

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 23 September 2013

**TRIAL CHAMBER V(b)**

**Before:** Judge Kuniko Ozaki, Presiding  
Judge Robert Fremr  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Defence Request for Conditional Excusal from Continuous Presence at Trial**

**Source:** Defence for Uhuru Muigai Kenyatta

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

**The Office of the Prosecutor**

Fatou Bensouda, Prosecutor  
Adesola Adeboyejo, Trial Attorney

**Counsel for the Defence**

Steven Kay QC  
Gillian Higgins

**Legal Representatives of the Victims**

Fergal Gaynor

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman Von Hebel

**Counsel Support Section**

**Deputy Registrar**

Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section      Other**

## I. INTRODUCTION

1. The Defence for President Uhuru Muigai Kenyatta (“Defence”) requests that the Accused be conditionally excused from continuous presence at trial and that his physical presence is required only in respect of the opening and closing of trial and delivery of judgment before the International Criminal Court (“ICC”). In respect of all other hearings at which Trial Chamber V(b) (“Chamber”) requires the presence of the Accused, or at which President Kenyatta requests to be present, the Defence requests that such presence is fulfilled by way of video-link.
2. This application supersedes the previous application for permission to attend the entirety of the trial via video link, which was filed in the context of President Kenyatta’s position at that time and upon which the Chamber has not ruled.<sup>1</sup>
3. The Accused’s election as President of the Republic of Kenya on 9 March 2013 constitutes a significant change in circumstances that necessitates the fresh consideration of this issue, particularly in light of his extraordinary and exceptional roles and responsibilities as an incumbent Head of State.
4. In the event that the Chamber does not conditionally excuse President Kenyatta from continuous attendance at trial, the Defence applies, in the alternative, for President Kenyatta’s continuous presence to be by means of video link.<sup>2</sup>

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<sup>1</sup> ICC-01/09-02/11-667, ‘Defence Request for Mr Kenyatta to be Present During Trial via Video Link,’ 28 February 2013.

<sup>2</sup> This request is consistent with the Defence’s previous submissions in ICC-01/09-02/11-667.

## II. PROCEDURAL BACKGROUND

5. On 14 February 2013, President Kenyatta participated in a 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.”<sup>3</sup> In addition, the Chamber stated that should the Defence wish to pursue “the possibility of the accused being permitted to use video link from Kenya as a means of participation in the trial on a regular basis,” it must file “full written submissions in that regard, including the legal basis and practical modalities of this request.”<sup>4</sup>
6. On 28 February 2013, the Defence filed its ‘Request for Mr Kenyatta to be Present During Trial via Video Link.’<sup>5</sup>
7. On 28 February 2013, the Defence for Mr Ruto (“Ruto Defence”) and Mr Sang (“Sang Defence”) filed ‘Joint Defence Submissions on Legal Basis for the Accused’s Presence at Trial via Video Link,’ requesting Trial Chamber V(a) to “authorize, in principle, the use of video link technology to ensure the accused’s right to be present at trial is effectuated.”<sup>6</sup>
8. On 22 March 2013, the ‘Prosecution’s response to the Defence Request for Mr Kenyatta to be Present During Trial via Video-Link’ was filed.<sup>7</sup> Similar observations were filed by the Prosecution in *Ruto et al.*<sup>8</sup>

<sup>3</sup> ICC-01/09-02/11-T-22-ENG, p. 5, lines 6 – 8.

<sup>4</sup> ICC-01/09-02/11-T-22-ENG, p. 7, lines 5 – 7.

<sup>5</sup> ICC-01/09-02/11-667.

<sup>6</sup> *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“*The Prosecutor v. Ruto et al.*”), ICC-01/09-01/11-629, para. 18.

<sup>7</sup> ICC-01/09-02/11-703.

<sup>8</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-660.

9. On 9 April 2013, the Accused was sworn in as the President of Kenya.
10. On 17 April 2013, the Ruto Defence filed an application seeking permission from the Chamber for the Defendant to be excused from continuous presence during the trial ("Ruto Excusal Application").<sup>9</sup> On 1 May 2013, the 'Prosecution's Observations on "Defence Request pursuant to Article 63(1) of the Rome Statute"' were filed.<sup>10</sup> During a Status Conference on 14 and 15 May 2013, the parties made oral submissions in respect of this application.<sup>11</sup>
11. On 18 June 2013, Trial Chamber V(a) issued by majority, Judge Herrera Carbuccion dissenting, its 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial' ("Ruto Excusal Decision"), in which it granted, within the limits of certain conditions, Mr Ruto's request to be excused from continuous presence in court during the trial.<sup>12</sup>
12. On 24 June 2013, the Prosecution filed its 'Application for Leave to Appeal the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial"' ("Leave Application"), seeking leave to appeal the Ruto Excusal Decision in relation to the following two issues:
  - (i) The scope of the requirement under Article 63(1) that the accused be present during the trial and whether, or to what extent, the Trial Chamber has a discretionary power to excuse an accused from attending most of the trial ("First Issue"); and
  - (ii) Whether the test for an excusal of the accused developed by the Majority

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<sup>9</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-685.

<sup>10</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-713.

<sup>11</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 13, citing the 'Order issuing agenda for status conference', ICC-01/09-01/11-728, para. 1(c).

<sup>12</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777 and ICC-01/09-01/11-777-Anx2.

is supported by the applicable law (“Second Issue”).<sup>13</sup>

13. On 27 June 2013, the Ruto Defence filed its response to the Leave Application.<sup>14</sup>
14. On 18 July 2013, Trial Chamber V(a) issued its ‘Decision on Prosecution's Application for Leave to Appeal the Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial,’ in which the majority, Judge Eboe-Osuji dissenting, granted leave to the Prosecution to appeal the Ruto Excusal Decision on the First and Second Issues.<sup>15</sup>
15. On 29 July 2013, the Prosecutor filed its document in support of the appeal (‘Document in Support of the Appeal’), in which it requested, *inter alia*, that suspensive effect be granted under rule 156(5) of the Rules of Procedure and Evidence if the Appeals Chamber should be unable to resolve the appeal before the commencement of Mr Ruto's trial on 10 September 2013.<sup>16</sup>
16. On 8 August 2013, the Ruto Defence filed its response to the Document in Support of the Appeal.<sup>17</sup>
17. On 20 August 2013, the Appeals Chamber granted the Prosecution’s request for suspensive effect from the Document in Support of the Appeal.<sup>18</sup>

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<sup>13</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-817, para. 2, citing ICC-01/09-01/11-783, para. 4.

<sup>14</sup> *The Prosecutor v. Ruto et al.*, ‘Defence Response to the “Prosecution's Application for Leave to Appeal the Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial,”’ ICC-01/09-01/11-788.

<sup>15</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-817 and ICC-01/09-01/11-817-Anx.

<sup>16</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-862 para. 3, citing ‘Prosecution appeal against the “Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial,”’ ICC-01/09-01/11-831.

<sup>17</sup> *The Prosecutor v. Ruto et al.*, ‘Defence response to the “Prosecution appeal against the ‘Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial,”’ dated 8 August 2013 and registered on 12 August 2013, ICC-01/09-01/11-846.

<sup>18</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-862, para. 11.

18. On 9 September 2013, the Defence applied orally for President Kenyatta to be excused from attendance at trial.<sup>19</sup> The Chamber stated that it would “indicate, after consultation with relevant units in the court” the time frame for the Defence to submit a written filing on this issue.<sup>20</sup>
19. On 10 September 2013, the United Republic of Tanzania and the Republic of Rwanda filed requests to submit *amici curiae* observations with respect to the matter before the Appeals Chamber concerning Mr Ruto’s request to be excused from continuous presence in court during the trial.<sup>21</sup> On 11 September 2013, the Republic of Burundi, the State of Eritrea and the Republic of Uganda also filed requests to submit *amici curiae* observations.<sup>22</sup> The Appeals Chamber granted the States’ requests on 13 September 2013.<sup>23</sup>
20. On 12 September 2013, the Chamber ordered the Defence to file any written submissions on excusal from continuous presence at trial by Monday 23 September 2013 at 4.00pm.<sup>24</sup>
21. On 17 September 2013, in *Ruto et al.*, the five African States submitted their *amicus curiae* observations to the Appeals Chamber (“Joint Amicus Curiae Observations”).<sup>25</sup>
22. On 23 September 2013, Trial Chamber V(a) excused Mr Ruto from the proceedings in *Ruto et al.* to allow him to return to Kenya to assist with the terrorist crisis which started in Nairobi on 21 September 2013.<sup>26</sup>

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<sup>19</sup> ICC-01/09-02/11-T-26-ENG, pp. 17 – 21 and 24 – 25.

<sup>20</sup> ICC-01/09-02/11-T-26-ENG, p. 21, lines 11 – 16.

<sup>21</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-922-Anx1 and ICC-01/09-01/11-921-Anx1.

<sup>22</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-924-Anx1; ICC-01/09-01/11-926-Anx1; and ICC-01/09-01/11-928-Anx1.

<sup>23</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-942.

<sup>24</sup> Email sent from Sarah Andrews on behalf of Trial Chamber V(b) to the parties at 15:40 on 12 September 2013.

<sup>25</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-948.

### III. THE LAW

23. Pursuant to Article 67(1)(d) of the Rome Statute, an accused before the ICC has the right and minimum guarantee to “be present at the trial.”
24. Article 63(1) of the Statute states that “[t]he accused shall be present during the trial.” 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 an accused to be present at trial and to prevent trials *in absentia*.<sup>27</sup> As previously submitted by the Defence, although Article 63(1) requires the presence of the accused at trial, no definition of the term “presence” is set out in either the Rules of Procedure and Evidence or the Statute.<sup>28</sup>
25. Article 64(2) requires the trial to be fair and expeditious and “conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”
26. Article 64(6)(f) provides the Chamber with a residual power and discretion to do “what is fair, reasonable and just in the particular circumstances confronting the Chamber.”<sup>29</sup> This provision states that in “performing its functions prior to trial or during the course of a trial, the Trial Chamber may...[r]ule on any other relevant matters.” Trial Chamber V(a) construed this provision as a means by which to exercise its discretion to excuse an accused, on a case-by-case basis, from continuous presence at trial.<sup>30</sup> It held that the exceptional circumstances

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<sup>26</sup> ICC-01/09-01/11-T-35-ENG, p. 6, lines 2 – 6.

<sup>27</sup> ICC-01/09-02/11-667, para. 16.

<sup>28</sup> ICC-01/09-02/11-667, para. 16.

<sup>29</sup> *The Prosecutor v. Ruto et al.*, ‘Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial,’ ICC-01/09-01/11-777, 18 June 2013, para. 33.

<sup>30</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 49.



that would make such excusal reasonable would include situations in which an accused person has important functions of an extraordinary dimension to perform.<sup>31</sup> Trial V(a) further ruled that the issue of excusal is a “matter for each Trial Chamber to appraise the situation according to its own judgement.”<sup>32</sup>

27. Article 66(1) of the Statute provides that an accused “shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.”

#### IV. SUBMISSIONS

28. The Defence submits that the Chamber should exercise its discretion in the present case under Article 64(6)(f) to excuse conditionally President Kenyatta from continuous presence at trial. In respect of all other hearings at which the Chamber requires the presence of the Accused, or at which President Kenyatta requests to be present, the Defence requests that such presence is fulfilled by way of video-link.
29. It is submitted that the Chamber’s discretion should be exercised in light of the duties President Kenyatta must perform as Head of State on behalf of the people of Kenya on a daily basis. In addition to being a figurehead and symbol of authority for the nation, the duties of an incumbent Head of State are both important and extraordinary in the management of the State of Kenya and its people.
30. Article 132 of the Constitution of Kenya sets out the extensive duties of the President, which include the chairing of cabinet meetings,<sup>33</sup> the direction and

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<sup>31</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 49.

<sup>32</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 49.

<sup>33</sup> The Constitution of Kenya, Article 132(3).

co-ordination of the functions of ministries and government departments,<sup>34</sup> and fulfilling his role as a principal member of the National Executive of the Republic.<sup>35</sup> It is a matter of fundamental importance to Kenya that the issue of attendance at trial is addressed in a way that permits its Head of State fully to discharge his constitutional duties. The exceptional nature of President Kenyatta's position may even be distinguished from that of Mr Ruto, the Vice President, as the office of President inherently carries greater responsibility. The exceptional nature of these duties was recognised in the Joint Amicus Curiae Observations submitted in *Ruto et al.*:

A Head or Deputy Head of State or Government, depending on the State in question, are responsible for the security and well-being of their entire population through ensuring an effective and functioning national government. It is self evident that the positions of Head or Deputy Head of State or Government are ones of singular importance – truly 'round-the-clock' roles – that reflect the electoral voice of a State as a whole.<sup>36</sup>

31. In respect of the interpretation of Article 63(1), the Defence supports the majority opinion of Trial Chamber V(a) that it “is neither reasonable nor necessary to interpret the provision in a manner that eliminates the discretion of the Trial Chamber reasonably to permit the accused to carry out his duties” while remaining “fully subject to the jurisdiction of the Court for purposes of the inquiry into his individual criminal responsibility under the Court’s Statute.”<sup>37</sup> The Defence urges the adoption of a “balanced approach by virtue of which the Court will continue to exercise the jurisdiction to inquire into the criminal responsibility of the accused, while still permitting him to continue to perform his functions of state”.<sup>38</sup> The Defence endorses the position taken in the Joint Amicus Curiae Submissions that the “mechanistic requirement of

<sup>34</sup> The Constitution of Kenya, Article 132(3).

<sup>35</sup> The Constitution of Kenya, Article 130(1).

<sup>36</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-948, para. 6.

<sup>37</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 53.

<sup>38</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 92.

continuous presence at the seat of the Court – in the case of an elected head of state or deputy head of state who cooperates with the Court and who appears on a summons – would deprive the electorate of the best government they are entitled to.”<sup>39</sup>

32. The people of Kenya were fully informed about the ICC proceedings when they elected President Kenyatta to lead the nation, and, having done so, they have a legitimate expectation that their country’s democracy should be respected by the wider international community. The democratic right of the people of Kenya to participate in an electoral process comes with the presumption that the result of this exercise “ought also to be accorded recognition and given effect in international law.”<sup>40</sup>
33. The Defence submits that the purpose of these proceedings is the evidential investigation of facts and the determination of issues in the case, which do not require President Kenyatta’s continuous presence. The purpose of these proceedings is not to punish an innocent man.<sup>41</sup> Indeed, the presumption of innocence dictates that the proceedings themselves should not be seen as an attempt to punish an accused. This fundamental legal principle is particularly pertinent in international cases, where trials are unusually protracted and can continue for several years. The Defence submits that the Court is wholly capable of dealing with any legal and evidential matters in the physical absence of the Accused, with the assistance of President Kenyatta’s lawyers, acting as they do with full instructions.
34. The Defence submits that the case presented on behalf of President Kenyatta at the confirmation of charges hearing has been demonstrated by subsequent

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<sup>39</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-948, para. 4.

<sup>40</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 89.

<sup>41</sup> ICC-01/09-02/11-T-26-ENG, p. 19, lines 22 – 25.

evidence in possession of both parties as having been correct. In the circumstances, President Kenyatta has every reason to be fully confident as to the merits of his defence being accepted by the Chamber. In the event that this application is granted and the charges are eventually dismissed against President Kenyatta, as is expected, it will have been in the best interests of Kenya that its President was able to continue uninterrupted with his responsibilities to his State. As expressed in the Joint Amicus Curiae Observations, “[i]t will be of little – or inadequate – comfort to the citizenry that elects an accused who is a head of state or deputy head of state to see them acquitted after a trial process that could take years – if this is at the cost of the most effective government to which they are entitled.”<sup>42</sup>

35. Contrary to the position taken by the Prosecution in *Ruto et al.*, the Defence submits that Trial Chamber V(a)’s understanding of the exceptional roles and responsibilities of an incumbent Head of State does not fall foul of Article 27 of the Statute which provides that the Statute shall apply equally to all persons without any distinction based on official capacity.<sup>43</sup> The clear intention of Article 27 is that the official position of an accused does not shield him or her against the jurisdiction of the Court for purposes of inquiring into his or her own individual criminal responsibility for crimes proscribed in the Statute.<sup>44</sup> Article 27 does not remove the Chamber’s “discretion to excuse an accused from continuous presence in an ongoing trial, when the excusal is recommended by the functions implicit in the office that he or she occupies.”<sup>45</sup>

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<sup>42</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-948, para. 8.

<sup>43</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-713, para. 12.

<sup>44</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 69.

<sup>45</sup> *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-777, para. 71.

36. Trial Chamber V(a) has recognised the need to accommodate important political duties by allowing Mr Ruto to return to Kenya to deal with the terrorist attack and national tragedy that unfolded on 21 September 2013.
37. Finally, President Kenyatta is satisfied that he will be able adequately to manage his defence by delegating responsibility to his legal team, who are in receipt of full instructions. International criminal trials are complex, lengthy and heavily rely upon the availability of modern technology to record and publicise the proceedings worldwide. President Kenyatta is fully aware that he will be able to follow the proceedings through Transcend and access live transcripts in Kenya through his legal team without being physically present in court.

## V. RELIEF

38. For the reasons set out above, the Defence requests that:

- (i) President Kenyatta is conditionally excused from continuous presence at trial whereby he attends in person the opening and closing of trial and delivery of judgment before the International Criminal Court; and
- (ii) In respect of all other hearings wherein the Court requires the presence of Uhuru Kenyatta, or he requests to be present, such presence is fulfilled by way of video-link.

39. In the alternative, the Defence requests that:

- (i) In the event that the Chamber does not conditionally excuse President Kenyatta from continuous attendance at trial, President Kenyatta's continuous presence at trial be by means of video link.

Respectfully submitted,




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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 23<sup>rd</sup> day of September 2013

At London, England