

1 International Criminal Court  
2 Trial Chamber V(b) - Courtroom 1  
3 Situation: Republic of Kenya  
4 In the case of The Prosecutor v. Uhuru Muigai Kenyatta - ICC-01/09-02/11  
5 Presiding Judge Kuniko Ozaki, Judge Robert Fremr and Judge Chile Eboe-Osuji  
6 Status Conference  
7 Friday, 6 September 2013  
8 (The hearing starts in open session at 3.42 p.m.)  
9 THE COURT USHER: All rise.  
10 The International Criminal Court is now in session.  
11 Please be seated.  
12 PRESIDING JUDGE OZAKI: Good afternoon to parties and participants.  
13 Can counsel introduce themselves for the record, starting with Prosecution?  
14 MS ADEBOYEJO: Good afternoon, Madam President, your Honours. The  
15 Prosecution today is represented by: Ms Ruth Frolich, trial lawyer; Ms Sylvie  
16 Wakchom, legal officer; Mr Julian Elderfield, legal officer; Ms Ramu Bittaye, our case  
17 manager; and myself, Adesola Adeboyejo, trial lawyer. Thank you.  
18 PRESIDING JUDGE OZAKI: Thank you.  
19 Representative of OPCV?  
20 MS MASSIDDA: (Interpretation) Good afternoon, your Honours. The Common  
21 Legal Representative, Mr Fergal Gaynor, represented today by Ms Anushka Sehmi  
22 and I am Paolina Massidda, principal counsel of the Office of Public Counsel for  
23 Victims.  
24 PRESIDING JUDGE OZAKI: Thank you.  
25 Defence, please?

1 MR KAY: I am Steven Kay of Queen's Counsel, lead counsel for Mr Kenyatta.

2 With me is my instructing solicitor, Mr Desterio Oyatsi, from Kenya; my co-counsel,  
3 Ms Gillian Higgins; and my case manager, Mr Benjamin Joyes.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 As usual, I'd like to remind all speakers to speak slowly and to pause for several  
6 seconds in-between speakers in order to ensure accurate transcription and  
7 interpretation.

8 The purpose of this status conference is to discuss the conduct of the trial proceedings  
9 and to address other outstanding matters to be resolved prior to the trial commencing  
10 in November.

11 We have this afternoon one session of two hours to discuss all issues on the agenda  
12 and, due to constraint on Judges and courtroom availability, we cannot have another  
13 session to continue our discussion this evening or next week. Therefore, parties and  
14 participants are requested to be concise and to the point in their oral submissions.

15 An agenda for this status conference was issued on 30 August, document 799. As  
16 provided for in the agenda, the Defence notified the Chamber on 3 September that it  
17 would like to raise two additional matters under item D of the agenda, firstly relating  
18 to the accused's attendance at trial and, secondly, relating to an adjournment of the  
19 trial date. The Defence advised the Chamber that part of the discussion would need  
20 to be held in private session.

21 In the interests of efficiency, the Chamber is going to diverge slightly from the order  
22 on the agenda and structure the hearing as follows: It will begin with a number of  
23 announcements under agenda item D. It will then hear submissions on items A and  
24 B. The Defence's first request regarding the accused's attendance at trial will then be  
25 heard together with item C, given the interrelationship between the issues. Finally,

1 the Chamber will return to item D to hear the Defence's second additional agenda  
2 item and will go into private session as necessary. If the discussion of this issue and  
3 any other issue cannot be concluded due to time limitations, parties and participants  
4 will be given the opportunity to file written submissions.

5 Now, the Chamber makes the following announcements in relation to three issues  
6 currently pending before it:

7 The first issue relates to the prospect of hearing the opening statements and other  
8 appropriate portions of the trial in Kenya, or Tanzania. The Chamber received  
9 submissions on this issue from all parties and participants, in accordance with an  
10 order of the Chamber, and submissions were made on 12 and 13 August.

11 Having considered the submissions and mindful that none of the parties or  
12 participants have requested an in situ hearing, the Chamber does not intend to pursue  
13 this matter further at this stage.

14 The second issue relates to the meaning of the term "organisational policy" as set out  
15 in Article 7(2) of the Statute.

16 At a status conference held in June 2012, in response to a question posed by the Bench,  
17 the Defence submitted that the Chamber should issue a ruling on its interpretation of  
18 the term prior to the commencement of trial. The Prosecution and the then Legal  
19 Representative submitted, on the other hand, that this question should be resolved at  
20 trial. The Chamber informed the parties at that time that it would come back to the  
21 issue if it considered it necessary.

22 For the benefit of the parties' preparations, the Chamber confirms that it does not  
23 intend to issue a ruling on this matter prior to the commencement of trial.

24 Thirdly, on 19 July this year, the Defence filed observations on an allegation set out in  
25 paragraph 2 of the pre-trial brief which purports to rely on an agreed fact. The

1 Defence disputes the reliance on the agreed fact and requests the Chamber not to take  
2 judicial notice of the fact as alleged in the pre-trial brief. The Prosecution did not  
3 respond to the Defence observation.

4 At this stage, the Chamber considers it sufficient to note the Defence observations for  
5 the record and may return to this matter if and when judicial notice of agreed facts is  
6 to be taken.

7 I now would like to go to agenda item A: Conduct of proceedings.

8 First, duration of Prosecution case. The Chamber notes that the Prosecution's  
9 revised witness list submitted on 16 July includes 30 witnesses, including two experts.

10 A total of 261 hours is projected for these witnesses, which amounts to an average of  
11 8.7 hours.

12 The Chamber further notes that the Defence had submitted its own estimate of its  
13 cross-examination time, which in total amounts to 404 hours; an average of 13.5 hours  
14 per witness.

15 The Chamber is concerned at the length of time projected by both parties. In  
16 preparation for this status conference, the Chamber requested the Prosecution to be  
17 prepared to submit a reduced time estimate.

18 Is the Prosecution now in a position to address this? If so, you have ten minutes.

19 MS ADEBOYEJO: Indeed, your Honour, the Prosecution is ready to address this  
20 agenda item and my colleague, Ms Ruth Frolich, will be addressing this issue.

21 Thank you, Madam President.

22 MS FROLICH: Good afternoon, your Honours. I'm Ruth Frolic, trial lawyer.

23 Yes, indeed, your Honours, we have noted the Chamber's invitation to propose

24 reduced times for our witnesses and we have attempted to do so and we have

25 undertaken every effort to look at every single witness and propose realistic estimates

1 for their testimony, noting in particular a Trial Chamber decision in the Ruto case  
2 recently, decision 900 in the Ruto case, whereby the Chamber gave four hours on  
3 average per witness to the Prosecution to conduct its case.

4 Given this decision and the possible expectations of your Honours, given also the  
5 decision on the witness preparation in our case, as well as what we think is time that  
6 is necessary for presentation - adequate presentation - of all relevant evidence in the  
7 case, we have proposed reduced estimates and the current number of hours that we  
8 propose for 30 witnesses in our case is 186 hours, which if my calculations are correct  
9 is about 6.2 hours per witness.

10 You will note, your Honours, that this is a reduction of about 25 per cent from the  
11 original estimates for the direct examination of Prosecution witnesses. So to clarify  
12 this, this is the estimate for direct - examination-in-chief - not the total for the  
13 presentation of the Prosecution case.

14 Now, first of all we would just like to note -- we would like to note several points,  
15 your Honours. Estimates in other cases, averages in other cases that took place in  
16 Bemba, in Katanga, in Lubanga cases, indeed were lower than the estimates that we  
17 are proposing at this stage. That is true, we recognise that, but we also wish to note  
18 that every estimate has to be made -- in our submission, it is our duty to make it at  
19 perhaps the higher end of the spectrum, taking into account that not every  
20 witness - even if perfectly prepared, even after witness preparation goes completely  
21 as planned - will not be able to produce fluid, smooth testimony.

22 We also wish to note that no amount of witness preparation can really reduce the  
23 amount of relevant evidence that the witness has to offer. In our case we have a  
24 number of witnesses, most of them classified as so-called "insider witnesses," whose  
25 expected testimonies are particularly dense, information heavy. We think that

1 sufficient time needs to be allocated for those witnesses to be able to properly testify  
2 to all the relevant facts, and this is again why our estimates are as they are.

3 And another point that I wish to make is, your Honours, next week - in the course of  
4 next week - we will be seizing the Chamber of an application to add two witnesses to  
5 the Prosecution witness list. Should this application be successful, of course, then  
6 these estimates will have to be somewhat increased by about ten hours. So, again,  
7 these are estimates for the examination-in-chief.

8 The Prosecution's submission was - in its original submission and it still remains - that  
9 the amount of time to be given to the Defence for cross-examination of Prosecution  
10 witnesses should be roughly the same; on average the same. We recognise the need  
11 of course for the Defence to sometimes take longer in each particular case than the  
12 Prosecution did in examination-in-chief, but the rule of thumb needs to be 50/50.

13 We did not calculate as well the amount of time that the Legal Representatives of  
14 Victims or the Chamber might take for the examination of the witnesses. We leave  
15 that entirely in the hands of your Honours.

16 Those are my submissions, your Honours. Thank you very much.

17 PRESIDING JUDGE OZAKI: Thank you very much.

18 Now I would like to give the floor to the Defence to address its time estimates and, in  
19 particular, if possible to consider how it can reduce those estimates.

20 MR KAY: Well, your Honour, we are now in a stage where evidence has been  
21 collected by the Defence and the Prosecution, using a joint communications expert,  
22 that goes fundamentally to the heart of this case.

23 This will not be a case that either progresses further once the evidence is properly  
24 considered by the party opposite, but the context of this evidence which has been  
25 provided through a joint communications expert has produced evidence that reveals

1 Prosecution witnesses have lied about their presence at certain events and the  
2 presence of others at alleged significant events.

3 The scale of the counter-evidence that has been produced by the parties jointly is to  
4 such an extent that it reveals two separate conspiracies to pervert the course of justice  
5 in this Court. Those matters are so serious that this cannot be dealt with in a way of  
6 50/50.

7 The evidence that we have deserves proper inspection not only by the party opposite  
8 before any trial can take place, but proper consideration by this Court, because the  
9 allegations are going to be very clear here that this evidence that is being relied upon  
10 is fabricated and the conclusions that one draws from the evidence provided by the  
11 joint communications expert goes entirely to prove that point.

12 So I think this Court needs to be very circumspect when applying time limits in  
13 relation to such important matters. This is not just an open and shut done deal.  
14 This is evidence that has been able to be independently extracted, it has been able to  
15 consider the activities of not only their witnesses, but the people they alleged they  
16 were with, and through the mobile phone cell site data establish that the allegations  
17 made are false.

18 So, in my submission, the matters before this Court require the party opposite to  
19 consider that evidence very carefully. It also requires this Court to consider that  
20 evidence very carefully.

21 This evidence is of course being produced in a digestible way, but it leads to one  
22 conclusion only in relation to its content and I'm very concerned about the discussion  
23 in relation to a trial when there is ignorance of the evidence and there is a deliberate  
24 attempt not to consider this evidence, which under Article 54 should be considered  
25 equally as evidence produced by the other party.

1 So this case has about it features within the evidence that this Court needs to be aware  
2 of.

3 PRESIDING JUDGE OZAKI: So, Mr Kay, in sum can you say something about the  
4 estimate of your cross-examination time, or you want total flexibility on this?

5 MR KAY: Absolutely. We put down time estimates at a stage before the disclosure  
6 of these findings through the joint communications expert. These materials are  
7 being analysed as we speak. We have a meeting with the party opposite on Tuesday  
8 of next week and various conclusions in relation to the basic allegations in their case,  
9 as drawn from this evidence, is going to be put before them.

10 I am aware they have not been paying attention to this evidence and considering it  
11 fitfully. I have written in correspondence about the significance of it as well as the  
12 significance of the findings, because they go fundamentally to the issues in this case  
13 and what is needed is for them to consider them.

14 MS ADEBOYEJO: Madam President, your Honours --

15 PRESIDING JUDGE OZAKI: Yes?

16 MS ADEBOYEJO: -- I know that you haven't granted me the occasion to use the  
17 floor, but I just wanted to take this opportunity to respond very briefly to my learned  
18 friend's observations, if I may?

19 PRESIDING JUDGE OZAKI: Very quickly.

20 MS ADEBOYEJO: Very quickly, your Honours, because I'm cognizant of our time  
21 constraints.

22 Mainly to respond in the sense that, according to the agenda that we have before us,  
23 the issues that my learned friend has raised are going to be properly discussed within  
24 the context, I believe, of the closed session. Some of those issues we are aware of,  
25 and as my learned friend has indeed raised we have corresponded with him to show



1 that we are alive to those issues and that, yes, we have taken them into cognizance,  
2 and that is why we have indeed been part of the steps that have been taken to ensure  
3 that the communication information that has been instructed has been done jointly.  
4 I just wanted to place that on the record, your Honours.

5 PRESIDING JUDGE OZAKI: Thank you very much.

6 The Chamber will issue a decision on this matter in due course, and all parties and  
7 participants are reminded in their submission to stick to the agenda.

8 Turning to the -- sorry, counsel for victims, do you have anything to say on this?

9 MS MASSIDDA: No, Madam President, of course not.

10 Just a quick observation in relation to the possibility for Legal Representative to  
11 question the witness. For the information of the Chamber, we have reviewed the  
12 estimate of times in the different trials. Our estimation is normally the time  
13 accorded to Common Legal Representative has been in different cases between  
14 45 minutes and one hour-and-a-half.

15 We cannot of course estimate at this point in time the duration of a possible  
16 questioning of witnesses, but the Common Legal Representative will adhere to the  
17 practice of the Court, including the fact that we will be very careful in not repeating  
18 arguments already addressed by the Prosecution and also taking into account how  
19 the personal interest of our clients will be affected by each single witness.

20 Thank you.

21 PRESIDING JUDGE OZAKI: Thank you very much for your submission. Our  
22 Chamber will take note of your submission.

23 Turning to the next question of a possible site visit, the Chamber recalls that the  
24 Defence and former Legal Representative previously submitted that a site visit should  
25 be conducted prior to the commencement of trial.

1 The Chamber wishes to clarify at this point its approach for the parties. The  
2 Chamber considers that a site visit should only be conducted in this case where it  
3 would serve a specific purpose in relation to facts at issue. Therefore, the Chamber  
4 would propose only conducting a site visit if certain specific questions arise during  
5 trial in relation to which a site visit may be of assistance in evaluating the evidence  
6 and making a determination. The parties should keep this guidance in mind as the  
7 case develops and when making applications, if any, for a site visit to be conducted.  
8 The third issue under this agenda item is sitting schedule. In relation to this issue,  
9 the parties are aware that submissions have been made in relation to the sitting  
10 schedule in the case against Mr Ruto and Mr Sang before Trial Chamber V(A) and  
11 that Trial Chamber undertook to consult with this Chamber with regard to  
12 determining an appropriate schedule.

13 The parties are now invited to present any views they may have in that regard,  
14 starting with Prosecution as usual. You have five minutes.

15 MS FROLICH: Thank you, Madam President.

16 I have just one very brief observation. With respect to the sitting schedule we are  
17 entirely in your hands, your Honours, whatever you see fit and which also  
18 corresponds with the sitting schedule in the Ruto case.

19 I just have one brief observation in relation to the site visit. We would just put on  
20 the record that clearly since the site -- if a site visit is contemplated at some point  
21 during trial, we would ask that such a site visit is only undertaken after the close of  
22 not just the Prosecution case, but also the Defence case, out of fairness to all the  
23 parties and participants.

24 That will be -- that will be all, your Honours. We have nothing else to add to what  
25 your Honours have stated. Thank you.

1 PRESIDING JUDGE OZAKI: Thank you.

2 Mr Kay?

3 MR KAY: Your Honour, I have no observations on the matter, because in effect the  
4 Court diary really dictates and the length a witness takes. So for me to provide a  
5 magic figure of this, it should be X days or whatever, really is unnecessary in my  
6 submission. It's often dictated by events themselves.

7 PRESIDING JUDGE OZAKI: Thank you very much, Mr Kay. I think you are  
8 aware that one of the proposals submitted by Ruto Defence is sitting alternately, or  
9 something like that. You don't have any opinion on this?

10 MR KAY: That is the reality of the application and will be a reality of the situation.  
11 We have one courtroom.

12 PRESIDING JUDGE OZAKI: Thank you very much.

13 Legal Representative of Victims?

14 MS MASSIDDA: We don't have any specific observation on this, your Honour,  
15 except noting that victims as usual would like this trial to be as expeditious as  
16 possible. Thank you very much.

17 PRESIDING JUDGE OZAKI: Thank you very much.

18 Yes, the Chamber will issue a decision on this matter as soon as possible, of course  
19 having consulted with Trial Chamber V(A).

20 The next agenda item is Regulation 55. The Prosecution requested for notice to be  
21 given pursuant to Regulation 55(2) of the Regulations of the Court.

22 There are two such requests, both submitted in July 2012. The first is for notice to be  
23 given that the mode of liability may be recharacterised from "indirect  
24 co-perpetration," under Article 25(3)(a), to one of the other forms set out in  
25 subparagraphs 3(b) to (d) of that Article.

1 The second request is for notice to be given that certain acts alleged to be of a sexual  
2 nature may be recharacterised from "other inhuman acts" to "other forms of sexual  
3 violence," under Article 7(1)(g), and that "property destruction" may be  
4 recharacterised as "an underlying act of persecution," pursuant to Article 7(1)(h) of the  
5 Statute.

6 The parties and former Legal Representative have submitted detailed written  
7 submissions in relation to these requests and the Chamber has already taken note of  
8 those submissions.

9 What the Chamber would like to hear today briefly is whether the parties and current  
10 Legal Representative have any updated submissions on this issue, in light of the  
11 Appeals Chamber's decision in the Katanga case issued in March in year.

12 I would like to give the floor to first the Prosecution, and please be reminded that you  
13 don't need to repeat what you have already said in your written submission.

14 Prosecution, please?

15 MS ADEBOYEJO: Thank you, Madam President, your Honours.

16 As you rightly pointed out, Madam President, we are going to be relying on our  
17 submissions made in filings 444 and 445, both dated 3 July 2012.

18 Your Honours, as you rightly pointed out, the applications that were made by the  
19 Prosecution seek to provide proper notice at the earliest stage to the Defence that the  
20 legal characterisation of the facts may change at some point during the trial, and the  
21 purpose of Regulation 55(2) is to give such notice at the earliest opportunity if the  
22 possibility exists. It is not, we submit, to change the legal characterisation at this  
23 stage. If this Chamber decides to recharacterise the facts at a later stage, the parties  
24 will be given the opportunity at an appropriate stage of the proceedings to present  
25 oral and written submissions. These, we submit, are very, very stringent safeguards

1 that have been provided under the ambit of Regulation 55(2).  
2 Your Honours, this therefore is not a request for submissions on the substance of the  
3 applications at this stage, but rather it is to provide notice in order to among other  
4 things preserve the fair trial rights of the accused.  
5 This process we will submit is fully compatible with the Rome Statute and fully  
6 reflects the powers of this Trial Chamber. These powers have been recognised  
7 previously in the Lubanga Appeals Chamber jurisprudence and, as you rightly  
8 mentioned, in the judgment on the appeal of Mr Germain Katanga against the  
9 decision of the Trial Chamber II of 21 November 2012, number 3363.  
10 As the Katanga Appeals Chamber jurisprudence noticed, paragraph 24 requires that  
11 early notice is preferable because it eliminates any chance of prejudice against the  
12 Defence. Your Honours, it will be our submission that in the light of this decision,  
13 where notice is going to be provided to the Defence before the start of the trial, this  
14 will be the most ideal circumstance as envisaged both under Regulation 55(2), as well  
15 as under the Appeals Chamber jurisprudence.  
16 Your Honours, both our applications are limited to the facts and circumstances in the  
17 Document Containing the Charges, and this means that in our view there is no  
18 prejudice to the Defence and no new investigative actions are needed to address any  
19 different potential legal characterisation. Indeed, it is for this Chamber to ultimately  
20 decide on the basis of the evidence presented and on the factual basis of the  
21 confirmed charges, as well as on the basis of the parties' submissions, whether or not  
22 to give notice. At this stage, your Honours, we submit that it is limited only to the  
23 provision of notice of the possibility that the legal characterisation may change.  
24 Your Honours, I can begin to delve into our submissions on the issue of the notice on  
25 the legal characterisation of the modes of liability, as well as on the notice for the legal

1 characterisation of the crimes, but because I'm cognizant of the admonition of Madam  
2 President I will stop here and instead invite any questions from your Honours, if need  
3 be, on this issue.

4 That will be our submissions, Madam President.

5 PRESIDING JUDGE OZAKI: Thank you.

6 Now I'd like to give the floor to Mr Kay, if there is anything you'd like to add?

7 MR KAY: Your Honours, the position is quite simple here on behalf of the Defence.  
8 The Prosecution is seeking notice of something that's not happened yet, so the  
9 Prosecution in a sense is trying to drive your Honours to give notice to provide a  
10 ruling on the law that is in their favour.

11 In our submission, as the Trial Chamber has not reached that position of giving notice,  
12 it is the Trial Chamber's right to do so when the Trial Chamber arrives at that position  
13 and not by one of the parties attempting to have the notice given on its behalf before  
14 such a substantive position has taken place, and that's simply the matter.

15 In the Katanga case, of course, it involved after the trial had effectively concluded  
16 characterisation taking place and not during the context of the proceedings, which  
17 was entirely different, but it's a matter for your Honours when you are of the view  
18 that the position has arisen.

19 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji?

20 JUDGE EBOE-OSUJI: Mr Kay, was the Katanga -- I pause to observe the five second  
21 rule. Was the Katanga scenario the ideal scenario, where the notice was given at the  
22 conclusion of the evidence?

23 MR KAY: No, because it was at a stage when no one could thereafter deal with the  
24 matters arising. If such a position arises during the course of the proceedings and  
25 your Honours are of the view that it may be subject to change, that is the appropriate

1 time to give that notice so that the parties may then deal with the matter in their  
2 conduct of their cases.

3 After the proceedings, no, in my view. Before the proceedings, we haven't arrived  
4 there yet, and to say that you adopt a particular position when you have not got  
5 yourselves into a position of actually considering it and issuing a notice that does not  
6 arise from your own independent consideration of the matters in my submission is  
7 not the correct approach and not what 55(2) envisages.

8 The language of 55(2), in our submission, clearly envisages the proceedings  
9 happening so that this matter can then take place during the currency of the  
10 proceedings, and one would read into it seems to be a rather exceptional course of  
11 action to take when one considers the matters and responsibilities that thereafter arise  
12 in the context of a trial.

13 JUDGE EBOE-OSUJI: 55(2) speaks in terms of appearance before the Trial Chamber;  
14 that it appeared before the Trial Chamber. My question is: What, in your view,  
15 would inform that appearance before the Trial Chamber? Is it exhaustive in terms of  
16 what could possibly give that appearance to the Trial Chamber?

17 MR KAY: And it is conditional upon having heard the evidence, so evidence in my  
18 submission is the driving factor in relation to the issuance of the notice.

19 JUDGE EBOE-OSUJI: Does it say that really, 55(2)?

20 MR KAY: "... the Chamber shall give notice to the participants of such a possibility  
21 and having heard the evidence shall, at an appropriate stage of the proceedings, give  
22 the participants the opportunity to make oral or written submissions."

23 JUDGE EBOE-OSUJI: I've read that Regulation and my question is: Does it  
24 envisage that necessarily the evidence must first be heard before notice is given, or  
25 can it also contemplate the giving of notice, hearing the evidence and then taking

1 submissions of the parties on whether or not characterisation may be given under  
2 55(1)?

3 MR KAY: 55(2), in our submission, involves you being put on notice as a result of  
4 evidence. In our submission, the case having been confirmed on particular charges  
5 and the characterisation of facts having been decided by the Pre-Trial Chamber,  
6 which is their exclusive function in the structure of this Court, I would submit it  
7 would have to be at a stage when you were put on notice concerning a change in  
8 those circumstances of the decision of the Pre-Trial Chamber requiring a  
9 recharacterisation.

10 JUDGE EBOE-OSUJI: But does the logic of that argument not also suggest that a  
11 trial may not proceed upon an indictment unless evidence is first heard before the  
12 Trial Chamber, considering that a document containing the charges necessarily  
13 involves not only a statement of the facts but legal -- original legal characterisation to  
14 begin with, which one may then apply or give notice of variation of subsequently?

15 MR KAY: But at this stage you have heard nothing to issue any notice upon,  
16 because the decision has been made by the Pre-Trial Chamber and the case moved up  
17 to the Trial Chamber and as yet you have no independent grounds upon which to  
18 give such notice, in my submission and with respect, your Honour. I wasn't being  
19 dictatorial.

20 PRESIDING JUDGE OZAKI: Thank you very much.

21 Legal Representatives of Victims?

22 MS MASSIDDA: Thank you, your Honour. Just a few small notes.

23 The first one is that the present Common Legal Representative acknowledges the  
24 submissions already presented by the former Legal Representative in toto, and I'm  
25 referring to the submission 456 and 458 of 24 July 2012.



1 In relation to the learned discussions that we are having this afternoon, in my humble  
2 submission, if I may just briefly, the Katanga Appeals judgment makes for me a very  
3 important point in relation to the timing in relation to Regulation 55. Paragraph 24  
4 of the Katanga judgment, "The Appeals Chamber ..." -- and I quote, your Honour,  
5 "The Appeals Chamber concludes that it is preferable that notice under Regulation  
6 55(2) of the Regulations of the Court should always be given as early as possible."  
7 Now, in this respect we fully support the oral submissions made today by the Office  
8 of the Prosecutor. We also notice, as it was stated very -- a few minutes ago by the  
9 learned Judge Eboe, the appearance to the Chamber, in my submission, can be in fact  
10 also from the material that the Chamber has already in its possession and has already  
11 had the possibility to scrutinise at this point in time.

12 Thank you very much.

13 PRESIDING JUDGE OZAKI: Thank you very much and the Chamber will take note;  
14 all very useful submissions in this regard.

15 Now I would like to turn to item C.

16 The Defence has an outstanding request for the accused to participate in the trial by  
17 means of video link from Kenya on a regular basis. This request was filed on  
18 28 February 2013 and is opposed by the Prosecution and Legal Representative. In  
19 addition, as I previously announced, the Defence notified the Chamber earlier this  
20 week that it intended to request the accused's excusal of attendance at trial.

21 The Chamber will therefore now give the floor to the Defence to hear this new request  
22 and to explain the inter-relationship between it and its previous request to participate  
23 via video link.

24 You have the floor, Mr Kay.

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

1 The position has changed in relation to Mr Kenyatta, in that he is now Head of State  
2 of Kenya, and so the issue of his attendance at this trial is now a matter of importance  
3 for that State to have properly dealt with by this Court to enable him to carry out his  
4 official functions and responsibilities on behalf of the citizens of Kenya.

5 The application originally made by us to have his attendance through the means of  
6 video link was in light of his position at that time. Subsequently, as the Court knows,  
7 there was a ruling in favour of Mr Ruto that allowed him, as Vice-President, to have a  
8 changed position in relation to his attendance, meaning certain events during the trial  
9 and then as and when necessary and according to his own needs, desires, wishes, but  
10 being undertaken on a basis of full responsibility for his actions by himself.

11 That matter, as we know, has now gone up to the Appeals Chamber. Suspensive  
12 relief has been given and a ruling by the Appeals Chamber in relation to that matter is  
13 awaited.

14 President Kenyatta is in a different position as he is the Head of State, and in relation  
15 to his position and his experience and commitments as Head of State he is now firmly  
16 of the view that the order made in favour of Mr Ruto, as Vice-President, on his behalf,  
17 is a ruling that should be made on behalf of Mr Kenyatta to enable him either by  
18 video link, when he chose to do so and with full responsibility for his own actions and  
19 conduct in relation to developments in the trial, be able to use the video link means,  
20 as well as the position that he should be excused from attendance if he did not wish to  
21 exercise that attendance save for any particular events specified by the Court. So  
22 could I put it this way: A Ruto form of order.

23 In his position as Head of State, the need is the greater. His position over the  
24 challenges to this trial and these proceedings are clear and the nature of the case that  
25 he challenges and how he advances that challenge is clear. I've referred to it already

1 earlier today and I'm not going over that again.

2 Those are matters that can be dealt with by his lawyers. His support in relation to  
3 what takes place in court is a matter that his lawyers can deal with.

4 The needs for him to carry out his functions as Head of State, however, are a  
5 responsibility on behalf of his people that he would prefer to execute and to carry out  
6 and to enable his lawyers to deal with matters in court on his behalf, and in the  
7 circumstances we submit that is an entirely reasonable position. We are prepared to  
8 put it in a filing.

9 The matter arises because the status conference agenda was set. It was put on the  
10 status conference, we've discussed the matter now and, in the light of his experience,  
11 he is able to instruct me to put this forward. So it was not something that we were  
12 going to float in advance of him becoming President, nor was it something we were  
13 going to advance before he had been in his position. That now is something that he  
14 has had experience of and it is a responsibility he would prefer to discharge, rather  
15 than being present in court throughout proceedings.

16 In our submission, given aspects of this case of which the Court is fully aware as to  
17 the quality of the Prosecution, from our Article 64(4) application as well as matters  
18 raised by me earlier in this status conference, in our submission, in the light of the  
19 evidence that is to be challenged and the quality of the evidence of the Prosecution, it  
20 is a matter that his considered judgment as to his need to be present in this court is  
21 something that he should be permitted to exercise.

22 These proceedings should not be seen as an attempt to punish an innocent man, and  
23 this concept of dragging someone before a court every day so that they become some  
24 kind of spectacle is not something that this honourable institution, in my submission,  
25 is a party to.

1 It is a court of law that can deal with matters without having some kind of barbarous  
2 exposition of the defendant. It is a court of law that can deal with matters in his  
3 absence and the spectacle of trying to have people public in court throughout, in my  
4 submission, is not a necessary function of this Court, and if the outcomes of these  
5 proceedings are as we submit they will be, and that is the dismissal of every charge,  
6 then what has happened? What has taken place? A totally unnecessary spectacle  
7 in relation to a Head of State.

8 That is why with eyes open we make that submission on his behalf, and if the Court  
9 wanted it in a written filing, it having arisen in the manner that it has, we would be  
10 prepared to do so.

11 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

12 Yes, the last point you mentioned is exactly the point I need some clarification. So  
13 you are ready to file written submissions? I am asking this, because the relief you  
14 requested is slightly different from what Mr Ruto requested and also the reasoning is  
15 also a bit different because you stressed the difference in the position of Mr Ruto and  
16 Mr Kenyatta, but do I understand correctly that as for example applicable law and  
17 interpretation of law you will follow Mr Ruto's submissions, or are you intending to  
18 submit the new written request and, if so, when?

19 MR KAY: We were awaiting the outcome of the Ruto decision and had our request  
20 in for a video link and allowed that to go forward.

21 As the Court knows, that going up to the Appeals Chamber, which has now altered  
22 the position by stopping through suspensive relief the original order, the Court will  
23 have noticed that our arguments on behalf of the Head of State are different from that  
24 of the Vice-President because we are Head of State, as well as our reasoning about his  
25 function, as well as a factor here that can be taken into account which is the quality of

1 the evidence.

2 So we would, with the Court's leave, seek to make a filing within 21 days on the  
3 matter, if that met the Court's approval on that time scale, and to put forward those  
4 arguments on our own behalf.

5 They would obviously reflect in part the Ruto arguments, but we do come from a  
6 position of difference as Head of State. We also make the application in the light of  
7 our experience as having been Head of State for six months. So it is coming with the  
8 knowledge of the position, rather than forecasting what was to be, and in my  
9 submission that is a slightly different position.

10 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

11 In terms of time frame we don't know yet when Appeals judgment will be issued, and  
12 at the same time as for practical issue we need some time if we are, for example, to go  
13 video link for preparation for video link, so at this stage we are not sure what would  
14 be the good time frame for you to submit any -- file any written submissions.

15 So -- well, I think the Chamber should indicate, after consultation with relevant units  
16 in the Court, any time frame to you.

17 MR KAY: I'm much obliged.

18 Oh, sorry, I was --

19 (Trial Chamber confers)

20 PRESIDING JUDGE OZAKI: I'm sorry for the interruption, Mr Kay. You would  
21 like to say something?

22 MR KAY: It's okay, your Honour. I've put adequately what we were going to say,  
23 thank you.

24 PRESIDING JUDGE OZAKI: Thank you very much.

25 Would you like to respond, Ms Prosecutor?

1 MS ADEBOYEJO: Certainly, Madam President, your Honours. Thank you very  
2 much.  
3 Just very briefly on the points that my learned friend on the other side has raised with  
4 regards to this issue, of course the two points are interlocking in terms of first of all  
5 there was the application for the video link and then now there is a request for  
6 non-attendance at trial, which my learned friend has now in his oral submissions  
7 tried to delineate, but we have noted that in your decision 728 you had indicated in  
8 the past that "Where parties ...", and I will quote, "... change or want to change the  
9 relief requested, they should do so in a manner that is clear and readily  
10 understandable which also includes mentioning that the relief requested has changed  
11 and specifying whether or not the previously requested relief is retained or  
12 withdrawn."  
13 I note that my learned friend on the other side has also mentioned the suspensive  
14 effect of the Appeals Chamber decision 862. It is our submission, Madam President,  
15 your Honours, that because the law is in such a state of flux, it really would be  
16 academic for us to begin to consider, or as it were begin to debate about this issue,  
17 until the Appeals Chamber decision has been rendered. It is better that we make any  
18 concrete submissions after the Appeals Chamber decision on this matter.  
19 Finally, and more importantly, your Honours, my learned friend has made repeated  
20 reference to the fact that this relief should be granted on the basis of the fact that his  
21 client is the President of Kenya and that on that basis it may be impossible - difficult  
22 or impossible - for him to be present here during the duration of the trial.  
23 Our submissions in this regard, Madam President, your Honours, is that granting  
24 such a request would violate the bedrock of the legal principle that all persons are to  
25 be treated equally, especially, your Honours, that this is reflected in Article 27(1)

1 which provides that the Statute shall apply to all persons without any distinction  
2 based on official capacity.

3 It is true that one of the functions of Article 27(1) is to foreclose Head of State  
4 immunity, but your Honours we would submit that the provision also is intended to  
5 ensure that all persons receive equal treatment under this Court's Rules, both on  
6 substantive and procedural matters.

7 We submit, your Honours, that granting the application of the Defence could invite a  
8 flood of excusal applications from accused persons who do not wish to attend trial.

9 Almost every accused person would be in a position to present a reason why he or  
10 she has important or extraordinary functions that will not enable them to be part of a  
11 trial.

12 Your Honours, may we also mention that the fact that my learned friend has  
13 presented arguments before this Chamber invoking the very fact that his client is the  
14 Head of State of Kenya seems almost disrespectful, in my humble opinion. It reeks  
15 of stating that a Head of State cannot - cannot - come and be part of the proceedings  
16 before this esteemed Chamber.

17 Your Honours, may we also as a last point note that one of the possibilities of  
18 non-attendance for the duration of trial is that it is possible for arrest warrants to be  
19 issued by a Chamber where an accused person has not obeyed the summons  
20 conditions.

21 Your Honours, finally I want to submit that we are also willing to provide in writing  
22 our submissions on this issue in response to the submissions of the Defence pursuant  
23 to Article 63(1). These would be our submissions, Madam President, your Honours.

24 PRESIDING JUDGE OZAKI: Thank you very much.

25 Ms Massidda?

1 MS MASSIDDA: Your Honour, the Common Legal Representative was opposed, as  
2 you know, to the possibility for the accused to be -- to appear by video link. These  
3 submissions were dated 3 September 2013.

4 The Common Legal Representative is also opposed to any possibility that the accused  
5 will not be present during trial. This is an important factor for victims. Victims  
6 consider that the accused should be present during the entire trial.

7 We note the arguments of the Prosecutor, and we particularly support the arguments  
8 in relation to which the Appeals Chamber is presently seized practically of the same  
9 issue in the Ruto case and it will be probably not timely at this point in time to discuss  
10 this matter until the Appeals Chamber has ruled on this contentious issue. If the  
11 Trial Chamber considers it useful to receive written submissions in the matter, the  
12 Common Legal Representative will be able to respond.

13 Thank you very much.

14 PRESIDING JUDGE OZAKI: Thank you very much. The Chamber will  
15 communicate to the parties and participants about whether and when we need  
16 written submissions on this issue.

17 Judge Eboe-Osuji?

18 JUDGE EBOE-OSUJI: Mr Kay, just to be clear, two brief questions for you. The first  
19 is the argument as to Head of State. Is it an argument of status, or is it one of  
20 functions?

21 MR KAY: One of functions and responsibility.

22 JUDGE EBOE-OSUJI: Second question to you: You mentioned the video link  
23 motion still. Is this still on the cards and, if it is, can it avoid the issue of continuous  
24 presence, considering that if video link is granted - if it is granted - will the question  
25 of presence at the other end at some point also not come up?



1 MR KAY: Yes, the way I envisage it is this way, your Honour. That attendance by  
2 video link is an attendance at a trial, in the same way as when a witness gives  
3 evidence via video link he is in effect attending the trial and he is participating  
4 through the video link. This is a common position.

5 In our submission the exercise of the right of attendance at will, as we submit should  
6 be the case here, because of the responsibilities of President Kenyatta should be  
7 permitted to use that medium for the manner of attendance.

8 So the position is one at his discretion, when he feels the need to exercise that right  
9 because his commitments permit him to do so and that he can do so through that  
10 medium of the video link. So the two of them exist together.

11 JUDGE EBOE-OSUJI: So to understand you - correct me if I'm wrong - is it then that  
12 the video link prayer is a variation of the question or the prayer as to excusal from  
13 continuous presence, in the sense that although -- assuming the first one is granted,  
14 excusal from continuous presence, there may be instances when he would like to  
15 participate in the proceedings but may not be able to come to The Hague, then would  
16 like to participate through video link he should be allowed to do so? Is that what  
17 you're saying, as opposed to - as opposed to - the video link prayer being an  
18 alternative, a whole complete alternative, to the excusal from continuous presence at  
19 trial prayer?

20 MR KAY: Yes, it is the first of the expressions of your Honour.

21 PRESIDING JUDGE OZAKI: And if I may follow up, in your submission the  
22 presence through video link is the presence as stipulated in the Rome Statute, right?

23 MR KAY: Absolutely, your Honour, as normal.

24 PRESIDING JUDGE OZAKI: Thank you very much for this clarification.

25 Now, I would like to go to the last agenda item and the Chamber will now hear the

1 Defence's second request relating to an adjournment of the trial.

2 The Defence has informed the Chamber that there are two grounds for this request.

3 The first ground relates to ongoing investigations into mobile phone data and can be  
4 heard in open session, and now I would like to give the floor to the Defence.

5 Mr Kay?

6 MR KAY: Your Honours, an important and fundamental development in relation to  
7 the evidence in this case has taken place during the last six weeks. This has been the  
8 joint seeking of telephone data in relation to witnesses - and I say witnesses and not  
9 victims and not victim/witnesses, but witnesses - who have made allegations in  
10 relation to this case asserting they were at significant events with certain specified  
11 individuals.

12 The history of this matter has in fact been put before the Trial Chamber in certain  
13 filings by the Defence in the course of the last year, where the Trial Chamber was  
14 alerted to the nature of our investigations and to the proposed advancement of those  
15 investigations.

16 Eventually, the Defence and Prosecution arrived at a position whereby a joint  
17 communications expert was instructed on their behalf. We also both arrived at a  
18 position whereby this data was able to become available and the data required to be  
19 analysed and processed.

20 It is a highly technical exercise. I won't go into it with the Trial Chamber, but I ask  
21 that it be taken from me - and I don't think the Prosecution would dissent from the  
22 matter - that the extraction of the data has involved leading experts using specially  
23 developed software to provide this evidence.

24 This evidence is key evidence because it goes to the truth of what is asserted by  
25 certain people as to their whereabouts, as well as to the whereabouts of others.

1 Those others have not been interviewed by the Prosecution, but they have given their  
2 telephone details to the Defence and consented to us extracting relevant data that  
3 goes to the issue of their whereabouts on certain specific significant dates that are  
4 fundamental to the nature of this case.

5 This extracted data has been successfully obtained in relation to a first batch of  
6 telephone numbers with highly significant results. The expert is due to produce  
7 reports for the Defence and Prosecution in relation to this material, but for my part,  
8 having had previous experience in this kind of evidence, I've been able to interrogate  
9 it, interpret it and put together various packages and draw a conclusion in relation to  
10 it.

11 However, the extent of this investigation is ongoing. It is also an investigation that  
12 requires the Prosecution to consider this evidence - and they are duty bound to under  
13 Article 54, he is a jointly instructed expert - and in our submission it is necessary for  
14 the evidence that is required to produce this data to be able to be sought, particularly  
15 by the Defence, because the fact of the matter is we are really driving it, rather than  
16 the Prosecution. They have joined and I'm not being critical of them, but we are  
17 driving the issue of the conclusions from this matter.

18 In my submission, as it goes to prove various fundamental points that we have  
19 asserted at various stages in the history of this case, not least at the confirmation of  
20 charges proceedings, it is of such fundamental importance that it needs to be properly  
21 considered and this case not just progress because a timetable has been set, because  
22 the significance of the evidence requires that it be properly considered by all parties.

23 As this material, which was forecast to the Trial Chamber by me in a filing when this  
24 date originally set for trial was vacated until the date now in November and the  
25 length of time it would take to do it, the Court did not accept my guidance on the

1 matter but chose another date, but my guidance on the matter was based upon  
2 experience, as well as involvement with the project at a hands-on level.  
3 In these circumstances, because this evidence is so crucial this case needs a  
4 fundamental rethink about whether it commences at all in the light of the evidence.  
5 The Prosecution need to consider the product and where this takes the proceedings.  
6 In my submission, in providing a trial date so close to the moment of production of  
7 this data, we already are aware of significant conclusions that are going in one  
8 direction only that completely support the Defence contentions, then trying to have a  
9 trial date that prevents the proper development of this evidence in my submission is  
10 contrary to the interests of justice.  
11 And this is not an issue of anyone being tardy, being lately developing evidence.  
12 This has been evidence that both parties jointly, as soon as they were able to,  
13 responded to the situation to provide appropriate evidence for the Court.  
14 In my submission, the context of it, as well as the quality of it, alters the whole nature  
15 of these proceedings. I can't stress that enough. We have spent considerable time  
16 looking at it and we advance these matters from a position of authority.  
17 We have a meeting that has been scheduled for some time with the OTP on Tuesday  
18 of next week, where I will be presenting to them the results of this data in relation to  
19 what they have asserted in their case and what impact it has upon the nature of their  
20 case, so in these circumstances that is why this application was made.  
21 In the agenda items I put various headings, but technicalities are not really what this  
22 Court wants to hear. It wants to hear whether this is a proper evidential issue,  
23 material and relevant to these proceedings and with an outcome that's relevant, and  
24 it's the outcome in the production of it that is highly significant.  
25 There is no question here of either of the parties making this as a late application. I

1 did foreshadow it earlier in the year when we were aware that this matter could be  
2 advanced and I had the date that I'd submitted to the Court altered by the Court - for  
3 whatever reason the Court altered it - but my original application was based upon my  
4 being able to foresee how long it would take to deal with this data.

5 We have had the first results. They go in one direction. There are more positive  
6 results on our side that can be developed from this evidence, and in those  
7 circumstances I ask this Court to be cognizant of the grounds for our application and  
8 the reasons behind it.

9 As a matter of note, the issues I wrote on the agenda in relation to a closed session on  
10 other matters I have no longer any need to raise in relation to a closed session for this  
11 status conference.

12 I hope that assists the Court.

13 PRESIDING JUDGE OZAKI: Thank you very much. Do you have any specific date  
14 for commencement of trial, or your guidance in this regard remains the same as  
15 before which was, if I remember correctly, January next year?

16 MR KAY: Yes, my original judgment on the matter has not changed. Viewing the  
17 matters as I have daily and the nature of this evidence and how far it goes, in my  
18 submission that estimate as taken by me at that time has been borne out in the  
19 circumstances of the production of these materials, which took place from 31 July and  
20 1 August which was the only time these materials could be produced.

21 PRESIDING JUDGE OZAKI: Thank you.

22 Now I would like to give the floor to the Prosecution to respond.

23 MS ADEBOYEJO: Thank you, Madam President, your Honours.

24 With regards to the matters raised by my learned friend on the other side, may I first  
25 of all indicate that we reserve our right to respond in writing to the issues that have

1 been raised in view of the fact that, as my learned friend has indicated, these were  
2 made known to us by reason of being included in the agenda item.

3 Your Honours, we submit that the Prosecution has been ready to start this trial since  
4 at least April 2013. As far as we are concerned, this will be the third time that this  
5 trial has been postponed. It has been delayed twice: The first time because of the  
6 Article 64 application, which led to a delay of three months; and the second time the  
7 Trial Chamber further vacated the trial date because it heard the application of the  
8 Defence on the need for more time, taking into account some of the issues raised at  
9 the status conference.

10 Your Honours, on the basis of those oral submissions and written submissions  
11 decision 763 was issued, and I will read, your Honours, for the record what this  
12 Chamber ruled, taking into cognizance the submissions made by my learned friend  
13 on the issue of the telephone or mobile phone evidence.

14 This Chamber ruled in paragraph 34, "In particular ..." -- and I quote, "In particular,  
15 the Chamber does not accept that the Defence's ongoing investigations into mobile  
16 telephone evidence and Prosecution intermediaries justifies an extension of time  
17 beyond the three months initially contemplated by the Chamber. Such  
18 investigations ...", and I will underline this, "... are part of the Defence's ordinary  
19 preparations and apart from the matter of delayed disclosure of the relevant  
20 individuals' identities have not been frustrated by conduct on the part of the  
21 Prosecution." Your Honours, our submission therefore is that there is nothing new  
22 that has come on the table that your Honours have not heard before.

23 As my learned friend has rightly submitted, this is a process that we are both  
24 involved in. My learned friend has served us notice about this. We were aware of  
25 this since as far back as October 2012. It is true that there is a large amount of data

1 that has now been extracted, but those are expected during the course of an  
2 investigation in a matter as huge and as important as this kind of case. If on the  
3 basis that their ongoing investigative actions we always have to adjourn proceedings,  
4 then we would never start.

5 My learned friend has said that he has advised the Chamber that we should have  
6 commenced the trial in January 2014. I'm glad that he has referred to that, because in  
7 our humble submission that is what this is driving to. It is an attempt again to  
8 reintroduce that application, to bring again before this Chamber this request that the  
9 trial be postponed.

10 We do not see a basis for it. We oppose it in its entirety. We submit -- and I will let  
11 my learned friend who is the Legal Representative for Victims expand on this further,  
12 but we would submit that such delays have a detrimental effect on the witnesses and  
13 on the victims.

14 We've given written submissions to this effect and so I'm not going to dwell on this  
15 much further, but I would say that in view of the fact that we have already engaged  
16 with the Defence on this matter we do not see the basis for there to be any further  
17 delays.

18 In our humble submission, we have at least two months before the commencement of  
19 trial, more than adequate time for all of the data that has been collected to be analysed  
20 and for it to be used during the course of the trial.

21 That will be our submissions, Madam President, your Honours.

22 PRESIDING JUDGE OZAKI: Thank you. So in your submission this investigation  
23 into telephone data which is jointly conducted will be completed before November  
24 start date of trial, or you are submitting that you are expecting, whether this  
25 investigation is completed or not, the trial should start as scheduled?

1 MS ADEBOYEJO: Your Honour, the latter would be our submission. The latter  
2 position would be our submission. In other words, we anticipate that we should  
3 have concluded before the start of trial in November, but in case we do not it still does  
4 not form any prejudice to the Defence for us to commence the trial in November as  
5 previously scheduled, or as already scheduled, because it does not prejudice the  
6 witnesses that we intend to call as the first set of witnesses.  
7 Your Honours will recall that you have given us until 12 September to provide you  
8 with a list of our first ten witnesses. So we are cognizant of these facts, your  
9 Honours, and it will indeed form part of the discussions, as my learned friend has  
10 said, that we're going to have on Tuesday the 10th.  
11 That would be our submissions, your Honour.

12 PRESIDING JUDGE OZAKI: Thank you.

13 Ms Massidda?

14 MS MASSIDDA: Your Honour, I have a few comments on this issue of the request  
15 for adjournment of the trial date.  
16 First of all, to be absolutely clear, victims are totally opposed to any further delay in  
17 the commencement of the trial. As indicated by the Prosecutor, this would be the  
18 third delay in the start of the trial and the victims in Kenya view with extreme  
19 suspicion this last attempt by the accused to delay the start of his trial. For them, the  
20 application is merely a step - the last step, probably - to try to stop the start of his trial  
21 and to further delay the start of his trial.  
22 The victims view also with scepticism the accused's reliance on the mobile phone  
23 device -- on the mobile telephone issue. Given the accused's very extensive  
24 commercial interests in Kenya and the ruling Jubilee Coalition's heavy emphasis on  
25 the importance of digital technology, specifically during the presidential campaign, it



1 is hard to believe the Defence could only recently been able to pursue this particular  
2 line of inquiry. We therefore support the conclusion of the Prosecution that the trial  
3 should start in November.

4 Thank you.

5 MR KAY: May I raise a matter in reply because there's something that the learned  
6 friend for the victims would not be aware of?

7 PRESIDING JUDGE OZAKI: Yes, please.

8 MR KAY: Both Prosecution and Defence, as you will note from the earlier  
9 Defence filings, had requested and sought this evidence and were told it did not exist.  
10 However, because we proved it did exist we received eventually co-operation.  
11 So this is not anything that has come about. Prosecution and Defence both sought  
12 this evidence independently, but the Defence was able to establish it did exist and  
13 thereby provide a medium of co-operation with the companies concerned, and that  
14 medium of co-operation and a proper defining of how and what should be accessed  
15 only commenced for good reasons until 31 July/1 August.

16 In my experience in other national jurisdictions, where evidence like this is produced,  
17 often the provision of such data does take a lot of time. In these particular  
18 circumstances, a particular software and technology has had to be developed to  
19 enable the material and data to be produced and considered, and in the circumstances  
20 it is not our fault.

21 What I'm interested in is the fact that Article 54 doesn't seem to really exist for the  
22 Prosecution in this case, the duty to investigate incriminatory and exculpatory  
23 evidence equally. It's quite clear from the submissions that this evidence is not being  
24 considered as to its true effect.

25 PRESIDING JUDGE OZAKI: Thank you very much.

- 1 Prosecution, would you like to say something?
- 2 MS ADEBOYEJO: Your Honours, I am cognizant of time and so just one sentence  
3 that the point - the last point - has been made by my learned friend. This is not  
4 about us not being cognizant of our duty to investigate. It's about the fact that my  
5 learned friends have failed to demonstrate what is the concrete prejudice that this  
6 would bear on them? What is it?
- 7 They haven't -- in any of their submissions they have failed to demonstrate that. We  
8 are prepared and we've said this consistently. We are prepared for this trial to start.  
9 We're ready for it to go forward. There's no reason why it shouldn't.
- 10 Thank you, your Honours.
- 11 PRESIDING JUDGE OZAKI: Thank you.
- 12 We have now exhausted the issues on our agenda to be dealt with in open session and,  
13 since the Defence is not seeking closed session any more, if there are no other issues  
14 that parties or participants would like to raise in this status conference? No? Okay,  
15 very good.
- 16 I thank parties and participants, as well as interpreters and our court reporters, and  
17 this hearing is adjourned.
- 18 THE COURT USHER: All rise.
- 19 (The hearing ends in open session at 5.22 p.m.)