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Date: **6 March 2008**

PRE-TRIAL CHAMBER I

Before: **Judge Akua Kuenyehia, Presiding Judge**
Judge Anita Ušacka
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

Public Document

Clarifications and Explanations on the Observations of the Office of Public Counsel for the Defence of 20 February 2008 by the Board of Directors of the Trust Fund for Victims Pursuant to the Decision of Pre-Trial Chamber I of 28 February 2008

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I. BACKGROUND

1. On 24 January 2008, the Board of Directors of the Trust Fund for Victims ("the Board of Directors" or "the Board'') notified Pre-Trial Chamber I ("the Chamber"), pursuant to paragraph 50(a) of the *Regulations of the Trust Fund for Victims*[1] ("the *Regulations of the Fund*"), of its conclusion[2] ("the Notification") to undertake specified activities listed in the annex.[3]

2. On 5 February 2008, the Chamber issued its *Decision on the time limit for the filing of observations on the Notification of the Board of Directors of the Trust Fund for Victims*,[4] inviting the Fund to disclose, as confidential, additional information to the Prosecutor and the Office of Public Counsel for the Defence ("the Office" or the "the OPCD"). By the same decision, the Chamber granted the Prosecutor, the OPCD and the Legal Representatives of the Victims authorised to participate the opportunity to submit their observations on the Notification no later than 20 February 2008.

3. On 7 February 2008, the Board of Directors filed the requisite additional information as confidential, available to the Prosecution and the OPCD only.[5]

4. On 19 February 2008, the Office of Public Counsel for Victims ("the OPCV"), acting as Legal Representative, submitted its observations on the Notification.[6] On 20 February 2008, the Prosecutor,[7] the OPCD,[8] and the Legal Representatives of the

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[1] *Regulations of the Trust Fund for Victims*, ICC-ASP/4/Res.3, 3 December 2005, in ICC-ASP/4/32, Fourth Session.
[2] ICC-01/04-439.
[3] ICC-01/04-439-Conf-Anx.
[4] ICC-01/04-441.
[5] ICC-01/04-445-Conf.
[6] ICC-01/04-460.
[7] ICC-01/04-462.
[8] ICC-01/04-458 and ICC-01/04-459-Conf.

Victims, Mr Keïta[9] and Mr Daoud and Mr Baudoin,[10] respectively, filed their observations.

5. On 25 February 2008, the Board of Directors of the Fund respectfully submitted to the Chamber an "*application for leave to respond to the 'OPCD [the ''Office of public counsel for Defense''] Observations on the Notification*'".[11]

6. On 28 February 2008, the Chamber issued its *Decision on the request of the Trust Fund for leave to respond to the Observations*[12] granting leave to "*the Board to file its clarifications and explanations on the Observations''* and specifying that the "*the 45-day deadline which commenced on 24 January 2008, plus the 60-day extension granted by the Board, shall be suspended until the Board files its clarifications and explanations*".[13]

7. It is against this background, that pursuant to the said Decision and on the basis of regulation 28(3) of the *Regulations of the Court*, the Board of Directors files these clarifications warranted by a reading and analysis of the OPCD's observations only (the "Observations").[14]

[9] ICC-01/04-461. Mr Keïta is the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06.
[10] ICC-01/04-463. Mr Daoud and Mr Baudoin are the Legal Representatives of Victims 'VPRS 1 to VPRS 6 and a/0071/06'.
[11] ICC-01/04-471.
[12] ICC-01/04-473.
[13] *Ibid*., p. 5.
[14] See *supra*, footnote 8.

II. DISCUSSION

The sufficiency of the additional information

8. The Office of Public Counsel for the Defence's main submission is that the additional information provided by the Board of Directors,[15] pursuant to the decision of Pre-Trial Chamber I of 5 February 2008, is insufficient.[16] Accordingly, the OPCD requested "*the Honorable Pre-Trial Chamber to order the Trust Fund to file, on a confidential basis, more detailed information concerning the intermediaries utilized, the date, location and nature of the allegedly suffered harm*".[17]

9. The Board of Directors, which has already complied with the Chamber's Decision by disclosing all the requisite additional information to the OPCD and the Prosecutor on 5 February,[18] must object to filing additional information, including on a confidential basis.

10. It should be pointed out that, in accordance with article 68(1) of the Statute of the International Criminal Court, the Chamber confined itself to requesting from the Board of Directors only additional information pertaining to "*specific places the activities will be pursued, the types of victims the activities are intended to benefit, and the particular crimes allegedly falling within the Court's jurisdiction that the activities intended to address*".[19]

11. Mindful of the Court's responsibility in this respect, the Chamber justified this restriction by the need to protect the victims and therefore "*to avoid that a victim who will benefit from the specified activities of the Trust Fund would be identified and considered as having contact with the Court through the Trust Fund*"[20] and "*to avoid letting the*

[15] See *supra*, footnote 5.
[16] See *supra*, footnote 4.
[17] See Observations, *supra*, footnote 8, paras. 6 to 9, 23 to 27, 57.
[18] See *supra*, footnote 5.
[19] See *supra*, footnote 4, p. 3.
[20] ICC-01/04-456, p. 3.

beneficiaries be identified because of the physical and/or psychological rehabilitation and/or material support".[21]

12. Accordingly, the said OPCD request for access to further confidential information constitutes a request for reconsideration of the Chamber's Decision even though "*in principle, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Pre-Trial Chamber or the single Judge*",[22] as recalled by the Chamber in its *Decision*[23] *on the "Demande du BPCV d'accéder au document confidentiel déposé par le Conseil du Fonds d'affectation spéciale au profit des victimes le 7 février 2008"*.[24]

13. In any case, the sufficiency of the information registered is also substantiated by the lack of an identical request from the Prosecutor, who, being in possession of the same additional confidential information as the OPCD, was able to submit his observations to the Chamber.[25] In fact, it must be noted that despite its request, the Office of Public Counsel for the Defence had sufficient information insofar as it was able to file its observations.

14. Accordingly, the Board of Directors must object to this OPCD observation on both procedural and protection-related grounds.

The Trust Fund for Victims' second mandate differs significantly from its reparations mandate

15. The Office of Public Counsel for the Defence submitted observations revolving mainly around the concept of reparations, thus seriously conflating the Fund's two mandates,[26] and going as far as to liken the Fund's second mandate to "*propaganda and private retribution*".[27] Without reiterating the contents of its Notification, the Board

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[21] *Ibid.*
[22] ICC-01/04-01/06-166 and ICC-01/04-01/06-123.
[23] ICC-01/04-456.
[24] *Ibid.*
[25] See *supra*, footnote 7.

of Directors must provide clarifications in response to the Observations in order to avoid any confusion which could arise from a reading of the said document.

16. As stated in the Notification, the Assembly of States Parties entrusted the Trust Fund for Victims with two separate mandates.[28]

17. Indeed, the Fund's second mandate which consists of providing, when "*the Board of Directors considers it necessary […] physical or psychological rehabilitation or material support for the benefit of victims and their families*"[29] is rooted in rule 98(5) of the *Rules of Procedure and Evidence* read together with paragraphs 47, 48, 49 and 50 of the *Regulations of the Trust Fund for Victims*.

18. These legal provisions, which were reviewed in one of the *travaux préparatoires*[30] which resulted in the adoption of the *Regulations of the Fund*, show very clearly[31] what the States Parties' intended when they conferred this second mandate upon the Fund. In support of this clarification, the Board of Directors refers, *inter alia*, to the "*Report of the Bureau [of the Assembly of States Parties] on the draft Regulations of the Trust Fund for Victims*"[32] to which are appended "*the Draft Regulations of the Trust Fund for Victims*". States Parties as well as a representative of the Registry contributed to its drafting.

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[26] See Observations, *supra*, footnote 8, *inter alia*, Introduction and paras. 10, 11, 12.
[27] See Observations, *supra*, footnote 8, Introduction.
[28] See Notification, *supra*, footnote 2, paras. 5 to 17.
[29] See paragraph 50 of the *Regulations of the Trust Fund for Victims*, *supra*, footnote 1.
[30] See resolution ICC-ASP/4/29, 21 November 2005, Fourth Session.
[31] *Ibid.*, pp. 10 and 11.
[32] See resolution ICC-ASP/4/29, 21 November 2005, Fourth Session.
The said document shows that the other resources of the Trust Fund for Victims shall be otherwise used:

> *(a) To complement resources collected through awards for reparations, where the Court has made an order directly against a convicted person (…)*
> *(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 (…) 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.] (…)*
> *(c) [To provide for physical and 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 and prosecuted by a State which has jurisdiction over it in accordance with article 17 of the Statute or when a situation or a case is not being investigated or prosecuted for reasons described in article 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).*

(See resolution, p. 11), the Fund shall then be seized, "*by decision of the Pre-Trial Chamber*''. See resolution, pp. 11 and 12.

19. It flows from the above-mentioned texts that the Fund's second mandate is indeed separate from its reparations responsibilities and is not restricted only to those cases where, despite the fact that "*victims […] have been adjudicated*",[33] "*the accused is acquitted of responsibility for the act in question*".[34] Accordingly, the Board of Directors, having provided notification of specified activities falling solely within the physical/psychological and material support mandate, none of the arguments advanced by the OPCD is admissible or has merit.

20. Indeed, the Office of Public Counsel for the Defence observes, firstly, that "*the actual principles governing reparations (including restitution, compensation, and rehabilitation) shall be established by the Court. […] At this point in time, the Court has not had occasion to define the principles concerning reparations*".[35]

21. This observation pertaining to reparations cannot succeed: article 75, which states that "*[t]he Court shall establish principles relating to reparations*", does not place on the Court the onus of drafting the principles relating to rehabilitation and material support activities. The principles governing the Fund's second mandate were considered and adopted "*according to criteria […] determined by the Assembly of States Parties*",[36] as contemplated by the annex to the Resolution[37] pursuant to which the Trust Fund for Victims was established.[38] The OPCD is therefore wrong to state "*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*

[33] See Observations, *supra*, footnote 8, para. 39.
[34] *Ibid.*
[35] See Observations, *supra*, footnote 8, paras. 10 and 11.
[36] Article 79(3) of the *Rome Statute*.
[37] *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*, Resolution ICC-ASP/1/Res.6, 9 September 2002.
[38] See resolution on 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, Third Plenary Session and the annex to the resolution para. 7: "*The Board shall, in accordance with the provisions of the Rome Statute, the Rules of Procedure and Evidence, and the criteria to be determined by the Assembly of States Parties, establish and direct the activities and projects of the Trust Fund and the allocation of the property and money available to it*."

unsustainable expectations concerning the outcome of reparation proceedings before the Court".[39]

22. Accordingly, the Board of Directors respectfully requests the Chamber not to take this argument into consideration.

23. In addition, the Office of Public Counsel for the Defence invokes the principle of complementarity to object to the "*specified activities*"[40] which the Board of Directors considered necessary to undertake to "*provide physical or psychological rehabilitation or material support*".[41]

24. While the Board of Directors fully respects State sovereignty and cannot exercise the responsibilities of States, which prevail with respect to the management of their internal affairs, article 1 of the Statute none the less states very clearly that the Court "*shall be complementary to national criminal jurisdictions*". As previously explained[42] by the Board of Directors and by the OPCV,[43] the Fund's second mandate is not connected to the case-related proceedings conducted by the Court or even to those conducted by national courts: hence, the principle of complementarity does not apply to the Fund's second mandate.[44]

25. Accordingly, the OCPD's observation that the specific activities that the Board of Directors intends to undertake in the territory of the Democratic Republic of the Congo "*prejudice or predetermine national proceedings*"[45] is unsustainable.

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[39] See Observations, *supra*, footnote 8, para. 12.
[40] See *supra*, footnote 1, paragraph 50(a)(ii).
[41] See *supra*, footnote 1, paragraph 50(a)(i).
[42] See para. 17 and *supra*, footnote 27 of this document and the Notification, *supra*, footnote 2, paras. 11 to 17.
[43] "[TRANSLATION:] This aspect of the mandate (Funds' other resources) is therefore directly implemented by it and is separate from that which is derived from the activities and projects undertaken pursuant to a decision of the Court." See *supra*, footnote 6, para. 10.
[44] Nevertheless, abiding by good humanitarian practice, the Fund notified its activities, which were developed in full respect of the sovereignty of the Democratic Republic of the Congo and national and international programmes for the assistance of victims of crimes within the Court's jurisdiction. However, the Board of Directors emphasises that the specified activities benefit the victims and not the Congolese State.
[45] See Observations, *supra*, footnote 8, paras. 18, 21, *inter alia*.

26. Similarly, the OCPD's observation pointing out that "*the Trust Fund should also verify whether alleged victims of the offences have already been compensated or will be compensated by national authorities*"[46] cannot succeed: indeed, as the specific rehabilitation and/or material support activities cannot be classified as reparation, they can in no way lead to compensating the same victim twice over for harm suffered as a result of crimes falling within the jurisdiction of the Court.

27. In support of this clarification, the Board of Directors recalls that the specific activities notified respond – by way of a community approach – to the need for psychological and physical rehabilitation and material support arising as a result of the crimes enumerated in article 5 of the Statute committed in the territory of the DRC after 1 July 2002. Under no circumstances does the Board of Directors aim to respond – in the context of its second mandate – to the harm suffered by any identified victim as a result of the commission of crimes by any accused, who would himself have been identified.

28. Lastly, the Board of Directors can only underscore the non-applicability of the case-law of the International Court of Justice cited[47] by the OCPD in support of its observation. The OCPD seeks to prove that the victims could receive reparations twice over for the harm they suffered: on the one hand, benefitting from the specific activities and, on the other, receiving part of the sum to be paid to the DRC by Uganda.

29. The judgment cited by the OCPD has no relevance whatsoever. Indeed, in saying "*that the Republic of Uganda is under an obligation to the Democratic Republic of the Congo to make reparation for all injury caused*",[48] the said Court clearly indicated that in that case it was a matter of reparation, in fact, interstate reparation. Accordingly, this observation must be disregarded taking into account the nature of the second mandate of the Fund, especially because, as the Defence itself points out, "*the ICJ*

[46] See Observations *supra*, footnote 8, para. 20.
[47] See Observations, *supra*, footnote 8, para. 20.
[48] See *Democratic Republic of the Congo v. Uganda*, ICJ Judgement 19 December 2005, No. 116, para. 345 (5).

cannot direct the Government of the DRC as to where and in what manner it should divest this compensation, when it eventually receives it".[49]

30. Together, the above clarifications by the Board of Directors establish very clearly and without any ambiguity the second mandate of the Trust Fund for Victims. Accordingly, in notifying the Chamber of the specific activities with the intention of undertaking them in the Democratic Republic of the Congo, the Board of Directors acted in accordance with rule 98(5) as well as with the *Regulations of the Trust Fund for Victims* and did not therefore act "*ultra vires*", as the OCPD would have it.[50]

The nature of the second mandate of the Trust Fund for Victims differs considerably from the mandate of the Victims and Witnesses Unit

31. In view of the observations submitted by the Office of Public Counsel for the Defence pertaining to the impact of the specific activities on the judicial proceedings, the Board of Directors wishes to respond with the following clarifications.

32. The OCPD observes that "*the local courts (and defendants appearing before theses 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*".[51]

33. The OCPD extends this argument to pending or future proceedings before the International Criminal Court: "*if entities associated with the Court, such as the Trust Fund, were made 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*

[49] See Observations, *supra*, footnote 8. It is, therefore, far from certain that the victims of crimes within the jurisdiction of the Court will benefit from this potential reparation. The Board of Directors points out that this issue might be relevant if and when the Chamber will rule on reparations, however it is not relevant at this point.
[50] See Observations, *supra*, footnote 8, para. 30.
[51] See Observations, *supra*, footnote 8, para. 17.

the credibility of the Court, and the perception of impartiality of the proceedings. […] 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".[52]

34. These observations must surely be disregarded, given the OPCD's confusion as to the nature of the assistance provided by the Victims and Witnesses Unit (the "VWU"), under certain conditions, to victims and witnesses participating in the proceedings with that of the specific activities falling under the second mandate of the Trust Fund for Victims.

35. In fact, the first type of assistance – that provided by VWU – is expressly provided for in the founding texts of the Court[53] and thus differs from that provided by the Trust Fund as follows: VWU is indeed mandated to provide "*counselling and other appropriate assistance for witnesses, victims who appear before the court, and others who are at risk on account of testimony given by such witnesses*".[54]

36. It is clear that the purpose of such assistance is to help them, during the proceedings, to manage and deal with participation, a process which for them could be a real ordeal. As such, the support provided by VWU is intrinsically linked to participation as victims or witnesses; for this reason, such assistance must be particularised and defined in order to preclude it from having any effect on participation and on the reality of the facts reported.

37. The same cannot be said of the specific physical and/or psychological rehabilitation and material support activities notified by the Trust Fund with a view to undertaking them in the field in the Democratic Republic of the Congo. The Board of Directors reiterates the non-judicial nature of this mandate, which is unrelated to

[52] See Observations, *supra*, footnote 8, paras. 51 and 53.
[53] See articles 43(6) and 68(4) of the Statute, regulation 89 of the *Regulations of the Registry*.
[54] See article 43(6) of the Statute.

pending and/or future proceedings before the International Criminal Court or domestic courts.[55] Contrary to the OCPD's contention,[56] the consequence of this is the total lack of impact "*on the credibility of the court, and the perception of impartiality of the proceedings*".

38. Accordingly, the case-law[57] cited and argued by the Office of Public Counsel for the Defence in support of its arguments does not apply to the specific activities that the Board of Directors intends to undertake in the field in the DRC. Indeed, and by way of example, the part of the judgment of 12 June 2007[58] cited by the OCPD relates to the assistance received by Prosecution witnesses in relation to their testimony and in order to facilitate such testimony. Under the system put in place by the Rome Statute, this assistance corresponds to the support that VWU may provide to Prosecution witnesses as well as to Defence witnesses, for that matter, and is therefore entirely dissimilar to specific activities. Accordingly, the Board of Directors must invite the Chamber to disregard such case-law, which is entirely irrelevant to the matter presently at issue.

39. It should also be pointed out that requests for assistance have already been sent erroneously to the Secretariat of the Trust Fund by victims seeking to participate and victims already participating in the proceedings, and that the Secretariat automatically and immediately referred those involved to VWU on the grounds that such requests do not fall within the Fund's mandate. In so doing, the Board of Directors respects "*the clear division of labor between the functions of the VWU and the Trust Fund for Victims*".[59]

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[55] See Notification, *supra*, footnote 2.
[56] See Observations, *supra*, footnote 8, para. 51.
[57] See Observations, *supra*, footnote 8, paras. 54 and 55; footnote 25.
[58] *Prosecutor v. Milan Martic*, Judgment, 12 June 2007, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of former Yugoslavia since 1991, Trial Chamber I, IT-95-11-T.
[59] See "*Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*", by Marieke Wierda and Pablo de Greiff, in International Center for Transitional Justice publication, p. 13.

40. Accordingly, the Office of Public Counsel for the Defence is wrong in alleging that the specific activities are allegedly inconsistent with the rights of the accused – current and future – as well as with the fairness and impartiality of Congolese and international proceedings.

41. Accordingly, the Board of Directors respectfully invites the Chamber to disregard these observations submitted by the OCPD.

Deadline

42. By the same decision granting leave to the Board of Directors "to file its clarifications and explanations on the Observations", the Chamber decided that "*the 45-day deadline which commenced on 24 January 2008, plus the 60-day extension granted by the Board, shall be suspended until the Board files its clarifications and explanations*".[60]

43. The Board of Directors respectfully indicates to the Chamber that it could not agree that a period of 60 days be added to the initial 45-day deadline. In fact, paragraph 50(a)(iii) provides that "*the Trust Fund shall be considered to be seized when: […] [s]hould there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii) [45 days]*."

44. Accordingly, the overall deadline can only be 60 days, that is, 45 days to which the Chamber requested that an extension of 15 days be added, and not a 105-day deadline. The Board of Directors notes therefore that the deadline, which applies to the current notification procedure and as extended pursuant to paragraph 50(a) of the *Regulations of the Trust Fund*, will expire on 31 March 2008.[61]

[60] See Decision of Pre-Trial Chamber I, *supra*, footnote 12, p. 5.
[61] In other words, 45 days plus 15 days plus the number of days (7) during which the deadline was suspended pending the present clarification by the Board of Directors.

IN VIEW OF THE FOREGOING CLARIFICATIONS,

The Board of Directors respectfully requests Pre-Trial Chamber I:

- to disregard the inappropriate observations filed by the Office of Public Counsel for the Defence,

- to consider, whether expressly or not, within the agreed deadline, that is before 31 March 2008, that the specific activities notified by the Board of Directors do not 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*".

[signed]

André Laperrière,
Executive Director,
Secretariat of the Trust Fund for Victims

Dated this 6 March 2008

At The Hague