

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-01/09  
Date: 18 January 2010

**PRE-TRIAL CHAMBER II**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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**Confidential, *ex parte*, Prosecution and VPRS only  
with Annex A – Confidential, *ex parte*, Prosecution and VPRS only**

**Prosecution's Application for Access to any VPRS Filing and any  
Decision by this Chamber**

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**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 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**

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**Registrar**

Ms Silvana Arbia

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Fiona McKay

**Other**

## Introduction

1. On 10 December 2009, Pre-Trial Chamber II ("PTC II" or "the Chamber") issued an order concerning the representation of victims in accordance with Article 15(3) of the Rome Statute and rule 50(3) of the Rules of Procedure and Evidence ("the Rules"). The Order required that the Victims Participation and Reparations Section ("VPRS") present a report by 21 December 2009. Further, the time limit for victims to make representations under Article 15(3), pursuant to Regulation 50(1), expired on 24 December 2009. The order was publicly filed.
2. To date, the Prosecution has not received a report or submission by the VPRS. However, there are media reports indicating that the VPRS filed a submission to the Chamber requesting an extension of time.<sup>1</sup> Regardless, no notification of an *ex parte* filing has been received by the Prosecution.
3. If, in fact, the VPRS filed an *ex parte* Registry only submission, without notice to the Prosecution, then the Prosecution hereby requests access to the filing, and access to any subsequent filings submitted by the Registry regarding victims' representations and decision.
4. The Prosecution additionally requests the opportunity to present its position, on an expedited basis, in response to any filing by VPRS.

### Request for Confidentiality

5. The Prosecution files this request confidentially because it seeks access to a document that it has reason to believe was filed also confidentially and *ex parte*. See Regulation 23*bis*. Should the Chamber deem it appropriate to reclassify this document as public, the Prosecution has no objection.

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<sup>1</sup> The Prosecution notes that VPRS alerted the Prosecution to the possibility that it would seek an extension of time to file its report. (Annex 1) and this was hinted at in the media. However, the Prosecution never received a copy of VPRS's report.

Prosecution's Submissions

6. Regulation 24*bis*(1) of the Regulations of the Court (RoC) requires the Registrar, "when necessary for the proper discharge of his or her functions, in so far as they relate to any proceedings," to make submissions to the Chamber "with notification to the participants". The only exception to this notification requirement is contained in Regulation 24*bis*(2) of the RoC, which allows the Registrar to file a document *ex parte* "Registrar only" "if knowledge by the participants of the content of the document filed would defeat its purpose". Regulation 24*bis*(2) further states that "[t]he Chamber shall decide whether notice of the existence of the filing is to be provided to the participants".
7. Assuming that the VPRS filed a document in this manner, the Prosecution cannot envision a reason that would substantiate that level of confidentiality or explain why the Prosecution did not receive notification of its submission. PTC II's Order to VPRS of 10 December was publicly filed. No basis can be inferred, which establishes that knowledge by the Prosecution of either the filing or the content would defeat the purpose of the Registry's filing.
8. The Prosecution has an interest and a right to be fully involved in the process leading to the decision of the Chamber on its Article 15 application requesting authorization to open an investigation. The failure to provide the Prosecution with the VPRS Report, if one was filed, deprives the Prosecution of its right to respond to any filings pursuant to Regulation 24(1) of the RoC.
9. As PTC II recognized in its 10 December Order, "[t]he Chamber is duty bound to ensure that proceedings are carried out in an expeditious manner".<sup>2</sup> That statement recognizes that there should not be delay in consideration of the application for authorization to initiate an investigation if VPRS did in fact file a report that requested an extension of time in which to file its final report, and that report must be filed and considered before the Chamber decides the Article 15 application, the extension request would seem to be contrary to the Chamber's intent to act expeditiously. Consequently, the Prosecution, pursuant to Regulation 35(2) of the RoC, would request the opportunity to be heard prior to any ruling on this issue that could delay the process.

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<sup>2</sup> ICC-01/09-4, 10 December 2009, para. 9.

### Relief Requested

10. For the reasons set out above, the Prosecution respectfully requests that the Chamber:

- (i) Grant the Prosecution access to the VPRS Report, if filed;
- (ii) Order the VPRS to notify the Prosecution of any subsequent filings and disallow ex parte Registry only filings unless the VPRS establishes that “knowledge by the [Prosecution] of the content of the document filed would defeat its purpose”;
- (iii) Grant the Prosecution the opportunity to present its position on the substance of VPRS’s submissions, if filed; and
- (iv) Reclassify any existing VPRS filing and the Prosecution’s response as public unless there is a basis for maintaining confidentiality.



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Luis Moreno-Ocampo  
Prosecutor

Dated this 18<sup>th</sup> day of January 2010  
At The Hague, The Netherlands