

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 22nd MAY 2015

Trial Chamber V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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 Document]

Request for leave to submit amicus curiae submission by Ms Moraa Gesicho

Source: Peter Njenga Mwangi Advocate

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
 Mr James Stewart, Deputy Prosecutor
 Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan, QC
 Mr David Hooper, QC
 Mr Essa Faal
 Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
 Ms Caroline Buisman

Legal Representatives of the Victims

Mr Wilfred Nderitu

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keïta

States' Representatives**Amicus Curiae**

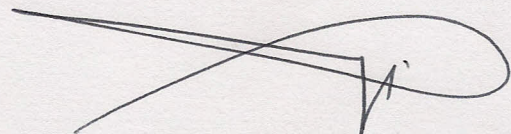
Moraa Gesicho

REGISTRY**Registrar**

Herman Von Hebel

Counsel Support Section**Victims and Witnesses Unit**

Mr Nigel Verrill

Detention Section**Victims Participation and Reparations Other
Section**


Respectfully submitted,



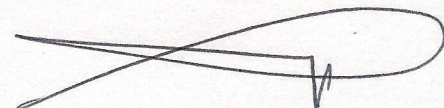
Peter Njenga Mwangi Advocate

On behalf of

Ms Moraa Gesicho

Dated this 22nd day of May 2015

At Nairobi, Kenya



I. Introduction

1. The applicant, **Moraa Gesicho, a Researcher** seeks leave to submit *amicus curiae* observation under Rule 103 of the Rules of Procedure and Evidence (the "Rules").
2. Rule 103(1) of the Rules provides 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 observation on any issue that the Chamber deems appropriate."

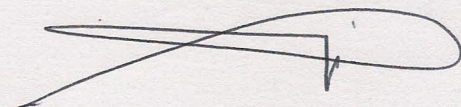
II. The Importance of Credible Research in the Understanding of Post Electoral Violence in Kenya

3. The importance of research cannot be gainsaid. Historically research has been used to solve both complex and everyday matters. In our quest for new knowledge, it is research we turn to. The truth may only be known when one scratches beneath the surface in order to unravel the truth. This understanding must have prompted the Prosecutor to turn to research to back her pursuit in prosecuting William Samoei Ruto and Joshua arap Sang, who were summoned to appear on 8th March 2011¹, and whose charges were confirmed on 23rd January 2012.² Towards this, the Prosecutor has solicited research expertise from Prof. Herve Maupeu to assist the chamber to contextualize and properly assess the evidence about what happened during PEV.³ In particular, Prof. Herve Maupeu was expected to explain (i) the sources of tension between the various ethnic groups during the 2007 election campaign; (ii) which parties drew their support from which segments of society and

¹ ICC-01/09-01/11-01; ICC-01/09-02/11-01

² ICC-01/09-01/11-373; ICC-01/09-02/11-382

³ ICC-01/09-01/11-492



why? Prof. Herve Maupeu was also to explain the situation in Rift Valley, which is necessary to understand why the province became the principal fault line during PEV.

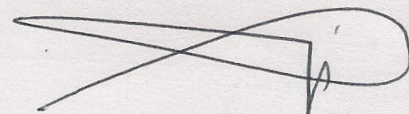
4. Prof. Herve Maupeu has published regarding the Kenya Society and elections in Kenya and his publications are among the many publications regarding the post 2007 general elections. A principal publication that sought to explain the PEV in Kenya was published by a Commission of inquiry into post election violence which was appointed by the President of the Republic of Kenya to investigate the 2007 election violence. This Commission also known as the Waki Commission published its findings in a report known as "*The report of the commission of Inquiry into Post Election Violence (CIPEV)*".⁴ The Commission's terms of reference were to:

- Investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election.
- Investigate the actions or omissions of State Security Agencies during the course of the violence, and make recommendations as necessary.
- Perform any other tasks that the Commission may deem necessary in fulfilling the forgoing terms of reference.

Recommend

- Measures to be taken to prevent, control or eradicate the occurrence of similar deeds in future.

⁴ http://www.knchr.org/portals/o/Reports/Waki_Report.pdf.



- Measures with regard to bringing to justice those persons responsible for criminal acts.
- Measures to eradicate impunity and promote national reconciliation in Kenya.
- Such other legal, political or administrative measures as the Commission may deem necessary.
- Make such recommendations to the Truth Justice and Reconciliation Commission as the Commission may deem appropriate.

5. In addition, the Waki Commission was obligated by the Commission of Inquiry Act (CAP 102 of the Laws of Kenya) and Section 7(1) thereof to:

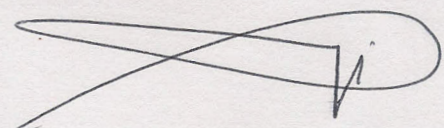
- Make a full, faithful and impartial inquiry into the violence that followed the 2007 presidential election;
- Conduct the inquiry without discriminating directly or indirectly against their participants on grounds including ethnic or social origin;
- Report to the President, in writing, the result of the inquiry and the reasons for the conclusions.

6. After completion of the investigation, the Commission reported its findings in the (CIPEV) report. Its findings, placed in sealed envelope⁵ were transmitted to the prosecutor.⁶ This sealed envelope enabled prosecutor to secure summons to appear for six Kenyans including William Samoei Ruto and Joshua arap Sang.⁷

⁵ GMM1 P.18 PARA.1

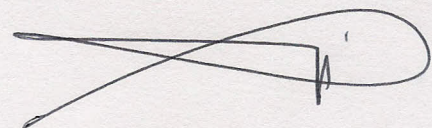
⁶ ICC-OTP-2000709-PR436

⁷ ICC-01/09-01/11



7. In the report, the commission has detailed the facts and surrounding circumstances related to violence and in particular, violence in Rift Valley Province. The commission starts by examining the roots of the post-2007 election where it chronicles the use of political violence; personalization of presidential power; deliberate weakening of public institutions and youth employment. The commission proceeded to give an account of Rift Valley province starting with North Rift Region where it recounts what it called the pre-election period and the legacy of the 1990s state sponsored violence; the build up to the tension; nature and extent of the violence; impact of the violence; whether violence was planned or sponsored; advance warning of violence; incitement to violence and the organization of violence. The commission then examined the violence in central Rift Valley Province starting with Molo District including a history of ethnic conflict; the pre-election violence and the post-election violence in the district. In Nakuru district, the commission gave an account of what it calls organized attack and counter-attacks; planning of the violence and the nature and extent of the violence. In Naivasha District, the commission describes what it calls planned attacks by Mungiki and Kikuyu politicians and eruption of violence. The commission completes description of the violence in Rift Valley with a description of the violence in the South Rift and Kisii regions where it gives an account of what it calls build up towards violence at Sotik/Borabu border and execution of the violence.

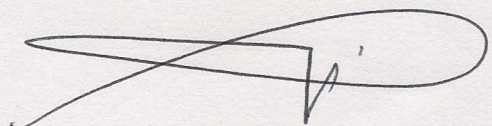
8. It can therefore be seen that the CIPEV report has a head start in explaining the source of the tension between the various ethnic groups during the 2007 election campaign. The report has also a head start in explaining the situation in the Rift



Valley Province necessary to understand why the province became principal fault line during the PEV. Hence, this report, should presumably assist the chamber contextualize and properly assess the evidence about what happened during the post-election violence. The need to assess the Report's credibility from the perspective of the integrity of its fact finding methodology and the assumptions made by the Commission is crucial. This interrogation ought to be done with the help of researcher, who has evaluated the report.

g. This evaluation will require an expert in research to guide the Chamber navigate through the report. The Applicant possesses this expertise which she draws from her academic qualifications as well as her field work as described here.

- *Academic qualifications:* the applicant has a Master of Philosophy degree in education from university of Cambridge in the United Kingdom and S Bachelors degree in education from the University of New Brunswick Canada.
- *Years of academic experience:* The Applicant is a researcher and has more than 25 years of academic experience, having taught Kenyatta University, the Kenya Polytechnic, Gusii Institute of Science and Technology, Kereri Girls High School and Kaimosi Girls High School.
- *Research done:*
 - a) An exploration of attitudes and behaviours of Kenyans in relation to citizenship education.
 - b) A reviews of the terms of reference issued by the president of the Republic of Kenya on 29 June, 2012 mandating a Commission of



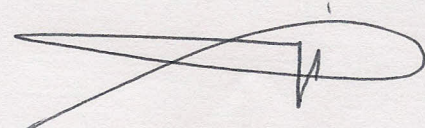
inquiry to investigate into the accident involving aircraft registration 5Y-CDT TYPE AS 350 B3 which occurred on 10 June, 2012 in Kibiko, Ngong Forest.

- c) A review of the terms of reference issued by the President of the Republic of Kenya on 21st September, 2013 mandating a Commission of Inquiry to investigate into the violence in Tana River, Tana North and Tana Delta districts.
- d) An assessment of environmental degradation surrounding the Thika Superhighway in relation to the impending commissioning of the Superhighway by the President of the republic of Kenya.
- e) A review of the Ethics and Anti-corruption Commission Bill.
- f) An appraisal of a report of an Inquiry appointed by the President of the Republic of Kenya to investigate into the facts and surrounding circumstances related to acts of violence that followed the 2007 presidential election.
- g) An appraisal of the report of The Truth, Justice and Reconciliation Commission, appointed by the President of the Republic of Kenya to investigate into the historical injustices and the violence which followed the 2007 Presidential elections.

III. **issues the Applicant proposes to address if granted status:**

i. **The choice of provinces**

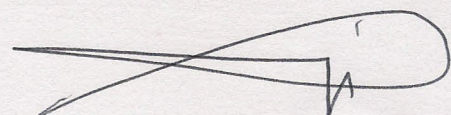
10. The choice of the provinces in which the Commission carried out its investigation is significant. Kenya is an amalgamation of 42 tribes each with distinct demarcated territories. These territories are divided up into units of administration defined as



Sub-location, Location, Division, District and Province in that order. A province is the highest administration units in the old constitution and there were eight provinces namely: Western Province, Nyanza province, Rift Valley province, Central Province, Eastern Province, North Eastern Province, Coast Province and Nairobi Province. When a researcher has eight choices, there must be criteria for choosing one, two, three or even all eight. It was important to get an explanation as to why the Commission carried out investigations in certain provinces or all the provinces. Why for example would Commission choose to carry out investigations in Nyanza Province and not Coast province, or in Rift Valley province and not Eastern province? Without proper explanation, there is nothing to stop anyone from insinuating that the Commission's investigations for example in Rift Valley province or in central province targeted particular communities.

ii. The choice of constituencies

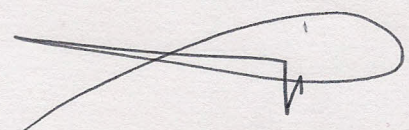
11. The choice of the constituencies in which the Commission carried out its investigations is vital. Kenya was divided into 210 Constituencies at that time. Constituencies are political units from where members are elected to represent the constituency in the National assembly. When a researcher has 210 choices, there must be criteria for choosing one, two, three or all the 210 constituencies. It was important to get an explanation as to why the Commission chose to carry out its investigations in certain or all constituencies. Why for example would the Commission choose to carry out investigations in Eldoret North Constituency and not Eldoret South Constituency or in Gatundu North Constituency and not Gatundu South Constituency? Without proper explanation, there is nothing to stop anyone



from insinuating that the Commission's investigations in Eldoret North Constituency for example or Gatundu North Constituency targeted particular individuals.

iii. The Choice of Witness

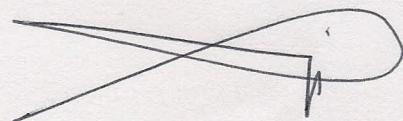
12. The political competition during the 2007 general election came from several political parties which took part in the elections. Of these, the most popular ones were (i) the Party of National Unity (PNU) (ii) the Kenyan Africa National Union (KANU) (iii) the Orange Democratic Movement (ODM) (iv) the Orange Democratic Movement Party of Kenya (ODM-K) (v) and New Forum for restoration of Democracy Party of Kenya (New Ford-K). The parties which presented Presidential candidates were: Party of National Unity (PNU) which presented Mr. Mwai Kibaki, Orange Democratic Movement (ODM) which presented Mr. Raila Odinga and Orange Democratic Movement of Kenya (ODM-K) which presented Vice President Kalonzo Musyoka. The party of National Unity (PNU) drew its support from central Province, home of Kikuyu tribe. The leader of the party was President Mwai Kibaki, himself a Kikuyu. The orange Democratic Movement Party (ODM) drew its support mainly from Nyanza Province and Rift Valley Province, the home of the Luo tribe and the Kalenjin tribe respectively. The leader of the party was Prime Minister Raila Odinga himself a Luo. The Orange Democratic Movement Party of Kenya (ODM-K) drew its support mainly from lower Eastern province, the home of the Akamba tribe. The leader of the party was Vice President Kalonzo Musyoka himself a Kamba. The other tribes which did not present a presidential candidate threw their support behind parties of their choice. The Party of National Unity (PNU) won the elections



and supporters of the party had a reason to celebrate. The celebrations however, never came to be as violence broke out moments after President Mwai Kibaki was announced the winner. This is the violence that saw President Mwai Kibaki appoint the Waki Commission, to investigate the violence that followed the 2007 Presidential election. The commission carried out the investigations and produced a report titled: A report of the Commission of Inquiry into Post-Election Violence (CIPEV). The Commission had the whole of the Kenya population from where it drew its witnesses. In view of the Political environment just described, the choice of witnesses. In view of the political environment just described, the choice of witnesses to testify before the Commission was critical considering what happened during the Middle Age Inquisitions, where, upon complaints from anonymous informers, the church burnt many in the stake. Joan of Ark and Galileo Galilei were victims of this inquisition. The church, many centuries later, canonized Joan of Ark and apologized to Galileo. So with the entire population of Kenya at its disposal, what criteria did the Commission use to select its witnesses to avoid a situation like the one of the Middle Ages Inquisitions?

iv. Questions for the witnesses

13. It is important that leading questions are not put before witnesses. Leading questions when asked, normally lead the respondent to respond in a way that would lead to a desired response. An analysis of the documents and supporting materials compiled by the Waki Commission will illustrate how the Commission framed the questions put before the witnesses.



v. Conducting a Full Inquiry

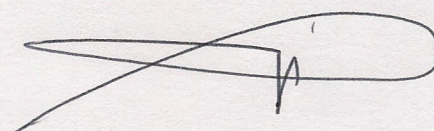
14. A full inquiry would entail analyzing the data collected so as to generate meaningful information. An analysis of the documents and supporting materials compiled by the Waki Commission will demonstrate how the Commission analyzed the data it collected.

vi. Conducting a Faithful Inquiry

15. A faithful inquiry would require that only matters specified in the terms of reference are inquired into findings are consistent with the evidence received. An analysis of the documents and supporting materials compiled by the Waki Commission will elucidate the matter that was investigated into and the evidence emerging from the investigation.

vii. Conducting an impartial inquiry

16. An impartial inquiry will require that the Commission declines to receive hearsay evidence or evidence adversely affecting the reputation of any person or tending to reflect in any way upon the character or conduct of any person. Any analysis of the documents and supporting materials compiled by the Waki Commission would show how the Commission treated the evidence from the many witnesses who testified. Those mentioned adversely by the witnesses called have a natural right to be called to explain or rebuff the evidence adduced or at least to test the veracity of the evidence adduced by cross examining the witness in person or through counsel.

viii. Consistency of methods and findings.

17. In an inquiry, the method used to collect information must be consistent with the findings of the inquiry. An analysis of the documents and supporting materials compiled by the Waki Commission would show whether the methods used to collect information were consistent with its findings considering, for example, if a researcher uses an interview as his or her method of collecting data, then the findings should be drawn from that interview only and nowhere else. Likewise if the researcher uses documentations as his or her method of collecting information, then the findings should be drawn from that documentation only and nowhere else. An evaluation of the CIPEV report will reveal whether the Commission's findings were consistent with the methods used to collect data.

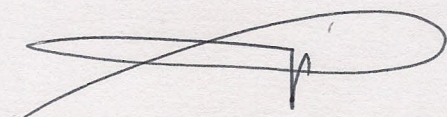
ix. Evidence

18. The evidence provided by the Commission will require substantiation. An evaluation of the CIPEV report will show whether the Commission substantiated its evidence.

x. Reporting the findings

19. The Commission of the Inquiry Act required of the Commission to report to the President, in writing, the result of the inquiry and the reasons for the conclusions. An Evaluation of the CIPEV report will verify whether the Commission reported to the appointing authority, in writing, the result of the inquiry and reasons for the conclusion.

xi. Implementation of the findings.



20. The recommendations of the Commission were supposed to be implemented by the appointing authority. An evaluation of the CIPEV report will disclose whether the appointing authority implemented the Commission's recommendations.

xii. Completeness and Comprehensibility

21. The Commission submitted the CIPEV report to the appointing authority. An evaluation of the report will lay bare the completeness or otherwise and the comprehensibility or incomprehensibility of the report.

xiii. Plagiarism

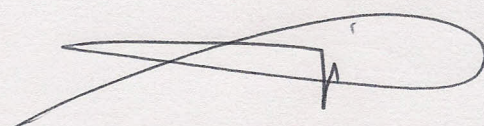
22. The Commission used other people's works. An evaluation of the CIPEV report will confirm whether it credited these works for any information it may have used.

IV. The relevant law.

23. The Pre-Trial Chambers have on various cases made a determination as to the test to be used in arriving at a determination whether to grant or refuse to grant leave under Rule 103(1) of the Rules. The Appeals Chamber in the Thomas Lubanga⁸ case allowed an application under The appeals Chamber on 30th day of April 2015, in the case of the *Prosecutor v Uhuru Muigai Kenyatta*⁹ did allow The Africa Centre of Open Governance to file amicus curiae observations of not more than 15 pages, in accordance with regulation 36 of the Regulations of the court pursuant to an application by AFRICOG under Rule 103(1).

⁸ Appeals Chamber, "decision on 'motion for leave to file a proposed Amicus Curiae submissions of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence' Case No. ICC-01/04-01/06 OA 11, 22 April 2008, para7-8.

⁹ Case No. ICC-01/09-02/11 OA 5 at page 3



24. International Criminal Tribunals have permitted submissions from third parties when it was determined that the submissions assisted the Court in reaching the right decision.¹⁰ Third party interventions are guaranteed by the status of other international tribunals and courts, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹¹, the International Criminal Tribunal for Rwanda (ICTR)¹² and the Special Court for Sierra Leone (SCSL)¹³; all on a similar basis as Rule 103(1). The International Court of Justice permits the appearance of *amicus curiae* in both contentious and advisory proceedings.¹⁴ The European Court of Human Rights accepts "*amicus Curiae*" submissions in the interest of the proper administration of Justice to any person concerned other than the applicant.¹⁵
25. Furthermore, both Trial and Appeals Chambers used *amicus curiae* extensively in the Blaskic proceedings when they considered the ICTY's power to address subpoenas to sovereign States and their high government officials, and the appropriate remedies for non-compliance.¹⁶

¹⁰ See for example Trial Chamber 1, The Prosecutor V. Jean-Paul Akayesu, and "Order Granting Leave for Amicus Curiae to Appear" Case No. ICTR-96-4-T, 12 February; Trial Chamber III, Prosecutor V. Laurent Semanza, "Decision on the Kingdom of Belgium's Application to file an Amicus Curiae Brief and on Defence Application to strike Out the observations of the Kingdom of Belgium concerning the Preliminary Response of the Defence", Case No. ICTR-97-20-T, 9 February 2001.

¹¹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("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 Appear before it and make submissions on any issue specified by the Chamber").

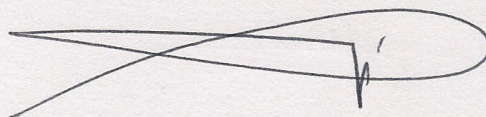
¹² Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal of Rwanda.

¹³ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

¹⁴ In contentious proceedings, Article 34(2) of the Statute of the ICJ provides that the Court "subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, shall receive such information presented by such organizations on their own initiatives", so public interest organizations do not have standing in contentious proceedings: Rule 69(4). In relation to advisory opinions, standing is less restrictive: any state or "International Organization" considered likely to be able to furnish information on the question will be notified by the Registrar "that the Court will be prepared to receive Written statements or to hear, at a public sitting to be held for the purpose, oral statement relating o the question". Art 66(4) Statute of the ICJ.

¹⁵ Rules 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of *amicus* briefs

¹⁶ *Prosecutor v. Blaskic*, Case No. IT 95 14 PT.



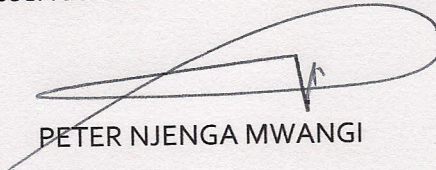
V. Justification for Amicus Curiae

31. The Applicant is a researcher who has conducted several researches in Kenya, one such research is an exploration seeking to understand the attitudes and behaviour of Kenyans in relation to citizenship. This expertise will assist in the evaluation of the report of the Commission of Inquiry into Post Election Violence.
32. Applicant participated in the 2007 elections and got an opportunity to comprehend the political environment that prevailed during this election and is therefore able to address certain issues concerning the violence that followed the elections.
33. the Applicant has filed two petitions in the Kenya High court being Petitions numbers 1 of 2010 in the High Court of Kenya in Kisii and petition number 317 of 2011 in the High Court of Kenya in Nairobi challenging the legality of the CIPEV report and its recommendations on the basis that the same breached the express provisions of the constitution and Kenyan law and the same is pending hearing.
34. The Applicant was not aligned to any of the protagonist coalitions during the 2007 general elections and is therefore capable of submitting unprejudiced observations.
35. The Applicant had previously made a similar application before this Honorable chamber but the same was denied for the reasons that;
 - a. The Waki report had not been tendered in evidence yet.
 - b. That the Waki Report was then not part of the record of the Chamber.
 - c. The parties had not yet made submissions regarding the admissibility, relevance or probative value of the Waki report.
 - d. The report may not be tendered or admitted in the case therefore rendering earlier admission of the applicant as amicus an act in speculation.



36. The Applicant submits that since the rejection of her application on the above grounds on 8th October 2013, the Chamber has subsequently received the expert testimony of Professor Herve Maupeu and admitted the Waki Report as part of the evidence and it is therefore critical that the Applicant be allowed to make *amicus curiae* observations which she believes will help the Chamber reach a proper determination of the case.

For all the above reasons, I pray that this Honourable Chamber allow the Applicant to submit *amicus curiae* observations.



PETER NJENGA MWANGI

Advocate for the applicant

PETER NJENGA MWANGI

ADVOCATE

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Dated this 22nd day of May 2015.