

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/11**

Date: **20 November 2013**

TRIAL CHAMBER V(A)

Before:

**Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr**

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR***

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

**Common Legal Representative Response to the Prosecution's Request for Provision of Further
Information and Reconsideration of the Excusal of William Ruto**

Source: Wilfred Nderitu, Common Legal Representative for Victims

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

The Office of the Prosecutor

Fatou Bensouda
Anton Steynberg

Counsel for the Defence

for William Samoei Ruto:

Karim AA Khan, QC, David Hooper, QC
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For Joshua arap Sang

Joseph Kipchumba Kigen-Katwa
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Legal Representatives of Victims

Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Fiona McKay

1. The Common Legal Representative “the CLR”) notes that while constitutionally the Deputy President shall act as the President “when the President is absent or is temporarily incapacitated, and during any other period that the President decides”¹, the Constitution of Kenya is silent as to whether both the President and the Deputy President can be absent from the country at the same time. The CLR submits that if, as appears likely in the present circumstances, both the President and the Deputy President can be absent from the country at the same time, then it should be presumed that there is no constitutional duty as such for at least one of them to be in the country at any one time. It is therefore submitted that where, as in this case, the absence is only of a transient nature, the absence of both the President and his Deputy cannot lead to any constitutional crisis. In addition to the foregoing, the CLR submits that the Constitution of Kenya even envisages situations where both the offices of President and Deputy President may be vacant at the same time, or a situation where the office of President may fall vacant at a time when the Deputy President is unable to assume the office of President.²

2. From the e-mail correspondence alluded to by the Prosecution in its Request,³ it does appear that there is a clear intention for the Deputy President to lead the Kenyan delegation to the Assembly of State Parties. If indeed it is true that the Deputy President will lead the delegation which has commenced today, and that the President will not return to Kenya before today, then the substratum for which Mr. William Ruto as Deputy President was excused by the Trial Chamber from tomorrow’s proceedings would have been lost. Accordingly, there would be

¹ Article 147(3), Constitution of Kenya

² Article 146(2)

³ “Prosecution’s Request for Provision of Further Information and Reconsideration of the Excusal of William Ruto”, filed on 20 November 2013, ICC-01/09-01/11-1104

sufficient grounds for the Prosecution's request for reconsideration of his excusal from tomorrow's proceedings.

3. The CLR does not wish to speculate on the full extent of Mr. Ruto's possible address, discussions by him at the ASP, and media interviews (particularly given the fact that as at the time of this filing the CLR is unaware whether, in fact, Mr. Ruto will lead or has led the Kenyan delegation to the ASP). The CLR agrees with the Prosecution that if Mr. Ruto does indeed make an address, or participate in discussions and/or give interviews to the media, there are reasonable prospects that such address, discussions or interviews may touch on the criminal proceedings against him or otherwise negatively impact the trial. This is particularly so due to the fact that a discussion on possible amendment of the Rome Statute in relation to Heads of State or Government, which is expected to be discussed at the ASP, directly or otherwise has a bearing on him. It is also not too far-fetched to expect the media to interview Mr. Ruto on various aspects of the case that have been contentious. The CLR submits in the circumstances that a direction enjoining the discussion of the merits of the case would be highly desirable. The CLR nevertheless notes the Ruto Defence's confirmation that he "will comply with all applicable court orders"⁴.
4. Accordingly, the Common Legal Representative respectfully requests for reconsideration of Mr. Ruto's excusal from tomorrow's proceedings, and for appropriate directions as to the limits of any address, discussions and interview that he may be a party to during the ASP.

Respectfully submitted,

⁴ ICC-01/09-01/11-1104, paragraph 8

A handwritten signature in blue ink, appearing to read 'Wilfred Nderitu', with a long horizontal stroke extending to the right.

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 20th day of November 2013

At Nairobi, Kenya