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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

**Prosecution's Submissions on the principles and procedures to be applied in
reparations**

Source: Office of the Prosecutor

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

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INTRODUCTION

On 14 March 2012, the Chamber invited the parties and participants to file submissions on a) the principles to be applied by the Chamber with regard to reparations and b) the procedure to be followed by the Chamber.¹ The Prosecution summarises the principles as follows:

1. The Chamber should define the parameters of reparations and delegate the task of implementation within such parameters to an expert appointed in accordance with Rule 97 of the Rules of Procedure and Evidence (Rules).
2. The Prosecution proposes the following parameters:
 - a. The criminal proceeding and the reparation procedures should be distinguished as separate processes. The crimes under the Rome Statute (Statute) would normally involve a massive number of victims, perpetrators and incidents. The Prosecution must carefully select incidents and charges to render the proceedings efficient and the trial fair. As the Prosecution explained in a policy paper distributed in 2010, the class of persons entitled to participate and seek reparations thus may exceed the smaller class of persons directly or indirectly victimized by the specific crimes of conviction.² The limited charges brought in this criminal proceeding therefore should not prejudice the right of others to seek

¹ ICC-01/04-01/06-2844, para. 8.

² Policy Paper on Victims' Participation, 12 April 2010, RC/ST/V/M.1, http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-V-M.1-ENG.pdf (last visited on 18 April 2012)

individual or collective restitution,³ through a reparations arrangement not to be paid by the convicted person for harm resulting from crimes committed directly or indirectly by him but in respect of which he has not been charged. The Prosecution submits that all victims of the attacks perpetrated by the UPC, the group led by Mr Lubanga, in particular the targeted members of the Lendu communities, could apply as victims in the reparations phase. It will be enough to permit their participation in this phase if they demonstrate the harm suffered and that it was as a result of the activities of the UPC.

- b. The Chamber should award reparations on both an individual and a collective basis to persons who suffered harm within the area of responsibility of the group led by Mr Lubanga.
- c. The Chamber should order Mr Lubanga to apologise in general terms and to individuals as a form of “satisfaction”.
- d. The Chamber can order Mr. Lubanga directly to pay compensation to the victims of the crimes for which Mr. Lubanga was convicted.
- e. The Chamber can order individual or collective compensation, subject to the availability of funds, for the other victims of the UPC identified under the parameters established in paragraph (2)(a) above, and delegate to one or more experts the management of the identification of victims and

³ We note that the Trust Fund for Victims (TFV) refers to collective as well as community-based awards, see ICC-01/04-01/06-2803-Red, *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund for Victim’s First Report on Reparation, 23 March 2012 (hereinafter *Trust Fund Report*), paras. 23 and 24. For these purposes the Prosecution’s use of collective reparations should include community-based reparations.

funds available to compensate them. The expert should consult with the Trust Fund for Victims (TFV) and other actors willing to provide special contributions.

3. The Prosecution advocates the following process:
 - a. The Chamber should convene a hearing to call experts and clarify the issues to be decided.
 - b. The Chamber should decide, in general terms, the classes of victims who may receive compensation, the types of harm suffered meriting reparations, the areas of influence of the UPC, the satisfactions that Mr Lubanga must personally offer and the possibilities to award both collective and individual reparations.
 - c. The Chamber should appoint one or more experts to:
 - i. Identify the persons who suffered harm as a result of the activities of the UPC and would be entitled to benefit from any reparations.
 - ii. Determine the communities affected and enquire, within those communities, what reparations would be most beneficial and appreciated.
 - iii. Identify the funds available.

- iv. Prepare and implement a Reparations Plan that would identify those entitled to collective and individual compensation and determine the amount, nature and scope of award, taking into consideration the number of victims, their interests and the funds available.
- d. The Chamber concludes its intervention, leaving the implementation of its decision (as described in paragraph (3)(b) above) to the expert(s).

STATEMENT OF PRINCIPLES

4. The Statute established a reparations scheme that, as the ICC's President recently stated, "is designed to offer victims a measure of restorative justice through their restitution".⁴ The Prosecution submits that the Statute reflects an innovative consensus by the international community – including States that actively participated in and supported the negotiations but have not yet ratified the Statute itself -- of the dual needs to end impunity and to respect, protect, and bring justice to victims. The emphasis on the victims is reflected in a reparations scheme that contemplates the availability of restorative justice, broadly, to affected communities.
5. In this case, these communities include the children who were unlawfully recruited by Mr. Lubanga's militia and/or used to participate actively in hostilities, and their immediate families – i.e. the class of persons who are authorised to participate in the proceedings themselves. But they are not

⁴ Opening Address, *Reparations before the ICC: Issues and Challenges*, Conference organized by REDRESS, Leiden University and Grotius Centre at the Peace Palace, The Hague, 12 May 2011.

limited to that class. As signified by the provision of collective reparations to communities, the drafters intended that the scope of victims for whom restorative justice can be ordered at the end of the case will exceed the narrower definition of victims who are authorised to participate in the trial proceedings themselves.

6. Accordingly, the Prosecution proposes that the reparations process be made available to a wider class of victims than has been defined for the purpose of participation in the proceedings, and that these victims may share in collective (or even individual, where available) reparations consistent with the overall intention to provide restorative justice to affected communities.

STATEMENT OF PROCEDURES

7. In its 14 March 2012 invitation,⁵ the Chamber identified the following issues:
 - i) whether reparations should be awarded on a collective or an individual basis (see Rule 97(1) of the Rules);
 - ii) depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards;
 - iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute;
 - iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and
 - v) whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.

⁵ ICC-01/04-01/06-2844.

i) Whether reparations should be awarded on a collective or an individual basis (see Rule 97(1) of the Rules)

8. The Prosecution submits that in this instance, the Chamber should award reparations on both an individual and a collective basis.
9. *Individual Reparations*⁶ - At its core, reparations are designed to restore the individual victim to his or her position before the commission of a crime. International human rights standards also are generally expressed in individual terms.⁷ Thus, a child soldier who suffered physical, psychological, or other harm might feel a particular sense of justice if an individual award were directed at him/her.
10. At the same time, it appears that Mr. Lubanga has limited resources and cannot possibly compensate all his victims for the damage and loss they suffered. Given the limited resources, the Prosecution submits that it could ultimately be unnecessarily frustrating to raise victims' expectations of significant compensatory payments knowing that there is little to no likelihood that Mr. Lubanga will be able to pay the judgment.

⁶ According to the *Registry's First Report to the Trial Chamber on applications for reparations* (ICC-01/04-01/06-2847, 28 March 2012) (hereinafter *Registry's First Report*), there are currently 85 applications for reparations, 53 submitted by women and 32 by men (see para. 9). From the 85, 19 requested individual reparations awards, five requested exclusively collective awards, 59 requested both individual and collective awards, and two did not state a preference (see para. 10). Though these figures are likely to increase, it nonetheless appears that in this case the number of claims requesting individual awards could be processed efficiently.

⁷ "Reparations to individuals therefore underscore the value of each human being and their place as "rights-holders." Lisa Maggarell for International Centre for Transnational Justice (ICTJ), *Reparations in Theory and Practice*, 2007, available at <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>

11. The Court can order Mr. Lubanga to pay a symbolic nominal sum to each identified victim. Such a payment, while clearly inadequate to restore the persons financially to the position that they would be in had the crimes not been committed, would symbolically recognise their loss. However, such a decision ought not to be made unless it is determined that the benefit of such recognition to provide closure and psychological satisfaction far outweighs the potential for offending the victims by seemingly minimising the degree of their suffering.

12. Individual awards do not need to be limited to financial payment. The Court can also order “satisfaction”. Article 75(1) and (2) leave open the availability of other forms of reparations. The Statute effectively defines reparations as “including restitution, compensation and rehabilitation”. The UN Basic Principles also expansively define reparations to include the following, as forms of satisfaction that might be relevant in this case: verification of the facts and full public disclosure of the truth; search for the disappeared and identities of those abducted; official declaration or a judicial decision restoring the dignity, reputation and rights of the victim; a public apology; and commemorations and tributes to the victims.⁸

13. While the Article 74 Decision already represents a form of redress⁹ and reparation to the former child soldiers and their families in Ituri, it is additionally possible for the Court to order or request Mr. Lubanga to issue a

⁸ GA Resolution 60/147 of 16 December 2005. These principles can guide the Court pursuant to Article 21 of the Statute.

⁹ In this regard, see *Juan Humberto Sánchez v Honduras*, Merits, Reparations and Costs, 7 June 2003, Inter-Am. Ct H.R., Series C.No.99. See also ICC-01/04-01/06-2806, *The Prosecutor v. Thomas Lubanga Dyilo*, Second Report of the Registry on Reparations, 19 March 2012 (hereinafter *Registry’s Second Report*), para. 81.

public and/or private apology to the individual victims that acknowledges his responsibility for their suffering.¹⁰ Personal acknowledgement by Mr. Lubanga himself of the harm suffered by individual claimants would further restore their dignity.

14. Collective Reparations - the Prosecution also submits that the Chamber can request the TFV to provide reparations on a collective basis. Such collective awards have considerable benefits,¹¹ such as promoting community cohesion and reconciliation, or directly targeting gender specific projects facilitating the rehabilitation of victims of gender violence, to identify but a few.
15. Both the Registry and TFV advocate collective awards. In addition to minimising the difficulty in attempting to determine individual eligibility for reparations, collective awards can use the limited available resources to provide the greatest benefit to groups of victims. They might also minimise, or at least to avoid exacerbating, ethnic conflicts in the region, since collective awards for demobilisation centres, micro-credit projects, or educational opportunities could be accessible by the community as a whole.¹² For example, in a Colombian Supreme Court (Bogota) collective reparations decision,¹³ the

¹⁰ The Prosecution submits that the Court has the authority to order Mr. Lubanga to make these admissions if it also immunises such acknowledgements of personal responsibility so that these compelled statements cannot be used by the Court as evidence of his guilt or affect his appellate rights, including the right to contest his conviction and/or sentence. However, compelled apologies would not justify a request by Mr. Lubanga for mitigation of sentence on the basis of his expressions of remorse, under Rule 145(2)((a)(ii). If Mr. Lubanga does not require immunity, mitigation might be available. See *Registry's Second Report*, para. 78.

¹¹ See ICC-01/04-01/06-2803-Red, *The Prosecutor v. Thomas Lubanga Dyilo*, Trust Fund for Victim's First Report on Reparation, 23 March 2012, paras 20-22 and *Registry's Second Report*, paras 72-73.

¹² REDRESS, "Justice for Victims: ICC's Reparations Mandate", page 68: "rehabilitation projects have had both collective and individual aspects – allowing individual victims to obtain services free of charge, but also constituting symbolic acts, addressing harm to the community". Also, paragraphs 70 to 73 of the *Registry's Second Report*.

¹³ See Colombian case - Decision: *Sentencia, Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, Radicación: 110016000253200782701, 16 December 2011 (Rendón Herrera Judgement)*

Court ordered the establishment of rehabilitation programs for victims, their families and communities and ordered that the training camps mentioned by victims should be converted into community centres where victims can denounce the commission of crimes by all actors in the armed conflict.¹⁴

ii) Depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards

(a) To whom are reparations to be directed

16. The Prosecution submits that reparations awards to be paid by Mr. Lubanga can only be directed to victims of the crimes for which he is convicted. Funds from other sources can be used for reparations to others who are within communities victimized by the convicted person.
17. First, the Prosecution agrees that reparation awards ordered to be paid personally by the convicted person can only be directed to victims whose harm is linked to the crimes for which the person has been convicted. This is because reparations ordered following a conviction may be regarded as a consequence falling on the person as a direct result of that conviction, and therefore they should bear a clear nexus to the conviction itself.
18. In so advocating, the Prosecution fully realises that its charging decisions may result in the exclusion of some victims whose personal claims are as compelling as those persons included in the reach of the charges. The cases

¹⁴ Colombia's Law 1448/2011, art. 25. The law states that victims of grave violations of human rights have the right to reparations in the forms of: restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. *Rendón Herrera Judgement*, para. 752.

before this Court reflect the tension between the interests in (a) airing and punishing the most egregious violations, while (b) limiting the number of persons put at risk by virtue of their interaction with the Court and avoiding unduly protracted trial proceedings. Notwithstanding the interests in broadening the cases, and as outlined in its Policy Paper on Victims' Participation, the OTP has adopted a policy of focused investigations and prosecutions.¹⁵ Inevitably, the charges cannot – for reasons of witness security and judicial economy, outlined above -- encompass all the crimes that could reasonably be attributed to the person. Victims who suffered harm from other uncharged crimes will thus be excluded from participation and entitlement to reparations paid directly by the convicted person. For instance, as in this case, Lendu civilians against whom the UPC child soldiers committed other war crimes, or female recruits in the UPC who were sexually assaulted and raped by UPC child soldiers were clearly victimized, but in light of the focused child soldier charges they could not participate under Article 68(3) as victims.¹⁶

19. However, this limitation can be ameliorated if the Court also allows a broader class of victims to participate at the reparations stage. Indeed, this Chamber appears to contemplate that the definition of victims for reparation will be broader than the definition of victims at trial.¹⁷ This broader class can theoretically be compensated from funds obtained through fines, criminal forfeitures, or funds otherwise collected by the TFV. There is no principled

¹⁵ OTP's Policy Paper on Victims' Participation, April 2010, page 7.

¹⁶ *Judgment on the appeals*, para.65.

¹⁷ ICC-01/04-01/06-2842, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, 14 March 2012 (*Article 74 Decision*). See paras. 631 and 896 of the *Article 74 Decision*. The Chamber expressly contemplated submissions on whether the uncharged allegations of sexual violence can be considered in the award of reparations. And, in determining that the allegations of sexual violence were not included in the charges and therefore no finding of fact was made for the purposes of the Article 74 Decision, the Chamber stated: "in due course, the Chamber will hear submissions as to whether the issue assists as regards sentence and reparations".

concern about fairness to the convicted person that would bear on the definition of victims entitled to be paid out of such funds: the fines are intended to be punitive (and the disposition of the fines is irrelevant to the imposition of the penalty); criminal forfeiture is designed to deprive the wrongdoer himself of the proceeds of crime (again, with the disposition of those proceeds being irrelevant to the purpose of the forfeiture itself); and other TFV funds do not come from the convicted person. Permitting the broader category of victims will also signify that the reparations process is equitable and does not favour classes of victims or particular ethnic communities over others.¹⁸

20. Given the above, the Prosecution submits that, *inter alia*, the following victims should be eligible for reparations: former child soldiers (direct victims) and their parents/guardians (indirect);¹⁹ persons who suffered harm when attempting to interdict the abduction of children from institutions (schools) for the purposes of recruitment;²⁰ victims of sexual violence that formed part of the

¹⁸ The TVF, the Registry and REDRESS all favour the position of expanding the class of victims entitled to reparations. See *Trust Fund Report*, paras 38-45 and 171-178; *Registry Report*, paras 5-7 and REDRESS, p.27 and pp. 53-62. In addition, the language of Article 75(1) reflects an intention of the drafters of the Statute to expand the category of victims to whom reparations can be awarded. A joint proposal of France and the United Kingdom before the last Preparatory Committee (U.N. Doc. A/AC.249/1998/WG.4/CRP.5, 25 Mar. 1998, article 66), which survives in the present Article 75, provided that “reparations shall be made not only to victims, but also *in respect of* victims” thereby extending the possibility of reparations not only to direct victims. (See Donat-Cattin, D., ‘Reparations to victims’, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (2nd ed: 2008), p 1402). Similarly in the Draft Statute for the International Criminal Court in the Report of the Preparatory Committee of the Establishment of an International Criminal Court (UN Doc. A/CONF.183/2/Add.1, 14 April 1998, p. 116), the expression ‘*in respect of victims*’ is further detailed in a footnote to Article 73. This footnote indicates that reparations are “to be granted not only to victims but also to others *such as* the victim’s families and successors (in French, ‘ayants droit’). The use of the phrase “such as” indicates that the expansion is not necessarily limited to successors and victim’s families.

¹⁹ *Judgment on the appeals*, paragraph 31.

²⁰ ICC-01/04-01/06-1556, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the applications by victims to participate in the proceedings, 15 December 2008, paras 110-111.

enlistment and conscription;²¹ and civilians of any ethnic group who suffered at the hands of the UPC without restriction to the period of the charges . In respect of the UPC, in the Prosecution's view it is not necessary that child soldiers directly cause the victims' suffering or loss. First, it would often be impossible for a victim to identify, years after the event, the UPC militia member who raped, assaulted, or otherwise harmed him or her as a child soldier. Nor should that be required. When Lubanga swelled the ranks of the UPC with children, he made it possible for his strengthened militia (adults and children alike) to cause greater harm to greater numbers. Using children as bodyguards for example, freed his adult soldiers for other tasks. The presence of children thus is causally linked to the opportunity, and thus the actual commission of crimes by the adult soldiers, sufficient to trigger a finding that the victims of the UPC militia's crimes may seek recognition and reparations.

(b) How is harm to be assessed

21. Pursuant to Article 75(1), the Court may determine the scope and extent of any damage, loss or injury and state the principles on which it is acting. Alternatively, the Court could set forth its parameters and principles on the assessment of harm and leave the actual assessment to the Trust Fund, if appropriate and as permitted in Regulations 60 and 61 of the Regulations of the Trust Fund, or, it could appoint one or more experts pursuant to Rule 97(2).
22. The Prosecution supports the delegation to an appropriate expert.

²¹ See fn. 17, above.

23. The types of harm to be considered range from the physical and psychological to economic and emotional.²² In this case the recruitment of children under 15 and their use in military conflict resulted in physical and emotional harm. The child soldiers were denied education, family life, and other opportunities,²³ all with damaging consequences that endure beyond their service in the militia. Further, for the female recruits, most or all were also particularly subjected to sexual violence and subsequent ostracisation within their civilian communities; as the Registry notes, “the physical and psychological consequences of sexual violence may well be considered to be part and parcel of the harm caused by the crime child conscription in respect of which reparation is required”.²⁴
24. With respect to the standard of proof to be applied for the purposes of eligibility to submit a reparations claim, the Prosecution submits that a high standard will exclude most if not all victims from the reparations process and defeat the purpose of the Article 75. Thus, the Prosecution advocates for a standard that takes into account that victims may not have ready access to documentation sufficient to establish beyond a reasonable doubt their status and the harm that they suffered. In particular, it would urge that the Chamber approve applications based on the standard of balance of probabilities, a standard that can be met if the victim submits an application with either documentation or confirmatory affidavits by, for example, at least one other person. As with eligibility to participate in the proceedings, the supporting

²² See ICC-01/04-01/07-579, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the 97 Application for Participation at the Pre-Trial Stage, 10 June 2008, paras 69, 71 and 115; ICC-01/04-101-tEN-Corr, *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, 17 January 2006, paras 132, 147, 162 and 173; ICC-02/05-111-Corr, *Situation in Darfur*, Decision on Victim Participation, 14 December 2007, para. 40; ICC-01/04-01/07-357, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08, 2 April 2008, p. 11.

²³ See *Trust Fund Report*, para. 200 and *Registry Second Report*, para. 21.

²⁴ *Registry's Second Report*, particularly paragraph 20.

documentation should be accepted if it is *prima facie* sufficient to establish victim status under Rule 85.²⁵ The Prosecution also favours the application of a presumption of harm standard and an acceptance that deceased victims' interests can be pursued by others on their behalf.²⁶

(c) The criteria to be applied

25. The Prosecution submits that the criteria to be applied in determining reparations awards should be proposed by an appointed expert,²⁷ who can take into account the number and classes of claimants and the availability of funds. The assessment of harm must balance the interest in providing reparations to those who most need them – especially when resources are limited²⁸ - with the need to ensure that further victimisation does not occur. The process is complex and potentially involves a multitude of categories of loss and harm that could, if litigated in the adversarial fashion, foster discord and acrimony between the different groups and corrupt the reparations process. The discord is likely exacerbated by the fact that the different groups might require different forms of reparations.²⁹

iii) Whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute

²⁵ See para. 484 of *Article 74 Decision*.

²⁶ See Article 84(1) of the Rome Statute allows “spouses, children, parents, or one person alive at the time of the accused’s death who has been given express written instructions from the accused” to seek to revise a conviction even after the convicted person died. The same class of interested persons should be permitted to represent a deceased victim. See also *Case of Aloeboetoe et al v Suriname*, Reparations and Costs, Inter-Am. Ct H. R., Judgement of 10 September 1993, Series C. No. 15.

²⁷ See, e.g., *United States Cases - Holocaust Victims’ Assets Litigation*, 424 F.3d 169 (2nd Cir. 2005) and *In re “Agent Orange” Prod. Liab. Litig.* 97 F.R.D. 427 (E.D.N.Y. 1983)

²⁸ *Registry’s Second Report*, para. 42 states that “it may appear inequitable for resources to be prioritized in favour of victims who were less severely affected by the crime {...}”.

²⁹ *Registry’s First Report*, paras. 10-12.

26. First, as noted previously, the Court may order Lubanga to make non-monetary reparations, such as a public acknowledgement or individual apologies to the victims.
27. With respect to orders of financial reparations, Mr Lubanga does not appear to have any financial resources or assets.³⁰ His financial status should be reviewed and updated. But assuming no improvement to his financial condition, an order requiring meaningful monetary reparations from him may not be currently enforceable.
28. However, unlike a fine, which the Statute expressly links to the convicted person's ability to pay,³¹ there is no statutory or regulatory bar against ordering reparations against a convicted person who lacks financial resources. Thus, the Prosecution submits that the Court may enter provisional orders that could be enforced later by this Court or by national courts should Mr. Lubanga acquire resources in the future.
29. The Prosecution also submits that the Court could order, for example, that if Mr. Lubanga were to sell book or movie rights to his story, as the first person to be convicted in the ICC, those proceeds must be seized and made available to satisfy outstanding reparations orders.³²

³⁰ See ICC-01/04-01/06-1286- Exp.

³¹ Rule 146(2) of the Rules.

³² See, for instance, the so-called "Son of Sam laws" in the United States. "A "Son of Sam" law, taken from the nickname of a serial killer who sold the rights to his story after conviction, typically restricts the ability of an individual to profit from subsequent books, movies, and the like related to his or her criminal activity and requires that the proceeds go to the victims of the crimes. Garrett Epps, *Wising Up: "Son of Sam" Laws and the Speech and Press Clauses*, 70 N.C.L.Rev. 493, 500-05 (1992).

30. Finally, notwithstanding limited resources, the Court may be able to order and enforce minimal symbolic payments, but it should consider whether this would be deemed beneficial or insulting to the victims themselves.

iv) Whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute

31. The Prosecution reads the Statute and Rules as providing that proceeds from forfeiture and criminal fines may be paid into and managed by the TFV and then disbursed as reparation to victims. Thus, such funds would be paid “through” the Trust Fund under Article 75(2).
32. In addition, the Prosecution submits that individual and collective reparation awards may be paid through the Trust Fund’s “other resources”. Rule 98(5) of the Rules states: “*other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of Article 79*”. There is no specificity here as to individual or collective awards, as in the previous sub-rules of Rule 98. Article 75(2) permits the Court to make awards *through* the TFV. Though the language is not precise, the Prosecution submits that Article 75(2), supported by the intention of the drafters of the Statute, entitles the Court to request the TFV to use its “other resources”³³ for the purpose of compensation to victims. However, disagreeing with the Registry,³⁴ the Prosecution considers valid the

³³ Rule 98(5) of the Rules.

³⁴ See *Registry’s Second Report*, paras 123-147.

argument presented by the Trust Fund that the funds it collected for various purposes cannot be ordered by the Court to fund payments.³⁵

33. That said, however, the Prosecution submits that it is contemplated that the TFV will make its best efforts to assist in providing meaningful reparations. Paragraph 56 of the Regulations of the Trust Fund for Victims provides as follows:

“The Board of Directors shall determine whether to complement the resources collected through awards for reparations with ‘other resources of the Trust Fund’ and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, sub-paragraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under Rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.”

³⁵ The TFV argues that it is not subject to the authority of the Court when managing its “other resources”. See *Trust Fund Report*, footnote 40.

v) Whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules

34. The Prosecution leaves open the possibility to propose that the Court call one or more experts³⁶ or offer expert evidence on how to assess victim eligibility and how to best approach the possibility of collective reparations.



Luis Moreno-Ocampo
Prosecutor

Dated this 18th day of April 2012

At The Hague, The Netherlands

³⁶ Such experts could include, for example, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantee of non-recurrence, Pablo de Greiff, the Head of the Assembly of State Parties, Ms. Tiina Intelmann, the Executive Director, Secretariat of the Trust Fund for Victims, Mr. Pieter de Baan, and/or persons from the TFV Board of Directors.