

**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 Document

Decision on a Request for Leave to Appeal

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

William Ruto/Joseph Kipchumba Kigen-
Katwa

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 renders this decision on the “Request for Leave to Appeal Against the Decision of the Pre-Trial Chamber II Dated 18th January 2011” (the “Request”).¹

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.²

2. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kosgey and Joshua Arap Sang” requesting the Chamber to issue summonses for the persons concerned to appear.³

3. 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” (the “Application”).⁴ This Application was submitted under rule 103 of the Rules of Procedure and Evidence (the “Rules”) by William Ruto (the “Applicant”), for whom the Prosecutor had requested the Chamber to issue a summons to appear under article 58 of the Rome Statute (the “Statute”). In his submission to the Chamber, Mr. Ruto requested “to be granted leave to make oral and written observations”⁵ on a number of issues elaborated in the filing.

4. On 18 January 2011, the Chamber rejected the Application of William Ruto (the “18 January 2011 Decision”). In sum, the Chamber held that the Applicant was excluded from the category of persons submitting an *amicus curiae* application and

¹ ICC-01/09-38-Conf-Exp; ICC-01/09-38-Conf-Exp-AnxA.

² 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.

³ ICC-01/09-30-Red with annexes.

⁴ ICC-01/09-32 with two annexes.

⁵ ICC-01-09-32-AnxA, p. 3.

that there was no legal basis for a person under the Prosecutor's investigation to submit observations at the current stage of the proceedings, as the proceedings triggered by the Prosecutor's application for a warrant of arrest or summons to appear are conducted on an *ex parte* basis.⁶

5. On 21 January 2011, counsel for the Applicant communicated electronically to the Registry the abovementioned Request. It was submitted to the Chamber on 27 January 2011. The Applicant seeks to be granted leave to appeal the Chamber's 18 January 2011 Decision.

6. The Chamber notes article 82(1)(d) of the Rome Statute (the "Statute"), rule 155 of the Rules and regulations 23*bis* and 65(2) of the Regulations of the Court (the "Regulations").

7. Article 82(1)(d) of the Statute provides that either party may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

8. The chapeau of article 82(1)(d) of the Statute uses the term "party" as a requirement for the possibility of lodging an application for an interlocutory appeal. Thus, before resorting to the merits of this Request, the Chamber must first consider whether the Applicant is a "party" within the meaning of this provision.

9. In this context, the Chamber recalls the 18 January 2011 Decision in which it decided, *inter alia*, that there was no legal basis for a person under the Prosecutor's investigation to intervene at the current stage of the proceedings, as the proceedings triggered by the Prosecutor's application for a warrant of arrest or summons to appear are conducted on an *ex parte* basis. Thus, it is the Chamber's view that during

⁶ Pre-Trial Chamber II, "Decision on Application for Leave to Submit *Amicus Curiae* Observations", ICC-01/09-35.

the article 58 proceedings, and until the Chamber has ruled on the Prosecutor's applications for summons to appear, none of the persons under the Court's investigation is allowed to participate even by way of submitting observations on the said applications. The Chamber, therefore, does not consider a person, against whom a summons to appear has been requested, as having *locus standi*, nor does it recognize him as a "party" to the proceedings, within the meaning of article 82(1)(d) of the Statute, until it has taken a decision on the Prosecutor's applications. It follows that the Applicant is not entitled to request a leave to appeal, and his Request should therefore be rejected.

10. Nonetheless, although the Chamber should not go any further to examine the merits of the Applicant's Request, it shall do so for the sake of providing further clarity to the person concerned, and to others, if they decided to approach the Chamber with similar requests.

11. The Chamber, being mindful of the exceptional character of this remedy, recalls that for leave to be granted, the following specific requirements must be met:

- (a) the decision involves an "issue" that would significantly affect (i) *both* the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. According to the established jurisprudence of this Court, an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. Concerning the other requirements set out in (a) and (b) above, the Chamber recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is

fulfilled makes it unnecessary for the Chamber to address the remaining requirements under article 82(1)(d) of the Statute.⁷

Preliminary Issues

13. According to rule 155 of the Rules, a written application under article 82(1)(d) of the Statute must be made within five days of being notified of the 18 January 2011 decision. This decision was notified to the Applicant on 18 January 2011. The Chamber notes that the Request was communicated to the Registry on 21 January 2011 but was only notified to the Chamber on 27 January 2011. As regulation 33 of the Regulations indicates, calculation of any time-limit depends on the filing of the document with the Registry. The Request was therefore submitted within the time-limit provided in rule 155 of the Rules. In view of that, the Chamber urges the Registrar to transmit any document to the Chamber without undue delay.

14. In addition, the Chamber notes that the Request was transmitted to the Chamber “confidential”, “*ex parte*, only available to the Registry”. 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 23*bis* (1) of the Regulations, to present those documents as “confidential”, “*ex parte*” or “under seal”. Finally, the Chamber observed that in its document transmitting the Applicant’s Request, the Registry made a finding that neither “Mr. William Ruto,

⁷ See the interpretative findings of the Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, paras 9-14; Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, ICC-01/05-0/08-532, paras 14-16; see also more recently, Pre-Trial Chamber I, “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, ICC-02/05-02/09-267, pp. 5-6; Trial Chamber III, “Decision on the prosecution and defence applications for leave to appeal the ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’”, ICC-01/05-01/08-1169, paras 23-25; Trial Chamber II, “Décision relative à la Demande d’autorisation d’interjeter appel contre la Décision sur le ‘Protocole régissant les enquêtes concernant les témoins bénéficiant de mesures de protection’ présentée par le Procureur”, ICC-01/04-01/07-2375, paras 3-4; Trial Chamber I, “Decision on the prosecution request for leave to appeal the ‘Decision on intermediaries’”, ICC-01/04-01/06-2463, paras 5-7.

nor the law firm are parties in a case before the Court".⁸ Consequently, the Chamber wishes to note that whenever a document is linked to a situation of which a Pre-Trial Chamber is seized of, it is the duty of the Registry to transmit this document without undue delay to the Chamber assigned with the situation, without engaging in an assessment as to whether the person or entity presenting such a document has procedural standing to do so. This is an assessment to be made solely by the Chamber. If the document is not linked to a situation of which a Pre-Trial Chamber is seized of, the Registry has to transmit it without undue delay to the President of the Pre-Trial Division in accordance with regulation 46(3) of the Regulations.

The Issues Raised by the Applicant

15. In paragraph 8 of his Request, the Applicant raises fourteen grounds which he wishes the Appeals Chamber to render a decision upon, contending that:

- a) The court erred in deeming the application filed by the Appellant as an application lodged by an *Amicus Curiae* when in fact the Appellant's application was not an application by an *Amicus Curiae*.
- b) The court erred in failing to appreciate that the Appellant had identified himself and the basis of his application as being made by a suspect (not *Amicus Curiae*).
- c) The court erred in failing to appreciate that under Rule 103 there are "*other forms of submissions*" apart from *Amicus Curiae*.
- d) The court failed to appreciate that the Appellant had in fact made his application under "*other forms of submissions*" provided for under **Rule 103**.
- e) The court erred in limiting and choking the scope of persons contemplated by **Rule 103** so as to exclude a person under the Prosecutor's investigations.
- f) That court erred in equating a suspect or person subject to investigations to a "*defendant*" as set out in **Rule 103 (2)**.
- g) The court erred in deeming the Appellant to be a "Defendant", when in fact he had not yet been found by any court to be a "Defendant" through the exercise of the court's Jurisdiction under **Article 58** and **61** of the **Rome Statute**.
- h) The court erred in failing to keep clarity of separation of process of investigation and the role of a Prosecutor from the process of Trial and the roles of the Judges.
- i) The court erred in its interpretation of the provisions of **Rule 103(2)** in stating that "The reference to the term "defence certainly implies the person who is subject to the court's investigation" so as to mean that a party under investigation by Prosecutor is already a "*defendant*" essentially rendering the statutory role of the Court under Article 58 and 61 redundant.
- j) The court in implying that an *Amicus Curie* has an improved standing and status before the court than a suspect and or a defendant, and that *Amicus Curie*

⁸ ICC-01/09-38-Conf-Exp.

under **Rule 103** would help and be more useful to the court in the course of Justice than a suspect.

k) The court erred in failing to note that the act of issuing summons (or otherwise issuing warrants of arrest) affects the rights of a party in a fundamental manner and should be approached with adequate caution and circumspection to secure a person from such prejudice whenever such prejudice can be avoided.

l) The court erred in failing to address the substantive issue raised by the Appellant, being whether or not the court can deem a Prosecutor's obligation to investigate incriminating and exonerating evidence under **Article 54** to have been fulfilled if the Prosecutor has not afforded the Appellant an opportunity to be heard on such concise facts constituting the crime under **Article 58 (2) (c)** he is preferring to the court.

m) The court erred in failing to warn itself that the Prosecutor discharges his mandate within the scope and supervision of the court generally (and specifically in this instance as authorized in the court's ruling of 31st March 2010 authorizing the Prosecutor to initiate investigations in the Kenyan situation) and that the issues raised by the Appellant are issues directly relevant to the prosecutor's discharge of his general (and specific) mandate as regards the relevance, and probative value of the evidence and or information and or the intrinsic quality of the prosecutor's investigations.

n) The court erred in tying its own hands by reference to limits arising from *ex-parte* provisions of law in disregard to precedents of the court and other international courts to entertain motions inter-parties whenever the greater cause of Justice warrants it.

16. In paragraph 11 of the Request, the Applicant further highlights ("especially") six out of the fourteen "identified and defined" grounds which he seeks to appeal. Even though the six grounds in paragraph 11 of the Applicant's Request are re-phrased and presented in a language that differs from that set out in paragraph 8 of the Request, the Chamber deems those six grounds encompassed by the catalogue of issues enlisted in paragraph 8 of the Applicant's Request.

17. The Chamber observes that the Applicant fails to substantiate any of the abovementioned "issues" which he seeks to put before the Appeals Chamber. The Chamber notes regulation 65(2) of the Regulations pursuant to which "[a]n application for leave to appeal under article 82, paragraph 1 (d), shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue". The Chamber also takes note of the jurisprudence of Pre-Trial Chambers which held that it is incumbent upon any applicant seeking leave "to demonstrate (...) that the issue at stake affects, first and foremost, the fairness and

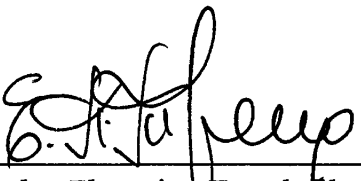
expeditiousness of the proceedings currently before the Chamber or the outcome of the related trial, as well as the impact (in terms of material advancement) of an immediate resolution of the issue on such proceedings”.⁹ As such, however, the Applicant has merely presented a catalogue of “issues” without any *substantiation* as to whether and how these “issues”, presented by the Applicant, significantly affect the fair and expeditious conduct of the proceedings currently before the Chamber. Nor has the Applicant substantiated how an immediate resolution by the Appeals Chamber would materially advance the proceedings before this Chamber. Consequently, the Chamber cannot grant the Applicant’s Request.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) Rejects** the Applicant’s Request;
- b) Decides** to re-classify as public document ICC-01/09-38-Conf-Exp and its annex A.

⁹ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58”, ICC-02/04-01/05-20, para. 21; see also Pre-Trial Chamber I, “Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-135-tENG, para. 44.

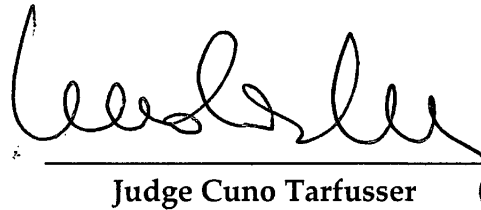
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Presiding Judge



Judge Hans-Peter Kaul
Judge



Judge Cuno Tarfusser
Judge

Dated this Friday, 11 February 2011

At The Hague, The Netherlands