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No.: ICC-02/11
Date: **4 October 2011**

PRE-TRIAL CHAMBER III

Before: Judge Silvia Fernández de Gurmendi, Presiding Judge
Judge Elizabeth Odio Benito
Judge Adrian Fulford

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

Public Document

**Prosecution's requests for reclassification of Annexes 1 to 1089 of the Registry's
"Report on Victims' Representations"**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Introduction

1. On 17 June 2011, the Prosecutor provided notice to victims and their legal representatives of his intention to request authorization to open an investigation in the situation of Côte d'Ivoire – which it subsequently filed on 23 June¹ -- and informed them that pursuant to Regulation 50(1) of the Regulations of the Court they have 30 days to make their representations to the Chamber.
2. On 6 July 2011, the Pre-Trial Chamber instructed the Victims Participation and Reparations Section ("VPRS") to submit, by 1 August 2011, a single consolidated report on the collective and individual representations received with the original representations annexed thereto.² Upon request of the Registry,³ on 28 July the Pre-Trial Chamber granted the VPRS an extension of time until 29 August 2011.⁴
3. On 30 August 2011, the Prosecution received a public redacted version of the VPRS Report, together with five annexes (Annexes A to E). The Registry filed the original representations annexed to the VPRS Report (Annexes 1 to 1089) confidential *ex parte*, available only to Registry,⁵ because "they contain information which would identify victims and other persons who have communicated with the Court and who may thereby be put at risk".⁶
4. On 3 October 2011, the Chamber authorized the investigation.⁷
5. Pursuant to Article 68(1) and Regulations 23*bis* (3) and 24*bis* (2) of the Regulations of the Court, the Prosecution requests that Annexes 1 to 1089 of the

¹ "Request for authorisation of an investigation pursuant to article 15" ("Prosecution's Article 15 Request"), ICC-02/11-3.

² ICC-02/11-6.

³ ICC-02/11-8.

⁴ ICC-02/11-9.

⁵ ICC-02/11-11-Red + Anxs A ~ E-Red ("VPRS Report").

⁶ VPRS Report, p.4.

⁷ "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" ("Article 15 Decision"), ICC-02/11-14.

VPRS Report be re-classified as *ex parte*, available to the Registry and the Prosecution only.

6. Regulation 24*bis* (2) stipulates that “[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”. There is no indication that the Prosecution’s knowledge of the contents of all the annexes would defeat their purpose, which is to make observations about the Prosecution’s request to open an investigation. Other than claiming that the *ex parte* filing is justified by security concerns, the Registrar did not provide any reasons for the classification of Annexes 1 to 1089 to the VPRS Report. These concerns does not apply to the Prosecution..
7. Regulation 23*bis* (3) empowers the Chamber to evaluate and, where appropriate, override the classification chosen by the Registrar. Moreover, Regulation 24*bis* (2) provides that the Chamber shall decide whether notice of the existence of the filing is to be provided to the participants.
8. Moreover, the Registry notes that the VPRS Report expressly stresses that the victims’ views may be of use to the Prosecution to inform its choice on how to prioritize investigations.⁸ In similar fashion, the VPRS Report notes that “numerous communications might have been sent [...] by victim for other purposes entirely – for example in order to [...] provide evidence to the Prosecutor”.⁹ In other words, Prosecution access to the information not only does not defeat, it may affirmatively advance, the purpose of the submissions.

Submissions

9. The Registry filed Annexes 1 to 1089 confidential *ex parte* available only to the Registry because, in its view, “they contain information which would identify

⁸ VPRS Report, para.92.

⁹ VPRS Report, para.93.

victims and other persons who have communicated with the Court and who may thereby be put at risk”.¹⁰ The Prosecution submits that the classification given to these documents by the Registry is inconsistent with Regulations 23*bis* and 24*bis* of the Regulations of the Court.

10. According to Regulation 23*bis* (1) “[a]ny document filed by the Registrar [...] and marked ‘*ex parte*’ [...] shall state the factual and legal basis for the chosen classification [...].” In this case, there is no reason to conclude that knowledge by the Prosecution might put the persons at risk. As the VPRS itself acknowledges, “of the 1038 materials submitted by the 20 July deadline, 141 documents were sent by the Office of the Prosecutor (“OTP”) via email to the Registry during the period from 6 to 19 July 2011”.¹¹
11. The Prosecution submits that there are no security concerns or any other presumptive factual or legal justification for denying it access to Annexes 1 to 1089. To the contrary, in addition to the presumption of access by the Prosecution of Registry filings stipulated in Regulation 24*bis* (2), the Chamber may be guided by Rule 89(1), which establishes that the Prosecution shall have access to any victims applications to participate in the proceedings. This provision may be applied by analogy to the victims representations at hand.
12. Moreover, bearing in mind the Prosecution’s duty and mandate to protect victims and witnesses pursuant to Article 68(1), as well as its institutional duty to interact with victims and witnesses, there is no basis for assuming that access by the Prosecution to the identity of victims and other persons who interacted with the Court will pose any risk to them.
13. The Prosecution also recalls that a large number of the victims expressed their wish that justice be done and that they are willing to support the Court,¹² which

¹⁰ VPRS Report, p.4.

¹¹ VPRS Report, para.12.

¹² VPRS Report, paras.68-69.

suggests that the sharing of the relevant information with the Prosecution affirmatively serves the interests of these victims.

14. If the Pre-Trial Chamber finds that knowledge by the Prosecution of some portions of Annexes 1 to 1089 would defeat their purpose, then the Chamber should consider whether lesser measures – such as redaction of discrete portions – would balance the Prosecution’s rights and a legitimate demonstrable interest.
15. The Prosecution acknowledges that on three occasions, Chambers of this Court have denied the Prosecution access to *reports* prepared by the VPRS in relation to victims applications. However, those decisions were based on the absence of an express provision in the Court’s regulatory framework that requires the Report to be transmitted to the participants.¹³ At the same time, notwithstanding denial to the Prosecution of access to the VPRS reports, the Prosecution received the victims’ applications pursuant to Rule 89(1). Moreover, two of these three decisions were issued prior to 18 December 2007, when Regulations 23*bis* and 24*bis* entered into force, and the third decision, though postdating 18 December 2007, overlooked Regulation 24*bis* and erroneously concluded that “neither the Statute nor its Rules and Regulations provide for the Report to be transmitted to the Prosecution and the Defence”.¹⁴
16. In addition, in the context of one of those decisions, Trial Chamber I found that the absence of any legal provision that would require the report to be shared with the parties “is not determinative of the issue, because the Trial Chamber undoubtedly has the authority to control disclosure for the purposes of the trial in the interests of justice”.¹⁵ In that case, Trial Chamber I found that the parties did not need access to the relevant reports because those reports contained only information that was independently available to the parties under Rule 89(1) in

¹³ See ICC-01/04-374, 17 August 2007, paras. 34 and 38; ICC-01/04-01/06-1022, 9 November 2007, para. 25; ICC-02/05-01/09-62, 10 December 2009, para. 16.

¹⁴ ICC-02/05-01/09-62, 10 December 2009, para. 16.

¹⁵ ICC-01/04-01/06-1022, 9 November 2007, para. 25.

the victims' applications themselves.¹⁶ This is not the case here, where the Prosecution has been denied access to the underlying information constituting the basis for the VPRS Report.

17. The Prosecution also notes that the VPRS Report expressly stresses that the views expressed by victims may be of use to the Prosecution, among others to inform his choice on how to prioritize investigations if and when authorization is granted.¹⁷ In addition, the VPRS Report notes that "numerous communications might have been sent [...] by victim for other purposes entirely – for example in order to [...] provide evidence to the Prosecutor".¹⁸ Both factors strongly militate in favour of re-classifying Annexes 1 to 1089 and to grant the Prosecution access to them.
18. Finally, given the absence of a defence at this stage of the proceedings in the situation of Côte d'Ivoire, there is no need to grant access to Annexes 1 to 1089 beyond the Registry and the Prosecution. If the Chamber grants the Prosecution's Article 15 Request, it may later decide in due course whether, to what extent and in what form the information may be shared with the defence.

Conclusion

19. The Prosecution requests the Pre-Trial Chamber to order that Annexes 1 to 1089 to the VPRS Report be reclassified as *ex parte*, Registry and Prosecution only.
20. In the alternative, the Pre-Trial Chamber should direct the Registry to review the content of Annexes 1 to 1089 to the VPRS Report to identify the information that cannot be disclosed to the Prosecution without defeating the purpose of the

¹⁶ ICC-01/04-01/06-1022, 9 November 2007, para. 24.

¹⁷ VPRS Report, para.92.

¹⁸ VPRS Report, para.93.

documents, to redact those portions and justify those redactions, and provide the Prosecution with the redacted versions.



Luis Moreno-Ocampo, Prosecutor

Dated this 4th day of October 2011

At The Hague, The Netherlands