



Original: English

No.: ICC-01/05-01/08
Date: 17 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 Document

Submission by the International Organization for Migration to the International Criminal Court pursuant to article 75(3) of the statute: on the issues proposed by Trial Chamber III on the 12th August 2016

Source: Registrar

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 Jean-Pierre Bemba

Mr Peter Haynes

Ms Kate Gibson

Legal Representatives of the Victims

Ms Marie Edith Douzima Lawson

Legal Representatives of the Applicants

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Ms Isabelle Guibal

Trust Fund for Victims

Mr Pieter de Baan

Applicants

Queen's University Belfast Human
Rights Centre

Redress Trust

The United Nations

International Organization for Migration

Table of Contents

- Section I.....4**
- a) Introduction.....4
- b) IOM at a glance.....5
- c) IOM in CAR.....5
- d) IOM and Reparations.....7

- Section II.....13**
- a) Reparations for Victims in the case of Prosecutor v. Jean Pierre Bemba Gombo13
- b) The concept of Reparations14
- c) The Process of Determining the Content of the Reparations Effort and the Importance of Victims’ Consultation and Participation.....18
- d) The identification of eligible victims and beneficiaries of the reparations effort.....21
- e) Possible Remedies.....23
- f) Rules of Evidence.....29
- g) Institutional aspects of the implementation of a reparations effort.....30

Section I.

a) Introduction

1. This submission is made pursuant the ICC Trial Chamber III Decision of 26 August 2016 in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* on “requests to make submissions pursuant to Article 75(3) of the Statute and Rule 103 of the Rules and Procedure and Evidence”. In this decision the Chamber granted, inter alia, IOM leave to make a submission on the issues proposed in its request.

2. Drawing upon its extensive experience in both implementing and advising governments, institutions and civil society organizations on the design and implementation of victims’ reparations programs as well as its field experience and presence in the Central African Republic (CAR), the International Organization for Migration (IOM) has aimed to identify key considerations for the establishment of a reparations program for the benefit of the victims falling within the ambit of the eventual Chamber decision in this regards. The submission aims to be brief and to the point, focusing on concrete steps that establishing a reparations effort for victims of the facts confirmed in the Trial Chamber III Verdict of 21 March 2016 would involve.

3. This submission is of a purely technical nature and IOM takes no position on any facts in dispute before the Chamber and does not represent any party to the proceedings.

4. Following a brief overview of IOM’s field experience and presence in CAR and the organization’s work on reparations globally, the submission then briefly discusses: some initial considerations on reparations; the issue of victims’ consultation and participation; the identification of eligible victims; possible remedies; rules of evidence and institutional aspects of implementation.

b) IOM at a glance

5. Established in 1951, IOM is the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental and non-governmental partners. With 165 member states, a further 8 states holding observer status and offices in over 150 countries, IOM is dedicated to promoting humane and orderly migration for the benefit of all. It does so by providing services and advice to governments and migrants. IOM's structure is highly decentralized and this has enabled IOM to acquire the capacity to deliver an ever-increasing number and diversity of projects.

6. IOM works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. IOM works in the four broad areas of migration management: migration and development, facilitating migration, regulating migration and forced migration. Lastly, IOM activities that cut across these areas include the promotion of international migration law, policy debate and guidance, protection of migrants' rights, migration health and the gender dimension of migration.¹

c) IOM in CAR

7. IOM has firmly established presence in the Central African Republic (CAR) and is currently implementing a number of projects and activities throughout the country.² The IOM office in CAR has been engaged in community stabilization efforts (including market revitalization via cash for work schemes, infrastructure rehabilitation, such as schools, health centers, administrative buildings, bridges, water access points, social

¹ For more information about the mandate and work of IOM, please visit: <http://www.iom.int/about-iom>

² International Organization for Migration, *Regional Appeal – Central African Republic*, (IOM, 2016), Available at: http://www.iom.int/sites/default/files/country_appeal/file/CAR-Appeal-June2016.pdf

centers, etc., as well as social cohesion activities through direct engagement with civil society) in a diverse set of geographical areas in CAR.³

8. Since 2014, more than 35,000 people (out of which 45% were women and 23% were displaced) benefited from income generating activities as well as alphabetization training in 5 locations throughout CAR. During 2015, more than 400,000 people in conflict-affected mixed communities participated in more than 100 community dialogue activities in Bangui.⁴ Moreover, IOM is engaged in community violence reduction programming which supports the establishment of community-based mediation and civic education in areas of high proliferation of weapons.⁵

9. IOM is further managing a counter-trafficking and border management project in close coordination with the civil society and government to re-establish referral systems between social services, justice and security sectors and to provide direct assistance to victims of trafficking through individual case management (incl. psychosocial/medical support, livelihood establishing activities etc.).⁶ The project is building on previous experiences working with the Ministry of Health and the Ministry of social affairs to increase access to psychosocial services in communities heavily affected by the 2013 crisis and another project working in similar areas on GBV, which sought to increase safety in areas experiencing high-levels of GBV.⁷

³ International Organization for Migration, *Press Release – Community Stabilization Project Launched in Central African Republic*, (IOM, 2015), Available at: <https://www.iom.int/news/community-stabilization-project-launched-central-african-republic>

⁴ International Organization for Migration, *IOM Humanitarian Compendium – Central African Republic*, (IOM, 2016), Available at: <http://humanitariancompendium.iom.int/central-african-republic/2016>

⁵ International Organization for Migration, *Press Release – IOM CAR Launches Theatre Campaign to Strengthen Social Cohesion*, (IOM, 2015), Available at: <http://www.iom.int/news/iom-car-launches-theatre-campaign-strengthen-social-cohesion>

⁶ International Organization for Migration, *Press Release – IOM Trains CAR Police, Justice Officials and Civil Society on Counter-Trafficking*, (IOM, 2016), Available at: <https://www.iom.int/news/iom-trains-car-police-justice-officials-and-civil-society-counter-trafficking>

⁷ International Organization for Migration, *Press Release – IOM Tackles Gender Violence and Trafficking in Central African Republic*, (IOM, 2016), Available at: <https://www.iom.int/news/iom-tackles-gender-violence-and-trafficking-central-african-republic>

d) IOM and Reparations

Direct Implementation of Reparations

10. IOM's engagement in reparations and property restitution started with two programmes established to address the human and property rights violations committed during the Nazi regime - the German Forced Labor Programme (GFLCP) and the Holocaust Victims Assets Programme (HVAP).⁸ Both programmes were established following litigation in United States Courts.

11. The GFLCP came as a result of settlement between the German Government and the claimants - victims of forced and slave labor, personal injury and property loss. The programme was administered by the German Foundation "Remembrance Responsibility and Future" and implemented by national and international institutions. IOM was one of the international institutions responsible for direct implementation of this programme and over the course of 7 years, the organization received, processed and resolved more than 300,000 claims, including 35,000 claims for property loss (looting and pillaging) under the Nazi regime.⁹

12. The HVAP resulted from a settlement between the Swiss Banks and the claimants from several categories: deposited assets, looted assets, refugees denied access to Switzerland during WWII and slave laborers. The settlement was presided by a Federal Judge of the Second Circuit Court in New York and administered by a Special Master appointed by the Court. Under this programme IOM received, processed and resolved more than 58,000 claims. Both programmes were fully implemented by IOM

⁸ International Organization for Migration, *Property Restitution and Compensation – Practices and Experiences of Claims Programmes*, (International Organization for Migration, 2008, p. 28-37); International Organization for Migration, *German Forced Labour Compensation Programme Holocaust Victim Assets Programme (Swiss Banks) – Activity Report*, (International Organization for Migration, 2002)

⁹ International Organization for Migration, *German Forced Labour Compensation Programme (GFLCP) – Property Loss Programme*, (International Organization for Migration, 2016), Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/German-Forced-Labour-Compensation-Programme-GFLCP-Property-Loss-Programme.pdf>

in more than 40 countries around the globe. The total value paid to the eligible claimants under GFLCP and HVAP exceeded 500 million USD.¹⁰

13. In order to implement programmes of such scale and complexity, IOM established full-fledged claims administration system including outreach, claims intake and registration processes, multiple verification tools, global payment processing arrangement and appeals mechanisms.

14. Considering that Roma population was specifically targeted by the Nazi regime, the administrators of both GFLCP and HVAP decided to establish special programmes designed to provide targeted and tailored assistance. In response IOM developed and implemented the Roma Holocaust Survivors – Humanitarian and Social Programme (RHS-HSP).¹¹ The programme benefited more than 70,000 elderly and vulnerably Roma Holocaust Survivors through provision of non-monetary but individualized type of assistance including food, non-food items, health and home care and legal assistance. The programme was managed by IOM and implemented by NGO partners across Eastern Europe.

Technical Assistance and Capacity Building

15. The experience and expertise acquired during the implementation of the GLCFP, HVAP and RHS-HSP, enabled IOM to expand and continue the reparations and land restitution/compensation activities by providing technical assistance and capacity building support to countries and societies facing similar challenges – massive conflict related human and property rights violations. For more than a decade, IOM supported dozen of transitional justice and land/property restitutions processes across the globe.

¹⁰ International Organization for Migration, *German Forced Labour Compensation Programme (GFLCP)*, (International Organization for Migration, 2016) Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/German-Forced-Labour-Compensation-Programme-GFLCP.pdf>

¹¹ International Organization of Migration, *Roma Holocaust Survivors – Humanitarian and Social Programmes (RHS-HSP)*, (International Organization for Migration, 2016) Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Roma-Holocaust-Survivors-Humanitarian-and-Social-Programmes-RHS-HSP.pdf>

16. Since 2005, in Colombia, IOM provided and still provides technical and capacity building support to the Government to implement the 2005 Justice and Peace Law as well as the 2011 Victims and Land Restitution Law.¹² Under both programmes IOM supports an array of complex activities such as training and capacity building for national administrative and judicial authorities, development and implementation of victim identification and verification mechanisms, direct assistance to individual victims and collective reparations approaches. IOM remains engaged with the Government of Colombia to continue its support to the existing and the new transitional justice initiatives.¹³

17. In Sierra Leone, IOM supported the national Reparations Programme (SLRP) funded by the UN Peace Building Fund (PBF) and implemented by the National Commission for Social Action (NaCSA) between 2008 and 2013.¹⁴ The SLRP registered and provided reparations to more than 32,000 victims including 3,600 victims of sexual violence. IOM's role in Sierra Leone was two-fold and included: 1) programmatic and fiduciary oversight over the funding provided by the UN PBF and 2) technical assistance/capacity building measures in support of developing victim-sensitive outreach programmes as well as registration and reparations delivery mechanisms, including individual material and collective symbolic reparations.¹⁵

18. In Nepal, IOM is continually supporting the Government and the civil society to address vestiges of the conflict. The Organization's engagement in Nepal started in 2010 with a joint IOM/OHCHR project aimed at enabling access to justice and reparations for victims and continued with programmes designed to support access to

¹² International Organization of Migration, *Technical Assistance to the Colombian Government for the Implementation of the 2011 Victims and Land Restitution Law*, (IOM, 2016) Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Technical-Assistance-to-the-Colombian-Government-for-the-Implementation-of-the-2011-Victims-and-Land-Restitution-Law.pdf>

¹³ International Organization for Migration, *IOM in Land and Property Rights and Victim Reparations*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/2013-12-LPR-FactSheet.pdf>

¹⁴ International Organization for Migration, *Support to the Implementation of the Sierra Leone Reparations Programme (SLRP)*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Support-to-the-Implementation-of-the-Sierra-Leone-Reparations-Programme-SLRP.pdf>

¹⁵ Ibid.

housing, land and property for women affected by the conflict.¹⁶ Recently, IOM expanded its activities in Nepal and has engaged with Government and civil society to address gaps with regards to recognition of status and provision of assistance to victims of CRSV.¹⁷

19. Similarly, in Bosnia and Herzegovina (BiH), IOM is collaborating in an inter-agency effort to facilitate the provision of care and justice to victims of CRSV.¹⁸ In BiH, IOM efforts are focused on supporting the various actors (government and civil society) to improve existing and open new avenues for victims of CRSV to achieve status recognition and access assistance and reparations.¹⁹

20. In addition, IOM also provides technical support to the “Human Rights Victims’ Claims Board in the Philippines” or the “Compensation Board” which oversaw the implementation of the 2013 ‘Compensation Act’ to Victims of Human Rights Violations under the Martial Law (1972-1982),²⁰ as well as expert advice and technical support to a number of land and property restitution processes around the globe including Yemen and Iraq.²¹

¹⁶ International Organization for Migration, *Fairness and Efficiency in Reparations to Conflict Affected Persons in Nepal*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Fairness-and-Efficiency-in-Reparations-to-Conflict-Affected-Persons-in-Nepal.pdf>

¹⁷ International Organization for Migration, *Building the Foundation for Access to Justice and Reparations for Conflict Related Sexual Violence (CRSV) survivors*, (IOM, 2015), Available at: <http://nepal.iom.int/jupgrade/images/stories/CoM/2015.10.01%20Building%20the%20Foundation%20for%20Access%20to%20Justice%20and%20Reparations%20for%20Conflict%20Related%20Sexual%20Violence%20CRSV%20survivors.pdf>

¹⁸ International Organization for Migration, *Seeking Care, Support, and Justice for Survivors of Conflict Related Sexual Violence in BiH*, (IOM, 2015), Available at: <http://bih.iom.int/sites/default/files/factsheets/FACT%20SHEET%20-%20CRSV.pdf>

¹⁹ Ibid.

²⁰ International Organization for Migration, *Technical Assistance to the Human Rights Victims’ Claims Board in the Philippines*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Technical-Assistance-to-the-Human-Rights-Victims-Claims-Board-in-the-Philippines.pdf>

²¹ International Organization for Migration, *Iraqi Property Claims Programme & Technical Assistance to the Southern Yemen Land Remedies Commission*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Iraqi-Property-Claims-programme.pdf> & <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Technical-Assistance-to-the-Southern-Yemen-Land-Remedies-Commission.pdf>

21. As a result of these engagements in direct implementation and the provision of technical assistance to reparations and land/property restitution programmes, IOM is frequently asked to conduct research and provide policy advice to variety of stakeholders.

22. Upon request from the Office of the President of the International Criminal Tribunal for the former Yugoslavia (ICTY) in early 2013, IOM conducted broad consultations of both national and international stakeholders engaged in the region, to develop a set of concrete recommendations on reparations for victims of international crimes during the Yugoslav wars, and to identify options for supporting funding structures.²² One of the key findings of the assessment was that after so many years following the ex-Yugoslav conflict there is no guaranteed pathway for victims to access judicial reparations nor are there any comprehensive efforts by the governments in the region to institute administrative reparations mechanisms. The ensuing report made number of recommendations and significantly contributed toward opening of the discussions and emerging initiatives to respond to the needs and rights of the victims.²³

23. Similarly, the President of the International Criminal Tribunal of Rwanda (ICTR) has requested that IOM undertake an assessment on potential ways forward, including technical and operational recommendations, on reparations for victims and survivors of the 1994 genocide.²⁴ In identifying the principal options for reparations in the Rwandan context, IOM's approach is pragmatic and takes into account potential hurdles and challenges that need to be considered. This includes making sure that any reparations programme is designed so as not to exacerbate inter-ethnic or political

²² International Organization for Migration, *Technical Assessment Report on Reparations for the International Criminal Tribunal for the former Yugoslavia (ICTY)*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Technical-Assessment-Report-on-Reparations-for-the-International-Criminal-Tribunal-for-the-former-Yugoslavia-ICTY.pdf>

²³ P. Van der Auweraert, *Reparations for Wartime Victims in the Former Yugoslavia : In Search of the Way Forward*, (IOM, 2013)

²⁴ International Organization for Migration, *Assessment of possible ways forward on reparations for victims of the 1994 genocide in Rwanda*, (IOM, 2016), Available at: <http://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Assessment-of-possible-ways-forward-on-reparations-for-victims-of-the-1994-genocide-in-Rwanda.pdf>

tensions while still being able to generate long-term positive effects for the whole community by means of individual and collective empowerment. Another important aspect that needs to be addressed is that financial resources are likely to be limited in relation to the very large community of potential beneficiaries. IOM's role is that of an objective technical advisor on reparations, drawing on its international experience in both designing and implementing reparations efforts to support local actors in finding the best possible solution(s) suited to Rwanda's unique context.

24. As mentioned before, the observations and the recommendations contained in this submission stem from the above referred experience from which the following are of special relevance to the Bemba case:

- IOM's experience in direct implementation of individual reparations (GFLCP, HVAP) and victim assistance programmes (RHS-HSP)
- IOM's experience in providing policy, technical and operational support to governments and societies implementing reparations or land restitution programmes (Colombia, Sierra Leone, Nepal, BiH, Philippines)
- IOM's collaboration with judicial institutions (US Federal Court, ICTY, ICTR)
- IOM's expertise in property restitution/compensation (GFLCP, Iraq Property Commission, Yemen Land Commission)
- IOM's advocacy and engagement to enable and facilitate access to justice and care for victims of CRSV (BiH, Sierra Leone, Nepal)
- Well established presence and access to information and locations in CAR

Section II.

a) Reparations for Victims in the case of Prosecutor v. Jean Pierre Bemba Gombo

Initial Considerations Regarding

25. From a policy perspective, the basic contours of a reparations effort are generally determined by the following key elements:

- **The process through which it was established** (e.g. through a judicial decision; a legislative act; a truth commission process; a consultative process; ...);
- **The concept of reparations it is based upon** and the core objectives that it seeks to pursue;
- **The individuals and/or communities it is intended to serve**, which includes the definition of crimes covered by the program and the determination of who is entitled to benefit from the effort;
- **The type of remedies or benefits it is intended to provide**, which can include a diverse range of individual and/or collective measures and cover both material and symbolic benefits;
- **Its institutional and procedural aspects**, i.e. what institutions are in charge of implementing the reparations effort; how they are managed; and what type of procedure is used to receive, review and decide upon reparations claims; and
- **The resources that have been made available for the reparations effort and the source(s) that have provided such resources**, including both monetary and institutional resources.

26. These elements are at the same time the key decision points for the entity responsible for the design of the reparations effort, which in this case will be the Chamber.

b) The concept of Reparations

27. In the context of a reparations effort that is intended to serve a relatively large group of victims - as seem to be case here given that 5229 victims participated in the trial - experience has shown that what broadly could be called the “juridical concept of reparations” does not tend to be the best and most effective way of ensuring justice.²⁵ Summarized, this concept has the following characteristics:

- Its objective is *integral restitution*, i.e. to return the victims to the situation they were before the violation. This is achieved by undoing the harm or, if that is impossible, by providing compensation for all forms of material and physical harm inflicted on the victims;
- It is “harm-centered” in the sense that the level and type of remedies awarded to a particular victim will be based upon the particular level and type of harm the violation(s) has/have caused *that particular* victim;
- Methodologically, it hence requires the identification and evaluation the specific harm each eligible victim has suffered and the availability of sufficient evidence to do so; and
- As a consequence the rules and procedures to implement a reparations effort based on this concept tend to be fairly complex, formalistic and demanding on the victims (who will hence often need to have recourse to legal representation).

28. There are a number of reasons why using this concept of reparations does not tend to produce just and fair results in contexts where the number of victims is relatively high and where human rights violations and/or international crimes were the rule rather than the exception, as was the case in CAR. They include the imposition of a burden of proof that many victims will find difficult if not impossible to provide, especially in contexts that witnessed protracted lawlessness and chaos, in turn

²⁵ See in the same vein, P. De Greiff, *The Handbook of Reparations*, (Oxford University Press, 2008), pp.451-477

resulting in the exclusion of legitimate victims; a very high transactional cost that tends to come at the expense of the invariably limited resources available for the actual remedies provided by the reparations; and the amount of time individual assessments require, which, if applied in the context of the case at hand, would likely result in much (further) delayed justice for the victims. The latter is even more pertinent in the context of this case and the situation in CAR more broadly, where all victims are in great need and the reparations effort is being put in place a long time after the violations took place.

29. There have so far been no large reparations efforts that have had the financial resources to provide full restitution to victims, making individualized harm-assessment even less pertinent. Moreover, individualizing harm and providing redress accordingly also injects inequalities amongst victims who have suffered from the same violation. Given the very nature of a context like the one in CAR and especially considering that the international crimes covered by the case at hand took place more than a decade ago, this individualization of harm is likely to rest on, ultimately, quite shaky grounds.

30. An alternative manner of understanding reparations that is more adapted to the case at hand, and efforts to provide (relatively) large groups of victims with redress more broadly, is to see it as an effort to provide redress to victims that is as comprehensive, fair, just and effective as is reasonably possible in the context at hand, including the level of resources that can be made available. This approach recognizes that a reparations effort in a situation where there are many victims, and where for a period of time human rights violations and/or international crimes were the norm rather than the exception will by definition be the outcome of a careful balancing act involving victims' needs and preferences concerning the realization of their right to reparations and a broad variety of contextual factors. For the Chamber to build its eventual reparations decision on this concept of reparations which, international experience shows, is the approach most likely to lead to actual remedies being

delivered to all eligible victims within a reasonable period of time, it would need to ensure that the content of the eventual reparations effort is developed in close consultation and dialogue with the victims falling within the case of the *Prosecutor v. Jean Pierre Bemba Gombo*.

31. While the exact scope and nature of a reparations effort built upon the concept of reparations described here-above will of course depend upon the context, a number of general characteristics can be discerned and considered as good practice:

- Victims can access the remedies provided by the reparations effort through a dedicated, victim-centered process that is accessible to all without legal representation and that is administrative in nature. ;
- The overall objective of the reparations effort is commonly understood as providing benefits directly to victim of certain types of violations grounded in their right to reparations, but with the acknowledgement that, given contextual constraints, those benefits are not aimed at *restitutio ad integrum*;
- The reparations effort is “violation- rather than harm-centered” in the sense that the level and type of remedy provided is linked to the violation a victim suffered from, rather than the specific harm an individual victim sustained in the process. This can mean, for example, that all victims that suffered the same violation will have the right to the same remedy or options of remedies, independent of the particular harm each of them suffered;
- As the remedies provided are not dependent upon individual harm, reparations effort does not require detailed investigations into individual harm, nor does it do require individuals to provide extensive evidence of the harm they sustained. Evidentiary rules can hence be more flexible, and multiple techniques can be used that allow for solid eligibility determinations also when victims do not possess significant formal evidence, while at the same time ensuring that false or fraudulent claims are weeded out.

- The concrete remedies provided are tailored to the preferences and present-day needs of the victims, integrating their diversity; the type of harms suffered by the victim population as a whole; the objectives of the particular reparations effort; and the available material and institutional resources to deliver those remedies. Practicability, i.e. the need to implement the reparations measures efficiently and effectively within a reasonable period of time and to ensure that the measures can make a real difference to the eligible victims' lives is, from the start, fully integrated into the design of the reparations effort.

32. It should be noted that there are precedents for courts ordering a reparations program that was built around the idea that the aim of the effort is to “provide redress to victims that is as comprehensive, fair, just and effective as is reasonably possible in the context at hand, including the level of resources that can be made available”. One example in this regard is the *Holocaust Victims Assets Program* that was implemented by IOM at the order of a New York court.²⁶

c) The Process of Determining the Content of the Reparations Effort and the Importance of Victims' Consultation and Participation

33. To the degree that the applicable law allows, an authority – be it a government; a national or international court or tribunal; or any other type of entity or actor – responsible for establishing a reparations program has a number of different options when it comes to determining its exact content. It can opt for a “top-down” approach whereby the authority determines autonomously what the program will look like, and then presenting it to the victims as “the reparations program that will be rolled out”. It can also choose to go about determining what should be done through consultations of a limited group of experts, who bring in expertise on the international experience with reparations; the situation of the victims in the particular context; the existing institutional capacities to implement certain remedies; and so on. Finally, it can

²⁶ De Greiff (2008); International Organization for Migration, *IOM in Land and Property Rights and Victim Reparations*, (IOM, 2016), Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Holocaust-Victims-Assets-Programme-Swiss-Banks-HVAP.pdf>

organize broad-based consultations with stakeholders in the affected society and construct the program in dialogue and, indeed, negotiation with the victims themselves.

34. While the Chamber will undoubtedly need to weigh a number of factors when it comes to organizing a consultation session with the victims on the ground in CAR, there are a number of good reasons why to at least seriously explore such exercise. International experience has shown that, even in contexts where victims have significant present-day needs and suffer from profound poverty, the symbolic element of recognition is important. Indeed, it is the symbolic element, and the message that the remedy is grounded in a right that the victims have, that represents one of the main distinctions between benefits provided as reparations and benefits provided as part of a humanitarian or development program. It is not an exaggeration to say that, invariably, how the process of getting to a reparations effort is designed is almost as important as what remedies the effort will eventually deliver the eligible victims.

35. Giving the victims themselves a voice in deciding what benefits a reparations effort will provide is, on the one hand, a guarantee that the reparations effort responds to the real present-day needs and concerns of the people it is intended to benefit and, on the other hand, a very powerful way in helping to reinforce the victims' agency as human beings but also as citizens. Finally, ensuring that victims participate in the process of designing the reparations effort is also likely to give the eventual effort a greater legitimacy in the eyes of the victims.

36. The case for the International Criminal Court to hold such a dialogue session in CAR through the Chamber is even stronger due to the fact that the trial in the case of the *Prosecutor v. Jean Pierre Bemba Gombo* was held in The Hague, and that the justice process has so far hence been far removed from the country and society where the international crimes took place. The most powerful gesture towards the victims would be for the Chamber itself to hold public hearings, directly with the victims in CAR. While working through legal representatives or NGOs can be helpful, it is unlikely to

have the same impact as sessions that directly involve those affected by the international crimes established in the *Prosecutor v. Jean Pierre Bemba Gombo*. There are many precedents of national governments and institutions working directly with victims to develop the contours and content of a reparations program from which the Chamber could draw, and there are sufficient international and national actors on the ground in CAR to assist the Chamber with the organization of such consultations.

37. If the Chamber decides to engage with the victims in CAR directly, the following considerations can usefully inform such effort:

- Given that the Chamber is looking at a reparations effort for victims of the facts as confirmed in its verdict of 21 March 2016, it is concerned only with one group of victims only, amidst many others that have suffered from violations in CAR but that fall outside the ambit of *the Prosecutor v. Jean Pierre Bemba Gombo* case. This needs to be taken into account in both the organization of, and the communication around, the consultation effort of the Chamber. One question that may need to be addressed ahead of time is whether the reparations effort will concern only some or all of the victims that have participated in the trial or whether the effort will also be opened to victims who did not participate in the trial but who suffered from the same facts confirmed in the Chamber verdict.
- The consultations should be organized so as to ensure also the participations of the most vulnerable amongst the victims. There are actors on the ground in CAR that can assist the Chamber with appropriate outreach and consultations for victims of the crime of rape, confirmed in the Chamber Verdict of 21 March 2016. If not organized with the appropriate sensitivity and care for protection, they do have the potential to do harm to the victims.
- Ideally, the Chamber would already have a concrete idea about the resources that will be available for the reparations effort. Expectations management in consultations is a key to their success – and a key issue in the ‘do no harm’

approach that needs to underlie such consultations – and prior knowledge of what is (likely to be) possible is quite helpful in this regards. While without that knowledge the Chamber could organize consultations around the preferred types of remedies (*see further*) *in abstracto*, it would still be asked what, concretely, victims are likely to receive, a question that is impossible to answer without knowing what resources will be available;

- Rather than open-ended consultations, the Chamber could consider designing options for reparations prior to the consultation and then engage in a dialogue with the victims about what, within that list of options, preferences would be. Such list of options would need to be based upon a realistic assessment of available resources; implementation capacities on the ground and the number of victims that are likely to have the right to benefit from a reparations effort in the *Prosecutor v. Jean Pierre Bemba Gombo case*.
- Finally, it should be noted that victims' consultations will necessarily in and by themselves resolve how the reparations effort will look like, and the Chamber will, in all likelihood still need to decide what options will be prioritized. Indeed, experience elsewhere has shown that victims are not necessarily unanimous when it comes to the type of reparations they prefer, and differences in opinion are likely to exist.

38. In case the Chamber would decide against a consultation on the ground, it may want to consider using a victims' survey to find out about the preferences victims have as regards a reparations effort. While imperfect, it would still ensure that victims are given a voice in the reparations they will eventually benefit from. There is experience amongst humanitarian actors in CAR to carry out surveys amongst the population that

could easily be put to use for this purpose, were the Chamber to require assistance in this regard.²⁷

d) The identification of eligible victims and beneficiaries of the reparations effort

39. From an operational perspective, there are different levels in the identification of eligible victims, which will need to be integrated into the design of the effort:

- The determination of who has the right to reparations under the effort that will be established by the Chamber in the *Prosecutor v. Jean Pierre Bemba Gombo case*. The clearer the rules laid down by the Chamber in its eventual reparations decision, the less complicated implementation of the reparations effort will be;
- The identification of victims when they present themselves to access the remedies that the reparations effort foresees for them. This includes:
 - Confirmation of the identity of the victim(s) who present themselves, an exercise that is not devoid of potential difficulties, given the challenges surrounding (access to) personal ID-documents in CAR; and
 - For some, confirmation and establishment of the relationship between the beneficiary and the victim of the facts confirmed in the Chamber's verdict (e.g. in case of murder, where the Chamber will have to determine which relatives will have the right to reparations, or in case a victim dies during the reparations process).

40. In the (likely) case that identification through ID-documents alone will turn out not be possible, it would be possible to use community validation processes that have been used also in other reparations contexts, possibly combined with methodologies that

²⁷ An example of such work can be found in: International Organization for Migration, *Un enquête sur les intentions de retour des personnes déplacées à Bangui et à Boda en République Centrafricaine*, (IOM, 2015), Available at: <https://carresponse.iom.int/blog/enquete-sur-les-intentions-de-retour-des-personnes-deplacees-bangui-et-boda-en-republique>

have been used in mass claims programs such as, for example, the German Forced Labor Compensation Program as implemented by IOM.²⁸ For the 5229 victims who have participated in the trial, this issue may not pose itself, depending, however, on what information the victims provided at the time they applied for participation and the degree to which the entity implementing the reparations effort would be able to use and match this information against victim applications on the ground. Another important consideration relating to the identification of victims is how to respond to the fact that many victims who were potentially eligible for reparations have passed away since 2002-2003 when the crimes of concern for the Court took place.

41. In light of the particular nature of this reparations effort – which presumable will only cover victims of the facts confirmed in the Chamber’s verdict – it would appear necessary to identify the victims individually, independent from whether the eventual remedies will be individual or collective (*see further*). For example, the opening of a center to provide psycho-social or medical support to victims of those facts as a collective remedy, would also attract people in need who are not, however, victims of the facts confirmed in the Chamber’s verdict, especially given the dearth of this type of services in CAR. Presumably, this center would only be allowed to use the resources allocated to it under the reparations effort for services to individuals eligible for reparations under the Chamber’s reparations decision, hence requiring it to engage in the identity verification.

42. To the extent that the Chamber would connect the eventual remedies to the type of violation a victim suffered from, part of the verification exercise will then also involve connecting an individual victim with the particular violation he or she suffered from. Given the time that has passed since the facts confirmed in the Chamber’s verdict took place, it would be important to ensure that the rules in this regard allow for flexibility,

²⁸ International Organization for Migration, *IOM in Land and Property Rights and Victim Reparations*, (IOM, 2016), Available at: <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/German-Forced-Labour-Compensation-Programme-GFLCP.pdf>

at the risk of rendering implementation so complicated and resource-intensive that efficient and effective victims' justice becomes a near impossibility.

43. In case the eventual reparations effort would rely on multiple service providers for implementation, it may be useful for the Chamber's reparations decision to foresee or allow for a centralized victims' determination / verification / confirmation process and for the creation of a victims' register upon which service providers could rely to determine the eligibility of an individual that presents him- or herself before them.

e) Possible Remedies

44. The Chamber would have the option to award individual reparations, collective reparations or a combination of both. The following operational considerations could inform this decision:

- Individual remedies frequently come closer to the victims' preferences than collective reparations, although this needs to be tested in each context afresh;
- Collective reparations are not easier to implement than individual reparations which, depending on what they consist of (*see further*) may actually be less costly, time-consuming and complex to implement than collective reparations as the latter usually depends on the collaboration of multiple government entities and/or involves a community-decision making process that tend to consume a significant amount of time and resources;
- Collective reparations tend to work best if there is a clearly identifiable collective aspect to the situation of the victims (e.g. when they are all or mostly living in particular, identifiable locations) and/or the crimes or violations of which they were the victim of (e.g. when a population group was targeted for their religious or ethnic belonging). For example, it is difficult to implement reparations in situations where, at the time of the reparations efforts, victims are living across large areas of the national territory, even more so when, as will

be the case here, the reparations effort only targets individuals that became victims of a quite narrow set of violations (i.e. the facts confirmed in the Chamber's verdict). Similarly, unless victims live in an identifiable number of communities and, within those communities, form a considerable proportion of the population, it is difficult to envisage community-based decision making for collective reparation projects.

- The transactional cost of implementing individual v. collective reparations should be integrated in the eventual decision on what model to choose, based upon the principle that as much of the available resources as possible should go to the victims themselves and not to the service providers or entities charged with implementing the reparations effort.
- Collective reparations – to the extent it involves remedies like, for example, the construction of schools or health centers; livelihood projects; and/or improvement of community infrastructures - need to be organized and implemented in such a way so as to ensure that victims distinguish them from “ordinary” humanitarian and/or development projects.

45. When it comes to the substance of the remedies, the following considerations could inform the decision of the Chamber:

- Preferences of the victims (*see above on the importance of victims' participation*);
- The fact, as a matter of principle, there is no benefit that cannot be offered by a reparations effort, as long as the main stakeholders, i.e. the victims, are by and large in agreement with what is being offered;
- The financial resources available for the reparations effort which will limit what can be done (which will undoubtedly sit in tension with what should, ideally, be done);

- The institutional capacity of governmental and non-governmental entities on the ground to implement those remedies (e.g. access to psycho-social care as a remedy only makes sense if there is sufficient capacity on the ground to service all victims who, by virtue of the reparations effort, would be entitled to such support);
- The time it will take to implement the remedy in question, given the realities on the ground in CAR, a consideration that is especially relevant in the context of this case, where victims have been waiting for justice for many years, and;
- The transactional cost of each remedy under consideration (*see above*).

46. While this submission does not want to pre-judge what the (majority of) victims in this case would prefer in terms of reparations, it would like to briefly zoom in on the issue of financial compensation, which is frequently cited by victims as one of their preferred remedies, but which, in the past, has tended to be not always enthusiastically embraced by other stakeholders in reparations processes. While opinions are slowly shifting – also in other areas of international policy and action such as, for example, the humanitarian sector²⁹ – reluctance often remains about the feasibility and, indeed, desirability of providing victims with cash, especially in fragile contexts like CAR.

47. In case a significant number of victims would indeed express preference for, or interest in, receiving financial compensation, the Chamber could usefully consider the following:

- In most large-scale reparations programs, financial compensation is aimed less at compensating the exact harm that each victim has suffered from than at providing a meaningful response to harm and suffering that can never be un-

²⁹ See, for example, the Report of the UN Secretary-General for the World Humanitarian Summit pleads in favor of a more widespread use of cash grants in humanitarian settings, thereby underlining that “Cash transfers have proved to have transformative potential for local communities, have strengthened local markets, and are a more dignified way of providing assistance across sectors. To that end, obstacles to direct investments at the local level need to be addressed, including by mitigating risks, addressing the effects of counter-terrorism and anti-money-laundering measures and developing local technical capacity”; United Nations General Assembly, UNGA A/70/709, p. 39

done through money. To a certain extent it would be more appropriate to speak of cash transfers than financial compensation as traditionally understood within most legal systems.

- The determination of the amount(s) of financial compensation is invariably a complex exercise that involves a balancing act between different factors including the available financial resources, the (expected) number of beneficiaries, and the average harm the victims population as a whole has suffered.
- In contexts where it is difficult to establish and value individual harm – which is almost invariable the case in reparations programs aimed at benefitting a large number of victims – and/or where such valuation is likely to create harmful and ultimately indefensible inequalities amongst victims – as is likely to be case here for the reasons set out earlier - programs have tended to rely on (a) dividing the victims' population in a limited number of categories along the different type of violations they have suffered from and (b) the determination and payment of one lump sum for each category, independent from the particular harm sustained by individual victims within such category. It is important to ensure that such categorization is done with the input from the victims and in such a way so as not to cause real or perceived injustices.
- Operationally, cash transfers are relatively easy to implement and in reparations programs that have both individual financial compensation and collective reparations included in their list of remedies, the former has invariably been implemented much faster than the latter. Moreover, the administrative cost of implementing an individual financial compensation effort also tends to be significantly lower than remedies that involve a higher level of complexity.

- As a general rule, the more complex the rules are to determine what level of financial compensation individuals have the right to and the higher the number of different levels of financial compensation that exist within a program, the more time, cost and resource-heavy implementation will be. Successful large-scale reparations programs have hence tended to have simple rules and limited categories in this regards.
- The humanitarian sectors in CAR has experience with both cash transfers and the provision of vouchers (which can replace or complement the payment of cash in certain circumstances) on which the implementation of the reparations program ordered by the Chamber could rely upon and draw from.
- Successful financial compensation programs require particular attention to the gender dimensions of cash (e.g. by putting measures in place that ensure that cash transfers to households are not exclusively given to or controlled by male head of households) and financial literacy levels amongst beneficiaries (e.g. by organizing basic financial literacy trainings where necessary).
- Finally, when implementing cash-transfers as part of a reparations programme the option of effectuating payments to households rather than to individuals could be explored. Such an approach strengthens the likelihood that the whole family will benefit and allows for compensation to be delivered in cases where a victim who has already been granted reparations is unable to collect or receive such.

48. When considering collective reparations, the Chamber could usefully take the following into account:

- Information about where the eligible victims currently reside, which, unless such information is available e.g. from the lists of the victims that participated in the *Prosecutor v. Jean Pierre Bemba Gombo* case, may need to involve an initial

mapping exercise, would be an important factor in deciding what collective reparations are feasible.

- Collective reparations can involve the support for and/or creation of services for victims e.g. in the areas of physical and/or psycho-social health, education, vocational and/or livelihood (including support for access to credit or micro-credit). A mapping exercise of what services are available where and by whom, including the National Government, national and international NGOs and international humanitarian and development actors present in CAR, is likely to be necessary prior to determining the range of benefits to include in the reparations effort. In case services would be established in the context of this reparations effort then sustainability and consideration for what to do with those in need who will try and access those same services need to be part of the conceptualization.
- Collective reparations can also involve the provision of cash grants to victims' communities who can then decide on what community projects to spend the money on. While such collective reparations efforts have yielded positive results elsewhere, the information about the current places of residence of the victims and the local contexts in those places will be important factors in determining whether or not such a community-based approach is feasible and desirable in this context.

f) Rules of Evidence

49. In addition to what has already been discussed above on the identification of eligible victims for the reparations effort, international experience has learned that rules of evidence in large and complex reparations programs work best when they are:

- Flexible so as to allow the implementing entity or entities to exercise discretion and be creative to ensure that as many genuinely eligible victims as possible can exercise their right to reparations and as few amongst them

as possible are excluded simply on the basis of not possessing the right evidence;

- Based upon an assessment of what type of evidence victims are likely to be able to produce, given the local context (e.g. a high degree of informality and/or lack of official document use when it comes to land and property relations as is the case in CAR) and the time that has passed since the violations took place, and;
- Able to foresee (reasonable) assistance for victims in providing evidence, e.g. by giving the implementing entity or entities a considerable role in this regard.

50. While it is important to attempt to ensure that no genuinely eligible victims are excluded from the reparations effort on the grounds of a lack of evidence, sufficient effort is also required to identify and exclude fraudulent or erroneous claims, as providing reparations to non-eligible claimants can easily undermine the legitimacy of the reparations effort.

g) Institutional aspects of the implementation of a reparations effort

51. When establishing the institutional framework for implementing the reparations effort, the Chamber could usefully distinguish between two functions:

- Receiving and processing of the reparations claims from the victims including the determination of the claims' eligibility and the actual remedies each claim gives rise to. This entity could also be in charge of communication with and outreach to eligible victims to encourage and assist them in submitting their claims for reparations; and
- The provision of the remedies awarded to the victims participating in the reparations effort. For financial remedies this could be done by the same entity charged with reviewing and processing the claims, if other remedies would be

foreseen then additional, specialized service providers will need to be called upon, including relevant government entities (e.g. for health and education).

52. Given the, most likely, limited amount of resources available for the reparations as well as the complexities of the operational environment in CAR, it would be important to ensure that implementation of the reparations effort draws upon expertise and experience already available on the ground. The transactional cost of establishing a new structure or entity further underscores this. Key will be to use an institutional set-up that allows for the delivery of concrete remedies in a fair, timely and cost-effective manner.



p.p. Peter Van der Auweraert

Head – Land, Property and Reparations Division

On behalf of:

The International Organization for Migration

Dated: 17-Oct-2016

At: Geneva, Switzerland