

# **ANNEX 1**

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

and

ICC-01/09-02/11

Date: 27th April 2011

**PRE-TRIAL CHAMBER II**

Before: Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser  
-----

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY,  
JOSHUA ARAP SANG**

*and*

**PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public Document**

**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**

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**  
Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**  
Steven Kay  
Kithure Kindiki  
Evans Monari  
Karim Ahmad Khan  
Kimutai Bosek

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**  
Paolina Massida

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

**States' Representatives**  
Sir Geoffrey Nice QC  
Rodney Dixon

**Amicus Curiae**  
Kenyan Section of the International  
Commission of Jurists

## **REGISTRY**

---

**Registrar**  
Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar  
**Deputy Registrar**

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations      Other**  
**Section**  
Fiona McKay

[PRE-TRIAL CHAMBER II] (the “Chamber” if applicable) of the International Criminal Court (the “Court”); or

I, [ ], judge at the International Criminal Court (the “Court”);

#### **A. Introduction**

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence (“the Rules”) of the International Criminal Court (“the Court”), the Kenyan Section of the International Commission of Jurists (“ICJ Kenya”) seeks leave to submit as *amicus curiae*, in the form of written observations on the application by the Government of Kenya pursuant to article 19 of the Rome Statute.

#### **B. The Application for Leave**

2. The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is a membership, non partisan, non-profit organization that is registered as a society in Kenya. As a membership body of Jurists, both local and global, ICJ Kenya works towards the adoption of systems that foster Democratic Governance, the Rule of Law and respect for Human Rights in Kenya and around the African Continent.
3. Rule 103(1) of the Rules permits application by a State, organization or individual for leave to submit observations by providing :

“At any stage 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”.

4. The applicant submits that the substantive amicus observations annexed as Annex A will contribute to the proper determination of the application by the Government of Kenya.

5. The applicant also conscious of the desirability of the chamber to decide on the application by the government expeditiously in order to ensure fairness both in the government application but also in the two Kenyan cases before the court, hereby submits the request for leave to file *amicus curiae* observations together with the Proposed substantive *amicus* observations so that in the event the request is granted no prejudice in relation to the time taken to prepare the observations will be occasioned to any of the other parties to the article 19 proceedings.
6. For the reasons set forth below, ICJ Kenya requests that it be granted leave to submit the proposed *amicus curiae* observations.

### C. Relevant Procedural History

7. On 31 March 2010, Pre-trial Chamber II of the International Criminal Court by majority issued its decision authorizing its Prosecutor to commence an investigation into the situation in the Republic of Kenya. The investigation was in relation to alleged crimes against humanity within the jurisdiction of the Court committed between 1 June 2005 and 26 November 2009 (Kenya having signed ratified and domesticated the Rome Statute<sup>1</sup>).
8. On 15 December 2010, the Prosecutor, after conducting his investigations, submitted to Pre-Trial Chamber II two applications under article 58 of the Rome Statute requesting the issuance of summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (case one) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (case two) for their alleged responsibility in the commission of crimes against humanity.<sup>2</sup>
9. On the 15<sup>th</sup> of March 2011, by a majority decision the Pre-trial Chamber II of the Court issued summonses to appear for William Samoei Ruto, Henry Kiprono Kosgey, Joshua Arap Sang (ICC-01/09-01/11) and Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali (ICC-01/09-02/11) for their alleged responsibility in the commission of crimes against humanity in Kenya.

<sup>1</sup> On 15 March 2005, Kenya ratified the Rome Statute of the International Criminal Court and Domesticated it in 2008.

<sup>2</sup> <http://www.icc-cpi.int/>

10. On the 29<sup>th</sup> of March the Government of Kenya filed a challenge to the admissibility of the cases before the Court. The Government of Kenya pleaded in paragraph 2 of its admissibility challenge that the cases were not admissible before the Court because a new Constitution was adopted in August 2010:

The new Constitution incorporates a Bill of Rights which significantly strengthens fair trial rights and procedural guarantees within the Kenyan criminal justice system.

The Constitution gives effect to a comprehensive range of judicial reforms which fundamentally transform the administration of justice in Kenya.

Deficiencies and weaknesses from the past have been specifically targeted to guarantee the independent and impartial dispensation of justice. National courts will now be capable of trying crimes from the post-election violence, including the ICC cases, without the need for legislation to create a special tribunal, thus overcoming a hurdle previously a major stumbling block.

The new Constitution guarantees the independence of the State's investigative organs and ushers in wide-ranging reforms to the police services.

An independent Commission for the Implementation of the Constitution is established to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the Constitution.

11. ICJ Kenya seeks leave to submit as *amicus curiae*, a proposed brief on the admissibility of the cases before the Court. The proposed brief will be desirable for the proper determination of the admissibility challenge application<sup>3</sup> because it will 1) provide sufficient contextual and factual information on the situation in Kenya with regards to the thresholds set out in the Rome Statute in relation to an

<sup>3</sup> Rules of Procedure and Evidence, ICC ASP/I/3(Part. II-A), r 103(1)

admissibility challenge.(2) Provide accurate, factual and balanced information on the reform process in Kenya both before and after the prosecutor opened investigations in Kenya which are now subject of the two cases before the court.(3) Provide contextual information on the viability of national prosecutions being undertaken in Kenya presently.(4) Provide contextual information on the experiences of Kenyan victims in relation to prosecution of crimes within the Kenyan courts and more specifically in relation to crimes committed during the post election violence.

**D. The proposed *Amicus Curiae* Brief will provide:**

- a) Contextual and factual information on the track record of the government in investigating and prosecuting crimes in Kenya.
- b) Contextual and Factual information on the effectiveness of past efforts aimed at establishing a local justice mechanism to deal with the post election violence cases.
- c) Contextual and Factual information on the actual progress of implementing both judicial and legislative reforms at the national level.
- d) Contextual and factual information on the existence or not of political will in pursuing accountability for the post election crimes.

**E. ICJ-Kenya's Focused Observations Satisfy the Purpose of Rule 103**

12. Submissions on relevant factual and legal issues are appropriate as under Rule 103(1)<sup>4</sup>. In the Situation in the Democratic Republic of Congo the Pre-Trial Chamber held that the rationale for admitting *amicus curie* in proceedings is to "have the opportunity to get experts' information on relevant issues of legal interest to the proceedings in order to provide the chamber with a contribution to the proper determination of the case..."<sup>5</sup>

13. The Chamber also observed in the situation in Uganda<sup>6</sup> that in considering the desirability and appropriateness of allowing submissions under rule 103 (1) of the

<sup>4</sup> Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-373, Decision on the Request on the motion for leave to file proposed *amicus Curiae*, International Criminal Bar Pursuant to rule 103 of the rules procedure and evidence8(22April 2008)

<sup>5</sup> Situation in the Democratic republic of Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-373, Decision on the motion for leave to file proposed *amicus Curiae*, International Criminal Bar Pursuant to rule 103 of the rules procedure and evidence8(22April 2008)

<sup>6</sup> *Amicus Curiae* submitted pursuant to the Pre-Trial Chamber II "Decision on application for leave to submit observations under Rule 103" dated 5 November 2008; <http://www.icc-cpi.int/NR/exeres/A9C79BA9-3DD9-47D2-88D4-1C9EC6C6A815.htm>



rules this has to be assessed against the duty of the chamber to ensure expeditiousness of the proceedings as a fundamental tenet of fairness. The applicant in acknowledgment of this important observation submits the request for leave to file *amicus curiae* observations together with the proposed substantive *amicus* observations so that in the event the request is granted no prejudice in relation to the time taken to prepare the observations will be occasioned to any of the other parties to the article 19 proceedings.

14. ICJ-Kenya's proposed brief on admissibility therefore satisfies both the rationale for the admission of *amicus curiae* and the practical concerns.

**F. ICJ Kenya is an appropriate organization to act as an *amicus curiae* in the present matter**

15. ICJ-Kenya works towards the development of policy for institutions and legislation that fosters rule of law, governance and protection of human rights in Kenya specifically and the African region and has a fifty year experience in executing this mandate.
16. Numerous international and national institutions recognize ICJ Kenya's expertise and ability to inform international discourse and assist resolve international conflict with regards to Human Rights and rule of law through legal interpretation and contextualization. ICJ Kenya has observer status before the African Commission, has on numerous occasions acted as *amicus curiae* in the High Court of Kenya including in a challenge filed in 2009 the High Court of Mombasa challenging the jurisdiction of the International Criminal Court in Kenya and seeking to stop the investigations that were already being conducted by the ICC in Kenya. In addition ICJ Kenya's written contributions have been referred to severally by the Kenyan National Assembly in the development of legislation and resolution of national conflict.<sup>7</sup>
17. ICJ Kenya has particular expertise in the Kenyan situation having been operational in Kenya since 1959. Specific to the Case before the Court, ICJ-Kenya was involved

<sup>7</sup> [www.darfurconsortium.org/about/text/icjkenya.html](http://www.darfurconsortium.org/about/text/icjkenya.html)

from the onset with the domestication of the Rome Statute in Kenya<sup>8</sup>, the Commission of Inquiry Into Post Election herein referred to as (CIPEV)<sup>9</sup> immediately following the post election violence and development of legislation to implement reforms within Kenya. ICJ Kenya has played the role of trial observation various situations, including the trial in Ethiopia of several opposition members who, in 2006, were charged with genocide before the High Court of Ethiopia. ICJ Kenya also observed before the Privy Council of the the United Kingdom, the case of the Chief Justice of Gibraltar who faced removal from office for misconduct. ICJ Kenya has also participated in fact-finding missions including one in 2008 in Zimbabwe.

18. ICJ-Kenya is independent of any government ideology economic interest or religion. It is funded mainly by its membership and development partners.

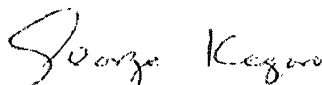
#### G. Conclusion

19. For the reasons set forth above ICJ-Kenya requests that it be granted leave to submit the proposed *amicus curiae* brief on these matters pursuant to Rule 103 of the Rules within any time limit fixed by the Chamber .To Comport with the Chamber submissions schedule under recently ordered ruling the proposed Amicus Curiae brief is attached onto this application for leave.

20. ICJ-Kenya is prepared to submit any further written comments at the request or with the leave of the Chamber.

Respectfully Submitted

For the Applicant




---

George Kegoro

Executive Director, ICJ Kenya

---

<sup>8</sup> ICJ Kenya, has since 2007 been running s an International Criminal Justice Programme that works on raising awareness on the Rome Statute with the objective of catalyzing more ratifications in the Eastern African region and increased domestication by the countries that have ratified the Statute.

<sup>9</sup> George Kegoro, the Executive Director of ICJ Kenya, served as Secretary to the Commission of inquiry into the Post Election Violence. ICJ Kenya also made submissions before this commission during the inquiry on various legal questions.

**Dated this 27<sup>th</sup> April 2011**  
**At Nairobi, Kenya**

Done in both English and French, the English version being authoritative.

---

Choose ICC Judge  
Title

---

Choose ICC Judge  
Title

---

Choose ICC Judge  
Title

---

Choose ICC Judge  
Title

---

Choose ICC Judge  
Title

Dated this

At [place, country]