

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09  
Date: 18 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 Application for Leave to Participate under Articles 58, 42(5), (7)-(8)(a)  
of the Rome Statute and Rule 34(1)(d) and (2) 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

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**

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 (the “Court”) is seized of “An Application for Leave under Article 58 and Article 42(5)(7) and (8)(a) of the Rome Statute and Rule 34(1)(d) and (2) of the Rules of Procedure and Evidence to Participate in the Proceedings Before the Pre-Trial Chamber Relating to the Prosecutor’s Application Made under Article 58(7)” (the “Application”).<sup>1</sup>

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>2</sup> in which it granted, by majority, the Prosecutor’s request, to the extent specified in the operative part of the said decision.<sup>3</sup>

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.<sup>4</sup>

3. On 14 February 2011, the Registry transmitted the Application.<sup>5</sup> The Application was submitted by Joshua Kirwa [Arap] Sang (“Mr. Sang/the Applicant”), a person against whom the Prosecutor requested the issuance of a summons to appear under article 58(7) of the Rome Statute (the “Statute”). In the relief, the Applicant put forward the following requests:

- a) That leave be granted to the Applicant to participate in the proceedings before the Honourable Court lodged by the Prosecutor under Article 58(7) of the Rome Statute.
- b) That orders do issue that no summons [or warrants of arrest] shall issue in respect to the Applicant before the Applicant’s issues raised herein have been taken into account.
- c) That orders do issue that the Prosecutor does avail the applicant his (the Prosecutor’s) whole unredacted copy of his Application and all supporting material made under Article 58 of the Rome Statute especially to the extent that affects him.

<sup>1</sup> ICC-01/09-44; ICC-01/09-44-Anx.

<sup>2</sup> ICC-01/09-3 and its annexes.

<sup>3</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>4</sup> ICC-01/09-30-Red with annexes.

<sup>5</sup> ICC-01/09-44; ICC-01/09-44-Anx.

- d) That an order do issue to give access and disclosure of any material, submissions or filings generally made by any other participant in the proceedings relating to the Kenyan Situation with leave to participate in such other filings.
- e) That an order do issue that the court does find that no summons or warrants of arrest may issue on the Applicant until and unless the Office of the Trial Prosecutor has demonstrated to the court that it has complied with Article 54 of the Rome Statute and more particularly that it has investigated exonerating evidence inclusive of notifying, and where possible interviewing the Applicant/suspect on the concise grounds of the charges in the manner equivalent to the effort applied by the prosecutor to investigating incriminating evidence.
- f) That the Pre-Trial Chamber does issue, directions without prejudice to any other prayer, on the Applicant's application for an order that Mr. Louis Moreno Ocampo be disqualified from prosecuting the Kenyan Situation and the Kenyan case including any other or further investigation and or prosecution as contemplated by Article 42(5)(7) and (8)(a) of the Rome Statute and Rule 34(1) (d) and (2) of the Rules of Procedure and Evidence for the reasons either that:-
- i) The Prosecutor is acting out of ulterior motives that are unrelated to the cause of justice; or
  - ii) The Prosecutor is incompetent; or
  - iii) The Prosecutor is disinterested to competently investigate the Kenyan Situation and case with any desire for justice and or with any objectivity.
- g) That leave does issue to present the Application orally and in writing, through his counsels on these observations, and any other or further relevant observations.<sup>6</sup>

4. The Chamber notes articles 21, 42(8) and 58 of the Statute and rule 34(3) of the Rules of Procedure and Evidence (the "Rules") and regulation 36(3) of the Regulations of the Court (the "Regulations").

5. The Chamber recalls its previous decision of 18 January 2011 in which it rejected William Ruto's request to submit observations under rule 103 of the Rules in the context of the article 58 proceedings.<sup>7</sup> It underlined 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.<sup>8</sup> The Chamber retained the same view in two recent decisions issued on 11 February 2011.<sup>9</sup> In its decision of 11 February 2011 rejecting William Ruto's request to appeal the Chamber's decision of 18 January 2011, the Chamber made clear that:

<sup>6</sup> ICC-01/09-44-Anx, paras. 10,36.

<sup>7</sup> Pre-Trial Chamber II, "Decision on Application for Leave to Submit *Amicus Curiae* Observations", ICC-01/09-35.

<sup>8</sup> *Ibid.*, para. 10.

<sup>9</sup> Pre-Trial Chamber II, "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)'" , ICC-01/09-42; *id.*, "Decision on a Request for Leave to Appeal", ICC-01/09-43.

[U]ntil [it] 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* [...].<sup>10</sup>

6. The Chamber reiterated the same finding in a further decision issued the same day with regard to Mohammed Hussein Ali, a further person under the Prosecutor's investigation. Although the applicant lacked the *locus standi*, the Chamber decided to entertain the merits of his request merely "for the sake of clarity and with a view to avoiding to be approached again in the future with same or similar requests".<sup>11</sup>

7. In the context of the present decision, the Chamber finds no reason to examine the Application on the merits, save for ground (f), given that it raises similar issues as those dealt with respect to William Ruto and Mohammed Hussein Ali. More importantly there is no legal obligation imposed on the Chamber to continue to do so. To the contrary, once the Chamber has detected that the person concerned lacks a procedural standing before the Court, it should primarily refrain from delving into the merits of his/her application, save for exceptional situations where it deems necessary to ensure, for instance, future clarity, judicial economy and expeditiousness of the proceedings. Having said the above, the Chamber finds that grounds (a)-(e) of the Application submitted by Mr. Sang must be rejected.

8. With respect to ground (f), the Chamber shall entertain it since it is not related to the Prosecutor's application under article 58 of the Statute. Under ground (f), Mr. Sang requests that the Prosecutor Luis Moreno Ocampo "be disqualified from prosecuting the Kenyan Situation and the Kenyan case including any other or further investigation and or prosecution". It is the Chamber's understanding that this is in effect a request for disqualifying the Prosecutor from his position with regard to the prosecution of cases arising out of the investigation in the situation in

<sup>10</sup> Pre-Trial Chamber II, "Decision on a Request for Leave to Appeal", ICC-01/09-43, para. 4.

<sup>11</sup> Pre-Trial Chamber II, "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)'" , ICC-01/09-42, para. 6.

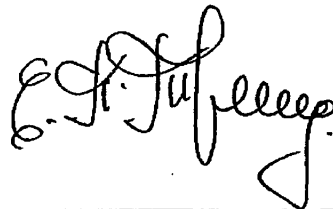
the Republic of Kenya. In this regard, the Chamber wishes to draw the Applicant's attention to the express language of article 42(8) of the Statute according to which "[a]ny question as to the disqualification of the Prosecutor [...] shall be decided by the Appeals Chamber". This is further confirmed by the language of rule 34(3) of the Rules. It follows that the Pre-Trial Chamber has no competence to deal with such a request, and therefore, this ground must also be rejected.

Lastly, the Chamber draws the Applicant's attention to regulation 36(3) of the Regulations establishing the format requirements of any submission to the Court.

**FOR THESE REASONS, THE CHAMBER HEREBY**

rejects the Application submitted by Joshua Kirwa [Arap] Sang.

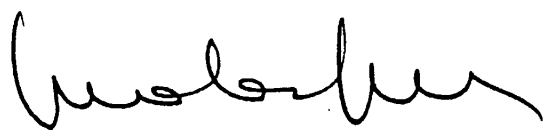
Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova  
Presiding Judge



Judge Hans-Peter Kaul  
Judge



Judge Cuno Tarfusser  
Judge

Dated this Friday, 18 February 2011

At The Hague, The Netherlands