

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai
5 Kenyatta - ICC-01/09-02/11
6 Presiding Judge Kuniko Ozaki, Judge Christine Van den Wyngaert and Judge Chile
7 Eboe-Osuji
8 Status Conference
9 Thursday, 14 February 2013
10 (The hearing starts in open session at 9.38 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE OZAKI: Good morning, parties and participants. Good
15 morning, Mr Muthaura, and good morning, Mr Kenyatta. I hope the video link is
16 working all right?
17 First of all, I would like to deal with some housekeeping issue. This status
18 conference is to last no longer than one-hour-and-a-half and we are dealing with three
19 agenda items. Therefore, I would like to ask the parties and participants to be
20 concise, focused and complete in their submissions during this status conference and
21 not to repeat their written submissions.
22 We are in open session, so if any party or participant needs to refer to confidential
23 information, particularly as regards disclosure issues, please ask to go into private
24 session.
25 In this regard, I note that both Defence written submissions 624 and 627 are

1 confidential, although the Bench sees no reason why some of the submissions
2 contained in those filings should not be referred to in this open session.

3 So I would like first to ask Mr Khan, is there any problem to refer to your submission
4 624 in open session, except for perhaps paragraphs 11 to 15?

5 MR KHAN: Madam President, I am grateful. Would you wish to hear appearances
6 first, or should I immediately proceed to answer the question of the Bench?

7 PRESIDING JUDGE OZAKI: As for this question, I would appreciate if you can
8 immediately answer.

9 MR KHAN: Madam President, I believe - I don't have the exact reference - is
10 Madam President referring to the Article 64 application? Sometimes the different
11 codes of the ICC are not the clearest to refresh the memory. There has been a lot of
12 filings recently.

13 PRESIDING JUDGE OZAKI: I am referring to your filing dated February 6, Defence
14 observation on issues related to the commencement of trial.

15 MR KHAN: Madam President, we are in your hands. We have no objections for
16 the matter to be made public, except I believe in relation to the conditions of stay in
17 The Netherlands. Obviously, we did not want to unnecessarily implicate the
18 security concerns of Ambassador Muthaura or his family and therefore those issues
19 and the related issues of privacy are matters that should be kept confidential. They
20 are not of public interest, but the overall tenor of the application can be made public,
21 save for the extracts that deal with the security issues of Ambassador Muthaura and
22 privacy issues of Ambassador Muthaura.

23 PRESIDING JUDGE OZAKI: Thank you. Those paragraphs 11 to 15 which I
24 mentioned is exactly dealing with those conditions of stay, so except for those
25 paragraphs. You are fine with referring to your submissions?

1 MR KHAN: Indeed.

2 PRESIDING JUDGE OZAKI: Thank you.

3 Mr Kay, as for your submission 627 on the same item, except for paragraph 13, are
4 you fine that we refer to your submission in public session?

5 MR KAY: Yes, your Honour. Thank you.

6 PRESIDING JUDGE OZAKI: Thank you very much.

7 THE COURT OFFICER (Kenya): Good morning, Madam President, your Honours.

8 We are back on line.

9 PRESIDING JUDGE OZAKI: Good morning.

10 THE COURT OFFICER (Kenya): Good morning. Sorry, we had a little technical
11 problem which now seems to be resolved.

12 PRESIDING JUDGE OZAKI: So may we proceed?

13 THE COURT OFFICER (Kenya): Yes, please.

14 PRESIDING JUDGE OZAKI: Thank you, Jasmine.

15 Our next housekeeping issue is to remind the parties and participants that today's
16 discussion is without prejudice to any of the motions currently pending before the
17 Court -- before this Chamber, such as motion with regard to trial in situ.

18 Lastly but not leastly, please also remember to speak slowly and to pause for several
19 seconds in between speakers. This is very important in order to ensure accurate
20 transcription and interpretation.

21 (Trial Chamber confers)

22 PRESIDING JUDGE OZAKI: I'm sorry, I am reminded that I omitted to ask
23 introduction of members of parties and participants. May I ask Prosecution to
24 introduce your team?

25 MS ADEBOYEJO: Thank you, Madam President, your Honours. The Office of the

1 Prosecutor is represented by: Mr Alex Whiting, Mr Manoj Sachdeva,
2 Ms Olivia Struyven, Mr Sam Lowery, Ms Dianne Luping, Ms Ruth Frolich and our
3 case manager is Ms Ramu Bittaye and of course myself Adesola Adeboyejo.

4 Thank you, Madam President.

5 PRESIDING JUDGE OZAKI: Thank you.

6 You would like to start, Mr Khan?

7 MR KHAN: Madam President, good morning, your Honours. Ambassador
8 Muthaura, who as you know sits behind in the middle behind me, is represented by
9 Essa Faal to his left, Mr Kennedy Ogetto to his right, Shyamala Alagendra, counsel,
10 Mr Anand Shah, case manager, and right at the back to the right Ms Inés Rubio, who
11 is our case manager. Madam President, your Honours, my name is Karim Khan.

12 PRESIDING JUDGE OZAKI: Thank you.

13 MR KAY: On behalf of Mr Kenyatta, your Honour, I am Steven Kay of Queen's
14 Counsel. I am with Gillian Higgins, Benjamin Joyes and Mr Desterio Oyatsi, all
15 representing him today.

16 PRESIDING JUDGE OZAKI: Thank you very much. Legal representative?

17 MR GAYNOR: Good morning, Madam President, good morning your Honours. I
18 am Fergal Gaynor, I'm the legal representative (indiscernible).

19 Thank you.

20 PRESIDING JUDGE OZAKI: Representative of Registry, please?

21 MS ARBIA: Madam President, your Honours, for the Registry is myself, Silvana
22 Arbia, the Director of Court Services Marc Dubuisson and the legal adviser,
23 Pieter Vanaverbeke.

24 Thank you.

25 PRESIDING JUDGE OZAKI: Thank you.

1 First agenda -- first agenda item, modalities of the accused's attendance at trial. The
2 parties have not requested any changes to the conditions of the summons to appear
3 issued by the Pre-Trial Chamber and subsequently modified by this Chamber's
4 protocol concerning the handling of confidential information and contacts of a party
5 with witnesses whom the opposing party intends to call.

6 The Chamber decides that the summons to appear issued by the Pre-Trial Chamber
7 continue in effect for purposes of the trial and that the existing conditions shall
8 remain in effect until varied by the Trial Chamber.

9 Therefore, the Chamber asks each of the accused to confirm that he understands that
10 it is the decision of the Chamber that the summons to appear issued by the Pre-Trial
11 Chamber continues in effect for purposes of the trial and that the existing conditions
12 shall remain in effect until varied by the Trial Chamber.

13 Can I ask first Mr Muthaura to confirm?

14 MR KHAN: Madam President, it's been explained to Ambassador Muthaura and
15 I can confirm he understands. Unless your Honours want to ask specifically
16 Ambassador Muthaura, of course he is welcome to put it to Ambassador Muthaura.

17 JUDGE EBOE-OSUJI: That is the intent.

18 MR KHAN: In that case Ambassador Muthaura will answer the question.

19 MR MUTHAURA: Yes, your Honour, I will continue observing the terms of the
20 summons as stand.

21 PRESIDING JUDGE OZAKI: Thank you very much, Mr Muthaura.

22 Mr Kenyatta?

23 (Pause in proceedings)

24 PRESIDING JUDGE OZAKI: There seems to be some technical problems about
25 connection. Oh, now it's connected. All right then.

1 Mr Kenyatta, can you hear us?

2 MR KENYATTA: Yes, ma'am, I can hear you, your Honour.

3 PRESIDING JUDGE OZAKI: Thank you.

4 The Chamber decides that the summons to appear issued by the Pre-Trial Chamber
5 continue in effect for purposes of the trial and that the existing conditions shall
6 remain in effect until varied by the Trial Chamber. So the Chamber asks you that
7 you understand that it is the decision of the Chamber that the summons to appear
8 issued by the Pre-Trial Chamber continues in effect for purposes of the trial and that
9 the existing conditions shall remain in effect until varied by the Trial Chamber.

10 Can you confirm, Mr Kenyatta?

11 MR KENYATTA: Yes, your Honour, I do confirm.

12 PRESIDING JUDGE OZAKI: Thank you very much.

13 Regarding practical matters related to the modalities of the accused's stay in The
14 Netherlands, the Registry has indicated in its filing that it may be in a position to
15 inform the Chamber as soon as additional information on the conditions to be applied
16 to the accused persons in The Netherlands is available. Is the Registry now in a
17 position to do so?

18 MR DUBUISSON: (Interpretation) Thank you, your Honour. Yes, indeed we
19 received information from the host country yesterday evening.

20 PRESIDING JUDGE OZAKI: Please be reminded that we are in open session.

21 MR DUBUISSON: (Interpretation) Yes, your Honour. There is no confidential
22 matter to be discussed here. I'm referring to information from the host country
23 confirming that there will be no problem for a period of 12 months. So we have
24 confirmation for a 12-month period. Beyond that time frame, we will again need to
25 revisit the issue of practical modalities with the host country regarding their stay in

1 The Netherlands.

2 PRESIDING JUDGE OZAKI: Thank you very much, Mr Dubuisson.

3 The Chamber asks the Registry to liaise with the Defence about any detailed
4 arrangement and update the Chamber if necessary.

5 The Defence team of Mr Kenyatta has raised the possibility of accused being
6 permitted to use video link from Kenya as a means of participation in the trial on a
7 regular basis. Should the Kenyatta Defence wish to pursue this issue, the Chamber
8 requests full written submissions in that regard, including the legal basis and
9 practical modalities of this request. Any submissions should be filed by 28 February.

10 MR KAY: I'm much obliged, your Honour.

11 PRESIDING JUDGE OZAKI: Next agenda item: Prosecution disclosure and the
12 impact on the trial start date.

13 Mr Kenyatta has raised the issue of the continued viability of the commencement date
14 of the trial in light of the current state of disclosure. Mr Muthaura has similarly
15 raised the issue of Prosecution disclosure and the impact of redacted witness evidence
16 on the ability of the Defence to prepare effectively for trial.

17 The Chamber would now like to hear the submissions of the parties on this issue.

18 The Chamber's understanding is that the current state of disclosure is that the
19 identities of between ten and 12 witnesses out of 34 have not yet been disclosed to the
20 Defence. The Chamber would like to ask the Prosecution to update the current
21 situation witness by witness. Please do not go into details, because we don't have
22 time to do that, and please be reminded that we are in open session.

23 So the Chamber would like to start with Witness 118, but as for this witness
24 disclosure is to take place on 17 April.

25 As for Witness 219, can the Prosecution confirm that the disclosure has already taken

1 place?

2 MS ADEBOYEJO: Madam President, your Honours, my colleague, Mr Manoj
3 Sachdeva would respond to this aspect of the agenda and the questions.

4 Thank you.

5 MR SACHDEVA: Thank you, Madam President. Indeed the Prosecution can
6 confirm that the identity of 219 was disclosed on Monday this week to the Defence.

7 PRESIDING JUDGE OZAKI: Thank you. How about Witness 232? Can the
8 Prosecution confirm that the disclosure has taken place?

9 MR SACHDEVA: Madam President, the same answer for Witness 232, although I
10 must say that there is one document outstanding in relation to this witness which will
11 be disclosed very shortly.

12 PRESIDING JUDGE OZAKI: The next witness is Witness 334. Can you update the
13 situation for us?

14 MR SACHDEVA: Indeed, Madam President. The Chamber has permitted the
15 Prosecution to, up until 11 March, one month prior to the start of trial, until the
16 Prosecution can disclose the identity of Witness 334. We are working tirelessly to
17 ensure that that disclosure is undertaken sufficiently before 11 March, but as yet the
18 identity has not been disclosed. Once protective measures are in place, then we will
19 do so forthwith.

20 PRESIDING JUDGE OZAKI: Thank you.

21 As for Witnesses 428, 429, 430, 493, 494, 505, 506 and 510, the Chamber has granted
22 delayed disclosure until protective measures are implemented.

23 As the Prosecution is aware, the schedule for trial indicated that the dead-line for
24 disclosure of the identities of non-ICCPP Prosecution witnesses with security
25 concerns is 30 days before the start of trial. Can you provide us with any update as

1 regards the anticipated date of disclosure of the identities of those eight witnesses?

2 MR SACHDEVA: Madam President, I certainly can. The decision, your Honours'
3 decision, well in fact before I go down that route, that decision was issued
4 confidentially. I simply want to refer to one aspect of the decision with your leave in
5 open session.

6 PRESIDING JUDGE OZAKI: Please go ahead.

7 MR SACHDEVA: The decision permitted the Prosecution to disclose the identities
8 of those witnesses only when the Victims and Witness Unit has confirmed to the
9 Prosecution that the protective measures have been put into place. Thus far we have
10 not had that confirmation from the Victims and Witness Unit and therefore it is right
11 that the identities of those ten witnesses have not yet been disclosed. That said, we
12 anticipate that those identities will be disclosed sufficiently in advance of
13 11 March 2013.

14 PRESIDING JUDGE OZAKI: Thank you.

15 Is there anything that Registry can say on those issues in open session?

16 MR DUBUISSON: (Interpretation) Thank you, your Honour.

17 I can confirm that, yes, indeed. I can confirm the remarks made by the Prosecution.
18 We are working on the last eight witnesses that you mentioned and we are working
19 in conjunction with the OTP and the decision should be coming no doubt in the
20 course of next week.

21 Thank you.

22 PRESIDING JUDGE OZAKI: Thank you very much.

23 May I ask the Prosecution that if you are contemplating any measures that could be
24 taken to mitigate any prejudice to the accused resulting from delayed disclosure, for
25 example calling certain witnesses first?

1 MR SACHDEVA: Madam President, certainly. In fact, in our applications for
2 delayed disclosure we specifically mentioned that we would endeavour to call those
3 witnesses whose identities have been disclosed just prior to the start of trial to call
4 them later in the case and we do intend to do that.

5 Secondly, we offered the Chamber to provide the Defence with summaries of those
6 witnesses whose identities have not been disclosed and again the Chamber ordered
7 us to do so and we have done so for those witnesses.

8 The third point I would like to make is that when we have applied the redactions to
9 the statements of those witnesses we have taken a very meticulous approach to
10 ensure that only that information that specifically identifies those witnesses is
11 redacted. Now, on some occasions it is right that the redactions would appear at
12 least to be very general, but we are faced with issues where the witnesses' function,
13 the fact that a witness was at a particular meeting, if that meeting is identified, if that
14 function is identified, then of course the identity of that witness is identified. But
15 what I can say is that the mitigating ways to try and prevent non-disclosure to the
16 Defence have been taken in advance by the Prosecution, may it please the Court.

17 PRESIDING JUDGE OZAKI: Thank you.

18 Now, I would like to give the floor to the Defence teams for any remarks, but I would
19 like to ask both Defence teams to be brief and concrete and of course the Defence
20 teams have every right to file written submissions on this issue if necessary. Which
21 team?

22 MR KHAN: Madam President, perhaps before I avail myself of that opportunity, I
23 would ask that the Prosecution be invited to give their submissions as to the viability
24 of the April start date, bearing in mind they have independent statutory obligations
25 as ministers of justice to give disclosure and to assist the Defence so that this is a fair

1 trial. So, your Honours, I would ask that the Prosecution be required to give their
2 submissions as to the viability of the April date and then, your Honours, with your
3 consent I will respond.

4 (Trial Chamber confers)

5 PRESIDING JUDGE OZAKI: The issue of trial date will be decided by the Chamber,
6 if necessary, taking into consideration all submissions by the parties and participants.
7 In this status conference the Chamber would first like to hear from the Defence teams
8 about what they are thinking. So please proceed, Mr Khan.

9 MR KHAN: Madam President, I will do so, although my submission does stand that
10 it is in my respectful submission incumbent upon the Prosecution as ministers of
11 justice to be required to state their position first. That would help inform us. If for
12 example they were to say, yes, we agree because of our non-disclosure and the
13 massive redactions that the Defence bearing in mind that Article 67 rights cannot
14 properly be ready by April, that would make this hearing go much more smoothly
15 and would save the time that your Honour is concerned about. So, your Honour,
16 that is my submission.

17 On the merits, your Honours, if you wish me to proceed to the merits without asking
18 the Prosecution to address the Bench --

19 PRESIDING JUDGE OZAKI: This is my intention, please.

20 MR KHAN: The disclosure system in this case is not fit for purpose. It is not
21 working. Your Honours, regarding the viability of the date, I would ask that you
22 look at the conduct of the Defence in this matter. Fairly appraise how we have
23 believed in this case.

24 Your Honours, the transcripts disclose that on 18 April 2011 before the Single Judge at
25 page 14 to 15 I addressed the learned Presiding Judge, Judge Trendafilova, and I said

1 as far as Ambassador Muthaura is concerned that we would want the confirmation
2 hearing as soon as possible. The exact words were "the sooner the better."
3 Your Honours, in the same hearing - in the same hearing - I put forward concerns that
4 I have real difficulties with and that's at page 13 of the transcript and I asked the
5 Bench to be alive to the proclivity of the Prosecution to disclose and I said, "Withhold
6 the most meaningful evidence until the last possible moment and then dump the
7 meat, the critical evidence, just 30 days before the hearing."
8 Your Honours, that submission of mine was shown to be well-founded, because we
9 were compelled on 11 September to file an application before the Pre-Trial Chamber
10 to adjourn proceedings because once again the Prosecution had withheld the key
11 evidence until the last possible moment and the charges had morphed since the
12 summons was issued.

13 Now, your Honours, as it turns out, this goes to our good faith. Within the period
14 between the date of the filing, 5 September, and the date we were required to submit
15 our evidence, we interviewed for Ambassador Muthaura 18 witnesses, including
16 eight in 24 hours, and your Honours those transcripts and those statements are before
17 the Court. One statement was signed at 2 a.m.

18 So we tried our very best to be ready for confirmation and that sleepless nights, that
19 massive amount of work, all occasioned because the party opposite is time and time
20 again allowed by Trial Chambers and Pre-Trial Chambers to get away with it despite
21 the sincere submissions of the Defence, we've got our act in order and we withdrew
22 our application to adjourn.

23 Your Honours, on 12 June of this year, your Honours, I had the privilege of
24 addressing this Bench and I said again that we want trial as soon as possible. In the
25 course of those submissions, 12 June, I said that your Honours -- I invited your

1 Honours to order the Prosecution to give us disclosure within two months. That
2 would have been by 12 August of this year.

3 Your Honours, once again the Prosecution were allowed to get away with it, despite
4 the attempts of the Defence, concerns put forward were not accepted by the Bench,
5 and we get a situation today where a fair trial is impossible in April not because of
6 anything we have done, but because of the massive violations in the OTP.

7 Your Honours, the reason I wished the Prosecution in all honesty to be invited to
8 address the Bench as to the viability of the commencement date is because in other
9 cases, for example in the Banda and Jerbo case, and your learned brother in this trial
10 sits in that case also, the Prosecutor at the end Mr Sachdeva sits in that case, the
11 Prosecution with a straight face said that they would complete their disclosure in
12 March and the Defence should be expected to be ready for trial in March. There is a
13 pattern of conduct that besets this Court in my submission where the Prosecution are
14 not taking their disclosure obligations seriously.

15 Your Honour, as far as the disclosure is concerned, we have already put in an Article
16 64 application and for the first time completely new allegations have been made that
17 have not been made before which have therefore not been investigated before. And
18 even today, your Honour, disclosure -- they can say they've disclosed compliant with
19 the Bench's order, but if one looks for example at 506, 505, one sees a huge amount of
20 ink because it's all blacked out.

21 So we know there's allegations of certain meetings, but we don't know when, we
22 don't know the time or the date or everybody that was present. How on earth can
23 any reasonable and fair Trial Chamber require the Defence to proceed in these
24 circumstances?

25 Your Honours, we are grateful for the opportunity to address you on the viability of

1 the date, but in my submission the Prosecution had an ethical obligation if they're
2 striving to have a fair trial not win a conviction at all costs to tell the Court for these
3 reasons we've delayed disclosure and there is a massive amount of redactions.
4 As ministers of justice, we do not think if it was my father, that's what the Prosecutor
5 should say, if it was my brother, if it was my family member, I would not want a trial
6 to proceed without the Defence being given proper time and facilities.
7 Your Honours, I have prepared bundles so I save time which I would hand up also
8 relating to the huge amount of PEXO evidence and the huge amount of Rule 77
9 evidence, if it can be handed up with the assistance of the usher, that was in the
10 Prosecution's possession at the time of confirmation and not disclosed to us. Again,
11 they dump it in at the last moment and expect the Defence somehow to proceed to
12 challenge their case. We say, we've made no bones about it, we say this case the
13 critical witnesses of the Prosecution in this case, not all of them, but the critical cabal
14 are coming to this Court to lie and we need, your Honours, time to expose those lies.
15 Not for the victims' lawyer, please.
16 Excuse me. No, they are confidential materials to the Prosecution and then the
17 Court. I'm grateful.
18 Your Honours, we need time to expose these lies. We did it for Witness 4. In fact,
19 the Prosecution knew at the time of confirmation that Witness 4 was a lying witness, a
20 deceitful witness, and we say, as it said in both the submissions by the Kenyatta team
21 and ourselves, that a fraud effectively was perpetrated upon not the Court, but on
22 something far loftier even which the Court represents; a fraud was perpetrated on
23 justice itself to proceed in those circumstances.
24 Your Honours, if you look at the evidence before --
25 JUDGE EBOE-OSUJI: Mr Khan, those are very serious allegations, using terms like

1 "fraud." You're sure you are making that submission?

2 MR KHAN: Your Honours, I am making that submission and your Honours -- I am
3 making that submission. Your Honours have seen and you are seized of matters,
4 both an application by the Defence regarding the necessity of a Code of Conduct. In
5 the whole panoply of international justice, the only Court that does not have a Code
6 of Conduct for prosecutors is this Court, is this Prosecutor instituted by Luis
7 Moreno-Ocampo. It is there for the Special Court for Sierra Leone, where your
8 Honour served; it's there for the Yugoslav tribunal; it's there for the Rwanda tribunal;
9 it's there for Cambodia. Why not this Court? Now, your Honours, these were not
10 abstract issues because we have occasion to put in an application for sanctions against
11 the Prosecution, and when you look at the Article 64 application, no domestic system,
12 no domestic judge, would have countenanced, in my submission, the Prosecution,
13 you know, taxing an overworked judge dealing with six suspects and not as an officer
14 of the Court highlighting to the judge for her benefit that this evidence is critical, it's
15 the only witness dealing with a key allegation.

16 PRESIDING JUDGE OZAKI: Mr Khan, the Chamber is quite aware of your
17 submissions, your written submissions, so please be -- please not to repeat your
18 written submissions on this issue or any other issue.

19 MR KHAN: Madam President, I won't repeat, but I will, with your leave, address
20 the questions of the Bench. The learned Judge asked me that these were serious
21 allegations and am I sure that I wish to describe it as such.
22 Your Honours, it is only right that when that question is put, I say what is my basis
23 for that. I did not see -- I have been a senior Crown Prosecutor in England. I have
24 had the privilege of working in the Yugoslav and Rwandan courts in the Prosecution.
25 I do not see how the Prosecutor could have exonerating evidence from their only

1 witness and not disclose it and, at the very least, give it one paragraph, not give a
2 one-paragraph summary saying this witness denied being at that meeting.

3 JUDGE EBOE-OSUJI: Okay.

4 MR KHAN: Your Honour, in my circumstances it compels, unsavoury though it is,
5 to one conclusion: Either a lack of guidance, ethical guidance, in the OTP or a
6 deliberate attempt not to disclose it for tactical advantage.

7 JUDGE EBOE-OSUJI: One second. I hope you've finished that submission, because
8 I was going to say if these are in your written submission that is pending. There is
9 no need to pursue it. We will deal with it in due course. There is a decision that is
10 pending, isn't there?

11 MR KHAN: Yes, it is.

12 JUDGE EBOE-OSUJI: All right. So here it is in the written submission.

13 MR KHAN: I am grateful.

14 JUDGE EBOE-OSUJI: We can take it from there.

15 MR KHAN: I am grateful.

16 Your Honours, I would ask you to give the most anxious scrutiny to the amount of
17 PEXO and Rule 77 that was not disclosed until recently in assessing whether or not
18 this is a viable trial date. There has been evidence before this Court, and we'll file
19 something soon that will hopefully assist the Bench understand the amount of hours
20 that have been spent investigating allegations that the Prosecution have now dropped.
21 It is my submission that - and it is linked to the Article 64, but I am not repeating
22 it - that the way the Prosecution have conducted this case is to have one case as a
23 decoy, where all the Defence attention is on another date based upon another witness,
24 and on the eve of trial, two months before the trial, hey, presto, like a rabbit out of the
25 hat, they come up with new allegations that simply have not been investigated.

1 Your Honours, I think there was a filing by the Kenyatta team which included an
2 investigator's note giving an inkling as to the amount of time it takes to expose, not
3 just to investigate in a casual sense but actually to expose deliberate attempts to
4 deceive your Honours. That does take time. It is not just a question of confronting
5 and telling the witness, "That's not true, is it, Mr X?" One actually needs to get into
6 the nitty-gritty. That takes time. When even today we do not have the time of
7 those meetings or the dates of those meetings or anything about anything to do - I
8 won't go into more details - anything to do with those meetings, how on earth can the
9 Prosecution say, well, April will stand?

10 Your Honours, in our submission there is -- if one looks objectively, the disclosure
11 practice of the OTP is to delay disclosure until the last possible moment. Let me give
12 you an example. Witnesses, leaving aside the fact that out of all these witnesses, out
13 of the 12 relied upon at confirmation, the seven -- 12 investigated by the Defence at
14 confirmation, the party opposite have dropped seven.

15 Leaving that to one side, leaving that to one side, looking at the new evidence, one
16 sees that there's more than 4,000 pages of new evidence disclosed for the first time
17 and there's a total of 28 new witnesses that have been dumped on the Defence at the
18 last possible moment: 68.67 per cent of the Prosecution case; 68.67 per cent. It's a
19 huge amount of the Prosecution case is completely new. So leaving aside the Article
20 64 and the purpose of confirmation and whether or not this is a decoy to get around
21 this judicial scrutiny, the Defence, if your Honours do not grant the Article 64
22 application, still need to investigate the case that's there, and that takes time. It
23 cannot be done between now and April.

24 Your Honours, the other thing is there's numerous witnesses that the Prosecution
25 have disclosed that they interviewed months ago, and I'll give you just one example.

1 Prosecution Witness 152 was interviewed on 15 October 2011; 15 October 2011. We
2 got disclosure for the first time in December of last year. What possible excuse, what
3 possible reason except to deny the Defence the opportunity to challenge, investigate
4 and then expose these witnesses, would the Prosecution have not to disclose it
5 earlier?

6 Your Honours, none of us, least of all me, bandy about readily serious accusations. I
7 have huge respect for this institution and huge respect for the Office of the Prosecutor,
8 but with that respect come responsibilities that the office cannot shirk and your
9 Honours we are living in the real world, not in a world of make believe where
10 everything as the English say is fine and dandy. It's not. And a point comes where
11 the only people that have a mandate to properly scrutinise and say is this system
12 working consistent with European law of human rights, disclosure at the earliest
13 opportunity, a presumption in favour of disclosure; is it working as the drafters of the
14 Rome Statute wanted? And if it's not, your Honours, let's mend it, and the way it
15 will be mended is not rhetoric from the Defence Bar. It is by the Bench as custodians
16 of justice requiring the Prosecution to discharge their obligations in a manner that is
17 consistent with the spirit of disclosure underpinning both the Rome Statute and
18 international human rights conventions. That reality is not occurring time and time
19 and time again.

20 Your Honours, there's a lot more that can be said, but I do say I do say, your Honours,
21 that the --

22 THE PRESIDENT: Judge Eboe-Osuji was --

23 MR KHAN: -- April date -- if I can finish. The April date is not viable. There's
24 two more points to make, but your Honours I will pause for the question from the
25 Bench, if I may.

1 JUDGE EBOE-OSUJI: No, please, finish.

2 MR KHAN: Your Honours, the Prosecution's approach to judicial orders, they are
3 an organ of the Court. In the same way that the Chambers are an organ of the Court
4 or the Registrar is an organ of the Court, but they are not equal. In this courtroom
5 the Prosecutor is equal to my friend, Mr Steven Kay. They are not above the law.
6 They are subject to it, and this is precisely the malady that Judge Sir Adrian Fulford
7 identified in the Lubanga decision, where the Prosecution blasély said, "We are not
8 going to comply with judicial edicts, we are somehow above the law," and that was
9 exactly the language identified by Sir Adrian Fulford.

10 Now, your Honours, what do we see in this present case? A small example: There
11 was a decision of the Bench on 3 December 2012 - 3 December 2012 - that the
12 Prosecution had to give us disclosure by 11 April. What did the Prosecution do?
13 By 11 February, by 11 February; I am grateful. What did the Prosecution do? What
14 is their real term respect? Not a nice smile and a "Hello." What is the real term
15 respect to the Bench, to the institution of the judiciary? On the day of the
16 dead-line - on the day of the dead-line - they filed an application seeking to withhold
17 five names. Your Honours, that is unacceptable. It renders a fait accompli the
18 Prosecution's application. All parties, whether it's the Defence or the Prosecution,
19 have an inescapable duty to comply with the Bench. There's only one master in this
20 courtroom and it is the Bench, it is the Judges, and we need to comply. If we feel, for
21 whatever reason, that we cannot, in good time we make an application.

22 Your Honours, the Prosecution have been criticised in other cases for this last-minute
23 practice. They have been told; the jurisprudence is there. They have been told it is
24 improper to make applications on the day of the dead-line, because actually it renders
25 the Bench powerless to deny it, because even if it is denied, there's non-compliance.

1 So these judicial admonitions that already have been made by the judiciary of this
2 Court are falling on deaf ears from the party opposite. Far too often they say they're
3 working tirelessly, I think my learned friend Mr Sachdeva said, working tirelessly,
4 using their best endeavours. The proof of the pudding is in the eating.
5 The Defence team said pre-trial we wanted confirmation as soon as possible and a
6 trial as soon as possible, the ask for disclosure within two months, is left in the
7 unfortunate position, in order to discharge their ethical obligation, to tell the Bench,
8 your Honours, not because of any lackadaisical attitude on their part, but because of
9 the party opposite's failure to disclose in a timely fashion, we cannot and your
10 Honours cannot have a fair trial in April. The Prosecution -- the Bench, we say,
11 cannot allow, cannot countenance the Prosecution effectively keeping cards under the
12 table, not disclosing it, and then asking the Defence to proceed to a trial in a manner
13 when they are not prepared.
14 As far as the submission of the Prosecution just now that somehow a relief would be
15 made that the Prosecution's scheduling of witnesses would alleviate the problem, that
16 those witnesses disclosed late can be called late, it's a nonstarter. Cases are not
17 passed out, they are not divided in this clinical manner. I need to know what the
18 case is when I start my very first cross-examination, and they have a duty to disclose
19 so I can fulfil my duty and, your Honours, we say that if your Honours do not take
20 the reins of this case and insist that the Defence are given a fair shot to challenge this
21 evidence, then this Court will be hamstrung at the beginning of the trial in such a
22 manner that there will be no confidence in the decisions that your Honours are able to
23 arrive at because evidence has not been properly disclosed.
24 Your Honours, I think I will leave it there so that my learned friend, Mr Kay, can also
25 address the Bench. Before I sit, is there a question from the Bench, or perhaps I've

1 addressed it?

2 JUDGE EBOE-OSUJI: Yes, yes, yes, there is. The reins of the case are fully in the
3 hands of the Chamber, Mr Khan, we can assure you of that, but the question to you is
4 this. When you mentioned the statistic of 68 per cent of material you say you are just
5 getting, are we talking about material revealed to you as a process of unpeeling
6 redactions, or are we talking about completely new material?

7 MR KHAN: Your Honours --

8 THE INTERPRETER: Microphone, please.

9 MR KHAN: The amount of new material on our calculation amounts to 4,466 pages
10 completely new which is 68.67 per cent of the case and that was disclosed in January.
11 Your Honours, the amount disclosed pre-trial was 1,996 pages and including incrim
12 Rule 77 evidence of OTP and non-ICC witnesses, that was 2,037 pages. Of course the
13 Prosecution have dropped seven witness and dropped some evidence so that's how
14 the figures were arrived at.

15 PRESIDING JUDGE OZAKI: Thank you, Mr Khan.

16 And please be assured that the Chamber, this Chamber is fully aware of its
17 responsibility under the Rome Statute.

18 And as for the hand-outs, Mr Khan, please submit this as a filing if you want to put it
19 on record.

20 MR KHAN: Madam President, I am most grateful. What we will do with your
21 leave is, as is clear from the cover sheet, we would need to file a corrigendum to the
22 Article 64 application anyway. One of the reasons for that, and it may be helpful, is
23 that when we were searching about what to disclose and what was not, the
24 Prosecution have adopted a practice of changing the ERN number when they give
25 new disclosure and what they don't do is in brackets put "previously disclosed as"

1 and giving the old ERN number and so the Article 64 needs to be corrected anyway
2 and this will supplement it. So we'll do that, with your Honours' leave. But the
3 reason we took the liberty of raising it now is the amount of material may also inform
4 your decision regarding the viability of the April start date, because these are matters
5 that the Defence need to read and then also will trigger further investigations. I'm
6 grateful.

7 PRESIDING JUDGE OZAKI: Thank you very much.

8 Mr Kay?

9 MR KAY: Your Honour, I'm grateful. We are asking this Court to suspend the
10 principle of expediency and the right of expedition to enable us to have adequate time
11 to prepare our defence under Article 67, as well as to have proper disclosure during
12 that period so that we may prepare for trial.

13 The procedures of this Court were developed so that a confirmation hearing took
14 place as a proper examination of charges and thereafter the Trial Chamber was able in
15 an orderly manner to follow the confirmation of charges and provide for a trial. I am
16 advising the Court that that has simply not taken place in this case.

17 In relation to the evidence to be considered for trial, the Prosecution have abandoned
18 an important witness whom on their own admission has lied about material facts and
19 evidence, and there is more to come about that witness, and changed the nature of its
20 case into being something else. It's not the same case that we faced at the
21 confirmation of charges hearing. We're now facing a very different case and it's a
22 case that was not immediately presented to us upon the confirmation of charges
23 decision, but it was a case that emerged from the filing of the pre-trial brief on 9
24 January and it was a case that emerged when we were able to scrutinise the
25 supporting documents.

1 My learned friend, Ms Higgins, will give you some very important information
2 relating to the quantum of disclosure and the type of materials which I think will
3 assist the Court in considering this issue, because the Court was asking the
4 Prosecution, "Well, when's the names going to be given?", as if it's an issue about the
5 names. It's actually an issue about the content of the information the names give. It
6 is as much as names as information, and I am telling this Court with all my
7 experience that going through redacted pages at a level I have never seen in my entire
8 career is not a platform upon which the Defence can understand the case and upon
9 which the Defence can mount a challenge to the evidence.

10 I have to put this generic submission before the Court because it's been apparent
11 throughout the evidence that's been -- that has been adduced in this case that the
12 Prosecution has highly suspect evidence that it is relying upon, and at the
13 confirmation of charges we challenged their primary witness and since then it's been
14 proved that we were right, not wrong.

15 So we're now coming to a case with that background whereby the nature of the case
16 has changed, the Defence has been proved correct in relation to an important witness
17 relied upon by KNCHR, CIPEV, the OTP, decisions by the Pre-Trial Chamber and we
18 were right.

19 Now, we are coming to this Court again saying, "Let us investigate these allegations
20 properly and we will show you we are right again," but what is happening here is
21 that we are being denied that opportunity of adequate investigation and it's not an
22 issue that a witness may be called in a period of time during a trial, and therefore we
23 have trial time to deal with it, because we have a right to make an opening statement;
24 we have a right to know the nature of the case that we face; we have a right to
25 question witnesses based upon what we know of other witnesses, and it is quite clear

1 to us from a recent disclosure, and we'll get to the bottom of it, that there are
2 individuals who have been supplying witnesses to the Prosecution and we would like
3 to look at that chain and see what is behind it, because the nature of the allegations
4 within the statements that we are able to determine show that the motivation of the
5 witnesses is often based upon matters completely different to the post-election
6 violence case, an entirely separate issue relating to the killing of Mungiki personnel
7 over many years.

8 Now, taking into account that background, there is a lot for the Defence to look at and
9 to consider whether a witness is a genuine witness or not because, like the witness for
10 the confirmation of charges hearing who wasn't there, it is our submission that a
11 number of these people who make allegations were simply not at the place at the time
12 they say they were. And we're not dealing here with victims or eyewitnesses.

13 We're talking about the people upon whom the Prosecution are now seeking to rely
14 for the connectivity of their case as expressed in their pre-trial brief, but we are able
15 from our position to inform the Court this isn't a misunderstanding about what
16 someone saw or heard in relation to a conversation and therefore it's a question of
17 questioning did he make the right -- did you hear it? No, you misunderstood it, as
18 many cases may be founded upon. It is simply and utterly that the person who
19 claimed to be present at an event is lying, and we know that the Prosecution have not
20 adequately investigated these witnesses and I'll tell you why we know that: Because
21 the witness who was the false witness for the confirmation of charges hearing was not
22 revealed by them before that hearing to be a fraudulent witness, and we know that
23 they are not investigating these witnesses as to whether they were at the place and in
24 the circumstances they allege. Partly that may be something to do with the Court
25 and due regard to victims and witnesses. I know not. I don't care. My

1 responsibility is to defend my client and make sure he is properly defended, and I am
2 advising this Court that I am extremely concerned, as I stand up here, that I have not
3 been able to adequately look at this evidence.
4 I've done many cases in my career whereby I have put up with levels of redaction, or
5 late information, and the trial goes on and I know I'll be able to deal with it later on,
6 but in this exceptional case which has great importance in relation to the nature of the
7 evidence being alleged, I am advising the Court that I am not in a position now
8 because I have not even been able to read the detailed evidence that Mr Manoj has
9 said "Ah, because that could identify him or others, we can't express who was at the
10 meeting, we have to redact that because that might reveal who it was." Well, I have
11 news for the Prosecutor. That's what a criminal case is about. That's what we are
12 entitled to do, and by their own admission they are failing to put us in that position.
13 And so it doesn't give me any great pleasure to seek to delay a trial date, but I am
14 advising the Court that in these circumstances it is so extreme that I have to.
15 Ms Higgins now will advise you further concerning quantities of disclosure which I
16 think it would be of interest to the Court and I know one of the Bench has already
17 expressed an interest in that.

18 PRESIDING JUDGE OZAKI: Mr Kay, when you asked for -- when you talk about
19 some delay, do you have any specific time frame in mind?

20 MR KAY: No, I can't have because I have not been shown the material, and we
21 deliberately took that step of filing an ex parte confidential investigation report on
22 that particular witness so that you were aware of the time, effort and resources that
23 are considerable when we are having to deal with issues such as that to investigate
24 where somebody was, and we've done it and we've succeeded on that and there will
25 be a further filing before the Court, but Ms Higgins will now advise you further.

1 MS HIGGINS: Your Honours, I would like to briefly address you and be as concise
2 as possible in respect of five points which I submit may assist you in coming to the
3 decisions that you must make concerning the start date of this trial.
4 The first point I will touch upon deals with the necessity of re-review of evidence by
5 the Defence given its redacted nature in which it is first served and later re-served.
6 The second point I will touch upon is the extent of the redacted source material that
7 underlies the allegations contained within the pre-trial brief.
8 The third, the extent of redactions in the witness transcripts, so not simply as Mr Kay
9 says the names, but the meat of what we need to investigate and prepare for trial to
10 address.
11 The fourth point briefly, to touch upon the impact of the number of witnesses in
12 respect of which the identity we still do not know and fifthly, to give you some
13 example, perhaps two, of the substantial way in which we submit the case is shifting
14 and changing. Further submissions on that will be provided in writing.
15 So to touch upon the first point, if I may, the necessity of re-review, and I'd like to
16 give you a concrete example.
17 I'm going to take the witnesses 11 and 12, key witnesses which remain in this case
18 relied upon by the Prosecution.
19 The Prosecution has served 79 transcripts of evidence in respect of these two
20 witnesses together. Out of the 1,415 pages, 1,021 pages were re-served lesser
21 redacted and I can inform your Honours that from my personal experience of reading,
22 re-reading, analysing and then of course preparing to segment the information that is
23 necessary to be investigated, that this is not only an arduous task, but the fact of the
24 lesser redaction makes it a task that must be repeated so that the key allegations are
25 found and investigated properly in readiness for trial. It's just one example and we

1 hope, given a little bit more time, to provide you with other examples in written
2 submissions.

3 The second point is the --

4 JUDGE EBOE-OSUJI: Ms Higgins, before you move on to your second point, I want
5 to be sure that I understand what you mean by "re-review." I must confess I don't
6 understand what you mean.

7 MS HIGGINS: From the Defence perspective in terms of preparation for trial, the
8 practical task of firstly counsel reviewing the material, and your Honour can imagine
9 79 transcripts takes time, each of which may be between ten to 25 pages, once that
10 task has been done, in the process of movement towards trial, the Prosecution has
11 served the same material again to some extent with lesser redactions. So as counsel I
12 need to go back through the material to see where the lesser redactions are and to
13 review them within the context of the evidence that I had initially seen.

14 JUDGE EBOE-OSUJI: Oh, the re-review is a job you yourself --

15 MS HIGGINS: Indeed.

16 JUDGE EBOE-OSUJI: -- need to do. All right. Okay. I thought you were --

17 MS HIGGINS: Sorry if I wasn't clear.

18 JUDGE EBOE-OSUJI: Okay.

19 MS HIGGINS: So your Honour can imagine the onerous nature of which that task is
20 in respect of the Defence preparations and the Defence resources that need to be
21 employed to make sure that that work is conducted properly.

22 The second point touches upon the pre-trial brief and I wanted again to use this
23 document as an example to your Honours. It's a useful document for everyone in
24 terms of Article 67 to know the true nature of the case that is faced. However, the
25 utility of that document is significantly reduced when one starts to examine the

1 reality of the extent to which the sources relied upon remain redacted.

2 As an example, I went through the footnotes, 589 footnotes. I looked and took note
3 of any footnote that was either source entirely redacted or source partially redacted
4 and in respect of that I can inform your Honours that 181 of the 589 footnotes are in
5 part or either entirely redacted. So almost a third.

6 What does that mean for Defence preparation for trial? It means that our
7 investigation team is simply not able to penetrate the reliability, the veracity, the
8 credibility of the source and therefore we are unable to properly prepare to be in a
9 position to cross-examine witnesses and to be able to employ proper investigations to
10 unravel this case and to present the truth to the Court. It's an example, but I submit
11 a significant one.

12 The third point I referred to is the extent of redactions in witness transcripts. Now, I
13 confess that given the extent of material that has been disclosed, I have conducted an
14 initial analysis of the extent of redactions and what I have done is to go through our
15 own Defence analysis and isolate some of those witnesses in respect of which there
16 are still significant and substantial transcript redactions that go to the heart of the
17 allegations in respect of Uhuru Kenyatta.

18 We will endeavour to provide more in writing, but so that the Bench has a flavour of
19 my submission I can perhaps inform the Bench that the following witnesses fall into
20 that category: Witness 2, Witness 11, 12, 118, 217, 219, 232, 334, 428, 429, 430, 494, 505,
21 506, 510 and 493. I add a note of caution that there may be more.

22 It's not just the number or extent of witnesses, because we fall back into my first point
23 which relates to re-review and the strain upon Defence resources, because all of this
24 evidence must be looked at initially, filtered, sent for investigation, re-reviewed once
25 the lesser redactions have been made apparent.

1 The next point that I have concerns the number of witnesses whose identity has not
2 been revealed to date, which we have touched upon and been provided with useful
3 information from my learned friends, but perhaps just again a note of caution that, as
4 we approach the trial date as it stands, 11 April, it's not again just the fact - the very
5 important fact - of the name. It's the extent of the percentage of evidence that is
6 related to the number of witnesses that are either unknown to the Defence or for
7 example evidence which has been collected post-confirmation and served within the
8 last few months.

9 An initial calculation of the amount of evidence that the Prosecution seeks to rely on
10 that was collated post-confirmation is 84 per cent. That, can I clarify, is based upon
11 the table that the Prosecution has provided to the Defence in respect of which it
12 indicates the number of hours of testimony and it relates to the evidence that was
13 collected post-confirmation. I would like to provide you with more in writing and
14 we will endeavour to support that figure, or indeed correct it if we subsequently find
15 it to be higher or lower, but an initial figure for consideration.

16 The final point, and perhaps I can make this briefly, concerns the extent of allegations
17 that have, we submit, substantially changed or morphed to the detriment of
18 Mr Kenyatta and which are based on new evidence post-confirmation which remains
19 still in part --

20 (Trial Chamber confers)

21 PRESIDING JUDGE OZAKI: Sorry, please proceed.

22 MS HIGGINS: Thank you, your Honour. The last point relates to the morphing,
23 the changing, the sand shifting shape of the Prosecution's case that has perhaps
24 escaped that initial confirmation process in terms of the detail and the underlying
25 evidence that is now being used to support it.

1 Let me give you one or perhaps two examples: Draw your attention to paragraph 29
2 of the pre-trial brief, and I'll refer to it as "the hotel allegation" because we are in
3 public session. You will be able to look at the extent of that allegation and the
4 exactitude of that allegation we submit has morphed. Flesh on the bones of what
5 was simply a line in a KNCHR report about the fact of this meeting, no more than a
6 line, has been developed and underpinned by substantially redacted evidence. The
7 only unredacted evidence in support is from P-217 of which the Defence was not
8 aware of his testimony until 9 January 2013.

9 The final example I will give -- the final example I will give in this category relates to
10 paragraph 31 of the pre-trial brief and I'll refer to it as "the club allegation." It's my
11 recollection it has been mentioned in public, but I'll refer to it as "the club allegation."
12 This allegation was confirmed by the Pre-Trial Chamber on the basis of the
13 Prosecution's supposed eye-witness, Witness 4. Your Honours are aware of the
14 submissions and I will not repeat them in respect of what we say about Witness 4,
15 who is no longer relied upon by the Prosecution. The morphing of this allegation it
16 has now moved from a date to vague, an unspecified time which of course makes
17 Defence investigation more difficult.

18 The underpinning again now by post-confirmation evidence underpinned when we
19 look at the footnotes in support by P-219, redacted. Don't have his identity. P-494,
20 redacted. We don't know who he is. Both of them were interviewed in 2012.
21 Other redacted documentary material relied upon and also Witness 12, but in respect
22 of this allegation we were not aware until October 2012. A source shifted case of
23 evidence post-confirmation provided to the Defence largely within the last couple of
24 months.

25 Can I end with this observation? That it is essentially our submission that the extent

1 of the redactions in names and substance render the proposed date for trial entirely
2 untenable when taken in the context of Article 67 and the Defence right at the start of
3 trial to know the case it faces.

4 Your Honour, those are my submissions. As I've indicated, we will endeavour to
5 supplement with more information that may assist you in due course. Thank you.

6 PRESIDING JUDGE OZAKI: Thank you very much, Ms Higgins.

7 (Trial Chamber confers)

8 PRESIDING JUDGE OZAKI: The Chamber has to rise for ten minutes now and then
9 we will come back and continue.

10 THE COURT USHER: All rise.

11 (Recess taken at 11.03 a.m.)

12 (Upon resuming in open session at 11.07 a.m.)

13 THE COURT USHER: All rise.

14 Please be seated.

15 PRESIDING JUDGE OZAKI: I apologise for interruption, but I was told that we are
16 given another 20 minutes to proceed.

17 Mr Kay?

18 MR KAY: Yes, your Honour, it's just one small matter, but it's a matter that needs to
19 be raised in relation to the Defence preparations. We are not doing this by following
20 everything, everything that moves. We actually take five major points and that's
21 what we need the time to investigate, because we feel that's the best way to
22 concentrate and provide cogent evidence. Perfect world, you would be able to
23 follow everything, but no, we have restricted, and the ex parte confidential filing you
24 had, I think that makes that point clear.

25 One final matter is this, and it's really the elephant in the room. Kenya I and Kenya

1 II have been linked by the Court. I don't know what Kenya I is going to say this
2 afternoon, but it would be very unfair to us to be put into a situation where our rights
3 are affected in order to keep some sort of synchronisation with Kenya I, because each
4 case has to be considered separately. It may be for presentation purposes thus far
5 they have been presented in a synchronised way, but we're now getting to the
6 circumstances where a trial and issues have to be properly considered in terms of our
7 rights, rather than Court convenience or presentation.

8 Thank you very much.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 And as for additional written submissions, I want the Defence -- I would like to ask
11 the Defence team to submit those submissions by 20 February, Wednesday next week.

12 Is that fine?

13 MR KAY: Absolutely. Thank you, your Honour.

14 PRESIDING JUDGE OZAKI: And the Prosecution have to make its response by
15 25 February.

16 MS ADEBOYEJO: Thank you, Madam President.

17 PRESIDING JUDGE OZAKI: On this understanding, does the Prosecution want to
18 respond now, on the understanding that we will have a chance to respond in writing?

19 MS ADEBOYEJO: Well, very briefly, your Honour, my learned friend Mr Sachdeva
20 will respond.

21 PRESIDING JUDGE OZAKI: Please respond.

22 MR SACHDEVA: Thank you, Madam President. I just wanted to make one brief
23 point, and my learned friends on the other side have alluded to this throughout their
24 submissions, and that is our disclosure process has been entirely within the Court's
25 rulings and parameters, namely the disclosure of witnesses that -- for whom delayed

1 disclosure has been ordered. When this issue was litigated, clearly, when we're
2 talking about the redaction of identities, it will necessarily involve the redaction of
3 further information because further information could identify the witnesses. So, in
4 our submission, this issue has been litigated, it has been dealt with. The Defence
5 have filed their objections and the rulings have been made and your Honours have
6 given us until 11 March to disclose the identity of all our witnesses one month prior to
7 the trial start date. So in that respect the Prosecution is ready to proceed.
8 Nevertheless, we recognise the Defence's submissions today and we'll leave the
9 matter of the start date in your Honours' hands, but I just wanted to reiterate that our
10 disclosure is entirely within the Court's rulings and, in our submission, we have
11 proceeded in a thorough and comprehensive manner.

12 Those are my submissions.

13 May I make one final point, Madam President? My learned friend, Mr Khan,
14 mentioned a corrigendum to, I think it's filing 628. We would ask with leave to be
15 given further time to respond to the corrigendum and the initial application, and if
16 we could have the time to also to respond to Mr Kay's submissions as well so we can
17 do it in an omnibus fashion.

18 JUDGE EBOE-OSUJI: Mr Sachdeva, it seems that the Defence are complaining not
19 merely about unredacting something that had once been redacted. It looks like the
20 complaint is that some completely new material has been given to them. You don't
21 need to respond to that now. The reason I point it out is I am sure there will be
22 written submissions; please keep that in mind. Thank you.

23 MR SACHDEVA: Indeed, and there will be, and a response will be made to those
24 considerations.

25 PRESIDING JUDGE OZAKI: Thank you very much.

1 The next agenda item and the last agenda item is scheduling of two Kenya trials.
2 The Kenyatta Defence team requested the Chamber to provide an indication during
3 this status conference as to the anticipated timetable of trial proceedings in this and
4 the Ruto and Sang cases, given that they are scheduled to commence before this
5 Chamber in early April.

6 In addition, in December last year, the Muthaura Defence submitted an application
7 for the Judges of this Chamber to consider excusing themselves from one or either of
8 the cases on the grounds that hearing such complex cases concurrently would
9 necessarily delay the trial process in both cases.

10 The Chamber is very mindful of the rights of the accused in both cases to be tried
11 without undue delay. Indeed, it considers it to be in the interest of all parties, in the
12 interests of all victims and in the interest of justice generally for the cases to proceed
13 as expeditiously as possible.

14 It is the view of the current Trial Chamber V that the most expeditious and efficient
15 way to proceed is to constitute two separate Chambers to hear the cases in parallel.

16 Since June last year this Chamber has been in communication with the Presidency in
17 that regard, recommending in particular that additional Judges be assigned to
18 compose two separate Chambers.

19 As all parties are aware, this Court also faces some logistic constraints, including
20 availability of courtrooms for example. Because both of the cases have two accused,
21 and because there are other cases going on at the same time, the use of Courtroom 1,
22 this courtroom, for both Kenya trials is the only option. We cannot use Courtroom 2
23 for Kenya cases because of the physical constraint.

24 For this reason, even if two Chambers are composed it will not be possible to conduct
25 simultaneous full day trials in both cases. The most that could be done is to share

1 this courtroom and to sit for four hours a day on each case, which in the view of the
2 current Chamber will best serve the purpose of ensuring expeditious and efficient
3 trials.

4 The Chamber is still waiting for the decision of the Presidency and this Chamber will
5 notify the parties and participants as soon as it is informed of any decision of the
6 Presidency in this regard.

7 So that's what the Chamber would like to inform under the third agenda item. Is
8 there any questions or submissions under this agenda item?

9 MR GAYNOR: Madam President, I do have a few submissions regarding delay in
10 this trial on behalf of the victims and the concept of running both trials
11 simultaneously and if I could take a few minutes of your time I will provide them to
12 you now?

13 PRESIDING JUDGE OZAKI: Yes, please proceed.

14 MR GAYNOR: Thank you, Madam President.

15 First of all, your Honours have heard a great deal today about delay in the conduct of
16 this trial and you have heard what amount to requests that this trial be delayed.
17 This is one of the issues of greatest concern to the victims, the post-election violence
18 was five years ago. The nearly three years have passed since the Prosecutor was
19 authorised to commence an investigation; nearly two years have passed since
20 Mr Muthaura and Mr Kenyatta were first summoned to appear and a year has passed
21 since the charges were confirmed against them.

22 Now, your Honours, four of the victims who were authorised to participate by the
23 Pre-Trial Chamber in this case have died since they were authorised to participate.
24 Two were rape victims. The circumstances of their death appear to be connected to
25 the psychological and physical circumstances which arose as a result of that rape

1 which falls within the charges in this case. For those four victims, your Honours,
2 justice delayed truly has been justice denied.

3 Now, many of the victims in this case are elderly or in ill health. They have received
4 from the Government of Kenya medical assistance which is totally inadequate,
5 educational assistance which is totally inadequate and shelter which is totally
6 inadequate. That specifically applies to non-Kikuyu victims.

7 Your Honours, those who are elderly and in ill health have seen their own relatives
8 pass away in recent years and months. Some of them have seen their own friends
9 pass away. They themselves quite honestly fear that they too will pass away before
10 they see justice in their own lifetimes. Many others are stronger and younger, but
11 they too are losing patience. They want to see justice. Justice means not only the
12 full truth about what happened in Nakuru and Naivasha in January of 2008, but also
13 they want just reparations for the suffering that they have endured. They know that
14 reparations will only arise on the day that a conviction is entered by your Honours, if
15 that day should come, and they know that day could be very many years off.

16 Your Honours, I wish to urge this Trial Chamber respectfully to be very vigilant to
17 any submissions by any party, the intention or effect of which would be to delay the
18 commencement of this trial or the conclusion of this trial. I would urge your
19 Honours to explore to the greatest extent possible procedural solutions to any
20 genuine instances of unfair prejudice which will have the least impact on the timely
21 commencement and conclusion of this trial.

22 I'd like just to raise one point and that is my learned friends for the Defence have
23 raised the very reasonable possibility that they might be caught unawares by the
24 evidence of a Prosecution witness, a Prosecution witness may give evidence that they
25 simply are not prepared to deal with and through no fault of their own. In such

1 situations, there are a range of options available to the Defence and to your Honours.
2 They can make an application to your Honours for a short adjournment to give them
3 a little more time to prepare their questions; they could make an application to your
4 Honours that the witness should be recalled in a month or a week or in six months to
5 give them further time to investigate the matter in question. If in extreme
6 circumstances they can show that the Prosecution has deliberately tried to ambush
7 the Defence, they can of course make an application to your Honours to entirely
8 exclude the Prosecution evidence. These are all tools which are at the disposal of
9 your Honours and I would urge your Honours to give greatest consideration to that
10 wide range of remedies which can be used during the trial process to minimise any
11 unfair prejudice to the Defence.

12 In respect of the prospect of the Ruto and Sang trial being run simultaneously with
13 this trial, I would again urge your Honours to do whatever you need to do even if
14 necessary borrowing a trial -- a courtroom from the ICTY to make sure that you can
15 sit for as long as your Honours can possibly bear each day of trial to ensure that this
16 trial begins and is concluded as expeditiously as possible.

17 Thank you for your time.

18 PRESIDING JUDGE OZAKI: Thank you very much, Mr Gaynor.

19 If there are no other submissions, this concludes today's status conference. Thank
20 you very much, parties and participants, thank you very much, Mr Muthaura and
21 Mr Kenyatta, for joining us.

22 THE COURT USHER: All rise.

23 (The hearing ends in open session at 11.22 a.m.)