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No.: **ICC-01/09-01/11**
Date: **21 February 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Prosecution Observations on the possibility of the trial being held in Kenya or,
alternatively, in Arusha, Tanzania**

Source: The Office of the Prosecutor

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

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Others

1. In accordance with the Trial Chamber's "Order requesting observations in relation to the 'Defence Application for change of place where the Court shall sit for Trial'",¹ the Prosecution hereby submits its observations on the possibility of the trial being held in Kenya or, alternatively, in Arusha, Tanzania.
2. The Prosecution in principle favours bringing trials as close as possible to the victims and acknowledges that one way to do this is by holding them, or portions thereof, in the region where most victims reside and/or where the crimes occurred.² Holding the trial in either of these locations, however, raises a number of issues that require careful consideration.
3. *First*, the provision of adequate safety and security to witnesses, victims and ICC staff is a necessary pre-condition to determining that the trial takes place either in Kenya or Arusha, Tanzania. This determination will need to take into account the unique security challenges and unprecedented level of witness interference in this case.³ These security challenges and their impact on victims and witnesses have been canvassed in previous Prosecution filings.⁴ The Prosecution's concern is that the attempts to interfere with trial witnesses would increase if the trial were held in Kenya and, to a lesser extent, in Arusha, Tanzania, where the Accused have significant influence, where the public interest in the trial is extremely high and where the Court has no infrastructure in place to ensure the security of ICC staff members and trial witnesses.
4. *Second*, the views and concerns of the witnesses and victims should be taken into account. On this matter, the Prosecution notes the Common Legal Representative for victim's preliminary report that "a majority of victims [...] indicate that they would like the Court to sit for trial at The Hague".⁵ Some of the witnesses and victims may be unwilling to testify in the region; this would particularly apply to

¹ ICC-01/09-01/11-580.

² In addition, the Office of the Prosecutor will support each and every effort to engage the victims and the Kenyan people through media – radio, live feed, television – and outreach.

³ See e.g.: ICC-01/09-01/11-496-AnxA-Corr.

⁴ See e.g. ICC-01/09-01/11-468; ICC-01/09-01/11-515; ICC-01/09-01/11-521; ICC-01/09-01/11-599.

⁵ ICC-01/09-01/11-592, p.4.

witnesses who are in the Court's protection program or who have otherwise relocated from Kenya specifically for protection reasons. Changing the location of testimony at this late hour may therefore adversely impact their well-being and/or even change their attitude towards testifying. Should the Chamber so order, the Prosecution will contact the witnesses who are not under the care of the Victims and Witnesses Unit ("VWU") and place their views and concerns before the Court, and it suggests that the VWU contact the witnesses under its care to the same end. More generally, the Prosecution questions the assumption in the Defence application that the Kenyan public would welcome the conduct of part or all the proceedings in or near Kenya.⁶ Persons have expressed to OTP staff members an opposite view, reflecting distrust that a fair trial on these charges, free of outside influence and corruption of the evidence, can take place anywhere in the region. In canvassing the views of victims and witnesses, these concerns should also be explored

5. *Third*, the logistical implications of a change of location should not delay the trial. The Prosecution wishes the trial to begin as expeditiously as possible and thus the logistics for any proceedings in Kenya or in Arusha, Tanzania should be organised between now and 10 April 2013, the scheduled start date for trial. In this respect, it is important to note that some witnesses reside outside of Kenya and that, from a logistical point of view, it may be more or equally difficult to receive their testimony in Kenya or in Arusha, Tanzania than it would in The Hague.
6. As mentioned above, one suggestion may be to hold portions of the trial in Kenya or Arusha, Tanzania, such as the opening/closing statements, the unsworn oral statement pursuant to Article 67(1)(h), the testimonies of the two Accused (should they choose to proceed therewith), and/or the testimonies of international experts. Hearings of this nature could strike the right balance between bringing the trial as close as possible to the affected region and thus satisfy the public interest in the

⁶ ICC-01/09-01/11-567, para.32.

case, and the need to protect witnesses.⁷ If so desired, the Chamber might also be able to use these opportunities to visit locations of relevance to the case in the presence of the parties (“site visits”). The Prosecution is prepared to make observations as to possible site visits should the Chamber require it to do so.



Fatou Bensouda, Prosecutor

Dated this 21st Day of February 2013

At The Hague, the Netherlands

⁷ In principle there will be less security concerns in respect of the international experts.