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PRE-TRIAL CHAMBER II

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

Public

OPCD Observations on the TFV Regulation 50 Notifications

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 Notifications by the Board of Directors, in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims, of its intention to undertake assistance activities in the Central African Republic.¹
2. The OPCD observes that the proposed activities have been defined in a non-discriminatory manner, and in particular without naming any identified suspect, accused, or acquitted person. The OPCD submits that such restriction must be maintained in implementation, should the proposed activities be carried out, to avoid predetermining any issue or violating fair trial principles in ongoing investigations and judicial proceedings connected with the Central African Republic. Further, the Trust Fund for Victims (“TFV”) and its implementing partners must also retain any relevant information concerning beneficiaries of the proposed activities, in case this become relevant to any ongoing or future proceedings.

II. RELEVANT PROCEDURAL HISTORY

3. On 22 December 2004, the Prosecutor formally notified the President of the Court of the referral, from the previous day, from the Government of the Central African Republic concerning the first situation in the Central African Republic (“CAR I Situation”).²

¹ *Situation in Central African Republic I*, [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 further specified activities in the Central African Republic](#), 15 September 2020, ICC-01/05-101 and *Situation in Central African Republic II*, [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 further specified activities in the Central African Republic](#), 15 September 2020, ICC-02/14-126 (together referred to as the “TFV Notifications”). The OPCD notes that Annex I to both filings details the same five proposed activities.

² *Situation in Central African Republic I*, [Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III](#), 19 January 2005, ICC-01/05-1, p. 2.

4. On 13 June 2014, the Prosecutor formally notified the President of the Court of the referral dated 30 May 2014 from the Government of the Central African Republic concerning a second situation in the Central African Republic (“CAR II Situation”).³
5. The only case in the CAR I Situation involving core crimes resulted in an acquittal on 8 June 2018.⁴ In response to a TFV notification to undertake specified assistance activities in this Situation,⁵ the Pre-Trial Chamber found on 8 April 2020 that the activities satisfied the relevant requirements provided that all references to, *inter alia*, the acquitted person were omitted during their implementation.⁶
6. In the CAR II Situation, two arrest warrants have been publicly issued.⁷ The two accused for whom arrest warrants were issued are in the custody of the Court and are currently facing trial.⁸
7. On 15 September 2020, the Board of Directors of the Trust Fund for Victims submitted the TFV Notifications proposing “five projects aiming to provide

³ *Situation in Central African Republic II*, [Decision Assigning the Situation in the Central African Republic II to Pre-Trial Chamber II](#), 18 June 2014, ICC-01/14-1, p. 3.

⁴ *Prosecutor v. Jean-Pierre Bemba*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute](#), 8 June 2018, ICC-01/05-01/08-3636-Red, paras 197–198.

⁵ *Situation in Central African Republic I*, [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 Republic](#), 25 February 2020, ICC-01/05-97, para. 21.

⁶ *Situation in Central African Republic I*, [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 Republic’](#), 8 April 2020, ICC-01/05-100, para. 8.

⁷ *Situation in Central African Republic II*, [Public Redacted Version of “Warrant of Arrest for Alfred Yekatom”](#), ICC-01/14-01/18-1-US-Exp, 11 November 2018, Date of Public Redacted Version 17 November 2018, ICC-01/14-01/18-1-Red; *Situation in Central African Republic II*, [Public Redacted Version of “Warrant of Arrest for Patrice-Edouard Ngaïssona”](#), Date of Public Redacted Version 13 December 2018, ICC-01/14-02/18-89-Red.

⁸ See *Prosecutor v. Yekatom and Ngaïssona*, [Corrected version of Public Redacted Version of ‘Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona’](#), 14 May 2020, ICC-01/14-01/18-403-Red-Corr.

physical and psychological rehabilitation, as well as material support to the victims and their families” in the Central African Republic.⁹

8. On 17 September 2020, PTC II invited observations of the OPCD, the Office of Public Counsel for the Victims, and the Prosecution on the proposed activities of the TFCV Notifications.¹⁰

III. OPCD MANDATE (RoC 77)

9. The OPCD references its mandate as promulgated by the Judges of the ICC in Regulation of the Court (“RoC”) 77.¹¹ As the following observations would apply equally to the general Defence interests of any unrepresented actual or potential suspects in the CAR I and II Situations, 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”*; 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

10. The OPCD recognises the important role the TFCV plays under Rule 98(5) of the Rules of Procedure and Evidence in providing assistance to persons who have suffered harm as a result of crimes within the jurisdiction of the Court in the absence of a conviction. This provision allows the needs of victims in Situation countries to be addressed without creating expectation or urgency for a certain outcome in any specific case.
11. The Chamber is vested with the power to scrutinize the TFCV’s assistance projects and activities, including assurance that they do not predetermine an

⁹ TFCV Notifications, para.19.

¹⁰ Email of 17 September 2020 from PTC II to, *inter alia*, OPCD Principal Counsel, Xavier-Jean Keïta.

¹¹ 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.

issue to be determined by the Chamber or violate the presumption of innocence as well as the principles governing a fair and impartial trial.¹² PTC II has emphasized that to fulfil these requirements, *“the proposed activities must be ‘defined in a non-discriminatory manner, without reference to any identified suspect/accused or particular victim(s)’, especially when such activities are connected to a situation in which an investigation and judicial proceedings are ongoing”*.¹³

12. The OPCD observes that the proposed activities in Annex I of the TFV Notifications do not refer to any identified suspect/accused, identifiable group or actor in connection with situations and/or proceedings before the Court,¹⁴ nor do they refer to any acquitted person.¹⁵ The OPCD respectfully requests that any finding that the proposed activities satisfy the requirements set out in Regulation 50(a)(ii) of the Regulations of the Trust Fund for Victims be made with the instruction that such references continue to be omitted during the implementation of these activities, as well as in any documentation or training relating to such implementation, whether already existing or forthcoming.¹⁶
13. Ensuring that such references are omitted in this way is especially important when it concerns proposed assistance activities in a Situation country where investigations and judicial proceedings are ongoing.¹⁷ The OPCD notes that

¹² *Situation in the Republic of Côte d'Ivoire*, [Information to the Trust Fund for Victims on the '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'](#), 8 September 2020, ICC-02/11-59 (“Information to the TFV in the Côte d'Ivoire Situation”), para. 11. *See also* Regulation 50(a)(ii) of the Regulations of the Trust Fund for Victims.

¹³ [Information to the TFV in the Côte d'Ivoire Situation](#), para. 11 (footnote omitted, emphasis added).

¹⁴ *See* TFV Notifications, Annex I.

¹⁵ The OPCD recalls that this Chamber has already found that earlier assistance activities in the CAR I Situation must omit, *inter alia*, the name of an acquitted person. The reasoning justifying this finding continues to be applicable for these proposed activities, which is why any reference to any acquitted person should continue to be omitted. *See Situation in Central African Republic I*, [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 Republic'](#), 8 April 2020, ICC-01/05-100, para. 8.

¹⁶ *See* [Information to the TFV in the Côte d'Ivoire Situation](#), para. 11.

¹⁷ *See* [Information to the TFV in the Côte d'Ivoire Situation](#), para. 10.

there are current trial proceedings in a case in the CAR II Situation,¹⁸ and that the Office of the Prosecutor intends to continue investigations in the Central African Republic well into 2021.¹⁹

14. Furthermore, the existence of ongoing investigations and the pending case highlights the concrete need to ensure that any TFV activities are carried out in a way that safeguards the integrity and fairness of any current or future proceedings. While the OPCD appreciates that the TFV will be aware of its obligations in this regard, the Chamber is respectfully requested, in the interests of due diligence, to remind the TFV and its implementing partners of the need to retain and preserve all relevant information on the beneficiaries of the proposed activities, in the event this proves to be relevant in any case before the Court. This is to ensure that any future order by a competent Chamber to produce or disclose such information would be capable of having effect.

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:
 - (i) Reserve the rights of any future suspect or accused in the CAR I and II Situations to make observations on the TFV's proposed assistance activities;
 - (ii) Should the Chamber find that the proposed activities satisfy the requirements as set out in Regulation 50(a)(ii) of the Regulations of the Trust Fund, instruct that no reference is made to any acquitted person, identified suspect/accused, group or actor identifiable in connection with

¹⁸ See *Prosecutor v. Yekatom and Ngaïssona*, [Corrected version of Public Redacted Version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona'](#), 14 May 2020, ICC-01/14-01/18-403-Red-Corr.

¹⁹ [Proposed Programme budget for 2021 of the International Criminal Court](#), 10 September 2020, ICC-ASP/19/10, para. 133.

situations and/or proceedings before the Court during the implementation of the proposed activities, as well as in any documents or training relating to such implementation whether already existing or forthcoming.

- (iii) Remind the TFV and its implementing partners to keep all appropriate information on beneficiaries of the proposed activities, in case it is relevant in any ongoing or future proceedings before the Court.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 2nd day of October 2020
at The Hague, The Netherlands