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**International  
Criminal  
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Date: **31 October 2016**

**TRIAL CHAMBER III**

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

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC**

*IN THE CASE OF*

*THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO*

**Public**  
**with public Annex A and confidential Annex B**

**Prosecution's Observations on Reparations**

**Source:** Office of the Prosecutor

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

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## Introduction

1. The principles established by the Appeals Chamber in the *Lubanga* case are generally applicable to the reparations proceedings against Mr Jean-Pierre Bemba. The Trial Chamber should, however, develop and supplement these principles to adapt them to the characteristics of this case, in particular, the harm suffered by the victims of the crimes for which Mr Bemba was convicted (murder and rape, both as crimes against humanity and war crimes, and the war crime of pillaging).
  
2. In addition, and considering the substantial number of rape victims, the principles and reparations procedures should be tailored to adequately identify and fully measure the devastating physical and psychological damage inflicted on the victims and the material and financial consequences of the crimes, and to provide prompt and effective remedies. At the same time, they should avoid reinforcing pre-existing social patterns of inequality and discrimination for both men and women.
  
3. Further, the scope of Mr Bemba's liability for reparations, and the monetary obligations to be imposed on him, should take into account the serious gravity of Mr Bemba's culpable conduct, in light of his repeated and ongoing failures to act in the face of heinous crimes being committed by his subordinates over approximately four and a half months, his consistent knowledge of those crimes and his ultimate authority over the *Mouvement de libération du Congo* ("MLC") troops in the Central African Republic ("CAR").<sup>1</sup>

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<sup>1</sup> ICC-01/05-01/08-3399 ("*Bemba* Sentencing Decision"), para. 67.

## Submissions

4. Mindful of the primary role of the Legal Representatives of Victims in proceedings solely pertaining to reparations,<sup>2</sup> the Prosecution provides below its observations on the issues identified in the Trial Chamber's Order of 22 July 2016:<sup>3</sup>

### A. Whether the principles established by the Appeals Chamber in the *Lubanga* case<sup>4</sup> need to be amended or supplemented

5. The "Principles on Reparations" established by the Appeals Chamber in the *Lubanga* case<sup>5</sup> are generally applicable to Mr Bemba. Nevertheless, the Trial Chamber should develop and supplement these principles to adapt them to the characteristics and needs of the victims of the crimes for which Mr Bemba has been convicted, in particular, the victims of rape.<sup>6</sup> The Trial Chamber should also provide guidance on the implementation stage of the reparations proceedings to avoid unnecessary litigation and ensure that the victims are promptly provided with an effective remedy.<sup>7</sup>

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<sup>2</sup> The Prosecution is not a party in reparation proceedings. See ICC-01/12-01/15-172, fn. 3 (*Al-Mahdi*). See also ICC-01/04-01/07-3532, para. 10 (*Katanga*) and ICC-01/04-01/06-3179, paras. 5-6 (*Lubanga*).

<sup>3</sup> ICC-01/05-01/08-3410, para. 7 ("Order of 22 July 2016").

<sup>4</sup> On 3 March 2015, the Appeals Chamber partially overturned Trial Chamber I's decision on reparations in the *Lubanga* case (ICC-01/04-01/06-2904: "*Lubanga* Reparations Decision") and amended its Reparations Order. See ICC-01/04-01/06-3129 A A2 A3 ("*Lubanga* Reparations AJ") and ICC-01/04-01/06-3129-AnxA A A2 A3 ("*Lubanga* Amended Order").

<sup>5</sup> *Lubanga* Amended Order, paras. 1-52. See *Lubanga* Reparations AJ, para. 3.

<sup>6</sup> *Lubanga* Amended Order, para. 5.

<sup>7</sup> *Lubanga* Amended Order, para. 1. See also UN Basic Principles on Reparation for Victims A/RES/60/147, 16 December 2005 ("UN Basic Principles"), principles 11(b), 15.

**(i) Victims of rape**

6. In light of the substantial number of rape victims in this case, the Principles established in the *Lubanga* case should be developed and supplemented to fully apprehend the tragic, diverse and far-ranging consequences of sexual and gender-based crimes in conflict-related areas as well as the sensitivities and stigmas attached to them.<sup>8</sup> Consequently, a gender-sensitive approach at all stages of the reparations procedure<sup>9</sup> is necessary to adequately identify the harm suffered by the victims of these crimes, to satisfactorily measure these harms,<sup>10</sup> and to design types and modalities of reparations that effectively address them.<sup>11</sup>

7. In addition, reparations should not reinforce pre-existing patterns of subordination and discrimination for men and women;<sup>12</sup> rather, they should strive to have a transformative effect.<sup>13</sup> This factor should also be considered throughout the reparations proceedings, in particular, in selecting and designing the types and modalities of reparations,<sup>14</sup> and when distributing the reparation awards.<sup>15</sup>

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<sup>8</sup> UN Secretary General Guidance Note on Reparations for Conflict-Related Sexual Violence, June 2014 (“UN Guidance Note”), pp. 2-3 and 19 (on rehabilitation).

<sup>9</sup> Although the Appeals Chamber in *Lubanga* already required a gender-inclusive approach (*Lubanga* Amended Order, para. 18) and bore in mind the gender and age aspect in several principles (*see e.g.*, paras. 17-19), additional and more detailed principles are necessary to fully capture and address the consequences of these crimes.

<sup>10</sup> UN Guidance Note, pp. 5, 17 (on compensation). Sexual violence can cause, among other consequences, loss of income and have serious consequences for the income potential of the victims. However, the damage may be difficult to quantify considering that often traditional women’s work is at home looking after the family.

<sup>11</sup> UN Guidance Note, p. 17.

<sup>12</sup> *See Lubanga* Amended Order, para. 17, where this concept is already introduced, and para. 38 on compensation. *See also* Nairobi Declaration on Women’s and Girl’s Right to a Remedy and Reparation, March 2007 (“Nairobi Declaration”), principle 1B; UN Guidance Note, pp. 5, 8.

<sup>13</sup> UN Guidance Note, pp. 8-9; Nairobi Declaration, principles 1D and 3H. *See also Lubanga* Amended Order, para. 34.

<sup>14</sup> UN Guidance Note, p. 5.

<sup>15</sup> UN Guidance Note, pp. 5, 16. *See also* Nairobi Declaration, principle 2E.

8. Further, considering the large number of victims participating at trial (5,229)<sup>16</sup> – and assuming, *arguendo*, that a large number of victims would be entitled to reparations, the Trial Chamber may need to prioritise among eligible beneficiaries and/or modalities of reparations. In *Lubanga*, the Appeals Chamber stated that priority may need to be given to victims “who are in a particularly vulnerable situation or who require urgent assistance”.<sup>17</sup> The Trial Chamber may want to identify additional criteria for prioritisation depending on the nature and scope of victimisation.<sup>18</sup>

### (ii) Implementation stage

9. In addition, the Trial Chamber should clearly set out the procedure to be followed at the implementation stage - and the Chamber’s interaction with the TFV.<sup>19</sup> First, and consistent with the Reparations Appeal Judgment in the *Lubanga* case,<sup>20</sup> the Trial Chamber needs not decide on individual applications if it decides to award collective reparations. Rather, the TFV would identify the beneficiaries of reparations at the implementation stage.<sup>21</sup> The TFV (and the Trial Chamber in approving the

<sup>16</sup> Order of 22 July 2016, para. 6.

<sup>17</sup> *Lubanga* Amended Order, para. 19.

<sup>18</sup> *Lubanga* Amended Order, para. 19. In its recommendations on reparations, the Kenyan Truth, Justice and Reconciliation Commission decided to also prioritise “individuals who have been victims of violations of the right to life as well as the right to personal integrity”: see KTRC, Report of the Truth, Justice and Reconciliation Commission Kenya, 2013, Volume IV, Chapter III, para. 16 (p. 104).

<sup>19</sup> The implementation stage begins after the Trial Chamber issues the Reparations Order: ICC-01/04-01/06-2953 A A2 A3 OA21, paras. 53-57.

<sup>20</sup> This conclusion can be reached from a general and purposive reading of the Judgment: *first*, the Appeals Chamber expressly entrusted the new Trial Chamber to only monitor and oversee the implementation of the Order (including having the ability to approve the Draft Implementation Plan) and determine the amount for which Mr Lubanga is responsible (*Lubanga* Amended Order, paras. 76, 81). *Second*, the Appeals Chamber found that Trial Chamber I had not erred when it did not rule on individual requests for reparations. As the Trial Chamber had determined that collective reparations were more appropriate, this decision operated as a decision denying, as a category, individual reparation awards (*Lubanga* Reparations AJ, paras. 149-157). *Third*, the Appeals Chamber found that Mr Lubanga’s rights were not infringed because he could not challenge the identity of the individuals applying for collective reparations. It sufficed that Mr Lubanga was able to review the screening process of victims at the implementation stage subject to any protective measures. (*Lubanga* Reparations AJ, paras. 166-167; *Lubanga* Amended Order, para. 66).

<sup>21</sup> In *Lubanga*, Trial Chamber II appeared to understand the *Lubanga* Reparations AJ as requiring it to approve the potential victims eligible to benefit from reparations before it could decide on the amount for which Mr

screening process)<sup>22</sup> should, however, ensure that only those meeting the eligibility criteria (namely, those who have suffered harm as a result of crimes for which Mr Bemba has been convicted) are entitled to reparations.<sup>23</sup>

10. Second, Mr Bemba's monetary obligations for collective reparations must be proportionate to the totality of the harm caused, which is up until now, like in the *Lubanga* case,<sup>24</sup> mainly reflected in the Trial Judgment and Sentencing Decision.<sup>25</sup> Additional enquiries should however be conducted to ascertain additional harms.<sup>26</sup>

## **B. Criteria and methodology to be applied in the determination and assessment of various factors:**

### **(i) The eligibility of victims**

*Direct and indirect victims; natural and legal persons; communities*

11. Victims eligible for reparations are those who have suffered harm as a result of

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Lubanga was responsible (ICC-01/04-01/06-3198-tENG, para. 14: "*Lubanga* Order 9 February"). The TFV sought reconsideration of this approach and submitted that the TFV should identify the beneficiaries at implementation stage (ICC-01/04-01/06-3208, paras. 85-201: "*Lubanga* TFV First Submission Victim Dossiers"). See also ICC-01/04-01/06-3237, paras. 25-33, where the TFV has further explained its victim screening process.

<sup>22</sup> *Lubanga* Amended Order, para. 76.

<sup>23</sup> *Lubanga* Reparations AJ, para. 214 and *Lubanga* Amended Order, para. 54.

<sup>24</sup> In the *Lubanga* case, the Trial Chamber appeared to initially link the amount for which Mr Lubanga was responsible to the harm suffered by the identified victims (*Lubanga* Order 9 February, para. 14). However, the Chamber's position may have shifted towards the TFV's approach (see ICC-01/04-01/06-3218-tENG, para. 8). The TFV has argued that the amount should be proportionate to the totality of the harm (*Lubanga* TFV First Submission Victim Dossiers, paras. 137-190).

<sup>25</sup> This conclusion can similarly be reached from a general and purposive reading of the Judgment: *first*, the Appeals Chamber linked the reparation proceedings to Mr Lubanga's criminal liability (*Lubanga* Reparations AJ, paras. 65, 151). *Second*, the Appeals Chamber found that the convicted person's liability for reparations must be proportionate to the harm caused as established by the Court (*Lubanga* Reparations AJ, paras. 6, 118 and *Lubanga* Amended Order, paras. 21, 45). *Third* and notably, the Appeals Chamber found that collective reparations must be based on the evidence and factual findings relevant to the entire trial proceedings and not on the basis of the individual requests for reparations received (*Lubanga* Reparations AJ, paras. 148(f), 151, 185, 186, 187).

<sup>26</sup> *Lubanga* Reparations AJ, para. 238. See *below*, paras. 21 and 29.

the crimes for which Mr Bemba was convicted,<sup>27</sup> namely, (i) murder as a crime against humanity and as a war crime in three different locations (Bangui, PK12 and Mongoumba) at the beginning and end of the 2002-2003 CAR operation;<sup>28</sup> (ii) rape as a crime against humanity and as a war crime throughout the geographical and temporal scope of the 2002-2003 CAR Operation;<sup>29</sup> and (iii) pillaging as war crime throughout the geographical and temporal scope of the 2002-2003 CAR Operation.<sup>30</sup>

12. Victims<sup>31</sup> can be direct victims (those whose harm was the result of the commission of the above mentioned crimes)<sup>32</sup> and indirect victims (those who suffered harm as a result of the harm suffered by direct victims).<sup>33</sup> Victims may include both natural and legal persons.<sup>34</sup>

13. The categories of indirect victims identified by the Appeals Chamber in the *Lubanga* case appear applicable to this case.<sup>35</sup> In determining whether a person is a family member of a direct victim (and thus a potential indirect victim), the Trial Chamber should consider the social and familial structures applicable in the CAR, bearing in mind that the concept of “family” may have many cultural variations.<sup>36</sup> In

<sup>27</sup> *Lubanga* Reparations AJ, paras. 1, 32, 99, 184, 211; *Lubanga* Amended Order, paras. 20, 54.

<sup>28</sup> ICC-01/05-01/08-3343 (“*Bemba* TJ”), para. 624; *Bemba* Sentencing Decision, paras. 27, 32-33.

<sup>29</sup> *Bemba* TJ, para. 633; *Bemba* Sentencing Decision, paras. 34, 40.

<sup>30</sup> *Bemba* TJ, para. 640; *Bemba* Sentencing Decision, paras. 48, 51.

<sup>31</sup> *Lubanga* Amended Order, para. 6. On the definition of direct and indirect victims, see ICC-01/04-01/06-1813, para. 44.

<sup>32</sup> *Bemba* TJ, paras. 624, 633 and 640, where the Trial Chamber lists the direct victims of murder, rape and pillaging, respectively.

<sup>33</sup> *Bemba* Sentencing Decision, paras. 23, 31-32, 38-40, 49-51.

<sup>34</sup> *Lubanga* Amended Order, para. 8; Rule 85(b). In this case Trial Chamber III admitted 14 organizations or institutions to participate at trial under rule 85(b). See *Bemba* TJ, para. 21.

<sup>35</sup> *Lubanga* Amended Order, para. 6.

<sup>36</sup> *Lubanga* Amended Order, para. 7. See for example ECCC Appeal Judgment in the *Kaing Guek Eav alias Duch* case, 3 February 2012, para. 562: “[...] the Trial Chamber was correct to articulate the requirement of special bonds of affection or dependence between a direct victim and the claimed indirect victim. This Chamber has further held that close family members may be presumed to have had such bonds. As to what constitutes a close family is context dependent. In the Cambodian context large families live together and form ties connecting immediate and non-immediate family members. By Western standards, grown-up family members do not usually co-habit with their parents or siblings; families are atomized, smaller and economically autonomous. Lack of co-habitation, however, does not preclude bonds of affection, especially within small families, where exclusivity of these bonds may render them strong.” Emphasis added.



particular, the existence of a close personal relationship – which is relevant to identify indirect victims - should not be limited to that between parents and children.<sup>37</sup>

14. Further, collective reparations may also be awarded to a community, understood as a group of victims,<sup>38</sup> as long as there is a sufficient causal link between the harm suffered by members of that community and the crimes for which Mr Bemba is found guilty.<sup>39</sup>

15. Finally, the underlying acts of murder, rape and pillaging for which Mr Bemba was convicted<sup>40</sup> were only a portion of the total number of crimes committed by MLC forces during the 2002-2003 CAR Operation.<sup>41</sup> To the extent that victims of those other crimes (for which Mr Bemba has not been convicted) are not eligible for reparations from him (because there is no causal link between their harm and the crimes for which Mr Bemba is convicted), they are not excluded from the benefits of any other assistance activities that the TFV may undertake according to its mandate under regulation 50(a) of the Regulations of the TFV.<sup>42</sup>

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<sup>37</sup> ICC-01/04-01/06-1432 OA9 OA10, para. 32 where the Appeals Chamber found that the relation between parents and children is an example of “close personal relationship”. This finding does not exclude other relations which, considering the circumstances of the case and context, also may constitute “close personal relationships”.

<sup>38</sup> See e.g., ICC-01/12-01/15-171 (“*Al-Mahdi* Judgment and Sentence”), paras. 78-80.

<sup>39</sup> *Lubanga* Reparations AJ, paras. 211-212, 214. Other members of the affected communities could benefit from activities undertaken by the TFV in relation to its assistance mandate. See *Lubanga* Reparations AJ, para. 215 and *Lubanga* Amended Order, para. 55.

<sup>40</sup> See above, footnotes 28-30.

<sup>41</sup> *Bemba* TJ, paras. 671 and 688; see also paras. 486, 525, 527, 531, 534, 543 and 563 and the “reliable evidence” referred to therein. See also *Bemba* Sentencing Decision, para. 22.

<sup>42</sup> *Lubanga* Reparations AJ, para. 199.

### *Identification of the victims*

16. The Trial Chamber may either choose to identify in the Reparations Order the victims eligible to benefit from reparations, or more appropriately if the Trial Chamber orders collective reparations,<sup>43</sup> only set out the criteria of eligibility for such victims in the Order and entrust the TFV to identify the beneficiaries at the implementation stage.<sup>44</sup>

17. Conversely, if the Trial Chamber orders individual reparations (not deposited through the TFV under rule 98(2)), it would need to rule on the victims' rule 94 applications and accordingly identify the beneficiaries in the Reparations Order.<sup>45</sup>

### *Documentation to be provided by victims*

18. As in the *Lubanga* case, and consistent with the practice in this case,<sup>46</sup> victims "may use official and unofficial documents, or any other means of demonstrating their identities."<sup>47</sup> In the absence of acceptable documentation, "a statement signed by two credible witnesses establishing the identity of the applicant and describing

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<sup>43</sup> In *Lubanga*, the Appeals Chamber made this finding in the context of collective reparations. The Appeals Chamber found that the Trial Chamber was not required to rule on the individual applications for reparations because a collective award was made pursuant to rule 98(3): *Lubanga* Reparations AJ, paras. 148-157.

<sup>44</sup> *Lubanga* Reparations AJ, para. 205. *See also* para. 32.

<sup>45</sup> In *Lubanga*, the Appeals Chamber found that Trial Chamber I did not err in not deciding on individual applications because collective reparations were awarded (*Lubanga* Reparations AJ, paras. 143, 156). It then clarified that this finding was without prejudice of whether a Trial Chamber would be required to rule on individual applications if it decides to award individual reparations pursuant to rule 98(2) or both individual and collective reparations (*Lubanga* Reparations AJ, para. 152). Hence, it appears that if the Trial Chamber decides to award individual reparations – but not through the TFV (rule 98(2)) - it would need to rule on the rule 94 applications (which are relevant to an "applications based process": *Lubanga* Reparations AJ, para. 142) and identify the beneficiaries' identities in the reparations order. The TFV Regulations only refer to individual reparations pursuant to regulation 98(2). *See* TFV Regulations 59 to 68.

<sup>46</sup> ICC-01/05-01/08-699, paras. 35-36 referring to the Pre-Trial Chamber's approach in ICC-01/05-01/08-320, paras. 36-38. *See also* ICC-01/05-01/08-1017, paras. 40-41.

<sup>47</sup> *Lubanga* Amended Order, para. 57.

the relationship between the victim and any individual acting on his or her behalf is acceptable".<sup>48</sup>

## (ii) The relevant harms

### *Types of harm and their identification in the Reparations Order*

19. As the Appeals Chamber has noted, "harm" may be understood as "hurt", "injury" or "damage".<sup>49</sup> In its nature, the harm may be "material", "physical" or "psychological".<sup>50</sup> Natural persons may suffer direct or indirect harm, and legal persons may suffer direct harm.<sup>51</sup> In all cases, the harms must be "personal to the victim" in the sense that the victim was (or still is) himself or herself adversely affected by it, although not necessarily uniquely so.<sup>52</sup>

20. In the Reparations Order, the Trial Chamber should clearly define the harms suffered by direct and indirect victims that have resulted from the crimes for which Mr Bemba has been convicted.<sup>53</sup> The Trial Chamber may choose to itself assess and determine the extent of the harms suffered (with or without the assistance of experts)<sup>54</sup> and to specify the size and nature of the reparations award in the Order<sup>55</sup> or instead, may defer such an assessment to the TFV and only set out the criteria to be applied by the TFV in making this assessment.<sup>56</sup> On the latter basis, the TFV would determine the size and nature of the reparations award in the Draft

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<sup>48</sup> *Ibid.*

<sup>49</sup> ICC-01/04-01/06-1432 OA9 OA10, para. 31. *Lubanga* Amended Order, para. 10.

<sup>50</sup> ICC-01/04-01/06-1432 OA9 OA10, para. 32. *Lubanga* Amended Order, para. 10.

<sup>51</sup> ICC Rules Procedure and Evidence ("ICC Rules"), rule 85(b).

<sup>52</sup> ICC-01/04-01/06-1432 OA9 OA10, para. 39. *Lubanga* Amended Order, para. 10.

<sup>53</sup> *Lubanga* Reparations AJ, paras. 181, 184.

<sup>54</sup> ICC rule 97(2).

<sup>55</sup> *Lubanga* Reparations AJ, fn. 231.

<sup>56</sup> *Lubanga* Reparations AJ, paras. 183-184.

Implementation Plan<sup>57</sup> – which the Trial Chamber must then approve.<sup>58</sup>

21. The Prosecution defers to the Victims' submissions, and eventual experts' observations, to assist the Trial Chamber in determining the specific types and the extent of the harms suffered in this case.<sup>59</sup> The Prosecution further supports the carrying out of a comprehensive assessment by experts on gender and sexual violence in conflict related areas to ensure that the reparations proceedings adequately identify and assess, and effectively address, the grave, diverse, far-reaching and long-lasting consequences of the harms inflicted, conform with the principle of "do no harm", and have a potential for a transformative effect. The Prosecution supports this approach as a consistent matter of policy.<sup>60</sup> Further, and considering that children were also victims of the crimes, as in *Lubanga*, a child-sensitive approach is relevant to capture the full extent of the harm caused to boys and girls.

22. Notwithstanding the above, the Prosecution notes that the Sentencing Decision provides guidance on the types and extent of the harm resulting from the crimes for which Mr Bemba was convicted:

<sup>57</sup> *Lubanga* Reparations AJ, para. 183.

<sup>58</sup> On the Trial Chamber's approval of the Draft Implementation Plan, see TFV Regulations, regulations 54-57 and 69. Although in *Lubanga* the Trial Chamber only awarded collective reparations, the Appeals Chamber indicated that this approach was also possible for individual reparations. See *Lubanga* Reparations AJ, para. 183. Although not expressly stated, the Appeals Chamber would have referred to individual reparations through the TFV pursuant to rule 98(2), which are regulated in regulations 59 to 68 of the TFV Regulations. Conversely, it would appear that the Trial Chamber cannot delegate to the TFV the determination of the extent and scope of the harm if individual reparations are not awarded through the TFV. TFV regulations do not refer to individual reparations pursuant to rule 94 applications. However and prior to issue the Order, the Trial Chamber should benefit from expert submissions on the extent of the harm, pursuant to rule 97(2).

<sup>59</sup> In *Lubanga*, the Appeals Chamber noted that a Trial Chamber need not limit to the harms identified in the Judgment and Sentencing Decision and could make findings of harms for which reparations may be awarded in the Reparations Order based on evidence under regulation 56 (it does not appear that such evidence was elicited at trial), evidence provided by experts, Parties and participants in a reparations hearing or written submissions, or evidence contained in rule 94 applications: *Lubanga* Reparations AJ, para. 185.

<sup>60</sup> OTP SGBC Policy, paras. 11, 102. Thus, the Trial Chamber should appoint experts pursuant to rule 97(2). The Prosecution hereby responds to issue (d) of paragraph 7 of the Order of 22 July 2016.

- First, indirect victims of murder may have suffered not only psychological harm resulting from the murder of a direct victim (in particular, if they witnessed the murder),<sup>61</sup> but also physical harm if they, for example, tried to prevent the murder or helped or intervened on behalf of the direct victim.<sup>62</sup> They may have also suffered material deprivation resulting from the loss of the direct victim.<sup>63</sup>
- Second, among the different types of harm caused to direct victims of rape, the Trial Chamber may identify physical injury and trauma (including the loss of being able to bear children), psychological trauma and the development of psychological disorders, such as PTSD, depression, suicidal tendencies,<sup>64</sup> which may in turn have an impact on the victim's education (causing the victim to drop out from school) and source of income as well as cause loss of opportunities and status.<sup>65</sup> Indirect victims of rape may have also suffered psychological harm.<sup>66</sup>
- Third, victims of pillaging suffered loss of property (including livestock) which may have led to, *inter alia*, loss of opportunities.<sup>67</sup>

*Standard of proof of the causal link and causation standard*

23. The applicant victims have the burden of proving the link between the crimes for which Mr Bemba was convicted and their harm. The “appropriate” standard—and also what is “sufficient” for an applicant to meet the burden of proof—will depend upon the circumstances of the specific case, including with reference to

<sup>61</sup> Bemba Sentencing Decision, para. 29.

<sup>62</sup> Bemba Sentencing Decision, para. 29. Lubanga Amended Order, paras. 6(b)(ii)-(iii) and 58(b)(iii).

<sup>63</sup> Bemba Sentencing Decision, para. 30. Lubanga Amended Order, paras. 6(b)(iv) and 58(b)(ii).

<sup>64</sup> Bemba Sentencing Decision, para. 38.

<sup>65</sup> *Ibid.*, para. 39.

<sup>66</sup> *Ibid.*, para. 38.

<sup>67</sup> *Ibid.*, para. 50.

difficulties encountered by the victims in obtaining evidence in support of their claim.<sup>68</sup> Given the fundamentally different nature of reparations proceedings, the standard need not be the criminal standard of proof “beyond reasonable doubt”<sup>69</sup> and it may generally be appropriate to require proof on the “balance of probabilities”, as in the *Lubanga* case.<sup>70</sup>

24. The standard of causation must likewise be determined in light of the particular circumstances of a case.<sup>71</sup> Thus, the Trial Chamber should consider the difficulties in linking the harm suffered to the crimes considering the multi-layered nature of the harms, the fact that the harms may have merged with other instances of harm and the time elapsed. As in *Lubanga*, the Trial Chamber may also want to require a “but for” and “proximate cause” relationship.<sup>72</sup>

**(iii) The scope of Mr Bemba’s liability, including the determination of the precise extent of the (monetary) obligations to be imposed on him**

25. As found by the Appeals Chamber in the *Lubanga* case, the Trial Chamber must determine the scope – and the amount - of Mr Bemba’s liability for reparations in the Reparations Order.<sup>73</sup> The Prosecution defers to the Victims’ submissions, and to the relevant expert advice, to assist the Chamber in this determination. The Trial Chamber should nevertheless consider that Mr Bemba’s participation in the commission of the crimes and his criminal liability are of serious gravity. In addition, the Trial Chamber should expeditiously determine the amount for which Mr Bemba

<sup>68</sup> *Lubanga* Reparations AJ, para. 81 confirming *Lubanga* Reparations Decision, paras. 251-252. See also *Lubanga* Amended Order, para. 22.

<sup>69</sup> *Lubanga* Amended Order, para. 22.

<sup>70</sup> *Lubanga* Reparations AJ, para. 83; *Lubanga* Amended Order, para. 65.

<sup>71</sup> *Lubanga* Reparations AJ, para. 80.

<sup>72</sup> *Lubanga* Reparations Decision, para. 250 upheld in *Lubanga* Reparations AJ, paras. 124-129 and *Lubanga* Amended Order, para. 59.

<sup>73</sup> *Lubanga* Reparations AJ, paras. 237.

is liable.

26. First, and consistent with the *Lubanga* Appeals Judgment, Mr Bemba's liability for reparations should be proportionate to the harm caused and to Mr Bemba's participation in the crimes for which he has been convicted, among other factors.<sup>74</sup> This assessment should be conducted considering the specific circumstances of the case rather than relying *in abstracto* on the legal qualification.<sup>75</sup>

27. The facts of this case indicate that Mr Bemba's culpable conduct was of serious gravity:<sup>76</sup> (1) Mr Bemba was the highest-ranking MLC official with authority over both the political and military wings with effective control over the MLC contingent in the CAR at all relevant times in the 2002-2003 CAR Operation;<sup>77</sup> (2) throughout the 2002-2003 CAR Operation and over approximately four and a half months, Mr Bemba continuously knew that MLC forces under his control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape and pillaging;<sup>78</sup> (3) Mr Bemba not only failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes; his failure to take action was deliberately aimed at encouraging the attack directed against the civilian population of which the crimes formed part, and directly contributed to the continuation and further commission of the crimes;<sup>79</sup> and notably (4) the crimes would not have been committed in the circumstances in which they were, or would have been prevented, had Mr Bemba exercised his control properly and taken certain measures.<sup>80</sup>

<sup>74</sup> *Lubanga* Reparations AJ, paras. 6, 118; *Lubanga* Amended Order, paras. 20-21.

<sup>75</sup> This is consistent with *Bemba* TJ, paras. 172-174 and *Bemba* Sentencing Decision, para. 16.

<sup>76</sup> *Bemba* Sentencing Decision, para. 67.

<sup>77</sup> *Bemba* TJ, paras. 697-705; *Bemba* Sentencing Decision, para. 66.

<sup>78</sup> *Bemba* TJ, para. 717; *Bemba* Sentencing Decision, para. 62.

<sup>79</sup> *Bemba* TJ, paras. 719-734; *Bemba* Sentencing Decision, para. 66.

<sup>80</sup> *Bemba* TJ, para. 741. See also para. 213. See also *Bemba* Sentencing Decision, paras. 60-61.

28. Accordingly, Mr Bemba's liability for reparations should reflect the gravity of his actions and omissions.

29. Second, the Trial Chamber should determine the amount for which Mr Bemba is liable in the Reparations Order.<sup>81</sup> Unlike the situation which has occurred in the *Lubanga* case, the Trial Chamber need not wait until the TFV has provided its Draft Implementation Plan to determine the amount for which Mr Bemba is liable. Since Mr Bemba's liability for reparations must be proportionate, *inter alia*, to the harm caused by the crimes for which he has been convicted,<sup>82</sup> the Trial Judgment and the Sentencing Decision provide relevant information. This is especially so if the Trial Chamber orders collective reparations, in which case the Trial Chamber need not rule upon the individual applications for reparations.<sup>83</sup> However, the Trial Chamber should obtain additional information<sup>84</sup> from experts' observations pursuant to rule 97(2), and from victims' submissions.

30. Similarly, for individual reparations, the Trial Chamber may rely on the victims' applications pursuant to rule 94,<sup>85</sup> but also on experts' observations.

31. This additional information (necessary to determine Mr Bemba's liability for reparations by the Trial Chamber)<sup>86</sup> appears to be different from the TFV's assessment of the extent and scope of the harm at the implementation stage (necessary to determine the size and nature of the reparations awards by the TFV) - if

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<sup>81</sup> *Lubanga* Reparations AJ, para. 237; *Lubanga* Amended Order, para. 81.

<sup>82</sup> *Lubanga* Reparations AJ, paras. 6, 118; *Lubanga* Amended Order, para. 21.

<sup>83</sup> *Lubanga* Reparations AJ, paras. 151, 148(f), 185 and 186.

<sup>84</sup> *Ibid.*, para. 238.

<sup>85</sup> *Ibid.*, para. 185.

<sup>86</sup> *Ibid.*, para. 238.



the Trial Chamber has delegated this assessment to the TFV for collective reparations.<sup>87</sup> Conversely, if the TFV's harm assessment is a precondition to determining the convicted person's liability, the Trial Chamber could only make such a determination *after* the TFV has presented its Draft Implementation Plan – as in the *Lubanga* case. However, the procedure followed in *Lubanga*, where the newly constituted Trial Chamber determines the amount of Mr Lubanga's liability after the Draft Implementation Plan has been submitted, is exceptional due to the circumstances of that case.<sup>88</sup> For the same reasons, the Appeals Chamber “exceptionally” asked the TFV to indicate in the Draft Implementation Plan the amount necessary to remedy the harms caused by the crimes for which Mr Lubanga was convicted.<sup>89</sup>

32. Because of the foregoing, it would appear that the TFV's harm assessment would seek to gather relevant information to design the concrete reparation awards, in light of the types and modalities identified by the Chamber in the Order,<sup>90</sup> rather than to inform the Chamber's determination of the convicted person's liability, which the Chamber would have previously determined in the Order on the basis of experts and victims' submissions.

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<sup>87</sup> *Lubanga* Reparations AJ, paras. 183-184.

<sup>88</sup> The Appeals Chamber did not determine the amount because (1) it lacked relevant information as the Trial Chamber had only conducted limited enquiries; and (2) the determination would be made for the first time on appeal and thus not appealable. *See Lubanga* Reparations AJ, paras. 238-239.

<sup>89</sup> *Ibid.*, para. 240.

<sup>90</sup> *Ibid.*, paras. 183, 200.

**C. The types and modalities of reparations and factors relating to the appropriateness of awarding reparations on an individual or a collective basis or both**

33. The Prosecution defers to the Victims,<sup>91</sup> the TFV and other expert advice to assist the Trial Chamber in determining the appropriate types and modalities of reparations in this case.<sup>92</sup> However, and in light of the criteria set out in rules 97(1) and 98(3), the Trial Chamber should at least consider the following factors:

- the large number of victims who may apply for – and be entitled to – reparations;<sup>93</sup>
- the direct victims identified by the Trial Chamber;<sup>94</sup>
- whether Mr Bemba disposes of funds and properties;<sup>95</sup>
- the serious, multiple, long-lasting and diverse consequences of the harms inflicted upon the victims of conflict-related sexual violence;<sup>96</sup>

34. Because of the foregoing, a combination of individual and collective reparations, complementing each other,<sup>97</sup> and including at least compensation,<sup>98</sup>

<sup>91</sup> On the Victims' preferences: *see* Annex B. Pursuant to regulation 23*bis*, the Prosecution has redacted identifying information.

<sup>92</sup> In the Reparations Order, the Trial Chamber must at a minimum identify the modalities of reparations that are appropriate to the circumstances of this case. If the Trial Chamber chooses not to determine the nature and size of the award for reparations in the Order, the TFV will design the award at the implementation stage on the basis of the modalities identified by the Chamber in the Order. *See Lubanga Reparations AJ*, para. 200. This would apply in the event of individual and collective reparations through the TFV pursuant to rule 98(2) and (3).

<sup>93</sup> 5,229 victims have applied so far to participate at trial: *see* Order of 22 July 2016, para. 6. Moreover, the total number of indirect victims may be high. On the far reaching impact of Mr Bemba's crimes, *see Bemba Sentencing Decision*, paras. 30-32; 40; 50-51. *See also Bemba TJ*, paras. 566, 567.

<sup>94</sup> *Bemba TJ*, paras. 624, 633 and 640.

<sup>95</sup> For the purposes of compensation, the Trial Chamber should consider, *inter alia*, if in view of the availability of funds, compensation is feasible. *See Lubanga Amended Order*, para. 37. *See ICC-01/05-01/08-3375-Conf-AnxII*. *See also ICC-01/05-01/08-3376-Conf*, paras. 99-104.

<sup>96</sup> *See above* para. 22.

<sup>97</sup> UN Guidance Note, p. 7.

<sup>98</sup> Compensation appears as an adequate modality of reparation for the victims of this case, considering the physical and/or mental harm suffered; material damage; loss of earnings; lost opportunities; costs of legal or other relevant experts, medical services, psychological and social assistance. *See Lubanga Amended Order*, para. 40. *See also* UN Basic Principles, principle 20; UN Guidance Note, pp. 16-17.

rehabilitation<sup>99</sup> and, if possible, restitution,<sup>100</sup> appears suitable to address the consequences of the crimes for which Mr Bemba has been convicted.<sup>101</sup> Indeed, the Inter-American Court of Human Rights (“IACtHR”) has resorted to both collective and individual awards to address mass human rights violations.<sup>102</sup> In addition, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has advocated for reparations programs which include different kinds of benefits to allow for a better response to—and to better redress—the different types of harm that a particular violation can generate.<sup>103</sup>

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<sup>99</sup> Rehabilitation also appears adequate in this case and could include, *inter alia*, the provision of medical services and healthcare, psychological, psychiatric and social assistance and any other relevant legal and social services. *See Lubanga* Amended Order, para. 42. *See also* UN Basic Principles, para. 21; UN Guidance Note, pp. 18-19; Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence A/69/518, 14 October 2014 (“Special Rapporteur Report”), paras. 35-37.

<sup>100</sup> *Lubanga* Amended Order, paras. 35-36. *See also* UN Basic Principles, principle 19 and UN Guidance Note, pp. 15-16. The Prosecution defers to expert submissions on the feasibility of restitution in this case. Although theoretically feasible for pillaging, the context and the time elapsed may make restitution impossible. In *Lubanga*, the TFV considered that restitution was not feasible. *See ICC-01/04-01/06-3177-Red*, paras. 191-193.

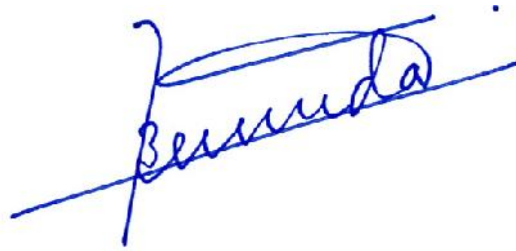
<sup>101</sup> The Trial Chamber may want to further explore with the Victims the adequacy of other modalities of reparations, such as symbolic measures of satisfaction (apologies, commemorations and/or the building of monuments). These measures have been rarely used specifically to help repair the harm caused to victims of conflict-related sexual violence and, when they have been used, they have often reinforced existing stereotypes. *See* UN Guidance Note, pp. 17-18.

<sup>102</sup> *Case of Sawhoyamaya Indigenous Community v. Paraguay*, Judgment, 29 March 2006, paras. 210, 218, 224-227. *See also Case of Moiwana Community v. Suriname*, Judgment, 15 June 2005, paras. 187, 194, 196, 202-208.

<sup>103</sup> Special Rapporteur Report, paras. 29-31; Nairobi Declaration, 3E.

## Conclusion

35. The Prosecution respectfully requests the Trial Chamber to consider these observations.



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Fatou Bensouda, Prosecutor

Dated this 31<sup>st</sup> day of October 2016

At The Hague, The Netherlands