

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/05**

Date: **3 April 2020**

PRE-TRIAL CHAMBER II

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

SITUATION IN CENTRAL AFRICAN REPUBLIC I

Public

**Public Redacted Version of “OPCD Observations on the Notification under
Regulation 50 of the Regulations of the Trust Fund for Victims”
(1 April 2020; ICC-01/05-98-Conf)**

Source: Office of Public Counsel for the Defence

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

The Office of the Prosecutor

Ms. Fatou Bensouda, Prosecutor

Mr. James Stewart

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Ms. Paolina Massidda

The Office of Public Counsel for the Defence

Mr. Xavier-Jean Keïta

Ms. Marie O'Leary

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Mr. Philipp Ambach

Other

I. INTRODUCTION

1. On 25 February 2020, the Board of Directors of the Trust Fund for Victims (“TFV”) notified Pre-Trial Chamber II of its intention to carry out a pilot assistance programme in the Situation in the Central African Republic I (“CAR I Situation”).¹
2. The Office of Public Counsel for the Defence (“OPCD”) recognises that the TFV has an important assistance mandate to carry out in the CAR I Situation. But [REDACTED]² would predetermine an issue to be determined by the Court. [REDACTED] should be reformulated to [REDACTED] before the programme is implemented. Further, the Notification refers to [REDACTED] and [REDACTED].³ As [REDACTED] should not be associated with the mandate of assisting these victims. Given the use already in play in the Notification, and the continuing litigation post-appeal, the Pre-Trial Chamber may wish to consider inviting [REDACTED] to submit observations on whether the Notification and proposed programme affects his rights safeguarded in Regulation 50 of the Regulations of the Trust Fund for Victims.
3. These observations have been filed confidentially because reference is made to: (a) the contents of a confidential annex of the Notification; (b) email communications between the Pre-Trial Chamber and participants in the proceedings, and; (c) the name of [REDACTED] in the context of TFV activities with Situation victims.

¹ *Situation in CAR 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](#) (“Notification”).

² [REDACTED]

³ Notification, paras 9–10.

II. PROCEDURAL HISTORY

4. The CAR I Situation was referred to the Court on 21 December 2004.⁴ The former Prosecutor opened an investigation on 22 May 2007,⁵ which is still open.
5. [REDACTED].⁶
6. The Board of Directors of the TFV submitted the Notification on 25 February 2020. It proposes a pilot assistance programme “in CAR for 200 vulnerable victims who have participated in the [REDACTED] and/or those who may not have participated in the case, but found themselves in life-threatening conditions, living with HIV/AIDS and survivors of sexual violence who suffered harm from crimes, under the jurisdiction of the Court, related to the CAR I situation”.⁷ [REDACTED].⁸

III. SUBMISSIONS

7. The OPCD recognises that the TFV has an important role to fulfil in the Central African Republic by delivering its assistance mandate to potential victims in this Situation. While the OPCD has no objection to the specified activities in the proposed programme, it submits that the way the [REDACTED], which would predetermine an issue to be determined by the Court in any future case.
8. The CAR I Situation was referred to the Court in a non-specific manner, without mentioning any specific group alleged to have committed crimes. The scope of the referral was “crimes within the jurisdiction of the Court

⁴ See Decision Assigning the Situation in the Central African Republic to Pre-Trial Chamber III, 19 January 2005, [ICC-01/05-01](#), p. 2.

⁵ Press Release from the Office of the Prosecutor, [“Prosecutor opens investigation in the Central African Republic”](#), 22 May 2007.

⁶ [REDACTED].

⁷ Notification, para. 13.

⁸ [REDACTED].

committed anywhere on the territory of the Central African Republic since 1 July 2002".⁹ Indeed, referrals of situations to the Court can only be framed according to geographic and temporal parameters, and cannot target any particular crime or group.¹⁰ When the Ugandan government, for example, made a referral specifically mentioning the Lord's Resistance Army, the former Prosecutor clarified he would "interpret the referral as concerning all crimes under the Statute committed in the Northern Uganda".¹¹

9. Given that Situations can only be defined according to geographic and temporal parameters, any conclusion that members of a specific group committed crimes therefore requires a judicial finding. The Notification, however, presupposes that members of a specific group committed crimes by [REDACTED].¹² Whether [REDACTED] committed these particular crimes is an issue that must be determined by the specific Chambers in findings.
10. The OPCD acknowledges that findings were made regarding [REDACTED].¹³ As this is a final determination made by the Court, [REDACTED]. But the broader conclusion that there are 200 such persons who suffered [REDACTED] clearly goes beyond what has been found by the Chambers of the ICC. The OPCD submits that the programme specifications must be amended to omit any reference [REDACTED] to avoid any possible judicial predetermination on this issue.

⁹ See Press Release from the Office of the Prosecutor, "[Prosecutor receives referral concerning Central African Republic](#)", dated 7 January 2005.

¹⁰ See *Prosecutor v. Mbarushimana*, Decision on the "Defence Challenge to the Jurisdiction of the Court", 26 October 2011, [ICC-01/04-01/10-451](#), para. 27 ("...the Chamber recalls that, pursuant to Articles 13 and 14 of the Statute, a State Party may only refer to the Prosecutor an entire 'situation in which one or more crimes within the jurisdiction of the Court appear to have been committed'. Accordingly, a referral cannot limit the Prosecutor to investigate only certain crimes, e.g. crimes committed by certain persons...").

¹¹ Luis-Moreno Ocampo, [Statement by the Chief Prosecutor on the Uganda Arrest Warrants](#), 14 October 2005, p. 2. See also Office of the Prosecutor, [Report on the Activities performed during the first three years \(June 2003 – June 2006\)](#), 12 September 2006, para. 25.

¹² [REDACTED].

¹³ [REDACTED].

11. Even though there appears to be no cases pending in the CAR I Situation, the issue of judicial predetermination is still alive. While the investigation in the CAR I Situation is still open, it cannot be assumed that there will be no further cases. Indeed, the Prosecution has indicated that, in its view, the alleged crimes in the CAR I Situation occurred “in the context of an armed conflict between the government and rebel forces”.¹⁴ The Prosecution has also referred to other groups it considers to have been involved.¹⁵ In light of the broader nature of the CAR I conflict, the TFV’s definition of [REDACTED], also undermines its own argument that [REDACTED].¹⁶
12. Furthermore, the Pre-Trial Chamber has emphasised that TFV programmes have to be “defined in a non-discriminatory manner, without reference to any identified suspect/accused or particular victim(s)”.¹⁷ The OPCD submits that the definition [REDACTED] is a reference to identifiable suspects, as it refers to [REDACTED]. Moreover, singling out victims [REDACTED] appears to also discriminate between victims, by excluding potential victims of other groups against whom crimes may be alleged. This further supports the OPCD’s proposal that the proposed programme should omit any reference [REDACTED], and rather be a non-specific reference to any victim in the CAR I Situation.
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.

¹⁴ Statement by the Office of the Prosecutor, [“Prosecutor opens investigation in the Central African Republic”](#), 22 May 2007.

¹⁵ See, e.g., *Prosecutor v. Bemba*, Prosecutor’s Application for Warrant of Arrest under Article 58, 9 May 2008, [ICC-01/05-01/08-26-Red](#), pp. 5–6; *Prosecutor v. Bemba*, “Public Redacted Version of ‘PROSECUTION’S CLOSING BRIEF’ [sic], 20 June 2014, ICC-01/05-01/08-3079-Conf-Corr”, dated 22 April 2016, [ICC-01/05-01/08-3079-Corr-Red](#), paras 1–3, 9, 12, 25, 28, 35, 44–45, 49.

¹⁶ [REDACTED].

¹⁷ See *Situation in CAR I*, Decision on the “Notification by the Board of Directors in accordance with Regulation 50 (a) of the regulations of the Trust Fund for Victims to undertake activities in the Central African Republic, 23 October 2012, [ICC-01/05-41](#), para. 10.

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.¹⁸

14. Finally, the OPCD also notes that the Notification makes several references to [REDACTED] when discussing victims [REDACTED].¹⁹ The Notification does not mention, however, [REDACTED].²⁰ The ambiguous nature of such phrases, without the clarification of [REDACTED], may lead a reader to believe that [REDACTED]. There is a risk, therefore, that the proposed programme would violate [REDACTED] rights safeguarded in Regulation 50(a)(ii) of the Regulations of the Trust Fund for Victims.
15. The OPCD does not, however, represent [REDACTED], and cannot make arguments [REDACTED]. The Office therefore respectfully requests the Pre-Trial Chamber to consider inviting [REDACTED], to submit observations on the Notification. This appears appropriate given that [REDACTED]. Any activities by the TFV, particularly involving [REDACTED], would most likely have an impact on [REDACTED].²¹
16. At a minimum, the OPCD respectfully submits that [REDACTED] should not be mentioned in connection with the provision of assistance activities in the CAR I Situation. [REDACTED], he has no connection with any harm suffered by Situation victims. Therefore, any references to him should be removed from the Notification, and his name should not be referred to when implementing the proposed programme. The OPCD respectfully suggests

¹⁸ 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.

¹⁹ Notification, paras 9–10, 13, 17.

²⁰ Notification, para. 10.

²¹ See, e.g., United States Supreme Court, [Johnson v. Mississippi](#), 486 U.S. 578, 585 (1988) (After a “conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge.”), which was recently reaffirmed in [Nelson v. Colorado](#), 581 U.S., 137 S Ct. 1249 (2017).

that, if reference has to be made to the victims who were participating in his case, the case number (ICC-01/05-01/08) is used instead.

IV. RELIEF REQUESTED

17. The OPCD respectfully requests the Pre-Trial Chamber to direct the TFV and any implementing partner to: (a) remove any references [REDACTED], and references to [REDACTED] from the Notification and any material on the proposed programme, and ensure that they are not referred to when the programme is implemented; and (b) inform the Court if any beneficiary becomes a potential witness at the ICC so that the relevant defendant may be informed of this fact. Further, the OPCD respectfully requests the Pre-Trial Chamber to: (c) consider inviting [REDACTED] to make submissions on the Notification given [REDACTED] in these filings to date.



Xavier-Jean Keïta
Principal Counsel of the OPCD

Dated this, 3rd Day of April 2020
At The Hague, The Netherlands