

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09  
Date: 18 January 2011

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

**Public**

**Decision on Application for Leave to Submit *Amicus Curiae* Observations**

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

**The Office of the Prosecutor**

Luis Moreno Ocampo

Fatou Bensouda

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

**Other**

William Ruto/Joseph Kipchumba Kigen-  
Katwa

**Registrar & Deputy Registrar**

Silvana Arbia, Registrar

Didier Preira, Deputy-Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”) is seized of an application for leave to submit *amicus curiae* observations under rule 103 of the Rules of Procedure and Evidence (the “Rules”).

1. On 31 March 2010, the Chamber issued its decision on the Prosecutor’s “Request for authorisation of an investigation pursuant to Article 15”,<sup>1</sup> in which it granted, by majority, the Prosecutor’s request, to the extent specified in the operative part of the said decision.<sup>2</sup>

2. On 21 December 2010, the Registrar transmitted to the Chamber “an application communicated by Katwa & Kemboy Advocates, Commissioners for oaths on behalf of Applicant William Ruto”, together with 2 annexes (the “Application”).<sup>3</sup> The Application and the annexes thereto were submitted under rule 103 of the Rules,<sup>4</sup> by William Ruto (the “Applicant”), for whom the Prosecutor had requested the Chamber to issue a summons to appear under article 58 of the Statute.<sup>5</sup> In presenting the Application, the Applicant made clear that the purpose of the request, under rule 103 of the Rules, is that “[u]pon the grant of leave, [he][...] intends to make detailed oral and written observations” on a number of issues elaborated throughout the filing. In the relief, the Applicant put forward three requests:

a) [That the Chamber] determines that no summons or warrants of arrest shall issue in respect to the Applicant before [...] [he] has been heard on the issues raised in the Application; b) the Applicant be granted leave and be heard on the above observations before the Prosecutor is heard on an application for summons and warrants of arrest; [and] c) [i]n the alternative and without Prejudice the Prosecutor be restrained from seeking any orders for summons or warrants before he [...] shall have given the Applicant an adequate and competent notice informing him that he is a suspect and the grounds for belief under Article 55(2); And before the prosecutor shall have investigated exonerating evidence in regard to the Applicant under Article 54. And before he shall have afforded the Applicant an opportunity to be heard on such concise facts constituting a crime contemplated by Article 58(2), the burden of proof being placed on the Prosecutor as an officer of the Honourable Court to proof

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<sup>1</sup> ICC-01/09-3 and its annexes.

<sup>2</sup> 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.

<sup>3</sup> ICC-01/09-32-Conf-Exp and its annexes.

<sup>4</sup> ICC-01/09-32-Conf-Exp; ICC-01/09-32-Conf-Exp-AnxA, pp. 1-2.

<sup>5</sup> ICC-01/09-30-Red.

compliance with these and all relevant provisions designed to balance the rights of all parties including suspects.<sup>6</sup>

3. The Chamber notes rule 103 of the Rules and regulation 23 *bis* of the Regulations of the Court.

4. In the Application, the Applicant submitted three requests, the last of which is in the alternative to the first two. Since the Application is initiated and developed on the basis of rule 103 of the Rules, the Chamber finds it appropriate to construct its line of reasoning on the basis of this provision. Accordingly, the Chamber shall first respond to the second request, which directly aims at the grant of leave to submit observations under the said rule; thereafter, it shall examine the first and the third requests.

5. According to rule 103 of the Rules:

1. 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 [...] person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The Chamber shall determine what time limits shall apply to the filing of such observations.

6. In this context, the Chamber wishes to point out, that although the language used in rule 103(1) of the Rules “grant leave to a [...] person” could be deemed broad enough to capture any “person” who has the legal capacity to engage in the proceedings, by way of submitting written or oral observations through an *amicus curiae* application, rule 103(2) of the Rules excludes a certain category of persons from the possibility of doing so. A plain reading of rule 103(2) of the Rules clearly excludes a person, subject to the Court’s investigation, from submitting an

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<sup>6</sup> ICC-01/09-32-Conf-Exp-Anx A, p.15. The Chamber notes that it is quoting the exact wording of the Application.

application pursuant to the said rule.<sup>7</sup> According to this provision both the “Prosecutor and the defence shall have the opportunity to respond to the observations submitted” under sub-rule 1. The reference to the term “defence” certainly implies the person who is subject to the Court’s investigation. Thus, it is unfeasible that the said person be permitted to submit an *amicus curiae* application and/or observation<sup>8</sup> and subsequently be called upon to respond to his or her own observations. If rule 103 of the Rules was meant to permit a person under the Court’s investigation to submit *amicus curiae* observations, it would have excluded him or her from responding to his or her own observations. The core rationale underlying an *amicus curiae* submission is that the Chamber be assisted in the determination of the case by an independent and impartial intervener having no other standing in the proceedings. Accordingly, the Applicant cannot be granted leave to submit observations. It follows that the second request outlined in the Application and any other request (namely, the first and third requests) developed on the basis of this provision, must be rejected.

7. The Chamber’s above finding provides sufficient basis to reject the three requests presented in the Application. However, for the sake of further clarity for the Applicant, the Chamber shall proceed to consider the two other requests.

8. As to the first request, that “no summons or warrant of arrest shall issue in respect to the Applicant before [...] [he] has been heard on the issues raised herein”, the Chamber considers that it is linked to the second request in the Application and is subject to the grant of leave thereto. As expressed in the words of the Applicant:

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<sup>7</sup> This is not necessarily the case with the *ad hoc* tribunals. See in particular the manner in which rule 74 of the Rules of Procedure and Evidence has been interpreted by the Appeals Chamber of the Special Court for Sierra Leone: *Prosecutor v. Morris Kallon*, Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae Brief and to Present Oral Submissions, Case No. SCSL-2003-07, 1 November 2003, paras. 5, 10 (where the Appeals Chamber of the Special Court for Sierra Leone opted for a wider interpretation of the word ‘person’ under rule 74 of the Rules of Procedure and Evidence concerning *amicus curiae* applications, presumably given that the said rule does not include any equivalent language to rule 103(2) and (3) of the Court’s Rules).

<sup>8</sup> Notably, no application is required in circumstances where the Chamber has invited a State, organisation or a person to submit *amicus curiae* observations.

“[u]pon the grant of leave, [Mr. Ruto] through his counsel intends to make detailed oral and written observations on” a number of issues set out in the Application.<sup>9</sup> Since the Chamber cannot grant leave to the Applicant under rule 103 of the Rules, he cannot be heard further “on the issues raised” in the Application, by virtue of this provision.

9. With regard to the third alternative request that the “Prosecutor be restrained from seeking any orders for summons or warrants [...]”, the Chamber deems it as moot. The Prosecutor has already submitted two applications for summons to appear under article 58 of the Rome Statute on 15 December 2010, that is, prior to the notification of the present filing to the Chamber on 22 December 2010. In any event, the Court’s statutory provisions do not empower the Chamber to prevent the Prosecutor from submitting requests under article 58 of the Statute. Therefore, the Applicant’s third request must be also rejected.

10. Apart from the foregoing reasoning, it is even more compelling that, under the statutory framework of the Court, there is no legal basis for a person under the Prosecutor’s investigation to submit observations at the current stage of proceedings. According to article 58 of the Statute, the Chamber shall examine “the application and the evidence or other information submitted by the Prosecutor”, upon the review of which it will decide whether the requirements of article 58 of the Statute have been fulfilled. Thus, the proceedings triggered by the Prosecutor’s application for a warrant of arrest or a summons to appear are to be conducted on an *ex parte* basis. The only communication envisaged at the article 58 this stage is conducted between the Pre-Trial Chamber and the Prosecutor. In particular, the Court’s statutory provisions do not provide the person(s) named in the Prosecutor’s application with any procedural means to challenge the relevance and/or the probative value of the evidence and information submitted by the Prosecutor pursuant to article 58 of the Statute or the intrinsic quality of his investigation. Thus, the Application shall also be rejected due to the lack of *locus standi* of Mr. Ruto.

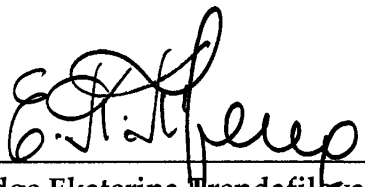
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<sup>9</sup> ICC-01/09-32-Conf-Exp-AnxA, p. 5.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) rejects the Application;
- b) decides to re-classify as public document ICC-01/09-32-Conf-Exp and annex A only.

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

  
Judge Ekaterina Vrendafilova  
Presiding Judge

   
Judge Hans-Peter Kaul      Judge Cuno Tarfusser  
Judge      Judge

Dated this Tuesday, 18 January 2011

At The Hague, The Netherlands