

1 International Criminal Court
2 Trial Chamber V - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai
5 Kenyatta - ICC-01/09-02/11
6 Presiding Judge Kuniko Ozaki, Judge Christine Van den Wyngaert and Judge Chile
7 Eboe-Osuji
8 Status Conference
9 Monday, 11 March 2013
10 (The hearing starts in open session at 12.02 p.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE OZAKI: Good afternoon and welcome to the parties and
15 participants.
16 First of all can counsel introduce themselves for the record, starting with Madam
17 Prosecutor?
18 MS BENSOUA: Thank you, Madam President.
19 The Office of the Prosecutor is today represented by: Mr James Stewart, the Deputy
20 Prosecutor; Mr Alex Whiting, the Prosecution's co-ordinator; Adesola Adeboyejo,
21 trial lawyer; Manoj Sachdeva, trial lawyer; Olivia Struyven, trial lawyer; and Sam
22 Lowery, trial lawyer. I'm Fatou Bensouda, Prosecutor.
23 PRESIDING JUDGE OZAKI: Thank you.
24 Defence team, please?
25 MR KHAN: May it please your Honours, Ambassador Muthaura, who sits to my

1 left, is represented by: Shyamala Alagendra of counsel; Mr Essa Faal and Mr
2 Kennedy Ogetto, also counsel in the case; Mr Anand Shah behind me, the case
3 manager; and at the back Inés Rubio, Shalini Jayaraj, who are case managers, and our
4 intern in the case, Ms Jaya Anil Kumar. Your Honours, my name is Karim Khan of
5 Queen's Counsel.

6 PRESIDING JUDGE OZAKI: Thank you very much.

7 MR KAY: Madam President, I'm Steven Kay of Queen's Counsel, representing
8 President Kenyatta. Gillian Higgins is my co-counsel, Mr Desterio Oyatsi is my
9 instructing solicitor and Ben Joyes is my case manager.

10 Thank you.

11 PRESIDING JUDGE OZAKI: Thank you.

12 Legal representative?

13 MR GAYNOR: Good morning, Madam President. Good morning, your Honours.
14 To my right is Caroline Walter. She's a member of the OPCV, and she will be
15 representing the victims during the proceedings in accordance with your Honours'
16 decision of 3 October of last year. Behind her is our case manager, Anushka Sehmi,
17 and I am Fergal Gaynor, the Common legal Representative for Victims.

18 Thank you.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 The Chamber convened this status conference to address the applications filed by the
21 Defence for Mr Kenyatta and the Defence for Mr Muthaura for the preliminary issue
22 of the validity of the confirmation decision be referred back to the Pre-Trial Chamber.
23 Those applications were filed on 5 and 7 February this year respectively, the
24 Prosecution filed its consolidated response to the application on 25 February this year
25 and the Defence, with leave of this Chamber, filed replies on 7 and 8 March.

1 In its order scheduling this status conference, the Chamber requested the parties to
2 file submissions on certain legal and factual issues arising from the applications.
3 Those submissions were filed on 8 March and have been considered by the Chamber.
4 This morning, the Chamber received an urgent request from the Office of the
5 Prosecution for the Prosecutor to take the floor at the beginning of this status
6 conference to make an announcement. The Chamber grants that request and
7 therefore, before proceeding any further with this conference, I will hand the floor to
8 Madam Prosecutor.

9 MS BENSOUDA: Thank you, Madam President.

10 Madam President, your Honours, today I have filed with the Trial Chamber a notice
11 withdrawing the case against Mr Muthaura.

12 Allow me, Madam President, to explain my decision. It has not been an easy
13 decision. As an Office, it is our obligation to pursue our prosecutions vigorously
14 and to do everything that we can to ensure that those most responsible for the crimes
15 within the Court's jurisdiction are brought to justice.

16 In the context of this case, we have sought to identify and prosecute those most
17 responsible for crimes committed during the post-election violence of 2007 and 2008
18 in Kenya.

19 Madam President, we proceeded against Mr Muthaura in good faith, believing that
20 there was a case against him. However, it is our duty to pursue cases only when we
21 believe that there is a reasonable prospect of conviction at trial.

22 If you come to this view, that the evidence does not meet this standard and there is no
23 prospect that with further investigations it will meet this standard, then it is our
24 responsibility as Prosecutors to take the decision to withdraw the case.

25 The decision to initiate an investigation or prosecution, or to terminate it, is one that I

1 alone must take as Prosecutor. The assessment of the cogency of the evidence in a
2 case is not always a simple or clear-cut process. It is a judgment call. It involves
3 the weighing and evaluation of all the evidence and how the evidence is likely to be
4 considered by the Judges.

5 As in this case, it is our practice in relation to any of our cases to assess the state of the
6 evidence at each stage of the proceedings. After considered deliberation and review
7 I have determined that, on the state of the evidence available to us now, we have no
8 choice but to withdraw the charges against Mr Muthaura.

9 As we have explained in our filing today, it is our view that the Prosecution has the
10 discretion to withdraw the charges upon notification of the reasons for doing so to the
11 Trial Chamber.

12 Although at prior stages of the proceedings, Madam President, we assessed the
13 evidence as sufficient, we no longer do so today. I no longer believe that there is
14 sufficient evidence to prove the charges against Mr Muthaura beyond a reasonable
15 doubt, and there are several reasons, Madam President, for this change.

16 Witnesses who may have been able to provide evidence concerning Mr Muthaura's
17 role in the events of 2007 and 2008 have either been killed, or have died since those
18 events, and other witnesses refuse to speak with the Prosecution.

19 In addition, Madam President, despite assurances of co-operation with the Court, the
20 Government of Kenya has provided only limited assistance to the Prosecution and
21 they have failed to provide the Prosecution with access to witnesses, or documents,
22 that may shed light on Mr Muthaura's case.

23 Further, and as the Chamber is aware, it came to light after the confirmation hearing
24 that a critical witness for the Prosecution against Mr Muthaura had recanted part of
25 his incriminating evidence after receiving bribes. In the circumstances, we felt we

1 could no longer present this witness as a reliable witness and dropped him from our
2 witness list.

3 Our investigations have continued until now to gather both inculpatory and
4 exculpatory evidence, but have failed to strengthen the case against Mr Muthaura.

5 In all of the circumstances, we do not feel that we have a reasonable prospect of
6 conviction and should therefore withdraw the charges against him.

7 Madam President, now that I have explained why I am withdrawing the charges
8 against Mr Muthaura, please allow me to make a few additional observations.

9 This decision affects Mr Muthaura's case alone. The decision is based only on the
10 facts and the law applicable to the case and not on any other consideration. We are
11 all keenly aware of the most recent political developments in Kenya, but these have
12 not, Madam President, and cannot have a bearing on the decisions that I make as
13 Prosecutor.

14 In addition, the Defence counsel has unfortunately made in his latest filing serious
15 allegations of misconduct and wrong-doings by members of the Prosecution;
16 allegations that I reject categorically. We are prepared, Madam President, to deal
17 with these allegations.

18 When I conclude my remarks in a few moments, members of the Prosecution's team
19 will address the particular issues of concern to the Chamber and these issues include
20 the allegations made by Mr Muthaura's Defence.

21 In conclusion, Madam President, your Honours, having withdrawn the case against
22 Mr Muthaura, my office will seek -- will continue with the other cases and will seek to
23 fulfil our duty to investigate and prosecute those most responsible for the crimes
24 committed in connection with the post-election violence in Kenya in 2007 and 2008.

25 Thank you, Madam President, your Honours.

1 PRESIDING JUDGE OZAKI: Thank you, Madam Prosecutor.

2 Do you mean that your team would like to continue to make submissions about some
3 other issues, or your announcement has been for the time being completed?

4 MS BENSOU DA: My announcement is complete, but I did raise some of the issues
5 including some of the allegations made which my -- other members of my team
6 would like to have the permission to address.

7 (Trial Chamber confers)

8 PRESIDING JUDGE OZAKI: The Chamber would rather like to listen to those
9 specific submissions in the afternoon session, if that's fine with you?

10 MS BENSOU DA: Very well.

11 PRESIDING JUDGE OZAKI: Thank you very much, Madam Prosecutor.

12 This is obviously a very important announcement which will have consequences not
13 just for the case against Mr Muthaura, but also in some way Mr Kenyatta.

14 You mentioned that the Prosecution intends to submit a written filing, or you have
15 already submitted?

16 MS BENSOU DA: Just at the commencement of these proceedings it was
17 simultaneously filed. It has just been notified, I am told.

18 PRESIDING JUDGE OZAKI: And does this filing include all those legal and factual
19 grounds for your announcement?

20 MS BENSOU DA: Indeed. Indeed, Madam President.

21 PRESIDING JUDGE OZAKI: I ask this because the Chamber would like to -- there
22 are a number of issues that the Chamber would like to hear from the Prosecution and,
23 in case those issues are not included in your submission which has already been filed
24 today, the Chamber would like the Prosecution to make additional written
25 submissions which address several issues.

1 Firstly, Madam Prosecutor, you mentioned about the discretion of the Prosecution to
2 withdraw charges. Well, the issue of the procedure for withdrawal of charges and
3 the appropriate Chamber to authorise that withdrawal, and if you say that the
4 Prosecution has discretion, we'd like to know the reasoning of this discretion.
5 Especially, Article 61(9) refers to the withdrawal of charges, with the permission of
6 the Chamber, after the commencement of trial. The Chamber would like to hear
7 from -- listen to your view about this provision; whether this provision applies to the
8 current stage.

9 Secondly, the issue whether any withdrawal would be with or without prejudice to
10 the Prosecution's right to re-initiate proceedings against Mr Muthaura. In this
11 connection, I refer to Articles 20 and 53(4).

12 Thirdly, the timing of this withdrawal. Based on the written submissions, the
13 Chamber understands that the Muthaura Defence first raised this issue with the
14 Prosecution in November last year. Why did the Prosecution wait until the formal
15 application was made to consider a withdrawal and why did the Prosecution
16 continue to assert as recently as the status conference in February this year that it was
17 ready to proceed to trial in April?

18 And, finally, the Chamber would like the Prosecution to address the impact of the
19 withdrawal on the charges against Mr Kenyatta, given that the accused are charged
20 as indirect co-perpetrators.

21 Madam Prosecutor already mentioned about this issue briefly, but the
22 Chamber would like to have more reasoning behind your submission.

23 And, Madam Prosecutor, are you in a position to submit this written filing say by
24 Friday, the 15th?

25 MS BENSOUA: Madam President, the first issue has actually been addressed in

1 the filing of today, but the other issues that have been raised we will certainly be able
2 to address by Friday.

3 PRESIDING JUDGE OZAKI: Thank you very much.

4 And obviously the Defence and the legal representatives will be given an opportunity
5 to respond in writing, and would next Wednesday, 20 March, be sufficient for those
6 responses to the Prosecution's announcement today and additional written
7 submissions from the Prosecution?

8 MR KHAN: Madam President, that will be fine. That will be fine.

9 MR KAY: Madam President, I think that's too short a time, because we had the
10 agreed facts issue which has been presented to us at a very late stage, with a vast
11 number of matters to deal with, and we don't know what's in this filing.
12 To ask us to commit to being able to turn it around in three days I think is too short a
13 period of time. I think next Friday would be -- give us a better chance. Otherwise,
14 we see work piling up that has to be attended to.
15 Thank you.

16 PRESIDING JUDGE OZAKI: Next Friday being the 22nd?

17 MR KAY: Yes.

18 MR KHAN: Madam President, perhaps I can assist and may I make a few remarks
19 that may be of assistance as well?

20 PRESIDING JUDGE OZAKI: Yes, please.

21 MR KHAN: At the outset, this is very welcome news for Ambassador Muthaura
22 and we would applaud this decision of the Prosecution. I think as far as
23 Ambassador Muthaura is concerned it's absolutely justified, and I do recognise that
24 this is not only a courageous, but a very correct decision of the Prosecutor to make.
25 That said, I do note that my learned friend, the Prosecutor, has predicated the

1 withdrawal on allegations in part of bribery and death of witnesses. Your Honours,
2 not only does Ambassador Muthaura have -- enjoy the presumption of innocence and
3 that's even more vindicated now the Prosecution has sought to withdraw the case,
4 but it's pertinent to note that no witness has died or been killed at all since the
5 confirmation hearing, since the original issuance of the summons, to the best of the
6 knowledge of the Defence.

7 Secondly, as we allude in our various applications that are before the Bench, we
8 absolutely and in unequivocal terms reject any suggestion that this Defence team or
9 Ambassador Muthaura have in any way, shape or form, to the smallest degree, been
10 involved in any plan to suborn the proper administration of justice.

11 It is pertinent to note once again that, when looking at Witness 4, a lot has been said
12 about him and the Prosecution have made allegations about bribery, what needs to be
13 underscored both in this courtroom and to the people of Kenya, the family and the
14 friends and acquaintances of Ambassador Muthaura, is that witness, even on the
15 Prosecution's own case, prior to any allegations of bribery regarding third parties,
16 again not relating to the team of Ambassador Muthaura at all, third parties, prior to
17 that had said in an affidavit to a certain country that he was not at the meeting. In
18 other words, he's dropped, he's not relied upon, because the Prosecution concede in
19 their filing to the Court that that man is and was a liar.

20 Your Honour, that has to be underscored because, if your Honours agree, we want
21 Ambassador Muthaura, who time and time again has co-operated with this
22 Court - he's come even when his attendance has not been required; indeed, he had a
23 part to play in the establishment of this Court in the ICC in the Prep Com Stage and
24 supported the Court - it's important that he can leave on a flight back home
25 unencumbered by the shadow of these proceedings, with an unsullied and unstained

1 name as he entered it. Your Honours, so I would ask that attention be paid for that.
2 I wanted to say that because it's important for the record.
3 The other matter regarding the timelines, there are perhaps at least two discrete
4 issues: The first issue is the withdrawal, and I concur with respect to the
5 Prosecution's analysis of the law that the Prosecutor can withdraw proceedings.
6 They are charged with the Statute with the principal decision-making power. The
7 Statute makes it very clear that only after the commencement of trial is leave required
8 of the Trial Chamber, and the trial of course has not started as yet. We're in the trial
9 stage.
10 Your Honour, any uncertainty in that respect must be resolved in light of the
11 principle of in dubio pro reo, the benefit of the doubt to the accused. In addition to
12 that, your Honours still until this matter is finally dismissed will be aware of the right
13 of Ambassador Muthaura to have this matter expeditiously decided and concluded.
14 So that's one matter that maybe can be dealt with quite summarily, if your Honours
15 are minded that the Prosecution and the Defence submission is correct and the
16 administration of justice militates in favour of that interpretation, that we don't
17 prolong the agony - that we do not prolong the agony - that Ambassador Muthaura
18 and his family have endured in this case.
19 There is a separate issue regarding the impact upon that withdrawal upon the case of
20 President-Elect Kenyatta. Your Honours, I would ask that the matters not be
21 muddled. Before we get to the second aspect, it's important to determine the first.
22 If we do not determine the first aspect, we run the jeopardy of giving the appearance
23 that the decision on the first is impacted by the consequences on the second.
24 My learned friend has noted there are other filings that need to be put in, but more
25 pertinently maybe the matter requires consideration. I would ask that not prejudice

1 the defence of Ambassador Muthaura. So what I'm asking the Bench to consider is
2 today to allow Ambassador Muthaura to get on a plane back to Kenya in the
3 knowledge that the case against him is withdrawn, to make a decision and to give my
4 learned friends for President-Elect Kenyatta proper time to respond to the
5 implications when it comes to their own case.

6 But the matters are not intertwined. There is a motion from the Prosecution
7 authority who investigated this matter, who brought this matter, and they have
8 decided, as I said courageously and very correctly, to say that this case should not
9 proceed. And, your Honours, it is my respectful submission that, in deciding what
10 is the right step forward, your Honours must not only look at the black letter law and
11 the spirit behind it, but look at the man that is before you and the consequences of
12 this case continuing a moment longer.

13 And I would ask your Honours and invite your Honours to adjourn and to consider
14 formally dismissing this case, in light of the Prosecution's response, so not as to
15 prolong the agony that Ambassador Muthaura has been suffering.

16 It is the most serious allegations that have been levelled against him. It's not
17 fair - it's not right - that there be any doubt about it. When the Prosecutor herself
18 very properly, very correctly and very courageously has said it should not continue,
19 I would invite you to dismiss this case without delay.

20 MR GAYNOR: Madam President, if I may just say a word or two?

21 JUDGE EBOE-OSUJI: One second, please.

22 Mr Khan, do I take it then you accept the Prosecutor's proposition that initiation and
23 withdrawal of a prosecution against anyone depends on the judgment call of the
24 Prosecutor?

25 By the way, Madam Prosecutor, I do not know if you've addressed that question in

1 your submission, but I'd be interested in the limits of that proposition when you get
2 to it.

3 Thank you.

4 MR KHAN: Your Honour, there is clearly a discretion and there's a division of
5 responsibilities in this Court in the whole architecture of the Rome Statute
6 mechanisms.

7 Your Honour, there's nothing in the rules that prohibit the Prosecutor withdrawing a
8 case at this stage at all. That is clear. The only requirement for leave that would
9 fetter that ability is that once trial commences, which has been defined in
10 numerous -- both here and elsewhere with opening speeches, only at that juncture is
11 leave of the Chamber needed.

12 Your Honour, in seeking to determine the ambit of that provision, it's important to
13 bear in mind why are we here. We are here because of the Article 15 exercise of
14 proprio motu powers by the former - by the former - Prosecutor, and after reviewing
15 the evidence and the Defence submissions and reviewing matters the Prosecution, as
16 I've said very correctly, very appropriately, have done the right thing.

17 And, your Honours, this is what inspired my submission that, in the exercise of your
18 own interpretation to the black letter law, one should not view this narrowly. One
19 must view it in favour of the accused.

20 When the prosecuting authority say they don't have a case that must be given an
21 awful lot of weight, and I do say, absent any provision preventing that requiring
22 leave, your Honours should say, "Yes, the matter should be withdrawn."

23 The Statute only requires leave once trial commences. It has not commenced and it's
24 as simple as that. And the interpretation I've put forward is supported, in my
25 respectful submission, by a purposive reading of the Statute, bearing in mind the

1 presumption of innocence and the rights of Mr -- of Ambassador Muthaura before
2 your Honours, and I would commend that interpretation to you and support the
3 Prosecution's submission in that regard.

4 PRESIDING JUDGE OZAKI: Yes, please.

5 MR GAYNOR: Madam President, a few brief words.

6 First of all, given that the Prosecution will be filing some written submissions on
7 Friday, could I ask that we are provided with perhaps a week to respond; that is one
8 week after the Prosecution has filed its submissions?

9 Secondly, we would submit that there is in fact an important point of law to be
10 addressed in relation to the operation of Article 61(9) of the Statute, which deals with
11 the withdrawal rather than the modification of the charges, and we believe that your
12 Honours should have the benefit of proper submissions before concluding the case
13 against Mr Muthaura. Of course he is free to get on a plane back to Kenya, but the
14 proper legal process in relation to him should be respected.

15 Thank you.

16 PRESIDING JUDGE OZAKI: When you say one week after the Prosecution filing, it
17 means the 22nd?

18 MR GAYNOR: A week after Friday, your Honour, whatever -- that is correct, your
19 Honour.

20 Thank you.

21 PRESIDING JUDGE OZAKI: Thank you.

22 (Trial Chamber confers)

23 PRESIDING JUDGE OZAKI: Having listened to the submissions of the parties and
24 participants the Chamber still believes that there are several important legal issues to
25 be solved, and especially the Chamber refers to the four points which we asked for

1 the Prosecution to come back.

2 Therefore, the Chamber would like to ask both Defence teams and the legal
3 representative to respond to the Prosecution's submission by Friday, 22 March. Is
4 that fine with you, Mr Kay?

5 MR KAY: Yes, your Honour.

6 PRESIDING JUDGE OZAKI: Thank you very much.

7 Now, do the Defence teams and the legal representative wish to make any
8 preliminary response to this very important announcement at this stage, or they
9 would like to wait for written -- for their written submissions?

10 MR KHAN: Madam Prosecutor -- your Honour, Madam President, we will of
11 course once we've seen the filing respond substantively to that in writing, but I would
12 ask the Bench again, mindful of course of the oral decision, that there are only two
13 options here: Either the interpretation we've put forward is correct, in which leave
14 is not required, or your Honours have the power to grant that the case is withdrawn.
15 Your Honours, perhaps it doesn't need too much thought, a written decision of
16 course can follow, a written decision as to how we get there can follow, but once the
17 Prosecutor has stated in such unequivocal terms that there's no reasonable prospect
18 of conviction in this case against Ambassador Muthaura, it is in my submission
19 incumbent upon the Bench to -- and consistent with the requirement of legal certainty,
20 and bearing in mind the rights of the accused, to rule on that type of matter
21 exceptionally quickly.

22 And so what I'm inviting the Bench to do is either the original submission was to
23 agree with the Prosecution that there's power to withdraw unilaterally, but, your
24 Honour, if for any reason you have hesitations about that you of course can grant
25 leave.

1 A written decision -- written reasons can follow, but I would ask that the Bench very
2 seriously consider the rights of Ambassador Muthaura here. It's not right really for
3 this stain to remain over his name a moment longer. It really is not fair from a
4 human point of view, a humanitarian point of view or even a legal point of view, and
5 your Honours have it in your power today to agree with the Prosecution that the case
6 be withdrawn, or for your Honours to dismiss the case by way of judicial edict from
7 the Bench. The result for Mr Muthaura is the same.

8 Your Honours, as I said, there's an individual here, not an automaton, and it would
9 mean of course an awful lot for him and his family, after complying with all orders of
10 the Court, respecting the administration of this Court, bowing to justice, to have this
11 case formally dismissed today. It's in your Honours' power and I would ask that
12 your Honours grant that relief today.

13 Really, this is not a matter that requires a great deal of thought. I think, even if we
14 adjourn for an hour, submissions can be made. The Bench will have an opportunity
15 of reading the written submissions of the Prosecution. We have -- we've been listed
16 for two days.

17 JUDGE EBOE-OSUJI: Mr Khan, may I?

18 MR KHAN: Of course, your Honour. Of course.

19 JUDGE EBOE-OSUJI: Of course, we understand your interest in that position. You
20 know this is the first time this sort of thing is happening in this Court. It is
21 important to get it right. There are questions of precedent to consider for the future,
22 so it needs to be thought through carefully.

23 We understand your submission. We've heard you. I thought I should tell you
24 that. Thanks.

25 MR KHAN: Your Honour, I'm really most grateful for that. What I was proposing,

1 putting it another way, is your Honours simply dismiss the case today without
2 saying more, and whether it's by way of a right of the Prosecution without leave, or
3 whether leave is required, can be decided following written filings.

4 How we get there can be the product of your Honours' written decision after hearing
5 arguments, but in my respectful submission it's very clear what the destination is.
6 The destination is that the case must be dismissed. When the Prosecutor herself,
7 who knows the facts, says that, I don't think any reasonable Trial Chamber will do
8 otherwise.

9 So what I'm asking, your Honours, it is of course a novel issue, it is of course an issue
10 that has not been decided before and of course there may be consequences regarding
11 precedent, but what I am beseeching the Court is, bearing in mind these competing
12 interests and the rights, your Honours simply today, without saying more, dismiss
13 the case against Ambassador Muthaura and give your ruling as to whether that's
14 based upon the Prosecutor's proprio motu powers, or whether it's the basis of your
15 Honours giving leave to withdraw, that can be decided at a later stage.

16 And, your Honours, I do with the greatest of respect -- with the greatest of respect I
17 would ask that you adjourn to consider that matter amongst yourselves because,
18 besides the very critical role that the Bench is doing in creating the law, what cannot
19 be lost - what cannot be lost - is the people, the humans, the families that are
20 impacted by this case.

21 And, your Honours, I would ask, given the Prosecutor's very correct and courageous
22 submissions, that the Bench today dismiss the case with written reasons to follow.
23 That will allow Ambassador Muthaura, who is 66 years of age, to go back home and
24 actually breathe and breathe a sigh of relief that this awful chapter in his life is closed
25 and he can get on with his life and enjoy his retirement.

1 Your Honours, I do ask from a human point of view, as well as a legal point of view,
2 that you give the most anxious scrutiny to this submission and don't readily dismiss
3 it.

4 Your Honours, perhaps if the Bench needs to -- some time to consult on this issue,
5 I would say that is time very well spent in these circumstances. I would be most
6 grateful, your Honours.

7 (Trial Chamber confers)

8 PRESIDING JUDGE OZAKI: Legal representative?

9 MR GAYNOR: Thank you, Madam President.

10 Madam President, on behalf of the victims of this case, I would like to point out that
11 the chapter against Mr Muthaura is not necessarily closed.

12 The Prosecutor in her submissions has referred to non-cooperation by the
13 Government of Kenya and has referred to the almost unprecedented level of
14 interference with witnesses in this case. This does throw open the question of what
15 would have happened if the Government of Kenya had provided proper co-operation
16 to the Prosecution and the possibility that the Prosecutor can bring charges against
17 Mr Muthaura in the future.

18 For those reasons, I would request the Trial Chamber to stick to the schedule that you
19 have in mind, to listen -- to read the written submissions made by all the parties and
20 order that the possibility of reopening charges against Mr Muthaura remains a
21 possibility that can be addressed in the future, if that should become necessary.

22 Thank you.

23 MR KHAN: Madam President, I will be brief and your Honours have been quite
24 indulgent perhaps with any -- whatever submissions have been made by the victims'
25 lawyer have been made, but of course many allegations have been confidential, many

1 filings of the Defence in response have been confidential and my friend sitting
2 opposite has not been privy to any of them. So one cannot gainsay the principal
3 individual mandated by the Assembly of States Parties to prosecute these cases when
4 she says there's no realistic prospect of conviction.

5 Your Honours have the full record before you. Your Honours can give
6 consequential rulings in any written decision. Any consequential rulings can be
7 given in a written decision, but I would ask that the Bench either summarily, if the
8 Bench needs -- would find it of benefit to consult for a few moments, to simply
9 dismiss this case now without delay and to give a written decision to follow upon
10 various submissions. The victims' lawyer can make any submissions that are
11 properly within the remit of the victims' lawyer. The Prosecutor - the learned
12 Prosecutor - can make any submissions that she thinks is appropriate and we can
13 respond as well but, your Honours, a point must come when the law triumphs and
14 we are no longer in a kind of choreographed dance.

15 When we get to a point when the Prosecutor has stood up and said, "There's no
16 realistic prospect of conviction. This case should be withdrawn," every legal rule I'm
17 aware of from the presumption of innocence onwards militates in favour of that
18 prompt action being taken. It's not a joke - Madam President, your Honours, know
19 it better than me - to allow this case to proceed longer, and no prejudice can be done
20 to any party because every party can make submissions.

21 JUDGE EBOE-OSUJI: Mr Khan.

22 PRESIDING JUDGE OZAKI: Mr Khan.

23 JUDGE EBOE-OSUJI: Mr Khan, the more you argue, the more we are here. You
24 want us to go and think about this thing, but you are delaying us. Why don't you
25 just cut it short so that the Presiding Judge can make a decision and we move on.

1 MR KHAN: I'm grateful. I will do that.

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

3 Before saying anything, I just wonder if Defence for Mr Kenyatta have anything to
4 say?

5 MR KAY: I'm grateful, your Honour. This development this morning is presented
6 to you in a way of responsible prosecution. It is anything but responsible
7 prosecution that has gone on in this case. Let's face the fact, this Confirmation of
8 Charges hearing was determined upon false evidence, evidence that was concealed
9 from the Defence, and the facts underlying the charges have been put utterly and
10 fully in doubt.

11 Let us consider the matter now. The Kenyatta case has been put into this Court on a
12 series of allegations and charges that at the time we said were fundamentally flawed.
13 We were in this courtroom for three weeks telling the Pre-Trial Chamber about that
14 matter. We were ignored. We were overridden.

15 The Prosecution have now conceded, in relation to one accused, the withdrawal of
16 charges. They know the impact of their decision if it was also applied to
17 Mr Kenyatta, and for that reason you are dealing with a Prosecutor that has tried
18 consistently and in the teeth of the evidence to try and put a case before you based
19 upon bad evidence, and the practices that have gone on in relation to the
20 Confirmation of Charges hearing have been utterly shameful and the conduct
21 thereafter.

22 This matter that has been brought to the attention of the Court now was something
23 that was submitted upon by the Muthaura Defence over 15 months ago, something
24 that we submitted upon.

25 Every opportunity we took to appeal that Confirmation of Charges decision the

1 Single Judge herself rejected, all of them. There was no listening to us.
2 This Court has been warned about this evidence. This Court has paid far too much
3 attention to the Prosecution's submissions and excuses. It has not listened to the
4 Defence. There's a considerable amount of experience over this side of the
5 courtroom that's challenging this evidence not because it's fanciful, because we do
6 know what is good evidence and bad evidence and it has been rejected consistently.
7 Now, our submission is that this case, in light of what the Prosecution has said this
8 morning, they should consider their position honestly in relation to Mr Kenyatta.
9 They haven't been doing that. The evidence that they are seeking to rely upon is
10 utterly flawed, all the witnesses they are relying upon are utterly flawed and none of
11 them speak to the same issues.
12 Now, the problem with this case is it has been brought into the International Criminal
13 Court and it is driving this Court up a blind alley and it's time for professional
14 decision-making to take place.
15 Now, the Court will be considering the issue in relation to the withdrawal against
16 Mr Muthaura, but it's quite clear that the Prosecution know exactly the fate of their
17 case. It's attempted to be dressed up in front of you in relation to other issues, but
18 they are a mere smokescreen and, in our submission, the submissions that we have
19 been making in this case about the need for a fresh Confirmation of Charges hearing
20 in relation to this evidence, as per our submission to you, is an entirely valid
21 submission because the Court was told at the time it was a disaster and it was wrong.
22 The judgments of the Pre-Trial Chamber are utterly called into question in rejecting
23 Defence evidence and relying upon this witness. It really is time for the Court to
24 take stock of this, and the Prosecution. This synchronisation of cases, and two from
25 one side and two from the other, has simply gone too far.

1 This case should be judged on its merits for what it is and, in my submission, our
2 submissions to this Court about the quality of this evidence and what has gone on
3 here is absolutely correct and proper.

4 Those are my submissions.

5 PRESIDING JUDGE OZAKI: Thank you very much.

6 Now we rise and we will come back at 2.30 and continue this discussion. Thank you
7 very much.

8 (Recess taken at 12.53 p.m.)

9 (Upon resuming in open session at 2.50 p.m.)

10 THE COURT USHER: All rise.

11 Please be seated.

12 PRESIDING JUDGE OZAKI: Good afternoon, parties and participants, again.

13 The Chamber is considering vacating the schedule for submissions issued earlier
14 today, for legal and factual issues, but prior to doing so, the Chamber would like to
15 request the legal representative of victims, whether he has anything additional to
16 submit on the Prosecutor's announcement as to the withdrawal of the charges.

17 MR GAYNOR: Well, Madam President, if I can very briefly summarise what our
18 position is, and that is we've read the Prosecution's filing of today in which they set
19 forth two interpretations, one taken by the Katanga Chamber and one taken by the
20 Lubanga Chamber, as to the meaning of the words "after commencement of the trial"
21 in Article 61(9).

22 Now, the Lubanga interpretation sounds right instinctively, but it is worth noting
23 that the Katanga interpretation is supported by the use of the word "trial" in Article
24 64(2) of the Statute in which the Trial Chamber is required to ensure that the trial is
25 fair and expeditious.

1 Obviously the drafters of that subsection had in mind the entirety of the process, such
2 as today's status conference, and not merely the trial proper.

3 I'd also like to note that Rule 51 of the Rules of Procedure and Evidence of the
4 International Criminal Tribunal for the former Yugoslavia would leave a decision of
5 this nature within the province of your Honours' competence. It would require your
6 Honours to approve the withdrawal of the charges. The appropriate subsection is
7 Rule 51(a)(3).

8 In summary, it appears to us at this stage that the withdrawal of charges by the
9 Prosecutor against Mr Muthaura does in fact require approval by this Chamber.

10 I would be happy to further -- make further submissions in writing.

11 PRESIDING JUDGE OZAKI: As I said, the Chamber is considering vacating the
12 written submissions, so if you want to say something, please do it now.

13 MR GAYNOR: In that case, Madam President, I have no further submissions.

14 PRESIDING JUDGE OZAKI: Thank you very much.

15 Do you have anything to respond to the current submission by the legal
16 representative, Mr Khan?

17 MR KHAN: Madam President, I note your last comment. We will brief, in that
18 case, if submissions are required. We will address the issue, but certainly in the
19 United Nations Transitional Authority for East Timor, and the special panels for
20 serious crimes there, they were operating the same rules as are applicable in this
21 Court, and in two cases in fact the Prosecutor was my learned friend, Ms Shyamala
22 Alagendra: The Prosecutor of the United Nations Transitional Authority of East
23 Timor and Antonio Lemos, and also The Public Prosecutor of the United Nations
24 Transitional Authority of East Timor and Domingos Amati.

25 In both cases, my learned friend, Ms Alagendra, withdrew the charges at a similar

1 time and leave was not required and those judges, international and domestic,
2 accepted that practice as quite proper, and as I said and underscore they were
3 applying the identical rules as are applicable today in this Court.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 Having listened to the submissions by the legal representative of victims and the
6 Muthaura Defence response, the Chamber would like to rise for deliberations for
7 15 minutes.

8 (Recess taken at 2.56 p.m.)

9 (Upon resuming in open session at 3.10 p.m.)

10 THE COURT USHER: All rise.

11 Please be seated.

12 PRESIDING JUDGE OZAKI: Welcome back, parties and participants, to this status
13 conference. The Chamber would like to make an oral announcement.

14 In light of the Prosecutor's announcement today, it is clear that the case cannot
15 proceed. However, the legal question as whether the charges are withdrawn at the
16 discretion of the Prosecutor or whether any withdrawal requires permission of the
17 Trial Chamber is a matter which will be considered in a decision to follow.

18 Submissions on the interpretation to be given to Article 61(9) have been received
19 orally and in writing today. The Chamber is of the view that submissions on the
20 second issue relating to the effect of a withdrawal on any future case which relate to
21 Article 20 and 53(4) of the Statute, and issue three which relate to timing of the
22 withdrawal, are no longer required given that these issues pertain to the Muthaura
23 Defence alone and his counsel's position is that an immediate decision should be
24 rendered.

25 Oh, I'm sorry. I have to re-read the first sentence of the oral announcement.

1 In light of the Prosecutor announcement today, it is clear that the case against

2 Mr Muthaura cannot proceed.

3 The Muthaura Defence remains a party in the proceedings until the time the Chamber

4 issues its written decision. The schedule for submissions issued this morning is

5 therefore vacated concerning issues one, two and three. As to the fourth issue, the

6 schedule is amended as follows: Submissions from the Prosecution to be filed by

7 Wednesday, 13 March 2013.

8 As for the status conference scheduled for today on Defence Article 64(4) request, this

9 status conference will be postponed until 18 March; and during this status conference,

10 Kenyatta Defence and the legal representative will respond orally to the submission

11 by the Prosecution on issue number 4 as well.

12 This is the announcement of the Chamber.

13 Is there any submission from parties and participants? Mr Khan?

14 MR KHAN: Madam President, I note the opening line that it is clear that the case

15 against Ambassador Muthaura cannot proceed in light of the Prosecutor's

16 announcement this morning. For the sake of clarity, can we confirm, your Honours,

17 that the case is dismissed with written reasons as to why it's dismissed to follow in

18 due course? Is that a correct understanding of the Bench's decision?

19 PRESIDING JUDGE OZAKI: Mr Khan, I can only repeat what I said. The case

20 against Mr Muthaura cannot proceed. That is the announcement of the Chamber.

21 MR KHAN: Madam President, please indulge me. Can we go to the next step, in

22 that case? Is it correct that submissions regarding -- your Honour, could you give

23 me one moment, please? Do you mind?

24 PRESIDING JUDGE OZAKI: Please.

25 MR KHAN: Madam President, I just wanted to clarify regarding the submissions

1 that are required from the Defence for the Kenyatta team and also the legal
2 representative of the victims on 18 March. Can I take it that a decision on the
3 withdrawal will be made prior to the filing of any submissions?

4 The caution I raise is that it is exceptionally important, in our submission, to have the
5 issue of the withdrawal determined prior to the next step about what consequences
6 that withdrawal may or may not have in relation to another suspect, and in reference
7 to that caution I pray in aid Rule 136 of the Rules of Procedure and Evidence.

8 That of course, as the Bench are aware, entitles Ambassador Muthaura to all the
9 rights in a joint trial that he would have if he were tried alone, and it would be
10 unfortunate and indeed pregnant with danger if a decision on that fundamental
11 question was in any way, shape or form tied into a completely separate matter;
12 namely whether or not that decision to withdraw has any effect on the case of a
13 co-accused.

14 And so, your Honours, I would ask -- I'm not asking for severance at this stage.
15 What I'm asking for is at the very least we -- in the timetable that the Bench puts
16 forward, the issue of withdrawal is finally determined before any party files any
17 submissions on what is then a sub judice matter.

18 Your Honour, that of course would be a different state of play if your Honours were
19 to extemporaneously today say the case was dismissed with reasons to follow. So if
20 that were -- if that is what the Bench was minded to do of course parties could put in
21 submissions, but absent that ruling I think it would be prejudicial to tie in a separate
22 matter when the first has not been determined on the facts of this case; on the
23 particular facts of this case.

24 Your Honours, I don't know if I've been understood, but I've tried the best I can.

25 MR GAYNOR: Madam President, on behalf of the victims in this case, who have an

1 enormous interest in seeing those responsible for the crimes committed to be held
2 accountable, I respectfully request the Chamber that, if you are to make an order
3 along the terms requested by Mr Khan, that you expressly recognise that any
4 dismissal of the charges against Mr Muthaura is without prejudice to the right of the
5 Prosecutor to bring charges in the future if for example co-operation from the
6 Government of Kenya improves, or in a different environment, and I'm saying that on
7 behalf of the victims in this case.

8 Thank you, Madam President.

9 PRESIDING JUDGE OZAKI: Judge Ebo-Osuji.

10 JUDGE EBOE-OSUJI: Mr Khan, I'm tempted to say that you were pleading for a
11 decision to be made today, but that's not what I will say. I'm not sure what you're
12 alluding to. I do not want to pretend that I follow your argument relating to
13 Rule 136(1).

14 MR KHAN: Your Honour, forgive me in that case. I was alluding I thought to
15 136(2), that the rights of Ambassador Muthaura are of course -- must be considered
16 independently as to the -- and completely separately from what may or may not be
17 the implications of a decision on a co-accused.

18 The Bench of course is mandated to look four-square at the application of the
19 Prosecution, the unequivocal submissions of the Prosecution that there's no realistic
20 prospect of conviction, and decide whether or not to dismiss this case based upon the
21 proprio motu submission of the Prosecution, or in the event leave is required with
22 leave of the Court.

23 I didn't want the appearance to remain that somehow any implications of that
24 decision to withdraw would have an effect -- any implications it may have on the case
25 of Mr Kenyatta should impact or have any connection at all to the determination to

1 withdraw it against Ambassador Muthaura.

2 So to guard against that danger, I thought it's better to quarantine, as it were, the two
3 issues that fall for determination: The first whether or not this case is withdrawn
4 and dismissed. Only in the event that that case is determined one way or the other,
5 in my respectful submission, should the Bench go to the second stage, which is what
6 if any effects that withdrawal will have on the case of the co-accused, but to mix them
7 up together is fraught with danger.

8 That was what I was attempting to underline, because it would give the unfortunate
9 impression that a ruling is implicated by what may or may not be the consequences to
10 a co-accused and I think that would be unfortunate and it can be readily prevented by
11 ruling on one issue and then the second.

12 JUDGE EBOE-OSUJI: So to clarify, what you're saying is that you wouldn't want a
13 situation where any decision to continue or not with the Kenyatta case impacts
14 whether or not your client's case is in fact withdrawn or dismissed, as the case may
15 be?

16 MR KHAN: That's quite right. The consequences, whether there are any or
17 whether there are none, is simply irrelevant to whether or not this case is properly
18 dismissed today. And, your Honours, what I was endeavouring to say is that those
19 are the rights that are clearly articulated in 136 subparagraph (2), coupled with your
20 Honours' of course duty to expeditiously deal with a matter like this and remove it
21 from the shoulders of Ambassador Muthaura as soon as practicable.

22 That was the tenor of my submissions, your Honour.

23 (Trial Chamber confers)

24 PRESIDING JUDGE OZAKI: Mr Khan, the Chamber is quite aware that there are
25 two separate issues, and in any case the Chamber will make its position, including

- 1 legal reasoning, quite clear in our coming written decision.
- 2 MR KHAN: I'm most grateful.
- 3 PRESIDING JUDGE OZAKI: Thank you very much.
- 4 Are there any other submissions? If not, thank you very much for attending this
- 5 status conference.
- 6 The hearing is adjourned.
- 7 THE COURT USHER: All rise.
- 8 (The hearing ends in open session at 3.26 p.m.)