

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 24 January 2014

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

Public redacted version of the 'Defence Request Pursuant to Article 63(1) of the Statute and Rule 134^{quater} of the Rules of Procedure and Evidence to Excuse Uhuru Muigai Kenyatta from Continuous Attendance at Trial' (ICC-01/09-02/11-882-Conf)

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
James Stewart
Benjamin Gumpert
Adesola Adeboyejo

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

Registrar
Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit
Patrick Craig

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Article 63(1) of the Rome Statute ('Statute') and Rule 134^{quater} of the Rules of Procedure and Evidence ('Rules'), the Defence for Uhuru Muigai Kenyatta ('Defence') hereby requests Trial Chamber V(B) ('Chamber') to excuse Mr Kenyatta from the opening of the trial and for the first weeks scheduled for the hearings of his case, and allow him to be represented by counsel only, due to his extraordinary obligations at the highest national level as the President of Kenya.
2. Mr Kenyatta showed his full cooperation with the Court by attending all Confirmation of Charges hearings and made himself available for questioning and cross-examination by all parties. In the election of him to the office of President and Head of State, circumstances concerning his availability to attend Court proceedings as he did in the past have now changed.
3. This request is made without prejudice to the Defence request to the Chamber to terminate these proceedings in the '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."'¹
4. This request is filed confidentially as it contains details of Mr Kenyatta's current international security obligations.

II. PROCEDURAL HISTORY

5. On 28 October 2013, the Defence submitted a signed waiver from Mr Kenyatta, in which he waived his right to be present at trial.²

¹ ICC-01/09-02/11-878.

² ICC-01/09-02/11-836.

6. On 25 October 2013, the Appeals Chamber issued its '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 from Trial"' ('Appeals Chamber Judgment').³
7. On 27 November 2013, the Assembly of States Parties ('ASP') adopted amendments to the rules that addressed the meaning, scope and application of Article 63(1), namely Rules 134*bis*, 134*ter*, and 134*quater*.⁴
8. On 16 December 2013, the Defence for Mr Ruto submitted its 'Defence Request pursuant to Article 63(1) of the Rome Statute and Rule 134*quater* of the Rules of Procedure and Evidence to excuse Mr. William Samoei Ruto from attendance at trial' ('Ruto Excusal Request').⁵
9. On 8 January 2014, the Prosecution filed the 'Prosecution response to Defence request pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for William Samoei Ruto' ('Response to the Ruto Excusal Request').⁶

III. APPLICABLE LAW

10. Under Article 63(1) of the Statute, 'The accused shall be present during the trial.' The recent Appeals Chamber Judgment found that Article 63(1) of the Statute does not preclude the continuation of trial proceedings in the absence of the Accused.⁷
11. Article 67(1)(d) of the Statute provides: 'In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the

³ ICC-01/09-01/11-1066.

⁴ Resolution ICC-ASP/12/Res.7.

⁵ ICC-01/09-01/11-1124.

⁶ ICC-01/09-01/11-1135.

⁷ ICC-01/09-01/11-1066, para. 1.

provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: [...] Subject to article 63, paragraph 2, to be present at the trial [...].’

12. Pursuant to Article 64(2), the Chamber must ‘ensure that a trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.’
13. Rule 134*quater*, entitled ‘Excusal from presence at trial due to extraordinary public duties’ provides:
 1. An accused subject to a summons to appear who is mandated to fulfil extraordinary public duties at the highest national level may submit a written request to the Trial Chamber to be excused and to be represented by counsel only; the request must specify that the accused explicitly waives the right to be present at the trial.
 2. The Trial Chamber shall consider the request expeditiously and, if alternative measures are inadequate, shall grant the request where it determines that it is in the interests of justice and provided that the rights of the accused are fully ensured. The decision shall be taken with due regard to the subject matter of the specific hearings in question and is subject to review at any time.
14. As noted by the Prosecution in its Response to the Ruto Excusal Request, the ‘interests of justice’ component recognises interests beyond those of the parties to the case, including those of the citizens of Kenya to enjoy effective leadership, as well as the victims, witnesses, and public in the proper administration of justice.⁸

IV. SUBMISSIONS

15. In order for an accused to be excused from presence at trial, the following elements of Rule 134*quater* must be satisfied:
 - (i) The Accused is summonsed to appear;
 - (ii) The Accused is mandated to fulfil extraordinary public duties at the highest national level;

⁸ ICC-01/09-01/11-1135, para. 4, citing ICC-01/09-01/11-1066, para. 49.

- (iii) The Accused submits a written request to the Trial Chamber to be excused, to be represented by counsel only and waives his right to be present at the trial;
 - (iv) Alternative measures are inadequate;
 - (v) Excusal is in the interests of justice;
 - (vi) The rights of the Accused are fully ensured; and
 - (vii) The decision to excuse is taken with due regard to the subject matter of the specific hearings in question.
16. The Defence submits that each of the elements of Rule 134^{quater} are satisfied, for the following reasons:
- (i) *Mr Kenyatta is summonsed to appear*
17. Mr Kenyatta is subject to a summons to appear before the International Criminal Court.⁹
- (ii) *Mr Kenyatta is mandated to fulfil extraordinary public duties at the highest national level*
18. The Defence submits that Mr Kenyatta is mandated to fulfil extraordinary public duties at the highest national level in his role as the President of Kenya. The Kenyan Constitution underscores the exceptional nature of the role of the President of the Republic. The national interest is particularly served at this time by having a President, who represents *all* the people of Kenya, being present and apparent to ensure the internal stability of the nation. The President is the symbol of national unity¹⁰ and the custodian of national values as articulated by Article 10(2) of the Constitution of Kenya:

The national values and principles of governance include –

⁹ ICC-01/09-02/11-01.

¹⁰ Constitution of Kenya, Article 131(1)(e).

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development.

19. The Constitution of Kenya mandates the President authority over the highest offices of State, which include: the Head of both State and Government, Commander in Chief of the Kenya Defence Forces and Chairperson of the National Security Council.¹¹ As Commander in Chief of the Kenya Defence Forces, the President exercises supreme command authority over Kenya's armed forces and is required directly to command them. The Defence submits that these constitute extraordinary duties.
20. As Chair of the National Security Council,¹² the President is required to preside over all meetings.¹³ These are held [REDACTED]. There is also the National Intelligence Service Council,¹⁴ which directly advises the President [REDACTED] on Kenyan, regional and global security matters, for which he has overall responsibility.
21. The President exercises other exceptional and extraordinary functions which include, *inter alia*, chairing all Cabinet meetings, directing and coordinating the functions of ministries and government departments, exercising the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries.¹⁵ He has the further authority to declare a state of emergency, declare war, and to suspend county governments in an

¹¹ Constitution of Kenya, Article 131(1).

¹² Constitution of Kenya, Article 240.

¹³ Constitution of Kenya, Article 240(4).

¹⁴ National Intelligence Security Act No. 28 of 2012, Section 64.

¹⁵ Constitution of Kenya, Articles 131 and 132.

emergency arising out of internal conflict or war or in any other exceptional circumstance.¹⁶

22. In considering the exceptional nature of the functions of a Head of State in Kenya, regard should be had to the current existing international security threats, such as [REDACTED],¹⁷ [REDACTED], all of which pose intractable security challenges that the Kenyan Head of State must personally constantly deal with and that, from all indications, he will need to continue to deal with in the foreseeable future.
23. For some time now, [REDACTED].¹⁸ [REDACTED]¹⁹ and related attacks in some sections of the northeastern part of the country.
24. More recently, the situation has been aggravated by [REDACTED].²⁰ This war has security implications not only for Kenya but also for the entire East Africa region. The President of Kenya, who in November last year was elected to the Chairmanship of the East African Community,²¹ must also deal with this additional security threat to the region. The situation [REDACTED] is such that, as President of Kenya and Chairman of the East African Community, Mr Kenyatta is inevitably permanently engaged in [REDACTED].
25. In circumstances where the security situation in Kenya and the region continues to be in a high state of alert, the constant engagement of President Kenyatta, as Commander in Chief, in the security affairs of the country and the region is imperative. He is permanently involved in constant consultations with his key security organs in order to provide the necessary leadership and

¹⁶ Constitution of Kenya, Article 192(1).

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ *President Kenyatta Takes Over EAC Leadership*,

<http://www.citizennews.co.ke/news/2012/local/item/15476-president-kenyatta-takes-over-as-eac-chairman>.

direction with regard to security matters, a situation that demands unhindered access to him by his security chiefs. Kenya is regarded as an important regional power, with high international expectations that it will perform an effective role in these matters.

26. Given the structure and legal framework of Kenya's security apparatus and the prevailing [REDACTED], any absence of the Head of State from his official duties will fundamentally undermine the capacity of the decision-making organs to carry out their duties and responsibilities. This can only be to the detriment of the safety and the security of: the Kenyan public; the other members of the East African Community, namely Burundi, Rwanda, Tanzania, and Uganda; and the other members of the Intergovernmental Authority on Development, being Djibouti, Eritrea, Ethiopia, Somalia, Sudan, South Sudan, and Uganda.
27. Significantly, the President also chairs the Cabinet (a function that he alone may perform),²² which meets regularly to provide leadership to the rest of the Government. These meetings are particularly important when the country is going through both external and internal security challenges, as is the case at this time. The Defence submits that the President's absence from Cabinet meetings would incapacitate Kenya, and would therefore undermine both domestic and regional peace and security.
28. Given the central role of the President of Kenya in security matters, it is important that he is not placed in a position whereby he cannot discharge his constitutionally mandated functions by reason of his unavailability to take immediate action.

²² Constitution of Kenya, Article 132(3)(a).

29. It is a matter of fundamental importance to Kenya that the issue of attendance at trial is addressed in a way that recognises the obligations of Mr Kenyatta as Head of State to discharge his constitutional duties.
30. The exceptional nature of Mr Kenyatta's duties was recognised by the governments of Tanzania, Rwanda, Burundi, Eritrea and Uganda in their 'Joint Amicus Curiae Observations [...] on the Prosecution's appeal against the "Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial."'²³ Heads of State 'are responsible for the security and well-being of their entire population through ensuring an effective and functioning national government.'²⁴
- (iii) Mr Kenyatta hereby submits a written request to the Trial Chamber to be excused, represented by counsel and explicitly waives his right to be present at trial*
31. Pursuant to the Chamber's 18 October 2013 'Decision on Defence Request for Conditional Excusal from Continuous Presence at Trial' ('Conditional Excusal Decision'),²⁵ Mr Kenyatta submitted a formal waiver to the Court on 28 October 2013.²⁶
32. Mr Kenyatta hereby informs the Chamber that he explicitly waives his right to be continually present at his trial and will be represented by Counsel during the trial.

²³ ICC-01/09-01/11-948.

²⁴ ICC-01/09-01/11-948, para. 6.

²⁵ ICC-01/09-02/11-830, para. 124(c).

²⁶ ICC-01/09-02/11-836.

(iv) *Alternative measures are inadequate*

33. Rule 134*quater* requires the Trial Chamber to consider alternative measures to excusal from presence at trial. If alternative measures are inadequate, the Chamber shall grant the request where it determines that it is in the interests of justice, provided that the rights of the accused are fully ensured.
34. The Defence submits that the Court is required to consider only alternatives that are reasonable. This requirement is explicitly stated in Article 63(2) of the Rome Statute, which requires that, 'other reasonable alternatives have proved inadequate,' and should be reflected in the interpretation of Rule 134*quater*. Moreover, the Defence notes that alternatives must be 'inadequate' rather than impossible.
35. This is consistent with the approach envisioned by the Appeals Chamber, which stated that 'the possibility of alternative measures must have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial.'²⁷

(a) *Changes to the trial schedule or adjournment of trial*

36. The Defence submits that changes to the trial schedule and regular adjournments cannot adequately accommodate the absences which will be required to enable Mr Kenyatta to fulfil his daily extraordinary duties as President of Kenya. Given the nature and extent of those duties, such changes or adjournment would not provide sufficient flexibility, or fairness to the accused, the victims, witnesses, or the citizens of Kenya.

²⁷ ICC-01/09-01/11-1066, paras 2, 62.

(b) Video link

37. In the light of Mr Kenyatta's experience as Head of State, the impact of recent events, and the introduction of the new rules, his attendance at trial by video link would constitute an inadequate alternative measure to his excusal. The use of such a measure, which would require Mr Kenyatta to be present at the video link facility, would disconnect him from his role as President and Head of State and prevent him from fulfilling his extraordinary duties.

(v) *Mr Kenyatta's excusal would be in the interests of justice*

38. The Defence submits that Mr Kenyatta's excusal from trial on the requested basis would be in the interests of justice, which extend beyond the parties in the case. The Defence agrees with the Prosecutor that the concept of 'interests of justice' in Rule 134^{quater} should be interpreted broadly, in recognition of the fact that 'there are interests at stake beyond those of the parties to the case, such as the interests of the citizens of the country concerned to enjoy effective leadership, as well as the interests of victims and witnesses and the interests of the public in the proper administration of justice.'²⁸
39. Granting Mr Kenyatta leave not to attend trial proceedings would allow the trial to continue with minimal interruption, which would be advantageous for all parties and participants in the proceedings while ensuring that the citizens of Kenya are protected by the execution of necessary and extraordinary duties on their behalf by their President. The Defence notes that the Appeals Chamber has considered, 'that the interests of justice and the psychological

²⁸ ICC-01/09-01/11-1135, paras 4, 35.

well-being of the witnesses would not be best served if the trial had to be automatically adjourned.’²⁹

40. Excusal would not deny Mr Kenyatta access to transcripts of the proceedings through his legal team or the opportunity to provide full instructions to his counsel.
41. Granting the requested excusal takes into account the democratic rights of the people of Kenya, and their rights to an effective government, and would have a positive effect on public confidence in the administration of justice in Kenya and the wider region. The Court will be able to act efficiently, effectively, expeditiously and fairly to the benefit of both the Accused and the witnesses and victims, avoiding an unnecessarily protracted trial.
42. The power of the Court to review a decision to grant excusal under Rule 134*quater* at any time provides an ongoing guarantee that the interests of justice will continue to be met should an excusal be granted in this case.

(vi) Mr Kenyatta’s rights will be fully ensured

43. The Chamber is vested with wide-ranging powers to ensure the fair and expeditious running of the trial.³⁰ Mr Kenyatta will, at all times, be fully represented by counsel, acting as they do upon instructions.
44. International criminal trials are complex, lengthy and rely heavily on the availability of modern technology to record and publicise the proceedings worldwide. Mr Kenyatta will be able to follow proceedings through transcripts and his legal team without being present in court.³¹

²⁹ ICC-01/09-01/11-1066, para. 50.

³⁰ Article 64(2).

³¹ ICC-01/09-02/11-809, para. 37.

45. The Court's power, under Rule 134^{quater}, to review a decision to grant an excusal at any time, provides a mechanism by which Mr Kenyatta's rights will continue to be fully ensured.

(vii) The decision to excuse Mr Kenyatta will be taken with due regard to the subject matter of the specific hearings in question and is subject to review

46. The Defence's request to excuse Mr Kenyatta for the opening of the trial and for the first weeks scheduled for the hearings of his case is made given the subject matter of the specific hearings in question. The hearings will concern the testimony of Prosecution witnesses, in respect of which the Defence team is in receipt of instructions from Mr Kenyatta.

V. RELIEF

47. For the reasons set out above, the Defence respectfully requests the Chamber to excuse Mr Kenyatta from the opening of the trial and for the first weeks scheduled for the hearings of his case.

Respectfully submitted,




.....
Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 24th day of January 2014

At London, England