

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/05

Date: 12 March 2008

PRE-TRIAL CHAMBER II

Before: Judge Mauro Politi, Presiding Judge
Judge Fatoumata Dembele Diarra
Judge Ekaterina Trendafilova

Registrar: Mr Bruno Cathala

SITUATION IN UGANDA

*IN THE CASE OF
THE PROSECUTOR v. JOSEPH KONY, VINCENT OTTI, OKOT ODHIAMBO,
DOMINIC ONGWEN*

Public Document

**Observations of legal representatives of victims on the Notification of the Board of
Directors of the Trust Fund for Victims**

The Office of the Prosecutor
Mr Luis Moreno Ocampo, Prosecutor
Ms Fatou Bensouda, Deputy Prosecutor
Mr Eric MacDonald, Trial Lawyer

Office of Public Counsel for the Defence
Mr Xavier-Jean Keïta

Office of Public Counsel for Victims
Mrs Paolina Massidda
Mrs Adesola Adeboyejo

I. PROCEDURAL HISTORY

1. On 1st of February 2007, the Single Judge rendered the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” and ordered the Office of the Public Counsel for Victims (the “OPCV” or the “Office”) to provide the applicants with any support and assistance which may be necessary or appropriate at the stage of the proceedings which precedes a decision on their status.¹

2. On 10 August 2007, the Single Judge rendered the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” which granted the status of victim to applicants a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 in the *Kony et al* case.²

3. On 25th of January 2008, the Board of Directors of the Trust Fund for Victims submitted the “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex” (the “Notification”).³

¹ See the “Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, No. ICC-02/04-01/05-134, 1st of February 2007, par. 13.

² See the “Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06”, No. ICC-02/04-01/05-252, 10 August 2007, p. 61.

³ See the “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex”, No. ICC-02/04-114, 25 January 2008 (the “Notification”).

4. On 12th February 2008, the Office introduced the "Request for Leave to file Observations in relation to the 'Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential annex'" before Pre-Trial Chamber II, seeking leave to submit observations on the Notification, either as legal representative or as counsel appearing before a Chamber in respect of specific issues pursuant to regulation 81(4) of the Regulations of the Court, on behalf of victims authorised to participate in the context of the situation and on behalf of applicants.⁴

5. On 15th of February 2008, the Single Judge rendered the "Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06" appointing Mrs. Paolina Massidda, Principal Counsel of the OPCV, as legal representative of victims a/0101/06 and a/0119/06 in the situation of Uganda and of victim a/0119/06 in the case *The Prosecutor v. Kony et al.* and Mrs. Adesola Adeboyejo, Counsel of the OPCV, as legal representative of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06, a/0122/06 in the case *The Prosecutor v. Kony et al.*⁵

6. On 18th February 2008, the legal representative of victims a/0101/06 et a/0119/06 filed her observations on the Notification in accordance with Regulation 50 of the Regulations of the Trust Fund⁶, seeking directions from Pre-Trial Chamber II as to whether it considers that the Notification also concerns the victims who have been granted the status in the case and accordingly, if need be, to give instructions for the legal representatives of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06,

⁴ See the "Request for Leave to file Observations in relation to the 'Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential annex'", No. ICC-02/04-116, 12 February 2008.

⁵ See the "Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06 a/0112/06, a/0118/06, a/0119/06 and a/0122/06", No. ICC-02/04-01/05-267, 15 February 2008, p. 6.

⁶ See the "Observations du représentant légal des victimes a/0101/06 and a/0119/06 suite à la notification du Conseil de direction du Fonds au profit des victimes conformément à la règle 50 du Règlement du Fonds", No. ICC-02/04-118, 18 February 2008.

a/0119/06 and a/0122/06 (the “Legal representatives”) to be able to make observations on the Notification⁷.

7. On 5th of March 2008, the Pre-Trial Chamber II rendered the “Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims” requesting the legal representative of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06 and a/0122/06 to submit to the Chamber, by Wednesday 12 March 2008, observations on the Notification.⁸

8. The Legal Representatives note that applicant a/0119/06 has been granted the status of victim both in the situation in Uganda and in the *Kony et al.* case. Therefore, these observations are also filed on behalf of victim a/0119/06.

9. As a consequence, the Legal Representatives respectfully submit the following observations on the Notification.

II. THE MANDATE OF THE TRUST FUND IN RELATION TO THE OTHER RESOURCES USED FOR THE BENEFIT OF VICTIMS

10. Article 79(1) of the Rome Statute provides for the establishment of a Trust Fund “for the benefit of victims within the jurisdiction of the Court, and of the families of such victims.”⁹ The Trust Fund is regulated by principles agreed upon by the Assembly of States Parties in its resolution adopting the Regulations of the Trust Fund.¹⁰

⁷ *Ibid.* par. 33.

⁸ See the “Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims”, No. ICC-02/04-120, 5 March 2008, p. 5.

⁹ See the Resolution concerning the “Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ICC-ASP/1/Res.6, 9 September 2002, in ICC-ASP/1/3, First Session, New York, 3-10 September 2002.

¹⁰ See the Resolution concerning the “Regulations of the Trust Fund for Victims”, ICC-ASP/4/Res.3, 3 December 2005, Fourth Plenary meeting.

11. These instruments grant the Trust Fund a twofold mandate for the implementation of reparations awards on the one hand, and for the assistance to victims through the use of "*other resources*" on the other hand.¹¹

12. In addition, the Regulations of the Trust Fund set out the principles for the management of the funds, so as to create an institution which is independent from the Court in its decision making process, whilst still empowered to discharge the decisions of the Court on reparations.¹²

13. Accordingly, in addition to its role concerning the award for reparations ordered by the Court against a convicted person, Regulation 50(a) of the Regulations of the Trust Fund provides that the Board of Directors may undertake specified activities designed to provide physical or psychological rehabilitation or material support for the benefit of victims and their families. This part of the mandate of the Trust Fund is to be implemented by employing the "*other resources of the Trust Fund*", that is, "*resources other than those collected from awards for reparations, fines and forfeitures.*"¹³

14. These other resources must be used for the benefit of victims and their families who have suffered harm as a result of the commission of a crime within the jurisdiction of the Court as defined by rule 85 of the Rules of Procedure and Evidence (the "Rules"), this possibility having been clearly conceived as a mean to go beyond the opportunity for a relevant Chamber to award reparations to specific victims or group(s) of victims.

¹¹ See Trust Fund notification, par. 10-11, 14, 16-17. See also regulation 3-13 of the Regulations of the Trust Fund, *supra* note 10.

¹² *Ibid.*, regulations 50(b). See also rule 98(3) of the Rules of Procedure and Evidence.

¹³ *Ibid.*, regulation 47.

15. As ascertained in the Notification, the capacity of the Trust Fund to undertake activities or projects for the benefit of victims and their families originated from the willingness of the States Parties to extend assistance to victims by means falling outside the parameters of the judicial proceedings. Indeed, the consequences of crimes that were committed during the course of a conflict for which the Court may exercise its jurisdiction, affect a large number of victims who may not be specifically connected to particular crimes pertaining to a case under the scrutiny of the Court, and as a result may fall outside the ambit of reparation proceedings.¹⁴

16. Furthermore, the Trust Fund has deliberately confined the methodology employed in choosing its specified activities to as the ones which would benefit or meet the needs of groups of victims.¹⁵ Such an approach not only benefits a large number of victims and takes into account the needs of communities as a whole, but also avoids the stigmatization of victims which will render void the objectives of the assistance provided and could put victims at risk.

17. The Legal Representatives are of the view that due to the needs existing in Northern Uganda as a consequence of the conflict, the flexible approach chosen by the Trust Fund appears to be necessary in order to provide assistance to a large number of victims who will not necessarily benefit from reparations awards ordered by the Court.

18. Finally, the procedure envisaged with regards to the distribution and the effective use of the resources collected and managed by the Trust Fund seems to ensure the good repartition of these resources. Moreover, the control exercised by the relevant Chamber on the initiatives of the Trust Fund, within the framework of its autonomous mandate, seems to be adapted to reach this balance.

¹⁴ See the Notification, *supra* note 3, paras. 6, 9, 12, 15, 29-30, 34-36 and 39.

¹⁵ See the Notification, *supra* note 3, paras. 25, 44, 52, 55 et 56.

19. Accordingly, the Legal Representatives are of the opinion that the activities included in the Notification will allow the Trust Fund to enter a pivotal phase of its operations to the benefit of victims and their families. As a consequence, it is appropriate that the projects and activities identified by the Trust Fund be implemented as soon as possible in order to promptly benefit victims who are in immediate need as a result of the conflict in Uganda.

III. CRITERIA UNDER REGULATION 50 OF THE REGULATIONS OF THE TRUST FUND ALLOWING THE IMPLEMENTATION OF THE SPECIFIED ACTIVITIES

20. Regulation 50(a) of the Regulations of the Trust Fund provides that:

"[...] the Trust Fund shall be considered to be seized when:

(a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families;

and

(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."

21. The Legal Representatives are of the opinion that regulation 50(a) of the Regulations of the Trust Fund establishes two criteria which are complementary and cumulative. The Legal Representatives consider that the Trust Fund, through its Board of Directors, has to employ a 'necessity test' to determine whether to provide

physical or psychological rehabilitation or material support for the benefit of victims and their families in the implementation of its specified activities.¹⁶ The evaluation of this need is thus left to the discretion of the Trust Fund which must interpret the relevant rules according to its specific expertise with regard to the principles governing the fields of development and humanitarian assistance. This discretion must, however, take place within a given framework since the specified activities ought not to pre-determine any issue to be determined by the Court, including the determination of its jurisdiction or the admissibility of a case. Moreover, they cannot violate the presumption of innocence or be prejudicial or inconsistent with the rights of the accused and a fair and impartial trial.¹⁷

(a) The Criterion under Regulation 50(a)(i) of the Regulations of the Trust Fund

22. With regard to the necessity to provide physical or psychological rehabilitation or a material support for the benefit of victims and their families, the method developed by the Trust Fund for assessing the concrete needs in the field, as well as the adequacy of the suggested projects and the type of assistance to be provided, must be successively studied.

23. Concerning the methodology developed by the Trust Fund, it falls under its specific field of expertise and seems to be modelled on the fundamental principles and the best practice in the development and humanitarian field¹⁸. The Trust Fund thus took care to evaluate the correspondence between the noted needs, the categories of assistance as specified in the Regulations of the Trust Fund and finally the projects suggested.¹⁹

¹⁶ See regulation 50(a)(i) of the Regulations of the Trust Fund, *supra* note 10.

¹⁷ See regulation 50(a)(ii) of the Regulations of the Trust Fund, *supra* note 10.

¹⁸ See the Notification, *supra* note 3, paras. 25, 44, 52, 55 and 56

¹⁹ *Ibid.* par. 28.

24. The discretion given to the Trust Fund with regard to this first criterion is crucial and extends to the interpretation of the relevant legal instruments. The principle with regards to interpretation of such texts is that they “*shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [relevant texts] in their context and in the light of [the texts’] object and purpose.*”²⁰ Consequently, the interpretation of the Regulations of the Trust Fund is left to the Fund which has to apply the principle of good faith interpretation taking into account the object and purpose of the said Regulations. However, this interpretation by the Trust Fund is subject to judicial scrutiny as far as the appreciation of the implementation of the good faith principle is concerned. The power of the Court under regulation 50(a)(i) of the Regulations of the Trust Fund is limited to this evaluation. Indeed, this power remains in the judicial domain while the expertise of the Trust Fund rests in the area of humanitarian assistance and development. Thus, the Legal Representatives are of the opinion that the power of the Chamber must be limited to verifying whether the Trust Fund abused its discretion in interpreting the relevant provisions.

25. The projects suggested by the Trust Fund in the Annex of the Notification²¹ seem to correspond to the three categories provided for in regulation 50(a)(i): physical or psychological rehabilitation and material support for the benefit of victims and their families. Some projects seem to include all the three aspects while others seem to focus on a particular category.

26. Moreover, the Trust Fund specifies in its Notification that the projects are to be implemented in Uganda, concentrating on the north of this territory.²² In this respect, the interpretation of the Trust Fund of the field of its specified activities seems to be in conformity with the letter of regulation 48 of the Regulations of the Trust Fund

²⁰ See Article 31(1) of the Vienna Convention on the Law of Treaties.

²¹ See the “Confidential Annex” to the Notification, No. ICC-02/04-114-Conf-Anx, 25 January 2008.

²² See the Notification, *supra* note 3, paras. 20 and 21.

which indicates that “[o]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence [...]”

(b) The Criterion under Regulation 50(a)(ii) of the Regulations of the Trust Fund

27. Regulation 50(a)(ii) of the Regulations of the Trust Fund provides that the Fund is considered to be seized, after having officially notified the relevant Chamber, this latter, *“has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction [...], admissibility [...], or violate the presumption of innocence [...], or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”*

28. The Legal Representatives are of the opinion that regulation 50-a-ii of the Regulations of the Trust Fund solely applies to cases brought before the Court. Indeed, at the situation stage and until a person sought by the Court has been identified, a notification of the Trust Fund cannot pre-determined an issue to be determined by the Pre-Trial Chamber. The Legal Representatives further note that the terms used in the examples provided for in regulation 50(a)(ii) of the Regulations of the Trust Fund are “accused” and “trial” and therefore seem to refer to a later stage of the proceedings. Moreover, the Legal Representatives submit that the specified activities of the Trust Fund as contained in the Annex to the Notification do not pre-determined any other issue on which the Pre-Trial Chamber could rule in the context of the situation in Uganda or of the pre-trial stage of the *Kony and al.* case.

29. In the alternative, with regard to the judicial and legal criteria subject to the evaluation by the Chamber, the Legal Representatives note that the Notification takes these criteria into account in the selection of its projects. Accordingly, the analysis

made by the Trust Fund in this respect complies with the requirements attached to the safeguard of issues which the Court might have to solve later on in the proceedings and with the rights of the Defence. Indeed, in demonstrating that the above-mentioned criteria are fulfilled, the Trust Fund relies on the following elements: the Notification relates to projects to be developed in the context of the situation in Uganda and not in the context of a particular case;²³ the Notification relates to project to be developed in the context of the situation in Uganda as referred to the Court by the Ugandan national authorities;²⁴ the projects are aimed at benefiting groups of victims as defined in rule 85 of the Rules of Procedure and Evidence²⁵ and are not limited to victims who appear or who participate in the proceedings before the Court. Consequently, the victims who are beneficiaries of the specified activities of the Trust Fund are not individually identified.

30. Moreover, the fulfilment of these criteria falls under the judicial and legal expertise of the Chamber, and as such, is to be evaluated by this latter when analysing the Notification. Concerning this issue, the Legal Representatives submit that if the Chamber considers that one of the proposed activities by the Trust Fund is not fulfilling the criteria established under regulation 50(a)(ii) of the Regulations of the Trust Fund, this does not justify a postponement of the implementation of the other activities included in the Notification. Indeed, the remaining specified activities not giving rise to any issue after the scrutiny by the Chamber ought to be implemented as soon as possible in order to protect the interests and meet the needs of the victims concerned in the best possible way. Moreover, since each project contained in the Notification has its own logic as well as distinct objectives which vary according to the groups concerned, the projects cannot be treated as a whole.

²³ *Ibid.*, par. 29.

²⁴ *Ibid.*, paras. 27-29 and 36.

²⁵ *Ibid.*, par. 32-35, 45, 46 and 49.

31. The Legal Representatives note that the Trust Fund took full consideration of the issues related to the protection of the victims concerned when developing its specified activities since it expressly mentions that *"each project has been designed to incorporate a protection approach."*²⁶ Moreover, the Trust Fund specifies that the method of implementation of the proposed projects has been chosen to protect the victims who will benefit from the specified activity.²⁷

32. Recalling their position with regard to the security of victims, as well as the responsibility of the Court in this regard and the fundamental nature of this issue in every activity undertaken by the Court, included by the Trust Fund, the Legal Representatives are of the opinion, together with the Fund, that there still exists a lingering danger, instability and conflict which continually threaten the safety and security of the victims in northern Uganda.

33. Furthermore, concerning the implementation of the specified activities of the Trust Fund, and in particular with regards to issues related to the protection of victims, the Legal Representatives are of the opinion that the Trust Fund may consult the persons listed in regulation 49 of the Regulations of the Trust Fund pursuant to which *"[t]he Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families as well as their legal representatives and may consult any competent expert or any expert organisation in conducting its activities and projects."*

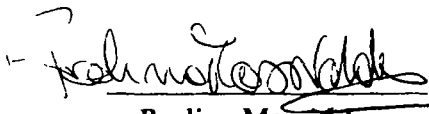
²⁶ See the Notification, *supra* note 3, par. 55.

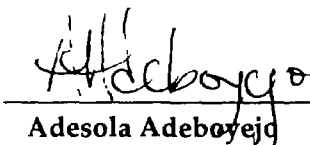
²⁷ *Ibid.*, par. 57.

IV. CONCLUSION

34. The Legal Representatives are of the opinion that regulation 50(a)(ii) of the Regulations of the Trust Fund does not apply within the framework of the situation in Uganda, nor at the preliminary stage of the *Kony et al.* case. Consequently, they fully support the projects presented by the Trust Fund in its Notification and wish for their implementation as soon as possible

35. In the alternative, should Pre-Trial Chamber II be of the opinion that Regulation 50(a)(ii) of the Regulations of the Trust Fund applies in the situation in Uganda and in the preliminary stage of the *Kony et al.* case, the Legal Representatives believe that the aforementioned projects do not pre-determine any issue to be determined by the Court nor do they violate the presumption of innocence or are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.


Paolina Massidda
 Principal Counsel
 Office of Public Counsel for Victims


Adesola Adeboyejo
 Counsel
 Office of Public Counsel for Victims

Dated this 12th day of March 2008

The Hague

The Netherlands

[Sceau de la Cour]