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

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

Public

Prosecution's Response to the "Defence request for an adjournment"

Source: Office of the Prosecutor

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

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Introduction

1. The Defence requests an adjournment of the case in order to permit Mr Ruto to return to Kenya to deal with the recent terrorist attack on the Westgate Mall in Nairobi and its aftermath.
2. The Prosecution expresses its deep concern and sympathy to the victims of the attack, to their families and friends and to the Kenyan people.
3. The Prosecution submits that the Defence has not made out a case in law that the presence of Mr Ruto is indispensable to the resolution of the situation. Nevertheless, in light of the serious and exceptional nature of the crisis, the Prosecution does not oppose a limited and conditional adjournment of the case, subject to the assessment of the VWU as to the impact of such an adjournment on P-0536 and other witnesses.

Submissions

4. The Ruto Defence submits that Mr Ruto, “as the serving Deputy President of Kenya, is required to return to Kenya to discharge his ordinary constitutional duties which include participating in security briefings and consultations and involvement in other on-going and very sensitive national security investigations {...}. Thereafter, Mr. Ruto will be required to deal with the aftermath of such a traumatic and tragic event for Kenya including attending funerals and other affairs of state.”¹
5. The Prosecution submits that the Defence has not made out a case that Mr Ruto’s presence in Kenya is indispensable to the resolution of the crisis. In particular, he has not explained why the President, responsible Ministers, the police and the army would not be competent to deal with the matter in his absence. The

¹ ICC-01/09-01/11-966, para. 5.

Prosecution points out that the Chamber has already taken reasonable steps to arrange proceedings so as to enable one or other of the President or Deputy-President to be present in Kenya to attend to all domestic affairs.

6. Nevertheless, notwithstanding the legal flaws in the application, the Prosecution is of the view that the situation is so serious and so unique that, as an exception to the normal position that the accused's presence before Court should take precedence over his day to day duties, a limited adjournment should be permitted to allow Mr Ruto to provide what assistance he can to the people of Kenya. This position is in line with the Prosecution's mission to protect the best interest of the victims of such crimes.
7. This concession is made subject to the assessment of the VWU, after consultation with witness P-0536, as to the impact of the delay on her safety and psychological well-being, as well as that of this witness' family and on the subsequent witnesses who are scheduled to appear.
8. However, the Prosecution opposes the Defence's request for an open ended adjournment "until such time as the security situation in Kenya resolves itself or an order of the Trial Chamber is issued."² The Prosecution submits that such an order would, for obvious reasons, be open to abuse. The Prosecution submits that a discrete adjournment for a period of no longer than one week will suffice. In that time, apart from his contribution to the resolution of the crisis, the Accused will have a reasonable opportunity to put in place the necessary mechanisms to deal with the on-going effects of the attack in his absence. Furthermore, the Prosecution observes that, given modern means of communication, the Accused would still be accessible outside of court hours and able to provide his guidance and instructions to those to whom he has entrusted this task in his absence.

² *Ibid.*, para. 6.

9. Moreover, the Prosecution strenuously disputes the Defence's submission that this attack is "an example of the situations which form part of the normal state affairs which fall within the portfolio of a country's deputy Head of State."³ This serious and abhorrent attack on the civilian population of Kenya, which may itself amount to a crime under international law, can hardly be characterised as part of 'normal state affairs'. The Prosecution submits that this tragic event should not be used by the Ruto Defence as opportunistic support for their bid to have the Accused excused from further attendance at his trial.

Conclusion

10. Subjects to the caveats above, the Prosecution does not oppose the Defence request.



Fatou Bensouda, Prosecutor

Dated this 23rd day of September 2013

At The Hague, the Netherlands

³ *Ibid.*, para. 4.