

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09

Date: 24 March 2010

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

Public Document

Decision on Re-classification and on the "Prosecutor's Application for Access to any VPRS Filing and any Decision by this Chamber"

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

Mr Luis Moreno-Ocampo

Legal Representatives of Victims

Legal Representatives of 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

REGISTRY

Registrar

Deputy Registrar

Ms Silvana Arbia

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Fiona McKay

The Judges of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”), address the matter of re-classification in the record of the situation in the Republic of Kenya.

1. On 6 November 2009, the Presidency issued the “Decision assigning the situation in the Republic of Kenya to Pre-Trial Chamber II”.¹
2. On 26 November 2009, the Prosecutor filed the “Request for authorisation of an investigation pursuant to Article 15”, together with 39 appended annexes, in which he requested the Chamber to “authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008”.²
3. On 10 December 2009, the Chamber issued an “Order to the Victims Participation and Reparations Section Concerning Victims’ Representations Pursuant to Article 15(3) of the Statute”.³
4. On 21 December 2009, the Registry, through the Victims Participation and Reparations Section (the “VPRS”), filed a confidential and *ex parte* “Report Concerning Victims’ Representation” with annexes (the “First Report”), requesting an extension of time for the filing of victims’ representations.⁴
5. On 23 December 2009, the Chamber issued a confidential and *ex parte* “Decision on Extension of Time Limit”, granting the VPRS’s request for extension of time and ordering the VPRS to file a report containing victims’ representation at the latest on 15 March 2010.⁵

¹ Presidency, ICC-01/09-1.

² ICC-01/09-3 and its annexes.

³ ICC-01/09-4.

⁴ ICC-01/09-6-Conf-Exp and its annexes.

⁵ ICC-01/09-7-Conf-Exp.

6. On 18 January 2010, the Prosecutor filed a confidential and *ex parte* "Prosecutor's Application for Access to any VPRS Filing and any Decision by this Chamber" (the "Prosecutor's Application"), requesting the Chamber (i) to grant the Prosecution access to the VPRS report, (ii) to order the VPRS to notify the Prosecutor of any subsequent filings and disallow *ex parte* Registry only filings, (iii) to allow the Prosecutor to present his position on the substance of the VPRS submissions and (iv) to re-classify the existing VPRS filings as public, unless there is a basis for maintaining confidentiality.⁶

7. On 15 March 2010, the Registrar, through the VPRS, filed a confidential and *ex parte* "Report on Victims' Representations" (the "Second Report"), together with 407 appended annexes.⁷ In this Report, the VPRS declared itself "ready to prepare a public redacted version of the Report should the Chamber so order".⁸

8. The Chamber takes note of the principle of publicity of the proceedings as laid out in article 67(1) of the Rome Statute (the "Statute") and its duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims in accordance with article 68(1) of the Statute. The Chamber also recalls that regulation 23 *bis* of the Regulations of the Court states, in its paragraph 3, that "[w]here the basis for the classification no longer exists, whosoever instigated the classification, be it the Registrar or a participant, shall apply to the Chamber to re-classify the document. A Chamber may also re-classify a document upon request by another participant or on its own motion."

⁶ ICC-01/09-10-Conf-Exp and its annex.

⁷ ICC-01/09-17-Conf-Exp and its annexes. See also "Corrigendum to the Report on Victims' Participation", ICC-01/09-17-Conf-Exp-Corr, 18 March 2010.

⁸ ICC-01/09-17-Conf-Exp, para. 17. See also para. 142, where the VPRS indicated the same with regard to its First Report.

9. Having reviewed the First Report and the Second Report and their annexes filed by the VPRS and taking note of the position expressed by the VPRS with regard to the possible re-classification of the said documents, the Chamber is satisfied that the basis for the confidential and *ex parte* classification no longer exists, except for such parts to be redacted in order to protect the safety, physical and psychological well-being, dignity and privacy of victims.

10. The Chamber also takes note of the Prosecutor's Application, where the Prosecutor indicated that "[s]hould the Chamber deem it appropriate to reclassify this document as public, the Prosecution has no objection."⁹

11. Concerning the "Decision on Extension of Time Limit" issued by the Chamber on 23 December 2009, the Chamber observes that this decision does not contain any sensitive information, nor does it contain information which would be detrimental to victims. In addition, the Chamber notes that this decision has now been enforced and that the VPRS has filed its Second Report on 15 March 2010. Therefore, the Chamber is satisfied that the basis for the confidential and *ex parte* classification of the "Decision on Extension of Time Limit" no longer exists.

12. With regard to the Prosecutor's requests to order the VPRS to notify the Prosecutor of any subsequent filings and disallow *ex parte* Registry only filings, the Chamber notes that the request is unsubstantiated and unsupported by any provisions in the Statute, the Rules of Procedure and Evidence or the Regulations of the Court.

13. Finally, the Chamber finds that the Prosecutor's request to present his position on the substance of the VPRS submissions is now moot.

⁹ ICC-01/09-10-Conf-Exp, para. 5.

FOR THESE REASONS, THE CHAMBER HEREBY

(a) Decides to *proprio motu* re-classify as public, and **orders** the Registrar to re-file accordingly:

(i) the “Decision on Extension of Time Limit” issued by Pre-Trial Chamber II on 23 December 2009 (ICC-01/09-7-Conf-Exp); and

(ii) the “Prosecutor’s Application for Access to any VPRS Filing and any Decision by this Chamber”, dated 18 January 2010 (ICC-01/09-10-Conf-Exp);

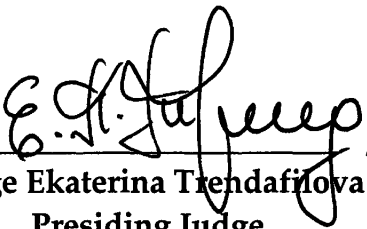
(b) Orders the Registrar to file, at the latest on Monday 29 March 2010 at 12h and in accordance with paragraph 9 of this decision, a public redacted version of

(i) the “Report Concerning Victims’ Representation” filed by the VPRS on 21 December 2009 and its annexes 2 to 10 (ICC-01/09-6-Conf-Exp);

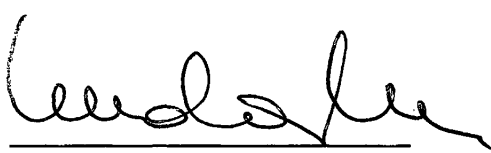
(ii) the “Corrigendum to the Report on Victims’ Representations” filed by the VPRS on 18 March 2010 and its annexes 1 and 5 (ICC-01/09-17-Conf-Exp-Corr);

(c) Rejects the Prosecutor’s request to order the VPRS to notify the Prosecutor of any subsequent filings and disallow *ex parte* Registry only filings and declares moot the Prosecutor’s request to present his position on the substance of the VPRS submissions.

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



Judge Ekaterina Trendafilova
Presiding Judge

Judge Hans-Peter Kaul Judge Cuno Tarfusser

Dated this Wednesday, 24 March 2010

At the Hague, The Netherlands.