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Date: 19 November 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
With Confidential Annexes A - C**

**Prosecution's Request for provision of further information and Reconsideration of
the excusal of William Ruto**

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 Prosecution requests Trial Chamber V(A) ("Chamber") to reconsider and vacate its decision to grant the excusal of the Accused, Mr William Samoei Ruto ("Ruto") from attending his trial on 21 November 2013. The Prosecution has been informed that Ruto is set to lead the Kenyan delegation to the Assembly of States Parties ("ASP) Twelfth Session, which commences on 20 November 2013 in The Hague. The Prosecution notes that Ruto's excusal request was premised on the fact that he would be constitutionally required to be present in Kenya until 21 November, due to the absence of Kenya's President, Mr Uhuru Kenyatta ("Kenyatta"), during that time. Considering Ruto's imminent attendance at the ASP Session in The Hague, the Prosecution submits that the underlying rationale for the request for excusal is no longer valid: either Kenyatta will return to Kenya before 20 November 2013, making Ruto available to appear at trial on 21 November, or alternatively Ruto's presence in Kenya is not in fact indispensable, notwithstanding Kenyatta's absence.

2. As leader of the Kenyan delegation to the ASP Session, it is highly likely that Ruto will address the Member States, take part in discussions with other delegates and give media interviews. The Prosecution recalls this Chamber's previous directions that parties to the proceedings in this case are to refrain from commenting on the merits of the case in the press. The Prosecution submits that the principles underlying this direction are equally applicable to any speeches, discussions or interviews that Ruto may take part in in his capacity as leader of the Kenyan delegation to the ASP. It would be contrary to the rationale underpinning previous decisions of this Chamber for Ruto to use his position before the ASP as a platform to enter into discourse with respect to the case in which he is an Accused person, on trial for Crimes Against Humanity, whether or not these statements are subsequently published in the media. The Prosecution therefore seeks a direction from the

Chamber ordering that the merits of the case against Ruto and the impending case against Kenyatta must not be discussed at any time before the ASP nor in the public domain.

Statement of Facts

3. On 8 November 2013, the Defence requested the excusal of the Accused Ruto from attending his trial, initially for the period 18 – 20 November 2013¹ and subsequently also for 21 November 2013 (“Request”).² The Request was premised solely on the fact that the President of Kenya would be absent from Kenya and attending the third Africa Arab Summit in Kuwait on 19 and 20 November. The Defence asserted in its application that due to Constitutional requirements, the “deputy president’s presence is required on Kenyan soil in order to permit the president to go and attend this quite exceptional regional political summit of the heads of state of the African and Arab world.”³ The basis for Ruto’s excusal on 21 November was that “the president would remain in Kuwait for the night of the 20th, getting back to Kenya on the 21st, and unlikely to release the deputy president for the night flight on the 20th.”⁴
4. The Prosecution opposed the Defence Request and argued that in the circumstances the court session should be adjourned rather than excusing the Accused.⁵
5. The Chamber issued its decision also on 8 November, adopting a compromise and postponed the commencement of the session until 20 November, while granting the excusal request for 21 November 2013, with reasons to follow.⁶ At the date of filing, the reasons have yet to be rendered.

¹ ICC-01/09-01/11-T-69-CONF-ENG, p.41, line 24 – p.47 line 13 (in public session).

² ICC-01/09-01/11-T-69-CONF-ENG, p.50, line 25 – p.51 line 10 (in public session).

³ ICC-01/09-01/11-T-69-CONF-ENG, p.43, lines 2-5 (in public session).

⁴ ICC-01/09-01/11-T-69-CONF-ENG, p.51, lines 2 – 4 (in public session).

⁵ ICC-01/09-01/11-T-69-CONF-ENG, p.48, line 4 – p.52, line 3 (in public session).

⁶ ICC-01/09-01/11-T-69-CONF-ENG, p.55, lines 24-25 (in public session).

6. On 15 November 2013, the Kenyan delegation notified the ASP of the full credentials of the Kenyan delegation to the ASP Twelfth Session commencing 20 November 2013 in The Hague, and that Ruto would in fact be leading the Kenyan delegation.⁷ The ASP was requested to rearrange the speaking schedule accordingly, indicating that Ruto intends to personally address the Assembly.⁸
7. On 18 November, the Prosecution requested via email, *inter alia*, confirmation as to whether Kenyatta would no longer be attending the Africa Arab Summit in Kuwait and whether Ruto would now be expected to attend trial on 21 November in light of the changed circumstances.⁹ The Prosecution also requested confirmation that the Defence agreed that the Chamber's order that parties should not discuss the merits of the case in the media would apply to Ruto's proposed address to the ASP.
8. On 19 November 2013, the Defence confirmed by email that Ruto would indeed be leading the Kenyan delegation to the ASP and that the Prosecution and Trial Chamber would be kept updated in case there are any changes which should be brought to the Chamber's attention.¹⁰ They confirmed also that Ruto "will comply with all applicable court orders." However, they did not provide the further information specifically requested.

Submissions

The reasons for Ruto's excusal from attendance at trial have fallen away

9. To date, the Chamber has not published its reasons for the excusal of Ruto's attendance at trial on 21 November. However, as the Defence put forward only one motivation for the Request, namely, Ruto's alleged constitutional duty to be in-country while the President is absent from Kenya, it is apparent

⁷ See Confidential Annex A.

⁸ The speaking order is arranged according to the seniority of the delegates addressing the Assembly.

⁹ See Confidential Annex B.

¹⁰ See Confidential Annex C.

that this submission must form the basis of the Chamber's decision granting of his excusal from trial.

10. The Prosecution sought confirmation from the Defence as to whether the President of Kenya will still be at the Africa Arab Summit on 20 November. However the response was vague and evasive and neither confirmed nor denied this.¹¹ It seems from open-source information however, that Kenyatta arrived in Kuwait on 18 November and was expected to participate in the summit on 19 and 20 November.¹²
11. The Prosecution submits two apparent possibilities in light of the information at hand, both of which would result in the basis for the Request falling away: either (1) Kenyatta is returning from Kuwait earlier than scheduled, meaning that the Defence submissions which underlie Ruto's Request are no longer current nor applicable; or (2) if Kenyatta is indeed still in Kuwait and will not return to Kenya until the Summit's conclusion, then it would appear that the Defence submission regarding the constitutional imperative that the Deputy President be present in Kenya whilst the President is absent is unsound.
12. Accordingly, the Prosecution submits that the Chamber should reconsider and vacate its 8 November decision granting the excusal of Ruto from trial on 21 November.¹³ The Prosecution submits that the basis of the application for Ruto's excusal from appearance at trial on 21 November has fallen away and as such, Ruto should appear at trial on 21 November.

Ruto's appearance before the ASP

13. As head of the Kenyan delegation to the ASP, it is anticipated that Ruto will address the Member States when it convenes on 20 November. The

¹¹ See Confidential Annex C.

¹² <http://www.president.go.ke/www/en/category/view-event.php?number=200> (last accessed 19 November 2013); <http://www.president.go.ke/www/en/category/view-event.php?number=199> (last accessed 19 November 2013); <http://www.kuna.net.kw/ArticleDetails.aspx?id=2345087&language=en> (last accessed 19 November 2013).

¹³ The jurisprudence of this Court consistently states that reconsideration of a decision may be appropriate where new facts and circumstances may influence that decision. See ICC-01/04-01/06-2705, para. 18.

Prosecution notes the apparent conflict of interest between Ruto's public position as leader of the Kenyan delegation and his personal position as an Accused in proceedings before the Court. The Prosecution submits that this Chamber has an interest in ensuring that the ASP meeting is not be used as a platform for the Accused to publicly litigate the merits of his on-going trial before this Chamber.

14. In its response to the Prosecution's request for confirmation that the Chamber's order that parties must not discuss the merits of the case with the media will also apply to any address Ruto may intend to give to the ASP, the Defence simply stated that "that Mr. Ruto is fully aware of his responsibilities and obligations to the Court and will of course comply with all applicable court orders."¹⁴ The Prosecution notes that the response stops short of confirming Ruto's acceptance that the Chamber's previous rulings on this issue are in fact "applicable court orders".¹⁵
15. The Prosecution therefore requests that the Chamber clarify that its prior rulings with respect to public statements will also apply to any statements and discussions by Ruto before or at the ASP. The Prosecution observes that any public address before the ASP would inevitably be reported in the media in the normal course of events. In the alternative, the Prosecution requests a fresh order from the Chamber directing that Ruto must not comment on the merits of the case in his capacity as head of the Kenyan delegation at the ASP, nor at any event or interview related to the ASP meeting.

Urgency

16. The Prosecution only learned of Ruto's intended attendance of the ASP on 18 November and only received a response to its *inter partes* request for

¹⁴ See Confidential Annex C (emphasis added).

¹⁵ ICC-01/09-01/11-T-51-CONF-ENG, p. 12, line 15 – p. 13, line 4 and ICC-01/09-01/11-T-59-CONF-ENG, p.25, lines 6 – 24.

clarification on 19 November. The Prosecution submits that this issue needs to be resolved before the date of the disputed excusal, namely 21 November.

17. Accordingly, the Prosecution requests that the Chamber receive this filing on an urgent basis and direct that the Ruto Defence file their response by 14:00 on Thursday 20 November.

Relief Requested

18. The Prosecution requests the following relief:

- (a) That the Chamber direct the Defence to take explicit instructions and confirm or deny that Kenyatta will be attending the Africa-Arab Summit in Kuwait, and hence will be outside Kenya until 21 November 2013;
- (b) That the Chamber vacates its order excusing Ruto from attending his trial on 21 November 2013 and order his appearance; and
- (c) That the Chamber clarify that its prior rulings with respect to public statements on the merits of the case also apply at the ASP meeting and related events, or in the alternative, deliver a fresh order to this effect.



Fatou Bensouda, Prosecutor

Dated this 19th day of November 2013

At The Hague, the Netherlands