



Original: **English**

No.: ICC-01/09  
Date: **16 March 2011**

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul, Judge  
Judge Cuno Tarfusser, Judge

**SITUATION IN THE REPUBLIC OF KENYA**

**Public Document**

**Response of the Office of Public Counsel for the Defence to the "Prosecutor's  
Request for Reclassification"**

**Source:** Office of Public Counsel for the Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor  
Cynthia Tai, Trial Lawyer  
Adesola Adeboyejo, Trial Lawyer

**Counsel for the Defence**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

Mr. Xavier-Jean Keïta, Principal Counsel

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

---

**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Daniel Pereira

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms. Fiona Mckay

**Other**

1. On 3 November 2010, Pre-Trial Chamber II ordered the Victims Participation and Reparations Section (VPRS) to report periodically every three months on the victims' applications received in the Situation of the Republic of Kenya and the progress made by the VPRS on their assessment under Rule 85.<sup>1</sup> VPRS's reports were to include "an assessment as to which applications might be accepted, rejected, or raise difficult issues".
2. The Registry filed its first Report on 4 February 2011.<sup>2</sup> On 24 February 2011, the parties were informed that the Registry had filed its Report and 2 associated annexes *ex parte*, Registry only. According to the Registry, they were so filed because they concerned "an internal communication between the Chamber and the Registry".<sup>3</sup>
3. On 11 March 2011, the Prosecution filed its "Prosecutor's Request for Reclassification" in relation to the Situation in the Republic of Kenya.<sup>4</sup> In its Request, the Prosecution submitted that the Registry failed to comply with its duties under Regulations 23*bis* and 24*bis* of the Regulations of the Court. This, it was argued, arose from a failure by the Registry to determine whether knowledge by the Prosecution would defeat the purpose of the documents, as required by Regulation 24*bis* (2).
4. The Office of the Public Counsel for the Defence (OPCD) supports this legal submission of the Prosecution. Noting that the wording of Regulation 24*bis* (2) refers to "knowledge by the participants" rather than solely by the Prosecution, the OPCD submits that the Registry's duty was to determine whether knowledge of the documents by both the Prosecution and the OPCD<sup>5</sup> would have defeated the purpose of the documents.
5. Consequently the OPCD requests that the Chamber review the content of the relevant documents to determine whether knowledge of them by the participants would defeat their purpose. If not, the OPCD requests that the documents – or portions thereof, as

<sup>1</sup> Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya, ICC-01/09-24.

<sup>2</sup> First Periodic Report of the Registry on the Activities of the Victims Participation and Reparations Section in the Situation in the Republic of Kenya, 24 February 2011, ICC-01/09-49, (the 'Report'), footnote 2.

<sup>3</sup> The Report, p.3

<sup>4</sup> ICC-01/09-51 (the 'Request').

<sup>5</sup> There are currently no assigned defence counsel. Regulation 77(4) states that the tasks of the OPCD include representing and protecting the rights of the defence during the initial stages of the investigation.

appropriate – should be disclosed to the participants, that is, to the Prosecution and the OPCD.

### Submissions

6. Regulation 24*bis* (1) establishes a presumption that the participants shall be notified of oral or written submissions made by the Registry to the Chamber. Regulation 24*bis* (2) provides “[t]he Registrar may file a document *ex parte* ‘Registrar Only’ if knowledge by the participants of the content of the document filed would defeat its purpose”.
7. Additionally, Regulation 23*bis* (1) states “[a]ny document filed by the Registrar [...] and marked *ex parte* [...] shall state the factual and legal basis for the chosen classification [...]”. Any document filed pursuant Regulation 24*bis* (2) requires, therefore, that the Registry provide an explanation as to why knowledge by the participants would defeat the purpose of the documents filed.
8. It is the submission of the OPCD that the Registry has failed to properly explain the basis for its filing of the Report and annexes *ex parte*, Registry only. That the Report and Annexes constitute “an internal communication between the Chamber and the Registry” is unacceptably opaque and wholly inadequate. As noted by the Prosecution, there is no reason why internal communications would be regarded as *per se* secret.<sup>6</sup>
9. Additionally, the explanation provided does not address what is required by Regulation 24*bis* (2): why knowledge of the contents document would defeat their purpose. The OPCD echoes the Prosecution submission that the Registry must, under Regulation 24*bis* (2), provide “an objective and factual basis for the Registry’s chosen classification and the basis must relate specifically to the content of the Report”.
10. The Chamber, under Regulation 23*bis*, is empowered to override the classification chosen by the Registrar, where the Chamber is of the view that such a reclassification is warranted. In evaluating whether the Report and the annexes filed on 4 February 2011 fall within the ambit of Regulation 24*bis* (2), it is submitted that the Chamber should determine whether knowledge by the participants would defeat the Report’s purpose. Where only portions of the Report and annexes would be suitable for an *ex parte* filing,

---

<sup>6</sup> Request, para. 9.

the Chamber may wish to consider whether measures such as ordering redactions would suffice.

11. The OPCD notes that on 8 May 2009, the Trial Chamber in *Prosecutor v. Lubanga*, rendered an oral decision ordering the disclosure of the information contained in a Registry/VPRS report submitted under Rule 85, together with the disclosure of the annexes to the report to the parties. The Trial Chamber did so while ensuring that no identifying information was disclosed:

Apart from updating the Chamber on the current position as regards victims, the VPRS requested guidance regarding the transmission to the parties of the supplementary information attached as annexes. This concerns, particularly, further information requested in the Chamber's decision of the 15th of December, 2008, and it relates, in essence, to applicants who have been granted the status of participating victims. The Chamber orders disclosure of the information contained in the report (rather than the report itself), together with the annexes to the report which we observe do not include identifying information.<sup>7</sup>

12. The OPCD notes that the presumption contained in Rule 89(1) that both the Prosecution and the Defence have the right to receive victims' applications and to present observations in connection with whether applicants have a right to participate in the proceedings. Where the Chamber is using the report of the Registry to assist it to make a judicial determination on an issue upon which the Defence have a right to be heard, then the principle of adversarial proceedings requires that the defence be accorded an opportunity to comment on the materials used by the Chamber as the basis for its decision.
13. The principle of adversarial proceedings and the right of the Defence under Rule 89(1) to be heard, require the Chamber to base its decision on the evidence available the Prosecution and Defence.<sup>8</sup> Indeed, it is arguable that if the Chamber renders a *prima*

---

<sup>7</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-171-ENG, Transcript of 8 May 2009, pp. 41-42.

<sup>8</sup> The right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision." *Vermeulen v. Belgium*, Application no. 19075/91, Judgment of 22 Jan. 1996, para. 33. That Court noted that despite the fact of the independent avocet général's objectivity, the potential for bias and appearance of impropriety were sufficient to constitute violations of Article 6.1. See also *Morel v France*, Application no. 34130/96, Judgment of 6 June

*facie* factual determination concerning a particular applicant on the basis of evidence which has not been disclosed to the parties and which might never be disclosed to the parties, the impartiality of the Chamber could be contaminated.<sup>9</sup>

14. The OPCD finds the suggestion made by the Prosecution that the Report and annexes be re-classified as *ex parte*, Registry and Prosecution only, unacceptable. In the first instance, Regulation 24*bis*(2) requires a determination to be made of whether knowledge by the participants of the contents of the documents would defeat their purpose. The presumption contained in Rule 89(1), set out above, also applies to Prosecution and Defence.
15. As held by the European Court of Human Rights in the case of *Edwards & Lewis v. United Kingdom*<sup>10</sup>: “It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that

---

2000 para. 27. These principles have been endorsed by the ICC: “In keeping with the right to adversarial proceedings, the parties to a trial are afforded the opportunity to have knowledge of all evidence adduced or observations filed.” Situation in the Democratic Republic of the Congo ICC 01/04-135 Decision on the Prosecutor’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 (31 March 2006), footnote 68.

In line with this principle, the ICTY has held that the adversarial process demands that the Chamber should not base its decisions on information which is only available to one of the parties. It would thus be unfair to permit the Prosecution to use the confidential decisions from other Chambers of the Tribunal as the basis for the arguments it puts forward in its submissions, since the Defence teams have no access to them”. The Chamber would therefore “not take into account any arguments based on confidential decisions for which the Prosecution has failed to obtain a public redacted version” *Prosecutor v. Prlić, et al.*, Case No. IT-04-74-T, Decision on a Stojić Defence Request Regarding References to Confidential Decisions Rendered by other Chambers, p. 3 (23 Mar. 2009).

The principle of adversarial proceedings also requires that the parties are aware of the factual basis for a decision so that they can appeal if necessary. As the Appeals Chamber has noted, the Court “must identify which facts it found to be relevant ... [and] ‘indicate with sufficient clarity the grounds on which they based their decision ... [i]t is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.’” See *Prosecutor v. Lubanga*, ICC-01/04-01/06-772, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81” para. 20 (14 December. 2006), citing to *Hadjianastassiou v. Greece*, Application no. 12945/87, Judgment of 16 December 1992, para. 33. The United Kingdom case of *Al Rawi and Others v. Security Service and Others* [2010] EWCA Civ. 482, paras. 12, 16 (4 May 2010) refers to the right to be heard as a fundamental principle and elaborates “[a]nother fundamental principle of our law is that a party to litigation should know the reasons why he won or lost, so that a judge’s decision will be liable to be set aside if it contains no, or even insufficient, reason.”

<sup>9</sup> See *Prosecutor v. Krnolejac*, Case No. IT-97-25-PT, Decision on Prosecutor’s Response to Decision of 24 February 1999, (20 May 1999), paras. 11-12, describing how a Judge who rendered factual findings on an indictment on an *ex parte* basis would be contaminated from participating in later stages of the case. The ICTY later recognised that this contamination would not arise if the defence was subsequently disclosed the materials which had been provided to the confirming judge, and was provided with an opportunity to contest the factual findings at trial.

<sup>10</sup> (Applications nos. 39647/98 and 40461/98), Judgment of 27 October 2004.

both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party.”

16. Access to the requested material is thus necessary to enable the OPCD to perform its mandate under Regulation 77(4) of the Regulations of the Court to represent and protect the rights of the defence during the initial stages of the investigation
17. The OPCD, cognisant of the duties imposed by Article 68(1) to ensure that the victims and witnesses are appropriately protected, vigorously rejects the Prosecution view that “given the tense security situation in Kenya.... it is not safe to grant access to the Report and its annexes beyond the Registry and the Prosecution”. Under Regulation 144(2), in discharging their responsibilities, members of the OPCD are bound by the Code of Professional Conduct for Counsel, which obligates them to respect the confidentiality of the proceedings. Additionally, the members of the OPCD are also bound by the ICC’s Staff Rules and Regulations, which also impose a similar duty as regards respect for the confidentiality of proceedings.
18. In its ‘Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation’ in the Situation in the Democratic Republic of the Congo, the Chamber considered  

a distinction is to be made between disclosing the Applicants’ identities to a suspect and disclosing the applicants’ identities to the OPCD. At the situation level, during the initial stages of the investigation, the OPCD’s role is restricted to safeguarding any potential rights of the defence, and does not extend to any form of direct assistance any suspect or accused. Thus, in light of the Court’s jurisprudence noted above and the obligations of the OPCD, the Chamber reiterates that, at the situation stage, unredacted copies of Applications will continue to be provided to the OPCD.<sup>11</sup>

## Conclusion

19. The OPCD concur that the Registry has failed to comply with its duties under Regulation 23*bis* and 24*bis*. Consequently, and as a matter of urgency, the Chamber is requested to review the contents of the Report and its two annexes in order to determine whether knowledge by the participants, the OPCD and the Prosecution, would defeat the

---

<sup>11</sup> ICC-01/04-374, 17 August 2007, pp. 13-15.

purpose of the documents. Where the Chamber to conclude that that this is not the case, the OPCD requests that the Chamber order that the contents of the Report and the two annexes be reclassified as Confidential and disclosed to the OPCD and Prosecution.

20. Where it is believed that knowledge by the OPCD and/or the Prosecution of portions of the Report and annexes would defeat the purpose of the documents, the OPCD requests that the Chamber consider whether redaction of the documents would properly address this concern and if so, provide redacted copies of the documents to the OPCD and/ or Prosecution.
21. Finally, the OPCD submits that there are no security risks likely to result from the disclosure of the contents of the Report and associated annexes to the OPCD, who are bound by the Code of Conduct for Professional Counsel and the Staff Rules and Regulations. In the event that there are concerns over potential security risks raised by such a disclosure, the Chamber is requested consider the approach taken by the Trial Chamber in Prosecutor v. Lubanga and to order the disclosure of the information contained in the report and its annexes which do not include identifying information.



---

Xavier-Jean Keïta, Principal Counsel of the OPCD

Dated this 16 March 2011

At The Hague, The Netherlands