Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-02/11**
Date: **31 August 2020**

PRE-TRIAL CHAMBER II

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding Judge**
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE

Public

OPCD Observations on the TFV Regulation 50 Notification

Source: **Office of Public Counsel for the Defence**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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I. INTRODUCTION

1. As invited by Pre-Trial Chamber II ("PTC II"), the Office of Public Counsel for the Defence ("OPCD") submits observations on the Notification by the Board of Directors, in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims, of its conclusion to undertake assistance activities in Côte d'Ivoire ("TFV Notification").[1] In sum, the OPCD makes no specific objection to the broadly outlined activities in the proposed programme, but requests certain safeguards in the manner of executing the assistance so as to not predetermine any issue to be determined by the Court or prejudice any right of defendants in any ongoing or future cases.

II. RELEVANT PROCEDURAL HISTORY

2. On 23 June 2011, the Prosecutor filed a request to investigate *proprio motu* in Republic of Côte d'Ivoire.[2]

3. On 3 October 2011, the Chamber authorised the commencement of an investigation in Côte d'Ivoire, first, for crimes within the jurisdiction of the Court committed since 28 November 2010 and, second, for any continuing crimes that may be committed in the future, "insofar as the contextual elements of the continuing crimes are the same as for those committed prior to 23 June 2011".[3] On 22 February 2012, Pre-Trial Chamber III expanded its authorisation for the investigation in Côte d'Ivoire to include crimes within

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[1] *Situation en République de Côte d'Ivoire*, Notification par le Conseil de direction du Fonds au profit des victimes de sa conclusion en vue d'entreprendre des activités spécifiques en République de Côte d'Ivoire conformément à la règle 50 (a) du Règlement du Fonds au profit des victimes, 27 juillet 2020, ICC-02/11-55.

[2] *Situation in the Republic of Côte d'Ivoire*, Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3.

[3] *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation in the Situation in the Republic of Côte d'Ivoire", 15 November 2011, ICC-02/11-14-Corr, paras 179 and 212.

the jurisdiction of the Court alleged to have been committed between 19 September 2002 and 28 November 2010.[4]

4. Since 2012, the Prosecution has publicly issued three arrest warrants in the Situation; two have resulted in full acquittal by the Trial Chamber (pending Prosecution appeal)[5]; one remains at a pre-confirmation/admissibility stage.[6]
5. On 27 July 2020, the Board of Directors of the Trust Fund for Victims ("TFV") submitted the TFV Notification proposing 'the need to undertake specific activities with a view to offering physical and psychological rehabilitation and material support for the benefit of the victims and their families of CIV, in response to crimes committed within the jurisdiction of the Court in Côte d'Ivoire since 19 September 2002'.[7]
6. On 6 August 2020, PTC II invited observations of the OPCD, the Office of Public Counsel for Victims, and the Prosecution on the proposed activities of the TFV Notification.[8]

III. OPCD MANDATE (RoC 77)

7. The OPCD references its mandate as promulgated by the Judges of the ICC in Regulation of the Court ("RoC") 77.[9] As the following observations would apply equally to the general Defence interests of any unrepresented actual or potential suspects in the Situation of Côte d'Ivoire, they are submitted pursuant to RoC 77(4)(a) "*on the instruction or with the leave of the chamber, mak[ing] submissions concerning the needs of the defence in ongoing proceedings*";

[4] *Situation in the Republic of the Côte d'Ivoire*, Decision on the "Prosecution's provision of further information regarding potentially relevant crimes committed between 2002 and 2010", 22 February 2012, ICC-02/11-36, para. 37.
[5] ICC-02/11-01/15.
[6] ICC-02/11-01/12.
[7] TFV Notification, para. 2 (« *à la nécessité d'entreprendre des activités spécifiques en vue d'offrir une réadaptation physique et psychologique et un support matériel au profit des victimes et des membres de leurs familles en CIV, en réponse aux crimes relevant de la compétence de la Cour subis en CIV depuis le 19 septembre 2002* »).
[8] Email of 6 August 2020 from PTC II to, *inter alia*, OPCD Principal Counsel, Xavier-Jean Keïta.
[9] RoC 77 was originally adopted by the Judges of the Court on 26 May 2004. It was subsequently amended by the Judges on 2 November 2011, with entry into force on 29 June 2012.

however, these submissions should not cause prejudice to defendants themselves, who may reserve the right to assert additional or, even, contrary submissions based on their own assessment and interest.

IV. OBSERVATIONS

8. PTC II has recently recalled the powers a Chamber has in scrutinizing the proposed assistance mandate activities of the TFV noting that it "must be satisfied that the proposed activities or projects:

   (i) are specific enough as to enable the Chamber to carry out its analysis, which excludes mere programme outlines or lists of suggested activities to potential implementing partners; and

   (ii) fulfil the criteria governing the Chamber's scrutiny as laid down in regulation 50(a)(ii) of the Trust Fund Regulations, which provides, *inter alia*, that the Chamber may 'inform the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the [Rules], would pre-determine any issue to be determined by the Court, including 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'."[10]

9. As the OPCD has expressed before, Rule 98(5) plays an important role in enabling the TFV to provide resources for the benefit of a person adjudicated to be a victim in the absence of a conviction.[11] This provision allows the needs

[10] *Situation in the Central African Republic*, Information to the Trust Fund for Victims on the 'Notification by the Board of Directors in accordance with regulation 50 (a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake specified activities in the Central African, 8 April 2020, ICC-01/05-100, ("CAR Information"), para. 5.

[11] *See Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, 12 March 2008, ICC-02/04-122, paras 12-13; *Situation in Uganda*, Public Redacted Version of the "Observations on the Notification of the TFV", 30 January 2019, ICC-02/04-234-Red, paras 13-14; *Situation in the Central African Republic*, Public

of victims in Situation countries to be addressed without creating expectation or urgency for a certain outcome in any specific case.

10. However, the OPCD also reiterates the need for concrete assurances in undertaking any such activities to ensure that no violation of the rights of named or yet-unknown suspects occurs in the process. While the language of the current TFV Notification appears generally neutral, the OPCD highlights the need to ensure that 1) implementation activities do not develop in such a way so as to create prejudice; and 2) that information on beneficiaries and selected victims are kept to a judicial standard to ensure that such information can be fully disclosable at the time of any further proceedings.

A) Avoiding prejudice to current or future suspects and/or accused

11. The OPCD notes that the current request broadly outlines three projects for physical and psychological rehabilitation and material support,[12] and that no specific suspect, accused, or groups of perpetrators are named in the TFV Notification at this time. The role of the Court to remain vigilant to any prejudice does not, however, end here, and the OPCD reincorporates by reference its previous concerns that language to be used in the programming and reports be perpetrator-neutral and refrain from making any predeterminations that should be left for the ultimate finder of fact.[13] As highlighted by PTC II, "for these risks to be adequately neutralised, the proposed activities must be 'defined in a non-discriminatory manner, without reference to any identified suspect/accused or particular victim(s)'".[14]

Redacted Version of "OPCD Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims", 3 April 2020, ICC-01/05-98-Red, para. 7.

[12] TFV Notification, Annex I.

[13] *See* I *Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, 12 March 2008, ICC-02/04-122, para. 6; *Situation in Uganda*, Public Redacted Version of the "Observations on the Notification of the TFV", 30 January 2019, ICC-02/04-234-Red, paras 17-18.

[14] CAR Information, para. 7.

12. Of primary concern is that it has been shown in previous assistance mandate renewals that language can develop over the life of such projects[15] and care must be taken to ensure that the TFV, itself, or its partners create careful terminology in these programmes to avoid prejudice to those who will come before the Court in the actual judicial proceedings.[16] Therefore, the OPCD respectfully requests that the Chamber direct the TFV to ensure that specific groups or actors are not named in their work; specifically, that this will not be included in terms of reference for vendors or included in any training and that the TFV will monitor the work to ensure that the type of assistance being rendered is that approved by the Chamber and remains distinct from 'reparations' as defined in the Rome Statute.

B) Ensuring information on beneficiaries remains available for potential judicial proceedings

13. Further, should the proposed programme be authorised, in line with the case law of the Court, the OPCD respectfully requests the Pre-Trial Chamber to direct the TFV, and/or any implementing partner, to inform the Court if any beneficiary of the programme ever appears as a potential witness at the Court. This is so that the relevant defendant may be informed of this fact, and he or she would have an opportunity to make arguments on the admissibility and probative value of that witness's testimony.[17]
14. While this specific relief was rejected in the CAR I Situation before this honourable PTC as "speculative and vague, in the absence of any active or

[15] *See Situation in Uganda*, Public Redacted Version of the "Observations on the Notification of the TFV", 30 January 2019, ICC-02/04-234-Red, paras 19-25.
[16] *See previous OPCD submissions in this regard at Situation in Uganda*, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, 12 March 2008, ICC-02/04-122, paras 15-18, 51-58. *See also* Situation in the Central African Republic, Public Redacted Version of "OPCD Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims", 3 April 2020, ICC-01/05-98-Red, para. 17.
[17] *See Situation in the DRC*, Decision on 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, 11 April 2008, ICC-01/04-492, pp. 9–10.

prospective new case related to the CAR I Situation", there is a fundamental difference in the status of proceedings in CIV I Situation in that there are active cases on appeal and one named defendant at the pre-confirmation level. Further, the ICC Proposed Programme Budget for 2021 indicates that investigations in CIV II Situation will continue and "the [OTP] expects to reach the point where a warrant of arrest is issued".[18] The OPCD submits that such requested measure is necessary at this stage of the CIV Situations and warranted to ensure that information procured in the assistance activities remains available for future litigation, particularly as the TFV and its implementing partners will be active in the region at the same time as the OTP investigations. The stated relief is nothing more than a request for an instruction to all involved in this work to preserve information collected for purposes of ligation without any duty to collect information it would not necessarily take in the conduct of such assistance. Such retention of information, without more, should not deter potential beneficiaries from coming forward to request assistance nor should it impede the valuable work of the TFV through this mandate.[19]

V. RELIEF REQUESTED

15. For the foregoing, the OPCD respectfully requests the Pre-Trial Chamber to accept these observations pursuant to RoC 77(4)(a) and:

- Allow for a reservation of rights of any future assigned Counsel for any suspect or accused in the Situation to make observations on any permitted assistance activities;
- Direct the TFV to ensure that specific groups or actors are not named in their work; specifically, that this will not be included in terms of reference for vendors or included in any training; and,

[18] Proposed Programme Budget for 2021 of the International Criminal Court, ICC-ASP/19/10/AV, 7 August 2020, para. 146; *see also* paras 3, 23.
[19] *See* CAR Information, para. 9.

– Direct the TFV to ensure that it and implementing partners keep all information on beneficiaries and selected victims, as potentially subject to mandatory disclosure obligations under the Rome Statute in ongoing or future proceedings.

Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 31st day of August 2020
at The Hague, The Netherlands