

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Kuniko Ozaki, Judge Robert Fremr and
7 Judge Chile Eboe-Osuji
8 Status Conference
9 Wednesday, 15 May 2013
10 (The status conference starts in open session at 11.06 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 afternoon, parties and participants.
15 Can counsel please introduce themselves for the record, starting with Prosecution?
16 MS TAI: Good morning, Madam President, your Honours. My name is Cynthia Tai
17 and I am again representing the Prosecution today, along with Lucio Garcia, Anton
18 Steynberg, Lara Renton and Jasmina Suljanovic.
19 PRESIDING JUDGE OZAKI: Thank you.
20 Defence team, please?
21 MR KHAN: May it please your Honours, Madam President, Mr Ruto is represented by:
22 David Hooper of Queen's Counsel; Shyamala Alagendra, to my left, of Counsel; Judy
23 Mionki, our case manager; and then at the back Ines Rubio and Shalini Jayaraj, who are
24 trial support. Your Honours, my name is Karim Khan.
25 PRESIDING JUDGE OZAKI: Thank you.

1 MR KIGEN-KATWA: Your Honours, Mr Joshua Sang present in court is represented by:
2 Silas Chekera; Logan Hambrick, legal assistant; and myself, Katwa Kigen.

3 PRESIDING JUDGE OZAKI: Thank you.

4 Legal representative of victims?

5 MR NARANTSETSEG: Good morning, Madam President, your Honours. My name is
6 Orchlon Narantsetseg, legal officer at the OPCV. Today I am appearing on behalf of
7 Mr Wilfred Nderitu, who is the Common Legal Representative of the Victims. I am
8 today accompanied by Tamara Margitic, who is the case manager at the OPCV. Thank
9 you.

10 PRESIDING JUDGE OZAKI: Thank you.

11 This status conference is being held in order to continue and complete the hearing of the
12 submissions by parties and participants which started yesterday.

13 This status conference is strictly limited to two hours, and first of all I would like to give
14 the floor to OTP to continue and complete its submission under agenda item A to C.

15 Will it be Mr Garcia to take the floor?

16 MR GARCIA: Yes, good morning, your Honours.

17 So basically I'm mindful of the time, I'm mindful of the fact that we only have two hours
18 and, as I promised yesterday, I don't intend on taking much time, five to ten minutes, and
19 I'm going to be -- I will be quite brief. I was actually ending my pleading yesterday.

20 When we left off yesterday, we were speaking - I was speaking, actually - about the first
21 Regulation 35 that the Prosecution submitted, and essentially I was speaking -- I had
22 already spoken about the two witnesses that the Defence has already had notice about in
23 the past, albeit in redacted form, and I was about to speak about the three new witnesses.
24 Those are witnesses 571, 572 and 564.

25 Essentially, the Prosecution is relying for the most part on the submissions that have

1 already been filed with the Chamber. I don't think it's necessary to repeat much of those
2 submissions. However, two things which in my opinion should be mentioned at this
3 point. I think that what is most concerning the Defence - and the Defence will correct me
4 if I am wrong - in this case is the questions of prejudice.

5 What I can say about these three new witnesses is that their anticipated testimony - the
6 evidence that they will be giving before this Court - it falls squarely within the case theory
7 of the Prosecution; the same case theory that's been developed since the inception of this
8 case and that is also in the pre-trial brief.

9 The case will not be mutated, it will be not -- it will not be changed either, so it's the same
10 case theory of the Prosecution which will allow the Defence obviously to investigate the
11 matters and should not pose difficulty for them.

12 The second matter which is also of importance on this whole question of prejudice is the
13 fact that I think that the Chamber needs to take into consideration the stage that we find
14 ourselves in. This is not the case - and I think that the Defence will readily acknowledge
15 this - that the prejudice is much lesser when you find yourself at the preliminary stage
16 when the trial proper hasn't started, as opposed to when the trial has already started and
17 the Prosecution has already started tendering evidence and the Defence has already
18 started out its cross-examination.

19 We are at the stage where the trial proper has not started, the Prosecution has not
20 tendered any evidence yet and no cross-examinations have been effectuated. So in this
21 case the prejudice is simply limited to this question of preparation time, and I submit
22 respectfully for the Prosecution that in such a case the appropriate remedy, or the
23 appropriate relief, is to grant the Defence the time that it feels necessary to investigate
24 these new witnesses and to undergo all these appropriate investigations that they see fit.
25 So those are basically my last remarks on these questions of the Regulation 35.

1 Essentially what the Prosecution is submitting is that the addition of these five new
2 witnesses, should the Chamber so decide, will not cause undue prejudice to the Defence
3 and, if there is any type of prejudice, it's a simple prejudice of a question of preparation
4 which can be remedied through the Chamber granting the Defence a certain amount of
5 time to investigate these new witnesses.

6 So, respectfully submitted, those are the submissions of the Prosecution regarding the
7 three Regulation 35 submissions.

8 Thank you.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 Now, I would like to give the floor to -- Judge Eboe-Osuji?

11 JUDGE EBOE-OSUJI: Mr Garcia, on the last point you've made, it engages one question I
12 had or, rather, comment for your side. Yesterday, when Ms Tai spoke, she urged that a
13 firm date be fixed so that there will be certainty for everyone. It's all well and good to
14 say that, but when one measures it against your last submission, you see a certain need for
15 adjustment of things. If, for instance, a date has been set, a fixed date had been set, and
16 as we approach that date the Prosecution seeks to have more witnesses added and then
17 calls them critical witnesses, we then see the result of this consistent, Mr Garcia, with your
18 last submission, it may well be that the date may be adjusted to accommodate the Defence
19 to investigate new allegations. So when we make suggestions as in let's fix the date, keep
20 it firm, the Prosecution suddenly has a big role to play in making that happen.

21 The fact that a Prosecution may have the right or a need to make a certain request also
22 carries with it the counter-fact of the Defence requesting for that to be taken into account
23 in order to adjust the time. So I thought I'd make this point so that we all work towards
24 this firm date being set. You don't need to respond to it. I thought I would just observe
25 it. Thank you.

1 PRESIDING JUDGE OZAKI: Do you want to respond, Ms Tai, or shall we -- Mr Garcia.

2 MR GARCIA: Yes. What I can say for the Prosecution is that the Prosecution is
3 extremely mindful of the fact that we can't obviously come at any time and try and
4 introduce new witnesses. However, we would just like to impress upon the Chamber,
5 and this has honesty come through in our submissions, that these are exceptional
6 circumstances that have led us to prompt investigations, to investigate further and find
7 witnesses that could either substitute for the witnesses for which there are some problems
8 or supplement the Prosecution's theory, case theory, in its case. So we are mindful of the
9 fact that the case must start at one point, obviously, and we must be efficient in that sense,
10 and we're keeping that in mind for the future.

11 PRESIDING JUDGE OZAKI: Judge Fremr.

12 JUDGE FREMR: Thank you for the floor. I have questions both for the OTP and
13 Common Legal Representative. I would like to touch on the issue of submission
14 pursuant to Article 63(1) made by the Defence for Mr Ruto. In your responses to that
15 submission, you have highlighted a need for integrity of proceedings. My question is:
16 Would you consider even partial absence of the accused as a significant harm to the
17 integrity of proceedings?

18 MS TAI: If I may. To answer the question pointedly, your Honour, yes, we would
19 object to any partial absence of Mr Ruto throughout the trial proceeding. To elaborate,
20 we first look at Article 63, which uses the words "shall be present," and we believe that's
21 the plain reading, that's the intention, and that should be adhered to.
22 Even if you look beyond Article 63 and take a step back, looking at the Statute holistically,
23 if you will, you can see that waiver or partial absence, if your Honour sees fit, was
24 provided for at an earlier stage, that being the confirmation stage. It's expressly
25 provided there. He can waive, he cannot be present for the parts that he chooses, but

1 that isn't the case here. We're at a later stage. We've already had the Article 58
2 application. There was judicial review of that. We've moved on. We had the
3 Document Containing the Charges and we've had a full-fledged confirmation hearing,
4 airing the Prosecution's evidence, and Mr Ruto himself had the opportunity to bring
5 witnesses forward, and he did.

6 After hearing all of that, the Pre-Trial Chamber confirmed the charges and we've moved
7 on to the trial stage, which requires his presence in total. We believe that any erosion or
8 exception flies in the face of the plain wording of Article 63, and equally as important, the
9 spirit of the Statute, which is to have dignity to these proceedings, to honour the
10 proceedings, to honour the victims, and assure the public and all of the participants that
11 this is not a show trial. This is -- this is a trial with depth, it has meaning and it counts.
12 I hope that answers your question, your Honour.

13 JUDGE FREMR: Thank you.

14 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

15 JUDGE EBOE-OSUJI: Ms Tai, that raises some questions also from me, related to that. I
16 noticed, for instance, that in -- and that's consistent with your response, I believe it's
17 paragraph 11 of your written response, you said that to grant the relief urged, we'll need
18 to, quote, "or will have" unquote, "extremely negative impact on how the Court is
19 perceived."

20 What I'd like to know is how it can be that this extremely negative impact would occur if
21 this relief is granted for purposes of trial, when the Statute itself expressly recognises such
22 a relief for confirmation hearings. Would that sort of express recognition also not have
23 led to extremely negative impact on how the Court is perceived? Can you reconcile why
24 one and not the other? And I may well have other questions.

25 MS TAI: Yes, your Honour, that's a fair point. In the Prosecution's view, the stages are

1 entirely different, and the Statute is very clear with respect to both stages. With respect
2 to the confirmation hearing, the Article 61 proceeding, you can read it, and it says that the
3 presence can be waived.

4 JUDGE EBOE-OSUJI: One second, so that we have a direct discussion. I understand
5 where you are going with that. You are saying the Statute says one thing. We will
6 discuss that, what the Statute says and what it means. Right now I'm only interested in
7 the idea of extremely negative impact on how the Court is perceived. One would ask,
8 okay, why is that a legal argument to begin with? But question number 2 would be:
9 How can it be that that extremely negative impact does not occur when absence happens
10 at the confirmation stage, but must necessarily be the case if such a thing also happens at
11 the trial stage? "Extremely negative impact," let's now not talk about what is the precise
12 wording of the Statute, but we will discuss that later.

13 MS TAI: Your Honour, simply put, the stakes are quite different, we believe, at
14 confirmation versus trial.

15 At trial, the expectation is that the accused is present. If he is not present, the impact or
16 the extremely negative impact in this position would be as to the victims and to the
17 witnesses. If I can expand on that more, it would specifically be the victims need to have
18 assurances, again, that this process is a serious process, that these are serious allegations,
19 and that we all are hearing what they have to say and considering their input.

20 With respect to the issue of just witnesses, your Honour, they themselves, like it or not,
21 are presumed to have to come here and to give their testimony orally, even if it's
22 uncomfortable for them, and it would impact their willingness to appear.

23 Moreover, I think, looking beyond these proceedings, one can see that the extremely
24 negative impact is not limited to this case only but extends onward to any other case.

25 And what I mean by that is that if a special exemption, if you will, is granted to Mr Ruto,

1 based essentially on his busy life and his rank, then what precludes any other accused, in
2 later trials, from making that same submission? What makes him different? And we
3 believe that that also should be considered.

4 Thank you.

5 JUDGE EBOE-OSUJI: But that presumes that granting the indulgence is based merely on
6 rank, rather than something else?

7 MS TAI: It would return, your Honour, to what is expressly stated in the Statute. I
8 know your Honour does not want to hear about the Statute right now, but it really
9 goes -- boils down to the plain letter of Article 63 as well as, stepping back, a more holistic
10 view of the architecture of the Rome Statute, where waiver is expressly called for or
11 allowed during the confirmation stage, and that right is not waivable at trial.

12 JUDGE EBOE-OSUJI: Now we come to the language of the Statute. You say it says,
13 "Accused shall be present during the trial." I take it the emphasis is on the word "shall."
14 Does that -- I notice -- I back up now. In your submissions in writing, you do say that
15 that imposes a duty. My question now is: Does that impose a duty on the accused
16 alone, or a duty on the accused and on the Court?

17 MS TAI: Thank you. If I understand your question correctly, the answer would be that
18 it is a two-fold duty, if you can call it that, the right of the accused and the duty of the
19 Chamber to ensure his presence, so it's both.

20 JUDGE EBOE-OSUJI: But then you say we have to look at the plain words of the Statute,
21 and if you read that provision, it says, "The accused shall be present." So the subject of
22 the sentence is "the accused" and the predicate is "shall be present." And you say that
23 despite the absence of express mention of the Chamber or the Court in that sentence, that
24 it still does impose a duty on the Chamber. How is that so?

25 MS TAI: Again, your Honour, stepping back and looking at the architecture of the

1 Statute, your Honours have the responsibility or the duty, if you will, of ensuring the
2 integrity of the proceedings, and part of that, although not expressly stated in Article 63,
3 requires the accused to be present. So that's where that comes from.

4 JUDGE EBOE-OSUJI: Looking, taking, as you say, a holistic look at the Statute, if we
5 now read Article 63(1) in the way you read it, or the way you now advocate as imposing a
6 duty on the Court to require the accused to be present, does that mean that in this Court,
7 if an accused who was once present absconds later, that the trial may not proceed? Is
8 that what you're suggesting?

9 MS TAI: Your Honour, we don't believe that that's the case here. That would be
10 speculative, of course. It's looking into the future. We don't believe that the Statute
11 contemplates the trial proceeding without the defendants' presence, as stated in Article 63,
12 or in 2, the exception that applies there.

13 JUDGE EBOE-OSUJI: Let me understand you when you say you don't believe that to be
14 the case. So you're saying that when an accused who was once present absconds, it
15 inevitably follows that the trial has to stop?

16 MS TAI: That's correct, your Honour. We believe that it would be up to the Chamber
17 at that point -- let's say somebody appears at an earlier stage and then leaves, then the
18 question would fall back on the Chamber to decide what remedy is appropriate at that
19 particular point, one of which would be to issue an arrest warrant for that particular
20 person and have him brought before your Honours, in which case the proceeding would
21 stop.

22 JUDGE EBOE-OSUJI: Again, taking a holistic look at the whole Statute, and that
23 includes the preamble of the Statute and the stated purpose of confronting impunity, does
24 that reading you give Article 63(1) -- is it consistent with that purpose of confronting
25 impunity if the trial must stop when an accused person who was once present absconds

1 later? That will be my last question on that run.

2 MS TAI: I think the answer, your Honour, lies as you stated in confronting impunity,
3 and we believe that part of that is following the Statute of course, that's our governing
4 instrument, and having a fair trial.

5 Here, where the Defence -- the accused can be present and merely wishes not to be, we
6 don't think that that's a reason for stopping the trial, if that's what you're getting at?

7 If it's the hypothetical about if somebody absconds, again I would return your Honour to
8 the remedies that your Honours can impose which include warrant of arrest, or other
9 measures as you deem fit.

10 JUDGE EBOE-OSUJI: I promised not to stop that run of question, but I've got the
11 indulgence of the Presiding Judge to return to one more matter that you raised in your
12 answers.

13 You invoked the interest I believe, or did you say "right", of victims to see the accused
14 persons in court and of witnesses? The witnesses first and then we'll talk about the
15 victims later. When witnesses come to testify in court, are they coming to tell the Judges
16 what they perceived, or are they coming to talk to the accused person?

17 And the second question, and I'll let you deal with them as you may, is the Defence are
18 saying - and I believe they rely on Article 66 of the Statute to say this - that their client has
19 a specifically provided for right of presumption of innocence, Article 66 of the Statute, and
20 they are saying that their request is a necessary incidence of that right and so it is a
21 specific right that they plead.

22 Now, necessarily they set up for you the task of pointing to another specific right that
23 should neutralise this right to innocence that the accused has, an incidence of which is
24 what the Defence is requesting in their prayer.

25 The point is: Is there any specific right you can point to in the Statute that somebody else

1 has that compels the outcome that the Defence, or the accused, must be in trial at all times?

2 A matter of right, not just mere wording of what 63(1) says?

3 MS TAI: Regarding the accused's argument on the presumption of innocence, and
4 linking that to the requirement that he appear before the Court at trial, we don't believe
5 that those are the same or incompatible.

6 Nobody is saying that because the accused has to be present at trial that there's any other
7 presumption. We're not saying that the presumption shifts, or is in any way connected.
8 They are simply two separate concepts.

9 JUDGE EBOE-OSUJI: But it shifts if you have to require somebody who is enjoying
10 presumption of innocence to tell them to be somewhere miles away where they cannot
11 perform their functions?

12 MS TAI: Your Honour, yes, it's a consequence. The requirement of the accused to
13 appear in court at trial is a consequence simply of the process.

14 As my earlier submission noted, this isn't a -- this is a staged proceeding. It's not a
15 requirement that was imposed on anybody at the inception of the proceedings. We're at
16 pretty much the ultimate stage of a long proceedings, with a series of judicial checks.

17 As I stated, we had a confirmation hearing. Mr Ruto presented witnesses - live
18 witnesses - we heard the evidence and there was a finding on that particular point. We
19 have now moved on and there is a different requirement for this portion of the
20 proceeding.

21 And, your Honour, we note that we have established that there is sufficient evidence.

22 We've met that burden at confirmation and that is the shift if you like, if I may.

23 PRESIDING JUDGE OZAKI: Ms Tai, just a small follow-up question from myself.

24 When you talk about integrity of proceedings, apart from a letter of the Article concerned,
25 when you talk about integrity of proceedings you mentioned the victims' point of view

1 and also public who are viewing the proceedings.

2 Is there anything else, or is that all what you mean by integrity of proceedings?

3 MS TAI: I don't think that the Prosecution, your Honour, are saying that those are the
4 only interests at play. What we believe is that you have to look at international justice as
5 a whole. We have to look at the respect that everyone has, not only the public, let's say
6 the participants, including the parties, have for the proceedings, how we conduct
7 ourselves, the entire process, and everyone's opportunity to participate in a meaningful
8 way. So, no, it's not limited to only those two things.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 Now I'd like to give the floor to OPCV in order to make any submissions, if any, under
11 agenda item 1, 2, 3 and also to respond to the questions posed by Judge Fremr.

12 MR NARANTSETSEG: Thank you, Madam President, your Honours.

13 Mr Nderitu sent us his instructions yesterday and asked me to make his submissions on
14 his behalf.

15 With your leave, your Honours, I would like to proceed in the following manner. First I
16 would like to make a few general observations, as requested by the Common Legal
17 Representative, and secondly I will make the Common Legal Representative's submission
18 on the specific issues stipulated in the agenda of today's hearing.

19 Regarding the specific questions you asked, your Honours, I would propose the following:
20 I will make the submissions sent by the Common Legal Representative first and, if your
21 Honours still believe that the further submissions are necessary, I will contact Mr Nderitu
22 and convey your instructions and ask him to specifically address those questions you
23 have raised this morning.

24 PRESIDING JUDGE OZAKI: Please proceed.

25 MR NARANTSETSEG: Preliminary observations: As a preliminary point, as referred

1 in the Common Legal Representative's response to the second Defence request to vacate
2 the trial commencement date, the Common Legal Representative wishes to inform the
3 Chamber that unfortunately he hadn't been fully and on a timely basis apprised of the
4 facts in contention between the parties regarding the late disclosure by the Prosecution
5 and the Prosecution's request to add new witnesses and evidence. This is unfortunately
6 due to non-notification and late notification by the parties.

7 Of the sum of the filings related to these issues, consequently the legal representative has
8 been unable to appreciate the full impact that these matters may have on the oral conduct
9 of these proceedings. In particular the Common Legal Representative is unable to make
10 detailed and substantive submissions on these issues, especially on the effect it may have
11 on the determination of the start date of the trial and the accused person's fair trial rights.
12 However, these issues remain relevant to the personal interests of the victims and they
13 will definitely have impact on the expeditiousness of the proceedings.

14 To conclude, your Honours, we were going to ask from your Honourable Chamber an
15 order instructing the parties to notify us any filings affecting personal interests of the
16 victims, but however yesterday, with your oral decision, you have already addressed this
17 issue and removed the tremendous obstacle that we are facing. Therefore we wish to
18 express our gratitude and thank you, your Honours, for taking the initiative and promptly
19 solving this problem.

20 Now, your Honours, I will move on to the Common Legal Representative's submissions
21 on the specific agenda items A, B, C and D.

22 A: Prosecution's request to add new witnesses in evidence.

23 The Common Legal Representative submits that a full inquiry into the truth, as well as
24 interests of justice for the victims, will be served through addition of new Prosecution
25 witnesses and evidence.

1 We take note of the fact that some Prosecution witnesses have dropped out of the case and,
2 since they are no longer willing to testify, we believe that this is inimical to the
3 ascertainment of the truth and will adversely affect the interests of the victims.

4 Accordingly, the Common Legal Representative submits that the Trial Chamber should
5 allow the addition of new Prosecution witnesses and evidence without prejudice to its
6 duty to ensure a fair and expeditious trial. Indeed, victims are concerned that delay in
7 the commencement of the trial may adversely affect the effective participation of the
8 victims and their personal interests.

9 Therefore the Common Legal Representative wishes to stress the fact that repeated delays
10 do cause injustice to the victims, who expect among others an expeditious conduct of this
11 trial. Thus, the Trial Chamber should strike a delicate balance between these competing
12 interests.

13 Your Honours, this concludes our submission on agenda item A, so we would move on to
14 the next issue: The Prosecution's disclosure.

15 The Common Legal Representative recognises the fact that the Chamber has a duty to
16 ensure that Defence has adequate time and facilities for preparation of its case. However,
17 this must go hand-in-hand with an obligation to ensure the trial is fair and expeditious.
18 However -- moreover the trial must pay due regard to the right of the victims, in
19 particular their right to effective participation in the proceedings.

20 That said, we recognise the importance of disclosure process as provided in the Statute
21 and Rules and Regulations of the Court for ensuring full inquiry into the truth.

22 Therefore, we believe that this requires striking a delicate balance on the part of the
23 Chamber when it determines the new trial commencement date, while having regard to
24 specific reasons which occasioned late disclosure on the part of the Prosecution and other
25 relevant considerations.

1 Your Honours, this concludes our submission on agenda item B. Now I would move on
2 to the next issue, which is the last issue we will address.

3 C: Date of the trial and related issues including Defence request pursuant to Article 63(1)
4 of the Rome Statute:

5 The Common Legal Representative considers that physical presence of the accused person
6 in the courtroom during trial is not a right but it's an obligation and the constant practice
7 that is well-established in the international criminal proceedings. In this regard, we
8 reiterate our submission on the Defence request pursuant to Article 63(1) of the Rome
9 Statute that the Common Legal Representative filed on 22 April 2013. Therefore, we
10 reiterate that such presence of accused person at trial is not a functional expression of the
11 accused's fair trial right as argued by the Defence.

12 Indeed, we recognise that some jurisprudence of this Court and other international
13 tribunals indicate that accused person may be allowed not to be physically present in the
14 courtroom under certain circumstances. However, we stress the fact that this is an
15 extraordinary procedure that has been only applied on exceptional basis and only for
16 extremely short period of time. I quote: "Such duration as is strictly required," to use
17 the express language of Article 63(2) of the Statute. Therefore, firstly, the accused person
18 would have to demonstrate to the Court the existence of an exceptional circumstance
19 justifying an application which would seek such an extraordinary measure and, secondly,
20 even when that onus is discharged, permission to be physically absent during the trial
21 would have to be granted only for a limited period of time, in order to ensure that there
22 would be no adverse consequences on the integrity of the proceedings.

23 These adverse consequences we refer may range from negative impacts on the accused
24 person's own fair trial rights to negative effects on the personal interests of the victims.
25 This may give rise to certain perceptions by the public which might undermine the

1 Court's legitimacy and they also may create a precedent which has to be followed in the
2 other cases before this Court. Moreover, we believe that there is a real risk that
3 evidentiary value of the witness testimonies given in this courtroom might be diminished
4 to the minimum and Court's authority over the accused persons such -- as persons subject
5 to Court's jurisdiction might be challenged and questioned and undermined.

6 Therefore, it's the Common Legal Representative's submission the Court should bear this
7 in mind when deciding to grant the Defence request. We wish to recall that a criminal
8 trial in absence of the accused person, just like their participation in the proceedings via
9 video link, is a concept that is unknown in traditional model of international criminal
10 proceedings and national proceedings, in particular in Kenya, where most of the victims
11 participating in this case live and reside. Therefore, allowing the accused person to be
12 absent from the courtroom or having him participate in the proceedings via video link
13 will spell the death knell of the essence of criminal process.

14 Your Honours, this concludes our submission on agenda item C. Your Honours, with
15 your leave, I would briefly conclude our submission.

16 Legal representative wishes to point out the fact that all items put on today's agenda will
17 significantly impact on the determination of the start date of the trial. Therefore,
18 Common Legal Representative prays that the Trial Chamber should strike a delicate
19 balance and keep the intervening period before the new trial commencement date to the
20 absolute minimum.

21 Common Legal Representative wishes to reiterate the fact that any delay to the start date
22 of the trial may adversely affect and impact effective participation of victims and their
23 personal interest in the case.

24 This concludes our submissions. And lastly, your Honours, we wish to thank you again
25 for ordering the parties to make notification of their relevant filings affecting the personal

1 interests of the victims to the OPCV and the Common Legal Representative on a timely
2 basis. Thank you, your Honour.

3 PRESIDING JUDGE OZAKI: Thank you.

4 Now I would like to ask Defence teams if there is any submissions in response to
5 submissions by OTP and Common Legal Representative?

6 Mr Kigen-Katwa.

7 MR KIGEN-KATWA: Madam President and your Honours, I would like to clarify the
8 position of my client in relation to the motion and Article 63. My client instructs me to
9 clarify and make it clear to the Court that he intends to attend the Court. He appreciates
10 it is a right given to him and he intends to exercise it by being present throughout the trial.
11 Thank you, Madam President and your Honours.

12 PRESIDING JUDGE OZAKI: Thank you. Mr Khan.

13 MR KHAN: Madam President your Honours, I'm most grateful.

14 I must say at the outset I'm rather astounded by some of the submissions by the
15 Prosecution. I have had the extreme privilege and, in fact, pleasure of being albeit a very
16 junior Prosecutor in the ICTY and the ICTR, as well as a prosecutor in England and Wales,
17 and certainly I would balk at the suggestion that the criminal process could be held to
18 ransom by an accused who simply absconds. Imagine the situation, and it was put very
19 properly by his Honour -- His Honour -- imagine a situation that just before closing
20 speeches --

21 JUDGE EBOE-OSUJI: To make it easier for counsel - I know the double-barreled name
22 can be a problem - you can use the last part of it, if it makes it easier for you.

23 MR KHAN: No, Eboe-Osuji, your Honour, it has no problems at all. I'm grateful. I'm
24 grateful.

25 But, your Honours, imagine the situation that, just before closing speeches, all these

1 gallant victims, many witnesses on both sides, have come and given evidence, and an
2 accused does a runner, as we say, absconds, particularly to a country like Sudan, for
3 example, not a State Party. The writ of the Court cannot extend. I don't believe for a
4 moment that the Prosecutor in those circumstances would say, "Fine, let justice be
5 delayed." I'm sure what the Prosecutor would say in such circumstances is the opposite,
6 "Justice delayed is justice denied."

7 My learned friend, Ms Tai's submission is an expedient and opportunist response. It
8 doesn't withstand the barest scrutiny. And even as defence counsel, I wouldn't in those
9 circumstances advocate that an accused, even a client, could somehow hold the process of
10 justice to ransom. It's devoid of substance in totality.

11 My learned friend says, Ms Tai, "Oh, the victims come to the Court and so an accused
12 should come to Court." Well, your Honour, there is no victim in this Court. The
13 victims are here through the legal representatives. They are participating in these
14 proceedings through the legal representatives. The same principle is what is requested
15 in the present circumstances. The third point, of course, it's manifest that Mr Ruto is not
16 here today. Your Honours, with the consent of the Bench, he returned to his duties in
17 Kenya, but somehow has -- is this a sham today? Is this a fiction? Is it a mirage, and is
18 it ineffective? The very fact that we are dealing with substantive issues of law shows that
19 it is not.

20 Your Honour, the other point is this, and his Honour, Judge Eboe-Osuji, hit the nail on the
21 head. Hit the nail on the head. Fairness starts from the beginning of the process to the
22 end of the process. Whilst there is -- of course, there is a clear statutory provision that
23 allows -- explicitly says that an accused need not be present at confirmation. Is it simply
24 the few words, the express provision, the existence or the absence of an express provision,
25 that renders a process fair or unfair?

1 Of course not. The rights of the victims, in the circumstances, the rights of an accused,
2 were absolutely protected in the case of Banda and Jerbo when they didn't turn up before
3 the Court, and the process was fair.

4 Your Honours, there's been reference to Kenyan law, but your Honours, in our filing, and
5 I will just read a section again, "The principles and guide-lines on the right to a fair trial
6 and legal assistance in Africa prepared by the African Human Rights Commission in 2001,
7 point N(6)(c)(3) states very clearly, "The accused may voluntarily waive the right to
8 appear at a hearing, but such a waiver shall be established in an unequivocal manner and
9 preferably in writing." We have said, of course, it's a right. It's a right, of course; it may
10 not be unqualified but it's a right. The Bench must decide whether or not in the
11 circumstances that granting the motion would somehow render the proceedings unfair or
12 not. And contrary to the submissions put forward both by the legal representatives of
13 the victims and by the Prosecution, there's no empirical evidence whatsoever that
14 somehow proceeding in the circumstances would be -- would bring the proceedings into
15 disrepute, the perception argument. It's a nonsense. The converse is the case. The
16 converse is the case.

17 This Court is here to establish the principle that the law is above -- the King is under no
18 man but God and the law, as it was said in antiquity in England in the Magna Carta. The
19 King is under no man but God and the law. No leader is above the law. Everybody is
20 answerable to these legal principles. And in this case, Mr Ruto has not just talked the
21 talk, but he's walked the walk and lived up to that fundamental requisite of justice and,
22 your Honours, that's why we also said that, going forward, if this Court is to be viable, if
23 it is to protect, if its humanitarian purpose is to be extended as the drafters wanted it to be
24 extended, having such leaders in senior positions have confidence to come before this
25 Court and balance, as your Honour said, Judge Eboe-Osuji, in relation to balancing the

1 requirements of compliance with the Court orders and statutory obligations, that
2 encouragement, facilitation of the rule of law, can only be a positive thing.

3 As I said, it's the first time in history, to the best of my knowledge, that any serving Head
4 of State or Deputy Head of State has voluntarily come. It is an important matter.

5 Let's go to the statutory interpretation.

6 PRESIDING JUDGE OZAKI: Mr Khan, let me remind you that you don't need to repeat
7 your written submissions, which the Bench already read. Thank you.

8 MR KHAN: I'm grateful.

9 Your Honours, let me go to the statutory interpretation point. And I'll give some quote
10 in a moment of Judge Shahabuddeen, which is to run contrary to the mere assertion of
11 "Dura lex sed lex," you know, "The law is harsh and therefore you live with it." That's
12 really the submission of the Prosecution, that that's the law. It says "shall."

13 Well, let's deal with it from a position of statutory interpretation for a moment.

14 Article 63(1) says an accused shall be present during the trial, and the legal representatives
15 say, well, Article 63(2) provides the only definitive exception, that an accused -- a trial can
16 continue if an accused disrupts. But there's a general principle that every word in a
17 Statute has a purpose. If the presumption was that in every single circumstance a trial
18 can only proceed if an accused is physically present at all times, it's my respectful
19 submission that the words "being present before the Court" in Article 63(2) would be
20 redundant because it was very clearly open, if that was the right interpretation, for the
21 drafters of the Statute to write - let me amend it - to write, "If the accused continues to
22 disrupt the trial, the trial may -- he may be removed and the trial continues." Why is the
23 insertion "being present before the Court"?

24 Your Honours, I don't say it's clear-cut, as the victims' representative will say. In fact,
25 that is a nod to the possibility that a trial could continue effectively and fairly when an

1 accused is not physically present before the Court but is otherwise represented through
2 counsel, and that's how the Bemba case proceeded, and we've listed, of course, a lot of
3 other authorities domestically and from the ICTY as well in our written submissions, and I
4 won't repeat them here.

5 Your Honours, let me go now to some other statutory provisions. Of course, we all
6 know --

7 JUDGE EBOE-OSUJI: Mr Khan, before you proceed, may I put some questions at this
8 stage? You raised the matter of waiver in your submissions just now, and you invoke it
9 quite extensively in your written paper filed on 17 April 2013, filing number 685.

10 Now, a waiver, as we use it in the law, means uncompelled or voluntary abandonment of
11 a legal right, claim or privilege, but you say at paragraph 10 -- and I need you to help me
12 understand what you're saying here. At paragraph 10 of your written paper, quote,
13 "Mr Ruto does not seek the grant - the grant - of a blanket waiver, but undertakes to
14 attend the opening and closing of trial, judgment and all other hearings as directed by the
15 Trial Chamber."

16 When you say, "Mr Ruto does not seek the grant of a blanket waiver," I want to
17 understand whether you are holding back some reservations as to this idea of voluntary
18 abandonment of legal right, claim or privileges?

19 MR KHAN: Yes, I'm grateful, your Honour. It's a very important question.

20 Your Honour, really that was there to show good faith of Mr Ruto and to show that he is
21 willing to comply with all orders of the Court, and this was actually also anticipated.

22 These are very important stages of the proceedings in which, you know, he would be -- he
23 would want to come and, your Honours, also any other time he's required he would come
24 as well.

25 JUDGE EBOE-OSUJI: So the word "waiver" in that context was wrong? What you

1 meant to say was "blanket excusal"?

2 MR KHAN: Yes.

3 JUDGE EBOE-OSUJI: Ah.

4 MR KHAN: Your Honour, that would be far more felicitously drafted if I had done that.

5 JUDGE EBOE-OSUJI: Does it then mean that your client -- if this relief is granted, that

6 your client basically waives in the proper sense of the word "waiver" all legal rights,

7 claims or advantages that might flow from presence during the trial?

8 MR KHAN: That may flow from physical presence, but of course he is not abandoning

9 the right for a moment to participate in proceedings and be properly represented through
10 counsel.

11 Your Honours, perhaps it may help additionally clarify. There's always some academic
12 discussion about rights and waiver of rights and can rights be waived to the point where a
13 process becomes unfair?

14 Your Honours, of course, are the ultimate guardians of ensuring the trial is fair, and in
15 these present circumstances we say the balance put forward strikes the right balance when
16 all the interests in fact of everybody are properly catered for. That's why we put the
17 main relief in the terms that we did but, your Honours, in relation to paragraph 10
18 absolutely it would have been better, more felicitously and more accurately drafted if I
19 had done it as your Honour now advises.

20 JUDGE EBOE-OSUJI: I wasn't advising. I was asking you what you meant to convey.

21 Again, when you say in academic discussions questions about whether waiver could be
22 waived or rights could be waived to the point where a trial becomes unfair, does that then
23 mean there is equivocation about waiver now?

24 MR KHAN: No, not a bit of it. We -- as I said, your Honours, we have considered this
25 carefully. This strikes the right balance. It's fully in keeping with our primary duty to

1 effectively represent Mr Ruto. It has been an informed decision by Mr Ruto, he will sign
2 the necessary formal documents of waiver whenever required and it doesn't hamper in
3 the least the proper administration of justice.

4 Your Honour mentioned the presumption of innocence and it's an important one. This is
5 a right to be present, not a punishment to be in detention almost, and your Honours for
6 the reasons we stated in our motion we say it's absolutely justified and will enhance rather
7 than diminish the proper administration of justice.

8 Your Honour, unless you've got additional questions, perhaps some matters of
9 interpretation?

10 JUDGE EBOE-OSUJI: I do. I do in fact and on this particular matter. For example, I
11 mean let's contemplate some practical matters to deal with in the courtroom and now the
12 dispensation you are seeking becomes implicated.

13 Let's say a witness is testifying. Are you going to at some point quarrel that the witness
14 while testifying had not identified your client in terms of a dock identification?

15 MR KHAN: Your Honour, no. That I can undertake will not be -- will never be raised.

16 JUDGE EBOE-OSUJI: The alternative prayer you seek also gets implicated, and that is
17 the prayer of -- your first prayer is to be relieved of a constant presence in the courtroom
18 and your alternative prayer if that fails is the video link prayer, so that is the alternative
19 prayer, and you make that alternative request as well.

20 It also raises questions of waiver of its own. We live in a world where these things
21 depend on technology and their imperfections. Waiver will also contemplate that there
22 will be no quarrel later that, because of video link technology or its failings, your client
23 was not able to follow, or do something or other? Is that the case?

24 MR KHAN: Your Honour, it is.

25 JUDGE EBOE-OSUJI: It is, in the sense that you accept the consequences of any failings

1 of video technology and will not complain later about it?

2 MR KHAN: Your Honour, indeed, and that's in fact the natural corollary to the first
3 application.

4 We undertake as counsel to keep the client properly apprised of developments, and even
5 under the Code of Conduct one only needs to have the objectives of representation from
6 the client. The strategy and every other matter we will pursue ourselves in court.

7 So, your Honour, there won't even be a delay of seeking to get instructions unless there is
8 something unforeseen in very unexpected circumstances, and that can be done
9 immediately by phone and so it will not delay proceedings. It will -- hopefully things
10 will work even more smoothly.

11 And, your Honours, before I forget it --

12 JUDGE EBOE-OSUJI: By the way, you may continue. I will have some questions for
13 you later, but I realise you have some things you were saying before I jumped in there. I
14 will have some questions for you later, but you may proceed with your submissions.

15 MR KHAN: Yes. Your Honour, just before I forget it, sometimes it's very ugly to repeat
16 allegations, but it's unfortunately that they are bandied about and one must. But here
17 what's being proposed is trial proceeding, witnesses being tested, the process of law
18 advancing and justice being determined by your Honours.

19 In this process, there's been numerous allegations by the party opposite of intimidation
20 and interference and all the rest of it. Normally what's said is it's scary, it's fearful, a
21 witness is somehow constrained sometimes if a perpetrator is before them, so if anything
22 it should even be if -- of course these are completely and utterly denied as rubbish, as
23 nonsense, but even from that perspective those that are representing victims and
24 witnesses should feel even more emboldened, not constrained, if there was a scintilla of
25 reality, a scintilla of truth, in any of those submissions.

1 Your Honours, I will move to the Vienna Convention and I won't go through
2 the -- belabour the points of the basic provisions. Everybody knows the provisions of
3 Article 31 and Article 32 but, your Honour, what I will do with your leave is just talk
4 about a couple of explanations as to the approach to interpretation in such matters.
5 Your Honour, I will cite first from a section from the Barayagwiza case. It's just a small
6 one paragraph, in fact, and it says, "It has been explained that the relation of rules of
7 practice to the work of justice is intended to be that of a handmaid rather than mistress,
8 and the Court ought not to be so far bound and tied by rules which are after all only rules
9 of general procedure as to be compelled to do that which would cause injustice in a
10 particular case." And, your Honours, that's the then Judge Shahabuddeen.
11 The learned Judge in his separate opinion of 31 March 2000 quoted another case of Coles
12 and Ravenshear, which is a civil procedure, but he said, "With proper caution, the idea
13 inspiring it generally applies to all Rules of Procedure to temper the tendency to rely too
14 confidently and too simplistically on the maxim *dura lex sed lex*."
15 In fact, what I say is that the Prosecution is sticking to that approach. I am sorry,
16 somehow their view is the Statute says simplistically physical presence is required. It
17 may be difficulty, it may be harsh, but you must live with it.
18 Judge Shahabuddeen cautioned against such a simplistic and primitive approach to
19 statutory interpretation because, if one stands back and actually does stand back and see
20 the wood for the trees, what's important here is getting to justice, balancing all the
21 different concerns of the victims, of the Prosecution and the rights of an individual and, if
22 one we say bears that in mind, it's important.
23 Your Honour, in the Delalic case in the judgment of 16 November 1998, at paragraph 170,
24 the learned Judges there said, and I quote, "The international community can only come to
25 terms with the Hydra-headed elusiveness of human conduct through a reasonable as well

1 as purposive interpretation of the existing provisions of the law."

2 And, your Honours, there's a lot about one should avoid paralysing the legal process, but
3 when one goes to mandatory and directory construction, even -- although I've said even in
4 relation to Article 63 and that one can get a glimpse of the proper purpose of Article 61
5 through the prism of Article 63(2), because those words cannot be taken as being otiose.
6 They must be taken to envisage a situation where an accused is not present.

7 And before I move on, it is no answer to legal principle to say whereas

8 Bemba - Mr Bemba - may have been excused on a couple of occasions and trial

9 proceeded -- and it's happened in other cases as well in all the different courts in fact. I

10 won't even talk about Mr Hinga Norman. But, your Honour, in those

11 circumstances -- let me come back to that in fact, your Honour. I just lost my thread.

12 But in relation to -- just one moment. Yes, I'll come back to it.

13 JUDGE EBOE-OSUJI: Mr Khan, I think we get -- I suspect that, much as the Presiding
14 Judge hinted earlier, it seems that much of the points you are making now have been
15 covered in your written material and also in your submissions so far, and I've got some
16 more questions I would like you to help me understand in your submissions.

17 MR KHAN: Well, your Honour, Judge Eboe-Osuji, just one legal point first, and I will
18 quote, regarding mandatory and directory construction, and I quote, "The language of a
19 Statute, however mandatory in form, may be deemed directory whenever legislative
20 purpose can be best carried out by adopting such a directory construction." That's at 82
21 Corpus-Juris Secendum, Brooklyn Press, of 1990, and it's also, if one goes to Craies in
22 Statute Law, 7th edition, at page -- sorry, paragraph 62, 249 to 250, "A statute may be
23 mandatory in some respects and directory in others." But the point is simple: When
24 one is seeking to interpret the Statute, it needs to be interpreted in a way that is sensible
25 and will best enhance the administration of justice. Your Honours, I stand, of course, to

1 take your additional questions.

2 JUDGE EBOE-OSUJI: The question now relates to the submission you made in
3 paragraph 17 of your written material, where you say, "Mr Ruto, who is entitled to the
4 presumption of innocence, is simply making a reasoned and practical request in view of
5 the unique position in which he finds himself as a serving Deputy Head of State."
6 My interest here is, I mean, this proposition raises a number of questions and one is, did
7 he find himself in this unique position or did he seek unique position and achieve it, much
8 to his credit?

9 MR KHAN: Your Honour, I think, in politics, and definitely in this case, you are asked
10 to serve your country, and when you put yourself forward for democratic elections and
11 millions of people vote for you, one serves, and this really was inspired by the reality, that
12 in addition to the personal and policy decision to co-operate with the Court and to
13 participate in proceedings and respect this institution, there are constitutional oaths that
14 are not frivolous, that are very real, and that's what bore -- that paragraph was inspired by
15 that particular reality.

16 JUDGE EBOE-OSUJI: It's not clear to me. Did he seek it then? He sought the position
17 as opposed to -- I understand there are some places where people are compulsorily
18 co-opted to serve in public office, whether or not they liked it. Is that what happened?

19 MR KHAN: Your Honour, no. Kenya is not a place where officials are corralled into
20 elective office. He stood on a democratic ticket with Uhuru Kenyatta as part of the
21 Jubilee Electoral team, and with that mandate he holds office as Deputy President of the
22 Republic of Kenya.

23 JUDGE EBOE-OSUJI: Now on that question still, just for the record, did he seek this
24 office before the proceedings were commenced against him here - I mean the proceedings
25 in this Court - or did he seek the office after the proceedings were commenced against

1 him?

2 MR KHAN: Your Honour, the road in politics as in life is a long one, if God grants that
3 life. And what is certain is he was engaged in politics well before these proceedings
4 commenced, and of course the highest office he has attained thus far is that of Deputy
5 President, so it's a continuation of his public service in the Republic of Kenya serving the
6 people of Kenya, albeit that the elections took place after these proceedings started.

7 Now of course there were some who -- it's a much larger debate may have been happier
8 for reasons completely contrary to justice to have the way cleared and that certain
9 individuals don't stand for election but he decided, given the massive support he had, to
10 allow his name to go forward to serve the people of Kenya who of course are a State Party.

11 JUDGE EBOE-OSUJI: When did he put himself forward to be elected to Deputy Head of
12 State for which he now won, as you say, the office? Was it before or after the
13 proceedings here were commenced?

14 MR KHAN: Your Honour, I don't have the details of these different issues but I think of
15 course it was after, the jubilee coalition was announced after these proceedings were
16 announced, though of course he had stood for high office previously.

17 JUDGE EBOE-OSUJI: The question then becomes: Should it make a difference in the
18 resolution of your request that he may have put himself forward for this office after the
19 commencement of the proceedings, knowing that there were proceedings against him in
20 the Court, should it make a difference?

21 MR KHAN: Rather the opposite, your Honours, because if the simple existence of
22 proceedings would result in the way being cleared for political adversaries, this would be
23 a licence for this Court to be used as a puppet, as a tool, to clear the way domestically, to
24 settle domestic scores. Allegations can be bandied about but presumption of innocence
25 remains. And so the fact that somebody has continued their job, and continued to serve,

1 should not make the slightest bit of difference.

2 Your Honour, put it another way. Put it another way. Should an individual not serve?
3 Should the people of Kenya suffer and should an individual not have the honour of high
4 office, and at the end you're acquitted and found not guilty, and one cannot go back in
5 time, one cannot turn back the clock, and so then there is an irredeemable prejudice that is
6 brought about that was not justified in fact or law.

7 Your Honours, in my respectful submission, the contrary is the case. In such
8 circumstances, as long as participation is there and respect for the Court is there and the
9 process can be fair, it should not make the slightest jot of difference whatsoever. Your
10 Honour, one can envisage circumstances maybe where individuals, not in this situation
11 but others, may seek to get hold of the levers of power in order to obstruct the
12 administration of justice to somehow say, "Okay, now we are not going to participate,"
13 but the opposite is the case here. Even when not required Mr Ruto has come to Court,
14 not just yesterday, not even before, many many times. So, your Honours --

15 JUDGE EBOE-OSUJI: So your legal argument there, your legal argument is that there is
16 such a thing as presumption of innocence and in view of that it should not make a
17 difference? Whether or not --

18 MR KHAN: Indeed, your Honour. The Court's business really can't be to start
19 stymying people's career and service of the country based upon what we say are flimsy
20 and unfounded allegations. Simple as that.

21 JUDGE EBOE-OSUJI: I was dwelling on the legal argument. Now, we move forward.
22 The other matter is, and the Prosecution raised this in their own written submissions, and
23 I would like to -- I notice you did not respond to it in writing, nor here. The implications
24 of Article 27 of the Statute, the opening words of which are, "This Statute shall apply
25 equally to all persons without any distinction on official capacity."

1 Now of course that provision does not say that this -- the indulgence you are seeking may
2 not be granted, it does not say that, but it necessarily raises the question whether that
3 indulgence can be granted to your client in virtue of being the Deputy President, and the
4 functions that go with it, and not open the floodgates for every other accused person who
5 comes here seeking similar indulgence. As you remembered just yesterday, your
6 colleague, Mr Kigen-Katwa, responded and said, "Well, he made that submission but did
7 not withdraw it" although this morning he clarified that his client will be here, but what
8 he submitted yesterday was that in granting this indulgence to your client we should not
9 make any distinction based on the office. He made that argument. Question then
10 becomes: What do we do? Have you resolved the effect of Article 27(1)?
11 MR KHAN: Your Honour, Article 27, of course, is entitled "Irrelevance of official
12 capacity." And in my submission, the ambit and purpose of this article is detailed really
13 in subarticle -- subparagraph (2) that it's to deal with immunities and special procedural
14 rules so not act as a bar to the jurisdiction of the Court.
15 So your Honour, actually this is not being -- this doesn't come into play, we say, given the
16 present application. Your Honour, it's an important question, but it's dealing with one
17 cannot hide behind any national immunities, for example Head of State immunity, that
18 cannot be used to shield an individual from an international law obligation. But your
19 Honour, that is not what is being sought in the Article 63 application. It is simply to
20 tailor justice to the circumstance of the case and that's what the Court does in every single
21 case, whether it's a bail application, an application for provisional release. Two suspects
22 in the same case have personal circumstances that may be different to them and the Court
23 in every situation must balance; can't have a one size fit all package to justice.
24 Your Honours have the sophistication and the ability and the experience to hear
25 arguments and decide what amounts to this -- what amounts to justice in every single case

1 and so, your Honours, in our respectful submission, Article 27 doesn't bite in this
2 particular circumstance.

3 JUDGE EBOE-OSUJI: So your argument then is that your request is based purely on the
4 uniqueness of the function as opposed to the mere rank; is that it?

5 MR KHAN: Your Honour, it's a combination. Article -- let me be very clear: Article
6 27, really it's there for immunities to say an individual can't be shielded. Our argument
7 is twofold, based upon a proper reading of the Statute. It's a right to be present and your
8 Honours will ultimately decide, as with every right, I have a right to make arguments, but
9 your Honours frequently say "I've -- we've heard enough." So every right is open to the
10 overall scrutiny and control of the Bench and all we are saying in this particular
11 circumstance, your Honours are holding the reins of this case, and the Defence is
12 absolutely comfortable with your Honours holding the reins which is why we are
13 engaged in this process.

14 Your Honours then have to make decisions in relation to every application how to
15 exercise discretion in order to allow all these competing interests to be best
16 accommodated, and we say for the reasons given in our motion, absolutely. I mean, no
17 articulatable, concrete prejudice has been raised by my friends for the legal representatives
18 to the victims or my learned friends for the Prosecution except this rather anomalous
19 phrase that it's -- the perception is bad or that it's a serious process.

20 Well, your Honours, I know my learned friend Mr Hooper has a great sense of humour,
21 but unfortunately I don't have that gift. I am rather quite serious, so it is a serious
22 process. So again, if one goes beneath the smoke, really, I see, your Honours, there is
23 absolutely no substance, absolutely no substance to the Prosecution's argument other than
24 somehow -- you know, in the old -- Middle Ages of England we used to have stocks, there
25 used to be stocks in the villages, and people would be pelted. Well, with that kind of

1 parading people for public curiosity, or that kind of exposure had a purpose in antiquity
2 but of course, your Honour, that has no place in the statutory provision here. The simple
3 question is whether or not granting this relief would render a fair trial not possible or
4 whether granting it enhances the proper administration of justice. Your Honour, our
5 submission is very clear. It's the latter.

6 PRESIDING JUDGE OZAKI: Thank you very much. And we now turn to the private
7 session of this status conference to address the matter of Article 70 investigations by the
8 Prosecution into allegations of witness interference and bribery.

9 Court officer, please turn into private session.

10 (Private session at 12.30 p.m.)

11 (Redacted)

12 (Redacted)

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13 Page 41 redacted – Private session

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Status Conference

(Private Session)

ICC-01/09-01/11

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13 Page 42 redacted – Private session

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Status Conference

(Private Session)

ICC-01/09-01/11

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13 Page 43 redacted – Private session

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Status Conference

(Private Session)

ICC-01/09-01/11

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13 Page 44 redacted – Private session

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Status Conference

(Private Session)

ICC-01/09-01/11

- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (The status conference ends in private session at 1.05 p.m.)