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Date: 14 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

URGENT

**Board of Directors of the Trust Fund for Victims' application for leave to respond to
the "OPCD observations on the Notification under Regulation 50 of the
Regulations 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 Defence

Mr. Xavier-Jean Keïta

Office of Public Counsel for Victims

Ms Paolina Massidda

Legal Representatives for the Victims

a/0101/06 and a/0119/06

Ms Paolina Massidda

Legal Representatives for the Victims

a/0090/06, a/0098/06, a/0112/06, a/0118/06
and a/0122/06

Ms. Adesola Adeboyejo

I. BACKGROUND

1. On 28 January 2008, in accordance with regulation 50 of the Regulations of the Trust Fund for Victims¹ (the “Regulations”), the Board of Directors of the Trust Fund (“Board of Directors” or the “Board”) notified Pre-Trial Chamber II (the “Chamber”), of its conclusion to undertake specified activities in the territory of Uganda² (the “Notification”).
2. On 6 February 2008, the Office of Public Counsel for the Defence (the “OPCD”) filed 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.’”³
3. On 12 February 2008, the Office of Public Counsel for the Victims (the “OPCV”) filed 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.”⁴
4. On 18 February 2008, the legal representatives of victims /0101/06 and a/0119/06 filed the “Observations du représentant légal des victimes a/0101/06 et a/0119/06 suite à la notification de Conseil de direction du Fonds au profit des victimes conformément à la règle 50 du Règlement du Fond.”⁵
5. On 19 February 2008, the Prosecutor filed the “Prosecution’s Observations on the ‘Notification of the Board of Directors of the Trust Fund for Victims’”⁶ and the

¹ The Regulations of the Trust Fund, adopted 3 December 2005 by Resolution ICC-ASP/4/Res.3.

² ICC-02/04-114 and ICC-02/04-114-Conf-Anx.

³ ICC-02/04-115.

⁴ ICC-02/04-116.

⁵ ICC-02/04-118.

⁶ ICC-02/04-119.

“Corrigendum to Prosecution’s Observations on the ‘Notification of the Board of Directors of the Trust Fund for Victims.’”⁷

6. On 6 March 2008, the Chamber issued the “Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims”⁸ in the record of the Case in which it requested “the legal representatives 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.”⁹ In the same decision the Chamber granted the OPCD until Wednesday 12 March 2008 to file their observations on the Notification.”¹⁰

7. On 12 March 2008 the legal representatives of victims a/0090/06, a/0098/06, a/0112/06, a/0118/06 and a/0122/06 submitted to the Chamber the “Observations of legal representatives of victims on the Notification of the Board of Directors of the Trust Fund for Victims.”¹¹

8. On 12 March 2008 the Office of Public Counsel for the Defence (the “OPCD”) filed the “OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims.”¹²

9. The Board believes it is necessary to respond to the abovementioned Observations submitted by the OPCD (the “Observations”), and hereby respectfully requests leave to file a response.

⁷ ICC-02/04-119-Corr.

⁸ ICC-02/04-01/05-275

⁹ ICC-02/04-01/05-275, page 5.

¹⁰ Ibid.

¹¹ ICC-02/04-01/05-277.

¹² ICC-02/04-01/05-279.

II. LEGAL BASIS AND RELEVANCE OF THE REQUEST

The legal basis of responding to the Observations

10. The Board of Directors seeks leave to respond to the Observations pursuant to regulations 22, 24, and 28 of the Regulations of the Court. Since the Board has not yet been specifically designated as a participant in the present proceeding, it is obliged to file an application for leave to respond.

11. Regulation 24 of the Regulations of the Court states:

“ 1. The Prosecutor and the Defence may file a response to any document filed by any participant in the case in accordance with the Statute, Rules, these Regulations and any order of the Chamber.

2. Victims or their legal representatives may file a response to any document when they are permitted to participate in the proceedings in accordance with article 68, paragraph 3, and rule 89, sub-rule 1, subject to any order of the Chamber.

3. States participating in the proceedings may file a response to any document, subject to any order of the Chamber.”

12. As the proceeding concerning the Notification of the Board to undertake specified activities pursuant to regulation 50(a) of the Regulations was established after the adoption of the Regulations of the Court, the drafters could not anticipate during the *travaux préparatoires* the necessity to add the Board to the list of those entitled to participate in the present proceeding.

13. Consequentially, regulation 24 of the Regulations of the Court does not establish any provision allowing the participation of the Board.

14. However, this should not lead to the conclusion that the Board does not have the right to participate in this specific proceeding. Indeed, the Board, in accordance

with regulation 50 (a) of the Regulations, initiated the Notification to the Chamber and has a significant interest in participating. Moreover, the Board considers itself to be a party *strico sensu* since without the Board this proceeding would not exist.

15. The inclusion of the Board of Directors as a participant in the present proceeding is consistent with Regulation 24 (1) of the Regulations of the Court, which states that “(1) *The Prosecutor and the Defence may file a response to any document filed by any participant in the case [. . .].*” The mentioning of “any participant” implies that there are more participants, than those mentioned in the Regulation that can be included by this regulation.

16. Due to the necessary involvement in the proceeding the Board should be considered a “participant” entitled to file a response in the present proceeding.

17. Should the Chamber not grant the Board the right to respond as a participant, in accordance with regulation 24 of the Regulations of the Court, the Board respectfully requests that the Chamber grant the Board leave to comment on the Observations.

18. In its decision filed on 6 March 2008, the Honourable Chamber stated that the “*general component of fairness [...] requires those concerned by the Notification to be accorded equal procedural treatment.*”¹³ The Chamber has observed that “*the notion of fairness of the proceedings should be preserved to the benefit of all participants in the proceedings.*”¹⁴

19. As the Chamber has observed¹⁵ the notion of fairness has been defined by international human rights conventions,¹⁶ and “*what is essential in determining whether*

¹³ ICC-02/04-01/05-275, page 3.

¹⁴ ICC-02/04-112, para 27.

¹⁵ ICC-02/04-01/05-275, page 3.

fairness is preserved is that participants be granted a genuine opportunity to [...] be apprised of and comment on the observations and evidence submitted to the Court that might influence its decision."¹⁷

20. The Board respectfully submits that even if it is not granted a participatory status, it is a *de facto* participant in the present proceeding and since the notion of fairness applies as much to the Board as any other participant, the Chamber should provide the Board with the "genuine opportunity" to comment on the Observations.

21. Even if the Honourable Chamber decides that the Board is not a participant in the present proceeding, the Board wishes to respectfully suggest that it provide clarifications and explanations on the Observations. In the "Decision in the Request of the Trust Fund to Respond to the Observations"¹⁸ of Pre-Trial Chamber I on 28 February 2008, the Chamber stated that it "*would greatly benefit from having additional clarifications and explanations from the Board on the Observations made by the Prosecution, the OPCD, the OPCV and the Legal Representatives of Victims.*"¹⁹

The relevance of responding to the Observations

22. The present application by the Board of Directors to grant the Board leave to a) respond, or b) comment, or c) file clarifications and explanations on the Observations is necessary because:

23. The response of the Board might be significant for the Chamber's determination of the scope and mandate of the Trust Fund under rule 98(5) of the Rules of Procedure and Evidence and regulation 50(a) of the Regulations.

¹⁶ Inter alia, Article 6 of the European Convention on Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 14 of the American Convention on Human Rights and articles 7 and 26 of the African Charter on Human and People's Rights.

¹⁷ ICC-02/04-01/05-90, para 24.

¹⁸ ICC-01/04-473.

¹⁹ ICC-01/04-473, page 4.

24. This is the first time the Board has notified the Chamber of its conclusion to undertake specified activities and the requested response will provide explanations and clarifications on possible misinterpretations by the OCPD of the two mandates; and provide information on the operational and program realities of the Trust Fund. In this regard, Pre-Trial Chamber I has already granted leave to the Prosecutor to reply to observations *“considérant la nouveauté de la question de la participation des victimes au stade de l’ enquête et le fait que pour la première fois, VPRS1 a VPRS 6 s’ opposent a une requitte du Procureur a ce stade.”*²⁰ As the Honourable Chamber is aware, whereas new issues have arisen from the Notification, the present proceeding has also produced a novelty which necessitates a respond.

25. As the specified activities intend to benefit targeted groups of victims, the Board wishes to underline that this request to the Chamber, takes into account the needs of victims, stipulated in rule 86 of the Rules.

26. The Board submits to the Chamber that the requested response relates to issues put forward in the Observations and assures the Honourable Chamber, if it is granted leave to respond, of its intention to respond quickly and with brevity.

FOR THE FOREGOING REASONS

The Board of Directors hereby respectfully requests the Pre-Trial Chamber II to:

- (i) Designate the Board of Directors as participant for the limited purpose of the present proceeding, and
- (ii) Grant the Board leave to a) respond, or b) comment, or c) file clarifications and explanations on the Observations submitted by OPCD, in either written form or at a public hearing.

²⁰ ICC-01/04-110.



André Laperrière
Excecutive Director
Secretariat of the Trust Fund for Victims

Dated this 14 March 2008

At The Hague, The Netherlands