

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original:

No.: ICC-01/09-02/11

Date: 29 April 2015

**APPEALS CHAMBER**

**Before:** Judge Silvia Fernández De Gurmendi  
Judge Sanji Mmasenono Monageng  
Judge Howard Morrison  
Judge Piotr Hofmański  
Judge Bertram Schmitt

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR V. UHURU MUIGAI KENYATTA**

**Public**

**Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of  
the Rules of Procedure and Evidence**

Source: Africa Centre for Open Governance (AfriCOG)

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Ms Helen Brady

**Mr Uhuru Muigai Kenyatta**

**Legal Representative of Victims**

Mr Fergal Gaynor

**States Representative**

Mr Githu Muigai SC, Attorney-General of  
the Republic of Kenya

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

## Introduction

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence (“RPE”), the Africa Centre for Open Governance (“the Applicant”) hereby applies for leave to submit observations as *Amicus Curiae* in the case of the *Prosecutor v. Uhuru Muigai Kenyatta* in the Situation in Kenya.
2. State cooperation is key for the effective functioning of the Rome Treaty system. As such, the Applicant would like to expound on how important it is for States Parties to comply with their obligations under the Rome Statute. Lack of cooperation or disregard for the Rome Statute provisions could have an devastating effect on the mission of the Court, not to mention the victims of mass atrocities.
3. The Applicant would like to bring to the attention of the Appeals Chamber the context in which the alleged non-cooperation by the Kenyan Government has occurred. The Applicant will argue that the Kenyan Government’s non-cooperation under Part IX of the Rome Statute is not limited to the Article 87(7) application before the Appeals Chamber,<sup>1</sup> but includes multi-pronged strategy aimed at ensuring Mr Kenyatta’s non-prosecution before the Court.
4. The Applicant will provide the Appeals Chamber with the relevant statutory provisions under Kenyan law which lay out the framework for cooperation with the International Criminal Court (“ICC”). In addition the Applicant will provide its legal interpretation of these provisions and hopefully assist the Chamber in its determination of whether Kenya as a State Party has fully complied with its

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<sup>1</sup> Prosecution appeal against the “Decision on Prosecution’s application for a finding of non-compliance under Article 87(7) of the Statute”, ICC-01/09-02/11-1006, 20 March 2015. See also ‘Prosecution’s application for leave to appeal the ‘Decision on Prosecution’s application for a finding of noncompliance under Article 87(7) of the Statute’, ICC-01/09-02/11-985, 9 December 2014.

international obligations under the RS and the International Crimes Act<sup>2</sup> which domesticates the RS.

5. In the case the honourable Appeals Chamber would grant this request for leave to submit observations pursuant to Rule 103 of the RPE, the Applicant intends to submit its *Amicus Curiae* brief within any time limit as set by the Appeals Chamber.

### **Procedural History**

6. On 3 December 2014, the Trial Chamber issued its 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute' ('Impugned Decision'), in which the chamber rejected the Article 87(7) Application.<sup>3</sup> In the Impugned Decision, the Trial Chamber found that the approach of the Government 'falls short of the standard of good faith co-operation required under Article 93 of the Statute'.
7. On 9 December 2014, the Prosecution filed its application for leave to appeal the Impugned Decision.<sup>4</sup>
8. On 9 March 2015, the Trial Chamber issued its Decision on the Prosecution's request for leave to appeal, and granted the appeal in relation to the following two issues: (i) whether the Chamber had already made the requisite findings under Article 87(7) of the Statute that the Kenyan Government failed to comply with the Prosecution's cooperation request, such that it ought to have refer the matter to the Assembly of States Parties ("ASP"); or in the alternative, if the Chamber's findings are not considered 'formal' or 'judicial' finding under

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<sup>2</sup> See The International Crimes Act, 2008, Laws of Kenya.

<sup>3</sup> 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', Trial Chamber V(B), ICC-01/09-02/11-982, 3 December 2014. See also 'Prosecution application for a finding of non-compliance pursuant to Article 87(7) against the Government of Kenya', ICC-01/09-02/11-866, 29 November 2013, reclassified as public on 12 February 2014.

<sup>4</sup> 'Prosecution's application for leave to appeal the 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of he Statute, ICC-01/09-02/11-985, 9 December 2014.

Article 87(7) of the Statute, whether it had any discretion not to enter to required finding under that provision and thus refer the matter to the ASP (First Issue); and (ii) even if the Trial Chamber had discretion not to enter 'formal' findings under Article 87(7) of the Statute and thereby refer the matter to the ASP, whether it erred in the exercise of its discretion by taking into account or giving weight to extraneous or irrelevant considerations, and/or by failing to consider or accord sufficient weight to relevant considerations (Second Issue).<sup>5</sup>

9. On 27 March 2015, the Appeals Chamber ordered that any any request for leave under rule 103 of the Rules of Procedure and Evidence to make observations on the appeal must be filed by 16h00 on 29 April 2015.<sup>6</sup>The Trial Chamber expressly referred to the victims' response to the Prosecution's request for leave to appeal<sup>7</sup> in issuing its decision granting leave to appeal.<sup>8</sup>

### **The Applicant and Motivation for the *Amicus* Brief**

10. The Applicant is an independent non-profit organization whose governance and anti-corruption reform initiatives are aimed at addressing the structural causes of Kenya's governance crisis while facilitating permanent civic vigilance. The Applicant's strategic priorities are: (i) to conduct research to highlight the structural causes of corruption and its effects on the Kenyan and African people;; (ii) to influence legislation, regulation, public policy and practice through strategic, pre-emptive, governance and anti-corruption interventions and

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<sup>5</sup> 'Decision on the Prosecutions request for leave to appeal', Trial Chamber V(B), ICC-01/09-02/11-1004, 9 March 2015.

<sup>6</sup> 'Order on the conduct of the appeal proceedings', 27 March 2015, ICC-01/09-02/11-1010.

<sup>7</sup> 'Victims' response to the Prosecution's application for leave to appeal the decision on non-compliance', ICC-01/09-02/11-989, 15 December 2014. See also 'Victims' response to the observations of the Government of the Republic of Kenya on the Prosecution's leave to appeal request', ICC-01/09-02/11-993, 5 January 2015.

<sup>8</sup> 'Decision on the Prosecution's request for leave to appeal', Trial Chamber V(B), ICC-01/09-02/11-1004, 9 March 2015, paras. 16-18.

activities including dissemination of information; and (iii) to reach out to like-minded groups and mobilise new constituencies for reform to counter corruption in Kenya and establish a deeply-rooted culture that rejects corruption and bad governance at all levels. From the Applicant's perspective Kenya's system of government is characterised by an excessive concentration of power in the Presidency, a weak judiciary and an intermittently independent but frequently delinquent Parliament that has resulted in centralised management of public life and unilateral decision-making that is prone to abuse and manipulation. As part of its institutional mandate, the Applicant has been closely following the judicial proceedings against both Mr Ruto and Mr Kenyatta before the International Criminal Court ("ICC").

11. The Applicant notes that at various junctures relating to the question of cooperation by the Government of Kenya, the Attorney General of Kenya has pointed to various domestic Kenyan law provisions in justifying a delay or other inactivity on the part of the Kenyan Government in providing requisite documents and material to the Prosecutor. The Applicant would therefore like to de-mystify these provisions and lay out the process for invoking, for example, the requisite sections of the International Crimes Act, amongst others. Furthermore, the Applicant will provide the Appeals Chamber with examples where the Kenyan Government and indeed the President of Kenya have in other contexts, for example, assisted in asset freezing requests, and Kenya's other international treaty based obligations.

## **Submissions**

### *(i) Relevant Law*

12. 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."*

13. Pursuant to Rule 103 States, organizations or persons are permitted to submit applications and participate in the proceedings before the Court.
14. Pre-Trial Chambers, in deciding on a submission, have applied "the proper determination test" to various cases.<sup>9</sup> A view that was underlined by the Appeals Chamber granting a leave for *Amicus Curiae* submissions in the case against Thomas Lubanga.<sup>10</sup> Pre-Trial Chamber II has espoused an "exceptional basis test" where 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 provide specific expertise on specific topics.<sup>11</sup>
15. International Criminal Tribunals have permitted submissions from third parties when it was determined that the submissions assisted the Court in reaching the right decision.<sup>12</sup> Third party interventions are guaranteed by the Statutes of other international tribunals and courts, such as the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>13</sup>, the International Criminal Tribunal for Rwanda

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<sup>9</sup> See for example Pre-Trial Chamber II, "Decision on Request for Leave to Submit Amicus Curiae Observations

Pursuant to Rule 103 of the Rules of Procedure and Evidence", Case No. ICC-01/05-01/08, 17 July 2009, para.

<sup>10</sup> Appeals Chamber, "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission 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, para. 7-8.

<sup>11</sup>PRE-TRIAL CHAMBER II, "Decision on the Application by the Redress Trust to Submit Amicus Curiae Observations", 18 February, ICC-01/04-02/06-259, Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as Amicus Curiae'", 12 April 2011, ICC-01/09-01/11-49, para. 14; Pre-Trial Chamber II, "Decision on the 'Request by Ms. Moraa Gesicho to Appear as Amicus Curiae'", 12 April 2011, ICC-01/09-02/11-54, para. 15; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 11 May 2011, ICC-01/09-01/11-84, para. 8; Pre-Trial Chamber II, "Decision on the 'Request for leave to submit Amicus Curiae Observations on behalf of the Kenya Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence'", 11 May 2011, ICC-01/09-02/11-87, para. 8

<sup>12</sup> See for example Trial Chamber I, *The Prosecutor v. Jean-Paul Akayesu*, "Order Granting Leave for Amicus Curiae to Appear", Case No. ICTR-96-4-T, 12 February 1998; 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.

<sup>13</sup> 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

(ICTR)<sup>14</sup> and the Special Court for Sierra Leone (SCSL)<sup>15</sup>; 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.<sup>16</sup> 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.<sup>17</sup>

16. Furthermore, both the Trial and Appeals Chambers used *amici 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.<sup>18</sup>

### **(ii) *The importance of State Party Cooperation***

17. In 1999, before the Rome Statute (RS) came into force, the late and eminent jurist Judge Antonio Cassese, stated that “the provisions on state cooperation with the Court should be clarified and strengthened so as to leave no loopholes available to those states which are unwilling to allow the Court to exercise criminal jurisdiction over persons under their control.”

18. In all of its activities, the ICC relies on international cooperation from States. States Parties are obligated to cooperate with the Court in its investigations, and

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leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber”).

<sup>14</sup> Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda.

<sup>15</sup> Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone.

<sup>16</sup> 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, and shall receive such information presented by such organisations on their own initiative’. The Rules of the Court define an international organisation as ‘an international organisation of states’, so public interest organisations 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 to the question”: Art 66(4) Statute of the ICJ.

<sup>17</sup> Rule 37(2), Rules of Procedure (amended to include an explicit ability to allow receipt of *amicus* briefs.

<sup>18</sup> *Prosecutor v. Blaskic*, Case No. IT 95 14 PT.



prosecutions. Indeed, the success of the ICC almost exclusively relies upon the cooperation of States Parties.

19. It is clear from the experiences of the ICTY and the ICTR that state cooperation is imperative to the effectiveness of any prosecutions. The decisions, orders and requests of the Court can only be enforced by national authorities. With no enforcement agency at its disposal, the ICC cannot execute arrest warrants, compel witnesses to give testimony, collect evidence or visit the scenes where the crimes were perpetrated, without the acquiescence of national state authorities. Article 28 of the ICTR Statute and Article 29 of the ICTY provided a very general provision for state cooperation in that, “States shall cooperate with the International Tribunal” and “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber”.
20. Furthermore, effective cooperation is not only an issue for the proper investigation and prosecution of a case – it is crucial for mounting a proper defence in respect of an accused person or suspect.<sup>19</sup> Therefore, the Applicant proposes to submit observations on the importance of state cooperation in allowing for the effective functioning of the ICC.<sup>20</sup>

*(ii) Non-cooperation in Kenya transcends the 87(7) application*

21. To date there is still a court order in place that prevents the Prosecution from interviewing ten key police officers in Kenya. On 15 July 2010 the Prosecution

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<sup>19</sup>Fair trial rights are at risk if proper cooperation is not effectuated by States Parties as demonstrated by cases at the ICTY and the ICTR. Indeed, one can imagine instances where a State might block evidence to an accused person - evidence necessary, for example, to prove the innocence of such an accused. Furthermore, in the Blaskic case before the ITCY the then president of Croatia, Franjo Tudjman, had refused numerous requests for cooperation from the ICTY. In addition, counsel for Tadic stated that the “lack of cooperation displayed by the authorities in the Republika Srpska had a disproportionate impact on the Defence ... and The effect of this lack of cooperation was serious enough to frustrate [Tadic’s] right to a fair trial.”

<sup>20</sup>In relation to the ICTR, apart from Rwanda’s failure to cooperate regarding defence requests concerning the production of documents or the summoning of witnesses, the Barayagwiza case is illustrative of how a State can bully an international tribunal into submission. The decision of the Appeals Chamber granting Barayagwiza’s release and dismissal of charges against him in order to “remedy prosecutorial inaction and the resultant denial of Barayagwiza’s rights in 1999” resulted in Rwanda suspending all cooperation with the Tribunal until the Appeals Chamber reversed its decision., Appeals Chamber, Barayagwiza I, ICTR-97-19-AR72, 3 November 1999, para.99.

made a request to interview these ten senior police officers. Hon. Justice Kalpana Rawal was appointed to conduct the process. A suit challenging the process was subsequently filed before the High Court of Kenya.

22. On 1 February 2011, a court order was issued, prohibiting Hon. Justice Kalpana Rawal from “taking or recording any evidence from any Kenyan or issuing any summons to any Kenyan for purposes of taking any evidence pursuant to any International Criminal Court process pending the hearing and determination of the application”.
23. The Attorney General, who is the principal legal adviser to the Government and is constitutionally mandated to promote, protect and uphold the rule of law and defend the public interest has stated that “there is little the Attorney-General or indeed any other person can do.”<sup>21</sup> This evidence could be vital, given the widely reported prevalence of crimes committed by the Kenyan police in Kenya during the post-election violence.
23. At the confirmation of charges hearing, however, the *Muthaura and Ali* Defence submitted written statements from police and other law enforcement officials. These statements were taken after the issuance of the injunction preventing the Prosecution from interviewing the ten police officials. The GoK’s failure actively and effectively to facilitate the OTP’s request to interview these police officials may have contributed to an uneven investigative playing field.
24. Thus, it appears that the Defence team for Major General Mohammed Hussein Ali was able to conduct interviews with a total of 39 police and other law enforcement officers, yet the Prosecution to date has been unable to interview a single Kenyan police officer.
25. The Applicant submits that this is merely one example amongst many where the Government of Kenya has demonstrated substantial reticence in complying with requests from the Prosecution. If given leave, the Applicant

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<sup>21</sup> ICC-01/09-02/11-901-Conf, reclassified as a public document on 13 February 2014, para. 46.

will detail the other various instances of non-cooperation, including the failure to freeze the assets of Mr Kenyatta, which may allow the Appeals Chamber to grasp the context in which these actions have taken place.

*(iii) Kenyan law fully provides for cooperation with the Rome Statute*

24. The International Crimes Act 2008 (“ICA”) is an act of Parliament which makes provision for the punishment of certain international crimes, namely genocide, crimes against humanity and war crimes. The ICA also enables Kenya to cooperate with the ICC in the performance of its functions.
25. The Act provides with force of law in Kenya almost the entirety of the Rome Statute, including the parts dealing with the relevant crimes, jurisdiction and admissibility (Part 2) and international co-operation and judicial assistance (Part 9).<sup>22</sup> The ICA also details the exact procedure for requests for arrest and surrender received from the ICC.<sup>23</sup>
26. However, the Attorney General has on numerous occasions pointed out that specific requests from the Prosecutor could not be carried out under the provisions of Kenyan law, or pointed to the procedures that had to be followed out in accordance with Kenyan law.
27. At a status conference held on 9 July 2014, the Attorney General of Kenya in reference to a request made by the Prosecutor, described the request as a “fishing expedition”, and submitted that “... from the resources available, the name given to us [Uhuru Muigai Kenyatta], which is the specific name of an individual citizen, we have no record at the moment indicating that that person owns any

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<sup>23</sup> According to the ICA should a request for arrest and surrender be received from the ICC, the Executive shall, if satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, notify a judge of the High Court so that an arrest warrant is issued. Such an arrest warrant may be issued if the judge is satisfied that, inter alia, the person is or is suspected of being present in Kenya or may go to Kenya.

land.” This statement raised eyebrows in Kenya, since it is common knowledge that the Kenyatta family is one of the biggest landholders in the country.

28. It is also noteworthy that in May, a few weeks before the status conference, Lands Minister and close Kenyatta ally, Charity Ngilu, had controversially shut down the central lands registry in Nairobi for a 10 day period, during which time members of the public and staff of the National Land Commission (NLC) were denied access to the NLC offices. This was ostensibly to “clean up the land register” in a move that the National Land Commission termed as illegal and contested in court.

### **Conclusion**

29. The Applicant notes that in Kenya the victims of the violence in Nakuru and Naivasha have finally relinquished all hopes that they had for justice. Despite the constant rhetoric from the Kenyan Government and the African Union, ordinary Africans are extremely supportive of the mission of the ICC. For victims, the ICC was their only hope for justice and it is easy to see why. There are yet to be any credible domestic investigations or prosecution of crimes that took place in 2007 during the post-election violence.

30. It has been said that *amicus curiae* briefs must not merely be used to advertise the views and concerns of the applicants, but must have a general interest that will contribute to the development of the law.<sup>24</sup> Non-cooperation by the Kenyan Government has played its part in ensuring that the case against Mr Kenyatta was terminated and as such, the Applicant is fully cognisant of the importance of genuine state cooperation and the impact of non-cooperation on future cases at the ICC.


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<sup>24</sup> At the ICTR it was held that *amicus* briefs must have some aspect of general interest that will contribute to the development of international humanitarian law. In the *Musema* case, the Prosecutor objected to African Concern’s *amicus curiae* brief, arguing “that the main purpose of the application is for African Concern to have a platform to promote its interests as regards restitution in Rwanda”

**Relief requested**

31. For the foregoing reasons, the Applicant respectfully requests the Appeals Chamber to grant leave to submit amicus curiae observations on these matters pursuant to Rule 103 of the Rules, within a time limit determined by the Appeals Chamber.

Respectfully submitted,



Gladwell Otieno  
Executive Director, Africa Centre for Open Governance

Dated this 29<sup>th</sup> day of April 2015

At Nairobi, Kenya