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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

OPCD Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims

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1. On 25 January 2008, the Board of Directors of the Trust Fund filed in the record of the situation in Uganda the Notification to Pre-Trial Chamber II concerning their intention to undertake specific activities in the territory of Northern Uganda.[1]
2. In this connection, Regulation 50 of the Regulations of the Trust Fund provides that the Trust Fund may seize itself of activities for the benefit of victims if "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 specified 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".
3. On 6 February 2008, the Office of Public Counsel for the Defence (OPCD) filed in the record of the Situation in Uganda the "Request for leave to file observations 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.'"[2]
4. On 5 March 2008, the Honourable Pre-Trial Chamber II issued a decision, in which the Chamber noted that "the general component of fairness, which extends to the pre-trial proceedings, requires those concerned by the Notification to be accorded equal procedural treatment".[3] The Chamber also held that "at the present stage of the proceedings, it is adequate and sufficient for the general interest of the Defence to be represented by the OPCD."[4]
5. The Chamber therefore granted the OPCD until Wednesday 12 March 2008 to file observations on the Notification of the Board of Directors of the Trust Fund.[5]

2. Insufficiency of information

6. The OPCD firstly submits that the information provided by the Trust Fund does not provide sufficient detail to enable either the Chamber or the parties to render a meaningful assessment as to whether the beneficiaries could be considered to fall under the definition of victim, as set out in rule 85, or whether the activities of the

[1] ICC-02/04-114
[2] ICC-02/04-115
[3] ICC-02/04-01/05-275 06-03-2008 3/5
[4] ICC-02/04-01/05-275 06-03-2008 4/5
[5] ICC-02/04-01/05-275 06-03-2008 5/5

Trust Fund would pre-determine any issues before the Court, or would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

7. The OPCD therefore respectfully requests the Honourable Pre-Trial Chamber to order the Trust Fund to file, on a confidential basis, more detailed information concerning the intermediaries utilised, the date, location and nature of the alleged crimes from which the beneficiaries allegedly suffered harm, and to provide the Prosecution and the OPCD with an opportunity to submit observations in light of this information.
8. Given that more detailed information concerning Trust Fund projects has already been publicly disseminated by the Trust Fund,[6] the OPCD respectfully submits that the provision of more precise information – on a strictly confidential basis – would not interfere with the security of the beneficiaries.
9. Pending the Chamber's determination of this request, the OPCD respectfully submits the following observations for the consideration of the Honourable Pre-Trial Chamber.

3. Preliminary observations concerning the underlying rationale of the use of 'other resources' of the Trust Fund

10. In its Notification, the Trust Fund has argued firstly, that the mandate of the Trust Fund to use "resources other than those collected from awards for reparations, fines and resources" (Rule 98(5)) for the benefit of "victims of crimes as defined under rule 85 […] and., where, natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes"[7] is generic in nature, and secondly, that rule 98 provides the Trust Fund with a "certain degree of discretion […] in identifying the best way to use "other resources" for the benefit of the victims in a different framework than the procedures that may apply for reparation awards". [8]
11. In terms of the ambit of rule 98, and the distinction between rule 98(3) and rule 98(5), the OPCD observes that the Court only has the power to award reparations

[6] See for example, L. Clifford, 'DRC: Court offers unique help scheme for victims' IWPR, 30 July 2007, in which the Director of the Trust Fund provides extremely precise details concerning the type of assistance provided in certain areas of Uganda.
[7] Regulation 48 of the Regulations of the Trust Fund.
[8] Notification at paras. 11 and 12.

through fines and forfeitures awarded against a convicted person.[9] In this regard, it should be noted that it is highly likely that many convicted persons will be indigent, or will not have sufficient assets to both fund their defence during the proceedings, and subsequently provide adequate redress to victims.

12. For this reason, rule 98(5) plays an important role in enabling the Trust Fund to provide resources for the benefit of a person adjudicated to be a victim, in the absence of any awards collected against the convicted person, or in the absence of a conviction. The interpretation of this provision is also expressly subject to article 79 (which is situated in the Penalties chapter of the Rome Statute), and the overall mandate of the ICC to promote peace and reconciliation through judicial mechanisms at either the local or international level.

13. The OPCD therefore queries whether rule 98(5) should be applied in a 'generic manner', without potentially prejudicing the capacity of this provision to address this lacuna in the Statute and Rules concerning the right of victims of serious violations of international criminal law to an effective remedy.

14. In this regard, the OPCD respectfully submits that the obligation to provide reparations is a more concrete and recognised obligation than the obligation to provide assistance.[10] As such, in the event of any potential financial conflicts between the two, the former should be accorded priority.

15. In terms of the applicable provisions of the Regulations of the Trust Fund concerning the intended beneficiaries of these other resources, the OPCD observes that during the drafting process, this element of the Trust Fund regulations was highly contentious. Indeed, the Regulations were not approved during the 3rd session of the Assembly of State Parties due to concerns the regarding the wording of this part.[11]

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[9] " Article 75 on reparations to victims, speaks in paragraphs 2, 3, and 4 of 'convicted person,' thus presupposing that reparation is due to the victim of a crime only when the alleged perpetrator of that crime is found guilty and 'convicted'. It would thus seem that Article 75 ignores the possibility for the reparation to the victim when the Court finds that the alleged perpetrator, although he has materially committed the crime, is nevertheless not guilty and punishable because his action is excused on one of the grounds excluding criminal responsibility provided for in the Statute. The Statute thus fails to envisage the principal reason for distinguishing between the two categories, as set out above." Cassese, "Justifications and Excuses in International Criminal law", in Cassese, Gaeta and Jones (ed) The Rome Statute of the International Criminal Court (2002) p. 955).

[10] "Up to this point there is no evidence in international or national law that there is a right to compensation, reparations, and redress other than as a consequence to the establishment of responsibility for the harm produced. Thus, the idealistic notion of providing compensation, reparations, and redress to a victim on the basis of human or social solidarity is not yet part of mainstream legal thinking, particularly in connection with criminal proceedings. Instead, we find this notion of human and social solidarity in social legislation that provides assistance to those in need and includes victims." M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6 Hum Rts L Rev 203 at p.2.

[11] "*Decides that*, subject to this resolution, Parts I and II of the draft Regulations of the Trust Fund for Victims, contained in annex A to the report to the Assembly of States Parties on the activities and projects of the Board of

16. The resulting text, which was eventually adopted, was intended to allay these concerns by requiring the Trust Fund to seek express or implied authorisation from the Chamber[12] before embarking on any projects which utilised these other resources. As such, this requirement should be interpreted and applied in an effective and rigorous manner, in order to give full effect to the intention of the drafters to create judicial oversight over the activities of the Trust Fund.

17. In addition, draft provisions which emphasised the discretion of the Trust Fund, and referred to its ability to provide assistance in a manner which was separate from the judicial activities of the Court were deleted. For example, the phrase "irrespective of the participation of the victim in the Court proceedings or his testimony before the Court" was deleted from the final version of regulation 45 (beneficiaries).[13] In addition, the following provisions were deleted from the draft regulation governing the use of the other resources of the Trust Fund:[14]

> a) To complement resources collected through awards for reparations, where the Court has made an order directly against a convicted person in accordance with article 75, paragraph 2, of the Statute and rule 98, sub-rules 1-4, of the Rules of Procedure and Evidence;
> (b) [*Alternative 1:* To provide for physical or psychological rehabilitation or material support where the Pre-Trial Chamber has authorized the commencement of an investigation in accordance with article 15, paragraph 3, and article 53 of the Statute, or where a situation has been referred to the Prosecutor by a State Party or the Security Council and the Prosecutor decides to initiate an investigation in accordance with article 53 of the Statute. The Board of Directors will determine the applicability of this provision.**]**
> [*Alternative 2:* To provide for {reparation, including} physical or psychological rehabilitation or material support where the Pre-Trial Chamber has issued, on the application of the Prosecutor and in conformity with article 58 of the Statute, a warrant of arrest of a person that is believed on reasonable grounds to have committed a crime within the jurisdiction of the Court.]
> [*Alternative 3: mirroring the language of Rule 53, Alternative 3*]
> [*Alternative 4: delete*]

Directors of the Trust Fund for Victims, 2003-2004, shall be applied provisionally, and r*ecognizes* that Part III of the draft Regulations will be a reference point for further work". *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Third session, The Hague, 6-10 September 2004,* (International Criminal Court publication, ICC-ASP/3/25), part III, resolution ICC-ASP/3/Res.7, operative para. 5.

[12] Regulation 50 envisages that either the Chamber will respond to the Trust Fund by indicating in a positive or negative manner as to whether the project could predetermine any issue before the Court, violate the presumption of innocence, or be prejudicial to or inconsistent with the rights of the accused or a fair and impartial trial, or the Chamber will implicitly authorise the projects by not issuing a negative decision within a period of 75 days from notification.

[13] Report of the Bureau on the Draft Regulations of the Trust Fund for Victims**,** ICC-ASP/4/29 http://www.icc-cpi.int/library/asp/ICC-ASP-4-29_English.pdf

[14] Draft Regulation 51, Report of the Bureau on the Draft Regulations of the Trust Fund for Victims**,** ICC-ASP/4/29 http://www.icc-cpi.int/library/asp/ICC-ASP-4-29_English.pdf

(c) [To provide for physical or psychological rehabilitation or material support, in exceptional circumstances, where the situation or the case is not being investigated or prosecuted by the Court because it is or has been investigated or prosecuted by a State which has jurisdiction over it in accordance with article 17 of the Statute or when a situation or case is not being investigated or prosecuted for reasons described in articles 53, paragraph 1(c) or 2(c). The Board of Directors will make a request to the Pre-Trial Chamber to determine the applicability of this provision, taking into account the situation of victims and the existence (or lack) of national or international programmes for the benefit of victims and their family members.] [*delete*]

18. Indeed, if reference were to be had to the draft Regulations, the most direct antecedent of the current version of regulation 50 appears to be the following provision, which provides that the Trust Fund may be seised:[15]

[*Alternative 3: By final decision of the Appeals Chamber on a challenge to the admissibility or jurisdiction in conformity with article 82 of the Statute*
In exceptional circumstances, where
(i) the Appeals Chamber has finally decided on appeal, pursuant to article 82 of the Statute, any challenge to the admissibility or jurisdiction pursuant to articles 18 and 19,
(ii) such seizure will not pre-determine any issue to be determined by the Trial Chamber or violate the presumption of innocence pursuant to article 66, and (iii) the seizure of the Trust Fund represents the only possibility of the provision of physical or psychological rehabilitation or material support for the benefit of victims and their family members. The Appeals Chamber will determine the applicability of this provision following representations from the Board of Directors and other interested parties.]

19. The above wording suggests firstly, that the ability of the Trust Fund to act absence a final judgment, was exceptional, and secondly, that in order not to predetermine any issues concerning admissibility or jurisdiction, it would be necessary to wait for a final decision from the Appeals Chamber concerning any challenges to admissibility or jurisdiction.

20. Finally, the OPCD observes that whilst, as noted above, there is a distinction between 'victim assistance' and reparations, many projects implemented by the Trust Fund either approximate the latter rather than the former, or appear to approximate development assistance rather than victim assistance linked to the mandate of the ICC.

21. In terms of the projects which approximate reparations, the OPCD observes that whereas the criteria for the management of the Trust Fund shall be established by the Assembly of State Parties, the actual principles governing reparations

[15] Draft Regulation 53, Report of the Bureau on the Draft Regulations of the Trust Fund for Victims**,** ICC-ASP/4/29 http://www.icc-cpi.int/library/asp/ICC-ASP-4-29_English.pdf

(including restitution, compensation, and rehabilitation) <u>shall</u> be established by the Court.[16]

22. It is therefore the responsibility of the Court, and not the Trust Fund, to ascertain the evidential threshold and criteria for reparations. This also requires the Court to exercise a level of judicial control over the disbursement of funds from an entity, which falls under the mandate and framework of the Rome Statute, in order to ensure that these principles are complied with.
23. At this point in time, the Court has not had occasion to define the principles concerning reparations. The OPCD is therefore concerned that premature authorisation of the activities of the Trust Fund could predetermine any case-related litigation concerning the principles governing reparations, and create unrealistic and unsustainable expectations concerning the outcome of reparation proceedings before the Court. It could also result in an inconsistent application of the principles concerning reparations.
24. In terms of the assistance projects of the Trust Fund, the OPCD observes that the United Nations Handbook on Justice for Victims[17] provides that the "goal of a victim assistance programme is to assist victims in dealing with emotional trauma, participating in the criminal justice process, obtaining reparation and coping with problems associated with the victimization."[18] Examples provided by the Handbook include providing assistance on obtaining lost documents necessary to establish property claims, and providing information concerning the legal avenues available to obtain a remedy.[19]
25. In light of the fact that the Trust Fund falls under the Rome Statute umbrella, a teleological approach to its mandate would suggest that its activities should also focus on the promotion of the rights of victims through the judicial process. An example of victim assistance in the ICC context could therefore include assisting persons who wish to participate or obtain reparations to obtain the documentation required to complete an application form, or providing interpretation facilities which enable such persons to properly understand the contents of these forms, or which would enable them to follow the proceedings before the ICC in a language which they understand.

[16] Article 75(1) of the Statute.
[17] United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims: On the Use and Application of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1999.
[18] At page 11.
[19] At page 18.

26. The OPCD notes in this regard that some of the projects, which focus on vocational issues or micro-credit assistance, do not appear to have any connection to the ability of the alleged victims to receive an effective remedy through the judicial process.
27. It also not apparent from the Trust Fund's filing as to whether the assistance of the Trust Fund addresses a real need, which cannot be met by other sources, or is simply supplementing/duplicating/or replacing the efforts of government authorities and existing donors.[20]
28. In this regard, the OPCD observes firstly, that the Juba Agreement, which was signed by the Government of the Republic of Uganda and the Lords Resistance Army,[21] obliges the parties to "promote national legal arrangements",[22] and "national ownership of the accountability and reconciliation process",[23] and further entails an obligation for the Government to provide collective and individual reparations for victims,[24] and secondly, that the UN Trust Fund for Security currently implements development oriented projects in Northern Uganda.[25]
29. Concentrating the funds of the Trust Fund on areas which fall within the mandate of other entities could have the effect of diluting the impact of international criminal justice, and deterring future donors. This possibility was evidenced by the closing statement of the representative of the Government of the United Kingdom at the 4th Assembly of State Parties:[26]

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[20] The UN Handbook on Justice for Victims also provides that "[i]n order to gain a general understanding of the needs of victims in a jurisdiction, it is important to analyse the gaps in and priorities of existing victim services, in order to identify what missing services are appropriate for the programme to implement" at page 12.
[21] "Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord Resistance Army/Movement Juba, Sudan" signed on 29 June 2007 http://www.beyondjuba.org/peaceagreements.aspx
[22] Article 2.1.
[23] Article 2.4.
[24] Article 9.2 of the Juba agreement, in conjunction with article 16 of the "Annexure to the Agreement on Accountability and Reconciliation signed between the Government of the Republic of Uganda and the Lord Resistance Army" on 19 February 2008
http://www.mediacentre.go.ug/uploads/Signed%20Annexure%20to%20Agreement%20on%20Accountability%20and%20Reconciliation.19.02.08%20_1_.pdf
[25]" [T]he Government of Japan and the United Nations (UN) decided to extend assistance of a total of 1,436,987.10 US dollar (approximately 155.19 million yen) through the Trust Fund for Human Security for the project "Multi-skills training and community service facilities for sustainable livelihoods and poverty alleviation - Reintegration of ex-combatants and former rebels" to be implemented by the United Nations Industrial Development Organization (UNIDO) in Uganda. […]This project is expected to benefit approximately 6,500 ex-combatants and former rebels through vocational training in woodworking, metalworking, food processing and assistance in starting micro-enterprises, and to contribute to poverty reduction in the target district through these activities." 'Assistance for a Poverty Alleviation Project for Ex-combatants in Northern Uganda through the Trust Fund for Human Security', 20 October 2005
http://www.mofa.go.jp/announce/announce/2005/10/1020-2.html
[26] Closing Statement by the United Kingdom at the Fourth Session of the Assembly of States Parties to the

> Mr President, the functions of the Fund are now significantly wider than our delegation had originally envisaged. This means that the Fund will now be operating in a field where there are many established providers of humanitarian and development assistance including those in civil society. These considerations, as well as our experience of the operation of the Fund in practice, will obviously need to be taken into account by the United Kingdom in deciding upon future contributions to the Fund.

30. In any case, the OPCD submits that at a minimum, the activities of the Trust Fund should be guided by the following principles, which are either expressly or implicitly required by the terms of regulation 50 of the Regulations of the Trust Fund:
    - the jurisdictional and admissibility requirements of the ICC;
    - the presumption of innocence and the principle of legality (in accordance with which the elements of crimes must be strictly construed);
    - the fairness and impartiality of the proceedings, which mandates that the Court cannot appear to have prejudged any issues which may be litigated before it in the future; and
    - the rights of future participants in the proceedings to a fair trial, in full equality.

4.1 Jurisdiction and admissibility

31. The ICC is constructed on the idea that the primary responsibility for providing an effective remedy is vested in the State; "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[27] As such, the ICC is a Court of last resort.
32. In order to trigger the competence of the Court, it is necessary to establish that the alleged offences are not being currently investigated or prosecuted by national authorities, or have not been finally adjudicated by national authorities.
33. The Uganda situation was referred to the Court by the Republic of Uganda itself. The OPCD observes in this regard that many commentators have questioned the legitimacy of self-referrals as a basis for triggering the jurisdiction of the Court.[28]

International Criminal Court, 28 November – 3 December, 3 December 2005 http://www.iccnow.org/documents/UK_GeneralDebate_3Dec05.pdf

[27] Preamble to the Rome Statute

[28] William A Schabas, An Introduction to the International Criminal Court (3rd ed.), Cambridge University Press, 2007 at p. 143; Antonio Cassese, Is the ICC Still Having Teething Problems?, Journal of International Criminal Justice, Volume 4, Number 3 (July 2006), 434-441; Paola Gaeta, Is the Practice of 'Self-Referrals' a Sound Start for the ICC?, Journal of International Criminal Justice, Volume 2, Number 4 (December 2004), 949-952.

34. It is also possible that given the tenuous legal basis for the initial referral, the Republic of Uganda might also attempt to void the self-referral by actively seizing itself of the investigation and prosecution of the alleged offences which fell under the terms of the initial referral. Indeed, the terms of the Juba agreement and its annex could be construed to amount to a positive declaration that the Republic of Uganda is both willing and able to assume responsibility for the judicial resolution of alleged violations of international criminal law. Such action would lay the groundwork for a potential challenge to admissibility under article 19(2), which could be filed either by the Republic of Uganda, or the defendants themselves.

35. In terms of the arrest warrants confirmed by the Pre-Trial Chamber, there appears to be strong indications that the defendants intend to challenge the admissibility of the case in the near future.[29] In this regard, in a decision issued on 28 February 2008,[30] the Honourable Pre-Trial Chamber referred to the Juba agreement and recent annex, and the implications which their terms could have for the execution of the arrest warrants pertaining to Kony et al. The Chamber therefore requested the "Republic of Uganda to provide the Chamber, at the earliest convenience, preferably no later than 28 March 2008, with detailed information on the implications of the Annexure on the execution of the Warrants and, in particular, on the following issues:

    1. The steps that the Republic of Uganda has undertaken or intends to undertake with a view to implementing the Principal Agreement and the Annexure;
    2. The exact competence attributed to the special division of the High Court of Uganda and specifically, the competence ratione materiae and ratione personae;
    3. The categories of offences and alleged perpetrators addressed by the traditional justice mechanisms and other alternative justice mechanisms referred to in the Annexure;
    4. The impact of the establishment of the special division of the High Court of Uganda and of recourse to traditional justice mechanisms or other alternative justice mechanisms on the execution of the Warrants

[29] Kony Lawyers to Seek Local Trial", by Henry Wasswa (IWPR), 19 February 2008, http://www.iwpr.net/ The OPCD nonetheless notes that the absent a valid power of attorney, the statement of the alleged representative of the LRA cannot be presumed to represent the future defence team's strategy.

[30] Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, 28 February 2008, ICC-02-04-01-05-274

and on the cooperation provided by the Republic of Uganda to the Court for their execution."

36. In light of the very real possibility that either the Republic of Uganda or the defendants in the Kony et al case might soon file challenges to the admissibility of the case against Kony et al, the OPCD respectfully submits that authorising the Trust Fund projects could create a public perception concerning the ICC's stance towards the Juba agreement and annex, and could thus create a perception that future challenges to admissibility have been predetermined.
37. In addition, if either the Pre-Trial Chamber or the Appeals Chamber were to conclude that the initial self-referral was invalid, or that the conditions of admissibility are not met, the Trust Fund would have no mandate as regards this situation and would thus be unable to meet its commitments to the beneficiaries.
38. The OPCD further observes that the ICC, as a treaty based institution, is primarily based on the idea of State consent: the State parties, by ratifying the Statute, consent to certain powers being vested in the ICC, and the respective organs of the ICC. The fact that the State parties have ceded certain rights is also counterbalanced by provisions in the Statute and Rules which oblige the Court to seek the observations of potentially affected State parties. For example, when the Prosecutor commences an investigation pursuant to either article 13(a) or 13(c), the Prosecutor is obliged to notify all State Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. These State Parties may then notify the Court that it is investigating or has investigated persons within its jurisdiction for these acts, and can request the Prosecutor to defer its investigations.[31]
39. Similarly, in deciding upon the disposition or allocation of a convicted person's property or assets, Rule 221(1) provides that "the Presidency shall, after having consulted, as appropriate, with the prosecutor, the sentenced person, the victims or their legal representatives ,the national authorities of the State of enforcement or any relevant third party, or representatives of the Trust Fund provided for in article 79, decide on all matters related to the disposition or allocation of property or assets realised through enforcement of an order of the Court".
40. Nonetheless, neither the Statute nor the Rules provide a mechanism by which a State party may consent or provide observations concerning the ability of the Trust Fund to undertake solely or jointly certain activities on its territory.

[31] Article 18(2) of the Rome Statute.

41. The confidential annex to the Trust Fund filings refers to areas which are not necessarily the subject of a public investigation or current prosecution before the ICC. Hence, in light of the fact that the activities of the Trust Fund might be occurring outside of the context of the actual proceedings before the Court, it is possible that State parties, which either could exercise jurisdiction or are actively exercising jurisdiction over these alleged offences, are not aware of the intended activities of the Trust Fund.
42. It also follows that local courts (and defendants appearing before these Courts) would not be aware of these activities, notwithstanding the possibility that the beneficiaries of the assistance may be appearing as witnesses in these proceedings. This is particularly problematic given the fact that offering assistance to persons, who allege that they have suffered from crimes, could distort national fact finding inquiries, and the credibility of these persons if they were to testify before national courts.
43. The OPCD submits that in accordance with the mandate of the ICC to eliminate impunity by acting as a guarantor that effective proceedings will either be launched at the national or international level, it should ensure that all activities associated with the Court do not prejudice or predetermine national proceedings.[32]
44. In this regard, Wierda and de Grieff have commented that

    > [I]t may be […] complex to devise a way in which the TFV [Trust Fund for Victims] could activate in respect of domestic proceedings without disturbing the appropriate relationship between the Court and domestic proceedings as regulated by the complementarity regime. Since funds within the TFV are likely to be limited in any case, the TFV should not assume additional responsibilities and raise false expectations in respect of domestic proceedings.[33]

45. Finally, the OPCD observes that the jurisdiction of the Court is further circumscribed by the gravity and nature of the alleged offences, and the temporal and geographic location of the alleged offences. It is not possible to assess these issues in a meaningful and effective manner due to the absence of any information

[32] The OPCD notes that during the drafting of the Rome Statute, it was recognised that "national courts could render a decision with respect to reparations in conflict with an order of the Court" and that "in the interests of legal certainty, [there should] be safeguards to prevent any such conflict". Bassiouni, The Statute of the International Criminal Court: A Documentary History (1998 Transnational Publishers) at p. 180, footnote 23. The OPCD submits that these concerns apply equally to the present scenario.

[33] Marieke Wierda and Pablo de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims', published by the International Centre for Transitional Justice (available at http://www.vrwg.org/Publications/02/ICTJ%20Trust%20Fund%20Paper.pdf), at p13.

concerning the nature, date, or location of the alleged offences (as opposed to the location of the beneficiaries). It is therefore not possible to ascertain that the alleged crimes occurred within the temporal and territorial jurisdiction of the ICC.[34]

46. The OPCD further observes that the jurisdiction of the ICC is expressly “limited to the most serious crimes of concern to the international community as a whole”. In selecting potential cases for investigation and prosecution before the ICC, it must be assumed that the Prosecutor is governed by this requirement.

47. Accordingly, if the Trust Fund were to utilise its other resources for the benefit of persons who have not suffered harm as the result of an alleged offence which is being actively prosecuted or investigated by the Court, it is possible that this jurisdictional requirement might not be met.[35]

48. The Trust Fund has not submitted any formula or criteria, which were used to verify factually and legally that the persons receiving assistance suffered harm as the result of a crime under the Rome Statute.[36] Indeed, the Trust Fund has not actually identified which specific crimes are alleged to have occurred: the confidential annex simply refers to ‘crimes within the jurisdiction of the court’.

49. In the absence of any information concerning how the Trust Fund assessed whether the elements of the alleged offences were met, it cannot be presumed that the threshold elements (gravity, existence of an international or internal armed conflict, or the existence of a wide-spread or systematic attack directed against a civilian population), which would trigger the jurisdiction and admissibility of proceedings before the Court, have been met.

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[34] The OPCD observes in this regard that the ad hoc counsel for the defence has already highlighted potential challenges to the temporal jurisdiction of the ICC as regards the Uganda situation and Kony et al case: Defence observations on applications for participation in the proceedings 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, 5 March 2007**,** ICC-02/04-01/05-21 at para.17.

[35] The OPCD observes that Principle 10 of the Basic Principles of Justice of Victims of Crime and Abuse of Power, which provides that a “person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted,” was intended to ensure “ *inter alia*, the application of the Declaration to civil and informal proceedings”; it was not intended to obviate the requirement that there must be some factual verification as to whether the person can be considered to be a victim: Guide for Policy Makers on the Implementation of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1999, at p. 16. http://www.uncjin.org/Standards/policy.pdf

Hence, in commenting on the implementation of the 2006 Basic Principles, which apply to “gross violations of human rights law” and “serious violations of international humanitarian law”, Bassisouni has observed that these terms “should be understood to qualify the situations with a view to establishing a set of facts that may figure as a basis for claims adjudication […]”; in other words, the right to assistance and a remedy is contigent on a factual determination as to the gravity or severity of the alleged offence. M. Cherif Bassiouni, ‘International Recognition of Victims’ Rights’ (2006) 6 Hum Rts L Rev 203 at p. 20.

[36] Regulation 42: The resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, *as defined in Rule 85* of the Rules of Procedure and Evidence

50. The OPCD is therefore concerned that the approach of the Trust Fund, apart from being *ultra vires*, may have the affect of watering down the gravity and strict elements of the offences under the Rome Statute, and could create unrealistic expectations concerning the role of the Court, and the evidential and legal standards required to ascertain responsibility for crimes under the Statute, and to award reparations for these crimes.

4.2 Presumption of Innocence and the Principle of Legality

51. The OPCD submits that the public announcement of an official entity associated with the Court that it is providing funds to certain projects which assist 'victims' of crimes within the jurisdiction of the Court, could prejudice the outcome of future proceedings relating to these alleged crimes.
52. In this regard, the ICTY has held that a non case-specific statement issued by the Registry that a crime base occurred could impact on the potential fairness of the proceedings against a defendant who may wish to challenge the existence of that crime base as part of their defence strategy.[37]
53. The OPCD further submits that the Regulations of the Trust Fund must be interpreted and applied in accordance with the Statute and Rules, and in the event of any inconsistency, the Statute and Rules shall prevail. In this connection, the OPCD respectfully submits that the powers of the Trust Fund under rule 98(5) should be construed in a manner which is consistent with rule 98 in its entirety. In this regard, the term 'victim' is used in rule 98(2) and (3) in the context of a post-judgment assessment that the person meets the definition of victim under rule 85(a), in accordance with the standard of beyond reasonable doubt. The OPCD therefore submits that the term 'victim' in rule 98(5) should also be construed in this manner.
54. This is also consistent with the fact that the powers of the Trust Fund, under article 79, are set out in the Chapter titled 'Penalties', which addresses the powers of the Court subsequent to a judgment issued in accordance with the standard of beyond reasonable doubt.[38]

[37] Prosecutor v. Popovic et al, Transcript of 26 March 2007 pages 9461-9465, http://www.un.org/icty/transe88/070326ED.htm

[38] See the Victims Rights Working Group, 'Comments on the Draft Regulations of the ICC Trust Fund for Victims', February 2005, (available at http://www.vrwg.org/Publications/01/VRWG_Feb2005.pdf), pages 9-10: 'This recommendation (of permitting rehabilitation where an investigation has commenced) has proved particularly problematic for some States that have raised concerns that the Regulation is too broad and that the Trust Fund should not conduct activities and projects during an investigation or trial but only after a conviction has been delivered'.

55. In this regard, the OPCD is aware that some observers have strongly attested that designating persons as victims as such does not impact on the presumption of innocence. For example, Donat-Cattin states that he does “not agree with the action as regarding as equal the presumption of innocence of the accused/suspect before conviction and the “putative” or “alleged” status of victims who are not recognised as such in judicial verdicts. Such a parallelism is unacceptable at least for two reasons. The first is related to the “historical” event that victimised an individual (i.e. a medically proved killing by a certain weapon) which remains true with or without a decision of conviction against a given perpetrator. The second is represented by the reality of National judicial systems that, on one side, fail to prosecute and punish an impressive number of authors of crimes, and on the other, admit victims to public recognition and provide for mechanisms to guarantee appropriate forms of reparation, including civil compensation”.[39]

56. The OPCD respectfully observes that this statement fails to take into consideration the distinction between domestic (or ordinary) crimes, and the crimes which fall under the jurisdiction of the ICC. Whereas domestic crimes can perhaps be incontrovertibly established by forensic evidence or by the testimony of the victim, whether an alleged event can be considered to be a crime under the Rome Statute depends on a number of complex factors, such as the intention of the perpetrator, the nature of the armed conflict, the existence of a policy or plan, an assessment as to whether the area attacked was a legitimate military target or whether the person attacked was a combatant.

57. The sheer scale of these inquires falls outside of the expertise of the Trust Fund.[40] It would also fundamentally damage the credibility of the Trust Fund if the Pre-

[39] D Donat-Cattin, ‘Protection of Victims and Witnesses’, Commentary on the Rome Statute of the International Criminal Court (Triffterer ed., 1999) fn 24 at p. 876.

[40] This difficulty was expressly recognised by the South African Truth and Reconciliation Commission: “There are major challenges for the reparation and rehabilitation process. ... [I]t is often difficult to distinguish victims from nonvictims and even to isolate key events that caused subsequent problems in people’s lives. It is not always possible to draw a clear line between a gross violation of human rights and the more general features of oppression. It is difficult to know where, in the ongoing development of individuals, families and communities, ne could measure the effects of human rights abuses, even if such measurement were theoretically possible.”
Truth and Reconciliation Commission of South Africa Report, Volume 6 – Section 2 – Chapter 7; Report of the Reparation and Rehabilitation Committee: Implications and Concluding Comments, at para. 6. http://www.info.gov.za/otherdocs/2003/trc/2_7.pdf
For this reason, United States courts have rejected claims under the Alien Torts Act concerning serious international crimes, such as genocide, which cannot be established through the testimony of a limited number of individuals: “Only individualized human rights claims against local government officials of the People’s Republic of China (PRC) for torture, cruel, inhuman, and degrading treatment, and arbitrary detention of the individual Falun Gong practitioners were justiciable; broader claims of genocide and crimes against humanity were non justiciable since they required findings of facts beyond those to which individual Falun Gong practitioners could competently testify and would enlarge the scope of the necessary factual inquiry.” Doe v. Qi, 349 F. Supp. 2d at para. 25.UN Human rights mechanisms concerning widespread and gross violations of human

Trial Chamber or Trial Chamber were to subsequently rule that these alleged 'historical events' either did not occur, or do not meet the definition of crimes under the Rome Statute.

58. The OPCD does however agree that it is possible for the Trial Chamber to rule that a person or persons can be considered to be victims of crimes under the Rome Statute, even if the accused is acquitted of responsibility for the act in question. In such circumstances, rule 98(5) would operate to ensure that there are no lacunae in terms of the right of victims who have been adjudicated as such to an effective remedy. However, it will only be apparent that it is necessary to have recourse to rule 98(5) once the Chamber has rendered its judgment.

4.3 Fairness, impartiality, and integrity of the proceedings

59. The Trust Fund has not adduced any transparent criteria as to how and why it selected the projects in question.[41] This is particularly problematic since the actions of the Trust Fund occur outside the context of a case, which is impartially adjudicated in accordance with the standard of beyond reasonable doubt.

60. In this connection, whereas providing reparations to victims following a final judgment is a purely judicial act, providing 'assistance' to persons has far greater political connotations, and raises issues of possible discrimination between beneficiaries and non-beneficiaries. Hence, if the Trust Fund were to concentrate on victims from only one side of the conflict, this could hinder reconciliation efforts, and reinforce the perception that the Court has granted *de facto* immunity to the government which referred the situation.

61. In this connection, Juba agreement emphasises firstly, that a "comprehensive, independent and impartial analysis of the history and manifestations of the conflict […] is an essential ingredient for attaining reconciliation at all levels",[42] and secondly, the importance of applying criminal and civil justice measures to any individual, notwithstanding their association with Government forces.[43] It could potentially counter these reconciliatory efforts if entities associated with the ICC were to adopt a contrary approach, which could reinforce perceived grievances between the parties.

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rights also require complainants to adduce evidence that a pattern of gross violations exists: 'What should complaints under the 1503 procedure include?' http://www.un.or.th/ohchr/complaints/faq.html#compindtreat.

[41] The OPCD respectfully submits that the methodology set out at paragraph 26 of the Notification lacks the transparency and accountability required to trigger the disbursement of international funds in such a sensitive and important area.

[42] Article 2.3.

[43] Article 4.1

62. At paragraph 27 of the Notification, the Trust Fund states that in order to assess whether crimes within the jurisdiction of the Court were committed, the Trust Fund "analysed decisions taken by Pre-Trial Chamber II, as well as reports from local, international NGOs and international organizations which all concluded that mass crimes within the jurisdiction of the Court have been committed after the 1 July 2002 on the territory of Northern Uganda.[44]

63. The OPCD firstly observes that the decisions of Pre-Trial Chamber II concerning the existence of alleged offences within the territory of Northern Uganda are pending potential challenges from either the Republic of Uganda or the defendants themselves. The status of these decisions is thus highly provisional.[45] It is therefore prejudicial to the outcome of future proceedings to use these preliminary decisions as a basis for the disbursement of funds.

64. In terms of the Trust Fund's reliance on IGO and NGO reports, the OPCD observes firstly that as repeatedly held by the Human Rights Committee, in the absence of supporting documents, NGO reports are not in themselves sufficiently reliable to establish personal harm.[46] In addition, reliance on particular NGO reports necessarily involves an element of pre-selection and partiality.

65. In addition, these reports may be relied upon to support prosecution cases before the ICC. The credibility and admissibility of the contents of these reports and the testimony of the personnel must ultimately be adjudicated by the Pre-Trial Chamber and the Trial Chamber. As such, reliance on information within these reports appears to predetermine the outcome of the Chamber's determination, and creates the public perception that the Trust Fund supports the Prosecution case against these defendants.

66. It is also possible that members of the local and international NGOs, who are responsible for implementing the projects of the Trust Fund, could participate in the proceedings in the future as witnesses for the Prosecution. It is thus highly

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[44] At paragraph 27.

[45] The Honourable Pre-Trial Chamber has expressly stated that its findings concerning admissibility and jurisdiction, as set out in the arrest warrants, are "without prejudice to subsequent determination": Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, ICC-02/04-01/05-53 at para. 38.

[46] Kouidis v. Greece, CPR/C/86/D/1070/2002 at paras 7.3 and 7.4; ZZ v Canada: .Z. (name withheld) v. Canada, Communication No. 123/1998, U.N. Doc. CAT/C/26/D/123/1998 (2001).
See also Article 56(4) of the African Charter on Human and Peoples Rights (adopted June 27, 1981), which stipulates that complaints before the African Commission can not be exclusively based on media reports, and Fact Sheet 7 Rev. 1 concerning the 1503 complaints procedure, "It is not sufficient to rely on mass media reports; specific evidence should be provided. In short, there must be reasonable grounds to infer from the material that the alleged pattern of gross human rights violations exists." (http://www.unhchr.ch/html/menu6/2/fs7.htm).

inappropriate for the Trust Fund to provide money to persons or entities, whose credibility might subsequently be an issue before the Court.

67. Finally, it is possible that recipients of assistance could eventually be prosecuted by either national courts or before the ICC, which could further impugn the credibility of the role of the ICC.

68. The OPCD is thus concerned that if entities associated with the Court, such as the Trust Fund, were wade in without weighing the consequences of providing assistance to certain persons or verifying whether the persons involved in the assistance programmes could potentially be involved in the actual proceedings before the Court, it could severely impact on the credibility of the Court, and the perception of impartiality of the proceedings.

69. For these reasons, the Court and entities associated with the Court should exercise extreme caution in terms of both the persons or groups of persons identified as being suitable beneficiaries, and the intermediaries involved in the compensation process, and should publish transparent criteria concerning the selection process.

4.4 The rights of future participants in the proceedings to a fair trial, in full equality

70. The OPCD submits that if any of the beneficiaries of the Trust Fund were to participate in the proceedings in the future as either a witness or as an applicant for participation under article 68(3), both the fact and the nature of the assistance could be subject to disclosure obligations.

71. For example, the ad hoc Tribunals have held that the fact that a witness has received counselling,[47] or benefited directly or indirectly from their status as a witness or alleged victim[48] potentially impacts on their credibility, and as such, falls under the Prosecutor's disclosure obligations.

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[47] Thus, in the Prosecutor v. Furundzija, the Trial Chamber "found that there had been serious misconduct on the part of the Prosecution in breach of Rule 68, and that the Defence consequently was prejudiced. It therefore ordered that the proceedings were to be re-opened only in connection with the medical, psychological or psychiatric treatment or counselling received by Witness A after May 1993, and the Prosecution was ordered to disclose any other connected documents." Trial Judgement of 10 December 1998, Prosecutor v. Anto Furundzija, IT-95-17/1, at para 22.

[48] For example, in the Prosecutor v. Martic, witness MM-079 "testified that after his lawyer had suggested that he contact the Tribunal to seek assistance with his asylum, he was interviewed by the Prosecution, and that he was subsequently informed that the Prosecution had written a letter to the authorities of the state where he currently lives to ask that he be allowed to stay there until he finishes testifying at the Tribunal".[48] The Prosecution "acknowledged that the evidence of Witness MM-079 should be "scrutinized with care" since "he said that he hoped to receive the assistance of the OTP to remain in the country where he is relocated.""[48] The Chamber ultimately concluded that in light of the assistance provided to witness MM-079 and another Prosecution witness, "there is significant doubt as to the credibility of both witnesses". The Chamber therefore

72. The OPCD observes that whereas the merits and weight of these arguments must be adjudicated by the Chamber seised of the actual case, it would be in the interests of justice for the Prosecutor to be in a position to fulfil such disclosure obligations should the need arise.

73. For these reasons, the OPCD respectfully submits that in order to preserve the rights of future participants (in particular, future defence teams), it would be in the interests of justice for the Chamber to order the Trust Fund to provide these details in a confidential *ex parte* register to the Prosecution, which would thus enable the Prosecution to fulfil future disclosure obligations.

5. Relief Sought

74. In light of the above submissions, the OPCD respectfully requests the Honourable Pre-Trial Chamber to:

- request the Trust Fund to provide, on a confidential basis, more detailed information concerning the intermediaries utilised, and the date, location and nature of the alleged crimes from which the beneficiaries allegedly suffered harm; and
- provide the Prosecution and the OPCD with an opportunity to submit additional observations in light of this information before rendering a decision on this issue.

75. In the alternative, the OPCD respectfully requests the Honourable Pre-Trial Chamber to take into consideration the above observations.

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gave "weight only to the parts of their respective evidence which are corroborated by other evidence". Trial Judgment of 12 June 2007, at paras. 37-38,
http://www.un.org/icty/martic/trialc/judgement/mar-tcjud070612e.pdf.
See also Prosecutor v. Zigiranyirazo, Scheduling Order – In Camera Hearing On Prosecutor's Motion To Permit Limited Disclosure Of Information Regarding Payments And Benefits Provided To Witness Ade And His Family *Rules 66(C) And 68(D) Of The Rules Of Procedure And Evidence*, 19 January 2006; and Prosecutor v. Bizimungu, Decision On Prosper Mugiraneza's Motion For Records Of All Payments Made Directly Or Indirectly To Witness D, 28 September 2006.

Mr Xavier-Jean Keïta
Principal Counsel of OPCD

Dated this Wednesday, the 12th of March 2008

At The Hague, The Netherlands