International Criminal Court
Trial Chamber V(b) - Courtroom 1
Situation: Republic of Kenya
In the case of The Prosecutor v. Uhuru Muigai Kenyatta - ICC-01/09-02/11
Presiding Judge Kuniko Ozaki, Judge Robert Fremr and Judge Geoffrey Henderson
Status Conference
Wednesday, 5 February 2014
(The hearing starts in open session at 10.02 a.m.)
THE COURT USHER: All rise.
The International Criminal Court is now in session.
Please be seated.
PRESIDING JUDGE OZAKI: Good morning and welcome to the parties and participants. Can counsel introduce themselves for the Court, starting with the Prosecution?
MR GUMPERT: Certainly, Madam President. My name is Ben Gumpert and I represent the Prosecution. With me today are Adesola Adeboyejo, Manoj Sachdeva, Sam Lowery, Ruth Frolich, Julian Elderfield, Sylvie Wakchom, Hai Do Duc and not in the courtroom, but observing from afar, Ramu Bittaye, the case manager.
PRESIDING JUDGE OZAKI: Thank you. And this is your first appearance, Mr Gumpert?
MR GUMPERT: Madam President, it is, that's right, the very first time I've been in a courtroom at the International Criminal Court.
PRESIDING JUDGE OZAKI: You're welcome.
MR GUMPERT: That's very kind of you.
PRESIDING JUDGE OZAKI: Defence team, please?

MR KAY: Thank you, Madam President. My name is Steven Kay, lead counsel for Uhuru Kenyatta. I'm in court today with Gillian Higgins, Mr Desterio Oyatsi, Mr Kennedy Ogeto and our case manager, Mr Benjamin Joyes. Thank you.

PRESIDING JUDGE OZAKI: Thank you.

Legal representative of victims?

MR GAYNOR: Good morning, Madam President. Good morning, your Honours. My name is Fergal Gaynor, representing the victims. With me is Caroline Walter to my right. Behind me we have Samuel Linehan and Anushka Sehmi. Thank you.

PRESIDING JUDGE OZAKI: Thank you very much. And from the Bench, following the decision of the Presidency on 30 January, Judge Henderson has joined us in the Chamber in place of Judge Eboe-Osuji. And he's, of course, very welcome.

As usual, I would like to remind everyone to speak slowly and to pause for several seconds in between speakers in order to ensure accurate transcription and interpretation.

An agenda for this status conference was issued on 3 February. As you know the main purpose of this status conference is to discuss matters regarding the Prosecution's request for an adjournment of the trial commencement date and the Defence related request for termination of the proceedings.

In its decision 886, the Chamber vacated the provisional trial commencement date of 5 February in order to enable proper deliberation on these pending requests. The parties and participants were also requested to notify the Chamber by email not later than 4 p.m. on Monday 3rd of any additional matters they wish to raise at the status conference, and no additional matters were notified.

In the interests of efficiency and having regard to the significant degree of overlap between the different agenda items, the Chamber is going to invite the parties and

participants to make consolidated submissions addressing the matters identified under agenda items B and C at the same time, that is, regarding the related Prosecution and Defence requests. However, we will first very briefly address agenda item 1, which relates to the status of Prosecution investigations. Prosecution, we noted the update provided in your filing on Friday. Is it correct that you no longer consider either of the proposed investigative avenues that had been identified in the annex of your previous request as likely to result in relevant evidence? And please be reminded that we are in open session.

Prosecution, please.

MR GUMPERT: I can answer very briefly. Yes, that is our state of mind. We do not believe that either of the avenues which we identified have any reasonable prospect of leading to evidence which could in combination with the existing evidence persuade a court beyond doubt of Mr Kenyatta's guilt.

PRESIDING JUDGE OZAKI: Thank you very much for a very concise answer. In that case I think we can move on to the other agenda items, unless either the Defence or legal representative have anything further to add on this specific point of agenda item 1 which cannot be raised in the context of the pending request.

MR KAY: No, your Honour.

MR GAYNOR: No. Thank you very much, your Honour.

MR GUMPERT: Your Honour, I realise that I'm not invited to speak and I apologise for interrupting, but your Honour having outlined the manner in which these proceedings should be conducted, may I draw to the Court's attention one matter which should at least be noted, even if your Honours don't feel that any discussion of it will be helpful?

Your Honours will have seen, as well I'm sure the parties and the participants, the

filing from the Government of Kenya, which was received late yesterday evening, summarising briefly, seeking to intervene in this matter and seeking the Court's leave to make submissions.

I have some remarks which I would wish to make, they are brief, about the appropriateness or otherwise of the Court granting that request. Those remarks could, of course, be set out in writing. But as I say, they are brief, and since we are gathered here today, it may be convenient and sensible for the Court to be made aware of the stance which the parties and indeed the victims take so that matters could be moved forward as quickly as possible.

PRESIDING JUDGE OZAKI: Thank you very much, Prosecution, to raise this issue. Can we go back to this issue at a later stage of this status conference?

MR GUMPERT: We certainly could, your Honours. And, of course, ultimately you must decide. The reason I raise it now is because one argument perhaps, if the Government of Kenya were here, would be that they would wish their arguments to inform the discussions which are to be held today. I don't make submissions on their behalf obviously, but in fairness it seems to me that it's proper to raise that.

PRESIDING JUDGE OZAKI: Very good. In that case, please proceed.

MR GUMPERT: I'm very grateful. On the Prosecution's part, we are not inclined to oppose the application by the Government of Kenya to be heard in this matter. We wouldn't wish to stand in their way. It seems plain from the agenda circulated and from your Honour's remarks this morning that this is not a hearing at which any decisions by the Court will be made, let alone announced. The purpose is for the Court to be informed of the parties' submissions briefly in supplement to their written submissions.

If I anticipate correctly that it was never the intention to announce any decision on

the competing submissions today, as I say, the Prosecution doesn't stand, seek to stand in the Government of Kenya's way. What we would submit is that if you are indeed to accede to their request to make submissions, you should set a tight timetable for them to do so within a few days and take those submissions into account if they are helpful when formulating and deliberating the judgment which you will ultimately make on the parties' competing submissions.

But I would wish to add this, that there are two distinct issues as will emerge from the submissions to be made in this hearing. And it may be difficult to see how the Government of Kenya's submissions in this context will assist the Chamber in determining whether they should accede to our application for an adjournment or to the Defence's application for the matter to be dismissed.

The Government of Kenya is going to have its opportunity to make submissions on the matters about which it's concerned in the proceedings to which they are fully a party, that is, the non-cooperation submissions which run in parallel to these proceedings now, and it's fully open to Mr Kenyatta through his counsel to argue any of the issues which are raised in the Government of Kenya's filing if he thinks it will advance his case.

It's difficult to see how submissions by the Government of Kenya as prefigured in their document, which appear to be that doctrines such as the separation of powers or the constitution of Kenya itself will advance the Chamber's understanding of the issue here, which is simply should the case be adjourned or should it be dismissed.

One difficulty which both the Government of Kenya and if it's thought right by Mr Kenyatta's representatives to raise the arguments is the provisions of Article 132(5) of the constitution of Kenya. The Kenyan government's position appears to be that there is a separation of powers, which means that what the Prosecution has said

about Mr Kenyatta's involvement in non-cooperation is inappropriate.
But I draw to the Chamber's attention the provisions of Article 132(5), which are quite simply, and I have copies if that would be useful, but it's very short, "The President shall ensure that the international obligations of the Republic are fulfilled," and I draw that to the Chamber's attention.
PRESIDING JUDGE OZAKI: Mr Gumpert, I'm sorry to intervene --
MR GUMPERT: Yes.
PRESIDING JUDGE OZAKI: -- but I don't think we need to go into detailed discussion about Kenya law at this status conference.
MR GUMPERT: I'm glad to hear it, your Honour. I wanted to --
PRESIDING JUDGE OZAKI: And please be assured that the Bench has no intention to make any decision --
MR GUMPERT: Yes.
PRESIDING JUDGE OZAKI: -- at today's status conference.
MR GUMPERT: Well, I'm grateful. I don't propose to go into Kenyan law to any greater extent than I have, only to ensure that the Bench is apprised fully of the position when it considers the merits of the application made by the Kenyan government.
PRESIDING JUDGE OZAKI: Thank you very much.
Defence, do you have anything to say about the specific point of Kenyan Government's request for leave for amicus curiae?
MR KAY: I do not, your Honour. It's not an application that was caused by us. The matter before the Court today was quite clear on the status conference agenda. And the matters raised within that filing of yesterday in my submission shouldn't divert the Court from the consideration of the clear issues before it on behalf of the

Defence.

PRESIDING JUDGE OZAKI: Thank you very much.

legal representative.

MR GAYNOR: Thank you, Madam President. We do not oppose the request of the Government of Kenya of 4 February 2014. Thank you.

PRESIDING JUDGE OZAKI: Thank you very much.

Now, I think now we can move on the other agenda items. We turn to the Prosecution request for adjournment contained in filings 875 and 892 and the related Defence request for termination contained in filing 878.

But before we start, I would like to ask all parties and participants, please do not repeat their written submissions and to only raise any supplementary submissions they may have, including arising from the Prosecution's most recent filing on Friday.

But before going into discussion, Prosecution, as an initial matter, I think it would be helpful if you could clarify the status of your original request in light of the new request contained in filing 892. Is your original request, 875, superseded by 892? In other words, are we to understand that the new request for adjournment of the trial, pending trial, pending compliance by Government of Kenya with an outstanding request for assistance is intended to entirely replace the earlier request for a three-month adjournment?

MR GUMPERT: In essence, the answer is yes. The difference between the two requests is that the earlier request was limited in time to a period of three months. Speaking frankly, the three-month period was no more than the best rough estimate which we could then come up with hoping, as we then did, that the investigative steps which we outlined to the Court might bear fruit. We tried to calculate forward how long, if they did bear fruit, it might take us to have the material ready

to serve on the Defence, how long it might take them to be able to react so as to be able to counter any such evidence, and came up with a date by no very scientific method three months beyond the trial date originally fixed.

As I made clear I hope in response to your Honour's very first question, those investigative steps have not borne fruit and cannot reasonably now be expected to do so. And so the Prosecution is thrown back upon other matters which it did raise in that initial filing, principally the submission that the Government of Kenya has obstructed this investigation by its non-compliance with requests for assistance. Our submission is that if that finds favour with the Court, and if it is right that the trial should not be -- sorry -- that the Prosecution should not be withdrawn until there has been compliance with that very important request, obviously a time limitation would not be appropriate. The trigger for further consideration of whether the matter should be withdrawn would be compliance by the Government of Kenya.

As I see it, the trial is currently adjourned, to use the Latin phrase, sine die, and that is to say no date has been fixed for the hearing. That, of course, was a temporary measure as your Honour has made clear to enable the Bench to consider fully the matters raised.

But the request which is now before the Court from the Prosecution is that the trial should continue to be adjourned without a date being fixed for the opening of the trial until such time as the Government of Kenya complies with its treaty obligations under the Statute of Rome.

PRESIDING JUDGE OZAKI: Thank you very much.

Another question, as I made it quite clear, we do not wish today to enter at all into the substance of Article 87(7) application which is also before pending before this

Chamber, and we would ask all parties not to do so. However, the Bench need one clarification from Prosecution. Could you clarify what you consider the primary purpose of the non-compliance related request included in filing 892 to be? Are they aimed at attaining relevant information in an attempt to reach the required evidentiary standard, or are they aimed at seeking some consequence for the alleged non-cooperation by the Government of Kenya? And please confine your answer to the specific point I asked. What is the intention of your request contained in 892?

MR GUMPERT: I hope I won't be impertinent if I say that the Prosecution does not view it as an either/or situation. The Prosecution seeks both results. The particular failure to cooperate which we allege concerns something which may be very significant. Taking it very shortly, because I'm mindful of your Honour's injunction, one of the allegations we make against Mr Kenyatta is that he personally provided very large quantities of money which were funnelled down through his intermediaries and messengers and delivered in the form of cash to the perpetrators of the violence.

The request for assistance which we made was for Mr Kenyatta's financial records, because we suggest, if he did indeed make such financial contributions, there would likely to be records of movement of funds at the relevant time. It, in fact, would be important both for the Prosecution and the Defence. If there were no such movements of funds, that will be a cardinal point to suggest his innocence. On the other hand, if there were unexplained movements of large amounts of money, that would tend to support the Prosecution's assertions.

And so the answer to your first query, the either, if I can put it that way, is yes, although we do not know what is contained within those records. Only Mr Kenyatta knows that at the moment. We were hopeful that considerable and

important light would be cast upon the truth of this matter, whether he was or was not involved in the violence which followed the election.

But in addition to that primary purpose, that is to say to seek important evidence which will reveal the truth in this matter or better reveal the truth in this matter, we also consider it to be of great importance that States Parties are held to the obligations to which they signed up when they became States Parties and submitted themselves to the jurisdiction of this Court. One of those obligations is to assist the Court when requests for assistance are made and to use all the powers of the State to provide information which is properly asked for.

It's nearly two years now since we asked for this material, and we characterise, I'll use a one-sentence summary, the position of the Government of Kenya as pure obstructionism. If that is right, and as your Honour has said, those are completely parallel proceedings, and I shan't seek to advance my case in that matter any further.

But if that is right, if your Honours conclude that the Prosecution's submissions are correct, and that the Government of Kenya is in breach of its treaty duties, it is vitally important that that is seen to have consequences that States Parties who find it inconvenient for one reason or another to comply with their duties and to supply information are seen to be held to account, are censored by the Court, and that their failure is referred to the Assembly of States Parties.

So I apologise if I sound greedy, but the answer to your Honours' question is not one thing or the other but both.

PRESIDING JUDGE OZAKI: Thank you, Prosecution. Just as a follow-up, do I understand correctly that even if the Government of Kenya were to comply with the outstanding request for financial and other information, the Prosecution is not sure whether this would result in evidence which would allow you to proceed to trial on

the basis of current charges, am I correct?

MR GUMPERT: Your Honour is absolutely correct. We do not know what is contained within those financial records. I've I hope a moment ago explored the two possibilities: One is that Mr Kenyatta's bank accounts are in stasis, that nothing is happening, which on the face of it would be highly suggestive of his innocence, at least his non-involvement in the way we have suggested, or alternatively there may be unexplained movement of large amounts of money.

We don't know the answer to that, because the Government of Kenya has prevented us from finding out. So we don't know whether it might yield evidence which would enable us then to say that our case was strong enough to bring before the Court.

PRESIDING JUDGE OZAKI: Sorry to ask the same question again, but that means the financial information about movement of the funds, do you think it's enough to sustain your charges even without Witnesses 11 and 12? Is that what you are saying?

MR GUMPERT: It's a very hard question to answer. Your Honour is asking me to speculate about the content and nature of material which I don't know, because we've been prevented from seeing it. I don't rule out the possibility that full disclosure of Mr Kenyatta's financial records, if indeed our case theory is correct and that he is involved, but just at the moment we don't have the evidence to prove it, I don't rule out the possibility that such evidence might be sufficient to enable the case to be brought. But that really is just the wildest speculation.

It's obvious equally that it might well not permit the case to go forward or even as I have pre-figured that it might, if not demonstrate his innocence, at least strongly suggest it, all the more reason why we say before this case is withdrawn, if it is to be

withdrawn, that information potentially crucial either way in fairness is obtained.

PRESIDING JUDGE OZAKI: Judge Fremr has a question.

JUDGE FREMR: Mr Gumpert, I would like to ask you, a part of this I would call it direction of prospective further investigation concerning Mr Kenyatta's assets, do you have also an intention to conduct further investigation in some other direction?

MR GUMPERT: Our current position is that of the leads available to us, we have exhausted all reasonable prospect. We're under a duty to continue our investigations. Mr Kay in his written pleadings speculated quite rightly that as the matter goes on, other people will be coming forward, other potential leads will emerge. And, indeed, as we acknowledge in our most recent filing, they have and we're under a duty to continue to follow those matters up and to investigate, but we have to take a realistic view based on our experience as prosecutors. At some stage, whether we consider that they're on the basis of what could switch, to borrow a phrase from the other Kenya proceedings, which stones could still be turned, the stones get less and less promising. And we've made a decision that absent the financial records of which we have spoken, the remaining stones unturned are better characterised as pebbles, and the realistic prospect that turning them will yield real potentially conclusive evidence is minimal.

JUDGE FREMR: Thank you.

PRESIDING JUDGE OZAKI: Thank you very much.

Prosecution, is there anything additional you'd like to add to your written submissions before we turn to Defence?

MR GUMPERT: Apologies. Your Honour spoke at the outset of this hearing of consolidated submissions. My submissions on the reasons for the Court adjourning this matter are complete within the document. We have also made submissions on

why it would be premature to consider the applications made by the Defence, that is to say that the Court should terminate the proceedings using its powers under Article 64(2) of the Rome Statute.

If I were given the choice and given that as I understand it we're not pressed for time, because we have the afternoon available as well if it is necessary, I would prefer to make my submissions in response to the Defence applications having heard Mr Kay, since it is his application to which I respond, rather than making all of my submissions now ab initio, but of course I'm in the Court's hands.

PRESIDING JUDGE OZAKI: Thank you very much.

In that case I think we should turn to Defence.

MR GUMPERT: Apologies for interrupting. On the basis that in respect of the submissions made by the Defence about dismissing the case I can reply?

PRESIDING JUDGE OZAKI: Yes, of course.

MR GUMPERT: I'm very grateful.

PRESIDING JUDGE OZAKI: So, Defence, we note in particular that there were a number of new issues raised in the Prosecution's filing on Friday, and we'd like to invite you now to make any submissions in response to those issues as well as anything you'd like to add to the written submission you have already made. And please try to confine your submission at this point to no longer than 30 minutes.

MR KAY: Thank you, your Honour, and I'll certainly be able to do it within 30 minutes.

Your Honour is quite right to observe that these were new submissions by the Prosecution that were put before the Court on Friday and they evidenced a change of direction. And the way it was submitted and has indeed been submitted today is the proposition that the responsibility for the failure of the case and the fact that

there is no evidence lies at the feet of the Government of Kenya for failing to comply with requests by the Prosecution.

Your Honours will have been seized of this matter in far more detail than me, because I have not been an active party within the proceedings between the Government of Kenya and the Prosecution. But it simply comes down to this as to whether there is any merit in this shift in direction, that the Government of Kenya has maintained consistently since 2012 that requests from the Prosecution should come through the Court, and by that they mean the Trial Chamber. And that has been a consistent position that it has advanced over the last two years and made it clear to the Prosecution that there are issues of national law that have to be considered if the Prosecution are approaching them, and that there is an entirely different position if it is the Court under Article 93 that makes the request.

Why I say this has become a change in direction at a convenient time, when the Prosecution has realized that its case has collapsed, is that in the two years since 2012, the Prosecution never came here for a ruling upon the matter. It just continued a series of letter battles with the Government of Kenya and didn't seek clarification of the issue.

The Court will know that Article 93 refers to national procedures as well as requests from the Court. And it's that key phrase "the Court" which has been of greatest concern to the Government of Kenya, a member of the Assembly of State Parties, in the interpretation of the correct procedures.

Within Article 93 itself there is reference to the Court and the Prosecution making a specific provision for actions and conduct that may be taken by the Prosecution. But in the key section that we're dealing with in Article 93, Article 93(1), it doesn't refer to the Prosecution.

The position of the Government of Kenya may not be unreasonable on this matter. Other tribunals also have a similar procedure available to them, and your Honours may well know Article 54 at the -- Rule 54 at the International Criminal Tribunal for the Former Yugoslavia, which refers to the chambers issuing orders and requests. And having received this filing on the Friday, a quick survey of the various procedures that exist in other institutions to see whether the Government of Kenya interpretation of Article 93 was unreasonable or not revealed that indeed they always specify the Chambers or the Prosecutor, or in the case of the Cambodian court, the Investigative Prosecutor. There is always a title which is available to describe who may take the requisite action. And this matter has been repeatedly made to the Prosecutor over the last two years, and the issue was not pursued, if it is such a valuable issue to the Prosecutor in relation to the case.

So our submissions on the matter of the conduct of the Government of Kenya are that their position has not been unreasonable. To jump a stage and to start seeking orders before the Assembly of State Parties, to start measures critical of Kenya in our submission is highhanded. And the Prosecutor itself is an organ of the Court, it is not the Court itself. And any reasonable interpretation looking at Article 93 brings into force that distinction between the two. And it is not unreasonable for international lawyers looking at the precise powers that are being sought here to interpret the way it has been.

Our submission is essentially this, that the very nature of the filing on Friday is more of a convenient vehicle to try and stop the case, but without admitting who has failed here. It's a blame-shifting exercise on to the State at the expense of the Prosecution. And in our submission that is not right, and it's not fair, and it's not reasonable at this stage given the apparent failure for all who have been observing

these proceedings of the allegations that have been made concerning the common plan.

I don't know how much your Honour wants me to go into those aspects at this stage. It's safe to say that in relation to the Government of Kenya issue, that is our clear position having looked at the filings and considered the matter and having seen the dispute between the two sides.

PRESIDING JUDGE OZAKI: I think, Mr Kay, you have said enough about Government of Kenya non-cooperation issue.

MR KAY: Thank you very much.

PRESIDING JUDGE OZAKI: Thank you very much.

May I now turn to the legal representative of victims. You may now make any additional submissions you wish in relation to the pending matters, but please be mindful that we are in open session in case you wish to engage further regarding the details of any of the Prosecution's responses to the specific questions you had raised in your previous filing. Again, please try to confine your submission to no longer than 30 minutes.

MR GAYNOR: Yes, Madam President. Thank you very much. In view of the gravity of the issues raised today, I would request a little over 45 minutes to make my submissions. The Defence's application if it is granted will mean the total extermination of the victims' rights in this case. And given the exceptionally important nature of today's proceedings, I would ask for the benefit of just a few extra minutes.

PRESIDING JUDGE OZAKI: Okay. Please proceed.

MR GAYNOR: Thank you very much, Madam President.

Let me just very quickly deal with an issue raised by Mr Kay. I would note that the

obligation is not on the prosecution to bring the matter to the Trial Chamber. The obligation is on the State under both 93(3) and under 99(4)(b) to consult with the Court as the word used in one of those is "promptly," the expression used in the other is "without delay." And we can see that the Government of Kenya certainly hasn't acted promptly or without delay in seeking to consult with the Court on those issues. I'll turn to my submissions now, Madam President.

When a machete lands on a human head, it can take many blows to kill. That became clear to victim 9309 one morning in Naivasha in January 2008. He had tried to escape his house, but Mungiki found him, hacked him repeatedly with a machete and then left him for dead.

When I first met him five years after the attack on him, his head bore deep, deep scars, and part of his skull appeared to be hanging on by a miracle. On the evening of the attack, as he laid helplessly in hospital, he telephoned his wife, who told him that after he had been -- after he had left, she had been gang-raped by a Mungiki, then doused in paraffin and set alight.

Both of them were lucky to escape alive. Both of them want this trial to continue.

During 2013, I held a total of 30 meetings in different parts of Kenya with 585 victims of the crimes charged in this case. What happened to them in Naivasha and Nakuru in January 2008 is a nightmare from which many are still trying to awake.

In meeting after meeting with them, it became clear to me in forceful terms that they overwhelmingly support the continuation of this case. Some do feel demoralised and betrayed, but many repeat the view that the truth must come out, whatever it takes.

The victims want your Honours to take all measures available to you to ensure that the truth emerges.

This case takes place in unique circumstances. The accused is Head of State and Head of Government. He has simultaneously presided over a high-profile international diplomatic campaign to discredit this Court, a policy of obstruction of access to evidence by the ICC which has impeded the emergence of truth at the international level, the deliberate non-prosecution of post-election violence crimes in Kenya which has impeded the emergence of truth at the domestic level, and the pursuit of a strategy of delay in these proceedings combined with an increase in anti-ICC rhetoric, which has exacerbated the climate of fear among Kenyan witnesses. The combined effect of this has been to seriously hamper the emergence of the truth both at this court and in Kenya regarding who is ultimately responsible for crimes committed during the post-election violence.

To terminate proceedings in these circumstances without first securing the full co-operation of the accused and his government in respect of access to evidence relevant to this case would be unconscionable.

Imagine a domestic case involving the systematic rape and murder of 20 victims in the space of one week. In such a case the police would be expected to arrive at the scene soon after being informed of the crime and take careful steps to preserve forensic evidence. They will interview and re-interview dozens of witnesses. The Prosecutor will swiftly obtain authorizations to gain access to all relevant documentary evidence, including all relevant cellphone data.

On the basis of that evidence, the police will arrest suspects and question them. Police and prosecutors can count on the co-operation of other law enforcement agencies in that jurisdiction, backed up by a supportive State apparatus, in seeking access to all evidence which will enable the truth to be revealed. Anyone suspected of bribing or intimidating witnesses will be swiftly arrested. State authorities will

offer full support to the investigation. If at the end of that process it emerges that there is insufficient evidence to proceed against the charged person, it is only right and proper to withdraw the charges.

That's what should happen in an ordinary case.

Your Honours, this is no ordinary case. None of the elements that I've just identified have been present in this case. This is a case involving an extensive set of steps taken by the Kenyan State, headed by the accused, to obstruct the emergence of truth and the course of justice.

In this case far from helping the investigation of the crimes, the police were implicated in the crimes. And the State obstructed interviews of key officers.

The national commissioner of police was himself charged. He obviously had little interest in facilitating evidence, in facilitating access to evidence which might further incriminate him. Instead of immediately searching for, seizing and delivering key documents, the government has been dilatory and obstructive in providing documents and has deliberately filtered out those which appear to be most capable of revealing the truth.

It has put forth bizarre and contrived legal arguments to justify its failure to co-operate. The Prosecution was deliberately misled as to the availability of cellphone data, obstructed in trying to access it, and when it did access it, some of it, it was provided with fabricated data.

This entire investigation and prosecution has been infected with unprecedented levels of witness intimidation and interference. Instead of giving legal, logistical, and moral support to the Prosecution of this case, the accused has devoted enormous resources to bringing it to an end. Instead of calling on others to come forth and assist this Court in its search for the truth, he has tried as hard as he can to

delegitimise this Court in the eyes of his own citizens and other African governments by launching vitriolic attacks on the integrity of the Court itself. It is perhaps little wonder then that after thousands of hours of work by Prosecution investigators and lawyers and the expenditure of untold millions of Euro that the ICC's most high profile case has suffered such a devastating series of setbacks.

Your Honours, this case has come to a crisis. At the heart of the crisis are two issues: First, the question of the sufficiency of the evidence in this case; second, the question of co-operation by the Government of Kenya. These are not two distinct, unrelated questions. They're two sides of the same coin.

The accused presides over a government which has single-mindedly pursued a policy of obstruction of access to any evidence which is likely to reveal the truth in this case. Simultaneously, he has obstructed the emergence of truth in Kenya by presiding over a domestic process of accountability which is deliberately going nowhere.

In tandem with these policies, the accused's venomous attacks on the integrity of this Court have fed the flames of anti-ICC sentiment in Kenya and exacerbated the climate of fear. This too impedes the emergence of truth.

Let us remind ourselves briefly what has happened in this case. In 2011, the Prosecution tried and failed to persuade the Pre-Trial Chamber to confirm charges against the former police commissioner Mohammed Hussein Ali.

In March 2013, the Prosecution informed the Court that in the context of witness bribery, intimidation, and State obstruction of access to evidence, it no longer had evidence to proceed to trial against Mr Muthaura.

In December 2013, the Prosecution informed the Court that it no longer had evidence to proceed to trial against the accused.

The core reason for this extraordinary series of events is State obstruction of access to evidence. From well before the confirmation stage, the Government of Kenya under President Kibaki pursued a policy of pretending to provide full co-operation to the ICC and pretending towards, to move towards genuine accountability within Kenya itself.

The accused was deputy prime minister and held a key portfolio as finance minister in the Kibaki administration.

He and President Kibaki were the two most senior Kikuyu politicians in that administration.

Since his election as president in March 2013, Mr Kenyatta as president has been constitutionally required to ensure that the international obligations of the Republic are fulfilled through the actions of the relevant cabinet secretaries.

And as I've noted in my written submissions it follows that any continuing failure by Kenya to fulfil its obligations under the statute, including any obstruction of access to relevant evidence, must be attributed to the president of Kenya.

Let us focus first on steps taken by the accused as Head of State of a State Party to the Rome Statute to comply with the spirit of the statute and in particular to encourage complementarity in Kenya.

As president, Mr Kenyatta has unleashed a diplomatic campaign of startling hostility directed at trying to reduce support for this Court in an effort to help him escape trial. When he took office, he knowingly assumed the responsibility to secure access for justice, access to justice for all Kenyans in accordance with Article 48 of the constitution.

But vast sections of the State apparatus were mobilised in a rigorous and energetic defence of the rights of those three Kenyans standing trial at this Court, totally

ignoring the right to justice of the hundreds of thousands of Kenyan victims of the post-election violence.

Instead of using State funds to provide fair compensation to victims, the accused used State funds to send high-level teams of diplomats around the world. They travelled to the African Union in Addis Ababa, to the UN Security Council in New York, to the Assembly of States Parties in The Hague to argue for immunity, deferral, or for rule changes on his behalf.

At the ASP in November 2013, the large Kenyan delegation, including the Attorney General, the Director of Public Prosecutions, the Minister for Foreign Affairs, and the Permanent Representative of Kenya to the United Nations used their status as State representatives to promote those amendments which were favourable to the accused and to oppose amendments to Rule 68, which aims to permit the admission at trial of evidence of a witness who has been bribed, intimidated, or who has disappeared.

Why, one might ask, did the Kenyan delegation oppose the new Rule 68 and indeed try to inoculate the two Kenya cases from its effect? Surely the new Rule 68 is a wise response to widespread witness intimidation. Why oppose it?

Instead of acting to secure justice for the victims at the ASP, the accused instead took steps to frustrate their search for the truth. Instead of championing the interests of the victims, he has worked against them.

The accused's quest for immunity for sitting Heads of State is also wholly contrary to the spirit of Article 143 of the constitution of Kenya, which does not allow immunity from prosecution for the president in respect of Rome Statute crimes. When the Kenyan electorate overwhelmingly approves -- approved the constitution in 2010, it can be presumed that they made an informed choice, and that choice included not shielding any future President of Kenya from prosecution for crimes against

humanity.

The accused's Defence team has filed before this Trial Chamber application after application after application to seek to delay the start of this trial or to stop it taking place at all.

That strategy of delay has been accompanied by a gradual escalation of anti-ICC rhetoric in Kenya. Together they have had the effect of creating space for witness intimidation. The Prosecution at page 2 of the annex filed on 31 January confirmed that the withdrawal of some witnesses, quote, "… appears to have been motivated at least in part by the anti-ICC climate in certain parts of Kenyan society."

In the midst of a climate of fear in respect of co-operation with the ICC, one would imagine that the Head of State would make a speech calling for full co-operation with this Court and encouraging all those with relevant information to come forth and provide it to this Court.

The accused did nothing of the sort. Instead, he gave a widely reported speech in Addis Ababa on the 12 October 2013 in which he said, "The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of victims. It stopped being the home of justice the day it became the toy of declining imperial powers," unquote.

On the question of race he said, quote, "It is the fact that this court performs on the cue of European and American governments against the sovereignty of African States and peoples that should outrage us. People have termed this situation 'race-hunting.' I find great difficulty adjudging them wrong."

Later on he went on to affirm, quote, "We only get bias and race-hunting at the ICC," end quote.

In a later speech, televised nationwide on Mashujaa Day or Heroes' Day on the 20

October 2013, the accused said in Kiswahili, "I want to assure you that this is an issue which will disappear. That devil will be defeated, and Kenya shall move forward." In the context of the speech, it was clear that this was a reference to the ICC process. That word "shetani" means devil or demon or evil spirit. It is not a word to be used lightly.

When the President of Kenya gives high-profile speeches in which he describes the ICC process as a racist process or as an evil spirit, Kenyan witnesses who have agreed to testify for the Prosecution, either living in Kenya or with family members in Kenya, are likely to hear what he has said. Whatever anxieties they might have had about participating in the ICC process to begin with, those anxieties certainly will not have been reduced by such utterances.

Others who have relevant information to provide, whether they are known to the Prosecution or not, will be less likely to come forward and offer that information. And those who are wholly opposed to the ICC and feel the patriotic need to take action as a result can only feel encouraged and emboldened by these presidential pronouncements.

Consider also how those speeches by the president of Kenya sound to a member of the Mungiki who has agreed to testify against the president.

The Mungiki have good reason to fear. As every Kenyan knows, the Mungiki can be ruthless, and they in turn have received ruthless treatment from the State. In 2009, Philip Alston, the UN Special rapporteur on extrajudicial, summary, or arbitrary executions issued a report confirming many extrajudicial killings of Mungiki by the Kenyan police. Alston told a news conference in Nairobi, quote, "Kenyan police are a law unto themselves. They kill often, with impunity," unquote.

Every Mungiki knows that the person who is today ultimately in control of the police is the accused in this case. Furthermore, the accused's invocation of racial bias to undermine the ICC is an insult not only to your Honours, but also to the victims of this case, who overwhelmingly support the ICC process. The victims passionately and intensely want justice to be done. They know that justice is not a European nor an African invention, and that the thirst for justice is as universal as the thirst for water. They are entitled to justice not because they are African, not because they are Kenyan, not because they are Luo or Kalenjin. They are entitled to justice because they are mothers whose children, children were burnt alive, they are wives raped in front of their houses, they are little girls whose fathers were beheaded.

Apart from the speeches by the accused, there have been other events which have given rise to a sense of serious disquiet.

In late July 2013, news of a confidential High Court application by the Defence in this case was very widely reported in Kenya. The suggestion was that it related to data concerning victims and witnesses in this case. This led to significant distress in the victim community. That distress was not fully allayed by the Defence after they belatedly clarified that the application, in fact, had nothing to do with victims in this case.

Serious concerns about the safety of witnesses in this case persist. On 5 December 2013, this Trial Chamber had cause to issue this warning, quote, "The Chamber recalls its finding above that the Defence acted with serious disregard for the safety of its own witnesses. The Chamber considers that this conduct risked endangering these persons and constituted a violation of the Defence's obligations to respect confidential information and not to expose witnesses to unnecessary pressure

outside the courtroom," unquote.

The fundamental rights of the powerless can be denied by the powerful in many ways. One is to nakedly and openly attempt to bring a legal system into disrepute. An example of this is the accused's speech to the AU Special Assembly in Addis Ababa.

But far more sinister is the denial of rights by neglect, inaction, and obfuscation, by pretending that something is being done when in fact nothing is. An example of this is the policy of non-prosecution of post-election violence crimes by the Kenyan State since 2008, a policy which has continued under the presidency of the accused to the present day. Domestic accountability for post-election violence crimes is a process which as I mentioned is deliberately going nowhere. It is a model of non-productivity.

For example, take the multi-agency task force, sometimes presented as a principal vehicle for domestic accountability. As we are present here today, long after its formation, the task force has not released any public report on its work, nor any indication of its methodology, nor the timeframe within which it will release its recommendations for prosecution. All the indications are that the task force is another smokescreen for continuing inaction.

Kenyan human rights groups have filed constitutional petitions in the Kenyan courts against the government for the failure to investigate and prosecute perpetrators of post-election violence. Their applications have not achieved the aim of securing any genuine commitment from the Director of Public Prosecutions. They have instead been met with inordinate delay and obfuscation.

In the international arena, the Government of Kenya has made solemn promises to prosecute those most responsible, promises that it hasn't kept. In 31 March 2011

application to have these cases deemed inadmissible under the statute, the government assured the Pre-Trial Chamber that Kenya would conduct its own prosecutions, quote, "… in respect of persons at the highest levels of authority and for the most serious crimes," unquote.

The government in that 30-page filing to the Pre-Trial Chamber made seven references to its intention to prosecute those at the highest levels of authority.

Today, six years after the post-election violence, and almost three years after the filing of that application, the government has in fact initiated not one prosecution against those at the highest levels of authority for post-election violence crimes.

This non-prosecution continues under the presidency of the accused. It is entirely consistent with the total impunity enjoyed by high level figures in the aftermath of the election-related violence in 1992 and 1997. That itself created an atmosphere of impunity which in part enabled the cycle of violence to be repeated in 2008.

Impunity for the 2008 post-election violence crimes has been confirmed by domestic and international groups, in particular by Human Rights Watch in "Turning Pebbles," which is a comprehensive 87-page analysis in December 2011. By April 2013, Human Rights Watch released an update in which it said that it had been able to identify convictions in Kenyan courts of only seven cases, one vacated on appeal, involving serious crimes committed during the post-election violence.

Amnesty International has released a report confirming police impunity for post-election violence crimes. That was in 2013. Impunity has also been confirmed by a report of Kenyan human rights groups in a report of April 2013.

The Director of Public Prosecutions appears to pursue a policy of evasion. There exists no public report issued by the DPP identifying the names or even the dates of conviction of anyone convicted for post-election violence crimes.

If you read all 82 pages of the Strategic Plan for the Independent Office of the Director of Public Prosecutions, which was released in March 2012 and covers the period until 2015, you will find one single reference to post-election violence crimes. That is a reference to, quote, "The expectation on the ODPP to prosecute cases including high-level corruption and PEV," end quote.

But the director makes no reference at all to any intention, let alone a strategic plan, to investigate or prosecute post-election violence cases at any level.

The International Crimes Division or ICD of the High Court, sometimes presented as Kenya's answer to the impunity issue, remains wholly unoperational. It does not exist. In any event, the Attorney-General reportedly made comments on 30 April 2013 that the post-election violence, quote, "is not the primary reason why the ICD is being set up," unquote.

The continuing state of non-prosecution over which the accused presides is not due to post-conflict difficulties as might have arisen in Rwanda or Bosnia. Kenya has technologically advanced courtrooms and an excess of qualified lawyers. What is missing is the will to prosecute, and genuine responsibility for that ultimately lies at the top of the government.

The accused to my knowledge has never expressed support for the investigation and prosecution of post-election violence cases to the highest levels nor to any level.

And why not? The accused has frequently said, whether to BBC or Al Jazeera or to others that he wants to go to The Hague to clear his good name. Why with all the presidential powers at his disposal is he obstructing the emergence of the truth in Kenya? What has he got to hide?

Why doesn't he do something, anything which would genuinely facilitate domestic accountability for post-election violence crimes?

Instead of supporting the creation of domestic structures which would assist the victims to know the truth about what happened in the past, the accused on the 7 September 2013 told internally displaced persons to forget the past. That's according to a press release issued by State House itself.

The accused's effort to obstruct the emergence of truth at the domestic level has taken place in parallel with an effort to obstruct the emergence of truth at the international level. This has taken place in the form of State obstruction of access to evidence by the Prosecution in this case.

That policy has been in place since well before the confirmation stage and has surely resulted at least in part in the Prosecution's overreliance on the evidence of a very small number of witnesses.

Nothing confirms the impact of pre-confirmation State obstruction more clearly than the issue of police crimes. As your Honours are aware, crimes committed by the police no longer form any part of this case. Yet there are credible indications that from Mombasa on the Indian Ocean to Kisumu on the shores of Lake Victoria, from Nairobi to Eldoret, that the police shot dead at least 400 victims. The number in the Waki report is 405. Hundreds of other Kenyans were shot by police and survived. Everything suggests that there had been at the very least, at the very least a failure to prevent and punish police crimes on an extensive scale.

Yet the Prosecution failed to persuade the Pre-Trial Chamber to confirm charges against the former police commissioner, Mohammed Hussein Ali. It is clear that the single biggest factor underlying that factor was State obstruction of access to evidence.

The Prosecution was prevented from interviewing 10 key police officers due to an interim injunction that is still in place today three years after it was issued. The

Attorney General, who is a party in the case in which that temporary order was issued, did not challenge the application for the order, nor did he appeal against the ruling, nor did he speak to have the order dismissed, nor did he ask for the matter to be sent forth for a full hearing. Instead, he has in fact used that interim order to justify the inaction of the Government of Kenya. It's in his filing of 9 April 2013 at paragraph 42.

Now, at the prosecution hearings, where as we know the Prosecution was completely prevented in accessing ten key police officers, the Muthaura and Ali Defence submitted 39 written statements from police and other law enforcement officials. As the Prosecution noted in its filing of 10 May 2013 at paragraph 20 to 24, those statements were taken after the issuance of that temporary injunction, preventing the Prosecution from interviewing ten key police officials.

The deliberate blocking of access by the Prosecution but not the Defence to police evidence is not a small matter. It could well be the principal reason why to date nobody has stood trial before this court, nor before any Kenyan court in respect of police killings during the post-election violence.

And in no circumstances can there be any possible justification for any State Party to block access to its own police force when in receipt of a legitimate request from the Office of the Prosecutor.

I would like to focus briefly on the question of obstruction of access to telephone data. The successful deployment of systematic attacks in Kenya in January 2008, whether against perceived ODM supporters or perceived PNU supporters, unquestionably required the extensive use of mobile telephones to send oral and text instructions.

Kenya is a regional leader in mobile telephone usage and a world leader in mobile

telephone banking. Phones were wildly available in Kenya, and calls were cheap in early 2008.

And yet we see from the annex to the Prosecution's filing of 31 January 2014 that the Prosecution was misled as to the availability of data, obstructed in trying to access it, and provided with data which had been fabricated.

Four years into its investigation, the Prosecution has clearly struggled to gain access to this absolutely vital category of evidence.

In contrast, the UN team which investigated the assassination of Former Prime Minister Rafik Hariri in Beirut in 2005 had amassed two years after that assassination more than 5 billion records of telephone calls and text messages sent through cellphones in Lebanon.

Even accounting for different rates of mobile telephone penetration in Kenya in 2008 and in Lebanon in 2005, it is clear that there is likely to exist in Kenya today a huge quantity of useful phone evidence. The Prosecution has been seriously hampered in its access to that evidence.

Your Honours, mobile telephone companies in Kenya are amongst the biggest taxpayers in Kenya. Safaricom, for example, is in fact the biggest taxpayer in the country. Their licences are subject to renewal by the government. It is, I suggest, unlikely that any Kenyan mobile telephone company would act in such an obstructive manner to the Prosecution of its own volition without receiving instructions from elsewhere.

Your Honours, the litigation concerning the financial information in this case is subject to parallel proceedings, and your Honours have said that you don't want to receive submissions about that. I would simply like to point out that the nature of the submissions filed by the Pros -- by the government on 20 December 2013 and

notified on 9 January 2014 are in my view a perfect illustration of the government's evasive and disingenuous attitude towards co-operation. Its submissions concerning the operation of the right to privacy and of the operation of the principle of self-incrimination defy belief.

In particular, the invocation of the self-incrimination privilege is illuminating. The government's considered view by the government's principal legal advisor appears to be that a State authority cannot disclose to a prosecution service incriminating information relating to a suspect without going to the suspect, asking him for his permission, and then getting that permission from him.

I would respectfully suggest that in no jurisdiction in the world does such a position exist. The acceptance of such an interpretation would render the State co-operation provisions of the Rome Statute wholly meaningless.

In addition to the imaginative legal barriers the government offers, it has made no effort to explain why it has failed to act without delay as required by its own legislation and as I mentioned earlier by Articles 93(3) and 99(4) of the statute to bring those purported legal barriers immediately to the Trial Chamber.

Now, the Prosecution at the bottom of page 6 and the top of page 7 of the confidential version of its annex of 31 January 2014 has identified some key documents. I would respectfully differ with my learned friend, Mr Gumpert, as to the potential value of those documents. In my view we cannot describe them as pebbles rather than stones until we have seen them. They, in my respectful submission, are documents which your Honours are entitled to see. The dates and descriptions of those documents stand out like a beacon. What possible justification can there be for withholding those documents from your Honours?

It is not disputed in this case as far as I'm aware that terrible crimes took place in

Naivasha and Nakuru in January 2008. What possible justification can there be for withholding them? They would surely assist in clarifying exactly what happened and who is responsible. What is the accused government doing by trying to hide them? What has the accused got to hide?

Further, the victims of this case are Kenyan citizens and are entitled to justice at this Court both under the International Crimes Act of Kenya and the Rome Statute. That includes knowing the truth about the crimes committed against them. The accused should show his commitment to justice for those Kenyans by disclosing those documents without delay.

Your Honours, if we can slightly shift our attention for a second to the United States Supreme Court. When I saw that list of documents identified by the Prosecution, I was reminded as nothing so much of a 1974 case in the United States. President Richard Nixon, who was, of course, the Head of Government and the Head of State of the United States, had withheld from a special prosecutor audiotapes and documents relating to precisely identified conversations and meetings between the president and others.

President Nixon, who was named as an unindicted co-conspirator, claimed that he was entitled not to disclose the tapes and documents due to executive privilege. The United States Supreme Court unanimously rejected Nixon's interpretation of executive privilege and ordered him to hand over the tapes and documents in question. That's United States against Nixon, 418 US 683 of 1974.

Nixon duly handed them over, resigned two weeks later, and was granted a pardon by his successor, President Ford.

But that decision stands for the principle that no matter how powerful the suspect, even if he is the most powerful individual in the world, his interest must yield to,

quote, "… a demonstrated specific need for evidence in a pending criminal trial," to use the words of the US Supreme Court.

And that is exactly what we have here.

Your Honours, the failure of the accused to secure State co-operation in this case is particularly reprehensible given the fact that the Court has already made very generous accommodation to him. He has not been to the ICC since October 2011. To reiterate, not once in 2012, 2013, or so far in 2014 has he in fact set foot in any ICC courtroom.

Of the hundreds of persons indicted for serious crimes by the ICC, the ICTR, the ICTY, the Special Court for Sierra Leone, and the ECCC since 1994, this accused has in fact treated with more deference than any of them. This itself is offensive to the victims of this case. And that offence was only compounded by a recent application by the accused in which he clarified that he does not even want to be present in court for the opening statements in this case, which of course concerns brutal crimes committed against many thousands of Kenyan citizens.

I've pointed out in my written submissions the difference between the situation of Laurent Gbagbo, who has no power over the current governments of the Côte d'Ivoire and is in custody here in The Hague. This accused is in full control of the Government of Kenya, which has impeded access to relevant evidence, and he is at liberty. The very least that justice demands is that equal respect be paid to the victims in this case as to the victims in the Gbagbo case and that the Prosecution's investigations continue until State co-operation has been fully delivered.

Your Honours, what can you do about the extensive State obstruction which has infected the entire history of this case? First, your Honours can and should order the immediate disclosure of the documents identified in the Prosecution's annex of

the 31 January in accordance with your powers under Article 64 and 69 if the accused and his government continue to refuse to disclose them.

Second, your Honours are seized of the application concerning non-cooperation by the accused government, and you should rule on it.

Third, the Trial Chamber should look closely at the question of whether the accused's failure to enable access to relevant evidence in this case is consistent with the summons conditions in this case. I referred to the conditions imposed on the accused on the 8 March 2011. Under those conditions, the accused is obliged to refrain from, quote, "… obstructing or interfering with the attendance or testimony of a witness or tampering with or interfering with the Prosecution's collection of evidence," unquote.

Your Honours, you must not flag or fail in your efforts to do justice in the face of continuing State obstruction of access to evidence by a government headed by this accused. The easy option is for this Court to raise the white flag of surrender, but this would send out a devastating message for others to consider. That message is that State obstruction of access to evidence is a viable strategy. It is a message that cannot be allowed to stand.

Terminating this case without taking all the measures available under the statute to force the accused to direct his authorities to provide the information requested by the Prosecution would render meaningless the carefully calibrated model of State co-operation set out in part 9 of the statute.

Termination in such circumstances truly would be, quote, "… a travesty that adds insult to the injury of victims," unquote, to borrow the accused's expression from his 12 October speech at the African Union.

If the charges in this case are dismissed, there will unquestionably be a widespread

perception in Kenya and elsewhere that the case against the President of Kenya is collapsing under the combined weight of witness intimidation, bribery and State obstruction of access to evidence.

To terminate proceedings against Mr Kenyatta while he presides over an administration that is clearly obstructing access to relevant witnesses and documentary evidence would have a devastating effect on the Court's deterrent effect. Deterrence, like a currency, can be debased or devalued. We can reasonably differ about the strength of the Court's deterrent effect, but there is no doubt that that effect does exist. It was perhaps the very threat of ICC prosecution which deterred election-related violence in Kenya in 2013, but the open expressions of contempt by the accused have -- for this Court have already debased and devalued the deterrent effect of this Court. This cannot stand.

Already this year in the Central African Republic and in South Sudan we hear of appalling atrocities which cry out for the strengthening and not the weakening of the Court's deterrent effect.

Over four years ago the victims of this case and a huge number of other Kenyans were first led to believe the ICC would deliver justice to the thousands of Kenyans targeted because they were perceived to be supporters of a particular political party. In this case during the post-election violence being a Luo, a Luhya, or a Kalenjin was a crime in itself punishable by death, gang rape, forcible circumcision or castration. Tens of thousands were expelled from their homes, which were themselves ransacked or burned to the ground. To this day hundreds of thousands of those expelled during the post-election violence live far from their former homes, displaced to what are considered to be their ancestral homelands in the western region and the Nyanza region of Kenya, and they are too afraid to return to where

they once lived and worked. And they have received next to no assistance from the government, whether under this accused or under his predecessor.

Tragically the ICC cannot intervene everywhere that atrocities are committed, but where it does intervene it raises hopes for justice in the hearts of tens of thousands that cannot simply be crushed underfoot. The victims of this case have a legitimate expectation that this Court will do all that it can do to reveal the truth of the atrocities that engulfed Naivasha and Nakuru in January 2008. It would be unconscionable now to abandon the thousands of victims of this case at this stage before they have heard even a single day of trial.

The process of justice for the Kikuyu victims of the horrific crimes alleged in case one is under way. It must continue. Yet to bring justice only to Kikuyu victims of the post-election violence and to an abandon the Luo, Kalenjin, Luhya, and Kisii victims will not enhance the reconciliation process in Kenya. Further, a conviction of either accused in case one accompanied by withdrawal of charges in this case is also unlikely to enhance the chances for a reconciliation.

Your Honours, just last week the accused told an AU summit, his words were, quote, "During the extraordinary session of the summit held in October 2013, we reaffirmed our commitment to fight impunity, promote human rights and democracy, the rule of law, and good governance," unquote. Yet his administration and the administration in which he was deputy prime minister have together brought not one high-level or mid-level suspect to trial for crimes against humanity committed against thousands of Kenyans in January 2008. He has done nothing to fight and everything to reinforce impunity for post-election violence crimes.

Under the accused's leadership, anti-ICC rhetoric in Kenya with the accused setting the example has increased considerably. Disingenuous expressions of co-operation

with this Court are now accompanied by genuine expressions of contempt for this Court. Instead of some movement in respect of domestic prosecutions, we now have total stasis in respect of domestic accountability for post-election violence crimes. I referred earlier to a woman I met who was gang raped by Mungiki attackers and then doused in paraffin and set alight. She was lucky to be rescued. Nine months later she gave birth to a little boy. His biological father is a Mungiki rapist. The woman explained all this to her husband, who as you will recall was himself hacked repeatedly by the Mungiki and left for dead on that same day. He understood his wife's hellish predicament, and today they are raising together that little boy. Conceived through rape, he is being raised in love.

What does he, the husband, what does he want taking into account the horrors that he and his wife were subjected to? His answer is justice. With justice, he told me, there can be reconciliation, but if there is no justice, he says, he won't be able to find it in his heart to forgive.

For there to be true reconciliation, there must be truth. For there to be truth, there must be evidence, all the evidence that is necessary to uncover the truth. For there to be evidence, there must be State co-operation, and for that, the accused must give the order.

If your Honours do not do justice in this case for the victims, nobody will. Justice ultimately is truth. It is the whole truth in all its measure. It is a rejection of those who try to create obstacles to reaching that truth. It is the rejection of false arguments based on racism promoted in an effort to avoid accountability.

Your Honours, they say in Kiswahili "Haki hu inua taifa," justice elevates a nation. Kenya's policy of evasion and obstruction must be replaced with a policy of truth and transparency. It would be wholly unjust to consider the insufficiency of

evidence in this case as unrelated to the ongoing policy of obstruction, the detailed and delicately balanced model acquiring State consultation and co-operation in order to secure the production of evidence relevant to this case as set out in part 9 of the statute should not be set aside. To terminate proceedings in the exceptionally unusual circumstances of this case before first securing the fulfilment by the accused's government of its duty under the statue to provide all evidence relevant to this case and not just the evidence which is the subject of the Prosecution's Article 87(7) application would be unjust. It would be a rich reward for an accused who has presided over the continued deployment of a policy of obstructing the emergence of the truth and would be a devastating betrayal of the thousands of victims in this case.

Thank you, Madam President.

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

Now, Prosecution, we will return to you and please respond to the points that have been made by the Defence as well as legal representative as appropriate.

And from the Bench, we would also like you to address the following question: In light of the admission that you do not at this stage have sufficient evidence to meet the required standard, and that you are not sure whether you can get sufficient evidence even if Government of Kenya will comply with your request, on what legal basis do you consider it appropriate to seek a continuation of the proceedings? In particular with regard to the provision of Regulation 60 of the Regulations of the Office of the Prosecutor.

MR GUMPERT: When your Honour speaks of Regulation 60 of the Regulations of the Office of the Prosecutor, the bundle of documents which I have in front of me concerning regulations contains the regulations of the Court and those of the

Registry. Do I take it that it is to neither of those that the Court is referring?

PRESIDING JUDGE OZAKI: No, it's OTP regulations I'm referring to. You can come back on this point in the afternoon if you don't, you do not have an answer right now.

MR GUMPERT: Well, I frankly concede that that regulation was not uppermost in my mind and, since if there is to be an afternoon session I would be better able to give a considered reply to a matter which is obviously of concern to the Bench, then I would ask for that indulgence.

PRESIDING JUDGE OZAKI: Okay. So please proceed on other points.

MR GUMPERT: Indeed. I have no reply or indeed -- well, I have nothing to say in respect to the remarks which have just been made by the representative of the victims, Mr Gaynor.

Mr Kay in his submissions did not deal with issues of whether it was necessary for the Court to grant its approval before a case could be withdrawn or of whether the Court had power to dismiss the case under the relevant article, Article 64, and, therefore, I have no response to make. My position remains as set out in writing that any determination of those issues for the present would be premature, that the issue for the present must be whether the determination of the co-operation issue must logically come first, and that this trial should be adjourned until that decision has been made.

I'm slightly reluctant to make submissions in reply, because in your instructions to both counsel, you were very clear, Madam President, that we shouldn't seek to argue the merits of the co-operation issue.

Now, there has been talk of a blame-shifting exercise, and I hope I'm not going to indulge in that now, but much of what Mr Kay said was indeed about the merits of

that precise matter and I don't accept all that he said.
I think, however, I can summarise it very briefly, rather more briefly than the submissions that he made. The position is not that the Government of Kenya has been consistent in saying that it has no duty to comply with requests for assistance when made by the Prosecutor and a duty only to comply with requests which are sanctioned or made by the Trial Chamber or indeed any other Chamber.
Indeed, as recently as November at the Assembly of States Parties, the Government of Kenya through the Attorney General, who was present as Mr Gaynor remarked, stated publicly that it was in full compliance with all requests for assistance.
If there has been any shifting of ground, I would respectfully submit it is in the novel proposition now at least clearly expressed that it would be improper, perhaps even illegal for the Government of Kenya to assist in respect of requests made by the Prosecutor. It's particularly novel, because, of course, at least in part, rather unhelpful part, but nonetheless in part, the Government of Kenya has responded to requests made by the Prosecutor not sanctioned by the Court. So there is an element of contradiction in the behaviour of the Government of Kenya.
The Prosecution is not engaged in a blame-shifting exercise. The Prosecution acknowledges that the case it hoped to bring has been undermined by the events which are set out in the document in which we first seized the Court with the fact that the evidence was no longer sufficient, and that, we concede, was not a question of non-cooperation. But there has been a lack of co-operation, and it would not be right as Mr Gaynor has said for this case to fail and for the Prosecution to be forced to withdraw the case as we may be in due course if the evidence does not emerge in the light of the fact of the sustained and deliberate obstructionism by the Government of Kenya.

Those are all the remarks that I have to make in response to those made by Mr Kay. I see that it's a quarter-to-12, and I'm going to take the very kind indulgence offered by the Court to consider the answer to the question which the Court has in the light of Regulation 60.

Would your Honour -- it may be that unless there is more to be said by other parties, we will be able to take a break in short order now, which is rather early for a lunch break, but perhaps we don't need to be constrained by our normal eating habits. It would be sufficient for me if there would to be an hour from whenever we break, and we could come back thereafter, if that meets with the Court's approval.

PRESIDING JUDGE OZAKI: Thank you very much.

MR KAY: Before your Honour rises --

PRESIDING JUDGE OZAKI: Yes, Mr Kay.

MR KAY: I'm so sorry. May I raise one matter? You did say we weren't to repeat submissions. Mr Gaynor has spent a great deal of time this morning repeating his filing and I seek an opportunity to reply as there are matters within his submissions to the Court that require me to address them in relation to the actual position and factual position of what has taken place.

I wouldn't propose to be very long about it, but it's very important that there is a balance in these proceedings, as I'm sure the Court will agree. And in a highly political speech, in my submission there are issues of justice that weren't addressed that have to be put before you and the public this morning. And we were mindful of your directions at the start of the proceedings, but we think it only fair in the circumstances that we be given an opportunity to respond, because very serious allegations have been made, and it wouldn't be right for the matter to be left there. There will be many people feeling that comments have been made in this court

today, which weren't supposed to be made because of filings that had taken place -- that would feel that a necessary response had not been permitted.

PRESIDING JUDGE OZAKI: Thank you, Mr Kay. Of course, Defence will be, excuse me, will be given a chance to respond to any of the submissions made by the other party or by legal representative. And I also partially agree with you that to some extent Mr Gaynor's statement was a repetition of what he submitted in writing. But because this status conference is a crucial status conference to discuss the issue of the future, the entire future of these proceedings, the Bench intentionally decided to listen as much as possible to the voice of victims, because this procedure has an immense impact on the rights and interests of the victims.

So if there is no participant wishing to take floor right now, we will rise.

And, court officer, when can we resume?

We will resume at 1.30 in this same courtroom. The hearing is adjourned.

THE COURT USHER: All rise.

(Recess taken at 11.48 a.m.)

(Upon resuming in open session at 1.37 p.m.)

THE COURT USHER: All rise.

Please be seated.

PRESIDING JUDGE OZAKI: Welcome back again to all parties and participants. I presume that the appearances remain the same?

MR KAY: Your Honour, we have one extra person in our team, Ms Kirsty Sutherland, a young lawyer from my chambers who's working on the case.

PRESIDING JUDGE OZAKI: Thank you very much.

MR GUMPERT: And, your Honour, we too have an addition, Ms Allison Shpall.

PRESIDING JUDGE OZAKI: Thank you.

MR GAYNOR: Nobody extra from our side.

PRESIDING JUDGE OZAKI: Thank you very much. Before going back to the discussion, as a preliminary matter the Chamber would like to announce that it intends to convene a status conference on 13 February to be devoted to the pending Article 87(7) application subject to availability of parties and participants. So this is tentative decision of the Chamber, and the formal scheduling order will be issued very soon.

MR GAYNOR: Madam President, could I --

PRESIDING JUDGE OZAKI: Yes.

MR GAYNOR: -- clarify. As you know, I'm living in Kenya in accordance with the order of the Trial Chamber. Is it your desire to have me attending that status conference? I certainly would be more than happy to do so given that it does impact on the progress of this case.

PRESIDING JUDGE OZAKI: That's the intention of the Chamber.

MR GAYNOR: Thank you, Madam President.

MR KAY: Madam President, may I mention one matter about that date. I'm actually booked for judicial sittings that week in England as part of my duties as a recorder of the Crown Court, and I'm booked for a week sitting in court as a judge myself, so I'd be grateful, because of the difficulties involved in rearranging such sittings, if we could choose perhaps a date on the following week.

PRESIDING JUDGE OZAKI: Thank you very much. The Chamber will communicate with all parties and participants through email and find a suitable date in place.

Well, the intention of the Chamber is that we just temporary -- or tentatively announce its intention, and this is -- it is in light of that that the Chamber has

requested that the submissions today do not unnecessarily enter into the merits of the Article 87(7) application, although the Chamber is fully aware of the difficulty of drawing a line -- clear line between two issues, well, especially considering the contents of the most recent Prosecution filing.

Having said this, I would now like to invite Prosecution to respond to the discussion we had in the morning, and then I will give the floor to the Defence.

Prosecution, please?

MR GUMPERT: Thank you, Madam President. It may be worth --

PRESIDING JUDGE OZAKI: Sorry. Please proceed.

MR GUMPERT: Not at all. It may be worth my reminding all the participants, and indeed those following in the public gallery, the question which your Honours wished me to answer. And reading from the transcript I have it thus, "In the light of the admission that you do not at this stage have sufficient evidence to meet the required standard and that you're not sure whether you can get sufficient evidence even if the Government of Kenya will comply with your request, on what legal basis do you consider it appropriate to seek a continuation of the proceedings in particular with regard to the provisions of Regulation 60 of the Office of the Prosecutor?"

Your Honours, it's worth bearing in mind that it has always been a central part of the case advanced by the Prosecution that the accused financed, at least in part, the violence which followed the election in Kenya. It was with that in mind that nearly two years ago the Prosecution sought the information about his financial records with the intention of gaining evidence which went to a central contention in the case.

Looking at Regulation 60, it can, I hope fairly, be summarised thus: If the Prosecution considers that the evidence available does not support the charges, then it must withdraw those charges. Those are the relevant parts of it to which I'm sure

your question is directed.

The Prosecution submits that the evidence about Mr Kenyatta's financial transactions at the time of the post-election violence plainly is available. That has not been denied by the Kenyan government. They haven't refused to cooperate on the basis that this material simply doesn't exist, nor has it been suggested by Mr Kenyatta himself.

So the evidence is available. Unfortunately, it has been withheld from the Prosecution through what the Prosecution characterise as the deliberate obstruction of the Kenyan government of which the accused person is the head; and therefore, the Prosecution has not been in the position to make the consideration which is at the heart of Regulation 60.

The Prosecution cannot consider whether or not that available but withheld evidence supports the charges sufficiently for the trial to continue because of the obstruction of which I have spoken, and therefore, the consequence when we have made that consideration, if it does not support the charges, the consequence of withdrawal simply doesn't arise yet. We need to be in a position to consider that evidence and we are not.

Can I assist the Court in any other way on that point?

PRESIDING JUDGE OZAKI: Thank you very much.

Now I would like to give the Defence -- the floor to the Defence.

MR KAY: Thank you, your Honour. Taking up the last point, in our submission Regulation 60 plainly refers to the evidence available to the Prosecution, and the evidence that they have to bring a case is the matter that is the subject of that particular regulation. Otherwise, it becomes fanciful law.

There may be anything available that they can't get and anything may be able to

become available that they can't get, and that would enable them to continue with any case notwithstanding the fact they didn't have the evidence available to themselves.

We've reached the stage today where issues are to be considered as to how we got here. Listening to Mr Gaynor this morning giving his statements to the Court and to the public about the state of the case bore no relation to the evidence in the case, and that is precisely why we have a justice system and a court of law.

People are tried on evidence, not statements that are made in the media, not statements that are passed around that become the narrative and the narrative is designed to become the case. It is the evidence that brings a trial to a court and it is the evidence that has to be considered.

We have a structure at this Court called the confirmation of charges, and the confirmation of charges hearing determines the charges and identifies the evidence upon which a trial will be based.

The important issue that has taken place in this case is that the evidence upon which the confirmation of charges was based has subsequently been found to have been false. Statements made by Witness 4 and Witness number 12 were lies. So the case that Mr Gaynor talks about is a case and an accusation that was based upon falsity.

False stories are meant to be wheedled out, filtered out by court proceedings because experience has shown that courts require to consider allegations and to check the reliability of the evidence upon which the accuser is making his allegations.

This case had a confirmation of charges hearing in which the Prosecutor was able not to call witnesses, was able to summarise evidence and was able to put a short form of the case to prevent inspection at the confirmation of charges stage. And it was made quite clear by her Honour Judge Trendafilova in the Pre-Trial Chamber that

that was to be the structure of these proceedings. The Defence, who at that time contested heavily the proceedings, were also limited in the ability to produce exonerating evidence.

The accounts of Witnesses 4 and 12, which were the central points of the Prosecution's allegation that there was a common plan in relation to the post-election violence, was considered by the Pre-Trial Chamber and its decision based upon their statements and their evidence.

The Defence in challenging right from the start the quality of that evidence, the reliability, the fact of inconsistent statements, the fact of changing statements, the fact of its inaccuracy as well as the denial by witnesses alleged to have been part of that produced before the Court in statement form because we were only limited to two witnesses. We couldn't call the ten witnesses we wanted to call.

We actually have been the parties, or the party -- it was parties involving all defendants at the beginning -- that have been seeking the truth in this case. It is us who alerted the Court to the falsity of this evidence and its unreliability. Extensive submissions were made by us to the Judges in oral and written form setting out the reasons why we believed this evidence was incorrect and not true.

Although we were confirmed on the charges for trial, we sought leave to appeal as we believed the wholesale rejection of all Defence points by the Single Judge was unfair. We believed that there had only been consideration of Prosecution evidence going to the alleged truth of the matter and a wholesale rejection of Defence evidence.

So what has happened then? What has happened was that a narrative was created, a narrative by the Prosecution first of all in its investigation filings, then in the confirmation of charges, a narrative that has been a hope that Mr Gaynor's clients

have clung to believing that someone who was responsible should be punished. That narrative however, with all its passion from him, was based upon false evidence.

No court can permit in such circumstances a miscarriage of justice that false evidence be the basis for the continuation of proceedings. That's not justice. That's a denial of justice to the party who has been accused.

The problem with making public statements such as those Mr Gaynor made today, statements made by the predecessor of the Prosecutor who is in office today, was that it builds expectations that the case they have built is a true case. That fuels not only the victims, the opponents of an individual, the Court, that fuels a narrative that people believe was the truth, and that's probably why Pre-Trial Chamber II rejected all the Defence evidence and made the wrong decisions in its judgment to confirm charges.

But we warned everybody. We came back to this Court last year when it was revealed that Witness 4 had lied. We came back and said there is the danger of a miscarriage of justice here that whilst there may be this narrative, it is not the truth. This case should be reconsidered because there are serious doubts about the quality of the evidence remaining.

A decision was made in relation to Ambassador Muthaura that he be discharged from the proceedings, but a different decision was made in relation to Mr Kenyatta, that he remain, because it was alleged there was other evidence against him, a meeting on another date provided by Witness OTP 12.

No one had checked the quality of that evidence and considered its reliability except for the Defence. We repeatedly alerted the Court, the Prosecutor in correspondence as to the inconsistency and the falsity of the evidence upon which they were seeking

to rely.

Our warnings were not heeded. In this case, the Defence have made unprecedented Defence disclosure. We have produced nearly 40 witness statements that the Prosecution have been able to see from Defence witnesses. Those supplied at the confirmation of charges hearing and subsequent ones in relation to our continued informing of them that the evidence they were seeking to bring was false and wrong and demonstrably so.

We have released tapes of interviews with Witness 152, Witness 11, Witness 12 to the Prosecution so they could hear for themselves what they were saying when these witnesses first came to us and wanted money, but we didn't want to go down that route, and then off they went to a member of so-called civil society in Kenya who diverted them to the Prosecution.

Witness 4 also came through the hands of so-called civil society in Kenya, and his story that changed and grew bigger and bigger and bigger we have no doubt was because of the influence and the hands that he was in controlling him.

So this case was a case not based on truth, and that's what should be of concern to the victims counsel today.

During the last four years that the Prosecution have had to prepare the case they have been able to access witnesses in Kenya. They have been able to obtain documents. We have seen the vast amount of disclosure they have produced. They have been throughout the media archives, but their investigation was not an investigation for the truth. It wasn't an Article 54 investigation until, if I may say so, Mr Gumpert arrived on the scene. He was plainly troubled by the inconsistencies within the evidence of Witness OTP 12.

PRESIDING JUDGE OZAKI: Mr Kay, sorry to interrupt. I thought that you asked

for the floor to respond to Mr Gaynor.

MR KAY: Yes, I had.

PRESIDING JUDGE OZAKI: Can you confine --

MR KAY: Yeah.

PRESIDING JUDGE OZAKI: -- your statement to that point? Thanks.

MR KAY: It's the issue of the search for the truth, your Honour, which Mr Gumpert no doubt went on when he interviewed Witness 12. And for Mr Gaynor to say that there hasn't been an attempt to search for the truth is absolutely incorrect. It was that search for the truth that unhinged the evidence in this case.

When it's said that there's been no co-operation from the accused, the accused has defence rights. That has to be acknowledged. And we as his counsel have every right to enforce and use those rights. When it's said we have attempted to stop the proceedings at every opportunity, well, we have because we have known that the evidence was false, and we would have been failing in our duty to this Court if we had done nothing less.

Uhuru Kenyatta gave evidence at the confirmation of charges hearing. He called a witness. He has cooperated with the Court. He was available to be questioned by anyone. We all have a record of that questioning and where it went and how far it got.

The Defence here have translated transcripts from Witness OTP 12 taken by the Prosecution. It was us who alerted the Court and the Prosecution to issues within those documents. This is proper and effective litigation not to be criticised. This is the legitimate right of the Defence to play its part in these proceedings in the presentation of the facts and the truth.

It was the Defence who went on the search for phone data. It was the Defence who

attempted to get the phone companies to release data, and they refused. It was the Defence who suggested to the Prosecution the appointment of a single joint expert. It was the Defence who took proceedings in Kenya to obtain the phone data from the phone companies. I invited the Prosecution to join us as plaintiff, but it was declined. They provided a supportive statement, which was perfectly proper. All that evidence, in fact, goes to the truth in this case, and the Prosecution are very well aware of it. Mr Gaynor may not know this, but on 24 January the single joint expert certified the authenticity of the data obtained and gives a detailed account of the fact of the impossibility of its fabrication. It's simply impossible.

So stirring up emotions with unfounded allegations, misrepresentations of what has taken place during the currency of these proceedings in our submission is unhelpful. We have come to the stage where the case presented reveals that it is not a case, that it is a case with allegations based upon falsity. The Prosecution know that. They know there's no contest over that matter.

The problem is now, though, that having taken two sides to go on trial in a selective way, a political problem emerges, but the politics of this matter should not be a consideration for the justice of the case. That is wrong. That is unfair.

Sometimes courts faced with difficult situations, tough decisions, judges know the pressures, expectations from one side against the other, those tough decisions may disappoint people at the time they're made, but they're the right decision because history often shows that bad decisions do not go away. And that's precisely what happened with the confirmation of charges in this case. That is why there is a lack of respect for what happened on the evidence for the Prosecutor's case. That causes the difficulty.

When those things happen, they are best admitted to have happened rather than

continuing and attempting to produce another allegation -- false allegation from elsewhere.

It was notable in OTP 12's last interview with Mr Gumpert. That's exactly what he was doing. "Oh, if you want another one, I've got one here." Quite remarkable. But anyone dealing with those people would have worked this matter out at an earlier stage, but the problem is everyone got on board the narrative. That's how it is. For them the evidence is an inconvenient truth. For us it is a necessary justice. Thank you.

PRESIDING JUDGE OZAKI: Thank you very much.

Judge Fremr has a question.

JUDGE FREMR: Thank you for the floor.

Mr Kay, I would like to come back to the first part of your speech you have made before the lunch break.

MR KAY: Yes.

JUDGE FREMR: Did I understood you correctly that the only obstacle which prevents Government of Kenya from responding to Prosecution request on Mr Kenyatta's financial records is the fact that such a request had been submitted by Prosecution itself, not through our Chamber?

I'm aware you are currently not representing Kenya government here, but taking into account a leading position of your client within the Kenya government, I believe you can respond to my question.

MR KAY: Thank you, your Honour. May I make it entirely clear I have not been involved at all in the Government of Kenya litigation. I have insisted that there is a division because there are potential conflicts of interest. And that has been acknowledged.

I was looking at the argument myself for the first time upon the filing that was made by the Prosecution and went back to consider it. I don't know what the rules and laws are within Kenya over particular issues. I don't know whether you've got to establish grounds for the revelation of evidence, you have to show why you want it. I know that at the Yugoslavia Tribunal you have to give a reason and the nexus for the provision of evidence.

It seemed to me from the argument that had broken out between the Government of Kenya and the Prosecutor that the Government of Kenya was saying we have cooperated, but you will also need, if you are to use Article 93, a request from the Court, so a procedural matter.

As to the detail of what happens after that, I do not know because quite clearly I've considered the evidence in this case about the money. It makes absolutely no sense at all. Twenty million pounds cash taken out of the Kenyan banking system in a heartbeat and provided to people, and we have no evidence, if this did happen, from financial sources readily available to the Prosecution as to how -- what effect that would happen, if it happened on the money markets in Kenya on a particular day at that time. Easily recognisable evidence.

To us the issue of the financial allegations were fabricated. Witness 12 being the source of them. And so what is being sought to rely upon here is Witness 12, who's the liar, and his connection with the money.

Well, this is, as I said earlier in the day, an attempt to cling on to something that they can rely upon. If it was so important and had any truth, it could have been investigated and requested earlier, but there is simply no other evidence in it.

The intriguing thing about the evidence is there's not a single person with any of this money in their hands. It's easy to talk about saying, oh, finance, cash was given.

But where? I mean, who saw it? No. It -- it does not make sense. It's not true. The whole story of the sudden production of the money on 30 December like that in a heartbeat after banking hours and it's produced belies the account anyway and the need for the records. And none of the people alleged to have received this money are seen in possession of it anyway. It is a complete red herring.

It's again part of the narrative. If you are a prominent person, if you are wealthy, it's an easy stone to thrown. But the factual basis of it, when you look at who's making these assertions, and it is not independently corroborated and it comes from the false sources, in our submission, our view was that this was clutching on to try and blame someone else and make them responsible for it.

JUDGE FREMR: Sorry to interrupt you, Mr Kay. I think it's enough for me, because for me the main issue was the obstacle, and the substance for that maybe we'll deal with in depth with that during the next status conference. So thank you very much.

MR KAY: Thank you.

MR GUMPERT: Your Honours may feel that you've heard enough from me. There's one tiny point of detail --

PRESIDING JUDGE OZAKI: Yes, please.

MR GUMPERT: -- in respect to something Mr Kay said just a moment ago. It isn't right to say that allegations about the distribution of money said to have come from the accused person come only from Witnesses 11 and 12. Witnesses 152, 429, 430, 510, 494 and 428 all speak about the distribution of money, which it was said at the point of distribution had come from higher up and on occasion specifically it was said had come from Mr Kenyatta.

PRESIDING JUDGE OZAKI: Thank you very much. I think it's enough to discuss

all detailed evidence about money.

Thank you very much, parties and participants. The Bench has two more questions to ask parties and participants. Prosecution has repeatedly argued that it is premature to discussing the issue of withdrawal of charges or termination of the proceedings. Nonetheless, the Bench for its own benefit appreciate if parties and participants enlighten us and answer to the following two questions to the extent it is possible for them to answer at this stage.

The first question is what parties and participants would consider to be the appropriate procedure for withdrawal of charges?

The second question is what parties and participants consider the differences to be between a termination of proceedings and a withdrawal of charges at this stage before commencement of trial, including any differences in the legal effect of those two causes of action?

I would like to start with Prosecution.

MR GUMPERT: Would your Honours just give me a moment?

Your Honours will clearly have understood that it is the Prosecution's case that under the provisions of Article 61(9) of the Rome Statute the discretion to withdraw the charges is a discretion held by the Prosecutor and that withdrawal may be made without seeking or gaining the leave of the Court up until the opening of the trial, which -- and this I hope is one point where there is no dispute -- the opening of the trial is the making of the opening speeches so that plainly we have reached the stage -- we have -- I apologise, we have not reached that stage yet.

We rely upon what we submit is the clear wording of Article 61(9), which in relevant part reads as follows, "After the commencement of the trial the Prosecutor may with the permission of the Trial Chamber withdraw the charges."

This matter was touched upon briefly, as, Madam President, you will be well aware, at the conclusion of the proceedings against Mr Muthaura. And the submissions made by the Defence in paragraph 11 of their submission, which is document 878, rely upon the decision made -- the Muthaura decision, if I may call it that in shorthand, as being authority for the contrary proposition, namely, that the Prosecution at this stage would require the leave, the permission of the Court to withdraw the charges.

The Prosecution would submit that those decisions amount to no such thing. It's perhaps worth note that the submissions of the parties at that hearing, Defence and Prosecution, were unanimous. Both the Defence and the Prosecution submitted that at this stage of proceedings, the equivalent stage of proceedings to this, no such leave was required, that it remained the sole discretion of the Prosecutor as to whether the charges should or should not be withdrawn.

It's instructive to look at the decision which is document 696 and at paragraph 10. It may be that members of the Court as presently constituted are not as familiar with that as you are, Madam President, because of course at that time of the currently constituted Court only you remain.

And I have copies here if it would be assistant -- of assistance to the two other members of the Bench, because I need to make reference to that decision in a little detail in order to answer the first of your Honours' questions. Would that be of assistance?

PRESIDING JUDGE OZAKI: Can court officer pick up those files?

MR GUMPERT: Just so that Mr Kay is aware of what I'm handing to the Bench, I'm sure he doesn't expect any impropriety, but there is a third copy for him as well if he would like.

If this is too much detail, the Court will of course stop me, but the question which the Court have asked -- has asked is a matter of a little complexity and a full and proper and I hope helpful answer requires some detailed reference to the authority.

PRESIDING JUDGE OZAKI: I appreciate if you could be as concise as possible.

MR GUMPERT: I certainly shall be, Madam President.

Can I invite your Honours' attention to page 6 of 9 of the first document before the divider and in particular to the heading "Analysis and Conclusions" and paragraph 10.

The Court there notes that the article and sub article from which I have just quoted does not squarely address the situation which is now before the Chamber where charges are withdrawn after the confirmation decision but before commencement of the trial.

So we can see there that we are indeed in an exactly parallel position with regard to the charges against Mr Kenyatta as the Court was then with regard to the charges against Mr Muthaura.

Having noted that the rules do not, as the Court then put it, squarely address the situation, the Court went on, "In the present case, the Prosecution has submitted that current evidence does not support the charges against Mr Muthaura, that it has no reasonable prospect of securing evidence that could sustain proof beyond reasonable doubt. Significantly, the Muthaura Defence does not contest the Prosecution's withdrawal. In these circumstances the Chamber acting pursuant to Article 64(2) of the Statute considers that the withdrawal of the charges against Mr Muthaura may be granted."

That is as far as the decision of the Court, to which all three Judges put their name, goes in clarifying the situation. And I would respectfully submit that in no sense

does that finding support the submission made by the Defence in paragraph 11 of document 878 where they assert that the discretion to grant the withdrawal of charges against an accused following a request by the Prosecution lies with the Chamber.

It would be an extraordinary manner of proceeding, and one which we can be quite clear that the Chamber was not, at least in its unified judgment, the judgment which all three Judges signed, going anywhere near establishing that as a proposition of law.

Indeed the Court had no need to make any such radical finding apparently in the face of the wording of the Statute because the parties were in agreement. At best what it is, I respectfully submit, is an obiter, a parallel remark made by the Court in coming to their judgment that they may grant. Even the tense -- or the mood I should say is a conditional one. There is no positive finding that any such grant of permission or leave is necessary.

So with great respect to my learned friend, when he asserts that this decision is clear authority that in this situation the Prosecutor needs the permission of the Court to withdraw the charges, it is no such thing.

The Court quite clearly and consciously abstains from making any finding about whether permission is necessary or not. It's fair to say that there were two judgments or opinions which were not the result of the unified findings of the Court but which were individual ones, and the first of those of course came from you, Madam President.

And again, it may be helpful for your brother Judges to go beyond the little green divider -- and I apologise if this is all old hat, but it may nonetheless be helpful -- and to look at page 3 of 5 which is headed "The Partly Dissenting Opinion

of Judge Ozaki."

And there your Honour plainly states, and I'm at paragraph 2, "In my view, Article 61(9), that is the article from which I quoted at the beginning of these submissions, is lex specialis in relation to amending or withdrawing the charges in the post-confirmation phase of proceedings before the Court. As noted by the majority, this provision clearly provides that after the confirmation hearing but before the trial has begun the Prosecutor may amend the charges with the permission of the Pre-Trial Chamber. It equally clearly provides that after the commencement of the trial, charges may be withdrawn with the permission of the Trial Chamber. Like the majority, I can consider that the trial has not yet commenced for the purposes of Article 61(9) ...", and you then go on to summarise what is the commencement of the trial and I'll leave that.

I'll go to the foot of the page, "Accordingly, on a plain text reading of Article 61(9) there is no requirement for the Prosecutor to seek the permission of any Chamber in order to withdraw the charges in the period following confirmation and prior to the commencement of the trial proper."

And I respectfully submit that that is an accurate statement of the law.

If the law were to the contrary, it would require, as you, Madam President, went on to point out -- and I shan't read it, but I'll summarise it in a couple of sentences -- it would require the Chamber to be reading into the Statute a wholly unfounded limitation upon the discretion of the Prosecutor.

There's a much lengthier document than your Honour's concise partly dissenting judgment from Judge Eboe-Osuji who was then sitting on the case. It's 14 pages and some 38 paragraphs long. I can summarise it thus and I hope I don't do violence.

He effectively says that the drafters of the Statute made a mistake -- his word, not mine -- and that what they meant to say was that at this stage, post confirmation, the leave of the Chamber is required.

Well, I respectfully accept that that was, and maybe still is, Judge Eboe-Osuji's opinion on the matter. But even if it's right, if the drafters made a mistake and if the plain language of the article is such that the only way Judge Eboe-Osuji could interpret it in the way that he thought right was to state that it was a mistake, then that mistake cannot be corrected by action by the Court in reading the Statute contrary to its plain meaning. It must be corrected by the Assembly of State Parties amending the Statute to erase the mistake and substitute the correct meaning.

In sum, therefore, the answer to your Honours' first question, what is the appropriate procedure for the withdrawal of the charges, is that the Prosecutor comes before the Court and announces that, exercising her discretion under Article 61(9) and in accordance with Regulation 60, she withdraws the charges. And if that occurs before the trial commences, at that point the charges are withdrawn.

Which brings me, neatly I hope, to the difference -- your Honours' second question, the difference between termination and withdrawal. I hope that I have accurately summarised what is a withdrawal, and I shall say no more about that.

As to termination, once again, we learn, I respectfully submit, by reference to your Honour's judgment or opinion in this matter.

And if you'll just give me a moment, I need to locate the precise passage.

It's in paragraph 3 which is on page 4 of 5 just after the green divider. The paragraph begins, "I cannot accept the implicit premise," and it's the last sentence to which I want to draw the Bench's attention.

Your Honour said this, "I would therefore interpret the powers conferred on the

Chamber in Article 64(2) and 61(11) of the Statute and Rule 134(1) of the Rules to extend to ordering the formal discontinuance of the case and issuing any related orders but not to authorising a withdrawal of charges which remains in the sole discretion of the Prosecutor."

The common law lawyers amongst us -- and I apologise in that I am one of them and therefore I'm referring to a system with which I am familiar -- will be aware that at the conclusion of a trial, if the Prosecution offers no evidence, there will still be ancillary orders to be made. Firstly, the verdict of not guilty will have to be entered. Secondly, there may be matters of bail or custody -- sorry, custody to be dealt with, which will require the Bench in the case of a prisoner in custody -- not Mr Kenyatta's case of course, but it's plainly a parallel order -- the discharge of the person from the custody of the Court, the discharge of the accused. That I would respectfully submit must be what your Honour was referring to when you were speaking of the formal discontinuance of the case. It's plain at that stage that the case could not continue because the Prosecutor has exercised her sole discretion to withdraw the charges, but nonetheless, the case is still before the Court and orders need to be made.

Of course one fundamental difference, which it might be argued there is, is the question of whether or not the conclusion of the case would prevent any further proceedings against the same person. I would respectfully submit that it is plain that the discontinuance of a case, the withdrawal of the charges by the Prosecutor would not have any such consequence. Indeed it would be disastrous if it were to. Let us imagine for a moment that your Honours were against the submissions which I hope will persuade you, but I contemplate the possibility that they may not, and decided that there was really no alternative at this stage but for the Prosecutor to

withdraw the charges and that our submissions about the trial being adjourned on the basis of non-cooperation had failed.

If the Prosecutor were then to withdraw the charges, it would plainly not be a bar to any subsequent proceedings which might be based upon new evidence. And I say plainly because if new evidence were to emerge, let us suppose that the parallel proceedings which are to be heard at some time in the month February, led to a conclusion that the Government of Kenya was indeed in default and that finding having been made, the Government of Kenya then complied in respect of the financial documents perhaps in respect of a tranche of other material which we say has not been provided when it should have been, and that material were indeed to provide grounds on which to base the Prosecution, it would be fundamentally unjust and contrary to the principle of impunity on which this Court is based for there to be no such further prosecution.

So those are the distinctions I would draw between withdrawal -- sorry -- yes, between withdrawal and termination and also my submissions in respect of who has the power ultimately to withdraw or permit the case to be withdrawn.

Is there any other assistance I can give your Honours on those points?

PRESIDING JUDGE OZAKI: Thank you very much.

May I now turn to the Defence.

MR KAY: Thank you, your Honour. On this issue we looked at it and we saw the partially dissenting opinion, leaving two other Judges, and so we thought we were accurately stating the law as determined by them, which is why we expressed it in the way that we did in our filing.

But I don't disagree with what Mr Gumpert has said on the law, and we in our filing thought we were following our duty of setting out the state of the law as it was and

to be applied. But we agree with the partially dissenting opinion and took the position as we did because of the circumstances between the Judges.

The Prosecution can withdraw on their own motion before a trial starts and that's a common enough principle throughout the world.

If a Prosecutor is in the position of Regulation 60 but does not carry out his duty according to the regulation, we remind the Court what his Honour Judge Chile Eboe-Osuji said. If -- it should not be right for a criminal court to compel a prosecutor to proceed to trial with a case admitted is insufficiently supported in the evidence currently or prospectively available and clearly wrong for a prosecutor to decide to proceed to trial with a case similarly deficient. And that's why we took issue with the interpretation of Regulation 60 this afternoon by Mr Gumpert, because it is our submission he is there in Regulation 60 land.

When this filing came out we had drafted a reply detailing these issues, but mindful of the admonition to the parties to seek leave to reply first, we found we'd run out of time by Monday to effectively put anything in to the Court, but our submission was on Regulation 60 and the impact that that would have on the present state of the proceedings.

So our submission is that in the failure of the proper exercise of the discretion, the Court may then move to terminate, and that's how proceedings become terminated. When the Prosecutor withdraws charges, the Court then terminates those proceedings. And we submit that the structure of this Court with the confirmation of charges being the basis of the case with the facts underlying the confirmation of charges which have been precisely identified by the Pre-Trial Chamber and is the basis for the proceedings to continue, as also expressed in the document containing charges, that in those circumstances verdicts of not guilty can be entered because the

charges for confirmation which have been proceeded to trial have been found to be wanting at the point of trial and an accused coming that far through the proceedings, we are on the eve of trial -- well, I think the day after now or a couple of days after -- we would be entitled to verdicts of not guilty being entered. That is fair. That -- it should not be the case that a stigma in relation to reputation is allowed to remain in circumstances where a case fails. That is not fair justice.

So that is the structure that we see, your Honours, and I hope that's helpful. If I can deal with any other matters, please ask.

PRESIDING JUDGE OZAKI: Thank you very much. I think you were clear enough, but do you still want to make submission in writing?

MR KAY: I've made them now.

PRESIDING JUDGE OZAKI: Okay, thank you very much. Mr Gaynor? Sorry. Mr Gaynor.

MR GAYNOR: Thank you, Madam President. I'll deal first of all essentially with the submissions of Mr Gumpert on this question. I think it's fairly clear from paragraphs 30 to 32 of the separate opinion of Judge Eboe-Osuji, and it's fairly clear from paragraphs 1 to 5 your Honour, Judge Ozaki's, separate opinion that the majority at the time of the Muthaura withdrawal did take the view that the Prosecution must be granted permission to withdraw charges. It cannot withdraw charges unilaterally. That was fairly clear I think on any reasonable reading of the decision and of the separate opinions. The Prosecutor did not seek a consideration of that decision. The Prosecutor did not seek appeal of that decision.

To a certain extent, the victims have been relying on that interpretation as being the correct one. And to some extent I would argue the Prosecution is now estopped from relying on an alternative interpretation as it waived its right to seek

reconsideration or appeal.

Second part is let's imagine for the sake of argument that the Prosecutor were to withdraw -- were to withdraw charges for reasons which are wholly unreasonable. Now, ordinarily in a domestic jurisdiction you might be able to seek judicial review of this and I would like to refer to the filings that we made in this case. I'll slow down a little bit.

On 13 January 2014 in filing 879, that's paragraphs 43 to 50, we set out a brief review about the position which obtains in a number of jurisdictions around the world where either the Prosecutor files a notice of nolle prosequi or simply the Prosecutor decides they want to withdraw charges. And very much the international view appears to be that there is judicial control. Whether you're in a civil law environment or a common law environment, certainly the tide is going very much in the direction that the judges can control that process. And in Kenya it's a constitutional right in fact that the Court must approve withdrawal of charges.

Now, I'll move on from that point. I would like to -- for that reason we -- on behalf of the victims I would submit that termination of the charges in this case and withdrawal of the charges is in fact the same thing, because the Prosecutor cannot withdraw the charges unilaterally. The Prosecution must seek the permission of the Chamber to do so.

I would like to state briefly just a couple of submissions about what Mr Kay said earlier on. These will just take one or two minutes. They won't be very long.

PRESIDING JUDGE OZAKI: Well, before that, if Prosecution has anything to say on those two specific questions, I would rather give the Prosecution the floor.

MR GUMPERT: Madam President, I rose because I was conscious that the argument Mr Kay had advanced about, if I can use the term "double jeopardy,"

about the fairness of there being a not guilty verdict was a matter on which there could be quite extensive debate. But I doubt whether it will be useful for that to be ex improviso debate given this is a matter -- I mean absolutely no criticism -- raised by the -- raised by the Bench in the course of the afternoon of these proceedings. What I was going to say was that given Mr Kay has raised those potentially important matters, that I would seek the Court's leave to make submissions on precisely that question in writing. They would be considered submissions. We could produce them in short order so that there would be no delay. And it would not extend this hearing, with perhaps what might be half-considered submissions which would help the Bench less.

So my application and the reason I rose, the reason I rise now, was for leave to submit to the Court briefly in writing on the question of whether or not there should be verdicts entered following any withdrawal of this matter by the Prosecution.

PRESIDING JUDGE OZAKI: Thank you very much. The Bench will invite you to file a written submission on this specific issue.

MR GUMPERT: I'm very grateful.

PRESIDING JUDGE OZAKI: And, of course, after that Defence will respond.

MR GUMPERT: I imagine.

PRESIDING JUDGE OZAKI: And legal representative as well.

MR GUMPERT: I imagine.

PRESIDING JUDGE OZAKI: When can you submit this written filing?

MR GUMPERT: We're on Wednesday, aren't we? Can I ask for Monday evening? I'm not sure what the date of that will be.

PRESIDING JUDGE OZAKI: Okay.

MR GUMPERT: We're on the 5th today. The evening of the 10th.

PRESIDING JUDGE OZAKI: Sorry. Could you repeat?

MR GUMPERT: Yes. I was simply calculating on my fingers what date Monday would be and I reckoned it's the 10th, but I stand ready to be corrected. By the -- by the close of business on Monday the 10th.

PRESIDING JUDGE OZAKI: Yes, Monday is the 10th.

MR GUMPERT: Yes. That's the time I would ask.

PRESIDING JUDGE OZAKI: And Defence, do you think you can respond to this filing by the end of next week? Or is it too early?

MR KAY: I am --

PRESIDING JUDGE OZAKI: You have to see --

MR KAY: Yes.

PRESIDING JUDGE OZAKI: -- the contents before.

MR KAY: Yes. And I am sitting as a judge next week, so my diary is -- is out of my control. So I would be grateful if we could be given seven days so that I've then got the weekend to look at it.

PRESIDING JUDGE OZAKI: So seven days after the submission of the Prosecution?

MR KAY: Yes. If -- we can come back to you if it's too difficult a research to us.

PRESIDING JUDGE OZAKI: Okay. And, Mr Gaynor, seven days is fine with you?

MR GAYNOR: That's fine by me. Thank you, Madam President.

PRESIDING JUDGE OZAKI: Thank you very much.

MR GUMPERT: Sorry to be a pain. That's both parties seven days from the submission of our filing, or is it consecutive seven days, seven days and seven days?

PRESIDING JUDGE OZAKI: I'm a bit confused.

MR GUMPERT: I'm sorry.

PRESIDING JUDGE OZAKI: You file your submission on Monday.
MR GUMPERT: On Monday, yes.
PRESIDING JUDGE OZAKI: After seven days --
MR GUMPERT: Which will be the next Monday.
PRESIDING JUDGE OZAKI: Yes.
MR GUMPERT: Yes. Both the Defence and the Victims?
PRESIDING JUDGE OZAKI: And legal representatives.
MR GUMPERT: I'm grateful.
PRESIDING JUDGE OZAKI: Now I think we need to come back to you, Mr Gaynor.
MR GAYNOR: Thank you, Madam President. I had a few points in response to submissions made by Mr Kay this afternoon. Mr Kay referred a couple of times to the fact that he was employing -- essentially he was making whatever applications he had to in defence of his client, and that's perfectly fine. There's no contest about that whatsoever. And he has nothing to do with the Government of Kenya. And essentially, I don't want to paraphrase what he submitted, but there is a Chinese wall between his Defence team and the Government of Kenya. And that's fine.
Now, nobody is making any suggestions that Mr Kay has obstructed the -- you know, the process of the emergence of the truth at the ICC or in Kenya, but your Honours are not concerned with the actions of Mr Kay. Your Honours are concerned with the actions of Mr Kenyatta.
For that reason justice in this case requires that you look very, very carefully at the actions and positions taken by Mr Kenyatta throughout 2013 and previously when he was deputy prime minister and minister of finance in the Kibaki administration, and particularly have a look at the policy of obstruction employed by the

government in respect of co-operation to this Court, the policy of obstruction of the emergence of truth in Kenya itself, the speeches which he made to the AU, for example, and the speech that he made on Heroes' Day, and his high-level diplomatic campaign. It's up to your Honours to take all of that into account.

Now, whatever unilateral moves Mr Kay might have made to secure access to mobile phone data are fine, but the fact remains that there was massive obstruction to this vitally important category of evidence by Kenyan mobile telephone companies, and in my submission it is inconceivable that that would have happened simply by the volition of those phone companies themselves.

Now, Mr Kay has pointed that we should not continue the proceedings on false evidence. In that I think we can all agree. Nobody wants this trial to begin or certainly nobody wants a conviction to be entered on false evidence.

And he's referred to -- he said that my submissions have nothing to do with the evidence in this case. Well, that goes to the heart of the matter. What is the evidence in this case? Is it that very, very small riddled-with-difficulty body of evidence which was presented to the Pre-Trial Chamber for confirmation, or is it all of the evidence which is necessary to uncover the truth and which -- and access to which is under the direct control of the Government of Kenya, which is under the direct control of the accused in this case?

Now, if we were in a situation where the accused is the president of Kenya and the Government of Kenya were given -- were providing one hundred per cent co-operation to this Court, I believe there would be great deal of weight in the submissions made by Mr Kay.

If we were in a position where the accused was a very low-level figure with absolutely no influence whatsoever over the Government of Kenya and there were

obstruction by the Government of Kenya, again Mr Kay's submissions would carry a great deal of persuasive weight, but that's not the situation we're in.

We're in the situation where there is massive and systematic obstruction of access to evidence by the government, and the accused is in complete control of that government. That's why this case is so unique, and that's why your Honours have to approach it in a totally exceptional fashion to consider what exactly does justice require in such a situation given the carefully calibrated model of State co-operation set out in part 9 of the Statute and given the accused's de jure and de facto control, total control over the Government of Kenya.

And I would respectfully suggest that in Judge Eboe-Osuji's separate opinion, which was just briefly alluded to by Mr Kay, he referred to the expression evidence which is, quote, "currently or prospectively available."

Now, His Honour did not fully explain what he meant by the expression "or prospectively," but I believe that test is driving at the point that where there is evidence that the Court has not been allowed to see, where it has been deliberately withheld from your Honours in total violation of part 9 of the Statute, that that is evidence which is prospectively available to your Honours for the same reason the interpretation of the relevant part of Regulation 60 of the Regulations of the Office of the Prosecutor refers to the expression "the evidence available."

And I would support the submissions made by Mr Gumpert on this question. The evidence available in the unique circumstances of this case includes the evidence that the Government of Kenya under the direct control of this accused has deliberately obstructed access to, access to the Prosecution and ultimately access to your Honours.

Thank you Madam President, your Honours.

PRESIDING JUDGE OZAKI: Thank you, Mr Gaynor.

Ms Higgins?

MS HIGGINS: Your Honour, may I just briefly address you? It touches upon two points that have been raised. And I won't take more than five to seven minutes of your time.

PRESIDING JUDGE OZAKI: Five minutes, please.

MS HIGGINS: Thank you. In my submission, this is important. Mr Gaynor has referred to what is the evidence in this case. My learned friend Mr Gumpert has contested my learned friend Mr Kay's submission that it's the evidence of number 12 alone that relates to financial corroboration or relevant to the corroboration issue and that there are indeed other witnesses.

And your Honour yourself asked Mr Gumpert the question of whether obtaining financial information about the movement of funds would be enough to sustain the charges given the absence of 11 and 12.

And I would ask this Bench, particularly given its new brother member, to just pause for a moment and go back and consider the meetings on which this case was confirmed and whether there are particulars of financials there. What is the state of what remains when you take away 4, 11 and 12? Are the stones that the Prosecution have sought to overturn reverted mainly to pebbles or in our submission sand?

And, your Honour, perhaps by way of one or two examples I direct you to the pre-trial brief paragraph 30.

PRESIDING JUDGE OZAKI: Ms Higgins?

MS HIGGINS: Yes.

PRESIDING JUDGE OZAKI: I think it's enough. I mean, I don't want to go into

the detailed discussion about evidence in this status conference. You'll have enough chance later to discuss those issues.

MS HIGGINS: Thank you for your observations, your Honour.

PRESIDING JUDGE OZAKI: Thank you very much. If there is no other submissions, as for the status conference on non-cooperation or co-operation issue, we will make a formal announcement after we consult with parties and participants, including Government of Kenya. So you will be notified about the time and the venue in due course.

And this bring us to the end of this status conference. I'd like to thank the parties and participants as well as interpreters, court reporters and other courtroom staff for their assistance. This hearing is adjourned.

THE COURT USHER: All rise.

(The hearing ends in open session at 3.02 p.m.)