

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 7th October 2014

TRIAL CHAMBER V (B)

Before:

**Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Geoffrey Henderson**

SITUATION IN THE REPUBLIC OF KENYA

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

**PUBLIC
URGENT**

**Amicus Curiae Observations of National Council of Elders Kenya pursuant to
Rule 103 (1) of the Rules of Procedure and Evidence**

Source: National Council of Elders Kenya

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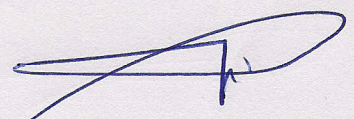
Other

I. Introduction

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence, National Council of Elders Kenya hereby apply, for the reasons set out below, for leave to submit observations as *Amicus Curiae* in the case of the *Prosecutor v. Uhuru Muigai Kenyatta* in the Situation in the Republic of Kenya

II. Background

2. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr. Uhuru Muigai Kenyatta.
3. On 9 July 2012, the Chamber set the dates for the commencement of the trial in the *Kenyatta case*, for 11 April 2013.
4. On 7 March 2013, the Chamber vacated the trial commencement date of 11 April 2013 and set the new date for start of trial as 9 July 2013.
5. On 20 June 2013, the Chamber vacated the 9 July 2013 trial date and set 12 November 2013 as date for commencement of trial. This date was vacated by the Honourable Chamber on 31 October 2013, with 5 February 2014 set as the new date for start of trial.
6. On 23 January 2014, the Chamber vacated the trial commencement date of 5 February 2014, and in its place convened a status conference pursuant to Rule 132(2) of the Rules.
7. On 31 March 2014, the Chamber ordered the adjournment of the provisional trial commencement date to 7 October 2014.
8. On 19 September 2014, the Chamber vacated the trial date of 7 October 2014, and scheduled two status conferences for 7 and 8 October 2014.



III. The Applicant

9. The National Council of Elders is a non-political and non partisan Association duly registered with the Registrar of Societies of Kenya under the Societies Act Chapter 108 of the Laws of Kenya.
10. The Association brings together all the councils of Elders of the forty plus communities in Kenya.
11. The Association is comprised of 47 County Council of Elders where all Communities resident in any particular county are represented.
12. The Association also has 10 Regional Council of Elders whose membership is delivered from the 47 County Councils of Elders.
13. The 10 Regional Councils of Elders ultimately form the National Council of Elders (NCE) where every region is well represented.
14. The National Council of Elders (NCE) was established with the following objects:-
 - a. To promote unity of all the communities of the Republic of Kenya.
 - b. To work for a united Kenya by promoting understanding, unity and cooperation within and among all Councils of Elders of all Communities in Kenya.
 - c. To provide an umbrella focal platform for affiliate councils of elders to interact, harmonize, negotiate, cohere, dialogue, manage and resolve conflicts and offer alternative conflict and dispute resolution.
 - d. To improve the livelihoods of all communities of Kenya by combating illiteracy, poverty and disease.
 - e. To preserve, promote, conserve, update and modernize the cultural heritage and practices of the diverse communities of Kenya.
 - f. To promote sustainable economic thrift of all communities in Kenya.

- g. To promote educational training and industrial technology programs to build capacity and empower Kenyans for economic and social progress.
 - h. To counsel the youth in good conduct, discipline, respect for their progressive cultural values and socially acceptable enterprises
 - i. To resolve any conflicts affecting the unity, welfare and future of the Association
15. To date, the NCE has managed to resolve disputes between different communities in Kenya the most recent being the resolution of the boundary dispute between the Meru county and the Isiolo County.
16. The NCE is currently involved in resolving the conflict between the Galle and Degodia clans of the Wajir and Mandera Counties.
17. The NCE is also involved in resolving the conflict between the Turkana and Pokot Communities of the former Rift Valley Province.

IV. The application for leave to intervene

18. Rule 103 (1) of the Rules of Procedure and Evidence ("the Rules") of the International Criminal Court ("ICC" or "the Court") 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."*
19. Pursuant to Rule 103 of the Rules, States, organizations or individuals interested to participate in the proceedings before the Court are permitted to submit applications and participate in the proceedings before the Court.

20. The Appeals Chamber, in deciding whether or not to grant leave to an Applicant to submit observations as *amicus curiae* in accordance with Rule 103 of the Rules, has underlined that the respective Chamber should take into consideration whether the proposed submission of observations may assist it *"in the proper determination of the case"*.¹
21. Other International Tribunals have permitted third party interventions, such as, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"), on similar basis as Rule 103(1). These Tribunals have permitted submissions from third parties when it was determined that the submissions assisted the Court in reaching the right decision.
22. The Appeals Chamber of the Special Court of Sierra Leone has further found, when ruling on the application by Non Governmental Organizations to intervene in the *Kallen case* that: *"The issue is whether it is desirable to receive such assistance, and 'desirable' does not mean 'essential' (which would be over-restrictive) nor does it have an over-permissive meaning such as 'convenient' or 'interesting'. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it."*
23. It is submitted that submissions by the Applicant as *amicus curiae* is of great importance which may assist in guiding the Court to reach a just adjudication of this matter.

¹ 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" ICC-01/04-01/06 OA 11 of 22 April 2008.

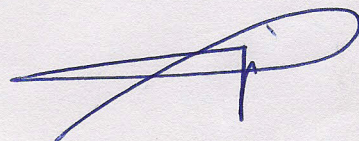
V. Specific issues the applicant seeking leave to submit amicus curiae on

24. In the event the Honourable Trial Chamber grants this humble request for leave to submit observations pursuant to Rule 103, the applicant intends to submit its *Amicus Curiae* brief on the following issues:-

- a. The importance of in-depth understanding of the historical origins of the 2007/2008 conflict and similar conflicts occurring as way back as the colonial days.
- b. The historical interaction between the different communities resident in Kenya.
- c. An in-depth understanding of the African Justice systems and processes.
- d. The implications of the current proceedings on National healing, Cohesion and integration.
- e. The impact of continuing the trial of Mr Uhuru Muigai Kenyatta when, by the Prosecutor's own admission its evidentiary basis has collapsed.
- f. The impact of continuing the case on the victims whose legitimate expectations are raised unreasonably.

VI. Further Justification

25. That the Association has over the years worked with the victims of political related violence through their respective affiliate councils of Elders and have continuously tried to reconcile the protagonist communities and to forge national healing, integration and cohesion.

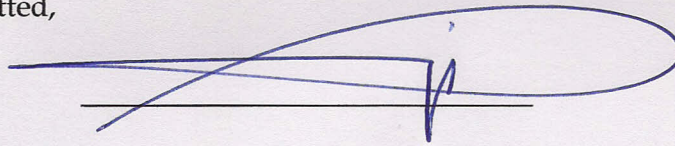


26. That it is in the interest of the Kenyan Nation, the region and international community of nations that the healing process currently taking place in Kenya be allowed to continue.

VII. Conclusion

27. For the foregoing reasons the National Council of Elders Kenya requests that the Chamber grant it leave to submit as *Amicus Curiae* observation on the issues pursuant to rule 103 of the Rules and to be granted standing at the status conference scheduled for 7th and 8th October 2014.

Respectfully submitted,



Peter Njenga Mwangi

Advocate for
The National Council of Elders (Kenya)

Dated this 7th day of October, 2014.

At Nairobi, Kenya

