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

Date: 10 June 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN KENYA

IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI*

Public Document

Request for leave to submit Amicus Curiae observations
pursuant to Rule 103 of the Rules of Procedure and Evidence

Source: Non c'e' pace senza giustizia - No Peace Without Justice

Document 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 Francis Kirimi Muthaura

Karim A. A. Khan and Kennedy Ogeto

Counsel for Uhuru Muigai Kenyatta

Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali

Gregory Kehoe and Evans Monari

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia, Registrar

Deputy Registrar

Didier Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

I. Introduction

1. Non c'è pace senza giustizia – “No Peace Without Justice” respectfully seeks leave to submit observations as *amicus curiae* on the desirability and feasibility of conducting the confirmation of charges hearing in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (“the Case”) on the territory of the Republic of Kenya.
2. The present application is made pursuant to Rule 103 of the Rules of Procedure and Evidence (the “Rules”).

II. Application for Leave

3. No Peace Without Justice, an international human rights organisation, was established as a non-profit organisation under the laws of Italy in May 1994. Further details of No Peace Without Justice and its interest in these proceedings are set out below in section V.

4. Rule 103(1) of the Rules allows:

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.

5. For the reasons set out below, No Peace Without Justice requests leave to submit an *amicus curiae* brief in the Case. In accordance with rule 103(1), No Peace Without Justice applies for leave to submit observations in writing and, if the Chambers would find it desirable, orally.

III. Relevant procedural background

6. On 31 March 2010, Pre-Trial Chamber II ("the Chamber), by majority, issued its decision authorising the Prosecutor to commence an investigation into the situation in the Republic of Kenya.¹

7. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on 7 April 2011.² On 18 March 2011, the Chamber issued a decision setting a new date for the initial appearance hearing, as Friday, 8 April 2011.³ Each accused has been charged with the following crimes: (i) Murder constituting a crime against humanity within the meaning of article 7(1)(a) of the Rome Statute for the International Criminal Court ("the Statute); (ii) Forcible transfer of population constituting a crime against humanity within the meaning of article 7(1)(d) of the Statute; (iii) Rape constituting a crime against humanity within the meaning of article 7(1)(g) of the Statute; (iv) Other inhumane acts constituting a crime against humanity within the meaning of article 7(1)(k) of the Statute; and (v) Persecution constituting a crime against humanity within the meaning of article 7(1)(h) of the Statute.⁴

8. On 8 April 2011, during the initial appearance hearing, the Chamber set 21 September 2011, as the date for the commencement of the confirmation of charges hearing.⁵

9. On 3 June 2011, the Chamber issued a decision requesting the Prosecutor and Defence to submit observations on the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya, appointing the Office of the Public Council for Victims to submit observations on behalf of victims who had applied for participation and ordering the Victims Participation and

¹ Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09-19-Corr.

² Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, "Decision Setting a New Date for the Initial Appearance", ICC-01/09-02/11-08.

⁴ Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

⁵ Transcript, initial appearance, ICC-01-09-02-11-T-1-ENG ET WT 08-04-2011 1-23 PV PT.

Reparations Section to provide the necessary assistance to the Office of Public Counsel for Victims for the purposes of contacting victims expeditiously (“the Location Decision”).⁶

10. No Peace Without Justice files the present request to seek leave to submit observations, *amicus curiae*, in a proposed brief on the matter of location of the confirmation of charges hearing, now before the Chamber.

IV. The Proposed *Amicus Curiae* Will Assist the Chamber in Resolving the Issues *Sub Judice*

11. No Peace Without Justice’s proposed *amicus curiae* brief will be “desirable for the proper determination of the case”⁷ because it will address the following substantive issues: (i) the “interests of justice” in the context of *in situ* proceedings; (ii) victims’ participation in the context of *in situ* proceedings; (iii) the impact of the ICC’s work on victims and affected communities in the context of *in situ* proceedings. The observations relate to issues that will have an impact on this case and future cases at the Court and will be based on the extensive legal and field-based experience that No Peace Without Justice has built in Kenya, other situation countries and elsewhere.

12. The proposed *amicus curiae* brief intends to offer observations on the application of rule 100(1), namely how the location of the confirmation of charges hearing, and in particular the holding of the confirmation of charges hearing in Kenya, would be in the interests of justice. The proposed *amicus curiae* brief would present a legal analysis of this question, based on recent international legal developments, including jurisprudence of international courts and tribunals and the writings of learned jurists. These observations are *de novo* and will have an impact on this and future cases before the Chambers and the Court.

⁶ Pre-Trial Chamber II, “Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-02/11-102.

⁷ Rule 103(1).

13. The ICC has already recognised that as part of their right to participate in proceedings of the Court that affect their personal interests, pursuant to article 68(3) of the Statute, victims have a right to participate in confirmation of charges hearings.⁸ The proposed *amicus curiae* brief intends to offer observations on how the location of the confirmation of charges hearing, and in particular the holding of the confirmation of charges hearing in Kenya, would facilitate the right of victims to participate in proceedings in an effective and efficient way. These observations are *de novo* and will have an impact on this and future cases before the Chambers and the Court.

14. Before and during the Review Conference for the International Criminal Court in Kampala, Uganda on 31 May – 11 June 2010, the Review Conference held a series of discussions on “The impact of the Rome Statute system on victims and affected communities”. These discussions culminated in the adoption of a resolution in which the Assembly of States Parties encouraged the Court to consider a number of ways in which it might maximise its impact, including how it might best address the concerns of victims and affected communities, paying special attention to the needs of women and children.⁹ Alongside conducting fair trials and bringing an end to impunity for the most serious crimes of concern to humanity as a whole,¹⁰ the impact of the Court’s work on victims and affected communities is of critical importance to the fulfillment of its mandate. The proposed *amicus curiae* brief intends to offer observations on how the location of the confirmation of charges hearing, and in particular the holding of the confirmation of charges hearing in Kenya, would contribute to the Court’s ability to maximise its positive impact on victims and affected communities and would be an important factor in the Court fulfilling its core mandate. These observations are *de novo* and will have an impact on this and future cases before the Chambers and the Court.

⁸ See, for example, Pre-Trial Chamber I, “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges”, 29 October 2010, ICC-02/05-03/09-89.

⁹ Review Conference, “The impact of the Rome Statute system on victims and affected communities”, 8 June 2010, RC/Res.2.

¹⁰ Statute, preamble.

V. No Peace Without Justice Is an Appropriate Organisation to Act as an *Amicus Curiae* in the Present Case

15. Since 1994, No Peace Without Justice, an independent non-governmental organisation, has been a leading human rights organisation advocating for the creation of a permanent International Criminal Court and supporting and monitoring the International Criminal Court since its establishment in 2002. No Peace Without Justice works with civil society, victims and affected communities in each situation currently before the Court, with a particular focus on promoting the ICC's responsiveness to justice needs on the ground and maximising the ICC's impact on its stakeholders in-country.

16. No Peace Without Justice staff includes renowned legal experts who are competent in legal theory and have extensive field experience working with civil society, victims and affected communities on international criminal justice generally. NPWJ has conducted field operations in Kosovo in 1998-9; in Sierra Leone in 2000-2004; in Afghanistan in 2005, 2007 and 2009; and elsewhere, all working with local actors to document crimes under international law, during which NPWJ developed particular expertise on promoting, maximising and assessing the impact of international courts and tribunals on victims and affected populations. In 2008, NPWJ worked in Kenya with local actors to document the post-election violence as it was unfolding and for some months after its conclusion. NPWJ therefore has unique insight into the post-election violence and, therefore, the present Case.

17. In addition, NPWJ has been conducting extensive research on the impact of the presence of international courts and tribunals in the countries where the crimes were committed, including publishing a paper on this issue in November 2009. From January to June 2010, together with local organisations, NPWJ conducted a series of visits for ICC State Party delegates to Uganda to experience first-hand the impact of the Court in the country by meeting with victims, affected communities and other stakeholders. NPWJ worked with Ugandan victims' rights organisations to organise the "War Victims Day Football Game" in Kampala on 30 May 2010, which provided

an opportunity for victims to engage with ICC State Party delegates and others. As a result of this work, NPWJ has particular insight into the impact of international criminal justice proceedings on victims and affected communities and seeks to share that insight with the Chamber through the proposed *amicus curiae*.

18. No Peace Without Justice has particular expertise on the Rome Statute and other core documents, having been actively involved in the drafting process of the Statute and other core documents, and is a founding member of the NGO Coalition for the International Criminal Court. No Peace Without Justice has served on the Coalition's Steering Committee from its inception to the present day.

VI. Conclusion

19. For the foregoing reasons, No Peace Without Justice respectfully requests that the Chamber grant leave to submit observations, *amicus curiae*, and order that a proposed brief be timely filed in the present matter pursuant to rule 103.



Alison Smith
Legal Counsel
on behalf of
Non c'e' pace senza giustizia - No Peace Without Justice

Dated this 10 June 2011

At Belgium, Brussels