

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 30 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**

**Decision on Defence request for excusal from attendance at, or for adjournment  
of, the status conference scheduled for 8 October 2014**

**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**

*Amicus Curiae*

**REGISTRY**

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**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 ('Court') in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having considered Article 64(2) and (6) of the Rome Statute ('Statute'), Rules 132(2), 134 *bis* and 134 *quater* of the Rules of Procedure and Evidence ('Rules') and Regulation 30 of the Regulations of the Court ('Regulations'), by Majority, issues the following 'Decision on Defence request for excusal from attendance at, or for adjournment of, the status conference scheduled for 8 October 2014'.

## **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.<sup>1</sup>
2. 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.<sup>2</sup>
3. 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.<sup>3</sup> The Prosecution requested that the case be further adjourned until the Kenyan Government fully executes the Prosecution's revised cooperation request.<sup>4</sup>
4. On 10 September 2014, the defence team for Mr Kenyatta ('Defence') filed the 'Defence Response to "Prosecution notice regarding the provisional trial date" (ICC-

<sup>1</sup> 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.

<sup>2</sup> Order requiring a notice in relation to the provisional trial commencement date, ICC-01/09-02/11-939.

<sup>3</sup> Prosecution notice regarding the provisional trial date, ICC-01/09-02/11-944, paras 1-2.

<sup>4</sup> Notice, ICC-01/09-02/11-944, paras 4 and 6.

01/09-02/11-944) and Request to Terminate the Case against Mr Kenyatta<sup>5</sup> in which it, *inter alia*, opposed the Prosecution's request for a further adjournment and requested the Chamber to terminate the proceedings.<sup>6</sup>

5. Also on 10 September 2014, the Legal Representative for Victims ('LRV') filed a response to the Notice.<sup>7</sup>
6. On 19 September 2014, the Chamber issued an order, *inter alia*, vacating the trial commencement date of 7 October 2014 and scheduling status conferences for 7 and 8 October 2014.<sup>8</sup> The Chamber, noting the 'critical juncture of the proceedings and the matters to be considered', specified that the accused is required to be present at the status conference on Wednesday, 8 October 2014 ('Status Conference').<sup>9</sup>
7. On 25 September 2014, the Defence filed a request for the accused to be excused from attendance at the Status Conference, pursuant to Rule 134 *quater* of the Rules, or, in the alternative, for the Status Conference to be rescheduled to a later date, and for the accused to be permitted to attend via video-link at that later date ('Request').<sup>10</sup>
8. On the same date, the Chamber shortened the deadline for responses to the Request to 16:00 on Monday, 29 September 2014.<sup>11</sup>
9. On 29 September 2014, the Prosecution<sup>12</sup> and LRV<sup>13</sup> each filed responses to the Request.

<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

<sup>8</sup> Order vacating trial date of 7 October 2014, convening two status conferences, and addressing other procedural matters, ICC-01/09-02/11-954.

<sup>9</sup> ICC-01/09-02/11-954, para. 12 and page 8.

<sup>10</sup> Defence Request for Excusal from Attendance pursuant to Rule 134 *quater* or to Adjourn the Status Conference Scheduled for 8 October 2014 and Permit Mr Kenyatta to Attend on a Rescheduled Date by Means of Video-link pursuant to Rule 134 *bis*, ICC-01/09-02/11-957.

<sup>11</sup> E-mail from Legal Officer of the Chamber to the parties and participants on 25 September 2014 at 17:55.

## II. Submissions

10. The Defence submits that, in his capacities as President of Kenya and chairman of the Heads of State of the East African Community, Mr Kenyatta is due to attend a summit in Kampala, Uganda, on 8 October 2014 addressing 'economic development and regional security issues'.<sup>14</sup> It is stated that this meeting was arranged prior to the Chamber convening the Status Conference.<sup>15</sup>
11. The Defence submits that the meeting constitutes 'extraordinary public duties at the highest national level' within the meaning and intent of Rule 134 *quater* of the Rules<sup>16</sup> and requests that the accused be excused from attending the Status Conference.<sup>17</sup> The Defence argues that the nature of the accused's duties on that day, and the fact that he will be in Kampala, mean it would 'not be appropriate' to request an alternative form of presence under Rule 134 *bis* of the Rules in the form of video-link.<sup>18</sup> The Defence states that the accused 'explicitly waives his right of attendance' in respect of the Status Conference and will be represented by his legal team, which has 'full conduct and authority over his case'.<sup>19</sup>
12. In the alternative, the Defence requests that the Status Conference be rescheduled to a later date 'convenient to all parties'.<sup>20</sup> In the event the Status Conference is rescheduled, the Defence requests that, pursuant to Rule 134 *bis* of the Rules, the

<sup>12</sup> Prosecution response to the Defence application for excusal from, or the rescheduling of, the 8 October 2014 status conference, ICC-01/09-02/11-958, ('Prosecution Response').

<sup>13</sup> Victims' response to 'Defence Request for Excusal from Attendance pursuant to Rule 134 *quater* or to Adjourn the Status Conference Scheduled for 8 October 2014 and Permit Mr Kenyatta to Attend on a Rescheduled Date by Means of Video link pursuant to Rule 134 *bis*', ICC-01/09-02/11-959, ('Victims' Response').

<sup>14</sup> Request, ICC-01/09-02/11-957, para. 3, *see also* paras 6 and 11. The Defence notes that the accused is also scheduled to attend Independence Day celebrations in Uganda on 9 October 2014, *see* ICC-01/09-02/11-957, paras 4 and 6.

<sup>15</sup> Request, ICC-01/09-02/11-957, para. 3.

<sup>16</sup> Request, ICC-01/09-02/11-957, para. 5.

<sup>17</sup> Request, ICC-01/09-02/11-957, paras 1, 7 and 16.

<sup>18</sup> Request, ICC-01/09-02/11-957, para. 8.

<sup>19</sup> Request, ICC-01/09-02/11-957, para. 8.

<sup>20</sup> Request, ICC-01/09-02/11-957, paras 1, 9 and 16.

accused be permitted to attend by way of video-link.<sup>21</sup> The Defence submits that attendance *via* video-link would allow the accused to perform his 'extraordinary public duties [...] to the greatest extent possible while causing the least inconvenience to the Court'.<sup>22</sup> The Defence further submits that the nature of the hearing is not such as would require the accused to 'take part in the proceedings in any significant manner'.<sup>23</sup>

13. In response, the Prosecution submits that the Defence's reliance on Rule 134 *bis* and *quater* of the Rules is 'misplaced', as those provisions only apply 'once the trial has begun'.<sup>24</sup> Citing to a previous decision of the Chamber, the Prosecution submits that this occurs only when opening statements are made, if any.<sup>25</sup> However, the Prosecution submits that it does not dispute the authority of the Chamber to otherwise excuse the accused from attending the Status Conference or to permit attendance by video-link.<sup>26</sup> The Prosecution submits that whether or not such relief is granted on this occasion is 'a matter for the Chamber's discretion' and will depend on the specific matters to be addressed at the Status Conference.<sup>27</sup>
14. The Prosecution submits that if the Chamber decides that the accused's attendance is required, it does not object to the Status Conference being rescheduled in 'the near future'.<sup>28</sup> Finally, the Prosecution avers that 'no clear reasons' for attendance by video-link, rather than in person, are advanced by the Defence other than the distance required to be travelled and the accused's status. It is submitted that those

<sup>21</sup> Request, ICC-01/09-02/11-957, paras 1, 12 and 16.

<sup>22</sup> Request, ICC-01/09-02/11-957, para. 13.

<sup>23</sup> Request, ICC-01/09-02/11-957, para. 14.

<sup>24</sup> Prosecution Response, ICC-01/09-02/11-958, para. 2.

<sup>25</sup> Prosecution Response, ICC-01/09-02/11-958, para. 2, referring to Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696, footnote 16, citing the *Prosecutor v Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084, para. 39.

<sup>26</sup> Prosecution Response, ICC-01/09-02/11-958, para. 3.

<sup>27</sup> Prosecution Response, ICC-01/09-02/11-958, paras 3-4 and 6.

<sup>28</sup> Prosecution Response, ICC-01/09-02/11-958, para. 5.

points alone do not 'represent reasons to excuse' the accused from attendance that would be required of any other accused person.<sup>29</sup>

15. On behalf of the victims, the LRV: (i) opposes the request for excusal from attendance; (ii) does not oppose a short adjournment of the Status Conference; and (iii) opposes the request for attendance by way of video-link.<sup>30</sup> The LRV notes that the accused has not been required to appear in person before the Court for three years.<sup>31</sup> Citing to jurisprudence of the Appeals Chamber, the LRV submits that the presence of the accused in the courtroom 'is an integral part of the victims' perception of a fair trial, and of their belief that justice is being done'.<sup>32</sup> The views of 28 individual victims are presented in an annex to the Victims' Response.<sup>33</sup>
16. The LRV submits that given the importance of the issues to be addressed, the interests of justice 'require the accused's presence' in person.<sup>34</sup> The LRV submits that no other accused before an international or hybrid court or tribunal has 'benefited from a regime of provisional release which was even remotely as favourable' as that of the accused in this case.<sup>35</sup> The LRV further submits that the accused should not be permitted to rely on circumstances he 'knowingly, voluntarily and deliberately' created, since committal for trial, to avoid the duty of physical presence before the Court.<sup>36</sup> Moreover, the LRV submits that the physical presence of the accused before

<sup>29</sup> Prosecution Response, ICC-01/09-02/11-958, para. 6.

<sup>30</sup> Victims' Response, ICC-01/09-02/11-959, paras 2 and 46.

<sup>31</sup> Victims' Response, ICC-01/09-02/11-959, paras 5, 15 and 28.

<sup>32</sup> Victims' Response, ICC-01/09-02/11-959, paras 13 and 16, referring to the Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, ICC-01/09-01/11-1066 ('Judgment on Mr Ruto's Excusal Request').

<sup>33</sup> Victims' Response, ICC-01/09-02/11-959-Anx.

<sup>34</sup> Victims' Response, ICC-01/09-02/11-959, paras 17-19 and 32-33.

<sup>35</sup> Victims' Response, ICC-01/09-02/11-959, para. 29.

<sup>36</sup> Victims' Response, ICC-01/09-02/11-959, para. 30. *See also* paras 41-42 (where the LRV cites pre-election statements by the accused regarding his capacity to simultaneously fulfil state responsibilities and attend Court sessions).

the Court is required in order for him to respond to any questions which the Chamber may have.<sup>37</sup>

17. Finally, recalling the jurisprudence of the Appeals Chamber that ‘alternative measures’ to absence, such as changes to trial schedule or a short adjournment, should be considered, the LRV submits that the Chamber should order a short adjournment if that is ‘adequate to ensure the accused’s physical presence’.<sup>38</sup>

### III. Analysis

18. The Chamber notes that pursuant to the applicable summons conditions the accused is under an obligation to attend ‘all required hearings’ at the Court.<sup>39</sup> The Chamber considers that the accused’s obligation to attend the Status Conference arises from the terms of this summons, which remains in continuing effect.<sup>40</sup>
19. The Chamber notes that the parties take different positions as to whether Rules 134 *bis* and *quater* of the Rules apply to the current circumstances. In either case, the Chamber clearly has discretion to require or excuse the accused’s attendance at status conferences prior to the commencement of trial. In the past, the Chamber, in exercise of this discretion, has either indicated that the presence of the accused was not required<sup>41</sup> or, having had regard to the nature of the hearing in question, has required the attendance of the accused either in person or by video-link.<sup>42</sup>

<sup>37</sup> Victims’ Response, ICC-01/09-02/11-959, paras 36, 38-39 and 43-45.

<sup>38</sup> Victims’ Response, ICC-01/09-02/11-959, paras 21-24, referring to Judgment on Mr Ruto’s Excusal Request, ICC-01/09-01/11-1066, paras 2 and 62.

<sup>39</sup> Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-1, pages 23-24.

<sup>40</sup> The summons conditions were expressly ordered to remain in effect until varied by the Chamber, see ICC-01/09-02/11-T-22-ENG, page 5, line 1 – page 6, line 11.

<sup>41</sup> See e.g. Scheduling order and agenda for status conference on 9 July 2014, 4 July 2014, ICC-01/09-02/11-929, para. 6.

<sup>42</sup> Order scheduling a status conference, 5 February 2013, ICC-01/09-02/11-620, para. 1 (noting that the issues to be discussed impact directly on the accused and ordering the accused to attend, either in person or via video-link). See also



20. In this case, the Chamber, having had regard to the matters to be considered, has already indicated that it considers the Status Conference to constitute a 'critical juncture' in the proceedings.<sup>43</sup> The Chamber notes that the matters to be discussed at the Status Conference, arising from the Notice and the responses thereto, directly impact the interests of the accused, of victims and of witnesses. The Chamber, by Majority, finds that the requirements of justice in this case necessitate the physical presence of the accused at the Court.
21. Moreover, noting that the Status Conference was convened for a date upon which the opening statements of the trial would have been expected to take place,<sup>44</sup> the Chamber does not find merit in the Defence's submission regarding the accused's engagements having been planned prior to the convening of the Status Conference. Therefore, the Chamber is also not persuaded by the alternative request for an adjournment of the Status Conference.

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Regulation 30 of the Regulations, which provides for status conferences to be convened, *inter alia*, 'by way of audio- or video-link technology'.

<sup>43</sup> ICC-01/09-02/11-954, para. 12.

<sup>44</sup> See 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, 31 March 2014, ICC-01/09-02/11-908, in which the provisional trial date of 7 October 2014 was set. As noted in the procedural history above, this date was only vacated simultaneously with the convening of the Status Conference for 8 October 2014 (*see* ICC-01/09-02/11-954).

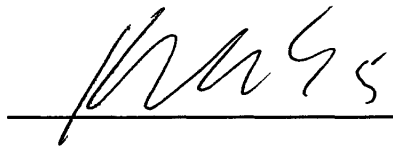
**FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY:**

**REJECTS** the Request; and

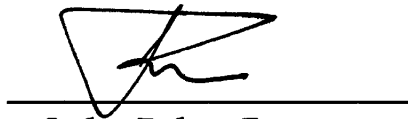
**ORDERS** the accused to be present, in person, at the status conference on 8 October 2014.

Judge Ozaki appends a partially dissenting opinion.

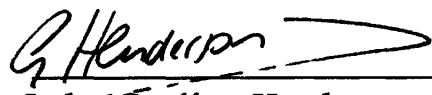
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding Judge**



**Judge Robert Fremr**



**Judge Geoffrey Henderson**

Dated 30 September 2014

At The Hague, The Netherlands

## PARTIALLY DISSENTING OPINION OF JUDGE KUNIKO OZAKI

1. I fully concur with the Majority that the Status Conference constitutes a critical juncture in the proceedings, and that the matters to be discussed directly impact the interests of the accused, of victims and of witnesses. For that reason I agree that the attendance of the accused is required. I also concur with the majority that the Defence's submission regarding the accused's engagement having been planned prior to the convening of the Status Conference is unpersuasive.
2. Regarding the applicability of Rules 134 *bis* and *quater* to the current circumstance, I note that these rules are exceptions to Article 63(1) of the Statute, which provides for the obligation of the accused to be 'present during the trial'. This relation is apparent both from the language of the rules themselves and the background to their adoption, in the immediate wake of the judgment of the Appeals Chamber on the appropriate interpretation of Article 63(1) of the Statute.<sup>1</sup> In my view, the interpretation of the Appeals Chamber supports a plain reading which applies the Article 63(1) obligation of presence to the phase of proceedings after the commencement of the actual trial on the merits. I note in that regard the Appeals Chamber's emphasis on the evidentiary aspects of the proceedings, including the participation of victims and witnesses, as underlying the obligation of presence.<sup>2</sup> Therefore, in my view, Rules 134 *bis* and *quater* of the Rules are not applicable in the current circumstances.
3. Nonetheless, and entirely without prejudice to my position on the interpretation of those rules more generally, I consider that certain of the factors identified in them may constitute valid considerations for the exercise of the Chamber's

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<sup>1</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber V(a) of 18 June 2013 entitled 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', 25 October 2013, ICC-01/09-01/11-1066 ('Excusal Judgment').

<sup>2</sup> See e.g. Excusal Judgment, ICC-01/09-01/11-1066, para. 49.

discretion in requiring the presence of the accused at the Status Conference. In particular, I note the necessity of having due regard to the subject matter of the specific hearings in question. As noted above, it is for that reason that I concur with the Majority that the attendance of the accused is required on this occasion.

4. However, in my view, the role of the accused during a status conference is different from that during the trial. I consider that the matters to be discussed, although of fundamental importance, pertain to the procedural direction of the proceedings, rather than to evidentiary issues for which the physical presence of the accused may be of particular benefit. I therefore consider that there are factors weighing in favour of permitting the accused's attendance at the Status Conference to be effected by way of video-link as an alternative to physical presence. Moreover, I note that Regulation 30 of the Regulations of the Court makes specific provision for the holding of status conferences, *inter alia*, by way of 'audio- or video-link technology'. This is a procedure that has been previously utilised by the Chamber,<sup>3</sup> and in my view, if requested in sufficient time to enable necessary arrangements to be made, could have been an appropriate alternative in this instance.
5. For those reasons, I would have directed that the attendance of the accused at the Status Conference may take place either in person or by way of video-link.



**Judge Kuniko Ozaki, Presiding Judge**

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<sup>3</sup> ICC-01/09-02/11-620.