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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 UGANDA

PUBLIC

Public Redacted Version of the “Observations on the Notification of the TFV”

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

As invited by Pre-Trial Chamber (“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 further activities in Uganda* (“TFV Notification”).

II. CONFIDENTIALITY

1. The present observations are filed confidentially, pursuant to Regulation 23*bis*(1) of the *Regulations of the Court* (“RoC”), as they relate to the confidential annex of the TFV Notification. A public-redacted version will follow in due course.

III. PROCEDURAL HISTORY

2. On 6 July 2004, the Situation in Uganda was assigned to Pre-Trial Chamber II.¹
3. On 25 January 2008,² the TFV notified Pre-Trial Chamber II, pursuant to Regulation 50 of the TFV Regulations, of its intention to undertake specific reparation activities in the territory of Northern Uganda pursuant to its assistance mandate. At that time, the OPCD sought³ and was granted leave to file observations, as “*adequate and sufficient for the general interest of the Defence to be represented by the OPCD*”.⁴ The OPCD submitted these observations on 12 March 2008 (“OPCD 2008 Observations”).⁵

¹ *Situation in Uganda*, Decision Assigning the Situation in Uganda to Pre-Trial Chamber II, ICC-02/04-1, filed 6 July 2004.

² *Situation in Uganda*, 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-02/04-114, filed 28 January 2008.

³ *Situation in Uganda*, 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”, ICC-02/04-115, 6 February 2008.

⁴ *Situation in Uganda*, Decision on Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-120, filed 6 March 2008, see p. 4.

⁵ *Situation in Uganda*, OPCD Observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-122, 12 March 2008.

4. On 19 March 2008, the Pre-Trial Chamber authorised the assistance mandate activities outlined by the TFV, indicating that such actions “*should not go beyond the descriptions outlined in the Notification, as approved by the Chamber*”.⁶
5. On 19 December 2018, the TFV filed a Notification of six projects it seeks to undertake in Uganda through its assistance mandate, noting that they are a continuation of the 2008 filing.⁷
6. On 24 December 2018, the Pre-Trial Chamber invited observations from the OPCD, the Defence for Mr Dominic Ongwen, the OPCV, the LRV in the *Ongwen* case and the Prosecutor on the TFV’s Notification (“PTC Order”).⁸

IV. PRELIMINARY ISSUE – OPCD MANDATE (RoC 77)

7. The OPCD is grateful for the opportunity to present submissions on this issue and takes note of the manner in which it is invited to provide such observations in the present PTC Order; namely, that the Pre-Trial Chamber considered that as “*the warrants of arrest against Joseph Kony and Vincent Otti have not been executed, yet, the Chamber finds that the Office of Public Counsel for the defence (the “OPCD”) should be appointed pursuant to regulations 73(3) and 77(4)(e) of the Regulations to provide observations, if any, on the Notification*”.⁹
8. The OPCD references its mandate as promulgated by the Judges of the ICC in RoC Regulation 77.¹⁰ By virtue of the present PTC Order, it could be assumed that OPCD – as an entity – is acting as a ‘Duty Counsel’ for both Mr. Joseph Kony and Mr. Vincent Otti, assigned for the purposes of these submissions. However, the OPCD puts on the record that it does not feel able to faithfully fulfil a position of ‘Duty Counsel’ for both Messrs. Kony and Otti, in this instance, given the inability to uphold certain provisions of the *Code of Professional Conduct for Counsel* in the role of an assigned counsel on

⁶ *Situation in Uganda*, Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD’s Observations on the Notification, ICC-02/04-126, 19 March 2008, p. 6.

⁷ *Situation in Uganda*, 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 activities in Uganda, with confidential annex, ICC-02/04-229, 19 December 2018.

⁸ *Situation in Uganda*, Decision requesting observations, ICC-02/04-230, 24 December 2018.

⁹ ICC-02/04-230, para. 4.

¹⁰ 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.

a case. In particular, as the whereabouts of these two suspects are unknown, it is impossible to consult on their positions – pursuant to Article 15 – or discuss any potential conflict of interest scenarios – pursuant to Articles 12 and 16.¹¹ Furthermore, as the OPCD does not have confidential access to the case file, it cannot wholly represent their interests with the benefit of the full record. Given their absence, there are several impediments – ethical and otherwise – to being assigned as their ‘Counsel’.

9. At the time of the last notification, OPCD’s observations were permitted pursuant to the principle that “*it is adequate and sufficient for the general interests of the Defence to be represented by the OPCD*”.¹² As the following observations would apply equally to the general Defence interests of any actual or potential suspects in the Situation of Uganda, the OPCD requests that the following be taken on the same basis as the 2008 observations – 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*” or, alternatively, in an *amicus curiae* fashion as envisaged pursuant to RoC 77(4)(c) – “*in respect of specific issues*”.
10. Further, the OPCD requests that these submissions do not cause prejudice to any later-assigned Counsel of Messrs. Kony and Otti, and the defendants themselves, who may reserve the right to assert additional or, even, contrary submissions based on their own assessment and interest.

V. OBSERVATIONS

11. Paragraph 50(a) of the *Regulations of the Trust Fund for Victims* (RoTFV) dictates:

For the purposes of these regulations, the Trust Fund shall be considered to be seized when:

- (a) (i) *the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and*
- (ii) *the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the*

¹¹ See also the chapeau of Regulation 77(4) of the RoC mandating that any provision must be used only “[w]hen a conflict of interest does not arise”.

¹² ICC-02/04-120, p.4.

Court has responded and has not, within a period of 45 days of receiving such notification, informed the Board in writing that 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.

(iii) Should 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). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities.

12. Based on the intentions and limitations of paragraph 50(a) of the RoTFV, the OPCD submits the following observations relating to: a) the TFV's assistance mandate, generally; b) potentially prejudicial language in the present notification and proposals; c) potentially prejudicial activities of the present notification and proposals; and, d) the matter of managing suspects' and accused's rights in assistance activities.

A. The TFV's Assistance Mandate

13. The OPCD reincorporates by reference its previous assertion that ICC Rule 98(5) and the TFV's assistance mandate "*play[] an important role in enabling the Trust Fund to provide resources for the benefit of a person adjudicated to be a victim, in the absence of any awards collected against the convicted person, or in the absence of a conviction [...] and [in] the overall mandate of the ICC to promote peace and reconciliation through judicial mechanisms at either the local or international level*".¹³

14. Over the last year, especially, the TFV's assistance mandate has shown to be an important provision of the work of the ICC given that the ICC is a criminal court and, as such, is subject to rendering both judgements of guilt and acquittal.¹⁴ As

¹³ ICC-02/04-122, para. 12.

¹⁴ *Prosecutor v. Bemba*, Final decision on the reparations proceedings, ICC-05-01/08-3653, 3 August 2018, paras 3, 11.

“reparations”, by current definition, can only be linked to findings of guilt,¹⁵ the lack of repair for harm to victims in light of an acquittal has created untenable tensions in the full execution of the Court’s goals.¹⁶ It is the OPCD’s view, then, that the assistance mandate of the TFV can serve to provide timely assistance, well before a final judicial decision, to address the *needs* of victims in Situation countries without creating expectation or urgency for a certain outcome in any specific case. However, assurances need to remain in place to ensure no violation of the rights of named or yet-unknown suspects occurs in the process.

B. Potentially Prejudicial Language of the Present Notification and Proposals

15. In its initial filing, the OPCD raised several concerns about parameters of the assistance mandate *vis-à-vis* protecting rights of suspects and accused. At that time, the OPCD voiced concern that:

*information provided by the Trust Fund does not provide sufficient detail to enable either the Chamber or the parties to render a meaningful assessment as to whether the beneficiaries could be considered to fall under the definition of victim, as set out in rule 85, or whether the activities of the Trust Fund would pre-determine any issues before the Court, or would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.*¹⁷

16. The last notice of the TFV, in 2008, indicated a broad audience, identifying that persons to be assisted will be “*groups of victims who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*”.¹⁸ At that time, the Pre-Trial Chamber permitted the activities on this basis, in that they were “*defined in general and nondiscriminatory terms, without reference to any identified alleged perpetrator, specific crime or location or individually identified victim and thus they are not incompatible with the criteria laid down in regulation 50 (a)(ii) of the TFV Regulations*”.¹⁹

¹⁵ Rule 98(1)-(4).

¹⁶ See *Prosecutor v. Bemba*, Final decision on the reparations proceedings, ICC-05-01/08-3653, 3 August 2018, paras 6-7. See also *Prosecutor v. Bemba*, ICC-01/05-01/08-3649, Legal Representatives of Victims’ Joint submissions on the consequences of the Appeals Chamber’s Judgment date 8 June 2018 on the reparations proceedings, 12 July 2018, para. 36 (French version filed as ICC-01/05-01/08-3647 on 6 July 2018).

¹⁷ ICC-02/04-122, para. 6.

¹⁸ See also ICC-02/04-126, p. 5.

¹⁹ *Ibid.*

17. One of these criterion laid down in paragraph 50(a)(ii) of the RoTFV is whether the proposed activity would “*violate the presumption of innocence*”. This does not merely protect a person from predetermination by the ultimate finder of fact, but is also one that requires public authorities to refrain from implying that a person is culpable unless it is proven by law. To respect this provision, therefore, ICC staff, NGOs, intermediaries, and other associated actors of the Court cannot make factual assertions inferring culpability in the absence of judicial determination when carrying out the work of the ICC. The Chambers have expounded upon this in holding that Court officials, such as the Prosecutor, “*should be mindful of the suspects’ right to be presumed innocent until proved guilty*” in making public statements.²⁰ Citing the ECtHR, the Chamber in *Mbarushimana* recalled that “*it is incompatible with the presumption of innocence when statements made by public officials encourage the public to believe the suspect to be guilty and prejudice the assessment of the facts by the competent judicial authority*”.²¹ Further, “*while the presumption of innocence cannot prevent the authorities from informing the public about criminal investigations in progress, it requires that they do so ‘with all the discretion and circumspection necessary if the presumption of innocence is to be respected.’*”²² Most resoundingly, in *Muthaura et al.*, the Single Judge emphasised:

*as a matter of principle, that the safeguarding of the proper administration of justice and the integrity of the judicial proceedings requires the parties, participants and any person involved in the proceedings, to refrain from making public statements or engage in any other activity which could have an impact on the evidence or the merits of the case or could be perceived as showing a predetermination of the cause pending before the Court.*²³

18. Designation or description in even what seems to be a ‘small detail’ has the ability to unintentionally influence witnesses who could misunderstand and assume that judicial findings have already been made in the Court’s proceedings *vis-à-vis* specific actors or individuals.²⁴ If, or when, called to provide testimony in the future, such assumptions

²⁰ *Prosecutor v. Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01-10/51, 1 February 2011, para. 17. See also *Prosecutor v. Gaddafi & Al-Senussi*, Decision on the Request for Disqualification of the Prosecutor, ICC-01/11-01/11-175, 12 June 2012, para. 26.

²¹ *Prosecutor v. Mbarushimana*, Decision on the Defence Request for an Order to Preserve the Impartiality of the Proceedings, ICC-01/04-01-10/51, 1 February 2011, para. 11.

²² *Ibid.* para. 10.

²³ *Prosecutor v. Muthaura et al.*, Decision on Defence “Application for Order to the Prosecutor Regarding Extra-Judicial Comments to the Press”, ICC-01/09-02/11-83, 5 May 2011, para. 6.

²⁴ See Peter Dixon, Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo, *International Journal of Transitional Justice*, 2016, 10, pp. 95–97 (“[t]he

could influence their testimony or create challenges to their reliability as witnesses. Thus, the concerns put forward in this respect in the OPCD 2008 Observations remain today, even a decade later, given the language submitted in the confidential annex, as well as in public reports of the TFV.

i. Language assigning culpability to [REDACTED]

19. It is noted that no language relating to [REDACTED] was used in the 2008 Notification's Confidential Annex. However, in the intervening 10 years, specific language identifying [REDACTED] as culpable actors seems to have seeped into the assessments of victims eligible for interim relief and has improperly permeated the public and non-public statements of this mission.

20. Pertinent to the current observations on the TFV Notification of projects to be authorised going forward, the Confidential Annex notes that the goal of three specified activities relate directly to:

-) [REDACTED]²⁵;
-) [REDACTED]²⁶; and
-) [REDACTED]²⁷.

21. Such language has, moreover, appeared in public reports of the TFV indicating the execution of this mandate.²⁸ Regrettably, one TFV report has gone as far as [REDACTED].²⁹ Given the public nature of these reports, the threat of distributing improper inference of a judicially determined fact is even more significant.

primary distinction between reparations and assistance is the principle of responsibility. In their clearest sense, reparations imply the responsibility of a wrong-doing party [...] for acts committed against an injured party [...]. Assistance is provided on the basis of need and not according to a determination of culpability. [...] [T]he Court faces the challenge of distinguishing reparations from assistance when the two are funded with money from the same entity. This is on top of the possibility that they will look similar in form and be implemented by similar organizations [...] – in international criminal law, it is clear that reparations can only stem from the determination of guilt of a convicted party. But in practice, the difference may not be so clear for victims on the receiving end.”).

²⁵ ICC-02/04-229-Conf-AnxI, [REDACTED].

²⁶ ICC-02/04-229-Conf-AnxI, [REDACTED].

²⁷ ICC-02/04-229-Conf-AnxI, [REDACTED].

²⁸ See, e.g., [REDACTED].

²⁹ [REDACTED].

22. The OPCD submits that this language detrimentally impacts the work of the ICC as a criminal court in that it plainly pre-supposes that crimes – especially crimes against specific TFV beneficiaries – have been committed by [REDACTED]. For example, as [REDACTED], presupposing that [REDACTED] committed crimes, as is done here, runs the risk of presupposing that they are liable.

ii. Language that could define the conflict

23. The six activities proposed are meant to represent “*a continuation of the specified activities contained in the 2008 Notification*”,³⁰ but it is noted that they have expanded in scope. Further, language has changed and become more specific, thus lending to a greater danger of encroaching upon those matters that should be reserved for judicial determination. For example, language defined for [REDACTED] that would be addressed in the assistance mandate has changed from [REDACTED] to the more specific and legally defined [REDACTED].³¹ Likewise, the word [REDACTED] can be one that is referring to [REDACTED], a finding more properly within the remit of a Chamber assessing admissibility or contextual elements.

24. Even the phrase [REDACTED]³² may seem harmless in focusing the goal of the specified activities, but it has the ability to create a latent understanding of the conflict that presupposes [REDACTED] in the legal definition. As these specific terms were not employed in the 2008 Notification, they are outside of the scope of the approval and, it is submitted, should not be permissible terminology as having more likelihood to do damage than to assist repairs. Further, losing the legally charged nomenclature does not change the purpose of the assistance to be rendered and remains more consistent with the description of each goal as defined in 2008. The TFV itself acknowledged that, not only can it be “*very difficult for implementing partners to qualify a violent act as crimes of war [or] crimes against humanity [...] it is not programmatically necessary for an implementing partner to distinguish whether or not harm is the result of one of these crimes under the assistance mandate*”.³³ Thus,

³⁰ ICC-02/04-229, para. 14.

³¹ See, e.g., ICC-02/04-114-Conf-Anx, [REDACTED] cf. ICC-02/04-229-Conf-AnxI, [REDACTED].

³² ICC-02/04-229-Conf-AnxI, [REDACTED].

³³ [REDACTED].

using [REDACTED] as an example, the OPCD illustrates one proposal to remove problematic terminology:

	2008 TFV Notification	2018 TFV Notification	OPCD Proposed Amendment
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

25. The OPCD appreciates that to define such assistance in broad terms may make it more onerous to determine who should receive such aid, but submits that increased specificity in the parameters can lead to unwitting pre-judgment of facts in issue, including those relating to the admissibility of a case before the ICC or the Court's jurisdiction, as envisaged in paragraph 50(a)(ii) of the RoTFV.

C. Potentially Prejudicial Activities of the Present Notification and Proposals

26. As stated by the OPCD previously, “*provid[ing] money to persons or entities, whose credibility might subsequently be an issue before the Court*” requires full transparency of this fact.³⁴ This has been further supported by the reasoning of PTC I, which determined that “*should any beneficiaries of the proposed [TFV] activities ever appear as witnesses before the Court, the competent Chamber retains, pursuant to article 69 of the Statute, the authority to rule on the admissibility and probative value of their testimony*”.³⁵ A competent Chamber can only exercise such authority, of course, if information regarding receipt of TFV assistance has been disclosed to the parties. Therefore, any individual or entity's receipt of assistance from the TFV must be a matter subject to mandatory disclosure provisions, as raised in the OPCD 2008 Observations.³⁶ This is especially important given that analysis of the publicly available information relating to [REDACTED]³⁷ line up with [REDACTED];³⁸ in fact, [REDACTED] have now become more specific and more numerous. Such activities of the TFV must be disclosed, with particulars, to the parties in ongoing or

³⁴ ICC-02/04-122, para. 66.

³⁵ Situation in DRC, ICC-01/04-492, pp. 9-10.

³⁶ See ICC-02/04-122, paras 66, 70, 73. The OPCD notes that the TFV should have access to this information as it ensures that implementing partners keep all information about potential beneficiaries and the selected victims in a secure database. See TFV Programme Progress Report 2015, p. 15.

³⁷ [REDACTED].

³⁸ [REDACTED].

subsequent proceedings, so that any relevant consideration can be brought before the Trial Chamber as finder of fact.

27. Further, certain activities that contain an element of psychological support are now described more specifically in a way that could impact community impressions of the conflict in messaging; for example, the activity of [REDACTED].³⁹ While psychological remedies to repair individuals and communities are necessary components of assistance, they must be exercised with the utmost caution not to create any kind of collective narrative about causation or responsibility that will later impact the reliability of evidence.
28. The OPCD submits that all assistance mandate activities of the TFV should be guided by Rome Statute principles.⁴⁰ In particular, any such assistance can have no bearing on the numerous factual and legal findings that occur in determinations of admissibility of a case or ultimate findings of individual criminal liability. These must remain wholly distinct and subject to unbiased judicial determination. If a proposed activity detracts from the rights of suspects and accused, it simply cannot be undertaken by the TFV as an entity of the Rome Statute system.

D. Managing Suspects' and Accused's Rights in Assistance Activities

29. It is welcome that the TFV has in mind and makes assertion “*that the selected specified activities will not pre-determine any issue to be determined by the court as provided for in regulation 50 (a) of the TFV Regulations*”, but the language it has used, as shown above in § IV(B) – especially [REDACTED] – is at direct odds with such assurance. Furthermore, that it is only relating to “*crimes committed in the situation of Uganda in general and are not related in any way to national or international proceedings or investigations*”,⁴¹ would seem an impossible task without full information of all ongoing national and international investigations, which are typically kept confidential.

³⁹ ICC-02/04-229-Conf-AnxI, [REDACTED].

⁴⁰ ICC-02/04-122, para. 30.

⁴¹ ICC-02/04-229, para. 16.

30. Evidence of the changed language, as shown above, demonstrates how strict judicial monitoring of any such activities should be undertaken to ensure that the rights of suspects or accused are not compromised by the TFV's work in assistance to victims.⁴² Perception of the work of the assistance mandate remains a concern since raised in the OPCD's 2008 Observations.⁴³ Care must be taken that the TFV's assistance mandate work is seen as distinct from its true 'reparations' work, as the latter presumes underpinning judicial findings of individual criminal culpability. Such suggestion of distinction is supported by academic insight which points to the value of the assistance mandate, but highlights the challenges in distinguishing this activity from true 'reparations' activities.⁴⁴ In particular, one author suggests that "*the TFV can publicly emphasise this distinction [between the TFV's assistance and reparations mandates] to victims who are provided with 'interim relief'*".⁴⁵ Further, the Appeals Chamber has acknowledged that, in certain circumstances, "*there is a real risk that the different mandates of the Trust Fund, namely its assistance mandate [...] and its role in implementing court orders for reparations may be blurred in a manner prejudicial to the rights of the convicted person*".⁴⁶ Aside from any terminology defined for use by the Court itself, the OPCD proposes that such definitions are used to provide clear instructions and terms of reference to the contracted organisations and intermediaries. Monitoring by the TFV of these vendors to ensure that proper language and messaging are used is equally important to ensuring that the type of assistance being rendered is that approved by the Chamber to preserve its distinction from 'reparations' as defined in the Rome Statute.

31. This distinction can, and should, be further implemented in the TFV's outreach strategy. As noted by Human Rights Watch in a 2008 Report:

the possibility of conflict [between the TFV's assistance mandate and undermining the presumption of innocence] also highlights why it is

⁴² See ICC-02/04-122, paras 15-18.

⁴³ See ICC-02/04-122, paras 51-58.

⁴⁴ See, e.g., Peter Dixon, Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo, *International Journal of Transitional Justice*, 2016, 10, pp. 94-97, 100.

⁴⁵ Anushka Sehmi, 'Now that we have no voice, what will happen to us?' Experiences of Victim Participation in the *Kenyatta Case*, *Journal of International Criminal Justice* (2018), p. 587. For definition of 'Interim Relief Model' see Peter Dixon, Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo, *International Journal of Transitional Justice*, 2016, 10, pp. 104-105.

⁴⁶ *Prosecutor v. Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, 3 March 2015, ICC-01/04-01/06-3129, para. 182.

*important for the TFV to develop and implement a strong outreach strategy to convey the non-confidential aspects of its work in those situations where it is operating. This should include conducting outreach to explain the relationship between the TFV and the court and their respective mandates. In addition, we urge the TFV to coordinate its outreach strategy with that of the court to eliminate the possibility of sending inconsistent messages to members of affected communities, which could otherwise compromise these communities' understanding of both bodies.*⁴⁷

32. Therefore, the OPCD requests that the Pre-Trial Chamber order the TFV to create a set of specific measures to ensure how the rights of suspects and accused will be regarded and preserved through any direction or execution of the assistance mandate. This exercise can be a part of the Outreach Strategy for any Situation bearing in mind any specific considerations of that jurisdiction and overseen by the Pre-Trial Chambers.

VI. RELIEF REQUESTED

For the foregoing, the OPCD respectfully requests the Pre-Trial Chamber to:

- Z Accept these observations pursuant to RoC 77(4)(a), as 'needs of the Defence in ongoing proceedings', or RoC 77(4)(c), 'in respect of certain issues' in a function of *amicus*;
- Z Direct the TFV to remove all reference to [REDACTED] or terminology that could define contextual elements or pre-determine issues of admissibility (as described in § IV(B)(ii), above) from the confidential annex and from any work plans/guidance/direction applicable to the assistance mandate for the Uganda Situation, and to ensure that such references, especially references to [REDACTED] or any suspect/accused, are not included in any public reports;
- Z Direct the TFV to provide, on a confidential basis, an outline of measures it will take 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;

⁴⁷ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, VII. The Role of Victims in ICC Proceedings, 11 July 2008, section E.2(a).

- Z 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 future proceedings;
- Z Allow for a reservation of rights of future assigned Counsel for Messrs. Kony and/or Otti and/or any other suspect or accused in the Situation to make observations on the ongoing assistance mandate;
- Z Monitor the progress reports of the TFV to ensure that the definitions and/or activities do not derogate from any permissive Order;
- Z Grant the OPCD confidential access to filings relating to the assistance mandate in the *Kony* and *Otti* cases to further ensure ability of submission on suspects' rights in this work.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 30 January 2019
At The Hague, The Netherlands