

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai
5 Kenyatta - ICC-01/09-02/11
6 Presiding Judge Kuniko Ozaki, Judge Christine Van den Wyngaert and Judge Chile
7 Eboe-Osuji
8 Status Conference
9 Monday, 18 March 2013
10 (The hearing starts in open session at 3.03 p.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE OZAKI: Good afternoon and welcome to the parties and
15 participants.
16 Can counsel introduce themselves for the record, starting with the Prosecution?
17 MS ADEBOYEJO: Thank you, Madam President, your Honours. The Prosecution
18 this afternoon is represented by: Mr Alex Whiting; Mr Manoj Sachdeva; Mr Sam
19 Lowery; and our case manager is Ramu Bittaye; and my name is Adesola Adeboyejo.
20 Thank you.
21 PRESIDING JUDGE OZAKI: Thank you.
22 Defence?
23 MR KAY: Thank you, Madam President.
24 I am Steven Kay of Queen's Counsel, my co-counsel is Gillian Higgins, my instructing
25 solicitor is Mr Desterio Oyatsi and my case manager is Mr Ben Joyes.

1 Thank you.

2 PRESIDING JUDGE OZAKI: Thank you.

3 Legal representative of victims?

4 MR GAYNOR: Good afternoon, your Honours.

5 Caroline Walter, Anushka Sehmi and myself, Fergal Gaynor, for the victims.

6 PRESIDING JUDGE OZAKI: Thank you very much.

7 Before we start, I would like to remind you that we are in open session. Therefore, if
8 any party or participant needs to refer to confidential information, please ask to go
9 into private session.

10 Second, this status conference is strictly limited to two hours and there are a number
11 of issues to deal with, so I would ask all parties and participants to bear this in mind
12 when making their submissions.

13 Actually, the Bench itself has a lot of questions to ask. Therefore, in case we cannot
14 finish within two hours, most likely the Bench will ask for additional written
15 submissions.

16 The purpose of this status conference is to address the application filed by the
17 Defence for Mr Kenyatta requesting the preliminary issue of the validity of the
18 confirmation decision be referred back to the Pre-Trial Chamber.

19 This issue, together with a similar application filed by the Muthaura Defence, was
20 scheduled to be discussed at the status conference 11 March. However, due to the
21 unexpected withdrawal of the charges against Mr Muthaura, the status conference
22 was adjourned without addressing the Kenyatta application. The Chamber will now
23 return to that application and hear the submissions of the parties and legal
24 representative.

25 The Chamber would like to begin by giving the Defence and the legal representative

1 the opportunity to respond to the Prosecution's most recent filing of 13 March. In
2 accordance with the order of the Chamber, this filing addresses the impact of the
3 withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta.
4 Having heard those submissions, the Chamber will then ask for submissions on the
5 legal and factual issues set out in the scheduling order for last week's status
6 conference. The parties already submitted written filings on these issues on 8 March,
7 which have been read by the Chamber.

8 There were five issues set out in that scheduling order but, as the first and last issue
9 related solely to Mr Muthaura's application, the Chamber will only address the
10 remaining three issues today; that is issues (b), (c) and (d). Each party and the legal
11 representative will be given an opportunity to make oral submissions on those issues
12 and to respond to questions from the Bench.

13 Finally, I note that during the status conference last Monday the Prosecution
14 requested an opportunity to make submissions rebutting allegations of misconduct in
15 relation to the non-disclosure of the Witness 4 affidavit. The Chamber will grant the
16 Prosecution time to make these submissions during the discussion of issue (d).

17 The first issue: Impact of withdrawal of charges against Mr Muthaura. The
18 Chamber would now like to invite the Kenyatta Defence to make its response, if any,
19 to the Prosecution's filing of Wednesday, 13 March, and in this filing the Prosecution
20 asserts that the withdrawal of charges against Mr Muthaura has no legal or factual
21 impact on the case against Mr Kenyatta.

22 The Defence is requested to limit its initial remarks to ten minutes.

23 MR KAY: Thank you, Madam President.

24 The impact of the withdrawal of the charges against Mr Muthaura I'm afraid can't just
25 be dealt with in ten minutes, I have to be frank about that, because it is clear that the

1 Prosecution acknowledged that without Witness 4 there was no case against

2 Mr Muthaura. So you look at the evidence and they said, "We agree that in relation
3 to him there is no evidence remaining that can go forward to trial."

4 Therefore, in relation to the Kenyatta matter we are in the position of seeing whether
5 their judgment in relation to the Kenyatta case would in fact have been incorrect, and
6 that's why I want to address you upon the content of the confirmation of charges
7 decision which bears very careful reading.

8 The basis of our Article 64(4) application is because, with the withdrawal of OTP

9 Witness 4, the application by us is that in fact this is not now a case upon which the
10 facts underlying the charges as found by the Pre-Trial Chamber still exist. Therefore,
11 this matter has to go back for reconsideration to the Pre-Trial Chamber.

12 Both Muthaura and Mr Kenyatta were confirmed under Article 23(a) as indirect
13 co-perpetrators of a common plan, and of course one person can stand trial in respect
14 of such an allegation and I noted the OTP filing, but what was interesting was how
15 they did not go into the facts that remain in this case.

16 When I addressed you last week, I said to you the decision had been made in relation
17 to Muthaura to prevent you deciding the issue in the case of Kenyatta and that has
18 been their strategy.

19 It's clear now that with the withdrawal of Mr Muthaura from the common plan, as
20 they cannot rely upon him as a participant in the common plan as they concede they
21 do not have sufficient evidence, the case stands as against Mr Kenyatta and, as at
22 paragraph 400 of the confirmation decision, only two people further remained to be
23 named. That was Mr Kenyatta and Maina Njenga. Mr Muthaura was the third
24 person named.

25 The Pre-Trial Chamber did not name any other individuals as co-indirect perpetrators

1 of the common plan, and at paragraph 297 the Pre-Trial Chamber correctly set out the
2 legal test for co-indirect perpetrators and they said that the concept goes to be
3 expressed by the notion of control over the crime, and that is something that they
4 expressed as a generic principle.

5 So what we need to do now, in our submission, is look at the true state of the
6 evidence, without Witness 4, just the same exercise as the OTP did in relation to the
7 Muthaura case, and look at what was actually relied upon by the Pre-Trial
8 Chamber to see whether there is in fact a case that can go forward. So we turn to
9 section 7 of the confirmation of charges decision, and in respect of the decision, every
10 single ground that we sought leave to appeal upon was refused. So it is for the first
11 time any court or anybody is going to have looked at the content of the sources that
12 the Pre-Trial Chamber relied upon.

13 No one has reviewed that decision, and I'm not seeking an appeal here, but it's of
14 great importance to know this as to what the content of the evidence actually was,
15 and within paragraph 427 of the decision, you will see an analysis of the evidence
16 that is based virtually 98 per cent upon the evidence of Witness 4 and Witnesses 11
17 and 12. But Witness 4, in respect of each aspect of criminal responsibility, was the
18 witness who was relied upon to confirm the charges, to prove the facts underlaying
19 the charges. Eleven and 12 were supportive of this case.

20 Now, why is that? Because 11 and 12 were actually providing hearsay evidence, not
21 direct testimony. So in summary now, what did 11 and 12 actually say when you
22 analyse footnote for footnote about the sources -- or from the sources relied upon by
23 the Pre-Trial Chamber?

24 First of all, the money issue in this case arises from OKA, O-K-A, Operation Kibaki
25 Again, which was paid in support of the election campaign by the Mungiki. That's

1 what 11 and 12 said. Eleven and 12 were not present at any single meeting or place
2 where such money was paid. They were told this by another person, D12-47, who
3 was in fact a Defence witness, and he said something else. The money could have
4 been paid by anyone from the Mount Kenya or Kikuyu elite. One of them said he
5 understood it was paid by Mr Kenyatta.

6 The concept of the case was not that of post-election violence; it was to support the
7 PNU election campaign, and we have had immortalised in stone this date of
8 30 December 2007, the date the election result was announced. In fact, the witness
9 said no meeting took place on that date. It was one or two days before and it was
10 not to do with the post-election violence, it was a meeting in relation to the support of
11 the PNU by the Mungiki in the election campaign, and key facts are put into the
12 mouth of this witness by the Prosecution investigator. The evidence does not arise
13 from him.

14 Furthermore, in the decision by the Pre-Trial Chamber, it was held and deemed very
15 important that the Mungiki were at the disposal of Mr Muthaura and Mr Kenyatta as
16 a result of payments that were made, but in fact, when you look at the source
17 evidence, the witness does not say that at all. He says the contrary, that there was
18 no reverting to Maina Njenga, as he was in prison.

19 So I have to say, in ten minutes in dealing with this issue, it would be impossible,
20 Madam President, because there are serious issues in the evidence in this case, which
21 is why we brought the application when 4 was deemed to be fraudulent, lied, with
22 evidence contradicting his case had been not disclosed to us, why we said the
23 Pre-Trial Chamber got this case wrong. And the analysis of the evidence, which we
24 seek to undertake, would take you through each footnote to the direct text, and I was
25 proposing to read it out for you.

1 I'm not just saying this because I'm Defence counsel making statements. All these
2 passages that I rely upon are in the direct transcripts, some of which have been
3 unpeeled from redactions for the first time.

4 So I will turn now to deal with section A of the confirmation decision, which is
5 preliminary contacts between Mr Muthaura and Mr Kenyatta's intermediaries.

6 These are all contacts before the post-election violence took place and so, in the
7 interests of time, I won't go through that section in detail, because there was no
8 common plan then. It is of historical use and so bravely, I may say, I will pass on
9 from that because the meat of this application is actually in the direct facts which go
10 to issues concerning the post-election violence and that comes in section B,
11 paragraphs 309 to 359, and it's the meetings, and this Court will know that there are
12 three meetings which were the foundation of this case for the Pre-Trial Chamber:
13 26 November, the date given, 30 December - but it's not - and 3 January.

14 So the first meeting on 26 November 2007 relies on the hearsay account provided
15 solely by Witnesses 11 and 12 that a meeting took place. They do not mention
16 Mr Kenyatta as being present at that meeting. It was solely Witness 4, who has now
17 been withdrawn from the case.

18 If we go to footnote 564, 0052-1506 at page 1513, you will see at line 258 that
19 Witness 11 learned of this meeting not from anyone at the time. He learnt of this
20 meeting from Ms Higgins, from the Defence lawyers, when he came to see us to
21 provide defence evidence and inform us generically about the Mungiki, and that is
22 this, "I remember this in particular, because this particular meeting, first in those
23 pictures that I was shown by the lawyers. I think it's the lawyers that referred to the
24 date," and he goes on to say he learnt about this meeting when he went, having met
25 us, to go and speak to the person we were inquiring about. That's the source of his

1 knowledge and a footnote in the decision. So he confirms that he is not in a position
2 in that page to say what happened that day. He doesn't say that Mr Kenyatta was
3 there, and he wasn't there himself.

4 So the Pre-Trial Chamber found further corroboration, allegedly, by looking at OTP
5 Witness 12, and we will go to footnote 566 and see how he got his knowledge.

6 He got his knowledge because this was a fact put into his mouth by the OTP
7 investigator, at line 843. The investigator says -- the interviewee says, "They went to
8 State House." He's not talking about Uhuru Kenyatta, he's talking about a meeting
9 generally. So, "They went to State House," and the investigator says, "So they went
10 to State House on 27 November?" Interviewee: "Yes." So that date was led to him
11 by the investigator, put into his mouth, and he isn't alleging that Uhuru Kenyatta was
12 there.

13 One other witness, OTP 6, is no longer a witness in this case. He was an anonymous
14 witness summary and not being used.

15 Let us now turn then, having dealt with 26 November, to what is one of the key
16 meetings; again, the second meeting, the so-called 30 December.

17 PRESIDING JUDGE OZAKI: Mr Kay?

18 MR KAY: Yes.

19 PRESIDING JUDGE OZAKI: Sorry to disturb you, but do you think you will go into
20 all the evidence right now, or -- because as I said, there is some time limitation, and
21 there are so many issues which is relevant not only to the Defence, but also for the
22 Prosecution and the Bench, and of course you have every right to make a written
23 filing, if you wish, but if you prefer to make oral submissions, of course the Bench
24 has --

25 MR KAY: Madam President --

1 PRESIDING JUDGE OZAKI: Which do you prefer?

2 MR KAY: Madam President, I am dealing here with a Prosecution that has said
3 things in this courtroom, that has put stuff on the internet in the last few days,
4 without having had any examination of its case like we are providing the Court.

5 As I said, this is not just Defence bluff. It may be that everybody thinks that what
6 defence lawyers do. This is actually referring the Court for the first time to the
7 Pre-Trial Chamber's decision and what this case is now left with, which is the basis of
8 the application.

9 I was proposing to direct you to this because it is important to hear it. We feel we
10 have been very badly served by the institution in this confirmation decision, because
11 when you look at the errors in this decision, they are fundamental. They have not
12 understood the case and it is quite clear where the -- what the actual text said when
13 you look at it carefully.

14 PRESIDING JUDGE OZAKI: Just a moment, Mr Kay.

15 MR KAY: Yes, I'm sorry.

16 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji would like to intervene.

17 JUDGE EBOE-OSUJI: Mr Kay, the -- one -- and this is on the substance, perhaps you
18 can word this into your submissions, if you do get there. To continue, the one
19 question that keeps troubling my mind, as you submit, and as I read the material, is
20 you ask us to send this thing back to the Pre-Trial Chamber. I'm sure you've looked
21 at Article 61(7)(c)(i), that is the provision that authorises the Pre-Trial Chamber to
22 invite the Prosecution to consider further evidence.

23 MR KAY: Yes.

24 JUDGE EBOE-OSUJI: If the matter gets there, how do you deal with that? How
25 does that help you? The reason I ask that, we need to keep this in mind while we

1 resolve this thing.

2 MR KAY: Because if we go back to the Pre-Trial Chamber with what is left here we
3 are able, for the Pre-Trial Chamber, to see the error essentially of what has gone on in
4 this case and reconsider their decision.

5 Pre-Trial Chamber may ask for further evidence, but we would be able to confront
6 that. All the new evidence - alleged new evidence - again, six of them, have come to
7 us, given statements to us, exculpatory statements. There's a game going on here,
8 which will not have escaped the attention of the Court. I've got them on tape, what
9 they say.

10 So there we are. So there's more in this case, but we are dealing with this specific
11 issue. And our position here is, and we've, in a certain extent, we have lost faith in
12 the decision-making because we did warn the Court, we warned the Pre-Trial
13 Chamber, about the quality of evidence, and we were ignored quite considerably.
14 But we say that this is a preliminary issue that is within the function of the Pre-Trial
15 Chamber as a -- as being the relevant body that has the capacity to deal with the
16 framing of the charge or whether there is or not a charge, and that that's why it falls
17 into 64(4) instead of Article 61(11), which is where you carry out their functions if it's
18 relevant to the function or you're capable of doing so, but 64(4) is a far bigger power,
19 so to speak, to revert more significant matters which would be, we submit, something
20 like this back for reconsideration as a preliminary issue, as to whether there is indeed
21 a charge here.

22 Madam President, I'm sorry, I don't want to appear to be rude, but being given ten
23 minutes to introduce the matter, that introduces the flavor of the matter, but I can
24 take you through footnote after footnote which establishes every single one of those
25 preliminary points that I put before you.

1 The meeting that has become cast in stone, of 30 December, the actual witness -- we'll
2 go and look at that very briefly now, at footnote 630, the witness says: "It was either
3 the day just before or the day before the elections were announced, the election
4 results, just before the election results were announced. It would have been that day
5 or a day before that it was just immediately then the elections were announced."

6 What's the significance of that? Well, there was no election violence on 28 December
7 or 29 December. The common plan doesn't arise.

8 So very, very important that the witness said that because crucially, when you go to
9 another case reference in footnote 630, page 0052 at 1514 -- I can't find the reference
10 there, Madam President, but the whole point is that the witness himself was giving a
11 completely different picture to the issue in this case. You are being asked to decide
12 upon the common plan that I am to address you upon and, actually, the common
13 plan has got elements of evidence that are not part of it here in the three significant
14 meetings.

15 If you go to the evidence, you can see that this meeting was convened before the
16 election results were announced because it was a rumour and very possible that Raila
17 would have won the election. So clearly before the election results were announced.
18 And this witness wasn't there, he wasn't present, so he can't say anything about what
19 actually happened at all, or even whether it did in fact take place. If we look at
20 footnote 633, again looking at his evidence, he makes it clear that money was being
21 paid before the election results for the Mungiki having supported the PNU, not for
22 funding the post-election violence. This is a very significant fact.

23 If I now turn --

24 PRESIDING JUDGE OZAKI: Mr Kay, can you -- just a moment?

25 (Pause in proceedings)

1 PRESIDING JUDGE OZAKI: Mr Kay, the Bench is very interested in listening to
2 what you are submitting right now; the problem is we have only two hours today,
3 and because of the Court's schedule which involves not only this case but also other
4 cases before this Court, it is very difficult to reschedule the status conference. It will
5 be very difficult to have additional status conferences, so what the Bench would
6 suggest is, because I see a lot of materials in your hands already, is it possible for you
7 to submit a written submissions about all evidences, which you are referring now,
8 and -- because the Bench -- the intention, the original intention of the Bench is not to
9 discuss actual evidences in this status conference but rather to focus on procedural
10 issues before us, like interpretation of Article *61 and 64.

11 So is it possible, Mr Kay, to submit the -- all your argument about the evidence in
12 written submissions?

13 MR KAY: Absolutely, your Honour, and we would be delighted to do so, and that
14 provides us then with an opportunity to direct the Court's attention to the state of the
15 evidence, which is an opportunity we have not had, and so it is a very important
16 matter.

17 And what we say is then, so that the Court can deal with the procedural issue, is that
18 the common plan, which is the fundamental point of the confirmation of charges
19 decision, when you go back to look at that evidence is such as to be unsustainable.
20 The real fact of the matter is that what was withdrawn against Muthaura should have
21 been withdrawn against Kenyatta, and we have here a very unfair and biased
22 decision that is keeping us in this case as a symbol, and I'm not saying that just
23 speaking out of hubris, I'm saying that because the key evidence against Muthaura,
24 which caused the withdrawal of his case, is exactly the same for Kenyatta.
25 The 3 January meeting doesn't exist, and 30 December there was never a meeting

1 anyway on that date. This has been misrepresented as having been part of the
2 evidence in the case and a misunderstanding by the Pre-Trial Chamber as to the
3 evidence which could clearly be read.

4 Now, I'm not being overly critical, because this case was done in a complete rush. It
5 was a rush to justice, the documents were served very, very late minute, full of
6 redactions, many issues for people to deal with, and they have taken a considerable
7 amount of time to analyse, to see exactly what is being said. But when we unpeeled
8 redactions as well as looked at the precise words being used, and relied upon by the
9 Pre-Trial Chamber, we were able to see that there had been significant errors in their
10 decision-making.

11 If that is the case, and this Court considers our written submission on a prima facie
12 business, this Court would be invited to turn to the Prosecutor and say "What is
13 going on here? If you're dropping against Mr Muthaura, you should also withdraw
14 the case against Kenyatta." Many Courts throughout the world do that as a matter
15 of course if there is an issue of unfairness.

16 If you're not prepared to do that, because of the errors, you could dismiss it of your
17 own motion maybe, but you could then refer the case back to the Pre-Trial
18 Chamber for them to consider. So that is the procedure we outline.

19 Thank you.

20 PRESIDING JUDGE OZAKI: Thank you very much. Now I would like to give the
21 floor to the legal representative of victims, and *considering the length of oral
22 submission by Defence, I would not like to limit the time for legal representative of
23 victims, but I just rely on your common sense.

24 MR GAYNOR: Very well, Madam President.

25 Madam President, very briefly, as to the legal position, in any case involving

1 participants in a common plan, evidence against each participant should be assessed
2 individually focusing on the participation in the common plan of that particular
3 participant.

4 Inevitably, there will be a different quantity of evidence about the participation of
5 each participant. The fact that the Prosecution does not have evidence sufficient to
6 sustain a reasonable prospect of conviction against one co-perpetrator does not
7 exclude the possibility that it has evidence sufficient to sustain a reasonable prospect
8 of conviction against a different co-perpetrator. There's no legal impediment to the
9 Prosecution proceeding against Mr Kenyatta having dropped the charges against
10 Mr Muthaura.

11 I'd now like to address, your Honours, the impact of the dropping of the charges
12 against Mr Muthaura two days after the election of Mr Kenyatta as President. Some
13 concerns have been expressed by the victims and I'd like to put them to you. It
14 should take no more than five minutes, I would say. Thank you.

15 Your Honours, those two developments, the election result and the withdrawal of the
16 charges, have resulted in a significant increase in levels of anxiety and fear among the
17 victims in this case.

18 As we are all well aware, Mr Kenyatta emerged as victor in the presidential election.
19 During the election campaign, he made statements in public that a vote for him and
20 Mr Ruto in the presidential election would be a vote of no confidence in this Court.
21 His supporters no doubt feel emboldened and encouraged by their victory in the
22 recent presidential elections and by the dropping of the charges against Mr Muthaura.
23 There is a significant risk that those supporters, whether they are within or outside
24 Mr Kenyatta's government, will do whatever they can, with or without his
25 knowledge or approval, to frustrate the progress of this trial.

1 If he is confirmed as president, Mr Kenyatta will be the Head of State, the Head of
2 Government, the Commander-in-Chief of the Defence Forces, the Chairman of the
3 National Security Council and the person ultimately in control of the police and the
4 State intelligence services.

5 Never before in history has a person with immediate access to such a vast structure of
6 power stood trial before an international court. Never before has there existed such
7 potential for an accused to use his own power, influence and wealth to affect the
8 outcome of the case against him.

9 Under Section 132 of the Constitution of Kenya, it is the president who is personally
10 obliged to, I quote, "... ensure that the international obligations of the Republic are
11 fulfilled through the actions of the relevant cabinet secretaries," unquote.

12 Mr Kenyatta pledged in his speech after his election victory to co-operate with all
13 nations and international institutions. I urge your Honours to be vigilant to ensure
14 that Mr Kenyatta, if he is sworn in as president, takes swift action to uphold this
15 pledge and to rectify any failure by the Government of Kenya relating to the
16 provision of access to witnesses and documentary evidence.

17 The withdrawal of the charges against Mr Muthaura and the reasons provided by the
18 Prosecutor for that withdrawal cannot be allowed to stand as an incentive to those
19 who would seek to undermine the work of this Court through bribery, intimidation
20 and blocking access to relevant evidence.

21 On behalf of the victims, I urge the Trial Chamber to do all within its power to ensure
22 that the best evidence possible is presented at trial, including holding Mr Kenyatta
23 accountable for any failure by the Government of Kenya to fully and promptly
24 respond to requests for access from this Court.

25 I also urge the Trial Chamber, on behalf of the victims, to make full use of your

1 powers under Article 64(6)(d) to order the production of additional evidence if it
2 appears to your Honours that the Government of Kenya has not fully complied with
3 its obligations under the Statute.

4 Last week, Mr Kenyatta pledged to serve all Kenyans equally and without
5 discrimination.

6 MR KAY: Your Honour, what's this to do with the Article 64 application? It
7 sounds very much like a political speech to me, with all due respect to my learned
8 friend.

9 MR GAYNOR: I will --

10 PRESIDING JUDGE OZAKI: I would like to ask parties and participants just to ask
11 for the -- ask for the Bench if any of you would like to stand.

12 Mr Kay?

13 MR KAY: I do have an application, your Honour, because this is a political speech,
14 rather than addressing your Honour on Article 64 and the issues as they would arise
15 in relation to the victims, and making general statements about enforcement of Court
16 orders, et cetera, are nothing to do with the issue before this Court.

17 It seems to me that mentioning positions of power, wealth, responsibility are nothing
18 to do with the legal issue that is before your Honour at all. If the Court thinks
19 otherwise so be it, but we are pressed for time.

20 PRESIDING JUDGE OZAKI: Legal representative?

21 MR GAYNOR: Madam President, I will be responding in full to the
22 Defence application to have the matter remitted to the Pre-Trial Chamber in due
23 course. I am providing your Honours with an update of the impact on the interest
24 of the victims of the withdrawal of charges against Mr Muthaura coming two days
25 after the election of the president. I will be finished in about -- in under one minute.

1 PRESIDING JUDGE OZAKI: Please proceed.

2 MR GAYNOR: Thank you.

3 Now, your Honours, Mr Kenyatta has given that pledge to serve all Kenyans equally
4 and without discrimination. For the thousands of Kenyans who were victims of the
5 crimes alleged in this case, it is important that he keeps this pledge. Specifically, it is
6 important that he does all that he can do as president to ensure that they receive
7 proper shelter, medical care and educational assistance and are not subject to any acts
8 of intimidation whatsoever from any of his supporters, and I fully intend to keep the
9 Trial Chamber informed of any relevant developments in this regard.

10 Your Honours, I do have submissions relating to the substance of the
11 Defence application. I can give them to you now or I can give them to you a little
12 later, as you wish.

13 PRESIDING JUDGE OZAKI: What do you mean by "substance of the Defence
14 argument?" You would like to address the evidentiary issues?

15 MR GAYNOR: No, not the evidential issues, but the procedural aspects of it.

16 PRESIDING JUDGE OZAKI: About the impact of withdrawal of charges, or --

17 MR GAYNOR: The Defence application to have the matter remitted to the Pre-Trial
18 Chamber, I do have submissions on that. If your Honours would like to hear them it
19 would take about five minutes, I imagine.

20 PRESIDING JUDGE OZAKI: Well, I think that should be addressed under a
21 different agenda item.

22 MR GAYNOR: Very well. Thank you, Madam President.

23 PRESIDING JUDGE OZAKI: Thank you very much.

24 Naturally I would like to give the floor to the Prosecution to respond, if the
25 Prosecution so wishes, but first of all I ask Prosecution not to go into evidentiary

1 details because in any case Defence will submit written -- Defence will file written
2 submissions.

3 And secondly, so far as the procedural and legal questions are concerned, because the
4 Bench has its own questions to ask I think it's better for the Bench to ask one or two
5 questions, because it has something to do with what Defence already raised, and then
6 I will give the Prosecution the floor to respond.

7 Is that fine with you, madam?

8 MS ADEBOYEJO: Yes, your Honour. That's fine.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 One of the questions the Bench have with regard to the impact of withdrawal of
11 charges against Mr Muthaura is that, as mentioned by Defence for Mr Kenyatta, the
12 Pre-Trial Chamber confirmed the charges against Mr Muthaura and Mr Kenyatta on
13 the basis of the control over the crime theory and this requires that each joint
14 perpetrator is able to frustrate the commission of the crime by not performing his or
15 her tasks. This means that the common plan could not have succeeded without the
16 contribution of Mr Muthaura, or a common plan even does not exist without
17 contribution of Mr Muthaura.

18 The Prosecution still maintain that the specific contributions initially alleged to have
19 been performed by Mr Muthaura were still essential to the common plan and, if so, is
20 it not incumbent upon the Prosecution to seek an amendment of the charges to
21 explain who instead of Mr Muthaura performed those acts?

22 MS ADEBOYEJO: Madam President, I'll be very brief because my learned friend,
23 Mr Lowery, is going to speak to the substantive issues with regards to the Article 64
24 and especially with regards to those specific points, but I will only say, your Honours,
25 that in response to that those discrete issues that your Honour has raised, yes, we -- as

1 far as we are concerned, with regards to the acts that have been attributed to
2 Mr Kenyatta, we are going to maintain that those acts are attributable to him. The
3 acts that are overlying or overlapping between Mr Muthaura and Mr Kenyatta, your
4 Honours, we would indeed still attribute those to Mr Kenyatta.

5 PRESIDING JUDGE OZAKI: So although Mr Muthaura -- so you still maintain that
6 there's a common plan, although Mr Muthaura is -- although now it is not
7 Mr Muthaura who --

8 MS ADEBOYEJO: Yes, your Honours, because for us there is no legal basis. My
9 learned friend on the other side has already conceded that, that there is no legal basis
10 why -- even though we have charged them as indirect co-perpetrators, there's no legal
11 basis why we cannot charge Mr Kenyatta alone, even though there was a common
12 plan between Mr Muthaura and Mr Kenyatta, and we maintain that there is
13 jurisprudence both in Bemba and in the Bashir case that supports our position and
14 we've already incorporated that in our filing 664.

15 PRESIDING JUDGE OZAKI: Mr Kay?

16 MR KAY: Madam President, for the avoidance of doubt, I wasn't conceding the
17 Muthaura element in the common plan at all. I was just saying, as a common
18 principle of law, that one person can go on trial as an indirect co-perpetrator. I was
19 not saying that the Muthaura acts can be relied upon as against Muthaura, because
20 plainly the Prosecution has withdrawn that evidence, so just to make it clear for my
21 learned friend.

22 PRESIDING JUDGE OZAKI: Thank you.

23 MS ADEBOYEJO: Madam President, your Honours, we can provide further
24 submissions on this and I will invite my colleague to speak to those issues.

25 PRESIDING JUDGE OZAKI: Yes, please.

1 MR LOWERY: Good afternoon, Madam President, your Honours.

2 Let me just make three short points to try to answer your question regarding the
3 mode of liability charged and the effects that the withdrawal of charges may have on
4 that mode of liability.

5 First, the question assumes that the control of the crime theory is governing law at
6 this Court. It is not. It's unsettled law. There have been two dissenting opinions
7 on that very point of law.

8 One of the first filings the Chamber asked the Prosecution to make in this case was on
9 our view of the law under 25(3)(a). In our reading of the law, there is no
10 requirement of an essential contribution by an accused such that the lack of that
11 contribution would frustrate the crime. So that's point number 1.

12 Point number 2 is - and we made this point in our filing of Wednesday last
13 week - indirect co-perpetration under Article 25(3)(a) is not the only mode of liability
14 open to the Chamber in this case. We have filed a Regulation 55(2) application;
15 again, very early in the case, at the first available moment, for the Chamber to give
16 formal notice to the accused that Articles (b), (c) and (d) were in play in this case, so
17 not just 25(3)(a).

18 We've given the Defence further notice with respect to that issue in the pre-trial brief,
19 so that's point number 2.

20 JUDGE VAN DEN WYNGAERT: Mr Lowery, may I interrupt you --

21 MR LOWERY: Yes, your Honour.

22 JUDGE VAN DEN WYNGAERT: -- with the permission of the Presiding Judge.

23 On your first point, it can well be that the Prosecution has a different view on the
24 essential contribution requirement, but don't we have to look at the confirmation
25 decision and the theory on which the Pre-Trial Chamber confirmed the case, the

1 charges against Mr Kenyatta in this case? And don't we have to it from there, rather
2 than from the point of view that you now are forwarding as the Prosecution's point of
3 view?

4 PRESIDING JUDGE OZAKI: And if I add, Mr Lowery, we are now discussing the
5 validity of confirmation of charges itself, so as Judge Van den Wyngaert said, that we
6 really have to start with the interpretation of -- given by the Pre-Trial Chamber in its
7 confirmation decision.

8 MR LOWERY: Thank you, Madam President, Judge Van den Wyngaert for your
9 questions.

10 The short answer to the question is, no, we do not believe that the Trial Chamber is
11 bound by the Pre-Trial Chamber's view of the law under 25(3)(a). If that were the
12 case, there would never be the possibility for the law of this Court to evolve beyond
13 that which the Pre-Trial Chambers set down in their confirmation decisions, so the
14 Pre-Trial Chamber, not the Trial Chamber, not the Appeals Chamber, would be the
15 beginning and the end of defining the law of this Court, and we say that cannot be
16 right.

17 Of course, Madam President, you're right that with respect to the Article 64
18 application, the starting point has to be the confirmation decision, but there this
19 brings me to the third point and last point I will make in response to the question,
20 which is -- which is this: Even if you assume that the Pre-Trial Chamber's view of
21 the law is correct, assume that an essential contribution is required under 25(3)(a), an
22 insufficiency of proof with respect to one alleged co-perpetrator does not necessarily
23 mean that there's an insufficiency of proof with respect to the other co-perpetrator.
24 So the withdrawal of charges of one alleged co-perpetrator does not necessarily mean
25 that the mode of liability fails as to the other.

1 Thank you, your Honours.

2 PRESIDING JUDGE OZAKI: Thank you very much, Mr Lowery. You referred to
3 the Regulation 55 application -- Regulation 55, and the Chamber is fully aware that
4 the Prosecution already is seeking -- made a filing in this respect. At the same time,
5 considering the current stage of the proceedings, does the Prosecution don't think
6 that it is appropriate for the Prosecution to seek an amendment of the charges against
7 Mr Kenyatta if Prosecution would like to seek different forms of participation?

8 MR LOWERY: Thank you, Madam President. To dispose of the Article 64
9 application, no, we do not believe it is necessary to seek a formal amendment. That
10 application can be disposed of, assuming that the current mode of liability, 25(3)(a),
11 indirect co-perpetration, holds. You can dispose of the application even if you
12 assume that to be true, and I can get into the substantive arguments why later on.
13 If your Honours wish for there to be a formal amendment of the updated document
14 containing the charges, such that Articles 25(3)(b), (c), and (d) are included, we
15 certainly wouldn't object to that. The key is obviously that the Defence are on
16 proper notice. We submit that they already are, but if the Chamber would like us to
17 amend the charges such -- so as to add those alternate modes of liability, we certainly
18 have no objection, your Honour.

19 PRESIDING JUDGE OZAKI: And the question relating to those alternative modes
20 of liability, has the Prosecution considered any possibility of charging Mr Kenyatta as
21 an indirect *perpetrator, instead of indirect co-perpetrator?

22 MR LOWERY: In this context, Madam President, we've proceeded on the basis that
23 the Court will examine the Article 64 application under the current mode of liability
24 25(3)(a) and we haven't considered that possibility for these purposes.

25 Thank you, your Honour.

1 PRESIDING JUDGE OZAKI: Judge Van den Wyngaert.

2 JUDGE VAN DEN WYNGAERT: In relation to the common plan, Mr Lowery, we
3 wanted to have a more specific answer to the question from the following perspective,
4 because in the confirmation decision the role of Mr Muthaura was described as being
5 an essential contribution to the common plan, *conditio sine qua non*, without which
6 the common plan would not have been realised.

7 Now that the charges against Mr Muthaura have been dropped, how in your view
8 does the common plan stand, because of the fact that this essential contribution has
9 been withdrawn, so to speak?

10 MR LOWERY: Fair question, your Honour. In our view, the important -- now that
11 the charges against Mr Muthaura have been withdrawn, obviously the focus of this
12 case is now Mr Kenyatta. The question is what was Mr Kenyatta's contribution to
13 that common plan, whether it's essential, as the Pre-Trial Chamber suggested,
14 whether it's less than essential, as we have suggested in our submissions on the law?
15 Whether or not Mr Muthaura had an essential contribution to the plan, that's not
16 what your Honours will need to decide in this criminal trial with Mr Kenyatta as the
17 defendant. The question for your Honours in this criminal trial is whether
18 Mr Kenyatta's contribution was essential or something less than essential, if you
19 decide to depart from the Pre-Trial Chamber's view of the law.

20 So the common plan, the allegations as to the scope of the common plan, your
21 Honour, they remain; it's just now that your focus shifts from contributions of two
22 accused to the contribution of one accused, and whether or not Mr Muthaura's
23 contribution was essential is neither here nor there at this point. Thank you, your
24 Honour.

25 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

1 JUDGE EBOE-OSUJI: Doesn't that depend on what we understand the word
2 "essential" to mean? Can you have two people who are making several
3 contributions to a plan, have those several contributions be essential to the realisation
4 of the objective? I think that would be the question, isn't it?

5 MR LOWERY: Thank you, your Honour. Well, you're right, it does depend to
6 some degree on the analysis of the law that the Chamber takes, whether a
7 contribution be essential or something less than essential, which is what we believe it
8 is if one looks at the underlying scholarly works that underpin the Pre-Trial
9 Chamber's control of the crime theory. But under any analysis, the key is to keep
10 focused on what your determination needs to be in this case. It needs to be what
11 was Mr Kenyatta's contribution.

12 Let's take Lubanga, just as an example. In Lubanga, in the trial judgment, the Trial
13 Chamber named co-perpetrators. They found that they were co-perpetrators. But
14 that judgment does not include findings that the contributions of those individuals
15 were essential. The Trial Chamber found, quite rightly in our view, that provided
16 Mr Lubanga's contribution was essential, under the Trial Chamber's understanding of
17 that term, that was sufficient for a conviction to be entered, and that's our position,
18 your Honour.

19 JUDGE EBOE-OSUJI: In the Lubanga case, were there two people charged with
20 essential contribution, or two people contemplated to have made essential
21 contribution?

22 MR LOWERY: Yes and no, your Honour. Lubanga was obviously a one-defendant
23 case, with just Mr Lubanga. However, there was an accused essentially charged
24 with the same criminal transaction, Mr Ntaganda, who was also charged as a
25 co-perpetrator, who obviously was not standing next to Mr Lubanga at trial because

1 he was and is on the run. So, no, not in a formal sense under that document
2 containing the charges, but in reality, yes, your Honour.

3 JUDGE EBOE-OSUJI: A related question to that: Did the Pre-Trial Chamber in
4 Lubanga characterise his contribution as essential?

5 MR LOWERY: When you say "him," your Honour, just to clarify, you're talking
6 about Mr Ntaganda?

7 JUDGE EBOE-OSUJI: Sorry, good question. Mr Lubanga.

8 MR LOWERY: Of all of the research I did for the status conference, your Honour, I
9 did not spend a lot of time on the Lubanga pre-confirmation decision, but if my
10 memory serves me right, it was classed as an essential contribution. That was the
11 genesis, if I remember well, of the control of the crime theory.

12 JUDGE EBOE-OSUJI: I think I should have corrected myself. Ntaganda, I mean to
13 say - sorry - that was discontinued.

14 MR LOWERY: Okay. To my knowledge, there was no such finding in the
15 confirmation decision, but, yes, your Honour.

16 JUDGE EBOE-OSUJI: Perhaps -- Madam President, I don't want to take the inquiry
17 off its course, but perhaps, Mr Kay, when it comes to your turn, be it in your written
18 submission or what, I'm interested in the question whether we are bound by the
19 pronouncements of the Pre-Trial Chamber made in the confirmation decision in
20 relation to questions of both law and fact, because that arises from this discussion
21 back and forth.

22 Thank you.

23 PRESIDING JUDGE OZAKI: Is that fine with you, Mr Kay?

24 MR KAY: Yes, your Honour, and paragraph 404 of the confirmation of charges
25 decision, the Pre-Trial Chamber found that the Chamber considered that, in the

1 absence of this action, common plan to commit the crimes would have been
2 frustrated and in this sense Mr Muthaura and Mr Kenyatta's contribution is to be
3 understood as essential within the meaning of the relevant element of indirect
4 co-perpetration, and that is the meeting on 3 January for which OTP-4 was the sole
5 witness, your Honour.

6 JUDGE EBOE-OSUJI: That wasn't my question, although it's interesting to hear it.

7 Sorry, Madam President, I should have asked you first.

8 My question was whether the Trial Chamber is necessarily bound by

9 pronouncements of the Pre-Trial Chamber, including on fact, as well as

10 pronouncements on what constitutes the law on common plan and other matters.

11 You don't need to answer that now. You can respond later.

12 MR KAY: Sorry, I thought you were asking me to direct you to the passage, because

13 I know Judge Van den Wyngaert was referring to that. I apologise.

14 PRESIDING JUDGE OZAKI: Thank you very much. One last question from the

15 Bench: With reference to paragraphs 4 to 10 of the Prosecution's observation of

16 13 March, Prosecution's position is that the essential contributions of alleged joint

17 perpetrators who are not jointly charged do not need to be proven.

18 In that case, is the Prosecution relying on the presumption that these contributions

19 could be proven if the person were charged, and is this presumption rebutted in the

20 current circumstances where the charges against Mr Muthaura have been withdrawn

21 on the grounds that there is insufficient evidence?

22 I understand that the Prosecution has partially already answered to this question, but

23 still the Bench would like to hear a full answer to this question.

24 MR LOWERY: Thank you, Madam President.

25 I'm just making sure I get the question right. There's a short answer to it, and the

1 answer is, no, we do not believe that as a matter of proof we're required to prove
2 essential contributions of non-charged co-perpetrators. If that were the case, your
3 Honours, these cases would be as much about individuals who are not in the
4 courtroom as it would about individuals who are in the courtroom.

5 It's our submission that the case should focus on the defendant and his or her
6 contributions, whether they were essential, substantial, significant, middling,
7 whatever word the Trial Chamber wishes to attach to those, but the focus should be
8 on the accused, your Honour.

9 PRESIDING JUDGE OZAKI: My question is that the Prosecution's presumption is
10 that these contributions could be proven if the persons were charged.

11 MR LOWERY: No, your Honour, we're not relying on presumptions here; we're just
12 saying that's an inquiry that need not be reached in a case where you have an
13 individual accused charged as a co-perpetrator and other non-charged
14 co-perpetrators. That question need not be reached. Therefore, there's no need to
15 rely on either presumptions or substantive evidence.

16 PRESIDING JUDGE OZAKI: Judge Van den Wyngaert.

17 JUDGE VAN DEN WYNGAERT: On what basis does the Prosecution then proceed
18 to include persons in the common plan?

19 PRESIDING JUDGE OZAKI: Whether this person is included in the charges -- I
20 mean, are charged or not.

21 MR LOWERY: Well, it's important to make a distinction here, your Honours. The
22 inclusion of an individual in the common plan is not the same as alleging that that
23 individual made an essential contribution. It's not the same.

24 In this case we allege that the members of the common plan were numerous. We've
25 detailed several of the key members who we say were involved in the common plan

1 in our pre-trial brief, so the Defence has plenty of notice, but their contributions need
2 not be proven as essential. That's our position, your Honour.

3 JUDGE VAN DEN WYNGAERT: I apologise for repeating myself, but if that means
4 that there is no consequence to be attached to the fact that Mr Muthaura's case has
5 been withdrawn, who was alleged to have made an essential contribution to the
6 common plan, which would have been frustrated had he not contributed, does that
7 not change the case? Does that not oblige the Prosecution to reconsider its charges?

8 MR LOWERY: Thank you, your Honour. No, we do not believe it necessarily
9 changes our case, no. Again, the focus must be on the accused in the courtroom. If
10 there were a necessary knock-on effect when the charges are withdrawn against one
11 indirect co-perpetrator, if we take that logic to its necessary conclusion, it would
12 mean that in every case where we have multiple accused charged under a
13 co-perpetration theory, decisions would have to be taken in lock step with relation to
14 those accused. So if you had a case with three alleged co-perpetrators all charged
15 under 25(3)(a) and the Chamber found that there was insufficient evidence as to one
16 that warranted an acquittal, it would have to find the same with respect to the others,
17 and in our respectful submission that cannot be right, your Honour.

18 That's our position. I hope that answers your question, your Honour?

19 PRESIDING JUDGE OZAKI: Thank you very much. Is there -- does Prosecution
20 would like to add anything on this specific legal question?

21 MS ADEBOYEJO: No, Madam President, your Honours.

22 PRESIDING JUDGE OZAKI: Defence?

23 MR KAY: The purpose of our application was because the common plan was held
24 by the Pre-Trial Chamber to concern only three people, and they didn't name others.
25 Their findings were very distinct, and it's the Prosecution who have said that this is

1 far wider, but actually that's not the case before this Court, because this Court is
2 seized of charges that were drafted - brought up - by the Pre-Trial Chamber, and the
3 Pre-Trial Chamber having exercised that function was providing the charges for this
4 Trial Chamber to take the case on to trial, which is the system of the ICC.

5 And so it is not the case, as stated by the Prosecution, that this trial was sent up by the
6 Pre-Trial Chamber in the manner that it is describing, and paragraph 404 is
7 fundamental to what the Pre-Trial Chamber found as the conditions for a charge to
8 go up for trial.

9 Prosecution aren't at liberty to take this in any direction that they want. The
10 evidence that we have been disclosed, and the manner of our preparation, is based
11 upon the regime set by the Pre-Trial Chamber in respect of the issues and the charge,
12 and that is why at paragraph 404, when the Pre-Trial Chamber found the trigger, and
13 they called it a trigger in another part of the decision, being this meeting on 3 January,
14 in which it was alleged Mr Muthaura had made a telephone call to the chief of the
15 police, that this was the essential meeting that provided for the plan to go forward in
16 relation to electoral violence.

17 All the activity before then is before the election results take place, so this matter and
18 this witness was the only witness on the matter, was fundamental to this case, and
19 that was one of the reasons, and perhaps one of the most significant reasons, for us
20 seeking a review under Article 64(4) of the basis of these charges.

21 It's not only this background of the evidence, it's what happened that it was a false
22 statement, as well as a withdrawal of his evidence, and the suppression of evidence.

23 So it's a combination of matters that bring us to your Honours with this issue, which
24 make our application out of the ordinary. It's not an application you'll have in many
25 cases, I doubt, or if ever again; it's rather an exceptional application.

1 PRESIDING JUDGE OZAKI: Judge Eboe-Osuji.

2 JUDGE EBOE-OSUJI: Mr Kay, of course, I mean, I'm sure you and I agree that this is
3 not an application that you'd have in too many criminal courts, besides this one.

4 One issue here that this whole thing throws up, of course, is the significance of the
5 confirmation process and the resulting decision of the Pre-Trial Chamber, particularly
6 when Article 61(5) and (7) talks about substantial -- sorry, sufficient evidence to
7 establish, "establish" substantial grounds to believe that a person committed crimes.

8 Are we talking about some sort of objective situation there that everybody is bound
9 by, or are we talking about the belief of the confirming body, being the Pre-Trial

10 Chamber, in which case one might ask the question: If the Pre-Trial

11 Chamber believes, as it does, the result of that is that the -- there should not be

12 frivolity to initiation of Prosecution, so they have looked at it and said, "Yes, we see
13 something here, the case goes forward to trial." But at trial, isn't the Trial

14 Chamber free to take a different view and at that stage isn't the Prosecution then free

15 to say, "Yes, the Pre-Trial Chamber found it believed, but we actually think there's

16 other reasons or there are other reasons to consider that this is a case that should be
17 taken seriously on the merits"?

18 MR KAY: I'm grateful for your Honour's observation on that, because hopefully this

19 will never be happening again, because this significant witness was the witness relied
20 upon for the investigation, for the issuance of summonses, and then for the

21 confirmation of charges. His statement is the backbone of the Prosecution case from
22 beginning to end to bring the jurisdiction of this Court to try the matter.

23 Now, the Pre-Trial Chamber, as the charge-framing body, found its grounds to

24 believe, that there was substantial grounds to believe, taking an objective test. They

25 took an objective test. They looked at the evidence and they came to that belief

1 based upon matters of evidence that it had taken in good faith, but it turns out that
2 that faith was misplaced. And we're not talking here about just a witness who goes
3 wrong; it was the witness who is the opening witness for each of the key facts in the
4 footnotes, and he is the witness who provided the facts that went to underlie the
5 charges, and then they went to the other evidence to see what else was around, and it
6 turns out that their Witnesses 11 and 12, and when you look at what was relied upon
7 there, it is a deeply unsatisfactory case.

8 And so faced with that, any Trial Chamber with this problem on its hands, because
9 the matters I outlined at the start concerning Witnesses 11 and 12, talking about
10 something else, are in the evidence.

11 This Court then is -- must say, "Well, what went on here? We've got an improperly
12 obtained confirmation of charges, that the supporting evidence to confirm those
13 charges doesn't even come up to scratch," I wouldn't be making this application if that
14 evidence came up to scratch, because it would be -- it would be ridiculous, but it is
15 evidence that at this stage, when you look at it, you should be deeply unsatisfied
16 about what has come up to your Court and refer it to the Pre-Trial Chamber, the
17 responsible body that has the capacity that is capable of framing charges to reconsider
18 the decision in view of what has happened. And we believe 64(4) is the mechanism
19 that enables that, in exceptional circumstances. This is not a flood-gate. The
20 Prosecution said that the flood-gates would be open, that everyone would be making
21 the application, that's plainly not the case.

22 JUDGE EBOE-OSUJI: I obtained a whisper to the Presiding Judge for one more
23 question and she said I may, and the reason I say that is, I was wondering whether at
24 some point one has to look at -- take a very pragmatic view of these things, in the
25 sense that we are talking about a situation where very experienced Defence counsel

1 has seen weakness in the case, or the Prosecution, the case that was confirmed, but
2 then he knows that the merits phase is not yet upon us, we are going further to a
3 point where he will unleash his full fire power against that evidence.

4 Do we need then to send this thing back to the Pre-Trial Chamber, with all the song
5 and dance involved, or do we need quickly to move forward and deal with this thing
6 and get it over with once and for all?

7 That is one pragmatic question that I want to ask and, as I ask that question, I also
8 think about here what would have happened if it was in the course of the trial on the
9 merits that this very experienced counsel has been able to tear the case of the
10 Prosecution to shreds, to the point where it really back feeds into the confirmation
11 decision in a very obvious way? Should we then stop at that point and send the case
12 back to the Pre-Trial Chamber because the evidence on which they confirmed the case
13 was weak?

14 MR KAY: It is a pragmatic question, and it's one that I had to go through to decide
15 the strategy in relation to this and it's one I considered.

16 If it happens after we've started the trial, the boat has left the port, we're all aboard
17 and then we have to deal with it while the ship is at sea, if I can put it that way, but
18 we haven't got to that stage yet because we haven't started our trial and so I haven't
19 unleashed my evidence to that effect.

20 JUDGE EBOE-OSUJI: Your fire-power.

21 MR KAY: Yes, my fire-power.

22 And we are -- so we have held back. So we have looked at this problem of the
23 charges and the case that we faced and we saw the pre-trial brief and it bore no
24 relation to the case upon which we were confirmed, and that troubled us because the
25 case had been stretched from the -- they say "evolved." It stretched in different

1 directions, which was not the evidence upon which our confirmation of charges was
2 heard.

3 So we say, if you're going to do that because you know that your evidence on
4 platform one that got you here is fundamentally flawed and you're trying to invent a
5 whole other case, let's go back and have that looked at to see whether it's -- there is in
6 fact substantial grounds to believe that that evidence comes up to muster and of
7 course the Defence can call evidence at the confirmation hearing and deal with it.
8 It might be said, "Well, you got a rough ride at the confirmation hearing and no one
9 listened to you," but we considered that because the case was being moved, our time
10 was short, we asked for more time and we got only limited time. In fact, with the
11 limited time we get to look at witnesses, we have felt that that's unfair as a matter and
12 I'll put that before you quite plainly.

13 We believed that the best thing to do, because this case was being moved in a way
14 that it was out of our control and not the case we were confirmed upon, that the
15 whole thing should go back and let's see first of all whether the confirmation of
16 charges Pre-Trial Chamber would have made that original decision.

17 It's quite clear from the decision, they would -- everybody looking at this decision
18 knows that it has been fundamentally taken apart, it is fundamentally defective and,
19 because of the particular procedures for this Court, that's the proper way of dealing
20 with it.

21 So we dealt with it according to the pragmatic way of the ICC we believed, your
22 Honour, but we did consider your Honour's point of view on the matter.

23 PRESIDING JUDGE OZAKI: Mr Kay, so the relief you ask is still basically referring
24 this case back to pre-trial in accordance with Article 64(4)? I ask this, because I think
25 you also mentioned about the withdrawal of charges against Mr Kenyatta?

1 MR KAY: Yes. If we're being pragmatic about the matter and we see something
2 that's utterly unsustainable, could this Court then take it upon itself to direct or order
3 the Prosecution to consider what it was doing?
4 Sitting as a judge in the UK one can ask them to consider their position and put it in
5 very strong terms, and then if they go ahead so be it, if they lose their case and the
6 public interest has been defeated, but we have this mechanism here where matters
7 can go back which are of a preliminary nature.

8 I do put forward that argument as something of a pragmatic nature. It might be one
9 that comes about after you've seen the written filings, and you can read for
10 yourselves and don't take it necessarily from me.

11 This problem arises when the investigations - most of the investigations - take place
12 after the confirmation hearing, and Judge Kaul in his dissenting opinion warned
13 about this and he said that the Prosecution should have their case ready, but it didn't
14 happen like that as you know from the figures that we gave you how large this case
15 became after confirmation and evidence being disclosed at a very, very late stage
16 because of the redactions regime and the protection of witnesses regime that made it
17 very difficult for us to prepare. And then you see the pre-trial brief, as we did, and
18 that immediately put me on inquiry as to, "What case am I now facing?" This was not
19 the case upon which charges were confirmed.

20 PRESIDING JUDGE OZAKI: Judge Van den Wyngaert.

21 JUDGE VAN DEN WYNGAERT: Mr Kay, I'm trying to understand what relief
22 you're asking from the Court. It seems to me that there's two different things. On
23 the one hand there's the question of the validity of the confirmation decision, whether
24 it still stands after the withdrawal of the charges in the Muthaura case, after the
25 recent information that we have about P4. This is one question that concerns the

1 validity of the confirmation decision as it stood when the decision was given.

2 The other question is whether the case upon the new evidence that has been
3 submitted has morphed into a new case, or whether the case that we have before us
4 now is substantially different from the case as it was before the Pre-Trial Chamber.

5 Do you want both issues to be referred back to the Pre-Trial Chamber under Article
6 64(4), or would you say that some of this is also within the province of what the Trial
7 Chamber can decide?

8 MR KAY: The matter to be referred back under Article 64(4) is the original
9 confirmation decision, and that was our filing as it was. This is not the new case that
10 they say they have. If that was so that would have to be a completely separate
11 confirmation of charges hearing, but the original case that you got and the decision
12 you got upon which the document containing the charges and the case plan is set out
13 is that confirmation decision. That is where -- that is what arises before the Trial
14 Chamber to go forward.

15 There may be some additions of evidence, as there always is, and I'm realistic about
16 that, but this case morphed entirely into a completely different case and that's a
17 separate matter, but we say our original confirmation decision, which is what they
18 had which got the case up here in the first place, that is what has to be looked at by
19 the Pre-Trial Chamber.

20 I mentioned about the withdrawal because, since we filed our Article 64 application
21 and the Prosecution put in their replies in opposition, then it changed to actually
22 them making the decision to withdraw against Mr Muthaura, so the whole context
23 changed even further from when we originally filed.

24 And so with that happening, with them doing it of their own motion, sometimes a
25 Court is able to give good advice to a Prosecutor that it sees is going in a very wrong

1 direction. Courts do that everywhere and, in my submission, that may be something
2 the Trial Chamber may want to consider doing in this case.

3 JUDGE VAN DEN WYNGAERT: What is the relief that you would then request for
4 this second question?

5 MR KAY: It's not in my power, because it would be something that came from you.
6 So I don't think I could -- well, I suppose I could request you to order them to
7 consider their position, but I wasn't being so presumptuous on the matter. Perhaps
8 I was taking more of a common law approach in this matter, I think I probably was,
9 but I hope I've answered the questions.

10 Thank you, your Honour.

11 PRESIDING JUDGE OZAKI: Regarding the scope of review of original confirmation
12 decision in case this Chamber decided to refer it back to the Pre-Trial Chamber, with
13 regard to submissions by Muthaura application -- with regards to the submission
14 made by the Muthaura Defence, Prosecution responded that if a referral was made
15 the Pre-Trial Chamber's review could be confined to the credibility of Witness 4.
16 I think that is the Prosecution's position.

17 Does this position still stand? Presume that Mr Kenyatta's case be referred back to
18 Pre-Trial Chamber, does Prosecution maintain that this kind of review be only
19 confined to credibility of witness number 4, or Pre-Trial Chamber can -- or Pre-Trial
20 Chamber can review the whole broad range of validity issue of the confirmation
21 decision and in that case Prosecution are allowed to submit various evidences which
22 they didn't submit at the original confirmation decision?

23 MS ADEBOYEJO: Madam President, Mr Lowery would answer one part and
24 then -- Mr Lowery will deal with it.

25 MR LOWERY: Thank you, Madam President.

1 As an initial point, it's not necessary to send this back to the Pre-Trial Chamber for
2 reconsideration because, even under the most charitable view of the non-Witness 4
3 evidence, we believe this case would have been confirmed. We can get into the
4 substance of that, but I understand that Mr Kay will be making further written
5 submissions and so perhaps that's the time to address that.

6 Assuming, however, that you disagree with us and refer the matter back to the
7 Pre-Trial Chamber, then the Pre-Trial -- you're correct, the Pre-Trial Chamber will
8 find itself in an awkward situation being asked to review basically a snapshot in time
9 of the evidence as it was in September 2011.

10 We believe that if this is going to happen that should be the Pre-Trial Chamber's
11 starting point, and the reason is a very practical one. A lot has happened in this case
12 between the confirmation hearing and now, as it will in every case.

13 Mr Kay mentioned Witness D12-47, a witness relied on by the Defence at
14 confirmation. Witness 4 is not the only witness for whom new evidence has
15 emerged post-confirmation. D12-47 is in the same boat. New evidence has
16 emerged that for us significantly undermines his credibility, so it would -- if we open
17 the door to new evidence it will quite quickly become a flood.

18 So in the first instance we would say the Pre-Trial Chamber should have a look at just
19 the affidavit of Witness 4, which was the document improperly withheld at pre-trial,
20 and determine whether that would have made a difference. If the Pre-Trial
21 Chamber wishes to consider the evidence that's subsequently been obtained, then of
22 course we would have no objection to it. We're entirely confident that that body of
23 evidence would be more than sufficient to surpass the substantial grounds threshold.

24 Thank you, Madam President.

25 PRESIDING JUDGE OZAKI: Thank you. Is that all?

1 MR LOWERY: Yes, it is, unless you have any further questions on that issue,
2 Madam President?

3 PRESIDING JUDGE OZAKI: Thank you very much.

4 (Pause in proceedings)

5 PRESIDING JUDGE OZAKI: Unfortunately, we don't have -- it is quite obvious that
6 we don't have time to deal with the rest of the subject matters which are relevant to
7 our future decision on the filing from Defence of Mr Kenyatta, so what the Bench is
8 now thinking is issues (b), for issues (b), (c), and (d), the Chamber will send its
9 questions in writing either later today or tomorrow to parties and the participants so
10 that parties and participants can file written submissions, written answers to those
11 questions. That's including Prosecution's response to allegations about witness
12 number 4.

13 Having said this, I would like to ask my colleagues if there is any specific questions
14 he or she would like to ask in the remaining ten minutes?

15 Judge Eboe-Osuji.

16 JUDGE EBOE-OSUJI: Thank you very much, Madam President.

17 I would like to ask Defence counsel, also the Prosecution, to consider and explain the
18 full import of Article 61(5), the second sentence there: "The Prosecutor may rely on
19 documentary or summary evidence that need not call the witnesses expected to
20 testify at the trial."

21 What does this really mean in all this debate, in particular? What does it mean in
22 relation to the assessment of credibility of particular witnesses who might have been
23 called at a confirmation hearing?

24 MR KAY: Shall I go first, your Honour? I'm grateful for that, because that's a very
25 pertinent question.

1 As I said, if this had been a witness on collateral matters, maybe important matters,
2 who was withdrawn or not relied upon, that's something that happens in a case, but
3 our point here was that this was a witness who was fundamental to each of the three
4 key meetings that underscored the confirmation of charges, and so when you had the
5 witness who was the witness relied upon to found the allegations, he has a far
6 enhanced significance.

7 If this was a witness who was one of seven, five, two, three, very different, then it
8 would be the other witnesses and one could say, "Ah, there -- that's sufficient." But
9 that wasn't so in this case because if you look at the facts relied upon, they are, as I
10 said, 98 per cent Witnesses 11 and 12, who came with a health warning because they
11 had been involved with the Defence, they had attempted to extort money from us,
12 they went to the Prosecution; they were playing both sides and then made their
13 statements.

14 When you analyse their statements, they weren't supportive of Witness 4, and that
15 was the key key point in looking at the footnotes of the confirmation decision as to
16 what was relied upon. So --

17 JUDGE EBOE-OSUJI: One question, sorry.

18 MR KAY: Yes.

19 JUDGE EBOE-OSUJI: Does that then not -- let me back up. This witness you're
20 talking about, although I see in the submissions his -- he was characterised as a
21 potential exculpatory witness PEXO, I guess we can loosely use that terminology, but
22 what the witness actually did in resiling his earlier implication of your client at the
23 meetings, was to say that he was no longer an eye-witness, you said he was not an
24 eye-witness, but he did not say that the meetings did not take place which, if he had
25 said, that might have put a different texture on the situation, but it seems that he's

1 continued to say that he was not there, but he heard about those meetings and who
2 were involved in it.

3 Now, assuming that the Pre-Trial Chamber had taken the view that that was -- sorry,
4 let me recharacterise. Does it mean that the Pre-Trial Chamber could not take the
5 view of this witness as hearsay evidence witness, combined with other hearsay
6 evidence, to form reasonable grounds to believe that there is a case to send up for
7 thorough inquiry?

8 MR KAY: Your Honour, it goes -- he was told to tell the truth. He didn't. And
9 this isn't just one statement. He started off not mentioning the meetings and Uhuru
10 Kenyatta. There is a series of statements made by this witness which were
11 significantly challenged by the Defence. He mentioned one meeting and failed to
12 say that Kenyatta was there until he got into the hands of the OTP, so it's not just, "Ah,
13 well, someone told him, so that's good enough." Not at all.

14 This evidence, your Honour, had a journey, and it started in one way and got bigger
15 and bigger and bigger, until it was a stage where you can't just say, "Oh, well, it's
16 good enough if he says" -- it was challenged evidence. He lied. He didn't lie once,
17 he lied twice, and then he gave a statement on a third document which was not given
18 to us and undermined the alleged consistency of his testimony that the Pre-Trial
19 Chamber found important, and the Prosecution had said this was consistent evidence
20 when they had evidence -- one of their trial counsel, who was in court, was making
21 submissions, was aware of this document saying the opposite.

22 So it is a matter that if I was sitting as a judge, I'd be wondering what had gone on?
23 I'd been utterly misled, not only by the witness, but by the activities of the counsel
24 and the Prosecution.

25 Now, I don't say that lightly, I'm not one to bandy that around, but that's what it

1 came down to. So we took the view that this was a fraud upon the proceedings, it
2 comes into that, and that court should sit back and look at its decision as to how it
3 came to it, what it relied upon, and whether it would make the same decision in view
4 of the very extreme circumstances that I hope will never happen again. It's been
5 unique in my career in this particular degree, and look at this case again, because it
6 was heavily fought for confirmation hearing, evidence was called by the Defence, and
7 nine-and-a-half pages of Defence evidence is referred to in the confirmation decision
8 which is dismissed.

9 So there was plenty of material that would have worked upon the Pre-Trial
10 Chamber's mind if it had had the full facts before it.

11 PRESIDING JUDGE OZAKI: Prosecution, would you like to respond?

12 MR LOWERY: Very briefly, your Honour, to Judge Eboe-Osuji's question. Article
13 61(5), for the purposes of this application, the key terms are sufficient evidence to
14 establish substantial grounds.

15 Our view is that even -- your Honour's right, it could be that the Pre-Trial
16 Chamber would have viewed Witness 4's evidence even with the recantations as
17 hearsay evidence and relied upon that, but we're not asking the Trial Chamber to
18 assume that here. We're saying even if you take the most charitable view of the
19 evidence, most charitable to the Defence, take the argument, the Defence argument, at
20 its highest, assume that Witness 4 would have been put aside entirely, his evidence
21 would have been discarded, our position is that there is still sufficient evidence for a
22 reasonable Pre-Trial Chamber to have confirmed.

23 And I fear in this hearing, your Honours, we may have made, the parties collectively
24 may have made this sound like it's more complicated than it is. There is an easy
25 way to dispose of this application.

1 Look at the 30 December meeting, just by itself. There's other evidence in the record
2 regarding Mr Kenyatta's other contributions, but the 30 December meeting, in and of
3 itself, is sufficient for criminal liability to attach.

4 Mr Kay has suggested today that this was a meeting held early, before things started
5 to happen. It may be that there's confusion as to redactions or recently disclosed
6 evidence, but that's simply not the case.

7 Mr Kay cited from footnote 633 of the confirmation decision, and I pulled it up while
8 we were in the hearing, the authority is -- it's Witness 11's testimony,

9 KEN-OTP-0052-1451, and the page is 1463. Mr Kay's suggestion was that the money
10 given at that meeting was for campaign purposes. Let me quote what the witness

11 actually said: "Part of that money is the money that was used to go and buy guns."

12 Your Honours, you don't use guns to campaign. The plan had already started on
13 30 December. If you look no further in the confirmation decision, 30 December is
14 sufficient to dispose of this application because, even putting aside the remainder of
15 the Pre-Trial Chamber's findings, that meeting in and of itself is sufficient for criminal
16 liability to attach.

17 That's the answer to your question, your Honour.

18 JUDGE VAN DEN WYNGAERT: One second. It seems to me that there's a second
19 part to what has been raised by the Defence, and it's the allegations of misconduct by
20 the Prosecution and its possible effects on the validity of the confirmation decision.

21 Unfortunately, we don't have the time to address this, because this was what the
22 Prosecutor was going to address last week in the afternoon, and again today we don't
23 have the time, but I think it's an important question for us to address, or the Pre-Trial
24 Chamber, because that's also one of the questions that is before us, whether this is
25 something that has to be taken into account in an Article 64(4) application or whether

1 this is something that could be assessed by the Trial Chamber itself, but given the end
2 of the tape, I must stop here.

3 PRESIDING JUDGE OZAKI: Well, I'm sorry, but the tape is really running out, so as
4 I said, the parties will be asked to submit their views in writing and the Chamber will
5 send its questions most likely tomorrow.

6 And, well, it has been a very fruitful status conference for the Chamber, and thank
7 you very much, parties and participant.

8 The hearing is adjourned.

9 THE COURT USHER: All rise.

10 PRESIDING JUDGE OZAKI: Mr Kay?

11 MR KAY: It was the timing of the analysis you wanted, because -- should we say
12 14 days for that to be produced? Would that suit the Pre-Trial Chamber -- the Trial
13 Chamber, sorry.

14 PRESIDING JUDGE OZAKI: Is that fine?

15 (Pause in proceedings)

16 PRESIDING JUDGE OZAKI: Well, I think we will set the dead-line in our written
17 order with our questions. So thank you very much.

18 The hearing is adjourned.

19 THE COURT USHER: All rise.

20 (The hearing ends in open session at 5.01 p.m.)

21 CORRECTIONS REPORT

22 The trial Chamber V has made the following corrections in the transcript:

23 *Page 12 line 10

24 "... like interpretation of Article 60, 61 and 64." Is corrected by "... like interpretation
25 of Article 61 and 64."

- 1 *Page 13 line 21
- 2 "... and concerning the length of oral..." Is corrected by "... and considering the
- 3 length of oral..."
- 4 *Page 22 line 21
- 5 "... an indirect co-perpetrator,..." Is corrected by "... an indirect perpetrator,..."