

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09
Date: 21 March 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

**Registry's Response to the requests by the Prosecutor and the OPCD for
reclassification**

Source: Registry

Document 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
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**
Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

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Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

The Registrar of the International Criminal Court (the “Court”);

NOTING regulations 23 *bis* and 24 *bis* of the Regulations of the Court;

NOTING the Chamber’s Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya, dated 3 November 2010;¹

NOTING the First Periodic Report of the Registry on the Activities of the Victims Participation and Reparations Section in the Situation in the Republic of Kenya, dated 24 February 2011;²

NOTING the Prosecutor’s Request for Reclassification dated 11 March 2011;³

NOTING the Response of the Office of Public Counsel for the Defence to the “Prosecutor’s Request for Reclassification”;⁴

TRANSMITS to the Chamber the following submission.

¹ ICC-01.09-24.

² ICC-01/09-49.

³ ICC-01/09-51.

⁴ ICC-01/09-52.

Background

1. In its Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya ("the Decision"), dated 3 November 2010 and notified on 4 November 2010, the Chambers set out a procedural framework for dealing with victims' applications relating to the Situation in the Republic of Kenya and required the VPRS to undertake specific activities in relation to those applications.
2. One of these activities was the provision to the Chamber of a regular three-monthly report "for information purposes". The first such report ("the VPRS Report") was submitted to the Chamber as a memorandum on 4 February 2011. On 18 February 2011 the Registry was informed by email that the Chamber required the VPRS Report to be filed in the record of the situation. This was done on 24 February 2011.⁵ The VPRS Report was filed as an annex marked as confidential *ex parte* only available to the Registry, as instructed by the Chamber.⁶
3. On 11 March 2011 the Prosecutor responded to the VPRS Report, challenging the legal basis for its classification and requesting that it be reclassified as confidential *ex parte* available to the Registry and the Office of the Prosecutor. On 16 March 2011 the Office of Public Counsel for the Defence ("the OPCD") responded by requesting that the VPRS Report be reclassified in order to provide access not only to the Prosecutor but also to the OPCD.
4. The Registry hereby seeks to respond to the submissions from the Prosecutor and the OPCD.

⁵ ICC-01/09-49.

⁶ Email from Legal Officer in the Pre-Trial Division to Associate Legal Officer in the Division of Court Services, dated 24 February 2011. This email referred principally to the Registry's concerning victim applications received in the situation in the Central African Republic, but was stated as also applying to reports filed in relation to the situation in the Republic of Kenya.

The subject-matter and legal basis of the VPRS Report

5. Before considering the legal basis for the VPRS Report's classification, it is appropriate to clarify the subject-matter of the report in question.
6. As explained above, the VPRS Report was prepared and filed in compliance with the requirement in paragraph 23 of the Decision, that a three-monthly report be presented "for information purposes". The objective of such reports is clear from the Decision: namely to enable the Chamber to remain aware of the number, nature and status of the applications received by the VPRS and the work being done regarding them, including on common legal representation.
7. Importantly, such regular reports "for information purposes" are to be distinguished from the reports which the Registry is required to present to the Chamber under Regulation 86(5) of the Regulations of the Court. The Chamber did address the question of regulation 86(5) reports in the Decision, explaining its requirements regarding their content,⁷ and clearly stating that such reports pertaining to applications for participation in the situation "will be submitted together with the applications *in case the Chamber has determined that judicial proceedings regarding a specific issue will take place.*"⁸ [emphasis added]. Indeed, it is clear from the overall procedural framework established by the Decision that applications pertaining to the situation, and not to a particular case, are to be analysed by the VPRS on an ongoing basis but not transmitted to the Chamber together with a report thereon (under regulation 86(5)) until such time as required by the Chamber due to the initiation of a judicial proceeding.
8. The Registry therefore emphasizes that the VPRS Report which is the subject to requests made by the Prosecutor and the OPCD must be distinguished from a report transmitted to the Chamber under regulation 86(5). The VPRS Report does not, as is apparently believed by the Prosecutor and the OPCD, contain an

⁷ ICC-01/09-24, paragraphs 19 to 21.

⁸ ICC-01/09-24, paragraph 21.

analysis or assessment from the VPRS of which applications received by it might be accepted, rejected or raise difficult issues.⁹

9. Rather, the VPRS Report presented information regarding the work done by the VPRS to date in implementation of the Decision and explained challenges encountered. The legal basis of the VPRS Report was not regulation 86(5), but rather the specific requirements of the Chamber contained in paragraph 23 of the Decision, and the order contained in the Decision that the Registry, through the VPRS, “comply with the requirements set forth in part IV of this decision”.

Legal basis for the classification of the VPRS Report

10. The First Periodic Report was annexed to a “Public” cover filing (ICC-01/09-49). This Report, as well as the two other documents annexed, were classified *ex parte*, Registry only. The legal basis for such classification was explicitly stated in the cover filing, which referred to Regulation 23*bis* only.
11. In spite of this explicit reference to Regulation 23*bis* as the legal basis for classification, the Prosecutor and the OPCD seek to rely on the requirements of regulation 24*bis*(2). In the view of the Registry, reference to Regulation 24*bis*(2) is irrelevant, insofar as the VPRS Report was not filed, nor did even mention, Regulation 24*bis*. The Report was filed in compliance of the Chamber’s earlier Decision.
12. Regulation 23 *bis* – which applies not only to the parties and participants but also to the Registry - sets out the usual procedure according to which a document may be filed as *ex parte*, confidential or under seal. Regulation 23*bis* leaves open the legal bases on which a document might be filed so as to restrict access to it, only requiring that such legal basis be stated. In the ordinary course of proceedings at the Court, documents are frequently filed as confidential, *ex parte* or under seal (including by the Registry) on various bases including for example that revealing

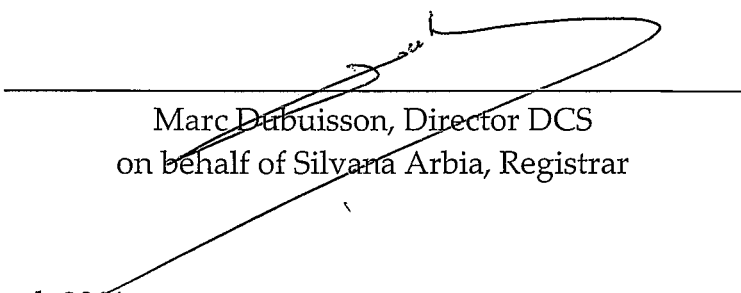
⁹ ICC-01/09-51, paragraph 15; ICC-01/09-52, paragraph 12.

their contents or existence could place a witness, victim, staff member or other person at risk, or that it could reveal the contents of an OTP investigation.

13. For these reasons, the Registry considers that the reliance by the Prosecutor and the OPCD on regulation 24*bis*(2) is misplaced. The VPRS Report was filed in compliance with a specific order of the Chamber, and was not made *proprio motu* under regulation 24 *bis*(1). Nor was its existence hidden from the parties, since it was annexed to a public filing. For these reasons, the Registry does not consider that it must demonstrate that knowledge by the parties of the contents of the VPRS Report “would defeat its purpose”.
14. As indicated above, regulation 23*bis* does not set out the possible legal bases by which a document may be classified as *ex parte* by the Registry. In the Registry’s view, one possible reason for documents to be classified as such is that they information about the internal workings of the Registry which, if revealed to the parties may hinder the efficacy or neutrality of the Registry’s work or place at risk those it is engaging with.
15. In the case of the VPRS Report, the Registry notes that the document contains some information which could be used to identify persons who have applied for participation and/or reparations. The non-disclosure of such information to the parties is well established in the jurisprudence of the Chamber.¹⁰ It is to be expected that the regular three-monthly reports prepared by the Registry in implementation of the Decision will frequently contain such information. For this reason, the Registry proposes that such reports routinely be filed as confidential *ex parte*.

¹⁰ ICC-02/04-01/05-134; See also the approach of Judge Kaul in PTCIII: ICC-01/05-01/08-184.

16. However the Registry also recognizes that some of the information contained in the VPRS Report is not of a sensitive nature, and might be made available not only to the Prosecutor and the OPCD but also to the public. Accordingly, should the Chamber be supportive of such an approach, the Registry would be ready to prepare a public redacted version of the VPRS Report.



Marc Dubuisson, Director DCS
on behalf of Silvana Arbia, Registrar

Dated this 21 March 2011

At The Hague, the Netherlands