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No.: ICC-01/04
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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 CONGO

Public Document

Observations of 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 and a/0228/06 on the Notification of the Board of Directors of the Trust Fund for Victims

The Office of the Prosecutor

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Defence Mr Jean Xavier Keita

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Secretariat of the Trust Fund for Victims

André Laperrière, Executive Director

BACKGROUND

1. Considering 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"¹ ("the Notification") filed on 24 January 2008 in the record of the Situation of the Democratic Republic of Congo by the Board of Directors ("the Board") of the Trust Fund for Victims ("the Trust Fund");

2. Considering the Pre Trial Chamber's "Decision on the time limit for the filing of observations on the Notification of the Board of Directors of the Trust Fund for Victims"² dated 5 February 2008 whereby the Prosecution, the OPCD and the legal representatives of those who have been granted the procedural status of victim may file observations on the Notification by 20 February 2008 at 4:00 p.m.;

3. Noting the decision of the Single Judge of Pre-Trial Chamber I dated 24 December 2007, as corrected by decision dated 31 January 2008, according the procedural status of victim in the Situation in the Democratic Republic of Congo to, *inter alia*, 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, a/0228/06.

4. 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, a/0228/06 (the "Legal Representative") submits the following observations on the Notification of the Board of Directors of the Trust Fund for Victims.

¹ 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, ICC-01/04-439, 24 January 2008.

² Decision on the time limit for the filing of observations on the Notification of the Board of Directors of the Trust Fund for Victims, ICC-01/04-441, 5 February 2008.

I. The Board of Directors' consideration that it is necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families

5. In accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims, it is respectfully submitted that the determination of whether it is indeed necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families is a decision solely within the remit of the Board of Directors. In the same light, Regulation 50(a) does not extend so far so as to task the relevant Chamber with determining whether the activities and projects identified by the Board of Directors are the most appropriate, timely and effective responses to the needs identified, and/or whether the intended beneficiaries are the most deserving.

6. It is submitted that the considerations of the relevant Chamber differ fundamentally from that of the Board of Directors. The relevant Chamber is concerned with the issues set out in sub-paragraph (ii) of Regulation 50(a) which fall appropriately within its mandate to ensure the effective administration of justice and to make certain that there is no inadvertent adverse impact on same as a result of the Board of Directors' independent decisions. The Pre-Trial Chamber, or other relevant Chamber notified by the Board of Directors in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims, is tasked only with determining and so informing the Board of Directors whether a specific activity or project would pre-determine any issue to be determined by the Court, violate the presumption of innocence or be prejudicial to the rights of the accused and a fair and impartial trial.

7. This interpretation is consistent with the independent mandate of the Board of Directors vis-à-vis voluntary contributions and other funding sources which do not derive from the Court's enforcement procedures. Regulation 47 of the Regulations of the Trust Fund for Victims makes clear that "other resources of the Trust Fund" set out in rule 98, paragraph 5 of the Rules of Procedure and Evidence refers to "resources other than those collected from awards for reparations, fines and forfeitures." The phrase "Other resources of the Trust Fund" therefore refers to voluntary contributions and such resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate.³ To involve the relevant Chamber in considerations about such "other sources" may negatively interfere with their judicial functions and impact upon their independence.

8. It is submitted that the notification procedure under Regulation 50 (a) should not be used to fulfil extraneous functions not linked to the Chamber's decision under subparagraph (ii) of Regulation 50(a). For example, regulation 49 which indicates that *"The Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families as well as their legal representatives and may consult any competent expert or any expert organization in conducting its activities and projects,"* should not be fulfilled through the Board of Director's notification to the relevant Chamber. Indeed, the Legal Representative for Victims would hope that the Board of Directors would seek out more direct routes of consultation outside of the proceedings before the relevant Chamber. It is understood that the purpose of such consultations is to assist the Board to gain a detailed understanding of the most urgent needs of victim communities from the widest possible array of sources, in order to enable it to decide on whether it is indeed necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families and if so, the most appropriate, timely and effective responses to the needs identified. In contrast, such consultations

³ Regulation 21 of the Regulations of the Trust Fund for Victims.

would not be aimed at seeking approval or comments on projects and activities already decided upon by the Board of Directors.

II. The 'livelihood' assessments and other consultations undertaken by the Trust Fund for Victims should not engage Subparagraph (ii) of Regulation 50(a)

9. As is explained in para. 22 of the Notification provided by the Board of Directors, it is expected that the Trust Fund for Victims will be required to undertake extensive preparatory work to enable it to be in a position to know whether Regulation 50(a)(i) is applicable, and if so, to assist it to formulate targeted and workable responses to the identified needs.

10. Such assessments and other consultations may at times go beyond simple consultations though the assessments themselves should not be considered to be "specific activities" under Regulation 50(a)(ii), otherwise this would risk to introduce significant obstacles and delays to the process. The conduct of such assessments and consultations with a view to determining needs and identifying potential projects and activities does not pre-determine issues before the Court as by its nature, it is preparatory work and does not serve as a determination, let alone a pre-determination.

B. Whether a specific activity or project would pre-determine any issue to be determined by the Court

11. The test for the relevant Chamber pursuant to Regulation 50(a)(ii) is whether: “a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

12. It is submitted that the relevant Chamber should adopt a narrow approach in determining whether a specific activity or project would pre-determine any issue to be determined by the Court. The relevant Chamber should consider whether there would be any pre-determination in respect of the particular project or activity under consideration, as opposed to on a *prima facie* basis.

13. It is submitted that specific activities and projects identified in the Notification of the Board of Directors which relate to the situation in the Democratic Republic of Congo do not pre-determine an issue related to jurisdiction pursuant to article 19. The Statute, Rules of Procedure and Evidence and Regulations of the Trust Fund for Victims are all silent on the extent to which a link is required, if at all, between the decision of the Board of Directors to initiate projects and activities and some specific action or decision relating to a situation or particular investigation. The Prosecutor has already made a determination, under article 53 of the Statute and rule 104 of the Rules of Procedure and Evidence, that there is a reasonable basis to initiate an

investigation,⁴ and it is submitted that this determination by the Prosecutor is sufficient to trigger the Board of Directors' competence in respect of "victims of crimes within the jurisdiction of the Court" in the instant case.

14. Enabling the Trust Fund for Victims to use its "other resources" for the benefit of victims of a situation is consistent with Regulation 42 of the Regulations of the Trust Fund for Victims which provides that "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, and, where natural persons are concerned, their families."

15. It is submitted that the specific activities and projects set out in the Notification of the Board of Directors of the Trust Fund for Victims do not pre-determine any issue to be determined by the Court relating to admissibility. The State of the Democratic Republic of Congo referred the situation in its country to the ICC thereby accepting in principle the Court's jurisdiction in respect of the situation. Furthermore, the activities and projects identified in the Notification which are of an essentially humanitarian nature do not have the character or purpose to ascribe jurisdiction to the Court nor do they provide any evidential basis for a legal finding of the Court regarding admissibility or jurisdiction.

16. In considering whether a specific activity or project would negatively impact on the presumption of innocence of a particular accused person, it is submitted that the Pre-Trial Chamber should be mindful that the existence of victims does not impact in any way on the recognition of particular individuals as responsible for the crimes.⁵

⁴ Decision assigning the Situation in the Democratic Republic of Congo to Pre-trial Chamber 1, ICC-01/04-1 5 July 2004.

⁵ "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between

17. In considering whether a specific activity or project would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial, it is submitted that the relevant Chamber should be mindful that the role of the defence is not necessarily to disprove the occurrence of crimes in general or the existing or suffering of victims. The implementation of the projects and activities of the Trust Fund for Victims is not related to questions pertaining to the guilt or innocence of any suspect or accused person or to the credibility of Prosecution witnesses. Hence, it is difficult to see how defence rights set out in Article 67 of the Statute would be negatively affected by the projects and activities.⁶ The usual role of the defence is to demonstrate that the Prosecution has failed to prove the culpability of the accused for specific crimes for which he or she is charged. Consequently, the possibility of prejudice is entirely context and case specific, based upon the particular charges and evidence put forward. Provided that a particular project or activity of the Trust Fund for Victims does not expressly or impliedly point to the particular guilt of an accused in respect of actual charges in the indictment, it is difficult to see how any prejudice might arise.

18. Paragraph 34 of the Notification of the Board of Directors indicates that the specified activities should benefit groups of victims as opposed to individually identified victims. This group approach which does not limit the beneficiaries of

the perpetrator and the victim." *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. See also the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Adopted by General Assembly resolution 40/34 of 29 November 1985 which recognizes in principle A(2) that "2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

⁶ Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, ICC-02/05, 3 December 2007, at paras. 6, 20.

assistance from the Trust Fund for Victims to witnesses in the prosecution is most consistent with a fair and impartial trial in that it avoids all possible inferences that witnesses are coming forward to testify in order to obtain some form of assistance from the Trust Fund for Victim. The de-linking of the assistance function of the Trust Fund for Victims from the prosecutorial and trial process of the Court is therefore highly appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Me Joseph KETA



The Legal Representative of the Victims

Dated this 20 February 2008

At London / Bunia