

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 12 April 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 by Ms. Moraa Gesicho to Appear as Amicus Curiae"**

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. Khan and Kennedy Ogetto

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

**Counsel for Mohammed Hussein Ali**  
Evans Monari, John Philpot and  
Gershon 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**  
Moraa Gesicho

**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 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” (the “Prosecutor’s Application”) requesting the Chamber to issue summonses to appear for the persons concerned.<sup>2</sup>

2. On 8 March 2011, the Chamber decided, by majority, to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court on Thursday, 7 April 2011 at 14.30 hours.<sup>3</sup>

3. On 18 March 2011, the Chamber decided to convene the initial appearance hearing on Friday, 8 April 2011 at 14.30 hours.<sup>4</sup>

4. On 5 April 2011, the Registry transmitted to the Chamber the “Request by Ms. Moraa Gesicho to Appear as Amicus Curiae”,<sup>5</sup> in which Moraa Gesicho (the “Applicant”), a Kenyan national, seeks leave to appear as *amicus curiae* and to file her brief within 30 days or within such period as the Chamber may direct ( the “First Request”).<sup>6</sup>

5. The Single Judge has carefully reviewed the issues outlined in the First Request, which would form the basis of the observations to be submitted to the Chamber.

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

<sup>2</sup> ICC-01/09-31-Conf-Exp.

<sup>3</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01, p. 23.

<sup>4</sup> Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

<sup>5</sup> ICC-01/09-02/11-45 and ICC-01/09-02/11-45-Anx. The Transmission by the Registry and the Applicant’s Request were also registered in the record of the Situation as documents ICC-01/09-55 and ICC-01/09-55-Anx respectively.

<sup>6</sup> ICC-01/09-02/11-45-Anx, p. 14.

Should the Applicant be granted leave to appear as *amicus curiae* in accordance with rule 103 of the Rules, she proposes to submit observations that would demonstrate that: (i) the Prosecutor's Application is "not founded on the Prosecutor's own initiative";<sup>7</sup> (ii) the copy of the report prepared by the Kenya National Commission on Human Rights which was relied upon for the purposes of the Prosecutor's Application under article 58 of the Statute is doctored and thus unreliable; (iii) the report of the Commission of Inquiry into Post Election Violence, used to substantiate the Prosecutor's Application, is equally unreliable, because it is alleged to be the result of manipulation of evidence and coached witnesses, is deficient with regard to the collection of information which it is based on, or is otherwise grounded on views, rumors and hearsay, and does not take into consideration the views of the Kalenjin community.<sup>8</sup>

6. In the view of the Applicant, all the abovementioned circumstances and deficiencies in the Prosecutor's investigation would have resulted in the selection of persons to be summoned to appear who have nothing to do with the 2007-2008 post-election violence in Kenya.<sup>9</sup>

7. In addition to the First Request, the Applicant also requests that the Single Judge "stay the decision summoning the 6 alleged perpetrators of post 2007 election violence pending the decision on this application" ( the "Second Request").<sup>10</sup>

8. The Single Judge notes articles 42(1), 53(3), 54, 58, 60(1) and 61 of the Statute, and rules 103 and 121(1) of the Rules.

9. 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

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<sup>7</sup> ICC-01/09-02/11-45-Anx, p. 5.

<sup>8</sup> ICC-01/09-02/11-45-Anx, pp. 5-12.

<sup>9</sup> ICC-01/09-02/11-45-Anx, p. 8.

<sup>10</sup> ICC-01/09-02/11-45-Anx, p. 14.

submit, in writing or orally, any observation on any issue that the Chamber deems appropriate".<sup>11</sup>

10. The Single Judge notes that since the Second Request does not fall directly within the subject-matter of the present application, it shall be addressed first. Thereafter, the Single Judge shall consider the First Request, which is the core of the present application.

11. As mentioned above, the Applicant also requests that in addition to being granted leave to appear as an *amicus curiae*, the summonses to appear for the 6 persons be "stayed pending the decision" on this Application.<sup>12</sup> In this regard, 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 or a request to the Chamber. Accordingly, the Single Judge considers that the Second Request should be rejected *in limine*. Nevertheless, for the sake of further clarity, the Single Judge underlines that nothing in the Statute and the Rules provides for the power of the Chamber to stay a summons to appear previously issued under article 58 of the Statute. Therefore, the Second Request lacks legal basis and on the basis of this line of reasoning it should also be rejected.

12. With regard to the other issues, the subject of the First Request, the Single Judge believes that they engage the duties and powers of the Prosecutor, according to articles 42(1) and 54 of the Statute. They also touch upon the duty of the Chamber to establish whether there is sufficient evidence establishing substantial grounds to believe that the persons concerned committed each of the crimes charged, in accordance with article 61(7) of the Statute.

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<sup>11</sup> See Appeals Chamber, "Decision on 'Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence'", ICC-01/04-01/06-1289, para. 8.

<sup>12</sup> ICC-01/09-01/11-39-Anx, pp. 13-14.

13. The Single Judge stresses that, according to articles 42(1) and 54 of the Statute, the Prosecutor enjoys discretion, entailing the power to select and investigate cases, which is a matter that falls within the pure mandate of the Prosecutor; this is not dealt with by the Chamber,<sup>13</sup> except to the extent provided for in article 53(3) of the Statute.

14. Regarding the determination as to whether the evidence collected during the investigation by the Prosecutor meets the evidentiary threshold under article 61(7) of the Statute, the Single Judge is of the view that receiving observations in the form of *amicus curiae* on the veracity, admissibility and probative value of the evidence submitted by the Prosecutor to the Chamber is not warranted at this stage of the proceedings. It will be the duty of the Chamber, in accordance with article 61 of the Statute, to evaluate the evidence to be presented by the parties in order to decide if there are substantial grounds to believe that the defendants have committed the crimes charged.

15. Finally, the Single Judge wishes to clarify 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.

16. In light of the foregoing considerations, the Single Judge concludes that receiving observations from the Applicant as *amicus curiae* on the issues proposed in the First Request is not desirable for the proper determination of the case at this stage of the proceedings.


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<sup>13</sup> See also Pre-Trial Chamber II, "Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence", ICC-01/05-01/08-453, para. 10.

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

- a) **dismisses** *in limine* the Applicant's Second Request;
- b) **rejects** the Applicant's First Request to submit *amicus curiae* observations pursuant to Rule 103(1) of the Rules;
- c) **orders** the Registrar to file this decision in the record of the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* and in the record of the situation in the Republic of Kenya.

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



Judge Ekaterina Trendafilova  
Single Judge

Dated this Tuesday, 12 April 2011

At The Hague, The Netherlands