

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09  
Date: 11 February 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 the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)"**

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**

**Other**

Mohammed Hussein Ali  
Evans Monori  
John Philpot  
Gershom Otachi Bw'omanwa

**REGISTRY**

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**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 renders this decision on the application submitted by Mohammed Hussein Ali requesting leave to participate in the proceedings related to the Prosecutor's application under article 58 of the Rome Statute (the "Statute").

1. On 31 March 2010, the Chamber issued its decision in which it granted, by majority, the Prosecutor's request to commence an investigation in the situation in the Republic of Kenya for crimes against humanity to the extent specified in the operative part of the said decision.<sup>1</sup>

2. On 15 December 2010, the Prosecutor submitted the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" requesting the Chamber to issue summonses to appear for the persons concerned.<sup>2</sup>

3. On 24 January 2011, the Chamber was notified by the Registrar of the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)' submitted on 20 January 2011" (the "Application") together with an annex containing three powers of attorney.<sup>3</sup> The Application was submitted on behalf of Mohammed Hussein Ali (the "Applicant"), one of the persons for whom the Prosecutor had requested the Chamber to issue a summons to appear under article 58(7) of the Statute. In his Application, the Applicant requests the Chamber to grant him leave to participate fully in the proceedings pursuant to article 58 of the Statute. According to the Applicant, the participation sought would encompass the right to make observations before the Chamber, either orally or in writing, on the substance of the Prosecutor's application pursuant to article 58 of the Statute. In order to

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<sup>1</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>2</sup> ICC-01/09-31-Red.

<sup>3</sup> ICC-01/09-37-Conf-Exp and annexes A and B attached thereto. A "Corrigendum" to the Application was then submitted to the Registrar and thereafter notified to the Chamber on 9 February 2011, see ICC-01/09-40-Conf-Exp and annex A attached thereto.

meaningfully exercise the right sought, the Applicant further requests the Chamber to be provided with access to: (i) the filings presented by the Prosecutor under article 58 of the Statute without any redactions or with minimal redactions if necessary; and (ii) any other filings by any other participant in the proceedings to which the Applicant further claims he is entitled to respond.

4. The Chamber is, therefore, called upon to determine whether the person named in the Prosecutor's application under article 58 of the Statute is entitled to participate, by way of submitting observations, in the article 58 proceedings currently pending before the Chamber. The reliefs sought by the Applicant are all dependent upon this issue.

5. The Chamber notes articles 58 and 68(3) of the Statute, rule 103 of the Rules of Procedure and Evidence (the "Rules") and regulation 23*bis* of the Regulations of the Court (the "Regulations").

6. The Chamber recalls that, with respect to the very same issue it is called upon to decide in the instant decision, it has already stated that "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" and 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".<sup>4</sup> The Chamber further clarified that "[t]he only communication envisaged at the article 58 (...) stage is conducted between the Pre-Trial Chamber and the Prosecutor".<sup>5</sup> Accordingly, the Applicant does not enjoy *locus standi* in the current proceedings and his Application should thus be rejected. Nevertheless, for the sake of clarity and with a view to avoiding to be approached again in the future with the same or similar requests, the Chamber finds it appropriate to respond to the arguments raised by the Applicant.

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<sup>4</sup> Pre-Trial Chamber II, "Decision on Application for Leave to Submit Amicus Curiae Observations", ICC-01/09-35, para. 10.

<sup>5</sup> *Ibid.*

7. While acknowledging the above-mentioned finding of the Chamber, the Applicant presents several arguments that, in his view, would ground his right to participate in article 58 proceedings. In particular, the Applicant submits that “on the basis of the related jurisprudence [...] and in the context of his interest in the matter and being only a step away from being formally recognized as persons [*sic*] charged, [he] ha[s] an inherent right to participate in the proceedings”.<sup>6</sup> Considering the reliefs sought in the Application, the Chamber will only address the arguments specifically raised by the Applicant with regard to his alleged right to participate in the proceedings under article 58 of the Statute. As elaborated below, the Chamber is not persuaded by any of those arguments and, accordingly, sees no reason to depart from its previous finding.

*On the alleged inconsistency with other relevant jurisprudence of the Court with respect to victims and amici curiae*

8. The Applicant submits that the position held by the Chamber with respect to the *ex parte* nature of the proceedings under article 58 of the Statute is “inconsistent with other relevant jurisprudence that the Chamber does not appear to have taken into account”.<sup>7</sup> In particular, the Applicant contends that “persons (victims) and other entities (*amici*) with a lesser (...) interest in the proceedings have been allowed to participate” in the proceedings under article 58 of the Statute<sup>8</sup> and, hence, that he “does not expect to be treated any less”.<sup>9</sup> The Chamber is of the view that this argument is defective and intrinsically flawed for the following reasons.

9. The Applicant refers to the right of victims, provided that certain statutory requirements have been satisfied, to participate in judicial proceedings at the investigation stage. In this regard, the Chamber notes that, contrary to the Applicant’s argument, neither victims nor *amici curiae* have ever been allowed by

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<sup>6</sup> Application, para. 15.

<sup>7</sup> *Ibid.*, para. 13.

<sup>8</sup> *Ibid.*, para. 12.

<sup>9</sup> *Ibid.*, para. 30.

any Pre-Trial Chamber to participate in the proceedings under article 58 of the Statute.

10. The Applicant supports his Application also by reference to the participation granted to victims and *amici curiae* in the proceedings related to the appeal lodged by the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir".<sup>10</sup> The Chamber is of the view that the *ratio* behind the right of participation granted to victims and *amici curiae* by the Appeals Chamber cannot be applied to the current proceedings due to the intrinsic difference with respect to the subject-matter and the nature of the two proceedings.<sup>11</sup> In fact, the evaluation to be carried out by the Pre-Trial Chamber in the current proceedings is centred on a determination as to the sufficiency of evidence and material presented by the Prosecutor in establishing reasonable grounds to believe that the conditions provided for in article 58 of the Statute have been met. Conversely, the Appeals Chamber, in the above-mentioned appeal, was called upon to determine whether the Pre-Trial Chamber had applied an incorrect evidentiary standard when assessing the Prosecutor's application under article 58 of the Statute: only the existence of an error in law made in the impugned decision was thus in question before the Appeals Chamber in the interlocutory appeal to which the Applicant refers. The above-mentioned decisions of the Appeals Chamber cannot thus be extended by analogy to the current proceedings before the Pre-Trial Chamber.

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<sup>10</sup> A number of victims and two *amici curiae* have been allowed to participate in this interlocutory appeal, respectively, by the following decisions of the Appeals Chamber: "Decision On the Applications by Victims a/0443/09 to a/0450/09 to Participate in the Appeal against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir' and on the Request for an Extension of Time", ICC-02/05-01/09-48; and "Decision on the Application of 20 July 2009 for Participation under Rule 103 of the Rules of Procedure and Evidence and on the Application of 24 August 2009 for Leave to Reply", ICC-02/05-01/09-43.

<sup>11</sup> In this respect, the Appeals Chamber has already clarified that "[a]n interlocutory appeal [...] in which a particular issue requires specific consideration, is a separate and distinct stage of the proceedings" to that from which the decision that has become the subject of such interlocutory appeal originates, see Appeals Chamber, "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", ICC-01/04-01/06-824, para. 43.

11. Accordingly, since there have been no instances wherein victims or *amici curiae* have been allowed to participate in the proceedings under article 58 of the Statute before a Pre-Trial Chamber, nor the *ratio* behind the above-mentioned decisions of the Appeals Chamber seems to be applicable, the argument raised by the Applicant that the jurisprudence of the Court would create a discrimination between victims/*amici curiae*, on the one hand, and the individuals for whom the Prosecutor seeks a warrant of arrest or summons to appear, on the other hand, is without merit, as is the submission with respect to the alleged inconsistency of the decision of this Chamber with prior jurisprudence of the Court.

12. Secondly, the Applicant submits that, if the Chamber were to apply the criteria for victims' participation in judicial proceedings taking place at the investigation stage (first and foremost, the requirement that their personal interests be affected in such proceedings), it would grant him leave to participate in article 58 proceedings, since his personal interests are affected by the outcome of the said proceedings. In this regard, the Chamber notes that the criterion of "personal interests" as a requirement for participation is only provided for by article 68(3) of the Statute with respect to victims. This requirement serves two interrelated purposes: in the negative, it excludes victims' participation in proceedings the outcome of which does not affect their interests; in the positive, it grounds the right of the victims to participate before the Court once the other criteria have been met. The Applicant requests the Chamber to apply the criterion of "personal interests" in the latter sense on him. As clarified, this criterion is only provided for the purposes of the participation of victims. Consequently, article 68(3) of the Statute, being *lex specialis* for a particular participant in the proceedings, cannot be applied by analogy to ground the granting of participatory rights to any person(s) named in the Prosecutor's application under article 58 of the Statute.

13. In addition, as previously held by the Chamber, the requirement that their personal interests be affected by the proceedings is not the only pre-requisite to the grant of participatory rights to victims: it is also necessary that the relevant stage of

the proceedings be deemed “appropriate” for the purposes of such participation.<sup>12</sup> In this respect, it is worth clarifying that proceedings that are to be conducted with the exclusive participation of one party (as is the case with proceedings under article 58 of the Statute) are, by definition, not “appropriate” for the purposes of victims’ participation: victims would, therefore, not be allowed to participate in any such proceedings even if their personal interests were affected by the outcome of the said proceedings. Accordingly, no issue of discrimination can purposefully be raised by the Applicant.

14. By the same token, no issue of discrimination can decisively be raised with respect to *amici curiae*, who do not enjoy any right expressly attributed to them by the legal texts of the Court. In this regard, the Chamber recalls that, pursuant to rule 103(1) of the Rules, it falls squarely within the discretion of the Chamber as to whether *amici curiae* may be entitled to submit observations on any issue deemed appropriate by the Chamber itself.

***On the alleged exceptional nature of ex parte proceedings***

15. The Applicant further submits that “the filing of *ex parte* Applications is the exception rather than the rule and such motions [are] only to be used exceptionally when they are truly necessary”,<sup>13</sup> supporting this proposition by reference to a series of decisions endorsing this interpretation and ultimately pointing out that *ex parte* filings should be appropriately justified on a case-by-case basis. Accordingly, the Applicant claims that *ex parte* filings should be admitted only in the presence of factual circumstances *in concreto* warranting such nature.

16. The Chamber is of the view that the Applicant’s argument is based on a misunderstanding as to the use of the expression “*ex parte*”. In qualifying the proceedings under article 58 of the Statute as *ex parte*, the Chamber indicates that the proceedings are to be conducted “without [...] argument by any person adversely

<sup>12</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya”, ICC-01/09-24, para. 10.

<sup>13</sup> Application, para. 44.



interested".<sup>14</sup> A slightly different meaning of the expression is employed with respect to submissions that are made, or proceedings that take place, "without notice to [...] any person adversely interested".<sup>15</sup> When arguing that the filing of *ex parte* applications constitutes an exception as opposed to the rule, the Applicant seems to refer to the latter meaning of the expression *ex parte*. This is confirmed by the Applicant's indication that article 72 of the Statute is "the only express provision with regard to *ex parte* proceedings"<sup>16</sup> as well as by his reference to decisions of different Chambers relating to the level of confidentiality of filings made by the parties. In a significantly different context, when proceedings are shaped by the legal instruments of the Court as *ex parte*, in the sense that they shall be conducted without any person adversely interested being given the opportunity to be heard, the concrete factual circumstances are not of relevance and cannot ground the modification of the *ex parte* nature of these proceedings.

***On the alleged power of the Chamber to render adversarial the proceedings under article 58 of the Statute***

17. The Applicant additionally maintains that the silence of the legal instruments of the Court with respect to the *ex parte* as opposed to the adversarial nature of the proceedings under article 58 of the Statute is such as to permit that participation in the said proceedings be granted to the individuals named in the Prosecutor's Application for a warrant of arrest or summons to appear. In particular, the Applicant asserts that "[i]n view of the crucial importance of Article 58 proceedings, if they were intended to be exclusive, there would have been an express provision to that effect".<sup>17</sup>

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<sup>14</sup> B. Garner (ed.), *Black's Law Dictionary*, (7<sup>th</sup> ed., West Group, St Paul, Minn., 1999), p. 597. An *ex parte* proceeding is also defined as "[a] proceeding in which not all parties are present or given the opportunity to be heard" (*Ibid.*, p. 1221).

<sup>15</sup> *Ibid.*, p. 597.

<sup>16</sup> Application, para. 44. The Chamber notes that article 72(1) of the Statute regulates the case "where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests".

<sup>17</sup> Application, para. 44.

18. With respect to this argument, the Chamber is of the view that the opposite holds true and that, had the drafters intended that the proceedings under article 58 of the Statute be conducted on an adversarial basis, they would have *expressis verbis* provided for it (*ubi lex voluit dixit, ubi noluit tacuit*), alongside the other instances wherein the voices of parties or participants shall or may be heard by a Chamber. On the contrary, the wording of article 58 of the Statute clearly indicates that the decision as to whether a warrant of arrest or a summons to appear should be issued is to be based upon an examination of “the application and the evidence or other information submitted by the Prosecutor” only. No role, actual or potential, is provided or anticipated for the person named in the Prosecutor’s application under article 58 of the Statute.

19. Equally, a systematic interpretation of article 58 of the Statute does not provide any support for the Applicant’s argument. In particular, there is no legal basis which would support the reading of the proceedings under article 58 of the Statute as adversarial proceedings such as the confirmation of charges hearing or the trial. In this regard, it is notable that the procedural framework of the Court contains extensive provisions on the disclosure of evidence between the parties in relation to the proceedings leading to the confirmation of charges and the trial, in principle to be held in the presence of the suspect/accused, who, at those stages, has the right to present evidence and to challenge the evidence introduced by the Prosecutor. Such disclosure and such rights to present and challenge evidence are instead not foreseen for the purposes of the decision to be taken by the Chamber under article 58 of the Statute. Furthermore, the legal texts of the Court do not provide the person named in the Prosecutor’s application under article 58 with any procedural instrument before the Pre-Trial Chamber allowing him to challenge the evidence presented by the Prosecutor other than, if and when the issuance of a warrant of arrest or a summons to appear has set in motion the process leading to the confirmation hearing, through the procedural remedies expressly provided for and within the context and for the

purposes of the hearing on the confirmation of charges pursuant to article 61(1) of the Statute.

20. Thus, the legal texts of the Court do not contain any provisions which would govern the conduct of proceedings under article 58 of the Statute on an adversarial basis. The Chamber is of the view that, in the absence of any indication to this effect, it does not have the authority to create new adversarial proceedings outside the given procedural framework.

*On the issue of the public disclosure of the Applicant's name*

21. Lastly, the Applicant argues that he has suffered negative publicity due to the Prosecutor's decision to publicly name the persons for whom he had requested the issuance of summonses to appear. The Applicant therefore contends that, given this circumstance, he has the right to make observations on the Prosecutor's application under article 58 of the Statute.

22. The Chamber is cognizant of the concerns of the Applicant with respect to the prejudice suffered due to the public disclosure of his name made by the Prosecutor. However, the Chamber is not of the view that such publicity caused could ground a construction of the proceedings of article 58 of the Statute in adversarial terms, contrary to the legal instruments of the Court. While it is not the Chamber's role to comment and advise the Prosecutor on his interaction with the press and media, the Chamber nevertheless is concerned if his actions have the potential to affect the administration of justice and the integrity of the present proceedings before the Chamber. In this respect, the Chamber expresses its deprecation regarding the Prosecutor's course of action in the present case, as it has unduly exposed the Applicant to prejudicial publicity before a determination of the Chamber pursuant to article 58 of the Statute has even been made.

***Conclusion***

23. In view of the above, the Chamber is not persuaded by any of the arguments raised by the Applicant. Accordingly, the Chamber reiterates its previous finding that, since the proceedings under article 58 of the Statute are to be conducted with the exclusive participation of the Prosecutor, the person named in the Prosecutor's application pursuant to article 58 of the Statute is not entitled to submit observations in these proceedings. The Application shall thus be rejected.

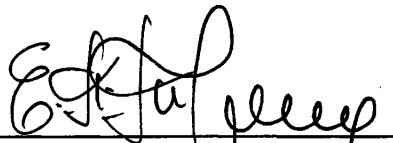
24. The Chamber notes that the Application was transmitted as "Confidential, *Ex Parte*, only available to the Registry", without any indication of the reasons for the chosen classification and contrary to the public classification of the document as expressly indicated by the Applicant. In this regard, the Chamber wishes to underline that when submissions are filed as public documents, the Registry shall transmit them to the Chamber according to the same level of classification, unless there is a "factual or legal basis", in accordance with regulation 23bis (1) of the Regulations, to present those documents as "confidential", "*ex parte*" or "under seal".

**FOR THESE REASONS, THE CHAMBER HEREBY**

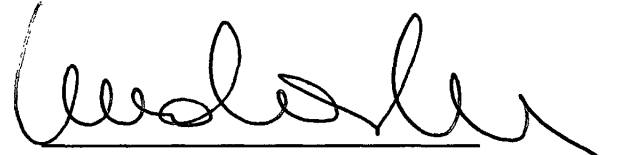
**REJECTS** the Application;

**DECIDES** to reclassify as "public" document ICC-01/09-37-Conf-Exp and annex A attached thereto and document ICC-01/09-40-Conf-Exp and annex A attached thereto.

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

  
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Judge Ekaterina Trendafilova  
Presiding Judge

  
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Judge Hans-Peter Kaul  
Judge

  
\_\_\_\_\_  
Judge Cuno Tarfusser  
Judge

Dated this Friday, 11 February 2011

At The Hague, The Netherlands