

1 International Criminal Court
2 Trial Chamber III
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Paul Gicheru - ICC-01/09-01/20
5 Presiding Judge Miatta Maria Samba
6 Status Conference - Courtroom 1
7 Friday, 24 September 2021
8 THE COURT USHER: [9:30:40] All rise.
9 The International Criminal Court is now in session.
10 Please be seated.
11 PRESIDING JUDGE SAMBA: [9:31:03] Can the court officer please mention the
12 matter.
13 THE COURT OFFICER: [9:31:06] Good morning, your Honour.
14 The Situation in the Republic of Kenya, in the case of The Prosecutor versus Paul
15 Gicheru, case reference ICC-01/09-01/20.
16 And we are in open session.
17 PRESIDING JUDGE SAMBA: [9:31:25] Thank you very much. Could I request the
18 parties to introduce themselves, please.
19 MR STEYNBERG: [9:31:34] Good morning, your Honour. For the Prosecution
20 today, from the back row, is Ms Grace Goh, case manager; behind me to my right,
21 Ms Inbal Djalovski, associate trial lawyer; to my right, Ms Alice Zago, trial lawyer,
22 and myself, Anton Steynberg, senior trial lawyer. Thank you.
23 PRESIDING JUDGE SAMBA: [9:31:55] Thank you very much,
24 Mr Steynberg. Defence, please.
25 MR KARNAVAS: [9:31:58] Good morning, your Honour, and good morning to

1 everyone in and around the courtroom. My name is Michael Karnavas, lead counsel.
2 I'm here with Suzana Tomanović, associate counsel, Noah Al-Malt, legal assistant,
3 and Daria Mascetti, our case manager.

4 PRESIDING JUDGE SAMBA: [9:32:12] Thank you very much, Mr Karnavas.

5 MR KARNAVAS: [09:32:12] You're welcome.

6 PRESIDING JUDGE SAMBA: [09:32:14] And for the record, I note that Mr Gicheru
7 is present appearing via video link.

8 MR GICHERU: [9:32:24](Via video link) Yes, I do.

9 PRESIDING JUDGE SAMBA: [9:32:28] Could the Registry representative introduce
10 him or herself, please, if you have anybody here from the Registry.

11 MR ZANEN: [9:32:38] Good morning, your Honour. For the Registry present
12 today, Anne-Aurore Bertrand, external relations and cooperation officer to my right.
13 And myself, Diederick Zanen, operational interpretation coordinator. Thank you.

14 PRESIDING JUDGE SAMBA: [9:32:55] Thank you very much.

15 Well, my name is Miatta Maria Samba and I am the judge assigned to this case. The
16 purpose of this status conference is to discuss the preparation of the trial in order to
17 have all the necessary information to decide on the start date for the trial. The
18 Chamber will render a written decision on this matter in due course.

19 In this regard, I note the submissions of the parties made on the 10 September this
20 year, which I am grateful for. I have studied those submissions, so I ask the parties
21 not to repeat them in the courtroom and only provide information which has not yet
22 been covered in the written filings. I first want to say some words on the manner in
23 which the Chamber will conduct these proceedings.

24 First, the Chamber expects that before the parties seize the Chamber with a request,
25 all reasonable efforts would have been made to resolve the issue *inter partes* or with

1 the Registry as the case may be. The Chamber may reject a request for relief sought
2 in limine if such efforts have not been undertaken. To this end, the Chamber expects
3 the parties to cooperate procedurally in order to achieve efficiency and expedition of
4 this trial. Such cooperation - and I emphasise this, too - does not in any way affect
5 the fairness of the trial or the onus on the Prosecution to prove its case and not indeed
6 infringe on -- upon the rights of the accused person.

7 Second, the Chamber will only deal with motions that formalise a specific request for
8 relief. Therefore, the parties are discouraged from making general observations
9 without any relief requested or announcements that a relief might be requested in the
10 future.

11 Thirdly, the Chamber stresses the importance of the publicity of the proceedings.
12 The parties and the Registry are expected to make a serious effort to make all of their
13 submissions publicly. Should that really not be possible, you are expected to file a
14 public redacted version at the same time as the original. References to confidential
15 filings can be made publicly as long as they do not reveal the information which gave
16 rise to the classification as confidential. When applying redactions to filings, the
17 parties must keep in mind that there needs to be a specific justification for not
18 revealing the information to the public. The mere wish by a party not to divulge
19 information to the public at large is not a sufficient reason.

20 Finally, the Chamber stresses that the classification *ex parte* should only be used in
21 exceptional circumstances. Most importantly, it should not be abused to gain
22 accusatorial advantage by excluding the other party.

23 So that said, the Chamber is attuned to the security concerns that have been voiced by
24 the parties. It assures the parties that this Chamber will do everything possible and
25 feasible to ensure the safety of the witnesses and everyone involved in these

1 proceedings. It will continue to monitor -- it will continue to monitor ongoing
2 situations and remain vigilant to any information which is brought to its attention.
3 In this vein, the Chamber urges the parties to remain mindful of what is said in open
4 session. Also, in light of the instructions provided by the Chamber in its email of
5 September 22, you should therefore request a private session whenever you deem it
6 would otherwise not be possible to provide the Chamber with all the necessary
7 information. This equally applies to today's hearing. Finally, a small but important
8 logistical point. I kindly remind the parties to respect the five-seconds rule and to
9 speak slowly when making oral submissions so as to assist the interpreters.
10 These were my few opening remarks. Now, let's discuss the specific items as
11 announced by the Chamber's email to the parties.
12 First, the Chamber informs the parties that the protocols which have been issued
13 during the Pre-Trial phase of the proceedings will continue to have effect until they
14 are amended by the Chamber. The Chamber will also issue a decision on the issue
15 of how witnesses will be prepared before providing their testimony in due course.
16 So now moving to disclosure. And before we get into specifics, I would like to make
17 a few general remarks regarding disclosure. Firstly, I wish to emphasise that I
18 expect the Prosecution to complete its disclosure in a timely manner. Similarly, the
19 Chamber expects that any request for disclosure should be discussed between the
20 parties before rulings are sought from the Chamber. In this regard, it is incumbent
21 on the Prosecution to give proper reasons if they're going to refuse a request for
22 disclosure.
23 Finally, the Chamber also wishes to remind the Prosecution that it has an ongoing
24 obligation to disclose exculpatory evidence to the Defence and this should be done in
25 a timely manner.

1 Turning to some specific questions, the Chamber notes that the Prosecution submitted
2 that its, and I quote, "It has completed its analysis of the review required in order to
3 meet its obligations under Article 67(2) and Rule 77." End of quote. And I quote
4 again, "Has already disclosed what is assessed to be the most relevant evidence
5 disclosable under these provisions prior to the confirmation of the charges." End of
6 quotes.

7 So in order for the Chamber to have the full picture, I have three concerns. First,
8 could the Prosecution, Mr Steynberg, please confirm that it disclosed to the Defence
9 the bulk and the most relevant items in July 2021 at the latest? How many items
10 have been disclosed in the meantime?

11 Second, the Prosecution mentioned that there are discussions with the Defence on
12 keywords or lines of Defence in order to focus the review and be more efficient.

13 Could you give an update on these discussions, Mr Prosecutor? And lastly, the
14 Prosecution states in paragraph 8 of each submissions that its, and I quote, "Must
15 finalise its review." End of quote. What is the status of the review? I noticed the
16 Prosecution's disclosure notice, which was filed yesterday, and that 435 items that
17 were disclosed as incriminating, exonerating and under Rule 77. So I see that the
18 process is well underway. Please provide further details on this matter? How
19 many items were already reviewed and how many are still outstanding?

20 Mr Prosecutor, please.

21 MR STEYNBERG: [9:42:33] Yes, thank you, your Honour. Perhaps as an initial
22 comment regarding your Honour's observations about the need for *inter partes*
23 cooperation, I can just assure the Chamber that we have been in constructive
24 discussions with the Defence. Indeed we are fortunate to have such an experienced
25 Defence team who appear to -- well, in fact, have given the assurances that they will

1 conduct a focused Defence and we are exploring ways in which we can streamline the
2 procedure.

3 As mentioned in my filing, we are in discussions about a possible agreement on
4 evidence. We'll give you more details in due course, and we do hope that we'll be
5 able to further streamline the procedure in line with the intention of the drafts of the
6 Statute that Rule 7 -- sorry, Article 70 procedures should be more streamlined and
7 conducted expeditiously.

8 Turning to a few of the other issues which your Honour has raised. On the issue of
9 the decision that your Honour has indicated you will provide on -- in due course on
10 witness preparation, the Prosecution has indicated that the two parties have -- or are
11 in -- have common cause that witness preparation should be permitted. In the event
12 that your Honour wishes to have further legal submissions on this issue, we will
13 obviously be grateful to provide those. We had not really made any substantive
14 submissions on that.

15 As regards the disclosure, the Prosecution obviously takes to heart your Honours
16 admonitions about the disclosure obligations of the Prosecution. We are aware of
17 disclosure obligations and we are doing our best to meet them in a timely fashion.

18 On the three specific concerns you've raised, your Honour, yes, I can confirm that the
19 Prosecution has disclosed what it -- what it considers to be the most relevant evidence.

20 And perhaps I can just give a little bit of detail as to the basis in which I make this
21 statement, that is, that the Prosecution has organised its disclosure review in such a
22 way that with the knowledge of its own case, and with the best information it has
23 about the Defence's case it has identified the items that it considered to be the most
24 relevant to this specific case. However, disclosure obligations obviously do not end
25 there. We need to be able to certify to the Chamber and we need to be able to assure

1 our learned friends on the other side that we have conducted a suitable review of the
2 information in our possession, in the Prosecution's possession, so that we can state
3 that we have disclosed all relevant material that is disclosable under Rule 77 or
4 Article 67(2).

5 The -- if the Chamber will bear with me one second, please.

6 As regards the question on the -- on the total number of items disclosed since July, the
7 total number of items is 717 of which -- of which 101 are disclosed as INCRIM, 334
8 as Rule 77 and the rest, the balance as potentially exonerating, PEXO.

9 Sorry, I'm being corrected, your Honour. Apparently, it's 101 INCRIM and 334 Rule
10 77. Not the PEXO. It was Rule 77, not PEXO. There's been a double counting.

11 As regards the discussions on keywords, perhaps discussion isn't -- isn't really the
12 correct description. The Prosecution has invited the Defence to provide its keywords
13 and themes already at the pre-confirmation stage. We've not really had any further
14 discussions on it. The invitation stands and I'm sure the Defence will -- will be in a
15 better position to advise the Chamber where they are with that.

16 Finally, I should just inform the Chamber - in lieu of the Chamber's instruction that
17 discussions should be had regarding disclosure issues - that the Defence has, over the
18 course of the proceedings, sent several disclosure requests which have been dealt
19 with *inter partes* to date. There are two pending that were sent - I think it was the
20 week before last - and that the Prosecution are still working on. We hope to respond
21 to my learned friends as soon as possible. Of course, there have been other pressing
22 issues in terms of urgent filings that the Prosecution has been dealing with in the
23 interim, as well as the preparation for the proceedings.

24 Your Honour, I hope have I sufficiently addressed the items that you have raised, but
25 if I have missed anything, please do let me know and I'll attempt to address those,

1 too.

2 PRESIDING JUDGE SAMBA: [9:48:41] Yes. Mr Steynberg, while you're still on
3 your legs, I had referred to paragraph 8 of your submissions where you said words to
4 the effect that, I quote, "must still finalise its review". What is the status of that
5 review?

6 MR STEYNBERG: [9:49:01] Your Honour, that review is still at a fairly early stage.
7 Those numbers that were given in our submissions on the 10th were the numbers
8 outstanding at that date. So it's 14 days since we made those filings. The -- what
9 the Prosecution has done is it has secured additional resources in terms of contracted
10 legal reviewers who are working full time on this, as well as the rest of the
11 Prosecution team which, unfortunately, is not a large one. It's what you see before
12 you today, plus two other lawyers who remain in -- in the office -- sorry, three other
13 lawyers, I beg your pardon.

14 So the figures that I have are that since the date of the filing 1,914 items have been
15 reviewed, and I've already given you the figures for those that have been disclosed
16 since then. There are also others that are sitting in the next disclosure packages and
17 they will be processed as soon as that's possible.

18 PRESIDING JUDGE SAMBA: [9:50:11] Thank you very much, Mr Steynberg.
19 I now give the floor to the Defence.

20 Mr Karnavas, it would be helpful if you could indicate how much time you will need
21 to prepare after the OTP has disclosed all incriminating evidence. The Chamber
22 understands that the bulk of the Prosecution's evidence has already been in your
23 possession for several months now and that any additions will be limited in terms of
24 volume.

25 Could you please elaborate as to why you would need three months between the date

1 of full disclosure and the start of trial?

2 MR KARNAVAS: [9:50:57] Thank you, your Honour.

3 First, let me begin by saying we totally agree with your general observations and

4 that's how we have been proceeding thus far. We have good communications with

5 the Prosecution. However, as you noted, yesterday we received 435 documents.

6 Now, what you see here is the Defence team. Over there, there is a Roman legion of

7 lawyers and experts and what have you and so we are at a disadvantage. I don't

8 know what more evidence is coming our way. Three months is not an unusual

9 amount of time. What the Prosecutor considers relevant is -- is a relevant term.

10 What he thinks may or may not be essential to the Defence is somewhat -- is -- is also

11 questionable. There also are expert reports that we are expecting from the

12 Prosecution, an item that is being examined. As I understand it, they indicated one,

13 possibly two more. The Prosecution's representations are that they -- these reports

14 should be available to us by the first of December, if I'm not mistaken. Obviously,

15 we will need to -- to exam those. We may need to secure our own expert to review

16 those documents.

17 Also, the Prosecution has indicated that they're in the process of continuing to

18 investigate and that there may be three additional witnesses that may have - I believe

19 the word was used -- (Redacted). If I'm mistaken, I can be corrected by

20 the gentleman.

21 So we -- there has been quite -- quite a bit of disclosure information. We -- we are

22 working diligently on this. We did send two letters back in September 8 and 9

23 requesting some additional information. We're hoping that we get, you know, more

24 or less what we're asking for. Barring that, we may need to file a motion to compel

25 disclosure. We're hoping that we don't have to do that. I am of the firm belief that

1 courtroom time and the Judge's time should be spent on the case and not fighting
2 disputes that can be resolved easily among the parties and which the rules especially
3 provide resolution for without contention.

4 So I think given that they're continuing to investigate, if yesterday's any indication
5 that there's more documents of that nature - and we're talking about 435 documents,
6 we're not talking about pages, we're talking documents - we want to digest it. We
7 want a fair trial, we want a fair process. We understand that they're expecting us to
8 provide them with keywords, but I -- this is not my first trial, nor is it the Prosecutor's
9 first trial. He knows the case. He knows what's exculpatory. He knows what's
10 relevant. He doesn't need, you know, a modest defence lawyer to tell him exactly
11 what his case is all about and what he should be disclosing to us.

12 So I'll leave it at that. I do want to say one -- make one short remark concerning
13 witness preparation. And I'm getting ahead of ourselves at this point.

14 In principle, we are -- we both agree that witness preparation is -- is essential.
15 However, what I have seen, the modalities that I have seen thus far are highly
16 disadvantageous to the Defence when they do allow preparation in that, one, even
17 though there's a videotape requirement it's not automatically turned over. You
18 would only get it up to 24 hours beforehand. Again, with a modest team, we don't
19 have that opportunity. Documents can be shown to a witness that were not known
20 to the witness. I have a problem with that because the witnesses' evidence is what's
21 in their memory. And when we begin to tamper with someone's memory we're
22 tampering with the evidence. So I would strongly advise against that. And I have
23 recently seen modalities that -- in another Trial Chamber adopted, the Yekatom Trail
24 Chamber, and I think that they provide all the necessary modalities required for a
25 witness to familiarise themselves with whatever statements they have made to know

1 what's going to happen in the courtroom without the need of having a lawyer
2 actually preparing them in a sense. Because once you start going down that road,
3 depending on the quality and the experience of the lawyer they can easily transgress,
4 trans -- trespass into the area of coaching inadvertently as it may be. In any event,
5 those are my remarks, your Honour. I hope I answered your question.

6 PRESIDING JUDGE SAMBA: [9:56:49] Thank you very much, Mr Karnavas.

7 As I said, there will be a ruling in respect of how the witnesses would present their
8 testimonies to the Court, so that one will come out subsequently. But may I ask,
9 Mr Karnavas, again, before -- if may I ask, do you have an intention to do any
10 investigations?

11 MR KARNAVAS: [9:57:14] Okay. As you may appreciate, your Honour, from the
12 very moment that we got into the case, we're investigating in a sense. We're looking
13 into -- we're reviewing the documents, so I don't want to go beyond that. I can
14 assure the Court that we're not going to be asking for additional time. I think
15 the -- if the Prosecutor has represented that March 1 is a good date for them and
16 provided that they provide us with the disclosure material, that would be sufficient
17 for us bar some -- some unexpected event. But I don't want to go into the specifics of
18 what we are doing in preparation, but I can assure Her Honour that we are being
19 exceptionally diligent as we normally are in all cases.

20 PRESIDING JUDGE SAMBA: [9:58:15] Thank you very much, Mr Karnavas. But
21 the Chamber would need sufficient detailed information, if you may, on which
22 specific investigations you believe you need to be able to carry out before we can start
23 hearing the Prosecution's witnesses.

24 So please also provide a realistic timeline for when you expect to be ready with these
25 investigations. And you may put this in a written ex parte submission, if you wish.

1 Should you wish to file a written submission, this should be done by next Tuesday, I
2 would say, September 28. I thank you very much.

3 MR KARNAVAS: [9:58:57] Very well, your Honour. Thank you.

4 PRESIDING JUDGE SAMBA: [9:58:59] Turning to -- to this same point, in respect of
5 ongoing investigations, since it will have a direct impact on the issue of disclosure, I
6 have two concerns or questions for Mr Steynberg with regards it's still ongoing
7 investigations. You said in paragraph 26 of your written submission that you still
8 need to complete the review and analysis of certain electronic data.

9 Could the Prosecution provide an update on this, please? The Chamber would like
10 to know more about the timeline. Is this process being finalised, Mr Steynberg?
11 And I have another question in that respect, if I may.

12 The second question is with regard the Prosecution's attempt to obtain further
13 evidence. Could the Prosecution also provide an update on this? Was a final
14 decision made on whether to call further witnesses? If not, when does the
15 Prosecution think it will be able to make this decision at the latest?

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Private session at 10.01 a.m.)

3 THE COURT OFFICER: [10:01:20] We are now in private session, your Honour,

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

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11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Open session at 10.05 a.m.)
16 THE COURT OFFICER: [10:05:13] We're in open session, your Honour.
17 PRESIDING JUDGE SAMBA: [10:05:15] Okay. So thank you very much
18 Mr Steynberg, as I said.
19 And talking more generally about anticipated evidence to be presented at trial, the
20 Prosecution submits in paragraph 11(4) of its submission filed that it might call, and I
21 quote, "two or three expert witnesses who are expected to testify on the issue of
22 recovery of data from cell phones". I have a couple of questions on that,
23 Mr Steynberg.
24 First, when does the Prosecution intend to make this decision? And second, why
25 does the Prosecution intend to call up to three expert witnesses on this matter? I

1 would assume that one expert witness would be sufficient, no? Does the

2 Prosecution envisage any specific problems?

3 MR STEYNBERG: [10:06:22] Your Honour, the decision whether or not we need to

4 call these witnesses is also -- is firstly contingent upon the proposed agreement of

5 facts which we are in the process of discussing with the Defence. The Prosecution

6 has proposed that we might reach an agreement on -- on the admission of this

7 material or at least the authenticity and reliability of the material. If that decision is

8 not reached, and to the extent that the Prosecution feels it needs to rely on the

9 contents of this phone, which at this stage it believes it probably will, the -- you know,

10 if we put to the proof, we will then obviously need to -- we will need to prove the

11 process by which the information was extracted and the authenticity and reliability of

12 the data itself.

13 Now, the -- the reason why more than one witness may be necessary is that more than

14 one body was involved in the process. The phone was initially examined by the

15 Prosecution's in-house expert in the forensic science section, but in relation to a

16 certain category of information they were not able to retrieve the data with the tools

17 at their -- at their disposal and, therefore, a request was made to an outside agency to

18 assist with this. So to the extent that this data is retrieved by two agencies, it may be

19 necessary for each to testify in this regard.

20 The third witness, again, if necessary, does not pertain to this device, but rather to the

21 audio enhancement of certain recordings that were made in the process of the

22 Prosecution's investigation. Certain of these recordings have already been enhanced.

23 We've received the -- the enhanced audio and we're now in the process of reviewing

24 the transcripts of that material. These transcripts have already been disclosed to the

25 Defence. If there are any corrections or improvements, as it were, as a result of the

1 enhanced audio, these will be disclosed in due course. And the Prosecution will
2 then consider whether it's necessary for any further audio material to follow the same
3 process. So those are the three potential witnesses. And, again, this will only be
4 necessary if there's any dispute as to this process. And to be honest, I can't recall as I
5 stand here whether or not this is the issue that's already included in the agreements of
6 facts. I think -- I think it likely is, but we will certainly have some *inter partes*
7 discussions with the Defence to see what is in dispute and tailor our witnesses
8 accordingly.

9 PRESIDING JUDGE SAMBA: [10:09:40] Thank you very much, Mr Steynberg.

10 Mr Karnavas, do you have anything to say in respect of what the Prosecutor has just
11 said?

12 MR KARNAVAS: [10:09:45] Thank you, your Honour. Not really. I just have to
13 wait and see. I think after this hearing I look forward to sitting down with the
14 gentleman and going over and see to what extent we might be able to reach any
15 agreements. I'm of the firm belief that when it comes to this sort of information it is
16 terribly important for the Prosecution or the moving party to lay a proper foundation.
17 So it might be even if - and it's a big if - we were to reach some accommodation, at
18 least one, perhaps two experts would -- would be required.

19 Now, if the reports are -- are comprehensive and detailed, it may not be necessary.

20 You know, we would take the expert at the report. If, on the other hand, there
21 would be a need for confrontation, you know, that's a different matter. But at least
22 my approach and advocacy is not to just, you know, swat every mosquito with a
23 cannon ball. So that's it.

24 MR STEYNBERG: [10:10:56] Your Honour, if I may just add something I omitted to
25 add. It is also possible - and the Prosecution will certainly examine the

1 possibility - that these reports may be -- we may request the admission of these via a
2 bar table motion if we don't think that *viva voce* is evidence required.

3 PRESIDING JUDGE SAMBA: [10:11:16] Well, thank you very much, Mr Karnavas.

4 Thank you very much, Mr Steynberg, for your submissions.

5 My next question is with regard Rule 68 of the rules. The Prosecution announces
6 that it will file requests under Rule 68(3) by the 1 December of this year. You also
7 foreshadow that you intend to file applications under Rule 68(2) of the Rules. May I
8 ask the Prosecution why it argues that it is only possible to file these applications on
9 1 December? Couldn't you file these requests at least for the witnesses you certainly
10 intend to call at an earlier date?

11 Mr Steynberg, please.

12 MR STEYNBERG: [10:12:06] Your Honour, anything is possible. It's a question of,
13 you know, competing obligations, deadlines, et cetera. There is no, in principle,
14 reason why we couldn't file it earlier than that, but of course decisions on exactly
15 what to do and what to request to do are best made when one has a complete picture
16 of the -- the case it intends to present. We have a fairly good idea where we're going
17 already, but there still are outstanding investigations, there still are -- there still is
18 material that needs to be reviewed, so the Prosecution would not want to be
19 precipitous in these requests only to find later that they're not necessary. But I do
20 believe that some time before 1 December would be feasible, but, you know, not as
21 soon as next week.

22 PRESIDING JUDGE SAMBA: [10:13:23] Thank you very much, Mr Steynberg.

23 Does the Defence, Mr Karnavas, do you have anything to say in respect of his
24 submissions?

25 MR KARNAVAS: [10:13:31] Yes, I do. And my heart goes out to the Prosecution.

1 They're so overwhelmed with this and what have you. They've only been working
2 on this case for the last five years or so. It would seem to me that by now they
3 should know what their case is about. Now, we're here by their invitation. That's
4 how I look at the charging document and where we are today. They should know
5 their case. This is not a complex case as cases go. They're talking about 12, 14, 16
6 witnesses. Of those, half of them they wish to avail themselves to these particular
7 rules. It would seem to me that by November 1 they should be able to provide that
8 information.

9 Now, I understand they have to juggle all sorts of balls in the air and what have you,
10 but imagine the Defence side getting those at the last -- you know, on December 1 and
11 then having to do all the other preparation and having to respond to this. It would
12 seem to me that if they know who their witnesses are, and they do know, I mean it's
13 not -- this is not rocket science, with all due respect. They -- and they know what
14 they want to adduce from these witnesses. They know what sort of documentary
15 evidence they want to use with these witnesses. Why pray tell? Can they not move
16 more expeditiously?

17 May I remind the Court that Mr Gicheru contacted the Prosecution well in advance
18 before coming to (inaudible) so they had sort of a -- 16, 18 months to already start
19 getting the ball ready. They knew. Now, we're at a -- you know, a year into the
20 case now almost and they're saying they need until December 1 to figure out what
21 evidence they want to adduce and how they want to adduce it with these particular
22 witnesses knowing that the universe of witnesses is rather small. I empathise with
23 them, I sympathise with them, my heart goes out to them, but I also have a very small
24 team. And if we want to start on time, because your initial question was, why do I
25 need three months? Well, the later I get this information, the more pressure it is on

1 the Defence. We want to have a fair trial. We're not trying to take -- take advantage
2 of the Prosecution, you know. We're not that clever. But they're clever enough and
3 they have the resources enough to -- to provide that information. And the sooner
4 that we get it, the sooner the battle -- because that's -- there are going to be some battle
5 royales over that material. I can assure the Trial Chamber. We're not just going to
6 go quietly into the midnight. We're going to fight that and those submissions will
7 require sufficient time for preparation and sufficient time for your Honour to go
8 through them. And it's important -- these are important matters that should not wait
9 until the very end. Thank you.

10 PRESIDING JUDGE SAMBA: [10:16:48] Thank you very much, Mr Karnavas.

11 The next topic is the issue of additional witnesses. And this is a question again for
12 the Prosecution. From the filings, it seems that the Defence does not have the
13 identity of additional witnesses the Prosecution is currently considering to call.
14 They don't have that identity yet. I'm looking at paragraph 35 of the written
15 submissions, Mr Steynberg. And is this -- is this correct? Is that the position?

16 MR STEYNBERG: [10:17:30] Indeed, your Honour, that is the position. And, again,
17 I'm mindful that we're in public session. But as foreshadowed in the filing, the
18 identities of these witnesses cannot be disclosed until the necessary security measures
19 have been put in place.

20 PRESIDING JUDGE SAMBA: [10:17:46] But do you concede that you have a
21 disclosure obligation to the Defence even if you decide not to call these persons under
22 Rule 77?

23 MR STEYNBERG: [10:18:05] Your Honour, that's something I'd like to take under
24 consideration, if I may. I think that will require some further thought. It may well
25 be. I don't want to say no, but I would have to certainly consider what obligations

1 the Prosecution has. And then if the conclusion is that we have such an obligation,
2 which we may well have, then consider whether or not the Chamber would need to
3 be approached if such disclosure might cause -- put the witnesses at risk.

4 PRESIDING JUDGE SAMBA: [10:18:45] While you're still on your legs,
5 Mr Steynberg, yes. The position, I believe, is that you have that obligation to
6 disclose to the other side, to the Defence. If you consider that there exists a
7 disclosure obligation, why do you submit in your filing that you liaise with the VWS
8 concerning these witnesses only when you have made a decision to call them?
9 Wouldn't it be more efficient to do this sooner? If there be any need for
10 non-standard redactions particularly pertaining to the witnesses' identity, the
11 Chamber will want to have an assessment from VWS in any event.

12 MR STEYNBERG: [10:19:32] The -- I take the Chamber's views to heart. Obviously,
13 what I think really doesn't matter if those are the Chamber's views.
14 Yes, your Honour, I think it would certainly be prudent to perhaps start those
15 discussions as soon as possible. Obviously, it -- you know, it really depends, again,
16 what the witness says. If we meet with the witness and they tell us, sorry, we know
17 nothing about this incident, we don't know the accused and we have no information
18 to provide you, that is a relevant factor to take into account, I think, when -- when
19 considering whether disclosure is necessary.

20 On the other hand, if the witness gives exonerating evidence, that's of course also
21 very relevant and would impact heavily on any decision that the Prosecution might
22 make. If the witness says, well, I don't want to cooperate with you or simply doesn't
23 respond to our communications, well, that's another situation which must be taken
24 into account. But, your Honour, I take your Honours admonitions to heart and we
25 will approach the VWS to discuss these issues. I may add that the Prosecution also

1 has its own internal protection strategies unit who are also experts in witness
2 protection, and we do liaise with them weekly certainly to discuss witness security
3 issues. But independent views of the VWS may certainly be helpful to the Chamber.

4 PRESIDING JUDGE SAMBA: [10:21:19] Sorry. Mr Steynberg, I'm sorry. When
5 are you meeting the witness? Do you have a date planned?

6 MR STEYNBERG: [10:21:28] Yes, your Honour. I do have a date planned, but I
7 regret that this is certainly not an issue I would want to discuss in public and indeed
8 not an issue I'd want to discuss *inter partes*. I do believe that I have indicated in an *ex*
9 *parte* e-mail communication with the Chamber on the issue of -- of certain redactions
10 related to witnesses the reasons why it would not be prudent to foreshadow exactly
11 when interviews are to happen since this may lead to identification of witnesses.

12 PRESIDING JUDGE SAMBA: [10:22:12] I thank you very much. The next item on
13 the list are agreements as to evidence pursuant to Rule 69 of the Rules. May I, as a
14 general comment, say that there is no deadline in order to reach an agreement on facts.
15 However, obviously, in order to have the biggest effects on the expeditiousness of the
16 proceedings, such agreement should ideally be reached before the Prosecution
17 presents its evidence. The Prosecution informed the Chamber that the discussions
18 on this matter between the parties are ongoing.

19 Can you kindly provide an update, Mr Steynberg?

20 MR STEYNBERG: [10:23:01] Yes, your Honour. Well, I don't think there's been
21 very much to update your Honour on. Prior to -- shortly prior to the filing of the
22 Prosecution's submissions, and after an initial *inter partes* meeting to discuss various
23 issues on which agreement might be reached, the Prosecution provided the Defence
24 with its, should we say, wish list of items which we believe are items on which
25 agreement may be reached, items which we believe are established by objective

1 evidence and may be accepted by the Defence. But, of course, the Defence have their
2 own duties to -- to the accused and notwithstanding their willingness to discuss these
3 issues and to cooperate, ultimately they will put their client first, I'm sure.

4 So the current status is that the request is with the Defence. We are awaiting any
5 response from them. But, again, there have been other urgent pressing issues in the
6 interim, and I'm sure that they will get back to the Prosecution at the earliest
7 opportunity.

8 PRESIDING JUDGE SAMBA: [10:24:20] Thank you very much, Mr Steynberg.

9 Does the Defence have anything to say or add? Do you envisage the possibility of
10 agreeing to some of the facts that are alleged by the Prosecution or will you be
11 contesting everything? This is obviously your prerogative, Mr Karnavas, but it
12 would be highly desirable or appreciated if it would be possible to focus this trial on
13 those issues that are truly contested. In order to achieve efficiency and expedition of
14 a trial, there must be *inter alia* and only identification of the real issues which are in
15 the case and a greater use of agreed facts between the parties. Can I hear you on that,
16 Mr Karnavas?

17 MR KARNAVAS: [10:25:12] You certainly may, your Honour. I couldn't agree
18 with you more on that. You know, facts that are notorious that you can take judicial
19 notice of, obviously, you don't need to hear -- or the Prosecution doesn't need to hear
20 from the Defence such as that Nairobi is in Kenya. Okay. We know that. There
21 are some other facts that we might be able to agree with. My -- what I intend to do is
22 I intend to sit down with the gentleman. I would prefer doing it that way, sitting
23 down and going one by one. And to the extent that we can agree to certain things,
24 we will. It is not my intention to make the Prosecutor prove that, for instance, today
25 is Friday. That's a notorious fact. I don't intend to take up the Court's time by

1 forcing the Prosecutor to prove things that are not necessarily relevant. It wouldn't
2 be fair to the court. It's not fair to the Prosecution. It's not fair to the process. It
3 doesn't help the case in any event.

4 So I won't be disputatious for the purpose of being disputatious, but there are some
5 facts that we might for various reasons require the Prosecutor to lay a foundation, to
6 put them to the test. But I can assure the Trial Chamber that we're going to do our
7 level best to agree to as many facts as is possible, keeping in mind that we have an
8 obligation to Mr Gicheru. That's why we're here. And we're not going -- I'm not
9 going to try to make his job easier. I can assure you of that. But we will -- we won't
10 take up unnecessary court time on fighting facts that are relatively agreeable by both
11 sides. Thank you.

12 PRESIDING JUDGE SAMBA: [10:27:16] Thank you very much, Mr Karnavas. As I
13 said, that's your prerogative, but if you could agree on facts that would help the
14 proceedings very much.

15 In its order on this status conference, the Chamber asked the parties to make
16 submissions on the opening statements.

17 First, I note that the Prosecution, in paragraph 44 of its submissions, stated that it
18 would request time to respond to the Defence's opening statement should the Defence
19 choose to make them at the beginning of the trial. This proposal might stem from a
20 misunderstanding of the purpose of opening statements. Opening statements are
21 not evidence or submissions by the parties on a discreet issue. They provide the
22 opportunity for the parties to succinctly present their case to the Chamber.

23 Accordingly, no response to an opening statement will be granted. So with this
24 clarification, the Chamber notes that the Defence has not made any submissions on
25 this issue. Could I kindly ask Mr Karnavas to present your view?

1 MR KARNAVAS: [10:28:35] Thank you, your Honour. And you took the thunder
2 from my argument. I precisely agree with you with respect to the purpose of
3 opening statements and that absolutely under no circumstances should there be a
4 response to that. Our position is as follows: We will know what we will do after we
5 hear the Prosecution's case. I don't see the point in -- they ask for two hours.
6 Frankly, I think two hours is far too much. I think they can do so in 30 minutes. A
7 good opening statement should just tell the Court what the evidence intends to show
8 so that the Court has a pretty good indication. But if they need two hours, if they
9 want four hours, if they want ten hours, that's fine with them. As far as our -- we're
10 concerned, we will hear what they have to say. By that point, we'll pretty much
11 know. I certainly will inform the Court well in advance. If were to -- to give an
12 opening statement, I can assure the Court, having been warned by one of my
13 favourite judges in the United States that he would only listen to 15 minutes of any
14 argument that I would make, but that I could talk as long as I want, my indication is
15 more than 15 minutes is superfluous. So were I to give one, it would be in that range.
16 Thank you.

17 PRESIDING JUDGE SAMBA: [10:30:11] Thank you very much, Mr Karnavas. I'm
18 sure we'll give a decision as to timing - two hours, four hours, as you say, 15
19 minutes - when we give out the decision.

20 Does the Prosecution wish to add anything, Mr Steynberg, in respect of opening
21 statements?

22 MR STEYNBERG: [10:30:27] No, your Honour. Only to observe that the
23 Prosecution said it would require no more than two hours. That was the absolute
24 top. We probably won't use two hours, but I prefer to err on the side of caution.

25 PRESIDING JUDGE SAMBA: [10:30:48] All right. Thank you very much,

1 Mr Steynberg.

2 So on a topic related to the opening statements, I note that at paragraph 42 of its
3 submissions the Prosecution indicated that it intends to file its trial brief on
4 1 December 2021. I also note that the Defence has not made any submissions on the
5 issue of a trial brief. I am aware of the view that it would assist everyone in this case
6 if a trial brief could be filed before the trial starts so that we all have an idea of what
7 the real issues are in this case and what the Defence is going to be in general terms.
8 Of course, the Chamber does not expect the Defence to provide the complete detail of
9 the Defence, certainly not at this stage. Similarly, the provision of such a brief does
10 not preclude you from adding other avenues at a later stage if those become evident
11 to you. However, the Chamber is of the view that it would be a good idea in order
12 to determine what the issues are in this case.

13 Could I kindly ask the Defence to present their views on this?

14 MR KARNAVAS: [10:32:07] Certainly, your Honour.

15 I've been at this business for about 40 years. Never in my 40 years have I alerted the
16 Prosecution or the Court of my views on the Defence prior to the Prosecution meeting
17 its burden of proof in their case-in-chief.

18 Now, in my previous cases before other international tribunals, I have managed to
19 stretch my trial brief to about a page and a half. That would include also the
20 signature line. I don't mean to be facetious, but my position is no quarter sought,
21 none given. The Prosecution has to prove its case. And if we do intend to put on a
22 Defence, we will do so through our cross-examination, of course, through -- during
23 their case-in-chief and then we will decide to what extent any witnesses will be called
24 on our behalf. But be that as it may, I can answer very quickly. Our trial brief will
25 be such as: We contest all relevant facts on all Counts. We find that Mr Gicheru

1 should not be prosecuted before this Tribunal and that we deny all allegations.
2 So that's our trial brief, your Honour. And were I to put it in writing, that's what I
3 would put in. I'm being very, very honest with you. I don't -- I see no reason to
4 hold anything back. And I don't -- I mean no disrespect. As I said, this is not a very
5 complicated case, but even if it were I would basically say the same thing. The
6 Prosecutor has a burden. They purposely wrote the document containing the
7 charges the way they wanted to write it. They have that authority, they have that
8 power. I have no power. You have discretion. All I have is what little rules and
9 statute allow me to do here. And so -- but we do have one thing and that is the
10 Prosecution has the burden of proof. They have to meet their burden of proof. We
11 have the presumption of innocence, so I'll leave it at that, your Honour.

12 PRESIDING JUDGE SAMBA: [10:34:33] Well, thank you very much, Mr Karnavas.
13 The next agenda item is the matter of translation during the proceedings. The
14 Prosecution indicated in paragraph 25 of its submissions that there were problems
15 with the interpretation between English and Swahili due to the fact that this was done
16 via French. The Chamber also notes the submissions by the Registry on the matter
17 of interpretation and that they will be able to provide interpretation for Swahili.
18 Now, with the Prosecution's comments in mind, could the Registry shortly confirm
19 that the interpretation will be done from Swahili directly into the English and provide
20 any other necessary information?
21 Registry, please.

22 MR ZANEN: [10:35:38] Yes, your Honour. Thank you for your question.
23 With regards to the observations of the Prosecution and Swahili -- sorry. I'll be more
24 understandable if I take this off.
25 With regards to the -- to the relay interpretation from Swahili into French via French

1 into English, that is an option, but indeed we will be able to provide the interpretation
2 from Swahili directly into English. It will require some effort on our part given that
3 we depend to some extent on external resources, but we will probably have sufficient
4 time to make that arrangement. So we foresee, in principle, no issue with providing
5 the interpretation from Swahili and vice versa into English for this case.

6 Other than that, just as today to support the hearings French/English simultaneous
7 interpretation will be provided, the interpretation Swahili/English will in principle
8 also be simultaneous. And I'm saying this simultaneous in the hearings because
9 we've had in the past -- had other languages for other situations in which the
10 interpretation had to be consecutive when there are no professional interpreters for
11 that language. But as far as our understanding at this point in time, that's not the
12 case.

13 PRESIDING JUDGE SAMBA: [10:37:17] Thank you very much. Does the
14 Prosecution have anything to add or bring to the Registry's attention?

15 MR STEYNBERG: [10:37:24] Only to say that I'm grateful to my Registry colleagues
16 for their cooperation on this issue. I have also had some separate communications
17 with Mr Diederick's colleague on this issue, and I did indicate to her that, you know,
18 it was not only the relayed interpretation that was the issue, but it was also the issue
19 of the dialect of Swahili that was spoken by the francophone Swahili interpreters. I
20 understand there are some significant regional variations in Swahili, particularly
21 between that spoken in the DRC and that spoken, on the other hand, in Kenya and
22 Tanzania. So the Prosecution has suggested and my colleagues have confirmed that
23 they will attempt to obtain interpreters that speak the same dialect of Swahili which
24 will facilitate, we believe, the interpretation in this case.

25 PRESIDING JUDGE SAMBA: [10:38:32] Thank you very much, Mr Steynberg.

1 Mr Karnavas, do you have anything to say?

2 MR KARNAVAS: [10:38:35] I have nothing to add, but I totally agree with the

3 Prosecution concerning the dialect issue. Thank you.

4 PRESIDING JUDGE SAMBA: [10:38:43] Well, thank you very much. The next

5 topic will be the issue of the presence of Mr Gicheru during the trial, and I think it is

6 best that we go into private session for this matter.

7 Court officer, we can please go into private session.

8 (Private session at 10.39 a.m.)

9 THE COURT OFFICER: [10:39:08] We are in private session, your Honour.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

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13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Open session at 10.42 a.m.)
18 THE COURT OFFICER: [10:42:26] We are back to open session, your Honour.
19 PRESIDING JUDGE SAMBA: [10:42:29] Thank you very much.
20 Now, these were all the items on the agenda. The Chamber will announce the
21 starting date of trial in due course and also issue a decision on the conduct of
22 proceedings.
23 Do the parties wish to raise anything which has not been discussed in this hearing or
24 was already mentioned in the written submissions of the parties? Do you wish to
25 raise anything?

1 Prosecutor, please.

2 MR STEYNBERG: [10:42:58] Your Honour, something that was raised in our written
3 submissions, we requested to place on the agenda the issue of evidentiary regime the
4 Chamber may wish to follow in the course of the trial. This is not something that has
5 received proper briefing yet, but I just wanted to mention that, your Honour, because
6 decisions like this will have implications for decisions the Prosecution might take in
7 terms of how it intends to lead its case, how it intends to provide documentary
8 evidence to the Court. And the sooner we have clarity, the more efficient it would
9 be for our preparations.

10 PRESIDING JUDGE SAMBA: [10:43:44] Well, that was not on the -- it was not on the
11 agenda for today -- for today's status conference, unless the other party is ready to
12 address this matter orally? Do you have anything to say, Mr Karnavas?

13 MR KARNAVAS: [10:44:02] Yes, your Honour. I'm ready. Should I go?

14 PRESIDING JUDGE SAMBA: [10:44:10] Oh, yes, please.

15 MR KARNAVAS: [10:44:11] On paragraph 55, I believe, is where the Prosecution
16 makes this -- makes its submissions.

17 I come from a common law system. I'm very well familiar with the civil law system
18 where everything comes in and you sort of sift it out at the end. I'm not a big fan of
19 that. I understand it's okay in some large cases, and also it allows the Trial Chamber
20 to make a determination on what is and what is not relevant and then to decide, in
21 conjunction with everything else that it has heard and has been adduced, how much
22 weight to give to the evidence. However, I think that in a small case such as this one,
23 and depending on the filings that we get concerning what they tried to admit, I think
24 it's important that as the evidence comes in that there's some kind of a screening
25 process as opposed to just letting it all in and then trying to figure out at the end.

1 The Prosecution claims that this is a more efficient process. I dare say it is not. Of
2 course, a lot of these issues can be dealt with in a written fashion. So to the extent
3 that a lot of the evidence can be sifted through for admissibility, as far as I'm
4 concerned, that's -- you know, even though it's a low threshold, we're looking at
5 relevance, reliability, authenticity. The Prosecution is going to have to, at least with
6 some of the evidence, establish a proper foundation to make sure that the evidence,
7 you know, is reliable and also that the witness is competent to testify about the
8 particular evidence. So I don't see that we gain that much time by just letting it all in
9 and then, you know, having the Trial Chamber sort of sift through it at the very end
10 and figure out and try to make sense of it all. So that's my position, your Honour.
11 Thank you.

12 MR STEYNBERG: [10:46:23] If I may, briefly, your Honour.

13 The Prosecution does also not take a strong position on this issue. I, like my learned
14 friend, am also from a common law jurisdiction and I am used to -- to this issue and
15 addressing the issue of admissibility during the proceedings. But from my prior
16 experience in these proceedings, it does seem that it takes an inordinate amount of
17 time, courtroom time during the course of leading witnesses if every time a document
18 is produced there is an argument about whether or not that document must go in.
19 These arguments can go on for five, ten, 15 minutes and there are often several. As
20 my learned friend said, this is a fairly circumscribed case, no more than 16 witnesses,
21 and I think there's a real danger that we might spend more time arguing over
22 documents than listening to evidence.
23 But, your Honour, I leave this in the Chamber's hands. My only observation is that
24 being an Article 70 case, we should look to follow the most expeditious procedure
25 possible. I'll say no more on the issue.

- 1 PRESIDING JUDGE SAMBA: [10:47:37] Well, thank you very much, Counsel. The
2 evidence regime will not need to be discussed today. The Chamber will announce a
3 decision on this in due course, okay?
- 4 So I thank you all very much for your submissions. I thank the parties and the
5 Registry for their attendance.
- 6 The Court is adjourned.
- 7 THE COURT USHER: [10:48:01] All rise.
- 8 (The hearing ends in open session at 10.48 a.m.)