

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11
Date: 3 December 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Geoffrey Henderson

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

Public

Decision on Prosecution's application for a further adjournment

Decision to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

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Mr James Stewart

Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
Defence**

States Representatives

Mr Githu Muigai, SC, Attorney General
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Amicus Curiae

REGISTRY

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Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(B) ('Chamber')¹ of the International Criminal Court ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 21(3), 64 and 67 of the Rome Statute ('Statute'), Rule 134 of the Rules of Procedure and Evidence ('Rules') and Regulation 23(1) of the Regulations of the Court ('Regulations') renders the following 'Decision on Prosecution's application for a further adjournment'.

I. Procedural history

1. On 19 December 2013, the Office of the Prosecutor ('Prosecution') filed a request ('First Adjournment Request')² seeking, *inter alia*, an adjournment of the provisional trial date for three months in order to 'undertake additional investigative steps' in relation to its case against Mr Kenyatta and for the Chamber to convene a status conference.³
2. On 13 January 2014, the defence team for Mr Kenyatta ('Defence') filed a confidential response ('First Defence Termination Request'),⁴ seeking that the Chamber dismiss the First Adjournment Request and terminate the proceedings under Article 64(2) of the Statute on the grounds of insufficiency of evidence.⁵ On the same day, the Legal Representative of Victims ('LRV') also filed a response⁶ supporting the First Adjournment Request.⁷

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V(b) as composed by the Presidency's 'Decision replacing a Judge in Trial Chamber V(b)', 30 January 2014, ICC-01/09-02/11-890, and to the chamber in its previous compositions as Trial Chamber V(b) and Trial Chamber V.

² Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date, ICC-01/09-02/11-875.

³ First Adjournment Request, ICC-01/09-02/11-875, paras 3, 4, 23-25.

⁴ Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date", ICC-01/09-02/11-878-Conf. A public redacted version was notified on 24 January 2014 as ICC-01/09-02/11-878-Red.

⁵ First Defence Termination Request, ICC-01/09-02/11-878-Red, paras 5, 38 and 39.

⁶ Victims' response to Prosecution's application for an adjournment of the provisional trial date, ICC-01/09-02/11-879-Conf. A public redacted version was filed concurrently (ICC-01/09-02/11-879-Red).

⁷ ICC-01/09-02/11-879-Red, para. 1.

3. On 23 January 2014, the Chamber issued the 'Order vacating trial date of 5 February 2014, convening a status conference, and addressing other procedural matters'.⁸
4. Having been authorised to do so by the Chamber,⁹ the Prosecution filed a response to the First Defence Termination Request ('Second Adjournment Request',¹⁰ and together with the First Adjournment Request the 'Prosecution Requests'), seeking, *inter alia*, that the Chamber reject the Defence's request for a termination of the proceedings and adjourn the case until the Government of the Republic of Kenya ('Kenyan Government') complies with its cooperation obligations under the Statute.¹¹
5. The Chamber convened a status conference on 5 February 2014¹² to address, *inter alia*, the issues raised by the Prosecution Requests and First Defence Termination Request.¹³
6. Following leave having been granted by the Chamber,¹⁴ the Prosecution filed submissions on 10 February 2014 regarding the question of whether or not there should be a verdict of acquittal entered after any withdrawal of charges ('Prosecution's *Ne bis in idem* Submission').¹⁵
7. On 12 February 2014, having been granted leave by the Chamber pursuant to Rule 103 of the Rules,¹⁶ the Kenyan Government filed observations in relation to the Prosecution Requests ('Adjournment Observations')¹⁷ on the following matters: (i) the

⁸ ICC-01/09-02/11-886.

⁹ ICC-01/09-02/11-886, para. 8.

¹⁰ Prosecution opposition to the Defence request for the termination of the Kenyatta case, ICC-01/09-02/11-892.

¹¹ Second Adjournment Request, ICC-01/09-02/11-892, para. 3. The Prosecution subsequently clarified that the Second Adjournment Request is intended to supersede the First Adjournment Request, *see* Transcript of hearing on 5 February 2014, ICC-01/09-02/11-T-27-ENG ET.

¹² Scheduling order and agenda for status conference of 5 February 2014, 3 February 2014, ICC-01/09-02/11-893.

¹³ ICC-01/09-02/11-T-27-ENG ET.

¹⁴ ICC-01/09-02/11-T-27-ENG ET, page 67, lines 11-15.

¹⁵ Prosecution submissions on the *ne bis in idem* principle, ICC-01/09-02/11-899.

¹⁶ Decision granting the request of the Government of Kenya to submit observations as *amicus curiae*, 7 February 2014, ICC-01/09-02/11-898.

¹⁷ Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor's 'Notification of the Removal of a witness from the Prosecutor's Witness List and Application for an Adjournment of the

role of the President of Kenya in relation to other governmental bodies, in the context of cooperation with the Court; and (ii) the doctrine of separation of powers as enshrined in the Constitution of Kenya as well as the independence it grants to various governmental organs.¹⁸

8. On 17 February 2014, the LRV filed observations in support of the Prosecution's *Ne bis in idem* Submission.¹⁹ On the same day, the Defence filed a response to the Prosecution's *Ne bis in idem* Submission,²⁰ seeking a termination of the proceedings and the issuance of an acquittal pursuant to Article 64(6)(f) of the Statute.²¹
9. On 19 February 2014, the LRV filed a response to the Adjournment Observations.²²
10. On 31 March 2014, the Chamber issued a decision, *inter alia*, directing the Prosecution to submit a revised cooperation request to the Kenyan Government ('Revised Request'), adjourning the provisional trial commencement date to 7 October 2014 in order to facilitate execution of the request and rejecting the First Defence Termination Request ('Decision of 31 March 2014').²³
11. On 28 August 2014, the Chamber issued an order requiring the Prosecution to file a notice by 5 September 2014 indicating whether or not it anticipated being in a position to start trial on 7 October 2014.²⁴

Provisional Trial Date', ICC-01/09-02/11-901. The Adjournment Observations were filed confidentially but were subsequently reclassified as public on 13 February 2014 by an order of the Chamber (ICC-01/09-02/11-T-28-ENG ET, page 6, line 8 – page 7, line 4).

¹⁸ Adjournment Observations, ICC-01/09-02/11-901, para. 9. *See also* ICC-01/09-02/11-898, para. 11 and page 7.

¹⁹ Victims' observations on the *ne bis in idem* principle, ICC-01/09-02/11-902, para. 5.

²⁰ Defence Response to the 'Prosecution submissions on the *ne bis in idem* principle' (ICC-01/09-02/11-899), ICC-01/09-02/11-903.

²¹ ICC-01/09-02/11-903, paras 11 and 47.

²² Victims' Response to "Submissions of the Government of the Republic of Kenya as *Amicus Curiae* in Response to the Prosecutor's 'Notification of the Removal of a witness from the Prosecutor's Witness List and Application for an Adjournment of the Provisional Trial Date'", ICC-01/09-02/11-904. A corrigendum was filed on 20 February 2014, ICC-01/09-02/11-904-Corr.

²³ Decision on the Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date, ICC-01/09-02/11-908, para. 98 and page 46.

²⁴ Order requiring a notice in relation to the provisional trial commencement date, ICC-01/09-02/11-939.

12. On 5 September 2014, the Prosecution filed its notice ('Notice') indicating that it would not be in a position to proceed to trial on 7 October 2014, as the available evidence is still 'insufficient to prove Mr Uhuru Kenyatta's alleged criminal responsibility beyond reasonable doubt'.²⁵ The Prosecution requested that the case be further adjourned until the Kenyan Government fully executes the Revised Request ('Further Adjournment Request').²⁶
13. On 10 September 2014, the Defence filed the 'Defence Response to "Prosecution notice regarding the provisional trial date" (ICC-01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta'²⁷ ('Defence Response') in which it, *inter alia*, opposed the Further Adjournment Request and requested the Chamber to terminate the proceedings ('Second Termination Request').²⁸
14. On 10 September 2014, the LRV also filed a response to the Notice ('LRV Response').²⁹
15. On 11 September 2014, the LRV filed a request for leave to reply to the Defence Response in relation to the submissions of the Defence regarding the LRV's mandate and conduct.³⁰ The following day, the Defence requested leave to reply to the LRV Response, in particular to respond to the LRV's allegations concerning the accused and to make submissions on the LRV's role in the proceedings.³¹ On 17 September 2014, the Prosecution filed a request for leave to reply to the Defence Response.³² All three requests were rejected by the Chamber in a decision of 19 September 2014.³³

²⁵ Prosecution notice regarding the provisional trial date, ICC-01/09-02/11-944, paras 1-2.

²⁶ Notice, ICC-01/09-02/11-944, paras 4 and 6.

²⁷ ICC-01/09-02/11-945-Conf. A public redacted version was filed on the same day as ICC-01/09-02/11-945-Red.

²⁸ ICC-01/09-02/11-945-Red, para. 37.

²⁹ Victims' response to the Prosecution notice regarding the provisional trial date, ICC-01/09-02/11-946-Conf. A public redacted version was notified on the following day, 11 September 2014, as ICC-01/09-02/11-946-Red.

³⁰ Victims' request for leave to reply to the 'Defence Response to Prosecution notice regarding the provisional trial date and request to terminate the case against Mr Kenyatta', ICC-01/09-02/11-947.

³¹ Defence Request for Leave to Reply to the 'Victims' response to Prosecution notice regarding the provisional trial date' (ICC-01/09-02/11-946), ICC-01/09-02/11-949.

³² Request for leave to reply to Defence filing ICC-01/09-02/11-945-Red, ICC-01/09-02/11-952.

³³ Decision on three requests for leave to reply, ICC-01/09-02/11-953.

16. On 19 September 2014, the Chamber also issued an order, *inter alia*, vacating the trial commencement date of 7 October 2014 and scheduling status conferences for 7 and 8 October 2014.³⁴
17. During the status conference of 8 October 2014, both the Prosecution³⁵ and the LRV³⁶ requested the Chamber to indefinitely adjourn the proceedings. The Defence reiterated its request for the Chamber to terminate the proceedings.³⁷

II. Submissions

18. Although not summarised in this decision, the Chamber has also considered prior relevant submissions made in the context of the Decision of 31 March 2014.³⁸

Prosecution submissions

19. The Prosecution requests the Chamber to adjourn the case until the Kenyan Government complies with the Revised Request.³⁹ The Prosecution submits that ‘there is no middle way’; either the Chamber grants the indefinite adjournment requested or refuses any further adjournment, as ‘[a]ny other course will simply be ineffective’.⁴⁰
20. The Prosecution submits that from an ‘evidentiary standpoint’ the situation is the same as at the time of the First Adjournment Request, in December 2013, and that the

³⁴ Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, ICC-01/09-02/11-954.

³⁵ Transcript of the Status Conference on 8 October 2014, ICC-01/09-02/11-T-32-ENG, page 6, lines 18-21.

³⁶ ICC-01/09-02/11-T-32-ENG, page 19, lines 12-15.

³⁷ ICC-01/09-02/11-T-32-ENG, page 31, line 5; page 44, lines 9-10.

³⁸ See e.g. Decision of 31 March 2014, ICC-01/09-02/11-908, paras 8-15 and 53-75.

³⁹ Notice, ICC-01/09-02/11-944, para. 6; see also ICC-01/09-02/11-T-32-ENG, page 6, lines 16-17.

⁴⁰ ICC-01/09-02/11-T-32-ENG, page 34, lines 7-11. See also page 15, lines 5-15; page 16, lines 4-9.

evidence is 'insufficient to prove [Mr Kenyatta's] alleged criminal responsibility beyond reasonable doubt'.⁴¹

21. The Prosecution recognises that under 'ordinary circumstances' where there is insufficient evidence, the charges would be withdrawn. However, the Prosecution submits that the current situation is unique in that the Kenyan Government has failed to comply with the Court's requests for assistance, and thus potential lines of investigation have been thwarted.⁴² The Prosecution states that only a 'fraction of the information sought' in the Revised Request has been delivered by the Kenyan Government.⁴³
22. The Prosecution further argues that under the Kenyan Constitution, the Head of State is responsible for compliance with international obligations; Mr Kenyatta is therefore ultimately responsible for the Kenyan Government's failure to cooperate with the Court.⁴⁴
23. The Prosecution rejects that there has been any undue delay on its part, noting that the original cooperation request was issued two and a half years ago.⁴⁵ As a 'supplementary argument', the Prosecution submits that since 2013 the accused has been 'constitutionally responsible' for ensuring the compliance of the Kenyan Government with its international obligations and it would therefore 'lie ill in his mouth' to raise grounds of unfairness in the context of the impact of the cooperation request on the trial.⁴⁶

⁴¹ Notice, ICC-01/09-02/11-944, para. 2.

⁴² Notice, ICC-01/09-02/11-944, para. 3; ICC-01/09-02/11-T-32-ENG, page 9, lines 17-22.

⁴³ Notice, ICC-01/09-02/11-944, para. 5.

⁴⁴ Notice, ICC-01/09-02/11-944, para. 6; ICC-01/09-02/11-T-32-ENG, page 10, lines 6-11. During the Status Conference of 8 October 2014, the Prosecution stated that it is not alleging that Mr Kenyatta has deliberately interfered with the investigation as it has no evidence to support such an allegation, ICC-01/09-02/11-T-32-ENG, page 8, lines 14-17.

⁴⁵ ICC-01/09-02/11-T-32-ENG, page 8, lines 21-24.

⁴⁶ ICC-01/09-02/11-T-32-ENG, page 8, line 25 - page 9, line 8.

24. The Prosecution submits that under these circumstances it would be inappropriate to withdraw the charges,⁴⁷ and that to do so would also undermine the Chamber's Decision of 31 March 2014.⁴⁸ During the Status Conference of 8 October 2014, the Prosecution referred to the Court's 'power to regulate its own proceedings' while taking into account 'the interests of justice' and the principle of 'fairness to the parties' to support the Further Adjournment Request.⁴⁹ The Prosecution submits that the 'exceptional circumstances' of the present case make an indefinite adjournment appropriate.⁵⁰
25. It further submits that there is 'a very great interest' in 'making it plain' that obstruction in investigations will not bring proceedings to an end.⁵¹ It argues that this is particularly the case in the current circumstances where the accused is the Head of the State whose cooperation is at issue.⁵² The Prosecution also responded to the Defence's allegation that it has 'no case', highlighting that '[t]here remains a considerable body of evidence that implicates Mr Kenyatta'⁵³ and that 'raise uncomfortable suspicions', which the Prosecution has been prevented from investigating because of 'non-cooperation by the Government of Kenya'.⁵⁴ For these reasons the Prosecution requests the Chamber to adjourn the proceedings indefinitely, until the Kenyan Government executes the Revised Request 'in full'.⁵⁵

⁴⁷ Notice, ICC-01/09-02/11-944, para. 3; ICC-01/09-02/11-T-32-ENG, page 5, lines 2-5.

⁴⁸ Notice, ICC-01/09-02/11-944, para. 6.

⁴⁹ ICC-01/09-02/11-T-32-ENG, page 7, lines 6-7; *see also* ICC-01/09-02/11-T-32-ENG, page 9, line 15; page 14, lines 17-20; page 15, lines 7-10; and page 34, lines 14-16. *See also* ICC-01/09-02/11-T-32-ENG, page 28, lines 3-14 (where the Prosecution invokes the provisions of Article 64(6)(f) of the Statute in the context of the Chamber's authority to grant the requested adjournment).

⁵⁰ *See generally* ICC-01/09-02/11-T-32-ENG, page 7, line 11 – page 8, line 1.

⁵¹ ICC-01/09-02/11-T-32-ENG, page 9, lines 17-25; page 13, line 17 – page 14, line 4.

⁵² ICC-01/09-02/11-T-32-ENG, page 10, lines 1-11.

⁵³ ICC-01/09-02/11-T-32-ENG, page 34, lines 17-21. *See also* page 35, line 6 – page 38, line 17.

⁵⁴ ICC-01/09-02/11-T-32-ENG, page 37, lines 17-21.

⁵⁵ Notice, ICC-01/09-02/11-944, para. 6.

26. However, the Prosecution submits that if the case were to be 'withdrawn and thus terminated' it should be 'without prejudice to the bringing of any further proceedings on precisely the same subject matter'.⁵⁶

*Defence submissions*⁵⁷

27. The Defence requests the Chamber to deny the Further Adjournment Request, terminate the proceedings and issue 'a final determination of the charges' against Mr Kenyatta.⁵⁸
28. The Defence submits that the Chamber should reject the Further Adjournment Request on the basis, *inter alia*, of Mr Kenyatta's fair trial rights under Article 67 of the Statute, the length of time the Prosecution has already spent on the investigation, the 'dilatory manner' in which the Prosecution has collected and assessed evidence, the inadequate efforts the Prosecution has made to obtain evidence from the Kenyan Government, and the 'voluntary disclosure' made by the Defence in this case.⁵⁹
29. The Defence submits that the accused's fair trial rights have been 'subordinated in the process of the Prosecution seeking to divert blame to the [Kenyan Government] for the failure of its case'.⁶⁰ According to the Defence, the Prosecution has followed

⁵⁶ ICC-01/09-02/11-T-32-ENG, page 26, lines 18-20.

⁵⁷ As indicated during the status conference on 8 October 2014 (*see* ICC-01/09-02/11-T-32-ENG, page 22, lines 16-23), the Chamber was concerned to note that the public redacted version of the Defence Response contains references to confidential material (*see e.g.* Defence Response, ICC-01/09-02/11-945-Red, para. 22, referring to ICC-01/09-02/11-822 without distinguishing between confidential and public information contained in that earlier filing). Moreover, the Chamber noted that certain of the allegations repeated in para. 22 of the Defence Response have previously been ruled upon by the Chamber and found to be unsubstantiated (*see* Decision on Defence application for a permanent stay of proceedings due to abuse of process, ICC-01/09-02/11-868-Red, paras 40 and 51). The Chamber therefore considered their unqualified repetition in the Defence Response to be inappropriate. The Chamber additionally recalls that the Defence has been previously warned regarding its handling of confidential information in this case (*see* ICC-01/09-02/11-868-Red, paras 55 and 100).

⁵⁸ Defence Response, ICC-01/09-02/11-945-Red, para. 37; ICC-01/09-02/11-T-32-ENG, page 28, lines 16-19. *See also* ICC-01/09-02/11-T-32-ENG, page 30, line 11 - page 31, line 6; page 44, lines 9-10.

⁵⁹ Defence Response, ICC-01/09-02/11-945-Red, para. 30. *See also* paras 19, 24 and 33.

⁶⁰ Defence Response, ICC-01/09-02/11-945-Red, para.18; ICC-01/09-02/11-T-32-ENG, page 23, line 23 - page 24, line 1.

‘misguided preconceptions’, which tainted the investigation from the beginning⁶¹ and has ‘failed to conduct its investigations and handle its witnesses’ properly, in accordance with its obligations under Article 54 of the Statute.⁶² The Defence submits that it has ‘repeatedly’ presented ‘grave concerns in relation to the lack of veracity and unreliability’ of certain Prosecution witnesses.⁶³ The Defence also contends that the provided financial records of Mr Kenyatta from December 2007 to February 2008 ‘undermine the Prosecution’s case’, showing that ‘Mr Kenyatta was not involved in the post-election violence’.⁶⁴ Consequently, the Defence argues that the Prosecution has ‘failed to present any case against the Accused’ despite the additional time granted by the Chamber for post-confirmation investigations.⁶⁵ Pointing to certain investigative actions that have been successfully taken by the Prosecution, the Defence submits that it is ‘disingenuous’ for the Prosecution to claim that it has faced ‘insurmountable investigative difficulties in Kenya’,⁶⁶ and that it had ‘failed to put in place an effective mechanism to collect the material it now demands from the Government of Kenya’.⁶⁷

30. Moreover, the Defence argues that the Prosecution should not be permitted to refer responsibility to the Kenyan Government for the provision of ‘broad categories of evidence’.⁶⁸ It submits that the Prosecution’s allegation that Mr Kenyatta is responsible for the Kenyan Government’s failure to cooperate is ‘flawed and without

⁶¹ Defence Response, ICC-01/09-02/11-945-Red, para. 20.

⁶² Defence Response, ICC-01/09-02/11-945-Red, paras 20 and 22-23. *See also* ICC-01/09-02/11-T-32-ENG, page 44, lines 18-23.

⁶³ Defence Response, ICC-01/09-02/11-945-Red, para. 21. *See also* paras 19, 26 and 33 (in relation to actions taken by the accused which the Defence submits ‘demonstrated [Mr Kenyatta’s] innocence’) and ICC-01/09-02/11-T-32-ENG, page 24, lines 3-5; page 46, line 23 – page 47, line 23.

⁶⁴ Defence Response, ICC-01/09-02/11-945-Red, para. 21; ICC-01/09-02/11-T-32-ENG, page 46, lines 7-16.

⁶⁵ Defence Response, ICC-01/09-02/11-945-Red, para. 22.

⁶⁶ Defence Response, ICC-01/09-02/11-945-Red, para. 24.

⁶⁷ Defence Response, ICC-01/09-02/11-945-Red, para. 24.

⁶⁸ Defence Response, ICC-01/09-02/11-945-Red, para. 25.

merit’.⁶⁹ The Defence submits that the accused’s position as Head of State ‘is only material if there is evidence that he has done something wrong’.⁷⁰

31. In addition, the Defence submits that a further adjournment would violate the fair trial rights of the accused, especially his right to be ‘tried without undue delay or to have the current case against him terminated on the basis of [the] concession of insufficient Prosecution evidence’.⁷¹
32. In support of its submission that a verdict of acquittal should be entered, the Defence argues that it ‘happens regularly [...] in the common law world’ in circumstances where the prosecuting body is unable to present evidence.⁷² The Defence submits that it would be an ‘affront to common sense’, and to justice, for an acquittal not to be entered because the first day of the trial did not take place.⁷³
33. Finally, the Defence submits that the conduct of the LRV, in particular the ‘potentially harmful public comments and accusations’, is ‘unacceptable’⁷⁴ and has caused further ‘unfairness to the Accused’.⁷⁵

LRV’s submissions

34. The LRV supports the Prosecution’s request for an adjournment until the Kenyan Government complies with the Revised Request and submits that if the Chamber were to terminate the case before the requested evidence is provided, this would be

⁶⁹ Defence Response, ICC-01/09-02/11-945-Red, para. 26.

⁷⁰ ICC-01/09-02/11-T-32-ENG, page 24, lines 5-7.

⁷¹ Defence Response, ICC-01/09-02/11-945-Red, paras 29 and 31. *But see* ICC-01/09-02/11-T-32-ENG, page 23, lines 4-11 (where the Defence appeared to challenge whether there had been unjustified delay in the proceedings).

⁷² ICC-01/09-02/11-T-32-ENG, page 29, lines 14-21.

⁷³ ICC-01/09-02/11-T-32-ENG, page 28, line 20 – page 29, line 9; page 44, lines 13-16.

⁷⁴ Defence Response, ICC-01/09-02/11-945-Red, para. 33.

⁷⁵ Defence Response, ICC-01/09-02/11-945-Red, para. 32. *See generally* paras 32-35.

‘premature, inconsistent with the Trial Chamber’s decisions, and tantamount to rewarding the [Kenyan] Government for its systematic [refusal to cooperate]’.⁷⁶

35. First, the LRV submits that, despite the Prosecution’s ‘reasonable efforts’, the Kenyan Government’s ‘ongoing inaction constitutes deliberate interference [...] with the collection of evidence’⁷⁷ and is consistent with, what the LRV alleges is, the accused’s campaign to bring the case to an end.⁷⁸ The LRV argues that the failure to cooperate by the Kenyan Government withheld evidence necessary to the Chamber’s determination of the truth and frustrates the ‘right to the truth’ of the victims’.⁷⁹
36. The LRV highlights both the *de jure* and *de facto* power of the accused in arguing that Mr Kenyatta has responsibility for the compliance by the Kenyan Government with the outstanding cooperation requests.⁸⁰ Consequently, the LRV submits that the accused’s conduct amounts to ‘interference with the collection of evidence’⁸¹ and that he should be warned of his liability for arrest for violation of the summons conditions’,⁸² as well as under Article 70 of the Statute, which relates to offences against the administration of justice.⁸³
37. The LRV submits that terminating the case in these circumstances would set a dangerous precedent, damaging ‘the [Court]’s credibility and deterrent effect.’⁸⁴

⁷⁶ LRV Response, ICC-01/09-02/11-946-Red, para. 67. *See also* paras 1 and 4; ICC-01/09-02/11-T-32-ENG, page 40, lines 22-25.

⁷⁷ LRV Response, ICC-01/09-02/11-946-Red, paras 23 – 25.

⁷⁸ LRV Response, ICC-01/09-02/11-946-Red, paras 25-31; *see also* ICC-01/09-02/11-T-32-ENG, page 39, line 25 – page 40, line 1; page 39, line 17- page 40, line 1.

⁷⁹ LRV Response, ICC-01/09-02/11-946-Red, para. 20.

⁸⁰ LRV Response, ICC-01/09-02/11-946-Red, paras 5, 32 – 39, 43 and 53; *see also* ICC-01/09-02/11-T-32-ENG, page 17, lines 16-17.

⁸¹ LRV Response, ICC-01/09-02/11-946-Red, paras 42, 44 and 46; ICC-01/09-02/11-T-32-ENG, page 17, lines 9-14; page 18, lines 9-17.

⁸² LRV Response, ICC-01/09-02/11-946-Red, paras 1 and 47-48.

⁸³ LRV Response, ICC-01/09-02/11-946-Red, paras 1 and 44.

⁸⁴ LRV Response, ICC-01/09-02/11-946-Red, para. 4.

38. The LRV submits that an accused's right to be tried without undue delay must be assessed 'in light of the accused's conduct'.⁸⁵ He argues that as Mr Kenyatta has 'deliberately and unlawfully delayed the Prosecution's access to evidence',⁸⁶ he has knowingly waived his right to trial without undue delay.⁸⁷ The LRV further refers to jurisprudence referenced in the Decision of 31 March 2014 in which Trial Chambers at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda granted indefinite adjournments, including pending action by a State in circumstances where the accused was not the Head of the State in question⁸⁸ and in circumstances where witness intimidation impacted the integrity of the proceedings.⁸⁹
39. In addition, the LRV submits that termination would be unjust to the victims of the 2007-2008 post-election violence in this case, as it would mean the 'complete destruction of justice' for them and 'effective impunity' for those involved in post-election violence crimes.⁹⁰ The LRV states that '[i]f there was a substantial likelihood' of the investigation against the accused being re-opened following withdrawal of charges, there would be 'merit' in the charges being withdrawn at this stage. However without that assurance, the LRV submits that a further adjournment is preferable from the victims' perspective.⁹¹

⁸⁵ LRV Response, ICC-01/09-02/11-946-Red, para. 50; ICC-01/09-02/11-T-32-ENG, page 40, lines 4-8.

⁸⁶ LRV Response, ICC-01/09-02/11-946-Red, para. 53. *See also* para. 51.

⁸⁷ LRV Response, ICC-01/09-02/11-946-Red, paras 50 – 51 and 53; *see also* ICC-01/09-02/11-T-32-ENG, page 20, lines 7 – 25; page 39, lines 1-8.

⁸⁸ ICC-01/09-02/11-T-32-ENG, page 19, lines 3-11; page 19, line 21 – page 20, line 1. It is noted that the relevant footnote in the Decision of 31 March 2014, ICC-01/09-02/11-908, is footnote 184 (rather than 183 as mentioned in the transcript).

⁸⁹ ICC-01/09-02/11-T-32-ENG, page 39, lines 9-16.

⁹⁰ LRV Response, ICC-01/09-02/11-946-Red, para. 4 and paras 54 – 61; *see also* ICC-01/09-02/11-T-32-ENG, page 22, lines 13-14; page 40, lines 18-19; and page 43, line 24.

⁹¹ ICC-01/09-02/11-T-32-ENG, page 21, line 21 – page 22, line 12. *See also* page 40, lines 22-25.

40. Finally, the LRV attached by way of annex a 'representative sample' of the individual views of 22 victims on the principal issues currently before the Chamber.⁹²

III. Analysis

41. As a preliminary matter, the Chamber considers the submissions of the Prosecution and Defence to lack sufficient reasoning regarding the legal basis for the remedies being sought.⁹³ Given the seriousness of the remedies requested, it should have been incumbent upon the parties to thoroughly support those requests, by reference not just to the factual circumstances but also to applicable legal standards, principles and authorities.⁹⁴
42. While both parties have sought to rely upon the exceptionality or uniqueness of the present circumstances,⁹⁵ the Chamber considers that this does not obviate the need for grounding the requests on a clear legal basis. Moreover, although the cumulative confluence of factual circumstances in this case may indeed be exceptional, the Chamber observes that situations in which trial proceedings or investigations have been frustrated by the actions of a third party, or where the evidence at the disposal of the Prosecution has fallen below the requisite standard prior to trial, or where

⁹² ICC-01/09-02/11-946-Anx.

⁹³ The Chamber had previously noted the lack of legal basis presented by the Prosecution in respect of its Second Adjournment Request (*see* Decision of 31 March 2014, ICC-01/09-02/11-908, para. 76). The Notice again provided no legal basis. The submissions of the Prosecution, when directly asked by the Chamber to provide a specific legal basis or relevant jurisprudence, are summarised in the submissions section above. Similarly, in respect of the Defence and as discussed in further detail below, the Chamber had indicated in the Decision of 31 March 2014 that it considered the standard applicable to the First Defence Termination Request to be akin to that required for an unconditional stay of proceedings (*see* Decision of 31 March 2014, ICC-01/09-02/11-908, para. 79). Yet, the Defence submissions did not clearly address this standard, its applicability, or how it has been met in the present case, even when specifically given the opportunity to comment on any distinctions between a termination and a permanent stay of proceedings by the Chamber (*see* ICC-01/09-02/11-T-32-ENG, page 25, line 4 – page 26, line 3).

⁹⁴ *See e.g.* Regulation 23(1)(d) of the Regulations requiring '[a]ll relevant legal and factual issues' to be addressed.

⁹⁵ *See e.g.* in respect of the Prosecution (ICC-01/09-02/11-T-32-ENG, page 7, line 11 – page 8, line 1; page 11, line 23 – page 12, line 3) and in respect of the Defence (Defence Response, ICC-01/09-02/11-945-Red, para. 31).

delay or obstruction of proceedings may be attributed to an accused - each of which are either admissions or allegations in the present case - are not unprecedented.⁹⁶

Further Adjournment Request

43. In respect of the applicable law, the Chamber incorporates by reference its findings from the Decision of 31 March 2014.⁹⁷ In particular, the Chamber recalls that: (i) an adjournment 'is a discretionary remedy arising from the Chamber's responsibility to control the conduct of the proceedings in a fair and expeditious manner';⁹⁸ (ii) the Chamber's determination will be based on a 'weighing of the interests of justice in this case, including the rights of the accused and the interests of victims';⁹⁹ and (iii) any further adjournment must be compatible with the Chamber's obligations under Articles 64(2) and 67 of the Statute, as well as its obligation under Article 21(3) of the Statute to interpret and apply the law in a manner consistent with internationally recognised human rights.¹⁰⁰
44. As an initial matter, the Chamber has noted the concerns of the Prosecution and LRV regarding the potential precedential impact of not granting a further adjournment in this case. The Chamber is fully cognisant that impeding access to evidence, including on the part of States Parties, must not be permitted to be considered as a viable policy to frustrate prosecutions before the Court. However, those interests have to be (i) considered in the particular context of this case; and (ii) balanced against other interests of justice, including the rights of the accused and the integrity of the proceedings.

⁹⁶ The Chamber, for example, identified certain relevant jurisprudence in respect of the first of those matters in its Decision of 31 March 2014 (*see e.g.* Decision of 31 March 2014, ICC-01/09-02/11-908, para. 77 and footnotes therein). In addition to referencing some of this jurisprudence, the LRV made submissions on additional jurisprudence potentially relevant to the principles at issue (*see e.g.* LRV Response, ICC-01/09-02/11-946-Red, footnote 20 and para. 50; ICC-01/09-02/11-T-32-ENG, page 19, line 3 – page 21, line 6; page 38, line 22 – page 39, line 17).

⁹⁷ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 76-81.

⁹⁸ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 76.

⁹⁹ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 78.

¹⁰⁰ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 80.

45. The Chamber recalls that in its Decision of 31 March 2014, having given careful consideration to relevant factors in weighing the interests of justice, it found that a 'strictly limited opportunity' to pursue further investigations was justified at that stage.¹⁰¹ This conclusion was premised on a finding that there had been certain 'unique circumstances, beyond the Prosecution's control, which contributed to a loss of evidence' in the case.¹⁰² However, such a finding does not provide a basis for open-ended investigations.
46. Indeed, the Chamber further recalls that, while it ultimately granted a further adjournment in its Decision of 31 March 2014, it noted with concern a number of factors which were not favourable to doing so at that time.¹⁰³ These included, in particular: the Prosecution's admission as to the insufficiency of the then available evidence, as well as the speculative prospect of obtaining further relevant evidence to support the charges;¹⁰⁴ and the 'timeliness and thoroughness of Prosecution investigations in this case'.¹⁰⁵
47. Those matters remain highly relevant to the present determination. Regarding the first of them, the Chamber notes that, despite the passage of almost a year – including the six month adjournment period granted by the Chamber – the Prosecution has stated that the evidentiary position remains as it was in December 2013, being insufficient to prove the accused's guilt beyond reasonable doubt. Moreover, the Prosecution has conceded that it remains speculative whether the information sought

¹⁰¹ See e.g. Decision of 31 March 2014, ICC-01/09-02/11-908, paras 95 and 98.

¹⁰² Decision of 31 March 2014, ICC-01/09-02/11-908, para. 95.

¹⁰³ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 80-89.

¹⁰⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 81-84.

¹⁰⁵ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 85 and 87-88.

in the Revised Request would, even if obtained, be sufficient to support the charges.¹⁰⁶

48. It remains the case that certain of the categories of material sought in the Revised Request are of potential relevance to central allegations in the Prosecution's case. The Chamber also recognises that, without access to the material sought in the Revised Request, the Prosecution is necessarily in a position of having to speculate regarding its content. However, noting the presumption of innocence to which the accused is entitled, in this case the Chamber considers the Revised Request is a speculative basis upon which to indefinitely adjourn the proceedings.¹⁰⁷
49. Ordinarily, granting an adjournment would be premised upon an expectation that a fair trial could subsequently ensue. Indeed, the basis for granting an adjournment would often be to ensure that was the case. The current circumstances are different. It is apparent that the Prosecution does not have any concrete prospect of obtaining evidence sufficient to meet the standard required for trial and to sustain the current charges. In the Chamber's view, such circumstances should now weigh compellingly in favour of not further prolonging these proceedings.
50. In this context, the Chamber re-emphasises that the onus is on the Prosecution to present a case ready for trial, and as previously indicated, the Chamber considers that the Prosecution has had ample time in which to do so.¹⁰⁸ In respect of the timeliness of investigations, the Chamber notes that investigations in the Kenya situation have

¹⁰⁶ Transcript of hearing dated 7 October 2014, ICC-01/09-02/11-T-31-CONF-ENG, page 12, lines 1-9 and 19; page 13, lines 3-4. *See also* ICC-01/09-02/11-T-32-ENG, page 14, lines 15-17 and page 15, lines 5-15.

¹⁰⁷ In this context the Chamber notes the jurisprudence of Trial Chamber IV, albeit in the context of a request for a temporary stay of proceedings, where it was held that a requesting party should establish that the 'unavailable' information is: (i) 'relevant to the contested issues' at trial and thus relates to the 'heart of the case'; and (ii) identified with 'sufficient specificity', rather than constituting 'vague speculations that lost documents or unavailable witnesses' may assist the case, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Trial Chamber IV, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, paras 92-93 and 95.

¹⁰⁸ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 87-88.

been ongoing for almost five years¹⁰⁹ and proceedings in this case for well over three years.¹¹⁰ Although the fact that the accused is not in detention is a relevant mitigating factor, it cannot be determinative in considering whether or not an accused's right to be tried without undue delay may be compromised. It is necessary to also give careful consideration, *inter alia*, to the conduct of the parties including, in particular, the diligence of the prosecuting authority.¹¹¹

51. In this case, the Prosecution rejects any suggestion of undue delay on its part on the basis that the original cooperation request to the Kenyan Government was made in April 2012. The Chamber recalls that it found there to have been a 'substantial unexplained delay' on the part of the Kenyan Government in respect of the Records Request,¹¹² and that the Prosecution's access to the material in question had been 'unjustifiably frustrated'.¹¹³ Nonetheless, the Chamber also recalls its finding that there had been a delay on the part of the Prosecution in effectively pursuing that request, which has not been adequately explained.¹¹⁴ Moreover, the Chamber notes that it was only in the Second Adjournment Request, and after other investigative avenues proved fruitless, that the Prosecution sought to make the future direction of the proceedings in this case explicitly dependent upon the Kenyan Government's compliance with outstanding cooperation requests. Had the Prosecution genuinely considered such compliance to be so central to establishing the charges in this case,

¹⁰⁹ Decision Assigning the Situation in Kenya to Pre-Trial Chamber II, 6 November 2009, ICC-01/09-1.

¹¹⁰ Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-1.

¹¹¹ See e.g. Human Rights Committee, General Comment No. 32, 23 August 2007, para. 35; European Court of Human Rights, Fifth Section, *Kiryakov v Ukraine*, 12 January 2012, Application no. 26124/03, para. 64 ('repeated remittals of a case for re-investigation and prolonged failure of the authorities to produce to the court a case ready for trial may be indicative of a serious deficiency in the operation of the criminal justice machinery'); European Court of Human Rights, *McFarlane v Ireland*, Grand Chamber, 10 September 2010, Application no. 31333/06, paras 147-156; European Court of Human Rights, Fifth Section, *Benyaminson v Ukraine*, 26 July 2007, Application no. 31585/02, paras 104-106.

¹¹² Decision of 31 March 2014, ICC-01/09-02/11-908, para. 51.

¹¹³ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 98.

¹¹⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 83.

the Chamber would have expected the matter to be vigorously pursued at a much earlier stage.

52. More generally, the Chamber also recalls its findings regarding the failure on the part of the Prosecution to take appropriate steps to verify the credibility and reliability of evidence on which it intended to rely at trial,¹¹⁵ being, in the Chamber's view, the 'direct reason' for the Prosecution's evidence falling below the required standard at such a late stage.¹¹⁶
53. It has also been submitted that the alleged non-compliance or 'obstruction' on the part of the Kenyan Government can be attributed to Mr Kenyatta, and that the requested adjournment would therefore not be contrary to the rights of the accused. First, to the extent that this submission is directed towards alleging that there has been deliberate interference by Mr Kenyatta, the Chamber notes that no substantiation for such an allegation has been provided.¹¹⁷ Indeed, the Prosecution has conceded that it has no evidence to support such an allegation.¹¹⁸ As the Chamber has previously indicated, should there be substantiation for such an allegation it would most appropriately be addressed through proceedings under Article 70 of the Statute.¹¹⁹ Second, to the extent that the submission is premised simply on Mr Kenyatta's political influence¹²⁰ and constitutional functions as Head of State, the Chamber considers that this might be a valid factor worthy of serious consideration in circumstances where it had been established that there is a realistic prospect of sufficient, concrete evidence being secured. However, as discussed above, this is not the situation in the present case.

¹¹⁵ Decision of 31 March 2014, ICC-01/09-02/11-908, paras 87-88.

¹¹⁶ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 90.

¹¹⁷ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 86.

¹¹⁸ ICC-01/09-02/11-T-32-ENG, page 8, lines 14-17.

¹¹⁹ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 86.

¹²⁰ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 94.

54. Even in the absence of such a direct bearing having been established, the Chamber has reflected upon whether, in the context of these proceedings where the degree of compliance of the Kenyan Government with the Court is in issue, Mr Kenyatta's status, as head of that State, nonetheless warrants granting the Further Adjournment Request. However, in the particular circumstances of this case, noting especially the concerns identified above regarding the timeliness and thoroughness of Prosecution investigations, the Chamber has not found that to be the case.
55. The Chamber has also carefully considered the detrimental impact that a decision not to grant a further adjournment is likely to have on the interests of the victims in the case, in particular, in light of the length of time which has already passed since the post-election violence occurred. Throughout the proceedings the Chamber has noted with concern the situation of the victims as reflected by the LRV in the periodic reports to the Chamber.¹²¹ However, the Chamber notes that, in the context of criminal proceedings, the interests of victims must be balanced with other interests of justice. While the victims' legitimate interests include seeing those responsible for the crimes committed being held accountable, the Chamber does not consider that, in light of the presumption of innocence, it would be in the interests of justice, or the interests of the victims, for the current proceedings to be continued on the speculative basis which has been presented.
56. The Chamber additionally notes that it considers that a refusal to grant a further adjournment in this case does not prejudice the right of the Prosecution to bring new charges against the accused at a later date, based on the same or similar factual circumstances, should it obtain sufficient evidence to support such a course of action. In that regard, the Chamber finds that in circumstances where the Prosecution

¹²¹ See most recently Twelfth Periodic Report on the general situation of victims in the case and the activities of the Victims Participation and Reparations Section and the Common Legal Representative in the field, 21 November 2014, ICC-01/09-02/11-978.

withdraws charges prior to the commencement of trial the principle of *ne bis in idem* would not attach.¹²² In reaching this finding, the Chamber has been guided, *inter alia*, by the fact that there is no support in the statutory framework for the entering of a verdict of conviction or acquittal prior to the commencement of trial. On the contrary, the Statute expressly provides that charges which a Pre-Trial Chamber has declined to confirm may be brought again for confirmation, if supported by additional evidence.¹²³ Despite submitting that the entering of an acquittal in circumstances akin to the present ‘happens regularly [...] in the common law world’,¹²⁴ the Defence has submitted no specific authority for its assertion. Noting differing domestic practice with respect to triggering of the *ne bis in idem* principle, the Chamber does not consider that a general principle of law, within the meaning of Article 21(1)(c) of the Statute, can be derived in this respect.

57. It is noted that most of the factors discussed above were already expressly within the contemplation of the Chamber at the time of the Decision of 31 March 2014 when it determined that only a strictly limited, fixed term adjournment, was appropriate. That adjournment period having been exhausted, and the interests of justice having been assessed anew in light of the current circumstances, the Chamber does not consider it appropriate to further adjourn the proceedings in this case.

Second Termination Request

58. In respect of the Second Termination Request, the Chamber notes that there is no express provision in the Statute which would permit termination of the case. However, the Chamber recalls its finding that the applicable standard for a termination would be that relevant to a permanent or unconditional stay of

¹²² See Article 20(1) of the Statute which provides that a person shall not be tried before the Court with respect to conduct ‘which formed the basis of crimes for which the person has been acquitted or convicted by the Court’.

¹²³ Article 61(8) of the Statute.

¹²⁴ ICC-01/09-02/11-T-32-ENG, page 29, lines 14-21.

proceedings.¹²⁵ That standard has been previously set out in the Chamber's jurisprudence and is incorporated herein by reference.¹²⁶ In particular, it is recalled that a stay of proceedings is an 'exceptional remedy to be applied as a last resort' but is available where it would be 'odious or repugnant to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible'.¹²⁷ Further, and as also noted in the Decision of 31 March 2014,¹²⁸ a stay of proceedings is a discretionary remedy in which the Chamber enjoys a 'margin of appreciation, based on its intimate understanding of the process thus far, as to whether and when the threshold meriting a stay of proceedings has been reached'.¹²⁹

59. The Chamber notes that, in practical terms and in the circumstances of this case, its decision to deny the Further Adjournment Request is likely to have the consequence of ending the proceedings.
60. However, the Defence appears to have requested the Chamber to terminate the proceedings at this point, and the Chamber will therefore turn to a consideration of the Second Termination Request. In this context, the Chamber notes a lack of clarity in the Defence's submissions regarding how, and on what standard, it envisages the requested termination occurring. As noted above,¹³⁰ despite the Chamber having indicated in the Decision of 31 March 2014 that it considered the legal standard

¹²⁵ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 79.

¹²⁶ Decision on Defence application for a permanent stay of the proceedings due to abuse of process, 5 December 2013, ICC-01/09-02/11-868-Red, para. 14.

¹²⁷ ICC-01/09-02/11-868-Red, para. 14.

¹²⁸ Decision of 31 March 2014, ICC-01/09-02/11-908, footnote 187.

¹²⁹ *Prosecutor v Lubanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486 (OA 13), para. 84. *See also Prosecutor v Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA 4) para. 28.

¹³⁰ *See* footnote 93.

applicable to a 'permanent stay of proceedings' to be relevant to the First Termination Request, in bringing the Second Termination Request the Defence made no specific submissions regarding the applicability of that standard or how it has been met in the present case.¹³¹ Moreover, the Chamber notes that, during the status conference on 8 October 2014, the Defence described quite a different procedural sequence of events 'that happens very, very regularly in criminal procedures' whereby a requested adjournment is denied, the prosecuting body fails or refuses to present evidence, but seemingly does not withdraw the charges, and a case is consequently dismissed.¹³²

61. Having denied the Further Adjournment Request it might ordinarily be appropriate to set a new date for trial. However, in the Chamber's view, and as previously indicated,¹³³ it would be contrary to the interests of justice for the Prosecution to proceed to trial in circumstances where it believes it will not be in a position to present evidence sufficient to prove the guilt of the accused beyond reasonable doubt. The Chamber notes that the insufficiency of the current evidence is a matter of admission on the part of the Prosecution, rather than being something that the Chamber is in a position to take an independent view on at this stage. Nonetheless, in the light of such admission and the Chamber's denial of the Further Adjournment Request, the Chamber is of the view that the appropriate course of action would now be the prompt withdrawal of charges.¹³⁴

62. The Defence submits that if the Prosecution is 'unwilling to exercise what amounts really to a personal discretion', the Court can, in the interests of justice, intervene.¹³⁵ The Chamber agrees that, in appropriate circumstances, it has the authority to do so.

¹³¹ When specifically invited to comment on any distinction between a termination and a permanent stay of proceedings the Defence focused upon the grounds for the respective requests but did not address the applicable legal standard in the context of seeking intervention by the Chamber to terminate proceedings (see ICC-01/09-02/11-T-32-ENG, page 25, line 4 – page 26, line 3).

¹³² See ICC-01/09-02/11-T-32-ENG, page 29, lines 14-18.

¹³³ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 81.

¹³⁴ Decision of 31 March 2014, ICC-01/09-02/11-908, para. 81.

¹³⁵ ICC-01/09-02/11-T-32-ENG, page 30, lines 12-13.

However, the Chamber considers that the Prosecution was entitled to seek the remedy of a further adjournment, and notes that the Prosecution has indicated that it would be required to withdraw charges in the event that the Further Adjournment Request was denied.¹³⁶ The Chamber considers that, consistent with the degree of discretion held by the Prosecution regarding the content of the charges at this stage of proceedings,¹³⁷ it is appropriate to provide an opportunity for the Prosecution to do so, failing which direct intervention by the Chamber might become justified. The Chamber therefore does not consider the Defence to have established that, beyond the Further Adjournment Request being denied, the circumstances justify direct intervention by the Chamber to terminate the proceedings at this stage. Consequently, the Chamber also rejects the Defence's related request for the entering of a verdict on the charges.

¹³⁶ ICC-01/09-02/11-T-32-ENG, page 34, lines 7-9. *See also* Second Adjournment Request, ICC-01/09-02/11-892, paras 4, 23 and 27.

¹³⁷ *See* Article 61(9) of the Statute.

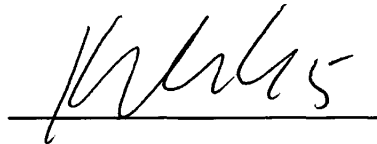
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Further Adjournment Request;

REJECTS the Second Termination Request; and

DIRECTS the Prosecution to file a notice, within one week of this decision, indicating either (i) its withdrawal of the charges in this case; or (ii) that the evidentiary basis has improved to a degree which would justify proceeding to trial.

Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 December 2014

At The Hague, The Netherlands