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Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-  
Date: 17-10-2016

**TRIAL CHAMBER III**

**Before:** Judge Joyce Aluoch, Presiding Judge  
Judge Geoffrey Henderson, Judge  
Judge Chang-Ho CHUNG, Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

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

**Public Document**

**Submission by QUB Human Rights Centre on reparations issues pursuant to  
Article 75 of the Statute**

**Source:** Queen's University Belfast Human Rights Centre

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr Jean-Jacques Badibanga

**Counsel for the Defence**

Mr Peter Haynes  
Ms Kate Gibson  
Ms Melinda Taylor

**Legal Representatives of the Victims**

Ms Marie-Edith Douzima-Lawson

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Ms Isabelle Guibal

**Other**

Mr Pieter de Baan

1. On the 21 March 2016 Trial Chamber III found Jean-Pierre Bemba Gombo criminally responsible for crimes committed by the Mouvement de Liberation du Congo (MLC) soldiers on the territory of the Central African Republic from on or about 26 October 2002 to 15 March 2003. Crimes included: murder as a crime against humanity under Article 7(1)(a) of the Statute; murder as a war crime under Article 8(2)(c)(i) of the Statute; rape as a crime against humanity under Article 7(1)(g) of the Statute; rape as a war crime under Article 8(2)(e)(vi) of the Statute; and pillaging as a war crime under Article 8(2)(e)(v) of the Statute.<sup>1</sup>
2. On the 22 July 2016, the Trial Chamber issued its 'Order requesting submissions relevant to reparations', inviting representations from organisations interested in making a submission on the issues identified by the Chamber of:
  - 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 liability of Mr Bemba, 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 ("Rules");
  - e. any other issue the parties and participants wish to bring to the attention of the Chamber.<sup>2</sup>

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<sup>1</sup> *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 752.

<sup>2</sup> ICC-01/05-01/08-3410, para.7.

3. On the 8 August 2016 we submitted leave to submit observations on reparation issues in the *Bemba* case.<sup>3</sup> On 10 August 2016 REDRESS requested leave to make submissions,<sup>4</sup> followed by the United Nations<sup>5</sup> and the International Organization for Migration on the 16<sup>th</sup> August 2016.<sup>6</sup>
4. On the 26 August 2016 Trial Chamber III granted all four organisations leave to make submissions to the Chamber on reparations to be submitted by the 17 October 2016 and not exceeding 50 pages.<sup>7</sup>
5. This submission considers the issues highlighted by the Chamber in their Order requesting submissions relevant to reparations in light of these specific crimes.<sup>8</sup> In particular, this submission focuses on I) the *Lubanga* principles; II) the need to prioritise certain victimisations; III) procedural issues; IV) types and modalities of reparations appropriate to address the harms caused by the specific crimes (murder, pillaging and rape); V) Mr Bemba's liability and assets; VI) complementarity; and VII) final remarks.

### **The *Lubanga* Principles**

6. The *Lubanga* principles are well thought-out, as well as being flexible enough to allow them to be built upon. Our comments relate to clarification and expansion of the *Lubanga* principles for the *Bemba* case.
7. First, we agree with the Appeals Chamber's position that reparations should be measures of accountability made against the convicted person as a liable party even if they are indigent. This principle ensures that reparations are not just assistance or 'hand-outs' by the ICC, but a measure of accountability by a responsible party to acknowledge and remedy the harm caused to those they victimised. We touch upon this issue further below in our discussion on

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<sup>3</sup> Request for leave to file submission on reparations issues pursuant to Article 75 of the Statute, 8 August 2016, ICC-01/05-01/08-3420

<sup>4</sup> Application by the Redress Trust for leave to submit observations pursuant to Article 75(3) of the Statute and Rule 103 of the Rules, 10 August 2016, ICC-01/05-01/08-3421

<sup>5</sup> Application by the United Nations for leave to make submissions pursuant to Article 75 of the Statute and Rule 103 of the Rules of Procedure and Evidence, 16 August 2016, ICC-01/05-01/08-3422

<sup>6</sup> Annex 1 to the Registry's implementation of Decision ICC-01/05-01/08-3410, 16 August 2016, ICC-01/05-01/08-3425-Conf-AnxI

<sup>7</sup> Decision on requests to make submissions pursuant to article 75(3) of the Statute and rule 103 of the Rules of Procedure and Evidence, ICC-01/05-01/08-3430, 26 August 2016.

<sup>8</sup> This submission was prepared by members of the Human Rights Centre: Luke Moffett, Rachel Killean, Yassin Brunger, Eithne Dowds, Katarina Schwarz and Lauren Dempster. Dr Sunneva Gilmore (Specialist Registrar in Obstetrics and Gynaecology) provided expertise input on the rape sections.

the use of a sentenced person's assets for reparations. We suggest that Trial Chamber III should provide greater guidance on the use of assets for reparations and the implications for a sentenced person's rights in its principles and reparation order.

8. Second, in relation to modalities of reparations we strongly agree that reparations can be awarded individually, collectively and concurrently, which may be the best way to remedy the personal and public or moral suffering of victims. However, the requirement in the *Lubanga* principles that collective reparations 'should not' be awarded to 'avoid' community tensions and divisions is too deferent to community cohesion, disregarding victims' agency and right to reparation. In effect, it means that reparations will not be ordered if it is perceived that one community or group will benefit over the other. This is apparent in the *Lubanga* case where individual reparations were side stepped to avoid ethnic division despite the victims' wishes.
9. Reparations will always be controversial, as some individuals' and groups' harms are prioritised over others.<sup>9</sup> Reparations try to maximise resources by concentrating on those who have suffered the most serious harms, which necessarily creates a hierarchy of victimhood. This is particularly acute within the context of the ICC's limited scope for reparations in a situation, which may cause tensions when individuals in one community are seen to be benefitting over others. The ICC can do little to mitigate this at the reparations stage, but should seek to ensure representative prosecutions of victimisation in a situation, rather than trying to find a balance at the end of proceedings. The Court should keep in mind that victims of international crimes have a *right* to reparations.<sup>10</sup> Their agency to designate their favoured form of reparation should be respected, as far as possible, to ensure meaningful redress. In the delivery of reparations, community sensitisation programmes should be operated to inform communities why a perpetrator is providing reparations to his/her victims. As such, we suggest that the language within the principles would be more appropriately phrased as 'reparations should be awarded in a way to *minimise* tensions and divisions within the relevant communities.'

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<sup>9</sup> See L. Moffett, Reparations for 'guilty victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice*, 10(1) (2016), 146-167.

<sup>10</sup> 2005 UN 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 ('UN Basic Principles').

10. The principles also outline that reparations can be ‘transformative’. The ICC must be realistic about the potential impact of reparations. It is impossible to fully rectify the wrongdoing; reparations cannot bring back the dead or necessarily heal all the pain of survivors.<sup>11</sup> However, well conceived and implemented reparations can at least acknowledge and alleviate the personal suffering of the victims living with the day-to-day consequences of the harm. This has the potential to enable those affected to live a more dignified life through the creation of new opportunities in which to exert their agency. Thus, ‘reparation cannot “efface” [a violation], but it can rather avoid the negative consequences of the wrongful act’.<sup>12</sup>
11. Other modalities of reparations that the Court can award should be developed beyond publication and dissemination of the judgment. Even this measure needs to be tailored to the affected population, i.e. in local languages and in accessible mediums, including comic-strips, infographics and radio programmes. Communication through multiple modalities, taking into consideration the differing literacy levels of individuals, and through local languages that are understood by victims is essential.<sup>13</sup> Other modalities of reparations should also include recovery and reburial of those disappeared (discussed further below), official declarations of acknowledgment recognising victims’ harm and those responsible, public apologies, public commemorations and memorials.<sup>14</sup> These measures are all feasible with the Court’s legal mandate, capacity and State cooperation obligations.
12. Third, we generally agree with the principles’ terming of ‘proportionate and adequate reparations’, but have two suggestions. While reparations can contribute to reconciliation more broadly, we suggest that their primary aim must be to remedy the harm suffered by victims, especially when court ordered. We also suggest that pensions or lump sums are a useful way for victims to manage their monetary awards. As far as possible victims should have an ability to designate or have a choice for either, recognising their agency. Such awards could be accompanied by information on financial management to maximise their longevity.

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<sup>11</sup> B. Hamber and R. Wilson, Symbolic closure through memory, reparation and revenge in post-conflict societies, *Journal of Human Rights*, (2002) 1 (1), 35-53.

<sup>12</sup> Separate Opinion of Judge Cañado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation Judgment, ICJ Reports (2012) 324, para. 26.

<sup>13</sup> United Nations Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence, June 2014 (hereafter ‘UN Guidance Note’).

<sup>14</sup> See Principle 19, 2005 UN Basic Principles.

13. Fourth, with regards to States and other stakeholders, the Court can take a more communicative role in promoting cooperation with the ICC in the implementation of its reparations awards as well as in the creation of domestic reparations programmes. Given the scale of victimisation in many of the situations before the ICC, and the few defendants and limited charges of which they are convicted, the majority of victims will be outside the scope of reparations awarded by the Court. We are not suggesting that the Court should broaden its reparations mandate to all victims in a situation. Instead we suggest that the ICC call upon State Parties and other stakeholders to create domestic reparations programmes to eradicate the ongoing effects of international crimes and impunity on victims.<sup>15</sup> The reparations order in a case offers a unique focal point for States, affected populations, media and international community to highlight the continuing plight of victims and their need for reparations.

### **The Need to Prioritise Certain Victims**

14. The limited nature of available funds necessitates prioritising which victims should receive reparations. In other contexts reparations have focused on the most severe suffering and vulnerability: truth commissions in Timor Leste and Sierra Leone recommended that reparations be addressed to amputees, orphans, widows, victims of sexual violence, and victims of torture.<sup>16</sup> In the Philippines reparations are organised on a ten point system which grants: 10 points to victims who died or disappeared and remain missing; 6-9 points to victims of torture, rape or sexual abuse; 3-5 points to victims who were detained; and 1-2 points for victims who suffered from kidnapping, involuntary exile by intimidation, or forceful takeover of businesses and property.<sup>17</sup> The reparations board has the discretion to determine the points allocated to each victim with consideration for the type of violation, frequency and duration.
15. The Kenyan Truth, Justice and Reconciliation Commission organised victims of gross violations of human rights into five categories: (1) violations of the right to life; (2) violations to the right to personal integrity, including sexual or gender based violence; (3) forcible transfer of populations; (4) historical and contemporary land injustices; and (5) systematic

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<sup>15</sup> L. Moffett, Reporative Complementarity: ensuring an effective remedy for victims in the reparations regime of the International Criminal Court, *The International Journal of Human Rights* 17(3) 368-390.

<sup>16</sup> Sierra Leone TRC Report Volume II, Chapter 4, para. 69-70; and Chega! Commission for Reception, Truth and Reconciliation in East Timor (CAVR), (2005), section 12.1.

<sup>17</sup> Section 19, Human Rights Victims Reparation and Recognition Act 2013.

marginalisation.<sup>18</sup> Victims in categories (1) and (2) were recognised as the highest priority in determining reparations, and were eligible for individual monetary compensation through a ten-year annual pension scheme, as support for rehabilitation in the form of medical and psychological vouchers. Victims in the remaining categories were entitled to collective reparations, which all five categories of victim could access. This approach is not, however, responsive to the extent of suffering of particular victims of the different categories of crime, nor does it account for a difference in the experiences and needs of direct and indirect victims. In the Swiss Bank Holocaust settlement, it prioritised those directly harmed over heirs due to the limited funds and their ongoing personal injuries.<sup>19</sup>

16. The ICC reparations regime is distinct from settlements, domestic reparations programmes and human rights courts, in that it is judicial decision on those victims before and faced with limited resources from the convicted person's estate and/or the TFV. This leads to difficult choices for the Court as to what extent victims have a right to reparations, what form of reparations can be meaningful, and which victims take priority. We suggest that resources for reparations to victims of murder and sexual violence be prioritised over those who have suffered from pillaging. The rest of the submission tries to navigate these issues by offering a cost-effective approach to maximise resources while affirming victims' rights.

## Procedural Issues

17. In determining eligibility of victims and the relevant harms, the Trial Chamber should hold reparations hearings, and engage in evidentiary analysis before making any orders for reparations. It is also important to have proactive outreach strategies beyond the urban concentrations of State infrastructure. In Colombia, transport subsidies were utilised to ensure the inclusion of rural victims and claimants.<sup>20</sup> Individuals seeking reparations should be able to lead evidence on their harm and the links with the crimes perpetrated by Mr Bemba. Any reparation orders should be strongly influenced by the wishes and interests of the victims as

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<sup>18</sup> Truth, Justice and Reconciliation Report, Volume IV, p.63–68

<sup>19</sup> J. Gribetz and S. C. Reig, *The Swiss Banks Holocaust Settlement*, in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, 115-142.

<sup>20</sup> F. Ni Aolain, A. Swaine and C. O'Rourke, *Transforming Reparations for Conflict-Related Sexual Violence*, *Harvard Human Rights Journal* (2015) 97-146. See also Committee on the Elimination of Discrimination against Women (CEDAW), *General recommendation on women's access to justice*, 23 July 2015 CEDAW/C/GC/33, para. 16(e).



expressed to the Chamber, and the participation of victims themselves should be particularly encouraged. As observed by Pre-Trial Chamber I,<sup>21</sup> and by other Courts,<sup>22</sup> victims may struggle to prove their identity, due to the realities in the individual countries. Yet given the evidential requirements for reparations of a balance of probabilities, further supporting evidence would be required. This does not necessarily mean official documentation, which could be costly and prohibitive to many victims. Instead other courts have accepted the testimony of a competent State official or community leader for the victim's identity and two credible witnesses' statements to establish the victim's suffering from a crime.<sup>23</sup>

18. When establishing principles for reparations, the Appeals Chamber in Lubanga found that:

Only victims within the meaning of rule 85 (a) of the Rules of Procedure and Evidence and regulation 46 of the Regulations of the Trust Fund, who suffered harm as a result of the crimes for which the accused is found guilty, are eligible to claim reparations against the accused. Where an award for reparations is made to the benefit of a community, only members of the community meeting the relevant criteria are eligible.<sup>24</sup>

19. When considering victims' eligibility for reparations, it is submitted that 'the crimes for which the accused is found guilty' should not be limited to the specific localities or incidences contained within the judgment when the crimes occurred as a course of conduct. In the *Bemba* case, the Court found that the existence of a policy to attack the civilian population was the only reasonable conclusion, and that the specific acts detailed in the judgment were only a portion of the total number of crimes committed in the Central African Republic by the MLC forces in the course of the 2002-2003 Operation. In such a case, it is in the interests of justice that victims seeking reparations for harm which occurred in areas and at times other than those specifically named in the judgment should be considered eligible.<sup>25</sup>

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<sup>21</sup> Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation, ICC-01/04-374, 17 August 2007, para. 14.

<sup>22</sup> *Prosecutor v. Nuon Chea et al.*, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications' ECCC Pre-Trial Chamber, 24 June 2011, para. 47.

<sup>23</sup> *Moiwana Community v Suriname*, Preliminary Objections, Merits, Reparations and Costs, IACtHR Series C No. 124, 15 June 2005, para.178. See our earlier submission in the *Katanga* case on this issue, ICC-01/04-01/07-3551, para. 44-49.

<sup>24</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-2904, 3 March 2015.

<sup>25</sup> See also ECCC Pre-Trial Chamber, Decision on Appeals against Orders of the Co-Investigating Judges on the Admissibility of Civil Party Applications' 24 June 2011, p. 35.

20. The Appeal Chamber's amended Order for Reparation specifies that the causal link between crimes and harm can be based on 'but/for' causation and 'proximate cause', which leaves considerable flexibility when determining responsibility.<sup>26</sup> When considering eligibility for reparations, standards of proofs should be more relaxed than during the trial and sentencing, due to the 'fundamentally different nature of reparation proceedings' and the potential 'difficulty victims may face in obtaining evidence'.<sup>27</sup> Causality between crime and harm should not be required to be established 'beyond reasonable doubt', as long as there is 'sufficient proof of the causal link' between the crime and harm suffered, as assessed in light of the specific circumstances of the case.<sup>28</sup>
21. Specific procedural issues arise relating to the crimes for which Mr Bemba was convicted.

### **Murder**

22. Determining which victims are eligible for reparations in relation to murder is a delicate issue, which inevitably requires the interests of victims to be balanced against limited resources. The degree of vulnerability of individual victims ought to be considered in determining reparations, as should the extent of the suffering caused and the connection to the direct murdered victim.
23. Direct victims of murder are entitled to reparations, which are transmitted to their successors. In the case of *Aloeboetoe v Suriname*, the Inter-American Court of Human Rights (IACtHR) recognised that direct victims were entitled to compensation for their suffering up to the time of their death, as well as for their deaths – a right which was transmitted to their heirs by succession.<sup>29</sup> The Court in *Lubanga* acknowledged the widely accepted presumption that an individual is usually succeeded by his or her spouse or children, whilst also recognising that this presumption might be displaced where the cultural context indicated to the contrary.<sup>30</sup>
24. The quantum of reparations granted for direct victims of murder are generally set without reference to the potential beneficiaries, as it responds to the harm of the individual killed rather than the personal suffering of their successors. The modalities and division of reparations granted, however, may reflect the needs of surviving heirs. The Chilean National Corporation

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<sup>26</sup> *Lubanga*, Judgment on the appeals against the "Decision establishing the principles and procedures to be applied to reparations" of 7 August 2012, ICC-01/04-01/06-3129-AnxA, para. 59.

<sup>27</sup> ICC-01/04-01/06-3129-AnxA, para. 22.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Aloeboetoe and others v Suriname*, Reparations and costs, IACtHR Series C No. 15, 10 September 1993, para. 49.

<sup>30</sup> ICC-01/04-01/06-2904, para.195. Reaffirmed in Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 7.

of Reparation and Reconciliation, for instance, provided children of those disappeared with pensions, military service waivers, and educational support.<sup>31</sup>

25. Issues of apportionment arise in relation to the division of reparations amongst the successors. If possible, apportionment based upon the circumstances of specific murders would ensure that the division of reparations reflected the needs and vulnerability of the recipients. However, apportionment may also be determined on the basis of a standard formula. In Chile, reparations awarded for persons who were disappeared were apportioned as: 40% for a surviving spouse, 30% for a mother or father in the absence of a surviving spouse, 15% for the mother or father of the victim's biological children and 15% for each child of a victim.<sup>32</sup>
26. Domestic inheritance law may inform the apportionment of reparations; however, this should not be determinative where it does not reflect the impact of the victim's murder on recipients. The Moroccan Equity and Reconciliation Commission, for instance, departed from the sharia-based inheritance law to give widows a larger percentage than they otherwise would have received, in lieu of the eldest son (40% rather than 12.5%).<sup>33</sup> The *Comisión de la Verdad y Reconciliación* in Peru also prioritised the spouse or widow over children and parents, providing not less than two fifths of the compensation awarded to the spouse or cohabitee. Two fifths of the remainder was equally divided amongst children, and not less than one fifth was equally divided between the parents.<sup>34</sup>
27. The successors of a murdered victim qualify as indirect victims. In determining the eligibility of direct victims' family members, the Court in *Lubanga* recognised that the concept of 'family' ought to be interpreted with regard to the social and familial structures of the cultural context in which the crimes occurred.<sup>35</sup> The Extraordinary Chambers in the Courts of Cambodia (ECCC) has also acknowledged the importance of interpreting victimisation in light of specific social and cultural contexts, and has argued in favour of a broad understanding of injury in

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<sup>31</sup> Law 19.123, 8 February 1992. E. Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3/4) (2006), 449-469, at 459.

<sup>32</sup> Article 20, Law 19.123, Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated, Official Gazette No. 34 (188), 8 February 1992.

<sup>33</sup> R. Rubio-Marín, The gender of reparations in transitional societies, in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, Cambridge University Press (2009), 63-120, p17.

<sup>34</sup> *Comisión de la Verdad y Reconciliación* (CVR), 27 August 2003, p190-191.

<sup>35</sup> Order for Reparations, ICC-01/04-01/06-3129-AnxA, para. 7.

cases where whole groups and communities were targeted.<sup>36</sup> In determining the eligibility of family members, the Court should have regard to the nature of familial structures in the CAR and the communities within which the murders occurred. The Court recognised that the harms suffered by surviving family and dependents of the direct victim 'cannot be underestimated'.<sup>37</sup> Such indirect victims are deprived of the victim and the support that they provided. Family members may suffer direct physical and/or psychological injury as a result of the murder.

28. Reparations for family members of direct victims are generally limited to the first surviving spouse, the children, and parents (if the deceased had no children). There is increasing psychological research, however, demonstrating the intergenerational harms of severe injustices and conflict.<sup>38</sup> Research suggests that the noxious effects of trauma may be psychologically transmitted from one generation to the next, as evidenced for example by the increases in depressive and anxiety disorders found amongst survivors of the Holocaust.<sup>39</sup> This can impact on the structure and mental health of families across generations. In the context of Northern Ireland, research recognises that the transgenerational effect of the conflict can manifest in the form of economic hardship, psychological impact, and carer responsibilities for parents and grandparents of direct victims.<sup>40</sup> Reparations programmes may focus on the prevention of the transfer of harms between generations, and enact measures specifically targeted towards victims beyond spouses, children and parents. The Peruvian Comprehensive Reparations Plan included this objective as one of its guiding principles.<sup>41</sup> The Chilean National Corporation of Reparation and Reconciliation also extended support beyond direct successors, making scholarships granted to the children of

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<sup>36</sup> *Prosecutor v. Nuon Chea and others*, 002/19-09-2007-ECCC-PTC, 24 June 2011, para. 93.

<sup>37</sup> *Bemba*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, 21 June 2016, para.29.

<sup>38</sup> See B. Bezo and S. Maggi, Living in 'Survival Mode': Intergenerational Transmission of Trauma from the Holodomor Genocide of 1932-1933 in Ukraine, *Social Science & Medicine* (2015) 134, 87-94; and N. Field, S. Muong and V. Sochanvimean, Parental Styles in the Intergenerational Transmission of Trauma Stemming From the Khmer Rouge Regime in Cambodia, *American Journal of Orthopsychiatry*, 83(4) (2013), 483-494.

<sup>39</sup> P. Fossion, C. Leys, C. Vandeleur, C. Kempnaers, S. Braun, P. Verbanck and P. Linkowski, Transgenerational transmission of trauma in families of Holocaust survivors: The consequences of extreme family functioning on resilience, Sense of Coherence, anxiety and depression, *Journal Of Affective Disorders*, (2015) 171, 48-53; and H. Wiseman and J. Barber, Anger, Guilt, and Intergenerational Communication of Trauma in the Interpersonal Narratives of Second Generation Holocaust Survivors, *American Journal of Orthopsychiatry*, 76(2) (2006), 176-184.

<sup>40</sup> *Transgenerational Trauma: Dealing with the Past in Northern Ireland*, WAVE Trauma Centre, March 2014.

<sup>41</sup> Article 7(c), Reglamento de la Ley N° 28592, Ley Que Crea El Plan Integral de Reparaciones (Pir), Decreto Supremo N° 015-2006-JUS.

those disappeared transferrable to the grandchildren.<sup>42</sup> While such approaches can be praised for their inclusive acknowledgment of harms, the challenge lies in balancing the needs of those who have been harmed and continue to suffer against the limited resources available for reparations.

29. Indirect victims who were dependent upon the victims will be placed in a particularly vulnerable position, potentially with their livelihood and survival at risk. This vulnerability ought to be considered in structuring reparations awards. The IACtHR in *Aloeboetoe v Suriname* concluded that the claimant's degree of financial dependence on the deceased ought to govern the measure of compensatory rights arising from direct, personal monetary damages. Reparations could therefore be granted to non-successors provided there was proof of regular payments made by a victim to the claimant, with some basis for assuming that they would continue, and representing a benefit the claimant could not obtain on his or her own. Moral damages could also be awarded to non-successors in *Aloeboetoe*, although such harm needed to be established before the court.<sup>43</sup> Dependents falling outside the 'family of the victim' should therefore be considered eligible for reparations.
30. Some indirect victims were witnesses to the murder of a member of their families, with severe and lasting impacts. Civilian witnesses who do not qualify as indirect victims because of their lack of a family connection to the victim should be considered for certain forms of reparations where they have been severely impacted by their experience of the crimes. The ECCC has acknowledged victimisation caused not just through the death of a close relative, but through the death of members of one's community, witnessing direct victimisation, the knowledge of a direct victim's fate, and the fear of a similar fate.<sup>44</sup> They therefore applied a presumption of collective injury, meaning that as long as the victim submitted that he/she was a member of the same targeted group or community as the direct victim and such was more likely than not to be true, psychological harm would be considered to have arisen.<sup>45</sup> Indeed, Professor Reicherter has previously noted to the ICC the importance of mental health treatment or

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<sup>42</sup> Law 20.405, 10 December 2009. Verdeja, n.31, p459.

<sup>43</sup> *Aloeboetoe and others v Suriname, Reparations and costs*, IACHR Series C no 15, 10 September 1993, para. 49.

<sup>44</sup> *Prosecutor v Nuon Chea and others*, 002/19-09-2007-ECCC-PTC, 24 June 2011, para. 83 – 92.

<sup>45</sup> *Ibid.*

supportive care in delivering better outcomes to survivors and witnesses of traumatic experiences.<sup>46</sup>

31. In relation to the murders for which Mr Bemba is convicted, several indirect victims of the murders are also victims of the crimes of rape and pillaging. This should be taken into account in reparations awards to ensure that funds are distributed as effectively as possible.

### **Pillaging**

32. The Chamber should adopt the lower threshold of the balance of probabilities when determining whether individuals have suffered harm as a result of pillaging for which the accused is responsible. The Chamber should consider the difficulties facing victims in proving the extent of their loss, and should keep in mind that individuals lost administrative documents and possessions, impacting on their ability to prove their identity and harm. Relaxing evidentiary requirements is in keeping with other claims programmes for lost property.<sup>47</sup> Many of the Holocaust related claims programmes required claimants to demonstrate that it was plausible in light of all the circumstances that they suffered a certain loss or violation that entitled them to the programme's benefits.<sup>48</sup> A pragmatic and sympathetic approach will better further the delivery of justice to victims. The appointment of experts may also be useful in establishing links of causality between the crime of pillaging and non-material damages such as the level of traumatisation or emotional harm.<sup>49</sup>

### **Rape**

33. Victims of rape need increased sensitivity to their privacy and security in developing effective procedures to support them in claiming reparations. In this regard, the Court should identify the legal, cultural, economic and security obstacles faced by victims coming forward. We strongly support the importance of a gender-inclusive approach to the process, design and implementation of reparations at the ICC.<sup>50</sup> The Court must ensure that there is meaningful consultation with victims regarding the mapping, design, monitoring and evaluation of

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<sup>46</sup> ICC-01/05-01/08-T-369-Red-ENG, 17 May 2016, lines 15-16, p34.

<sup>47</sup> IOM, *Property Restitution and Compensation Practices and Experiences of Claims Programmes* (2008), p4.

<sup>48</sup> See e.g. Article 22 of the Rules of Procedure for the Claims Resolution Process, 15 October 1997.

<sup>49</sup> O. Amezcua-Noriega, *Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections*, Briefing Paper No. 1 (2011), Essex Transitional Justice Network, Reparations Unit.

<sup>50</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation 2007; UN Guidance Note; *Lubanga*, ICC-01/04-01/06-3129, 3 March 2015, para.18.

reparations.<sup>51</sup> Victims may be unwilling to identify themselves as harmed from rape and may use alternative language, as evidenced in some applications to participate before the Court, where victims used phrases such as "*faire du mal*" (doing harm) to identify sexual violence.<sup>52</sup>

34. Public registration processes that openly categorise violations are likely to exclude many victims of sexual violence. In Timor Leste, the Commission for Reception, Truth and Reconciliation (CAVR) recommended that the categories of single mothers, widows and children born out of rape were used to provide reparation to victims of conflict-related sexual violence, under the assumption that they would be more willing to claim reparations if their harm was treated with some confidentiality.<sup>53</sup> In Sierra-Leone, the process of registration for reparations was sex-segregated; however, when women came together in large groups they were asked to publically identify the harm they had experienced.<sup>54</sup> Whatever means of registration are adopted the Court must be alert to the possibility of miscommunication or misunderstanding and take care to provide comprehensive and accurate information. For example, in Sierra Leone, many women registered as 'widows' as opposed to 'rape victim' due to the belief that they would receive support for their family and children as well as themselves. Yet they have not received reparations.<sup>55</sup>
35. The investigation of claims must be sensitive and comprehensive and avoid secondary victimisation. Stringent documentation and evidentiary requirements, such as medical documentation proving sexual violations, need to be thoughtfully considered. Consideration could be given to designing reparations programmes that do not require evidence which may be difficult to obtain or place victims at further risk. In Chile, for example, the payment of reparations for torture did not require victims to disclose or prove their experiences. The fact that they had been detained in a location known for its extensive use of torture meant that compensation was automatically paid.<sup>56</sup>

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<sup>51</sup> UN Guidance Note, p8-9.

<sup>52</sup> Public redacted version of "Decision on the tenth and seventeenth transmissions of applications by victims to participate in the proceedings", ICC-01/05-01/08-2247-Red, 19 July 2012, para.37 citing the Internal Report of the field interpreters, 29 November 2011, ICC-01/05-01/08-1960-Conf-Exp-Anx2.

<sup>53</sup> *Chega!*, The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste Report, Part 11: Recommendations, p.43.

<sup>54</sup> R. Rubio Marin, Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue, *William and Mary Journal of Women and the Law* (2012) 19(1) 69-104, p87.

<sup>55</sup> M. Suma and C. Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ, (2009).

<sup>56</sup> UN Women, *Progress of the Worlds Women: In Pursuit of Justice*, 2011-2012, p.97.

## Types and Modalities of Reparations

36. In this section we address the appropriate forms of reparations for victims based on the crimes they have suffered: murder; pillage; and rape. We recognise that some victims have suffered from multiple crimes, and some may have also succumbed to their injuries and died. The Court should be sensitive to potential gender differences regarding what may constitute appropriate reparations. For instance, a study carried out by UN Women in the CAR found that women were more likely than men to demand apologies, punitive measures for those responsible for violations and recognition of their suffering.<sup>57</sup> In another study, by the Trust Fund for Victims in the CAR, women preferred individual over collective approaches to reparations.<sup>58</sup> As such, gendered preferences need to be taken into consideration when designing reparations.

### Murder

37. The Court has recognised the deprivation of life as the ‘ultimate harm’.<sup>59</sup> Both individual and collective reparations are appropriate responses to the crime of murder in this case. For those who were dependent on the victim, compensation will be particularly important. Reparations for murder should take into account the specific sufferings of the indirect victims. In the *Barrios Altos* case before the IACtHR, concerning the massacre of 15 people in Lima, Peru, payments of \$175,000 were granted to the four survivors and for the next of kin of murdered victims, and one family of the victims received \$250,000.<sup>60</sup> Likewise, in the *Velásquez Rodríguez* case the Court ordered the payment of a tax-free sum either in a single payment or in six monthly instalments, with reparations for the children of victims paid into trust funds.<sup>61</sup>

38. The Court in *Lubanga* stated that where economic benefits, they should be paid in instalments (such as a pension) rather than through a lump sum. This is designed to ensure ‘support programmes that are self-sustaining, in order to enable victims, their families and communities to benefit from these measures over an extended period of time.’<sup>62</sup> Although this approach reduces the agency of victims in managing their compensation as they see fit, it

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<sup>57</sup> Ibid. p99.

<sup>58</sup> The Trust Fund for Victims, Reviewing Rehabilitation Assistance and Preparing for Delivering Reparations Programme Progress Report, Summer 2011.

<sup>59</sup> ICC-01/05-01/08-3399, para. 29.

<sup>60</sup> *Barrios Altos Case v Peru*, Reparations and Costs, Judgment IACtHR, Series C No. 87 30 November 2001.

<sup>61</sup> *Velásquez Rodríguez v Honduras (Reparations and Costs)*, Judgment IACtHR, Series C No. 7, 21 July 1989.

<sup>62</sup> *Lubanga*, ICC-01/04-01/06-3129-AnxA, para. 48.



helps to ensure that the awards have long-term impact, thereby supporting efforts to address the continuing and intergenerational harm of the crimes.

39. For some victims in the present case, the psychological impact of the murders was ‘chronic and severe’.<sup>63</sup> Compensation is insufficient in itself to redress the psychological suffering of victims without rehabilitation and other supportive measures. Rehabilitation services are vital to ensuring victims’ recovery from trauma and preventing the transgenerational transmission of harms. Consistent with the *Lubanga* decision, rehabilitation services for victims of murder should include the provision of ‘medical services and healthcare, psychological, psychiatric and social assistance to support those suffering from grief and trauma; and any relevant legal and social services’.<sup>64</sup> Such support may include equipping public or NGO-run hospitals and health centres to provide psychological assistance to victims. Rehabilitation is vital for victims, as it often serves as a precondition for victims to benefit from other forms of reparations.<sup>65</sup>
40. Reparations for the victims of murders, and in particular their children and dependents, can also take the form of education support. In the *Barrios Altos* case the IACtHR ordered Peru to grant various forms of educational support including scholarships and supplies of school uniforms, equipment and books.<sup>66</sup> The Chilean National Corporation of Reparation and Reconciliation likewise provided the children of those disappeared with educational support, including the payment of university fees and expenses.<sup>67</sup> Dependent victims could also be provided or supported with vocational training in order to acquire skills that could lead to income and provide long-term support for their livelihood.
41. As listed in Article 75 of the Statute, reparations are not limited to restitution, compensation and rehabilitation. The Court in *Lubanga* recognised that other types of reparations, including those with a symbolic, preventative or transformative value, may be appropriate.<sup>68</sup> Such collective reparations ought to be granted for groups with a collective identity that have suffered as a result of the wrongdoing, and should be responsive to the cultural context of the crimes. As the Committee against Torture recognised, ‘[c]ulturally sensitive collective reparation measures shall be available for groups with shared identity, such as minority

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<sup>63</sup> ICC-01/05-01/08-3399, para. 31.

<sup>64</sup> ICC-01/05-01/08-3399, para. 42.

<sup>65</sup> C. Sandoval, *Rehabilitation as a Form of Reparation under International Law*, (London, REDRESS, 2009).

<sup>66</sup> *Barrios Altos v Peru*, Judgment on Reparations, IACtHR, Series C No 87, 30 November 2001.

<sup>67</sup> Law 19.123, 8 February 1992; Verdeja n.31, p459.

<sup>68</sup> ICC-01/04-01/06-3129-AnxA, para. 34.

groups, indigenous groups, and others.<sup>69</sup> However, we recognise that victims in the *Bemba* case may not have a collective identity or have been since displaced and so may not identify themselves as a collective entity.

42. The Court may award collective reparations along with individual measures, to address the more public harm suffered by victims. As recognised by the Chamber in its Sentencing Judgment the impact of the murders ‘rippled through the relevant communities’.<sup>70</sup> The chaotic and traumatic circumstance of the crimes meant that family members and communities were denied the comforts of funeral services and burial rituals in their period of grieving. Measures such as the erection of monuments and the holding of public commemorations may be appropriate in redressing the collective harms of the murders,<sup>71</sup> as discussed below this may be something for the Court to recommend to the CAR government. Such efforts should reflect the cultural context in which they are granted, and should be constructed in dialogue with the victims and affected communities.

### *Disappeared*

43. Although Mr Bemba was only convicted of murder, some family members of those murdered by the MLC have been unable to recover or identify the bodies of their loved ones for the purposes of burial.<sup>72</sup> As a result of the suffering experienced in the period following the disappearance, family members are considered to be direct victims in this context.<sup>73</sup> In cases of disappearances, money by itself constitutes insufficient reparations.<sup>74</sup> The long-lasting, profound and complex effects of a disappearance on those left behind require other forms of reparation.<sup>75</sup> Where compensation alone has been provided, it has been seen in some contexts

<sup>69</sup> Committee against Torture, General Comment No. 3 (2012), 13 December 2012, CAT/C/GC/3, para. 32.

<sup>70</sup> ICC-01/04-01/06-3129-AnxA, para. 30.

<sup>71</sup> *Case of the Moiwana Community v. Suriname*, IACtHR, Series C No. 124, 15 June 2005, para. 218.

<sup>72</sup> Sentencing remarks by Douzima-Lawson Marie-Edith, ICC-01/05-01/08-T-370-ENG, 18 May 2016 p31, lines 20-21. E.g. a/0511/08, T-228-Red-FRA, Version publique expurgée des soumissions de la Représentante légale des victimes sur la peine, ICC-01/05-01/08-3371-Red, 4 July 2016, fn.105; Annex D: Decision on 1400 applications by victims to participate in the proceedings, ICC-01/05-01/08-2219-AnxD-Red2, 6 August 2014, p40-41 and p228.

<sup>73</sup> S. Fulton, Redress for Enforced Disappearance: Why Financial Compensation is Not Enough, *Journal of International Criminal Justice*, 12(4) (2014), 769-786; see also UN Commission on Human Rights, *Report Submitted by Mr Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances*, E/CN.4/2002/71, 8 January 2002; International Convention for the Protection of All Persons from Enforced Disappearance, A/RES/61/177 (20 December 2006).

<sup>74</sup> Report of the Working Group on Enforced or Involuntary Disappearances on Reparations, A/HRC/22/45, 28 January 2013, para.56.

<sup>75</sup> Fulton n.73.

as ‘blood money’ – an attempt to buy silence and impunity. In others, accepting financial reparations can induce guilt in family members, who feel that by accepting they are giving up hope of finding their loved one.<sup>76</sup> The establishment of the fate of the disappeared is a vital first step toward addressing the suffering of families, and should be a priority. The violation of enforced disappearance continues until the fate of an individual is made known.<sup>77</sup> Uncertainty over the fate of a disappeared person renders family members vulnerable to the effects of ‘ambiguous loss.’<sup>78</sup> Those affected can be immobilised, as uncertainty over their situation prevents them from problem-solving, re-organising their relationships, or moving forward. Family members often hang on to the hope that their relative may return. The restoration of the dignity of victims (both the disappeared individuals, and their families) cannot happen while the family remains uncertain of a loved one’s fate.<sup>79</sup> Without the remains of a loved one being found, relatives can struggle to achieve a sense of closure.<sup>80</sup>

44. Mechanisms can take various forms. In Northern Ireland, the Independent Commission for the Location of Victims’ Remains (ICLVR) was established via legislation enacted in both the British and Irish parliaments, along with the signing of an international agreement. The ICLVR operates on the basis of a limited immunity from prosecution. Information provided to the ICLVR can only be used to help locate remains, and cannot be used in prosecution. Forensic evidence collected during the exhumation of remains can only be used for the purposes of identification and ensuring remains can be removed safely. The establishment of the ICLVR was supported by a number of the families of the ‘disappeared’ and the limited immunity served as an incentive for those with information to bring it forward. To date the remains of 12 of 16 disappeared persons have been recovered and returned to their families for burial.<sup>81</sup> Examples can also be found in other transitional contexts, for example, the Timor-

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<sup>76</sup> Fulton, *ibid.*; and Claire Moon, “Who’ll Pay Reparations on My Soul?” Compensation, Social Control and Social Suffering, *Social and Legal Studies*, 21(2) (2012), 187-199.

<sup>77</sup> Article 8(1)(b), 2006 Disappeared Convention.

<sup>78</sup> P. Boss, *Ambiguous Loss: Learning to Live With Unresolved Grief* (Harvard University Press, 1999); S. Robins, Ambiguous Loss in a Non-Western Contest: Families of the Disappeared in Postconflict Nepal, *Family Relations*, 59 (2010), 253-268.

<sup>79</sup> Fulton n.73.

<sup>80</sup> J. N. Clark, Missing Persons, Reconciliation and the View from Below: A Case Study of Bosnia-Herzegovina, *Southeast European and Black Sea Studies*, 10(4) (2010), 425-442.

<sup>81</sup> Criminal Justice (Location of Victims’ Remains) Act 1999; Northern Ireland (Location of Victims’ Remains) Act 1999; and L. Dempster, The Republican Movement, ‘Disappearing’ and Framing the Past in Northern Ireland, *International Journal of Transitional Justice* 10(2),(2016) 250-271.

Leste CAVR recommended that a public registry of all those disappeared be established alongside a systematic inquiry to establish the whereabouts of those still missing.<sup>82</sup>

45. In the case of disappearances, it is the State that has the primary responsibility to take all appropriate measures to 'locate, respect and return' remains.<sup>83</sup> The CAR government should take 'appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.'<sup>84</sup> This would be consistent with Article 93(1)(k), whereby the Court can call upon State Parties to cooperate with the Court through exhumation of graves and examination of grave sites. Where States prove unable to effectively investigate disappearances, efforts should be made to clarify the establishment of particular procedures. For example, despite payment of compensation by Russia over disappearances in Chechnya, investigations into the disappearances were not effective. As a result, in 2012, the European Court of Human Rights provided guidance on specific measures to be followed.<sup>85</sup> These included the creation of an investigative body and the allocation of resources specifically for forensic and scientific work.<sup>86</sup>
46. Thus, the ICC could pursue reparative complementarity (discussed below) to recover bodies. It could require cooperation from the CAR government under Article 93(1), and perhaps collaborate with organisations such as the Red Cross in the 'exhumation and examination of grave sites'. It may be possible to provide incentives for members of the MLC to become involved, such as immunities from prosecution for any information provided.
47. The symbolic rituals that culturally, socially, and psychologically designate a death are denied by the act of disappearance.<sup>87</sup> Most cultures have a range of traditional rites associated with death. The inability of the families of the disappeared to participate in such rituals is recognised internationally as a particular point of suffering.<sup>88</sup> Treatment of the bodies of the

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<sup>82</sup> *Chenga!*, part 11 p11, 3.2.3.

<sup>83</sup> International Convention for the Protection of All Persons from Enforced Disappearance, A/RES/61/177 (20<sup>th</sup> December 2006), Article 24.

<sup>84</sup> Article 24(6), International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>85</sup> *Aslakhanova and others v Russia*, Application no. 2944/06, 18 December 2012.

<sup>86</sup> H. Keller and C. Heri, Enforced Disappearance and the European Court of Human Rights, *Journal of International Criminal Justice*, 12(4) (2014), 735-750.

<sup>87</sup> Boss n.78.

<sup>88</sup> Article 33, Additional Protocol I to the Geneva Conventions 1977; and International Convention for the Protection of All Persons from Enforced Disappearance 2006. Z. Crossland, Buried Lives, *Archaeological*

disappeared in a culturally and politically appropriate manner should therefore be an important aspect of any reparations process. For example, in South Africa, relatives of the Mamelodi Four were angered and embittered by the lack of what they considered to be acceptable funeral rites when their loved ones were reburied. Despite having fought for the MK, the funeral ceremony arranged by the local ANC branch lacked a significant military presence. For the families, the memorialisation of their relatives as military heroes was as important as locating and reburying their remains. While the local Truth and Reconciliation Commission Unit was responsible for returning the remains to the family, no responsibility lay with the TRC with regards to the burial itself.<sup>89</sup> This example suggests that it is important that reparations are comprehensive in addressing all stages of the process of returning remains to families, including providing support for a proper burial.

48. It may be appropriate to consider the provision of some form of memorial to the disappeared. Memorialisation can take various forms. In South Africa, the exhumation guidelines for disappeared persons specify that both the old and new burial sites will be memorialised.<sup>90</sup> A reparations agreement between Ecuador and the family of disappeared Consuelo Benavides-Cevallos included the naming of streets, squares, or schools after the victim.<sup>91</sup> It should be noted that in contexts where the fate of the disappeared remains uncertain, memorialisation may be unwelcome. For example in Argentina, the *Madres de Plaza de Mayo* opposed the construction of a memorial to their disappeared children as this presumed death.<sup>92</sup>
49. If disappeared persons have survived and are either released or escape, they are likely to suffer from post-traumatic stress disorders and will require access to psychological, medical, and social care.<sup>93</sup> For relatives of the disappeared, continuing uncertainty leads to physical and emotional exhaustion.<sup>94</sup> In Nepal, research conducted with 160 families of 'disappeared' persons found that more than half (55%) were experiencing symptoms of generalised anxiety

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*Dialogues*, 7(2), (2000), 146-159; and G. Ruiz Romero, Voices Around Us: Memory and Community Empowerment in Reconstruction Efforts in Colombia, *International Journal of Transitional Justice*, 6(3), (2012), 1-11.

<sup>89</sup> J. D. Aronson, The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons, *International Journal of Transitional Justice* 5(2) (2011), 262-281.

<sup>90</sup> Department of Justice and Constitutional Development, *Exhumation Police: Cases of Missing Persons Reported to the Truth and Reconciliation Commission (TRC)* (Staatskoerant: 12 December 2008, No. 31723).

<sup>91</sup> *Benavides-Cevallos v Ecuador*, IACtHR, Series C No. 38, Judgment of 19 June 1998.

<sup>92</sup> See Moon n.76.

<sup>93</sup> Nowak n.73.

<sup>94</sup> Boss, n.78.

disorders, 36% reported impairment of mental capacity as a result of their loved one's disappearance, and 27% experienced chronic physical symptoms which they linked to the disappearance.<sup>95</sup> The provision of free medical and psychological treatment should be considered. In the case of *Nineteen Tradesmen v Colombia*, the IACtHR ordered that the State provide free medical and specialist psychological treatment to the victims' next of kin.<sup>96</sup>

50. There is often a gender bias to the effects of disappearing. As the victims are often male, the after-effects of the disappearance are felt particularly by women. Women can face specific economic and social hardships. As neither widows nor wives, they can end up in a 'social and legal limbo'.<sup>97</sup> This imbalance should be taken into consideration with regards the design of reparations. The specific nature of harms suffered by women as a result of disappearing has been recognised in transitional justice processes in a number of contexts. In Morocco, compensation originally based on traditional Sharia-based inheritance laws was amended by applying international legal reparations standards, so that women could be treated equally.<sup>98</sup>
51. In designing reparations, it is important to consider effects that may be culturally specific. For example in Nepal, where wives traditionally join their husband's household, the 'disappearance' of a husband can result in stigmatisation and alienation, as the wife becomes an economic burden to their husband's family, but is unable to leave because of social stigma.<sup>99</sup> A range of reparations measures have been awarded in various contexts, including educational support, the provision of a public apology, relevant training for judges and security forces, changes to the law, and publication of judgements through national media outlets.<sup>100</sup> Consideration of any context-specific cultural, social, or political effects is essential to the development of appropriate reparations.

### **Pillaging**

52. The MLC soldiers took numerous items from the victims, including administrative documents, clothing, furniture, tools, radios, televisions, items of personal value, money, livestock, food, vehicles, and fuel.<sup>101</sup> Individual reparations are necessary to adequately

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<sup>95</sup> Robins n.78.

<sup>96</sup> *Nineteen Merchants v. Columbia*, IACtHR, Series C No. 109, Judgment of 5 July 2004.

<sup>97</sup> D. Tolbert, *Enforced Disappearances: Justice for the Disappeared has a Woman's Face*, *The International Centre for Transitional Justice*, 30 August 2013.

<sup>98</sup> *Ibid.*

<sup>99</sup> Robins n.78.

<sup>100</sup> Fulton n.73.

<sup>101</sup> *Bemba*, ICC-01/05-01/08-3399, para.50.

redress the specific economic, professional and personal harm suffered as a result. Collective reparations alone would be insufficient to address these specific, individualised forms of harm. Thus, individuals who have proven or who prove on the balance of probabilities that they are victims of pillaging should be considered eligible for restitution or compensation.

53. If possible, pillaged property should be returned to the victims. Such an approach is in keeping with international law. As noted in the often quoted case of the *Factory at Chorzów*: ‘Reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.’<sup>102</sup> While restitution is now considered just one option within a flexible conception of reparations, it has traditionally been the preferred form of reparation under international law, and is particularly relevant to the loss of recoverable material assets.<sup>103</sup> State practice demonstrates the priority given to restitution (and compensation, see below) in cases where individuals have had property seized without compensation.<sup>104</sup> The restitution of property also plays an ever increasing role in rehabilitation and rebuilding measures following conflict, as demonstrated by the significant number of claims programmes around the world.<sup>105</sup> If restitution is not possible or feasible, claims programmes often provide compensation instead. While the ICC’s focus on individual responsibility renders it distinct from claims programmes related to State responsibility, such programmes demonstrate the importance and value of restitution and compensation in delivering justice to victims.
54. The importance of restitution is also stipulated in the 1985 UN Victims’ Declaration and 2005 UN Basic Principles reflecting accepted international treaty provisions and jurisprudence.<sup>106</sup> The historical importance of restitution in international criminal law is evident in its inclusion as the sole form of reparation in the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute, which allows the Court to order ‘the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner.’<sup>107</sup> If

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<sup>102</sup> Claim for Indemnity, Merits Judgment, 13 September 1928, PCIJ Series A, No. 17, p.29.

<sup>103</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, General List No. 131 (2004), para. 152; ILC, Articles on Responsibility of States for Internationally Wrongful Acts, Articles 34 and 35(a) and (b).

<sup>104</sup> See e.g. Serbia’s Law on Property Restitution and Compensation, 6 October 2011.

<sup>105</sup> See IOM, *Property Restitution and Compensation Practices and Experiences of Claims Programmes* (2008).

<sup>106</sup> Principle 8, Declaration of Basic Principles of Justice for Victims of Abuse of Power, A/RES/40/34, 29 November 1985; and Principle 19, UN Basic Principles, A/RES/60/147, 16 December 2005.

<sup>107</sup> Article 24(3) of the Statute of the ICTY.

feasible, such an order could be made requiring Mr Bemba to contribute to attempts to facilitate such a return. However, it may not be possible to deliver full restitution to the victims of pillaging; furniture was burned, food eaten, possessions shared amongst the MLC soldiers. It is also possible that the power of restitution may not rest with Mr Bemba, due to his status as military commander, rather than a direct perpetrator. We argue further below that the conviction of Mr Bemba could offer an opportunity to examine whether the assets of other MLC commanders should be subject to a reparations order.

55. Guidance on establishing the correct amounts and forms of compensation can be found in international law. The UN Claims Commission in Kuwait based the monetary payments for property damage on market value, but had a ceiling due to budget constraints. Such an approach may be valid here.<sup>108</sup> The IACtHR has applied a principle of equity in order to calculate both material and non-material damages, when damages cannot be fully proven. Thus, when a calculation for the loss of earnings cannot be made because there are no bases to determine what income the victim might have earned if not for the violation, the IACtHR has referred to the relevant State's minimum wage to calculate such loss. This may be of relevance when calculating appropriate damages for professional damages incurred as a result of pillaging.<sup>109</sup> Experts may also be of assistance when making calculations related to the loss of earnings, or other professional losses incurred as a result of pillaging. Compensation can be provided through the payment of cash in an amount equivalent to the value of the lost property (monetary compensation) or through the provision of property functionally equivalent to the destroyed or damaged property (in lieu).
56. In addition to addressing quantifiable harm, individual compensation can provide symbolic acknowledgement of suffering by the ICC. Compensation also recognises victims' agency by enabling them the 'freedom of choice' to spend the money as they see fit to redress their suffering.<sup>72</sup> As suggested by Shelton compensation can 'supply the means for whatever part of the former life and projects remain possible and may allow for new ones.'<sup>73</sup> Monetary

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<sup>108</sup> See Reports and Recommendations of the Panels of Commissioners. The UNCC is far larger in scale than anything the ICC will face in terms of number of victims and resources, as it has so far awarded \$52.4 billion to 1.5 million claimants.

<sup>109</sup> Case of the *Juvenile Reeducation Institute v Paraguay*, Preliminary Objections, merits, reparations and costs, Judgment, IACtHR, Series C No. 112, 2 September 2004, para. 288.



awards provide short-term alleviation of suffering and potential long-term economic self-sufficiency.

57. Under international human rights law, the relief provided for human rights violations should accord with the substantive rights violated.<sup>110</sup> Unlike the loss of life or limb, the loss of property can be expressed as an objective monetary value. However, as noted above, reparations will be limited by the resources available, and there are other harms which require prioritisation. Thus, it may not be possible to fully compensate lost property. However, fair compensation must go beyond purely 'symbolic' amounts of compensation.<sup>111</sup> As noted by the IACtHR, 'under such circumstances, it is appropriate to fix the payment of "fair compensation" in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered.'<sup>112</sup> Even a small sum could represent a useful amount for an individual victim to invest in tools, equipment or stock for their own enterprise. While of course there are not enough resources to fully or completely remedy victims' harm, Hamber suggests the notion of 'good enough', whereby sufficient effort and recognition is made to victims to leave them psychologically satisfied, in turn rebuilding community and societal bonds.<sup>81</sup> As individual compensation awards at the ICC are likely to be small (\$25-\$100 for pillaging), it should not bar victims from obtaining compensation or other forms of reparations from any future national reparations programmes.

## Rape

58. The overwhelming physical, psychological, emotional and social consequences of rape demand a systematic and methodical approach to identifying appropriate reparations. The rapes committed by the MLC in CAR occurred over a decade ago, thus a focus on medium and long-term reparations is required. However, the deficit of short-term medical assistance in a conflict zone has a number of implications for victims. Inaccessibility to post-exposure prophylaxis for Human Immunodeficiency Virus (HIV), lack of screening and treatment for other sexually transmitted infections, and an inability to access emergency or immediate medical treatment secondary to fear or lack of resources, can lead to longstanding physical

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<sup>110</sup> See Concluding Observations, Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add.91.

<sup>111</sup> *Albert Wilson v the Philippines*, Communication no. 868/1999, UN Doc. CCPR/C/79/D/868/199 (2003).

<sup>112</sup> *Velásquez Rodríguez*, Interpretation of the Compensatory Damages Judgment, Judgment of 17 August 1990, para. 27.

disability or infertility. In addition, there can be stigma attached to victims of rape.<sup>113</sup> Due to the plurality of harms associated with sexual violence and its consequences a dual approach to reparations should be taken i.e. certain needs are more readily dealt with on a collective basis, whereas other needs can only be addressed on an individual basis.<sup>114</sup>

59. Although the following discussion relates to victims who are living with the consequences of rape, reparations must account for those that have died as a result of complications of the sexual violence or other physical injuries they sustained during the assault. Death may have resulted from physical complications arising from sexual violence. Penetrating pelvic trauma, which extends within the bony confines of the pelvis to involve urinary or intestinal organs or vasculature, can lead to life-threatening conditions.<sup>116</sup> For instance, it can cause haemorrhagic shock where emergency haemostasis is not possible; or septic shock, arising from fistula, pelvic abscess, urosepsis, miscarriage or atypical infection from acquired immune deficiency associated with HIV. In addition, pregnancies as a result of rape may have been concealed. Women may have suffered a miscarriage (increased likelihood in young adolescents), ruptured ectopic pregnancy (higher rates in cases of pelvic inflammatory disease), and complications from labour dystocia as women laboured without accessing health services given fear of stigmatisation.<sup>115</sup> These factors increase maternal and fetal mortality. Family members of these victims may have also witnessed the death or resultant disability. Other physical injuries sustained during the sexual assault may include head trauma, intracranial haemorrhage, venous thromboembolism from long bone fractures and self-neglect from depression. This short list highlights the importance of treating the victim holistically and devising individual care plans.
60. Women and girls can experience harm differently from men and boys resulting in 'gender-specific injuries' which must be taken into consideration.<sup>116</sup> For instance, women and girls are at risk of pregnancy when they are subjected to sexual violence. Furthermore, women's victimisation is situated within pre-existing social inequalities which disproportionately

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<sup>113</sup> UN Guidance Note, p6.

<sup>114</sup> *Ibid.*

<sup>115</sup> E. Hornez, T. Monchal, G. Boddart, P. Chiron, J. Danis, Y. Baudoin, J. L. Daban, P. Balandraud, S. Bonnet, Penetrating pelvic trauma: Initial assessment and surgical management in emergency, *Journal of Visceral Surgery* 153(4) (2016), 79–90.

<sup>116</sup> R. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, *Wisconsin Women's Law Journal* 15(1) (2000) 149-215.

compound their suffering. These include social and employment discrimination, cultural conventions regarding women's honour and chastity, lack of access to land and property rights and exposure to intimate violence.<sup>117</sup> Men and boys, on the other hand, may suffer harm differently as a result of hyper-masculinity resulting in the destabilisation of gender and sexual identity, as well as harms such as sexual dysfunction, castration and social ostracisation.<sup>118</sup> The need for tailored intervention to address these gender-specific harms cannot be underestimated. We set out the types and modalities of reparations for rape under the sub-headings of: rehabilitation (physical and psychological); compensation; guarantees of non-repetition; and measures of satisfaction.

### *Rehabilitation*

61. Rehabilitation of victims of rape would require a centralised hospital setting to address complex cases. This has the advantage of physicians maintaining competency by managing a minimum number of cases. Victims may receive funding for transport links and community crèche services for their dependents. Innovative strategies are required to encompass victims in rural areas. Using mobile units to provide visiting clinics to regional health centres, on an interval basis such as fortnightly, may pose a solution to poor follow up rates.<sup>119</sup> This continuity of care may reduce physical complication rates and help dispel the social stigma of attending larger specialised centres. Inadequate access requires careful consideration and innovation, using existing links and formulating new sustainable health programmes. The medical profession requires education and training in sensitive patient interactions and rehabilitation programmes. The paucity of high quality research studies on health/medical outcomes of conflict-related sexual violence, means policy on reparation based frameworks requires a review panel to ensure effectiveness.<sup>120</sup> Given the financial outlay required for such services the TFV should consider engaging donors to support these activities.<sup>121</sup>

### *Physical*

62. Rape committed during conflict causes a number of devastating physical consequences to

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<sup>117</sup> Ni Aolain et al n.20, p102.

<sup>118</sup> C. Dolan, *Into The Mainstream: Addressing Sexual Violence Against Men and Boys in Conflict*, A briefing paper prepared for the workshop held at the Overseas Development Institute, London, 14 May 2014.

<sup>119</sup> A. Kohli, *A Congolese community-based health program for survivors of sexual violence*, *Conflict and health* 6(1) (2012), 1752-1505.

<sup>120</sup> I. Ba and R.S. Bhopal, *Physical, mental and social consequences in civilians who have experienced war-related sexual violence: a systematic review (1981–2014)*, *Public Health (forthcoming 2016)*, 1-15.

<sup>121</sup> Regulation 27, TFV Regulations, ICC-ASP/4/Res.3, as amended by ICC-ASP/6/Res.3.

victims in the short, medium and long term. Whole communities were targets for rape, irrespective of sex, marital status or age.<sup>122</sup> Early adolescent pregnancy is associated with a higher rate of adverse pregnancy outcomes.<sup>123</sup> This may be attributed to biological immaturity of female victims less than 15 years of age and poor antenatal care due to neglect and stigma. Pregnancies may have been concealed due to fear of a woman's future prospects of marriage. Preterm birth, stillbirth, low birthweight and intrauterine growth restriction (IUGR) are some researched perinatal complications of impregnated females aged 13-15 years.<sup>124</sup>

63. Adverse neonatal outcomes are thus high with neonatal morbidity and mortality.<sup>125</sup> Bereavement from the loss of their child adds to the trauma of the event. Therefore, bereavement services whether individualised or in a collective setting, could help women who have suffered miscarriage or death of a child as a result of sexual violence.
64. Transmission of sexually transmitted infections (STI) is one of the most commonly reported physical complications, as high as 83% in some studies of victims in conflict zones.<sup>126</sup> Among the most serious infections is human immunodeficiency virus (HIV). The World Health Organisation estimates that approximately 13% of adults in the CAR are HIV positive in 2016, increased from 10.7% in 1998. This figure is expected to increase exponentially in light of recent violence.<sup>127</sup> The type of sexual violence impacts on the risk of HIV transmission. Rape, gang rape and sexual slavery are prevalent among victims of conflict related sexual violence.<sup>128</sup> The increased number of sexual perpetrators involved in these acts increases the risk of HIV acquisition. Access to post-exposure prophylaxis (PEP) screening of sexually transmitted infections in a conflict environment may be limited. Therefore, victims may be affected with

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<sup>122</sup> E. Dartnall and R. Jewkes, Sexual violence against women: The scope of the problem, *Best Practice & Research Clinical Obstetrics and Gynaecology* 27 (2013) 3–13.

<sup>123</sup> M. Kaplanoglu, M. Bülbül, C. Konca, D. Kaplanoglu, M. Selcuk Tabak, and B. Ata, Gynecologic age is an important risk factor for obstetric and perinatal outcomes in adolescent pregnancies, *Women and Birth* 28 (2015) 119–123.

<sup>124</sup> K. Traisisilp, J. Jaiprom, S. Luewan and T. Tongsong, Pregnancy outcomes among mothers aged 15 years or less, *Journal of Obstetrics and Gynaecology Research*, 41(11) (2015) 1726–1731; and F. Kurth, S. Be'lard, G. Mombongo, K. Schuster, A. Adegnika, Adolescence As Risk Factor for Adverse Pregnancy Outcome in Central Africa A Cross-Sectional Study, *PLoS ONE* 5(12) (2010).

<sup>125</sup> S. Tabak and B. Ata, Gynecologic age is an important risk factor for obstetric and perinatal outcomes in adolescent pregnancies, *Women and Birth* 28 (2015) 119–123.

<sup>126</sup> Ba and Bhopal n.120.

<sup>127</sup> Central African Republic 2016 Country Review, Country Watch, p181.

<sup>128</sup> Ba and Bhopal n.120; and C. Watts, A. Foss, M. Hossain, C. Zimmerman, R. von Simson, and J. Klot, Sexual Violence and conflict in Africa: prevalence and potential impact on HIV incidence, *Sexual Transmitted Infection* 86(3)(2010) 93-99.

the chronic implications of HIV and other sexually acquired infections. These include syphilis, genital herpes, herpetic neonatal transmission, hepatitis and other tropical infections, namely Lymphogranuloma venereum (LGV). Syphilis may be transferred to fetus transplacentally, and may progress to tertiary syphilis with neurological and cardiovascular consequences. The contraction of one STI also increases the risk of contracting other STIs. Genital chlamydia trachomatis may be asymptomatic at presentation but in cases of delayed or missed treatment, long term consequences of pelvic inflammatory disease, infertility, pelvic pain and life threatening ectopic pregnancy may ensue.<sup>129</sup> Victims with HIV require specialist input with anti-retroviral therapy, education, and access to acute services when required.

65. Victims of physical sexual assaults are susceptible to sexually transmitted oncogenic strains of viruses such as human papilloma virus (HPV), which are associated with cervical carcinoma. The increasing burden of these HPV ano-genital cancers necessitates appropriate funding for active screening in the form of cervical cytological smears and HPV typing. A referral pathway to victims with abnormal smears or cytology is then required. This may take the form of colposcopy, and a biopsy for tissue diagnosis depending on the degree of cytological abnormality. Active invitation for these high risk individuals may prevent consequential malignancies.
66. Obstetric implications of those exposed to sexual violence include genital mutilation, psychological impacts of re-experiencing pain in sexual organs, and fears in the first stage of labour. Intimate vaginal examinations may be perceived as invasive and painful, and victims may lack confidence in medical personnel. Obstetricians, midwives or registered birth attendants require training in managing the labour of victims of sexual violence. One to one support, and tailored antenatal programmes may be of benefit, as evidenced in high income countries such as Iceland.<sup>130</sup> There is a paucity of data on women who have been victims of sexual violence and the subsequent obstetric outcomes. The majority of research that exists has been conducted in high income countries and non-conflict zones. Logically the greater the degree of physical disability, the more likely labour is to be prolonged or obstructed.

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<sup>129</sup> J. Tscholl, M. Letson, and H. Williams, Sexually Transmitted Infections in Child Abuse, *Clinical Pediatric Emergency Medicine* (forthcoming 2016).

<sup>130</sup> A. Gisladdottir, M. A. Luque-Fernandez, B. L. Harlow, B. Gudmundsdottir, E. Jonsdottir, Obstetric Outcomes of Mothers Previously Exposed to Sexual Violence, *PLoS ONE* (2016) 11(3).

67. To improve reproductive outcomes for victims of sexual violence and their children, antenatal screening of infections such as HIV and syphilis is essential; provision of antiretrovirals, including highly active retroviral therapies (HAART) can reduce vertical transmission from mother to foetuses; small outreach or nurse led teams can provide acute care; and educational initiatives may limit transmission rates. These interventions provide opportunities to protect and promote sexual and reproductive health beliefs.
68. Conflict related sexual violence has also been associated with higher incidence of fistulae formation in comparison to non-conflict related sexual violence.<sup>131</sup> A fistula is an abnormal connection between two body parts such as organs, blood vessels or other internal surfaces. Fistulae related to sexual violence involve the genito-urinary and/or intestinal system. This debilitating condition has a profound impact on quality of life, functionality of vital body functions whilst also subject to complications such as infection.<sup>132</sup> Sexual dysfunction as a result of such physical insult, or secondary psychological harm is a common consequence.
69. Fistulae can lead to body dismorphia, social and marital rejection and community isolation. The type and extent of acquired genito-urinary or recto-genital fistula, will depend on the pathogenesis and mechanism of injury.<sup>133</sup> In conflict situations a fistula may develop from direct vaginal trauma, erosion from a foreign body, a pelvic abscess, an infected vaginal vault haematoma or as a result of an obstetric injury from a pregnancy as a result of rape. This dynamic and evolving area of medicine poses surgical challenges. Therefore, a thorough diagnostic evaluation is required to determine classification according to anatomical structures, size and site. A specialised team can then manage the fistula based on conservative or surgical interventions.<sup>134</sup>
70. Reparations provide an opportunity to increase financial and human resources in existing

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<sup>131</sup> A. O. Longombe, K. M. Claude, J. Ruminjoc, Fistula and Traumatic Genital Injury from Sexual Violence in a Conflict Setting in Eastern Congo: Case Studies, *Reproductive Health Matters*, 16(31) (2008), 132-141. Studies from victims of sexual violence in conflict zones have revealed varying rates of rectal and vaginal fistulae ranging from 9%-40.7%. Genital trauma is also prevalent with some studies reporting 28.7% suffering severe genital tears.

<sup>132</sup> N. Dossa, M. Zunzunegui, M. Hatem, and W. Fraser, Fistula and Other Adverse Reproductive Health Outcomes among Women Victims of Conflict-Related Sexual Violence: A Population-Based Cross-Sectional Study, *BIRTH* 41(1) (2014) 5-13.

<sup>133</sup> M. Stamatakos, C. Sarged, Theodora S., and K. Kontzoglou, Vesicovaginal Fistula: Diagnosis and Management, *Indian Journal of Surgery* 76(2) (2014)131-136.

<sup>134</sup> R. Pal et al., Role of conservative management of genitourinary fistula: review of literature, *International Journal of Reproduction, Contraception, Obstetrics and Gynecology* 5(10) (2016) 3280-3282; and Stamatakos et al. *ibid.*

genital injury and fistula services, which are currently overburdened and unable to provide optimal care. Victims with fistulas secondary to vaginal trauma, or who acquired an obstetric fistula from a pregnancy resulting from rape, will benefit from an enhanced quality of treatment. Current infrastructure for essential surgery and chronic care is inadequate.<sup>135</sup> In addition to vital medical equipment, human resources in the form of adequately trained doctors and medical personnel are scarce. Monetary reparations and opportunities for training scholarships and fixed term medical positions may help provide competent fistula surgeons and the multi-disciplinary team that is essential for long term care of these complex patients. Most women with a fistula remain untreated for the majority of their lives, and those victims who received surgical repair of fistula, often do not receive sufficient medical follow up. Strategies for registration and follow-up mechanisms will reduce fistula associated morbidity, while obstetric education will enhance maternal and fetal wellbeing. The International Federation of Gynaecology and Obstetrics, the International Society of Obstetric Fistula Surgeons and the Fistula Foundation have devised a competency based obstetric fistula training programme.<sup>136</sup> A co-ordinated effort between professional medical bodies, UN agencies, voluntary and humanitarian bodies will make reparations more effective.<sup>137</sup>

71. Currently the fistula services in the CAR are overwhelmed, and whilst a significant proportion of their workload is a result of obstetric induced fistula, funding could be allocated to help develop services that will positively impact victims of sexual violence with traumatic fistula injuries, or obstetric fistula from a pregnancy that resulted from rape. Funding may be allocated to hospital services specialising in survivors of fistulae and complications from genital trauma. This may translate into funding fellowships, training programmes/scholarships and long term fixed medical positions. In rural areas, healthcare centres unable to facilitate complex cases require education on referral pathways to specialist centralised services.<sup>138</sup>

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<sup>135</sup> M. Kouo-Ngamby, F.N. Dissak-Delon, I. Feldhaus, C. Juillard, K. A. Stevens and M. Ekeke-Monono, A cross-sectional survey of emergency and essential surgical care capacity among hospitals with high trauma burden in a Central African country, *BMC Health Services Research*, 15 (2015) 478.

<sup>136</sup> S. Elneil, Provision of fistula Services and Programmes, *RCOG International News*, September 2012.

<sup>137</sup> Supporting Efforts to end obstetric fistula, Report of the Secretary General, Sixty-Ninth session of the United Nations General Assembly, A/69/256, 5 August 2014.

<sup>138</sup> R. B. Singh, S. Satish Dalal, S. Nanda, and N. M. Pavithran, Management of female uro-genital fistulas: Framing certain guideline, *Urology Annals* 2(1)(2010) 2–6.

72. Individualised medical reparations for victims of complex genital trauma are vital. Victims may require examinations and investigations such as imaging and microbiological testing, which pose financial expenditures. If operative intervention is deemed beneficial, for example in the correction of female uro-genital fistula, an appropriately trained surgeon and a multi-disciplinary team capable of providing post-operative care is imperative. Victims with fistulae who have previously undergone surgery, remain vulnerable to complications and fistula recurrence. Funding of services including visiting scholarships to surgeons would help ensure adequate training and staffing levels. The patient may also require education, physical therapy, mental health programmes, cognitive coping mechanisms and contraceptive advice.

*Psychological*

73. In many post-conflict areas, the psychological and social impacts of sexual violence cannot be overstated. The trauma of rape, especially that which is committed with weapons and violence, is a significant risk factor for suicide.<sup>139</sup> Moreover, there may have been a delay in addressing the assault emotionally, compounding the victim's isolation and psychological wellbeing.<sup>140</sup> These consequences are evident in the Court's judgment and reliance on experts on the psychological consequences of rape.<sup>141</sup>

74. Courts have previously ordered psychological rehabilitative reparations for sexual violence. The IACtHR in *González et al. ('Cotton Field') v. Mexico* ordered the State to 'provide appropriate and effective medical, psychological or psychiatric treatment, immediately and free of charge, through specialised State health institutions'. Critically, the Court emphasised that health care should specifically address 'the psychological trauma as a result of the gender-based violence'.<sup>142</sup> In terms of appropriate psychological interventions in the *Bemba* case, clinical psychology and counselling services need to be available within community medical centres, and on an outreach basis to rural communities. Meeting areas may take the form of a variety of settings, such as community halls. Collective and individual services may be adopted. As such, victims should have a choice in terms of individual or group psychological

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<sup>139</sup> Dartnall and Jewkes n.122.

<sup>140</sup> N. Dossa, M. Zunzunegui, M. Hatem, and W. Fraser, Mental Health Disorders Among Women Victims of Conflict-Related Sexual Violence in the Democratic Republic of Congo, *Journal of Interpersonal Violence* (2015) 30(13) 2199–2220.

<sup>141</sup> *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para 567.

<sup>142</sup> *González et al. ('Cotton Field') v. Mexico*, Preliminary Objections, Merits, Reparations and Costs, Judgment, IACtHR Series C No. 16 November 2009, para. 549.



rehabilitation, where resources allow. Such psychological rehabilitation should be accompanied with sensitisation measures aimed at communities and society in CAR, which will require State cooperation and support of donors to fund such programmes.

75. During the *Bemba* case, Trial Chamber III heard expert evidence that provided critical information about post-traumatic stress disorder and the longitudinal and inter-generational impact of sexual violence crimes.<sup>143</sup> Not only have many of the victims of sexual violence experienced the individual trauma of harm inflicted upon their person, they would also have witnessed the brutality and cruelty inflicted on their family members. The frequency and ferocity of acts of rape that were committed in the presence of or within earshot of victims' children, parents, siblings, other family members, and/or neighbours was acknowledged.<sup>144</sup> The Court should consider family members or dependents of the direct victims as indirect victims that have suffered harm both individually and collectively. Family members are at considerable risk of psychological damage, particularly when they have witnessed the sexual violence or been forced to participate in the rape of their family members.<sup>145</sup>
76. Children conceived from rape are particularly vulnerable; many are without societal or family support. Their existence may serve as a reminder of trauma; they may be ostracised, neglected, malnourished, and have poor educational attainment. Disruption to their education may impact their behaviour, emotional well-being, capacity for future employability and relationship with other family members. Many children may have been orphaned, their mothers' having died from HIV complications. Furthermore, a percentage of these children may be HIV positive requiring care and Antiretroviral Therapy (ARVT).
77. In Rwanda children born of rape were stigmatised as '*Interhamwe children*', denigrated with the identity of their perpetrator father.<sup>146</sup> Rwandan women who had a child as a result of rape were forced to leave their communities; many were completely banned due to societal rejection of their '*enfants mauvais souvenirs*'.<sup>147</sup> This Court has the opportunity to provide

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<sup>143</sup> Dr Adeyinka M. Akinsulure-Smith (P221), Dr André Tabo (P229) and Dr Daryn Reicherter (P925).

<sup>144</sup> *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 488 and 494.

<sup>145</sup> Harvard Humanitarian Initiative and Oxfam International, "*Now, the world is without me*": an investigation of sexual violence in Eastern Democratic Republic of Congo (2010), p1.

<sup>146</sup> S. Le Courtois, Justice and Reparations for Rwanda's *Enfants Mauvais Souvenirs* in D. Buss et al. (eds.), *Sexual violence in conflict and post-conflict societies: international agendas and African contexts*, Routledge (2014), 158-168.

<sup>147</sup> M.C. Mukangendo, Caring for Children Born of Rape in Rwanda, in R. Charlie-Carpenter (ed), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, Kumarian Press (2007), 40-52, p42.

visibility to children born to the victims of rape by considering their particular needs for reparations of psychological rehabilitation, ARVT provision and education or skills based support. For instance in Bukavu, the Brazilian government funded the OHCHR Reparations for Victims of Sexual Violence Project, which created the DRC Red Cross transit house where victims and other vulnerable persons received psychosocial assistance as well as training in various skills such as dyeing, sewing, knitting and basket-making.<sup>148</sup>

78. For male victims of sexual violence, there may be feelings of emasculation as they may be unable to provide for their families due to the physical and psychological trauma experienced.<sup>149</sup> This may have a direct impact on the economic earnings of the family unit and their livelihood. Male and female victims of sexual violence will share certain barriers as informed by the socio-cultural context in the CAR, such as 'stigma, fear, shame, guilt, confusion and the need to focus on immediate survival priorities.'<sup>150</sup> The Court must be mindful that reparative measures need to take into account the additional barriers that are gender specific to male victims of sexual violence, which include the perceived need to live up to masculine gender norms heightened as a result of war, a lack of cultural expressions or terms to describe male sexual violence, or a perception that men and boys simply cannot be victims of sexual violence. Reparations can be used to provide support services for male victims who have faced sexual violence, but have not yet come forward due the barriers above.<sup>151</sup> In addition, wider community sensitisation could help to better inform communities of the harm caused to male victims of sexual violence and encourage greater understanding.

### *Compensation*

79. While quantification of awards is difficult, a gender-sensitive approach is needed and requires that all consequences flowing from sexual violence are included. In calculating economic

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<sup>148</sup> This was a 12-month project funded by Brazil, implemented from August 2012 to September. Five NGO were granted funds to implement the project activities in South Kivu for victims' economic and social reintegration. The Project also involved three NGO-run Legal Clinics for victims in Equateur province. Access to justice and reparations for victims of sexual violence in the Democratic Republic of the Congo, OHCHR News, 28 November 2013.

<sup>149</sup> *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, para. 494 and 498.

<sup>150</sup> V. Oosterveld, Sexual violence directed against men and boys in armed conflict or mass atrocity: addressing a gendered harm in international criminal tribunals, *Journal of International Law and International Relations*, (2014) 10, 107-128, p127; S. Sivakumaran, Sexual violence against men in armed conflict, *European Journal of international law*, (2007) 18(2), 253-276.

<sup>151</sup> S. Sivakumaran, Male/male rape and the "taint" of homosexuality, *Human Rights Quarterly* 27(4) (2005) 1274-1306.

damage, it is important to take into consideration traditional gender roles in society. For instance in many communities, women's work is at home looking after family, or working on family land, where they do not receive any income.<sup>152</sup> Furthermore, economic damage should be interpreted as including loss of educational opportunities, employment or social benefits, as well as the material implications of the birth of children as a result of rape, fertility issues for women and men, and lifelong reproductive health problems.<sup>153</sup> In terms of moral damage, this may include harm to the reputation and dignity of the victim as a result of stigmatisation, and impact on women's ability to access marriage and social benefits.<sup>154</sup>

80. The severity of the specific physical violation of sexual violence can be compounded by inequality, destitution, and social dislocation, as well as family separation and isolation. Sexual violence has long-term ramifications for the economic futures of the survivors. In the Democratic Republic of Congo (DRC), and among Ethiopian refugees in Sudan, research found that agricultural output has reduced because women who were sexually violated are afraid to return to their 'normal' lives.<sup>155</sup> Similarly, a study of male survivors of sexual violence in the DRC found that all of them had abandoned their previous occupations as a result of fear and stigma, with the result that their families lacked 'funds to meet basic household needs such as food, medication, shelter and education for children'.<sup>156</sup> For women, the stigma attached to sexual violence and the consequences flowing from such stigma can be linked to the high value placed on ideals such as chastity, honour and purity. The stigma attached to sexual violence can result in the breakdown of the family unit with severe economic consequences. In contexts where marriage represents women's best – and sometimes only – route to security, abandonment by their partner or the loss of their marriage prospects can be detrimental to their future and result in a lifetime of poverty.<sup>157</sup>

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<sup>152</sup> The World Bank, *World Development Report: Gender Equality and Development*, (2012), Chapter 5.

<sup>153</sup> Ni Aolain et al n.20.

<sup>154</sup> G. Citroni, P. Grant, L. Mamut and S. Korjenic, *Between Stigma and Oblivion, A Guide on Defending the Rights of Women Victims of Rape or other Forms of Sexual Violence in Bosnia and Herzegovina*, (2012) 56.

<sup>155</sup> J. Kelly, M. Van Rooyen, J. Kabanga, B. Mclin and C, Mullen. *Hope for the Future Again: Tracing the effects of sexual violence and conflict on families and communities in eastern Democratic Republic of the Congo*. (HHI, 2011).

<sup>156</sup> M. Christian, O. Safari, P. Ramazani, G. Burnham, and N. Glass, Sexual and gender based violence against men in the Democratic Republic of Congo: effects on survivors, their families and the community, *Medicine, Conflict and Survival* 27(4) (2011) 227-246.

<sup>157</sup> Harvard Humanitarian Initiative and Oxfam International n.145.

81. Although the Court must avoid the reinforcement of these ideals and the entrenchment of patriarchal systems of meaning, it should nonetheless recognise that women's positioning in many societies remains highly determined by their conformity with these cultural and social standards. Indeed, an award of reparations will be unable to 'return' a female victim to her pre-conflict status; however, it may help to alleviate the resulting harms she faces today.<sup>158</sup>
82. The moral and material damage caused by sexual violence requires a combination of individual and collective reparations.<sup>159</sup> Compensation to each victim would be the most appropriate, given the personal harm caused, but complemented with wider collective measures of rehabilitation, measures of satisfaction and guarantees of non-recurrence. Compensation may take the form of a lump-sum payment enabling the victim to spend the money as they see fit. Moreover, a lump sum can provide victims who have been stigmatised with the financial independence to start over, i.e. to live elsewhere or find alternative employment.<sup>160</sup> Alternatively, the Court could create a pension program, enabling victims to have some financial security in the long term. In Chile annual pensions of between approximately US \$2,300 and US \$2,600 were awarded to survivors of sexual abuse.<sup>161</sup>
83. The Court may also wish to award educational scholarships to the victim and/or their family members who have been affected. As noted by the IACtHR in *Ortega v Mexico*, the award of scholarships is in recognition of the fact that 'this harm continues and has resulted in significant alterations to their lives and also to their domestic relations and their relations with the community, which have affected their personal development'.<sup>162</sup> Advance study programs could be established, such as Sierra Leone's Complementary Rapid Education for Primary Schools which provides schooling to targeted youths who had their schooling interrupted because of the war.<sup>163</sup> Peru provides adult literacy programmes, and technical or professional training for people who are no longer of schooling age.<sup>164</sup> A similar approach could be taken for individuals whose education was interrupted as a result of the sexual violence they suffered.

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<sup>158</sup> Ni Aolain et al, n.20.

<sup>159</sup> REDRESS, *A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence*, (2016) 9.

<sup>160</sup> UN Guidance Note, p17.

<sup>161</sup> UN Women Virtual Knowledge Centre to End Violence Against Women and Girls: Mechanisms.

<sup>162</sup> *Fernández Ortega et al. v Mexico*, Merits, Reparations, and Costs, Judgment IACtHR, Series C No. 215, 30 August 2010.

<sup>163</sup> The World Bank, *World Development Report: Development and the Next Generation* (2007), p185.

<sup>164</sup> C. Correa, *Helping Victims Overcome Human Rights Violations Through Education*, ICTJ (2016).

84. It is clear that the harm of rape is compounded by prejudicial, stereotyped, and false beliefs about sexual violence, which direct blame towards the victim and have a devastating impact on their sense of self.<sup>165</sup> The victims' relationship to their bodies and their gender identity is negatively affected by sexual violence.<sup>166</sup> In this regard, monetary compensation is insufficient by itself and should be complemented with other rehabilitative and reparative measures.<sup>167</sup>
85. Collective measures, such as educational programmes for the wider community, are also necessary to address the root cause of stigmatisation. In *TPF v Peru*, the Committee on the Elimination of Discrimination Against Women called for 'education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence'.<sup>168</sup> Similarly in *Gonzalez v US*, the IACtHR recommended that the United States 'continue adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims, and to promote the eradication of discriminatory socio-cultural patterns that impede women and children's full protection from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs'.<sup>169</sup> We suggest that the Court explore a similar approach, using the TFV assistance mandate to create training and wider educational programmes in the CAR.
86. Compensation payments need to be carefully managed to ensure that they are gender sensitive. There is a risk that payments can create tensions within victim communities if they are not administered in a culturally sensitive way. In South Africa, reparations took the form of a once-off payment of approximately USD \$4,000. However, the policy failed to take into consideration both power differentials within families and the historic lack of access to bank accounts among women. Local victim groups reported that the money was often deposited into the accounts of male family members and women were given limited or no control over

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<sup>165</sup> *Bemba*, ICC-01/05-01/08-3399, para. 38-39.

<sup>166</sup> I. Skjelsbæk, Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina, *Feminism and Psychology*, 16(4) (2006) 373-403, p395.

<sup>167</sup> CEDAW, *RPB v the Philippines* 12 March 2014 Communication No. 34/2011.

<sup>168</sup> CEDAW, *TPF v Peru*, 4 November 2011, Communication No. 22/2009.

<sup>169</sup> Inter-American Commission on Human Rights, *Jessica Lenahan (Gonzalez) v US*, Report No. 80/11 Case 12.626.

the resources. In some cases, tensions over how money should be spent in households lent itself to family violence.<sup>170</sup>

87. Care must be taken not to further stigmatise the victims when delivering individual awards. For instance, during the payment of compensation to victims of conflict-related sexual violence in Guatemala, confidentiality was breached. Victims of rape were singled out in State-sponsored community ceremonies and given compensation checks that said ‘victim of rape’, contributing to their stigmatisation.<sup>171</sup> In Timor-Leste, to minimise risk of identification, victims of sexual violence were awarded the same amount as those who suffered other violations. Further, in recognising that women were more likely to claim benefits for their children than themselves, when claiming education grants women were also given literacy training, livelihood skills and reproductive health care.<sup>172</sup>

### *Guarantees of Non-Repetition*

88. The aspiration in the Nairobi Declaration is that reparations ‘must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls’ and that ‘reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of the violations of women’s and girls’ human rights predate the conflict situation.’<sup>173</sup> The profound harm experienced by direct victims and their families can be compounded by the underlying structural and socio-cultural context in which they live. The IACtHR has endorsed this position when considering the issue of reparations for women victims of sexual violence, stating that ‘bearing in mind the context of structural discrimination in which the facts of this case occurred, [...] the reparations must be designed to change this situation, so that their effect is not only of restitution, but also rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.’<sup>174</sup> The Court should pursue this approach to reparations as far as possible, given its limited jurisdiction and capacity.
89. The TFV could play a critical role for victims of sexual violence and their families. In light of its mandate to benefit both the victims of crimes within the jurisdiction of the Court, and the

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<sup>170</sup> UN Guidance Note, p17.

<sup>171</sup> UN Guidance Note, p16.

<sup>172</sup> UN Women, *Progress of the Worlds Women: In Pursuit of Justice, 2011-2012*, p97.

<sup>173</sup> Nairobi Declaration on Women’s and Girls’ Right to Remedy and Reparation (2007), para. 3.

<sup>174</sup> *González et al. (‘Cotton Field’) v. Mexico*, para. 450.

families of such victims it could identify and work with civil society partners in order to implement a public campaign that raises awareness in specific communities in the CAR about the discriminatory practices and negative stereotypes of women victims and their children.<sup>175</sup> Such a public campaign can be delivered in various forms such as television, radio, newspapers, and other appropriate mass media, such as radio programmes or comic strips. Moreover, these could be deployed in diverse forums such as schools, community groups, hospitals and places of worship. The knowledge expertise of civil society partners will be integral to the design and delivery of such campaigns in order for reparations to have a longer-term effect in tackling deeper societal inequalities that affect victims and their families.<sup>176</sup> This would be in line with the current Strategy of the Trust Fund that aspires to ‘contribute to [the] transformative quality of reparative justice’ and ‘break with historic patterns of subordination and social exclusion’.<sup>177</sup>

### *Measures of Satisfaction*

90. Measures of satisfaction for rape can be important in awakening society to the consequences of sexual violence and in turn ‘facilitate the process of victims’ psychological and social rehabilitation’.<sup>178</sup> While a fine balance has to be struck in protecting victims’ privacy, measures of satisfaction publicise the wrongful nature of rape and try to engender social solidarity with the victims’ plight. In South Africa, the final report of the Truth and Reconciliation Commission in 1998 recommended that symbolic reparations be included in the reparations policy. According to the TRC Report, symbolic reparations refer to measures that facilitate the ‘communal process of remembering and commemorating the pain and victories of the past.’<sup>179</sup> Symbolic measures can help to restore the dignity of victims.
91. The IACtHR in *González et al. (‘Cotton Field’) v. Mexico* ordered a monument of ‘commemoration of the victims of gender-based murder’. The IACtHR justified its decision on the basis that it was ‘a way of dignifying them and as a reminder of the context of violence they experienced, which the State undertakes to prevent in the future.’<sup>180</sup>

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<sup>175</sup> Article 79, Rome Statute.

<sup>176</sup> WHO, Violence Prevention: the evidence. Promoting Gender Equality to Prevent Violence against women, (2009).

<sup>177</sup> Trust Fund for Victims, Strategic Plan 2014-2017 (August 2014)

<sup>178</sup> Rubio-Marín n.33, p114; and Hamber, and Wilson n.11.

<sup>179</sup> Report of the Truth and Reconciliation Commission Report, Volume 5, Chapter 5, 175.

<sup>180</sup> *González et al. (‘Cotton Field’) v. Mexico*, para 471.

92. The former UN Special Rapporteur on Violence against Women, Rashida Manjoo, stressed that States' obligations to eliminate and prevent violence against women and girls and hold perpetrators to account demands that they 'ensure comprehensive reparations for women victims of violence and their relatives.'<sup>181</sup> It may be appropriate for the Court to request that the Assembly of State Parties calls upon donors to provide funds to any funding programme the Trust Fund develops for memorialisation and commemoration of victims. This can provide redress for a wider group of conflict-affected communities and for those victims whose suffering was not represented in the *Bemba* case. Memorialisation should complement compensation, rehabilitation and other measures, to tackle the individual harm as well as rouse society's consciousness of the victims' plight.

### Liability and Assets

93. Given the potential assets of Mr Bemba which may have or have been seized by the ICC, this case offers the first opportunity for the Court to carefully develop its practice around the freezing of assets and their use for reparations. While €5.2 million of Mr Bemba's assets have been reportedly seized, there may be further resources.<sup>182</sup> The Prosecutor has the primary responsibility to investigate any assets the defendant may have, but the Court can of its own motion request the cooperation of States.<sup>183</sup> Although the Registry has issued requests to relevant States to identify and freeze such resources, it would be worth reengaging with States to trace any assets of Mr Bemba. There may be other assets not yet identified, traced or frozen belonging to Mr Bemba, such as his shareholding of the Heineken subsidiary 'Bralima' in the DRC.<sup>184</sup> As Mr Bemba was indicted in 2008 it is likely that if there are any further assets, they have been moved into other accounts as occurred in other contexts.<sup>185</sup> This has happened in

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<sup>181</sup> Statement by Ms. Rashida Manjoo, Special Rapporteur on Violence against Women, Its Causes and Consequences, Commission on the Status of Women, (4 March 2013).

<sup>182</sup> *Bemba*, Decision et demande en vue d'obtenir l'identification, la localisation, le gel et la saisie des biens et avoirs adressées à la République Portugaise, ICC-01/05-01/08-8-US-Exp, 27 May 2008; and Portugal Seizes Booty of Suspected Congolese War Criminal: Report, *AFP*, 22 July 2008.

<sup>183</sup> Art. 57(3)(e), Rome Statute.

<sup>184</sup> See O. van Beemen, De Heineken-connectie van Strafhof-verdachte Bemba, *Vrij Nederland*, 21 March 2016.

<sup>185</sup> J. G. Orozco and M. Goetz, Reparations for Victims in Colombia: Colombia's Law on Justice and Peace, in Ferstman n.19, 435-458, p456.



at least one instance already in Mr Bemba's case with large sums of money disappearing from one of his bank accounts in Portugal, despite being frozen at the time.<sup>186</sup>

94. Ferstman identifies five issues that must be addressed to make asset recovery for reparations at the ICC more effective: (1) the weak statutory framework for States in seizing assets as precautionary measures; (2) inadequate State cooperation; (3) insufficient promotion of State cooperation by ICC organs; (4) lack of enforcement for State non-cooperation; and (5) limited engagement by victim legal representatives with OTP to pursue assets.<sup>187</sup> These issues should be more clearly articulated and tackled head-on by Trial Chamber III in its reparations decision. Our comments touch on some of these issues in addressing how to seize assets; proceeds of crime and legally held assets; how to split assets; and *bona fide* third parties.

### Seizing Assets

95. In terms of seeking cooperation from State Parties, requests for the freezing and seizing of assets should be specific and not general 'fishing expeditions', which most countries will ignore.<sup>188</sup> This requires sufficient investigation to identify the relevant bank accounts and other assets in a State.<sup>189</sup> The experience in other countries with seizing the assets of leaders is that governments can be reluctant to disclose the private bank information of third parties without guarantees, such as in the Marcos litigation.<sup>190</sup>
96. Greater effort should be made to identify the proceeds of crime. Money taken from Mr Bemba's frozen bank accounts could have been invested in property or intangible assets. This necessarily includes freezing and seizure requests to target named associates of the convicted person such as 'relatives, front companies or other suspect individuals or entities linked to the suspect or accused'.<sup>191</sup> Assets can be reclaimed through tracing this money where it has been transferred into other family members' accounts. In the Marcos case the Philippine

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<sup>186</sup> Request for Cooperation to Initiate an Investigation Addressed to the Competent Authorities of the Republic of Portugal, ICC-01/05-01/08-254 17-11-2008.

<sup>187</sup> C. Ferstman, Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations, in O. Bekou and D. Birkett (eds.), *Cooperation and the International Criminal Court Perspectives from Theory and Practice*, Brill (2016), 227-247.

<sup>188</sup> REDRESS, *Justice for Victims: The ICC's Reparations Mandate*, 2011, p78.

<sup>189</sup> D. Chaikin, Tracking the Proceeds of Organised Crime - The Marcos Case, Paper presented at the Transnational Crime Conference convened by the Australian Institute of Criminology in association with the Australian Federal Police and Australian Customs Service and held in Canberra, 9-10 March 2000.

<sup>190</sup> C. McCarthy, Reparations for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice, in Ferstman n.19, 283- 312, p348.

<sup>191</sup> REDRESS n.188, p78.

Presidential Commission on Good Government sought to recover assets from President Marcos' 'immediate family, relatives, subordinates and close associates whether located in the Philippines or abroad'.<sup>192</sup>

97. In the case of General Abacha former President of Nigeria, Swiss prosecutors designated General Abacha's family and former associations as a criminal organisation for stealing billions of US dollars from the Nigerian State.<sup>193</sup> Swiss prosecutors were able to proceed on the provision that the court has the power to confiscate all assets of a criminal organisation. For all persons who participate or support the criminal organisation, there is a presumption that all assets are at the disposal of the organisation until the defendant proves otherwise.<sup>194</sup> This reverse onus provision places the obligation on the defendant to prove that such assets have been obtained lawfully and are not the proceeds of crime. Accordingly, the Court should consider the use of a reverse onus burden for those who have benefitted from transfers out of Mr Bemba's frozen accounts, whether these be family members or former associates.

#### **Proceeds of Crime and Legally Held Assets**

98. It is worth distinguishing the cases of Marcos and Abacha, in that while they were allegedly responsible for serious human rights violations, their assets were frozen and seized on the basis of corruption investigations. Concentrating on the proceeds of corruption in the Swiss courts and other European countries such as the UK is easier than providing evidence on human rights abuses, especially given the system established within the UN Convention against Corruption on asset recovery.<sup>195</sup> In such cases, the assets seized are limited to the proceeds of crime. In the present case, where *Bemba* has been found guilty of international crimes, assets for the purpose of reparations should not be limited to the proceeds of crime, but should also include legally held assets. This has been explored in depth by the Colombian Constitutional Court in the *Gustavo Gallón Giraldo and others* case in relation to paramilitaries' assets being seized as part of a sentenced policy under the Justice and Peace Law 2005. In *Gustavo Gallón Giraldo and others* the Constitutional Court held that assets which could be seized for reparations necessarily included illegal and legal ones, despite the 2005 law stipulating only illegal assets could be seized and the resulting disincentives that handing over

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<sup>192</sup> Chaikin n.,189, p5.

<sup>193</sup> See E. Monfrini, *The Abacha Case*, in M. Pieth (ed.), *Recovering Stolen Assets*, Peter Lang (2008), 41-62.

<sup>194</sup> Article 59(3), of the Swiss Criminal Code. Now under Article 72 of the July 2016 version of the Code.

<sup>195</sup> Chapter V 'Asset Recovery', Articles 51-59, A/RES/58/4 of 31 October 2003.

such resources would have on peace and reconciliation.<sup>196</sup> The Colombian Constitutional Court justified this on the grounds that:

- those who cause damage should repair it as a principle of redress;
- while a perpetrator should be able to keep some money for them to lead a dignified life and move away from violence, this imposes the burden of financing reparations on those who did not cause the harm;
- paramilitary organisations accumulated vast wealth and developed sophisticated money laundering operations by moving the proceeds of crime or plundered property through the sale to bona fide third parties; and
- reparations are not solely beholden to financial policy, but are a right for victims to be satisfied. Reduced sentences for those who provide reparations can constitute a fair and appropriate balance.<sup>197</sup>

99. Accordingly, individuals who are convicted for international crimes at the ICC should have their illegal and legal assets seized for the purposes of reparations. This reflects the gravity of their crimes and the often diminutive resources available to the TFV in contrast to the number of victims. We would suggest that this is a useful approach for the current case, and that Mr Bemba's legal and illegal assets should be used for reparations. Regulation 117 of the Regulations of the Court provides for the Presidency and Registrar to monitor the financial situation of the convicted person even after imprisonment for the purpose of reparation orders. More broadly, this is congruent with one of the central principles of the Appeals Chamber decision in *Lubanga* that reparations are about accountability in making a convicted person responsible for remedying the harm they have caused.<sup>198</sup> With regards to Mr Bemba's family members and associates, they should not have their legal assets seized, as they have not been convicted. However, taking on board the Swiss practice in cases such as Abacha, a reverse onus should be placed on such individuals, allowing their assets to be seized and frozen (such as in cases where money was transferred from the Portugal accounts), until the family members and associates prove that the assets of are not the proceeds of crime.

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<sup>196</sup> Article 11.5, 2005 Peace and Justice Law. *Gustavo Gallón Giraldo y otros*, 18 May 2006, Sentencia C-370/2006, Expediente D-6032 (Colombian Constitutional Court), paragraph 6.2.4.1.11 of the Constitutional Court Judgment. See Orozco and Goetz n.185, p446-447.

<sup>197</sup> *Gustavo Gallón Giraldo y otros*, 6.2.4.1.12-15.

<sup>198</sup> ICC-01/04-01/06-3129, para. 69; and Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015, para. 2.

100. As Mr Bemba was convicted on his command responsibility for the crimes of the organisation, other members of the MLC/ALC should be held jointly liable for any reparations.<sup>199</sup> This follows practice in other States where there is a causal link between the activity of the armed group and the individual; collective responsibility for causing harm to victims is a liability jointly shared by all members of an armed group.<sup>200</sup> In other words, members of armed groups are responsible for their own individual actions as well as the crimes perpetrated by the group to which they pledge their allegiance and benefit from the proceeds of crimes. Thus an obligation to make reparations for both individual and organisational crimes should be incurred.
101. Other collaborators responsible for the violence committed by the MLC should be held to account for reparations, such as late former president Ange-Félix Patassé, who invited the MLC into CAR in 2002, ordered them out in 2003 and gave orders to their troops during the conflict to support his regime, and who is also responsible for misappropriating \$115 million of CAR public funds.<sup>201</sup> The military courts in the DRC have held the State and militias responsible for reparations to victims where they committed the crimes together.<sup>202</sup> The ICC should consider the implications of a conviction against the leadership of non-State armed groups on the joint liability of members of the organisation or those who facilitate crimes.

### **How to Split Assets?**

102. The Rome Statute, Rules and Regulations of the Court do not address the issue of competing claims for reparations. While Rule 221 and the Assembly of State Parties clarifies that reparations are prioritised over other claims (such as fine and forfeitures) on assets before the ICC,<sup>203</sup> there is no guidance on competing claims for reparations that fall outside the Court's jurisdiction or the charges convicted in a case. Indeed, such claims are likely to arise where a non-State armed group or State forces commit atrocities across country borders, such as the

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<sup>199</sup> See L. Moffett, *Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda*, in N. Gal-Or, C. Ryngaert and M. Noortmann, (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings*, (2015), 323-346.

<sup>200</sup> Corte Constitucional C-370/2006, 18 May 2006, para.6.2.4.4.7-6.2.4.4.13. A similar approach was adopted by the Northern Irish High Court against members and military council of the Real IRA for the Omagh bombing in *Breslin and Ors v Seamus McKenna & Ors* [2009] NIQB 50, para. 83-86.

<sup>201</sup> CAR's ex-leader 'wanted for murder', BBC News, 26 August 2003.

<sup>202</sup> For instance, Military Court of Katanga, *Affaire Ankoru*, 20 December 2004, RP 01/2003 and RP 02/2004.

<sup>203</sup> Rule 221 RPE; and Assembly of State Parties Resolution on *Victims and affected communities, reparations and Trust Fund for Victims*, ICC-ASP/12/Res.5, 27 November 2013, para. 12.

Lord's Resistance Army in the Great Lakes Region. This is particularly the case with the MLC in CAR and DRC. As Ferstman points out, there is no provision in the Rome Statute for competing requests for cooperation on asset claims, only the obligation for State Parties to engage in consultation with the Court on resolving such matters.<sup>204</sup>

103. A victim legal representative has previously tried to raise the responsibility of Mr Bemba for the crimes in the DRC,<sup>205</sup> but the Pre-Trial Chamber rejected this claim.<sup>206</sup> This is despite the fact that atrocities were committed by the MLC in 2001-2004 with the same *modus operandi* as the atrocities in the CAR, with hundreds killed, sexual violence committed against large numbers of women and children and widespread pillaging.<sup>207</sup> There is also the issue of other parties who collaborated and supported the MLC in committing such crimes, such as the Uganda government and Ugandan troops (UPDF).<sup>208</sup>
104. We appreciate the findings of the Appeals Chamber in the *Lubanga* case that only crimes of which a defendant is convicted can be the subject of a reparations award (although see our comments above regarding geographical scope). Given that the ICC remains the only current international forum on reparations for crimes committed in the DRC,<sup>209</sup> it is unlikely that victims of the military wing of the MLC in the DRC are likely to receive redress elsewhere. Rather than suggesting reparations for these victims in the DRC that would be beyond the ICC's jurisdictional remit, we would suggest that the Court has a choice between using all available resources for those victims eligible for the crimes Mr Bemba is convicted in the CAR, or extending this scope of victims to include assistance measures for victims of the military wing of the MLC in the DRC.
105. With regards to the latter option, Mr Bemba's assets would be split between victims of the military wing of the MLC in CAR for reparations and the TFV to provide assistance to

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<sup>204</sup> Ferstman n.187; Article 97, Rome Statute.

<sup>205</sup> *Situation in the Democratic Republic of the Congo*, Demande du représentant légal de VPRS 3 et 6 aux fins de mise en cause de Monsieur Jean-Pierre Bemba en sa qualité de chef militaire au sens de l'article 28-a du Statut pour les crimes dont ses troupes sont présumées coupables en Ituri, ICC-01/04-564, 30 June 2010.

<sup>206</sup> Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed, ICC-01/04-582, 25 October 2010.

<sup>207</sup> OHCHR, Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, August 2010 (UN Mapping Report), para. 381, 416, 602, and 607.

<sup>208</sup> UN Mapping Report, *ibid.* para. 697.

<sup>209</sup> We recognise the ongoing reparations proceedings at the International Court of Justice in *DRC v Uganda* case, but this is inter-State with individual victims unlikely to receive direct reparations unless the DRC creates a domestic reparations programme for victims if Uganda pays the reparations due.

additional identified victims of the military wing of the MLC in DRC.<sup>210</sup> Ideally a domestic Congolese reparation mechanism would redress these victims, but there is nothing yet proposed in the DRC that could fulfil such a function. For such a fund to be established for DRC victims they would have to reach the evidential standard of a balance of probability that Mr Bemba as commander of the military wing of the MLC was responsible for atrocities in the DRC and to identify those locations. For Mr Bemba to be liable for reparations for such crimes in the DRC, it would clearly go beyond the standard set by the Appeals Chamber for reparations being based on the crimes of which the individual is convicted.<sup>211</sup> This would side step the issue of using the donor-raised resources of the TFV for court directed reparations and assistance. Although the Appeals Chamber in the *Lubanga* case was clear that a Trial Chamber cannot control the TFV donor funds under its reparations mandate, for resources seized against a convicted person the Trial Chamber is in control.<sup>212</sup>

106. There is some precedence to split seized assets for reparations and assistance measures to maximise benefits to victims. In the Swiss Bank Holocaust, persecution, slavery and forced labour settlement, the Distribution Plan drawn up by the Special Master was intended to be a fair and equitable way to distribute 'an historic, yet limited, settlement fund'.<sup>213</sup> While the \$1.25 million settlement fund was distributed to identifiable owners of bank accounts and victim classes, \$205 million of unanticipated tax benefits was designated as humanitarian assistance for the most vulnerable survivors.<sup>214</sup> In addition, \$10 million of the settlement fund<sup>215</sup> was set aside 'to compile and make widely accessible, for research and remembrance, the names of all Victims or Targets of Nazi Persecution.'<sup>216</sup> Similarly in the Philippines former president Marcos' assets were managed by a District Attorney of Zurich and split between reparations and assistance. A distinction could be drawn with the Marcos case, which involved a sizeable amount of money (\$567 million) that enabled a meaningful dual programme of reparations

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<sup>210</sup> B. McGonigle Leyh, *The Socialization of Transitional Justice: Attempts to Recognize the Indivisibility, Interdependency and Interrelatedness of Human Rights*, paper presented at 2016 Association of Human Rights Institutes, Utrecht University, 2 September 2016.

<sup>211</sup> ICC-01/04-01/06-3129, para. 118.

<sup>212</sup> Article 79(2). ICC-01/04-01/06-3129, para. 106-117.

<sup>213</sup> Gribetz and Reig, n.19, p121.

<sup>214</sup> *Ibid.* p122.

<sup>215</sup> *In re Holocaust Victim Assets Litigation*, 319 F.Supp.2d 301, 303 (E.D.N.Y. 2004).

<sup>216</sup> *Ibid.* fn.19.

for victims of the Marcos regime and assistance to poor farmers.<sup>217</sup> The Trial Chamber should explore with the TFV the possibility of splitting any remaining assets of Mr Bemba between reparations to victims in the CAR and assistance to MLC victims in the DRC.

### **Bona Fide Third Parties**

107. In making any reparation awards against the assets of Mr Bemba, the Court will have to consider the claims of bona fide third parties over such resources. The Rome Statute stipulates that States 'shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties'.<sup>218</sup> The Court can achieve this by providing notification to bona fide third parties that such resources will be used for reparations as per Rules 99(3) and 147. If third parties have any claims their due process rights should be ensured through participation or representation before the Court to determine their bona fide claims, based on legal documents on the nature of their ownership of the property.<sup>219</sup>

### **Complementarity**

108. We are acutely aware that any reparations the ICC can award in the *Bemba* case are likely to be only a small contribution to remedying the harm of some victims. Given more recent violence in CAR, there is pressing need for redress that expands beyond the bounds of the *Bemba* case. The crimes Mr Bemba is responsible for in the CAR are part of a wider mosaic of atrocities committed by other actors over the past few decades and the ICC can only contribute to remedy a piece of the consequences of this violence.

109. The ICC is severely constrained in its resources and capacity to deliver reparations. As noted in our earlier submission to the Court in the *Katanga* case, State cooperation will be a key component of widening the benefits of any reparations awarded by the ICC.<sup>220</sup> The Court can adopt a two-pronged approach: hard and soft options. The hard approach to cooperation is ordering State Parties to cooperate under Article 93(1) with its reparations order to facilitate certain measures. This reflects that reparations are integral in addressing the harmful

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<sup>217</sup> See I. Carr and R. Jago, *Corruption, the United Nations Convention against Corruption, and Asset Recovery*, in King and Walker (eds.), *Dirty Assets: Emerging Issues in the Regulation of Criminal & Terrorist Assets*, Routledge (2014), 203-228.

<sup>218</sup> Article 109(2), Rome Statute.

<sup>219</sup> Article 55(3)(b), UNCAC.

<sup>220</sup> ICC-01/04-01/07-3551, para. 72-75.

consequences of international crimes. We have already outlined such cooperation possibilities with seizing assets and recovery of the remains of those disappeared. The soft option is engaging in a dialogue with State Parties, such as the CAR and DRC, in terms of reparative complementarity.<sup>221</sup> Trial Chamber III should make the most of the opportunity, with the attention on the Bemba reparations decision, to call upon the CAR and DRC governments to establish national reparations mechanisms. Although a conviction of an individual person before the ICC does not affect the responsibility of the State, States have a primary interest in remedying the harm of individuals and groups within their jurisdiction. A national reparations mechanism would help to widen the benefits of reparations to other victims, beyond those before the Court and avoid a hierarchy of victimhood that may stigmatise any reparations awards to ICC eligible victims alone.

110. To fully achieve transformational reparations for sexual violence, the coordination of State and civil society actors (local and international) to tackle the causes and consequences of such crimes is necessary. To realise gender justice for sexual violence ‘requires extensive State-sponsored, collective measures to bring about equal gender representation in decision making, a significant redistribution of economic resources and the removal of socially and culturally embedded gender-biased practices.’<sup>222</sup> The ICC cannot redress all harm in the CAR, nor shape the State’s institutions to prevent future violence. Nonetheless the *Bemba* case and its reparations order offers a unique opportunity to highlight the wider victim population in CAR and their need for redress similar harms suffered as a result of violence in 2003-4 and since 2013. Perhaps suggesting the CAR establish a national public holiday of a day of reflection, remembrance or recognition of victims would help to increase respect for victims and encourage further dialogue on national reparations for victims who will not benefit in the *Bemba* case.

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<sup>221</sup> See Moffett n.15.

<sup>222</sup> A. Durbach and L. Chappell, Leaving Behind the Age of Impunity, *International Feminist Journal of Politics* 16 (4)(2014) 543–562, p554.



## Final Remarks

111. Reparations at the ICC offer an opportunity for the Court to focus on victims' harm and engage in a discussion on how best to alleviate their continuing suffering. We recognise that Mr Bemba's assets may be depleted and the TFV resources limited, but the ICC is not the only institution that can support reparations for victims in the CAR. Given that over a decade has passed since the MLC's crimes in the CAR, we recommend that the ICC swiftly moves forward to minimise any further secondary victimisation in delayed legal proceedings. We hope these suggestions on principles, procedure, types and modalities, liability and assets, and complementarity can help to inform reparations in the *Bemba* case.



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Dr Luke Moffett,  
Director of Queen's University Belfast Human Rights Centre  
on behalf of  
Queen's University Belfast Human Rights Centre

Dated this 17th October 2016

At [place, country]