

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 January 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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***

Confidential

**Joint Defence Response to
the KHRC Request for leave to present a brief in the capacity of amicus curiae
pursuant to rule 103(1) of the rules of procedure and evidence**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
Cynthia Tai, Trial Lawyer

Counsel for William Ruto

David Hooper QC
Kioko Kilukumi Musau

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa
Philemon K.B. Koech, Joel Kimutai Bosek

Legal Representatives of the Victims

Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

Applicant –
Kenyan Human Rights Commission

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 8 January 2013, Ms. Atsango Chesoni, for and on behalf of the Kenya Human Rights Commission - KHRC ("the Applicant"), requested the Trial Chamber to grant the applicant leave to file amicus curiae observations, pursuant to Rule 103 of the Rules of Procedure and Evidence, on the issue of disclosure of the identity of the witnesses.¹ In the event that leave be granted to file amicus curiae observations, the Applicant further requested that the submissions contained in its request be considered as the amicus brief.²
2. The defence files this response confidentially, as it is in response to a confidential request by KHRC. However, the defence is unclear as to why it is necessary for the original Request by the Applicant to have been filed as confidential in the first place; there was no explanation given by the Applicant.³ The defence therefore requests that the Trial Chamber reclassify both documents (the Request and this Response) as public.

II. SUBMISSIONS

3. The defence is concerned at the manner in which the application is made, as the very issues that the Applicant seeks to raise in the event of leave being granted are set out in full and placed before the Trial Chamber regardless of whether leave be granted or not. As has been previously stated, the "submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so".⁴ The application for leave should precede and be distinct from any subsequent submissions.
4. Rule 103(1) states that "at any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-534-Conf, Confidential with Annex A, B and C, Request for leave to present a brief in the capacity of amicus curiae pursuant to rule 103(1) of the rules of procedure and evidence, 8 January 2013 ("Request").

² Request, p. 13.

³ See Regulation 23*bis* of the Regulations of the Court.

⁴ *Prosecutor v. Bemba*, Appeals Chamber, ICC-01/05-01/08 OA 2, Decision on the application of 14 September 2009 for participation as an amicus curiae, para. 9.

observation on any issue that the Chamber deems appropriate". The practice of the Court has been that "the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations providing specific expertise are needed on particular topics, and subject to the Chamber's consideration that this is desirable for the proper determination of the case".⁵ For instance, it has been considered appropriate to dismiss a request to submit an *amicus curiae* brief when such filing did not constitute an indispensable aid and did not provide information that the Chamber could obtain otherwise.⁶

5. In any event, the request is untimely. It is filed far too late in the proceedings to be of any assistance, given that the majority of the prosecution witness identities were disclosed on the day the request was filed. Furthermore, the defence notes that the materials KHRC has relied on are newspaper reports from January, May and July 2012;⁷ if these are concerns that should have been brought to the Chamber's attention, they should have been raised in a timely manner.
6. However, and having regard to the contents of the request, which is very generalized and largely lists duties and responsibilities of which the Court is well aware,⁸ the defence submits that the contents of the request indicate nothing to justify its admission on an exceptional basis. Nor will the submissions assist the Trial Chamber in its proper determination of any issue in the case.⁹
7. In particular, the Chamber already benefits from the information and assistance provided by the Victims and Witnesses Unit and the prosecution to assess the

⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-84, Decision on the "Request for leave to submit Amicus Curiae Observations on behalf of the Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence", 11 May 2008, para. 8. See also ICC-01/04-01/06-1175, Decision Inviting Observations from the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, 18 February 2008, para. 7, stressing that "the central matter to be determined [...] is whether the Chamber will be assisted in its 'proper determination' of the issues in the case".

⁶ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-3003, Décision sur une requête en amicus curiae et sur la « requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile » (articles 68 et 93-7 du Statut), 9 June 2011, paras 53-54.

⁷ See articles linked to the Request at footnote 2.

⁸ For instance, paras. 23-29 and 37-8 of the Request.

⁹ The Chamber likewise denied requests by Kituo Cha Sheria and the Civil Society Organization Network to submit amicus curiae observations on the modalities of victim participation during the trial phase, because the Chamber did not consider that their submissions would assist with the proper determination of issues related to the victims' application process. ICC-01/09-01/11-456, Decision on two requests for leave to submit *amicus curiae* observations, 13 September 2012, para. 4.

security situation in Kenya in general, and of the witnesses in particular. Presumably, KHRC does not know the identities of the prosecution witnesses,¹⁰ so its submissions are entirely speculative and the defence fails to see how they could assist the Chamber in this particularized assessment. Furthermore, and to the extent that KHRC purports to have specialized experience in dealing with victims of the PEV,¹¹ the defence notes that Mr. Wilfred Nderitu and the OPCV are best placed to provide comments on issues relating to victims.¹²

8. The defence also requests to the Chamber to be alive to the possibility that one (or more) of the prosecution witnesses may have worked for or somehow be connected to KHRC. The defence submits that this could impact the NGO's impartiality and should be taken into account.
9. In regard to one substantive matter, the defence simply points out that at paragraph 34 of its Application, KHRC has inaccurately represented the decision of the Trial Chamber in *Prosecutor v. Tadic*, claiming that "the identity of the witnesses could be withheld indefinitely from the accused and the accused's counsel". However, the *Tadic* decision contained in confidential Annex B of the applicant's Request says as follows:

Of the four witnesses granted anonymity, two were not called to give evidence and one testified in open session without any protective measures. The remaining witness, Witness H, was also heard in closed session and was **shielded from the view of the accused but not from Defence counsel**. The written transcript of the testimony of all of these protected witnesses has subsequently been released by order of the Trial Chamber, after review by the party presenting the witness and by the Victims and Witnesses Unit of the International Tribunal and redaction of any material disclosing identity.¹³

This sufficiently negates the point that KHRC was attempting to make with regard to indefinite non-disclosure of the identities of witnesses to the defence and the accused, in the event that exceptional ICTY case law from the first trial of that tribunal could even be deemed applicable to the issue when under consideration at the ICC.

¹⁰ Request, para. 17.

¹¹ Request, paras 9-16.

¹² The defence recalls that Kituo Cha Sheria has already submitted an amicus relating to the modalities of victims representation and participation. ICC-01/09-01/11-478, 23 November 2012.

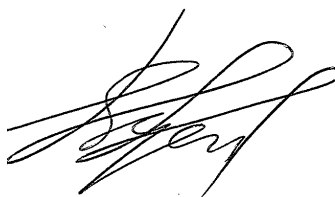
¹³ Request, Conf Annex B, *Prosecutor v. Duko Tadic*, IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 30.

III. RELIEF REQUESTED

10. For these reasons, the defence requests the Chamber to dismiss the Request filed by KHRC. The defence also requests that this response and the original Request be reclassified as public.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 16th day of January 2013
In The Hague



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 16th day of January 2013
In Nairobi