

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: French

No.: ICC-02/05-01/20

Date: 17 July 2020

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. MR ALI MUHAMMAD ALI ABD-AL-RAHMAN ("ALI KUSHAYB")

Public Document

Request and Observations on Reparations Pursuant to Article 75(1)

Source: Mr Cyril Laucci, Lead Counsel

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

Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr Julian Nicholls, Senior Trial
Lawyer

Counsel for the Defence

Mr Cyril Laucci, Lead Counsel

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**Office of Public Counsel for
Victims**

Ms Paolina Massidda

**Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta, Principal Counsel
Ms Marie O'Leary, Counsel

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Mr Esteban Peralta-Losilla

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

Mr Paddy Craig

**Victims Participation and
Reparations Section**

Mr Philipp Ambach

Other

Mr Pieter de Baan, Executive Director,
Trust Fund for Victims
Ms Sonia Robla, Public Information and
Outreach Section

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I INTRODUCTION

1. This Request and Observations on Reparations pursuant to article 75(1) of the Rome Statute (“Statute”) is submitted within the page limit specified in regulation 38(2)(f) of the Regulations of the Court (RoC).

II CONTEXT OF THE REQUEST

2. At his initial appearance on 15 June 2020, Mr Ali Muhammad Ali Abd-Al-Rahman requested a minute of silence and contemplation in memory of all the victims in Darfur and more extensively in Sudan. The Single Judge rejected the suggestion.¹ A request was submitted seeking, *inter alia*, the Single Judge’s reasons for that rejection.² The request is pending.

3. At the same hearing, Mr Ali Muhammad Ali Abd-Al-Rahman stated that he had travelled for two months from Sudan to the Central African Republic on his own initiative, at his own expense and placing himself in peril – quite apart from the risks incurred by his two sons who accompanied him –, in search of justice before the Court.³

4. Mr Ali Muhammad Ali Abd-Al-Rahman, who enjoys the same presumption of innocence as any citizen of Sudan, is motivated by genuine concern for the victims of the Situation in Darfur and the related cases, including his own. After his Lead Counsel had outlined the procedure before the International Criminal Court to him, he found it regrettable that according to the Court’s practice thus far consideration of the right of victims to reparations has been contingent on a conviction subsequent to trial on the basis of article 75(2) of the Statute. He finds it strange that the victims have

¹ Transcript of 15 June 2020, ICC-02/05-01/20-T-001 FRA, <https://www.legal-tools.org/doc/ut4g7z/pdf>, p. 21, lines 14-26.

² “Request to Provide Written Reasoning for Two Oral Decisions Delivered at the First Appearance Hearing”, 18 June 2020, ICC-02/05-01/20-2-tENG, <https://www.legal-tools.org/doc/bi64zi/>

³ Transcript of 15 June 2020, ICC-02/05-01/20-T-001 FRA, [https://www.legal- tools.org/doc/ut4g7z/pdf](https://www.legal-tools.org/doc/ut4g7z/pdf), p. 20, line 27 to p. 21, line 2.

to wait until the end of the trial to be awarded reparations, and even stranger that nothing is awarded to victims where the accused is found innocent and is acquitted, regardless of the actual suffering they have experienced. He is, quite candidly, concerned by the fact that a legitimate desire to provide reparations for victims may weigh against him in the Judges' decision on whether he is guilty or innocent, even though he is innocent. The criticism voiced in support of the victims' interest in obtaining reparations following the Court's acquittals⁴ could have serious

⁴ As non-exhaustive examples: "Côte d'Ivoire/CPI – L'acquittement de Gbagbo met en péril la quête de justice (Paolina Massidda Avocate des victimes) [Côte d'Ivoire/ICC – Gbagbo acquittal imperils quest for justice (Paolina Massidda, counsel for the victims)]", Agence Ivoirienne de Presse, 15 January 2019, <https://aip.ci/cote-divoire-cpi-lacquittement-de-gbagbo-met-en-peril-la-quete-de-justice-avocate-des-victimes/>; "Kenya: Ruto and Sang decision must not derail efforts to ensure justice for victims", Amnesty International, 5 April 2016, <https://www.amnesty.org/en/latest/news/2016/04/kenya-ruto-and-sang-decision-must-not-derail-efforts-to-ensure-justice-for-victims/>; "CAR: Acquittal of Bemba a blow to victims", Amnesty International, 8 June 2018, <https://www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/>; "Cote d'Ivoire: Acquittal of Gbagbo and Blé Goudé a crushing disappointment to victims of post-election violence", Amnesty International, 15 January 2019, <https://www.amnesty.org/en/latest/news/2019/01/cote-acquittal-of-gbagbo-a-crushing-disappointment-to-victims/>; "The Acquittal of Jean-Pierre Bemba: Lessons must be Learned", Avocats Sans Frontières, 11 June 2018, <https://www.asf.be/blog/2018/06/11/acquittal-bemba/>; Lydia El Halw, "Note d'analyse : L'affaire Bemba ou le défi de réhabiliter les victimes en l'absence de condamné [Analysis: the Bemba case or the challenge of rehabilitating victims where no one is convicted]", Centre Thucydide, *Thucydoc* No. 21, 17 April 2019, <https://www.afri-ct.org/2019/thucydoc-n-21-note-danalyse-laffaire-bemba-ou-le-defi-de-rehabiliter-les-victimes-en-labsence-de-condamne-2-2/>; Martina Falkovska-Clarys, "L'acquittement de Jean-Pierre Bemba par la Cour pénale internationale : et les victimes dans tout ça? [The acquittal of Jean-Pierre Bemba by the International Criminal Court: where are the victims in all this?]", *Justice en ligne*, 1 September 1998, <https://www.justice-en-ligne.be/L-acquittement-de-Jean-Pierre/>; "Acquittal of Jean Pierre Bemba on appeal: an affront to thousands of victims", International Federation for Human Rights, 8 June 2018, <https://www.fidh.org/en/region/Africa/central-african-republic/acquittal-of-jean-pierre-bemba-on-appeal-an-affront-to-thousands-of-victims/>; Benoit Hili, "Gbagbo et Blé Goudé devant la CPI : leur acquittement toujours fortement contesté [Gbagbo and Blé Goudé before the ICC: their acquittal still fiercely contested]" (interview with Paolina Massidda), 23 June 2020, <https://www.fratmat.info/article/206054/Politique/gbagbo-et-ble-goude-devant-la-cpi--leur-acquittement-toujours-fortement-conteste/>; "ICC: Kenya Deputy President's Case Ends", Human Rights Watch, 5 April 2016, <https://www.hrw.org/news/2016/04/05/icc-kenya-deputy-presidents-case-ends/>; Elise Keppler, "No Redress for Central African Victims", Human Rights Watch, 11 June 2018, <https://www.hrw.org/news/2018/06/11/no-redress-central-african-victims/>; "Kenya: ICC Decision a Reminder Victims Are Still Waiting for Justice", International Centre for Transitional Justice, 24 January 2012, <https://www.ictj.org/news/kenya-icc-decision-reminder-victims-are-still-waiting-justice/>; Saber Jendoubi, "Jean-Pierre Bemba acquitté en appel: un nouveau traumatisme pour les victimes du Centrafrique [Jean-Pierre Bemba acquitted on appeal: a fresh trauma for CAR's victims]", RTBF, 20 October 2018, https://www.rtf.be/info/monde/detail_jean-pierre-bemba-acquitte-en-appel-un-nouveau-traumatisme-pour-les-victimes-du-centrafrique?id=10034435; "Acquittement de Jean-Pierre Bemba : les victimes centrafricaines entre colère et incompréhension [Jean-Pierre Bemba's acquittal: CAR's victims angry and bemused]", Jeune Afrique, 13 June 2018,

implications, at least in his view, were the Judges to find that the Office of the Prosecutor has failed to adduce evidence to refute his presumed innocence. He moreover observes that it is simply illogical that reparations for victims should be tied to the outcome of the trial of simple, indigent people who, like him, have no financial resources that can be used for reparations. For all those reasons he fears that the victims who experienced the conflicts in Darfur will also have to deal with bitter disappointment at the end of lengthy proceedings with no hope of meaningful reparations. Lastly, he expresses hope that, in the event of a stay of proceedings against him or an acquittal, which he would consider to be the right decision, news of the decision would not attract the above-mentioned barrage of criticism of the Court and will not be regarded as an affront to the victims and their justified request for reparations for the suffering they have endured. When he returns home to Sudan, Mr Ali Muhammad Ali Abd-Al-Rahman's hopes to be able to tell the victims that the justice he came to seek in The Hague has also benefitted them.

<https://www.jeuneafrique.com/576983/societe/acquittement-de-jean-pierre-bemba-les-victimes-centrafricaines-entre-colere-et-incomprehension/>; *"Côte d'Ivoire : une association de victimes s'oppose au retour de Laurent Gbagbo* [Côte d'Ivoire: a victims association opposes the return of Laurent Gbagbo]", *Le Monde-Afrique*, 2 June 2020, https://www.lemonde.fr/afrique/article/2020/06/02/cote-d-ivoire-une-association-de-victimes-s-oppose-au-retour-de-laurent-gbagbo_6041476_3212.html; Stéphanie Maupas, *"La méfiance des victimes envers la justice internationale dépasse l'affaire Bemba* [Victims' mistrust of international justice goes beyond the Bemba case]", *Justiceinfo.net – Fondation Hirondelle*, 17 August 2018, <https://www.justiceinfo.net/fr/reparations/38443-la-mefiance-des-victimes-envers-la-justice-internationale-depasse-l-affaire-bemba.html>; "No Time to Wait: Realising Victims' Right to Reparations before the ICC", *Redress*, January 2019, <https://redress.org/wp-content/uploads/2019/02/20190221-Reparations-Report-English.pdf>, pp. 27, 30, 40; "RCA : Jean-Pierre Bemba acquitté, quid de l'indemnisation des victimes [CAR: Pierre Bemba acquitted: what about compensation for victims?]", *RFI*, 14 June 2018, <https://www.rfi.fr/fr/afrique/20180614-rca-acquittement-bemba-indemnisations-victimes>; *"Acquittement de Bemba : l'amertume des victimes [Bemba's acquittal: victims' bitterness]"*, *BBC*, 13 June 2018, <https://www.bbc.com/afrique/media-44420792>; *"Laurent Gbagbo acquitté: colère et déception pour les victimes de 2011"* [Laurent Gbagbo acquitted: anger and disappointment for the victims of 2011], *RFI*, 16 January 2019, <https://www.rfi.fr/fr/afrique/20190116-laurent-gbagbo-acquitte-colere-deception-victimes-crise-2011>; Marceau Sivieude, *"Centrafrique : L'acquittement de Jean-Pierre Bemba est un choc pour les victimes et un échec pour la CPI* [Jean-Pierre Bemba's acquittal is a blow for victims and a failure for the ICC]", *Le Monde-Afrique*, 13 June 2018, https://www.lemonde.fr/afrique/article/2018/06/13/l-acquittement-de-jean-pierre-bemba-est-un-choc-pour-les-victimes-et-un-echec-pour-la-cpi_5314262_3212.html; Caroline Wafula (interview with Ms Fatou Bensouda, Prosecutor), *"Collapse of Uhuru Kenyatta case worst moment for victims, says Bensouda"*, *The Daily Nation*, 31 March 2015, <https://www.nation.co.ke/news/Bensouda-speaks-collapse-Uhuru-case/1950946-2671978-format-xhtml-xc0sdxz/index.html>; etc.

5. That is why Mr Ali Muhammad Ali Abd-Al-Rahman has instructed his Lead Counsel to draft this request. He wishes to respectfully express the hope that the submissions in this request regarding his case be the starting point for a wide-ranging reflection, the outcome of which will be that the right of victims to reparations will be envisaged irrespective of the outcome of criminal proceedings, and invites the community of scholars involved in the promotion of the right of victims to reparations, including those cited in footnote 4 above, to take up this discussion and make extensive contributions to it in order to redirect the current practice concerning reparations towards one that is more favourable to victims and in accordance with the Statute and other texts of the Court.

6. Lead Counsel is aware that by these submissions he is about to move the Single Judge, at the request of Mr Ali Muhammad Ali Abd-Al-Rahman, to engage in a rather bold alteration of the Court's practice – contrary to mainstream thinking on the issue that confines reparations before the Court to reparations pursuant to article 75(2). Should the Single Judge grant this request in any way, he will have rendered a landmark decision in international criminal justice and ushered in the right of victims to be awarded reparations for the suffering they have experienced as a result of the commission of the most serious crimes affecting the international community as a whole. Such a decision will no doubt go down as one of the most important decisions ever rendered by the International Criminal Court and will continue to attract comment for decades to come. This is the historical event in respect of which Lead Counsel humbly moves the Single Judge to action.

7. It would be easy to dismiss this request simply by citing the practice of the Court founded on article 75(2) as defining a priori the scope of the principles relating to reparations on the basis of article 75(1), should the Single Judge find it more appropriate to do so. However, if these submissions prove persuasive enough to warrant consideration in the future of the complementarity, as opposed to the overlap, between paragraphs (1) and (2) of article 75 and their interpretation in the light of general international law on the right of victims to reparations, Lead Counsel is confident that the Single Judge will show the independence of mind necessary to

depart from the dominant opinion and take up this key challenge for justice, for victims and for the future of the International Criminal Court.

8. As so eloquently stated by Pre-Trial Chamber I in one of the first decisions in the history of the Court regarding the issuance of a warrant of arrest for a person subject to prosecution⁵ and as reiterated by the Appeals Chamber in the first order for reparations,⁶

the reparations regime in the Statute is not only one of its particularities but also one of its essential features. In the view of the Chamber, the success of the Court is, to some extent, linked to the success of its reparations system.

Lead Counsel cannot but subscribe to that sentiment and respectfully submits this contribution to the “success of the Court” for consideration by the Single Judge.

III THE RIGHT OF VICTIMS TO REPARATIONS IN GENERAL INTERNATIONAL LAW

9. The right of victims to reparations predates the drafting of article 75 of the Statute in 1998. It is rooted in general international law, notably international humanitarian law. Its recognition has been gradual, moving progressively from affirmation of the classic principle of State responsibility in international law to affirmation of the right to reparations for individual victims for harm they have suffered as a result of the commission of international crimes. Lead Counsel attempts here a brief and non-exhaustive overview of the main stages in that process as a means of finding out what the “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict” and “internationally recognized human rights” say about reparations for victims pursuant to articles 21(1)(b) and 21(3) of the Statute.

10. As early as 1907, the *Hague Convention (IV) Respecting the Laws and Customs of War on Land* stated in article 3 that

⁵“Decision on the Prosecutor’s Application for a warrant of arrest. Article 58”, ICC-01/04-01/06-1-Corr-Red, <https://www.legal-tools.org/doc/af6679/>, para. 136, footnotes omitted.

⁶ “Order for Reparations (amended)”, 1 August 2016, ICC-01/04-01/06-3129-AnxA, <https://www.legal-tools.org/doc/df2804/> para. 3.

[a] belligerent party which violates the provisions of the said [Laws and Customs of War on Land] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁷

11. In 1949, Common Articles 51, 52, 131 and 148 of Geneva Conventions I to IV respectively state:

No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [regarding grave breaches to the Geneva Conventions].⁸

12. In 1977, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted, under article 91, a formulation similar to that of the Hague Convention (IV) of 1907:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.⁹

13. While it is true that these three instruments merely codify the usual grounds for State-to-State compensation in public international law, their relevance in the gradual construction of the right to reparations for individual victims cannot be underestimated as it should be recalled that the diplomatic protection mechanism used by States to invoke the responsibility of another State was, for a long time, the only way that individual victims could be awarded reparations by a foreign State.

14. In 2006 the International Committee of the Red Cross elevated as rule 150 of customary international humanitarian law the principle that “[a] State responsible for violations of international humanitarian law is required to make full reparation for

⁷ *Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907, <https://www.legal-tools.org/doc/fa0161/>, art. 3.

⁸ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949, <https://www.legal-tools.org/doc/baf8e7/>, art. 51; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949, <https://www.legal-tools.org/doc/0d0216/>, art. 52; *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949, <https://www.legal-tools.org/doc/365095/>, art. 131; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*. Geneva, 12 August 1949, <https://www.legal-tools.org/doc/d5e260/>, art. 148.

⁹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, <https://www.legal-tools.org/doc/d9328a/>, art. 91.

the loss or injury caused”.¹⁰ Rule 150 applies equally in situations of both international and non-international armed conflict.

15. In the area of human rights, the International Covenant on Civil and Political Rights of 19 December 1966 is much more specific regarding the right to reparations for victims. Article 2(3) states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.¹¹

16. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 states as follows in article 14(1):

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.¹²

17. The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the right of victims to “just satisfaction” in article 41, which reads as follows:

If the [European Court of Human Rights] finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.¹³

18. On the basis of that article, the European Court of Human Rights (“ECtHR”) has established the principle of *restitutio in integrum* at the expense of the defendant

¹⁰ J-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law – Volume 1: Rules*, International Committee of the Red Cross, 2006, rule 150, pp. 707-726. For discussions regarding established practice cited in support of Customary IHL rule 150, see J-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law – vol. II: Practice*, International Committee of the Red Cross, 2005, pp. 3530-3610.

¹¹ *International Covenant on Civil and Political Rights*, 19 December 1966, <https://www.legal-tools.org/doc/2838f3/>, art. 2(3).

¹² *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, <http://www.legal-tools.org/doc/326294/>, art. 14(1).

¹³ *European Convention on Human Rights* (as amended by Protocols Nos. 11 and 14), 4 November 1950, <https://www.legal-tools.org/doc/8267cb/>, art. 41.

State whenever the violation allows or, failing that, pecuniary reparation.¹⁴ The *American Convention on Human Rights* is particularly protective of the right to reparation for victims, to which it attaches a fast-track procedure. It states in article 63:

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.¹⁵

19. The Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights provides a similar mechanism to that of the Inter-American Court in article 27:

1. If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary.¹⁶

20. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the United Nations General Assembly *resolution 40/34* of 29 November 1985 ("Declaration of 1985") establishes under sections 12 and 13 the principle of substitution by the State to provide financial compensation to victims "[whenever] compensation is not fully available from the offender or other sources".¹⁷ Although this declaration is not binding, it has played an important role in the progressive recognition of the right of victims to reparation.

¹⁴ ECtHR, *Papamichalopoulos and Others v. Greece*, "Judgment", 31 October 1995, application no. 14556/89; *Scozzari and Giunta v. Italy*, "Judgment", 13 July 2000, application nos. 39221/98 and 41963/98, <https://www.legal-tools.org/doc/91c63c/>. See F. Sudre, *Droit européen et international des droits de l'homme*, 10th ed., Presses Universitaires de France, 2011, pp. 791-796.

¹⁵ *American Convention on Human Rights* (Pact of San Jose, Costa Rica), 22 November 1969, <https://www.legal-tools.org/doc/1152cf/>, art. 63.

¹⁶ Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights, 9 July 1998, <https://www.legal-tools.org/doc/b9eae8/>, art. 27.

¹⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations, General Assembly, *Resolution 40/34*, 29 November 1985, <https://www.legal-tools.org/doc/b3fde4/>, sects. 12-13. [the hyperlink is empty]

21. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (“Guidelines on Child Victims”) extended the right of child victims to reparation from “restitution from the offender ordered in the criminal court” to “aid from victim compensation programmes administered by the State and damages ordered to be paid in civil proceedings”.¹⁸ For the purpose of implementing the Guidelines on Child Victims, the United Nations Office on Drugs and Crimes and UNICEF recommend developing

[...] State compensation schemes for those children who cannot obtain restitution from their offenders. These schemes may be financed, for example, through subrogation procedures to get the compensation reimbursed, in full or in part, by the offender(s) or other responsible bodies, through public funding, confiscation of the perpetrator’s assets, fines or other sources, such as a tax imposed on insurance contracts;¹⁹

22. Even more pertinently, “Chapter IX – “Reparation for harm suffered” of the 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 by United Nations General Assembly *Resolution 60/147*, also known as the Van Boven/Bassiouni Principles in recognition of the two special rapporteurs who drafted them (“Van Boven/Bassiouni Principles”),²⁰ confirms the reversal which had already occurred in the Declaration of 1985 of the traditional prioritizing of reparation by the person found guilty, with priority now given to reparation provided by the State, which can potentially bring a recovery action against the criminal in the event of a conviction:

In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for

¹⁸ ECOSOC Resolution 2005/20, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, 22 July 2005, <https://www.legal-tools.org/doc/289b24/>, Chapter XIII – The right to reparation, sects. 35-37.

¹⁹ UNODC-UNICEF-International Bureau for Children’s Rights, Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses of crime, 2011, https://www.unodc.org/pdf/criminal_justice/Handbook, p. 99.

²⁰ “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”, United Nations, General Assembly, *Resolution 60/147*, 21 March 2006, <https://www.legal-tools.org/doc/bcf508/>, sects. 15-23.

reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.²¹

Indeed, the Van Boven/Bassiouni Principles urge States to “establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations”.²² The forms of reparation envisaged include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

23. The same reversal of the burden of reparation from the person found guilty to the State found in the Declaration of 1985 and the Van Boven/Bassiouni Principles is applied at European level under article 2 of the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983, pursuant to which “[w]hen compensation is not fully available from other sources the State shall contribute to compensate” the victims.²³

24. In the light of the above brief overview of the relevant provisions of international law, Lead Council accordingly moves the Single Judge to conclude: (1) that general international law, in particular international humanitarian law and international human rights law, has established the right of victims to reparation; (2) that the said right is not contingent on the outcome of the criminal proceedings or the ability of any person who is found guilty to provide reparations; and (3) that in the most developed national systems there is a parallel and expedited procedure for the award of reparations by the State or by special funds for victims.

IV NATIONAL PRACTICES RELATING TO REPARATIONS

25. Lead Counsel does not claim to provide an exhaustive overview here of national practices relating to reparations, which varies significantly. For the purposes of article 21(1)(c) of the Statute, he merely moves the Single Judge to identify certain

²¹ *Ibid.*, sect. 15.

²² *Ibid.*, sect. 16.

²³ Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, 24 November 1983, <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680079751>, art. 2.

general principles of law on reparations “derived by the Court from national laws of legal systems of the world”, on the basis of the national information and sources of law referred to below.

26. In **South Africa**, the Promotion of National Unity and Reconciliation Act, Law No. 34 of 19 July 1995²⁴ established the President’s Fund financed by Parliament and voluntary contributions (article 42(1)) to pay reparations (article 42(2)) to victims of gross violations of human rights during the apartheid period.

27. In **Argentina**, a reparations programme for victims of human rights violations was set up. It includes a component on pecuniary reparation. Laws Nos. 24.043,²⁵ 24.411,²⁶ 25.192,²⁷ and 25.914²⁸ provide for a system of pecuniary compensation for victims and their beneficiaries which is independent of criminal proceedings in respect of the crimes that caused them harm and is adjudicated by an administrative authority under the judicial control of a court separate from the court that would have heard any prosecution. According to academic authorities, 22,234 applications for reparations were filed under Law No. 24.043, with 9,776 of them resulting in the award of reparations; 10,123 applications were submitted under Law No. 24.411 and 7,781 of them were granted; 31 applications were filed under Law No. 25.192 and 25 of them were granted; and 1,618 requests were filed under Law No. 25.914 and 619 of them were granted.²⁹ The individual liability of the perpetrators of crimes is also envisaged

²⁴ South Africa, “Promotion of National Unity and Reconciliation Act 34 of 1995”, 19 July 1995, <https://www.justice.gov.za/legislation/acts/1995-034.pdf>

²⁵ Argentina, “Ley No. 24.043 Otórganse beneficios a las personas que hubieran sido puestas a disposición del P.E.N. durante la vigencia del estado de sitio, o siendo civiles hubiesen sufrido detención en virtud de actos emanados de tribunales militares” (English version not available), 23 December 1991, <https://www.legal-tools.org/doc/3505b7/>

²⁶ Argentina, “Ley No. 24.411 Beneficios que tendrán a percibir por medio de sus causahabientes, personas que se encuentren en tal situación” (English version not available), 28 December 1994, <https://www.legal-tools.org/doc/734b39/>

²⁷ Argentina, “Ley No. 25.192 Beneficio destinado a los causahabientes de las personas que fallacieron entre el 9 y el 12 de junio de 1956, con motivo de la represión del levantamiento cívico militar de esas jornadas o de su disidencia política” (English version not available), 24 November 1999, <https://www.legal-tools.org/doc/41eef9/>

²⁸ Argentina, “Ley No. 25.914 Indemnización para niños y niñas nacidos en cautiverio” (English version not available), 25 August 2004, <https://www.legal-tools.org/doc/07431e/>

²⁹ A. Gualde, N. Luterstein, “The Argentinian Reparations Programme for Grave Violations of Human Rights Perpetrated during the Last Military Dictatorship (1976-1983)”, in C. Ferstman, M. Goetz, A. Stephens, Reparations for Victims of Genocide, War crimes and Crimes against Humanity, Brill, 2009, pp. 415-434.

in the Argentinian programme, although in terms of non-pecuniary reparation and in reaction to Report No. 28/92 of the Inter-American Commission on Human Rights of 2 October 1992,³⁰ which found that Laws Nos. 23.492³¹ and 23.521,³² which brought an end to criminal proceedings against the perpetrators of the crimes of the dictatorship, were in violation of the Inter-American Convention on Human Rights. The prosecution of the perpetrators of violations therefore remains separate from and of no consequence for the procedure for providing reparation to victims.

28. In **Belgium**, the Law of 1 August 1985 on taxation and other measures³³ set up a special fund for victims of intentional acts of violence and voluntary rescuers (article 28). The special fund is financed by a mandatory contribution of EUR 25 levied on all persons sentenced to principal criminal penalties and a supplement on fines for road traffic offences (article 29). Reparations are granted by judicial decision of a special commission (article 30) under the supervision of the Belgian Council of State (article 34 *quater*). The commission awards compensation to the victim where “[TRANSLATION] reparation for the damage cannot be effectively and sufficiently provided by the perpetrator or the person liable in civil law, by a social security scheme or private insurance, or in any other way” (article 31 *bis*(5)).

29. In **Bosnia and Herzegovina**, the Human Rights Chamber ordered the authorities of the *Republika Srpska* to pay reparations in respect of victims of forced disappearances.³⁴

³⁰ Inter-American Commission on Human Rights, “Report No. 28/92 Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, Argentina”, 2 October 1992, <http://www.cidh.org/annualrep/92eng/Argentina10.147.htm>

³¹ Argentina, “Ley No. 23.492 Ley de Punto Final” (English version not available), 24 December 1986, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21864/norma.htm>

³² Argentina, “Ley No. 23.521 Ley de Obediencia Debida” (English version not available), 8 June 1987, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/20000-24999/21746/norma.htm>

³³ Belgium, “Loi portant des mesures fiscales et autres”, 1 August 1985, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=1985080130&table_name=loi, arts. 28-41.

³⁴ For example, Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, “Case No. CH/99/3196, *Avdo and Esma Palić v. The Republika Srpska*”, Decision on Admissibility and Merits, 11 January 2001, http://www.worldcourts.com/hrcbih/eng/decisions/CH99_3196_Palic2.pdf; Bosnia and Herzegovina, Human Rights Chamber for Bosnia and Herzegovina, “Case No. CH/01/8365 and others, *Ferida Selimović and 48 others v. The Republika Srpska* (“Srebrenica Cases”)”, Decision on Admissibility and Merits, 7 March 2003, http://www.worldcourts.com/hrcbih/eng/decisions/2003.03.03_Selimovic_v_RS.htm, paras. 203-220.

30. In **Canada (Province of Quebec)**, the Act Respecting Assistance for Victims of Crime of 1988³⁵ established the Crime Victims Assistance Fund (“FAVAC”). The Fund is aimed at “any natural person who, in the course of a criminal act committed in Quebec, suffers physical or psychological injury or material loss, whether or not the perpetrator of the act is identified, arrested, prosecuted or convicted” (article 1). Initially, FAVAC was funded solely by voluntary contributions voted by Parliament and allocated by the government, as well as by voluntary contributions from individuals or legal entities (article 12). A subsequent amendment added to these sources of finance a CAD 10 compulsory supplement on criminal fines for violations of Quebec laws, with the exception of violations of municipal by-laws.³⁶

31. In **Colombia**, Law 975 on Justice and Peace of 25 July 2005³⁷ set up a reparations fund for victims of crimes committed by the illegal armed groups to which it applies (article 54). The fund acts at the request of the criminal court, in particular where the perpetrator of the crimes is not identified whereas the damage suffered by the victims and its causal link with the activities of the illegal armed groups have been established (article 42).

32. In **Estonia**, Law RT I 2004, 2, 3 of 17 December 2003³⁸ set up a national compensation mechanism for victims of certain crimes, up to a maximum amount of EUR 9,590 per victim (article 15). Compensation is awarded on conclusion of an autonomous procedure parallel to the criminal proceedings, if any (article 19). The compensation may be suspended in the specific situation where it is evident that the person liable for the damage is willing and able to pay compensation for it (article 21(1)(2)) although, even in such a situation, an advance on the amount payable as

³⁵ Canada (Province of Quebec), “A-13.2 Act respecting assistance for victims of crime” 1988,

<http://legisquebec.gouv.qc.ca/en/ShowDoc/cs/A-13.2>

³⁶ Canada (Province of Quebec), “C-25.1 – Code of Penal Procedure”, 1987, <http://legisquebec.gouv.qc.ca/en/showDoc/cs/C-25.1?&digest=>, art. 8.1 as amended by the Law of 17 March 2020,

http://legisquebec.gouv.qc.ca/en/showversion/cs/C-25.1?code=se:8_1&pointInTime=20200708#20200708

³⁷ Colombia, “Ley 975 de Justicia y Paz” (English version not available), 25 July 2005, https://www.cejil.org/sites/default/files/ley_975_de_2005_0.pdf

³⁸ Estonia, “Victim Support Act RT I 2004, 2, 3”, 12 December 2003, <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/502012017002/consolide>

compensation may be made (article 22). The payment of compensation by the State transfers to the State the right to claim repayment from the perpetrator of the crime that caused the damage, by bringing an action for recovery for a maximum amount equal to the amount paid to the victim as compensation (article 31).

33. In the **United States**, Section 3525 USC³⁹ set up the Federal Victims Compensation Fund on the basis of which the U.S. Attorney General may pay restitution or compensation to any victim of a crime (§ 3525(a)) in an amount not to exceed USD 50,000, provided the victim has sought reparations by a civil action (§ 3525(d)).

34. In **Finland**, Act No. 935/1973 on Compensation for Crime Damage⁴⁰ set up a similar fund for the compensation of crime-related loss (article 1) up to a maximum amount of EUR 47,934 (article 6(a)(2)). Other damages paid by the criminal are deducted *a posteriori* from the amount of the compensation payable by the State (article (3)(3)). Compensation is paid by the State even when the victim has not lodged a complaint (article 12). The fund is not bound by court decisions on reparations (article (14)(1)). The fund is vested with the same right to bring a recovery action against the criminal for the amount of compensation paid (article 19).

35. In **France**, article 706(3) to (15) of the Code of Criminal Procedure⁴¹ provides for the right to full reparation of damage due to offences against the person for any person who suffers injury as a result of deliberate or involuntary acts (article 706(3)). Those articles establish an autonomous mode of reparation following its own rules and with proceedings held before a civil court of first and last instance, the *Commission d'Indemnisation des Victimes d'Infractions* [Commission for the Compensation of Victims of Offences] ("CIVI") (article 706(4)). Article 706(7) states that where criminal proceedings have been instituted, the CIVI may make a decision before the ruling in the prosecution. Where the criminal proceedings result in an award of damages in

³⁹ United States, "18 USC § 3525 – Victims Compensation Fund".

⁴⁰ Finland, "Act no. 935/1973 on Compensation for Crime Damage" [unofficial translation], 1973, https://finlex.fi/en/laki/kaannokset/1973/en19730935_19990306.pdf

⁴¹ France, "Code de procédure pénale". https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006071154/LEGISCTA000006121328/#LEGISCTA000006121328, art. 706(3)-706(15).

excess of the amount set by the CIVI, the victim may return to the CIVI and request additional compensation (article 706(8)). The reparations ordered are financed by the *Fonds au profit des victimes d'actes de terrorisme et d'autres infractions* [Fund for Victims of Terrorism and other Offences] ("FGTI") which is governed by articles L. 422(1) to (6) and R. 422(1) to (10) of the *Code des Assurances* [Insurance Code]⁴² and financed by a levy on property insurance premiums (article L. 422(1) of the *Code des Assurances*). Once the reparation compensation has been paid, the FGTI is subrogated to the right of the victim to obtain reimbursement of the compensation from the persons responsible for the damage. The obligations to pay compensation ordered in respect of the offender are enforced for the benefit of the FGTI (article 706(11)).

36. In **Italy**, a body of laws and regulations establishes various compensation mechanisms for victims of varied forms of crime, such as Law No. 466 of 13 August 1980 relating to victims killed or injured in the line of duty and victims of terrorism,⁴³ Law No. 302 of 20 October 1990 establishing measures for victims of terrorism and organized crime,⁴⁴ Decree-Law No. 419 on the creation of a fund to support victims of extortion,⁴⁵ Law No. 512 setting up a solidarity fund for victims of mafia crimes⁴⁶ and Law No. 228 on measures against trafficking in human beings, setting up a fund for anti-trafficking measures and a special programme to support victims of crimes under articles 600 and 601 of the Criminal Code.⁴⁷ The common feature of those measures is

⁴² France, "Code des Assurances", <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006073984>, arts. L. 422(1)-(6) and R. 422(1)-(10).

⁴³ Italy, "Legge n. 466 – Speciali elargizioni a favore di categorie di dipendenti pubblici e di cittadini vittime del dovere o di azioni terroristiche" (English version not available), 13 August 1980, <http://www.levittimedeldovereditalia.it/files/---Legge--466-del-13.08.pdf>

⁴⁴ Italy, "Legge n. 302 – recante norme a favore delle vittime del terrorismo e della criminalità organizzata" (English version not available), 20 October 1990, <http://www.levittimedeldovereditalia.it/files/---Legge--302-del-20.10.pdf>

⁴⁵ Italy, "Decreto Legge n. 419 – recante istituzione del Fondo di sostegno per le vittime di richieste estorsive, convertito dalla legge 18 febbraio 1992, n. 172" (English version not available), 31 December 1991, <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:1991:419>

⁴⁶ Italy, "Legge n. 512 – Istituzione del Fondo di rotazione per la solidarietà alle vittime dei reati di tipo mafioso" (English version not available), 22 December 1999, <http://www.parlamento.it/parlam/leggi/995121.htm>

⁴⁷ Italy, "Legge n. 228 – recante misure contro la tratta di persone, che istituisce il Fondo per le misure anti- tratta e uno speciale programma di assistenza per le vittime dei reati previsti dagli articoli 600 e 601 del codice penale" (English version not available), 11 August 2003, <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2003:228>.

that they are neither constrained by nor conditional on the criminal proceedings against the perpetrator of the crimes.

37. **Japan** also has a compensation programme for victims of violent crimes who have sustained serious injury and for the beneficiaries of deceased victims. As in other countries, compensation is paid through a procedure which is independent of the criminal proceedings before a prefecture public security commission. The only precondition is that the crime must have been recorded by the police. The perpetrator does not even have to be known for the victim to benefit from the programme. This procedure is additional to any traditional compensation subsequently ordered by the court against the perpetrator as an outcome of criminal proceedings.⁴⁸

38. In **Mexico**, the Law of 22 April 2003 on care and support for victims of crimes for the federal district⁴⁹ also establishes a fund to provide care and support to victims. It is financed by the government and voluntary contributions (article 23).

39. In **Portugal**, Law No. 31/2006 on the compensation of victims of crimes⁵⁰ enables victims of violent crime to apply for compensation from the State, independently of any criminal proceedings (article 1).

40. In the **Democratic Republic of the Congo**, the military courts have established that the State is liable to pay damages to victims of crimes and their beneficiaries on the basis of article 260(3) of the Congolese Civil Code.⁵¹

41. In the **Czech Republic**, Law of 31 July 1997 on Compensation for Victims⁵² extends the right to reparation of harm by the State in cases where the person under

⁴⁸ Japan, Ministry of Justice, “For Victims of Crime – Victim Protection and Victim Support”, March 2017, <http://www.moj.go.jp/content/001142224.pdf>, pp. 51-55.

⁴⁹ Mexico, “Ley de atención y apoyo a las víctimas del delito para el distrito federal” (English version not available), 22 April 2003, <http://cgsservicios.df.gob.mx/prontuario/vigente/r6302.htm>

⁵⁰ Portugal, “Lei no. 31/2006 relative a indemnização das vítimas da criminalidade” (English version not available), 2006, <http://www.gplp.mj.pt/home/concluidos/penal/lei312006.pdf>

⁵¹ DRC, Military Court, Katanga, *Ankoro*, 20 December 2004, RP 01/2003 and RP 02/2004; Military Tribunal, Garnison de Kindu, *Kalonga*, 26 October 2005, RP 011/05, p. 7; Military Tribunal, Garnison de Mbandaka, *Mutins de Mbandaka*, p. 41; Military Court, Équateur, *Songo Mboyo*, 7 June 2006, RPA 014/06. These references are drawn from Document ICC-01/04-01/07-1198-Anx, “Étude de jurisprudence – L’application du Statut de Rome de la Cour pénale internationale par les juridictions de la République démocratique du Congo, mars 2009”, Avocats Sans Frontières, 10 June 2009, (English version not available), <https://www.legal-tools.org/doc/306cd3/pdf>, pp. 98-105.

⁵² Czech Republic, “Law 209/1997 Sb. On Compensation for Victims” (English version not available), 31 July 1997, <https://rechten.uvt.nl/victimology/national/cz-viccomp.doc>

prosecution is acquitted and in cases where criminal proceedings were not possible because the perpetrator of the crimes could not be identified or where the law prevents criminal proceedings, such as in the case of expiry of the limitation period (article 5(2)).

42. In the **United Kingdom**, a Criminal Injuries Compensation Scheme was established by the Crime Compensation Act 1995⁵³ and strengthened in 2012. It provides that the Secretary of State may award reparation in the form of compensation to victims of violent crime out of funds allocated for this purpose by Parliament (article 9(6)). The amount of the compensation is determined by the Criminal Injuries Compensation Authority. Appeals may be made to the Criminal Injuries Compensation Tribunal.

43. In **Sudan**, article 77(A) – “Compensation”⁵⁴ – of the Criminal Code of 2003 employs an extremely backward notion of reparation for victims which shows none of the progress made in other countries and major legal systems: the criminal court that convicts a criminal may order compensation for the victims of the person sentenced, which may be enforced in civil proceedings against that person. This provision in itself is not the whole story, as it does not exclude the existence under Sudanese law of other mechanisms for reparation by the State or any other entity. Indeed, Lead Counsel draws the attention of the Single Judge to a precedent cited in an academic article in which in 1992 the Sudanese regime apparently ordered the payment of compensation by the government to the family of a murder victim in lieu of capital punishment for the murderer on the basis of the Islamic concept of *Diya*, that is to say, financial compensation paid to the victim or the victim’s beneficiaries in cases of *Qesas* crimes (murder, bodily injury or damage to property).⁵⁵ Regardless of how reliable this doctrinal reference may be, if confirmed, this precedent would

⁵³ United Kingdom, “Criminal Injuries Compensation Act 1995”, <http://www.legislation.gov.uk/ukpga/1995/53/contents>

⁵⁴ Sudan, “The Penal Code, 2003”, 2003, <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/75718/78931/F440057801/SDN75718.pdf>, art. 77(A).

⁵⁵ K. B. Gravelle, “Islamic Law in Sudan: a Comparative Analysis”, in *ILSA Journal of International and Comparative Law*, vol. 5:1, 1998, <https://core.ac.uk/download/pdf/51091725.pdf>, pp. 15-16.

suggest that other Sharia-based reparation mechanisms not dependent on the convicted person may be permissible under Sudanese law.

44. In **Switzerland**, the federal law of 23 March 2007⁵⁶ on assistance for victims of violations enshrines the right of victims to reparations regardless of whether the “[TRANSLATION] perpetrator (a) was known or not; (b) acted wrongfully or not; (c) acted deliberately or was negligent” (article 1(3)). The canton paying the compensation is subrogated to any benefits of the same nature that the victim may claim in respect of the violation, without exceeding the amount of the payments (article 7).

45. These examples from the national laws and practices in the 19 countries referred to above belonging to the different legal systems of the world demonstrate therefore, with the sole possible exception of Sudan, that (1) the main reparations for harm caused by certain, in any event the most violent and serious, crimes, are addressed separately from the criminal proceedings; (2) they are not contingent on conviction of the perpetrator of the crimes; and (3) they are the subject matter of separate autonomous mechanisms before different authorities, whether courts or administrative bodies subject to judicial review, while (4) reparations by the convicted person are residual and extremely subsidiary even where they are possible; (5) national reparations programmes are financed directly by the State, by voluntary contributions and/or by a fund specifically set up for that purpose; and (6) in the most developed systems, the authority bearing the financial burden of reparations is subrogated to the position of the victim in respect of criminal reparations and may take action for recovery against the perpetrator, if one is known and convicted. Lead Counsel prays the Single Judge, who has full jurisdiction over the matter, to examine these national laws and practices and to find that they establish the six principles summarized above as general principles of law within the meaning of article 21(1)(c) of the Statute, in the area of reparations for victims outside criminal proceedings.

⁵⁶ The Swiss Confederation, “*Loi fédérale RS 312.5 sur l’aide aux victimes d’infractions*”, (English version not available), 23 March 2007”, <https://www.admin.ch/opc/fr/classified-compilation/20041159/index.html>

V PROVISIONS REGARDING REPARATIONS FOR VICTIMS IN THE COURT'S SYSTEM

46. In this part, Lead Counsel briefly recalls the main provisions regarding reparations for victims in the Court's system on which he will rely to substantiate this Request. The provisions are identified following the order of their numbering in the relevant texts and listed in descending order of the Court's hierarchy of core legal instruments.

47. **Article 21 of the Statute** defines the law applicable before the Court. In addition to the Statute and the Rules of Procedure and Evidence ("Rules") (article 21(1)(a)), it refers in the second place to "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict" (article 21(1)(b)) and, "[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world" (article 21(1)(c)). Article 21(3) states further, that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". The Court's case law, established by the Pre-Trial,⁵⁷ Trial⁵⁸ and Appeals Chambers,⁵⁹ enshrines the Van Boven/Bassiouni Principles cited above as sources of "internationally recognized human rights" under article 21(3) of the Statute.

48. **Article 68(3) of the Statute** permits "victims", without further specification, to present their views and concerns where their personal interests are affected. It is on this provision in particular that the participation of victims in criminal proceedings is founded. However, the participation of victims in a case is by definition restricted to victims whose victimization is the result of the specific crimes described in the charges brought against an accused person. The word "victims" used in article 68(3) is

⁵⁷ "Fourth Decision on Victims' Participation", 12 December 2008, ICC-01/05-01/08-320, <https://www.legal-tools.org/doc/1652d9/>, paras. 16 and 87.

⁵⁸ "Decision on Victims' Participation", 18 January 2008, ICC-01/04-01/06-1119, <https://www.legal-tools.org/doc/4e503b/>, para. 35.

⁵⁹ "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", 23 February 2009, ICC-02/04-179 OA/OA2, <https://www.legal-tools.org/doc/5808c7/>, para. 34.

however generic and refers to the definition of “victim” in rule 85 of the Rules, which encompasses all victims of crimes over which the Court can exercise its jurisdiction, namely those committed in the context of a situation brought before the Court under article 13 of the Rome Statute. In the Court’s case law victims have indeed been permitted to participate in the context of situations “provided their personal interests are affected by the issues arising for resolution”.⁶⁰ Should issues relating to reparations for victims be addressed at the pre-trial stage and/or as part of proceedings in a situation before the Court, that personal interests test would undoubtedly be met. The right of victims to present their views and concerns whenever their personal interests are affected must therefore be understood in a broader sense than victims’ participation in cases before the Court, which can and should encompass the right to seek reparations for all crimes falling under the Court’s jurisdiction, including in proceedings before the Pre-Trial Chamber in the context of situations.

49. **Article 75(1) of the Statute** is the main article pursuant to which this Request and Observations is submitted. Even though the inclusion of reparations for victims in the statute of a criminal court – as opposed to a civil court – has long been a controversial issue, the idea received broad consensus at the Rome Diplomatic Conference.⁶¹ Nevertheless, the late stage at which remnants of resistance were silenced left too little time to flesh out provisions before the Conference. A solution was therefore found, of allowing the Court to establish its own principles relating to reparations. However, the final draft Statute prepared by the Preparatory Committee included a footnote to serve as guidance. The footnote stated that for the purposes of defining the terms “victims” and “reparations”, the Court was to refer to the Declaration of 1985 and the draft of what were in 2006 to become the Van Boven/Bassiouni Principles.⁶² It follows that by including article 75(1) in the Statute,

⁶⁰ “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007”, 19 December 2008, ICC-01/04-556 OA4 OA5 OA6, para. 56.

⁶¹ A/CONF.183/SR.2, <https://www.legal-tools.org/doc/1583a7/>, para. 37 (European Union, Lithuania, Latvia, Estonia, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Cyprus, Iceland, Norway), para. 113 (Rwanda); A/CONF.183/SR.7, <https://www.legal-tools.org/doc/e59c08/>, para. 56 (Malawi).

⁶² A/CONF.183/2/Add.1, <https://www.legal-tools.org/doc/816405/>, p. 116, footnote 22.

the States parties to the Diplomatic Conference entrusted a virtually blank page to the Court, the sole frame of reference for filling it being the Declaration of 1985 and the future Van Boven/Bassiouni Principles. After the Court had been set up, the issue of establishing principles relating to reparations before any reparations proceedings before the Chambers was discussed by the plenary of Judges in 2006 and 2008, but the discussion led to the decision to leave it to the competent Chambers to establish those principles in the context of judicial debate according to the specificities of each case.⁶³ That is what the Court has done thus far by rendering successive decisions on principles relating to reparations in *Lubanga*,⁶⁴ *Katanga*⁶⁵ and *Al Mahdi*.⁶⁶ It is what Lead Counsel, in submitting this Request and Observations, is now moving the Single Judge to do.

50. **Article 75(2) of the Statute** is the article on which the Court's first proceedings in relation to reparations have been founded thus far. Article 75(2) is applicable on the conclusion of the trial, once an accused person has been convicted and sentenced. Its application is contingent on the conviction of the accused person: as stated by Trial Chamber III in *Bemba*, "no reparations order can be made **against Mr Bemba** under Article 75 of the Statute"⁶⁷ after his final acquittal by the Appeals Chamber. It was therefore the old, traditional approach to reparations as associated with the sentence and borne by the offender that is implemented by article 75(2). However, as

⁶³ ICC-ASP/12/39, "Report of the Court on principles relating to victims' reparations", 8 October 2013, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-39-ENG.pdf, para. 3.

⁶⁴ "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, ICC-01/04-01/06-2904, <https://www.legal-tools.org/doc/a05830/>; "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" [The highlighted part of the footnote is not in the original French footnote. Reflect omission?], 3 March 2015, ICC-01/04-01/06-3129, <https://www.legal-tools.org/doc/c3fc9d/>

⁶⁵ "Order for Reparations pursuant to Article 75 of the Statute", 24 March 2017, ICC-01/04-01/07-3728-tENG, <https://www.legal-tools.org/doc/63d36d/>; "Public Redacted Version of Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled 'Order for Reparations pursuant to Article 75 of the Statute'", 8 March 2018, ICC-01/04-01/07-3778-Red A3 A4 A5, <https://www.legal-tools.org/doc/0a95b7/>

⁶⁶ "Reparations Order", 17 August 2017, ICC-01/12-01/15-236, <https://www.legal-tools.org/doc/02d1bb/>; "Judgment on the appeal of the victims against the 'Reparations Order'", 8 March 2018, ICC-01/12-01/15-259-Red2 A, <https://www.legal-tools.org/doc/37b846/>

⁶⁷ "Final decision on the reparations proceedings", 3 August 2018, ICC-01/05-01/08-3653, <https://www.legal-tools.org/doc/0f7b45/>, para. 3, Emphasis added.

demonstrated by international sources, notably the Declaration of 1985 and the Van Boven/Bassiouni Principles, and the overwhelming majority of national practices, this traditional form of reparation has now been largely replaced, or at least supplemented, by another approach founded on awarding reparations to victims independently of the identification or conviction of the perpetrator of the crimes, through a procedure that is independent of criminal proceedings and relying on resources other than those of the convicted person, whether provided by the State, voluntary contributions or a designated special fund. To restrict reparations for victims before the International Criminal Court to the procedure stipulated in article 75(2) is incompatible with developments in international law and national practices on this issue. Pursuant to articles 21(1)(b), 21(1)(c) and 21(3) of the Rome Statute, an interpretation that limits the scope of the principles relating to reparations under article 75(1) solely to the narrow scope of article 75(2) is therefore incompatible with the mission entrusted to the Court by the 1998 Diplomatic Conference in respect of reparations for victims. That incompatibility is all the more manifest in view of the Preparatory Committee's sole instruction in its Final Report that the principles relating to reparations should be established by reference to the Declaration of 1985 and the Van Boven/Bassiouni Principles:⁶⁸ both those texts give primacy to reparation for victims through an independent procedure that is not contingent on the criminal proceedings and their outcome; principles relating to reparation that are established in the light of these two texts cannot invert that order of priority by making reparation to victims contingent on the outcome of the criminal proceedings. Article 75(2) cannot therefore be interpreted as restricting the scope of the principles relating to reparations under article 75(1), which is broader. The relationship between the two provisions is a relationship of complementarity, meaning that reparation for victims must be made in accordance with either the principles of article 75(1) or, where a person is convicted, article 75(2), or both.

51. **Article 75(3) of the Statute** provides for the submission of representations on reparations by "the convicted person, victims, other interested persons or interested

⁶⁸ A/CONF.183/2/Add.1, <https://www.legal-tools.org/doc/816405/>, p. 116, footnote 22.

States". The reference to "the convicted person" suggests that this article is applicable only with respect to reparations proceedings pursuant to article 75(2) following the trial and contingent on a conviction. However, the reference to "other interested persons" suggests that this is not in fact the case and that a person who is merely a suspect or accused person may qualify as another interested person within the meaning of article 75(3). As shown below, this broader and alternative interpretation becomes necessary on account of the wording of rule 94(2) of the Rules, which refers to "the commencement of trial" and would otherwise be insolubly contradictory. It follows that article 75(3) must be interpreted broadly to cover either reparations pursuant to article 75(2) or other reparations procedures developed on the basis of the principles relating to reparations pursuant to article 75(1).

52. **Article 75(6) of the Rome Statute** confirms that article 75(1) cannot be interpreted restrictively by subjecting it to the condition pursuant to article 75(2), namely that there has to be a conviction, because such an interpretation would be incompatible with "the rights of victims under national or international law". Under international law, including the Declaration of 1985 and the Van Boven/Bassiouni Principles, the right of victims to reparation is not contingent on the conviction of the accused person. Nor is it under the overwhelming majority of national laws. The provisions of article 75, in particular article 75(2), cannot therefore make a conviction a condition. On the contrary, the intention of the States parties to the Diplomatic Conference was to ensure that, irrespective of the source, victims are afforded the most favourable terms regarding reparations.⁶⁹

53. **Article 79 of the Statute** establishes the Trust Fund for Victims ("Trust Fund"). The Trust Fund is established "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims" (article 79(1)). It may receive money and other property collected through fines or forfeiture (article 79(2)),

⁶⁹ D. Donat-Cattin, "Article 75 – Reparations for Victims", in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed., Beck-Hart-Nomos, 2008, p. 1411; S. Pellet, "Article 75 – Réparation en faveur des victimes", in J. Fernandez, X. Pacreau, M. Obéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2nd ed., Pedone, 2019, p. 2005.

although this by no means constitutes its main source of revenue.⁷⁰ It is in other respects managed according to criteria to be determined by the Assembly of States Parties (article 79(3)), which accordingly adopted the “Regulations of the Trust Fund for Victims” (“RTFV”) in Resolution ICC-ASP/4/Res.3.⁷¹ Their relevant provisions are analysed below. The Trust Fund is not an organ of the Court within the meaning of article 34 of the Statute, but for administrative purposes its Secretariat is attached to the Registry pursuant to Resolution ICC-ASP/3/Res.7 establishing the Secretariat.⁷² The draft article which was ultimately included as this terse article in the Rome Statute, submitted by the Preparatory Committee to the 1998 Diplomatic Conference, also contained the following additional wording in bold and underlined: “This article should be examined in the context of reparation to victims.”⁷³ In other words, article 79 was for its part also designed as a blank page to be filled by the future Assembly of States Parties (article 79(3)), the sole directive being consistency with the principles relating to reparations in article 75(1). It follows from the directive given by the Preparatory Committee that the RTFV must therefore be interpreted in the light of the principles relating to reparations in article 75(1), to which they are subordinate, and that the principles relating to reparations established by the Court prevail in the event of a conflict with the RTFV. The fact that 79(1) refers to “victims of crimes within the jurisdiction of the Court” without further detail refers the reader back to the definition of “victim” in regulation 85 of the Rules, which encompasses all victims of crimes over which the Court can exercise its jurisdiction, namely the crimes committed with respect to a situation brought before the Court under article 13 of the Rome Statute, as stated above regarding article 68(3).⁷⁴

54. **Article 82(4) of the Statute** enables orders for reparations under article 75 to be appealed by a “legal representative of the victims, the convicted person or a bona

⁷⁰ P. de Baan, E. Saabel, “Article 79 – Fonds au profit des victimes”, in J. Fernandez, X. Pacreau, M. Obéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, 2nd ed., Pedone, 2019, pp. 2043-2050.

⁷¹ ICC-ASP/4/Res. 3, Regulations of the Trust Fund for Victims, 10 September 2004, <https://www.legal-tools.org/doc/0177da/>, para. 2.

⁷² ICC-ASP/3/Res.7, “Establishment of the Secretariat of the Trust Fund for Victims”.

⁷³ A/CONF.183/2/Add.1, <https://www.legal-tools.org/doc/816405/>, p. 122.

⁷⁴ P. de Baan, E. Saabel, “Article 79 – Fonds au profit des victimes”, *op. cit.*, pp. 2038-2039.

fide owner of property". In its judgment on the appeals against the reparations awarded in *Lubanga*, the Appeals Chamber inferred from the fact that the convicted person can appeal against orders for reparation that reparations are intended to ensure that offenders account for their acts.⁷⁵ In the event that someone who is under prosecution is convicted in a final judgment and sentenced, he or she should therefore, according to the Appeals Chamber, bear, at least to the extent of his or her capacity to do so, the burden of reparations to victims. That principle, halfway between retributive justice and reparative justice, is perfectly consistent with what is proposed in this Request and Observations. As with the subrogation of the reparations body to the rights of the victim in the procedure observed in several countries, including Estonia, Finland, France and Switzerland, and recommended by principle 15 of the Van Boven/Bassiouni Principles, the suggestion is that the entity bearing the burden of reparations outside criminal proceedings, on the basis of Article 75(1) principles subject to the Single Judge's approval, should be subrogated *de facto* to the position of victims in subsequent proceedings pursuant to article 75(2), so that any convicted person would bear the burden of reparations for victims to the extent of his or her means, while those means would not have limited the extent of the reparations awarded to the victims.

55. **Rule 85 of the Rules** defines the notion of "victims" according to the Statute. As discussed above in relation to article 68(3), the term "victims" under rule 85 of the Rules includes all the victims of crimes over which the Court can exercise its jurisdiction, namely crimes committed in a situation brought before the Court under article 13 of the Rome Statute. The notion of "victims" is therefore eminently broader than a definition encompassing only victims who apply or are admitted to participate in a case before the Court, that is to say, those whose alleged victimization was caused by the commission of the crimes covered by the charges brought against a person being prosecuted. It is even broader than the notion of victims "affected directly or indirectly

⁷⁵ "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" [this is not in the French version; reflect omission?], 3 March 2015, ICC-01/04-01/06-3129, <https://www.legal-tools.org/doc/c3fc9d/>, para. 68.

by the crimes committed by the convicted person” used in several regulations of the RTFV.⁷⁶ The fact that the term “victims”, with no further specification, is used in articles 68(3), 75(1) and 79(1) is confirmation that the victims referred to in those articles are all the victims included in the definition in rule 85, and may not be in any way restricted to the narrow scope of a case or of particular charges against a suspect or an accused person.

56. **Rule 86 of the Rules** states that when performing their functions the Chamber and other organs of the Court such as the Presidency and the Registry, including the Secretariat of the Trust Fund, have to take into account the needs of all victims and witnesses, again understood with the broad meaning of regulation 85 described above. This provision should therefore serve as a general principle of interpretation that clarifies and complements article 21(3) of the Statute regarding all provisions relating to victims, such as those relating to reparations, including articles 68(3), 75(1) and 79, rule 85 and the RTFV. In general, rule 86 therefore favours the proposal that the award of reparations to victims within the jurisdiction of the Court should be envisaged irrespective of the outcome of a criminal trial and through independent proceedings. Lead Counsel therefore prays the Judge to take into account rule 86 when making a decision on this Request and Observations and the proposal that article 75(1) should be interpreted independently of article 75(2).

57. **Rule 94(2) of the Rules** provides for the notification of requests for reparations to the Defence “[a]t the commencement of the trial”, and the possibility for the Defence to file representations under article 75(3) of the Statute. This rule worded as it appears to cause a contradiction as it speaks of representations “[a]t the commencement of the trial” and refers to article 75(3), which for its part speaks of “the convicted person, victims, other interested persons or interested States”. There can be no “convicted person” at the “commencement of the trial”. However, this apparent contradiction can be resolved by a broad interpretation of article 75(3) not restricted to reparations pursuant to article 75(2). If other phases of reparations that are independent of the outcome of the trial are possible otherwise than under article 75(2)

⁷⁶ Regulations of the Trust Fund, regulations 46, 50(b) and 59-73.

and, therefore, on the basis of article 75(1), then the expression “[a]t the commencement of the trial” in rule 94(2) ceases to be problematic, since at that stage requests for reparations can be notified to “the person or persons named in the request or identified in the charges” without any presumption that the accused person has been convicted. The twofold reference in rule 94 to “the person or persons named in the request [for reparations] or identified in the charges” furthermore demonstrates that it is possible that those named in the application for reparations as being the persons responsible for the crimes and the resulting harm may not be the same as those named in the charges that define the scope of the case. This is confirmation that applications for reparations may be made and examined outside the scope of the case, that is to say, in the broader context of the situation. An interpretation of article 75(3) as being applicable to scenarios other than the one described in article 75(2) and, therefore, defined by the principles relating to reparations established on the basis of article 75(1), is therefore necessary in order to resolve the apparent contradiction found in rule 94(2). When construed from that perspective, rule 94(2) takes on its full meaning, of stipulating that the defence should be informed at the commencement of the trial of applications for reparations made in the situation, and afforded an opportunity to file information under article 75(3) if it so desires, not on behalf of a “convicted person”, who by definition does not exist at this stage, but on behalf of the accused as another potentially interested person. The defence will exercise this right only to the extent that it sees fit.

58. **Rule 95 of the Rules** allows the Court to “proceed on its own motion pursuant to article 75 paragraph 1”, that is to say, in the absence of a request for reparations from victims or any other source. Rule 95 is silent on the phase of the proceedings to which it applies. Subsection 4 of the rule under which it appears is entitled “Reparations to Victims” which forms part of the “[p]rovisions relating to various stages of the proceedings” [Emphasis added] contained in Chapter 4 of the Rules. Subsection 4 and rules 95 to 99 of the Rules are therefore intended to apply to “various stages of the proceedings”, including the pre-trial stage, and therefore cannot be applied solely to a “reparations phase” after the conclusion of the trial and, by virtue

of article 75(2), contingent on a conviction. In common with rule 94(2) before, rule 95 is therefore confirmation that the issue of reparations can be envisaged at “various stages of the proceedings”. Since the reparations phase pursuant to article 75(2) occurs of necessity after the end of the criminal proceedings, rules 94(2) and 95 do indeed confirm that other reparations procedures independent of the outcome of the trial are possible on the basis of article 75(1). That is the idea which this Request and Observations seeks to explore by considering reparations proceedings from as early as the pre-trial phase.

59. **Rule 97(1) of the Rules** provides for the award of individual or collective reparations. It has to be read in conjunction with rule 98(1) which states that “[i]ndividual awards for reparations shall be made directly against a convicted person”, that is to say, restricted to reparations pursuant to article 75(2) only, as opposed to those awarded following the principles relating to reparations established under article 75(1). However, that dichotomy is nullified by rule 75 of the RTFV, analysed below, which extends the application *mutatis mutandis* of solutions relating to the implementation of individual reparations under rule 98(2) or collective reparations under rule 98(3) to all reparations under rule 98, that is to say, including those awarded on the basis of the principles relating to reparations established under article 75(1).

60. **Rule 97(2) of the Rules** provides that the Court may appoint reparations experts “[a]t the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion”. However, as with rules 94(2) and 95 above, this rule is intended to be applicable to “various stages of the proceedings”, that is to say, including when no person has yet been “convicted”. If the rule applicable to “various stages of the proceedings” is interpreted as a restriction on reparations pursuant to article 75(2) of the Statute it would again amount to saying that the drafters of the Rules violated the presumption of innocence under article 66. Such an interpretation must therefore be ruled out. The only way to reconcile rule 97(2) with article 66 is therefore to consider that it applies to alternative scenarios of reparations proceedings: in the context of reparations pursuant to article 75(2), a person has been

convicted and may request the appointment of experts on the basis of rule 97(2); in reparations proceedings other than those pursuant to article 75(2) and therefore of necessity brought on the basis of on the principles relating to reparations established under article 75(1), there is no “convicted person” and experts can only be appointed either by the Chamber on its own motion or at the request of victims or their legal representatives, without the defence or the Office of the Prosecutor having a say on the matter.

61. **Rule 97(3) of the Rules** states that in all cases the Court is to respect the rights of victims and of the convicted person, rather than those of the person being prosecuted. Again, rule 97(3) cannot be construed as providing for the award of reparations while restricting the possibility of challenging their assessment to only victims and convicted persons. That provision could lend credence to a claim that the only reparations phase contemplated by the Statute and the Rules is that pursuant to article 75(2) and that there is therefore always a “convicted person” at the phase at which rule 97(3) is implemented. However, as noted above, that restrictive interpretation of article 75 becomes impossible as a result of the reference to the unconditional right of victims to reparations in international law, in particular the Declaration of 1985 and the Van Boven/Bassiouni Principles, and national laws; the wording of article 75(1) and its relationship with article 75(2); article 75(3) read in conjunction with rule 94(2); article 75(6); the definition of victims in rule 85; rules 86, 94(2), 95 and 97(2) of the Rules; and the other provisions mentioned below. It must therefore be set aside. It follows from rule 97(3) that in reparations proceedings other than those pursuant to article 75(2) occurring at “various stages of the proceedings”, neither the defence nor the Office of the Prosecutor are required to be represented, which implies of necessity that the individual interests of the person being prosecuted are not at stake. The other reparations proceedings that may be brought at “various stages of the proceedings” must therefore necessarily take place between the victims applying for reparations and the Trust Fund set up for the purpose of reparations by article 79 and empowered to implement them under rule 98, under the judicial supervision of a Chamber and without the involvement of either the Office of the

Prosecutor or the defence, that is to say, outside the criminal proceedings, as is the case in various national systems and as recommended by the Declaration of 1985 and the Van Boven/Bassiouni Principles. That is what Lead Counsel is proposing in this Request and Observations.

62. The five paragraphs of **rule 98 of the Rules** are clearly divided into two categories. Rules 98(1), 98(2) and 98(3) refer to the “convicted person”. They therefore clearly pertain to reparations under the prism of article 75(2), that is to say, after completion of the trial and a conviction. Rules 98(4) and 98(5), on the other hand, envisage the payment of reparations by the Trust Fund without mentioning a “convicted person”, either to “an intergovernmental, international or national organization approved by the Trust Fund” (rule 98(4)), or to victims using the “other resources” of the Trust Fund (rule 98(5)). Taking into account rule 98(4) and 98(5), it therefore becomes possible to envisage reparations procedures distinct from the procedure pursuant to article 75(2) of the Statute, and therefore governed by the principles relating to reparations established on the basis of article 75(1) at “various stages of the proceedings”, which would lead either to reparations payable to partner organizations in support of their activities for the benefit of victims or directly to the victims themselves using the Trust Fund’s “other resources”. This possibility therefore answers the question of who bears the burden of reparations where they are not imposed on the convicted person, without prejudice to the subsequent subrogation of the Trust Fund to the position of the victims in any proceedings pursuant to article 75(2).

63. **Rule 148 of the Rules** envisages the making of orders to transfer the proceeds of any fines or forfeitures to the Trust Fund. Thus far this provision has been purely theoretical because the Court has never had occasion to apply it in a case, in the absence of fines levied or forfeitures enforced against convicted persons. It is worth noting that, unlike rules 94 to 99 on reparations for victims applicable to “various stages of the proceedings”, rule 148 is found under chapter 7 of the Rules, on penalties, and is therefore applicable after a conviction has been handed down. Unlike rules 94 to 99, it is therefore inherently linked solely to reparations pursuant to article 75(2) of

the Statute. This difference between rule 148 which is linked to article 75(2) and becomes applicable only after a conviction and the other rules, 94 to 99, on reparations which are applicable to “various stages of the proceedings” demonstrates once again that reparations before the Court cannot be restricted to the procedure pursuant to article 75(2) alone and must also encompass other reparations procedures at the various phases of proceedings founded on the principles relating to reparations established on the basis of article 75(1).

64. In common with the paragraphs of rule 98 of the Rules, the provisions of the **RTFV** fall into two categories: (i) the first category of provisions refer to a “convicted person” and are therefore clearly positioned in the particular scenario of reparations pursuant to article 75(2) of the Statute: this is the case of regulations 46, 50(b) and 54 to 73 of the RTFV and of regulations 21(b), 21(c) and 30 to 33 which, although without mentioning a “convicted person”, operate within the ambit of rule 148 of the Rules and, therefore, article 75(2); (ii) the second category of regulations do not refer to a “convicted person” and are therefore applicable to other reparations scenarios founded on principles established on the basis of article 75(1): this is the case of regulations 20, 21(a), 21(d), 27, 42, 48, 49, 50(a) and 52 of the RTFV. Lead Council will focus the remainder of these observations on this second category of rules in the RTFV as the first category, on the implementation of article 75(2), is not relevant.

65. **Regulation 20 of the RTFV** mentions victims as defined in rule 85 of the Rules. As stated above with regard to article 68(3) of the Statute and Rule 85, the term “victims” here includes all victims of crimes falling within the jurisdiction of the Court in the situations brought before it. It extends well beyond the restricted category of victims whose alleged victimization was caused by the crimes described in the charges against a person under prosecution in a case.

66. **Regulation 21(a) and 21(d) of the RTFV** identifies resources of the Trust Fund that are not related to the property of the person under prosecution or to alleged proceeds of the commission of crimes. These are “[v]oluntary contributions from governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties”

(regulation 21(a)) and “[s]uch resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the Trust Fund” (regulation (21)(d)). These two sources of funds which do not come from the person under prosecution may therefore be used to award reparations to victims without prejudice to the presumption of innocence under article 66 of the Statute, that is to say, without the person under prosecution bearing the cost. These are therefore the two sources of funding for the Trust Fund that may be used for reparations other than those pursuant to article 75(2).

67. **Regulation 27 of the RTFV** governs the use of voluntary contributions from governments, received by the Trust Fund under regulation 21(a) above. The key rule is that the voluntary contributions cannot be earmarked for a particular Trust Fund activity or project. This means that a State that makes a voluntary contribution is in principle not allowed to reserve it for the victims of a particular situation before the Court. Nevertheless, the same rule includes an exception to its own provision, allowing a State to reserve its voluntary contribution for a particular situation or activity provided it (a) benefits victims as defined in rule 85 of the Rules, meaning all victims of a situation before the Court and (b) does not result in discrimination. Subject to these two conditions, which do not prohibit reservation of a voluntary contribution for the victims of a particular situation before the Court, earmarked contributions are allowed.

68. **Regulation 42 of the RTFV** reiterates that “[t]he 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”. As stated above regarding article 68(3) of the Statute, rule 85 of the Rules and regulation 20 of the RTFV, this category of beneficiaries is far broader than the category of only victims whose alleged victimization was caused by the crimes described in the charges against a person under prosecution in a case and includes all victims of situations before the Court.

69. **Regulation 48 of the RTFV** states that the “[o]ther resources of the Trust Fund” under rule 98(5) of the Rules and regulations 21 to 27 of the RTFV have to be used for the benefit of victims of crimes as defined in rule 85 of the Rules without distinction.

To restrict the use of those other resources to only victims whose alleged victimization was caused by the crimes described in the charges against a person under prosecution in a case therefore amounts to a violation of rule 48 of the RTFV by excluding the other victims of the situation. That is the basis on which the Trust Fund has developed the theory of a “second mandate” in the form of providing assistance to populations affected by the commission of crimes falling within the jurisdiction of the Court, as opposed to reparations measures pursuant to article 75 of the Statute, independently of any court decision. Irrespective of the merits of the activities undertaken under the Trust Fund’s second mandate, to make a distinction between those activities and other reparations under article 75 and present them as not constituting reparations under that article implies that the right to reparations is not upheld for all victims of crimes falling within the jurisdiction of the Court as defined by rule 85, as some of them would be offered only mere assistance under the Trust Fund’s second mandate, as opposed to true reparations under article 75. It is important to note that the notion of the Trust Fund’s second mandate does not appear anywhere in the texts of the Court, including the RTFV, that regulation 50(a) of the RTFV does not refer to any separate mandate of this type and that the Trust Fund was established for the sole purpose of fulfilling its one single mandate of implementing reparations for victims. The fact that the distinction claimed between the Trust Fund’s reparations mandate and its “second mandate” is clearly only slight has in fact been acknowledged by the Trust Fund’s Executive Director himself in his commentary on article 79, where he states:

[TRANSLATION] It should be noted that the types of activities permitted under this non-judicial mandate [the Trust Fund’s second mandate] indicates a clear correspondence with the types of reparations listed under Chapter IX (“Reparation for harm suffered”) of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims [the Van Boven/Bassiouni Principles], which were in fact developed at the same time and in the same place as the Regulations of the Trust Fund. [...] It is therefore possible to perceive the Trust Fund’s assistance mandate – even though it is non-judicial – as an essentially reparative mandate, an integral part of restorative justice as provided for in the Rome Statute.⁷⁷

The reference to the Van Boven/Bassiouni Principles is confirmation indeed of the fact that the Trust Fund’s activities as a whole are geared towards the implementation of reparations for the benefit of victims, regardless of the stated mandate under which it

⁷⁷ P. de Baan, E. Saabel, “Article 79 – Fonds au profit des victimes”, *op. cit.*, p. 2056.

acts or their legal basis in the RTFV. It is sufficient merely to ascertain that the Trust Fund's "assistance activities" are meaningful enough to satisfy the rights of victims to reparations pursuant to article 75.

70. **Regulation 49 of the RTFV** provides that victims can be consulted regarding the Trust Fund's activities. The victims referred to are again victims as defined by rule 85 of the Rules, which includes all victims of situations before the Court.

71. **Regulation 50(a) of the RTFV** is the provision usually cited as the legal basis for the Trust Fund's second mandate. However, it does not mention any mandate distinct from the Trust Fund's main mandate to implement reparations for victims of crimes before the Court. As the Executive Director of the Trust Fund rightly pointed out in his commentary on article 79 cited above, "[TRANSLATION] physical or psychological rehabilitation" and "[TRANSLATION] material support", which cannot *a priori* exclude the payment of a measure of financial reparations, do indeed constitute forms of reparation under principles 20 ("Compensation") and 21 ("Rehabilitation") of the Van Boven/Bassiouni Principles. The fact that they are offered independently of a court decision does not disqualify them as reparations as it is up to the Court whether or not to adopt this non-judicial approach as part of the principles relating to reparations established on the basis of article 75(1). Nor are they removed from all judicial oversight as the activities of the Trust Fund under regulation 50(a) of its Regulations are notified to the Court which may object to them. A body of decisions has in fact been rendered by the Pre-Trial Chambers regarding such oversight of the Trust Fund's activities under rule 50(a) of its Regulations in the records of situations before the Court.⁷⁸ Those decisions confirm that, even though the Trust Fund describes its activities under rule 50(a) of the RTFV as non-judicial, they are in fact subject to a

⁷⁸ For example, "Decision on the time limit for the filing of observations on the Notification by the Board of Directors of the Trust Fund for Victims", 5 February 2008, ICC-01/04-441, <https://www.legal-tools.org/doc/fc4ee7/>; "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, <https://www.legal-tools.org/doc/a2eff7/>; "Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification", 19 March 2008, ICC-02/04-126, <https://www.legal-tools.org/doc/c11493/>; "Decision on the Submission of the Trust Fund for Victims dated 30 October 2009", 16 November 2009, ICC-01/05-30, <https://www.legal-tools.org/doc/ebbc0c/>

minimum of judicial oversight by the Court. It would therefore be useful and desirable for the Court to codify the principles applicable to those forms of reparation for victims of the situation implemented under enhanced oversight by the Pre-Trial Chambers, by establishing the principles in compliance with article 75(1). By that codification the Court should ensure that the contemplated activities do indeed meet the criteria to be reparations for victims, which implies in particular ensuring that they benefit only persons who have established their victimization – to the applicable standard of proof – and that they do not benefit other persons, such as potential perpetrators of crimes within the jurisdiction of the Court. The current implementation of the activities of the Trust Fund’s second mandate for “affected populations” without any further test and without judicial oversight does not in fact rule out the possibility that possible perpetrators of crimes falling under the Court’s jurisdiction could benefit from them. This would be contrary to the very principle of reparation for victims and could contribute to their secondary victimization. One of the objectives of this Request and Observations is a codification of that nature.

72. **Regulation 52 of the RTFV** states that the Trust Fund may call for voluntary contributions to fund its activities pursuant to regulation 50 of its Regulations. This regulation is one of the provisions that are applicable at various phases of proceedings and on behalf of all victims falling under the definition of rule 85 of the Rules, that is to say, pursuant to regulation 50(a) of the RTFV regarding reparations according to the principles established on the basis of article 75(1) of the Statute and pursuant to rule 50(b) read in conjunction with reparations on the basis of article 75(2).

73. **Regulation 75 of the RTFV** lastly broadens the application *mutatis mutandis* of the solutions contained in the RTFV for the implementation of rule 98(2) and 98(3) of the Rules according to whether reparations are individual or collective to the implementation of rule 98(4) and, at least implicitly, rule 98(5). Under this regulation, individual and/or collective reparations measures can be implemented as part of reparations implemented following the principles established under article 75(1) of the Statute and rule 98(4) and 98(5) of the Rules, on the same basis as reparations pursuant to article 75(2).

74. In the light of the foregoing analysis of the relevant texts of the Court, Lead Counsel moves the Single Judge to find that none of the rules cited obstructs reparations procedures and the implementation of reparations for victims of a situation in a manner that is independent and not contingent on the outcome of the criminal proceedings. Lead Counsel moves the Single Judge to find that, on the contrary, only the solution suggested is capable of confirming that all the Court's existing texts on reparations – in particular rules 94 to 99 of the Rules – are consistent with the other relevant provisions of the Rome Statute and the RTFV. That conclusion is arrived at irrespective of the other benefits, set out below, expected from separating reparations proceedings following the principles established on the basis of article 75(1) of the Statute from the rest of the criminal proceedings in the records of the case file.

VI PRINCIPLES RELATING TO REPARATIONS ESTABLISHED BY THE COURT THUS FAR

75. As already pointed out, the Court opted to develop its principles relating to reparations pursuant to article 75(1) of the Statute itself on a case-by-case basis.⁷⁹ The first consequence of that choice and the judicial developments that followed it is that issues of reparations could only be addressed at the stage specifically stipulated in article 75(2), following a conviction against a person under prosecution, and never at any other stage of a case. In the absence of an initiative similar to that taken by Lead Counsel at the express request of Mr Ali Muhammad Ali Abd-Al-Rahman in the instant case, the issue has never been addressed at another stage. The choice of an exclusively judicial definition of the principles relating to reparations has meant that they have been considered only from the perspective of article 75(2) and there has until now been no discussion of alternative reparations procedures in other phases of proceedings.

76. The only initiative of which Lead Counsel is aware that could have allowed consideration of the matter beyond the strict letter of article 75(2) is the initiative taken

⁷⁹ "Report of the Court on principles relating to victims' reparations", 8 October 2013, ICC-ASP/12/39, https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-39-ENG.pdf, para. 3.

by the Legal Representatives of Victims in *Bemba*.⁸⁰ Many of the arguments raised by the Legal Representatives of Victims in that case are reflected in this Request and Observations. However, that initiative came after the Accused had been finally acquitted by the Appeals Chamber, and after the reparations phase pursuant to article 75(2) had already commenced on the basis of the conviction of the Accused at trial. That specific circumstance caused Trial Chamber III to reject the initiative of the Legal Representatives of Victims on the ground that “in the specific circumstances of the case, in particular at this stage, it would be inappropriate to issue principles on reparations”.⁸¹ Those specific circumstances do not exist in the instant case. There can therefore be no more appropriate time to consider establishing principles separating the reparations proceedings from the criminal proceedings on the basis of article 75(1) than at the most initial stage of the pre-trial phase immediately following the initial appearance of Mr Ali Muhammad Ali Abd-Al-Rahman, when the submissions on victims’ participation in the case have not even started. That is what Lead Counsel is praying the Single Judge to do by submitting this Request and Observations.

77. Apart from the particular instance of *Bemba*, all the decisions establishing the principles relating to reparations delivered by the Court since it was set up have been delivered with respect exclusively to the scenario envisaged in article 75(2), subsequent to a conviction following trial in the relevant cases.

(i) First decision on the principles relating to reparations in Lubanga

78. The first decision laying down principles relating to reparations was rendered in *Lubanga* on 7 August 2012,⁸² that is to say, 10 years after the Court was set up. In paragraphs 176 to 288 of the decision, Trial Chamber I stated the principles it would follow in relation to reparations for the *Lubanga* case. The Chamber added *in limine* the following caveat: these principles “are limited to the circumstances of the present case.

⁸⁰ “Legal Representatives of Victims’ Joint Submissions on the Consequences of the Appeals Chamber’s Judgment dated 8 June 2018 on the Reparations Proceedings”, 12 July 2018, ICC-01/05-01/08-3649, <https://www.legal-tools.org/doc/1fdc64/>

⁸¹ “Final decision on the reparations proceedings”, 3 August 2018, ICC-01/05-01/08-3653, <https://www.legal-tools.org/doc/0f7b45/>, para. 16.

⁸² “Decision establishing the principles and procedures to be applied to reparations”, 7 August 2012, ICC-01/04-01/06-2904, <https://www.legal-tools.org/doc/a05830/>, paras. 182-288.

This decision is not intended to affect the rights of victims to reparations in other cases” (paragraph 181). Even were some of the principles relating to reparations identified by Trial Chamber I incompatible with this Request and Observations – which is not the case – the Single Judge would still have full authority to depart from them.

79. Trial Chamber I addressed a set of issues that need not be revisited and discussed at this Request and Observations stage, without prejudice to subsequent debate. Those issues relate in particular to the principles of dignity, non-discrimination and non-stigmatization (paragraphs 187 to 193), proof of identity of victims (paragraphs 198 to 199), the right of victims to obtain reparations before the national courts (paragraph 201), accessibility to reparations and consultation with victims (paragraphs 202 to 206), electing between individual and collective reparations (paragraphs 217 to 221), modalities of reparations (paragraphs 222 to 241) – with the exception of a conviction (paragraph 237) that cannot be a reparations measure when it is of an innocent person, but constitutes instead an aggravation of the harm victims suffer, the causal link (paragraphs 247 to 250), the standard of proof (paragraphs 251 to 254), cooperation by States (paragraphs 256 to 257 and 276 to 280), the appointment of experts (paragraphs 263 to 266) and the implementation of the reparations plan (paragraphs 281 to 288).

80. The submissions made in this Request and Observations directly reflect other principles established by Trial Chamber I, in particular regarding applicable law and rules of interpretation (paragraphs 182 to 186), the beneficiaries of reparations (paragraphs 194 to 197), the priority given to certain vulnerable victims (paragraphs 200 and 207 to 216), the need for proportional and prompt reparations (paragraphs 242 to 246), the rights of the defence – with the exception of the reference to the “convicted person” which is not applicable in this instance (paragraph 255), and the publicity of reparations proceedings, including this Request and Observations (paragraphs 258 to 259). In particular, Lead Counsel agrees with the Chamber’s declaration that it “accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international

instruments”, including the Declaration of 1985 and the Van Boven/Bassiouni Principles (paragraph 185).

81. The findings of Trial Chamber I on designation of the Chamber seized of the reparations proceedings (paragraphs 260 to 262) and on participants in the reparations proceedings (paragraphs 267 to 268) elicit the following observations. Regarding the first point, since it is proposed to conduct separate proceedings independent of the criminal proceedings, it would be rational and expedient to entrust those proceedings to Pre-Trial Chamber II in the context of the *Situation in Darfur, Sudan* (ICC-02/05)⁸³ and that a single judge responsible for reparations, who could be the Single Judge in the instant case or another judge of the Chamber, be designated in accordance with rule 7 of the Rules and the established practice of the Court.⁸⁴ Pursuant to article 39(2)(b)(iii) of the Statute, that single judge merely needs to belong to the “Pre-Trial Division” and therefore could even be chosen from outside Pre-Trial Chamber II if the individual workload of each of the judges and/or their specialization in reparations matters made such a designation appropriate. Regarding the second point, since the proposed reparations proceedings would be exclusively against the Trust Fund and would be separate proceedings independent of the criminal proceedings, Lead Counsel submits that the Office of the Prosecutor and the defence should not even be involved as parties, thus allowing them to focus their resources exclusively on the criminal proceedings. That proposal is supported by article 82(4) of the Statute, under which orders for reparations under article 75 can be appealed by a “legal representative of the victims, the convicted person or a bona fide owner of property.” In the absence of a convicted person, and since the proposed reparations proceedings would be exclusively against the Trust Fund, subject to a possible action for recovery in the event of the accused being convicted, it is natural that the person under prosecution and the Office of the Prosecutor should not participate.

⁸³ “Decision assigning judges to divisions and recomposing Chambers”, 16 March 2018, ICC-02/05-249, <https://www.legal-tools.org/doc/9c0aa4/>, p. 9.

⁸⁴ “Decision Appointing a Single Judge for Unsealing of Documents”, 30 May 2006, ICC-02/04-01/05-87-tENG, <https://www.legal-tools.org/doc/427ab5/>

82. Lastly, the findings of Trial Chamber I regarding reparations orders against the convicted person (paragraphs 269 to 275) do not apply in the instant case.

(ii) Judgment of the Appeals Chamber on the principles relating to reparations in Lubanga

83. Three appeals were lodged against the decision of Trial Chamber I on the principles relating to reparations. The Appeals Chamber decided those appeals in a single decision dated 3 March 2015.⁸⁵ The judgment is however inseparable from the reparations phase pursuant to article 75(2) taking into account the Appeal Chamber's statement in the first of its reasons, to the effect that: "An order for reparations under Article 75 of the Statute must contain, at the minimum, five essential elements: (1) it must be directed against the convicted person [...]" (paragraph 1). Since the Appeals Chamber's findings are restricted to the scenario of an order for reparations against a convicted person pursuant to article 75(2), which corresponds to the particular scenario brought before it in *Lubanga*, they are of no direct relevance to alternative reparations proceedings following principles relating to reparations on the basis of article 75(1).

84. The submissions made in this Request and Observations directly reflect other principles established by the Appeals Chamber in its Order for Reparations in *Lubanga*, in particular with regard to the beneficiaries of reparations (paragraphs 6 to 9 of the order), accessibility to reparations and consultation by victims (paragraphs 29 to 32 of the order), the adequacy, proportionality and promptness of reparations (paragraphs 44 to 48 of the order), the rights of the defence – with the exception of the reference to the "convicted person" which is not applicable in this instance (paragraph 49 of the order), and the publicity of reparations proceedings, including this Request and Observations (paragraphs 51 to 52 of the order).

⁸⁵ "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" [same comment as above re: this title], 3 March 2015, ICC-01/04-01/06-3129, <https://www.legal-tools.org/doc/c3fc9d/>; and "Order for Reparations (amended)", 1 August 2016, ICC-01/04-01/06-3129-AnxA A A2 A3, <https://www.legal-tools.org/doc/df2804/>, paras. 6-53.

85. In the order the Appeals Chamber also considered a set of issues that need not be revisited and discussed at this Request and Observations stage, without prejudice to subsequent debate. Those issues relate in particular to harm (paragraph 10 of the order), causation of the harm (paragraph 12 of the order), the principles of dignity, non-discrimination and non-stigmatization (paragraphs 12 to 19 of the order), the standard of proof (paragraph 22 of the order), giving privilege to the situation of child soldiers (paragraphs 23 to 28 of the order), the choice between individual and collective reparations (paragraph 33 of the order), modalities of reparations (paragraphs 34 to 43 of the order) – with the exception of a conviction and sentence (paragraph 43 of the order) that cannot be a reparations measure when ordered against an innocent person but constitute instead an aggravation of the harm victims suffer, and cooperation by States and other stakeholders (paragraph 50 of the order).

86. The principle set out by the Appeals Chamber in paragraphs 68 to 69 of the judgment and paragraphs 2 and 20 to 21 of the order, according to which the convicted person has to be held accountable for his or her acts and bears the burden of reparations, can be reconciled with the alternative reparations proceedings independent of and different from the criminal proceedings and brought against the Trust Fund suggested in this Request and Observations by the proposed subrogation of the Trust Fund to the position of the victims in any subsequent reparations phase pursuant to article 75(2): the order for reparations against the convicted person would then be made for the benefit of the Trust Fund as provided for in rule 98(2) of the Rules, which would then recover part of the reparations already paid to victims, within the limits of the convicted person's ability to pay, without the reparations that the victims actually received ever being at stake. The right of victims to prompt and effective reparations will thus be protected from the vagaries of the criminal proceedings and the actual ability of the person being prosecuted to pay if convicted. That solution, which is the solution applied in several countries including Estonia, Finland, France and Switzerland, and recommended by principle 15 of the Van Boven/Bassiouni Principles, renders the principle of the liability of the convicted person compatible with that of the right of victims to prompt and effective reparation.

87. On 18 July 2019, the Appeals Chamber issued a second judgment in *Lubanga* on the amount payable under the reparations orders.⁸⁶ However, that second judgment relates to the implementation of reparations against the person convicted pursuant to article 75(2). It is therefore of no direct relevance to this Request and Observations.

(iii) Order for Reparations in Katanga

88. Trial Chamber II was the second Chamber to issue an order for reparations in *Katanga*, on 24 March 2017.⁸⁷ As with the previous decision rendered by Trial Chamber I in *Lubanga*, the order was made after the conviction of the accused and therefore falls under the scenario peculiar to article 75(2). In paragraphs 29 to 44 of its order, Trial Chamber II set out the principles it would follow for reparations in *Katanga*, which are basically the same as those identified by the Appeals Chamber in *Lubanga* (paragraph 30 of the order). Lead Counsel therefore refers the Single Judge to the observations he made above regarding the order of the Appeals Chamber in *Lubanga*.

89. In paragraphs 37 to 38 of its order Trial Chamber II emphasizes that during the reparations phase pursuant to article 75(2) the term “‘victims’” no longer refers to victims under rule 85 of the Rules, but only to those to whom harm was caused by the commission of one of the crimes of which the person concerned was convicted. The Chamber thereby confirmed the restriction inherent in the reparations pursuant to article 75(2) and their manifest inadequacy and insufficiency in protecting the right to reparations for all rule 85 victims pursuant to article 75 of the Statute, the Declaration of 1985 and the underpinning Van Boven/Bassiouni Principles. That perfectly justified qualification by Trial Chamber II therefore validates the relevance of developing additional principles of reparations, unconnected with article 75(2), on the basis of article 75(1).

⁸⁶ “Public redacted Judgment on the appeals against Trial Chamber II’s ‘Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable’”, 18 July 2019, ICC-01/04-01/06-3466-Red, <https://www.legal-tools.org/doc/7ec94f/>

⁸⁷ “Order for Reparations pursuant to Article 75 of the Statute With one public annex (Annex I) and one confidential annex ex parte, Common Legal Representative of the Victims, Office of Public Counsel for Victims and Defence team for Germain Katanga (Annex II)”, 24 March 2017, ICC-01/04-01/07-3728-tENG, <https://www.legal-tools.org/doc/63d36d/>, paras. 29-34.

(iv) Judgment on reparations in Katanga

90. Three appeals were likewise lodged against the Order for Reparations in *Katanga*. The Appeals Chamber rendered its judgment on those appeals on 8 March 2018.⁸⁸ In the judgment, the Appeals Chamber refers extensively to the principles relating to reparations already established in the judgment in *Lubanga*. It does, however, consider a number of new issues that had not been considered previously, one of which is of particular relevance to this Request and Observations.

91. In paragraph 147 of the judgment, the Appeals Chamber expressed concern that “faced with hundreds or thousands of applications, it would be impracticable to tailor reparations to each claim”. This is what led the Appeals Chamber to find, in paragraph 1 of its findings:

The Appeals Chamber is not persuaded that the approach chosen by the Trial Chamber for the reparations proceedings in this case, which was based on an individual assessment of each application by the Trial Chamber, was the most appropriate in this regard as it has led to unnecessary delays in the award of reparations.

The findings of the Appeals Chamber raise the crucial question of the sustainability of conducting an adversarial hearing for each of the individual requests for reparations – which may be very numerous: several hundred or even several thousand – as part of the reparations phase in criminal proceedings pursuant to article 75(2). The issue of sustainability of itself contains and sums up the pertinent questions concerning the right of victims to effective, adequate and prompt reparations that the Appeals Chamber previously enshrined in paragraphs 44 to 48 of the order in *Lubanga*.

92. The issue of sustainability also reflects the very insightful comments made by Judge Christine van den Wyngaert, one of the judges in the composition of the Appeals Chamber that rendered the judgment in *Katanga*, which were published in 2011: having raised the issue of the significance of reparations, the Judge enquired as follows:

Is the system sustainable? A lot of judicial energy and resources have been put in the victims’ participation and reparation regime. [...] I know from experience that the time devoted by Chambers to victims-issues is considerable. At any given time before or during

⁸⁸ “Public Redacted Version of Judgment on the Appeals against the Order of Trial Chamber II of 24 March 2017 entitled ‘Order for Reparations pursuant to Article 75 of the Statute’”, 8 March 2018, ICC-01/04-01/07-3778-Red A3 A4 A5, <https://www.legal-tools.org/doc/0a95b7/>

the trial, there would always be some victims-related issue pending for decision. [...] And then I don't even think of the hundreds of hours spent on determining victim status of all hundreds (and in the future perhaps thousands) of applicants, which also puts a strain on the parties (prosecution and defence). [...] When I compare my experience as an ICC judge with my experience as an ICTY judge, a huge amount of time is spent on victims-related issues, which, obviously, has an impact on the length of the proceedings. Whether this is in the best interest of the victims whom the ICC wishes to serve remains to be seen.⁸⁹

93. The process of defining the Court's comprehensive reparations system cannot reasonably overlook the legitimate issues raised by Judge Christine van den Wyngaert and reflected in the Appeals Chamber's judgment in *Katanga*. To do otherwise would amount to admission by the Court of failure on "one of the essential features to which the success of the Court is [...] linked".⁹⁰ In proposing to separate the issue of reparations for victims from the criminal proceedings and to allow it to be considered in parallel to the criminal proceedings in the situation, by the Pre-Trial Chamber or by a separate single judge, this Request and Observations envisages a lasting solution to the issue raised by the Appeals Chamber and Judge Christine van den Wyngaert, that could relieve the criminal proceedings, the parties to them and the Chambers seized of the proceedings of the significant workload involved in reparations for victims, while creating conditions that afford victims more prompt access, not contingent on the outcome of the criminal proceedings, to meaningful and adequate reparations including reparations determined on the basis of an individual examination of each application, irrespective of the number of applications.

94. The solution proposed would also have the advantage of relieving the criminal proceedings, the parties to them and the Chambers seized of a significant part of the burden of managing victim participation. The unexpected success of victim participation and the ever-increasing number of persons applying to participate is largely the result of the fact that during the first 10 years of its existence, up to the first decision on reparations in *Lubanga* and still today, the Court has had nothing else to

⁸⁹ C. van den Wyngaert, "Victims before International Criminal Courts – Some Views and Concerns of an ICC Trial Judge", Case Western Reserve University, 21 November 2011, pp. 14-15.

⁹⁰ "Decision on the Prosecutor's Application for a warrant of arrest, Article 58", 10 February 2006, ICC-01/04-01/06-1-Corr-Red, <https://www.legal-tools.org/doc/af6679/>, para. 136, footnotes omitted; "Order for Reparations (amended)", 1 August 2016, ICC-01/04-01/06-3129-AnxA A A2 A3, <https://www.legal-tools.org/doc/df2804/>, para. 3.

offer victims apart from the chance to participate in its proceedings, since the phase in which requests for reparations are examined was postponed to a date subsequent to the outcome of the trial, pursuant to article 75(2). To a certain extent and without this necessarily having been deliberate, the Court has also maintained the false impression that participation in the proceedings was a precondition for access to reparations. The Court drafted an application form for participation and reparations, which it made available online, which maintains that false impression.⁹¹ If a separate procedure for reparations was offered as from the pre-trial stage it is conceivable, if not probable, that a significant proportion of victims who would apply to participate in the current system would opt instead for the parallel and independent reparations procedure without applying to participate. Only those victims who genuinely wish to express their “views and concerns” during the criminal proceedings would apply to participate, while all others would probably choose reparations. This would improve the sustainability of the system as a whole and promote the right of victims to effective, appropriate and prompt reparations.

(v) *Reparations order in Al Mahdi*

95. On 17 August 2017, Trial Chamber VIII rendered the reparations order in *Al Mahdi*.⁹² The facts of that case differ significantly from those in the earlier *Lubanga* and *Katanga* cases because the Accused had been convicted on the basis of a guilty plea and the crimes of which he was convicted consisted fundamentally of the destruction of cultural property. This order and the previous orders nevertheless have in common that they were made pursuant to article 75(2) after the conviction. In paragraphs 23 to 50 of the order, Trial Chamber VIII set out the principles relating to reparations that it was to follow. Those principles are essentially the same as those established by the Appeals Chamber in *Lubanga* (paragraphs 25 to 26 of the order). Lead Counsel therefore directs the attention of the Single Judge to the observations made above regarding the order of the Appeals Chamber in *Lubanga*.

⁹¹ “[TRANSLATION] Application form for individuals – 2019 abridged application form”, <https://www.icc-cpi.int/itemsDocuments/palestine/Application-form-for-individuals-Fra.pdf>

⁹² “Reparations Order”, 17 August 2017, ICC-01/12-01/15-236, <https://www.legal-tools.org/doc/02d1bb/>

96. Trial Chamber VIII however stresses the authority of the Declaration of 1985 and the Van Boven/Bassiouni Principles (paragraph 24), underscores the importance of reparations from the perspective of reconciliation (paragraph 28) and the need for them to be “appropriate, adequate and prompt” (paragraph 33), and declares that “the reparations ordered cannot be prejudicial to or inconsistent with the rights of Ahmad Al Mahdi” (paragraph 37), even though he was found guilty and sentenced. The Defence for Mr Ali Muhammad Ali Abd-Al-Rahman cannot but agree with this important statement by Trial Chamber VIII, while emphasizing that the last point is all the more justified in his case from the perspective of respect for his rights to a defence, to the presumption of innocence and to a fair trial.

(vi) Judgment on the appeals on reparations in Al Mahdi

97. An appeal was lodged against the order of Trial Chamber VIII. The Appeals Chamber delivered its judgment on 8 March 2018.⁹³ The appeal had focused essentially on the modalities and criteria for identifying victims who were entitled to reparations and on the role of the Trust Fund in the process of decision-making on applications for reparations. It is therefore of limited relevance to this Request and Observations. Nevertheless, the Appeals Chamber makes some interesting findings regarding the Trust Fund’s role in decision-making on applications for reparations as part of the first level of “administrative screening of beneficiaries of individual reparations meeting the eligibility criteria set out by the Trial chamber” (paragraph 1) with the oversight and judicial control of the Trial Chamber (paragraph 2). Even though these aspects are slightly outside the actual scope of the Request and Observations, Lead Counsel considers them to be relevant sources of inspiration for the form and the concrete procedure that could be adopted for a reparations phase that is parallel to and independent of the criminal proceedings and conducted according to the principles established on the basis of article 75(1).

⁹³ “Judgment on the appeal of the victims against the ‘Reparations Order’”, 8 March 2018, ICC-01/12-01/15-259-Red2 A, <https://www.legal-tools.org/doc/37b846/>

(vii) Findings on the principles relating to reparations established thus far by the Court

98. On conclusion of the foregoing review of the Court's relevant case law in the cases that have dwelled on the issue of reparations, Lead Counsel prays the Single Judge to find that the suggested additional principles relating to reparations which he makes below are completely consistent with and do not contradict any of the principles relating to reparations established thus far by the Court. The additional principles that it is suggested be adopted on the basis of article 75(1) are intended to be applicable at a different phase of proceedings compared to the principles hitherto set out regarding solely reparations pursuant to article 75(2), but not to cast doubt on those principles. The additional principles suggested below are in fact aimed at implementing and giving full effect to the complementary and all too often conflicting guarantees of the right of victims to appropriate, adequate and prompt reparations and of the rights of the defence to the presumption of innocence and to a fair trial.

VII SUGGESTED LIST OF ADDITIONAL PRINCIPLES RELATING TO REPARATIONS FOR VICTIMS ON THE BASIS OF ARTICLE 75(1)

99. The purpose of the foregoing legal arguments is to demonstrate that Mr Ali Muhammad Ali Abd-Al-Rahman's legitimate concerns expressed at the beginning of these submissions at the disadvantages of deferring the victim reparations phase until the end of the criminal proceedings and the need to provide appropriate, adequate and prompt reparations for all victims of the Situation in Darfur are addressed in the analysis provided of the provisions of relevant international law, the law and comparative practice of States belonging to the various legal systems of the world, with the possible unconfirmed exception of Sudan, the texts of the Court on reparations and principles relating to reparations established thus far in other legal proceedings. It is the solutions offered by that analysis that the additional principles relating to reparations set out below seek to implement in the instant case on the basis of article 75(1) of the Statute.

100. Lead Counsel therefore prays the Single Judge to consider adopting the following proposals for Additional Principles Relating to Reparations on the basis of article 75(1).

**ADDITIONAL PRINCIPLE NO. 1 RELATING TO REPARATIONS –
INFORMING VICTIMS OF THEIR RIGHT TO REQUEST REPARATIONS**

In conformity with regulation 88(1) of the Regulations of the Court, the Registrar shall develop a standard form for victims to present their requests for reparations in the situation before the Court. This form is different from the form for applying to participate in cases under regulation 86 of the Regulations of the Court, which no longer mentions the possibility of using the same form to apply for both participation and reparations. The application form for reparations requests the information required pursuant to rule 94(1) of the Rules of Procedure and Evidence. After the form has been approved in accordance with regulation 23(2) of the Regulations of the Court, the Registry is to make it available to victims and groups of victims, as well as government and non-governmental organizations, which can assist in its dissemination. The form shall be disseminated from the beginning of the pre-trial phase and as early and as widely as possible, in accordance with rule 96 of the Rules of Procedure and Evidence. The dissemination of the form shall extend to all victims of the situation before the Court with the assistance of the Registry's public information and outreach programmes pursuant to regulation 5 *bis* of the Regulations of the Registry.

**ADDITIONAL PRINCIPLE NO. 2 RELATING TO REPARATIONS – ANALYSIS
AND TRANSMISSION OF APPLICATIONS FOR REPARATION**

As soon as it receives the first application forms for reparations completed by victims of a situation, the Registry shall carry out the actions stipulated by regulation 110 of its Regulations and seek any additional information pursuant to regulation 88(2) of the Regulations of the Court. The Registry shall submit its report without delay to the Pre-Trial Chamber constituted for the situation mentioned in the form. The completed

forms received shall be transmitted annexed to the report. Applications for reparations that specifically state the name(s) of one or more persons being prosecuted before the Court pursuant to rule 94(1)(c) of the Rules of Procedure and Evidence, and exclusively those, shall also be transmitted to the Chambers hearing the case brought against the person or persons concerned.

ADDITIONAL PRINCIPLE NO. 3 RELATING TO REPARATIONS – NOTIFICATION

Once a sufficient number of requests for reparations is considered to have been received in a situation, the Pre-Trial Chamber in charge of the situation or the single judge of the Pre-Trial Division designated pursuant to article 39(2)(b)(iii) for the purposes of reparations for victims (“Pre-Trial Chamber or Single Judge”) shall order the Registry to inform the Trust Fund for Victims and provide it with notification of the forms received. The Pre-Trial Chamber or Single Judge shall also request the Registry to also inform the Chambers seized of cases against persons named in the requests for reparations, which shall then provide the notification stipulated under rule 95(1) of the Rules of Procedure and Evidence. The right of persons named in requests for reparations to file representations in response under rule 95(1) of the Rules of Procedure and Evidence is not applicable at this stage.

ADDITIONAL PRINCIPLE NO. 4 RELATING TO REPARATIONS – SOLICITATION OF FUNDS FOR THE FINANCING OF REPARATIONS

As soon as the Trust Fund for Victims is notified of the first requests for reparations under Additional Principle No. 3, it shall immediately solicit voluntary contributions in accordance with regulation 23 of its Regulations. The solicitation shall clearly be identified as seeking voluntary contributions earmarked for reparations for victims of the situation in respect of which the applications for reparations have been received, in accordance with regulation 27(a) and (b) of the Regulations of the Trust Fund for Victims. The solicitation may mention the number of applications for reparations received by the Court and the approximate total amount of reparations requested in

them. The solicitation shall be renewed as often as required with updates on new applications received and the new total amount of reparations requested since the last solicitation. The Court, including the Office of the Prosecutor, shall use its public information and public relations services to support the Trust Fund for Victims in soliciting voluntary contributions. The Trust Fund for Victims shall regularly inform the Pre-Trial Chamber or Single Judge of the voluntary contributions received in respect of the situation, and of the supplement that the Trust Fund itself is willing to devote to reparations in that situation in the ongoing reparations phase.

ADDITIONAL PRINCIPLE NO. 5 RELATING TO REPARATIONS – CLOSURE OF THE SUBMISSION OF APPLICATIONS FOR REPARATIONS

Once it is satisfied that the amount of the voluntary contributions received for the situation and supplemented by the Trust Fund for Victims under Additional Principle No. 4 is sufficient to consider a first phase of reparations for the victims of the situation who have requested them, the Pre-Trial Chamber or Single Judge shall close the phase of applications for reparations commenced under Additional Principle No. 1. Any new applications received after that closing date shall be transmitted to the Pre-Trial Chamber or Single Judge in accordance with Additional Principle No. 2 with a view to commencing a new phase of reparations in respect of the same situation in the future, if the conditions set out in Additional Principles Nos. 3 to 5 are once again met.

ADDITIONAL PRINCIPLE NO. 6 RELATING TO REPARATIONS – PROCESSING OF APPLICATIONS FOR REPARATIONS

On the basis of the Registry's report submitted in accordance with Additional Principle No. 2, the Pre-Trial Chamber or Single Judge shall determine the admissibility of the requests for reparations transmitted and report to the Trust Fund for Victims accordingly. On the basis of that notification the Trust Fund for Victims shall evaluate the amount needed to finance the various reparations measures referred to in the requests found to be admissible and shall submit a report to the Pre-Trial Chamber or Single Judge, stating (i) the estimated cost of the reparations measures requested

according to type of harm; (ii) the estimated total cost of all the reparations measures referred to in the reparations requests found to be admissible, with an estimate of the cost of the reparations measures according to type of harm; (iii) specific problems identified in respect of the implementation of particular reparations measures; (iv) the total amount of available voluntary contributions and any supplement that the Trust Fund for Victims is prepared to devote to the ongoing reparations phase in the situation, reassessed if necessary; (v) any recommendations that the Trust Fund for Victims sees fit to make to the Pre-Trial Chamber or Single Judge before the issuance of an order for the current phase. The Office of Public Counsel for Victims and/or any Legal Representatives of Victims appointed to represent victims who have applied for reparations shall submit observations on the report of the Trust Fund for Victims.

ADDITIONAL PRINCIPLE NO. 7 RELATING TO REPARATIONS – DELIVERY OF THE ORDER FOR REPARATIONS

In the light of the report of the Trust Fund for Victims and the observations submitted under Additional Principle No. 6, the Pre-Trial Chamber or Single Judge shall issue an order for the ongoing reparations phase. In the order the Pre-Trial Chamber or Single Judge may:

- (i) approve the report of the Trust Fund for Victims and order implementation of all the modalities of reparations that the Pre-Trial Chamber or Single Judge considers appropriate, up to a maximum amount not exceeding the total voluntary contributions received and supplemented by the Trust Fund for Victims;
- (ii) order implementation of certain reparations measures for a maximum amount not exceeding the total amount of voluntary contributions received and the supplement from the Trust Fund for Victims. In this case, the requests not covered shall either be rejected by a reasoned decision or referred back to the Trust Fund for Victims for the solicitation of targeted additional voluntary contributions or additional supplementary funding by the Trust Fund for Victims; or

- (iii) reject the report of the Trust Fund for Victims in its entirety and order the Trust Fund for Victims to again solicit voluntary contributions and/or provide supplementary funding in accordance with Additional Principle No. 4.

ADDITIONAL PRINCIPLE NO. 8 RELATING TO REPARATIONS – APPEAL AGAINST ORDERS FOR REPARATIONS

Pursuant to article 82(4) of the Statute, the Office of Public Counsel for Victims and/or any Legal Representatives of Victims appointed to represent the relevant victims applying for reparations may appeal against the order for reparations issued by the Pre-Trial Chamber or Single Judge pursuant to Additional Principle No. 7. The Appeals Chamber shall entertain observations by the Trust Fund for Victims when hearing the appeal.

ADDITIONAL PRINCIPLE RELATING TO REPARATIONS NO. 9 – IMPACT OF REPARATIONS ON PROCEEDINGS IN THE RECORD OF THE CASE

The order issued in accordance with Additional Principle No. 7 and, in the event of an appeal, the judgment of the Appeals Chamber in accordance with Additional Principle No. 8 shall be transmitted to the Chambers seized of the cases against the persons named in the applications for reparations covered by the order, and notified to the defence. At the commencement of trial or at any other time subsequently if the trial has already commenced, the notification stipulated under rule 94(2) of the Rules of Procedure and Evidence shall be provided, on the basis of which the defence may file representations. In the event of a final conviction of one of those persons, the Trial Chamber may issue an order against that person pursuant to article 75(2) of the Statute. Victims who have already been awarded reparations under an order issued on the basis of these Additional Principles shall not be eligible to participate in reparations proceedings pursuant to article 75(2). The order shall be made for the benefit of the Trust Fund for Victims up to the limit of its supplement to the reparations awarded to victims of the crimes for which the convicted person was found guilty. At the

discretion of the Trial Chamber after consulting the Trust Fund for Victims, any remaining balance shall be added either to the funds available for a new phase of reparations in the same situation for victims of crimes of which the convicted person was found guilty, or paid to the Trust Fund for Victims pursuant to rule 98(2) or 98(3) of the Rules of Procedure and Evidence.

101. Considering the novelty and boldness of the additional principles proposed above and how crucial they are for the “success of the Court”,⁹⁴ Lead Counsel suggests to the Single Judge that it may be appropriate to invite any State, organization or person who wishes to do so to submit written or oral observations on the issues raised in this Request and Observations and the proposals for the adoption of additional principles relating to reparations, as amici curiae on the basis of rule 103(1) of the Rules.

FOR THESE REASONS LEAD COUNSEL HUMBLY PRAYS THE SINGLE JUDGE
to:

1/ **CONSIDER** the adoption and implementation of the additional principles relating to reparations outlined above in the present case pursuant to article 75(1) of the Statute; and

2/ **CONSIDER** the appropriateness of requesting submissions, from persons in the capacity of amici curiae under rule 103(1) of the Rules, on the additional principles relating to reparations set out above.

[signed]

Mr Cyril Laucci,
Lead Counsel for Mr Ali Muhammad Ali Abd-Al-Rahman

Dated this 17 July 2020

⁹⁴ “Decision on the Prosecutor’s Application for a warrant of arrest, Article 58”, 20 February 2006, ICC-01/04-01/06-1-Corr-Red, <https://www.legal-tools.org/doc/af6679/>, para. 136; “Order for Reparations (amended)”, 1 August 2016, ICC-01/04-01/06-3129-AnxA A A2 A3, <https://www.legal-tools.org/doc/df2804/>, para. 3.