

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion
7 and Judge Robert Fremr
8 Status Conference
9 Monday, 23 September 2013
10 (The status conference starts in open session at 8.34 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Good morning, everyone.
15 Court officer, quickly call the case, please.
16 THE COURT OFFICER: Good morning. Situation in the Republic of Kenya, in the
17 case of The Prosecutor versus William Samoei Ruto and Joshua Arap Sang, case
18 reference ICC-01/09-01/11, and for the record we are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 I see that appearances remain the same and I also note for the record that Mr Ruto is
21 in court today.
22 MR STEYNBERG: Your Honour, for the record we have one addition on the
23 Prosecution side, Mr Ade Omofade, behind me on my left.
24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
25 MR NDERITU: Your Honour, and from the Common Legal Representative, we also

1 have Carolin Herzig, the case manager today. Thank you.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

3 I understand that the VWU is in Court as well.

4 MS SCHAUDER: Yes, your Honour, Natacha Schauder, acting head of operations
5 for the VWU. Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

7 We have been made aware of an incident at the Westgate Mall in Nairobi. There is
8 never a justification for such acts against innocent people. The Chamber expresses
9 its deepest sympathy to the victims and their families and friends and to all Kenyans
10 in this most difficult time.

11 We are seized with an application connected to this incident. We would not need to
12 hear from Mr Ruto generally on the facts of the matter, but we may need to hear from
13 him on specific points of clarification, if need be.

14 Mr Khan, you have an application before us, I take it?

15 MR KHAN: I do, your Honours. Firstly, thank you for convening an hour earlier
16 this morning so that the application could be heard. The flexibility of the Bench is
17 appreciated. The condolences also are in order and of course all right-thinking
18 people express their heart-felt and sincere condolences to those that have lost loved
19 ones, people that have been injured, and most of all those that are living in terror, the
20 30 or so hostages that remain in that shopping mall in fear of their lives. So our
21 prayers and thoughts are with them and those members of the security services that
22 are trying their utmost to bring them to safety and reunite them with their families.
23 Your Honour, the background of this matter is important to the present application.
24 This case was scheduled many months ago and it was known that the Deputy Head
25 of State, William Ruto, would be here in The Hague. Your Honour, it was also

1 anticipated that, as we speak, at the time of the terrorist attack the President of the
2 Republic of Kenya would not have been inside Kenya because he was due to have
3 been in New York at the high-level week of the General Assembly and the
4 United Nations.

5 Your Honour, because of the requirement of the Court for William Ruto to be here,
6 the President of the Republic of Kenya regrettably informed the Secretary-General
7 before the terrorist attack that he would not be attending. And, your Honour, I hand
8 up a letter from the Permanent Mission of Kenya, dated 20 September - 20
9 September - of this year, so before the attack took place, that detailed Kenya's position
10 as to why it would not be attending.

11 Your Honour --

12 PRESIDING JUDGE EBOE-OSUJI: Mr --

13 MR KHAN: -- fortuitously --

14 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one second. At this stage it appears
15 that we may truncate the discussion on this matter into the first issue being whether
16 or not Mr Ruto, pursuant to your application, will need to be excused. If that is the
17 case, that may well be a discrete matter that we can take up, and if that is resolved I
18 assume he will have a plane to catch and then, if that is resolved either way, looking
19 at the OTP's response which they will also speak to, it may well be that that is
20 resolved favourably, we may let him go --

21 MR KHAN: I'm grateful.

22 PRESIDING JUDGE EBOE-OSUJI: -- and then take up the rest of the matter with
23 regards whether to adjourn the matter and why and why not. It may well be that it
24 is at that point that some of the remarks I anticipate you are heading towards may be
25 made. Consider it.

1 MR KHAN: Your Honour, I'm grateful because it is essential, we say, for
2 the -- William Ruto to go back. One wouldn't have expected, or the world would
3 have found it intolerable, if the President and Vice-President of the United States were
4 not in the country after 9/11. Well, this is Kenya's 9/11 and it is absolutely essential
5 for law and order, for assisting the president to resolve the situation, to prevent
6 recurrences, to give confidence and security and succour to the families of those that
7 have lost loved ones that the Deputy President returns home.

8 Your Honour, the Prosecution have said that the Defence should not use this as an
9 opportunistic support for their bid to have the accused excused from further
10 attendance. We found that most regrettable and scandalous.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's not go there yet. We may have
12 occasion to take that matter up. The question now is whether or not Mr Ruto needs
13 to be excused, and you say he needs to be because of the functions of his office.
14 Does the Prosecution oppose that?

15 MR KHAN: Your Honour, can I just say one thing? The Dean of the Diplomatic
16 Corps of all diplomats in Kenya has informed us, and it is on public record, that he
17 has said publicly, on part of all the diplomats of all countries represented in Kenya,
18 that they call upon those that are mandated to have the power of decision in their
19 hands to do what is necessary to allow the Deputy President to return home at this
20 moment, and that's the Dean of the Diplomatic Corps in Nairobi. Your Honour,
21 with that I will leave it for the Prosecution and, if necessary, I will reply, with the
22 Court's leave.

23 MR STEYNBERG: Thank you, your Honour. As foreshadowed in the filing
24 submitted this morning and a courtesy copy which was distributed yesterday evening,
25 the Prosecution does not object to a short and limited postponement of the matter to

1 accommodate Mr Ruto and to accommodate Kenya in these difficult times.

2 I would just like to add to the Chamber's expression of sympathy, also the

3 Prosecution's thoughts are with the people of Kenya. So at this point we have no

4 difficulty with Mr Ruto being excused and we can then debate, as your Honour has

5 suggested, the appropriate modalities of what befalls the case before the Chamber.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, you are counsel for victims. We

7 would like to hear from you quickly.

8 MR NDERITU: Thank you, Mr President, your Honours. We made a filing last

9 night and we would not need to add to that for the time being. We are saying that

10 we have no objection too for the adjournment for a reasonable time. It's a matter

11 that's really --

12 PRESIDING JUDGE EBOE-OSUJI: We're not yet -- I'm sorry, I see you are overcome

13 as well, Mr Nderitu, with emotion and that's totally understandable. We will be

14 discussing the second question of whether or not to have an adjournment. Right

15 now we're dealing with whether to excuse Mr Ruto from the Court. I take it you do

16 not oppose.

17 Mr Sang.

18 MR KHAN: Your Honour, if I can just say for the Court's management purposes - I

19 think even security - I can say, your Honour, there's a flight at 11.00 and that's the

20 flight the -- yes, I'm grateful.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, counsel for Mr Sang.

22 MR KIGEN-KATWA: (Microphone not activated)

23 THE INTERPRETER: Microphone, please.

24 MR KIGEN-KATWA: Sorry. On our part we do not oppose Mr Ruto's request to

25 travel. We think it is necessary. Thank you.

1 (Trial Chamber confers)

2 PRESIDING JUDGE EBOE-OSUJI: The Chamber's ruling on the matter is this: In
3 light of the circumstances and the views heard so far, the Chamber does excuse
4 Mr Ruto from the proceedings. For the moment the excusal is permitted for one
5 week only, subject to any further requests that Defence counsel may make if need be
6 to extend it. We will rise now in order to enable the Court to clear and Mr Ruto can
7 depart the courtroom.

8 We will reconvene in ten minutes to continue the rest of the submissions on this
9 matter.

10 MR KHAN: I'm grateful, your Honour.

11 THE COURT USHER: All rise.

12 (Recess taken at 8.46 a.m.)

13 (Upon resuming in open session at 9.00 a.m.)

14 THE COURT USHER: All rise.

15 Please be seated.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you very much and welcome back.

17 Now we will take submissions on the second limb of the matter, which is whether or
18 not to adjourn the proceedings pending the return of Mr Ruto to the courtroom.

19 Mr Khan, you were beginning -- you may complete your submissions in this regard.
20 You were beginning to address it.

21 MR KHAN: Mr President, your Honours. I'm grateful.

22 Your Honour, I've handed up a letter from the Permanent Mission of Kenya to the
23 Secretary-General of the United Nations on 20 September, which -- it was only
24 then - this was not a public document at the time - in which the President confirmed
25 that he would not be attending the General Assembly week in New York at the

1 moment because of the Deputy's presence here. Your Honour, the letter written
2 before the terrorist attack and sent to the Secretary-General before this atrocity that's
3 underway refers to the constitution of Kenya, that the President -- that either the
4 President or the Deputy must remain in the country at all times. Your Honour,
5 there's good reason for that, but it seems that the terrorists that have planned this
6 attack aimed it at a period when they thought Kenya was most vulnerable, when
7 there would be a vacuum of leadership, and that the President would be in New York
8 and that the Deputy would be here. Your Honour, it was a calculated attack to strike
9 a country in its moment of weakness.

10 Your Honour, the last page of the letter I think is relevant and it states that -- just one
11 paragraph --

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, may I recommend that we limit our
13 submissions to what the Court can actually appraise --

14 MR KHAN: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: -- as a factual matter or, you know, inevitably
16 reasonable inference. I think we begin to enter the realms of speculation when
17 we start projecting what's --

18 MR KHAN: Well, your Honour, actually, it wasn't --

19 PRESIDING JUDGE EBOE-OSUJI: One second, let me finish. In the minds of the
20 terrorists who attacked.

21 MR KHAN: Well, your Honour, let me say this then. The Prosecution -- well, the
22 application for an adjournment was compelled upon us because what we say of
23 course is an eminently sensible and reasonable decision of the majority of the Bench
24 to excuse the Deputy President has been subject to appeal and then suspensive effect
25 has been granted. So the only available option, it seemed to us, was not to continue

1 in the absence of Mr Ruto, but it was to adjourn proceedings because of the pending
2 Appeals Chamber matter. That's why, your Honours, we put forward the
3 application to adjourn.

4 Your Honour, this is not -- and it really is -- a point comes, your Honours, where all of
5 us have to act responsibly. This is not about who wins what contest. You know,
6 your Honours, on the last occasion my learned friend repeated comments of an
7 individual, saying that Kenya may be becoming a pariah State and then he stood up
8 again and said, "Well, Mr Khan says Kenya's not a pariah State," but I referred to
9 Libya and perhaps it was Sudan.

10 Well, your Honours, apart from the fact that that was in a different context, saying
11 that Kenya's co-operation is in very marked contrast, despite the protestations, to the
12 Cote d'Ivoire, who refused to surrender Gbagbo - Simone Gbagbo - or in marked
13 contrast to Libya, which refuses to comply with orders of the Court, Kenya is - and it
14 may stick in the throat of the Prosecution sometimes - a model of exemplary conduct
15 when it comes to the highest level co-operation with the International Criminal Court.
16 And for the Prosecution to say that somehow the Defence should not use this tragedy,
17 when blood is still on the ground and people are shivering in fear, as an opportunistic
18 support for the bid to have the accused excused, is really unwarranted and it's
19 objectionable and it is offensive.

20 Your Honour, the Prosecution may be feeling I hope -- well, your Honour, the last
21 thing it is, put it that way, is opportunistic. It's driven by the needs of the
22 Constitution of the Republic of Kenya, the needs of the victims, and it's not the
23 Defence being a lone voice. I think all right-minded people are saying that it is
24 important.

25 You know, this Court, 173 Maanweg, does not -- life does not begin and start at its

1 door. It is part of the international architecture. And, your Honour, in deciding or
2 navigating the way forward for the Court, the Court very rightly balances public
3 interest - international public interest - in the same way that a domestic court will do
4 so. So, your Honours, we do deprecate the attempt of saying that somehow this is
5 an opportunistic attempt.

6 Your Honour, the other aspect is -- and I think it shouldn't be lost on us and it is really
7 to support your Honour's, Mr President's, comments at the outset - our condolences
8 go not only to the people of Kenya, but there are British and there are French and
9 there are Americans and there's other Africans that have tragically lost their lives.

10 A very renowned Ghanaian, Professor Kofi Awoonor, who's 78 years of age, who was
11 the well-known poet and author and also Permanent Representative of Ghana to the
12 United Nations and Chair of the Anti-Apartheid Committee, has also died in this
13 tragic attack. So our heart goes out to all of them.

14 Now, your Honours, we do say, number one, we're grateful for the Bench granting
15 the adjournment - it's needed for the people of Kenya and the interests of justice in its
16 widest form - but, your Honour, when it comes to the length of the adjournment,
17 because it seems -- and we have no objection if your Honour -- you know, it doesn't
18 seem to us the trial -- because of the Prosecution's rigid position that the trial can
19 continue in the absence of William Ruto, but if it can of course so much the better, but
20 your Honour the period of one week is not sufficient.

21 The Prosecution -- and, of course, none of us have had the responsibilities of the
22 highest office of a country. Your Honours, you know, may have a better
23 understanding than the Prosecution, but for the Prosecution to say that one week
24 would be sufficient for a crime of this magnitude really shows how divorced they are
25 from the reality of government and the responsibilities that is on leadership.

1 Even the journalist -- even if one had watched TV, CNN and BBC, the journalists are
2 saying that they are having difficulty contacting officials because they're constantly in
3 different high-level security meetings, National Security Council meetings, other
4 briefings, to deal with this issue.

5 Your Honour, this is a complex matter. The immediate concern, of course, is the
6 terrorist attack and those people that have been -- that are still in the hands of these
7 terrorists, but there is a wider issue, of course, about the Al-Shabab attempts to attack
8 the Republic of Kenya because Kenya is on the front line of the war of terror. It is
9 part of a group of African countries that are trying to stop terrorists on the front line
10 and, your Honour, if these terrorists are not defeated here, they are a risk to the world
11 everywhere.

12 And so for the Prosecution to glibly say either that it's an opportunistic attempt is
13 derisory, or for them to say that one week is sufficient, bears no understanding to the
14 essentials of government dealing with this issue, dealing with the aftermath.

15 There are of course -- even in addition to security, there are issues which are
16 important to government, which is reassurance, rehabilitation, to those that have
17 suffered and there are funerals tragically that have to be attended. And, your
18 Honours, in all tragedies, Presidents, Heads of State, provide that spine, that strength,
19 that cohesion that brings a country together and stops it fragmenting under its pain.

20 Your Honour, one week is not sufficient unfortunately.

21 Your Honour, the President, His Excellency Uhuru Kenyatta, made it clear
22 yesterday --

23 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I know you are -- I do not mean to
24 interrupt you on that train of thought. I just wanted to explain the reason why we
25 pointed to the one week in the meantime, because that seems to be the least common

1 denominator or factor in all of this.

2 The Prosecution had agreed to it, the limit, and for you that included of course in
3 what you wanted. You wanted more. So we wanted to deal quickly with the
4 matter so that Mr Ruto could proceed to the airport and limited it to the one week in
5 the meantime, subject to any further submissions you may make.

6 You may continue. I just wanted to clarify that.

7 MR KHAN: Well, I'm grateful, and we are cognizant and we're grateful for the
8 Bench dealing with it in that manner. We do know that the common position was
9 that the Prosecution, despite how it was couched, was not to object to one week, and
10 the Bench of course I think very rightly and correctly -- and we're grateful for it,
11 interest was to in those circumstances and after having considered the matter allow
12 Mr Ruto to get on a plane so he could go back home to his people.

13 Your Honour made it quite clear before the break that your Honours were not
14 closed-minded regarding the length and you were going to hear submissions on that.
15 We are grateful to it - the Bench - for that understanding.

16 Your Honour, the his Excellency the President, Uhuru Kenyatta, said in a public press
17 conference yesterday - and this is a sad reality that all leaders have in this day and age
18 unfortunately, and we've heard similar sentiments after the 7 July bombings in the
19 United Kingdom, or after 9/11 - that what the public don't see are how many terrorist
20 attacks are foiled, are uncovered.

21 And it is known that Al-Shabab and this terrorist group is implacably opposed to
22 democracy, the rule of law and a pluralistic society where all people are free,
23 regardless of their colour or their religion or their creed, to live in peace complying by
24 the rule of law, not by fundamentalist, rigid, contorted and a twisted interpretations
25 of a peaceful religion.

1 Your Honour, these other attacks that are being planned and are underway are not
2 matters to be taken lightly. We do hope, of course, that the Appeals Chamber will
3 render its own decision on the merits of the Prosecution's appeal at the first available
4 opportunity. It is an important matter. It affects not only William Ruto, but
5 40,000,000 Kenyans.

6 But, your Honour, in the meantime - in the meantime - what we do ask is that the
7 Court does balance the competing concerns, and in these circumstances if the Court
8 feels that the case cannot proceed in the absence of Mr Ruto because of the
9 Prosecution's position and the Appeals Chamber decision, then I'd ask that the case be
10 adjourned for at least two weeks to allow matters of State to be dealt with, this current
11 crisis and the terrorist attack to be quashed and then the aftermath for proper
12 planning and discussions to take place that may prevent recurrences of such terrible
13 crimes in the future.

14 Your Honour, that's why I say two weeks.

15 PRESIDING JUDGE EBOE-OSUJI: A question for you: You say that it was the
16 suspensive effect decision of the Appeals Chamber that compelled you to move for
17 adjournment in the circumstances. Did you or have you considered a request to the
18 Appeals Chamber to consider, or reconsider, the suspensive effect decision for
19 purposes of proceeding in the circumstances?

20 MR KHAN: Your Honour, it's a very pertinent question. We have considered it.
21 The reasons I didn't pursue it are twofold. We wanted an immediate decision
22 because of the proximity of time, and to be quite frank about it it's -- normally the
23 Trial Chamber tends to work more quickly for whatever reason than the
24 Appeals Chamber of the Court. That's just an observation, but I think it's borne out
25 probably by statistical analysis.

1 Your Honour, the second matter is that, even if the Appeals Chamber were to have
2 removed the suspensive effect, it wouldn't have dealt with the relief we are seeking
3 because the current individual would be classed as a victim witness and even
4 otherwise Mr Ruto's attendance would have been necessary by dint of the majority of
5 the Trial Chamber.

6 That's why, your Honours, I thought it more prudent and effective to seize the Bench
7 of the application. Your Honour, so that explains my reasoning.

8 Your Honour, the other matter that I do ask through the Court is the Prosecutor to
9 reconsider whether or not she wishes to continue with this appeal, whether or not it is
10 actually necessary in the interests of the wider mandates of her office and the
11 responsibilities and the -- of the OTP and the mandate of the ICC, but your Honour I
12 can't do more than ask that the Prosecutor reconsiders whether or not a very
13 well-reasoned, we say, very balanced and flexible decision by the majority of the Trial
14 Chamber should be appealed, or whether or not this incident helps show the
15 Prosecutor the good sense - the very good sense - of the majority of the Trial Chamber
16 in granting the -- in rendering the decision that it did, on the terms that it did,
17 balancing all the various competing consideration.

18 Your Honour, one hopes it opens the eyes to realities, but your Honours I'm not the
19 Prosecutor and I can do no more than simply request Madam Fatou Bensouda to
20 please reconsider her responsibilities and the merits of actually pursuing an appeal on
21 this issue at all. If she doesn't pursue it of course it may be that it will help the
22 people of Kenya and all individuals in a much wider way, but your Honour that's a
23 matter for her, not for me.

24 Your Honour, so those are my submissions on the issue, unless I can assist further?
25 I'm grateful.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

2 Mr Steynberg?

3 MR STEYNBERG: Thank you, your Honours.

4 As my learned friend, I believe, has conceded even on the -- even in the terms of the
5 majority's original decision, Mr Ruto would not be able to be excused from attending
6 during the rest of this witness's evidence since she is a dual-status victim witness.

7 PRESIDING JUDGE EBOE-OSUJI: But that aspect of the majority's decision was
8 necessarily an incident of exercise of what the majority then thought a discretion that
9 it had, which means that it was still possible for the Chamber to continue in the
10 current circumstances, had the original decision been allowed to stand. Isn't that the
11 case?

12 MR STEYNBERG: Yes, I take your Honour's point on that. If the Chamber did, in
13 fact, have the discretion which the majority found it to have, then no doubt it would
14 also have the discretion to revisit that decision which was based on a balancing of the
15 rights and of the interests of victims, witnesses, and of the accused. However, in the
16 Prosecution's submission, the matter is unfortunately now out of the hands of the
17 Chamber in that it is pending before the Appeals Chamber and, in my respectful
18 submission, I need go no further than to read from the decision of the
19 Appeals Chamber granting the Prosecution's request for suspensive effect; it's
20 Decision 862 on Appeal 5: "The Appeals Chamber notes the Prosecutor's concern
21 regarding the trial proceeding on the basis of an incorrect legal framework" --

22 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, please hold the thought for a
23 minute.

24 Sorry, please proceed.

25 MR STEYNBERG: Thank you, your Honour.

1 "The Appeals Chamber notes the Prosecutor's concern regarding the trial proceeding
2 on the basis of an incorrect legal framework and the difficulties that may arise should
3 witnesses who testified in Mr Ruto's absence be unwilling or unable to testify again if
4 the impugned decision were to be overturned and the trial had to restart in Mr Ruto's
5 presence. In all the circumstances of the case the Appeals Chamber finds ..." --

6 THE INTERPRETER: Please slow down for the interpreters.

7 MR STEYNBERG: -- "... of complementing the impugned decision prior to the
8 issuance of the judgment of the Prosecutor's appeal would be difficult to correct and
9 may be irreversible and that suspension of the impugned decision is warranted."
10 Quite apart from the fact that this matter is pending the decision of the
11 Appeals Chamber, in my submission the Appeals Chamber has given a clear
12 indication that the effects which the Prosecution fears might arise if the trial proceeds
13 in Mr Ruto's absence are reasonable fears, and that in the circumstances it would be
14 highly imprudent at the least to continue with leading of any evidence in the absence
15 of Mr Ruto. For those reasons, the Prosecution has not objected to a limited
16 adjournment in order to allow Mr Ruto to make the necessary arrangements.
17 Now, I hear my learned friend's arguments that one week will not be sufficient to
18 resolve the issues arising out of this dreadful attack --

19 PRESIDING JUDGE EBOE-OSUJI: Before you proceed, I want to understand what
20 you've said. Are you saying that the Prosecution is of the view that this case needs
21 to be adjourned now until Mr Ruto comes back?

22 MR STEYNBERG: That is indeed the Prosecution's position.

23 Continuing then with the necessary length of the adjournment, the Prosecution does
24 not for a moment suggest that the aftermath of this attack will be dealt with in a week,
25 and that is clear from the Prosecution's written submissions, and any characterisation

1 of those submissions otherwise is incorrect.

2 What the Prosecution suggests is the following: Mr Ruto knows and has known for
3 a considerable time now that a trial is pending before this Court. In the
4 Prosecution's submission, a responsible position would have been to put in place the
5 necessary mechanisms for the country to function without him.

6 PRESIDING JUDGE EBOE-OSUJI: What would those be?

7 MR STEYNBERG: Well, delegation of his functions to another -- to another
8 responsible individual is the first thing which comes to mind. Now, Kenya's
9 constitution is by no means unique when it requires that either the Head of State or
10 Deputy Head of State be present at all times. The constitution of my own country is
11 the same, and I'm sure many other countries. But from time to time it happens that
12 neither the Head nor the Deputy Head of State is available or in the country, for
13 reasons outside of their control. In my country this is dealt with by swearing
14 somebody in as Acting Head of State.

15 Now, I don't know whether my learned friend is suggesting that Mr Ruto is the only
16 person available in Kenya who is capable of dealing with this crisis. If that is the
17 suggestion, I would suggest that it is not correct. Kenya faced security concerns
18 before Mr Ruto's election and no doubt it will face concerns similar to that long after
19 he's departed the scene. My submission is, and the Prosecution's position is, that in
20 the coming week Mr Ruto should take the necessary steps to put in place capable and
21 responsible people to delegate the necessary powers to them in order to respond to
22 the crisis.

23 PRESIDING JUDGE EBOE-OSUJI: Does the constitution permit that?

24 MR STEYNBERG: My learned friend will, no doubt, be able to address on that. I'm
25 unaware of that, but --

1 PRESIDING JUDGE EBOE-OSUJI: No, but it's your submission. You should be
2 able to speak to it.

3 MR STEYNBERG: I have to come back to the Court on that. I can't make a
4 statement on that. I'm not aware of the answer. All I can say is I would be
5 dreadfully surprised if it wasn't permitted and that would -- it seems to be a glaring
6 omission because it is always foreseeable that for some or other reason the Deputy or
7 the Deputy President might not be available.

8 PRESIDING JUDGE EBOE-OSUJI: Judge Fremr has a question for you.

9 JUDGE FREMR: Mr Steynberg, one question. You referred to the balance between
10 the rights of accused and the interests of victims. Do you think that in this concrete
11 case of Witness P-536, which also has a double status as a victim, it is in her interest to
12 adjourn the trial?

13 MR STEYNBERG: Your Honour, I will certainly not go so far as to say it is in her
14 interest to adjourn the trial, but in balancing the interests of Mr Ruto and of the victim
15 and the witness, P-536, the Prosecution's position is that a limited and discreet
16 adjournment for the period of no longer than one week would not unduly affect the
17 witness. And I say this bearing in mind that I'm conscious of VWU's assessment that
18 the witness may be affected, but I've not yet heard any specific reports on the
19 witness's views on this. I would not be surprised if the witness, learning of this
20 terrible attack, would not take the position that of course this must take precedence in
21 some degree over my continued testimony.

22 PRESIDING JUDGE EBOE-OSUJI: I think that's a matter on which we will hear
23 from the VWU somehow, whether or not the victim's view -- what the victim's views
24 are on it.

25 Returning to the question of constitutionality, you said you would be surprised if

1 there was no provision made in the constitution, in which case that would be a
2 glaring omission. What if it is a glaring omission, is it for us to correct it?

3 MR STEYNBERG: Your Honours, of course the -- this Chamber has no powers to
4 correct omissions in the constitution of a sovereign State such as Kenya, so no, that
5 would not be the Court's duty to correct. However, one should not lose sight of the
6 fact, in the Prosecution's submission, that the Chamber has already taken steps to
7 ensure that the sitting schedule of the trial of Mr Ruto and the second trial involving
8 Mr Kenyatta have not overlapped so that one of the two of them may always be in the
9 country to fulfil his presidential functions.

10 Now, that being the case, I have yet to hear anything from my learned friend which
11 indicates why Mr Ruto's presence is essential. I'm not saying that he won't be in a
12 position to contribute in one way or another, but my submission is that Kenya - as my
13 learned friend has pointed out on numerous occasions - is a mature and functioning
14 democracy, with a democratic government, with law enforcement apparatus, with a
15 functioning army, with a whole cabinet of ministers, including ministers dealing with
16 internal affairs and security, with an intelligence service and all manners of
17 government who are available to deal with this sort of crisis. And in the
18 Prosecution's respectful submission, Mr Ruto's personal presence in the country on an
19 ongoing basis is not justified by this matter alone and that the responsible position
20 would be to ensure that the governance of the country is left in good hands in his
21 absence, and I'm not necessarily referring to constitutional duties but simply to
22 appoint a crisis group of responsible ministers and officials to deal with this.

23 Mr Ruto will not be on Mars. He will be here in The Hague with access to modern
24 communication. He will be available to get daily updates outside of court hours and
25 to give instructions as necessary. Now, this may place an additional burden on him,

1 I don't dispute that. We know that court days are long and at the end of court days,
2 one is tired. But like members of the Prosecution and the Defence, after court, we
3 still carry on and do a full day's work. In my submission, that is not an unreasonable
4 position.

5 Now, to respond to one other criticism of my learned friend, the Prosecution's
6 comment regarding the fact that we hope this would not be used as an opportunistic
7 attempt to advance a separate agenda that was not the agenda of an adjournment of
8 this matter for the purposes of attending to this crisis, that was prompted by the
9 following statement by my learned friend at paragraph 4 of his request that was
10 submitted yesterday where he says the following: "The attack which started
11 yesterday and continues to unfold is regrettably in today's world an example of
12 situations which form part of the normal State affairs which fall within the portfolio
13 of a country's Deputy Head of State."

14 The Prosecution's submission is that there is nothing normal about this attack. In
15 our submission this is exceptional, it is gravely serious, it has caused a number of
16 innocent victims dead, many, many more wounded and many, many more affected in
17 one way or another, and cannot be regarded as an example of the day-to-day business
18 for which Mr Ruto's presence is required in Kenya.

19 So that if it is suggested that this should give reason for the Appeals Chamber to
20 come to a decision which it might not otherwise have arrived at that is most
21 unfortunate, because this is not an example of the sort of thing - a genuine example of
22 the sort of thing - which the Deputy President would be expected on a daily basis to
23 deal with.

24 So the Prosecution's point is, in a nutshell, this is an exceptional and significant event
25 which justifies a short adjournment of the case in order to allow Mr Ruto to attend to

1 his duties and to make necessary arrangements to deal with the aftermath in his
2 absence, but that it does not go so far as to give grounds to the Appeals Chamber or to
3 the Prosecution to reconsider the matter presently on appeal before the Chamber; the
4 Appeals Chamber.

5 Unless there are any further issues, your Honour, I'm still on my feet?

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

7 MR KHAN: Your Honours, in our respectful submission, it's the Prosecution that is
8 using this tragedy as an agenda, fearful that its rigid and exposed position, seeking to
9 set aside an eminently sensible, pragmatic and principled decision of the Trial
10 Chamber, has been so terribly exposed for the strait-jacket that it is; a strait-jacket that
11 we say is so fundamentally inimicable to the proper administration of justice.

12 Your Honour, my learned friend states in the one breath that taking issue with my
13 filing - and I don't cavil at a word of that filing - in this day and age the tragic reality
14 is which country has not faced terrorism and security threats? They are part of the
15 day-to-day issues of government. They shouldn't be, but they are.

16 Now, that may create an inconvenience to the Prosecution's objective here, but it's a
17 reality that I think any sane and objective person, not emotionally tethered or linked
18 to a particular result, would be forced to accept.

19 Your Honour, my learned friend states that there's nothing normal about a terrorist
20 attack. Well, there isn't, but it's part of the day-to-day affairs dealing with the threats
21 of terror. But the issue of normalcy goes out of the window, because with the
22 greatest respect, however eminent the lawyers are in this room, there's nothing
23 normal about being a president or being a deputy president; nothing normal at all.

24 And when my learned friend makes submissions, your Honour, it behoves all of us to
25 make submissions that are not simply knee-jerk reactions, convenient smoke-screens

1 to pursue a particular end. As officers of the Court we must do our best - we fail on
2 occasion - to put forward arguments based upon law, reason and logic and truth - and
3 truth - so that the Bench may come to the right decision.

4 Now, your Honour, my learned friend's proclivity to -- of knee-jerk reaction
5 submissions is unfortunately exposed by his throwing out of the Constitution of
6 Kenya. Well, your Honours, I've got a number of observations. Firstly, the licence
7 that the deputy president swears somebody else in is tantamount to a legal coup,
8 regime change, through the device of the Office of the Prosecution sitting opposite.

9 Your Honour, it is not said that the only person -- Kenya's a rich country in personnel,
10 in human resources and people of fantastic potential and ability. If anyone has spent
11 time in Kenya - and not as a tourist, but actually living there - they would realise the
12 wealth of that country and that continent.

13 But, your Honour, the only person -- I'm not saying William Ruto is the only person
14 that can solve the problems of the world, I'm not saying he's the only person, even
15 with the president, that can solve the problems of Kenya, but they are the only people
16 democratically elected to do so and that is a fundamental reality.

17 The rule of law goes very neatly together with democracy, and the democratic
18 essential reality that the deputy president has a massive democratic mandate to
19 perform should not be glossed over so lightly by the Prosecution's fallacious
20 understanding of the Constitution of Kenya to say that there should be regime change
21 and somebody else can be sworn in.

22 Your Honour, an individual is presumed innocent. The people of Kenya have voted
23 for William Ruto, they have a right to the government they deserve and
24 your Honours have acknowledged that by allowing Mr Ruto to leave the seat of the
25 Court to deal with the tragedy that is unfolding in Kenya today.

1 Your Honour, cavalier submissions should be given short shrift by the Prosecution.

2 I'm told by my learned friend, Mr Katwa Kigen, who's appeared several times before
3 the Supreme Court of Kenya and is a senior advocate, that there is no constitutional
4 provision of that sort, and I would deprecate -- I deprecate in reality even that a
5 Prosecutor in good conscience could even suggest such a thing. It's irresponsible
6 prosecutorial utterances without any understanding, we say, of the consequences in
7 the Republic of Kenya.

8 But, your Honour, be that as it may --

9 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you may make your submissions, but
10 let's remove the aspersions from them.

11 MR KHAN: But, your Honour, we do say -- I take that on board, but your Honour
12 we do say that they are irresponsible at a time when there is a terrorist attack
13 underway. It's a licence that -- a vacuum. Somebody else should be sworn in.
14 Your Honour, the democratic essential reality that William Ruto is the Deputy
15 President -- many countries, many individuals, may not have wanted him to have
16 become -- to have been elected by the people of Kenya, but he was. And, your
17 Honour, that reality should be respected, we say, has effect and is germane to the
18 application before the Court.

19 Your Honour, issues of terrorism -- your Honour, I remember years ago reading
20 George Shultz's book, even in the '80s with Ronald Reagan, and he said they had this
21 tent - communications tent - that he used to go into when they were discussing issues
22 of the cold war.

23 Well, your Honours, not all countries have the technological ability of the
24 United States of America regarding secure communications that are dedicated to the
25 president. Not everybody has an Air Force One. So, your Honour, security issues

1 dealing with a violent terrorist group that has the audacity even to Twitter and have
2 social media accounts cannot, with respect, be done via a mobile phone, or on the
3 telephone. Executive decisions need to be made. The Court should be flexible
4 enough to realise it. It has been at the present.

5 Your Honour, our simple submission is that one week is insufficient. It requires two
6 weeks if the Bench is of the view that the trial cannot proceed in the absence of
7 Mr Ruto.

8 Your Honours, the urgency of the application was to allow the Court to consider the
9 merits of the request so that Mr Ruto could go. Now it's been done, your Honour, I
10 do inform the Bench I will be filing today an application to the Appeals Chamber to
11 lift the suspensive effect in any event. Your Honour, I think that is a matter that the
12 Appeals Chamber should be appraised of. They will decide it on the merits of the
13 application.

14 Your Honour, I'm grateful and those are my submissions in response.

15 PRESIDING JUDGE EBOE-OSUJI: For the record, the information received by the
16 Chamber on this thing from the VWU is that they do recommend not adjourning this
17 witness's testimony, both out of VWU's own appraisal of the sensitivities of this
18 witness as well as VWU's report of the result of their own consultation with the
19 witness, that the witness wishes to proceed with the testimony. That's just to put the
20 matter on the record.

21 Mr Nderitu, are you in a position to submit on this matter?

22 MR NDERITU: Yes, Mr President, your Honours.

23 I think I will want to just leave it to the Trial Chamber to reach a decision on this. I
24 believe that either way by the time I would be required to examine the witness, if
25 leave is granted, I will be in a position to do so, but speaking on my own behalf of

1 course I would be happier, I must say, if it was possible to have an adjournment.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa Kigen?

3 MR KIGEN-KATWA: Mr President and your Honours, we on our part as Mr Sang's
4 Defence would request that the matter be deferred until Mr Ruto is able to resume the
5 attendance at the hearing.

6 Speaking on my own behalf and on behalf of my team, they would also like an
7 opportunity to mourn the loss that has occurred in Kenya, both in the immediate
8 sense of loss of their friends and the general terms that Kenyans have lost life and
9 property.

10 I am instructed also to highlight the seeming discomfort that would arise if the
11 proceedings were to go on in complete disregard of the tragedy that has befallen
12 Kenya, and there is -- the request for adjournment is on that additional ground that
13 there is some awkwardness in Mr Sang seeming to want to go on with his hearing
14 notwithstanding the tragedy that has befallen the Kenyans.

15 On our part, we have no objection to the days that have been deferred being
16 compensated either by coming in earlier or coming in later. Depending on the
17 Court's directions, we are agreeable to have the dates compensated.

18 We had in our filing suggested an alternative to proceeding in the absence of Mr Ruto.
19 That filing was, however, made before we had received the filing from the
20 Prosecution, where the Prosecution and happily the victims also considered that the
21 tragedy is significant and warrants the adjournment. In the circumstances, we do
22 not maintain the insistence -- we do not maintain the submission that we proceed in
23 the absence if the Court is not minded to grant the proceedings in his absence.

24 We are also alive to the fact that that witness is a dual-status witness, both a victim
25 and a witness, and proceeding in the absence of Mr Ruto would need an adjustment

1 or a revisit of the orders of the Court that Mr Ruto be present when a person who is
2 also a victim is testifying.

3 In response to the issue that it's peculiar to Kenya, may I observe that Article 149 and
4 Article 150 of the Kenyan Constitution does not allow for delegations of the powers of
5 the deputy president unless the deputy president is either completely unavailable, or
6 is incapacitated, or has been impeached, and neither of all those circumstances obtain
7 in this situation.

8 The last observation I wish to make is that the Defence of Mr Sang are grateful that for
9 the first time the Office of the Prosecutor acknowledges that Kenya is a functional
10 State, in acknowledging that it has a presidency, it has an executive, it has cabinet, it
11 has an army, it has an intelligence organisation. That is a concession that so far the
12 Prosecution's case has never acknowledged.

13 Apart for those words, Mr President and your Honours, we do not wish to say
14 anything more. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: The Chamber will adjourn now and -- as if we
18 are in the morning break. We will reconvene at 11.30 for a ruling on this matter.

19 (The status conference ends in open session at 9.45 a.m.)