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**TRIAL CHAMBER III**

**Before:** Judge Joyce Aluoch, Presiding  
Judge Geoffrey Henderson  
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

***IN THE CASE OF  
THE PROSECUTOR  
v. JEAN-PIERRE BEMBA GOMBO***

**Public Document**

**Joint submission by the United Nations containing observations on Reparations  
pursuant to Rule 103 of the Rules of Procedure and Evidence**

**Source: The United Nations**

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

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## I. Introduction

1. The United Nations respectfully transmits the present observations (“Observations”) in the reparations phase of the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* (Case No. ICC-01/05-01/08) pursuant to the Decision of Trial Chamber III (“Chamber”) of the International Criminal Court (“ICC” or “Court”) dated 26 August 2016, on behalf of the following United Nations entities:

- (i) The Office of the United Nations High Commissioner for Human Rights (“OHCHR”);
- (ii) The United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (“MINUSCA”);
- (iii) The United Nations Entity for Gender Equality and the Empowerment of Women (“UN Women”); and
- (iv) The Office of the Special Representative of the United Nations Secretary-General on Sexual Violence in Conflict (“OSRSG-SVC”).<sup>1</sup>

## II. Procedural Background

2. Between 2009 and 2012, the Chamber considered thousands of applications to participate in the *Bemba* case and formally authorized 5,229 victims to do so (including both individual and institutional victims).<sup>2</sup> The substantial number of victims participating in these proceedings indicates the scope and severity of the crimes committed by Mr. Bemba as well as the trust that victims have placed in the Court to address their claims fully and fairly.

3. On 21 March 2016, the Chamber found Mr. Bemba guilty, as a person effectively acting as a military commander, of murder, rape, and pillaging as war crimes and crimes against humanity.<sup>3</sup> Significantly, the *Bemba* judgment is the first by the ICC to find a defendant guilty of rape as an international crime. The Chamber’s judgment recounts the

<sup>1</sup> Given their relevant expertise on the issues before the Chamber, MINUSCA and UN Women have joined these Observations in line with paragraph 2 of the United Nations Application for leave to make submissions pursuant to Article 75 of the Rome Statute of the International Criminal Court (hereinafter the “Rome Statute”) and Rule 103 of the Rules of Procedure and Evidence, 15 August 2016 (hereinafter “UN Application”). See also ICC-01/05-01/08-3430, 26 August 2016, para 9.

<sup>2</sup> ICC-01/05-01/08-3343, para 18.

<sup>3</sup> ICC-01/05-01/08-3343, para 752. (Mr. Bemba has since appealed this decision.)

substantial harm that victims suffered.<sup>4</sup> The Chamber found *beyond reasonable doubt* that this harm included both death and grievous bodily injuries resulting from rape or gang rape, such as HIV infection, severe and lasting injuries to the vagina, anus and pelvis of the victims and other physical disorders.<sup>5</sup> The Chamber also found *beyond reasonable doubt* that the mental pain and suffering that many victims experienced was no less acute or life threatening than the physical harm itself. The judgment describes how victims experienced post-traumatic stress disorder, suicidal ideation, depression and social stigmatization as a result of Mr. Bemba's crimes.<sup>6</sup> Moreover, the Chamber's judgment found that Mr. Bemba's forces spared no one. Both women and men were victims of rape.<sup>7</sup> Girls, sometimes as young as ten years old, were raped and found bleeding from their vaginas.<sup>8</sup>

4. The Chamber also found that Mr. Bemba's forces murdered three victims and pillaged significant amounts of victims' property.<sup>9</sup> Many victims of various crimes described in the judgment remain unidentified.<sup>10</sup>

5. On 21 June 2016, the Chamber sentenced Mr. Bemba to a total of eighteen years' imprisonment.<sup>11</sup> In the Chamber's sentencing decision, it "note[d] that the number of victims of underlying acts of rape is substantial" and that these rapes were "of utmost, serious gravity", which caused "severe and lasting" damage to victims, families and their communities".<sup>12</sup> The Chamber also found that rape and pillaging were committed with particular cruelty and that

<sup>4</sup> ICC-01/05-01/08-3343, para 567 ("[R]ape victims experienced significant medical, psychiatric, psychological and social consequences, including PTSD, HIV, social rejection, stigmatization, and feelings of humiliation, anxiety, and guilt. Regarding the crime of murder, the evidence shows that, on some occasions, MLC soldiers killed or threatened to kill those who resisted acts of pillaging and rape").

<sup>5</sup> ICC-01/05-01/08-3343, para 464 (victim suffered harms including "depression, a fear of armed soldiers, vaginal and stomach ailments, and HIV"); para 472 (victims suffered harms including "depression, skin disorders, and pelvic pain"); para 488 (victim suffered harms including "physical injuries to her vagina, back, pelvis, kidneys, and eyes, and she was socially stigmatized"); para 501 (victim's sister was killed due to gunshots to the head); and para 510 (victim suffered harms including "high blood pressure, gastric problems, hypertension, and nightmares").

<sup>6</sup> ICC-01/05-01/08-3343, paras 464, 472 (describing rape victims' depression); para 488 (describing rape victim's social stigmatization); para 508 (noting rape victim "was suicidal, reluctant to engage in any sexual relationship, and exhibited symptoms consistent with post-traumatic stress disorder"); para 494 (noting victim "considered himself a 'dead man'" after his rape).

<sup>7</sup> ICC-01/05-01/08-3343, para 633.

<sup>8</sup> See, e.g., ICC-01/05-01/08-3343, paras 467, 516.

<sup>9</sup> Regarding murder, see, e.g., ICC-01/05-01/08-3343, para 624; regarding pillaging, see, e.g., ICC-01/05-01/08-3343, para 640.

<sup>10</sup> ICC-01/05-01/08-3343, para 633.

<sup>11</sup> ICC-01/05-01/08-3399, para 97.

<sup>12</sup> ICC-01/05-01/08-3399, para 40.

rape was committed against particularly defenceless victims.<sup>13</sup>

6. On 22 July 2016, the Chamber requested that the parties and interested organizations provide submissions on the following issues related to reparations in the *Bemba* case:

- (a) whether the principles established by the Appeals Chamber in the *Lubanga* case need to be amended or supplemented in the light of the particular circumstances of the case;
- (b) the criteria and methodology to be applied in the determination and assessment of
  - (i) the eligibility of victims; (ii) the relevant harms; and (iii) the scope of Mr. Bemba's liability, including the determination of the precise extent of the (monetary) obligations to be imposed on him;
- (c) the types and modalities of reparations appropriate to address the harm relevant in the circumstances of the case, including factors relating to the appropriateness of awarding reparations on an individual basis, a collective basis, or both;
- (d) whether experts may be usefully appointed to assist the Chamber in determining any of the issues set out above pursuant to Rule 97 of the Rules of Procedure and Evidence; and
- (e) any other issue the parties and participants wish to bring to the attention of the Chamber.<sup>14</sup>

7. On 15 August 2016, the United Nations applied to the Chamber for leave to file submissions on these matters. This request was granted on 26 August 2016.<sup>15</sup> The present document sets out these submissions.

### III. Overview of the United Nations Submissions

8. As will be explained in more detail below, the victims of crimes committed by Mr. Bemba and the forces under his responsibility have a right to an effective remedy, including gender-sensitive reparations, as enshrined in the Rome Statute, international human rights and humanitarian law, and elaborated upon in jurisprudence globally.

<sup>13</sup> ICC-01/05-01/08-3399, paras 43, 47, 57.

<sup>14</sup> ICC-01/05-01/08-3410, para 7.

<sup>15</sup> ICC-01/05-01/08-3430, page 6.

9. Furthermore, the Pre-Trial Chamber froze a portion of Mr. Bemba's assets located in Portugal.<sup>16</sup> The opportunity to utilize these funds to provide full and effective reparations to his victims is potentially significant. With this being the first conviction by the ICC for rape as an international crime, the precedential effect of the Chamber's decision as to appropriate reparations could be substantial. The United Nations welcomes the Chamber's permitting the observations of interested parties to craft a reparations decision that is victim-centred, delivers justice and has a transformative impact on victims' lives.

10. The United Nations provides its submissions on reparations in this case in three parts:

- Part III.A below describes how the Rome Statute, in accordance with international law, requires full and effective reparation for victims. It discusses the principles of reparation to be applied to the case in accordance with Article 75(1) of the Statute and suggests how principles from the *Lubanga* reparations decisions and Order may be applied or adjusted by the Chamber in its eventual decision on reparations in the *Bemba* case.
- Part III.B addresses questions of methodology and modalities of reparation in the present case. The United Nations submits that a burden of proof, and standard of proof similar to those applied in the *Lubanga* case should apply in the *Bemba* case. The United Nations also suggests that the Chamber consult with the victims and their representatives on the nature, forms and modalities of adequate reparations. These reparations could include for victims in the *Bemba* case, upon consultation, both individual monetary compensation and collective measures of rehabilitation, including priority access to services.
- Part III.C recommends that experts may be usefully appointed by the Chamber in this case. Such experts should include persons specializing in economic valuation and mass claim techniques; the assessment of medical and psychiatric/psychosocial harms (particularly those arising from sexual violence) and the development of long-term sustainable rehabilitative programming in these areas, which addresses possible stigma and marginalisation of victims; and ensuring that reparations measures and modalities are victim-centred and gender-sensitive.

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<sup>16</sup> See, e.g., ICC-01/05-01/08-8.

11. The United Nations stands ready to assist the Chamber and the other organs of the Court in carrying out the Court's reparations mandate in this case to the extent that it is able.

#### IV. Submissions

##### A. Direct and indirect victims in the *Bemba* case are entitled to full and effective reparation under the Rome Statute and international law.

12. In its Order for Reparations against Mr. Thomas Lubanga Dyilo ("Lubanga Reparations Order"), the Court stated that "[t]he reparation scheme provided for in the [Rome] Statute is not only one of the Statute's unique features. It is also a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations."<sup>17</sup> Indeed, the Court's reparations mandate fulfils several distinct, but essential roles. Reparations "oblige those responsible for serious crimes to repair the harm they caused to the victims and they enable the Chamber to ensure that offenders account for their acts."<sup>18</sup> Centrally and most importantly, reparations can restore and transform the lives of victims of international crimes and deliver justice to them directly and tangibly.

13. The Rome Statute grants the Court flexibility to implement reparations decisions in a manner that best suits the victims. Article 75 of the Statute states in relevant part that:

1. *The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*
2. *The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79 [of the Statute]. [...]*<sup>19</sup>

14. The Appellate Chamber during the reparations phase of the *Lubanga* case noted a

<sup>17</sup> ICC-01/04-01/06-3129-AnxA, para 3.

<sup>18</sup> ICC-01/04-01/06-3129, para 65.

<sup>19</sup> Rome Statute, Art. 75.

distinction between “principles relating to reparations” in Article 75(1) and an “order of reparations” against the convicted person. The *Lubanga* Appellate Chamber held that, on the one hand, “[p]rinciples should be general concepts that, while formulated in light of the circumstances of a specific case, can nonetheless be applied, adapted, expanded upon, or added to by future Trial Chambers.”<sup>20</sup> On the other hand, an order of reparation is “the Trial Chamber’s holdings, determinations and findings based on those principles.”<sup>21</sup>

15. The ICC’s Rules of Procedure and Evidence provide further guidance to the Court in shaping these principles with respect to a reparation order’s potential beneficiaries. Rule 85(a) defines “victims” as “natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court.”<sup>22</sup> Rule 85(b) also allows “organizations” or “institutions” to be considered as “victims” if they “have sustained direct harm to any part of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”<sup>23</sup>

16. The definition of “victim” and the Court’s jurisprudence surrounding it were influenced by prior international practice, including the United Nations General Assembly’s *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (the “Declaration”).<sup>24</sup> The Declaration makes clear that victims include not only “direct victims” of crime, but also, “where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”<sup>25</sup> Relying on the Declaration, the *Lubanga* Reparations Order stipulated that beneficiaries of the Court’s Order in that case included direct victims and indirect victims such as: (i) family members of direct victims; (ii) individuals who attempted to prevent the commission of one or more crimes under consideration by the Court; (iii) individuals who suffered harm when

<sup>20</sup> ICC-01/04-01/06-3129, para 3.

<sup>21</sup> ICC-01/04-01/06-3129, para 3.

<sup>22</sup> ICC Rules of Procedure and Evidence, Rule 85(a).

<sup>23</sup> ICC Rules of Procedure and Evidence, Rule 85(b).

<sup>24</sup> For example, see, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res/40/34, 29 November 1985, para A(1) stating that “[v]ictims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.” (hereinafter “Declaration”). See also *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*, G.A. Res. 60/147, 16 December 2005, paras 8–9 (hereinafter “Basic Principles”).

<sup>25</sup> Declaration, para A(2).

helping or intervening on behalf of direct victims; and (iv) other persons who suffered personal harm as a result of the offences under consideration by the Court.<sup>26</sup> The Lubanga Reparations Order was also careful to note “that the concept of ‘family’ may have many cultural variations, and the Court ought to have regard to the applicable social and familial structures” in a given context.<sup>27</sup>

17. The United Nations respectfully submits that the list of types of beneficiaries articulated in the *Lubanga* proceedings should be applicable in the *Bemba* case. However, given the substantial number of rape victims in the *Bemba* case, the list of beneficiaries articulated in the Lubanga Reparations Order should be supplemented to include as distinct categories both children born as a result of pregnancy from rape (if applicable) and victims’ dependants more broadly.<sup>28</sup>

18. The United Nations respectfully submits that the principles on reparation that the Chamber articulates in the instant case should incorporate international legal principles that have been developed over the past century on the topics of remedy and reparation. For example, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights both state that every person should have the right to an effective remedy; a right that accordingly entitles those who seek to use that remedy to reparation.<sup>29</sup> Furthermore, the International Convention on the Elimination on All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

<sup>26</sup> ICC-01/04-01/06-3129-AnxA, para 6.

<sup>27</sup> ICC-01/04-01/06-3129-AnxA, para 7.

<sup>28</sup> *Guidance Note of the United Nations Secretary-General: Reparations for Conflict-Related Sexual Violence*, p. 3 (2014) (“Victims of conflict-related sexual violence include persons who, individually or collectively, suffered such violence but also family members, such as children or partners, and children born as a result of pregnancy from rape. Persons who depend on the victim of sexual violence and others may also be victims as a consequence of the harm inflicted through the violation. Victims may also include persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”) (hereafter “Guidance Note”).

<sup>29</sup> Universal Declaration of Human Rights (1948), Art. 8; International Covenant on Civil and Political Rights (1966), Art. 2 (hereafter “ICCPR”). The Human Rights Committee, in its General Comment No. 31 of 26 March 2004 (CCPR/C/21/Rev.1/Add.13) expanded on Article 2 of the ICCPR, stating that:

*Article 2, paragraph 3 [of the ICCPR] requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals [...] the obligation to provide an effective remedy [...] is not discharged. [...] [T]he Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction [and], guarantees of non-repetition [...].* (emphasis added)

See also Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30 (2013); Committee against Torture, General Comment No. 3, Implementation of Article 14 by State Parties, No. CAT/C/GC/3 (2012).

the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearances all guarantee a right to effective remedies in their various contexts.<sup>30</sup> Regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights also contain relevant provisions to this effect<sup>31</sup>. This is also the case for some provisions of international humanitarian law.<sup>32</sup>

19. It is also a fundamental principle of customary international law that an internationally wrongful act entitles the victim of that act to "full reparation."<sup>33</sup> For example, the Permanent Court of International Justice in the *Case Concerning the Factory at Chorzów* held as early as 1928 that, when there has been a breach of international law:

*"[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation, which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear [...] should serve to determine the amount of compensation due for an act contrary to international law."*<sup>34</sup>

20. This general statement of principle has been articulated in various ways in a number of international instruments on reparations for victims, which the United Nations respectfully submits should be taken into account by the Chamber. This includes the Declaration, which states that "[o]ffenders [...] should [...] make fair restitution to victims, their families or

<sup>30</sup> International Convention on the Elimination of All Forms of Racial Discrimination (1965), Art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Art. 14; Convention on the Rights of the Child, (1989) Art. 39; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 83; International Convention for the Protection of All Persons from Enforced Disappearances (2006), Arts. 8 and 24.

<sup>31</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Art. 41, American Convention on Human Rights (1969), Art. 25; African Charter on Human and Peoples' Rights, Art. 7 (1981).

<sup>32</sup> See Footnote No. 38 below

<sup>33</sup> International Law Commission's Responsibility of States for Internationally Wrongful Acts (2001), Art. 31(1).

<sup>34</sup> *Case Concerning the Factory at Chorzów* (P.C.I.J. Series A, No. 17), Judgment of 13 September 1928, p. 47. Although the *Chorzów Factory Case* involved issues of inter-state responsibility for breach of international humanitarian law, the International Law Commission codified this principle in the *Responsibility of States for Internationally Wrongful Acts* (2001) (Arts. 30, 31, 34–37), which in turn influenced the types of reparation due to individuals called for by the Basic Principles (paras. 19–23). For further information regarding the obligation of States to pay compensation for breach of international humanitarian law, see also the ICRC publication CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge University Press 2005), p. 537, The Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Art. 3 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, Art. 91.

dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”<sup>35</sup> The United Nations General Assembly’s *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* (the “Basic Principles”) also state that: “victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with *full and effective* reparation [...]”<sup>36</sup> It is, therefore, a fundamental right of Mr. Bemba’s victims to receive full and effective reparations from him. The United Nations respectfully submits that the principles derived from Article 75(1) be interpreted as guaranteeing that right.

21. Article 75(1) of the Statute provides a non-exhaustive list of the types of reparation that the Court can order. These include restitution, compensation and rehabilitation. In addition to these forms, reparation in accordance with international law includes both satisfaction and guarantees of non-repetition.<sup>37</sup> Any decision on reparations, including on the form and modalities of reparations, should be based on adequate consultations with victims and on a full understanding of the cultural setting in which reparations are to be provided and must be consistent with principles of gender equality and confidentiality.<sup>38</sup>

22. The above-mentioned types of reparation are generally defined in international law as follows:

- **Restitution** is designed to “restore the victim to the original situation” before an international crime occurred. Restitution can include returning lost or stolen property, returning a victim to his or her family, home or previous employment, or providing education.<sup>39</sup> For victims of conflict-related sexual violence, restitution may require restoring a victim’s home in a place of safety where the chance for stigma is diminished.<sup>40</sup>

<sup>35</sup> Declaration, para A(8).

<sup>36</sup> Basic Principles, para 18.

<sup>37</sup> Basic Principles, paras 22 and 23.

<sup>38</sup> Guidance Note of the Secretary-General, *Reparations for Conflict-Related Sexual Violence*, June 2014, page 18.

<sup>39</sup> Basic Principles, para 19; ICC-01/04-01/06-3129-AnxA, para 35.

<sup>40</sup> Guidance Note, p. 15.

- **Compensation** “should be provided for *any* economically assessable damage” to a victim to the extent that restitution would be impossible or inappropriate. Compensation should capture all types of compensable damage including, but not limited to: (i) physical or mental harm (including the loss of the ability to bear children); (ii) lost opportunities, including employment, education and social benefits; (iii) material damage, including loss of property; (iv) loss of earnings, including loss of earning potential; (v) moral damage, such as pain and suffering; and (vi) costs required for legal or expert assistance, medicine and medical services, and psychological or social services.<sup>41</sup> It is important to note when calculating loss of earnings or lost opportunities that uncompensated domestic work, including taking care of home and family or working on family land, be valued appropriately. In more traditional societies, this work is typically done by women and girls, and the failure to value it properly could potentially be discriminatory and lead to victims being undercompensated.<sup>42</sup> In the case of victims of conflict-related sexual violence, the compound economic harms of the physical act of sexual violence itself and the societal stigma that victims of sexual violence may face later must both be addressed in any award of compensation. Indeed, such stigma was extensively documented in the judgment in the *Bemba* case.<sup>43</sup> The reparations process must also avoid the reinforcing existing stereotypes and cultural norms to the detriment of victims. The form in which compensation is provided should also be carefully considered to enhance its transformative potential. The payment of compensatory lump-sums, which may help in bringing financial independence to women in particular, should also take into account the obstacles women may face in accessing and keeping money, as well as the likelihood of money being spent quickly to meet needs of other members of the family or for reasons not necessarily related to the harm suffered.<sup>44</sup> Additionally, the fact that victims of conflict-related sexual violence may become pregnant due to rape must also be taken into account. It is the United Nations’ experience that both the victim-mother and a child born of pregnancy as a result of rape may face stigma from families and communities and so face significant discrimination and lost opportunities. Both victim and child

<sup>41</sup> Basic Principles, para 20 (emphasis added); ICC-01/04-01/06-3129-AnxA, para 40.

<sup>42</sup> Guidance Note, p. 17.

<sup>43</sup> See, e.g., Footnote no.6 above

<sup>44</sup> Guidance Note of the Secretary-General, *Reparations for Conflict-Related Sexual Violence*, June 2014, pages 16-17,

should be eligible to receive compensation awards (and other appropriate reparative measures). Compensation may also include appropriate pre- and post- judgment interest, accounting for the time value of money or property lost.<sup>45</sup>

- **Rehabilitation** “refers to the restoration of function or the acquisition of new skills required as a result by the changed circumstances of a victim in the aftermath”<sup>46</sup> of an international crime. It includes medical and psychiatric/psychosocial care, especially care pertaining to grief and trauma, educational grants and other measures of material or livelihood support.<sup>47</sup> Rehabilitation aims to provide victims with all essential services and skills that are needed to carry out their daily living in a dignified manner. Rehabilitative measures accordingly often act as a necessary precursor, which allows victims to benefit from other forms of reparation. If the Chamber were to order rehabilitative measures, it should ensure that there is “consistency and quality in the delivery of services [...] provided by people with relevant expertise [...]”<sup>48</sup> This is especially the case when providing rehabilitative services to victims of conflict-related sexual violence, “so that further harm and secondary victimization are prevented.”<sup>49</sup> It is important to note in this regard that male victims of conflict-related sexual violence may need different types of rehabilitative measures from female victims. Particular attention should also be paid to possible differences in the needs of child victims, as they may differ substantially from those of adult victims. The physical location of rehabilitative services is also important to consider. The accessibility to victims of these services should be borne in mind when selecting rehabilitative projects.<sup>50</sup> The United Nations submits that, given the harms described in the *Bemba* judgment, rehabilitative measures will be an especially important form of reparations in this case and that such measures should be provided in consultation with victims and in a non-discriminatory fashion.
- **Satisfaction** may include apologies, commemorations and memorials or other symbolic measures. Satisfaction can also include, on the basis of the right to the

<sup>45</sup> See, e.g., *Case of Gonzalez et al. (“Cotton Field”) v. Mexico*, Judgment of the Inter-American Court of Human Rights, 16 November 2009, para 601; Responsibility of States for Internationally Wrongful Acts (2001), Art. 38.

<sup>46</sup> Committee against Torture, General Comment No. 3, Implementation of Article 14 by State Parties, No. CAT/C/GC/3 (2012), para 11.

<sup>47</sup> Basic Principles, para 21. It is important to note that rehabilitation measures need not be limited to health services and direct victims.

<sup>48</sup> Guidance Note, p. 19.

<sup>49</sup> Guidance Note, p. 19.

<sup>50</sup> Guidance Note, p. 19.

truth, assistance, if requested in “[t]he search [...] for the bodies of those killed and assistance in the recovery, identification and reburial of those bodies in accordance with the expressed or presumed wish of the victims or the cultural practices of their families and communities.”<sup>51</sup> The right of family members to know what happened to victims may be especially important in light of the Chamber’s findings regarding murder. In the United Nations’ experience, victims must be carefully consulted on any award of satisfaction because this form of reparation may be disfavoured where other measures of reparation are available. Further, memorials can pose unacceptable risks of re-traumatizing victims and reinforcing harmful stereotypes, particularly for victims of conflict-related sexual violence.<sup>52</sup>

- *Guarantees of non-repetition* are measures aimed at preventing the crimes at issue from recurring. The Central African Republic remains in conflict and conflict-related sexual violence is still occurring.<sup>53</sup> In this light, such measures have an important potential for being transformative. For example, using some of Mr. Bemba’s assets for educational or outreach programmes designed with the input of Mr. Bemba’s victims and their representatives, which publicize the *Bemba* judgments locally and reaffirm the prohibition of war crimes and crimes against humanity (and especially of conflict-related sexual violence), may have a positive impact.

23. For reparation awards to be comprehensive and effective, they “must explicitly be based on the principle of non-discrimination” and include “affirmative measures to redress inequalities.”<sup>54</sup> This is consistent with provisions of the Statute that require it to be applied and interpreted in accordance with human rights principles and “without any adverse distinction founded on grounds such as gender [...], age, race, colour, language, religion or belief, political or other opinion, national, ethnic, or social origin, wealth, birth or other status.”<sup>55</sup> In this regard, the Lubanga Reparations Order stated that “[r]eparations need to address any underlying injustices and in their implementation the Court should avoid replicating discriminatory practices or structures that predated the commission of the crimes.” Decisions

<sup>51</sup> Basic Principles, para 22(c).

<sup>52</sup> Guidance Note, pp. 17–18.

<sup>53</sup> See, e.g., Report of the United Nations Secretary-General on Conflict-Related Sexual Violence (S/2016/361), 20 April 2016, paras 26–28 (regarding continuing conflict-related sexual violence crimes in the Central African Republic).

<sup>54</sup> Nairobi Declaration on Women’s and Girl’s Right to a Remedy and Reparation (2007), p. 3, art.1B.

<sup>55</sup> Rome Statute, art. 21(3).

on reparations should also avoid further stigmatisation and discrimination of victims.

24. Particularly in cases of conflict-related sexual violence, the United Nations submits that it is critical for the Court to understand the cultural and social context of the victims at hand, the harm that they have suffered, their needs, and the obstacles that they could face in accessing or benefiting from the reparations awarded to them.<sup>56</sup> It is also of the utmost importance that victims of conflict-related sexual violence benefit from special consideration, as they have suffered particular violence and trauma. In particular, measures should be taken to ensure their safety and respect and to avoid any re-traumatization throughout the reparation process<sup>57</sup>.

25. The Court in *Lubanga* mandated “a gender-inclusive approach” to “guide the design of the principles and procedures applied to reparations” and emphasized that “gender parity in all aspects of reparations is an important goal of the Court.”<sup>58</sup> A “gender-inclusive approach” to reparation design is essential in cases of conflict-related sexual violence. In practice, this means that the Court must seek to understand the ways in which inequalities surrounding sexual violence “can [...] aggravate the consequences of the crime” for women, men and children.<sup>59</sup>

26. As stated in the United Nations Secretary General’s Guidance Note on Reparations for Conflict-Related Sexual Violence (“Guidance Note”), “gender-sensitive reparations [should] take into account pre-existing gender relations and power imbalances to ensure a fair assessment of the harm inflicted upon women and men, [and] equal access to – and benefits from – reparation programmes for both women and men.”<sup>60</sup> The Guidance Note states further that “[d]ecisions on and the delivery of reparation should similarly not reinforce pre-existing

<sup>56</sup> Guidance Note of the Secretary-General, *Reparations for Conflict-Related Sexual Violence*, June 2014, page 8.

<sup>57</sup> See Principle 6 of the UN Reparation Principles (A/RES/60/147), in which paragraph 10 states that: “Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”

<sup>58</sup> ICC-01/04-01/06-3129-AnxA, para 18.

<sup>59</sup> Guidance Note, p. 8.

<sup>60</sup> Guidance Note, p. 4. See also the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (2007); Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, A/HRC/14/22; Principles on Housing and Property Restitution for Refugees and Displaced Persons, E/CN.4/Sub.2/2005/17.

patterns of gender-based discrimination, but rather strive to transform them.”<sup>61</sup> A “gender-sensitive” or “gender-inclusive” approach to reparation should therefore embrace the concept of transformative reparations.

27. The principle of transformative reparations acknowledges that conflict-related violence often results from, and perpetuates, patterns of pre-existing structural subordination and discrimination. These inequalities can also aggravate the consequences of the harm suffered by victims. Rather than re-establishing or reinforcing the existing paradigm that contributed to victimization in the first place, reparations should aim to transform or change the *status quo* by making tangible improvements that redress these inequalities.

28. As to what this means in practical terms, transformative reparations should, for example, involve the Court in ensuring that “personal status laws and property and inheritance rights” do not provide women “with lesser rights than men” if and when reparations are awarded.<sup>62</sup> As another example, the concept of transformative reparations can impact the calculation of compensatory damages, if awarded. For instance, the September 11<sup>th</sup> Victim Compensation Fund of 2001, when calculating compensatory damages owed to victims, ensured that female victims would benefit from the more generous pay scales of male victims so as to avoid gender bias in compensation awards.<sup>63</sup> The United Nations submits that important steps such as these can ensure that reparation programmes do not reinstate or reaffirm existing inequalities and harmful stereotypes. Indeed, these measures can transform traditional social norms and patriarchal and sexual hierarchies without negatively impacting the due process rights of the convicted person. Finally, “[t]he process of obtaining reparations should itself strive to be empowering and transformative”.<sup>64</sup> Hence, the importance of the Chamber and the various organs of the Court consulting victims in the process of designing reparations.

29. The United Nations agrees with the principle set out in the Lubanga Reparations Order that, when dealing with child victims, “the Court should be guided, *inter alia*, by the Convention on the Rights of the Child and [...] the ‘best interests of the child’ [standard] that is

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<sup>61</sup> Guidance Note, p. 5.

<sup>62</sup> Guidance Note, p. 20.

<sup>63</sup> Final Report of the Special Master for the September 11<sup>th</sup> Victim Compensation Fund of 2001, Volume 1, p. 31.

<sup>64</sup> Guidance Note, p. 9.

enshrined therein.”<sup>65</sup> Any consultation processes with victims should include efforts to seek the views of children, as children also have the right to be heard and to express their views freely in all matters affecting them, including judicial and administrative proceedings.<sup>66</sup> To this end, the Court should provide as much information as possible to children and their parents, guardians and legal representatives and solicit their views to the extent appropriate, as well as ensure a gender-sensitive approach to reparations for child victims.<sup>67</sup> The participation of child victims needs to be carefully managed, taking into account their age, abilities, intellectual maturity and evolving capacities, and handled in a manner that does not create the risk of further harm or trauma.<sup>68</sup>

30. Children have particular needs and experiences, which should be granted special consideration, as should be the additional rights that they carry.<sup>69</sup> Bearing in mind that girls are one of the groups most adversely affected by conflict-related sexual violence and that they face discrimination, special care should be taken to ensure that their rights are duly protected.<sup>70</sup>

31. Indeed, Article 68 of the Rome Statute requires the Court during the reparations phase to “take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses [and] [i]n so doing [...] have regard to all relevant factors, including age, gender [...], and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”<sup>71</sup> Moreover, in all aspects of its work “the Court should avoid further stigmatisation

<sup>65</sup> ICC-01/04-01/06-3129-AnxA, para 24.

<sup>66</sup> See, e.g., Committee on the Rights of the Child, General Comment No. 12, CRC/C/GC/12 (2009), para 34 (“A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, [and] appropriately trained staff [...]).”)

<sup>67</sup> ICC-01/04-01/06-3129-AnxA, paras 24–28.

<sup>68</sup> Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 (2005), para 10.

<sup>69</sup> Guidance Note of the Secretary-General, *Reparations for Conflict-Related Sexual Violence*, June 2014, page 12.

<sup>70</sup> Guidance Note of the Secretary-General, *Reparations for Conflict-Related Sexual Violence*, June 2014, page 12; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC resolution 2005/20, principle 8.

<sup>71</sup> Rome Statute, Art. 68(1). See also Rule 86 (“A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence”); Basic Principles, para 10 (“Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma

of the victims and discrimination [...].”<sup>72</sup>

32. Although a significant number of victims have filed applications in the *Bemba* case with competent counsel representing them, proactive and gender-sensitive outreach by the Court and its organs to victims during the reparations phase is still essential.<sup>73</sup> This is especially true where victims of conflict-related sexual violence are involved. For example, the Chamber found in the *Bemba* judgment that victim P87 omitted allegations of rape from her victim application due to the shame it caused her, while otherwise being a credible witness about her rape.<sup>74</sup> In the United Nations’ experience, this situation is not unique. As victims of sexual violence gain trust in a judicial process, they are more likely to reveal sensitive and traumatic experiences that could bear on the types and amounts of reparations determined to be due to them. The Chamber should also take into account specific obstacles women and girls may face, including limitations regarding mobility, confidentiality, taboos or stigma attached to the participation of women and girls in reparation processes.

33. Moreover, certain witnesses, such as witnesses P73 and P42, noted confusion as to how victims’ applications forms might be used in the proceedings and how to appropriately define the harm that they had suffered.<sup>75</sup> The Chamber has also taken steps to mitigate certain issues resulting from victims’ illiteracy in order to ensure the participation of illiterate victims in these proceedings.<sup>76</sup> Furthermore, as time elapses, the types of reparations that victims might want or need may change from those initially requested in their application forms, highlighting once again the need for the Chamber to seek the views of victims and their representatives.

34. The United Nations therefore recommends that the Chamber take a victim-centred approach in the mapping, design, implementation, monitoring and evaluation of reparations, so that the process is empowering and transformative. Victim consultation is essential to: ensuring

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should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”).

<sup>72</sup> ICC-01/04-01/06-3129-AnxA, para 17.

<sup>73</sup> ICC-01/04-01/06-3129-AnxA, paras 29–32.

<sup>74</sup> ICC-01/05-01/08-3343, para 473. This has been the case in other prominent cases of sexual violence as international crimes. For example, in the *Akayesu* judgment before the International Criminal Tribunal for Rwanda, where rape was found as a constituent act of genocide, the spontaneous testimony of a victim about her rape and that of others required the court’s intervention to allow the prosecutor time to investigate and amend the indictment. See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21(2) BERKELEY J. OF INT’L. L. 288, 318–19 (2003).

<sup>75</sup> ICC-01/05-01/08-3343, para 340–341.

<sup>76</sup> ICC-01/05-01/08-3343, para 22.



jurisprudence,<sup>78</sup> the Chamber should reaffirm the holding in the Lubanga Reparations Appeals Judgment that “reparations proceedings are fundamentally different from proceedings at trial and therefore a less exacting standard [of proof] should apply.”<sup>79</sup> Although claimants for reparations should carry the burden of proof to establish their claim for reparations, the United Nations submits that the standard of proof should be lower than that of a criminal case.

39. The Lubanga Reparations Order specified that, “[i]n relation to the standard of proof, the standard of ‘a balance of probabilities’ shall apply.”<sup>80</sup> The United Nations submits that this standard should be applicable in the *Bemba* case and that it would grant victims the opportunity to advance their claims, while adequately protecting the rights of the Defence. However, it should be noted that many of the harms that Mr. Bemba inflicted on his victims have already been proven beyond reasonable doubt, as confirmed by the Chamber’s judgment, and do not need to be re-litigated by the Defence in the reparations phase of the proceedings.<sup>81</sup>

40. As noted in the excerpt from the decision of the Appeals Chamber that is quoted above, the Rules of Procedure and Evidence provide guidance on the bases on which reparation measures can be awarded to victims. Rule 97(1) states that, while “[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis, or where it deems it appropriate, on a collective basis or both.”<sup>82</sup> Rule 98 continues in material part as follows:

1. *Individual awards for reparations shall be made directly against a convicted person.*
2. *The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust fund shall be separated from other resources of the Trust fund and shall be forward to each victim as soon as possible.*
3. *The Court may order that an award for reparations against a*

<sup>78</sup> See, e.g., Howard M. Holtzmann and Edda Kristjánsdóttir, *INTERNATIONAL MASS CLAIM PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES*, Section 5.02 (“Standard of Proof”) (Oxford University Press 2007). See also Guidance Note, p. 14.

<sup>79</sup> ICC-01/04-01/06-3129, para 81 (internal quotations omitted).

<sup>80</sup> ICC-01/04-01/06-3129-AnxA, para 65.

<sup>81</sup> See paragraphs 3–5 above.

<sup>82</sup> ICC Rules of Procedure and Evidence, Rule 97(1). There is no generally accepted definition of “collective reparation” under international law, i.e., whether collective means an award rendered to a collective group that suffered harm or a collective benefit provided to eligible victims. For further discussion, see *Guidance Note of the United Nations Secretary-General: Reparations for Conflict-Related Sexual Violence*, p. 7 (2014). For the purposes of these Observations, the United Nations will use the latter definition.

*convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. [...]*<sup>83</sup>

41. It has been the United Nations' consistent recommendation that, where the gravest international crimes have occurred, a combination of individual and collective reparations, which reinforce each other, are gender-sensitive and strive to be transformative, is appropriate.<sup>84</sup> These reparation measures may include individual monetary compensation. In the United Nations Secretary-General's Guidance Note on Reparations for Conflict-Related Sexual Violence, UN entities are given a number of guiding principles for operational engagement in designing reparations programmes for victims of sexual violence. These principles state that the "meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be ensured"; that "[a]dequate reparation for victims of conflict-related sexual violence entails a combination of different forms of reparations"; and that "[i]ndividual and collective reparations should complement and reinforce each other."<sup>85</sup> Indeed, the United Nations also recommended that the Chamber in the case of *The Prosecutor v Germain Katanga* ensure a victim-centred approach, in which the process itself can be empowering and transformative, and consider both individual and collective reparations as part of that Chamber's reparation award for other crimes in addition to sexual violence.<sup>86</sup>

42. The United Nations respectfully submits that, as one component of an Order of reparations in the *Bemba* case, an appropriate level of monetary compensation should be considered, as it may contribute to guaranteeing comprehensive and effective reparation in accordance with international law. Individual compensation awards could help provide personal and symbolic acknowledgment of the suffering of the victims and could be a powerful reparation measure in the Court's first case of a conviction for sexual violence as an international crime.

43. A number of recent court judgments, including judgments of courts of States Parties to the Rome Statute, have provided individual monetary compensation for international crimes,

<sup>83</sup> ICC Rules of Procedure and Evidence, Rules 98(1)–(3).

<sup>84</sup> As noted in Section A above, these reparations should be gender-sensitive and strive to be transformative.

<sup>85</sup> Guidance Note, p. 1.

<sup>86</sup> ICC-01/04-01/07-3350, para 22.

including conflict-related sexual violence. Most recently, in 2016, the Extraordinary African Chambers in the Senegalese courts awarded individual compensation as reparations in the case against Hissène Habré in the amounts of FCFA 20,000,000 for victims of crimes of sexual violence (around EUR 30,490); FCFA 15,000,000 (around EUR 22,867) for victims of arbitrary detention and torture, prisoners of war and survivors of massacres; and FCFA 10,000,000 (around EUR 15,245) for indirect victims.<sup>87</sup> Also in 2016, a Guatemalan court in the *Sepur Zarco* case awarded victims of sexual slavery and homicide/enforced disappearance individual reparations of GTQ 500,000 (around EUR 59,580) and GTQ 250,000 (around EUR 29,790) respectively; ordered a number of rehabilitation measures from the State related to health care and education; and ordered measures of satisfaction.<sup>88</sup> Furthermore, in 2015, criminal courts in Bosnia and Herzegovina awarded BAM 26,500 (around EUR 13,550) to a woman of Croatian nationality for her wartime rape by Bosnian Serb soldiers in the *Kotor Varoš* case.<sup>89</sup>

44. Additionally, domestic trust funds for victims of crime also calculate individual awards of compensation to victims. For example, the United Kingdom Criminal Injuries Compensation Authority's Criminal Injuries Compensation Scheme provides that a direct victim of a violent crime may be eligible for an award in certain circumstances. The Scheme sets out a schedule of monetary tariffs in accordance with which compensation may be awarded. Specific monetary damages may be awarded for injuries ranging from broken bones, to psychological trauma, to sexual offences, and even death.<sup>90</sup> The United Kingdom's schedule provides a total cap on the amount of compensation payable to an individual in accordance with the Scheme and includes elements such as multipliers and discount factors as part of its overall method of calculation.<sup>91</sup>

45. The Republic of Colombia established a comprehensive administrative reparations

<sup>87</sup> *Ministère Public c. Hissène Habré*, Jugement, Ordre de réparations, *Chambres Africaines Extraordinaires*, 30 May 2016, para 82. The United Nations understands that certain aspects of this judgment are being appealed. All currency conversions are made as of the value of the currency in the underlying judgment to the rate in euros as of the judgment date.

<sup>88</sup> *Sepur Zarco Case*, Sentencia C-01076-2012-00021, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra El Ambiente 26 February 2016, pp. 509–12.

<sup>89</sup> Press Release, Track Impunity Always (TRIAL), *BiH: Groundbreaking Court decision paves the way for wartime victims to get compensation*, 24 June 2015.

<sup>90</sup> United Kingdom Criminal Injuries Compensation Scheme 2012, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243480/9780108512117.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf) (last accessed 16 October 2016).

<sup>91</sup> United Kingdom Criminal Injuries Compensation Scheme 2012, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243480/9780108512117.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf) (last accessed 16 October 2016).

programme in 2011 through the promulgation of the Victims' and Land Restitution Law (Law No. 1448). The law consolidated and created a wide range of measures to address violations of international humanitarian law and/or human rights law that occurred after 1 January 1985, in the context of the internal armed conflict. Pursuant to Law No. 1448, direct victims of sexual violence who register with the government are entitled to compensation in the amount of 30 times the minimum monthly wage, or approximately USD 6,218.<sup>92</sup> Law No. 1448 also provides for the rehabilitation of victims, land restitution and collective reparations for communities and groups affected by the conflict, as well as measures of satisfaction and guarantees of non-recurrence.<sup>93</sup> Moreover, the law seeks to address gender inequalities by incorporating specific provisions on women, including with respect to ensuring their access to restitution measures.

46. The United Nations provides these examples without taking a position as to the ultimate amounts to be awarded in any particular case. Rather, they are meant to demonstrate that criminal court judges, like those of this Chamber, and victims' compensation authorities, like the Trust Fund for Victims, regularly employ methods such as those described above to calculate individual compensation awards for victims of international and domestic crimes.

47. Given the number of victims' applications in these proceedings, the question arises as to how the Court can process them expeditiously if individual compensation awards are granted. The United Nations submits that mass claim techniques may be a useful precedent in this regard. For example, during the 1990s, in *Hilao v. Estate of Ferdinand Marcos*, United States courts considered 9,539 claims of torture, summary execution and enforced disappearance committed in the Philippines during the Marcos regime.<sup>94</sup> The United States Ninth Circuit Federal Court of Appeals found that the use of statistical sampling by a special expert and the deposition by that expert of fewer than 150 claimants was sufficient to calculate the damages owed by the estate to a high degree of statistical certainty, while guaranteeing due process of law for both claimants and defendants.<sup>95</sup>

<sup>92</sup> Cristian Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (International Center for Transitional Justice, October 2015), p. 12.

<sup>93</sup> See generally Cristian Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (International Center for Transitional Justice, October 2015).

<sup>94</sup> *Hilao v. Estate of Marcos*, Appeals Judgment of 17 December 1996 (9th Circuit U.S.C.A.), Sec. III.A.

<sup>95</sup> *Hilao v. Estate of Marcos*, Appeals Judgment of 17 December 1996 (9th Circuit U.S.C.A.), Secs. IX and Conclusion.

48. Furthermore, specialized bodies and schemes, such as the United Nations Compensation Commission (for claims arising out of Iraq's invasion of Kuwait), the Claims Resolution Tribunals for Dormant Accounts in Switzerland and the German Forced Labour Compensation Programme, have distributed individualized reparations to thousands of beneficiaries globally.<sup>96</sup> The Government of Canada also used mass claim techniques in its Indian Residential School Settlement Agreement to distribute around CAD 1.9 billion in compensation to aboriginal peoples forced to attend residential schools, some of whom suffered abuse, including sexual abuse, while attending those schools.<sup>97</sup> The United Nations respectfully submits that the Chamber should explore the methodologies used in mass claims cases and their potential application in the present proceedings, especially when considering potentially relevant experts, as noted in Section C below.

49. If the Chamber ultimately grants individual compensation awards, these awards should to the extent practicable be made inalienably to the individual victim. The Chamber should also consider whether any such individual awards should be made in trust to victims who are disabled, minors or to other victims that request it. Victims should also be consulted with respect to whether they wish a payment to be made as a lump sum or as a monthly (or other periodic) stipend or pension.<sup>98</sup> As noted previously, rules of succession related to any such awards should be non-discriminatory. If individual compensation awards are granted, the Trust Fund for Victims may also need to provide programmes for beneficiaries on basic financial literacy and negotiate with banks or mobile money providers on the transfer to and use of funds by beneficiaries.<sup>99</sup> Once again, such issues should not be seen as obstacles to individual awards of compensation, but rather as having the further ability to transform the lives of victims.

50. Although rehabilitation measures can also be provided individually to a victim, the United Nations submits that providing collective awards of rehabilitation could be appropriate in this case for reasons of sustainability and reach (including reaching unidentified victims).

<sup>96</sup> For more information on these processes, see generally, Howard M. Holtzmann and Edda Kristjánsdóttir, *INTERNATIONAL MASS CLAIM PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES* (Oxford University Press 2007); British Institute of International and Comparative Law, *Education and the Law of Reparations in Insecurity and Armed Conflict*, Section 4.4.2 (discussing grouping techniques).

<sup>97</sup> See Official Court Web Site of the Indian Residential School Settlement and the Agreements located therein at <http://www.residentialschoolsettlement.ca/english.html>. This program included a variety of other reparative measures including a truth and reconciliation commission.

<sup>98</sup> See Guidance Note, pp 16–17.

<sup>99</sup> For a description of the issues faced by South Africa in the implementation of individual compensation awards, see Report of the Reparation and Rehabilitation Committee, Vol. 6, Ch. 2, Part I, pp. 174–78.

The United Nations submits that rehabilitative services, including medical, psychiatric and psychosocial care, livelihood and housing support and educational services are essential for victims of international crimes.

51. In this regard, the United Nations recommends that the Chamber examine the jurisprudence of the Inter-American Court of Human Rights, which has been innovative with regard to the types of rehabilitative measures that it has ordered on behalf of victims. As examples, in the *Case of the Plan de Sánchez Massacre v. Guatemala*, the Inter-American Court of Human Rights ordered monetary payments to victims, rehabilitative measures (such as adequate housing to surviving victims who had lost their homes) and medical and psychiatric/psychological treatment and necessary medicines.<sup>100</sup> Likewise, in the *Cotton Field* case, which involved gender-based violence, the Inter-American Court of Human Rights awarded measures of rehabilitation such as “immediate” and “appropriate and effective medical, psychological or psychiatric treatment” for as long as the course of treatment was required, as well as “the supply of any medication” necessary for that treatment.<sup>101</sup>

52. Truth and reconciliation commissions have also proposed important rehabilitative measures for victims. For example, the South African Truth and Reconciliation Commission provided an innovative list of rehabilitation measures, in addition to providing individual grants of monetary compensation. These included health services (both mental and physical) in local treatment centres, housing and educational support.<sup>102</sup> The Sierra Leone Truth and Reconciliation Commission similarly recommended health care programmes, education and skills training and pensions as measures of reparation for victims of the civil war in that country.<sup>103</sup>

53. When considering implementing partners for rehabilitative measures, due consideration should be given by the Chamber and Trust Fund for Victims to local organizations that are presently providing assistance to Mr. Bemba’s victims.

<sup>100</sup> *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of the Inter-American Court of Human Rights (Reparations), 19 November 2004, paras 105–111.

<sup>101</sup> *Case of Gonzalez et al. (“Cotton Field”) v. Mexico*, Judgment of the Inter-American Court of Human Rights, 16 November 2009, para 549.

<sup>102</sup> Interim Final Report of the South Africa Truth and Reconciliation Commission, Reparation and Rehabilitation Policy, Volume 5, Chapter 5, 29 October 1998, paras 100, 102, 105–113.

<sup>103</sup> *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Volume 2, Chapter 4 (2004).

**C. The Chamber may usefully appoint experts in this case related to economic valuation, medical treatment, and gender.**

54. Pursuant to Rule 97(2) of the Rules of Procedure and Evidence, “the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations.” The Chamber queried in its Order of 22 July 2016 whether it could usefully invoke this rule in the present case. If several of the United Nations submissions are accepted by the Chamber, then the answer likely would be in the affirmative.

55. Specifically, experts may be usefully appointed by the Chamber in order to:

- (i) calculate the quantum of damages owed by Mr. Bemba to his victims. Such experts in economics and loss adjustment can calculate a range of harms, from personal injury to loss of property. As noted earlier in this submission, many of these experts are well-versed in mass claims techniques.
- (ii) evaluate the types of medical harm suffered by victims and propose long-term options for their rehabilitative care. Many of Mr. Bemba’s victims have, as a result of his conduct, suffered life-changing medical conditions. Independent experts, especially those with knowledge of treating victims of sexual violence and patients in the Central African Republic, may be able to propose appropriate long-term care options for victims. The Chamber has already relied on expert medical testimony on post-traumatic stress disorder and sexual violence in armed conflict in the Central African Republic in its sentencing decision.<sup>104</sup> It may wish to benefit from similar expertise in reaching its decisions on reparations.
- (iii) ensure that reparation measures and modalities are gender-sensitive. The United Nations notes that the Office of the Prosecutor already makes use of a Special Gender Adviser. The Chamber may wish to solicit similar expertise to evaluate the proposals of the parties and the Trust Fund for Victims’ ultimate implementation plan in the present case.

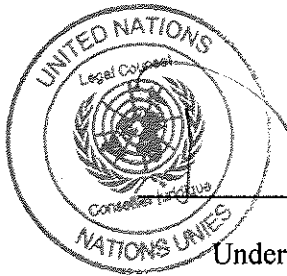
56. The United Nations would respectfully recommend that the Court and the Trust Fund for Victims maintain an ongoing and active search for Mr. Bemba’s assets, potentially through

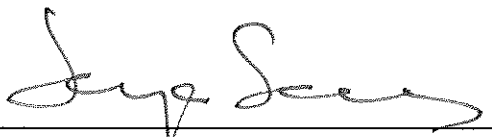
<sup>104</sup> ICC-01/05-01/08-3399, paras 36–37.

the use of experts in asset tracing, in order to fulfil any award of reparation granted in this case.

57. Finally and most importantly, the United Nations submits that the Chamber should ensure, in the Registry's and Trust Fund for Victims' outreach activities, that victims' claims for reparations are fully heard. In this regard, the Court may wish to solicit expertise in this regard from organizations experienced in providing reparations to victims in order to evaluate the proposals of the parties in this case and ensure that the granting of reparations fully takes into account gender considerations, for example, by ensuring that reparations do not cause further stigmatisation, perpetuate harmful gender stereotypes or cause other forms of harm. Expertise in engaging with victims of conflict-related sexual violence, including children, is of particular importance.

58. The United Nations respectfully requests that the Trial Chamber take due consideration of these submissions. The United Nations remains at the disposal of the Court to provide it with further information and to present its views to the Court if called to do so.



  
Miguel de Serpa Soares,  
Under-Secretary-General for Legal Affairs  
and United Nations Legal Counsel

Dated this 17th day of October 2016

At New York, United States of America