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No.: ICC-01/09-02/11  
Date: 29 September 2014

**TRIAL CHAMBER V(B)**

**Before:** Judge Kuniko Ozaki, Presiding  
Judge Robert Fremr  
Judge Geoffrey Henderson

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public with public Annex**

**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*'**

**Source:** Legal Representative of Victims

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

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## I. Introduction

1. In accordance with the Trial Chamber's direction<sup>1</sup> and on behalf of the victims, the Legal Representative for Victims ('LRV') respectfully submits this response to the '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*' ('Request').
2. In summary, 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 accused's request to attend the status conference by video link.
3. Given the importance of the subject matter to be addressed at the status conference, and the fact that a short adjournment of the status conference would be adequate to secure the accused's presence, the LRV submits that the Trial Chamber should order a short adjournment and require the accused to attend in person.
4. For the benefit of the Chamber, the LRV sets out in the Annex, in English translation, the views of 28 victims collected during the period 26 to 28 September 2014 on this particular matter.

## II. Procedural History

5. On 29 September 2011, the accused last attended the seat of the Court.<sup>2</sup>
6. On 23 January 2012, the Pre-Trial Chamber, by majority, confirmed the charges against Mr Kenyatta, and committed him to trial.<sup>3</sup>

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<sup>1</sup> Email from the Trial Chamber to the parties and to the LRV of 25 September 2014.

<sup>2</sup> ICC-01/09-02/11-T-11-Red-ENG WT 29-09-2011.

<sup>3</sup> ICC-01/09-02/11-382-Red.

7. On 14 February 2013, Mr Kenyatta was permitted to attend a status conference via video link. This was the last date on which he has appeared in these proceedings, whether in person or by video link.<sup>4</sup>
8. On 9 April 2013, the accused assumed office as President of Kenya.
9. On 19 September 2014, the Trial Chamber scheduled status conferences for 7 and 8 October 2014 and ordered that, '[g]iven the critical juncture of the proceedings and the matters to be considered, the accused is required to be present at the status conference on 8 October 2014.'<sup>5</sup>
10. On 25 September 2014, the Defence filed the Request.<sup>6</sup>

### III. Submissions

*It is in the interest of the victims that the accused appear in person at the Court*

11. The Trial Chamber has ruled that 'the Common Legal Representative may file responses to documents but must first demonstrate that the subject matter at issue is directly related to the interests of victims.'<sup>7</sup>
12. In meetings with victims in Kenya from late January 2013 until September 2014, the issue of the 'presence' by video link of the accused at trial has frequently emerged as a topic. In every meeting where the issue has been raised for substantive discussion, victims have overwhelmingly expressed opposition to permitting the accused to be present by video link.
13. They are aware that persons accused of far less serious crimes than Mr Kenyatta are required to be physically present in the courtroom in Kenya. Many have expressed the view that the accused, like any other person accused of participation in murder, rape or other serious crimes, should be physically present in the courtroom at all relevant stages of the proceedings.

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<sup>4</sup> ICC-01/09-02/11-620.

<sup>5</sup> ICC-01/09-02/11-954.

<sup>6</sup> ICC-01/09-02/11-957.

<sup>7</sup> ICC-01/09-02/11-498, para. 71.

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.

14. The victims have also expressed repeated concern at reports in the media and in updates from the LRV relating to: the withdrawal of witnesses in this case; witness interference; recantations of evidence by witnesses testifying from Kenya in the *Ruto & Sang* case; and non-cooperation by Mr Kenyatta's government.
15. The fact that the accused has not appeared in person in an ICC courtroom in three years, and therefore appears to be benefiting from unusually favourable treatment -- more favourable even than the already favourable treatment afforded to Mr Ruto -- has had a negative impact on the victims' perception that justice is being done in this case.
16. The victims' perception is consistent with the Appeals Chamber's observation in *Ruto & Sang*:

Furthermore, the continuous absence of an accused from his or her own trial would have a detrimental impact on the morale and participation of victims and witnesses. More broadly, the presence of the accused during the trial plays an important role in promoting public confidence in the administration of justice.<sup>8</sup>

*Presence by counsel alone is not justified*

17. Having excused the accused from attending in person, or appearing by video link, at the hearings in this case on 6 September 2013<sup>9</sup>, 5 February 2014<sup>10</sup>, 13 February 2014<sup>11</sup> and 9 July 2014<sup>12</sup>, the Trial Chamber has ordered the accused to be present at the status conference scheduled for 8 October 2014, due to the critical juncture of these proceedings. The Trial Chamber would not have required Mr Kenyatta's presence at the hearing of 8 October 2014 were not a

<sup>8</sup> ICC-01/09-01/11-1066, at para. 49.

<sup>9</sup> ICC-01/09-02/11-T-25-Red-ENG WT 06-09-2013 1-1 WN T.

<sup>10</sup> ICC-01/09-02/11-893, para.3.

<sup>11</sup> ICC-01/09-02/11-897, para.7.

<sup>12</sup> ICC-01/09-02/11-929, para.6.

matter of considerable importance. There is no good reason for the accused to be excused from attendance.

18. Trial Chamber V(a) has ruled that the condition of 'the interests of justice' test in Rule 134 *quater* requires the balancing of competing interests: '(i) the interest of the Court to conduct fair, effective and expeditious proceedings, (ii) the interest of victims in the proceedings conducted in the presence of the accused, (iii) the interest of the Prosecutor, (iv) the evidentiary value of the presence of the accused during the testimony of witnesses, on the one hand; and the interest of the State mandating the accused to fulfil extraordinary duties at the highest national level, on the other hand.'<sup>13</sup> Trial Chamber V(a) also noted that 'not every duty at the highest national level is an extraordinary one'.<sup>14</sup>
19. In this case, the accused has been ordered to attend a single status conference on one day following an absence of three years. Taking into account the importance of the issues to be addressed – discussed further below -- the interests of justice require the accused's presence at the status conference.
20. The LRV therefore opposes the request for the accused to be permitted not to attend the status conference and to be represented by counsel.

*A short adjournment of the status conference is not opposed by the LRV*

21. The LRV does not oppose the request to adjourn, provided that the two status conferences take place in the relatively near future, as delay in these proceedings is a concern frequently raised by the victims.
22. The Appeals Chamber, in *Ruto & Sang* ruled unanimously that, in considering requests to be absent from trial, 'the possibility of alternative measures must

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<sup>13</sup> ICC-01/09-01/11-1186, para.73.

<sup>14</sup> *Ibid*, para. 64.

have been considered, including, but not limited to, changes to the trial schedule or a short adjournment of the trial'.<sup>15</sup>

23. This requirement was codified in Rule 134 *ter* (2): 'The Trial Chamber shall only grant the request if it is satisfied that [...] alternative measures, including changes to the trial schedule or a short adjournment of the trial, would be inadequate'.
24. If a short adjournment is adequate to ensure the accused's physical presence, this constitutes an 'alternative measure' under Rule 134 *quater* (2). The Trial Chamber should order a short adjournment and require the accused to be present at the rescheduled status conference.
25. The LRV confirms his willingness to attend the status conferences scheduled for 7 and 8 October 2014 on any dates ordered by the Trial Chamber.

*The importance of the hearing requires the attendance of the accused in person*

26. The Defence has failed to set out circumstances justifying the use of video link in the present circumstances. In particular, it has failed to demonstrate that 'alternative measures', such as a short adjournment, are inadequate.<sup>16</sup>
27. Discretionary factors weigh against permitting the accused to appear by video link.
28. The last time Mr Kenyatta entered a courtroom at the ICC was precisely three years ago. The freedom and flexibility afforded to Mr Kenyatta, a person accused of crimes against humanity, is unprecedented in international criminal justice.
29. No other person charged at this Court has enjoyed such favourable treatment. 95 persons were indicted for serious crimes by the International Criminal Tribunal for Rwanda, and 161 by the International Criminal Tribunal for the former Yugoslavia. Not one of them benefited from a regime of provisional

<sup>15</sup> ICC-01/09-01/11-1066, paras. 2 and 62.

<sup>16</sup> Rule 134 *quater* (2).

release which was even remotely as favourable as the summons regime extended to Mr Kenyatta by the ICC. Similarly, no person in good health charged with serious crimes by the Special Court for Sierra Leone, nor by the Extraordinary Chambers in the Courts of Cambodia, has been excused from appearing in a courtroom during pre-trial or trial proceedings for a period which comes even close to one year, let alone three years.

30. In the period since the accused has last appeared before this Court, he has stood for election in Kenya in full knowledge of his obligation to appear in person at this Court for trial. He now prays in aid his extraordinary public duties as President of Kenya.<sup>17</sup> It is respectfully submitted that no accused, regardless of his status, should be permitted to rely on circumstances which he has knowingly, voluntarily and deliberately brought into being, since committal for trial, in order to avoid his duty to physically appear before this Court.

31. Under Rule 134 *bis*,<sup>18</sup> the Trial Chamber must have ‘due regard to the subject matter of the specific hearings in question’. Rule 134 *bis* (2)<sup>19</sup> implicitly accepts that some hearings are of more significance than others.

32. The Prosecution’s notice of 5 September 2014 and the responses of the Defence and the victims to that notice raise vitally important issues. In particular, the Defence response contains a request to end the case against the accused. If granted, this is likely to mean the total and irreversible destruction of the justice process for the thousands of victims of this case.

33. The hearing scheduled for 8 October 2014 is therefore of critical importance to the victims, the accused, and the credibility and deterrent effect of this Court.

<sup>17</sup> Request, paragraphs 3, 10 and 13.

<sup>18</sup> The LRV wishes to reserve his position as to the consistency of Rules 134 *bis*, *ter* and *quater* with Article 63(1) of the Statute, which provides: ‘The accused shall be present during the trial’. The Rules of Procedure and Evidence are ‘subordinate in all cases’ to the Rome Statute. (Explanatory note, Rules of Procedure and Evidence, cover page).

<sup>19</sup> Rule 134 *quater* (2) provides: ‘The Trial Chambers 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.’



There will also be great interest in this hearing from States Parties, and the public at large. It is not the kind of hearing for which the accused should be permitted to be present by video link.

34. This is particularly so as many events have taken place in the three years since the accused was last physically present before the Court which have negatively impacted on the Prosecutor's efforts to establish the truth, the Court's ability to determine the truth, and the victims' right to know the truth.

35. These include:

- a. The accused has made gross insults<sup>20</sup> towards this Court and has tried to vilify and delegitimize it.<sup>21</sup>
- b. The Government over which the accused presides has failed to comply with requests for assistance from the Prosecutor and with directions issued by this Trial Chamber on 31 March 2014 and 29 July 2014 for the delivery of evidence which is of central importance to this case.
- c. The Prosecution has made serious allegations relating to interference with important witnesses in this case.

36. In any case in which the accused has made public insults to the Court, and credible allegations of obstruction of access to evidence and intimidation of witnesses have arisen in the proceedings generally, it is more than reasonable to require the accused to appear in person in court so that he is available to answer the Trial Chamber's questions. This applies even if the accused had been required to attend every other hearing during the case in question.

37. In the present circumstances, it is even more reasonable to do so. To require an accused to appear in an ICC courtroom for an important hearing at a critical juncture in the proceedings, for one day after three years of absence, is

<sup>20</sup> Lord Denning, M.R. concluded his judgment in *Balogh v. Crown Court at St. Albans* [1974] 3 All E.R. 283 at 289 E with the following: 'Insults are best treated with disdain - save when they are gross and scandalous. Refusal to answer with admonishment - save where it is vital to know the answer. But disruption of the court or threats to witnesses or jurors should be visited with immediate arrest.'

<sup>21</sup> 'Speech by President Uhuru Kenyatta at the Extraordinary Session of the African Union,' *The Standard*, 13 October 2014, <http://www.standardmedia.co.ke/thecounties/article/2000095433/speech-by-president-uhuru-kenyatta-at-the-extraordinary-session-of-the-african-union> [10 September 2014].

surely not asking too much. This is particularly so as the accused resides in, and controls the government of, the state in which the crimes were allegedly committed, and in which almost all of the surviving victims live.

38. Mr Kenyatta is uniquely positioned to help the Trial Chamber to understand the real reasons why Mr Kenyatta's Government has failed to comply with the Trial Chamber's directions of 31 March 2014 and 29 July 2014. This discussion will be the inevitable follow-up to the discussion at the status conference to which the Government of Kenya has been invited, currently scheduled for 7 October 2014. Given his enormous *de jure* and *de facto* power in Kenya, Mr Kenyatta is uniquely placed to enlighten the Trial Chamber as to when his Government will comply in full and in good faith with the directions of the Trial Chamber.

39. In respect of witness interference, the Prosecution has said: 'In terms of bribery, individuals attempted to persuade Witnesses 4, 11 and 12 to recant their testimony and/or to withdraw their cooperation with the Prosecution. On some occasions, money was offered to them.'<sup>22</sup> The Trial Chamber and the victims are entitled to hear the accused explain what he knows about: (i) who made these attempts; (ii) at whose instigation; and (iii) for what reason. This information will assist the Trial Chamber in its assessment of the overall context of non-delivery of key evidence in Kenya to the Court.

40. The outcome of the status conference is likely to have a significant effect on pending request for referral of Kenya to the Assembly of States Parties pursuant to Article 87(7) of the Statute. That referral entails possible diplomatic consequences for Kenya, as it could negatively affect Kenya's

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<sup>22</sup> ICC-01/09-02/11-892-AnxA-Red at page 3, where the Prosecution added: 'While the Prosecution ultimately withdrew Witnesses 4 and 12 from its witness list for reasons unrelated to the bribery attempts, those attempts required the Prosecution to expend considerable resources to investigate the bribery and to ensure the safety of its witnesses'. See also the substantiated allegations at paragraphs 92 to 95 of the Second Updated Prosecution pre-trial brief of 26 August 2013 (ICC-01/09-02/11-796-Conf-AnxA). The pre-trial brief, at the insistence of the Defence, remains confidential: ICC-01/09-02/11-T-30-ENG, lines 21-22.

relationship with other states. From the perspective of national interest,<sup>23</sup> the hearing therefore is an important event.

41. Furthermore, the accused's position, as set out in the Request,<sup>24</sup> appears to be substantially different to that which he adopted prior to the 2013 presidential election. At that time, Mr Kenyatta consistently maintained the view that his case at the ICC was a personal matter, and that both he and Mr Ruto would be able simultaneously to execute state responsibilities and to appear in person in The Hague.
42. For example, Mr Kenyatta reportedly said in January 2013: 'I can assure you that the government will function even as we attend court sessions. You should trust us with your votes because this would be an endorsement to our leadership and a vote of no confidence to the Court itself [...] The president sometimes goes out of the country even for three weeks and the government still runs smoothly.'<sup>25</sup> He made similar remarks to *Al Jazeera*.<sup>26</sup>

<sup>23</sup> National interest is cited in the Request at paras. 6 and 11.

<sup>24</sup> Request, para. 13.

<sup>25</sup> 'ICC will not affect my regime, says Uhuru', *The Daily Nation*: 30 January 2013, available at: <http://elections.nation.co.ke/news/ICC-will-not-affect-my-regime-says-Uhuru/-/1631868/1680382/-/etfqkn/-/index.html>

<sup>26</sup> *Talk to Al Jazeera: Uhuru Kenyatta*. Available at: <http://www.youtube.com/watch?v=x2CSdLSVfwU&noredirect=1>. A transcript of the relevant portion is set out here:

Presenter: Let's talk about how you would handle the issues that confront Kenya – both you and your running mate William Ruto are facing trial at the International Criminal Court in the Hague in April just a few weeks after the first round, and you've both said that you would continue to appear before the court even if you were elected

Mr Kenyatta: Absolutely

[...]

Presenter: I'm talking about the practicality here, of defending yourself while also being in the office of President.

Mr Kenyatta: I'm actually getting there. We are a democracy, Kenya is a democracy, there is no statement anywhere, even by the ICC itself that says that we are not eligible, right, to stand for office, right, as we move on, second...

Presenter [interruption]: it's not about the question of eligibility

Mr Kenyatta: I'm getting to you. Let me get to you. So therefore, right, even as we continue to face these charges, right, we will still continue to appear, the affairs of government, right

Presenter [interruption]: but there could be a power vacuum as soon as you are inaugurated, if you have to go back and forth to the Hague, you know those hearings last months Uhuru Kenyatta, how are you going to do it?

Mr Kenyatta: There is absolutely no power vacuum because one thing people always forget ...

Presenter [interruption]: if the President and Vice President are at the Hague and not in the country?

Mr Kenyatta: One thing people tend to forget is Kenya is not a banana republic, right, Kenya is a country that actually has very firm and clear institutions in place that will allow, right, and...

Presenter [interruption]: for you to shuttle between Nairobi and the Hague constantly?

43. If the accused chooses to answer questions from the Trial Chamber during the status conference, his demeanour is likely to be of assistance to the Chamber in assessing his credibility, in the same way as a witness's demeanour is of assistance to the trier of fact in any case, whether civil or criminal.<sup>27</sup>
44. Mr Kenyatta has a right not to be compelled to testify and to remain silent, without such silence being a consideration in the determination of guilt or innocence.<sup>28</sup> If he chooses to remain silent at the status conference, the Trial Chamber will nevertheless gain valuable insights, which will assist it in determining the truth in this case, from its observation of Mr Kenyatta in the courtroom. As a matter of common experience, even a high-quality video link cannot capture the demeanour of a person in a courtroom in the same way as physical presence. To permit the accused to participate in the status conference by video link would thus deprive the Trial Chamber of those significant insights.
45. The ICTR Appeals Chamber, in a decision concerning presence at trial, cited *Riggins v. Nevada*, where Justice Kennedy of the United States Supreme Court emphasised the benefit to the trier of fact of observing the accused in person during all stages of the proceedings:

It is a fundamental assumption of the adversary system that the trier of fact observes the accused *throughout the trial, while the accused is either on the stand or sitting at the defense table*. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause. [...] *At all stages of the proceedings*, the defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall

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Mr Kenyatta: ...that we also, right, are not facing similar charges, we are never there at the same time, if at all, alright, so consequently, the system and the State, right, will continue, right, to run, right, irregardless of whether the Court, the two are not interlinked, right.

<sup>27</sup> Citing *Rains v. Rains*, 17 N.J.Misc. 310, 8 A.2d 715, 717, 'Black's Law Dictionary' (6<sup>th</sup> edition, 1990, at p. 430) says a witness's demeanour includes: 'The tone of voice in which a witness's statement is made, the hesitation or readiness with which his answers are given, the look of the witness, his carriage, his evidence of surprise, his gestures, his zeal, his bearing, his expression, his yawns, the use of his eyes, his furtive or meaning glances, or his shrugs, the pitch of his voice, his self-possession or embarrassment, his air of candor or seeming levity.'

<sup>28</sup> Article 67(1)(g) of the Rome Statute.

impression on the trier of fact, an impression that can have a powerful influence on the outcome of the trial. If the defendant takes the stand, as Riggins did, his demeanor can have a great bearing on his credibility, persuasiveness, and on the degree to which he evokes sympathy.<sup>29</sup>

#### IV. Conclusion

46. For the foregoing reasons, the LRV, on behalf of the victims:

- a. opposes the request to permit the accused not to attend the status conference;
- b. does not oppose a short adjournment of the status conference;
- c. opposes the request to permit the accused to attend the status conference via video link.

Respectfully submitted,



Fergal Gaynor

Common Legal Representative of Victims

Dated 29<sup>th</sup> September 2014

At Berlin, Germany

<sup>29</sup> *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring), (available at <http://www.law.cornell.edu/supct/html/90-8466.ZC.html>), cited in *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 at footnote 48. Emphasis added.

Available at: <http://www.unictr.org/Portals/0/Case%5CEnglish%5CZigiranyirazo%5Cdecisions%5C061030.pdf>