

1 International Criminal Court
2 Trial Chamber V(b) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Uhuru Muigai Kenyatta -
5 ICC-01/09-02/11
6 Presiding Judge Kuniko Ozaki, Judge Robert Fremr and Judge Geoffrey Henderson
7 Status Conference
8 Wednesday, 9 July 2014
9 (The hearing starts in open session at 2.03 p.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE OZAKI: Good afternoon and welcome to this status conference.
14 First of all can counsel please introduce themselves for the record, starting with
15 Prosecution?
16 MR GUMPERT: Certainly, Madam President. My name is Ben Gumpert. Sitting
17 next to me is Sam Lowery and in the row behind Shamiso Mbizvo and Hai Do Duc.
18 Thank you.
19 PRESIDING JUDGE OZAKI: Thank you.
20 Defence counsel, please?
21 MR KAY: My name is Steven Kay. I'm in court today with Mr Desterio Oyatsi, Ms
22 Gillian Higgins, Mr Kennedy Ogeto and Mr Benjamin Joyes.
23 PRESIDING JUDGE OZAKI: Thank you.
24 Legal Representative of Victims?
25 MR GAYNOR: Thank you, Madam President. My name is Fergal Gaynor. To my

1 right is Caroline Walter of the OPCV and directly behind me is our case manager
2 Anushka Sehmi. Thank you.

3 PRESIDING JUDGE OZAKI: Thank you. And today we welcome our
4 representative of the Government of the Republic of Kenya.
5 Please.

6 MR MUIGAI: Madam President and the Court, my name is Githu Muigai,
7 Attorney-General of the Republic of Kenya. I'm assisted by Njee Mututuri, the
8 Solicitor-General of the Republic of Kenya, and with us Caroline Wamaitha and
9 Belinda Kiilu who are counsel assisting us in this matter. Thank you.

10 PRESIDING JUDGE OZAKI: Thank you very much.
11 The main purpose of this status conference today is to receive an update from the
12 Prosecution and the Kenyan government on the status of the co-operation and the
13 consultation which was ordered by this Chamber in its decision of 31 March (filing
14 908) and the scheduling order and agenda was issued on 4 July (filing 929).

15 As you are aware, an ex parte, Prosecution and Kenyan government only, hearing
16 was held this morning. This was necessitated by the nature of the co-operation
17 issues to be addressed. Nonetheless, the Chamber's preference was always for as
18 much as possible to be discussed inter partes and indeed in public session, and the
19 Prosecution and Kenyan government were therefore requested to consult in advance
20 and identify any issues which might be addressed with everyone present.

21 As you will have seen, they filed a joint submission, filing 930, yesterday evening
22 complying with that request and proposing some modalities, including regarding
23 appropriate levels of confidentiality of each item to be discussed.

24 But before turning into more substantive issues, I will first repeat a number of
25 introductory matters for the benefit of those who -- those who are just joining us.

1 First of all, as usual, in order to assist translation and transcription, I remind everyone
2 to please speak slowly and to pause for several seconds between speakers.

3 Secondly, the parties, Legal Representative and Kenyan government, had also been
4 requested to notify the Chamber by 7 July of any additional matters they wished to
5 raise under agenda item C. No such matters were raised and therefore we are
6 focusing solely on agenda items A and B.

7 By way of background, as directed in the Chamber's decision of 31 March, the
8 Prosecution and the Kenyan government have already each provided the Chamber
9 with two written reports on the progress of the co-operation. These reports were
10 received on 23 May (filings 922 and 925) and on 30 June (filings 927 and 928). Public
11 or public redacted versions of three of those reports have already been issued, and
12 this morning the Kenyan government were requested to provide a proposed public
13 redacted version of its filing 928.

14 As noted in those public filings, the Prosecution and Kenyan government met in May
15 to discuss matters relating to the Prosecution's revised co-operation request. At that
16 meeting, agreement was reached on certain categories of information to be provided
17 and a number of points of outstanding contention were identified. It was decided
18 that following provision of the materials for which agreement had been reached, the
19 Prosecution and Kenyan government would consider further the outstanding
20 requests. Certain materials were provided to the Prosecution in June and have since
21 been reviewed by them.

22 As I mentioned, the Prosecution and Kenyan government filed a further update
23 yesterday evening in the form of their joint submission (filing 930). This is a public
24 filing, which notes agreement on a number of further points, including the
25 establishment of certain new timelines. It also identifies a couple of areas on which

1 it was indicated that guidance from the Chamber might be sought.

2 These areas of difference were discussed further in the ex parte decision this morning.

3 It has been agreed that in this session - in this afternoon's session - we will go one by

4 one through the current status of each of the eight categories of materials requested

5 by the Prosecution in their revised co-operation request dated 8 April.

6 We are aware that the Defence and Legal Representative were not party to that

7 co-operation request, or, save to the extent that counsel to the provision of certain

8 items may have been requested from the accused, to any of the discussions that have

9 subsequently taken place in relation to it.

10 Nonetheless, both the Defence and Legal Representative will have the opportunity to

11 respond this afternoon on the basis of the submissions which the Prosecution and

12 Kenyan government will make, as well as on the basis of the public filings.

13 My intention is that we move directly to -- concerning the categories of requested

14 materials. Bearing in mind that we only have two hours, more accurately one hour

15 and 45 minutes, I would ask each counsel to please be as concise as possible in your

16 submissions.

17 In the interests of efficiency, it may be preferable for the Defence and Legal

18 Representative to reserve their submissions until after you have heard the status of

19 each of the eight categories of materials and then address them all together.

20 However, of course, if you do have comments on any specific issues as we proceed,

21 you may still make them.

22 Now, the first category is what the Prosecution calls company records. May I ask

23 Prosecution briefly summarise the status of this request from your perspective and I

24 remind you again to please be as brief as possible in doing so.

25 MR GUMPERT: Well, Madam President, for your purposes I could be as quick as a

1 flash by saying you've seen the document, but given that this is a public hearing and
2 part of the purpose is that the public should know what the business of the Court is,
3 what I propose to do is to stick - and I shall follow this procedure unless you guide
4 me otherwise - to what I have said in that document more or less verbatim. It is --

5 PRESIDING JUDGE OZAKI: Yes, please.

6 MR GUMPERT: -- mercifully short. The first category was, as your Honour has
7 said, company records. We asked the Kenyan government to identify and provide
8 records relating to companies and other corporate institutions in which Mr Kenyatta
9 had an ownership interest between June 2007 and December 2010. We have not
10 received any such records. We have received a communication from the senior
11 deputy registrar general who, I understand, has the responsibility for the keeping of
12 such records, who has stated that, "In order to issue information pertaining to
13 ownership of companies, we need to be provided with names or registration
14 numbers."

15 The commentary which the Prosecution make is that there is a certain circulatory here.
16 What the Prosecution is asking the Government of Kenya and specifically this
17 particular registry to do is to conduct a search focused on Mr Kenyatta's name to
18 determine which companies he is an officer in or in which companies he has
19 significant shareholdings. It is our understanding that at least in part the purpose of
20 the keeping of such records in the first place is to enable such searches to be
21 undertaken.

22 Whilst open-source media, Google and the like, would enable us to name certain
23 companies with which Mr Kenyatta is said to be connected, that is not the purpose of
24 this inquiry, which is to obtain formal, official confirmation from the Kenyan
25 government records, or the records of the Kenyan government agency, as to what

1 those companies may be.

2 I have understood subsequently that there may be practical difficulties in terms of the
3 searchability of the records, particularly focusing on the name of an individual rather
4 than the company name or registration number. If that is right, it may be that the
5 resources of the OTP can be harnessed in some respect to bring what may otherwise
6 be a voluminous and cumbersome task within reasonable bounds.

7 So those are the comments that I would make in that respect.

8 PRESIDING JUDGE OZAKI: Thank you very much.

9 Mr Attorney-General, would you like to respond? Bearing in mind that it's open
10 session.

11 MR MUGAI: Save, Madam President, to reaffirm that we have and intend to
12 continue co-operating within the limitations placed by the law of Kenya and within
13 the limitations placed by the administrative, managerial and other issues that affect
14 this. We have made it abundantly clear to the Prosecution that prior to 2009, records
15 in the companies' registry were maintained manually and that, therefore, it is
16 virtually impossible to conduct a search that is not restricted or referenced in the
17 manner that we have stated to them.

18 We have in good faith, and I think that the Prosecutor would be the first to admit, we
19 have gone beyond the scope of our initial discussions in our attempt to demonstrate
20 good faith in this respect.

21 Now, we have undertaken that where -- where specific company numbers can be
22 provided, we will be very ready, very willing to conduct a manual search of the
23 registry. We welcome the assurance by the Prosecutor that at such a point we -- he
24 would be able to supply assistance by way of officers from his office.

25 Whereas, we do not think that that would be necessary, because our problem is not

1 the human resource, our problem is the technical capacity of -- of going through the
2 paper trail prior to 2009. So I think that that is clear in itself, Madam.

3 PRESIDING JUDGE OZAKI: Thank you very much.

4 MR KAY: Madam President, you did say that comment could be invited as matters
5 are raised.

6 PRESIDING JUDGE OZAKI: If it is necessary for you --

7 MR KAY: Well --

8 PRESIDING JUDGE OZAKI: Because my intention is rather, if possible, to ask you
9 to provide comments at the end of the session, but if you prefer to raise it right now --

10 MR KAY: I do, while we're dealing with it, so that my time isn't left at the end very,
11 very brief, as I've experienced on occasions in this Court having to listen to the
12 victims' counsel.

13 And the first point I want to make, the Attorney-General, who has been charged with
14 this matter and who is challenging issues of scope, relevance to the case, has no idea
15 what the case is. He doesn't have the pre-trial brief, which is confidential. He
16 doesn't have other confidential materials. There's been a discussion ex parte this
17 morning on matters that I wonder whether they were truly necessary to be done in
18 my absence when I have been given access to the requests by the OTP to the
19 Attorney-General in a series of letters.

20 And I raise this matter now, because it can be boldly raised, is what on earth is the
21 relevance of company records, corporate institutions, to the PEV in January 2007? If
22 that is what we are looking at, it doesn't feature in the pre-trial brief anywhere or the
23 DCC, and it does beg the question as to why the case is in the mess it is in and has
24 never had evidence to support the charges, as admitted by the Prosecutor.

25 Now, what is happening here is that the Government of Kenya is almost being made

1 a whipping boy to go on searches manually for documents to try and find every
2 occasion, no matter how many documents there may be within the company
3 registrations of Companies House in Nairobi, to go and find these documents without
4 any purposive effect.

5 Now, my concern is that these matters get discussed in my absence, matters raised, no
6 one is able to challenge what is the relevance, but I hope this Court was able to say to
7 the Prosecutor this morning, "Well, what is the relevance? Point me to the passage
8 in the evidence where this is relevance to the issues of the PEV and the alleged
9 financing of it."

10 As far as I'm aware there is not a single witness statement saying a company did this,
11 or a company did that, or anyone was transferred shares or paid dividends within the
12 ranks of the Mungiki.

13 And I put it in that sarcastic way because, Madam President, our patience is really at
14 an end on this matter, whereby there's been an admission of no evidence, and we
15 have had to wait and wait whilst requests like this are made and a whole battle of
16 letters, applications, ex partes between this man and the OTP on what is a completely
17 fruitless exercise, and someone needs to get a grip of the Prosecutor in this case and
18 this case pointed to the exit, where it deserves to go.

19 And hearing that that was the first matter, I apologise for my intemperate language,
20 but it really is something, with a case knowledge here of the people I work with in
21 relation to these proceedings, not a single one of us can track the relevance of this
22 matter nor deal with it. Thank you.

23 MR GAYNOR: Madam President, if I can just say one thing?

24 PRESIDING JUDGE OZAKI: Yes, Mr Gaynor?

25 MR GAYNOR: Just very briefly. In fairness to Mr Kay and others, I do have about

1 20 minutes of submissions in terms of timing.

2 In respect of the co-operation between the Government of Kenya and the Prosecution,
3 I believe having listened to just the responses to the first issue, they already confirm
4 and my suspicions that we are seeing the continuation of an ongoing practice of
5 providing nominal co-operation while obstructing access to relevant documents and
6 relevant witnesses. But I won't -- I can assure you that I very much doubt that my
7 oral submissions on the eight categories will be very long. I will be addressing
8 co-operation and a very short piece on current security concerns of the victims under
9 the government of Mr Kenyatta. Thank you.

10 PRESIDING JUDGE OZAKI: Thank you very much.

11 As for the issues raised by Mr Kay, this morning during ex parte session, we had
12 some discussions about the issues related to your submissions right now and the
13 Chamber decided -- it was agreed that the Chamber would receive written
14 submissions on certain identified points of disagreement relating to the specificity,
15 relevance and -- relevance of certain of the requests.

16 Having said this, may I now turn to the second category, which is the land registry
17 records. Prosecution, please.

18 MR GUMPERT: Madam President, yes, there's an enormous temptation to reply to a
19 number of the statements which Mr Kay has made, almost all of which I would
20 characterise as unhelpful. I shall try to resist it, but I am not going to resist this:
21 The reason why the pre-trial brief is confidential is because the Defence asked that it
22 should be so. We'd be perfectly happy for it to be a public document tomorrow.
23 Now, I turn to the land registry records, which are the second category. The request
24 was for the identification of land which was transferred from Mr Kenyatta or third
25 parties identified under the first category to any other person between June of 2007

1 and December of 2010.

2 In response, we have received nothing. We have received this explanation, that the
3 Ministry of Land, Housing and Urban Development is in the middle of a
4 comprehensive reorganisation. Over 1.3 million files, apparently, have been either
5 misfiled, misplaced or lost.

6 The cabinet secretary, a lady called Charity Kaluki Ngilu states that, "Doing the best
7 with the resources and time available to us, we have not located any land, title or
8 property registered under the name of Uhuru Muigai Kenyatta." So her best answer
9 at the moment is that Mr Kenyatta doesn't own any land, although that is an interim
10 answer.

11 The comments we would make are, firstly, given this is an interim answer, when can
12 we expect something more comprehensive? And furthermore, of course, the
13 Prosecution is interested not only in land which may be held in Mr Kenyatta's own
14 name, but in land which is held by companies in which he may have a significant or
15 controlling interest.

16 And we would also like to know what government records exist and can be searched
17 to determine whether Mr Kenyatta or those third-party corporate entities paid stamp
18 duty or sales taxes in relation to the property transfers.

19 So, in brief, the position is that we've received nothing, that an explanation has been
20 given as to a technical difficulty caused by reorganisation, that we can expect we hope
21 a more comprehensive answer, and we have suggested a new avenue which the
22 Government of Kenya could and should pursue in relation to the transfer of land.

23 PRESIDING JUDGE OZAKI: Thank you.

24 Mr Attorney-General.

25 MR MUIGAI: Madam President, at the first meeting we held to resolve this matter,

1 this was not one of the matters that we were required to make any further effort as we
2 had already informed the Prosecutor of the nature of the legal process in Kenya and
3 the management of the land registry and the practical problems that
4 would -- however, and as he admits himself, out of abundant caution and to
5 demonstrate our good faith, we did make an effort to get an authoritative position
6 from the relevant ministry. And the answer we got was as follows -- was as he has
7 indicated.

8 I think it bears repeating that the Government of the Republic of Kenya is not, has
9 never been a party to these cases. Sometimes it appears that assumptions are made
10 that by some miracle of some sort the government has become aware of what the
11 charges are, of what the evidence disclosed between the parties are, as -- as to what
12 witnesses will be availed, as to what witnesses have been dropped and other matters
13 that by treaty are confidential to the parties.

14 And some of this very unfortunate language that is used sometimes, perhaps, to
15 achieve a collateral purpose about the government being obstructionist, about the
16 government not co-operating is unfortunate because this record speaks for itself.

17 And if the Prosecutor, with whom we have had several fruitful engagements admits
18 that genuine good-faith measures have been made, I wonder who else not privy to
19 those deliberations would be in a position to comment as to the quality of our
20 engagement? I say no more for fear that I may be provoked to address the gentleman
21 in the tone and the manner that he appears to have chosen.

22 Number two, Kenya has never represented to this Court or to any other person or
23 authority that it will co-operate in violation of its own constitution, or in violation of
24 its own law, or beyond its management administrative capacity that is available to it.
25 In the letter from the minister she says, "We are in the middle of a comprehensive

1 reorganisation of our ministry. We have discovered 1.3 million files to have been
2 misfiled, misplaced or lost. However, from the resources available, the name given
3 to us, which is the specific name of an individual citizen, we have no record at the
4 moment indicating that that person owns any land."

5 I leave it to Mr Kay to deal with the question of how that ties up to the evidence,
6 because we are strangers to the evidence. We don't know what the Prosecution
7 wants to prove, or how they want to prove it, or how land becomes part of their case,
8 but we are saying this: In the registries that are controlled by the Kenya government,
9 the position is as explained to the Prosecutor. We have, however, said that we will,
10 subject to a question we discussed in the morning, your order was clear, it should be
11 specific, it should be material.

12 We are in this embarrassing situation where we have the book thrown at us, "Find out
13 whether Mr X owns any piece of land in Kenya." Where? In Nairobi? In
14 Mombasa? In Nakuru? In ...? The Prosecutor does not know. He has been
15 investigating the case for five years. He doesn't know.

16 I repeat now what I said earlier that if the Prosecutor says, "Confirm to me that land
17 reference number Nairobi-Nakuru 10, give me its file and show me the transactions
18 on that file between this date and this date," it shall be done, but the Prosecutor
19 cannot outsource to us the work of investigators.

20 We have sufficient difficulties of our own. That's why the minister is saying, "I am
21 trying to find 1.3 files which are lost, which are misplaced." That is our position, but
22 if we receive more specific, more pertinent, more focused, we will be of assistance, but
23 the way it is right now we regret that our position is this offends the rule of relevance
24 and specificity, and we are not able to be of assistance.

25 I think I should say no more lest I be tempted to answer.

1 PRESIDING JUDGE OZAKI: Thank you very much, Mr Attorney-General, and
2 I would like to take this opportunity to remind parties and participants to strictly
3 adhere to the agenda.

4 We have very concrete agenda items; very technical ones in a sense, although it is
5 very important. This status conference is not the place where parties and
6 participants will discuss about the substancy or lack of evidence of the case against
7 Mr Kenyatta, or to what extent Kenyan government is privy to other evidence or
8 some certain level of confidentiality of some document, or general security situation
9 in Kenya, and I would like to stress that please not to employ too strong or provoking
10 languages and please avoid unnecessarily heated or emotional languages. I can
11 assure you that it will neither help this Chamber, nor parties and participants.

12 Having said this, do you have any comments at this moment, Mr Kay?

13 MR KAY: I do, your Honour.

14 June 2007 to December 2010 is the request for transfers of land. The post-election
15 violence was in January 2008. The pre-trial brief makes no specific reference to
16 anything other than cash being paid, which was a feature of the evidence at the
17 confirmation of charges hearing.

18 To ask the Government of Kenya to undertake this work until December 2010, on an
19 issue in which the parameters do not fit the case, in my submission is something that
20 should be said here. He would not know that because he is not involved in dealing
21 with the evidence and the issue over the ownership of land is not the point. It is the
22 transfers of land, apparently.

23 So, Madam President, our submission is that this (a) is an irrelevant request; (b) it is
24 immaterial to the case and the specificity is utterly lacking and shows a lack of due
25 diligence in relation to the comprehension of the case.

1 Thank you.

2 PRESIDING JUDGE OZAKI: Thank you.

3 Mr Gaynor?

4 MR GAYNOR: Simply, Madam President, I simply want to observe that, if it is the
5 government's position that Mr Kenyatta whether as a legal or as a beneficial owner
6 and whether directly or through his family members or through companies does not
7 own any land whatsoever in Kenya, there will be millions of Kenyans who will be
8 extraordinarily surprised to learn that news.

9 Thank you.

10 MR MUIGAI: Madam President --

11 PRESIDING JUDGE OZAKI: Mr Attorney-General?

12 MR MUIGAI: -- it is going to be very unfair for us to engage in this sort of semantics.
13 We have a record. I have exchanged written material with the Prosecutor. He has
14 sent me written material.

15 For a speculative -- if you allow this sort of pejorative language, intended to attract
16 some publicity of some sort, it is demeaning to the stage of Kenya as a State Party that
17 has come here to co-operate voluntarily.

18 Mr Prosecutor cannot stand there and say anybody has ever told him what is now
19 alleged by a person who has never seen our communication. It is preposterous.

20 We request you, Madam Chair, to take charge of the Court and allow our
21 interventions between parties that are within the know, parties that understand what
22 has happened, parties that have exchanged documents. If any other person wants to
23 hold a press conference after this event, for whatever purpose, they are welcome to it.

24 PRESIDING JUDGE OZAKI: Thank you, Mr Attorney-General.

25 The third category relates to tax returns. Mr Prosecutor?

1 MR GUMPERT: (Microphone not activated) Yes. We asked -- sorry, we asked the
2 Kenyan government to identify income tax and VAT returns submitted by
3 Mr Kenyatta, or the third party corporate entities to be identified under the first
4 request, between that same time period. The response we received was a categorical
5 assurance that Mr Kenyatta is not registered for VAT.

6 We also received, and we're grateful for, summaries of Mr Kenyatta's declared income
7 and tax liabilities over two decades, 1992 to 2012, together with Revenue Authority
8 working materials for the years ending 2007 and 2008.

9 I would comment - and indeed it's set out here, it takes nobody by surprise - the
10 documents which we have been provided are not the documents we asked for. We
11 asked for the tax returns. We suggest that they may be key documents which could
12 be expected to identify business and companies in which Mr Kenyatta has holdings
13 and for which he received dividends or other revenues.

14 That would be one way in which the names of relevant companies, which is being
15 asked for by the Registrar of Companies, could be provided.

16 Those are all the remarks that I make in public session on that score,
17 Madam President.

18 PRESIDING JUDGE OZAKI: Thank you.

19 Mr Attorney-General, would you like to respond?

20 MR MUIGAI: Tax information relating to the citizen were provided in good faith
21 from the Kenya Revenue Authority. We have explained to the Prosecutor and at
22 some point we thought we had concurrence on this matter that there is a limit in as
23 far as the Government of the Republic of Kenya is concerned in the disclosure of
24 private tax and other legally protected information and that we must work with the
25 consent and approval of the Defence in such matters.

1 I leave it to Mr Kay to comment about the relevance of tax returns to the case that is
2 before the Court because we don't know the case. I must -- suffice it to say this,
3 because I think it bears repeating: There appears to be a misplaced notion that all
4 that is required of the Government of Kenya is to be confronted by a document
5 bearing the logo and the letterhead of the ICC and by hook or crook there will be a
6 delivery of whatever is demanded.

7 Let me repeat at the risk of clogging the record with things we've already said before:
8 Kenya has a comprehensive legal system. It may come as a surprise, but it is indeed
9 the case. And under that legal system, we, even as government, are required to
10 comply with the law. We are not able --

11 PRESIDING JUDGE OZAKI: Mr Attorney-General --

12 MR MUGAI: Yes.

13 PRESIDING JUDGE OZAKI: -- I'm sorry to intervene, but I think you are repeating
14 yourself and concerning the time constraint we have, please strictly adhere to the --

15 MR MUGAI: Okay. I will -- I will just wrap up by saying: The request by the
16 Prosecutor that over and above the documents voluntarily disclosed, he would like to
17 receive other tax documents of any other corporate entities, offends the principle of
18 relevance and specificity, and here we must say the dog -- the tail is beginning to wag
19 the dog. We don't have the companies because we can't search them because he
20 doesn't know them, but yet we have failed to give records of the companies that he
21 doesn't know which we don't have. It's as simple as that. It is an absurd situation.

22 Thank you.

23 PRESIDING JUDGE OZAKI: Thank you.

24 Mr Kay?

25 MR KAY: Madam President, as we go further and further into this exercise, it

1 becomes more and more ludicrous because the allegation in this case was that cash
2 was paid to finance the PEV during January 2007. The numerous references in the
3 transcripts and documents will bear that out.

4 There has never been a suggestion that that finance, that cash, was made tax
5 deductible by the accused and subject to his tax returns. We are now embarking
6 upon what is a fishing expedition or something that is akin to setting up the
7 Government of Kenya so that it fails and carries the can.

8 The period of June 2007 to December 2010 said it all in relation to this matter, and in
9 my submission, this Court should remember why it adjourned this case, on what
10 grounds it adjourned this case, and the reasons stated by the Prosecutor to get his
11 adjournment from the trial date in February of this year, and now a whole multitude
12 of unrelated matters are poured into the offices of the Attorney-General to set him up
13 to fail, and in my submission this is not something that the Court should permit along
14 with the two previous matters we've had already as it fails the test for this case.

15 Thank you.

16 PRESIDING JUDGE OZAKI: Thank you.

17 Mr Gaynor?

18 MR GAYNOR: Thank you, Madam President.

19 I observe that the government has returned to its earlier argument that incriminatory
20 evidence relating to a suspect can only be disclosed to the Office of the Prosecutor
21 with the consent of the suspect.

22 Now, not only does that not reflect the position in Kenyan domestic law, it does not
23 reflect the position, in fact, in any jurisdiction that I'm aware of. It's a wholly absurd
24 position and would cripple criminal justice systems across the world. And the fact
25 that the Attorney-General has returned to that is indicative that Mr Kenyatta has got

1 something to hide, he doesn't want certain material to be brought to your Honour's
2 attention. If he had nothing to hide, he would be happy for this to be provided -- to be
3 provided confidentially to the Office of the Prosecutor and to your Honours. Thank
4 you.

5 PRESIDING JUDGE OZAKI: Thank you.

6 The next category is vehicle registration records.

7 Prosecution?

8 MR GUMPERT: Your Honour, let's hope that this can lower the temperature a little
9 and be dealt with a little bit more briefly.

10 We have received the records that we asked for, which show that between
11 November 2007 and October 2012 there were four vehicles registered to Mr Kenyatta
12 at the Kenyan National Transport and Safety Authority. And we thank the
13 Government of Kenya for that information. We point out, of course, that that is the
14 records only in his own name and not in the name of any third party companies or
15 other entities in which he may have an interest.

16 PRESIDING JUDGE OZAKI: Thank you very much.

17 Mr Attorney-General, anything to respond?

18 MR MUIGAI: Madam President, we are happy to have been in a position to supply
19 that information. It actually demonstrates what we have consistently said before,
20 where the request is specific and direct and capable of -- of compliance, we will do so
21 expeditiously. And I think that that particular request we were able to comply
22 within seven days of our first meeting.

23 Unfortunately, the Prosecutor has then gone further and said, "We need further
24 vehicle registries of corporate entities." Our position is the same. Number one, this
25 offends the principle of relevance and specificity, and the burden of proving

1 relevance and specificity is not ours, it's the Prosecutor's. But number two, and more
2 important, it is the same, same difficulty that the Prosecution has created and the
3 Prosecution is saying, "We have investigated this case for five years. We came to the
4 Court and said we had enough material to have it confirmed, it was confirmed. We
5 came to the Court and said we were ready for a hearing, give us a hearing date. A
6 hearing date was confirmed." And now the Prosecution says --because we have said
7 to them, "Give us these names of those other corporate entities so that we do a search"
8 and their answer is "We don't know those corporate entities and we don't know the
9 third parties and we ..." --

10 PRESIDING JUDGE OZAKI: Mr Attorney-General, I'm sorry again to interrupt, but
11 this issue has been already raised by you.

12 MR MUGAI: Yes. So we are unable --

13 PRESIDING JUDGE OZAKI: So you don't -- you don't need to repeat.

14 MR MUGAI: We are unable to comply with a request that says the Prosecutor does
15 not know the entities he's investigating, but by some miracle we should find out what
16 those entities are and investigate whether they own motor vehicles. It's absurd.

17 PRESIDING JUDGE OZAKI: Thank you.

18 Mr Kay?

19 MR KAY: Madam President, the most appropriate investigation on this matter
20 would have been to take vehicle registrations that were mentioned in the evidence
21 and search for them on the Kenyan national record database. That's never been done.
22 Instead, we were asked to supply vehicle registration numbers in the hope that
23 something might fit. Well, it doesn't fit on the database, and this is again a reflection
24 of the lack of direction to obtaining material evidence in this case and I hope the
25 Court takes note of it.

1 Thank you.

2 PRESIDING JUDGE OZAKI: Thank you very much, Mr Kay.

3 Mr Gaynor?

4 MR GAYNOR: No, thank you, Madam President.

5 PRESIDING JUDGE OZAKI: Thank you.

6 The fifth category is bank records.

7 Prosecution?

8 MR GUMPERT: Indeed, it is, Madam President. The request was to identify
9 accounts held by Mr Kenyatta personally or through third party entities, the same
10 proposition about which Mr Muigai, the Attorney-General, and I have been in some
11 dispute and to provide statements between the same two dates. And in response,
12 records relating to various accounts at various banks which there is no public interest
13 in -- in revealing have been provided between the months of -- well, between 1
14 December and 28 February 2007 and 2008 respectively.

15 The remarks I would make are these: It has become plain that as with a number of
16 these requests -- and we heard from Mr Kay just a moment ago something I was
17 unaware of, that it was -- that the vehicles -- the vehicle registration were provided as
18 a result of a request made by the Kenyan government to -- to the Defence, but here
19 the records have been provided not as a result of any court order, but by
20 Mr Kenyatta's consent. And indeed the Kenyan government make no secret of that.
21 What I have observed the Government of Kenya is that the OTP needs formal
22 assurance that the accounts revealed represent the totality of accounts held and in
23 particular that Mr Kenyatta's consent has not been withheld in respect of any account.
24 What's important once again is not for the Prosecution to learn what Mr Kenyatta
25 says the position is, but to learn what the formal records held by the banks and the

1 banking authorities say the position is.

2 More technically, whilst we're very grateful for the accounts which we have received
3 in his own name, there is a need to understand the underlying documentation which
4 will enable us to determine where money was coming from and going to on that score,
5 and we've asked for personal contact with bank officers to clarify bank procedures in
6 that respect. And as your Honours know, and indeed it's in the public filing, there's
7 been an agreement in principle that that will take place and a timeline expressed.
8 We are -- we remain of the position that bank records for a very much longer period
9 are necessary to enable proper comparisons to be made, and let me expand on that in
10 about three sentences. What's been provided are the accounts for the period when
11 the election -- post-election violence was taking place. Well and good. Those are
12 obviously some of the most important records, but in order for the Prosecution and
13 the Court eventually to determine whether there is any significance about payments
14 made during that period, there needs to be a comparison made. The Court will need
15 to be able to see, is the activity at the time of the violence unusual activity? Let us
16 compare it with January in the preceding year or January in the following year. That
17 is, I would respectfully submit, plainly the way in which such investigations are
18 properly done because it enables the financial history to be put into its proper context
19 and enables the Court to see whether there is, in truth, any significance to payments
20 made.

21 Thank you.

22 PRESIDING JUDGE OZAKI: Thank you.

23 Mr Attorney-General?

24 MR MUGAI: Madam President, we have a -- we have availed to the Prosecution
25 what was in our judgment possible in the circumstances. We, however, repeat what

1 we've said before. We are unable to provide records of third parties who are
2 unidentified or corporate entities that are unidentified.

3 But allow me to say this in one second: This is the first time we have encountered a
4 request for what amounts to mutual legal assistance where the party seeking legal
5 assistance is unable to identify the subject that he would or she would want assisted
6 about.

7 I have challenged the Prosecutor to tell me who is this other corporate entity, and as
8 soon as I have the name, I will look up their records. But we neither have the means
9 nor the resources nor the technical ability nor the legal framework to do on his behalf
10 the fishing expedition that he desires.

11 PRESIDING JUDGE OZAKI: Thank you.

12 Mr Kay?

13 MR KAY: Madam President, the submissions concern the relevant time, not
14 comparisons. The accounts which were disclosed I have here took me half an hour
15 to go through, identify how they worked and to see that there was nothing
16 exceptional that fitted with the Prosecution case.

17 On 23 June, these accounts were disclosed to the Prosecution. If they were so
18 concerned about matters, they should have gone on that day to have an explanation
19 made to them by various bank officials as to how the banks operated and how the
20 payments in, came in and the payments out, went out.

21 In fact, the Prosecution case is not about payments in and moneys received. As you
22 will be well aware, it is about payments out. And the allegations at the pre-trial brief
23 in paragraphs 28, 34, 36 and 38 all concern allegations of cash. Millions of shillings
24 that we heard about was what was required to fund the PEV. There is not a single
25 payment that fits that description. So now what do we have? We have another

1 request, something else needs to be done. And this goes on and on and on.

2 In our submission fishing expedition was exactly right, a correct description of what
3 is going on and attempts to construct some sort of argument to show non-cooperation
4 by the Government of Kenya when in fact it is the case of the Prosecutor that is the
5 need to have relevance and this material to be relevant towards. That is not the case.
6 You are being asked to give more time on this matter so they can do something that
7 any person of due diligence would have done on the day they received it if it was
8 such an issue of concern. It was not done. Two weeks they've sat on their hands on
9 the matter and then raised it just as we come into the status conference as being some
10 sort of issue they need clarification upon how -- I'm sure they can get access to a
11 forensic accountant, other than myself, to explain the detail. Thank you.

12 PRESIDING JUDGE OZAKI: Thank you.

13 Mr Gaynor?

14 MR GAYNOR: Madam President, once again, I note with concern the reference, if
15 I'm not mistaken, in Mr Gumpert's submission, to the consent of the suspect to the
16 provision of the potentially incriminatory evidence. Consent is not required under
17 the Rome Statute, it's not required under the International Crimes Act, it's not
18 required under the Civil Procedural Code of Kenya. What the Statute expressly has
19 in mind is provision of incriminatory evidence without the consent of the suspect.
20 Now, in this case it's hardly surprising that Mr Kay in his examination of the
21 accountants didn't find anything exceptional.

22 Thank you, Madam President.

23 MR KAY: Madam President, I must say --

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

25 MR KAY: -- that earlier this afternoon --

1 PRESIDING JUDGE OZAKI: Mr Kay.

2 MR KAY: Earlier this afternoon, we were told we should be consenting and
3 providing material. Now when we do, it is suddenly found against us. I'm
4 astonished.

5 PRESIDING JUDGE OZAKI: Mr Kay, I don't think that's the intention of
6 Mr Gaynor.

7 MR KAY: I think it is.

8 PRESIDING JUDGE OZAKI: His intention is that the Government of Kenya is under
9 obligation to provide materials even if they don't get someone's consent. Am I
10 correct?

11 MR GAYNOR: That is precisely correct. Thank you.

12 PRESIDING JUDGE OZAKI: Thank you.

13 MR MUIGAI: I think that we shouldn't allow that to lie on the record without
14 explanation.

15 PRESIDING JUDGE OZAKI: Mr Attorney-General.

16 MR MUIGAI: We discussed this at great length with the Prosecutor. We explained
17 that there are things under Kenyan law we can give without reference to any other
18 body or authority. We also explained that there are institutions that are autonomous.
19 The Central Bank of Kenya is constitutionally an autonomous body. We cannot give
20 them instruction.

21 We also explained that there are many statutes that require that we get a court order.
22 We then agreed jointly -- and that's why I think all this commentary inspired by the
23 ignorance of what transpired are not helpful -- we then agreed, because we had a
24 timeline, because we wanted to demonstrate good faith, because they had good faith,
25 we should take full faith measures, full faith measures to work together to produce as

1 quickly as possible material that was available without problem.

2 PRESIDING JUDGE OZAKI: Thank you, Mr Attorney-General.

3 This is exactly the purpose of having this status conference in public session that
4 everyone concerned should have certain kind of information.

5 The next category is foreign exchange records.

6 Prosecution?

7 MR GUMPERT: It is, Madam President. I am going to make a point which applies
8 to this as much as it does to the last matter and indeed others, a point made by
9 Mr Kay suggesting that the Prosecution has, I think his words were "sat on its hands."
10 Now, all of these requests were contained in a much larger and longer request made
11 in April of 2012, which the Government of Kenya did not reply to until there were
12 proceedings in open session in this court which effectively required them to.
13 The Prosecution has not been sitting on its hands. It's been asking for these things
14 for years.

15 Foreign exchange records, we asked that there should be an identification of
16 transactions by Mr Kenyatta or those third-party entities at foreign exchange
17 institutions between the same dates.

18 The response by the Government of Kenya was, "The request cannot be executed
19 without identification of relevant foreign exchange institutions." We comment, "We
20 do not possess such information." We suggest that there may be a duty on the part of
21 foreign exchange institutions within Kenya to record the conversion of currency from
22 one currency to another and to inform the appropriate authorities, and if that is right,
23 we ask that the appropriate inquiries be made of the holder of those records in the
24 name of Mr Kenyatta and of the third-party company entities to establish whether
25 during the relevant period such exchanges were made. Thank you.

1 PRESIDING JUDGE OZAKI: Thank you.

2 Mr Attorney-General?

3 MR MUIGAI: Except to say, Madam President, that it is this request, more than any
4 other, that demonstrates the difficulty that the Government of the Republic of Kenya
5 has been placed under.

6 It has come to our knowledge that there has been a two-year discussion between the
7 Defence and the Prosecution about phone records related to Uhuru Muigai Kenyatta.
8 That is not disclosed to us at all, at any stage. So what has happened?

9 We are asked by the Prosecution to go and find out numbers registered in the name of
10 Uhuru Muigai Kenyatta. Sorry, sorry, sorry, sorry, I am -- I am -- I think I am very
11 anxious that we should get to that. I apologise unreservedly to the Honourable
12 Judges and let me come back to the question of foreign exchange records.

13 Now, here we have again taken the same view as we took about the bank records.
14 We have great difficulties in understanding who the third parties and other entities
15 would be, and we are unable to provide an answer in the manner requested by the
16 Prosecution. And we have no records, we have after due diligence not been able to
17 find any records of what is described here as foreign exchange records. I leave it at
18 that for now.

19 PRESIDING JUDGE OZAKI: Thank you.

20 Mr Kay?

21 MR KAY: This does not pass the test of relevance to these proceedings. There is
22 not a single part of the evidence to which it relates. It is not material and it should
23 not be a matter thrust upon the Government of Kenya, which is struggling to deal
24 with all these matters in -- in the way that it best can. And I can see no relevance at
25 all to the proceedings.

1 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

2 Mr Gaynor?

3 MR GAYNOR: Simply to briefly observe that the question of relevance should
4 strictly not be for the government. I know there is court jurisprudence to this effect,
5 but certainly under the International Crimes Act, the Attorney-General has absolutely
6 no mandate to examine the relevance of material.

7 As far as the victims are concerned, anything which the Prosecution in good faith
8 believes is relevant to the flows of funds potentially from a suspect which are in any
9 way reasonably related to the commission of a crime, that is material which should be
10 handed over by every State Party. Thank you.

11 MR MUIGAI: Madam President, allow me to answer that in one sentence. I have
12 consistently deferred to Mr Kay to provide an explanation on relevance on all these
13 questions. I didn't say anything regarding foreign exchange records that goes to
14 relevance. What I said is that to the extent that we were required to make an inquiry,
15 we did and found nothing.

16 My next point was we don't understand what the other corporate entities are.

17 Maybe it would be useful for court officials to supply the documents to counsel for
18 the victims so that we avoid a further wastage of time.

19 PRESIDING JUDGE OZAKI: Thank you.

20 I think we can safely go to the next category, which is telephone records.

21 Prosecution?

22 MR GUMPERT: Yes, Madam President. We requested the Government of Kenya
23 to identify and -- sorry, to identify numbers ascribed to, used by or associated with
24 Mr Kenyatta and to provide call data records between those same two dates.

25 In response, we have not yet been provided with any data. We're informed and

1 indeed we've been kindly shown a letter written by an official from the
2 Communications Commission of Kenya, as I understand it's the government agency
3 which regulates the telecommunications industry in Kenya, and that letter states,
4 "Information in respect of the numbers that were in use at that time ..." -- sorry, it
5 asks for "Information in respect to the numbers that were in use at that time ..." he
6 means by Mr Kenyatta, "... taking into account that Kenya did not have a
7 comprehensive regime for registering subscribers at the time."

8 So as I understand it, what is being said is that not all phones -- there was no
9 comprehensive requirement when you bought a telephone or when you set up a
10 connection with a mobile telephone company for you to give them their name and for
11 them to register it.

12 The comment we would make is this: There must be records which would enable
13 contract, as opposed to pay-as-you-go subscribers; in other words people who pay
14 their bills after they've had the usage to be billed by those telephone companies. It
15 would be obviously a physical necessity that one has a name and an address in order
16 to get the person associated with the number to pay the bill.

17 We observe that there's been to our knowledge no court order in Kenya, or any other
18 compulsion, aimed at obtaining these telephone records. The CCK, the regulatory
19 body, has expressed hope that the data can be obtained on a consensual basis; that is
20 to say that we can have the data if Mr Kenyatta consents to our having it.

21 We emphasise that it is in order to obtain a full list of relevant numbers, as held by the
22 telephone companies under the authority of the CCK, that we're making this request
23 in the first place. There is once again an element of circularity here. We say "There
24 must be records which show the numbers associated with Mr Kenyatta." They say,
25 "Tell us the numbers."

1 We're asking the government to make formal inquiries to obtain and provide
2 comprehensive materials, using legal powers of compulsion if necessary, irrespective
3 of Mr Kenyatta's consent.

4 Furthermore, we would respectfully suggest that there must be formal and informal
5 lists and records of telephone numbers on which cabinet ministers and members of
6 parliament and their staff could be reached in 2007 and 2008. Mr Kenyatta was one
7 such person, and we would respectfully submit that there must be material within the
8 possession of the Government of Kenya which contains numbers which were
9 associated with him. We'd like that material.

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

11 The court officer just informed me that the English real-time transcript has stopped
12 working and IT is now investigating the issue. I hope we can continue and unless
13 we have some problem in -- unless we may some problem in case of redactions, but if
14 we all be very careful I don't think we need redactions. And of course the edited
15 transcript will reflect the whole proceedings, so it should be okay.

16 With this, I would like to invite Mr Attorney-General to respond now on telephone
17 records.

18 MR MUIGAI: Thank you, Madam President.

19 I want to repeat myself by saying it is this request for phone records that best
20 demonstrates the difficulty that the Government of Kenya has been placed under.

21 The Prosecutor has requested that we search for any numbers that were in use by

22 Mr Uhuru Kenyatta. The regulator has been written back and said, "At the time that
23 you have identified, Kenya did not have a comprehensive regime of mobile
24 subscribers." If I am not mistaken, that comprehensive regime is being implemented
25 now.

1 What would have a -- what would a diligent prosecutor intending a logical lawful
2 outcome have done? He would have said, having heard that, "These are the five or
3 ten numbers that from the evidence we have," and he doesn't need to tell us who the
4 witnesses are. We don't want to know. He would say to us, "Zero, zero, zero
5 number that and that and that are numbers of interest to us," which is exactly what
6 CCK is saying. "Disclose numbers so we can search numbers." What does the
7 Prosecutor say? "I will not disclose because it is a question of principle."

8 What then transpires has been happening behind our back. The Prosecutor and the
9 Defence have been already discussing and gone to the High Court of Kenya and
10 jointly were doing an investigation about phone records.

11 In our view, therefore, this is not a request made in good faith, because if it were
12 made in good faith that collaboration already taking place would have been disclosed
13 to us. It wasn't. We are therefore unable to assist for the very good valid legal
14 reasons that have been given there.

15 PRESIDING JUDGE OZAKI: Thank you.

16 Mr Kay?

17 MR KAY: Madam President, since July 2013 the Prosecution and Defence instructed
18 a joint expert to obtain phone records, cell site data, and we had to go to the High
19 Court of Kenya for an order to get the delivery up of the evidence to the parties.
20 The Prosecution have had in their possession phone data and ability to acquire phone
21 evidence data. For as long as they've been investigating the case, they've been able
22 to get data concerning particular numbers since July 2013.

23 We attended together, through my lead investigator, Mr Summers, and a team from
24 the Prosecutors, with the joint investigator, to the phone companies in Kenya, and
25 they were told that they could not identify names and give names for the provision of

1 numbers, but they could provide records of any numbers that were supplied
2 according to the limitations of the data housing systems that they employ.
3 I received an inquiry yesterday, and it was quite clear the Prosecutor had not been
4 informed by his team of the nature of the meeting that had taken place in July 2013
5 where they were in possession of information concerning the use of the databases of
6 the phone companies in Kenya.
7 They have had every opportunity themselves to acquire this evidence. They don't
8 need the Government of Kenya. I proved it could be done. They didn't want to be
9 joined as a party to the proceedings. They thought it was better if I did it in my own
10 name. So it was taken in my own name by counsel in Kenya. They have had the
11 opportunity and facility to obtain any of this evidence themselves. They're quite
12 capable of doing it, and they have been involved in consenting to that procedure
13 within Kenya since July 2013.
14 The evidence has produced nothing for them, absolutely nothing. They were asking
15 for the provision of a number when they'd already got that number and provided it to
16 the joint expert to supply the data for that number. They'd already extracted that
17 from the evidence.
18 They've analysed mobile phones. They've taken mobile phones from witnesses and
19 had the contents analysed to provide themselves with a database of contact numbers.
20 That evidence has always been available to them. The number they investigated
21 came from one of their witnesses. They've investigated this. Setting this up now as
22 a further issue causes me to repeat in summary what I've said before, that obstacles
23 are being placed in the way of this case and made the fault of the Government of
24 Kenya utterly unreasonably and wrongfully.
25 And I hope this Bench took the Prosecutor to task this morning over what he was

1 asking for and what its relevance was, because for us we can see what relevance there
2 has been and what the evidence was able to defeat when it was produced.

3 Those are my submissions. Thank you.

4 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

5 Prosecution, do you have anything to say in response to the point made by Mr Kay
6 about joint investigation and availability of telephone records?

7 MR GUMPERT: Mr Kay is absolutely right that there were investigations conducted
8 through a jointly instructed expert. However, he's absolutely beside the point.

9 What we are trying to ascertain here is a definitive record of the telephone numbers
10 and the usage of those numbers associated with the defendant, with the accused
11 person, Mr Kenyatta.

12 We are not satisfied the material in our possession represents anything like that
13 comprehensive record. We suspect that those records are available in the companies
14 who provide telephone services in Kenya, that's what we're asking for the help of the
15 Kenyan government on.

16 PRESIDING JUDGE OZAKI: Thank you.

17 Mr Gaynor?

18 MR GAYNOR: Thank you, Madam President.

19 Your Honours, if you could imagine for a moment that you did have the requested
20 telephone data, then your Honours would know exactly where Mr Kenyatta was
21 during the period of the crimes alleged, and you would know exactly who he was
22 speaking to, and you would also know that information for his close associates. In
23 other words, your Honours would have a very clear picture as to what exactly he was
24 up to.

25 The fact that that information is being withheld from your Honours is a matter of

1 extremely great concern. The suggestion that the telephone numbers have either
2 been erased or no longer exist or have been forgotten, if that suggestion has been
3 made, is thoroughly unpersuasive. And I think this issue in my submission, Madam
4 President, illustrates perhaps more than any other just what we're up against here,
5 and that is a policy of deliberate obstruction of access to relevant evidence in this case.
6 Thank you.

7 MR MUIGAI: Madam President --

8 PRESIDING JUDGE OZAKI: Mr Attorney-General?

9 MR MUIGAI: -- let me ask, because we are -- you are a court of record. Things are
10 being said on the record. We have explained that at the material time in Kenya,
11 there wasn't a comprehensive phone registration system.

12 Mr Gaynor seems to know more about Kenya than Kenya knows about itself. And
13 we would want him to provide us with these numbers, the same challenge we have
14 put to the Prosecution. Those numbers that are disclosed by the evidence, give them
15 to us, we will do a search on the numbers. But you cannot tell us to find documents
16 that the regulator says have never existed in Kenya. And that is not obstructionist.
17 That is common sense.

18 PRESIDING JUDGE OZAKI: Thank you.

19 I suggest that we do not repeat our discussion about obstruction and so on.

20 The final category is intelligence records.

21 Prosecution?

22 MR GUMPERT: Yes, Madam President. The request was for the identification of
23 any information held by the Security and Intelligence Services of Kenya concerning
24 the activities of Mr Kenyatta and any corporate identities identified under paragraph
25 1, the same thorny problem we have been wrestling with throughout. That's the

1 request.

2 The response was a letter we were provided with and we're grateful for it, a letter
3 dated the 19 June from the Kenyan National Intelligence Service stating that
4 Mr Kenyatta was not a target of the NSIS between 1 December 2007 and 28
5 February 2008; and that there is, therefore, no information held by the NIS, that's the
6 National Intelligence Service, on the activities of the accused for this period.

7 The only comment I make is that we continue to request records in the name of third
8 parties or companies which may be identified as entities in which Mr Kenyatta has a
9 significant interest, and when that material is provided, we ask that the intelligence
10 records be combed again for reference to those entities. It is a point your Honours
11 will have well in mind by now.

12 PRESIDING JUDGE OZAKI: Thank you.

13 Mr Attorney-General?

14 MR MUIGAI: In our view, the certificate by the National Intelligence Service is
15 conclusive of the matter. We would be willing to respond to a claim that a report
16 other than what has been given is available somewhere else which we should
17 investigate.

18 Secondly, the requests by OTP that NSIS should be requested to give another report
19 on third parties, other corporate entities, not only is this an impossible one to comply
20 with because the corporate entities are not identified, and we have no way of
21 knowing -- I would imagine that if Mr Kenyatta has ten shares in Kenya Airways, the
22 Prosecutor would want a security intelligence report on the activities of Kenya
23 Airways during that period. We would be happy to provide that if any of such is
24 kept. But we would have to be told what are these corporate entities and who are
25 these other persons. Is it his watchman? Is it his cook? Is it his gardener?

1 The absurdity of this request must be clear to all that we are being asked without
2 specificity, without any identification, to do a general search about persons we do not
3 know. We are unable to do that, and we regret that we are unable to do that because
4 it is impractical, not because we are obstructing.

5 PRESIDING JUDGE OZAKI: Mr Kay?

6 MR KAY: Madam President, a corporation is a statutory body. I don't know
7 whether the national intelligence agency was sitting in Companies House watching
8 the files of shares or anything like that. This is a completely badly-drawn request of
9 no relevance to the case for immaterial evidence that could never be fulfilled and is
10 plainly a fishing exercise.

11 I ask the Court to remember the very limited area of which the Court was concerned
12 when this case was adjourned, and somehow this has been allowed to develop and
13 mushroom, and we're spending our time arguing matters, but not the primary
14 matters with which we were concerned on that day in January when the Prosecution
15 got their adjournment to avoid a disposal of the case in a trial by the entering of a not
16 guilty verdict.

17 And so requests like this have been made that are utterly fruitless for the case and,
18 whatever explanations are given, I can assure you we have found nothing of
19 relevance within the evidence.

20 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

21 Mr Gaynor?

22 MR GAYNOR: I simply want to observe, Madam President, that under the law of
23 Kenya, the accused is in fact in direct control of the National Intelligence Service,
24 which illustrates another of the unique difficulties of this case. He controls that
25 service, so it perhaps should not be entirely surprising that we're not able to get

1 anything, or the Prosecution is not able to get anything useful from that service.

2 Thank you.

3 MR MUIGAI: Is he going to be allowed to continue demonstrating his ignorance of
4 Kenyan law? The National Intelligence Service is organised under an independent
5 entity, if you may bother to look up the law.

6 PRESIDING JUDGE OZAKI: Mr Attorney-General, please be reminded that if you
7 want to speak in this courtroom please wait for me to call you.

8 MR MUIGAI: Thank you. I appreciate that.

9 PRESIDING JUDGE OZAKI: Thank you, Mr Attorney-General.

10 (Trial Chamber confers)

11 PRESIDING JUDGE OZAKI: Well, as for the next steps and timeline, part of which
12 we have already discussed, it is clear from the discussion that there are still a number
13 of outstanding issues. And, as I mentioned before, following the discussion this
14 morning in ex parte session, it was agreed that the Chamber would receive written
15 submissions on certain points of this agreement regarding the specificity and
16 relevance of certain of the requests.

17 Filing deadlines of 11 July for the Prosecution and 16 July for the Kenyan government
18 had been agreed. However, given the urgency and importance of this issue, because
19 judging from the submissions made in this session as well those issues are common to
20 almost all categories, and given the Prosecution's submission that they intend largely
21 to rest on their existing submission and would be willing to make the requested filing
22 as soon as required, the Chamber would like to inquire whether it would be agreeable
23 to move each of those deadlines forward by one day. Therefore, the Prosecution
24 would make its filing tomorrow, by the end of tomorrow, and the Kenyan
25 government on 15 July. Would that be acceptable?

1 Prosecution.

2 MR GUMPERT: Your Honour, there is no doubt that if I were the sole producer of
3 such a document, I could do it by 4 o'clock tomorrow evening, which is what you're
4 asking for.

5 PRESIDING JUDGE OZAKI: Yes.

6 MR GUMPERT: Regrettably there are a number of procedures which require those
7 above me, I'm trying not to sound too bureaucratic here, to ensure that I haven't gone
8 off my head and have made submissions which are not to the point or in some way
9 wholly inappropriate. Realistic, having spoken to my colleague, Mr Lowery, who
10 has a longer experience than I, I think there would be a risk that we wouldn't be able
11 to comply with something which would require us to produce a fully checked and
12 authorised document in 24 hours and 20 minutes.

13 So although I have urged that we move as quickly as we can, and I remain of that
14 view, and indeed remain of the view that written submissions in truth could be
15 dispensed with, if they are required and if they are required to be of the appropriate
16 standard and to have gone through the appropriate hoops, the original time period of
17 48 hours is one which I must ask for.

18 PRESIDING JUDGE OZAKI: Thank you very much. In that case, let's stick to the
19 initial deadline of 11 July for the Prosecution and 16 July for the Kenyan government.

20 MR GUMPERT: Very well, Madam President.

21 PRESIDING JUDGE OZAKI: Yes. Thank you.

22 And the Chamber also would like to reiterate that the co-operation and negotiations
23 are to proceed in parallel and the fact -- and that the fact that submissions have been
24 requested on this point should in no way suspend the ongoing execution of the
25 request.

1 That's the point I made this morning, and I would like to stress the importance of this
2 request in this open session.

3 Now, Prosecution and Kenyan government, are there any other submissions that you
4 would like to make? And after that I would like to give the floor to Defence and
5 Legal Representative to make any submissions.

6 MR GUMPERT: No, I think the Attorney-General and I, from what I gather from his
7 body language across the court, are in agreement. There's nothing further to be said
8 on our part.

9 PRESIDING JUDGE OZAKI: Attorney-General? No?

10 MR MUIGAI: Just to place on record the -- our thanks for the co-operation we've
11 received from the Prosecutor on this matter.

12 MR GUMPERT: And indeed I return that.

13 PRESIDING JUDGE OZAKI: Thank you very much.

14 Mr Kay?

15 MR KAY: Thank you, your Honour.

16 Can I remind the Court of what was said on 5 February 2014 concerning the request
17 by the Prosecution to have this trial adjourned, and that concerned that the last
18 remaining -- "... absent the financial records ... the remaining stones unturned are
19 better characterised as pebbles, and the realistic prospect that turning them will yield
20 real potentially conclusive evidence is minimal."

21 And the Prosecutor went on to say that if records of the financial accounts of the
22 accused were produced and "If there were no such movements of funds, that will be a
23 cardinal point to suggest his innocence. On the other hand, if there was unexplained
24 movements of large amounts of money, that would tend to support the Prosecution's
25 assertions."

1 Those bank records have been obtained. They have been able to be analysed by
2 today's date. The Court knows exactly the allegations that have been made in this
3 case and the amounts of money that were being posited as being payments for the
4 post-election violence. I wonder if the Prosecutor has explained to you that in every
5 single one of those accounts that he will have looked at there is actually not a single
6 withdrawal that supports the allegations made in this case.

7 But instead of just dealing with the stones and pebbles, we now seem to be dealing
8 with large earth-moving equipment to try and find extra evidence or create a situation
9 where requests are made that cause a further request to be made that is incapable of
10 fulfilment and any person considering -- because the allegations in the case would
11 well have been understood by the Government of Kenya, by the parties and by those
12 watching, that the heads of request of tax returns and other information, when the
13 accounts, not any returns or forms but the actual accounts have been produced by the
14 relevant authority from the Kenyan banking system utterly defeat the allegations
15 made in this case.

16 And what I am concerned with is that we have been going through this process when
17 we have reached a stage of there being no evidence, and it seems that the Court is
18 unwilling to grab the issue and dismiss this case.

19 Prosecution don't want to withdraw it. They create obstacles saying it's the Kenyan
20 government, that's the reason why they can't come to a decision when they've had the
21 means at their disposal since 23 June to satisfy the statement that was made in this
22 Court on 5 February.

23 Our concern is that the Court and the pressure of this case - and I don't mean the
24 Judges, I mean the institution itself - having brought such a high profile case against
25 President Kenyatta has now found itself with a big problem of credibility in relation

1 to this Prosecution and we are being made the victims of the process.

2 The answers to the evidence of the Prosecutor and the case that he wanted to build
3 are very apparent from the evidence that is being disclosed, be it phone records,
4 vehicle records, financial records. Instead, requests far exceeding any notion of the
5 evidence in this case are being made without any relevance to the allegations. And
6 it's quite clear to many people, having listened to what these requests were today,
7 that we are simply descending into a world of complete lack of objectivity.

8 Our position is that this case failed on 5 February. Time was given, work has been
9 done to try and enable the Prosecutor to fulfil what he claimed he wanted to fulfil on
10 5 February, but what has happened is another game has started because they have
11 had cold feet about the disposal of this case.

12 Everybody knows the pressure around this building concerning this case, the things
13 that were said about my client, the allegations and assertions made in this courtroom,
14 the decisions made from the confirmation of charges hearing based upon evidence
15 they produced, which then proved to be fabricated and false. This is a very unreal
16 position that we are in at this stage if this Court has not had a grip of this case to put
17 this case --

18 PRESIDING JUDGE OZAKI: Mr Kay, I'm sorry to interrupt. Please stick to the
19 theme of the status conference, which is co-operation request.

20 MR KAY: Yes, and the co-operation requests are merely a frontispiece. They are
21 nothing more than that. And we have had outstanding our request for a verdict of
22 not guilty and a termination of these proceedings since the declaration by the
23 Prosecutor that their case lacked sufficient evidence and probably at a time an
24 understanding, because it is very close in proximity, we get the rebirth of the requests
25 to the Government of Kenya in November of last year, but we have outstanding this

1 application for the termination of these proceedings, and it is utterly wrong when the
2 evidence that is being supplied comprehensively proves that.

3 And if there had been any real need for inquiries to be made, they would have made
4 those inquiries from 23 June to satisfy themselves of the operations of these accounts.
5 And those are my -- my submissions, that this Court has the power. The game of
6 disclosure and discovery and ex parte status conferences to discuss matters sucks the
7 Court into a longer process.

8 PRESIDING JUDGE OZAKI: Mr Kay, may I remind that you don't need to argue the
9 decisions already made by this Chamber.

10 MR KAY: Yes. I'm -- thank you, your Honour, but you can understand our
11 frustration, I hope, and it's -- in our submission it should be a fair trial consideration
12 that we have a right for the expeditious disposal of this case since the collapse of the
13 confirmation of charges decision, the collapse of the document containing charges,
14 and we have been waiting and my client has had a function and task on behalf of his
15 people to fulfil, and this matter is left undetermined and hanging over his head when
16 he has a clear business in ensuring the proper governance of Kenya.

17 In fact, the expectations and rights of the victims would have been better served by a
18 dispassionate investigation in this case instead of having their hopes raised and a case
19 that was built on unsolid foundations inevitably collapsed, as we always said it
20 would and we continue to say that.

21 And those are my submissions at this stage urging this Court to dispose of this
22 matter.

23 PRESIDING JUDGE OZAKI: Thank you.

24 Mr Gaynor?

25 MR GAYNOR: Thank you, Madam President. At the risk --

1 PRESIDING JUDGE OZAKI: And please stick to the agenda item of this status
2 conference.

3 MR GAYNOR: I will indeed, Madam President. At the risk of sounding
4 pessimistic, everything that we've heard today from the Government of Kenya is
5 indicative that we have had no real change in what is essentially a policy of
6 obstruction of access to relevant documents and relevant witnesses.

7 Now, I do want to express my concern that the Prosecution is only proceeding on one
8 specimen charge under Article 87(7) of the Statute. I've communicated with the
9 Prosecution that we believe it's imperative that they should file as many 87(7)
10 requests to your Honours as are necessary to reflect the totality of obstruction by the
11 government in this case.

12 In my submission, the Prosecution has been very lax with the Government of Kenya.
13 Its first 87(7) request came in December 2013. By then the cases against Mr Ali and
14 Mr Muthaura had already collapsed. According to the Prosecution's own
15 submissions, both cases had suffered from evidentiary weaknesses which can be
16 directly linked to the State's failure to provide proper access to relevant witnesses and
17 relevant documents.

18 Now, it is imperative that should, in due course, the Trial Chamber refer this matter
19 to the Assembly of States Parties for their further action, the Assembly of
20 States Parties must have a full picture of the entirety of what's going on in this case.
21 And the question of obstruction of access to evidence, let's leave that to one side, but
22 let's not forget that the government has opposed the compulsory of testimony of
23 witnesses in Kenya; it has opposed rule changes intended to facilitate the admission
24 of the evidence of witnesses who have been bribed, intimidated or who have
25 disappeared; it has promoted the view that the ICC is racist and neo-colonialist; it has

1 put forth arguments repeated today that the consent of the suspect is required before
2 incriminatory evidence can be delivered to the Prosecution; it has failed to keep its
3 numerous promises to this Court, to the UN and to the ASP to ensure a genuine
4 domestic justice process for PEV crimes.

5 Not one police officer, not one rapist has been convicted in Kenya for crimes
6 committed during the post-election violence period. There is, in fact, a status of total
7 impunity in Kenya for those who directed PEV crimes at the local, national and
8 regional level.

9 Now, the Attorney-General has previously argued, I don't want to misquote him, but
10 I think he's essentially taking the position that Mr Kenyatta has no power to order the
11 provision of evidence to the ICC, but a striking demonstration of Mr Kenyatta's
12 power and willingness to order the provision of documents is revealed in his decision
13 last month to provide documents sought by Swiss prosecutors investigating financial
14 crimes allegedly committed by Kenyan citizens around 15 years ago.

15 Those victims who might have followed this in the newspapers in Kenya or on
16 television are entitled to ask why Mr Kenyatta will not also order the provision of
17 relevant evidence to the ICC. A few facts will serve to illustrate the point. The
18 Swiss Attorney-General issued a press release on 20 June of this year confirming his
19 request for documents to the Government of Kenya. Within four days it appears
20 from articles published in The Star, both Mr Kenyatta and the Attorney-General had
21 met the Swiss ambassador in Nairobi, assured him of their full support and the
22 requested documents had been handed over.

23 An editorial in The Star, for what it's worth, suggests that Mr Kenyatta gave his civil
24 servants 24 hours to hand over the documents sought by the Swiss prosecutors.

25 Now, we have links to these -- to these articles which I'll circulate to your Honours

1 and to the parties after this.

2 The Swiss ambassador in Kenya personally said on television - I'll circulate a link to
3 the video - that quote, "The level of co-operation we have had with the Kenyan
4 government is impressive." He went on to say, "You can feel that there is political
5 will to solve this and we feel that the president is really serious about finally giving
6 this kind of justice. So it is very good news."

7 Well, that is good news, but it would be even better news if the president was really
8 serious about finally giving this kind of justice to the victims of the post-election
9 violence and giving the same kind of assistance to the ICC as they gave to the Swiss
10 prosecutors in that affair known as the Anglo-Leasing affair.

11 Now, assistance provided by Kenya to other states is governed by the Mutual Legal
12 Assistance Act of 2011. The Attorney-General is the designated central authority
13 under the Act. His role in that Act is similar, but not identical to his role in the
14 International Crimes Act, which of course governs assistance to your Honours.
15 And under Article 132 of the constitution, "The President shall ensure that the
16 international obligations of the republic are fulfilled through the actions of the
17 relevant cabinet secretaries."

18 So it should come as no surprise that when Mr Kenyatta, as president of Kenya,
19 wanted the Swiss prosecutors to get access to the material relevant to their
20 investigation, the Attorney-General very promptly provided access.

21 An entire episode undermines the Attorney-General's arguments concerning the
22 distance of the president from the issue of ICC co-operation. It shows that
23 Mr Kenyatta ultimately controls the provision of evidence to prosecutors outside
24 Kenya. It shows that the Attorney-General will hand over relevant evidence when
25 Mr Kenyatta instructs him to do so. It shows, in summary, that where there is

1 political will, evidence requested by outside prosecutors relating to criminal
2 investigations of Kenyan citizens can be very swiftly identified and provided.
3 Your Honours, in May and June of 2014, I held ten days of meetings with 401 victims
4 of the crimes charged in this case in western Kenya and near Nakuru.
5 Now in every one of those meetings the reaction was largely the same; the victims feel
6 angry, frustrated, and betrayed and, frankly, your Honours, deeply unimpressed with
7 the performance of the Prosecutor and the Court in general. A very large part of that
8 comes down, in my submission, to the slowness of the proceedings which is
9 ultimately the fault of the Government of Kenya for obstructing the access in -- of the
10 Prosecutor to relevant evidence.

11 Your Honours, I wish to turn briefly to the question of trial without undue delay
12 which, I believe, is connected to -- it was raised at paragraph 80 of your decision of 31
13 March 2014. Now, important --

14 PRESIDING JUDGE OZAKI: Mr Gaynor, you have two more minutes --

15 MR GAYNOR: Very well.

16 PRESIDING JUDGE OZAKI: -- but no more.

17 MR GAYNOR: I simply want to say that jurisprudence from Canada and elsewhere
18 recognises the conduct which amounts to knowing waiver of the right to an
19 expeditious trial, as well as dilatory procedural tactics that might not amount to a
20 knowing waiver, are relevant factors in determining whether delay has been
21 reasonable. Mr Kenyatta, by presiding over a government, which obstructs the
22 justice process, in this case in violation of Part 9 of the Statute, has knowingly waived
23 his right to an expeditious trial. And your Honours might wish to invite
24 submissions on that in due course.

25 Now, your Honour, it is absolutely imperative that you remain determined and

1 unwaivering in your dealings with the Government of Kenya. I request you to do all
2 you can do using the extensive powers conferred upon you by the States Parties to
3 ensure Kenya's full compliance with its obligations under Part 9.

4 If having done so, Kenya remains unwilling, and you make a finding of
5 non-co-operation, let that be, the Court can then provide the Assembly of States
6 Parties with a full and honest account of the totality of the government's campaign of
7 non-co-operation, and then the States Parties and other States who have expressed
8 strong support, such as the United States at the United Nations Supreme Council, for
9 the ICC's work in Kenya, they can have a firm and informed basis for taking such
10 steps as they deem appropriate in respect of the deliberate obstruction of justice by
11 Mr Kenyatta and this government.

12 Your Honours, at this pivotal moment in history, it is no exaggeration to say that you
13 can help to break the cycle of impunity for political leaders which has existed in
14 Kenya since before independence. And I request you to remain firm and
15 unwaivering in your commitment to do justice for the victims in this case.

16 Thank you.

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

18 Thank you very much and --

19 MR KAY: I apologise, Madam President, there is one matter. It is over the filings.

20 PRESIDING JUDGE OZAKI: Yes, Mr Kay?

21 MR KAY: Did you want the Defence to make a filing as well? It wasn't clear to me.
22 It may be something that the Court would appreciate on the basis that the facts are
23 something that we do have information about, unlike the Government of Kenya.

24 I don't know whether --

25 (The Trial Chamber confers)

1 PRESIDING JUDGE OZAKI: Mr Kay, because of the -- due to the nature of the
2 contest and due to the nature of co-operation, I don't think the Chamber needs the
3 filings from -- submissions from Defence or legal representative.

4 MR KAY: Very well, your Honour. Thank you. Sorry for raising it.

5 PRESIDING JUDGE OZAKI: No.

6 And this brings us to the end of the matters to be discussed today. The Chamber has
7 well noted the submissions made by not only Prosecution and Government of Kenya,
8 but also Defence and legal representative.

9 We thank very much the parties and participants and, of course, Mr Attorney-General
10 for your contribution. And, as usual, I would also thank the court officers,
11 interpreters, court reporters and all other courtroom staff for their assistance.

12 This status conference is now closed and the Court will rise. Thank you.

13 (The hearing ends in open session at 4.00 p.m.)