

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 11 May 2011

**PRE-TRIAL CHAMBER II**

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public**

**Decision on the "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 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 Ogetto

**Counsel for Uhuru Muigai Kenyatta**  
Steven Kay and Gillian Higgins

**Counsel for Mohammed Hussein Ali**  
Evans Monari, John Philpot and  
Gershom Otachi Bw'omanwa

**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**  
Kenyan Section of The International  
Commission of Jurists

**Other**

**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**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)<sup>1</sup> of the International Criminal Court (the “Court”) is seized of a request for leave to submit *amicus curiae* observations under rule 103 of the Rules of Procedure and Evidence (the “Rules”).

1. On 31 March 2011, the Chamber received the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”, requesting the Chamber, *inter alia*, to determine that the case against the suspects is inadmissible.<sup>2</sup>

2. On 28 April 2011, the Chamber received the “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” (the “Request”) and the “Proposed Amicus Curiae Observations by the Kenyan Section of the International Commission of Jurists Pursuant to Rule 101 of the Rules of Procedure and Evidence” (the “Observations”).<sup>3</sup> In the Request, the Kenyan Section of the International Commission of Jurists (the “Applicant”) sought leave to submit the Observations<sup>4</sup> which are annexed to the Request.<sup>5</sup>

3. The Single Judge notes rule 103(1) of the Rules.

4. The Single Judge recalls that pursuant to rule 103(1) of the Rules, the Chamber may, at any stage of the proceedings, “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. At the outset, the Single Judge notes that, together with the Request, the Applicant submitted in a separate document the Observations intended to assist the

<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

<sup>2</sup> ICC-01/09-02/11-26.

<sup>3</sup> ICC-01/09-02/11-75, ICC-01/09-02/11-75-Anx1 and ICC-01/09-02/11-75-Anx2.

<sup>4</sup> ICC-01/09-02/11-75-Anx2.

<sup>5</sup> ICC-01/09-02/11-75-Anx1, para. 19.

Chamber in the proper determination of the case at hand. The Single Judge wishes to clarify that thus far, “the Applicant is neither a party nor a participant to the proceedings, and unless the Single Judge grants leave to participate in the proceedings, in accordance with rule 103(1) of the Rules, the Applicant has no procedural standing to submit any observations [...] to the Chamber”.<sup>6</sup> In other words, the “submission of substantive observations is only permissible after a Chamber has decided to invite or grant leave to do so”.<sup>7</sup>

6. For this reasons, in its assessment of the Request, the Single Judge shall not take into considerations the Observations.

7. In the Request, the Applicant submitted that, should it be granted leave to submit observations in accordance with Rule 103(1) of the Rules, it will provide the Chamber with contextual and factual information: (i) on the track record of the Kenyan Government in investigating and prosecuting crimes in Kenya; (ii) on the effectiveness of the efforts made to establish a local justice mechanism to deal with post-election violence cases; (iii) on the actual progress in implementing both judicial and legislative reforms at the national level; and (iv) on the existence of political will in pursuing accountability for post-election crimes.<sup>8</sup>

8. The Single Judge stresses that the Chamber will resort, at its discretion, to *amicus curiae* observations only on an exceptional basis, when it is of the view that such observations providing specific expertise are needed on particular topics, and subject to the Chamber’s consideration that this is desirable for the proper determination of the case.

9. In the present case, the Single Judge is of the view that receiving observations from the Applicant on the issues proposed in the Request is not desirable for the proper determination of the case at this stage of the proceedings.

<sup>6</sup> Pre-Trial Chamber II, “Decision on the Request by Ms Moraa Gesicho to Appear as Amicus Curiae”, ICC-01/09-02/11-54, para. 10.

<sup>7</sup> Appeals Chamber, “Decision on the application of 14 September 2009 for participation as an *amicus curiae*”, 01/05-01/08 OA 2, para. 9.

<sup>8</sup> ICC-01/09-02/11-75-Anx1, para. 11.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

- a) **rejects** the Applicant's Request to submit observations pursuant to Rule 103(1) of the Rules;

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



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**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Wednesday, 11 May 2011

At The Hague, The Netherlands