

**Cour
Pénale
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**International
Criminal
Court**

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Date: 28 February 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

Public with Confidential Annex A

Defence Request for Mr Kenyatta to be Present During Trial via Video Link

Source: Defence for Uhuru Muigai Kenyatta

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Registrar

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section **Other**

I. INTRODUCTION

1. The Defence submits its request to the Trial Chamber ("Chamber") to permit Uhuru Muigai Kenyatta to be present during the trial via video link from Kenya, as a means of participation in the proceedings on a regular basis.
2. This filing is submitted publicly with Confidential Annex A ("Annex A"). Annex A contains information from the Registry designated as "highly confidential".

II. PROCEDURAL HISTORY

3. On 8 March 2011, the Pre-Trial Chamber, by a majority, issued its "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Summons Decision"), which imposed certain conditions ("summons conditions") on the suspects.¹ The Summons Decision included the condition that the suspects "attend all required hearings at the International Criminal Court."²
4. On 4 April 2011, the Single Judge issued the "Decision on Variation of Summons Conditions" setting out the modalities to be observed by the suspects when complying with the summons conditions.³ The Pre-Trial Chamber subsequently modified the conditions in its "Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call."⁴

¹ ICC-01/09-02/11-01.

² ICC-01/09-02/11-01, page 24.

³ ICC-01/09-02/11-38.

⁴ ICC-01/09-02/11-469.

5. Mr Muthaura and Mr Kenyatta appeared voluntarily before the Court at the initial appearance on 8 April 2011.⁵
6. The Confirmation of Charges Hearing (“Confirmation Hearing”) took place between 21 September and 5 October 2011, and was attended by Mr Muthaura and Mr Kenyatta.
7. On 23 January 2012, the Pre-Trial Chamber issued, by a majority, the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (“Confirmation Decision”), confirming the charges against Mr Muthaura and Mr Kenyatta. The Confirmation Decision stated “that the conditions imposed on Mr Muthaura and Mr Kenyatta in the Decision on Summonses to Appear remain in effect.”⁶
8. The Confirmation Decision and the record of proceedings were transmitted to the Presidency on 12 March 2012.⁷ On 29 March 2012, the Presidency constituted the Chamber and referred the case to trial.⁸
9. On 9 July 2012, the Chamber issued its “Decision on the schedule leading up to trial,” setting a trial commencement date of 11 April 2013.⁹
10. On 30 January 2013, the Chamber scheduled a status conference for 14 February 2013.¹⁰ On the same date, the Chamber issued its “Order for observations on issues related to the commencement of trial” (“Order”), directing the Defence

⁵ ICC-01/09-02/11-T-1-ENG ET WT.

⁶ ICC-01/09-02/11-382, page 154.

⁷ ICC-01/09-02/11-407.

⁸ ICC-01/09-02/11-414.

⁹ ICC-01/09-02/11-451, para 25.

¹⁰ Email correspondence from Trial Chamber V to the Parties, 30 January 2013.

teams for Messrs Muthaura and Kenyatta to submit to the Chamber by 6 February 2013, any observations relating to:¹¹

- a. whether the conditions listed in the summonses to appear issued by the Pre-Trial Chamber are sufficient and adequate for the purposes of the trial; and¹²
- b. whether there are any practical, financial and/or legal matters to be dealt with for the accused to be able to attend the trial at the seat of the Court, including the modalities of the Accused's stay on the territory of the Host State during the trial.¹³

11. The Chamber also requested the Prosecution, Defence and the Common Legal Representative of Victims to submit any other urgent issue that required the immediate attention of the Chamber by no later than 6 February 2013.¹⁴
12. On 5 February 2013, the Chamber issued its "Order scheduling a status conference,"¹⁵ confirming the date for the status conference of 14 February 2013.¹⁶ The Chamber required "the accused's attendance"¹⁷ and ordered them "to attend the status conference, either in person or via video link."¹⁸
13. On 6 February 2013, the Defence filed its "Response on behalf of Uhuru Kenyatta to the 'Order for observations on issues related to the commencement of trial'"¹⁹ and the Muthaura Defence filed its "Defence Observations on issues related to the commencement of trial filed pursuant to the Trial Chamber's

¹¹ ICC-01/09-02/11-615.

¹² ICC-01/09-02/11-615, para 2.

¹³ ICC-01/09-02/11-615, para 2.

¹⁴ ICC-01/09-02/11-615, para 2.

¹⁵ ICC-01/09-02/11-620.

¹⁶ ICC-01/09-02/11-620, para 1.

¹⁷ ICC-01/09-02/11-620, para 1.

¹⁸ ICC-01/09-02/11-620, para 1.

¹⁹ ICC-01/09-02/11-627.

Order ICC-01/09-02/11-615.”²⁰ On the same day, the Prosecution filed the “Prosecution observations on issues related to the commencement of trial,”²¹ in which it stated that it considered the Summons Conditions to be “adequate for the purpose of trial”.²²

14. On 11 February 2013, the Registry emailed the Defence with information setting out the logistics regarding Mr Kenyatta’s presence at the status conference via video link.²³
15. On 14 February 2013, Mr Kenyatta attended the status conference via video link. During the hearing, the Chamber rendered its decision that “the summons to appear issued by the Pre-Trial Chamber continue in effect for purposes of the trial and that the existing conditions shall remain in effect until varied by the Trial Chamber.”²⁴ In addition, the Chamber stated that should the Defence wish to pursue “the possibility of accused being permitted to use video link from Kenya as a means of participation in the trial on a regular basis,”²⁵ it must file “full written submissions in that regard, including the legal basis and practical modalities of this request.”²⁶

²⁰ ICC-01/09-02/11-624.

²¹ ICC-01/09-02/11-626.

²² ICC-01/09-02/11-626, para 2.

²³ Confidential Annex A.

²⁴ ICC-01/09-02/11-T-22-ENG, page 5, lines 6-8.

²⁵ ICC-01/09-02/11-T-22-ENG, page 7, lines 5-7.

²⁶ ICC-01/09-02/11-T-22-ENG, page 7, lines 7-9.

III. SUBMISSIONS

(i) Legal Justification

(A) Mr Kenyatta's Presence at Trial via Video Link Satisfies the Requirement of Presence in Article 63(1) of the Rome Statute

16. Article 63(1) of the Rome Statute ("Statute") requires the presence of the accused at trial. The wording of Article 63(1) does not preclude the presence of an accused via video link.²⁷ The concept of presence is not defined in either the Rome Statute or the Rules of Procedure and Evidence. The intention of Article 63(1) can be determined from an analysis of the *travaux préparatoire* of the Rome Statute, which shows that the aim of this provision is to protect the right of the accused to be present at trial and to prevent trials *in absentia*.²⁸
17. In the instant case, Mr Kenyatta is not seeking to waive his fundamental right to be present at trial. His consistent conduct to date indicates his intention to exercise his right to be present and participate fully in court proceedings. Mr Kenyatta attended voluntarily the initial hearing at which he confirmed that he understood the charges against him; he attended the entirety of the Confirmation Hearing and gave live evidence before the Pre-Trial Chamber; and has been actively involved with his case throughout the proceedings with his legal team.
18. The Defence submits that Article 63(1) should be interpreted in a manner consistent with the intention of the drafters of the Statute, namely as a mechanism to ensure that the accused's right to be present during trial is

²⁷ "The accused shall be present during trial", Rome Statute, Article 63(1).

²⁸ United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, Vol. III, A/CONF.183/13(Vol. III), pp 53-54, 297-299, 303-04.

protected. Provided that an accused's rights under Article 67 are not infringed by the manner in which the accused is present during the trial, the Defence submits that the requirement of presence pursuant to Article 63(1) can be fulfilled by the presence of an accused via video link during trial, particularly in circumstances when an accused resides in a country external to the seat of the Court and has complied with all conditions set out in the summons issued by the Court. The Defence submits that presence of an accused via video link is tantamount to presence in the courtroom. All court procedures and rules apply to exactly the same degree in the video link room as they do in the courtroom of the Trial Chamber.

(B) Presence at Trial via Video Link is Permissible at the Special Tribunal for Lebanon ("STL")

19. Article 16(1)(d) of the STL Statute provides that an accused has the right to be tried in his or her presence.²⁹ This right is subject to Article 22 of the STL Statute, which, unlike the Rome Statute, permits trials *in absentia* in certain prescribed circumstances.³⁰
20. Support for the Defence submission that presence at trial can be satisfied by an accused's participation via video link can be found in the approach taken by STL President Cassese in an explanatory memorandum.³¹ His Honour Judge

²⁹ "In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality: [...] (d) Subject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing."

³⁰ "The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge."

³¹ The Explanatory Memorandum as of 12 April 2012 was originally drafted by the late President Cassese. Recent modifications to the Explanatory Memorandum were added by President Baragwanath on the basis of the latest amendments to the Rules of Procedure and Evidence as of 12 April ("Explanatory Memorandum").

Cassese opined that if granted provisional release, an accused may return to his country and, if allowed to remain there, may attend the trial proceedings by video-conference:

The RPE envisage the possibility for a suspect or an accused *not* to be arrested and *not* to be held in custody in The Hague during pre-trial proceedings and the trial itself. In the interests of justice, suspects or accused may be summonsed to appear, with the consequence that they are not held in custody in the Tribunal's detention facility (and they may be allowed to be released on bail in their national State). This, of course, does not exclude the possibility for a defendant who is arrested, brought before the STL, and ordered to be detained, to request provisional release under the appropriate rules. Provisional release, being the exception, may only be refused under strict circumstances. If granted provisional release, an accused may return to his country and, if allowed to remain there, may attend the trial proceedings by video-conference. If his conditions of provisional release require him to return to the seat of the Tribunal, he would attend trial proceedings while being detained in the Tribunal's detention facility.³²

21. The Defence submits that the Chamber should be guided by the STL's approval of video link technology with transcontinental capabilities as a means of participation during the trial phase.

(C) Video Link Technology has been Employed Successfully at the Special Court for Sierra Leone ("SCSL") in Contempt of Court Trial Proceedings

22. Article 17 of the SCSL Statute provides that an accused has the right to be tried in his or her presence.³³
23. The SCSL has used video link technology in the recent contempt of court trial of Bangura et al,³⁴ linking three court locations, namely The Hague, Freetown and

³² Explanatory Memorandum, para. 25.

³³ "In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: [...] d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing."

Kigali. In this case, two accused (Kamara and Kanu) who were already serving sentences at the Mpanga prison in Rwanda attended the trial from the International Criminal Tribunal for Rwanda's courtroom in Kigali via video link, while two other accused (Bangura and Kargbo) participated in the proceedings from the Special Court's courthouse in Freetown. The courtrooms were connected successfully via video link.

(D) Neither the Statute of the International Criminal Tribunal for the former Yugoslavia ("ICTY") nor the Rules Prohibit the Making of an Appearance by Video Link before the ICTY

24. In proceedings before the ICTY, the use of video link has enabled a trial to continue in the instance of an accused's ill-health;³⁵ permitted several accused to enter a plea to charges while on provisional release;³⁶ and allowed one Defendant to appear via video link to change her plea to the indictment.³⁷ While distinct from the issue of presence by video link during trial, these instances illustrate the wide acceptance of video-conference technology in court proceedings in international criminal law.

25. The ICTY has held explicitly "that neither the Statute nor the Rules prohibit the making of an appearance by videoconference-link"³⁸ and that "pursuant to Rule 81bis, a Judge or a Chamber may order, if consistent with the interests of justice,

³⁴ The Independent Counsel v Hassan Papa Bangura, Samuel Kargbo, Santigie Borbor Kanu, Brima Bazy Kamara, SCSL-11-02.

³⁵ Prosecutor v. Stanisic and Simatovic, Trial Chamber "Corrigendum to Second Decision Amending Modalities for Trial," 7 September 2009, para 5, "In order to further accommodate Mr Stanisic, the Chamber will allow him, if he opts to, not to be present in court but instead follow the proceedings via a video-conference link from the UNDU."

³⁶ Prosecutor v. Cermak and Markac, Trial Chamber, "Scheduling Order", 7 December 2005, page 2; and Prosecutor v. Mico Stanisic, "Order Scheduling a Status Conference and Further Appearance," 12 November 2008; page 3; Prosecutor v. Stanisic and Simatovic, "Order Re-Scheduling Further Appearance," 14 March 2006, page 2.

³⁷ Prosecutor v. Plavsic, Rule 62 bis hearing, Transcript of 2 October 2002, page 337.

³⁸ Prosecutor v. Gotovina et al, Trial Chamber "Order Scheduling a Status Conference"; 25 June 2007; p. 2.

that proceedings be conducted by way of video-conference link.”³⁹ In *Stanisic*, the Prosecution observed that “the video-conference link and related technology ordered by the Trial Chamber create a ‘virtual presence that allows the Accused to participate fully and effectively in his case.’”⁴⁰

(ii) Practical Modalities

(A) Summons Conditions

26. The Defence submits that Mr Kenyatta’s presence at trial via video link will not impact on his ability to comply with the summons conditions, which the Chamber has stated will remain in effect for the purposes of the trial.⁴¹

27. In accordance with the Registry’s recent request, the Defence will designate a team member in Kenya to “act as the main Registry contact for logistical and security related matters in relation to the appearance of [Mr Kenyatta] at trial ... [who can] be reached by the Registry at all time [sic]”.⁴²

(B) Rights of the Accused

28. The Defence submits that the rights of the accused pursuant to Article 67 will be properly upheld in circumstances where Mr Kenyatta is permitted to exercise his right to be present during the trial by video link.

³⁹ Prosecutor v. Mico Stanisic, “Order Scheduling a Status Conference and Further Appearance,” 12 November 2008, page 3.

⁴⁰ Prosecutor v Stanisic and Simatovic, Case No.: IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of Proceedings, 16 May 2008, para 13, citing the Prosecution Response, para 53.

⁴¹ ICC-01/09-02/11-T-22-ENG ET WT, p. 5, lines 6-8.

⁴² ICC-01/09-02/11-643, para 4.

29. In liaison with the Registry, the conduct of the recent status conference by video link ensured that:
- a. The proceedings were conducted in public;⁴³
 - b. Mr Kenyatta had appropriate legal assistance in the video link room in Kenya and the courtroom in The Hague.⁴⁴
 - c. He was able to communicate freely with his lawyers in confidence and conduct privileged communications;⁴⁵
 - d. He was able to fully understand and follow the proceedings;⁴⁶ and
 - e. The Court was able to understand Mr Kenyatta fully.
30. In the event that Mr Kenyatta is permitted to exercise his right to be present during trial by video link, the fact of his legal representation by Counsel in the courtroom would also ensure the protection of his fundamental rights to have witnesses examined on his behalf, raise defences and present other evidence admissible under the Statute.⁴⁷

(C) Liaison with the Registry and Court

31. The Defence was able to liaise effectively with the Registry and the Court, within a short time period, in respect of the practicalities of the video link, including the requirements of privileged communications between Mr Kenyatta and his Counsel,⁴⁸ and the arrangement for a lawyer to be present in the video link room in Kenya at short notice.⁴⁹

⁴³ Rome Statute, Article 67(1), chapeaux.

⁴⁴ Rome Statute, Article 67(1)(b).

⁴⁵ Rome Statute, Article 67(1)(b); see also Annex A, email of 12 February 2013 entitled “RE: Upcoming status conference”, 10:43; see also Annex A, email of 11 February 2013 entitled “RE: Upcoming status conference”, 18:55, para.3.

⁴⁶ Rome Statute, Article 67(1)(a).

⁴⁷ Rome Statute, Article 67(1)(e).

⁴⁸ Annex A, email of 11 February 2013 entitled “RE: Upcoming status conference”, 18:55, para.3.

⁴⁹ Annex A, email of 12 February 2013 entitled “RE: Upcoming status conference”, 10:43.

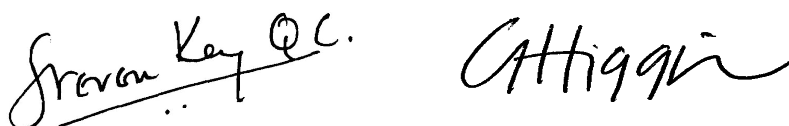
(D) ICC External Parties Network

32. The ICC External Parties Network⁵⁰ will allow the members of the Defence team, who will be present in the video link room with Mr Kenyatta, to provide him with access to live transcripts,⁵¹ real-time evidence⁵² and filings.⁵³

IV. RELIEF

33. For the reasons set out above, the Defence respectfully requests the Chamber to permit Mr Kenyatta to be present at his trial and participate by means of video link from Kenya on a regular basis.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 28th day of February 2013

At London, England

⁵⁰ The ICC External Parties Network is a means by which members of defence teams gain secure remote access to the ICC computer system.

⁵¹ Using the Transcend software.

⁵² Using the Ringtail software.

⁵³ Using the ICC Court Records programme.