

Trial Hearing

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang
5 - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia
7 and Judge Robert Fremr
8 Trial Hearing
9 Monday, 17 November 2014
10 (The hearing starts in open session at 11.29 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, did you say you needed for purposes of the transcript to also put on
16 record the case? All right, proceed.
17 THE COURT OFFICER: Indeed, Mr President. Thank you.
18 The situation in the Republic of Kenya, in the case of The Prosecutor versus William
19 Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
20 We are in open session.
21 PRESIDING JUDGE EBOE-OSUJI: Thank you.
22 You don't have to do the appearances thing again, counsel, but we are in open
23 session.
24 Mr Khan?
25 MR KHAN: Mr President, your Honours, I'm most grateful. Perhaps we could go

1 into private session?

2 PRESIDING JUDGE EBOE-OSUJI: Private session then.

3 *(Private session at 11.30 a.m.) Reclassified as Open session

4 THE COURT OFFICER: We are in private session, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Before we proceed, there was one other matter the court officers -- sorry, the court

7 reporters and interpreters had brought to the attention of the Chamber off the record

8 before the start of this block of the sessions.

9 It's about the direction of the microphone. Apparently it is unidirectional, so we at

10 all times need to be speaking to the microphone. So it doesn't work well if, as they

11 pointed out, I'm looking at the Prosecutor and talking. They don't get it. So I need

12 to be looking at the Prosecutor from the angle of speaking into the microphone.

13 So that also I need to remind everybody. I'm the greatest culprit of the matter, but I

14 hope you all take that into account.

15 Mr Khan?

16 MR KHAN: I'm grateful, Mr President.

17 Your Honour, it appears to us that this witness will take most of -- Witness 800 will

18 take most of this week, probably all of the week, and the next witness slated in, as we

19 are in private session, it's (Redacted) Witness 658.

20 Your Honours, on 7 November we received from the Prosecution a large batch of

21 further disclosure which relates to (Redacted)

22 (Redacted)We have not received the transcripts. We received only

23 summaries, prepared by whom I know not, but it is clear that it is material relevant to

24 the preparation of the Defence on numerous bases.

25 Now, your Honours, the Prosecution invited us to prioritise which transcripts we

1 need first and we've said we need all of the transcripts, but we informed them on

2 17 November as to the 17 most urgent.

3 We haven't received those as yet, and I'm told by my learned friend - and he will

4 correct me if I'm wrong - that there's no realistic chance we will get those before the

5 witness comes and goes in this current session.

6 Your Honours, that's not satisfactory in my respectful submission. We say we are

7 entitled to information that is directly relevant to the credibility and motivations of

8 these witnesses.

9 Your Honours, I'm not going to reveal all my cards and go into more detail, but to

10 give the Bench a flavour of why it's relevant it's clear (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted) what's motivating, because a witness that comes to speak the truth

17 should have only one interest, not which party is calling, but speaking the truth, and I

18 want to see the transcripts.

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 Your Honour, there are numerous issues regarding motivations, the interest of money
7 and benefits. I'm not going to say more, but that's a taste of -- of some of the
8 information.

9 We say - and we've said it from the beginning - there is a core unfortunately of
10 deceitful witnesses that are coming before this Court and I -- in my respectful
11 submission, we say we are entitled to the transcripts.

12 (Redacted)

13 (Redacted)

14 Now, I understand the Prosecution received these in tranches and they have -- my
15 friend, the case manager, Grace Goh, on behalf of Mr Steynberg, detailed that they
16 were received in batches by the OTP (Redacted), but your
17 Honour I'm not here casting blame at this point. I'm simply stating I -- we say we're
18 entitled to the actual transcripts, (Redacted)

19 (Redacted)

20 Your Honour, it's not appropriate for a witness like this, where credibility is up stage
21 and centre, to recall a witness. I should have a right, we say, to see the detailed
22 landscape and to deal with this witness in one go based upon the information that is
23 in the Prosecution's possession.

24 I understand that the delay is in transcribing. Your Honours, whatever the delays
25 are, we say we're entitled to the -- at the very least the transcripts of the information

1 that the person summarising says is relevant to ICC proceedings. That's at a
2 minimum. And of course there may be a question as to who's making that
3 assessment and their understanding of relevance, but at the very least we're entitled
4 to the words uttered by (Redacted)

5 PRESIDING JUDGE EBOE-OSUJI: Is there any issue about entitlement; your
6 entitlement to the transcript?

7 MR KHAN: Your Honour, I don't believe there is because the Prosecution have
8 consented and conceded we're entitled to it. The only question is logistics. Because
9 they have their own internal procedures and (Redacted) they haven't been
10 able to get us the transcripts that we require, and my learned friend was quite candid.
11 As I understand it, and he'll correct me if I'm wrong, there's no realistic prospect we're
12 going to get even the 17 that we've requested out of the 170 summaries that were
13 given to us on 7 November.

14 Your Honour, this isn't delay caused by the Defence and I'd hope the Bench has seen
15 we want to move matters forward, but we are not willing with respect, we don't think
16 it's right, to deal with very important witnesses when we're not in possession of all
17 the relevant information.

18 And for that reason, your Honours, I put forward two proposals. I'm not willing or
19 prepared to cross-examine without this, but either - and it's a matter of course for
20 submissions and my learned friend - I would propose that we start with
21 (Redacted) next week in-chief and we adjourn for cross-examination until such time
22 as we receive the outstanding disclosure, i.e. the (Redacted), we can digest it and
23 cross-examine on that basis, or the other option is we put him over for chief and cross
24 in one go to a later date.

25 Your Honour, I have no preference. I have no preference. If the witness is

1 (Redacted) but I don't think we should be required
2 to cross-examine him without this information because a witness can squirm and try
3 to say, "Well that's not a fair characterisation of what's said," and indeed the person
4 who's made the summary may not understand the -- the context and it may actually
5 be much more useful for us to get the actual words spoken.
6 Your Honour, as an addendum to that, of course it would give the Prosecution
7 hopefully time to comply with your Honours' order of today to get the information
8 from the (Redacted) regarding the (Redacted), but the nub of it is, your
9 Honours, I'm not -- it's my application that we not be required to cross-examine this
10 witness until we receive our disclosure that we say we're entitled to under the Statute.
11 PRESIDING JUDGE EBOE-OSUJI: At any rate, this may -- this doesn't directly arise
12 from your submissions, but it is an outstanding matter with Witness (Redacted) the
13 Chamber had on an earlier occasion when the prospects of calling this witness the
14 first time came up, the Chamber had directed that it is a witness for which the
15 Chamber needs to hear Mr Ruto present for the duration of the testimony of this
16 witness. You take that into account, of course.
17 MR KHAN: Indeed. And, Mr President, I can reveal it; I think given my estimation
18 of Witness 800, Mr Ruto will be here unless there's another order from the Court
19 vacating his--(Redacted) testimony on the 24th and he will be here of course, you know,
20 for as long the Court require him. That's a given of course compliance with the Court
21 orders, but what we're saying is we shouldn't be required to cross-examine when we
22 haven't got evidence that, on any view, is relevant to credibility and other issues.
23 I mean, your Honours, there's other matters, and the Prosecution may dispute its
24 relevance, but regarding the character of these individuals we put them forward
25 clearly on the -- from the summaries as (Redacted). All of these are

1 relevant in assessing credibility in the event that we have a Defence case and, in any
2 event, it's relevant to their believability of the -- of the case put forward and their
3 motivations which are financial in our view.

4 So, your Honour, that's the nub of it. I take on board the issue of -- of Mr Ruto. He
5 will be here unless there's another Court order on the 24th when I anticipate that's the
6 earliest the Prosecution would start but, for the reasons I've previously given, it's my
7 respectful submission that the Court put us out of our misery and make it clear that
8 we're not going to be required to cross-examine this witness without the outstanding
9 disclosure in our possession.

10 MR KIGEN-KATWA: Mr President, on our part, we wrote to the Prosecution on
11 14 November and in that email we expressed ourselves on the two very important
12 issues in respect to this witness. The first one was that we would very much like to
13 proceed with the testimony of this witness and generally with the proceedings.
14 We also asked how soon they could possibly get all the transcripts and we indicated
15 that, subject to what comes out of reading those transcripts, we may want to recall the
16 witness.

17 Your Honours, quite clearly this witness is a very important witness for the
18 Prosecution and we suppose that is what has informed the wish to have Mr Ruto
19 present, and unlike the Ruto team, we were not able to prioritise any (Redacted) And
20 the reason is when we looked at what we had been given each and -- each one of
21 those (Redacted) was very important and for those reasons, your Honours, we would
22 have -- we would really like to cross-examine this witness with the full benefit of the
23 real transcripts (Redacted) that are being referred to.

24 We would also submit that if that is afforded to us, it will also give Prosecution an
25 opportunity to assist us with the material relating to (Redacted), which is

1 also, in our view, very important for purposes of cross-examining this witness, both
2 in terms of what he has alleged against the accused and for purposes of myself what
3 he has said against Mr Sang and also separately as a question of credibility.

4 For those reasons, your Honour, we support the application made that this witness
5 can either testimony in part and be cross-examined after all the transcripts have been
6 disclosed, or in the alternative his testimony is delayed until all the transcripts have
7 been availed.

8 Your Honours, may I indicate also that this is an issue which both myself and
9 Mr Karim have consulted with mister -- the Prosecution and indicated to them that
10 we really need them.

11 Lastly, your Honours, may I say that in attempting to get into a situation where we
12 can make an informed decision, we have -- we asked the Prosecution in our email to
13 give us an indication of how soon they can complete the transcripts and today the
14 Prosecution have not responded.

15 We had hoped on our part, speaking for Mr Sang, that if those transcripts could be
16 availed in the course of the evidence-in-chief of that witness it could still afford us an
17 opportunity to make an informed cross-examination where we would be studying the
18 transcript concurrently with taking his testimony.

19 Unfortunately, we haven't gotten that response from the Prosecution. I must also
20 acknowledge that Mr Steynberg told us that it might not be ready even by the time
21 that witness comes to testify, but that's what he communicated this morning. Thank
22 you, your Honours.

23 PRESIDING JUDGE EBOE-OSUJI: So Mr Kigen-Katwa, while you're on your feet, so
24 we're looking at three options, is that it, from your perspective: Either delay -- put
25 this witness over entirely, that's one option; second option is we don't do that but

1 suspension of cross-examination is the second option; and the third option might be
2 to proceed in the normal course but then recall the witness if later on Defence counsel,
3 after digesting the transcripts thoroughly, feel there is a need to recall the witness. Is
4 that the sum of it?

5 MR KIGEN-KATWA: Yes, your Honour, but I must say that we would very much
6 wish to avoid a situation of having to recall him for two reasons, your Honours: One
7 is that we would really prefer to avoid a situation where we cross-examine him by
8 installments where we have to cross-examine him after we get the documents.
9 That's the first reason.

10 The second one, your Honour, is we would pray that the Court takes judicial notice of
11 the fact that I think this is (Redacted)
12 (Redacted) and otherwise, is
13 an issue which gives us concern as to whether we can get him to come back and be
14 cross-examined if we were to go the direction of recalling him.

15 PRESIDING JUDGE EBOE-OSUJI: Noted. I mean, the -- not all the options are as
16 good as the others, but those are the options.

17 MR KIGEN-KATWA: Thank you, your Honours. That's true.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

19 MR KHAN: I'm grateful. Mr President, can I just say that if the Court was minded
20 to require the Prosecution to have the witness give evidence-in-chief and then
21 postpone cross-examination, I would ask that the cross-examination be the first order
22 of business of the next session so that there's no other witness intervening in the next
23 session, we deal with whoever's available this session and we cross-examine
24 (Redacted) the first session -- the first days of the new year session.

25 Your Honour, my learned friend --

1 PRESIDING JUDGE EBOE-OSUJI: Sorry, you need to run that by me again. So if
2 the Prosecution does their examination-in-chief, assuming that the order of -- or, the
3 direction of the Chamber is that the -- there is to be a suspension of cross-examination,
4 are you saying that there should be no witness in-between; is that what you're saying?

5 MR KHAN: No. I'm grateful. Your Honour, we've got another witness this
6 session, (Redacted), and I hope we will --

7 PRESIDING JUDGE EBOE-OSUJI: (Redacted).

8 MR KHAN: -- (Redacted), that he will be -- that witness will be finished in this
9 session, but rather than, for example, (Redacted) or one of the other witnesses
10 coming first next session, let's finish the cross-examination of (Redacted).
11 Your Honours, I would be extremely wary and indeed opposed to seeking to recall a
12 witness because it puts us as -- as Defence counsel, of course, in a difficult position.
13 If I start cross-examination based upon a summary without knowing the detail, of
14 course I am forewarning the witness as to the areas that are of interest to me and
15 when I recall him with the transcripts it becomes very problematic, and also the
16 strategy and the approach to cross-examination needs to be determined at the outset,
17 not in the course of -- of evidence. The way I structure cross-examination and the
18 approach I take will be informed by the evidence that we say we're entitled to and, for
19 that reason, it really is my strong submission that it would not be appropriate to recall
20 the witness. We're entitled to cross-examination in one go based upon the evidence
21 that the Statute says we're entitled to and that's why I depart somewhat and I put
22 forward only two options; either deferring his evidence in total until the new year, or
23 starting now and cross-examining him when the transcripts are available.
24 Your Honour, there's another option, of course, and I'm grateful, that if the
25 Prosecution can somehow expedite these transcripts, given that (Redacted) has been

1 put back to the next session, if we're given that one week in this current session
2 maybe we can also cross-examine (Redacted) in this current period. It really is a
3 function of the ability of the Prosecution to get the transcripts together and my
4 learned friend will speak to that no doubt.

5 PRESIDING JUDGE EBOE-OSUJI: Dealing specifically with your concern about
6 being put in the situation of splitting your cross-examination in the first part using a
7 summary and then coming back in the second part to use the transcript, you can deal
8 with that, can't you, by foregoing using the summary altogether?

9 MR KHAN: Your Honour, that's one approach, but it's important to bear in mind,
10 we say, firstly this disclosure is not our fault. The fact that disclosure (Redacted)
11 since (Redacted) have not been translated and transcribed in November is no fault of
12 the Defence and we shouldn't pay that price.

13 We're entitled to know what the landscape is and to see the detail of this witness's
14 utterances and connivance with (Redacted) and others. We're
15 entitled to that.

16 PRESIDING JUDGE EBOE-OSUJI: Specifically, I know -- nobody is it's not now
17 about fault. It's about resolving a situation we have on hand in order to move the
18 proceedings forward as best we can. All of us, including you, have an interest in
19 moving the proceedings forward rapidly. It's specifically that situation if you
20 have -- in light of the circumstances in which we are, which is not your fault, but we
21 have to move forward.

22 If you see that there is a need for you to cross-examine the witness on the basis of
23 information, the intimation of which you have gleaned from a summary but you
24 think that the actual transcript will give you the meat of the subject matter, you might
25 altogether not alert the witness to the area and postpone your cross-examination in

1 relation to that area until you've got the transcript and then you then decide, "We
2 want to cross-examine in this area," and you'll go full flow --

3 MR KHAN: Your Honour --

4 PRESIDING JUDGE EBOE-OSUJI: -- in that area.

5 MR KHAN: Your Honour, as your Honour's pointed out on many occasions,
6 litigation is a human process and where one seeks to interpose certain evidence may
7 affect - may have a ripple effect - to getting to the truth on other areas.
8 Now, if I'm required to finish my cross-examination in effect without this material
9 that I'm entitled to and then as an epilogue at the end bring a witness -- seek to bring
10 the witness back and cross-examine him on a discrete issue, it may be possible, but in
11 my respectful submission it's hardly conducive to the fair trial rights of the Defence
12 because, if I use that same information in a different sequence and in a different way
13 with other evidence, one may -- and one has seen it in experience. One may get the
14 witness to start speaking the truth.

15 So, your Honours, we say at the outset we're entitled to the disclosure and then it's for
16 us in our professional judgment to decide how and when to use that in the context of
17 an overall cross-examination. I shouldn't be required, in our respectful submission,
18 to do our cross-examination and at the end of it, when it's all finished and the witness
19 has said whatever he has said, bring in a discrete issue at the end, whereas if I bring it
20 in a different order in conjunction with different facts and different aspects that will
21 confront his original account it may be that we can get to the truth, or at the very least
22 your Honours would assess credibility in the context that we wish to show it.

23 PRESIDING JUDGE EBOE-OSUJI: It is of course, yes, not -- it is a human process,
24 but part of that is that sometimes we have to work with possibilities rather than the
25 ideal. The ideal situation would be for you to have received this ahead of time, but

1 that's not what we have and we're trying to see what we can do to move the process
2 forward.

3 You keep putting it in terms of what you are required and not required to do. It's
4 about what the process calls upon all of us to do to move the matter forward. That's
5 the --

6 MR KHAN: Indeed.

7 PRESIDING JUDGE EBOE-OSUJI: -- concern.

8 MR KHAN: And, your Honour, I'm alive to that and that's why what I had hoped is
9 that my halfway house, my agreement that -- you know, my suggestion that one
10 option was to start examination-in-chief, wouldn't prejudice the Prosecution. It
11 would allow them to put forward the case in the way that they are content to do
12 whilst preserving the rights of the Defence.

13 That was a way of balancing both considerations, but it comes back to our ability
14 really to confront the witness in a case where credibility, veracity -- it's not
15 forgetfulness, this case and these witnesses. It's not forgetfulness, where we say
16 directly - we've said it from day one - it's a deliberate attempt to deceive. And in
17 assessing that, your Honours, whether or not the witness is telling the truth, or is
18 forgetful, or is brazenly telling a pack of lies to this Court, we say it's critical in fact to
19 have evidence that goes to the motivations (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 And so we say having that at the beginning, before cross-examination, is really
25 important. This is not an addendum that somehow -- an appendage that's added on

1 to the main body of cross-examination. This really is an aspect that goes to the heart
2 of cross-examination which is that these witnesses have clearly and quite obvious
3 motivations that have nothing to do with the truth evidenced by, "Who should we
4 give evidence for?", everything about self-interest and personal advancement, and
5 that's why we say we're entitled to that before we get started and embark upon the
6 journey of confronting them in Court.

7 That, your Honours, we say will allow you and your Honours to make the best
8 possible assessment as to the credibility and the Defence contentions that these
9 witnesses are telling a pack of lies.

10 PRESIDING JUDGE EBOE-OSUJI: But it should be possible, isn't it, to structure
11 cross-examination in terms of subject matter that, yes, one could see where the -- at a
12 certain level of abstraction subject matters are related, but it is also possible to
13 structure cross-examination in such a way that certain subjects could be dealt with in
14 a way that does not necessarily affect other subjects that could be taken up at another
15 time? Isn't that possible?

16 MR KHAN: Well, your Honour, everything's possible. The question is what
17 respects the rights of the Defence and what will assist your Honours to get to the
18 truth.

19 Put it another way, if one starts cross-examination and touches upon certain areas and
20 then there is a break for us to get the transcripts and to recall the witness, one can
21 foresee what will happen. A witness either speaking to people that we know from
22 Prosecution disclosure are speaking together and watching proceedings on the
23 internet together, they will come back and either "correct something," in speech marks
24 for the interpreters for the transcript, correct i.e. change, modify, manipulate their
25 testimony, or they will say, "Oh, I've forgotten X, Y and Z," to somehow cure aspects

1 that they say that they may have reflected over and say that don't accord -- are not
2 believable. So --

3 PRESIDING JUDGE EBOE-OSUJI: Are you telling me that -- are you telling me that
4 you wouldn't have countermeasures for that sort of a concern, Mr Khan?

5 MR KHAN: Your Honour, my argument is the Defence in any case is always
6 swimming against the tide and it shouldn't be made more difficult in circumstances
7 where that can be prevented by giving us time to start our cross-examination once
8 we're given the disclosure and, if we get that, we can use it more effectively.
9 I'm grateful.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
11 Mr Steynberg?

12 MR STEYNBERG: Thank you, your Honours.

13 I'd like to start off by just clarifying the -- some facts relating to where we are at the
14 moment, starting off with the material in question, and we've sent these to the
15 Defence in an email last week.

16 (Redacted). The

17 material was received in three tranches (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 I don't have an exact date when that was done, but it was fairly recently. It was
4 certainly after -- after (Redacted), as far as I can recall.

5 At that stage we obviously realised the importance of this, bearing in mind that

6 (Redacted)

7 (Redacted). That was also a fairly recent development.

8 For that reason we decided to prioritise (Redacted)

9 (Redacted)-- well, there was more than that which we sent for

10 summarisation. Some of them were identified as being completely non-relevant.

11 (Redacted) so we left those

12 aside.

13 (Redacted) which appeared to have some relevant content, and we set

14 a wide parameter for what was relevant, any discussion of the case, any discussion

15 with other witnesses or any other matter which appeared to be linked to this case

16 were marked as relevant.

17 Those were all disclosed to the Defence as soon as they were received, which was -- I

18 forget the date, but I think it was last week sometime or perhaps the week before.

19 My learned friend will have the exact date.

20 So that brings us to where we are now. Now, we received, I'm not sure if it was this

21 morning or over the weekend, (Redacted) which my learned friend for Mr Ruto has

22 identified as being the most important for them after we asked them to prioritise

23 certain (Redacted) I prioritised those (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted). So this is not something

8 we can just hand out to anybody to do. Those are unfortunately the constraints

9 within which we are operating.

10 We recently got a reply as to my learned friend's inquiry as to when these (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 PRESIDING JUDGE EBOE-OSUJI: From what point?

15 MR STEYNBERG: From today, from today. We've up until now, we've been

16 (Redacted)

17 (Redacted) because they both require the same resources and

18 we can't work on both at once.

19 But if we prioritise this and they work only on that and they get everything and start

20 working today, there might be a couple of days lead-in time, but we're looking at the

21 17th of February before we would have access to even (Redacted)

22 (Redacted). And if one extrapolates, you can see that the timeline will be

23 running into months rather than weeks before we are able to get all of this material.

24 Your Honours, with that background, the Prosecution's position is that the witness,

25 the evidence of the witness should proceed as scheduled. While we do recognise

1 that there is material contained in these from our reading of the transcripts which is at
2 least material to the preparation of the Defence, the Prosecution does point out that
3 (Redacted)

4 (Redacted)

5 Now, at that stage they were clearly content to cross-examine the witnesses. I
6 presume they must have prepared their cross-examinations, and there must be issues
7 relating to the evidence itself, evidence related to the PEV that my learned friends
8 could deal with at this stage.

9 I point out, your Honours, that this evidence is evidence which would not even have
10 existed but for the fact that the Prosecution decided in exercise of its duty to ascertain
11 the truth to follow up on information that witnesses were being interfered with
12 (Redacted) which we've done in good faith and disclosed as soon as we're
13 able to do with the resources that are available, (Redacted)
14 (Redacted) but unfortunately those are the constraints we're
15 working with.

16 My suggestion, your Honour, is that we should proceed and that my learned friend
17 should cross-examine to the extent my learned friend can. It's in his discretion, or
18 their discretion, whether or not to touch on these issues or to save them as your
19 Honour has proposed as a separate tranche for the witness to be recalled at a later
20 stage.

21 Your Honours, my learned friend points out to Prosecution's or Defence strategy;
22 strategy of counsel. Obviously in an ideal world counsel would like to proceed with
23 their cross-examination in the strategy which suits them best, but one knows that in
24 the reality of litigation, strategies have to be adjusted to the realities of the situation,
25 just as I had to adjust my strategy with Witness 604 when my learned friend objected

1 to my application to declare the witness hostile. One must as an experienced counsel
2 be able to make those adjustments where necessary.

3 As regards to the contents of the (Redacted), I point out, your Honours, that
4 it's entirely speculative at this stage as to whether or not there will be any content in
5 those (Redacted) that are relevant to the current proceedings. We simply
6 do not know (Redacted)

7 (Redacted) and only once those are received will the Defence be in
8 a position to make an application to recall the witness on that basis. Obviously if the
9 witness is to come back and there is relevant content, well, then they can put it to
10 them at that stage.

11 So my suggestion, your Honours, is that it would not be fair to the witness to start the
12 cross-examination now and then adjourn. I would also like to point out that this
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)

17 Now, if either the entire evidence or the entire cross-examination were to be
18 adjourned for two or three months, it would only be fair to the witness that he would
19 have to go through, if not go through the entire witness preparation consultations
20 with the Prosecution, at least be given the opportunity to read over his material again,
21 which would be extremely -- or what is the word I'm looking for -- onerous for the
22 witness and would not be in my submission good for his psychological well-being.

23 Your Honours, so in a nutshell, whilst the witness does acknowledge the relevance of
24 the material to the Defence, we submit that the balance of convenience and the
25 balance of the proper conduct of proceedings dictates that the witness should start

1 testimony, should be cross-examined to the extent that the Defence are able to, and if
2 they wish to cross-examine further on the basis of the disclosure of the transcripts,
3 that they may then apply to have the witness recalled at that stage. Thank you.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Khan, you're on your feet.

6 MR KHAN: Yes, sir. With your leave, Mr President, a brief response.

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 Secondly, the Prosecution have accepted the information is material to the
14 preparation of the Defence. But somehow and without any evidence, my learned
15 friend says that in the balance, the Defence rights can be curtailed in order to protect
16 the unproven psychological well-being of the witness. That is a contention that's
17 devoid of any legal basis or any evidence. We say in such a situation it's very clear
18 that the Statute says that the rights of the accused must be given a margin of
19 deference.

20 Your Honours, in relation to the (Redacted), because it's not unrelated to the
21 core application regarding the transcripts, it's very clear from anybody who has been
22 involved in (Redacted)

23 (Redacted)

24 (Redacted)So I don't think it's a

25 stretch at all to have a very reasonable basis to state that that (Redacted)will

1 include matters that are directly relevant to the testimony upon which he's going to
2 give in this Court. And, your Honours, either it will amount to a previous
3 inconsistent statement or a divergence. In any event, it's material that we also say
4 we're entitled to before we embark upon cross-examination.

5 Your Honours, the --

6 PRESIDING JUDGE EBOE-OSUJI: The concern really to narrow it down, the
7 Prosecution isn't here arguing that you need not make use of the fruits of your
8 inspection or of either the (Redacted) or the transcript that may come
9 to you eventually. The matter is rather how do we move forward in the
10 circumstances?

11 And the thing with your argument, it just seems that when you speak about the right
12 of a Defence in these circumstances, you have an eye on an unwrought right of a
13 Defence that's not touched by anything, it must remain pristine and not take into
14 account the ordinary bumps and things of that nature of real life. That's the concern.
15 Now, here we have an issue, I'm still trying to understand the real objection to you
16 proceeding on the basis of what you can cross-examine relatively safely on on the
17 merits, and then you've already advised that, look, you do want to see the rest of the
18 material, at that stage you would like to preserve your -- the opportunity to doing
19 further cross-examination. That has already been, you know, clearly communicated.
20 It's just about moving with what you can do in the circumstances, and then we'll see
21 how we do.

22 MR KHAN: Your Honour, to move from an amorphous or intangible concept of the
23 rights of the accused and some intangible, one needs to look at the issues at stake.
24 Your Honours, I can fully accept that in relation peripheral matters or peripheral
25 disclosure of a marginal or very limited nature, there could be an argument to say,

1 well, bearing in mind your overriding obligation to ensure the fair trial rights of the
2 accused, move forward and bring a witness back. I can concede that. Your
3 Honours have maximum discretion because you are entrusted, of course, with
4 ensuring a fair trial.

5 What I'm saying here is the outstanding disclosure is so significant it is not peripheral,
6 it is core. It is the (Redacted)

7 we would not have seen at the time we have to confront this witness that may be
8 directly relevant to weaving into the other cross-examination we have. And it's not
9 that alone it's linked, not to one, but to more than (Redacted) of which
10 some are on any view directly relevant to credibility and motivation, and we say that
11 because it's not peripheral but core, we're entitled to see that before we decide our
12 strategy for cross-examination; otherwise we are moving forward with, if not
13 completely blindfold, at least blind in one eye, unaware of what may hit us or what
14 we may miss.

15 And so we say we should start cross-examination with our eyes open when it is in the
16 possession of the Prosecution - the delay is due to no fault of our own - and when it is
17 conducive to our right to confront this witness in the most effective manner.

18 Your Honour, the argument that more than a year and a bit ago we asked and the
19 Prosecution we say stubbornly refused to call (Redacted)
20 beginning is really an argument in futility. It doesn't pass muster. It's an argument
21 that because you were ready then you should somehow move forward irrespective of
22 the changing landscape occasioned by disclosure. That's not how a trial process
23 works.

24 We have information. The Prosecution say it's because of their truth-finding
25 responsibilities --

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let me stop you there. Imagine this
2 scenario.

3 MR KHAN: Indeed.

4 PRESIDING JUDGE EBOE-OSUJI: We had continued then with this witness a year
5 ago. Let's assume just that scenario. As the case was set to proceed, the
6 Prosecution did not have any information to lead them on to investigate an Article 70
7 issue, but only got that after the conclusion of this witness's testimony in the main last
8 year. And the Prosecution gets this material, it's important, and discloses it to you.
9 How would that make a difference from what was then the issue and what you were
10 able to do?

11 MR KHAN: Your Honour, a bench, of course, is always mindful to remedy any
12 prejudice and to cure any injury that may be caused to the fabric of justice. In that
13 situation nothing was foreseeable and the Bench would allow recalling of a witness to
14 cure prejudice.
15 Here it is clearly foreseeable. It is known. And to move forward blithely saying
16 that the Defence can cure that prejudice when it is known in the outset is, in our
17 respectful submission, not only disproportionate, but it would be not conducive to the
18 proper assessment of the witness's credibility, and that's how I distinguish the two
19 scenarios.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you.

21 MR KHAN: I'm most grateful.

22 PRESIDING JUDGE EBOE-OSUJI: We will then retire now. We will give our
23 ruling on that matter later, but we will adjourn now and return at 2.30 for the
24 commencement of Witness 800, the testimony of the witness.
25 The Court will rise.

Trial Hearing

(Private Session)

ICC-01/09-01/11

- 1 THE COURT USHER: All rise.
- 2 (The hearing ends in private session at 12.17 p.m.) Reclassified as Open session
- 3 RECLASSIFICATION REPORT
- 4 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 5 2013, the version of the transcript with its redactions becomes Public.