Cour
Pénale
Internationale

International
Criminal
Court

Original: English

No.: ICC-01/09
Date: 31 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

Second Decision on Application by Nine Persons to be Questioned by the Office of the Prosecutor

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 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 Ken Ogetto

REGISTRY

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" or the "ICC") renders this decision on an application on behalf of nine persons to be allegedly questioned by the Office of the Prosecutor (the "OTP") in the course of the Prosecutor's investigation in the situation in the Republic of Kenya.

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.[1]

2. On 7 December 2010, the Registrar transmitted to the Chamber "a document communicated by the Law Firm 'Ogetto, Otachi & Company Advocates and Daly & Figgis Advocates'" together with 8 annexes.[2] The document and the annexes thereto were submitted by Mr. Ken Ogetto, allegedly a legal counsel, representing nine persons (the "Applicants"), who are seeking a number of "reliefs in connection with their rights arising out of the ongoing investigations by the Prosecutor in the Kenyan Situation" (the 7 December 2010 Application").[3]

3. On 14 December 2010, the Chamber dismissed *in limine* the 7 December 2010 Application on the ground that the legal counsel failed to provide a power of attorney from the Applicants he is allegedly representing.

4. On 15 December 2010, the Prosecutor submitted two applications requesting the Chamber to issue summonses for six persons to appear before the Court.[4]

---

[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.
[2] ICC-01/09-28-Conf-Exp and its annexes. Albeit not applicable in this context, the Chamber, for possible future purposes, draws the Registrar's attention to regulation 46(3) of the Regulations of the Court and the existing roster in case she deems that a matter, request or information does not arise out of a situation assigned to a Pre-Trial Chamber.
[3] ICC-01/09-28-Conf-Exp-Anx 1, paras 1 and 67.
[4] ICC-01/09-30-Red with annexes and ICC-01/09-31-Red with annexes.

5. On 22 December 2010, the Chamber received "a resubmitted Application communicated by the Law Firm 'Ogetto, Otachi & Company Advocates and Daly & Figgis Advocates'" (the "Re-submitted Application"),[5] in which the Applicants each attached a power of attorney and put forward the following requests:

> (a) An order by the Pre-Trial Chamber providing the Applicants with assurances that they will not be prosecuted now or in the future for information they may voluntarily provide during the interviews that the OTP has requested with the Applicants.
>
> (b) Without prejudice to the foregoing, a declaration that the Applicants are not compellable to provide evidence before the ICC designated Judge and that the Applicants may testify before the judge in so far as the process is voluntary.
>
> (c) An order for the immediate suspension of the process initiated by the OTP requiring cooperation of the Kenyan state by way of obtaining evidence from the Applicants in any manner or form pending the final determination of the issues raised herein.
>
> (d) A request to the Kenyan authorities to suspend any evidence taking from the Applicants for purposes of the ICC investigation pending the final determination of the issues raised herein.
>
> (e) A declaration that the determination on the issues of compellability and rights of persons during investigations by the Pre-Trial Chamber supersedes the decisions of the municipal court.

6. On 21 January 2011, the Prosecutor upon request of the Chamber,[6] provided, observations on the Re-submitted Application.[7] The Prosecutor did not provide any new factual details to the information already set out in the Re-submitted Application. However, he asserted that the Re-submitted Application lacks legal basis and that the Applicants have no standing to make the application.

7. The Chamber notes articles 54, 55, 57(3)(c), 68(1), 93 and 99(1) of the Rome Statute (the "Statute") and rule 74 of the Rules of Procedure and Evidence (the "Rules").

[5] ICC-01/09-33-Conf with annexes. The information revealed from the confidential filing, including its annexes, does not affect its level of classification as "confidential".
[6] Pre-Trial Chamber II, "Decision Requesting Observations from the Prosecutor", ICC-01/09-34-Conf.
[7] ICC-01/09-36-Conf with three annexes.

The Applicants' First Request

8. The Applicants request that the Chamber provide them "assurances that they will not be prosecuted now or in the future for information they may voluntarily provide during the interviews that the OTP has requested". In light of the entirety of the Re-submitted Application, the Chamber understands this request to mean that the Applicants wish to receive, beyond the rights guaranteed under article 55 of the Statute, an "assurance" that they will not be prosecuted either by the Prosecutor of the ICC or by any other local court.[8]

9. The Applicants base their request on articles 93(2) and 57(3)(c) of the Statute as well as rule 74(2) of the Rules.

10. The Court's basic legal texts foresee the provision of an "assurance" for witnesses in proceedings before this Court, such as in article 93(2) of the Statute and rule 74(2) of the Rules. In accordance with article 21(1) of the Statute, the Chamber will first examine the Statute before turning to the Rules.

11. Article 93 of the Statute is situated in Part IX of the Statute which addresses the issue of international cooperation and judicial assistance between States and the Court. Article 93(1) of the Statute enlists the various forms of legal assistance that States Parties are obliged to provide to the Court. Article 93(2) of the Statute allows the Chamber to provide an assurance to a "witness (...) *appearing* before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the *departure* of that person *from the requested State*" (emphasis added). The plain wording of this provision suggests that the witness is required to *appear* before the Court in The Hague, departing from the territory of the requested State. This is not the case here. The Applicants have been requested by the Prosecutor to testify in the

[8] ICC-01/09-33-Conf, paras 16 and 19, 21(iv), 30, 31, 44 and 75.

Republic of Kenya and do not appear at the seat of the Court. Article 93(2) of the Statute is therefore not applicable.

12. Rule 74 of the Rules deals with the issue of self-incrimination of witnesses. The Court must notify the witness of rule 74 of the Rules before his or her testimony at the seat of the Court.[9] In case the Court requires the cooperation of a State Party requesting it to facilitate the voluntary appearance of a person as a witness before the Court,[10] the latter must annex, pursuant to rule 190 of the Rules, an instruction concerning rule 74 of the Rules relating to self-incrimination to its request for cooperation under article 93(1)(e) of the Statute. Rule 74(2) of the Rules provides that where the Court determines that an "assurance with respect to self-incrimination" should be provided to a particular witness, it shall provide the assurances as set out in rule 74(3)(c) of the Rules, before the witness *attends*, directly or pursuant to a request under article 93(1)(e) of the Statute. Hence, a plain reading of rule 74(2) of the Rules makes clear that there is a requirement that the witness *attends* before the Court following a request for cooperation to the State Party to facilitate the witness's appearance before the Court. Accordingly, rule 74(2) of the Rules is equally not applicable.

13. Lacking any specific provision on the issue of "assurance", the Chamber must now examine whether a legal basis can be found in any other provision of the Statute. The Applicants refer the Chamber to article 57(3)(c) of the Statute which sets out the general powers of the Pre-Trial Chamber.[11] That provision vests the Chamber with the authority to provide, where necessary, for the "protection and privacy of (...) witnesses". Thus, the Chamber must consider whether an "assurance" providing immunity from prosecution is encompassed by this provision.

[9] Rule 74(1) of the Rules.
[10] Article 93(1)(e) of the Statute.
[11] Article 57(3)(c) of the Statute reads: "Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information."

14. The Chamber is doubtful whether an "assurance" such as requested by the Applicants is encompassed by article 57(3)(c) of the Statute. Article 57(3)(c) of the Statute deals, *inter alia*, with the protection of witnesses and victims. A literal and contextual interpretation of this provision makes clear that the Chamber has the authority to order measures designed to protect the individual, who is put at risk on account of the activities of the Court, from physical harm, such as threats and intimidation. This interpretation finds further support in the language of article 68(1) of the Statute, which also instructs the Chamber to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of witnesses.[12] Thus, the scope of protection provided under article 57(3)(c) of the Statute is confined to those measures outlined in article 68(1) of the Statute. It follows that an "assurance" as requested by the Applicants goes beyond the scope of article 57(3) of the Statute. The assurance sought is not aimed at protecting the Applicants' physical or psychological well-being, but rather at preventing the Applicants from being prosecuted. Had the drafters of the Statute intended to include such a form of protection in articles 57(3)(c) and 68(1) of the Statute, they would have stated it in express terms, as evidenced by the explicit references to the notion "assurance" in other provisions of the Court's statutory documents. The Chamber is therefore not convinced that article 57(3)(c) of the Statute is an appropriate legal basis for the Applicants' request.

15. The request of the Applicants touches upon a further more fundamental aspect of the proceedings before the Court: whether the Court can, in the abstract, provide any person with an "assurance" that he or she will not be prosecuted. As is submitted in the filings before this Chamber, at this stage, it is wholly uncertain whether the

[12] Article 68(1) of the Statute stipulates: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".

Applicants will provide any testimony to the Prosecutor and thereby become "witnesses" in the proceedings. Hence, the scenario that the Applicants sketch to be protected from is for the moment wholly hypothetical.

16. Further, the Applicants expressed their fear that their account of the facts observed may entail prosecution either before this Court or before national courts from which they seek to be protected. At the same time the Applicants confirm that they have been informed of their rights under article 55 of the Statute. They also confirm their willingness to cooperate on a voluntary basis with the Prosecutor in his investigation. Whether or not they will be prosecuted on account of their testimony and in violation of the law remains a hypothesis. The Chamber believes that any potential risk of prosecution on the basis of a possibly self-incriminating statement by the Applicants is a scenario for which the Court's basic texts, in particular article 55 of the Statute, offer the appropriate remedy. This remedy, which does not need to be reiterated, must be employed if the said scenario would materialize in the proceedings. To go beyond what the Statute provides would entail that the Chamber assumed the role of a legislator, creating new remedies for the Applicants.

17. Lastly, outside the narrowly defined instances in the Statute in which the Chamber may express a form of "assurance", such a far-reaching "assurance" as requested by the Applicants would entail that the Chamber would sit on behalf of the Prosecutor taking decisions that fall within his pure mandate. Such power is not in the hands of the Chamber. It is the Prosecutor who may determine that there is no reasonable basis to proceed under article 53 of the Statute, thereby deciding not to prosecute a particular person. This decision may only be reviewed by the Pre-Trial Chamber in accordance with article 53(3) of the Statute. Thus, under the Statute, it is the Prosecutor who decides to refrain from prosecuting a certain person and not the Chamber.

18. In sum, at this stage, the status of the Applicants is that of "persons during an investigation" falling squarely under the protection of article 55 of the Statute. As the Chamber lacks any legal basis in the statutory documents to pronounce a far-reaching "assurance" as requested by the Applicants, the Chamber finds the first request without merit.

The Applicants' Second Request

19. The Applicants request that the Chamber declare that "the Applicants are not compellable to provide evidence before the ICC designated Judge and that the Applicants may testify before the judge in so far as the process is voluntary". The Chamber understands that this is a two-fold request. First, the Applicants request the Chamber to declare that the process of testimony is voluntary; and second, that the designated local Judge should not compel the Applicants to testify.

20. With respect to the first limb of the Applicants' request, the Chamber is not persuaded by the arguments put forth by the Applicants. The Chamber notes that, according to the submission of both the Applicants and the Prosecutor, the understanding of all concerned is that any possible questioning be made on a voluntary basis. According to the Statute, the Court may request a State Party to facilitate the voluntary appearance of a witness before the Court, but not to compel a witness to testify before the national authorities of that State. The only remedy to be found in the Court's statutory documents lies in rule 65 of the Rules. It empowers the Court to compel a witness, who *appears* before it to provide testimony, which is not the case under consideration. Moreover, based on the submissions provided to the Chamber, the Prosecutor has made it clear that any testimony given is based on the willingness of the persons concerned. The Applicants, who are all legally represented, were informed about their rights under article 55 of the Statute, in particular their right not to be compelled to incriminate themselves. Thus, the Chamber deems it pointless to make any such declarations.

21. With respect to the second limb of the Applicants' request, the Chamber wishes to highlight that the ICC was not designed to replace domestic justice systems in the performance of their judicial functions. Nor was it created to act as an oversight mechanism with respect to decisions taken by domestic judges.[13] The only powers provided to the Court *vis-à-vis* domestic courts in terms of ensuring compliance with its legal framework are those instances mentioned in the institution's statutory documents. Therefore, the Court is not in a position to dictate on the national authorities the manner in which they should perform their cooperation with the Court. In light of the foregoing, the Chamber finds the second request without merit.

The Applicants' Third Request

22. The Applicants request that the Chamber issue "[a]n order for the immediate suspension of the process initiated by the [Office of the Prosecutor] requiring cooperation of the Kenyan state by way of obtaining evidence from the Applicants in any manner or form pending the final determination of the issues raised herein". The Chamber understands this request to mean the immediate suspension of the Prosecutor's investigative actions with regard to the Applicants.

23. The Chamber notes that the Prosecutor is in the course of investigating the events on the territory of the Republic of Kenya as delineated in its decision of 31 March 2010. The Applicants seek to halt the investigative actions of the Prosecutor with a view of taking testimony. In this regard, it must be noted that the Court's statutory documents do not empower the Chamber to block the Prosecutor's investigative activities, unless there is a compelling need to intervene in instances such as those contemplated in article 57(3)(c) of the Statute. The Chamber therefore finds the third request without merit.

[13] Appeals Chamber, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006", ICC-01/04-01/06-772, para. 41.

The Applicants' Fourth Request

24. The Applicants appeal to the Chamber to request the "Kenyan authorities to suspend any evidence taking from [them] for purposes of the ICC investigation pending the final determination of the issues raised herein". The Chamber understands this request as to order the Kenyan authorities entrusted in the High Court Judge designated for the purposes of taking evidence from the Applicants to suspend this process.

25. The Chamber recalls that it is not in a position to suspend the Prosecutor's investigations including the taking of testimony, which is based on the cooperation between his office and the Kenyan authorities, unless there is a compelling need that triggers the Chamber's powers to intervene in the said process as defined in the Court's statutory documents. Hence, the Chamber finds the fourth request without merit.

The Applicants' Fifth Request

26. The Applicants request the Chamber to declare "that the determination on the issues of compellability and rights of persons during investigations by the Pre-Trial Chamber supersedes the decisions of the municipal court". The Chamber understands this request to mean that it makes a determination *vis-à-vis* a decision of the "municipal courts" in the Republic of Kenya.

27. The Chamber wishes to highlight that the ICC has not been endowed with its own enforcement apparatus. Thus, the Court, including the OTP, must rely on the assistance of sovereign States. As noted above, the Statute (only) provides for the forms of assistance that the Court may request from States. However, it is for the States to comply with the Court's requests. In so doing, they may choose the manner in which they execute the Court's cooperation requests. This entails that a decision taken by domestic courts, based on national law, remains in principle within the sphere of the domestic legal system. The Chamber has mentioned earlier that, in

principle, the ICC is not an appellate instance,[14] and that the only powers provided to it *vis-à-vis* domestic courts in terms of ensuring compliance with its legal framework are those instances mentioned in the institution's statutory documents.

28. In this regard, the Chamber takes note of the fact that the process of questioning of witnesses in the Republic of Kenya, by way of cooperation, must be carried out in accordance with the relevant procedure under Kenyan national law.[15] According to the submissions before the Chamber, a local Judge was appointed in whose presence the Applicants were compelled to testify, subject to a guarantee against self-incrimination per Kenyan law.[16] Thus, the process under consideration is unfolding before the local Judge and based on national law. It is, therefore, the view of this Chamber that any determination of the ICC Judges cannot "supersede" any decision taken by a local court. Consequently, the Chamber finds the fifth request without merit.

FOR THESE REASONS, THE CHAMBER HEREBY

Rejects the Re-submitted Application.

[14] See, Appeals Chamber, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006", ICC-01/04-01/06-772, para. 41.
[15] Articles 93(1) and 99(1) of the Statute.
[16] ICC-01/09-33-Conf-Anx1.E., para. 37.

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

Judge Ekaterina Trendafilova
Presiding Judge

1/2/11

Judge Hans-Peter Kaul
Judge

Judge Cuno Tarfusser
Judge

Dated this Monday, 31 January 2011

At The Hague, The Netherlands