

1 International Criminal Court

2 Trial Chamber V(b) - Courtroom II

3 Situation: Republic of Kenya

4 In the case of The Prosecutor v. Uhuru Muigai Kenyatta -

5 ICC-01/09-02/11

6 Presiding Judge Kuniko Ozaki, Judge Robert Fremr and

7 Judge Geoffrey Henderson

8 Status Conference

9 Thursday, 13 February 2014

10 (The hearing starts in open session at 9.35 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is
12 now in session. Please be seated.

13 PRESIDING JUDGE OZAKI: Good morning, parties and participants,
14 and welcome to this Status Conference.

15 I apologise for the compact size of this courtroom because there
16 are other trials going on in the other courtroom which is confirmation
17 hearing of Ntaganda case.

18 First of all, as usual, can counsel introduce themselves for the
19 record of the Court, starting with Prosecution.

20 MR GUMPERT: Certainly, Madam President. My name is Ben Gumpert,
21 and with me today are Adesola Adeboyejo, Manoj Sachdeva, Shamiso Mbizvo,
22 Julian Elderfield, and Sam Lowery.

23 PRESIDING JUDGE OZAKI: Thank you.

24 Defence team, please.

25 MR KAY: I'm Steven Kay of Queen's Counsel, with Gillian Higgins,

1 Desterio Oyatsi, Mr Ben Joyes, Kirsty Sutherland, as well as
2 Mr Kennedy Ogeto. Thank you.

3 PRESIDING JUDGE OZAKI: Thank you.

4 Legal Representative of Victims.

5 MR GAYNOR: Good morning, Mr. President. Appearing for victims
6 today, I'm Fergal Gaynor. Appearing with me is Caroline Walter of the
7 OPCV, and to her right is Anushka Sehmi, our Case Manager.

8 PRESIDING JUDGE OZAKI: Thank you very much.

9 And today representatives of the Government of Republic of Kenya
10 are also joining us. And you are very welcome. And we thank you very
11 much for attending this Status Conference, and the Chamber appreciates if
12 you could also introduce yourself for the record.

13 MR MUIGAI: Madam President of the Court. My name is
14 Githu Muigai, I'm a senior counsel of the Kenya Bar and Attorney General
15 of the Republic of Kenya since September 2011. I am also admitted to
16 practice before this court independently. I am here today with my
17 assistant, Mr Dan Ochieng, Ms Caroline Wamaitha, and Mr Tom Odede. Thank
18 you.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 And as usual, I'd like to remind everyone to speak slowly and to
21 pause for several seconds in between speakers in order to ensure accurate
22 transcription and interpretation.

23 Today we are scheduled to sit until 11.00 and take a 30-minutes
24 break, and then continue from 11.30 to 1.00 p.m. We will only resume in
25 the afternoon if that is absolutely necessary, and I hope not.

1 This Status Conference was called on 6 February by court order
2 897, and the purpose of this Status Conference is to discuss matters
3 relating to the Prosecution's request for a finding of noncompliance,
4 pursuant to Article 87(7) of the Rome Statute.

5 So far we have received written filings on this matter, from the
6 Prosecution, filings 866 and 896; the Registry, filing 877; and from the
7 Government of Kenya, filing 877, Annex 2. In the interest of
8 expeditiousness, the Chamber would like to ask that submissions made in
9 the written filings not be repeated here as the Chamber has already taken
10 careful note of them. However, we'd like to take the opportunity today
11 to seek some further clarification on particular points.

12 At the outset, we'd like to note that, in principle, it is not
13 normally the role of this Chamber to interpret national laws. However,
14 given that the questions before us relate to the implementation of Rome
15 Statute through national law and execution of request made thereafter, as
16 well as the fact that the government has -- Government of Kenya has
17 specifically invoked certain national legal provisions in its pleadings,
18 and the Chamber would like to seek some further clarification on those
19 matters relating to national law as well.

20 As a preliminary matter, we note there is a disagreement
21 regarding the interpretation of the word "court" in the context of making
22 requests for assistance under Article 93(1) of Rome Statute. I would
23 like to start asking a question to representative of Kenyan Government.

24 The first question is: Our understanding of Kenyan Government's
25 position is that the court and the Prosecution are distinct entities for

1 this purpose and that their obligation to comply with requests pursuant
2 to Article 93(A) of the Statute does not apply to requests made by the
3 Prosecution. Is that correct description of the interpretation of Kenyan
4 Government? And in your response, please, you may also, if you so wish,
5 address the specific points regarding interpretation of the word "court"
6 that were raised in the Prosecution's most recent filing, which is filing
7 894. And I would like to give the floor to the representative of
8 Government of Kenya.

9 MR MUIGAI: Madam President, first I want to say how much the
10 Government of the Republic of Kenya appreciates the opportunity to be
11 before the Court and to assist the Court in arriving at a fair
12 determination of the questions that have been placed before the Court.
13 In particular, we welcome the opportunity to clarify the interpretation
14 of Kenyan law that has been placed before this Court in the course of the
15 hearing that has taken place.

16 I wish to draw the Court's attention to my filing dated
17 yesterday, 12th February 2014, in which I have, to the best of my
18 ability, tried to answer some of the issues that were raised by the Court
19 in the current order that has been served on us.

20 But before I answer your question, Madam President, I would seek
21 a clarification from the Court, because when I look at the order dated
22 7th February 2014 in its material part, which is paragraph 10, it is
23 stated there, Madam President:

24 "The Chamber considers that it would be assisted by receiving
25 submissions from the Government of Kenya, pursuant to Rule 103(1) in

1 relation to the Prosecution's requests."

2 At 11, the order states:

3 "However, the Chamber notes that the Kenyan Government has
4 already extensively addressed the questions of its alleged
5 non-co-operation in it's observations. Therefore, in granting the
6 Rule 103 request, the Chamber directs the Kenyan Government to confine
7 its submissions only to the other two issues identified in Rule 12 -- 103
8 request. "

9 So I would like a clarification, Madam President, whether you and
10 the Court would like us to address all three issues identified at
11 paragraph 7 of the order or merely (ii) and (iii), because what we have
12 done in our response is respond to (ii) and (iii). And if the Court
13 would like us to respond more extensively as well to the general issue of
14 co-operation and therefore the distinction we have placed in our various
15 opinions between that the Court, being the Trial Chamber, in one sense of
16 the meaning; and the Court being the Trial Chamber under the Chambers and
17 the Register and the OTP and the entire infrastructure of the court. In
18 that -- if we're required to make clarifications on this other point,
19 we're happy to but we need your guidance.

20 PRESIDING JUDGE OZAKI: Thank you very much for clarification.
21 The Court would like to remind you that there are two distinct issues
22 before this Chamber. One is an issue relating to the Prosecution's
23 request for adjournment of trial date, and the other you referred to was
24 relating to that issue. And the -- the issue now before this Status
25 Conference is about the -- another request from the Prosecution about the

1 noncompliance of the obligation under the Rome Statute.

2 So for this Status Conference, the Chamber's intention is to
3 concentrate on the issue of noncompliance. And your submission yesterday
4 was requested in the context of the first issue, which is the adjournment
5 of the trial start date. And of course, you are free to refer to your --
6 any submission of yours to the extent that it relates to the
7 noncompliance issue, which is the issue before this Status Conference.

8 And as for the -- your submission yesterday, we note that this
9 submission is marked as confidential. And if -- and you're, of course,
10 free to refer to your submission yesterday as long as this relates to the
11 noncompliance issue. But if you want to refer to the submission
12 yesterday, either you should ask for the reclassification of this
13 document into public document, or if you want to mention any confidential
14 information contained in this confidential document, we can always go
15 into private session. So it's up to you how to refer to your submission
16 yesterday.

17 MR MUIGAI: First I want to thank you, Madam President, I think
18 that is where I should have started. The filing yesterday erroneously
19 indicated that it was the desire of the Government of Kenya to file it as
20 a confidential document. We regret that error. Actually, it should have
21 indicated that it was intended as a public filing. To the best of our
22 appreciation of the law applicable in this court, there is no material
23 contained in this document that is of a confidential nature.

24 And if the Court was pleased to permit a reclassification, we
25 would be most obliged and it would be classified as a public filing.

1 PRESIDING JUDGE OZAKI: Thank you very much.

2 So court officer, can you reclassify this document? I think
3 it's -- I don't have the number right now, but you know, into public
4 document. Thank you.

5 MR MUIGAI: Madam President, I would like to respond to your
6 question about our characterisation of the -- our relationship with the
7 court and its various organs by, if I may, giving a very, very short
8 history, very brief history.

9 The impression has been created in this court and elsewhere that
10 the Kenya Government has not at any time extended any co-operation either
11 to this court as a judicial organ, meaning the Chamber and its appellate
12 component, or to the Office of the Prosecutor, or to the Office of the
13 Registrar, or to the Witness Protection Unit, or, indeed, to any person
14 associated with the court.

15 Madam Chair, Madam President, nothing could be further from the
16 truth. You will find in the records of this court that the Government of
17 the Republic of Kenya, without any prompting, without being required to
18 do so by any person whatsoever, voluntarily approached this court on the
19 8th of April, 2013, and sought this court to permit that the
20 Government of the Republic of Kenya should place on record its various
21 efforts to co-operate with the court.

22 I don't know whether I should go to the history of that matter
23 because it is very, very well set out in great detail, both in my filing,
24 the response of the Prosecution, and the order of the Court that arose
25 from that process. The -

1 PRESIDING JUDGE OZAKI: Mr Attorney General, I think as I said, I
2 don't think you need to go back to your written filings. As I said, the
3 Court has already taken note of this.

4 MR MUIGAI: Very well. I appreciate that.

5 In response to the very specific question you have placed to me,
6 or rather addressed to me, which is the question whether the Government
7 of Kenya draws a distinction between the court as a judicial organ and
8 the Office of the Prosecutor, the answer is in the affirmative. We do.
9 And this issue -- our opinion on this issue has been on record for the
10 last one year. Indeed, it may very well be in excess of a year because
11 when I first wrote to Madam Fatou Bensouda, the Prosecutor, on the
12 23rd of November, 2012, a document that has and will be relied on by the
13 Prosecutor, I very clearly laid out this argument that the Government of
14 the Republic of Kenya took the view, a legal view, an issue of
15 jurisprudence that there were certain requests for co-operation that
16 could be made by the Prosecutor as an independent organ of the court,
17 identified clearly in the Statute of Rome.

18 And there were other requests of a judicial character that
19 required a Court order to be available for enforcement.

20 If I have your permission, I would read from this letter very
21 briefly.

22 PRESIDING JUDGE OZAKI: Mr Attorney General, I think we have your
23 letter already in our case logs.

24 MR MUIGAI: You do have my letter.

25 PRESIDING JUDGE OZAKI: Yes.

1 MR MUIGAI: So I want to affirm that it is indeed true that the
2 Government of the Republic of Kenya takes the view that the Prosecutor is
3 not the court - the Prosecutor is not the court - for purposes of certain
4 aspects of co-operation of a judicial character that require to be
5 supported by either an order of the court, a directive of the court, or
6 merely a declaration of the existence of an obligation by the court.

7 And we therefore took the view, for example, just to put that
8 point to rest, that where the Government of the Republic of Kenya was
9 required to undertake a process in the Republic of Kenya, which was
10 regulated in very clear and specific manner by existing Kenyan law, then
11 there would be a necessity for the Prosecutor to have approached the
12 court with an instrument that is to be affected under Kenyan law.

13 And allow me to say this, for example, Madam President, we have
14 received from this court a warrant of the arrest of a Kenyan citizen
15 against whom allegations of interference with witnesses have been made.
16 Upon receipt of that warrant, we have submitted the warrant to the Kenyan
17 judicial process. And as we speak today, Kenyan courts acting in
18 accordance with the International Crimes Act, which is the law in Kenya,
19 seeking to effect the Rome Statute, are already processing the warrants
20 in that manner.

21 It is our submission, therefore, that where we have been of the
22 view that we could co-operate the Prosecutor without requiring a court
23 order, we have done so.

24 Let me give you an example, Madam President. The Prosecutor
25 admits that, since 2009, the Government of the Republic of Kenya entered

1 an MOU with the court that facilitated the transfer of staff of the court
2 to Kenya. These staff members remain in the Republic of Kenya under the
3 protection of the sovereign Republic of Kenya. That is a co-operation
4 for which we did not need a court order.

5 The previous Prosecutor of this court, Mr Ocampo, came to Kenya
6 no less than three times, was escorted throughout the Republic of Kenya
7 to meet whoever he wanted to meet in Kenya, whether in private or in
8 public. That's a co-operation for which we did not need a court order.

9 In my own ten years as Attorney General, Madam President, I have
10 facilitated the visit to Kenya of Madam Fatou Bensouda; in fact, in
11 circumstances in which we met at a conference in Berlin and she said to
12 me, "I would like to come to Kenya." And I said, "Give me your diary.
13 Tell me when you want to come." I did not ask for a court order.

14 In Kenya today, as we speak, there are several investigation
15 teams throughout the Republic of Kenya under the guidance of the
16 Prosecutor and the investigation office being facilitated daily by the
17 Kenyan Government to visit any place that they would wish. We have never
18 asked for a court order.

19 We drew the line, and shall continue to draw the line unless
20 there is an order to the contrary, when we were requested by the
21 Prosecutor - as a right, as a right - she asserted the power of the court
22 as a power available to her personally, and we disagreed.

23 Madam President, when two lawyers disagree on how the law should
24 be interpreted, it is not an act of non-co-operation. It is not an act
25 of non-co-operation. It is issues are joined. And we invited

1 Madam Prosecutor, in the letter that you have said, Madam President, that
2 you have seen, over one year and three months ago I told Madam
3 Prosecutor: "This is my understanding of the law, and I welcome the
4 opportunity for you to go before the court so that the court may guide
5 both of us." One year, three months later, the Prosecutor has never come
6 to the court on that question.

7 The Prosecutor now seeks to come to the court for an
8 interpretation on that issue through the back door, through an
9 application by, A, where they seek to have a continuous on this matter
10 indefinitely and where the Defence seeks to have the matter terminated.
11 On that point, the Prosecutor has remembered the long outstanding
12 jurisprudential contestation. Not lack of co-operation. A
13 jurisprudential contestation where there is one interpretation of the law
14 by them and one by us.

15 And therefore I summarise my submission on this point by saying
16 if the Kenyan Government was not intent on co-operating, this - this -
17 exchange of communication, voluminous citations of law by me, and I must
18 in fairness to the Prosecutor say by the Prosecutor, quoting learned
19 authors, quoting the preparatory text of -- of the treaty. And therefore
20 I suggest, with tremendous respect to the Court, that it is indeed our
21 position that there is a distinction between the Prosecutor as such and
22 the court as a judicial organ as such and that that is borne out by the
23 treaty and the Rules, and that Kenya has not taken that position
24 flippantly, frivolously, or to obstruct justice. But it is to ensure
25 that the Rome Statute, the constitution of Kenya, and international

1 crimes act are enforced in a harmonious manner.

2 PRESIDING JUDGE OZAKI: Thank you very much.

3 Judge Fremr has a question.

4 JUDGE FREMR: Thank you for the floor.

5 Mr Attorney General, you said that the interpretation of
6 different lawyers could be of one provision of -- by different lawyers
7 could be different. That is why I would like to know your
8 interpretation, and I'm sure that you know perfectly Article 34 of the
9 Statute, but maybe for the needs of public I will quote it. Article 34:

10 "Organs of the Court.

11 "The Court shall be composed of the organs:

12 "(a), the Presidency;

13 "(b), an Appeals Division, a Trial Division, and Pre-Trial
14 Division;

15 "(c), the Office of the Prosecutor;

16 "(d), the Registry."

17 So at least this article doesn't make any distinction among those
18 organs. So may I know your interpretation of Article 34?

19 MR MUIGAI: Yes, I would be happy to answer that. And I think it
20 goes to the point that I was endeavouring to make earlier, which is this:
21 This treaty, and indeed many statutes of state parties seeking to develop
22 domestic legislation to enforce the treaty, speak of the court in two
23 senses. When Article 34 speaks of the court in its corporate entity,
24 that this is the International Criminal Court, it is one entity with one
25 seal. It is a body corporate. And within it, it contains the four

1 divisions that are set out there.

2 But you will note, sir, if you -- if you look at Article 38, for
3 example, Article 38 talks about the Presidency of the court. And
4 Article 42 talks about the Office of the Prosecutor; Article 43, the
5 Registry.

6 Now, let me give you an example of Article 48: "Privileges and
7 immunities." When it says there the privileges and immunities:

8 "The Court shall enjoy in the territory of each State Party such
9 privileges and immunities as are necessary for the fulfilment of its
10 purposes."

11 That is the court in its corporate sense. But when we go to the
12 question of, for example, the powers and functions of the court, for
13 example, let's look at Article 62. Article 62 talks about the place of
14 trial. Unless otherwise decided, the place of trial shall be the seat of
15 the court. The seat of the court in this sense is the seat of the
16 judicial organ. It is the seat of the judicial organ. It does not, in
17 our very humble view, have the same meaning as you have identified in the
18 corporate definition of the court.

19 And when we talk in -- Article 62 says of the powers of the Trial
20 Chamber, now the Trial Chamber is a much more specific body, so that
21 again the inference to be drawn there is that there is a recognition that
22 the court functions as a corporate body for certain purposes and the
23 court functions as individual, autonomous, institutions for other
24 purposes.

25 So if I may say this, with your kind permission: This form of

1 structure that we have in this court, of which Kenya is a proud member,
2 is a very unique structure in criminal jurisprudence. It is a very
3 unique structure where you have the judicial chamber and the investigator
4 and the Prosecutor housed in one institution. Because in most
5 jurisdictions, the professional distance between the judicial organ -
6 that is, the court - and the Prosecutor who is in an adversarial
7 relationship with the Defence is a very serious matter. So in this as we
8 read the Rome Statute, I want to suggest, we must remember that
9 international best practices are where the judicial chamber and the
10 Prosecution are completely at arms-length, completely. I would say three
11 arms-length, because any other perception that the judicial chamber and
12 the Prosecutor are one organ would seriously do violence to our sense of
13 justice and fair play.

14 Therefore, we resubmit this: The Prosecutor is not the court.
15 The Prosecutor is an organ of the court for functionality only. For
16 functionality only. But the Prosecutor cannot take the garments of the
17 court and parade -- the Prosecution cannot parade itself in the garments
18 of the court demanding and invoking powers that inhere in the court
19 itself as a judicial body because to do that would to -- to create a
20 playing field that can never possibly produce justice. That is my
21 submission.

22 JUDGE FREMR: Thank you, Mr Attorney General.

23 PRESIDING JUDGE OZAKI: Another question I would like to pose to
24 the Government of Kenya.

25 In the written submission of the Government of Kenya, you

1 referred to the Kenyan International Crimes Act, the legislation which
2 was passed in Kenya to domesticate the Rome Statute, and could you please
3 confirm whether that is the national legislation through which the
4 Prosecution request could be processed? And if so, we note that
5 Article 2 of the International Crimes Act contains a definition of ICC
6 which specifically includes any of the organs of the court referred to in
7 the Rome Statute, and the term "ICC" is then subsequently used in the
8 co-operation articles in this act.

9 Could you clarify if that definition of International Crimes Act
10 consistent with the interpretation of Article 93(1) of the Rome Statute
11 which you have just explained?

12 MR MUIGAI: Yes, Madam President. I am happy to confirm that the
13 International Crimes Act of the Republic of Kenya is the statute that we
14 have used to domesticate the Rome Statute. And it confirms in its main
15 title that this is an act of parliament to make provision for the
16 punishment of certain international crimes; namely, genocide, crimes
17 against humanity and war crimes, and to enable Kenya to co-operate with
18 the International Criminal Court established by the Rome Statute in the
19 performance of its functions.

20 Let me come, Madam President, to your question about Article 2.
21 It is indeed true that Article 2 defines the ICC as the International
22 Criminal Court established by the Rome Statute and includes any of the
23 organs of the court that are referred to in that statute.

24 We find absolutely no contradiction whatsoever. Article 2 is
25 making the same recognition as the Rome Statute does, that the court

1 exists in the first instance as a corporate body; and secondly, it exists
2 in its distinct, individual, independent, but interdependent parts.

3 That's why, and I'm not are a draftsman, Madam President, and I have
4 great respect for draftsman, but I think the comma there is very
5 material. The comma is very material. It says:

6 "The ICC means international Court established by the Rome
7 Statute, and includes," and includes, "any of the organs of the court
8 that are referred to in the Rome Statute."

9 When you retire to deliberate on this matter, Madam President and
10 the Court, and this statute becomes available for you to peruse, it will
11 become clear that, like the Rome Statute itself, it makes many, many
12 distinctions between the court as a judicial organ, the Prosecutor, the
13 Registry, and other organs. And let me give you just one example.

14 Who is required to co-operate with the court under Kenyan law?
15 There are two ministers, in that sense of that word, they are two persons
16 who are required to co-operate - and that is part of our submissions
17 which we filed yesterday - one is the Attorney General and the other one
18 is the minister of the interior. And almost without exception, the
19 facilitation by the minister of the interior, which is considered by the
20 Prosecution in the hundreds of letters that they have written over the
21 last five years that Kenya -- over five years now, that Kenya has been a
22 situation country, is that communication with the minister of interior
23 requiring the co-operation of that ministry is almost exclusively in
24 respect of nonjudicial processes. And the co-operation of the Attorney
25 General in almost nine out of ten is in regard to judicial or

1 quasi-judicial processes.

2 And therefore, I want to answer your question by confirming that
3 in our own understanding of our own law, we enacted Article 2 --
4 Section 2(1) of the International Crimes Act 2008 to be read in the same
5 way as we are able to read Article 40 -- sorry, not Article 40. I have
6 misplaced -- yeah, Article 34. I'm calling it Article 43, article. And
7 the two are consistent and there is no controversy whatsoever.

8 And I -- maybe, if I still have one minute, can demonstrate that
9 again by going back to a question that has -- I have already addressed
10 relating to the warrants that we received from this court.

11 And again, you can see the multiple usage of the word "court,"
12 because this court was approached by the Prosecution to issue a warrant.
13 The "court" there means "the judicial organ." The judicial organ in its
14 absolute discretion made a judicial order, but the transmission of the
15 judicial order to the Government of the Republic of Kenya is not made by
16 the court as a judicial organ. It is made by the Registry as an organ of
17 the bigger corporate court. And therefore the meaning continues to be
18 consistent, the meaning that the court as a judicial organ and the court
19 as a corporate body are consistent is, in our very humble view, very
20 clear. And therefore, our statute is clearly in -- consistent with the
21 treaty, which is our intention.

22 Only before I sit down to mention that whenever it is said that
23 Kenya has failed to co-operate with the court, the very existence of
24 Kenyan law in force effecting the Rome Treaty is the primary evidence of
25 the enthusiasm with which Kenya has always embraced the court since it

1 became a party to the court. And I have looked at how many state parties
2 actually have domestic legislation, and Kenya is in a very unique
3 position in that view.

4 And I also wish to add this. I have also looked at the history
5 of this court. And unless I have missed something, I was unable to find
6 in the history of this court, in excess of ten years, an occasion when
7 the Attorney General of the republic in question - the situation
8 country - has come to this court in person, in person, not by retaining
9 counsel, in person, to say: This is what we have done, this is what we
10 are doing, and this is why we are doing it. That, to us, is the ultimate
11 example of co-operation, the ultimate insignia of the respect that the
12 Republic of Kenya holds this court.

13 PRESIDING JUDGE OZAKI: Thank you very much.

14 (The Trial Chamber confers)

15 PRESIDING JUDGE OZAKI: Thank you very much.

16 We would like to move on to other more specific points, unless
17 any of the parties and participants wish to specifically address this
18 question of our interpretation of the word "court" beyond the submissions
19 they have previously made on the point.

20 MR KAY: Your Honour, I --

21 PRESIDING JUDGE OZAKI: Defence.

22 MR KAY: Your Honour, I remember being on my feet on the previous
23 occasion last week and specifying within Article 93 that there was the
24 court or the Prosecutor, and I couldn't remember the particular
25 provision. During the Attorney's submissions to you this morning, I

1 noticed it's Article 93, sub-article (5) which I've been able to note,
2 which is an article -- 6, sorry, Article 93(6), which is consistent with
3 the Attorney's submissions, I believe, this morning.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 Prosecution.

6 MR GUMPERT: On that precise matter, can I invite the Court's
7 attention to the very article and sub-article to which Mr Kay has
8 referred, Article 93(6):

9 "If a request for assistance is denied" -- I pause there, because
10 in fact this request for assistance wasn't denied until very recently.
11 The history of the correspondence shows that the Kenyan Government was
12 consistently saying, "Yes, yes, we're getting around to it," until quite
13 recently, but it is now, I accept, denied.

14 Well, what should follow? We read on:

15 "... the requested State Party shall promptly inform the Court or
16 the Prosecutor of the reasons for such denial."

17 Well, this request, the request about which we are complaining,
18 was made 22 months ago. There has not been compliance in any shape or
19 form with that sub-article. The requests -- I beg your pardon, the
20 reasons now advanced have come very, very late in the day.

21 There is one other remark which I seek to make relating to
22 something which the Attorney said earlier, and it is in relation to a
23 document to which he referred. And I'm aware that your Honours will be
24 familiar with the documents, but it is one small portion to which I would
25 refer you because it casts a blinding light upon the merits of the

1 position of the Government of Kenya. May I refer your Honours to --

2 PRESIDING JUDGE OZAKI: Mr Gumpert.

3 MR GUMPERT: Yes.

4 PRESIDING JUDGE OZAKI: It is the intention of the Chamber that
5 we will discussion the issues of consultation and timing of the request
6 at later stage.

7 MR GUMPERT: Your Honour, I was -- yes.

8 PRESIDING JUDGE OZAKI: So if you can confine your points to the
9 issue of definition of "the court" and "Prosecution," I would be most
10 grateful.

11 MR GUMPERT: Your Honour, the points I make only arise from
12 submissions which other parties said were relevant to your question of
13 the definition of "the court," so I make them in response to matters
14 which have been said to be relevant to that. But in fact this one point
15 that I'm about to make or one matter I'm about to draw to your Honour's
16 attention, which will take no more than a minute to do, is precisely on
17 the question of whether or not within the word "the court" is included
18 "the organ of the court, the Prosecutor," and it is a demonstration of
19 the position which the Government of Kenya itself occupied. It's
20 paragraph number -- it's at tab 16, and it's paragraph 16. Do
21 your Honours have it? Tab number 16 in the folder which I have produced
22 for your Honours. That is the Government of Kenya's filing of the
23 8th of April of 2013, filing number 713. That's a 20-page document. Do
24 your Honours have it? Yes. And paragraph 16 is on page 9. And this is
25 what the Government of Kenya submitted to the court was the law on the

1 8th of April of last year.

2 "Part 9 of the Rome Statute establishes a comprehensive framework
3 for co-operation between the ICC and States Parties. Article 93(1)
4 details numerous specific types of assistance that the Prosecutor and
5 court may request from States Parties and which States Parties must
6 comply with in accordance with part 9 of the Statute."

7 There, a clear acknowledgment, because, I submit, the argument
8 they now advance hadn't at that time occurred to them, that the powers
9 set out in Article 93 - which are, after all, the principle investigative
10 powers which the Prosecutor has - are, indeed, available to the
11 Prosecutor. Indeed, any submissions to the contrary might be thought to
12 be difficult to sustain. If the Prosecutor can't investigate by asking
13 for assistance under 93(1), what can it do?

14 So those are the only submissions I make in respect of what has
15 been said thus far.

16 MR MUIGAI: May I -- may I --

17 PRESIDING JUDGE OZAKI: Thank you very much.

18 MR MUIGAI: -- Madam President.

19 PRESIDING JUDGE OZAKI: Mr Attorney General.

20 MR MUIGAI: May I, with your permission, address that matter,
21 lest it be understood that we agree with that submission. That
22 submission is totally factually inaccurate. The letter to Madam Bensouda
23 that the Prosecution has made reference to, which is dated the 23rd of
24 November, 2012, that cannot be described as a recent declaration by the
25 Kenya Government of its view.

1 Indeed in that letter, if I may read because this is important,
2 this is what I say to her, the learned Prosecutor:

3 "You will recall in our discussion during our recent meeting held
4 on the 17th of November, 2012, in which I informed you that the requests
5 made to the Republic of Kenya must conform to the laws of the republic.
6 You will also recall that I reiterated that Kenya will continue to
7 co-operate with the ICC within the context of its international
8 obligations as provided for in the Rome Statute and the Kenyan laws, and
9 it was important to note that Kenya has agreed to law the ICC judicial
10 process to proceed to its conclusion."

11 And I said further:

12 "We draw your attention to the issues raised in our letter of the
13 7th of November. We draw your attention to the distinction," and when I
14 finalised on the following page, I said:

15 "Our reading of this part of the Statute, the Republic contends
16 that the request has to be from the court, which is distinct from the
17 Prosecutor, and that a court order has to be in place before this request
18 is in force."

19 In our view, a judicial process is necessary in order to avail
20 third parties a chance to present their cases. It would be totally
21 inaccurate to suggest that we made up our mind on what the law is a year
22 later. We knew what the law is a year earlier and we stated it.

23 And I want to finally draw your attention to the document that
24 the learned Prosecutor has read, and I am -- I am constrained to observe
25 that he has read it selectively. He has read the preambular part of the

1 document in which we were beginning to introduce the idea of the
2 distinction between the court as a judicial organ and the Prosecutor as
3 an officer and an organ of the court, because if you proceed -- if you
4 proceed with the paragraphs that he did not read - which I will not read,
5 paragraphs 18, 19, 20, 21, 22, 23 - we made the same argument and we
6 said:

7 "There is a distinction" --

8 In paragraph 23, we invited the Prosecutor to come to this court,
9 to come to this court and seek an interpretation. That was one year ago.
10 It would not lie in the Prosecutor's mouth now to suggest that we have
11 only recently taken this position or we have only recently become clear
12 what the law is.

13 Finally, I think that the -- I am obliged to Mr Kay for bringing
14 the attention of the Court to Article 93(6) which, in my very humble
15 view, should bring this matter to a very clear end. It says,
16 Article 93(6), when it is dealing with forms of co-operation:

17 "If a request for assistance is denied, the requested state shall
18 promptly inform the court or the Prosecutor."

19 Do we need any other evidence that the Prosecutor is not the
20 court? This section actually recognises that a state that does not wish
21 to deal with the Prosecutor - another state other than Kenya, Kenya is
22 quite happy to deal with the Prosecutor - can come directly to the court
23 itself and say: "The Prosecutor was asking us for the following
24 assistance, and we have told her that we can't give her." What did the
25 Kenya Government do? It says: "We hold the Prosecutor in the highest

1 professional regard." As one professional to the other, I did not ignore
2 her communication. I wrote to her and said: "I am unable to facilitate
3 this sort of co-operation because of the following legal reasons ..."

4 It cannot now lie on the lips of the Prosecutor to allege that
5 we -- we denied assistance and did nothing. No. We informed the
6 Prosecutor that of -- the following of your requests have been
7 facilitated: You wanted a court filed from a place called this and that
8 place, have it? You wanted motor vehicle records of the owners of this
9 vehicle, have it. You wanted this and the other and the other, have it.
10 But of this and this and the other, please go and get a court order
11 because that is the requirement of the law. Thank you.

12 MR GAYNOR: Madam President.

13 PRESIDING JUDGE OZAKI: Thank you very much.

14 Mr Gaynor, on this specific point?

15 MR GAYNOR: Yes, on this specific point.

16 Madam President, you referred to Article 2 of the International
17 Crimes Act of 2008 which set out clearly that the term "ICC" includes any
18 organs of the court that are referred to in the Statute.

19 Now, when the Attorney General receives a request for assistance
20 pursuant to paragraph 1(i) of Article 93 of the Statute, he is bound by
21 Section 104 of the International Crimes Act that expressly deals with
22 requests coming from the ICC under that specific sub-article of Article
23 93 of the Rome Statute.

24 Now, in the opening words of section 104, the words are:

25 "Where the ICC makes a request under paragraph 1(i) of Article 93

1 of the Rome Statute for the provision of records and documents including
2 official records and documents, the Attorney General shall give authority
3 for the request to proceed if he is satisfied of two things ..."

4 Now my point at this stage - I'll return to this article later
5 during my submissions - is that it's absolutely clear that if the request
6 comes from the ICC, which is defined in section 2 to include the organs
7 of the court, the Attorney General must act. Now, if the Attorney
8 General really truly believed that the term "ICC" did not include the
9 Prosecutor, he was under an obligation immediately to come before the
10 court under Article 93(3) of the Statute; Article 99(4)(b) of the
11 Statute; and Article 97 of the Statute. The obligation lies squarely on
12 the state party to consult with the court. It does not lie on the
13 Prosecutor to litigate the matter.

14 Thank you, Madam President.

15 PRESIDING JUDGE OZAKI: Thank you very much.

16 And I think it's a very good cue to go to another issue, which is
17 national barriers to execution of the request. And as I said, as for the
18 issue of consultation and timing, who said what when, we will come back
19 later, and parties and participants, including the Government of Kenya,
20 will have ample time to discuss this issue.

21 But before going into consultation and timing issue, the Chamber
22 has several questions which it would like to ask Government of Kenya
23 about the national barriers to the execution of the Prosecution request.
24 And after that, of course, parties and participants will be given an
25 opportunity to make submissions.

1 Mr Attorney General, in your written submission, you highlighted
2 for the Chamber certain provisions of domestic law which your government
3 submits create an obstacle to the execution of the Prosecution's request.
4 These obstacles include a right to privacy ensured in the Kenyan
5 constitution as well as certain provisions of national legislation,
6 provided for the nondisclosure of an individual's financial information
7 in the absence of consent.

8 The first very factual question: In respect of the information
9 for which it is submitted that consent is required, has the Government of
10 Kenya sought the consent of the relevant individuals; specifically in
11 this case of Mr Kenyatta? And if you prefer to answer this question not
12 in open session, we can go into private session if you prefer.

13 MR MUIGAI: I thank you, Madam President. I will start with your
14 last question.

15 Has the Government of the Republic of Kenya sought, sought the
16 consent of any of the accused persons before this court to release any
17 documents that it may have? The answer is simply no. No. For very good
18 reason. And that is the reason that has brought me to this court to
19 explain, and it is fundamental to the confusion that has pervaded the
20 submissions that were made in the absence of the Kenya Government.

21 The Republic of Kenya is a sovereign, autonomous, independent
22 state. The governments that run the state of the Republic of Kenya are
23 different, and every five years voters go to an election to make a
24 determination whether they will elect one person as opposed to the other.

25 Madam President, since Kenya became a situation country, we have

1 interacted with the court as the sovereign state of the Republic of
2 Kenya. You yourself have said in the ruling to my amicus application
3 that the Government of Kenya is not a party to proceedings, and therefore
4 my own understanding of the law was that as the chief law officer of the
5 Republic of Kenya, it was my duty to keep a clear independent distance
6 from the Prosecution and from the Defence and to have a direct engagement
7 with the court. I did not feel that it was in my place to contact the
8 Defence and to suggest to the Defence how the Defence should conduct its
9 case including facilitating or not facilitating these documents.

10 Indeed, the answer to -- the further answer to your question,
11 Madam President, is this: It is the duty of the Prosecutor, in my
12 understanding of best international practices in criminal jurisprudence,
13 to seek from the Defence a concurrence at the disclosure stage of the
14 case.

15 Let me under -- and this is not a lamentation. It is a statement
16 of fact. One of the difficulties that the Republic of Kenya has had in
17 this case and why I filed my first amicus application is because
18 submissions were made in this case by all manner of parties regarding
19 matters that were totally outside our knowledge.

20 We, as you know, Madam Chair, have no access to the thousands
21 upon thousands of confidential documents filed in this court. The
22 Republic of Kenya does not know the list of witnesses, it doesn't know
23 who they are, it doesn't know where they are, it doesn't know their
24 identity, it doesn't know who has agreed to testify and then refused to
25 testify, and it has no way of knowing. But that has not stopped the

1 Prosecution, and unfortunately sometimes other parties in the court, to
2 make allegations about the Government of Kenya relating to issues that
3 the Government of Kenya has no way of finding out.

4 Let me give you an example. Both the former Prosecutor and the
5 current Prosecutor have carried out a long public lamentation about the
6 alleged obstruction by the Government of Kenya which they claim is
7 manifested in the intimidation of witnesses. On more than a dozen
8 occasions, Madam President, I have said to them: "Who are your witnesses
9 if you want me and the Republic of Kenya to protect them." The answer,
10 your Honours, may shock you. The answer has been: "We cannot tell you
11 the names of the witnesses because they are not safe with you." So I am
12 guilty of not protecting witnesses whose identity I don't know, whose
13 identity I will not be given --

14 PRESIDING JUDGE OZAKI: Mr Attorney General --

15 MR MUIGAI: Yes.

16 PRESIDING JUDGE OZAKI: -- I'm so sorry to interrupt, but we have
17 many more questions to ask and the time is rather limited, so I plead you
18 are not going into details about the protection of witnesses issues, for
19 example. Thank you.

20 MR MUIGAI: I stand corrected and I will go to your other
21 specific point, and my answer is as follows.

22 There is another misapprehension of the law by the Prosecutor
23 which runs very deep in the proceedings before this court, and it is
24 this: That if the Prosecutor wishes for anything - anything whatsoever -
25 to be done within the Republic of Kenya relating to this case in whatever

1 manner, that that which the Prosecutor wishes will be done irrespective,
2 A, of Kenya's own understanding of its obligations under the Rome
3 Statute. Our submission is that that is not true.

4 The Government of the Republic of Kenya does not take legal
5 advice from the Prosecution as regards what its obligations are under the
6 treaty. The Government of the Republic of Kenya takes legal advice from
7 its law officers. That's point number one.

8 Point number two. The Prosecutor seems to be under a
9 misapprehension that any request by them must be complied with
10 irrespective of what Kenyan law may say, including and fundamental being
11 the constitution of the Republic of Kenya. There can be no such legal
12 proposition that can be made in an international tribunal of this
13 stature.

14 The Rome Statute itself recognises that the process of the
15 facilitation of co-operation is subject to national law. The word
16 "national law" is repeated a dozen times. And our submission therefore
17 is this: What the constitution of the Republic of Kenya says as regards
18 the protection of the citizens of the Republic of Kenya regarding the
19 disclosure of their private confidential documentation is a matter
20 determined by domestic law, and that is beyond contestation.

21 PRESIDING JUDGE OZAKI: Mr Attorney General --

22 MR MUIGAI: Yes.

23 PRESIDING JUDGE OZAKI: -- my question was a rather simple one --

24 MR MUIGAI: Yes.

25 PRESIDING JUDGE OZAKI: -- because you said in your written

1 submission that you need the consent of the accused in order to disclose
2 certain information. I just asked whether you actually asked the consent
3 from Mr Kenyatta. Am I correct in understanding your answer to be that
4 you didn't sought the -- you didn't seek the consent of Mr Kenyatta
5 because you are prohibited by Kenyan law to seek the consent or you are
6 not obligated by Kenyan law to seek the consent?

7 MR MUIGAI: I've said, Madam President, it is neither my duty
8 under the Rome Statute nor my duty under Kenyan law to seek such consent.
9 I have said that it is -- in an adversarial system such as is before this
10 court, it is a matter between the Prosecutor and the Defence whether they
11 will consent to the production of any.

12 As I sit here now, and I'm afraid again it sounds like a
13 lamentation, I don't know what the Defence and the Prosecution has --
14 have exchanged by consent. I don't know what they admitted to or did
15 not.

16 What I have said to you Honourable Judges is this: If the
17 Republic of Kenya were to descend into the arena of this conflict and
18 were to begin to make demands of the accused person, our position as an
19 independent state party, not party to the proceeds before the court,
20 would be irredeemably and irreversibly compromised.

21 PRESIDING JUDGE OZAKI: Thank you very much.

22 MR MUIGAI: And therefore my answer is that the duty is a duty of
23 the Prosecutor. Not my duty.

24 But let me finish by saying that, yes, it is true. I would not
25 call this "national barriers" or "national obstacles." I would say that

1 it is important to understand that co-operation with the International
2 Criminal Court is subject to Kenya's own domestic law.

3 And Kenya's own domestic law, because this is another
4 misrepresentation I need to correct, does not say that we cannot give
5 bank or financial statements. On the contrary, it says we can "subject
6 to." "Subject to." And that "subject to" is either the consent to be
7 obtained in that manner or the obtainance of a court order where the
8 court itself is satisfied in very specific terms, that this information,
9 otherwise protected by the constitution, the Central Bank Act, the
10 Banking Act, and other legislation ought to be disclosed for an
11 overriding public interest that the court would define. Thank you.

12 PRESIDING JUDGE OZAKI: Judge Fremr.

13 JUDGE FREMR: Thank you for the floor.

14 Mr Attorney General, now please forget about the -- this case
15 before the ICC. I would just like to ask you about practice within the
16 Kenya criminal proceedings. If you or your investigators or prosecutors
17 have a domestic case where accused is alleged for a very serious crime,
18 and according the intent of investigators or prosecutors there is a clue
19 that very important evidence can be found within his financial records, I
20 can imagine that you can very rarely get consent of the accused. So how
21 do you mostly proceed in your domestic practice in such kind of cases?

22 MR MUIGAI: Under our domestic law, whenever we investigate
23 serious crimes, say such as, say, terrorism, for example, and we want to
24 access bank records, telephone records, or such other communication that
25 is otherwise ordinarily protected by law, we obtain a court order. And I

1 think that this is a very, very important part of this.

2 I have reason to believe, and again - again - this is a
3 difficulty I have in this case, I know for a fact that Mr Kay and his
4 Defence team, because I read in the papers - I was not party to the
5 case - I read in the papers that Mr Kay and Mr Kenyatta's Defence team
6 came to Kenya, went to the High Court of Kenya, filed proceedings that I
7 didn't see because I didn't need to see them, and they said in those
8 proceedings, to the best as I was able to discern: Could the High Court
9 of Kenya allow them access to certain phone records. That's what I read.
10 And I read later that an order had been made by the High Court of Kenya
11 which, at one level, involved a form of -- a form of negotiation between
12 the parties. And the holders of the phone records appeared to have said,
13 "The legal advice we have received is this," and the applicants did
14 whatever they said, and some modality was found. That is the normal
15 practice in Kenya.

16 It is impossible that a Prosecutor may walk to a bank and say,
17 "Give me the banking records of Mr Y," because not only would they have a
18 constitutional violation suit against them, but they would also -- they
19 would also have a civil suit, which I don't think many banks would do.

20 So even if we received this order, we would send it to the
21 Central Bank. The Central Bank would send it to the bank, the bank would
22 write back and say, "We can't comply with this order, it violates it
23 Banking Act in this form, in that form, in that form, do you have a court
24 order?" Now, the only -- then we have a stalemate because we don't have
25 a court order, and it is -- the court in Kenya will not hear an argument

1 that says: There is a Prosecutor in America who has said he wants access
2 to the record because a Prosecutor is a lawyer like any other, only a
3 lawyer acting on the public side of the dispute. Thank you.

4 JUDGE FREMR: Thank you, Mr Attorney General.

5 PRESIDING JUDGE OZAKI: Thank you very much.

6 Well, I see now we have only two minutes to 11.00. We will
7 adjourn right now, take 30-minutes break, and come back to this courtroom
8 at 11.00. The hearing is adjourned.

9 (Recess taken at 10.57 a.m.)

10 (Upon resuming in 11.31 a.m.)

11 THE COURT USHER: All rise. Please be seated.

12 PRESIDING JUDGE OZAKI: Welcome back, and I would like to start
13 this session with another question to the representative of the Republic
14 of Kenya, if I may.

15 If I understood correctly what you said in the previous session,
16 Kenyan law, I mean this international -- I mean, Kenyan law makes
17 distinction between judicial requests and nonjudicial requests, and
18 judicial requests you need a court order while nonjudicial requests you
19 don't need. And in Article 93(1) of the Rome Statute, there are various
20 types of requests from the court enumerated from A to L. In your
21 interpretation of Rome Statute, some of them are judicial requests and
22 some of them are nonjudicial requests. Am I right? I'm asking because
23 there is also a dispute between the Prosecution and the Government of
24 Kenya about the legal basis of the Prosecution request for financial
25 information.

1 Prosecution's view is that this request was made on the basis of
2 93(1)(i) and (l), while Kenyan Government's interpretation was this
3 request was made based on 93(1)(k). Would that make any difference?

4 MR MUIGAI: Your Honours, it is indeed true -- it is indeed true
5 that Article 93 contains both judicial and nonjudicial requests. But on
6 the main, in substance, it enumerates judicial requests; that is to say,
7 it requires, for example, on the main, the taking of legal action within
8 the state party. And in most of the provisions there set out, it
9 requires the invoking of domestic legislation or law.

10 If, for example, you look at 93(1)(a), the identification and
11 whereabouts of persons or the locations of items, it requires no judicial
12 intervention of any nature because it can be complied with simply by the
13 state party providing information, say, on the location of -- of the
14 scene of the subject matter of the proceedings or the identification of
15 persons.

16 For example, if we received a request that asked: In Kenya under
17 your management of government, tell us who is responsible for the
18 registration of persons or the issuance of passports? There is no
19 requirement for a court order and we would be able to comply with that.

20 That is also true in the main if you go to (i), the provision of
21 records and documents, including official records and documents. There
22 are many records and documents held by the government that do not
23 compromise the -- the privacy or the personal rights of any person. In
24 fact, in these proceedings before this Court, we have already -- if I
25 remember correctly, the Prosecution requested of us to provide documents

1 indicating ownership of certain motor vehicles. We did that. We don't
2 need a court order. There is no privacy about the ownership of a motor
3 vehicle. It is a matter of common and public knowledge and that's why we
4 complied directly.

5 On the main, however, 93 requires certain other facilitation that
6 call for judicial support. For example, facilitating the voluntary
7 appearance of persons as witnesses or experts before the court is a
8 matter within the consent of the person. The court will say, "We
9 understand that in Kenya there is an officer called the Chief Government
10 Chemist, who is a person who runs the government's laboratories. He has
11 agreed to come to The Hague to talk about this process that he carried
12 out. Can you facilitate?" That means: Can you issue him with a travel
13 document? Can you give him leave from his work? We don't need a court
14 order because that is within our mandate, especially if we confirm.

15 However, if we require the questioning of any person being
16 investigated or prosecuted, a whole regime of the statute itself and of
17 Kenyan law kicks in because this person being investigated or prosecuted
18 has rights under the Rome Statute, under the procedures of these courts,
19 and, indeed, under Kenyan law as well. A Kenyan court asked to question
20 any person, because it is a judicial process, I cannot call this person
21 to my chambers and question him. It would be worthless because I am not
22 a judicial officer. If I took a statement from a witness, it would be
23 worthless because I am neither an agent of this court nor a judicial
24 officer, and that process under Kenyan law would be of very little value.
25 And if the person from whom I have taken a statement were to dispute the

1 contents of his statement, then you can see, Madam President, it's a
2 Pandora's box.

3 The correct way to do it would be to have this process referred
4 to -- which is what we've done in the past, referred to a judicial organ
5 and that judicial organ then uses the normal rules of an investigation
6 and prepares evidence taken under oath. Nobody else can take evidence
7 under oath for purposes of supporting a judicial process.

8 So my short answer to your question is this: It is true that 93
9 contains both sorts of procedures, and it is also true that the
10 Prosecution misdirected itself in believing that all these processes
11 could be treated as similar.

12 And before I wind up, if you look at (i), I think (i) is very
13 instructive, your Honours, and if I may read it, it says:

14 "Any other type of assistance which is not prohibited by the law
15 of the requested state ..."

16 Any other assistance.

17 My own understanding of the rules of statutory interpretation are
18 this: That where the Statute clearly enumerates the draftsman intended
19 that each article be appreciated as such, and where there is a general
20 provision of this nature, it is also to be understood in the context of
21 its limitation. Any other assistance not set out in 93(1)(a) to (k) can
22 only be made if it does not contradict the law of the requested state.

23 What has happened in this case? The Prosecutor has made a
24 request which, in our interpretation, is a 93(1)(i) request, and we have
25 said it is prohibited by domestic law. In our view, nothing could be

1 clearer. That is a prerogative of the receiving state to interpret its
2 own law.

3 In fact, the reason we are here before you today, your Honours,
4 is because the Prosecution has done something unprecedented in
5 international judicial proceedings. It has sought, it has sought to
6 impose its own interpretation of the law of another jurisdiction on the
7 officers of that jurisdiction whose constitutional mandate is to make the
8 interpretation. I have no -- in my experience, which is not as extensive
9 as that of the Honourable Judges of this court, but is close to three
10 decades of the law, I have always understood the law to be that an
11 international tribunal cannot purport to interpret the law of a sovereign
12 state in a manner inconsistent with the way the organs of that state
13 interpret that law.

14 In this court, or indeed any other international tribunal, should
15 not place itself in a situation where the Supreme Court of the
16 United States has declared the law of the United States to be X, or the
17 Constitutional Court of Germany has declared German law to be X, but the
18 International Criminal Court declares that domestic law to be something
19 else. That would be a recipe for disaster and international
20 jurisprudence is consistent on this point.

21 In Kenya, the Attorney General is the chief Legal Officer of the
22 republic. His interpretation of law is final except where the same
23 dispute is referred to a judicial organ that overrules that
24 interpretation.

25 So as we sit here this morning, the law of the Republic of Kenya,

1 as has been stated by the Office of the Attorney General. Thank you.

2 PRESIDING JUDGE OZAKI: Thank you very much, Mr Attorney General,
3 and please rest assured that nobody in this Court would like to try to
4 impose any specific interpretation of your law. But at the same time,
5 this is for this Court to interpret and adjudicate the Rome Statute and
6 whether any acts of anyone are consistent with the Rome Statute or not.

7 The related question: As for this judicial request, in order for
8 you to get a court order, do you always need an order from the Chamber of
9 International Criminal Court? I ask this question because in some
10 jurisdictions, in the context of international co-operation on judicial
11 matters, the -- some jurisdictions Attorney General can get a court order
12 upon the request from the competent authority of requesting state which
13 is not necessarily a court.

14 MR MUIGAI: Thank you, Madam President, your Honours, for this
15 opportunity to make this clarification which is contained in my filing of
16 yesterday.

17 Under the constitutional law of Kenya, all criminal processes,
18 the representation of the Government of the Republic of Kenya in any
19 criminal case in Kenya is the absolute mandate of the director of public
20 prosecutions who is an independent constitutional office, and, as I have
21 extensively set out in my written submissions, is not subject to any
22 direction by any body or authority.

23 And as your Honours will -- when you will retire to consider all
24 the written material, as Your Honours will find out, this is at the heart
25 of the argument that the Republic of Kenya is making about co-operation.

1 Because if I received an order from you, for example, I would receive it
2 as the competent authority under the Statute to receive the order, but
3 then I would have to surrender it to the constitutional organ in Kenya
4 that has the mandate to represent the Government of Kenya in any criminal
5 process.

6 And let me come back, with your permission, to the example I gave
7 you earlier. When you gave us the warrant -- when this court, in its
8 corporate sense, transmitted to us the warrant of the arrest of a Kenyan
9 citizen alleged to have interfered with witnesses, I and the minister of
10 interior received the warrant. We then jointly transmitted the warrant
11 to the director of public prosecutions. Why did we do that? Because
12 Kenyan law says that in all criminal proceedings or proceedings of a
13 criminal nature, the director of public prosecutions has constitutional
14 mandate that he doesn't share with any other person.

15 So that as we speak here today, Madam President, that process is
16 going through the courts under the stewardship of the director of public
17 prosecutions. I have no constitutional authority. The president has no
18 constitutional authority. The minister has no constitutional authority
19 to direct him to do it, to stop doing it, to halt, interrupt, or do
20 anything else. That would be a violation of our law and our
21 constitution. And I know that the time to discuss what was alleged to be
22 the interference by the head of state in the process is coming, but this
23 is the basis of the misunderstanding.

24 There is a misunderstanding that in Kenya all we need to do is to
25 receive an order from a court, then it is effected directly by the

1 recipient. I can't do it. If I received an order about financial
2 records, I would have to go to the governor of the Central Bank, an
3 independent institution under the constitution. And it says so in the
4 constitution: The Central Bank of Kenya shall be an independent
5 institution that cannot take instructions from any other body or
6 authority.

7 The same is true of court. You -- many times I have been asked
8 by the Prosecutor, "Give me a file of a case that was conducted in a
9 certain place at a certain time," and all I have been able to say is: "I
10 have transmitted your request to the Registrar of the High Court of
11 Kenya, who cannot take instructions from me as to what they will do in
12 their judicial capacity." So I wish to confirm, therefore, that this
13 would have to be placed before the constitutionally mandated authority,
14 and that is the normal procedure in Kenya. Thank you.

15 PRESIDING JUDGE OZAKI: I'm sorry, Mr Attorney General, I'm a bit
16 confused. As for Central Bank of Kenya, if there is a court order, I
17 mean, order from the Kenyan court, they are under obligation to disclose
18 certain materials. Am I right?

19 MR MUIGAI: The Central Bank of Kenya is the regulator of banks,
20 all banks, and in terms of processing requests, we would send that sort
21 of request to the regulator. Then the regulator would send the request
22 to the specific bank or banks. In theory, it is expected that the
23 Central Bank of Kenya would have access to information or would have the
24 authority to acquire information from banks. But banks themselves, in
25 responding to the Central Bank, would have to comply with the Banking

1 Act, which itself says: "No information may be disclosed except with the
2 consent of the depositor or the client." So that is the problem.

3 May I clarify something that you asked me earlier and my mind was
4 not firmly on it, and it is this, Madam President. You asked me whether
5 I ever approached Mr Kenyatta for this purpose, or Mr Ruto, indeed, for
6 the general purpose of the request. And I told you I didn't, and I gave
7 you the reason then. As I had coffee, I thought of another reason as
8 well, even more fundamental. The request to supply information relating
9 to the financial records of the two accused persons was done
10 confidentially, and had I -- had I used communication given to me
11 confidentially by the --

12 PRESIDING JUDGE OZAKI: Mr Attorney General, this is open
13 session. Do you want me to go into closed session or private session?

14 MR MUIGAI: No, we have since -- Madam President, the Prosecution
15 and ourselves have since discussed the matter on record.

16 PRESIDING JUDGE OZAKI: Okay.

17 MR MUIGAI: Yeah. And we agreed that we -- there was a mistake
18 on the part of our first filing, which we disclosed -- you, this Court,
19 reprimanded us for having disclosed the information, and we were -- we
20 were apologetic, it was a mistake, but now it's a matter of public
21 record. But I have explained why it would have a violation then of -- of
22 the treaty and of the Rules of this Court to have discussed it with the
23 other parties. Thank you.

24 PRESIDING JUDGE OZAKI: Thank you very much.

25 Another related point. I see, for example, in Article 79 of

1 International Crimes Act of Kenya about producing documents or other
2 articles. I think this article corresponds to Article 93(1)(b) of the
3 Rome Statute. The Article 79 of International Crimes Act says:

4 "If the Attorney General gives authority for a request relating
5 to the production of documents or other articles to proceed, a judge of
6 the High Court may make an order requiring their production."

7 Does this mean, for example, if the request was made on the basis
8 of Article 93(1)(b), your office will process this request and send it to
9 the judge of the High Court and judge of the High Court may make an order
10 requiring their production? Is that a correct interpretation of the law
11 of Kenya?

12 MR MUIGAI: That is not correct. What is correct,
13 Madam President, is this: If the Attorney General is satisfied that a
14 request for the production of documents or other articles is regular, is
15 consistent with the Rome Statute and Kenya's own law, then what ought to
16 happen is that the Attorney General ought to direct whoever is
17 responsible for the maintenance of these records to produce them.

18 Supposing, for purposes of argument, that person didn't or didn't
19 do it timeously. In furtherance of the co-operation required of the
20 Attorney General, the Attorney General can notify a judge of the
21 High Court that we have been requested by the Prosecutor of the
22 International Criminal Court to provide the following information --

23 PRESIDING JUDGE OZAKI: Mr Attorney General, I'm so sorry to
24 interrupt. You are speaking too fast and the interpreters are having
25 difficulties. Can you just a little bit slow down. Thank you.

1 MR MUIGAI: Can I start again, then?

2 Madam President, Section 79(1) of the International Crimes Act
3 envisages a situation where the Attorney General has been persuaded that
4 documents or articles required by the court, or for this purpose the
5 Prosecutor, ought to be released to the Prosecutor. And I am using the
6 example here of the registration of motor vehicles, which is because it
7 is an item we have already dealt with with the Prosecutor. If I have
8 made that determination and I forward my recommendation -- my instruction
9 to the registrar of motor vehicles, and I say, "Release to me immediately
10 the log-books, copies, of the following motor vehicles," supposing he
11 doesn't do it, it means that the obligation now is in my hands to
12 approach the court. And therefore the court can make an order.

13 And you have to look at the language there again. The language
14 there is "may." The language is "may," meaning the court itself, to whom
15 I have complained that the director of motor vehicles hasn't given me
16 documents, can, itself, re-evaluate afresh whether I had made the right
17 decision. The court is under no obligation to go by my order.

18 The distinction here which is important, your Honours, is that in
19 respect of an application, in respect of an application under 93 of a
20 judicial character, the consent of the court must be sought *ab initio*.
21 The intervention of the court must be sought from the very beginning.
22 And let me give you an example.

23 93(1)(h), the execution of searches and seizures. If I received
24 a request for the execution of a search and a seizure, I would have to
25 process that within the domestic law of Kenya because I would have to

1 call the inspector general of police and say to him, in a communication,
2 "We are required by the International Criminal Court by this warrant, by
3 this order, signed by these Judges, in this manner, for you to conduct a
4 search and to seize" whatever it is. That is a process that the
5 inspector general himself, because he would be looking at a court order,
6 from here, would be required to enforce within the domestic machinery
7 within the criminal justice system of Kenya. And therefore, that is a
8 different problem from the one anticipated by 79(1).

9 I hope I have answered your question.

10 PRESIDING JUDGE OZAKI: Thank you very much. I may be repeating
11 myself, but I appreciate if you can help me.

12 MR MUIGAI: Yes.

13 PRESIDING JUDGE OZAKI: Let's take example of bank records. If
14 this Chamber is to make an order for production of the records of the
15 bank, this Chamber -- it's Chamber's order, not Prosecution request, what
16 will happen for you to go to Central Bank and Central Bank will contact
17 with relevant banks, and if banks cannot produce the required documents
18 because of bank secrecy law or whatever, then someone in your government,
19 it may be your or prosecutor general, will go to the Kenyan court to get
20 an order in order to comply our request. Is that what will happen?

21 MR MUIGAI: I'm afraid, Madam President, that that is not very
22 accurate. The accurate sequencing would be as follows. If - if - there
23 was a proper application before you made in the proper manner, and there
24 was an appropriate order of this court, the order would be received by
25 me. And because it is an order in furtherance of the -- a criminal

1 investigation and prosecution, I would transmit those documents to the
2 director of public prosecutions.

3 In my own understanding of the law, which I believe would be his
4 as well, he would then place that order before the High Court of Kenya,
5 and he would say in his application: "I have received this order by the
6 International Criminal Court asking me to obtain bank records relating to
7 X, Y, and Z. I am mindful that I'm required to execute this order in
8 accordance with the procedures of Kenyan law. And therefore, I have come
9 to this court to request - to request this court - to give me an order
10 that I will serve on the Central Bank and where we know the relevant
11 banks, the specific banks, requiring this information."

12 The minute the DPP initiates that judicial process in Kenya, two
13 things may happen: A, the court may, the Kenyan court may, *ex parte*,
14 without hearing any person, grant that order; or B, the court may require
15 that persons affected by that order be given a right of hearing in
16 respect of the proposed process.

17 So in short, Madam President, you are right in the general sense
18 that we would require to have a domestic process, but the sequencing is
19 different. We don't begin with the order from the court and serve it.
20 We begin by taking the order of the court to a Kenyan court.

21 I must add this, with your permission. I have looked at several
22 statutes in other countries domesticating the Rome Statute and the
23 procedure is consistent. I have looked at the procedure in South Africa
24 and Australia, it is consistent. There are those things that would not
25 be done without a domestic court process, and there are those things that

1 can be done without a domestic court process. Thank you.

2 PRESIDING JUDGE OZAKI: Thank you very much.

3 Judge Henderson has a question.

4 JUDGE HENDERSON: Yes, thank you, Mr -- good afternoon,
5 Mr Attorney General. Thank you very much for coming here to assist us as
6 we grapple with this issue before the Court of noncompliance. I want to
7 ask some questions, essentially, to, if I may, tease out ultimately who
8 is responsible for the execution of requests, as I think this is integral
9 to us understanding the process and it also featured significantly in
10 your written submissions which we received yesterday afternoon.

11 So perhaps, if I can -- if I can just catalogue some of the
12 provisions which I thought might have been relevant, but ultimately as
13 you persuade us individually and collectively, I think this may be
14 helpful.

15 So I looked at and we looked at Article 6 of the Statute, which
16 provides for the general obligation to co-operate, looked at Article 88
17 which provides for procedures under your -- under the national law. I
18 would have looked also at the legislation which domesticated the
19 Rome Treaty, which is, I think, the International Crimes Act, number 16
20 of 2008, which locates within yourself, Attorney, under Section 23,
21 certain responsibilities for the execution of requests. And, of course,
22 I also looked at the Constitution of Kenya, which is the supreme law
23 which -- and, of course, there is a body of Commonwealth jurisprudence
24 which locates and understands respective constitutional authority. And
25 with respect to the constitution, I looked at - if you'll just bear with

1 me a moment - Section 132(1), which deals with the powers of the
2 president under the constitution, and in particular subsection (3) which
3 deals -- if I could just quickly set it out, shortly:

4 "... sharing of cabinet meetings, directing and co-ordinating the
5 functions ministers and government departments."

6 And then this important one, subsection (5) -- or sub-article
7 (5), I beg your pardon, which also locates with him the ultimate
8 responsibility under the constitution of ensuring that international
9 obligations of the republic are fulfilled through the actions of the
10 relevant cabinet sections and departments.

11 So the question which I therefore want to really seek your
12 assistance on is: Who ultimately is responsible for the execution of
13 these requests? And if there are issues of noncompliance, who does one
14 turn to? Because it can't be that -- who does one turn to? Yes.

15 MR MUIGAI: Thank you very much. I want to refer your Honours to
16 my filing, which you very graciously accepted to reclassify in the
17 morning, because I have treated this question at some length. And I have
18 done that on the basis that, and I don't want to rehash that argument --

19 JUDGE HENDERSON: Right, because it wouldn't enhance your
20 argument or bolster it if you were to repeat it because I assure you that
21 we have read it.

22 MR MUIGAI: Thank you very much, your Honour. Suffice it to say
23 this, that one of the reasons I approached this Court to allow me to come
24 as I have done here today to address this question is because the
25 Prosecutor and the representative of the victims repeatedly said on

1 record that the president of the Republic of Kenya, Uhuru Kenyatta, is
2 personally responsible for failing to co-operate or force the machinery
3 of state to co-operate with the court.

4 I don't want to rehash again what I have said in my 31-page
5 filing, except to make this point in a preambular nature: The president
6 of the Republic of Kenya is not, has never been, and cannot be under our
7 constitutional dispensation responsible for the compliance of the
8 Republic of Kenya with any request. And the answer is a simple one. The
9 constitutional -- the constitution of Kenya donates to independent organs
10 of state. And I want to repeat that: The constitution of Kenya donates
11 to independent organs and officers of state. Authority and jurisdiction,
12 to deal with certain matters, in a manner that does not require them to
13 be guided by any other person or authority.

14 And I have already given you an example, but I'm happy to give
15 you another one and another one. And the first one is the office of the
16 director of public prosecutions. The director of public prosecutions
17 cannot be instructed by the president to prosecute or stop prosecuting
18 any individual. And I know, your Honour, you have been, yourself, a
19 director of public prosecutions and you would appreciate that. Madam
20 Bensouda herself has been a director of public prosecutions. It would be
21 an anarchical situation in a democracy if persons were to be held before
22 a court because the director of public prosecution has been instructed by
23 any other person and he has done so without regard to evidence and the
24 law. I can assure you in Kenya it would not happen.

25 Number 2. Take, for example, the office of the attorney general.

1 The office of the attorney general is an office in the executive, but the
2 constitutional mandate of the office of the attorney general requires the
3 attorney general to make independent objective decisions, and that's why
4 our constitution says, as you have rightly pointed out, your Honour, the
5 attorney general is the guarantor of the rule of law. Part of his job is
6 to advise the government on -- but there is a separate independent
7 constitutional obligation to defend the rule of law. It is stated in
8 this language, if I may:

9 "The Attorney General shall promote, protect, and uphold the rule
10 of law and defend the public interest."

11 The attorney general cannot be asking other individuals in
12 government, including other ministers, what is the public interest,
13 because the constitution says it is his business to promote and uphold
14 the rule of law and he's deemed to know what the rule and the law is.

15 I could go on and on and on. The president of Kenya cannot
16 direct the electoral commission to declare a result in the election in
17 one way or the other. It cannot. The president of the Republic of Kenya
18 cannot advise the judicial service commission to recommend one judge as
19 opposed to another for appointment. And therefore, just to summarise,
20 our institution is replete with independence and autonomy for
21 institutions, and the president cannot assume responsibility for how
22 those institutions function.

23 But what about Section 132(5) that your Honour has drawn my
24 attention to. What about the responsibility of the president to ensure
25 that international obligations of the Republic of Kenya are fulfilled

1 through the actions of the relevant cabinet secretaries. Indeed, that is
2 the heart of the matter. If the drafters of the constitution - and I
3 must confess I was one of them - intended that this constitution should
4 impose on the president personally this responsibility, it would have
5 stopped at that: "The president shall ensure that the international
6 obligations of the Republic Kenya are fulfilled." Full stop. It goes on
7 to say, "through the actions of the relevant cabinet secretaries." So
8 what does it mean?

9 I'm sorry, honourable --

10 JUDGE HENDERSON: (Microphone not activated) -- I also asked you
11 to consider the impact or the relevance of sub-Article (3) which deals
12 with co-ordinating because if there is an impasse or things have stuck,
13 as it were, is everybody to sit on their hands or is it that the general
14 obligation to co-operate under the statute has to be given effect to?
15 This is what I would like your help with.

16 MR MUIGAI: Well, I appreciate that -- sorry, I appreciate that,
17 your Honour, if I have your permission, if I summarise on the first
18 argument and then I'll come to that.

19 The duty of the president of the Republic of Kenya in the
20 fulfilment of Kenya's international obligations is to ensure that there
21 is in place a responsible cabinet secretary for each purpose. For
22 example, your Honour, if - if - Kenya is a party to the International
23 Criminal Court Statute, the president of the Republic of Kenya is obliged
24 to ensure that there is, in his government, an Attorney General to whom
25 these requests can be transmitted, 1; 2, that there is a minister for

1 foreign affairs to whom the statute makes reference; and 3, to ensure
2 that there is a minister of interior to whom a specific request can be.

3 The failure of the president's mandate would arise if he had
4 failed to appoint responsible persons as required by the treaty and the
5 law. In Kenya, there is no such problem. Is there an Attorney General?
6 I am very happy to confirm to you, your Honour, that indeed that is the
7 case. Is there an minister of the interior? There is. Is there a
8 minister for foreign affairs? There is.

9 In as far as Kenya's -- the president's obligation under 132(5)
10 is concerned vis-à-vis the Rome Statute, he has discharged that
11 obligation. What will the attorney general do if he receives a request
12 from the court? The president does not know, nor should he know because
13 that is an independent function donated by the constitution to the office
14 holder. What will the minister of the interior do? The president
15 doesn't know and he doesn't need to know.

16 What the president needs to know and what he knows is that there
17 is an independent officer serving in that position. And I think the
18 complaint that your Honour can entertain in this court or in an
19 international forum is to say: The Government of the Republic of Kenya
20 is not living to its treaty obligation. Why? Because it is obliged to
21 have an attorney general to whom we can take a request. The president
22 has failed to appoint an attorney general. It is obliged to have a
23 minister of the interior to whom we can take a request. The president
24 has declined to appoint such a person. Thirdly, it is obliged to have a
25 minister of international affairs to whom we should make, and the

1 president has failed to do it. That, then, would be a failure of the
2 president's constitutional mandate. Is that the situation here? Not at
3 all.

4 The three principal persons identified in the Rome -- in the
5 International Crimes Act as the persons required to interface with the
6 court exist, and, in addition, practically, have been in communication
7 with the court.

8 In my tenure as attorney general, I have dealt with three
9 different - three different - ministers of the interior, and I have seen
10 every correspondence from the court to those three ministers, and there
11 has never been a breakdown. Right. I have dealt with three ministers of
12 foreign affairs, and there has never been a breakdown. And each time we
13 have received high officials of the court, I, and the minister of
14 interior and the minister for foreign affairs, have been available for
15 that purpose.

16 An argument therefore that says that the president of Kenya
17 conceivably can bear responsibility for what individually we are doing in
18 furtherance to our individual mandate, either is based on a total lack of
19 appreciation of our law or is just flippant.

20 Now, you have asked me, your Honour, what would happen -- what
21 would happen if there was a total breakdown in the machinery for
22 co-operation. I must thank you for asking me that question because you
23 have given me an opportunity to point out the exact circumstance that the
24 drafters of the Rome Statute anticipated when they thought about a
25 referral to the State Parties Conference. That is what can go to a State

1 Parties Conferences. That would be so fundamental, it would go to the
2 heart of the states's commitment to its international obligation under
3 the Rome Statute.

4 I make no comment, because I assume I will have an opportunity to
5 do so, as to what now the Prosecutor purports as an afterthought can be
6 taken to the State Parties Conferences. I will come to that. But let
7 me, before I finish, make these points because they are in my submission,
8 and I need to restate them, and they are this.

9 I have been in the Office of the Attorney General since September
10 2011. That date predates the date that the Honourable Uhuru Kenyatta was
11 elected to be president of the Republic of Kenya. An argument that
12 suggests that everything I did a year earlier, a year and a half earlier,
13 two years earlier, was dictated upon by a person who had not assumed
14 office is absolutely ridiculous, to say the least.

15 How would I have anticipated that I should fashion my
16 communication with the court in anticipation of an outcome of an
17 election, that even people more knowledgeable than I could ever be in
18 those circumstances had -- had confirmed was a contested election,
19 legitimately contested election; meaning, that there were persons running
20 for those offices who had popular support.

21 Finally, I want to place it on record, because I have stated in
22 my statement, at no time did I receive or have ever communicated or
23 received any direction or suggestion or prompting as to how my
24 intervention with the court should be. I have made those decisions
25 myself based on my knowledge and my experience and my learning which a

1 third lawyer or a fourth one may find to be inadequate, but I made them
2 in good faith. Thank you.

3 JUDGE HENDERSON: I am just going to ask you one last question,
4 and, of course, give the other parties an opportunity to deal with the
5 same point if Presiding Judge permits.

6 What efforts have you, Attorney, yourself, pursued to ensure
7 these specific requests that are at the heart, the nub of this particular
8 application today?

9 MR MUIGAI: I must say, if what your Honour means is what have I
10 done about the requests regarding financial statements, nothing went --
11 nothing went beyond the final communication we had with the Prosecutor in
12 November 2012. The Prosecutor stated her position. I stated mine. She
13 stated she was entitled to the records. I stated that she wasn't. I
14 encouraged her to take up the matter at an independent forum. She
15 didn't.

16 I considered myself then, as I do now, entitled to assume that
17 the Prosecutor was no longer interested in this particular disputed area
18 of co-operation. Indeed, until the application for adjournment was made
19 a few weeks ago -- or, rather, a few months ago, this issue had become
20 moot. It had become moot because two lawyers reading the same set of
21 laws had come to two different conclusions in what the law required.

22 I wasn't therefore in a position, your Honour, to act in a manner
23 inconsistent with my own interpretation of the law, and indeed my own
24 conscience on this matter because I never entertained a doubt then, nor
25 do I now, as I stand before, that the Prosecutor as a prosecutor is not

1 entitled to this form of material without a court order. That is the
2 reason I have not pursued the matter further.

3 I hope I have answered your question, your Honour.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 Now I would like to give the floor to the other parties and
6 participants.

7 But before that, I have a very practical question to ask
8 Mr Attorney General. So I understand that your position is that you need
9 an order from this Chamber in order to proceed with the request for
10 financial record. In that case, could you provide an indication of how
11 long from the issuance of such order it would take for the requested
12 records to be provided? I know I'm asking you to speculate, but if you
13 can even give us an indication or average number of days or months in
14 order to process this kind of request, that will greatly help us.

15 MR MUIGAI: I appreciate your question, Madam President, but I
16 regret I would have to go back to my original explanation, which is this:
17 The organs that would deal with a request of that nature are independent
18 and autonomous. I don't control them. Nobody controls them. And if I
19 received an order, I would pass it to the DPP, pointing out our
20 obligations under the law, but I cannot tell him: "I have directed you
21 to start tomorrow morning, and I have directed you to finish by Friday
22 afternoon." I have no such power, I have no such authority, and nobody
23 in Kenya has such an authority.

24 If he went to a court -- if he went to a court, that court has
25 its own docket. He can make an argument to the court to prioritise the

1 hearing. The court is independent; i.e., the court can consider what he
2 says, but the court is independent. Even if the court made an order,
3 there is an appellate mechanism. I can't stop a person affected by such
4 an order from preferring an appeal. The DPP cannot stop him. The chief
5 justice cannot stop him. That process would have to go on.

6 We have a supreme court. It has its own docket. If this person
7 were to say that there is a novo point of constitutional law and the
8 supreme court decided that there was, I -- not -- neither myself nor the
9 chief justice nor anybody else can interfere with the docket of the
10 supreme court. Would it take a month, six months, one year, two? I
11 don't know and I would not speculate.

12 PRESIDING JUDGE OZAKI: Thank you very much. It's a very candid
13 and clear explanation, which I appreciate.

14 Now, I would like to give the floor to parties and participants
15 to raise any issue including the points raised by my colleague
16 Judge Henderson. But again, I would like to remind you not to repeat
17 previous written submissions.

18 I would like to start with Prosecution.

19 MR GUMPERT: I'm grateful, Madam President. In response to some
20 of the things that my learned friend said, I pick up first his assertion
21 in response to His Honour Judge Henderson, that the letter which he wrote
22 on the 23rd of November of 2012 was his last word on the matter, that
23 he'd invited the Prosecutor, the ICC Prosecutor, to go to court, and that
24 hearing nothing more, he assumed that she was no longer interested in
25 this material; meanwhile, the Attorney himself was quite clear that such

1 requests had to be made by means of an order of the Chamber rather than
2 simply by a request of the Prosecutor.

3 Can I take your Honour to that letter and indeed to what
4 followed, because it demonstrates, with the greatest of respect to the
5 Attorney, that what he's just said is quite inaccurate. The bundle which
6 I provided your Honours with this morning, the tabbed bundle, has that
7 series of correspondence in chronological order. And the Attorney's
8 letter is at tab 10.

9 The first thing I would observe is that the statement made by the
10 Attorney, that certain portions of the request, RFA 45, the document
11 which originated this whole dispute, had to be accompanied by a court
12 order, is restricted to a tiny portion of the material which had been
13 asked for. Can I invite your Honours to turn to page 4.

14 Your Honours see there that the Attorney writes under
15 paragraph (c):

16 "With regard to the request," and he's saying there to freeze
17 bank accounts.

18 And he goes on to say that there needs to be a court order for
19 that. I must emphasize that that request for assets to be frozen forms
20 no part of our application today. I accept that the position of the
21 Government of Kenya in respect of that request has been consistent, but
22 it's completely irrelevant so far as these proceedings are concerned.

23 Now let us turn, if we may, to what the Attorney said was the
24 position of the Government of Kenya on the 23rd of November with regard
25 to all the other requests - that's at the beginning of this same letter.

1 The requests for tax returns from the Kenya Revenue Authority, what does
2 he say about that? He goes -- I'm sorry, let me take it in turn. The
3 request for tax returns at para 1. And then on the next page, records,
4 bank accounts from the central bank of Kenya, post office savings banks
5 and then other financial records. They are set out from 1 to 6. What is
6 the position of the Government of Kenya? Is it saying you must have a
7 court order? The Chamber must have authored this? No, it isn't.

8 It's saying on the 23rd November:

9 "With regard to these requests, we have transmitted the request
10 to the competent authorities and we will revert as soon as we have
11 relevant information."

12 So far from it being the position of the Government of Kenya, as
13 I understand the Attorney to say, that he'd closed the correspondence off
14 in November, he'd said, "You're not having this unless the Trial Chamber
15 or the Pre-Trial Chamber orders it." He was saying exactly the opposite,
16 save for the freezing, which has got nothing to do with the case, he was
17 saying, "We're on the case, we're dealing with it. Don't worry."

18 And as for that being the end of the matter and that at that
19 stage, hearing nothing back, he assumed that the Prosecutor, as he put
20 it, was no longer interested, I shan't take you in similar detail, but
21 tab 11, Prosecutor writes back like a shot, 6th December: I don't agree
22 with you, you need to hurry up please. I'm sorry if I'm using rather
23 colloquial language, but that's the gist of what she's saying.

24 At tab 12, on the 11th of December, the Attorney writes back.
25 He's aware that the Prosecutor still wants this material. And indeed in

1 respect of certain requests, he says that they are carrying inquiries
2 out. And in respect of the financial requests, his only response, once
3 again, is to do with the freezing of certain assets. He says nothing to
4 indicate that his previous assurances, that these records - the records
5 that you, your Honours, are interested in - were being obtained is no
6 longer the case.

7 The Prosecutor writes back on the 12th of December at tab 13.
8 She restates her position.

9 At tab 14, the Attorney himself writes back. Again he says you
10 can't have the freezing of the assets without an order. But he says
11 nothing to indicate that the position of the Government of Kenya has
12 changed with regard to the financial records. And the correspondence
13 continues, as your Honours see, through February, and then into April,
14 with the Government of Kenya's filing, and culminates in June with the
15 very clear statement of the Government of Kenya, in the filing which is
16 at tab 18, which I've already drawn to your attention and will not draw
17 to your attention again, but in essence they are saying: Yes, we accept
18 the Prosecutor has the right to make these applications.

19 So the submission which my learned friend made is simply
20 unsustainable. The correspondence didn't finish then, it was quite plain
21 that the Prosecutor was still highly interested in this material. And
22 the Government of Kenya had never stated that there needed to be an order
23 by the Chamber in order for the Government of Kenya to comply. In fact,
24 they'd said the opposite. They'd said: We're on the job, we're dealing
25 with it, we will provide it. That's the first point that I seek to deal

1 with.

2 The second is this: The Attorney, of course, has the advantage
3 of all of us. He is not only a Kenyan lawyer but he is also the senior
4 law officer of the Republic of Kenya and therefore he speaks with a
5 certain authority when it comes to matters of Kenyan law and the Kenyan
6 constitution. And I'm aware that there is considerable sensitivity about
7 the proposition that non-Kenyan lawyers, particularly, it seems, those
8 representing the Prosecution at the International Criminal Court, try to
9 interpret Kenyan law because it's suggested they're not competent to do
10 so.

11 I say all of that by way of proviso because when His Honour
12 Judge Henderson asked the Attorney to comment upon, to elucidate
13 paragraph 132(5) of the Kenyan constitution, which sets out the
14 president's duty, as I understood it, the answer which the Attorney gave
15 was, firstly: All the president has to do in order to comply with his
16 obligations is to appoint independent officers. The important one, of
17 course, in this case, being the Attorney himself. And that that is the
18 whole scope of the president's duties.

19 Well, I repeat the reservations, I'm not a Kenyan lawyer, but
20 that appears to fly in the face of common statutory interpretation and,
21 indeed, common sense. It can't possibly be the case that where you have
22 a duty to ensure that the state of which you are a head complies with its
23 obligations, its international obligations, you can discharge that duty
24 simply by appointing somebody independent and saying, "Well, it's up to
25 them now." Of course your duty has to continue to ensure that that

1 independently appointed person is actually doing the job. If he sits, as
2 the Attorney said a moment ago, on his hands and does nothing, it won't
3 satisfy your constitutional obligations to say, "Oh, well, that's not my
4 business anymore."

5 If that is what is happening, then it is your duty, firstly, to
6 stir him up into action, and if you can't do that, to replace him.

7 And may I just focus for a moment on the word "independent." I
8 have no doubt that the Attorney is a man of independent mind and that he
9 does indeed exercise his functions independently and perfectly properly,
10 but he isn't, in fact, independent of the president. As we can see from
11 provision -- from Article 132(2) of the Kenyan constitution, that is
12 right at the beginning of the folder which I handed to your Honours this
13 morning. Immediately after the index there are some selected pages from
14 the constitution of Kenya, and we're dealing here with the provisions of
15 Article 132, and sub-Article (2):

16 "The president shall nominate and with the approval of the
17 National Assembly appoint and may dismiss," who? Well, amongst others,
18 the Attorney General.

19 Now, as I say, I cast no aspersions. I'm quite sure that the
20 Attorney does in fact perform his statutory duties perfectly
21 independently. I'm not making any complaint about his independence. But
22 ultimately he is appointed by and may be dismissed by the president.

23 So when he spoke of the president fulfilling his duties by
24 independent -- by the appointment of independent persons to carry out the
25 specifics of compliance and nominated himself as one of those persons, it

1 has to be borne in mind that Mr Kenyatta has the power, firstly, to
2 appoint him; and secondly, perhaps more importantly, to dismiss him.

3 There is just one other matter which I wish to deal with. I'm
4 conscious of the time.

5 Just before I do, perhaps I can ask what might be called a
6 scheduling question. Your Honours mentioned, or, Madam President, you
7 mentioned that we will come to who said what. Now, I have dealt with a
8 little bit of who said what because it was raised by the Attorney and I
9 felt the need to rebut what he had said. But I make the strongest
10 representations that in order to fully understand the context, it's
11 important to understand who said what from an earlier stage, and I would
12 appreciate at some stage, and if we're going to do it, it's going to have
13 to be this afternoon, and I know that that was an unwelcome thought, but
14 if we're going to do it, I would seek the opportunity briefly to take you
15 through the correspondence because it is extremely illuminating. But I
16 say that as an aside. There is one other matter, substantive, that I
17 want to refer to now on this subject.

18 A little while ago, I think it was, in fact, in answer to one of
19 Madam President's questions, the Attorney dealt with the procedure which
20 would have to be followed for the taking of evidence; that was article --
21 our Article, the ICC Article 93(1)(b). I just pause so that your Honours
22 can find the relevant.

23 Your Honours will recall that the Attorney, as I understand it,
24 draws a distinction, he hasn't been completely precise as yet, but he
25 says some of these powers can only be exercised, such requests can only

1 be made, if there is an order of the Chamber, those which he
2 characterised as judicial requests; whereas others, he said, the
3 Prosecutor can make the request direct. I have to say as an aside, I
4 struggle to find any such distinction in this Article or anywhere else,
5 but that's his submission.

6 And specifically, your Honour was asking about 93(1)(b), the
7 taking of evidence, and he gave the example -- I think your Honours said,
8 "Would it be like this?" And he said, "No, not quite, it would be like
9 this." But in any event, it was a matter which he was quite clear about.
10 If it's simply a request directly from the Prosecutor, it would not be
11 something that the Kenyan state could legally comply with. A request
12 under Article 93(1)(b) would have to come from the court, would have to
13 be by -- sorry, from the Chamber, by way of an order of the Chamber.

14 And it's been drawn to my attention that, in fact, that is
15 inconsistent with the last time -- I may be misspeaking, I don't know
16 what was the last time, but an occasion when the Prosecutor made
17 precisely such a request. And I've been handed a letter from the
18 previous Attorney, which is dated the 4th of October, and this relates to
19 a request made directly by the Prosecutor, without the intervention of
20 the Chamber, without any Chamber order, transmitted directly to the
21 Attorney, then Amos Wako, the honourable Amos Wako, and the Attorney
22 responded. And in responding -- and I will have copies of the letter
23 produced over the luncheon adjournment so that your Honours can see it.

24 But in responding, the Attorney simply said:

25 "The Prosecutor has requested the Government of Kenya to

1 authorise and facilitate the interview of provisional commissioners." So
2 it's interviews, its 93(1)(b) business we're dealing with.

3 The Attorney goes on to say:

4 "I am satisfied that the request relates to the investigation
5 being conducted by the Prosecutor, and I hereof give authority for the
6 request to proceed. I kindly request you to appoint on a priority basis
7 a judge of the High Court to take the evidence."

8 So at no stage back in 2010 when precisely such a request was
9 made was the Government of Kenya as represented by the then Attorney
10 General, saying, "No, no, only the court can ask us to do this." On the
11 contrary, in a very brief letter, he was making apparent his ready
12 compliance with the direct request of the Prosecutor. It's a very clear
13 indication, there are others, that the position currently occupied by the
14 Government of Kenya is not a consistent one. It's a late-coming one in
15 an attempt to evade its responsibilities.

16 PRESIDING JUDGE OZAKI: Thank you very much.

17 You will be given a chance to talk about who, what, when, yes.

18 MR GUMPERT: I'm very grateful.

19 PRESIDING JUDGE OZAKI: We have ten minutes before our lunch
20 break.

21 I would like to ask Defence team if Defence has anything to say?

22 MR KAY: I do, Madam President, on the matter of late-coming
23 arguments being relied upon by parties in these proceedings, because it's
24 my submission that, in fact, contrary to the impression we were given
25 last week that the reason why the Prosecution could not withdraw the

1 proceedings because of the failure of their case relied upon
2 nondisclosure of financial records relevant to the case to the
3 Prosecution by the Government of Kenya is, in fact, not a correct
4 assertion. For the first time, I have been able to review the
5 correspondence between the parties, being the Government of Kenya and the
6 Prosecution, in a file provided to me yesterday by Mr Gumpert. And for
7 my purposes in relation to the situation concerning the state of the
8 Kenyatta case, which is a discrete issue in relation to the generality of
9 the application before the Court, the issue that I have to make concerns,
10 in fact, the absence of any request at any stage by the Prosecutor for
11 the facts that they said they relied upon this evidence for last week.

12 And I have a note here of what was said in court concerning the
13 request for assistance. That you'll find in tab 2 of your bundle, dated
14 the 24th of April, 2012. And the assertion made in court was that the
15 request for assistance which was made was for Mr Kenyatta's financial
16 records because, we suggest, if he did indeed make such financial
17 contributions, they would likely to be records of movement of funds at
18 the relevant time. And last week we were told that this was the one
19 remaining pebble in relation to the case of the Prosecutor that needed to
20 be looked at.

21 And in relation to the matter, it was given this importance to
22 the issue that it could be highly suggestive of innocence or at least
23 noninvolvement in the way we have suggested; or alternatively, there may
24 be unexplained movement of large amounts of money. And despite the four
25 years of this case, the impression was given that repeated requests had

1 been made to the Government of Kenya specifying in accordance with the
2 Statute the grounds and reasons for wanting this evidence.

3 I invite your Honours to, in fact, turn to the second page of the
4 request for assistance that forms the basis of this dispute, dated the
5 24th of April, 2012, and you will see set out in paragraph 9 the various
6 assistance in relation to all accused who have appeared before the court
7 since the Confirmation of Charges proceedings. And it is quite clear, as
8 you review paragraph 9(a), that there is no request for the accounts to
9 show the movements of funds. It is simply not here.

10 And paragraph 9(a) deals with lands; paragraph 9(b), companies;
11 paragraph 9(c), income tax returns. And then we get to paragraph 9(d),
12 it specifies to identify any bank accounts held by the individuals,
13 personally or through third parties, companies, on a present and
14 historical basis going back to June 2007, and the current balance on
15 those accounts. It just says "specify or identify bank accounts," not
16 the records of those accounts for January 2008, which is the matter that
17 was raised before you last week and the impression given that the case
18 could not fail last week because there was an outstanding issue that had
19 been prevented from being investigated.

20 In fact, it was an issue that was never raised. If you go to
21 paragraph 9(e), the request concerns transactions by individuals or
22 linked companies at foreign exchange institutions or money service
23 bureaus since June 2011; (f), capital markets authority; (g), post office
24 savings bank account, identify them and give the current balance on those
25 accounts. The list goes on.

1 It is not the issue of the financial records of the accused and
2 the matter of withdrawal of funds in relation to the activities alleged
3 by the Prosecution at all. Those grounds were never in this request, and
4 the linking of this issue with the collapse of the case reflects exactly
5 what I told the Court last week, that this is being used as a cover to
6 blame someone else for a case that has failed entirely on its evidence,
7 and finding us drawn into these proceedings deflect from the issue that
8 the Court was dealing with in relation to my case, which was the issue of
9 the termination of those proceedings given the admission by the
10 Prosecutor of the lack of evidence and the offering of no evidence for
11 the trial date of the 5th of February.

12 And I raise this matter now because I've noticed some of the
13 questions from your Honours referring to financial records as though that
14 was an issue, the truth of which could be found or the responsibility for
15 which can be found, within the dispute of the Prosecutor and the
16 Government of Kenya. It is not that case and what we were dealing with
17 last week was an unrelated issue to the matter of the termination of the
18 proceedings. The basis that was sought to bring us and to provide an
19 adjournment for the Prosecutor in relation to that matter was simply not
20 a matter that had ever previously been raised. And I draw that to the
21 attention of the Court at this stage. Thank you.

22 PRESIDING JUDGE OZAKI: Thank you very much.

23 We need to take a lunch break for 90 minutes, so we rise now and
24 come back to the same courtroom at 2.30. The hearing is suspended.

25 (Recess taken at 1.01 p.m.)

1 (Upon resuming in open session at 2.30 p.m.)

2 THE COURT USHER: All rise. Please be seated.

3 PRESIDING JUDGE OZAKI: Good afternoon. And thank you very much
4 for coming back to this courtroom.

5 Before I give the floor to Legal Representative, I have one
6 clarification which I would like to seek from Mr Attorney General
7 regarding the interpretation of Kenyan law, which I may be repeating
8 myself and Mr Attorney General has already responded. In that case,
9 forgive me, but I need this specific clarification.

10 When you talk about judicial request, judicial request means that
11 you need a court order - I mean, Kenyan court order - in order to
12 execute. The requesting body also should be always a court, in this case
13 this Chamber, and is that so, for example, in the case of Bilateral
14 Mutual Legal Assistance Treaty in order for requesting government? For
15 example, if it is the mutual legal assistance treaty between Kenya and
16 UK, in order to make a judicial request through that treaty, UK
17 government has to have a court order to that effect or just the
18 Prosecution request is suffice?

19 MR MUIGAI: Madam President, I'm happy to answer your question.
20 First, I want to clarify that we have in Kenya, as in many other
21 countries, an Independent Mutual Legal Assistance Act, it applies to
22 mutual legal assistance across the board. Its provisions do not override
23 where there is a specific treaty obligation.

24 For example, we have a whole corpus of law on extradition. On
25 that, let's say -- let's say we have two sets of law on extradition; one

1 covering Commonwealth countries as a special category of countries, and
2 another one covering the rest of the world. That law is a law of general
3 application. Where there is another methodology specific to another
4 treaty, that specific overrides the general.

5 It is not a requirement that every mutual legal assistance
6 request should be -- should be contained in a judicial order because, as
7 we have sought to demonstrate, there are very many mutual legal
8 assistance requests of a non-judicial character. For example, we receive
9 routinely from many countries around the world --

10 PRESIDING JUDGE OZAKI: I'm sorry to interrupt, but I'm talking
11 about judicial request. In case that any country with which you have
12 this Mutual Legal Assistance Treaty, whenever this country requests
13 assistance in getting document and if this request comes under the
14 category of judicial request, the requesting country always needs court
15 order or not?

16 MR MUIGAI: Well, it depends and it goes back to the discussion
17 in the morning. It depends on the nature of the request. If we were to
18 be requested by a camp a -- any government to arrest and surrender a
19 person, that would have to be contained in a judicial order that we are
20 enforcing. A prosecutor in a foreign condition cannot tell us: "I am
21 investigating the crime of murder in London. Please arrest in Nairobi
22 Mr X, Y, and Z and send him over to me." We cannot do that and that
23 cannot be done. But we can receive from the Crown Prosecution Service,
24 from the Serious Fraud Office, from any other competent authority, a
25 request, for example, to confirm are the following companies registered

1 in the registry of the Republic of Kenya on companies as foreign British
2 companies, and we don't need a court order because that is a
3 straight-forward request that can be enforced outside a court order.

4 So my answer, like it was in the morning, is: We need to remind
5 ourselves what is the character of the request. Some requests do not
6 require any court order or any judicial intervention of any nature.
7 Others must by their very nature be embodied in a judicial order,
8 otherwise they would be in violation, both of Kenyan law and, I think, of
9 international law.

10 PRESIDING JUDGE OZAKI: Thank you very much.

11 Now I give the floor to Legal Representative of Victims to
12 address issues which we have been discussing.

13 MR GAYNOR: Thank you, Madam President.

14 The model for state co-operation, which is set out in the ICC's
15 structure insofar as it is relevant to today's proceedings, is set out in
16 part 9 of the Statute; Chapter 11, Section (1) of the Rules of Procedure
17 and Evidence; and Chapter 7, Section (1) of the Regulations of the court.
18 And in Kenya, that model is set out, as we know, in the International
19 Crimes Act. The model attempts to reconcile three competing interests:
20 State sovereignty, individual liberty, and the deterrence of atrocity.

21 Now, the model was agreed to by the States Parties after very
22 extensive negotiations in which Kenya also participated. Kenya is very
23 much a coauthor of that detailed and delicately balanced model of state
24 co-operation. And I submit there are four themes which run through that
25 model, whether you look at the Statute and the associated ICC instruments

1 or whether you look at the International Crimes Act.

2 First State Parties must co-operate and must comply with requests
3 for assistance from the ICC's Prosecutor in its investigation and
4 prosecution of crimes within the jurisdiction of the court. This is not
5 an option. It is not a favour to the court nor to the victims of the
6 crimes charged. It is an obligation.

7 Now, in a decision of the Al-Bashir case, concerning the failure
8 of the Republic of Malawi to arrest Omar Al-Bashir, at paragraph 46,
9 Pre-Trial Chamber I said:

10 "Indeed it is the view of the Chamber when co-operating with this
11 court, and therefore acting on its behalf, States Parties are instruments
12 for the enforcement of *jus puniendi* of the international community."

13 Now, that arose in the context, of course, of Malawi failing to
14 arrest Al-Bashir, President Al-Bashir of Sudan. I would like to note in
15 this context that Kenya also failed to arrest Omar Al-Bashir when he
16 visited Kenya upon the inauguration of the constitution in 2010.

17 This concept of an obligation to co-operate appears in the
18 Statute in Articles 86 and 93(1), and appears in the International Crimes
19 Act in Section 76, 77, and 104.

20 The second theme is that states must comply with requests for
21 assistance promptly. This concept of prompt compliance comes out
22 particularly strongly in the International Crimes Act. The words which
23 appear in that act are "promptly," "immediately," "without delay,"
24 "urgently." I refer to Sections 26, 76, 84, 86, and 95 of the
25 International Crimes Act. Some of those provisions relate to surrender

1 of persons, some of them relate to access to evidence.

2 The third theme is that a state is expected to make a genuine
3 effort to co-operate. If a state feels that it cannot meet the request
4 for assistance, it must find or at least explore other ways to meet the
5 request. That comes out in Article 90(3)(iii) and subsection (v) of the
6 Statute. It appears in Section 24(2), Section 111 and Section 112 of the
7 International Crimes Act.

8 And the fourth theme which I submit appears is that if there is a
9 legal barrier to co-operation, the state party must consult with the
10 court promptly and without delay. That appears in Article 93(3) and 97
11 of the Statute. It also appears in Regulation 108(2) of the Regulations
12 of the court. And in the International Crimes Act it appears in Sections
13 24, 111, and 112.

14 Now I wish to reemphasize a point I made I think a couple of
15 times. The obligation is not on the Prosecutor to prosecute the
16 noncompliance by the state. The obligation rests squarely on the state
17 party to consult with the court. The difficulty in this case is
18 certainly not with the enabling legislation. In many ways, I
19 respectfully submit, the International Crimes Act 2008 is a model for
20 enabling legislation.

21 The problem is that the Attorney General has failed to comply
22 with its provisions.

23 Now I wish to go straight to what happens when the Attorney
24 General receives a request. Under Article 93(1)(i), i.e., the provision
25 of records and documents, he must turn to Section 104 of the act, as I

1 mentioned this morning. If the request appears to fall under
2 Article 93(1)(l), then the Attorney General must turn to Section 108 of
3 the act.

4 Now, whichever section the Attorney General turns to or, to put
5 it another way, whichever section the request relates to, the discretion
6 given to the Attorney General under the act is very limited. He must
7 satisfy himself of two things: First, the request relates to an
8 investigation being conducted by the Prosecutor or any proceedings before
9 the ICC; and second, the document or records sought is or may be in
10 Kenya. That is the extent of the inquiry that he's expected to carry out
11 or indeed permitted to carry out under Sections 104 and 108 of the
12 International Crimes Act.

13 Now, one of the letters referred to by Mr Gumpert I believe was
14 dated the 6th of December, 2012, and at page 2 of the Prosecution's
15 letter, the Prosecution refers to an assertion made by the Government of
16 Kenya in which the government said:

17 "The Government is convinced that the court, through the
18 Prosecutor, has the evidence necessary that it needs to prosecute the
19 trials."

20 Now, that assessment clearly falls outside the ambit of the
21 Attorney General's discretion under either Article 104 or 108. That
22 assessment by the Attorney General is entirely irrelevant.

23 Now when the Attorney General satisfies himself of the two
24 branches of the test that I just referred to, he shall forward the
25 request to the appropriate Kenyan agency. He has no discretion about

1 that. He must send it on. And when the agency receives it, without
2 delay, it must use its best endeavours to comply with it.

3 Now, there is no express follow-up duty set out in that part of
4 the International Crimes Act, but I submit that the spirit of those
5 sections and, indeed, the entire act, suggests that the Attorney General
6 should be following up with the agencies that he sent the communication
7 to, to say, "Well, how are you getting on, have you found anything, when
8 can I expect to receive it, and do you have any legal problems which I
9 should raise with the court?" And as far as I've seen, and I wish to
10 emphasize I'm not privy to all of the correspondence -- in fact, I'm only
11 privy to that which I was provided yesterday as well as Mr Kay, but I
12 have not seen anything to suggest that the government's follow-up has
13 been particularly impressive in the circumstances of the present
14 proceedings.

15 Now, in the Attorney General's submissions, both written and
16 oral, there has been a suggestion, I understand, that incriminatory
17 evidence relating to a Kenyan citizen cannot be disclosed to the ICC
18 without the consent of that citizen. I won't repeat Mr Gumpert's
19 submissions, which he has alluded to, I believe. I fully support what
20 the Prosecution has already said in writing on this.

21 But the argument is itself totally inconsistent with the
22 International Crimes Act. Almost the entirety of Sections 95 to 104 of
23 that act deal with providing evidence to the ICC where that evidence is
24 located in Kenya. It includes search and seizure operations. There is
25 no reference anywhere in the International Crimes Act to any obligation

1 to obtain the consent of the suspect, nor is there any reference to any
2 obligation to consider the privacy rights of the suspect. I accept that
3 the right to privacy appears in the constitution, but as, I believe,
4 your Honours have already alluded, the right to privacy in most
5 jurisdictions exists, and the right of law enforcement authorities to
6 gather the evidence that they need to uphold the rule of law and to hold
7 accountable those for crimes also exists. The right to privacy never
8 trumps the latter of those rights.

9 Clearly Sections 95 to 104 of the act envisage the provision of
10 evidence which will incriminate a Kenyan citizen as well as the provision
11 of evidence which will exonerate a Kenyan citizen. The only legal
12 barriers to providing assistance to the ICC which are expressly
13 identified in the International Crimes Act, as far as I could tell, are
14 those in Sections 109 and 110. I'm open to correction. I don't believe
15 that the Attorney General has raised 109 or 110 as barriers in the
16 present case.

17 Let's turn now to the subject of consultation. As I've said
18 earlier, the obligation of a state party to consult with the court if a
19 legal difficulty emerges when the state party tries its best to comply
20 with an RFA runs through the International Crimes Act itself. It comes
21 up time and again. See, for example, Sections 20(4)(i). It comes up
22 again in Section 24(2), Section 44, Section 45, Section 54, Section 114,
23 115 -- correction, Section 156, Section 157. These provisions concern a
24 wide range of areas including the surrender of a person, providing access
25 to evidence, and concerns relating to state security. But the message is

1 absolutely clear: If there is any difficulty with complying with a
2 request for assistance, the solution is to consult immediately with this
3 court.

4 Now the request for assistance at the heart of these proceedings
5 is dated the 24th of April, 2012. The Government of Kenya initiated the
6 Article 93(3) consultation process on the 20th of December, 2013. In my
7 submission, that is simply not in accordance with its obligation to
8 consult promptly and without delay. That delay in initiating
9 consultation is itself a violation of both the Rome Statute and the
10 International Crimes Act.

11 In this morning's proceedings, there was some discussion about
12 two issues. The first was whether the court order necessary to obtain
13 access to evidence in Kenya must be an ICC court order or whether it can
14 be a domestic court order. And the second point which I believe has
15 arisen both in written and in oral submissions is whether it is the duty
16 of the Attorney General to seek a court order or whether it is the duty
17 of the Prosecutor to seek a court order. And I'd like to identify a few
18 submissions which might assist on this point.

19 The International Crimes Act in Sections 96(2), Section 107, and
20 in the second schedule to the act at Sections 3, 8, 17, and 23(1)
21 contains repeated reference to situations where a court order is sought
22 in Kenya with the authorisation of the Attorney General. And some of
23 those -- in at least one it's sought from a magistrate, in others it's
24 sought from the High Court of Kenya. In at least three of those
25 provisions, as I recall, it is a police officer who will request the

1 court order, having been authorised to do so by the Attorney General.

2 So the clear model which appears in the International Crimes Act
3 itself is that if a court order is necessary, it is a domestic court
4 order, and it is essentially the duty of the Attorney General to make the
5 arrangements for someone to go to court and to request that order. I
6 haven't seen any reference anywhere in the International Crimes Act to an
7 obligation on the Prosecutor of the ICC to go to a domestic court in
8 Kenya in order to request a court order, nor do I see any reference in
9 the International Crimes Act that the Prosecutor provide an order from a
10 Trial Chamber of this court in order to gain access to evidence in Kenya.

11 Let's pause for a moment here to raise a question: What is it in
12 the requested documents - and I'm not focusing just on the documents
13 which are the subject of today's Article 87(7) application, but on all of
14 the documents referred to in the Prosecutions's annex of the 31st of
15 January, 2014 - what is it in them that the government is so worried
16 about? Why don't they want your Honours to see them? Why don't they
17 want the Prosecutor to obtain them? If there is nothing wrong in there,
18 why don't they disclose them?

19 Now, I also would like to briefly point out that both the
20 Attorney General and the president are obliged, under the constitution to
21 uphold the constitutional rights of all Kenyans. That appears in
22 Articles 131 and 148 of the constitution. Why, I ask, rhetorically, is
23 the Attorney General so firm and unyielding in his defence of the rights
24 of the three Kenyans on trial before this court and, as far as we can
25 tell, wholly uninterested in the rights of the tens of thousands of

1 Kenyan citizens who are the victims of the crimes of this case and who
2 have an equal right to see the rule of law upheld in Kenya and that rule
3 of law includes the International Crimes Act and includes the Rome
4 Statute which, as the Attorney General pointed out, has been
5 domesticated.

6 I'd now like to turn to a couple of arguments made by the
7 Attorney General in his filing, dated the 20th of December, 2013. It's
8 filing number 877. I'll run through these points fairly quickly.

9 The Attorney General has referred to the Public Officer Ethics
10 Act and has criticized the Prosecution in part because the Prosecution
11 has failed to identify the correct commission that it sought the records
12 referred to at paragraph 10 of the request's letter.

13 Now, a bit of background might be of assistance here. The act,
14 as I understand it, focuses on the conduct and performance of public
15 officers and seeks to improve service delivery to the public. The act
16 defines a public officer. It includes employees of the government or any
17 department, service, or undertaking of the government, the national
18 assembly, or the parliamentary service or a local authority. And it
19 requires those individuals to provide an annual declaration of income,
20 assets, liabilities, et cetera.

21 Now, the -- there are a small family of different commissions
22 which are covered and identified under Section 3 of the act. It should
23 be very easy for members of the Attorney General's staff to identify
24 which commission applies to Mr Ruto, which commission applies to
25 Mr Kenyatta, and which one applies or applied to Mr Muthaura. Mr Sang

1 was not a part of this, I understand. Yet the Attorney General has
2 nevertheless thrown the duty to identify the commission back on the
3 Prosecution, and yet he's taken the position today, and indeed he took
4 the position in a filing 1184 in the Ruto and Sang case of the 10th of
5 February, 2014, at paragraph 23, the Attorney General said:

6 "It is thus not the Prosecution's place to set out the national
7 laws that apply and the procedures there are as they relate to the
8 appearance of witnesses."

9 His point was that the Prosecution had improperly arrogated to
10 itself the power to interpret Kenya's national law and he's maintained
11 that position here today, I believe.

12 Now, the Attorney General cannot simultaneously argue that the
13 Prosecution has failed to identify the correct commission to which a
14 request should have been sent while saying that the Prosecution,
15 basically, has no standing whatsoever to interpret the law of Kenya. The
16 government's submissions of the 20th of December, 2013, refer to a Civil
17 Aviation Act which is no longer in force; specifically, the government
18 referred to Civil Aviation Act, Chapter 394. That act was repealed by
19 the Civil Aviation Act number 21 of the 2013. Indeed, at Section 83 of
20 the 2013 act, a sidenote expressly notes that Act 394 has been repealed.

21 It is -- the 2013 act was assented to on the 14th of January,
22 2013, and entered force on the 25th of January, 2013, with none of the
23 confidentiality clauses of the earlier act. The 2013 act does contain
24 one clause which I'll read into the record to save us looking it up:

25 "Aviation safety and security information obtained, gathered

1 voluntarily, or otherwise given to the authority obtained, gathered,
2 voluntarily or otherwise, given to the authority under this act or
3 regulations made thereunder shall not be put to any inappropriate use."

4 Now in my -- it's clearly the appropriateness or otherwise that
5 guides the authority in deciding whether to share information, but
6 clearly, information relating to crimes committed against thousands of
7 Kenyan citizens is certainly the kind of information which is put to
8 appropriate use and should be disclosed under the new act.

9 I want to turn briefly to some aspects of the constitution.
10 There has been reference to the powers of the Attorney General under the
11 constitution. I would like to identify a couple more provisions which
12 haven't yet been referred to in the constitution.

13 Your Honour, Judge Henderson noted that it is the president who
14 appoints and dismisses the Attorney General. I'm slowing down for the
15 benefit of the transcriber. That is Section 132(2)(b). Under Section
16 152(1)(c), the Attorney General is a member of the cabinet. Under
17 section 240(2)(f), the Attorney General is a member of the National
18 Security Council. Elsewhere in the constitution we see that the
19 president chairs cabinet meetings. The president appoints all of the
20 cabinet secretaries; that is to say, he appoints the minister for
21 finance, he appoints the minister for foreign affairs, for land, for
22 education, for health, all of the ministries which we would find in most
23 countries.

24 It's clear, therefore, that the Attorney General sits right at
25 the heart of government. It is also inconceivable that co-operation with

1 the International Criminal Court by the Government of Kenya was not
2 discussed in cabinet meetings over the past year in particular since
3 Mr Kenyatta took office as president.

4 Under the International Crimes Act, it is principally the
5 Attorney General who is responsible for co-ordinating the compliance of
6 requests for assistance from this court. And we've referred earlier to
7 the fact that, under the constitution, it is the president who is obliged
8 to ensure that the republic complies with its international obligations
9 and the president has the power to appoint and dismiss the Attorney
10 General.

11 Your Honours, consider for the moment, and I'm not referring to
12 the current Attorney General, consider the hypothetical situation of an
13 attorney general who deliberately sets out to violate on a daily basis
14 every international agreement to which Kenya is a party, the Vienna
15 Convention on -- relating to diplomats, for example, the Charter of the
16 African Union, the Charter of the United Nations, the Convention for the
17 Suppression of Unlawful Acts Against the Safety of Civil Aviation,
18 hostage-taking conventions, terrorism-related conventions. If we were to
19 have what I might describe as a rogue prosecutor going into work, day in,
20 day out, violating the obligations of Kenya, is the president expected
21 simply to sit there and watch? Is he expected simply to let this rogue
22 attorney general to get on with the job of violating the country's
23 obligations? Of course not. The president must then step in and dismiss
24 the attorney general.

25 So it is absolutely the position, in my respectful submission,

1 that the president, as the constitution sets out, is the person
2 ultimately responsible for ensuring that the republic complies with its
3 international obligations. And any failure by the republic to do so is
4 ultimately - ultimately - the responsibility of the president.

5 Your Honours, I know you're already familiar, because His Honour
6 Judge Henderson has already referred to the extensive nature --

7 PRESIDING JUDGE OZAKI: Mr Gaynor, I'm sorry to interrupt you.

8 MR GAYNOR: Yes.

9 PRESIDING JUDGE OZAKI: We have to finish this Status Conference
10 today.

11 MR GAYNOR: Yes.

12 PRESIDING JUDGE OZAKI: Because tomorrow there will be another
13 Status Conference for another case.

14 MR GAYNOR: I will --

15 PRESIDING JUDGE OZAKI: So I would appreciate if you could
16 just -- not speed up, but to limit your submission to --

17 MR GAYNOR: Certainly.

18 PRESIDING JUDGE OZAKI: -- the most important parts.

19 MR GAYNOR: Certainly. Certainly. Just two more points, and
20 we'll be responding in writing to the government's submissions of
21 yesterday. But the president of Kenya is not a ceremonial office. It's
22 nothing like the president of Germany or the president of Ireland. This
23 is a president with very heavy executive powers. Those are set out, as
24 you know, at length in Sections 131, 132, and elsewhere in the
25 constitution.

1 The final point, and I'd like quickly to update your Honours on
2 something that I referred to in the submissions in the last Status
3 Conference. It's relevant to the question of non-prosecution. I told
4 your Honours that we were waiting for a report from the multi-agency task
5 force.

6 Now the deputy -- pardon me, the director of public prosecutions
7 confirmed on the very same day as that Status Conference that the
8 multi-agency task force has finished its review of the 4.000-plus files
9 and that not one of them is prosecutable that ironically was in Naivasha
10 on the 5th of February, 2014.

11 For the record, I'll simply read what he said and then I will
12 finish my submissions. Thank you.

13 The director said:

14 "Of the 4.000-plus files that they have reviewed, none of them
15 ask prosecutable. And that is that fact, a sad and a painful fact. None
16 of them has been found to contain sufficient evidence to be prosecuted,
17 whether it is international crimes or otherwise. What I'm saying,
18 therefore, I'm saying this: The sad and painful truth, we must face it,
19 is that at present there are no cases arising out of the PEV that can be
20 prosecuted before the ICD."

21 I'll end that quote. And I would very much encourage
22 your Honours, when considering the Prosecution's application, to focus
23 not only on the specific requests which the Prosecution has chosen as a
24 specimen charge of the litany of non-co-operation, but also to take into
25 account the entirety of what has happened in this case, as I explained on

1 the 5th of February in the Status Conference, as well as, for example,
2 the filings by the victims dated the 6th of May, 2013, filing 731, and
3 also, very importantly, annex to the Prosecution's submission of the
4 31st of January, 2014.

5 Thank you very much, Madam President.

6 PRESIDING JUDGE OZAKI: Thank you very much.

7 Now I would like to give the floor back to Prosecution, as I
8 promised. And then I give the floor to Mr Attorney General so that
9 Mr Attorney General can respond to the entirety of the submissions by
10 other parties and participants.

11 Prosecution.

12 MR GUMPERT: Madam President, the procedure must, of course, be
13 entirely a matter for you.

14 Ultimately, this is an application by the Prosecution. And in
15 normal circumstances, in my submission, in these effectively civil
16 proceedings, we're not prosecuting anybody here, we're asking for an
17 order which the court will make, I understand it, on the balance of
18 probabilities, determining whether there has or has not been a failure of
19 compliance. In those circumstances, those asking for the order would
20 normally have the last word. I would invite you to consider whether, in
21 fact, the sequence of proceedings which you have just outlined, should be
22 reversed. But if that doesn't find favour with you, I'm ready to make
23 four separate points now.

24 PRESIDING JUDGE OZAKI: Well, I think you asked the Chamber for
25 the time to go through all those exchanges.

1 MR GUMPERT: Yes.

2 PRESIDING JUDGE OZAKI: And I think it's better if you proceed
3 with the --

4 MR GUMPERT: I take no further point. I raise the matter. If
5 your Honour is against me in the end, who speaks when probably doesn't
6 matter very much. It's the quality of what is said, I'm sure, in the end
7 which will matter.

8 PRESIDING JUDGE OZAKI: Well, I think we will come back to this
9 issue later and see what will happen.

10 Just a moment, please.

11 (The Trial Chamber confers)

12 PRESIDING JUDGE OZAKI: Please proceed.

13 MR GUMPERT: I'm grateful, and I'm sorry, I need to seek a
14 further clarification. There are four matters that I need to say to
15 your Honours, to submit to your Honours at some stage. The first is just
16 to clarify the letter which I referred to but have now provided in
17 written form. The second is the matter of who said what and when, which
18 we referred to before lunch. The third is a brief response to the point
19 which my learned friend Mr Kay made which centred on the word "identify"
20 in the request. And the fourth is a matter which your Honours yourselves
21 raised about the possibility of the Court now making an order effectively
22 to supplement or double-up on the Prosecution's request.

23 May I address all of those four now or would you wish to restrict
24 myself simply to the chronology of who said what when?

25 PRESIDING JUDGE OZAKI: Well, I think that considering that we

1 have 50 minutes, I think you should address four points at the same time.

2 And how many minutes do you need?

3 MR GUMPERT: I think I can manage in ten.

4 PRESIDING JUDGE OZAKI: Okay. That's good.

5 MR GUMPERT: Let me deal firstly with the chronology, because
6 that joins up. I've dealt with the latter half of the chronology in
7 responding. So let me start and may I refer you to the binder which I
8 provided and take you immediately to tab number 3.

9 RFA 45, the Request For Information, is served on the 24th of
10 April. This response comes on the 14th of June, six weeks later. And
11 it's a blanking response. We need more details. Another six weeks
12 passes until we get to the item which is at tab 4. We're now on the 25th
13 of July, or at least there is a meeting on that date. This is an e-mail
14 or a copy of part of an e-mail on the 31st of July, and it appears from
15 that that there has been confusion in the mind of the Attorney General
16 about whether it is this request or some other request from the Registry.

17 Do I -- do I understand I'm going too fast? No? Sorry.

18 So it seems finally, now, three months after the event, that
19 things are clear in the Attorney's mind.

20 The next item is the loose item. This was my error. I hope I've
21 provided -- I know I provided this morning, I hope your Honours still
22 have it. It's a letter of the 7th of August. This is my error in not
23 including it in the tabbed bundle, even if your Honours can't find it,
24 and I urge you not to spend ages because I've only got a few minutes
25 left. It's the next installment on that date, some two weeks later, the

1 Attorney General is for the first time addressing substantively the
2 requests the Prosecution have made. What do they say? They do not say,
3 "We can't deal with this, there isn't a court order." On the contrary,
4 request for financial information, "We transmitted your request to the
5 Ministry of Finance." So any reasonable reader would understand things
6 are, albeit a little slowly, going ahead.

7 The next item, which is at tab 5, the Prosecutor writes back and,
8 as he says, "The slow pace of processing these request is a source of
9 frustration." Your Honours may think not surprising.

10 18th of September at tab 6: "Follow-up for the above matters and
11 your letter dated the 11th of September." The relevant part is on the
12 second page: "Request for financial information for," amongst others,
13 "Uhuru Muigai Kenyatta. We hereby attach the request sent to the
14 relevant authorities."

15 So again, the Kenyan Government is saying, "Yes, it's fine, it's
16 just taking a little time. We have sent off the request."

17 Tab 7, 29th of October, more time passing, by now six months has
18 gone by. And again, this is now from the Prosecutor herself:

19 "Please hurry up. Time is running out."

20 And the reference is made to the dead-lines which have been
21 imposed not by the Prosecutor but by the Trial Chamber for the submission
22 of evidence.

23 The next item at tab 8. The Attorney General writes back on the
24 7th of November. It looks here as though he is for the first time making
25 the submission he makes now:

1 "Request for financial information. There has to be a court
2 order in place."

3 If that sentence stood alone, then it would be very clear. But
4 what he goes on to talk about is the request under Article 93(k), not
5 included in our submissions today, it's an order for freezing of
6 property. And what he doesn't mention at any stage is the whole of the
7 rest of the 17 headings of financial records.

8 And the Prosecutor takes him up on that at tab 9 and spells it
9 out: "We need to know what you're doing about the financial records."
10 And that takes me to the point where I last began.

11 So the chronological sequence makes it plain that at no stage,
12 even at late as June of last year, and that is at tab number 18, I won't
13 take you to it now, the Attorney General was recognising that the
14 Prosecutor had the right to make these requests. That's point number 1.

15 Point number 2, your Honours have the letter now in writing, it
16 was a request to interview police officers. It was classically the kind
17 of request which the Attorney has called a request of a judicial
18 character which he has told you would have to be firstly coming from this
19 Chamber, rather than Prosecutor, and then being processed in the manner
20 he's described. And yet we see clearly here that that is not the view
21 the Government of Kenya took in relation to interviews with those police
22 officers, which, I may say, have never happened because there remains an
23 injunction in Kenya, an interlocutory injunction now nearly three years
24 old which the government has never challenged. Those interviews --
25 crucial interviews with police officers have never taken place.

1 Point 3, Mr Kay's point. As a matter strictly of grammar and
2 etymology, I immediately concede that using the word "identify" rather
3 than "copy and produce" was probably suboptimal. It was not the best
4 choice of the word. But is Mr Kay really suggesting that we just wanted
5 to know whether Mr Kenyatta did have some bank accounts and that we
6 wouldn't then be interested in knowing what the records were? That's
7 not, respectfully, a sensible proposition.

8 In ordinary circumstances, the process of seeking assistance
9 would be an ongoing and collaborative one. Yes, the Kenyan Government
10 would say, he's got these bank accounts, these are the numbers, this is
11 the current balance. Oh, we would say, that's very interesting, please
12 could we see the statements for this one, that one, and the other one.
13 But we didn't even, to use the baseball expression, get past first base
14 here. We didn't even have the documents identified to us. The idea that
15 we are being in someway slightly disingenuous or misleading the Court
16 doesn't stand up. It is quite plain that what the Prosecutor wanted was
17 access to Mr Kenyatta's phone records and various financial records, and
18 we've never got them.

19 And point 4 is a matter raised by your Honours. Am I out of
20 time? I hope I've got a couple of minutes left.

21 Madam President, you supposed, you made no indication that this
22 was the way the Bench was thinking or the Bench would ultimately resolve
23 it, and indeed, I dare say, you haven't decided yet. But one possible
24 solution to the Government of Kenya's first proposition - well, the
25 Prosecutor doesn't have the power to do this, it has to come from the

1 Chamber - would be for the Chamber to make a parallel order so that that
2 argument by the Government of Kenya would then fall way.

3 Madam President, that might be a rather pragmatic solution to
4 disposing of that argument. And ultimately, it will be for your Honours
5 to decide whether to take that course. But it shouldn't be that way.

6 There is an important matter of principle here which is much
7 wider than just the proceedings in this case. It strikes at the root of
8 the Prosecutor's powers. The essence of what the Prosecutor can do by
9 way of investigations is set out in Article 93(1). That is plainly
10 intended to cover the gamut of all of the inquiries which could
11 reasonably be made of a states party; please help us in this way, that
12 way, the other way, and then the catchall at the end, if there is
13 anything else, the states party has to do that as well.

14 It's vital that there is clarity. For the last ten years no
15 state, including Kenya, has ever suggested that the Prosecutor does not
16 have the power to make those requests. Now for the first time that
17 radical and novel suggestion is being made. If it is a correct
18 suggestion, it will transform the way in which the Prosecution carries
19 out its duties under the Rome Statute. It will dramatically restrict the
20 Prosecutor's powers.

21 Every time the Prosecution wants to do anything which will
22 require government assistance, we'd have to come to the Court to do it.
23 That's never been understood to be the way in which the Prosecutor has to
24 operate. And so it is vital, I respectfully submit, that whatever course
25 the Chamber takes with regard to ensuring that these items requested are

1 eventually provided, and that's extremely important in itself, that the
2 other important matter is also addressed, the matter of principle. There
3 needs to be a declaration by the court that the Prosecutor is indeed
4 entitled to make such requests, that the Prosecutor is indeed included
5 within the word "the court" in the preamble to Article 93(1). And I
6 respectfully submit that whatever ruling your Honours make addresses that
7 issue, and I, of course, invite you to find that the Prosecutor does
8 indeed have those powers.

9 Thank you very much.

10 PRESIDING JUDGE OZAKI: Thank you very much, Prosecution.

11 Now I invite representative of the Republic of Kenya if they want
12 to make any --

13 MR MUIGAI: Yes, Madam President --

14 PRESIDING JUDGE OZAKI: -- response.

15 MR MUIGAI: -- and I thank you for the occasion to respond very
16 briefly to the observations that have been made. And I would like to
17 start with the observation that was made regarding the responsibility of
18 the president of the Republic of Kenya in regard to the enforcement of
19 international treaties.

20 I would have thought myself that it stands to reason that the
21 reason the constitution requires the president to appoint cabinet
22 secretaries is so that they may carry out the functions including the
23 enforcement of treaties in their area of specialisation. If that had not
24 been the case, the constitution would have said that the president shall
25 enforce the treaties himself. It would be an absurdity.

1 The constitution places one obligation on the president in this
2 respect, and it is in section -- Article 132(1)(iii), and it is to submit
3 a report for debate to the National Assembly on the progress made in
4 fulfilling the international obligations of the republic.

5 The fulfilment of international obligations by treaty on a
6 day-to-day basis is entrusted to officers appointed for that purpose.
7 The only obligation the president has is to report annually to the
8 National Assembly, a supervising body. And I rest that argument and say
9 no more.

10 And then I would like to make reference to a much, much -- heavy
11 weather was made of an argument that the Attorney General is not an
12 independent office and the occupant is not an independent officer. I
13 think the research of Mr Gaynor would have shown that there is a statute
14 known as the Office of the Attorney General's Act, which states in the
15 clearest possible language, in Section 16(5) that:

16 "In the exercise of the powers and performance of the office, the
17 Attorney General shall not be under the direction or control of any other
18 person or authority."

19 Maybe for the completeness of the record, it should be shown
20 that.

21 Now as to whether the individual Attorney General is -- exercises
22 independence, I do not wish to say anything that may -- may appear like a
23 personal defence of my person, but I do not know any person who would
24 want to occupy that office merely to perpetuate his stay. I do not know
25 of any ethical lawyer, and believe you me, Kenya has many ethical

1 lawyers, who would want to remain in that office by violating the
2 constitution and the law to which the person has sworn an oath to
3 protect, and I say no more as to that.

4 The distinction between judicial process and a nonjudicial
5 process is not only a commonsensical one. Under Article 93, it is also a
6 legal one. It is inconceivable, in my judgement, that any court would
7 countenance a situation where a person can be arrested and removed from
8 the territory of a sovereign state on the instigation of a letter by a
9 prosecutor. It would be inconceivable. If the rule of law means
10 anything, it would mean that every decision of that nature would be
11 subjected to judicial review. At any rate, if that is not the law in any
12 other country, it is certainly the law in Kenya.

13 Now let me come to an issue raised relating to an opinion that
14 has been placed before the Court that has been attributed to my learned
15 predecessor, the honourable Amos Wako, and that is dated 4th of October,
16 2010. Two things are important here, your Honours: Number 1, on 4th of
17 October, 2010, there was not a prosecution relating to Kenya. There was
18 an investigation. The distinction between an investigation and a
19 prosecution, I do not think requires any elaboration. That numerous
20 prosecutions do not result in a prosecution, I do not need to elaborate
21 upon. That the minute you have a defendant or an accused person or a
22 suspect, the character of the investigation changes, again, does not need
23 any elaboration. That in most jurisdiction the difference between a
24 statement and an inquiry and a charge and caution statement under which
25 the person must disclose that I am investigating the offence of murder

1 and everything you tell me will and can be used against you, again,
2 requires no elaboration whatsoever.

3 Number 2. This letter is written during a transition period.
4 The new constitution has come into force, but the director of public
5 prosecution has not been appointed. Mr Amos Wako is acting as the acting
6 director of public prosecutions. Again, he's dealing simultaneously with
7 a conflict that does not face us today, which I have demonstrated at
8 great length.

9 I think the less I say about that, the better, save to add this.
10 Mr Wako himself says: "I am authorising you to facilitate an interview,"
11 an interview. I don't know whether that is the language that the learned
12 Prosecutor suggests is to be found in Article 93. I have seen no
13 reference to an interview in Article 93.

14 Finally, it is a matter of record, Honourable Judges, that the
15 Kenyan Government, as soon as Mr Wako wrote this letter and as soon as
16 the chief justice constituted a bench, the Kenyan Government ran into
17 serious constitutional and legal questions arising out of the letter, and
18 that is how the High Court, as a constitutional court, stopped this
19 process by Mr Wako and said this process was illegal and
20 unconstitutional.

21 I think it is the obligation of the Prosecutor to, at the very
22 least, place those facts before this Honourable Court.

23 I associate myself fully, Honourable Judges, with the observation
24 of the learned Queen's Counsel, Mr Kay. The Prosecutor goes back over
25 and over and over, glossing over the question of what is it they asked

1 the Attorney General to do about the financial records of Mr Kenyatta.
2 The document speaks for itself, Honourable Judges. The document said:
3 "The OTP requests that the competent authorities of the Republic of Kenya
4 should provide full financial profiles ..." I have not come across that
5 language in the Statute or the Rules or anywhere else, "... full
6 financial profiles of" so-and-so and so-and-so and so-and-so.

7 Now, unless the Prosecution wishes, which it can because that is
8 their prerogative and privilege, if they wish to serve a different
9 request, that would be their privilege. They never served the request
10 that they now claim before this Court was never honoured. There was
11 never such a request. And I say no more about that.

12 Mr Gaynor is perfectly entitled to the very strong submission
13 that he makes about the circumstances of the victims. And I want to
14 place this on record, Madam President, because this is the position of
15 the Kenyan Government and it has never changed over the last six years.
16 The tragic events of 2007/2008 were very, very serious, admitted by all
17 to have been so, and the Kenya Government and the Kenyan people committed
18 themselves to ensuring that this would never happen again. And we had a
19 peaceful election a year ago. The only evidence that you require of
20 that.

21 The Kenya Government has spent billions of shillings on the
22 resettlement of victims, on schemes to support the victims, not because
23 the Kenyan Government is answerable to a third party about the treatment
24 of its own injured victims of an unfortunate circumstance like this,
25 because this is the very fundamental duty of every sovereign state to its

1 citizens. We have done that. The material is on record. We continue to
2 do that, and I can assure you we will always continue to do that because
3 that is our duty.

4 We care about the victims. We are concerned about the victims.
5 And anybody who has been to Kenya, and I challenge anybody who has been
6 to Kenya, and gone to contact the groups that have been working in this
7 area will confirm that a lot has been. If more works remains to be done,
8 we are committed to that work. But it would be a real absurdity to claim
9 that the Government of the Republic of Kenya has been insensitive or
10 uncaring or unconcerned.

11 It was said of my person, as Attorney General, that I have been
12 firm and unyielding in favour of the accused but unyielding in the favour
13 of the victims. I do not know whether I should respond to that. I do
14 not know whether it was said in jest. I do not know whether it was
15 intended as part of the serious material that the quote should take into
16 account.

17 Let me say this, however. My job is to defend the rule of law.
18 If in this court there is a proper defendant, properly presented to the
19 court, with the threshold evidence required by law, with requests
20 processed in accordance with the statute and the law, I shall comply.
21 But I cannot possibly admit to an argument that says whether or not there
22 is law in Kenya, whether or not there is a constitution in Kenya, whether
23 or not you have an International Crimes Act, whether or not you have
24 other laws, forget all that. We are telling you that because there were
25 victims involved in this very unfortunate and tragic -- do what we are

1 telling you. The existence of a body of victims is enough justification
2 for a disregard of international law, a disregard of constitutional law,
3 and a disregard of other law. I refuse for my part to believe that that
4 is to be considered a serious legal proposition.

5 Mr Gaynor also says that in his own judgement it is inconceivable
6 that the cabinet of the Republic of Kenya could not, over the last year,
7 have discussed the collaboration or co-operation of the ICC and of the
8 Kenyan Government. I do not know his sources of information. I do not
9 know whether he is privy to cabinet papers or cabinet minutes, but I have
10 placed before you a signed statement in which I have controverted the
11 possibility of that issue for reasons that are not far fetched.

12 The position in Kenya is unique. I don't think that needs any
13 repetition. There has not been and there is unlikely to be any reason
14 for this case to be discussed as a cabinet matter because the case and
15 the process is being handled by independent office holders that cannot be
16 directed by cabinet and that do not require the direction of cabinet.

17 Finally, there was an argument relating to the DPP's view about
18 what he should do or not do. Again, I dealt with this in the morning.
19 The DPP is an independent office. But let me make this point because,
20 again, when a half truth is repeated many times, it wears the garments of
21 truth.

22 The cases that were reported in the critical phase of 2007/2008
23 were cases reported to police stations in a period of turmoil. Persons
24 were on the move, communities were on the move, for several weeks and
25 sometimes months during the interim. And therefore, several police

1 stations - and the DPP as explained this ad nauseam - several police
2 stations received a single complaint: My house was set on fire.
3 Immediately after the complaint or soon thereafter, that family or that
4 community would move to a place they considered themselves safe. When
5 all these files were put together, including files of sexual assault and
6 other files, there were actually not 4.000, there were 6.500 and
7 something. And we shared that with the Prosecution.

8 The Prosecution came to my office. I understand that the
9 Prosecutor in this court is presently probably new to the brief. The
10 Prosecutor's Office came. We sat in my office. We went through the
11 files with the task force. We availed all these files for inspection.
12 That it can now be claimed that this candidness and this openness by the
13 Kenya Government was without factual basis, then the Prosecution is in a
14 position to say, "When we reviewed your files, unlike what you say, we
15 found that 3.000 of them had evidence." They don't say that. They
16 couldn't possibly say that because it would be untrue.

17 As to what orders you can make or not make, I offer no opinion
18 because that is a matter that must lie between the applicant of this
19 matter and the respondents to the matter. What I can tell you for sure
20 is that if - if - an application, a proper application for an order was
21 to be made, we would ourselves require to be enjoined so that we could,
22 at the earliest possible opportunity, guide the Court on the nature of
23 the processes that would be of assistance. And as I have said earlier
24 before we broke for lunch, it is not a process that can be assumed will
25 take a week or two weeks or a month or six months or a year. It is -- it

1 would be an indefinite, an indefinite process because of the independence
2 of the institutions that we have talked about.

3 Finally, as my last comment to you, Honourable Judges, in
4 thanking you for giving the Kenyan Government an opportunity to come and
5 ventilate these issues, I want to suggest with tremendous respect that
6 when you have looked at all the evidence on the record and considered all
7 the submissions that we have made, you will find that there isn't in the
8 history of this court any situation country that has ever done what Kenya
9 has done. There is no situation country whatsoever where this has ever
10 happened. We take pride in that because it is our constitutional
11 obligation.

12 And maybe I can say this before I sit down. Two successful
13 governments, two successful governments of the Republic of Kenya have
14 been urged by the National Assembly in an overwhelming resolution, not
15 once but twice, to discontinue co-operation with the ICC. It is a matter
16 of public record. What has the government done? The government has
17 continued despite those resolutions, concurring resolutions of two
18 successful parliaments. We have continued to co-operate with the court.

19 And that is why I'm here this afternoon. I do not think that
20 that is what the Prosecutor suggests is the experience that the court had
21 in a number of countries that I shall not name because of the Committee
22 of Nations. Officers of this court have been arrested and held
23 incommunicado in several situation countries upon arrival at the airport.
24 What has happened in Kenya? Each time the Prosecutor has wanted to come,
25 he has received state security, including paratroopers, to escort him

1 throughout the country. Is that a country to be reprimanded? Is that a
2 country to be rebuked? Or is that a country to be recognised as a model
3 of how this court should work with situation countries?

4 I leave it to your good judgement, but I thank you.

5 PRESIDING JUDGE OZAKI: Thank you very much, Mr Attorney General.

6 The Chamber has a couple of questions to both Kenyan Government
7 and Prosecution.

8 The first question is the question of requirement of consultation
9 as referenced in Article 93(3) and 97 of the Rome Statute which, as
10 Mr Gaynor pointed out, is mirrored in Article 24 of the Kenyan
11 International Crimes Act.

12 The Prosecution also pointed out numerous exchanges between the
13 Prosecution and the Kenyan Government. We would like both the
14 Prosecution and Government of Kenya to address whether or not they
15 consider it correct to state that so far no consultations within the
16 meaning of those provisions have taken place. And in that regard, we
17 note that the government's submission, which is 877, annex 2, in
18 paragraph 29, that they are taking this opportunity to initiate
19 consultations.

20 So in short: In your view, this consultation, as provided in
21 Article 93(3) and 97 has already started or not?

22 Prosecution first, please.

23 MR GUMPERT: Your Honours, the purpose of the consultation, as I
24 understand it, is where the state, Kenya in this case, finds that there
25 is a fundamental legal principle of general application. I quote from

1 the Statute, which is preventing it from complying with the request for
2 assistance.

3 Well, you've heard my submissions on whether there is or isn't,
4 so I won't belabour that point. But I would say the applicability of
5 this fails right from the start. This isn't some fundamental legal
6 principle which is preventing co-operation, but just suppose that you
7 find I'm wrong about that.

8 The next thing is that there must be prompt consultation to try
9 to resolve the matter. Well, even now that it's talking, as your Honour
10 points out, about consultation at the very last gasp, it isn't talking
11 about consultation to resolve the problem, to get over this hurdle of
12 domestic difficulty or the inability of the Prosecutor to make such
13 requests, it's saying flatly: "You can't do this. You, the Prosecutor,
14 haven't got the power." That's not consultation, it is confrontation.
15 So the answer to your Honours's question is, I respectfully submit,
16 consultation, whatever words may have been used, has not begun in any
17 meaningful sense.

18 PRESIDING JUDGE OZAKI: Thank you very much.

19 Can Mr Attorney General address this question. I would like to
20 remind you that under those articles it is for the requested state to
21 initiate those consultations.

22 Mr Attorney General, please.

23 MR MUIGAI: I want to repeat, Madam President, that as far as we
24 are concerned, the clear requirements of Article 93 are that:

25 "State Parties ... in accordance with the provisions of this Part

1 and under procedures of national law ..."

2 We have been invited over and over and over again to ignore the
3 reference to procedures of national law and to deliver ourselves to
4 interpretation of what this particular part of the treaty means as -- as
5 interpreted by the Prosecution.

6 The Prosecution says, a letter that says: We disagree with your
7 reading of Article 93 and we disagree that it can yield the sort of
8 outcome that you are suggesting. We have just been told a few minutes
9 ago that that is not a consultation, that is a confrontation. So when do
10 you, in the mind of the Prosecution in this court, when is it that you
11 are deemed to be consulting? It is when you accept every demand that is
12 made of you without demand.

13 Can there be such a reading of this Statute? Then what would be
14 the necessity of national law procedures? What would be the necessity of
15 domesticating the Rome Statute. If the Prosecutor is right, then what
16 the Prosecutor is saying: Forget any other law or procedure whatsoever.
17 The Rome Statute as interpreted by the Prosecutor, because the Prosecutor
18 is part of the court, is binding on you as transmitted in the request
19 document. If you question anything in the request document, you have
20 started a process of non-co-operation.

21 I want to respectfully suggest to you, Honourable Judges, that an
22 interpretation of that nature would create an absurdity. It would
23 mean -- it would mean, therefore, that notwithstanding the -- one of the
24 most venerated traditions of international law, recognising the
25 distinction between the monist and dualist traditions would have by the

1 single stroke of the pen of the ICC Prosecutor been resolved forever in
2 favour a reading of international law that says: "If you sign a
3 treaty" --

4 PRESIDING JUDGE OZAKI: Mr Attorney General, I'm sorry to
5 interrupt.

6 MR MUIGAI: Yeah.

7 PRESIDING JUDGE OZAKI: My question was quite simple: In your
8 view, has consultation, provided in Article 93(3) and 97 of Rome Statute,
9 has been initiated or not? And I presume from your previous written
10 filing that your government view is that this consultation has not been
11 initiated --

12 MR MUIGAI: (Microphone not activated) A formal consultative
13 process has never been commenced at the instigation of either party.
14 However, the nature of the exchanges between the parties, very
15 elaborately set out by the Prosecutor, shows that the parties had an open
16 and candid discussion, and we ourselves -- we, ourselves, take the view
17 that the Prosecutor was entitled to take the position of law that he
18 took, only it was a mistaken and misguided interpretation of the treaty
19 and of Kenyan law. But that he was entitled to do that, we cannot
20 question that at all. That he can question that we were entitled to
21 interpret our own law is surprising to us.

22 PRESIDING JUDGE OZAKI: Thank you very much.

23 The second question for Prosecution. Although you are not -- you
24 said you are not aware -- you have not been aware of the detailed legal
25 arguments of the Kenyan Government up until very late stage, but still

1 couldn't you have seized the Chamber before this timing at a little bit
2 earlier stage?

3 MR GUMPERT: Well, if I were to say anything other than "yes," I
4 would plainly be lying. We could have. And looking back now, with
5 hindsight, perhaps it would have been better if we had.

6 But your Honours will see from the correspondence that the Kenyan
7 Government was at no stage expressing the position that there was a
8 complete bar because the Prosecutor wasn't entitled to make this request.
9 Indeed, in a rather tantalizing fashion, when it was -- when its feet
10 were held to the fire, when it was actually required to address the
11 financial and telephone records which we're talking of, its frequent
12 response was, if I can use the colloquial: "The check's in the post.
13 We're working on it."

14 Even as late as June, as we see from their filing, there was an
15 acknowledgment that the Prosecutor was entitled to make such requests.
16 There was a complaint about the fact that the Prosecutor was publicly
17 saying they're not doing what they ought to, but they weren't say: "No,
18 you don't have the entitlement." Your Honour will recall that the trial
19 was slated to start in July, and it was perhaps not unreasonable that the
20 Prosecutor was concentrating on the evidence it did have rather than
21 evidence it had failed to obtain through non-co-operation.

22 And, indeed, when the trial date was adjourned until November,
23 similarly, the Prosecution, for better or worse, with hindsight, was
24 preparing for a trial on the basis of the evidence it had. It was when
25 that trial date was adjourned, and I won't give your Honours the details

1 of the internal consultation, that it was decided that this motion, which
2 had been long considered, now had to be pursued.

3 So the short answer to your Honour's question, is: Yes, of
4 course, it could have been, and perhaps in hindsight it would better have
5 been. But I can't be right for a matter like this to be determined on
6 the basis of the Prosecution having, with hindsight, acted a few months
7 later than it might have done, when the real problem here is not those
8 few months but the 22 months which have elapsed since the Prosecution
9 uttered this perfectly valid request and during which time the Government
10 of Kenya has signally failed to respond.

11 PRESIDING JUDGE OZAKI: Thank you very much. And I'm glad to
12 report to you --

13 MR MUIGAI: If I can respond to that very briefly, please.

14 PRESIDING JUDGE OZAKI: I will give you the floor after I speak.

15 MR MUIGAI: Thank you.

16 PRESIDING JUDGE OZAKI: And I am glad to report to you that our
17 interpreters and court reporters and courtroom staff are -- very kindly
18 give us 30 more minutes so we can -- we can sit until 4.30, although I
19 believe that we don't need 30 minutes more.

20 Prosecutor, I take it you've finished.

21 MR GUMPERT: Yes, I have. I was just going to thank the court
22 staff for making that time available. Although, like you, I sincerely
23 hope that we are not going to eat up all of those 34 minutes.

24 PRESIDING JUDGE OZAKI: Thank you.

25 Mr Attorney General.

1 MR MUIGAI: I just wanted to draw the attention of the Court to,
2 again, part of the difficulty that we experience as the Government of
3 Kenya, because the complaint now before this court, as we understand it,
4 is that the Court -- the case now pending before this Court cannot
5 proceed because there is evidence in the position of the Kenya Government
6 that has not been surrendered to the Prosecution by the Kenya Government
7 over the last one year or so.

8 Reference was made to a communication in which I had previously
9 expressed surprise by this contention, and I need to explain myself in
10 that regard.

11 Honourable Judges will remember that when Kenya became a
12 situation country and inquiry was opened, the former Prosecutor of this
13 court, and I have made extensive references to media coverage of his
14 comments in public, he said over and over again: "We have overwhelming
15 irrefutable evidence to prove," and he made his claim.

16 When the confirmation hearings were held in this court, again the
17 Prosecutor over and over and over again, as a matter of public record,
18 said: "We have overwhelming evidence in these cases that will prove
19 these cases beyond a reasonable doubt." This Court, in its wisdom, and
20 despite the dissent of one member of the Court, decided that it had seen
21 the evidence of the level that it required to see. That is the
22 prerogative of the Court. That is the discretion of the Court.

23 When the trial dates were taken, my recollection, again there
24 was, if I remember correctly, an application by the Defence suggesting
25 that more time would be useful. And I -- if my recollection is correct,

1 the Prosecutor came in person to this Court and said: "I am ready and
2 all my evidence is available."

3 PRESIDING JUDGE OZAKI: Mr Attorney General, I'm sorry to
4 interrupt, but let's limit our argument to the issue before us, which is
5 non-co-operation issue.

6 MR MUIGAI: Okay. Let me now come to the issue.

7 PRESIDING JUDGE OZAKI: And not going into the details of the
8 case itself. Let's stick to relevant --

9 MR MUIGAI: Okay. Let me come to why I was telling part of the
10 background.

11 I wanted to demonstrate to you, your Honours, that the
12 Prosecution has been changing its narrative continuously throughout this
13 case and the Kenya Government merely became a boogeyman in this case
14 very, very recently. That was merely the narrative. There was never the
15 narrative that this case has any difficulty occasioned by the Kenya
16 Government that would stop the case from going to trial.

17 And therefore as you consider this question of whether there
18 ought or there can be or there has been any consultation, you must
19 appreciate that the background is such that the facts demonstrate that
20 the Prosecution has never been interested in any consultation beyond
21 asserting its right, consistently saying: "We have already told you the
22 law as we know it. Now comply with it."

23 I will therefore like to end by saying that in the view of the
24 Kenya Government, we have provided all the material that did not require
25 an -- under Kenya's domestic law for any special procedures to be

1 invoked. And we have declined -- and my own submissions,
2 Madam President, will show this, we received over 40 requests - we
3 received over 40 requests - from the OTP. We complied with over 36 of
4 them, if not more. Therefore, an argument that says that after
5 considering 40 requests you are obstructionist, you are unco-operative,
6 you are stalling the case because you have raised a question about two
7 issues or three issues cannot be in -- it cannot be supported by the
8 truth.

9 So we urge you, then, to consider everything we have placed
10 before you and to find that we, like you did before when we came to you
11 to be joined amicus, you made a finding that said the Kenya Government
12 should not, in the future, be the subject of adverse commentary in
13 proceedings not availed to it so that it can respond to those adverse
14 comments. We urge you to make the same finding now, that we have
15 demonstrated that we co-operated, we gave everything that was not
16 contentious, and where there was contestation, we gave good legal
17 explanations, and that only this Tribunal or a judicial tribunal can
18 override our interpretation of the law. Thank you very much.

19 PRESIDING JUDGE OZAKI: Thank you very much. And please be
20 assured that this Chamber will make any findings and any decision after
21 carefully consider all the submissions from all the parties and
22 participants.

23 Judge Fremr has a question.

24 JUDGE FREMR: I have one additional question to Defence.

25 Mr Kay, today we have listened extensively submissions of both

1 Government of Kenya, represented by Mr Muigai, and from Prosecution as
2 well, but I still miss one thing that is, you know, the position of your
3 client. But if I'm saying "position of your client," I don't mean
4 Mr Kenyatta as a president, because position of Government of Kenya, I
5 think, was extensively reported by Attorney General, but I mean position
6 of Mr Kenyatta as an accused. Do you think that you are able or allowed
7 to indicate his position? At least, roughly.

8 MR KAY: Yes, your Honour. Any request of President Kenyatta in
9 relation to his Defence in these proceedings come to me. Not to him.
10 I'm his legal advisor and I may or may not decide to exercise my Defence
11 rights, which this Court must respect and has an obligation to respect.
12 And so decisions concerning the trial are decisions that I make in a
13 broader tactical understanding of what this case is about.

14 We have never had any doubt about the falsity of the allegations.
15 You saw our filing. The number of times we pointed this out in
16 correspondence, verbally before the Court, and we specifically pointed to
17 the issues that have led to the collapse of this case against
18 Mr Kenyatta. Witness 4, Witness 11, Witness 12.

19 We were met, may I say, with unremitted arrogance with respect of
20 our observations. We were delivering up tapes, interviews. We pointed
21 out to the Court that the man Witness 12 was a congenital liar, that
22 Witness 4 was a congenital liar. We were able to piece together the
23 fabric that demonstrated those lies. No one listened to us. It's only
24 when we come to the collapse of the case on the eve of trial that these
25 issues were being raised as against us.

1 I pointed out in the correspondence between the Government of
2 Kenya and the Prosecution this morning what I thought was a salient fact
3 going to the issues in the case in respect of proceedings on behalf of
4 the Prosecutor that were alleged, on many occasions, to have been
5 trial-ready, and in fact the evidence that they had been seeking was
6 nothing to do with the issue that they had brought before this Court on
7 the occasion of the hearing at our Status Conference.

8 In relation to Mr Kenyatta's position, may I point out to the
9 Court that there was another president before him and this argument and
10 exchange between the Government of Kenya and the Prosecution commenced
11 long before he was elected president. And, in fact, it barely rumbled
12 after he was elected president. It only became an issue upon the
13 collapse of the case.

14 And may I point out as well that there are two sets of
15 proceedings, two separate sides that are within the framework of this
16 correspondence. It doesn't only concern Mr Kenyatta. It concerns the
17 accused in the trial of Kenya I. All those arguments were happening
18 before he became president. And so in the circumstances, at this stage
19 laying or trying to impute or say we are responsible for it without a
20 shred of evidence in support is unfair and not right, and it's trying to
21 deprive him of his just right at this stage which is the termination of
22 the proceedings because the case has been found to have been false.

23 That's a very important matter at this stage. And why -- I was
24 very concerned about us being dragged into this dispute on legal issues
25 that we have never been a part of. In fact, last week I thought the

1 request for the financial records did concern the post-election violence
2 and withdrawals of cash. And then when I see the correspondence and
3 realised it wasn't, it did reinforce my submission of last week that this
4 was a very convenient argument for the Prosecutor to seize upon as an
5 excuse and pass blame for their failure to find credible witnesses,
6 honest witnesses, and ignoring repeated warnings from the Defence.

7 We have given much disclosure in this case. We invited the
8 Prosecution, without any knowledge about mention of cell-site, in these
9 letters, to join as co-plaintiffs in proceedings in the High Court under
10 Kenyan legal procedures because we considered how this should be done in
11 relation to the proceedings. In fact, the Prosecutor did not want to
12 join us as co-plaintiff. They issued a letter in support of the justice
13 of our application.

14 So in many respects, they are the architects of their own
15 problems here. And seizing upon areas of evidence that they say now are
16 important to the issue, in fact, I would submit show that in their own
17 minds they were not committed to the evidence in this case. They were
18 committed to the recycled narrative of the interviews of their spread of
19 witnesses, an extraordinary set of interviews that we have analysed at
20 great length.

21 They weren't looking for extraneous independent evidence that
22 could lead them to the truth. We repeatedly put that before them. They
23 weren't concerned about that. They were happy to peddle these Mungiki
24 witnesses into this Court to tell lie after lie after lie.

25 And in our submission, we have come to the stage of this

1 proceedings where Mr Kenyatta is being brought into a dispute that had
2 already been happening between the parties. I, as his lawyer, will
3 exercise his defence rights as I consider them necessary and right to do
4 so, and those decisions as to whether anyone had asked him, they wouldn't
5 ask him. They would ask me because he has given me the power of attorney
6 to represent him, and no request was ever made of us.

7 Those are my submissions. Thank you.

8 JUDGE FREMR: Thank you, Mr Kay.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 Any parties -- oh, Mr Gaynor.

11 MR GAYNOR: Madam President, very briefly, I'd like to make two
12 submissions in response to what the Attorney General said.

13 PRESIDING JUDGE OZAKI: Very, very briefly, please.

14 MR GAYNOR: Yes, very briefly.

15 He referred to the billions of shillings that have been given to
16 victims in Kenya. Well, I've personally met 575 of them in 30 meetings.
17 The vast majority have received virtually nothing from the government. A
18 small number received 10,000 shillings from the government once. And a
19 couple of others received one tin weighing 2 kilogrammes of maize meal.
20 That's all they received for six years in order to feed their families.
21 So his representations regarding the overall character of assistance
22 given to victims of post-election violence, especially in the Western and
23 Nyanza regions, is -- falls far short of the complete story.

24 Secondly, I'd like to address his suggestion, which I believe is
25 around page 95 of the transcript, that the cabinet never discussed

1 ICC-related matters.

2 Now, the Government of Kenya took very strong positions at the
3 United Nations Security Council, at the African Union in Addis-Ababa, and
4 at the Assembly of States Parties in The Hague on a number of issues. At
5 the Assembly of States Parties the Kenya delegation including the
6 Attorney General, the director of public prosecutions, the minister for
7 foreign affairs, and, for example, the head of the witness protection
8 agency, and they took positions on Rule 68, which is -- which is designed
9 to deal with witness intimidation and witness bribery. They opposed it
10 completely. They managed to get some language put in the preamble of the
11 Resolution adopting Rule 68. They completely supported immunity for a
12 sitting head of state from prosecution. They did that also at the
13 African Union. And also if immunity was not to be granted, they took the
14 position that the head of state should not --

15 PRESIDING JUDGE OZAKI: Mr Gaynor, I think it is not a suitable
16 place to discuss the -- the --

17 MR GAYNOR: Yes, if I can finalise in one sentence: If all those
18 positions were taken without consultation with the president of Kenya, I
19 would be extremely surprised.

20 Thank you very much, Madam.

21 PRESIDING JUDGE OZAKI: Thank you very much.

22 If there are no other submissions that brings us to the end of
23 the matters to be discussed today. We thank very much parties and
24 participants, and our special thanks goes to Mr Attorney General and his
25 team for their contributions and also for travelling to this city of

1 The Hague.

2 And I would also like to thank the interpreters, court reporters,
3 especially for additional time given to us, and other courtroom staff for
4 their assistance.

5 This Status Conference is now closed and the Court will rise.

6 THE COURT USHER: All rise.

7 (The hearing ends in open session at 4.14 p.m.)