

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 - ICC-01/09-02/11
5 Presiding Judge Kuniko Ozaki, Judge Robert Fremr and Judge Geoffrey Henderson
6 Status Conference
7 Wednesday, 8 October 2014
8 (The hearing starts in open session at 10.02 a.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE OZAKI: Good morning.
13 Could the court officer please call the case.
14 THE COURT OFFICER: Thank you, Madam President.
15 The situation in the Republic of Kenya, in the case of The Prosecutor versus Uhuru
16 Muigai Kenyatta, ICC-01/09-02/11. We are in open session.
17 PRESIDING JUDGE OZAKI: Thank you very much.
18 And as usual, can counsel please introduce yourselves for the record, starting with
19 Prosecution.
20 MS BENSOUA: Madam President, your Honours, the Office of the Prosecutor is
21 represented this morning by Mr James Stewart, Deputy Prosecutor; Mr Benjamin Gumpert,
22 senior trial lawyer; Adesola Adeboyejo, trial lawyer; Mr Sam Lowery, trial lawyer; Shamiso
23 Mbizvo, international cooperation advisor; Hai Do Duc, legal assistant; and I am Fatou
24 Bensouda, Prosecutor.
25 Madam President, your Honours, I am here today because, as the Chamber has observed, the

1 case is at a critical juncture and I thought that it would be right to be present in person. I
2 have complete confidence in senior trial lawyer Mr Benjamin Gumpert, who has been leading
3 the trial team in this Prosecution, and I am sure that your Honours will understand when I
4 defer to him in speaking for the Prosecution on matters of detail which may assist the
5 Chamber. I thank you.

6 PRESIDING JUDGE OZAKI: Thank you.

7 Defence.

8 MR KAY: Thank you, Madam President. I'm Steven Kay of Queen's Counsel with my
9 co-counsel, Gillian Higgins. In court with me today is my instructing solicitor, Mr Desterio
10 Oyatsi; Mr Ken Ogeto; and then I have the team Kirsty Sutherland, Katy Hovington, Ben
11 Joyes and Tom Obhof, who are all part of the Defence team; and I'm with Uhuru Kenyatta in
12 court today.

13 PRESIDING JUDGE OZAKI: Thank you very much.

14 Legal representative of victims.

15 MR GAYNOR: Good morning, Madam President. Fergal Gaynor, Caroline Walter of the
16 OPCV and Anushka Sehmi for the victims. Thank you.

17 PRESIDING JUDGE OZAKI: Thank you. And again, as usual, in order to assist translation
18 and transcription, I'd like to remind everyone to speak slowly and to pause for several
19 seconds in between speakers.

20 Today we will be sitting in the morning until 12 o'clock, and the courtroom has also
21 been reserved in the afternoon between 2 o'clock and 4 o'clock if necessary.

22 In terms of structure of status conference today, the Chamber has a number of specific
23 questions for each of the parties and the participants which we will address first, during the
24 first part of the status conference.

25 After that there will be a second part, an opportunity for each of the parties and

1 participants to make additional submissions you wish to make. In order to give you
2 an indication of timing for those submissions, additional submissions, the Prosecution
3 and legal representative will each be allocated no more than 15 minutes.
4 The Defence will be allocated 25 minutes to encompass sufficient time should Mr Kenyatta
5 wish to address the Chamber directly. Any such submissions by the accused should be done
6 within this allocated time frame for general Defence submissions. If Mr Kenyatta does not
7 wish to speak, and he's under no obligation to do so, the Defence time shall be modified
8 accordingly to 15 minutes, which is the same as the Prosecution and legal representative.
9 Like yesterday, I again remind all counsel to be concise and focused in your
10 submissions, to be courteous at all times and to wait until given the floor before
11 speaking.

12 And, Mr Kenyatta, we note your presence in the courtroom today and we welcome
13 you. This hearing has been convened to address matters of fundamental importance
14 which impact directly on your right as an accused, as well as the interests of victims
15 and witnesses in this case.

16 As you are aware, the Chamber is seized of a request from the Prosecution for the indefinite
17 adjournment of these proceedings and from the Defence on your behalf for termination. A
18 decision granting either request would have profound implications, and it is in that light that
19 the Chamber has required your attendance at this hearing.

20 The issues to be discussed today may include submissions regarding the potential relevance
21 of your dual status, that is the fact that you are both an accused person before this Court and a
22 head of state of a State Party from whom cooperation -- certain cooperation has been
23 requested by the Court. However, you are present here today solely in your capacity as an
24 accused individual.

25 The Chamber may choose to direct questions to you or to counsel on your behalf. You are

1 under no obligation to answer the questions directly. You may defer entirely to your counsel
2 to respond to any question. But if you choose to speak, you are not under oath. This is a
3 status conference and the submissions will be considered in that light.

4 Moreover, you may speak only in your capacity as an accused and may not make
5 statement either of a political nature or in your official capacity.

6 Have I been clear enough? Do you understand, Mr Kenyatta? Can you say yes or no?

7 MR KAY: Madam President, this was all discussed last night between myself and my client,
8 and I would answer questions on his behalf in court today. We were aware the Court may
9 take an approach and offer the right of response to him, but having considered matters and in
10 view of the nature of the proceedings, I will be answering questions on his behalf and he does
11 not choose to make a statement today.

12 PRESIDING JUDGE OZAKI: Thank you very much.

13 As I said, this status conference was ordered on 19 September 2014. The purpose of
14 the hearing is to address matters arising from the Prosecution's request for a further
15 adjournment of the proceedings and the Defence request for -- Defence related
16 request for termination.

17 As I indicated, we will start with a number of specific questions from the Bench.

18 First, Prosecution, in your notice of 5 September 2014, which is filing 944, you provided two
19 main reasons why you do not consider it appropriate to withdraw the charges. One is the
20 alleged failure of the Kenyan government to comply with the cooperation request and the
21 other is the position of the accused as the head of that government. We note also that you
22 indicated in the hearing yesterday that you consider the cooperation with the Kenyan
23 government to have reached a deadlock.

24 Now, can you please explain what relationship you see, if any, between your request under
25 Article 87(7) of the Statute and the request for an indefinite adjournment?

1 MR GUMPERT: It is an indirect relationship. The request for the adjournment is the
2 substantive decision which we ask the Chamber to make. We submit that it is justified by
3 the two reasons to which your Honour has referred. We submit that it would be wholly
4 inappropriate for a case to be withdrawn where there has been obstruction of the proper
5 enquiries which the justice of the case required to be make -- to be made.
6 That is the substantive step that we ask the Chamber to take irrespective of any other
7 finding that it may make.
8 The second finding, the finding under Article 87(7), the finding of noncompliance, is a
9 finding which is indirectly related. We submit that if it is right that there has been a
10 failure on the part of the Government of Kenya to comply with its duties under the
11 treaty, and if it is right that this Court is satisfied that there is no explanation, no
12 proper excuse for that failure, it is a necessary step for this Court to take to sanction
13 that failure. It is, if I may put it this way, akin to sanctions which a court may
14 impose where there has been an interference with the court -- course of justice or a
15 contempt of court.
16 Such a finding that there has, for example, been a contempt of course -- of court is
17 linked to the proceedings because it arises out of those proceedings, but it is an
18 indirect link. It is not a step in those proceedings in itself. It is a necessary and
19 proper disciplinary measure, if I can call it that, which the Court takes in order to
20 mark the fact that one of the parties to litigation or in this case a concerned body,
21 concerned in the litigation, has failed in its duty to the Court and that the Court takes
22 what steps it can to sanction that failure.
23 That is the relationship which the Prosecution submits exists between the two orders which
24 we ask the Court to make.
25 PRESIDING JUDGE OZAKI: Thank you very much. In that case, Prosecution, am I correct

1 that the Prosecution does not consider fixed period of adjournment as an option? For
2 example, if referral under Article 87(7) were to be made, adjournment -- there is an option that
3 adjournment might be granted pending the Assembly of States Parties exhausting all
4 measures. Am I right that you are not -- for the Prosecution this course of action is not an
5 option?

6 MR GUMPERT: One could imagine a number of dates. Let's recall where we started with
7 this procedure. Your Honours effectively accorded the Kenyan government six whole
8 months to comply with a request which in the end the Court found was an appropriate one.
9 That didn't work.

10 We could now imagine a further six months, but it would be I respectfully submit a
11 pointless repetition of what the Chamber had done before, or one could imagine a
12 date such as the date of the next elections in the Republic of Kenya. That too might
13 be a feasible date.

14 I confess that I hadn't thought of the possibility of fixing a date by reference to
15 whatever determination the Assembly of States Parties might come to, but in the end,
16 your Honours, the only realistic date is the date when the Government of Kenya does
17 what it is bound to do under the Rome Statute.

18 We don't know what that date will be, it is mere speculation, and therefore I submit
19 the best course is to adjourn the case effectively sine die, that is to say without fixing a
20 date, but making it plain at the same time that the event which will trigger the end of
21 that adjournment is compliance by the Government of Kenya.

22 PRESIDING JUDGE OZAKI: In that case, Prosecution, I also note that at the status
23 conference yesterday you yourself indicated that the prospect of obtaining sufficient evidence,
24 even if the Kenyan government cooperate fully, be -- remains speculative.

25 Could you identify any specific legal basis or jurisprudence to support your request

1 for an indefinite adjournment? Could you please comment more specifically on
2 what you consider the legal basis for such an adjournment?

3 MR GUMPERT: Your Honour, I'm not going to be able to provide either case law or specific
4 powers within the Statute which in black and white terms give the Chamber the power to
5 make an indefinite adjournment.

6 The Court undoubtedly has the power to regulate its own proceedings and to do so
7 taking into account the interests of justice and fairness to the parties. I hope that that
8 is an uncontroversial statement which I make there and doesn't require specific
9 reference to the Rome Statute, or the Rules. It would be bizarre if the law were
10 anything other than that.

11 In exceptional cases, that will require the Court to take exceptional measures.

12 Domestic jurisdictions will permit exceptional steps to be taken when the justice of
13 the case requires them, and I would respectfully submit that this Court - this
14 Chamber - must apply exactly the same criteria.

15 The grant of an adjournment is uncontroversially something which is within the
16 Chamber's power. There is no law that requires the grant of an adjournment to
17 nominate a specific date on which that adjournment will come to an end. Indeed, it
18 might be observed that a strict interpretation of the Chamber's current position is that
19 the case is adjourned and no date is fixed for the trial or the termination. We have in
20 existence, as we speak at this moment, an adjournment without a day being fixed;
21 that is to say sine die.

22 So the short answer is, no, I don't present the Court with any case law or any statute
23 which specifically says the Court may adjourn a case indefinitely, but I submit that it
24 is plain to everyone that that course of action may be appropriate where exceptional
25 circumstances demand and I submit that these circumstances are well and truly

1 exceptional.

2 PRESIDING JUDGE OZAKI: Thank you, Prosecution.

3 I just want to add that in our last decision to adjourn or vacate the trial date, it was in
4 the same -- in the same decision we decided to convene this status conference to
5 further discuss. So I don't see the situation as the same as indefinite adjournment,
6 but anyway --

7 MR GUMPERT: I shan't argue with the Court. If that's your Honour's judgment on the
8 matter, then so be it.

9 PRESIDING JUDGE OZAKI: Thank you.

10 Regarding the relevance of the position, still with Prosecution, regarding the
11 relevance of the position of the accused as head of state or head of government, first
12 do we understand correctly that the Prosecution is not alleging at this time that the
13 accused has deliberately interfered with the collection of evidence?

14 MR GUMPERT: There is no evidence of any action, or inaction, that he has taken or
15 refrained from in the course of the period between our request for cooperation and today.
16 And so the answer to your Honour's question is, yes, we make no allegation. We have no
17 evidence on which we could properly do so.

18 PRESIDING JUDGE OZAKI: So your argument is that the accused should, by reason of his
19 official status, be precluded from raising the issue of undue delay in the context of requested
20 adjournment; is that correct?

21 MR GUMPERT: The argument the Prosecution would make against any argument of undue
22 delay would be based upon the fact that we asked for the things which the Court has ruled
23 we're entitled to two-and-a-half years ago. That is, I submit, the compelling argument
24 against any suggestion that there has been undue delay on the part of the Prosecution.
25 It might, I suppose, be added as a supplementary argument that since 2013 the

1 accused has had a specific duty under the Kenyan constitution - if I recall it's Article
2 132(5) - to ensure that the Republic of Kenya complies with its international
3 obligations, and it would lie ill in his mouth in those circumstances to say, "I am
4 unfairly affected by a state of affairs for which ...", although he may bear no personal
5 responsibility, he is constitutionally responsible.

6 So I wouldn't put that argument as the first argument countering any suggestions of
7 undue delay, but I would place it as a supplementary argument which undoubtedly
8 should influence any finding that your Honours might make on that subject.

9 PRESIDING JUDGE OZAKI: Thank you very much.

10 With all what you explained so far, but still, Prosecution, do you really consider that
11 an indefinite adjournment, consistent with the accused's rights and as well as
12 integrity of the proceedings and the interests of justice, under the circumstances
13 where the underpinning evidence has fallen below the standard required for trial?

14 MR GUMPERT: Yes. Yes, the Prosecution has come to that conclusion. Principal amongst
15 the arguments which the Prosecution advances are the interests of justice, one of the trio
16 which you mentioned a moment ago, Madam President.

17 Where an accused comes before any tribunal - in this case the International Criminal
18 Court - accused of very serious crimes, and where the investigation of those crimes,
19 what I have called in previous pleadings the basic building blocks of establishing a
20 case where the accused is alleged to have financial and organisational involvement,
21 have been impeded by a third party, there is obviously a very great interest in
22 sending the message -- well, let me not start there. In the Court making it plain to all
23 parties that such interference, such obstruction, will not bring proceedings to an end,
24 that the Court will be resolute in pursuing the case which has been brought before it
25 despite any obstruction in investigations.

1 That would be the case even if there were not the extra dimension to which you,
2 Madam President, have already referred, that is to say the dual status of this
3 particular accused person, because the party - the body - that we say has been failing
4 to cooperate in the way that it is required to is the Government of Kenya.
5 Mr Kenyatta has been part of that government for many years, but since 2013 he has
6 been the head of that government. And if there were any doubts about the Court
7 making a resolute finding to demonstrate to those obstructing its work that they will
8 not succeed in doing so, if there were any doubt about the propriety of such a course,
9 those doubts would be removed in this particular case - this exceptional case - where
10 the accused person has a specifically defined constitutional duty to ensure that no
11 such obstruction takes place.

12 PRESIDING JUDGE OZAKI: Thank you.

13 Judge Henderson has a question.

14 JUDGE HENDERSON: (Microphone not activated)

15 MR GUMPERT: Can I ask your Honour to put the microphone on, or alternatively I will
16 take my headphones off?

17 JUDGE HENDERSON: Yes. Yes. In answer to the Presiding Judge, you indicated that
18 you couldn't really refer to any authority for this indefinite adjournment.

19 MR GUMPERT: Yes.

20 JUDGE HENDERSON: And you essentially referred to this as an exceptional circumstance
21 and that such an application would be grounded in the interest of fairness and interest of
22 fairness to the respective parties.

23 MR GUMPERT: And the interests of justice, if I may add?

24 PRESIDING JUDGE OZAKI: And interests of justice.

25 MR GUMPERT: Yes, generally.

1 JUDGE HENDERSON: Right. Now -- and you also referred to a domestic type situation in
2 which domestic courts would permit this exceptionally.
3 Now, of course this is the difference. This is an exceptional circumstance, or this is
4 different. Here we have -- perhaps I should start this way. The essential question I
5 want to ask you is how is this compatible with the Regulation 60, which essentially
6 would require, if I can just direct your mind to it, "If at any stage in the proceedings
7 the office ..." -- this is under the rubric "Withdrawal and amendment of charges,"
8 because as you would apprehend in a domestic situation it is always open to a
9 Prosecutor to withdraw a charge and to come again when they have the evidence.
10 This is a measure which is open to a DPP, or any prosecutor.
11 Regulation 60 provides, "If at any stage of the proceedings the office considers that the
12 evidence available, including both the incriminating and exonerating evidence, does
13 not support an element of the charges pleaded, or supports a different charge, or that
14 any charge pleaded otherwise cannot be pursued in particular due to the individual
15 circumstances of the accused, then the office shall promptly seek to either ..." and one
16 of the options is to withdraw the charges.
17 How is your submission compatible, because we would have to -- we would have to
18 be persuaded ultimately by your submissions? How is your submission for an
19 indefinite adjournment compatible with this?
20 MR GUMPERT: This was -- this was a question which the Court asked effectively at the very
21 first hearing after we asked for an adjournment and for a finding of noncompliance. I was
22 specifically referred to this regulation.
23 In my respectful submission, the Court has already effectively demonstrated that it is
24 satisfied that an adjournment of the trial, in other words, that the Prosecution is not
25 by reason of this regulation duty bound immediately to withdraw, that an

1 adjournment is or may be an appropriate course of action in the peculiar, perhaps
2 unique, circumstances of this case where a State Party is failing to provide
3 cooperation. The Court has already permitted an adjournment of the case for six
4 months and permitted the Prosecutor effectively not to withdraw during that period.
5 So in brief, without repeating myself too much on the submissions I made last time,
6 the key word here, or the key words, are "The office considers that the evidence
7 available does not support the charge."
8 We're not yet in a position to make the consideration which the regulation requires us
9 to do before we withdraw. We know that there is evidence in existence. We do not
10 know what that evidence will indicate. As I have stated previously, it might
11 exonerate or inculcate, but at the present time the actions of the Government of
12 Kenya are preventing us from making the consideration to which this regulation
13 requires.
14 The evidence or the material is available. It could be provided. We know that there
15 are 33 months' worth of bank statements which have not been provided under
16 compulsion or otherwise. We know that material is available, but we can't consider
17 it. Why? Because we are being obstructed from doing so.
18 In those circumstances, in my submission, a further adjournment, this time without a
19 date being fixed, other than the clearest possible indication that the adjournment will
20 cease when the Government of Kenya abides by its duties to the Court would be, we
21 submit, both fair and entirely in accordance with Regulation 60 to which Court has
22 referred me.
23 JUDGE HENDERSON: Ultimately, the exercise is one of carefully balancing the rights of the
24 accused person and also the rights of the victims, which the Court must pay the closest heed
25 to, because ultimately it is a balancing act, having regard to the two.

1 What in my -- as far as I'm concerned, has to be -- I have to understand though is does
2 an indefinite adjournment cure that, to keep the Court's resources engaged as
3 opposed to the OTP's resources, that is, the Chamber's? Ultimately, what is to
4 prevent, as in a domestic type situation, a withdrawal? You pursue your
5 charges -- you pursue your investigations in light of the concession that you do not
6 have sufficient evidence to take you to, perhaps, half -- what in the common law
7 would be referred to half time, prima facie case, and then come fresh by the
8 reinstatement of fresh charges.

9 MR GUMPERT: There is nothing to prevent the course taking that course of action.
10 Speaking frankly and -- and without having considered the matter at length, it seems to me
11 that that is within a range of reasonable decisions which the Court could make. So let me
12 make that concession.

13 But in this case, as your Honour has indicated, the Court has to balance what is the
14 most appropriate thing to do, and there are other courses of action within that range
15 of reasonable decisions which the Prosecution submit better fit the circumstances of
16 this case.

17 In particular, the Prosecution submit, the interests of justice should be paramount
18 here. I don't mean to say that the defendant's rights should be ignored for a moment,
19 but the interests of justice should, I submit, be the most important consideration in
20 your Honours' minds, and it would not be in the interests of justice - and I risk
21 repeating myself here, so I shall be brief - for the Court to make a ruling which will
22 effectively be interpreted as the Court saying if a country sticks out for long enough
23 obstructing proper enquiries being made by the Prosecutor, despite the Court having
24 made a finding that that obstruction is improper, then the case against the person that
25 country wants to protect will go away.

1 Any such ruling would be capable, plainly capable of that interpretation, and that
2 would be a disastrous interpretation. It would be capable of being understood to
3 mean that States Parties, with a legal duty to act in a particular way, can torpedo the
4 course of justice.

5 PRESIDING JUDGE OZAKI: Judge Fremr.

6 JUDGE FREMR: Thank you.

7 Mr Gumpert, in my view the purpose of an adjournment considered by the Court should be
8 some better perspective, I would call it, of the case. I think court also should very carefully
9 consider duration of such adjournment and even, yourself, you said that, from your point of
10 view, six months' adjournment probably shouldn't bring any fundamental improvement was
11 my understanding, you don't believe in any fundamental improving in such a duration.

12 MR GUMPERT: Your Honour is right, yes.

13 JUDGE FREMR: Yeah, yeah. So in such a case, frankly, I think it's not clear to me why you
14 believe then in case of indefinite adjournment such a measure could bring any improvement.

15 MR GUMPERT: No, your Honour. That's not the reason. It is not because I think that an
16 indefinite adjournment will act as a bigger lever in moving the position of the Government of
17 Kenya, that the Prosecution ask for an indefinite adjournment. It is to prevent the injustice
18 which I say would be represented by a decision not to grant an adjournment and which I
19 expanded upon in my answer to his Honour Judge Henderson just a moment ago. It is that
20 injustice which I say can only properly be avoided by the grant of an indefinite adjournment.
21 It has to be or, I submit, it can only practicably, reasonably be indefinite because we
22 have run out of hooks on which we can hang any particular date. In answer to, to
23 Her Honour Judge Ozaki, I suggested, not entirely seriously in respect of all of them,
24 various dates which we could consider. I think implicit in her question was to find
25 out the date on which the Assembly of States Parties will consider this matter, if there

1 is a referral, and make that the terminating date. I suggested the date of the next
2 general election in Kenya. But all of these dates are not going to provide any
3 realistic greater prospect of what we would say is ultimate compliance with the
4 Government of Kenya's treaty obligations.

5 The only realistic endpoint, it isn't an endpoint, the only realistic order to make, if the
6 Court is minded to adjourn, is to say we don't know when this case may resume, but
7 we believe that justice demands that it shouldn't be terminated now on these
8 conditions in the light of this obstruction, if that is the finding you make and,
9 therefore, the only realistic order we can make is to adjourn the case without fixing a
10 date.

11 There may come a time during the future, who knows when it will be, when this
12 Court, you three Judges, remaining seized of this matter will say, I know not, in five
13 years' time, whenever, enough's enough, but I would respectfully submit that whilst
14 this continuing failure on the part of the Government of Kenya is still fresh and while
15 this accused person is still the head of that government, that day will not come.

16 JUDGE FREMR: And my second and the last question for the moment: You think that at
17 this moment of proceedings the Assembly of State Parties could or should play any role in
18 solving the issue?

19 MR GUMPERT: Well, your Honour, I think that probably comes back to some of the issues I
20 touched upon in response to -- I think it was the very first question that Judge Ozaki asked me.
21 I would hope that if I am right in my assertion that there has been a failure on the part of the
22 Government of Kenya to cooperate properly, that they will come to their senses and a proper
23 recognition of their obligations under the Rome Statute sooner rather than later.
24 I can't -- well, I could, but it's not going to be a legal submission, and it's not going to
25 be a submission which is helpful to the Court to speculate on what kind of effect the

1 discussion by the Assembly of States Parties might have upon the intentions and
2 actions of the Government of Kenya. Political commentators can do that far better
3 than I.

4 Let me simply say this: The Prosecution does not ask you to condition this
5 adjournment or to fix a length for this adjournment with reference to any action the
6 Assembly of States Parties may take. If this Court judges the Government of Kenya
7 to be in breach of its duties, it will be for the Assembly of States Parties to discuss that
8 matter and to decide what, if any, reprimand or sanction they impose upon the
9 Government of Kenya, but those have only an indirect impact upon this case.

10 JUDGE FREMR: Thank you very much.

11 PRESIDING JUDGE OZAKI: Thank you.

12 Now I would like to turn to legal representative.

13 Thank you, Mr Gumpert.

14 Mr Gaynor, you have also made submissions regarding the relevance of the official
15 position of the accused, therefore we would like to ask you a couple of questions on
16 this point.

17 First, do you consider there to be a distinction between Mr Kenyatta's de jure position
18 as head of state and any actual active interference with the collection of evidence?

19 And relatedly, is it your position that the latter circumstance of active interference can
20 be substantiated in this case bearing in mind the responses of the Prosecution to my
21 almost-the-same question?

22 And in this regard, I hasten to add we have already noted the examples cited in your
23 written filings of conduct by the accused which you allege may have had a chilling
24 impact on cooperation with the Court and there is no need to repeat those
25 submissions. And we have also noted your submissions regarding the de jure and

1 de facto power of the accused; therefore, if your position is that there has been
2 deliberate interference, is it based on these circumstances which you mentioned in
3 your written filings, or do you have any further substantiation? Mr Gaynor.

4 MR GAYNOR: Thank you, Madam President. On the first point, it's clear that there has
5 been no evidence presented to the Court that the accused has specifically taken action to
6 destroy evidence or other acts which would ordinarily fall under the rubric of obstruction of
7 justice or perverting the course of justice. That's not the argument that I've presented to your
8 offers -- to your Honours.

9 My argument is that the accused controls an entity. That entity is unlawfully
10 withholding evidence which your Honours have directed to be provided.
11 If the accused were the director of a company, your Honours had ordered that
12 company to deliver evidence to you, and if the accused did not take any action to
13 ensure that that company delivered the evidence to you, in many jurisdictions he
14 would be liable for an obstruction of justice investigation and possible prosecution.

15 Now, what I have said, and I know your Honours don't want me to repeat myself,
16 what I have said is that the accused is without question the most powerful and
17 influential person in Kenya. Yesterday the Honourable Attorney-General said four
18 times that 72 hours was all that was necessary to turn over telephone records, bank
19 records, I think he might have said land records. I'll have to check the transcript.
20 But it's quite clear from what the Attorney-General said that really, it's not a time
21 issue involved, that the evidence is in Kenya, it can be turned over very quickly. The
22 accused has a constitutional obligation to ensure that Kenya complies with its
23 international obligations. He has an obligation under public international law
24 generally.

25 PRESIDING JUDGE OZAKI: Mr Gaynor --

1 MR GAYNOR: Yes.

2 PRESIDING JUDGE OZAKI: -- sorry to interrupt. I don't think that's what

3 Mr Attorney-General meant when he mentioned 72 hours.

4 MR GAYNOR: Yes. My only point is that in terms of the time frame that he gave, four
5 times I think he mentioned 72 hours as the time within which he would be able to provide
6 evidence if he received, in his argument, appropriate --

7 PRESIDING JUDGE OZAKI: But it has nothing to do with the accused's position as the head
8 of government.

9 MR GAYNOR: Right. In my submission it does. The accused controls the Government of
10 Kenya under the constitution of Kenya. The Attorney-General can only be dismissed by one
11 person and that person is the president of Kenya.

12 The cabinet secretaries responsible for securing the State's compliance with the
13 International Crimes Act can only be dismissed by the president of Kenya. So it is
14 because of his powers under the law of Kenya and his responsibility under the
15 constitution of Kenya that my -- that grounds my argument that he is, through his
16 action and inaction, obstructing the provision of evidence to this Court, evidence
17 which your Honours have directed to be provided.

18 PRESIDING JUDGE OZAKI: Thank you very much. And this leads to my next question to
19 you, Mr Gaynor. Can you comment on the question I asked to the Prosecution regarding
20 how you consider that an indefinite adjournment of proceedings could be reconciled with the
21 rights of accused in the particular context of the evidence having fallen below the standard
22 of -- standard required for trial? And in this connection, we note that in your last written
23 submission you referred to a particular Canadian jurisprudence regarding circumstances in
24 which a knowing waiver may be imputed.

25 If you please, you may wish -- could you expand further on this point and how you

1 see such jurisprudence fitting into the Chamber's decision-making process and its
2 obligation under Article 64(2).

3 MR GAYNOR: Yes. Thank you, Madam President. In respect of authority for ordering an
4 indefinite adjournment, I note that at footnote 183 of your Honours' decision of 31 March 2014,
5 which is document number 908, your Honours have set out a number of instances from this
6 Court, from the ICTR and from the ICTY where adjournments were provided, for example,
7 pending the appointment of co-counsel for the accused or, for example, indefinitely adjourned
8 due to the unavailability of Prosecution witnesses arriving from new travel procedures
9 implemented by the Government of Rwanda. So that in that case there was adjournment
10 pending action by the Government of Rwanda in a case in which the accused was not in
11 control of the Government of Rwanda.

12 So I think that there is -- the term "indefinite adjournment," as I understand your Honours to
13 mean it, it's not adjournment forever, it's adjournment until a specific step is taken. And in
14 this case, in my submission, that step can be taken at any moment by the accused in this case
15 if he directs his government to comply with your Honours' directions of 31 March and 29 July.
16 Another point I would like to make is if in a domestic jurisdiction an accused
17 absconds from the jurisdiction, if he takes off to Spain or if he goes into hiding within
18 his own jurisdiction, in many jurisdictions - and I'm willing to do research and bring a
19 written filing on this - the case is adjourned until the accused is either arrested or
20 voluntarily turns himself in.

21 In this case the accused has not absconded, but the parallel is that the accused has voluntarily,
22 in my submission, through his inaction created the delay which is in this case -- the delay in
23 this case is noncompliance with the revised records request. That noncompliance is not due
24 to any action of the Prosecution. It's not due to any action of your Honours. It's due
25 exclusively to action of the Government of Kenya, which is under the total control of this

1 accused.

2 Now, turning to the Canadian cases that your Honours asked me to elaborate on --

3 PRESIDING JUDGE OZAKI: Just briefly --

4 MR GAYNOR: Yes.

5 PRESIDING JUDGE OZAKI: -- if you may.

6 MR GAYNOR: Yes, as short as possible, Madam President.

7 Essentially my argument is, and it emerges from the Supreme Court of Canada, an

8 accused cannot complain of delay in the proceedings if he is solely or primarily

9 responsible for that delay. And the main obstacle in this case, as I said, is

10 noncompliance with the revised records request. Securing compliance with the

11 international obligations of Kenya is an obligation of the president of Kenya under

12 both the constitution of Kenya and under international law.

13 The one person who can remove the principal obstacle to progress of this case is the

14 accused. So in summary, and I'll end with this, the accused's failure to remove that

15 obstacle is not only unlawful, both under domestic and international law, his failure

16 to do so also amounts to a waiver of his right to an expeditious trial, and that waiver

17 will last for as long as he fails to secure compliance by Kenya with its obligations

18 under the Rome Statute.

19 PRESIDING JUDGE OZAKI: So your view is that -- your submission is that the indefinite

20 adjournment can be reconciled with the right of the accused even under those circumstances, I

21 mean absconding or deliberate obstruction, even when the Prosecution explicitly admitted

22 that the evidence has fallen below the standard required for trial?

23 MR GAYNOR: It is, because it is the accused who is in total control of the delay in this case

24 and in the -- remember, we're dealing with an absolutely unique case here where the accused

25 controls the government which is unlawfully obstructing the Prosecution's access to evidence.

1 It's something which is by its nature unheard of in a domestic proceeding.
2 The only previous domestic case that I could find was the one I mentioned on 5 February,
3 which was the Nixon case at the United States Supreme Court where the Supreme Court
4 ordered Nixon, then the president of the United States, to deliver evidence which could be
5 inculpatory against him, and following his resignation, President Ford pardoned him. So
6 that is the only direct precedent I could find.
7 But it remains the case that no matter how powerful the accused, if -- even if he's head of state,
8 your Honours must remain firm in ordering his government under his control to deliver
9 evidence which is relevant to criminal investigation against him.

10 PRESIDING JUDGE OZAKI: Thank you.

11 Judge Henderson.

12 JUDGE HENDERSON: Thank you, Mr Gaynor.

13 The application to adjourn a case indefinitely you will accept is a very exceptional
14 circumstance. Now, unlike the jurisprudence from the ICTY, ICTR, the Rome Statute
15 does provide a place at the table for victims. So this is hence your locus.

16 My question is a direct one. Would -- one of the possible options following
17 Regulation 70 would be a withdrawal of the charges with the leave of the Court.

18 Would such a situation, with a view to continuing investigations and perhaps at the
19 appropriate stage, if it is appropriate, the reinstatement of proceedings, would such a
20 course of action occasion any prejudice to the victims in this case?

21 MR GAYNOR: Thank you, your Honour. If there was a substantial likelihood that the
22 Prosecution would reopen the investigation against Mr Kenyatta following withdrawal of
23 charges and following the delivery of evidence, I can see a great deal of merit in that
24 arrangement. On the basis of everything that I've seen, it seems to me that if these cases are
25 terminated, the government will see once again that obstruction of access to evidence is a

1 viable strategy. That policy will continue and it will be harder than ever for the Prosecution
2 to get the evidence that it needs.

3 Secondly, I know that the Prosecution has many other cases before it. As victims, we
4 don't have the choice of focusing on an easier case. We don't have the choice of
5 focusing on a case where there might be more evidence. The Prosecution has that
6 choice. For all I know -- and I need to emphasise I'm speaking on behalf of the
7 victims. For all we know, the Prosecution might choose to prosecute an easier case.
8 They might choose to abandon this case.

9 So from the victims' perspective, we would much prefer for your Honours, if you are
10 considering an adjournment until the Assembly of States Parties procedures for securing
11 cooperation have been fully exhausted, we would much prefer for your Honours to take that
12 route, and I can see a great deal of sense in that route.

13 But to allow the Prosecution to withdraw the charges completely, I frankly think that
14 would be the complete end of the justice process for victims in this case.

15 JUDGE HENDERSON: Thank you.

16 PRESIDING JUDGE OZAKI: Now I would like to turn to the Defence.

17 And thank you very much, Mr Gaynor. However, as a preliminary matter, the
18 Chamber wishes to note a point of concern with your filing 945. And I am referring
19 specifically to its paragraph 22. And our concerns relate to the public referencing of
20 conditional material and the unqualified repetition of allegations which the Chamber
21 has already ruled upon and found to be unsubstantiated.

22 But I will not go into further detail in this session because of time limitation, but
23 please bear this guidance in mind and exercise great care in future filings.

24 And returning to the substance of the matter at hand, legal representative of victims
25 and to some extent the Prosecution submit that the Defence should be precluded from

1 raising the issue of undue delay because of the accused position as head of state,
2 whose international obligations in the form of cooperation with the Court are in issue.

3 How does the Defence respond to that particular point?

4 MR KAY: The first matter that has to be looked at in answering that question is whether
5 there has been unjustified delay, or obstruction, and for my part I was struck by the
6 submissions of the Attorney-General yesterday and the correspondence that had been
7 produced between the Prosecution and the Government of Kenya that showed the very active
8 steps that they had taken in furtherance of the enquiries of the Prosecution.
9 So the matter hinges as to whether there has been either delay by the Government of
10 Kenya, or any failures on their part, and I wondered if the responses of the
11 Government of Kenya had properly been taken into account.

12 I can go through each of the eight heads that were submitted upon yesterday. I don't
13 know whether that would be met with favour by your Honour as something you
14 would like me to do, or --

15 PRESIDING JUDGE OZAKI: Not in this status conference.

16 MR KAY: Not in this status conference.

17 PRESIDING JUDGE OZAKI: No.

18 MR KAY: Because it seemed to me that the matters raised by the victims' counsel this
19 morning on the very same issues, alleging obstruction, wasn't obstruction at all. It was the
20 nature of the requests that were the problem, and the responses by the Government of Kenya
21 in my submission had clearly dealt with the natures of the requests and provided answers.
22 So from that position there we have that issue that has to be determined.
23 The Prosecution this morning are alleging that the fault for the failure of the case is
24 the Government of Kenya as being the issue, and in my submission that is not
25 something that a proper inspection of the materials would actually produce a

1 reasonable conclusion upon.

2 Be that as it may, we have a position here where my client is head of state but he is
3 also an accused with rights. There are no allegations at all of obstruction by him, or
4 of me, in relation to any of those enquiries by the Prosecution, and we have put
5 forward before this Court several instances of quite extreme cooperation by us. So
6 his position as head of state is only material if there is evidence that he has done
7 something wrong in pursuance of this case.

8 At the moment the report to him by the Attorney-General and an inspection of the
9 materials that took place yesterday reveal that his government is cooperating with the
10 Office of the Prosecutor, who is failing to recognize the negative answers are not a
11 failure on their part to cooperate, but an answer to their particular lines of enquiry.
12 So the head of state issue, as far as he is concerned, is perfectly satisfied.

13 In relation to his private capacity as an accused, he obviously does not interfere in
14 these matters because he has personal rights and he has a lawyer that has told him not
15 to interfere in these matters and that is the clear position.

16 So in response to the question, your Honour, my submission is that the evidence
17 reveals that the head of state issue that has been brought to bear as an allegation is not
18 in fact founded upon substance, and all Heads of State rely upon the competence of
19 ministers to discharge their duties and the Attorney-General yesterday referred to the
20 correspondence between the parties which in my submission showed that
21 cooperation.

22 Issues were raised as to whether there'd been delay of one month. Why no response?
23 Well, the fact of the matter is the bodies were researching the evidence that they'd
24 been asked to look at. They didn't come back with a response the next day to say,
25 "There is no evidence." They waited 'til they'd looked at their files and considered

1 the matter.

2 So that is my submission upon it.

3 PRESIDING JUDGE OZAKI: Thank you.

4 Mr Kay, next question to you is you have previously - I think it was last year - sought
5 a permanent stay of proceedings on the basis of alleged abuse of process in this case
6 and now you are requesting a termination of the proceedings.

7 What differences, in your view, does the Defence see -- what differences does the
8 Defence see between those two remedies?

9 MR KAY: The grounds upon which the stay of the proceedings for an abuse of process are
10 entirely different from the grounds that we present to the Court that require a termination of
11 the proceedings. The grounds for the abuse of the process was as a result of particular
12 evidential matters, which the Court is well seized of, that we submitted went to the quality
13 and the corruption, if you like, of the investigation in this case and the presentation of the
14 evidence. So that was a very distinct area.

15 We moved on from there when it appeared that the witness who had been relied
16 upon by the Prosecution had changed his story. He admitted lying. Another
17 witness had withdrew, had changed his story, made allegations against the
18 Prosecution in relation to his conduct.

19 And the position we had there was with an admission of the insufficiency of the
20 evidence to support the case, and that insufficiency of the evidence immediately
21 brought to bear the responsibilities under Regulation 60 concerning the future
22 conduct of the case.

23 So the initial matter was not a -- because it was based upon any admission by the
24 Prosecution, but was something we sought judicial interference upon -- I don't mean
25 interference in a derogatory way, but intervention if you like into the conduct of the

1 proceedings, whereas the issue concerning the sufficiency of evidence is a bold and
2 plain matter and had been the culmination of a number of significant events going to
3 the quality of the evidence in the case. So a different matter entirely.

4 PRESIDING JUDGE OZAKI: Thank you very much.

5 I would like to ask -- excuse me. Prosecution and legal representative, do you have
6 any comments on this specific issue?

7 Thank you, Mr Kay.

8 MR GUMPERT: That is to say the difference between a termination by the Court and a
9 permanent stay?

10 PRESIDING JUDGE OZAKI: Yes.

11 MR GUMPERT: Well, I understand Mr Kay's meaning of both of those to be that the case
12 will stop, will come to an end, in other words there will be no adjournment of any kind, and I
13 also understand him to mean that there shall be no further proceedings in respect of any
14 similar charges.

15 Inasmuch as I understand him correctly, I don't believe there is any difference
16 between those two things. They simply arise, no doubt as he has just explained, at
17 different stages in the proceedings and therefore get different labels.

18 The Prosecution of course says that, if the case is to be withdrawn and thus
19 terminated, that should be strictly without prejudice to the bringing of any further
20 proceedings on precisely the same subject matter.

21 PRESIDING JUDGE OZAKI: Mr Gaynor on the same point?

22 MR GAYNOR: Thank you, Madam President.

23 Yes, the two terms to me appear to be more or less synonymous. The most
24 important point to be made by any court would be to clarify whether the termination
25 is with or without prejudice.

1 So I would agree with Mr Gumpert on that. It's important to clarify are charges
2 dismissed with prejudice, or without prejudice? Thank you.

3 PRESIDING JUDGE OZAKI: Thank you, Mr Gaynor.

4 Relatedly then, Prosecution, does the Prosecution consider there to be a difference
5 between the remedies of a conditional stay of proceedings and an indefinite
6 adjournment?

7 MR GUMPERT: I'm embarrassed to say that I was speaking to my learned leader when your
8 Honour began that question and I missed it.

9 PRESIDING JUDGE OZAKI: I can repeat.

10 MR GUMPERT: I'm very sorry to trouble you to do so.

11 PRESIDING JUDGE OZAKI: Does the Prosecution consider there to be a difference between
12 the remedies of a conditional stay of proceedings versus indefinite adjournment?

13 MR GUMPERT: I'm trying to give a coherent and brief answer. I think that must depend
14 upon what the stay is conditioned upon.

15 Let me venture an understanding. Let us say that the Court decided it was going to
16 stay the proceedings and that the condition on which the stay would be lifted would
17 be the Court being satisfied that the Government of Kenya had now complied with its
18 duties to cooperate.

19 If that were the nature of the conditional stay - I hazard a guess it might be - that
20 would in real terms be absolutely no different from an adjournment which was
21 expressed to be sine die, without a date fixed for the resumption of the case, but with
22 the clear statement by the Court that that date would be the date on which it was
23 satisfied that the Government of Kenya had complied with those obligations. Those
24 would be two labels for functionally exactly the same thing.

25 PRESIDING JUDGE OZAKI: And, Prosecution, I know that Prosecution has answered that

1 question before, but can you repeat what is your position on the authority of the Chamber to
2 terminate proceedings at this stage?

3 MR GUMPERT: Let me not misquote. Article 64 of the Rome Statute sets out the functions
4 and powers of the Trial Chamber. It's long, it's familiar, so I shan't read it, save for Article
5 64(6)(f) which reads in relevant part, "In performing its functions prior to trial or during the
6 course of a trial, the Trial Chamber may, as necessary ... (f) Rule on other relevant matters."
7 The plain intention of the drafters was to give the Judges the power to control their
8 own proceedings and, where specific instances were not covered by the article, to give
9 the Judges - to give the Chamber - the power to rule on any particular matter where
10 the interests of justice demand a ruling and to make any appropriate ruling
11 demanded by the interests of justice. That is the authority which you have. It is
12 couched in the broadest and most general terms, but I do not believe there is any
13 greater and more specific, any *lex specialis*, to use the jargon, which specifically
14 relates to indefinite adjournments or, indeed, adjournments of any type.

15 PRESIDING JUDGE OZAKI: Thank you very much, Mr Gumpert.

16 Mr Kay, the Chamber notes in your written filings you seek final determination of the
17 charges. Is it correct to understand from this that the Defence seeks a verdict to be
18 entered?

19 MR KAY: Yes, your Honour. And I can elaborate on that, if you would like, having given
20 the answer. I don't want -- I have an eye on the clock, but the reason is this: We got to the
21 position of a trial about to start, and for all intents and purposes, in relation to the conduct of
22 this case, we were at the trial stage. And it may have been that we weren't at the first day
23 with the usual ceremony because what happened was, instead of having that first day, we
24 were listed just before, and so in many respects what would have been something that could
25 have been discussed on the first day of the date of trial did not happen.

1 And so one has to be broad about this and robust about it, it would be an affront to
2 common sense to say you were not entitled to your acquittal in those circumstances
3 because the first day of the trial didn't actually happen. Really, that's an affront to
4 justice because the circumstances meant that the plug was pulled for the very reason
5 that a trial could not take place. And in those circumstances, I respectfully submit to
6 the Court, that we are entitled, taking into account all the circumstances of this case.
7 The journey it went through and the evidential matters that arose that put us in that position
8 meant that there had been a degrading and destruction over a period of time that should
9 entitle that verdict of not guilty to be entered, and the Court could do that precisely under the
10 regulation referred to by my learned friend, Mr Gumpert. We are in agreement with him
11 upon the nature of that regulation, which refers to prior to trial as well as during trial.

12 PRESIDING JUDGE OZAKI: But apart from that regulation, Mr Kay, do you happen to have
13 any authority or jurisprudence on what you have just explained?

14 MR KAY: Yes. This is a very common feature. Prosecution have no evidence, and it
15 happens regularly in courts throughout the -- certainly the common law world. "I have no
16 evidence. I have insufficient evidence, but I want a case adjourned." "No, you cannot have
17 your adjournment." "Well, I'm not going to offer no evidence." "Right, call your evidence
18 then." "I can't call my evidence." Therefore the case is dismissed by the judge. And trying
19 to say that technical rules can in some way prevent that, in my submission, is not in the
20 interest of justice, and there is a broad perspective that can be looked at here that happens
21 very, very regularly in criminal procedures.

22 PRESIDING JUDGE OZAKI: Thank you very much, Mr Kay.
23 Judge Henderson?

24 JUDGE HENDERSON: Yes, Mr Kay, just one question: When Judge Ozaki asked you
25 about the authority, of course, you referred to the usual position in the common law in which

1 the head of prosecution services would withdraw the case in precisely the circumstances
2 which you described, but you would agree with me, would you not, that there appears to be a
3 fundamental difference in that in a domestic situation a DPP, or a head of a prosecution
4 services, in a sense, has a control over the domestic investigative arm of the state and,
5 therefore, the situation is distinguishable. And that perhaps might be the nub of the matter;
6 would you agree?

7 MR KAY: With respect to your Honour, I don't because the procedure of this Court is all
8 about an investigation, that that's how we started this journey; with the investigation,
9 permissions being given, evidence being brought to a Pre-Trial Chamber, summons being
10 issued, investigation continuing.

11 There is clear control over the investigation, and there is also a clear duty in the regulations.
12 If the Prosecutor is unwilling to exercise what amounts really to a personal discretion this
13 Court, in my submission, in the interests of justice, can intervene.

14 And in many respects with an international court you can see the more likely need for
15 that because we have to look outside the confines of the courtroom. There are
16 enormous political pressures on cases here, on the nature of the cases, who goes on
17 trial, as well as the influence of victims.

18 So we are looking at something very different here that may cause a Prosecutor to put a break
19 upon how far that Prosecutor is prepared to go because of the wider questions of image as
20 well as responsibility.

21 And I remind the Court that was something I said right at the start when this first
22 arose. I think it was last February that this would be a matter that the Court should
23 intervene upon.

24 So in my submission, this Court has a clear oversight of the prosecutorial functions
25 which enable it to take upon itself that role in circumstances such as these. You have

1 the admission of the insufficiency of the evidence in the case. You have issues
2 concerning cooperation, which you will look at and make a decision upon, and I hope
3 look at it carefully, as I'm sure the Court will, that, in my submission, bring us to this
4 position that the case has failed and it has failed in a way that means there is no
5 prospect of it going further if the Prosecutor does not intervene, you act to terminate.
6 The Prosecutor will not offer any evidence.

7 JUDGE HENDERSON: So you do not see a difference with a domestic situation where the
8 head of the prosecution services can call a chief constable, or a commissioner of police, or
9 whoever leads the investigations and has, as it were, a more hands-on dealing with the
10 investigative process as opposed to here where the Prosecution does not have any
11 investigative arm of its own and has instead to rely on the very State Party because this is, in
12 essence, the complaint that is being made, as I understand it?

13 MR KAY: I see the way your Honour is putting it. All I can say is that a Nairobi airport
14 one is constantly bumping into investigators from the OTP and seeing them at hotels. So
15 they have investigators and they investigate and, in a way, it's a bit of a fig leaf for them to
16 hide behind to try and say "This is not our fault, that we didn't get the evidence."
17 The case was brought after an investigation and evidence produced which came from
18 the national sources and, in those circumstances, for my part, at this stage, I see an
19 injustice if this Court is unable to return a verdict which, for all intents and purposes,
20 would have been there. For my part, that involves the Court in not being able to
21 take charge of the decision making processes.

22 Whatever the structure -- whatever the structure is is not the point; the point is it is
23 the quality of the case. When we consider the interests of victims and witnesses, also
24 our witnesses are within that collective and our victims are within that collective and,
25 in my submission, that entitles this Court to return a verdict upon where we reached

1 in the case, and that can lie with your Honours.

2 PRESIDING JUDGE OZAKI: Thank you, Mr Kay.

3 I have one small clarification from Mr Gaynor. You briefly mentioned about the
4 relationship between the referral to the ASP based on Article 87(7) and indefinite
5 adjournment. Is it your position that a finding under Article 87(7) is only of utility if
6 it is accompanied by an adjournment?

7 MR GAYNOR: Thank you, Madam President. I believe that it would make most sense in
8 that environment. The entire procedure set out in the ASP documents referred to at
9 paragraph 60, footnote 77, of filing 946, where the ASP sets out its formal and informal
10 procedures for securing the State's compliance, they make most sense in this case if the case is
11 still in place, instead of being an entire procedure for trying to convince the Government of
12 Kenya to provide evidence in relation to a case which no longer exists.

13 It makes most sense, in my submission, if the case is still existing for the Assembly of
14 States Parties to be in full purchase of the situation and also, I would submit, just very
15 briefly that every confidential filing relating to noncompliance by the Government of
16 Kenya with Part 9 of the Statute should be provided by your Honours to the
17 Assembly of States Parties so that they have a full picture of the true extent of the
18 Part 9 violations in this case.

19 PRESIDING JUDGE OZAKI: Thank you very much.

20 MR GAYNOR: Thank you.

21 PRESIDING JUDGE OZAKI: And that brings us to the end of the first part of this status
22 conference. And as I indicated at the start of the hearing, we will now allow each counsel to
23 make any additional relevant submission they consider to be necessary.

24 In your remarks, you should each summarize your respective positions taking into
25 account the nature of this status conference. However, of course, we do ask you to

1 be as concise as possible and to address only the substance of the matters which are
2 the -- yes, only the substance of the matters of this status conference.

3 But before asking each counsel to stand up, court officer, about the time frame, is it
4 possible to shorten lunch-time -- lunch break?

5 (Pause in proceedings)

6 PRESIDING JUDGE OZAKI: I'm sorry for the interruption.

7 Because we are now entering into the second phase of this status conference and
8 during the second status conference we have submission from parties and Mr Gaynor,
9 I think it would be better if we break now. And the court officer needs 30 minutes to
10 change the tape. That means that we break now and resume 5 past 12. And after
11 one hour I think we can complete this status conference if that suits parties and
12 participants.

13 MR KAY: Certainly, your Honour.

14 MR GUMPERT: Yes.

15 MR GAYNOR: Yes. Thank you, Madam President.

16 PRESIDING JUDGE OZAKI: Thank you very much. Then the hearing is adjourned and we
17 will meet at 5 past 12.

18 THE COURT USHER: All rise.

19 (Recess taken at 11.36 a.m.)

20 (Upon resuming in open session at 12.10 p.m.)

21 THE COURT USHER: All rise.

22 Please be seated.

23 PRESIDING JUDGE OZAKI: Good afternoon and welcome back.

24 Let us go straight to the second part of this status conference and may I now invite the
25 Prosecution - will it be Madam Prosecutor - to make general submissions no more

1 than 15 minutes?

2 MS BENSOUDA: Thank you, Madam President. Madam President, I will start with the
3 final submissions from the Prosecution and then senior trial lawyer, Mr Gumpert, will
4 continue.

5 Madam President your Honours, there are two points that I want to make. One is a
6 short one and the other long.

7 The short point is this: There is no middle way. Either, Madam President, you
8 refuse any further adjournment and therefore require the Prosecution effectively to
9 withdraw, or you permit an indefinite adjournment conditioned on the eventual
10 compliance of the Government of Kenya with its duties. Any other course will
11 simply be ineffective.

12 As Honourable Judge Henderson has said, ultimately it is a balancing act. The scales
13 of justice have to come down one side, or the other.

14 The interests of the accused alone do not trump all others, and all others, Madam
15 President, are the rights of victims and the wider interests of justice. They are all
16 vital components.

17 The longer point, Madam President, that I mentioned is this: At various stages of
18 these proceedings the Defence have suggested that the Prosecution has no case, that
19 all the evidence it once relied upon has been exploded. This is the Defence
20 submission throughout the case, but this is incorrect.

21 There remains a considerable body of evidence that implicates Mr Kenyatta. The
22 Prosecution has scrutinized very carefully this body of evidence and we judge that
23 this evidence is insufficient to make you sure, but concerns that the Chamber may
24 have about the injustice of allowing a case to continue where there is simply no
25 evidence can be put aside.

1 We are going to summarize the evidence that we currently have, Madam President,
2 and senior trial lawyer, Mr Benjamin Gumpert, is going to do that. We will try to
3 remain within the 15 minutes.

4 PRESIDING JUDGE OZAKI: Thank you.

5 MR GUMPERT: Let me do that briefly and I apologise if I go at a little pace.

6 Witness 152 says he was present at a meeting at a hotel which was attended by
7 Mr Kenyatta, and during the meeting he says Mr Kenyatta contributed money to the
8 Mungiki and announced that there had been an agreement with the Mungiki that
9 they would fight on the PNU Kikuyu side during the post-election violence. That
10 witness also says that during the post-election violence Mr Kenyatta approached him
11 through a member of parliament and the message was that Mr Kenyatta wanted to
12 facilitate the ability of the Mungiki to protect the Kikuyu community.

13 Witness 428 received money and weapons from a former member of parliament on a
14 daily basis during the violence. That person told 428 that he was acting on behalf of
15 Mr Kenyatta.

16 Witness 505 received money and weapons from a former MP during the violence.
17 He told Witness 505 that he'd discussed the attacks with Mr Kenyatta, that the money
18 came from Mr Kenyatta and that Mr Kenyatta was in solidarity with the Mungiki.

19 Witness 428 corroborates -- sorry, Witness 548 corroborates Witness 428's account.

20 Witness 510 received money for organising violence from yet another MP.

21 PRESIDING JUDGE OZAKI: Mr Gumpert, I think you are too fast for interpreters.

22 MR GUMPERT: From yet another MP who is alleged to have been the coordinator of the
23 violence in Naivasha. During a meeting at a hotel in Naivasha, he contributed 200,000
24 shillings from his personal funds and a million shillings which he said came from Kamwana.
25 That means young man and it was Mr Kenyatta's nickname. The money was given for

1 funding of weapons.

2 Witness 493 says that yet a third MP persuaded that witness and other Mungiki to
3 join the fight and that he later learnt that this MP was acting on behalf of
4 Mr Kenyatta.

5 Witness 494 was told by a senior Mungiki that he'd received a large sum of cash from
6 Mr Kenyatta in early January 2008 and that that money was for the violence, and
7 Witnesses 429 and 430 both say they went to Mr Kenyatta's house in Ischaweri (phon)
8 to raise funds for the violence and that at that house they were given a significant
9 amount of money.

10 That is a total of nine witnesses who would come before the Court and give the
11 evidence which I have summarized.

12 Then there is material which is available both to the Prosecution and the Defence
13 arising from joint efforts in respect of telephone investigations.

14 Mr Kenyatta, the Prosecution believes, used a telephone which ends with the
15 numbers 891. That's evidence by what Witness 152 says, and it's confirmed by open
16 source data freely available on the Internet and indeed other individuals to whom the
17 OTP has spoken.

18 Telephone data which is in the possession of the Prosecution and the Defence reveals
19 that just five numbers were in contact with Mr Kenyatta's telephone in December and
20 January of 2007 and 2008.

21 The data for the outgoing calls made on Mr Kenyatta's phone has been destroyed.

22 The only data that is available is the incoming calls, but that data alone gives rise to a
23 number of questions.

24 The telephone being used by former Witness 12, who, whatever his status may be as a
25 truthful witness, was undoubtedly a member of the Mungiki, ends with the numbers

1 218.

2 He was around both Nakuru and Naivasha on his own account when violence broke
3 out and that witness accepts that this telephone 218 was his.

4 Between 4 and 21 December, the telephone data in possession of both the Defence and
5 the Prosecution shows that there was contact between former Witness 12 and

6 Mr Kenyatta's telephone on six separate occasions. What was the government
7 minister and future president talking to the Mungiki member about?

8 The telephone number being used by one of the MPs, that I have referred to
9 previously, was in contact with Mr Kenyatta's phone on no less than 39 occasions in
10 the months of December and January. Perhaps some contact between a minister and
11 MP is unsurprising. What is surprising is that the contact between that MP and
12 Mr Kenyatta spikes when -- I'm using it in graph form, it takes a sudden upturn in the
13 three days before the violence in Naivasha in which that MP is said to have been
14 involved. Of the total number of calls, in January, something like one-third took
15 place in those three days. Was that just a coincidence, or was the MP getting
16 instructions on how he should proceed?

17 The Prosecution doesn't know the answers to those questions, but they raise
18 uncomfortable suspicions. The obvious way to investigate those suspicions is for the
19 Prosecution to gain full access to the telephones being used by Mr Kenyatta at the
20 time. That is what the Prosecution has been prevented from doing by the
21 non-cooperation of the Government of Kenya.

22 The Prosecution doesn't accept that the 891 number can possibly have been the only
23 number used by Mr Kenyatta. As a wealthy man and a cabinet minister, he must
24 have had access to many phones.

25 There is every reason to believe that the data from those telephones is still available

1 and would reveal connections of relevance to the Prosecution's enquiries.

2 There must be records available to the Kenyan government which would reveal what
3 those numbers are. The Prosecution doesn't know. If the Kenyan government was
4 genuinely using its best efforts to comply with our revised request it would find and
5 disclose those records and it would ensure that the telephone companies conducted
6 appropriate searches.

7 As Madam Prosecutor said, the Prosecution has looked carefully at all of this
8 evidence. It gives rise to considerable suspicion. It completely destroys any
9 suggestion that there is no case at all against Mr Kenyatta, but the Prosecution
10 recognizes that suspicion is not enough. Looked at critically, as we have made plain
11 many times now, this evidence alone is insufficient to provide a reasonable prospect
12 that you will be sure.

13 In the absence of the kind of confirmation which might have been provided if the
14 Government of Kenya had abided by its treaty duties, the Prosecution recognizes that
15 it cannot take the case forward. What it urges the Court to do is to mark the fact that
16 those investigations have been stymied by the Government of Kenya by making a
17 finding that this case should be adjourned rather than withdrawn.

18 Thank you for your attention.

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

20 Legal representative of victims. Again, please stay within 15 minutes.

21 MR GAYNOR: Thank you very much, Madam President.

22 I start with President Bashir of Sudan. He has a right to trial without undue delay. He
23 controls the government of Sudan. That government will not arrest him in violation of its
24 obligations under international law.

25 Is it unfair to keep the charges in place against Omar Bashir? Of course it is.

1 The accused controls the Government of Kenya which withholds key evidence - key
2 evidence - of direct relevance to charges concerning vicious crimes. It does so in
3 violation of its obligations under the constitution of Kenya and under international
4 law.

5 Is it unfair to adjourn until Mr Kenyatta executes his responsibilities under the
6 constitution of Kenya and orders his government to comply with its international
7 obligations and specifically to comply with your Honours' unanimous decisions of 31
8 March and 29 July. It is not.

9 In the Prosecutor against Vojislav Šešelj, at the ICTY, a decision was given on 11
10 February 2009 called the decision on prosecution motion for adjournment. There
11 was a dissenting opinion attached to it. In it, the Trial Chamber said that it was
12 aware of the impact that an adjournment of the hearing of the last witnesses would
13 have on its ability to try the accused within a reasonable time, but it held by majority
14 that its duty to preserve the integrity and fairness of the proceedings must prevail
15 over time considerations in light of the exceptional circumstances of this case. That
16 case concerned intimidation of witnesses.

17 This case concerns, in my submission, obstruction of justice. Everything we heard
18 yesterday from the Government of Kenya, when read in the light of the
19 correspondence between the government and the Prosecution, in the last few months,
20 and in the light of the positions adopted by the government in Ruto case at the
21 Assembly of States Parties, at the United Nations Security Council and at the African
22 Union, is confirmation that the Government of Kenya consistently takes positions
23 which are aligned with the interests of the accused in both Kenya cases and
24 specifically Mr Kenyatta.

25 This has been a long and bitter campaign of attrition, the ultimate aim of which has

1 been to see this case collapse. If the Trial Chamber terminates this case, it will have
2 rewarded that long campaign and those responsible for it. It will have forced the
3 victims and not the accused to pay the price for obstruction of justice.

4 This is a unique case and it requires a unique response but, in a broader sense, this
5 case offers a lesson to -- lessons to others. If the Trial Chamber terminates this case,
6 others will draw the conclusion that a prosecution at the ICC can be effectively
7 undermined through a combination of bribery, intimidation and unlawful obstruction
8 of access to evidence.

9 If the Trial Chamber terminates this case, it will generously reward the government
10 controlled by the accused for its refusal to comply with your Honours' directions
11 given at the end of March and at the end of July and for its many violations of Part 9
12 of the Statute.

13 Some might say that in any case a price must be paid for the fact that the Prosecution
14 does not have the evidence that it needs, but in this case who should pay that price?
15 Should it be the victims, whose quest for justice has been cruelly frustrated both in
16 Kenya and before this Court, or should it be the accused, who is the principal author
17 of the deadlock in this case?

18 Your Honours, it would be unfair, in my submission, to compel the victims to pay
19 that price for the government's noncompliance with the Trial Chamber's directions
20 and for the government's deliberate frustration of a quest for all the evidence which is
21 necessary to uncover the truth, a quest which should be shared by all in this case.

22 For this reason, I strongly encourages -- encourage your Honours, if you do not wish
23 to make an indefinite -- an adjournment sine die, to adjourn in order to give the
24 Assembly of States Parties the opportunity to exhaust its own procedures in order to
25 see if it can bring compliance by the Government of Kenya.

1 One of the most troubling aspects of this case has been intimidation of witnesses. In the
2 meetings I have held with victims they very frequently raise this issue. They want to know
3 what the Court is doing about it, giving its potentially devastating impact on the
4 administration of justice.

5 The Prosecution has publicly made allegations of interference with important
6 witnesses in this case, including Witnesses 4, 11 and 12. The victims, I suggest, are
7 entitled to know who interfered with those witnesses, at whose instigation, for what
8 reason. And I wish to reemphasise the importance for your Honours, if I may, of
9 paragraphs 92 to 95 of the second updated Prosecution pre-trial brief, of 26
10 August 2013, and take the assertions set out in those paragraphs into account in
11 determining whether the correct remedy really is to terminate this case.

12 Your Honours, the Defence has placed great weight on consent provided by the
13 accused. I wish to draw your Honours' attention to the conditionality of that consent.
14 Yesterday, at page 38 of the transcript, the Defence referred to consent being provided
15 for bank records, vehicle records, telephone records. Now, let's take those in order.

16 In respect of bank records and the letter of consent which was provided to us last night and
17 earlier on 10 September, there is repeated reference, and I don't believe I'm violating the
18 confidentiality of that letter, to relevant archived bank account records, relevant banks,
19 relevant material.

20 My learned friend, Mr Kay, said that he had provided consent to disclosure of three months of
21 bank records, this is yesterday at paragraph 39, quote: "... relevant to the case brought
22 against us, that was relevant to the evidence that was relied upon and not some other case."
23 Unquote.

24 Now, at the 9 July status conference at -- the Defence suggested that certain
25 information was not relevant to the case against Mr Kenyatta as, quote, "... it doesn't

1 feature in the pre-trial brief anywhere or the DCC ..." And I refer to passage and the
2 transcript of 9 July, at page 7, lines 13 to 24.

3 Now, it is clear from your Honours' decision of 29 July that your Honours' concept of
4 relevance of material in this case is different to the Defence's concept of relevance in
5 this case. Setting aside that, your Honours, for example, never suggested that
6 relevance depends on whether a particular subject features in the DCC or in the
7 pre-trial brief.

8 Now, on telephone records, it's clear from the filings made last night, that's filing 964,
9 by the Defence and from the Prosecution's submissions yesterday and today, that the
10 Prosecution has one number - one number - relating to Mr Kenyatta. It was not
11 provided by the Government of Kenya, nor by the Defence. There has been no
12 consent by the Defence to the delivery of any telephone number relating to
13 Mr Kenyatta or his close associates. I invite the Defence to correct me if I am wrong
14 on that.

15 The third category is vehicle records that are less controversial, perhaps. We see
16 from last night's filing that no consent has been provided by the Defence as it was
17 deemed unnecessary for the reasons set out therein.

18 In summary, there was no consent provided by the Defence for the disclosure of
19 telephone or vehicle records associated with Mr Kenyatta; there was consent for three
20 months' disclosure of banking records, but only for such records as the Defence
21 believed to be relevant. I invite your Honours to inquire further with the Defence as
22 to what it considers to be, quote, "relevant," unquote.

23 Mobile telephone data is at the heart of this case. It would certainly help to clarify
24 what Prosecution witnesses have been saying. The good thing about mobile
25 telephone data is that you can't bribe it and you can't intimidate it.

1 The Attorney-General has said repeatedly yesterday, at pages 7, 18, 46 suggestions
2 were made that there was no compulsory data capture prior to 2009.
3 Now, whether or not data was required by law to be captured prior to 2009 is not the
4 point. Whether it is still available is the point. Activities undertaken by the
5 Defence, as confirmed in last night's filing, to obtain cellphone and cell site data from
6 late 2007 and early 2008 confirm that such data is available and it can be obtained by
7 application to the High Court of Kenya.

8 Now, I wish to reserve the position of the victims in respect of the accuracy of
9 information provided by the Defence, but I do note that relevant information relating
10 to retention of 2007 and 2008 records does appear at page 7 of annex F to Defence
11 filing 878 of 13 January 2014 and it also appears in annex D to the filing made last
12 night.

13 I wish to reemphasise the critical importance of this category of evidence. If the
14 accused truly wished to clear his name in this case, he would have done whatever he
15 could to ensure that all cellphone and cell tower data from the period of the
16 post-election violence relating to him and his associates was disclosed as soon as
17 possible. This would be one of the fastest ways he could take action to clear his
18 name. He can still do so.

19 The time period for turnaround and disclosure of telephone data mentioned by the
20 Attorney-General yesterday at page 23 was 72 hours. I would hope that we can let
21 those 72 hours begin as soon as possible.

22 Your Honours, I was rewriting some of my submissions. I believe I've come to the
23 end, but I would again emphasise, your Honours, critical core of my submission is:

24 Is it really fair to force the victims to pay the price given what they have gone through?
25 They have lost mothers, fathers, brothers, sisters. They have been repeatedly raped.

1 They have been set alight. They have lost their small businesses in Naivasha and
2 Nakuru. They have received next to no compensation from the Government of
3 Kenya, and there is no accountability in the Kenyan courts. Is it really fair to force
4 them now to pay the price for obstruction of justice by Mr Kenyatta's government?
5 Thank you very much.

6 PRESIDING JUDGE OZAKI: Thank you, Mr Gaynor.

7 Mr Kay, you have 15 minutes.

8 MR KAY: Thank you, Madam President.

9 Well, everything I've heard in the last 30 minutes confirms my application in the
10 justice of an acquittal being entered on the record in this Court.

11 What you heard from the Prosecution was a scandalous misrepresentation of the quality of
12 their case as well as the reasons for not pursuing this case.

13 In our submission, that is the reason why in circumstances like this a man who is
14 innocent until proven guilty is entitled to have a record against him to show that
15 those who accused him failed to prove their case or have a case that they thought
16 worthy to bring before the Court.

17 If the quality of the Prosecution evidence was such as it claims to be, why didn't they
18 go to trial? They didn't go to trial because there were fundamental problems
19 throughout that case, not only the person who provided a number of those witnesses
20 cited this morning and his involvement in the proceedings that I cannot mention, but
21 the whole circumstances of evidence gathering as well as the production of evidence
22 through alleged witnesses was one that utterly failed to meet any acceptable
23 standards.

24 I'm not going to be diverted here though into discussing other matters, because the plain issue
25 before the Court is one of the future conduct of this case based upon the cooperation of the

1 Government of Kenya.

2 Have they in the intervening six months produced evidence upon which the

3 Prosecution can rely to go further with these proceedings? And what is troubling

4 here is that the Prosecution have ignored the plain answers to their questions which

5 they say could have helped them in the examination of their evidence to provide

6 some sort of case.

7 The company records that they seek, and I'm referring here to the tabulated list at

8 paragraph 15 of the filing that was made, 943, which is a useful ready reckoner of the

9 issues before this Court today. The company records that was simply answered

10 back that the information that they sought could not be supplied because of their

11 system. If the Prosecution wanted to know about a company, the system would be

12 name that company or the registration number.

13 Notwithstanding that, the company records of Kenya have been searched in relation

14 to specific districts that could well have been of interest to the case, and they provided

15 a negative result - a negative result - in relation to the areas considered for the

16 question asked by the Prosecution.

17 In our submission, this is a matter that this Court should properly take into account as

18 to the nature of the response, what was requested, whether it was able to be

19 performed and the answer that was given.

20 Land registry records, the search has been done in relation -- sorry, I've got this the

21 wrong way around. It was the land registry where they made certain checks, and I

22 take that matter back, and they could not find in the land registry districts the

23 particular information.

24 In relation to companies it was: "Supply us with the details so that we are aware of it."

25 In relation to tax returns, the letter that was supplied by the particular tax office was

1 this: "All records have been supplied. The data that you seek cannot be supplied.
2 We cannot fulfil your request."
3 In relation to vehicle registration records, the material aspect that could be complied
4 with was: Open-ended aspects such as the regular use of other cars that could have
5 provided some sort of evidence to the Prosecution, the office could not supply that
6 information.
7 In relation to the bank records, I supplied three months of relevant evidence in
8 relation to the accounts of the accused. That evidence was relevant to the points
9 raised by Mr Gumpert this afternoon as to his witnesses claiming certain facts.
10 There is no support in that evidence at all for the allegations that have been made by
11 those witnesses or any other witnesses.
12 The reason why further accounts are required, and I haven't supplied them of my
13 own volition, is that so-called comparative purposes are needed to assess the evidence
14 that was supplied. In my submission, that is a complete and utter smokescreen.
15 The evidence that you had countered the allegations that you made, and there is
16 nothing within that evidence that supported the Prosecution case.
17 Again, foreign exchange records, that request was complied with.
18 Telephone records, the Prosecution have known, as I demonstrated in the filing made last
19 night, for a long while, since we first went together to seek the telephone data records, that the
20 whole system was a numerically based system. That is why no names were supplied in
21 relation to that matter by their investigator, by their counsel in relation to the meetings that
22 took place with the telephone companies in Kenya. So the best evidence has been supplied.
23 And again, I am not going to supply further telephone numbers. I make that entirely clear.
24 And the reason is every time the Defence supply evidence, the Prosecution seek to go in
25 another direction, and I have drawn a line in relation to our personal cooperation for the

1 provision of evidence.

2 We got no credit in relation to the matters that we did supply. We got no credit for
3 the data that revealed their witnesses were not at the places they had claimed to be.
4 And that fact has not been acknowledged at any stage by the Prosecution.

5 We have undertaken a considerable amount of work over the last 15 months attributing
6 telephones to particular witnesses that proved they were not at those places he's claiming to
7 have been at in relation to the statements relied upon by the Prosecution.

8 So in our submission, I have drawn a line in the sand. I do not have to provide any
9 further evidence. We in many respects have not had trust in the Court and the
10 Prosecution. And I'm not saying that in an abusive way, but because when evidence
11 was produced by us that went to the integrity of key witnesses, we were ignored.
12 We weren't relied upon. Our evidence was just dismissed.

13 So for my part that has had a great influence on my conduct of this case on behalf of
14 my client. When we revealed at the confirmation hearing about Witness 12 and
15 Witness 11, who had come to us and sought money, all our criticisms there were
16 ignored. The witnesses were still relied upon. The witnesses ensured the
17 confirmation of charges, and those witnesses eventually were withdrawn, and those
18 witnesses have completely gone back on their statements.

19 When we informed the Court of the enormous contradictions in the statements of
20 Witness 4 as to the content of what he was saying, that was all ignored.

21 So for my part in relation to supplying evidence to this Court, we are used to being
22 regularly ignored. We provided three months of bank accounts and we have had no
23 acknowledgment that they do not support the Prosecution case. The fact of the
24 matter is, if there was anything in there that relied upon by the Prosecution to support
25 its case, it would have been relied upon.

1 And so we come to this: Has the intervening six months produced material and
2 evidence to satisfy the Prosecution's enquiries? In my submission, it has. And a
3 line is entitled to be drawn now under the conduct of this case against Mr Kenyatta.
4 He's entitled to his verdict of not guilty because this case has not been brought, there
5 are no further enquiries going on. It is plainly not the case that was brought against
6 him that can be sustained at all.

7 And so when I say there is no evidence, I say deliberately there is no evidence because
8 if there was evidence, we would have a trial.

9 Those are my submissions.

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

11 And that brings us to the end of the matters to be discussed today. We thank the
12 parties and participants, Mr Kenyatta, very much for their contributions, and I would
13 also thank the court officers, interpreters, court reporters, and all other courtroom
14 staff as well as other court staff outside the courtroom for their assistance.

15 The status conference is now closed and we will rise.

16 THE COURT USHER: All rise.

17 (The status conference ends in open session at 12.49 p.m.)