

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 19 September 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

**Order vacating trial date of 7 October 2014, convening two status conferences,
and addressing other procedural matters**

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

The Office of the Prosecutor

Ms Fatou Bensouda

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
Victims**

Ms Paolina Massidda

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

States Representatives

Mr Githu Muigai, SC, Attorney General
of the Republic of Kenya

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Others

Trial Chamber V(B) ('Chamber') of the International Criminal Court in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, pursuant to Article 64(2) and (6) of the Rome Statute ('Statute'), Rule 132(1) and (2) of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis* and 34 of the Regulations of the Court ('Regulations'), issues the following 'Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters'.

I. Procedural History

1. On 31 March 2014, the Chamber issued a decision, *inter alia*, directing the Office of the Prosecutor ('Prosecution') to submit a revised cooperation request to the Government of the Republic of Kenya ('Kenyan Government') and adjourning the provisional trial commencement date to 7 October 2014.¹
2. On 23 May 2014, the Prosecution² and the Kenyan Government³ each filed their first updates on cooperation and, on 30 June 2014, each filed second updates.⁴

¹ 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, page 46.

² Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya originally due on 30 April, ICC-01/09-02/11-922-Conf, with confidential *ex parte*, Prosecution and Kenyan Government only, annex. On 5 June 2014, the Chamber directed the Prosecution to propose a public redacted version of this filing (e-mail from Legal Officer of the Chamber to the Prosecution and Registry on 5 June 2014 at 8:45). On 16 June 2014 the Prosecution advised that it proposed for the entire filing, excluding the annex, to be reclassified as public (e-mail from Prosecution to Legal Officer of the Chamber on 16 June 2014 at 17:31). Pursuant to a direction of the Chamber (e-mail from Legal Officer of the Chamber to the Registry on 19 June 2014 at 10:47) the filing was reclassified accordingly.

³ The Government of the Republic of Kenya's First Update to the Trial Chamber Pursuant to the 'Order further extending deadline for filing of first update due on 30 April 2014', ICC-01/09-02/11-921-Conf-Exp. On 30 May 2014 the Kenyan Government filed both a corrigendum (ICC-01/09-02/11-921-Conf-Exp-Corr) and an addendum (ICC-01/09-02/11-924-Conf-Exp) to this first update. On 5 June 2014, the Chamber directed the Kenyan Government to propose a public redacted version of this filing (e-mail from Legal Officer of the Chamber to the Prosecution and Registry on 5 June 2014 at 8:45). On 11 June 2014 the Registry transmitted the Kenyan Government's proposal (ICC-01/09-02/11-925-Conf-Exp + Conf-Exp-Anx). Pursuant to a direction of the Chamber (e-mail from Legal Officer of the Chamber to the Registry on 19 June 2014 at 10:47) ICC-01/09-02/11-925, and its annex, were reclassified as public.

⁴ Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya due on 30 June, ICC-01/09-02/11-927 and Conf-AnxA; The Government of the Republic of Kenya's Update to the Trial Chamber Pursuant to the 'Decision on Prosecution's applications for a finding of non-compliance pursuant to Article 87(7) and for an adjournment of the provisional trial date' of 31 March 2014, notified on 2 July 2014, ICC-01/09-02/11-928-Conf-Exp. On 9 July 2014 the Chamber requested the Kenyan Government to propose a public redacted version of

3. 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 2014.⁵
4. Third updates to the Chamber on the status of cooperation from the Prosecution⁶ and the Kenyan Government⁷ were notified on 1 and 2 September 2014, respectively.
5. On 5 September 2014, the Prosecution filed observations on the Kenyan Government's third update on cooperation.⁸
6. Also 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 'insufficient to prove Mr Uhuru Kenyatta's alleged criminal responsibility beyond reasonable doubt'.⁹ The Prosecution requested that the case be further adjourned until the Kenyan Government fully executes the Prosecution's revised cooperation request.¹⁰
7. On 10 September 2014, the defence team for Mr Kenyatta 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'¹¹ in which it, *inter alia*, opposed

its second update by 20 July 2014 (see Transcript of Hearing dated 9 July 2014, ICC-01/09-02/11-T-29-CONF-EXP-ENG, page 3, lines 18-25).

⁵ Order requiring a notice in relation to the provisional trial commencement date, ICC-01/09-02/11-939.

⁶ Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya, ICC-01/09-02/11-940-Conf. The Prosecution had provided two earlier updates on cooperation to the Chamber on

⁷ The Government of the Republic of Kenya's Update to the Trial Chamber pursuant to the 'Decision on Prosecution's applications for a finding of noncompliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date' of 31 March, ICC-01/09-02/11-941-Conf-Exp.

⁸ Prosecution observations on the Government of Kenya's 2 September 2014 update (ICC-01/09-02/11-941-Conf-Exp), ICC-01/09-02/11-943-Conf-Exp.

⁹ Prosecution notice regarding the provisional trial date, ICC-01/09-02/11-944, paras 1-2.

¹⁰ Notice, ICC-01/09-02/11-944, paras 4 and 6.

¹¹ 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.

the Prosecution's request for a further adjournment and requested the Chamber to terminate the proceedings.¹²

8. Also on 10 September 2014, the Legal Representative for Victims ('LRV') filed a response to the Notice.¹³
9. On 16 September 2014, the Kenyan Government filed observations on the Prosecution's third update on cooperation.¹⁴

II. Provisional Trial Date and Status Conferences

10. In light of the foregoing, and having due regard to the requirements of Article 64(2) of the Statute, the Chamber considers it appropriate to vacate the trial commencement date of 7 October 2014, without prejudice to the position of the Chamber on the aforementioned pending requests.
11. Further, the Chamber considers it appropriate to convene a status conference, pursuant to Rule 132(2) of the Rules, to discuss the status of cooperation between the Prosecution and the Kenyan Government. The status conference will be held on Tuesday, 7 October 2014. A representative of the Kenyan Government is invited to attend this status conference.
12. Separately, to facilitate the fair and expeditious conduct of proceedings, the Chamber convenes a second status conference on Wednesday, 8 October 2014 to discuss the issues raised in the Notice and the responses thereto. Given the critical juncture of the

¹² 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, ICC-01/09-02/11-945-Red, para. 37.

¹³ 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. It is noted that the defence team for Mr Kenyatta, the Prosecution and the LRV have since filed requests for leave to reply, which the Chamber will address in a separate decision.

¹⁴ The Government of the Republic of Kenya's Observations on the 'Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya', ICC-01/09-02/11-951-Conf-Exp.

proceedings and the matters to be considered, the accused is required to be present at the status conference on 8 October 2014.

13. Additionally, given the significance of the issues and their potential impact on the interests of the victims, the LRV may be present at both status conferences.

III. Reclassification of filings

14. Finally, there are a number of classification matters which the Chamber will now address.
15. First, at the direction of the Chamber,¹⁵ the Kenyan Government proposed a public redacted version of its second update on cooperation.¹⁶ Noting that the proposed public redacted version does not contain any information which could not be publically disclosed the Chamber considers it appropriate for it to be reclassified as public.
16. Second, the Prosecution indicated that it had no objection to its third update on cooperation, as well as Annexes B-F thereof, being reclassified as public.¹⁷ The Chamber notes that while the Prosecution specifically indicated that Annex A should remain confidential,¹⁸ it made no submission in relation to Annex G. However, the Chamber notes that Annex G, like Annex E, comprises copy correspondence from the Kenyan Government which is marked 'confidential'. The Chamber does not therefore

¹⁵ Transcript of Hearing dated 9 July 2014, ICC-01/09-02/11-T-29-Conf-Exp-Eng, page 3, lines 18 – 25.

¹⁶ The proposed public redacted version was transmitted to the Chamber by the Registry on 22 July 2014, Registry's Transmission of the public redacted version of the "The Government of the Republic of Kenya's Update to the Trial Chamber pursuant to the 'Decision on Prosecution's applications for a finding of noncompliance pursuant to Article 87(7) and for an adjournment of the provisional trial date' of 31 March 2014" (ICC-01/09-02/11-928-Conf-Exp) dated 30 June 2014 proposed by the Kenyan Government, ICC-01/09-02/11-936-Conf-Exp and ICC-01/09-02/11-936-Conf-Exp-Anx.

¹⁷ Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya, ICC-01/09-02/11-940-Conf, para. 3.

¹⁸ Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya, ICC-01/09-02/11-940-Conf, para. 3.

consider that either of Annexes E or G should be reclassified at this stage.¹⁹ In addition, the Chamber notes that Annex F makes reference on the first page to separate proceedings and, at various points throughout the document, identifies officials in the Kenyan Government or administration by name. The Chamber considers that such information should be redacted. However, noting that the remainder of the filing does not contain information which could not be safely disclosed, the Chamber finds that it is appropriate to reclassify ICC-01/09-02/11-940-Conf, and Annexes B, C and D thereof, as public.

17. Third, the Prosecution indicated that it had no objection to its observations on the Kenyan Government's third cooperation update being reclassified as public, excluding the annexes which address matters unrelated to these proceedings.²⁰ The Chamber considers that the filing in question may be reclassified as public, excluding the annexes.
18. Fourth, the Kenyan Government is directed to propose, by 3 October 2014, a public redacted version of: (i) its third update on cooperation, dated 29 August 2014 and filed on 2 September 2014;²¹ and (ii) its observations on the Prosecution's third update on cooperation, dated 15 September 2014 and filed on 16 September 2014.²² The Kenyan Government should also indicate whether it has any objection to the reclassification as public of each of the annexes to those filings. The proposed public redacted versions are to be transmitted to the Chamber on a confidential *ex parte* basis for review.

¹⁹ It is noted that copies of these letters are also annexed to the Kenyan Government's third update on cooperation at ICC-01/09-02/11-941-Conf-Exp-AnxXIV and ICC-01/09-02/11-941-Conf-Exp-AnxXXXIII.

²⁰ Prosecution observations on the Government of Kenya's 2 September 2014 update (ICC-01/09-02/11-941-Conf-Exp), ICC-01/09-02/11-943-Conf-Exp, para. 2.

²¹ The Government of the Republic of Kenya's Update to the Trial Chamber pursuant to the 'Decision on Prosecution's applications for a finding of noncompliance pursuant to Article 87 (7) and for an adjournment of the provisional trial date' of 31 March, ICC-01/09-02/11-941-Conf-Exp.

²² The Government of the Republic of Kenya's Observations on the 'Prosecution update on the status of cooperation between the Office of the Prosecutor and the Government of Kenya', ICC-01/09-02/11-951-Conf-Exp.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

VACATES the provisional trial commencement date of Tuesday, 7 October 2014;

SCHEDULES a status conference for 10:00am on Tuesday, 7 October 2014, at which a representative of the Kenyan Government is invited to attend;

SCHEDULES a status conference for 10:00am on Wednesday, 8 October 2014, at which the accused is required to be present;

APPROVES the Kenyan Government's proposed public redacted version of ICC-01/09-02/11-928-Conf-Exp, which is reflected in filing ICC-01/09-02/11-936-Conf-Exp-Anx;

ORDERS the Registry to register and notify the public redacted version of ICC-01/09-02/11-928-Conf-Exp as provided by the Kenyan Government;

ORDERS the Registry to reclassify as public:

- ICC-01/09-02/11-940-Conf, together with annexes B, C and D thereof; and
- ICC-01/09-02/11-943-Conf-Exp, excluding annexes;


DIRECTS the Prosecution to file a public redacted version of ICC-01/09-02/11-940-Conf-AnxF, redacting references to other proceedings and to the names of individuals in the Kenyan Government or administration; and

DIRECTS the Kenyan Government, by 3 October 2014, to provide to the Chamber, on a confidential *ex parte* basis, proposed public redacted versions of (i) ICC-01/09-02/11-941-Conf-Exp and (ii) ICC-01/09-02/11-951-Conf-Exp, and to indicate whether or not it considers that each of the annexes thereto may also be reclassified as public.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 19 September 2014

At The Hague, The Netherlands