that it must do here is

1 different from changing the charging documents at all. We are not suggesting that's
2 what should be done in this case. We are happy with the way the facts are charged here.
3 We believe that indirect co-perpetration is an appropriate characterisation of the accused's
4 participation in the crimes and we believe that the crimes are appropriately charged.
5 What we are saying here is, for some of the crimes, and for the modes of liability, the way
6 we have charged it, it's not the only way. And let me, if I may, your Honour, give an
7 example that might help illustrate the point I am trying to make.
8 The mode of liability. We've charged indirect co-perpetration under 25(3)(a) of the
9 Statute. If one is to accept the view of the law as articulated by the Pre-Trial Chamber in
10 this case and others, they have laid down an eight-part test for indirect co-perpetration,
11 eight elements. One of those elements is effectively ordering, ordering is an express form
12 of liability under Article 25(3)(b) of the Statute. So if this Chamber is to accept the
13 Pre-Trial Chamber's view of the law, and I am not saying you will, then it necessarily
14 follows that a characterisation under Article 25(3)(b) is a possibility now. And
15 Regulation 55(2) by its terms is triggered by a possibility. That is the word in the
16 regulation, a possibility, and when triggered the Chamber shall give notice.
17 Thank you, your Honour.

18 PRESIDING JUDGE OZAKI: Thank you. Judge Van den Wyngaert.

19 JUDGE VAN DEN WYNGAERT: Mr Lowery, have I understood you correctly that you
20 would refer to this possibility for the entirety of Article 25(3) not just for one other
21 subparagraph of Article 25(3)?

22 MR LOWERY: Thank you, your Honour. Yes, is the answer to that question. And
23 that is based on the particular circumstances of this case. It's not going to arise in every
24 case but it does arise in this case for the simple reason that our allegations against the two
25 accused are that their individual conduct essentially runs the gamut of 25(3). We say

1 that they helped formulate the plan. That they implemented the plan by way of
2 providing materiel, money, facilitating conduct with -- between the Mungiki and
3 government forces. Based on these facts we believe that the criminal conduct can be
4 appropriately bucketised into any of the four subdivisions of Article 25(3) so the answer to
5 your question, your Honour, yes.

6 JUDGE VAN DEN WYNGAERT: But when you were referring to 25(3)(b) as being
7 included under the theory of the Pre-Trial Chamber in 25(3)(a) would that also apply to
8 25(3)(c)?

9 MR LOWERY: Your Honour, we are happy to flesh this out more in our application but
10 as I read and understand the Pre-Trial Chamber's eight element test for indirect
11 co-perpetration under (a) I am not sure that it necessarily encompasses any elements, any
12 subcategory, any subpart of 25(3)(c), but that's a legal question which is separate and
13 apart from the factual allegations and what we are really saying here is, this is about the
14 facts.

15 On the facts of this case, the way we have charged the case is one of several possibilities,
16 and Regulation 55, it accounts for this reality. It says that in a case like this there is a
17 procedure that can be employed by the Chamber if it wishes and that procedure is to
18 re-characterise the law as it believes most appropriate. But if the Chamber thinks it may
19 be appropriate, just maybe, just a possibility, then the Chamber shall give notice to the
20 parties, to ensure the fairness of proceedings. Thank you, your Honour.

21 PRESIDING JUDGE OZAKI: Thank you. Mr Lowery, you mentioned mode of liability
22 and also some crimes charged. Could you elaborate the second part a little bit?

23 MR LOWERY: Yes, certainly, your Honour. If it pleases the Chamber I will do so by
24 way of example.

25 The document containing the charges in this case contains factual allegations regarding

1 forced circumcision and penile amputation. The Pre-Trial Chamber, in its confirmation
2 decision, characterised these criminal acts as "other inhumane acts" under Article 7(1)(k)
3 of the Statute.

4 In our view, that's not the only way in which these criminal acts could be categorised. In
5 our view, they could equally be categorised, among other things, as other forms of sexual
6 violence under Article 7(1)(g) of the Statute. That is an illustrative example, your
7 Honour, and we will flesh out the others in our application, if that pleases the Court.
8 Thank you.

9 PRESIDING JUDGE OZAKI: Thank you very much. I would like Defence teams to
10 respond.

11 MR KHAN: Madam President, your Honours. We're grateful. It seems to us that the
12 Prosecution intent in this regard amounts to alternative charging by the back door. In
13 fact it's quite obvious, it may even be the front door. But your Honour, the scheme of the
14 Rome Statute is clear. The learned Judges of the Pre-Trial Chamber, pursuant to Article
15 61(7)(c), could have amended the charges. These were charges not drafted by the Judges
16 but put forward by the Prosecution and it seems for unexplained reasons, the Prosecution
17 now are getting jittery and saying, "Well, maybe not this, and maybe that."

18 Your Honours, in the Bemba case, the Pre-Trial Chamber, as your Honours know, invited
19 further submissions and substituted Article 28 instead of Article 25. They could have
20 done so in this case. They did not and now the Prosecution are trying to read in the
21 supervisory powers of the Trial Chamber into the scheme of Article 61(7)(c) which is not
22 justified.

23 Your Honours, the application is premature. It should be rejected on that basis alone.

24 Your Honour, this is the very first status conference, and the terms of Regulation 55(2) are
25 explicit. It only comes into play after the commencement of the trial.

1 The Prosecution say trial will not start before next year. Well, your Honours, we say let
2 it start now and they can make their application but they can't have it both ways and so,
3 your Honours, we say it's premature and it's a misreading of the rules and on those -- for
4 those reasons, the application is poorly founded and should be summarily rejected by the
5 Bench.

6 PRESIDING JUDGE OZAKI: Thank you, very much. Mr Kay?

7 MR KAY: I have no further observations. Thank you, your Honour.

8 (Trial Chamber confers)

9 PRESIDING JUDGE OZAKI: Well, the Chamber supposed that the Prosecution is ready
10 to submit written filing on those issues? I don't think the Prosecution would like to make
11 a decision in this status conference.

12 MR LOWERY: If your Honour is asking whether in addition to what we've said today
13 we wish to submit something in writing the answer is "yes." And then we will do so at
14 the Chamber's convenience. Thank you, your Honour.

15 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

16 JUDGE EBOE-OSUJI: Just so we all are on the same page, Mr Khan, in his last comments,
17 urged for your application to be dismissed. Do I understand it that you have made an
18 application or were you informing us that you intend to make one?

19 MR LOWERY: Yes, your Honour, we get back to carts and horses again. I believe that
20 Presiding Judge asked for a preview or an explanation of the application we intend to
21 make. That's what I intended to give. I think I've given ample notice to the Defence of
22 what's coming and to the Chamber, but I don't think I formally made the application yet,
23 that will come in writing, again at the Chamber's convenience.

24 PRESIDING JUDGE OZAKI: Yes. Thank you very much. That was my
25 understanding.

1 So, in this context, the Chamber would like to address the filing. It had asked the parties
2 and the legal representative to make, by 25 June, on the interpretation in law of the mode
3 of individual criminal responsibility applicable to the present case. The order on which
4 the Defence of Mr Muthaura has requested some clarification, in light of the current
5 position of the Prosecution, the Chamber wishes to amend this original order, and now it
6 would like to request written submissions from the Prosecution addressing both its
7 application for re-characterisation, in terms of mode of liability, as well as the correct
8 interpretation in law of Article 25(3), taking into account the divergence of the
9 jurisprudence of Article 25(3) and, in particular, as you mentioned, the interpretation of
10 the Pre-Trial Chamber, in this case.

11 The -- this submission, this filing dealing with both these issues, is not to exceed 30 pages,
12 and should be submitted to the Chamber by 3 July. Thereafter, the Defence and the legal
13 representative will have 21 days to respond, by way of written submissions, not to exceed
14 30 pages each.

15 As for the issue of re-characterisation of crime, the Prosecution is requested to submit
16 separate filing, but on the same dead-line, 3 July. Is this acceptable to the Prosecution?

17 MR LOWRY: It is, your Honour. Thank you very much.

18 PRESIDING JUDGE OZAKI: Thank you very much.

19 The next agenda item I would like to take up is post-confirmation document containing
20 the charges, but I see that we have only 12 minutes before the -- until the lunch-break, so I
21 would like to suspend now, and come back at 2.30 in this same courtroom.

22 The hearing is suspended.

23 THE COURT USHER: All rise.

24 (Recess taken at 12.48 p.m.)

25 (Upon resuming in open session at 2.32 p.m.)

1 THE COURT USHER: All rise.

2 Please be seated.

3 PRESIDING JUDGE OZAKI: Good afternoon, everybody. The first agenda item in this
4 session is Post-Confirmation Document Containing the Charges.

5 Both Defence teams submit that the Prosecution should be ordered to file a new
6 Document Containing the Charges, reflecting the charges as confirmed by the Pre-Trial
7 Chamber, as well as a summary of the Prosecution evidence and an in-depth analysis
8 chart.

9 May I ask Prosecution to respond to this request?

10 MR LOWERY: Thank you, your Honour. In response to the three requests, the answers
11 are "yes," "yes" and "no." No objection to providing an updated Document Containing
12 the Charges that corresponds to the confirmation decision. We'll file that at the
13 Chamber's convenience.

14 No objection to providing a summary of the presentation of evidence or a pretrial brief,
15 whichever one wants to call it. On that point my only observation relates to timing. In
16 the Muthaura submission, it's suggested that the brief should be submitted within the
17 time frame for the disclosure of the entirety of the Prosecution evidence. In our view, it
18 logically needs to come after. It can come very shortly after, but it must come after
19 disclosure is complete.

20 The whole idea of a summary of the presentation of evidence, or a pre-trial brief, is to
21 road map our case and we obviously want to refer in that document to everything we are
22 going to rely on as evidence in trial. So one must follow the other, but other than that
23 timing issue we have no objection.

24 The third request was for an updated in-depth analysis chart. I have two submissions to
25 make on this point. The first is a substantive and the second is an alternative. On a

1 substantive point, we oppose the Defence request for an updated in-depth analysis chart,
2 or IDAC, for the trial stage.

3 We presume that the Defence wants this document as a road map for the Prosecution's
4 case, effectively as a notice tool, and we have absolutely no objection to laying out our
5 case before trial and the evidence we're going to rely on before trial as clearly as possible
6 for the Chamber and for the Defence. We welcome the opportunity to do so.

7 Our objection is based upon our view that the IDAC is not an effective vehicle to achieve
8 that purpose at the trial stage. Four reasons why: First, unlike the pre-trial
9 confirmation proceedings, trials revolve largely around live testimony of witnesses not
10 documents. That's certainly going to be the case here in this case.

11 At pre-trial the Prosecution often relies principally, and in this case exclusively, on
12 documentary evidence. In effect, witness testimony presented in writing at confirmation
13 is locked in for the purpose of those confirmation proceedings. It doesn't change because
14 the witnesses don't testify.

15 In that context it makes much more sense to have an in-depth analysis chart type
16 document that links each and every document to each and every -- to the charges or
17 elements to which they relate.

18 At trial the situation is different. At trial the focus is on live testimony of witnesses and
19 less on documents, in a case like this.

20 Why is this important? Well, it's important because no one knows what a witness is
21 going to say at trial before they take the stand. We have an idea of what our witness are
22 going to say, and that's why we've decided that we're going to call them, but witnesses
23 can and often do change their accounts on the stand and depart from prior statements,
24 and that's obviously one of the reasons why we have trials at all.

25 How does that effect the IDAC issue and Defence request for the IDAC issue? Well, in

1 our view, it renders the document a largely meaningless exercise at the trial stage because
2 a trial IDAC would be made up largely of parts of witnesses' prior statements which may
3 well differ from their testimony at trial. Because testimony is the focus of trial, not
4 documents, it makes little sense to dedicate a huge amount of resources to a tool that's not
5 going to be particularly useful to either the Chamber or to the Defence.

6 That leads me to my second point, which is that at pre-trial an IDAC makes a little bit
7 more sense because there is less road mapping done of the Prosecution's case elsewhere.

8 A couple of minutes ago we agreed to provide the Defence with a pre-trial brief, welcome
9 the opportunity to do it, to lay out our case and the evidence we'll rely upon.

10 That's not the case at pre-trial. The practice to date of the Pre-Trial Chambers has been to
11 order the submission of in-depth analysis charts in lieu of a pre-trial brief type document,
12 and in that context it makes some sense but here we've got a pre-trial brief that we've
13 agreed to submit in accordance with the Defence's request and that's going to road map
14 our case and the evidence we intend to rely upon at trial; and we submit it's going to be a
15 much more useful document to both the Chamber and to the Defence in terms of
16 understanding our case before a trial proper commences.

17 And that really leads to my third point, which is usability and accessibility. IDACs have
18 been ordered in two trials to date, the Katanga case, of which Judge Van den Wyngaert is
19 no doubt familiar, and the Bemba case, of which the Presiding Judge is no doubt familiar.

20 In Katanga the documents came to about 1,200 pages, give or take, it's huge document,
21 and I was interested to note in yesterday's hearing -- and here I'm going to quote from
22 transcript number 15, the English edited version, page 32 at lines 15. Mr Hooper, who's
23 counsel for one of the accused in the Katanga case, described the IDAC as "A confusing
24 point of reference that was much less useful than the updated Document Containing the
25 Charges," which was eventually ordered by the Chamber.

1 In Bemba the document came to 550 pages. Again, it's very hard to access a document of
2 that density and that brings us to the IDAC produced at the pre-trial stage in this case;
3 6,639 pages. That's big by any standards. To give your Honours an idea, it fills about
4 12 of these four-inch binders.

5 With great respect to all of those in the Office of the Prosecutor who spent many late
6 nights compiling the document with the best will in the world, I am not sure that it's a
7 particularly useful document in terms of road mapping the case for the Defence or for the
8 Chamber.

9 And that brings me to the fourth and final point on why we object to the request, which is
10 delay. Mr Khan understandably today made a number of submissions as to why
11 Ambassador Muthaura wants no delay, no delay, no delay and for the trial to proceed as
12 expeditiously as possible.

13 I can guarantee an IDAC will cause a delay, it takes a lot of work, and in our view the
14 amounts of time if -- and, frankly, money that goes into producing an IDAC would be
15 significantly outweighed by the minimal benefit it could provide to the Defence and
16 perhaps to the Chamber at the trial stage. So in that respect, we oppose the Defence
17 request.

18 I don't want to take up too much of the Chamber's time. I have an alternate submission
19 to make which is, in the event the Chamber decides that it will order an IDAC produced,
20 we have two practical suggestions; one on timing and one on form. On timing, as with
21 the pre-trial brief, it should follow the completion of disclosure of the Prosecution's
22 evidence. We can't -- obviously can't be expected to produce a document that refers to
23 materials that have not yet been disclosed.

24 On form, the Muthaura Defence took the position in their submission that they would be
25 happy with the proposal with the form of the IDAC proposed in the Gbagbo case at the

1 pre-trial stage. Again, pre-trial stage might have made sense in the Gbagbo case; we
2 don't think it makes sense here, but putting that aside the Muthaura Defence's position is
3 they like the form.

4 If we are to be ordered to produce another IDAC, we have no objection to that form with
5 one tweak. The tweak is as follows: Instead of including document excerpts in the
6 chart itself, we would propose just pinpoint page cites. So we wouldn't include
7 extensive quotes from the document. In fact, this is what has happened in the Gbagbo
8 case, although the Muthaura submission quite rightly and accurately cites the proposal
9 that was made by the parties in that case. It was ultimately agreed by the parties that the
10 IDAC would not include excerpts.

11 More substantively, there are two reasons why it's not a good idea, in our view, to include
12 excerpts in the IDAC: First, witness protection. If the IDAC refers to documents for
13 which redactions are required, and there will no doubt be some, those redactions will
14 need to be implemented into the IDAC, otherwise they would be useless.

15 This needs to be done manually, it's a cumbersome process, but more importantly if we're
16 talking about a 6,000-page document, even with the best will in the world, sometimes
17 mistakes will happen, and we submit that as a way to avoid any risk of mistakes, which is
18 not to have excerpts in there.

19 And second, we don't think excerpts are necessary because they make the documents long
20 and unwieldy, as I've just described in the Bemba, Katanga and in this case here.

21 So that's our position on the IDAC. So the answers to the three Defence requests again,
22 "yes," "yes" and "no."

23 Thank you, Madam President.

24 PRESIDING JUDGE OZAKI: Thank you very much for the explanation. As for
25 updated Document Containing the Charges, how long does it take for the Prosecution to

1 produce this document?

2 MR LOWERY: Your Honour, it shouldn't take long, but it's in the process of being
3 prepared. We note that the Muthaura Defence cited the Bemba case in its submission.
4 In that case, the practice was a month, was what the Trial Chamber gave, and that would
5 be amenable to us, if it pleases the Chamber.

6 PRESIDING JUDGE OZAKI: Thank you very much. Do Defence teams -- would you
7 like to respond to the Prosecution, especially on the analysis of in-depth analysis chart?
8 Mr Khan.

9 MR KHAN: Madam President, your Honours, we do have a response. At the outset, a
10 number of times today reference has been made to the proceedings in Kenya 1; and whilst
11 there may be a link, I'm not straddling two cases, I am dealing with this case, and I would
12 at the outset urge caution that we shouldn't be expected to cite routinely submissions of
13 opposing party in a completely difference case not linked to the present.
14 Submissions of counsel in this case are relevant rather than what counsel for a different
15 accused may or may not make. And as an aside, I will say that that is fortified by the
16 absence of any disclosure by the Prosecution from Kenya 1 in this case. They haven't
17 deemed it fit to disclose that evidence, and I think we need to be rather disciplined in
18 ensuring that we are not confusing facts from another case or submissions in another case
19 and just, like an automaton, transplanting them in this case simply because we happen to
20 have the same three Judges.

21 Your Honours, I know the Bench will be alert to that danger but, your Honour, insofar as
22 reference was made to my learned friend David Hooper, QC, the Prosecution perhaps
23 should have been fair to Mr Hooper, because his submission was not as portrayed.
24 The very next sentence that my learned friend omitted to read is critical. What
25 Mr Hooper said yesterday, you will remember, is that "On the other hand, the IDAC, it

1 does have utility in as much as it clearly gives the Chamber the opportunity to see exactly
2 the way in which the OTP anchors its case in high detail." So rather than my learned
3 friend Mr Hooper saying it's useless, he was saying that it had utility.

4 Your Honours, in assessing -- in assessing the merits of this application, it really is of little
5 utility to hear the Prosecution's submissions regarding utility. They have access to all the
6 evidence; redacted and unredacted. They have their own internal work product. We,
7 as the other party, must be in -- perhaps in a very important position to speak to the utility
8 of a particular document. The Bench as well for trial management purposes.

9 But if one peels away the layers of arguments, the different reasons - I forget how
10 many - that were put forward by my learned friend in advance of his proposition, one
11 sees a gaping hole because the Prosecution have not explained, have not even attempted
12 to explain, why your Honours should depart from the established jurisprudence of all
13 other cases.

14 Your Honours, it's not only two cases, it's the Gbagbo case, it's the Katanga case. In
15 Banda and Jerbo, the Prosecution voluntarily - voluntarily - cognisant of their obligations
16 under the Statute provide a useful in-depth analysis chart. Bemba the same.

17 All the arguments rehashed by the Prosecution have been judicially considered and
18 rejected by other Benches of this Court. Your Honours only need to look at the
19 applications for leave to appeal in those cases filed by the Prosecution in their attempt to
20 struggle against the judicial order to provide IDACs, to see that those arguments were
21 advanced and rejected. They were not considered persuasive for leave to appeal. They
22 were not considered persuasive at first instance when the Prosecution struggled to argue
23 against an IDAC being filed.

24 Your Honours, the case law has been cited by the Defence in our motion. The
25 jurisprudence of fellow Benches, whilst not strictly speaking binding at all, is of

1 persuasive authority.

2 Your Honours, as Defence counsel who -- and as a collective experience in these courts,
3 we do say it is important. It is important in our preparation. It's also important, in all
4 candour, so the Prosecution makes sure that it is satisfied with the case that it brings. It
5 may be 1,200 pages, it may be more, I don't know. That is not -- if these cases were
6 simple, they shouldn't really come to this Court, but that's not an argument to not do
7 something if it's in the interests of justice, in the interests of fairness and, as other Trial
8 Chambers have held, in the interests of efficiency for the Prosecution to be put to that task.
9 Your Honours, given that this is the established jurisprudence of the Court is not a novel
10 submission put forward by counsel today. I would have presumed that experienced
11 counsel opposite would have already started preparing such an in-depth analysis chart
12 and an amended DCC in light of the confirmation decision.

13 To now say that somehow it's exceptionally arduous is perhaps not the most helpful
14 comment that has been made. It is something that they knew they were obliged to do,
15 and I would ask that they simply -- with that well-resourced office sitting opposite, that
16 they do what is judicially required.

17 Your Honours, those are my submissions on this issue. I would ask that the DCC be
18 prepared. It not be delayed until the Prosecution have completed disclosure. This case
19 is rather -- if not unique, it is distinguished by the fact that, on any fair reading, the way
20 the Prosecution pitched its case in the summons application and during the confirmation
21 hearing has fundamentally changed.

22 The ambassador from being the head of the security services allegedly, ordering the police
23 to step aside, has found himself under the current state of affairs allegedly in charge of a
24 gang of criminals called the Mungiki.

25 Your Honours, it is critical that that amended situation be crystallised in a new DCC now,

1 looking back at the 12 witnesses that the Prosecution relied back upon and looking back at
2 the decision of the learned Judges of the Pre-Trial Chamber.

3 Your Honours, if in due course further witnesses appear then, of course, a DCC can be
4 amended again; but, your Honours, I don't envisage that is the situation because I asked
5 repeatedly, the Bench asked repeatedly, if the Prosecution were ready for trial and they
6 effectively, and I maintain it -- it shouldn't be getting -- like getting water from a stone,
7 they said that they were ready except to the extent that witness protection issues and
8 disclosure and synchronisation had to be featured.

9 They did not say at any point they had further investigations. It was they were trial
10 ready but for witness protection, synchronisation and redaction.

11 That being the case, I do not see any merit in the contentions put forward by the party
12 opposite that a DCC should be delayed until finalised, full and unredacted disclosure is
13 made to the Defence. It is such a critical document for us really to understand what is
14 being alleged, and for the Prosecution to go through the exercise of seeing whether in
15 good conscience they can pursue a case now, that they may find is completely different to
16 the way that they put their case to the Pre-Trial Chamber, that it is needed.

17 So, your Honours, I would ask that the DCC be filed without delay. I'm most grateful.

18 PRESIDING JUDGE OZAKI: Thank you very much. Mr Kay.

19 MR KAY: Thank you, your Honour. An in-depth case analysis chart is a very useful
20 tool when properly constructed and thought about to enable those who have to consider
21 the Prosecution's case, being the Defence and the Trial Chamber, to see how they put their
22 case and what they rely upon.

23 Anyone can produce a document over 6,000 pages that's repetitious, inaccurate, and
24 overstating and misstating the case, but a properly thought out document is a useful tool
25 for any trial to be in possession with because it enables us to consider the quality of the

1 evidence relied upon in advance, for instance, on a particular issue, whether all the
2 witnesses relied upon are referring to hearsay evidence; whether it's reports that are relied
3 upon, rather than direct testimony.

4 When a witness gives live testimony, such a document is useful to compare and contrast if
5 the witness does not come up to proof with what was relied upon in the document to
6 prove the case, which is no longer the case. Sometimes it can expose deficiencies in
7 relation to the evidence to be relied upon and the evidence that was actually heard.

8 So, in my submission, because the trial situation has changed, and we can no longer rely
9 upon the original in-depth case analysis, we now have two accused, we have a significant
10 component of the police state-like entity removed from the case, we then have to consider
11 what should we properly have now to focus our minds on this case?

12 And, in my submission, a proper chart, properly drafted should not run to more than
13 6,000 pages; it should run to considerably less, probably a tenth of it, if well-thought out,
14 well-structured and I'm sure the Prosecution are able to do that.

15 Thank you.

16 PRESIDING JUDGE OZAKI: Thank you very much. As one of the Bemba Judges, I'm
17 very, very aware of the -- this document called in-depth analysis chart and, as Mr Khan
18 rightly pointed out, this is almost established practice in other Chambers; but, at the same
19 time, exactly as Mr Khan also pointed out, every case is independent. And also we,
20 although -- even if there is a kind of examples in other Chambers, we have to always
21 improve ourselves.

22 Having said this, do I -- my impression, the impression I got from the submissions by both
23 Defence teams, is that the important thing is what kind of information the Defence teams
24 can get, not the format of or a name of in-depth analysis chart per se.

25 So if, for example, the summary of Prosecution evidence is detailed enough, may the

1 Chamber assume that it can be -- the in-depth analysis chart can be substituted by
2 summary of Prosecution evidence?

3 MR KAY: In my submission, your Honour, the answer is no, because the summary is
4 only what's written as a summary. The in-depth analysis, of course, element-by-element,
5 step-by-step, shows what is relied upon and what is revealed.

6 A summary can be a generic document. It can completely -- in the cases I've been in, has
7 often been overblown, overstated and does not bear any relationship to the components
8 and elements of the evidence that is actually relied upon.

9 And to be frank, that's what is trying to be avoided here. I think we can see it
10 happening, that it's something that they don't want to do because it requires a degree of
11 introspection as well as a degree of inspection, to reveal what the structure of the case
12 actually is.

13 So those are my submissions.

14 PRESIDING JUDGE OZAKI: Thank you very much. I think I've got the idea of what
15 Defence wants. Mr Khan.

16 MR KHAN: Madam President, I agree and concur with the submissions of my learned
17 friend Mr Kay. Your Honour, I think the Trial Chamber themselves have articulated
18 exactly what is needed by the Defence in its decision in Bemba Gombo of 29 January.

19 And, your Honour, with your permission, I'll read just three lines: "The impugned
20 order ..." quoting from the Katanga case, "The impugned order directs the Prosecution to
21 list its incriminating evidence and requires within each item of evidence the Prosecution
22 shall identify the pertinent passages which are directly relevant to the specific factual
23 allegation."

24 Your Honour, that's all we want. We do want that degree of specificity in relation to the
25 evidence the Prosecution rely upon in relation to each charge, each count.

1 PRESIDING JUDGE OZAKI: Thank you very much. Judge Eboe-Osuji.

2 JUDGE EBOE-OSUJI: My concern also has been touched upon by the last question asked
3 by Judge Ozaki. I'll try and see if I can approach it from another angle.

4 The Prosecution has offered to produce a pre-trial brief. The question now is for both
5 parties: If the Prosecution produces what Mr Kay regarded as a properly constructed
6 and thought out document in the form of a pre-trial brief they had in mind, but instead of
7 calling it a pre-trial brief call it in-depth analysis chart, is it something that both sides can
8 live with?

9 MR KHAN: Your Honour, I think it's a very pertinent question from the Defence
10 perspective. We can live without the summary; we can't live without the in-depth
11 analysis chart, your Honour, whatever it's called. It's those constituent elements that
12 respective and successive Trial Chambers and Pre-Trial Chambers have focused upon that
13 the Defence requests in the present case.

14 PRESIDING JUDGE OZAKI: Thank you very much. Would you like to respond,
15 Prosecution?

16 MR LOWERY: Very briefly, your Honour, and thank you for the question.
17 The form is not important to us. We are very happy to lay out our case and the evidence
18 we are going to rely upon at trial, and we welcome the idea to do it, and of course there
19 will be introspection and inspection in that process.
20 We are not trying to hide the ball. What we're trying to do is lay out our case and the
21 evidence we intend to rely on in a useable fashion. We don't think the IDAC is useable at
22 the trial stage and we think the pre-trial brief, together with the amended document,
23 updated Document Containing the Charges, is adequate.
24 And on the last points, on the updated Document Containing the Charges, I fear that my
25 learned friend and I were talking past each other. We have agreed to provide that

1 promptly at the Chamber's discretion, and suggest that 30 days from now would be an
2 appropriate time. We are not seeking to delay that document until disclosure is
3 complete. That would make no sense.

4 Thank you, your Honour.

5 PRESIDING JUDGE OZAKI: Judge Van den Wyngaert.

6 JUDGE VAN DEN WYNGAERT: Thank you. I agree that what we must achieve is to
7 have something that is useful both for the Defence and for the Trial Chamber.
8 Now, as Judge Ozaki has said, we have to learn from the experience. I am a Judge in the
9 Katanga case, so also in a trial where a chart has been asked from the Prosecutor, and it
10 remains to be seen how useful this chart is for the Trial Chamber; and that applies to all
11 the other cases where charts have been asked, but where the judgment still needs to be
12 written.

13 So it's something that really needs to be done in consultation with everybody.

14 PRESIDING JUDGE OZAKI: Mr Khan.

15 MR KHAN: Madam President, if I may, I think the observations of the learned Judge
16 Christine Van den Wyngaert are exactly on point. It's not about form.
17 We saw in this case the in-depth analysis chart provided by the Prosecution at the pre-trial
18 stage was really inadequate and not useable by us. The same office has been capable in
19 the Banda and Jerbo case to serve upon me an in-depth analysis chart that is very helpful
20 and allows the Defence and the Chamber to proceed.

21 So, your Honours, it's not the title. I think the point is well taken. It really is the degree
22 of specificity that the Prosecution are required to put in the document, and it requires time
23 and attention, but that time and attention pre-trial will save we say a lot of time once we
24 get going and it will assist the Defence to prepare.

25 Your Honour, I am grateful to my learned friend. She points out the very good point

1 that such a document will also help focus our minds and assist us in what facts we are
2 able to agree. So I think it serves that additional purpose as well.

3 PRESIDING JUDGE OZAKI: Thank you very much. As for a Document Containing
4 Charges, the Chamber will in any case issue a decision. And as for summary of
5 Prosecution evidence, as well as in-depth analysis chart, the Chamber would like to ask
6 both parties to confer in a view to coming up with agreed elements of those documents if
7 possible and come back to the Chamber, say, 3 July. Is it reasonable for you?

8 MS ADEBOYEJO: Yes, Madam President, your Honours. That will be reasonable for
9 us.

10 PRESIDING JUDGE OZAKI: Defence team?

11 MR KHAN: Madam President, your Honours, I would ask the Bench to consider a more
12 streamlined time limit to get back to the Chamber. I think matters are moving at pace. I
13 think we can have those discussions and revert to the Chamber in a shorter amount of
14 time. Either agreement can be made or there will not be agreement, but either way the
15 Bench will be in a position to rule on the merits.

16 Your Honours, 3 July will mean that we will -- we're liable to get any document or
17 material significantly later, maybe even after the summer recess. So I'd ask for perhaps
18 within ten days we be ordered to file before the Bench.

19 PRESIDING JUDGE OZAKI: That is a very good suggestion. Within ten days, is that
20 fine with the Prosecution?

21 MS ADEBOYEJO: Your Honours, we have no objection either way in terms of the
22 time-line. It's quite fine with us.

23 PRESIDING JUDGE OZAKI: Mr Kay?

24 MR KAY: I agree, your Honour.

25 PRESIDING JUDGE OZAKI: Thank you very much. So within ten days please come

1 back to the Chamber.

2 The next agenda item is definition of "Organisational Policy."

3 I have to apologise to Mr Khan because this is coming from the different case, which is
4 the -- this issue has been raised in the Ruto and Sang case. This concerned whether the
5 parties and participants should be required to file written submissions on the legal
6 definition of "Organisational Policy" and whether the Chamber should rule on the
7 definition prior to the commencement of the trial.

8 I would first like to ask Prosecution if Prosecution has any view on this?

9 MR LOWERY: Thank you, Madam President. As we understand the Chamber's
10 question and the amended scheduling order, it has two parts: First, whether the parties
11 should be required to file written submissions on the issue and, second, whether the
12 Chamber -- file written submissions before trial on the issue and, second, whether the
13 Chamber should rule on the issue before trial. Our answer to each of those questions is
14 no, and I will explain why.

15 On the first question, we certainly have no objection to making written submissions on
16 this legal issue, and we welcome the opportunity to do so. The only question is one of
17 timing. We suggest that those submissions should come at the end of trial, and the
18 reason why ties into our answer to the second question which is when the Chamber
19 should rule on this legal issue.

20 We do not think that the Chamber should rule on this issue before trial in the abstract.

21 Three reasons why, your Honours: First, the Appeals Chambers' 24 May 2012 judgment
22 on the accused purported jurisdictional challenge makes clear that this question should be
23 resolved at trial, not before. This is document number 425 in this case, and I refer in
24 particular to paragraphs 36 and 37 of that document.

25 Among other things, in those paragraphs the Appeals Chamber cites jurisprudence from

1 the ICTY, the ICTR and Extraordinary Chambers of Cambodia under which, and I quote,
2 "Challenges relating to the contours or elements of crimes or modes of liability," end quote,
3 are matters to be determined at trial.

4 This contrasts under the jurisprudence of those courts with questions regarding the
5 existence of a crime or mode of liability which tend to be resolved before trial in the
6 abstract, often as jurisdictional challenges.

7 And I would respectfully draw the Chamber's attention in particular to the decision in the
8 Milutinovic case that our Appeals Chamber cites in footnote 97 of its judgment, decided as
9 Prosecutor v. Milutinovic, and it's the decision on Dragoijub Oidanic motion challenging
10 jurisdiction 22 March 2006.

11 The Appeals Chamber actually identifies it as an ICTY Appeals Chamber decision; it's
12 actually a Trial Chamber decision, but the important point is the principle it lays out.

13 And I would urge the Chamber to look at it, because it's right on point with the question
14 you have before you now.

15 In Milutinovic the Trial Chamber was faced with a motion file by one accused who sought
16 a ruling prior to the commencement of trial that joint criminal enterprise, or JCE, could
17 not as a matter of law extend to acts of individuals who fell outside that joint criminal
18 enterprise.

19 As the Defence did with the organisational policy requirement of Article 7(2), in this case
20 the Oidanic Defence framed his argument as a jurisdictional challenge. The argument
21 was Trial Chamber, as a matter of law, this fails; therefore, you lack jurisdiction and you
22 should decide it upfront. Exactly the same situation we have here.

23 The Chamber denied the motion, and in doing so it stated as follows, and I'm going to
24 quote it because the language is important, it's exactly the situation we have here.

25 I quote: "Like challenges relating to the contours of a substantive crime, challenges

1 concerning the contours of a form of responsibility are matters to be addressed at trial.
2 The Trial Chamber will have to decide applying the law to the evidence in the case
3 whether JCE has been established for each accused." That's at paragraph 23.
4 And that's exactly the situation we have here. It's -- the dispute between the parties here
5 is not whether Article 7(2) contains an organisational policy or requirement, that's
6 undisputed, it's in the Statute in black and white; the dispute is over what that
7 requirement means. What's an organisation under Article 7(2)? That's the dispute.
8 That, in our submission, relates to the contours or the characteristics of the chapeau
9 elements of Article 7(2) and not the existence of that requirement which is clear from the
10 Statute. And on that basis, the Appeals Chamber's 24 May decision and the
11 jurisprudence of ICTY, ICTR and Cambodia Chambers it cites supports the conclusion
12 that the Chamber should rule on this issue at the end of trial, not upfront.
13 The second reason is that ruling on this issue upfront is unlikely to increase the efficiency
14 or expeditious of the proceedings, and it's in fact we submit inadvisable for the Chamber
15 to make an unnecessary ruling in a vacuum because of the evolving state of the law.
16 Now, it is entirely possible that before this Chamber is required to issue its judgment
17 under Article 74 in this case our Appeals Chamber will have had the opportunity to
18 address merits appeals in two cases in which crimes against humanity have been charged,
19 Katanga and Bemba, and it's quite possible that in the context of those appeals the
20 Appeals Chamber will rule itself on what is the organisational policy requirement of
21 Article 7(2) of the Statute means.
22 Why does this matter? Well, let's assume that this Chamber does what the Defence in
23 Ruto and Sang case have done, I am not sure what the position of my learned friends will
24 be on this issue. Let's assume that the Chamber rules on this definitional question
25 upfront. The Chamber says, "In our view 'organisational policy' under Article 7(2) means

1 X." The parties proceed on that basis on the understanding that that is the test this
2 Chamber will apply in rendering its final judgment in this case. Then before this
3 Chamber issues its judgment the Appeals Chamber comes along in Katanga or Bemba or
4 both, and it says, "Well, we are going to address this question ourselves because it's an
5 issue on appeal," and they stay, "We disagree with what Trial Chamber V did. We don't
6 think 'organisational policy' means X, we think it means Y," and in that scenario, which is
7 entirely possible, the Chamber would have gained nothing in terms of efficiency by ruling
8 on the issue before trial because it would need to take into account the intervening
9 evolution in the law in rendering its final judgment.

10 Perhaps more importantly, it may actually be unfair to the parties because the parties
11 would have litigated and presented their cases at trial in this case on the assumption that
12 the test laid down by this Chamber before trial will ultimately be applied in the final
13 judgment which may not happen because of an intervening change in the law.

14 And my third and final point on this is that there will be no prejudice, in our submission
15 at all, to the parties if the Chamber addresses this legal question at the end of trial.

16 There can certainly be no suggestion of a notice problem. The Pre-Trial Chamber has
17 articulated its view of the law in three written decisions, and the parties have clearly
18 staked out their positions in the litigation around those decisions.

19 In particular, the parties filed written submissions on -- in relation to Mr Kenyatta's
20 jurisdictional challenge, that was in September and October last year, the Defence's final
21 submissions following the confirmation hearing, and in relation to the Defence's joint
22 appeal on the purported jurisdictional issue.

23 I am not sure that so much angst has ever been spilt on the question of what an
24 organisation means. The parties have clearly staked out their positions and we are well
25 and truly on notice of what the Pre-Trial Chamber believe the law to be and there is a

1 divergence there, but the important point is that the parties' positions are extremely
2 well-crystallised. I mean, there can be no question that there will be any kind of notice
3 problem if this Chamber decided not to rule on the issue upfront, and for these reason we
4 submit that the Chamber should not rule on the issue upfront but should instead wait
5 until the end of trial and resolve it on the merits.

6 Thank you, Madam President, your Honours.

7 PRESIDING JUDGE OZAKI: Thank you very much. I would rather caution against
8 equating contextual element with criminal responsibility but, nevertheless, I would like to
9 ask the Defence teams, starting with Mr Khan, to respond.

10 MR KHAN: Madam President, you will be glad to know at least on this point I will be
11 very brief. In general terms I agree with the Prosecution.

12 PRESIDING JUDGE OZAKI: Thank you. Mr Kay?

13 MR KAY: I am grateful. I don't, Madam President, and the first point I want to make
14 has already been addressed by your Honour. This is not a form of responsibility, and the
15 parallel that has been drawn is not the parallel here. The issue here on a very important
16 matter concerns the context, and my submission is we have a right to know what the law
17 is before we start the case, because it matters in the forms of presentation, questioning of
18 witnesses as well as submissions during the trial. To say that we are on notice of the
19 issues, well, there are two very widely diverging points of view and to cater for both of
20 them during the trial is not only confusing, in my submission, it does not focus the case in
21 a proper way, and only the Pre-Trial Chamber has determined this issue so far.

22 The Pre-Trial Chamber determined the issue in the absence of Defence submissions
23 originally, and then stuck to that line, and we made submissions at the end, but the
24 ground had been sown by the time we came to it, and I doubt very much in the experience
25 of anyone in a courtroom here, one has seen a court volt face as they would have been

1 required to do by the Defence, but we now come here to this Trial Chamber for the matter
2 to be decided afresh.

3 Court has regards to the jurisprudence of all the various Pre-Trial Chambers and
4 elsewhere, but it's a very important matter, in my submission, to know what we are
5 dealing with. It's like embarking on a robbery trial without knowing the ingredients of
6 the offence of robbery, what has been determined before.

7 So in my submission, this should be dealt with by the form of submissions by parties and
8 a ruling by this Court.

9 Thank you.

10 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

11 JUDGE EBOE-OSUJI: Mr Lowery, I don't know if you would be able to assist me here,
12 but in the course of your submissions, you brought in the decision of the Trial Chamber of
13 ICTY in Milutinovic, and you said it was the Trial Chamber that decided what you read
14 out. Are you able to assist me with how the decision of the ICTY Appeals Chamber in
15 Hadzihasanovic case, dealing with command responsibility ahead of time, were you able
16 to reconcile it? Were you able to distinguish that? If, if you can't, that's all right. I
17 know that this is just something I threw at you. Thanks.

18 MR LOWERY: Thank you, your Honour. I'm glad you said it's all right if I can't assist.
19 Unfortunately, I am unable to assist. We've just reviewed the authorities cited in the
20 footnotes by the Appeals Chamber. Thank you, your Honour.

21 PRESIDING JUDGE OZAKI: Thank you very much for submissions from parties.

22 MR ANYA: Madam President, if I may interject, I apologise.

23 PRESIDING JUDGE OZAKI: Yes.

24 MR ANYA: May I state on the record the victims' position with respect to the
25 organisational policy issue?

1 PRESIDING JUDGE OZAKI: Please.

2 MR ANYA: In respect of the first question posed by the Chamber for whether we would
3 be amenable to filing written submissions, the answer is of course "yes" to the extent that
4 it will assist your Honours in your duties.

5 With respect to the timing of any such submissions, as well as the question of when the
6 Court might be inclined to rule on them, we support the Prosecution's position on that
7 issue. The Appeals Chamber's decision of 24 May makes it pretty clear that the
8 two-pronged questions of what interpretation to give to the phrase "organisational policy"
9 as well as the sufficiency of the evidence showing the existence of an organisational policy
10 are issues that go to the substantive merits and they are issues that properly should be
11 determined at trial. As such, it would be premature, in our submission, to address those
12 issues pre-trial, before the evidence is adduced.

13 I thank you.

14 PRESIDING JUDGE OZAKI: Thank you very much. Based on those submissions, the
15 Chamber will come back to this issue if it thinks it is necessary.

16 There are several additional issues Chamber would like to address. First, the Chamber
17 notes the Prosecution's proposal to submit application for in-court protective measures
18 ten days before the start of the witness evidence. Does Registry have any comments on
19 this?

20 MS ABDULLAEVA: Madam President, your Honours, just -- it's indeed stated in the
21 familiarisation protocol which was applied before Pre-Trial Chamber that such
22 information should be submitted, or to the extent possible, 35 days in advance before the
23 start of the testimony.

24 However, we do understand that sometimes the parties have difficulties in providing
25 such information so far in advance. That's why ten days is fine by us, as long as it will

1 allow the Chamber to make its decision in the -- with regard to the request on in-court
2 protective measures. Why it is important is because during in-court familiarisation it is
3 explained for the witness which in-court protective measures have been requested or
4 granted and that's why, if the Chamber is fine with the ten days, and we know the answer
5 before the start of familiarisation process, it is fine.

6 Thank you.

7 PRESIDING JUDGE OZAKI: Thank you very much. Well, I think the Prosecution will
8 duly take note of the submission by the Registry.

9 MS ADEBOYEJO: Noted, your Honour.

10 PRESIDING JUDGE OZAKI: The next point is participation of victims. With regard to
11 the participation of victims in this trial, the Chamber will request submissions in order to
12 issue a decision on this matter in due course. So we are not dealing with this issue in this
13 status conference.

14 Another issue, the protocol to be adopted for contacts with the opposing parties' witnesses,
15 and also for communicating non-public information to members of the public, we will
16 note here submissions on this issue today, but the Chamber would like to direct the
17 parties and the legal representative of victims to jointly consult with the Registry, with a
18 view to coming up with a workable protocol.

19 The Registry is then to file a report to the Chamber with a draft protocol for the Chamber's
20 consideration by 4 July.

21 ECourt protocol. A decision on the eCourt protocol applicable in this case will be issued
22 in due course. However, the Chamber would like to state now that material disclosed
23 inter partes should not be assigned EVD numbers.

24 Additionally, the Chamber should not receive Article 67(2) and Rule 77 material, but
25 should only have access to incriminatory material in Ringtail.

1 Email communications. All email communications directed to the Chamber should use
2 the address "Trial Chamber V Communications," Which will copy the message to the
3 legal team advising the judges, so the address is "Trial Chamber V Communications."
4 The Chamber does not need to be included on exchanges between the parties and the
5 participants. However, all parties and participants should be copied on any email
6 communications with the Chambers, unless there is a specific justification for doing
7 otherwise.

8 Emails to the Chamber should not contain any substantive issues. Generally, all requests
9 should be submitted in proper filings. Exceptionally, requests can be made by email
10 only if the matter requires urgent attention, in circumstances in which the only way to
11 bring it to the attention of the Chamber, within an actionable time-frame, is by email.

12 Finally, on 24 May this year, the Appeals Chamber issued its decision rejecting the
13 jurisdictional appeal of Mr Muthaura and Mr Kenyatta against the decision on the
14 confirmation of charges. On this basis, the Chamber notes that the application by the
15 Defence team of Mr Muthaura and Mr Kenyatta, to postpone setting a date for trial
16 pending the resolution of the appeal, is now moot.

17 This exhausts the agenda items which the Chamber proposed. Is there any other
18 submissions from parties and participants?

19 MR KHAN: Madam President?

20 PRESIDING JUDGE OZAKI: Mr Khan.

21 MR KHAN: I am most grateful. As I intimated, perhaps it was before lunch, that I do
22 have submissions in relation to which we need the assistance of the Bench, if possible, and
23 the guidance of the Bench, and it relates principally to agenda item 3(a).
24 Your Honour will see that in that agenda item, reference is made to the Prosecution filing,
25 and specifically paragraphs 3, 11 and 12.

1 Your Honour, paragraph -- those paragraphs relate to the assertion and the reference to
2 instances of witness interference. Paragraph 12 goes on to material posted on-line.

3 Your Honours, we understand that at 4 o'clock, when your Honours adjourn this
4 particular inter partes hearing, there will be an ex parte hearing dealing also with
5 protected witnesses.

6 Your Honours, the reason we need your assistance is that there is a really remarkable and
7 very real problem that we have encountered in this case.

8 Your Honour, the first point is one fully accepts the necessity to protect witnesses that are
9 in danger, notwithstanding that disclosure should be the norm, and protection resulting
10 in the Defence being kept in the dark or even in the shade should be exceptional and
11 justified.

12 Your Honours, we have seen in Kenya, newspaper article after newspaper article, if I
13 could have them, where protected witnesses, protected by order of the Court, assisted by
14 the Victim and Witness Unit, are going to journalists, going to the press.

15 Your Honours, I will go through just briefly because all are available on-line, and I will tell
16 you the point at the end. Your Honours, if one looks at the Star Newspaper of 16 -- I am
17 grateful --

18 PRESIDING JUDGE OZAKI: Excuse me, Judge Eboe-Osuji.

19 JUDGE EBOE-OSUJI: The reason I thought I would stop you before you proceeded is, I
20 don't know to what extent, how deep you go into that because the fact that certain
21 newspaper might have blown -- physically outed some protected witness. I am not sure
22 that that -- we don't want to compound the problem, that is what I mean, by drawing
23 further attention to it. I thought I -- if your submission would --

24 MR KHAN: Yes, I am grateful. Your Honour, if I get to a point where I consider or of
25 course the Bench at any time considers it necessary to go into private session I will make

1 that application, but --

2 JUDGE EBOE-OSUJI: But when you start referring to specific articles by date, and
3 newspapers, that's what I am talking about now.

4 MR KHAN: Yes, your Honour. If the Bench allows me, this article doesn't refer to
5 names but it refers to a malaise we say that has infected this case and if it is not stemmed
6 it will make a fair trial exceptionally difficult. Your Honour, in an article --

7 PRESIDING JUDGE OZAKI: Mr Khan, even if the article doesn't refer to the names, if
8 you refer to the name of the newspaper and date and all those details, it will be an
9 identifying information and I just wonder if you -- do you really need to refer to
10 the -- each and individual articles, in order to make submissions?

11 MR KHAN: Well, your Honour, let me just say this: I have a lot of articles. These do
12 not quote witnesses by name but what the journalists in these various articles say, in
13 newspaper article after newspaper article, they say that they have been in contact with
14 Prosecution protected witnesses. They have spoken to Prosecution protected witnesses
15 and they purport to relay what Prosecution protected witnesses are saying.
16 The simple point is this: Protection is there for a purpose. It seems not only
17 discourteous, but much more importantly absolutely unnecessary and unsustainable that
18 witnesses, on the one hand, seek to withhold their identities and their evidence from the
19 Defence, who have a code of professional conduct that separates us from the non-lawyer
20 in the street, and yet these very same witnesses are willing to speak to journalists who are
21 not bound by any code at all, and your Honours, when you have ex parte hearings, and
22 when you are looking at these matters, I think these are important matters that require
23 investigation and inquiry, perhaps by the Victim and Witness Unit but perhaps by the
24 Prosecution, because it is relevant to your judicial determination as to whether or not
25 those protective measures that impact upon Defence knowledge of the case, and the

1 identity of the witnesses, are necessary and proportionate in these proceedings.

2 Your Honour, it is an important matter, we say. Your Honour, I link it in, if I may, with
3 what we have said even at the pre-trial stage, is a one-sided information flow, that is
4 going between intermediaries, sometimes Office of the Prosecution who have put
5 affidavits in, in the pre-trial stage, to the press, that has the potential to infect the witness
6 pool.

7 And your Honours, as an aside, we did file an application to restrain the learned
8 Prosecutor in this case from making some of his, what we would say were rather
9 outlandish comments or painting with a very broad brush stroke in Kenya because
10 witnesses are following these proceedings live. They have followed the confirmation
11 hearing in an unprecedented manner. We were told perhaps since independence the
12 people of Kenya haven't followed anything, even the World Cup, more than these
13 proceedings, and what the danger is is that witnesses are hearing what we said at the
14 confirmation hearing. They are hearing what intermediaries are saying, what the
15 Prosecution are saying, and they are coming to the parties with lies, we say. They are
16 repeating what has been heard. They are repeating what they think the parties want to
17 hear. We've had experience of such lying witnesses, and we have put evidence forward
18 of such lying witnesses that are centre of the Prosecution camp.

19 Now, your Honour, the reason this is important goes to the next issue, and your Honour,
20 for this point -- would your Honours just bear with me one moment?

21 (Defence counsel confer)

22 MR KHAN: Your Honour, in this regard, we, and I don't see, I am just pausing to make
23 sure that I am not putting anybody in peril and I don't see at all that I am, but your
24 Honour, there has been a whole host of discussion in Kenya regarding an individual who
25 is said to be a Prosecution witness.

1 Now, it's in the press in Kenya that one individual, David Matsanga, is under
2 investigation. I don't touch any of that. But your Honour, there is a very worrying
3 trend, a very troubling relationship, we say, in this case regarding an individual called
4 Makau Mutua. This individual, we say, appears to be either a friend of the Prosecution
5 or an intermediary with the Prosecution, and we say it for good reason. If one looks at
6 the Buffalo University website of March 2010, and I quote, "In mid-March, Dean Mutua
7 travelled to The Hague, The Netherlands, to train investigators of the International
8 Criminal Court, who are seeking evidence," and it goes on. So this individual has trained,
9 it seems, members of the OTP.

10 In December 16, 2011, this individual was to take part in a town hall style forum, with the
11 Prosecutor, in New York. That's another press report and, your Honour, this individual,
12 in his newspaper articles dated 9 March 2011, and March 17, 2012, so both are 2012, talks
13 about this witness to the extent of even giving a purported pseudonym to the press, when
14 he travelled, it's said, on a UN passport.

15 Now your Honours, it cannot be right, firstly, that all of this is being bandied about in the
16 press in Kenya, by somebody who is intimately linked with the Prosecutor, has trained
17 investigators, it's said, and who was sharing a platform until it was suspended with the
18 Prosecutor in town hall style meetings, and he is privy to information that isn't served on
19 us. We can't be the only party in the whole of Kenya that don't know what's going on.

20 Now, your Honours, this brings me to a second point. In relation to, and a video is
21 mentioned in all of this, in relation to this video and all the background, I do ask that the
22 Bench require the Prosecution to answer whether or not they are in possession of that
23 information, number 1. Number 2, if so, when did they receive it? Number 3, if they
24 received it prior to the confirmation hearing, why it was not disclosed and 4, their views
25 on it, because it does appear to us to be critical information. We don't know more but,

1 your Honours, given the massive public debate we can't be the only party that puts our
2 head in the sand like an ostrich and pretends like the three monkeys, we see no evil, we
3 hear no evil, and all the rest of it. So your Honours, that clarification is -- would be
4 useful and we would ask the Bench's assistance in that regard.

5 Your Honour, I'd also ask that the Bench order the Prosecution to disclose the role of this
6 individual Makau Mutua with the Office of the Prosecution and to detail any and all
7 contacts they have had with this person.

8 Your Honours are familiar with the caution of the Lubanga Trial Chamber regarding the
9 dangers of the Prosecution office dealing with intermediaries and farming out some of
10 their functions to these unregulated persons.

11 So your Honours, I would like that to be discretely answered by the Prosecution and to
12 answer whether or not he is or is not an intermediary, and otherwise the nature of the
13 relationship. And your Honours, I would also like to know whether or not the Office of
14 the Prosecutor has had, in relation to any of his articles because he is a weekly columnist,
15 or even more than that, advance notice of any of the publications that he has put on-line
16 and that have been published in the newspapers in Kenya.

17 Your Honours, I think that will assist the Defence to know more about this individual
18 who we say should be approached with caution, and for reasons which I don't need to
19 enter at the moment we have misgivings regarding his role.

20 Your Honour, I think that deals with the issue of that matter.

21 The next matter deals with applications that had previously been made to the Pre-Trial
22 Chamber.

23 PRESIDING JUDGE OZAKI: Maybe at this point, the Chamber should intervene. Well,
24 first of all, let me assure you again that the Chamber is fully aware of its duty to protect
25 rights of the Defence, while the Chamber is also under the duty to protect witnesses, and

1 those duties are clearly stipulated in the Rome Statute and it has nothing to do with what
2 newspaper articles say.

3 As for the various incidents, or allegations you have made, the Chamber would appreciate
4 if you could provide facts and all related facts you have in writing to -- maybe you
5 should first address it to the VWU and also if necessary to the Prosecution. I do not
6 think the status conference, which the major purpose of which is to resolve basically
7 logistical issues for the preparation for the trial, this status conference is not proper forum
8 to deal with those kind of issues.

9 Having said this, I just want to give floor to the Prosecution if, only if the Prosecution
10 would like to respond.

11 MS ADEBOYEJO: Your Honours, we are going to take a cue from what your Honours
12 have already indicated, since your Honour has already given an oral decision that my
13 learned friend should put his submissions in writing. If your Honours are so minded,
14 we will provide a response based on the time-line that your Honours are minded to give
15 to us, we will provide our written response appropriately.

16 Thank you, your Honours.

17 MR KHAN: I am grateful, Madam President, and certainly we will put something in
18 writing and I will explain a little bit later that we have had difficulties with the
19 Prosecution in putting questions forward and those questions falling into a black hole of
20 non-responsiveness, and the reason I have raised it today is that some certain similar and
21 linked inquiries have gone unanswered for months, and also because there is an ex parte
22 hearing afterwards, and I thought this background may inform you -- the Bench's
23 approach and the degree of scrutiny it will give applications when you are in the ex parte
24 session.

25 PRESIDING JUDGE OZAKI: Before, sorry to interrupt you again. It depends on which

1 kind of issue you are addressing. Some issues you have to address VWU, if it concerns
2 the victim protection issue, and some issues you have to address OTP. And as for the
3 issue of disclosure itself, it should first be dealt with inter partes. So --

4 MR KHAN: Your Honour, I am most grateful. Let me also perhaps for the first time
5 today give an example. I know the Prosecution like giving examples and it's linked in
6 some ways.

7 We received information that the Prosecutor was using an intermediary to contact one of
8 our witnesses, somebody they know is a Defence witness because of what we have
9 provided to the Prosecution.

10 We wrote, if I can have the email, we wrote to the Prosecution some time ago, asking for
11 clarification and in fact we wrote, and I have got the email here, we said we are -- "We
12 don't believe this is going to be true, we believe it to be a rumour because we know you
13 would be very well aware of the established jurisprudence of this Court but can you
14 please confirm or deny the fact that you have used this intermediary to contact, in breach
15 of the established law of this Court, a Defence witness."

16 Now, your Honour, the response from my learned friend Ms Adesola, sitting opposite to
17 me, sorry, to Ms Alagendra, dated 25 May, is surprising, to put it mildly. "Thank you for
18 your email. Whilst the Prosecution is well aware of the practice in relation to contacting
19 other parties' witnesses in other cases, the position is not yet settled with regards to the
20 Kenya case. To this end we would be grateful to receive from you the exact details of the
21 attempted contact."

22 Now, your Honour, I pause there. While it's the principle of stare decisis of precedent
23 does not apply rigidly in international courts there is a competing principle of like cases
24 being treated alike and judicial certainty, and we say absent a judicial ruling on a
25 particular matter all parties must seek to conduct themselves in accordance with the law

1 of these Chambers. We must respect the existing law. That applies as much as to the
2 Defence as to the Prosecution. What we cannot do is simply say on every issue, to say on
3 every issue, that the wheel can be reinvented, and there is a no holds barred approach to
4 proceedings.

5 Now, your Honours, what my response is, if I can read, to Ms Adesola, I wrote to her the
6 same day, 25 May and I said, "Dear Adesola, many thanks for your response to
7 Shyamala's email. The practice you describe is properly described as the required
8 procedure when contacting another party's witness. The required procedure has been
9 established pursuant to orders of successive Chambers of the ICC. It had been presumed
10 by me that absent new jurisprudence altering the stated principles and practice set out by
11 the Judges, the OTP would not arrogate to itself the authority to unilaterally set aside that
12 law and required practice. Be that as it may, I must notify you that I do not consider it
13 appropriate to give you any more information about this matter. The inquiry contained
14 in Shyamala's email was specific and capable of being easily denied or confirmed by the
15 OTP. Accordingly, I must ask for a formal response to Shyamala's inquiry, either to
16 confirm or deny the allegation, or to formally state that you decline to comment on the
17 allegation of the OTP contacting Defence witnesses by means of the named intermediary
18 without our knowledge. I take the liberty of copying this matter to the VWU."

19 So your Honour, I did follow precisely the procedure that the learned president has
20 enjoined upon the parties.

21 I did say, perhaps I thought in hope, "I look forward to your urgent response."

22 Now, your Honour, to date, to this very moment, this important inquiry has not been
23 answered. So your Honours, this is why such matters are brought before the Bench
24 because proceedings must be regulated. Your Honours --

25 PRESIDING JUDGE OZAKI: Mr Khan, if I may interrupt, I think this issue is exactly the

1 issue to be covered by the future protocol on contacts with the opposing parties' witnesses,
2 and if I'm not wrong, Pre-Trial has also established some protocol on contacts, which is
3 now applicable to -- maybe not?

4 MR KHAN: Yes, Madam President, there are protocols.

5 PRESIDING JUDGE OZAKI: And in any case, I am sorry to say, but basically those
6 issues are inter partes issues, and I, I apologise for repeating myself, but status conference
7 actually is not the place where -- well, I understand you have many difficulties but still, I
8 don't think this is the right place to take up this inter partes -- basically inter partes issue.

9 MR KHAN: Well, your Honours, I understand and of course I give great regard to the
10 views of the Bench on this issue but, in my respectful submission, this is precisely the
11 purpose of status conferences to iron out problems that are coming between the parties.
12 Your Honours, where we don't get response to an important inquiry, that is undermining
13 the jurisprudence of this Court, jurisprudence that was not the result of some judicial
14 fetish, just to make law, but was put in place to safeguard certain important interests, and
15 the Prosecution do not say "We comply with the law," they do not deny it, we say it's an
16 improper practice.

17 Your Honours, what else can we do except to ask the Bench, in a status conference, "Ms
18 Adesola, please, can you confirm or deny that you're contacting Defence witnesses
19 without informing the Defence and in disregard of the jurisprudence of this Court." What
20 is the danger? Your Honours, I must also make --

21 PRESIDING JUDGE OZAKI: I'm -I am sorry, Mr Khan, I think I made it quite clear that
22 this is not the place to take up this issue, and I would like you -- I appreciate if you just
23 refrain from making further submissions on this issue.

24 MR KHAN: Well, Madam President, what I would ask is that I can put our concerns in
25 writing and I have put forward concerns to the Bench. What I would ask is that before

1 those submissions are put in and ruled upon, in the interim, an awful lot of harm can be
2 done and there is a saying in English, there is no point crying over spilt milk. Until the
3 Chamber alter the jurisprudence of the Court, what I would ask is that they comply -- an
4 order to be given that they comply with the existing law and, secondly, I'd ask for an
5 injunction, that you injunct the Prosecution from contacting Defence witnesses without
6 the permission of the Bench or without complying with the stated and established
7 jurisprudence of the Court and, your Honours, they need the permission of the Defence as
8 well.

9 So your Honours, I fully accept you can rule on this matter after filings but I don't know
10 when that decision will be. A lot of harm can take place. Until you rule, I would ask for
11 that injunction and that order.

12 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

13 JUDGE EBOE-OSUJI: Mr Khan, I think we are trying to communicate and see where you
14 are coming and as an experienced lawyer you know that often frustrations do arise in
15 communication between counsel in opposite sides of the case, but where critical matters
16 are concerned, after exploring the possibility of trying to resolve these things between the
17 parties, and there are lingering critical issues that need to be resolved that are not being
18 resolved, then formal motions may be brought, to which the parties are given the usual
19 right of response, and that is so that we can have an orderly manner of proceeding. That
20 is what we are trying to communicate.

21 MR KHAN: I am most grateful.

22 PRESIDING JUDGE OZAKI: Mr Khan.

23 MR KHAN: I am most grateful. Your Honour, Article -- Rule 132 governs status
24 conferences and it was only my -- and applications of course can be made orally as well as
25 in writing. I was making an application for orders. Your Honours, it's my submission

1 that they are within the four walls of Rule 132 because they lend themselves to the fair
2 and expeditious conduct of proceedings.

3 Your Honours, I can say no more.

4 PRESIDING JUDGE OZAKI: Thank you very much. And I would really ask Mr Khan
5 if he thinks it's necessary, please make a filing, written filing, please, because it is very
6 difficult for the Chamber to make a decision on any issue of this complexity, without
7 having our responses from the Prosecution, responses from the VWU, and everyone
8 concerned. So, if necessary, please make written filing.

9 Thank you.

10 MR KHAN: Madam President, perhaps if you would indulge me, can I ask for
11 clarification? Is the Chamber minded at least pending oral submissions, written
12 submissions, and your adjudication of those written submissions, to make an interim
13 order based upon my oral application that the Prosecution, until the Chamber decide
14 otherwise, be prevented from contacting Defence witnesses without following the
15 procedure that has been stated in Lubanga and other cases?

16 Your Honours, from the newspaper reports as well, it seems the Prosecution are actively
17 engaged in Kenya at the moment, and I do not see how the interests of the Defence are
18 properly safeguarded if the Prosecution filing, if the Bench agree with the Defence and
19 agree to follow the previous jurisprudence to remedy that situation. It seems that the
20 appropriate way is to injunct or order the Prosecution now to follow the existing law and
21 your Honours can vary it if you are not minded to follow our arguments in the written
22 brief.

23 (Trial Chamber confers)

24 PRESIDING JUDGE OZAKI: May I -- may I ask one clarification? I think, as I said
25 several minutes ago, there is a pre-trial protocol which governs this issue? Am I right or

1 not? Prosecution please.

2 MS ADEBOYEJO: Your Honours, that is the point and that was what informed our
3 response to the Defence. We do not believe that there is a protocol that governs this
4 issue. If my learned friend believes that this is a very urgent matter, or believes that it's
5 something that he can file, a written submission very urgently, and we would then be in a
6 position to respond just as urgently, so that your Honours will be in a position to then
7 decide, based on the written submissions on both sides, but it was also in the context of
8 exploring the inter partes nature of, you know, of the matters that should be discussed
9 inter partes that we had written back to them to say, "Well, that's not our understanding
10 of the jurisprudence and we would invite that there be more discussions on this matter."
11 So, we would invite my learned friends to provide written submissions and we would
12 respond.

13 PRESIDING JUDGE OZAKI: So there is

14 MS ADEBOYEJO: But in answer to your first question, your Honours, our
15 understanding is that there is no protocol because the decision number 89, which I can
16 actually even read from, right here your Honours, was very clear with regards to the way
17 and manner in which both parties should have any contacts, and it dwelt almost
18 exclusively with Defence contact with witnesses.

19 PRESIDING JUDGE OZAKI: Thank you very much. Now I understand. Mr Kay.

20 MR KAY: I must apologise, your Honour. It was just to say that as we understood it
21 the pre-trial protocol which had been put in place pre-confirmation hearing was still
22 running, and until someone rips it up or says there is a new one, for our part, we were
23 very conscious that that should be a protocol we should file and any short-term gains
24 from a month or two months before anything else was developed would not be proper,
25 and we invite the Court to say that until such new protocol is issued, that the pre-trial

1 protocol is still in place, that it doesn't lapse, because otherwise, we are in an anarchy,
2 unfortunately.

3 PRESIDING JUDGE OZAKI: Thank you, Mr Kay. That is exactly my understanding,
4 that a pre-trial, there is a pre-trial protocol exists, and it is applied up until this trial -- this
5 Chamber will make a decision of a new protocol.

6 MR KHAN: Well, Madam President, I will be guided by you. I must confess, I wasn't
7 familiar with that pre-trial protocol. I was aware only of the jurisprudence from the
8 Judges, the case law, and the reason it's important, in my view, in my humble view, is that
9 if the parties simply willy-nilly discarded the jurisprudence of the Judges, in previous
10 cases, in every case there would be misconduct or there is a danger of that or there would
11 be omissions.

12 If the Defence, for example, in similar circumstances contacted a Prosecution witness
13 with -- and I would simply say that the case law of Lubanga and others is not applicable
14 because your Honours haven't ruled, the Prosecution would seek a warrant for my arrest.
15 I mean, so what is sauce for the goose is sauce for the gander. There must be equality of
16 treatment. If the Prosecution are doing precisely the same thing, contacting a Defence
17 witness without following the jurisprudence of the Court, we say that is not appropriate.
18 (Trial Chamber confers)

19 PRESIDING JUDGE OZAKI: Thank you. So now, there is a decision 89 which regulates
20 Defence contacted witnesses but not OTP contacting Defence witnesses?

21 MS ADEBOYEJO: That is exactly right, your Honours, and I can read to your Honours
22 the particular paragraph in respect to that because my learned friends, on the other side,
23 had made written submissions to the Single Judge on this particular point and issue, and
24 the particular paragraph, your Honours, is paragraph 23 and it says, "As regards the
25 argument that the Defence is subjected to modalities which do not apply to the Prosecutor,

1 the Single Judge recalls that the fundamental principle of equality of rights cannot be
2 applied mechanically, and highlights that the Prosecutor and the Defence differ markedly
3 in their respective status, as well as rights and obligations under the Statute. The
4 Prosecutor is, next to being a party in criminal proceedings, an organ of the Court and has
5 significant duties as well as powers related to the protection of victims and witnesses
6 which the Defence does not have."

7 And having said that she then ruled -- overruled my learned friends, and did not grant
8 the application.

9 MR KHAN: Madam President, if I can assist?

10 PRESIDING JUDGE OZAKI: Yes, please.

11 MR KHAN: Your Honour, that is a complete misleading of the law and the facts. That
12 related to an order of the learned Single Judge, her Honour, Judge Trendafilova at the
13 pre-trial stage that required the Defence, before we conducted any investigations, to seek
14 clearance of the Victim and Witness Unit and we complained because that was quite
15 irrespective of danger, so we made submissions on that issue, and we said in the reductio
16 ad absurdum argument that the same then should apply to the Prosecutor.

17 The learned Judge said that the relationship between the OTP, they have a statutory
18 obligation, also would have regard to witnesses and victims. Their relationship as an
19 organ of the Court gives them a special relationship with the VWU, so they are bound by
20 that, but it simply didn't deal with this issue. It didn't deal with the issue of contacting
21 another party's witnesses.

22 Now, your Honours, if one steps back, I know Judge Van den Wyngaert is familiar with,
23 for example, the jurisprudence of the ICTY, but in the Lemi (phon) case, his Honour,
24 Judge Parker and the Bench of which the learned Judge was a member, gave orders
25 regarding modalities of contacting other parties' witnesses. Now, your Honours, we are

1 members of the Bar, we are not subversives. We are a necessary party in these
2 proceedings. If the Defence do not contact the Prosecution witnesses without certain
3 safeguards, given the principle of equality of arms and equal treatments before the law,
4 before the Bench, what possible good reason is there for the Prosecution not to comply
5 with similar safeguards?

6 Your Honours, if one steps back --

7 PRESIDING JUDGE OZAKI: Mr Khan, if I may interrupt, now, the Chamber is
8 beginning to understand the complexity of this issue, and there seems to be a history and
9 background to this, and this is another reason, unfortunately for you, the Chamber cannot
10 make any decision on the spot, on this spot, and we do need written filing. And I
11 understand you are in a hurry, you are in a difficult situation and therefore I hope you can
12 file a written submission as quickly as possible so that Prosecution can immediately
13 respond for the Bench to make a proper decision.

14 MR KHAN: Madam President, we will proceed as instructed. I will say that the emails
15 and the correspondence was marked "urgent." It ended with the request for an urgent
16 response.

17 Am I taking it that my oral application that pending your written ruling to those
18 submissions that the Prosecution be estopped, enjoined from contacting Defence
19 witnesses is rejected, or do your Honours think it appropriate and proportionate that until
20 you rule on those issues the jurisprudence of other fellow Judges of the Court, be -- the
21 Prosecution comply with those modalities for the reasons that those Judges have deemed
22 appropriate and justified?

23 So are you rejecting or granting the application for an injunction or an order to the
24 Prosecution not to contact Defence witnesses until you've been briefed on the matter fully
25 in writing?

1 (Trial Chamber confers)

2 PRESIDING JUDGE OZAKI: Mr Khan, when do you think you can file this written
3 submission?

4 MR KHAN: Madam President, 48 hours.

5 PRESIDING JUDGE OZAKI: Prosecution?

6 MS ADEBOYEJO: Your Honours, in fairness, because of the urgency of this matter we
7 will also endeavour to respond within 48 hours.

8 PRESIDING JUDGE OZAKI: Mr Khan?

9 MR KHAN: Yes. And madam, so it's a matter of four days. I would ask for those four
10 days and then at any time until you adjudicate the matter finally that the order be granted,
11 that you -- the Bench do consider an interim order that until you've been briefed and
12 you've adjudicated this issue the Prosecution be estopped and ordered, prohibited from
13 contacting Defence witnesses.

14 JUDGE EBOE-OSUJI: Mr Khan, you see the difficulty here is some -- there has not been a
15 crystallised view of the prevailing protocol that you are talking about. There is no
16 agreement on whether or not one exists for purposes of -- that were set at the pre-trial
17 stage, and the protocols on the merits, on the various jurisprudence you are talking about,
18 would necessarily have taken into account the peculiarities of the cases, in every case as
19 you said, you -- when you said in your submission in the morning, you were quite clear in
20 saying you didn't want a parity between the Kenya 1 and Kenya 2 case, and that begins to
21 tell you how these things can differ. That is the difficulty we are faced with.

22 So if there was a clear view that there was a protocol established at the pre-trial phase that
23 addressed both parties it would have been easier to deal with that but we don't have that
24 and that is why this difficulty is engaged.

25 Now, is there any urgency that you can talk about immediately, that compels a decision

1 right now?

2 MR KHAN: Your Honour, there is. The Prosecution, according to all the press reports,
3 and they can, the party opposite can clarify or not, but all the press reports say the
4 Prosecution are engaged in flying witnesses out and approaching witnesses right now.
5 And so what is our relief if damage is caused to our case because of what amounts to
6 misconduct?

7 Your Honour, I am not talking about the pre-trial protocol. Can I give you an example
8 from comparative law, if I may? From Islamic law, the Holy Koran was revealed over 23
9 years. Until a new revelation, until new law, in that case Sharia law, was enjoined,
10 Mosaic law was followed. The law of the Torah was followed.

11 What I'm saying in this case, until this Chamber rules on an issue all parties should
12 proceed as a matter of good conscience and good form legal certainty, and to safeguard
13 the whole process of getting to the truth, parties should follow the law of other Chambers.
14 Your Honours, if that is not the case, there may well be cases in which parties are not
15 guided by law at all until it is spoken from the Bench before us. Your Honours, that is
16 not conducive to the effective and efficient administration of justice. That amounts not
17 only to reinventing the wheel, but it will cause dangers that would be obviated by
18 following judicial guidance in earlier cases. So your Honours, I think the balance of
19 convenience, if I put it like that, is definitely in favour, in our respectful submission, in
20 granting the prohibition for 48 hours, four days or such time as the Bench rule.

21 I don't see why the -- how or in what way the Prosecution would be prejudiced. There
22 are obvious ways, given - and I'll come to it in a moment - given the newspaper articles
23 that repeatedly are talking about education in Europe, that are talking about European
24 resettlement and the economic disparity in Kenya. There are ample obvious reasons why
25 witnesses may want to change their stories and in fact concoct stories.

1 PRESIDING JUDGE OZAKI: Mr Khan, so you are saying that you cannot wait for four
2 days, for some reason?

3 MR KHAN: Madam President, what I'm saying is a lot -- a week is a long time in politics.
4 It's also a long time in reality if damage is done to the Defence case. Your Honour, what
5 is the countervailing interest in the Bench --

6 PRESIDING JUDGE OZAKI: That is exactly what I would next like to ask Prosecution
7 but, in your view, from Defence perspective, Defence view-point, Defence cannot wait for
8 four days? Right?

9 MR KHAN: Your Honour, we have already waited far too long and in our respectful
10 submission we expressed the gravest of concern, the gravest of concern that the
11 Prosecution has unilaterally seem to have left aside the jurisprudence of other elected
12 Judges without good cause and without judicial sanction. Inherent in that approach, if
13 adopted by the victims and the Defence, the whole edifice of fairness could be eroded.
14 The stakes are much wider, in our respectful submission, than just this one issue, grave
15 though they are in the present case. Madam President can I just say, because the
16 Prosecution must be given the chance to respond, the fact that once again, the Prosecution
17 have not denied that they are contacting Defence witnesses, seems by implication to be
18 that they are contacting our witnesses when we are behaving in what we say is
19 honourable and lawful manner and we are not contacting or even making inquiries of
20 Defence witnesses in a way -- Prosecution witnesses in a manner that would violate their
21 protection and Court orders.

22 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

23 JUDGE EBOE-OSUJI: Now, in inviting the Prosecution to respond, which you've done,
24 would you be prepared, just canvassing the possibilities, with an undertaking from the
25 OTP to refrain from making such contacts pending the ruling? I just wanted to canvass

1 all the possibilities.

2 PRESIDING JUDGE OZAKI: And if I may, the tape is running out in seven minutes.

3 Please take that into account.

4 MR KHAN: I am so sorry?

5 PRESIDING JUDGE OZAKI: The tape is running out in seven minutes so we have to

6 suspend after seven minutes.

7 MR KHAN: Your Honour, the Prosecution have so far failed to answer the question.

8 Of course the primary submission is the Defence order -- the Bench order that the

9 Prosecution comply and all parties, ultimately you three Judges, the Bench before us, is

10 supreme in this courtroom, not the victims, not the witnesses, not the Prosecution,

11 certainly not the Defence, and we must comply with all orders of the Bench and that is

12 what I'm asking.

13 Your Honours, if the Prosecution are willing to give an undertaking of course I will accept

14 that, but I would also ask that they provide information within the end -- by the end of

15 day as to which witnesses of the Defence they have contacted because that will inform our

16 written submissions to the Bench.

17 JUDGE EBOE-OSUJI: That is conditional on the undertaking -- I mean, the undertaking

18 would be that they refrain simply from further contact pending the resolution of your --

19 MR KHAN: Indeed, your Honour. An undertaking and information regarding any

20 Defence witnesses they have thus far contacted because we can't be expected, in our

21 respectful submission, to shoot in the dark. We are putting forward a submission not as

22 a game but so your Honours can determine it. The scope of which, the process we would

23 say, has been infected or otherwise.

24 PRESIDING JUDGE OZAKI: Mr Khan, I am afraid that because of the time I think we

25 have to make an urgent decision. Prosecution, can you voluntarily refrain from contact

1 with potential Defence witnesses for four days, except for the -- some urgent
2 circumstances involving witness security?

3 MS ADEBOYEJO: Madam President, your Honours, it's a difficult undertaking for us to
4 make but yes, within the framework as framed by your Honours, we can make that, but
5 with the caveat that because there is no protocol, even the issue of which Defence
6 witnesses has been referred to, is still something that is still subject to discussion between
7 both parties.

8 Be that as it may, we would take it for the purpose of this hearing that these Defence
9 witnesses being referred to are those identified as such for the -- during the pre-trial
10 hearings. That's the extent to which we can give an undertaking, your Honours.

11 MR KHAN: Well, your Honour, no, it's actually not good enough. I apologise. This is
12 not a game here and the Lemi case and other cases in the ICTY have ordered such
13 measures that I'm requesting without a protocol. There is no magic in protocol. I know
14 sometimes there is bureaucracies, but we are a court of law here.

15 Your Honour, when a party, if I come across a Prosecution witness, if I come across
16 somebody who tells me they are a Prosecution witness, I've filed confidentially protocols
17 about how we conduct ourselves. Now, your Honours --

18 PRESIDING JUDGE OZAKI: Mr Khan, I am sorry, I am sorry to interrupt again and
19 again, but without written submissions, and without knowing more, without our
20 provided with more information, concrete information, the Chamber cannot make any
21 decision.

22 The only thing the Chamber can ask is for Prosecution to refrain, to do whatever effort
23 they can make, pending the decision of the Chamber which will be issued most probably
24 after, immediately after four days. I am sorry to say, but this is the decision of the
25 Chamber.

1 MR KHAN: Your Honour, I am grateful but for the sake of clarity, there is no magic in
2 four days. It must, to be rational, be until such further order from the Trial Chamber.
3 Your Honours, you have to adjudicate whatever is filed, so to be logical --

4 PRESIDING JUDGE OZAKI: Yes, of course.

5 MR KHAN: -- and to have utility, it can't be four days. It must be until further judicial
6 order.

7 PRESIDING JUDGE OZAKI: Oh, yes, yes, that's right.

8 MR KHAN: I am grateful.

9 PRESIDING JUDGE OZAKI: Yes. So written submissions and response from the
10 Prosecution and, after that, the Bench will issue an order and pending that order the
11 Prosecution will do whatever they can do.

12 The related matter, I just wonder, having listened to so many problems of this contact,
13 maybe the Chamber should bring forward the dead-line to the parties to confer on the
14 protocol. I think we said 4 July. Maybe we should change it, instead of 4 July within
15 ten days? Is it reasonable for both parties?

16 MR KAY: I think so, your Honour.

17 PRESIDING JUDGE OZAKI: Prosecution?

18 MS ADEBOYEJO: That would be -- that would be agreeable to us, your Honours.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 MR KHAN: Madam President, can I also request that the Chamber order that both
21 parties make submissions on the protocol that should apply to this issue of contacting
22 witnesses of the other side within 48 hours? It's a wider issue as well.

23 PRESIDING JUDGE OZAKI: Well, the order of the Chamber is, first, to confer, the
24 parties to confer with each other and then come back to the Chamber for this protocol
25 issue, together with Registry.

1 MR ANYA: Madam President, I understood you when you spoke initially to include the
2 victims in this consultation? Thank you.

3 PRESIDING JUDGE OZAKI: Yes, of course. Thank you for reminding me.
4 Now, I hope it brings to the end of this status conference.

5 MR KHAN: Madam President, just two matters: We do -- you haven't addressed the
6 submissions regarding a site visit. To emphasise we do say that is very important in this
7 case.

8 The second matter is the issue of venue and we do ask the Bench to consider inviting the
9 Republic of Kenya to make submissions about the possibility of holding this trial either in
10 Kenya or alternatively in Arusha for all the reasons that are advanced in our written
11 filings.

12 PRESIDING JUDGE OZAKI: Yes, I am sorry, Mr Khan. The tape is -- there is only one
13 minute left for the tape.

14 We are quite aware of those submissions of both Defence teams but the -- and the
15 Chamber takes note of all those submissions. However, at this moment it is not the
16 Chamber to make a decision, and at appropriate timing, I hope that the Court will come
17 back to this issue.

18 Thank you very much for parties and participants, for very productive status conference.
19 This meeting is adjourned.

20 Thank you.

21 THE COURT USHER: All rise.

22 (The hearing ends in open session at 4.28 p.m.)