

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-RoC46(3)-01/14
Date: 12 September 2014

PRE-TRIAL CHAMBER II

**Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Cuno Tarfusser
Judge Christine Van den Wyngaert**

REQUEST UNDER REGULATION 46(3) OF THE REGULATIONS OF THE COURT

Public

Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014'

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Counsel for Applicant

Mr Ken Macdonald

Mr John Dugard

Mr Rodney Dixon

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

Other

REGISTRY

Registrar

Herman von Hebel, Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court” or the “ICC”) is seized of a request to review the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and an alleged decision of the Registrar of 25 April 2014.

1. On 5 September 2014, the President of the Pre-Trial Division received a memorandum from the Registry entitled “Second Submission from President Mohamed Morsi together with the Freedom and Justice Party of Egypt”. In this memorandum, the Registry informed the President of the Pre-Trial Division that it had received a document entitled “Re-filing before the President of the Pre-Trial Division of the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’”, together with three annexes appended thereto (collectively the “Request”).¹ The Request was presented on behalf of “President Mohamed Morsi and the Freedom and Justice Party of Egypt” (the “Applicant”).²

2. On 11 September 2014, the Chamber was notified of the “Decision assigning the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’ to Pre-Trial Chamber II”.³ In that decision, the President of the Pre-Trial Division assigned the Request to the Chamber, pursuant to regulation 46(3) of the Regulations of the Court (the “Regulations”), on the ground that its subject-matter “does not appear (a) to fall outside the competence of the Pre-Trial Chamber, or (b) to be manifestly frivolous”.⁴

¹ ICC-RoC46(3)-01/14-2 and its annexes A, B and C.

² ICC-RoC46(3)-01/14-2, para. 1.

³ President of the Pre-Trial Division, ICC-RoC46(3)-01/14-1.

⁴ President of the Pre-Trial Division, ICC-RoC46(3)-01/14-1, pp. 3-4.

3. The Chamber notes articles 21(1)(a), (2) and (3), 15, 53(1), (3) of the Rome Statute (the "Statute"), rules 48, 105, 107, 109 of the Rules of Procedures and Evidence (the "Rules") and regulation 46(3) of the Regulations.

4. In the Request, the Applicant seeks "[r]eview of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014".⁵

5. At the outset, the Chamber recalls regulation 46(3) of the Regulations according to which "[a]ny matter, request or information not arising out of a situation assigned to a Pre-Trial Chamber in accordance with sub-regulation 2, shall be directed by the President of the Pre-Trial Division to a Pre-Trial Chamber according to a roster established by the President of that Division". In this regard, the Chamber highlights that regulation 46(3) of the Regulations is a purely administrative provision, and as such, it is *merely* meant to regulate the assignment of the Request to the relevant Pre-Trial Chamber. This means that no substantive rights can be deduced from this regulation. Accordingly, when addressing any "matter", "request" or "information", the Chamber shall act in accordance with the applicable law set out in article 21 of the Statute.

6. Turning to the Applicant's challenge to the Prosecutor's decision of 23 April 2014, the Chamber considers that the power of the Prosecutor to initiate investigations on her own motion and the potential review of her decisions are mainly governed by the Statute and the Rules. Article 15(1) of the Statute provides that "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court". Article 15(2) of the Statute proceeds further by stating that the Prosecutor "shall analyse the seriousness of the information received" and may seek additional information from different sources. The following step the Statute envisages is either that the Prosecutor concludes "that there is a reasonable

⁵ ICC-RoC46(3)-01/14-2, paras 1 and 17.

basis to proceed with an investigation” (article 15(3) of the Statute) or “that the information provided does not constitute a reasonable basis for an investigation” (article 15(6) of the Statute). In reaching her conclusion, rule 48 of the Rules dictates that, the Prosecutor shall consider the criteria set out in article 53(1)(a)-(c) of the Statute.

7. The Court’s statutory documents make clear that the decisions of the Prosecutor pursuant to article 15(6) or 53(1) of the Statute may be subject to judicial review according to certain conditions referred to in article 53(3) of the Statute. These conditions vary depending on the triggering mechanism or the basis for the Prosecutor’s decision. This appears from the wording of article 53(3)(a) and (b) of the Statute and rule 105 of the Rules. Article 53(3)(a) of the Statute stipulates that the Pre-Trial Chamber *may* review a decision of the Prosecutor under article 53(1) of the Statute, subject to a request made by the referring State under article 14(1) of the Statute or by the Security Council under article 13(b) of the Statute. Although the review power of the Chamber in this case is discretionary, the exercise of such power is first and foremost dependent on a request by a State Party or the Security Council that has referred the situation to the Court.

8. The situation is different under article 53(3)(b) of the Statute, where the Chamber may exercise its discretionary power to *proprio motu* review a decision of the Prosecutor not to proceed with an investigation. The Chamber *may* exercise this power only if the Prosecutor has taken her decision on the basis of the criterion of article 53(1)(c) of the Statute i.e. if an investigation “would not serve the interests of justice”. As this Chamber stated elsewhere:

[T]he Chamber considers that a review of [the] requirement [of article 53(1)(c) of the Statute] is unwarranted in the present decision, taking into consideration that the Prosecutor has not determined that an investigation “would not serve the interests of justice”, which would prevent him from proceeding with a request for authorization of an investigation. Instead, such a review may take place in accordance with article 53(3)(b) of the Statute if the Prosecutor decided not to proceed with such a request on the basis of this sole factor. It is only when the Prosecutor decides that an investigation would not be in the interests of justice

that he or she is under the obligation to notify the Chamber of the reasons for such a decision, thereby triggering the review power of the Chamber (footnotes omitted).⁶

9. Given that the decision of 23 April 2014 referred to in the Request was not a decision taken on the basis of article 53(1)(c) of the Statute, but rather a decision grounded on the criteria embodied in article 53(1)(a) of the Statute, the Chamber cannot but dismiss *in limine* the first part of the Request.

10. With respect to the remaining part of the Request challenging the alleged decision of the Registrar of 25 April 2014, the Chamber wishes to point out that the role of the Registrar in relation to declarations lodged under article 12(3) of the Statute is merely administrative. This is clear from the language of rule 44(2) of the Rules which mandates the Registrar to receive declarations lodged under article 12(3) of the Statute and to inform the relevant "State" lodging it of the "consequence" of accepting the jurisdiction of the Court. Beyond that, the Registrar has no power to make a legal or judicial ruling upon receipt of any declaration. It follows that the second part of this Request must also be dismissed *in limine*.

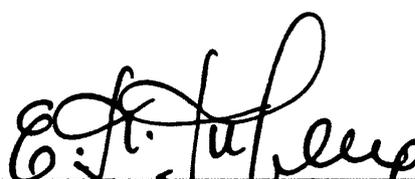
11. The Chamber's foregoing assessment of its review powers should not in any way be construed as an acknowledgment that the Applicant enjoys *locus standi* in these proceedings. Rather, the Chamber does not deem it necessary to discuss the Applicant's procedural standing in view of the fact that it cannot, in any event, review the Prosecutor's decision not to proceed.

⁶ Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09-19-Corr, para. 63; see also Pre-Trial Chamber III, "Corrigendum to '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'", 15 November 2011, ICC-02/11-14-Corr, para. 207.

FOR THESE REASONS, THE CHAMBER HEREBY

dismisses *in limine* the Request in its entirety.

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


Judge Ekaterina Trendafilova
Presiding Judge


Judge Cuno Tarfusser
Judge


Judge Christine Van den Wyngaert
Judge

Dated this Friday, 12 September 2014

At The Hague, The Netherlands