



**SUMMARY OF ICTJ'S RECOMMENDATIONS TO THE ICC
ON REPARATIONS IN THE LUBANGA CASE¹**

1. **Ensuring acknowledgment, access and the right to reparations.** The ICC's reparations order in this case should (a) require the acknowledgment of all victims, by considering all available forms of reparations that the Court can order, request or recommend, (b) ensure fair and meaningful access to the Court and to the Trust Fund for victims to request reparations, and (c) enable and strengthen the right of victims to reparations through appropriate transitional justice mechanisms.
2. **A reparations hearing in the DRC.** The ICC may wish to anticipate and obviate some of the inequitable and burdensome aspects of litigation by ensuring that victims have fair and meaningful access to requesting reparations from the Court. The Court may want to consider holding a reparations hearing in the DRC as a way to reach victims who have not had access to the court. This is an opportunity to hear victims who are not participants in this case as well as those who have not applied but may be eligible for court-ordered reparations.
3. The inherent limitations of court-ordered reparations and the absence, so far, of assets that can be forfeited and used for reparations are important considerations in deciding what the ICC should prioritize. We recommend that in this case, the ICC should prioritize the immediate and direct victims of the crime, i.e. the victims of forced recruitment and their immediate families.
4. But the Court should at the same time ensure that the larger universe of victims in this situation, including direct victims who have not yet been able to request reparations from the Court, will have the opportunity and the means to do so.
5. **Priorities for reparations in this case.** We proposed a possible combination of measures including
 - (a) compensation to direct victims, but preceded by an assessment of the potential impact on their families of an award of money,
 - (b) additional compensation to victims of sexual violence and other violations against the child-victims that accompanied the crime of forced recruitment,
 - (c) financial assistance toward the care for children born out of rape linked to the crime,

¹ Prepared by Ruben Carranza, Director, Reparative Justice Program, ICTJ. This is a summary of the submission filed by ICTJ in the *Lubanga* case before the International Criminal Court (ICC)

(d) rehabilitation through health care for direct victims, including mental health care, treatment for HIV and other STDs, aids to mobility for victims who suffered resulting physical disability, access to skills training, or the option to receive financial assistance to continue their education

(e) measures of 'satisfaction' that includes an official declaration in the relevant local languages to the effect that the direct victim person should not be held legally or morally responsible for his or her actions as a combatant during the conflict.

6. **Mapping and needs assessment may be indispensable.** In considering how individual reparations should be made, it is important to remember that victims' needs may change over time. Several years have passed since the conflict in Ituri. Families have sometimes left the region to secure a better life elsewhere. The different situations that victims are now in supports the need for a comprehensive mapping and needs assessment exercise to obtain empirical knowledge about victims and what reparations make most sense.
7. As to how reparations can begin to be implemented by the ICC, we recommended that it will likely be more effective for the Court (or the TFV) to maintain an 'open' list of applicants, to conduct a series of registration periods, and to retain the flexibility to adjust awards for reparations on the basis of mapping and needs-assessment results.
8. **Lessons from Sierra Leone and Colombia on courts and reparations.** We pointed out two seminal court decisions that point to the importance of pursuing transitional justice approaches so that reparations can be realized for victims in conflicts where forced recruitment has taken place. These two decisions are the 2007 *AFRC decision*² of the Special Court of Sierra Leone (SCSL), and the 2011 *El Aleman*³ decision from the Justice and Peace Law court in Colombia. Both courts have jurisdiction over conflict-related crimes including forced recruitment.
9. Apart from sentencing the convicted persons to prison, the SCSL did not, because it could not, award reparations. It was not until two years later, and on the basis of truth commission recommendations rather than a court order, that the government of Sierra Leone established a reparations program. Uniform payments of approximately \$100 each was given to around 30,000 registered victims. No reparations were offered for victims of forced recruitment as such.
10. The Sierra Leone experience shows that in the absence of court-ordered reparations, reparations are possible through other transitional justice mechanisms, such as a truth commission and an administrative reparations program. But without such mechanisms -- such

² Prosecutor v. Brima, Kamara and Kanu, *Judgment*, Trial Chamber II (20 June 2007), *Appeal Judgment*, (22 February 2008), <http://www.sc-sl.org/> [accessed 7 May 2012].

³ Tribunal Superior del Distrito Judicial de Bogotá, Sala de Justicia y Paz, case against *Edward Cobos Téllez y Uber Enrique Banquéz M.*, for aggravated murder and others. *Judgment.*, June 29, 2010, resolution 7 in regard to paragraphs 356 to 402.

as it is in the DRC – victims are left to rely on unenforced domestic court judgments for reparations.

11. On the other hand, in Colombia, the absence of a truth commission has not precluded the award (but not yet the enforcement) of reparations for victims. The Justice and Peace Law court granted individual reparations to all victims of forced recruitment, but imposed the condition that victims should have completed the reintegration process. For girls who were recruited, the court ordered an additional amount, relying on evidence showing that women suffered more due to the physical hardship of military life, the disregard for their physical condition specifically during menstruation periods and their exposure to sexual violence or harassment.
12. As a guarantee of non-repetition, the Court requested (because it had no jurisdiction to order the State) that the government guarantee the State's presence where the conflict is still active, including through the implementation of programs capable of overcoming the conditions of extreme poverty and vulnerability in those regions.
13. When the convicted leader of the armed group offered to build a monument in memory of the children, the court rejected the offer. It said that the best guarantee of non-repetition would be to dismantle the hierarchical relationship between the former commander and his victims. Instead the court 'requested' the State to build a community center in the former training center for the paramilitaries.
14. There are two important aspects of the *El Alemán* case. First, the Colombian court did not grant collective material reparations to the victims of forced recruitment. The court did not consider children commonly recruited into the same paramilitary group as a collective or that the experience of each victim was the same. Second, the Colombian court 'requested' the State to investigate the complicity of a corporation ("Chiquita Brands International") that appears to have financially supported the paramilitary group involved and requested the government to identify and seize local assets with the objective of using those assets to fund reparations. This is relevant in the *Lubanga* case because it refers to reparations for victims of the paramilitary groups, not only victims of its forced recruitment. It is also relevant because it attempts to deal with the problem of implementing the court's reparations orders, particularly compensation, given the likelihood that the individual perpetrator may not have enough assets to pay.
15. **Lessons from Peru, Morocco and Indonesia on community-based reparations.** The identification and registration of communities for community-based reparations, as well as the process in which communities decide on questions involving reparations, will require attention to factors of external and internal marginalization: whether some communities were already marginalized even prior to a conflict and whether *within* such communities, there are persons or families who may be internally marginalized.

16. Based on ICTJ's work in the field, three of the clearest examples of community-based 'collective' reparations are those implemented in Morocco, Peru and the Indonesian province of Aceh. Many communities that have proposed projects have introduced symbolic elements in the material reparations program they seek funding for.
17. The Morocco program asked communities to design proposals for livelihood and infrastructure projects. In Peru, the government has allocated uniform, fixed budgets for projects that the community selects from a 'menu' of authorized projects. The post-conflict reparations and post-*tsunami* rehabilitation program in the province of Aceh in Indonesia incorporated a similar, project-based approach to community-based reparations. The humanitarian relief dimension of the program made it necessary to use the Indonesian government's development agency because of the communities' development requirements. In other contexts, the overlap between development programs and reparations measures can lead to skepticism over whether a community is receiving reparations because of violations it suffered or because development projects are overdue in the region.
18. **Maintaining the community's involvement in discussing reparations.** It will be important in such cases for political leaders, justice and human rights policymakers and civil society organizations to maintain a public discussion over why a community deserves reparations. In Sierra Leone, the reparations agency funded community 'talking' sessions in which members could discuss their views about the conflict. This has been echoed more recently in the recommendations of the Liberia truth commission, which proposed the initiation of 'palava (or palaver) hut' discussions in communities, to discuss difficult issues surrounding the country's conflict.
19. **Reconciliation and reparations in divided communities.** A question that has often arisen in relation to reparations generally, but to community reparations in particular is whether 'reconciliation' should be a conscious goal of community reparations. Our February 2009 Rabat Report on Collective Reparations⁴ noted that "there were views that tried to distinguish between "collective" and "community" reparations. Some participants said that there is a 'reconciliation' component in community reparations and not necessarily in collective reparations because relationships within a community may have been broken."
20. **Gender considerations beyond sexual violence.** In considering the harm experienced by female victims, we suggested that the Court should avoid the reinforcement of existing gender stereotypes and social structures that marginalize certain groups of victims. For instance, the stereotypical depiction of sexual violence survivors as female may lead to the exclusion of girl

⁴<http://ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf>

child soldiers who suffered from other types of violence, such as forced labor, or to the invisibility of boys as victims of sexual violence.

21. In terms of ensuring women's access to individual reparations, one of the lessons learned in Sierra Leone is that victims of sexual violence may opt to come forward to claim reparations if they can avoid the stigma of being identified as victims of rape or as mothers of children born out of rape. In Nepal, while families of the disappeared and of those killed in the armed conflict receive the same lump sum amount, widows receive an additional sum. As a consequence, a number of wives of the disappeared have opted not to report the disappearance and instead registered as widows.
22. The lesson that ICTJ has gathered from these examples is that victims will often disregard normative categories in order to receive more benefits. The Court and the TFV will therefore need to consider the need to complete registration in all categories before determining the benefits and allocating resources to each.
23. **The importance of ordering perpetrators to pay reparations.** Ordering the convicted person to pay compensation, regardless of his purported indigence, has symbolic value. The court ordering the convicted person to make a symbolic payment of one Congolese franc may have resonance for the different communities in Ituri. The payment can represent a public acknowledgement of the prejudice a victim has suffered at the hands of the perpetrator, and a form of restoration of their dignity.
24. **Why symbolic reparations should also be given.** Symbolic reparations can be effective ways of acknowledging the loss and harm suffered by victims and survivors, particularly where the loss is irreparable. But symbolic reparations cannot be a substitute for all other forms of reparations. The economic and physical consequences of violations will require various means of restitution or rehabilitation. The continuing impact of certain violations – such as enforced disappearance, displacement, or the deprivation of livelihood or educational opportunities – can only be adequately and effectively addressed by adopting a policy or offering a benefit that changes the victims' present situation, rather than simply acknowledging the past.
25. In offering symbolic reparations, particularly in societies divided by conflict, it will also be important to ensure that it contribute to the possibilities for reconciliation and restoring (or building) civic trust, i.e. the confidence that citizens have in their fellow citizens' willingness to resolve conflict peacefully and in the State's capacity to dispense justice fairly.
26. Through its country program in the DRC, ICTJ has assessed the context for potential symbolic reparations measures, including an assessment of existing initiatives on memory and reconciliation in selected areas of Ituri. Both Hema and Lendu communities have already separately initiated activities to memorialize the losses experienced during the war; members of

both communities have expressed a willingness to explore joint measures to foster a common sense of responsibility and healing.

27. **Can an apology be useful in this case?** Based on ICTJ's assessment of victims' expectations in other cases involving the commission of serious crimes in the DRC, a public apology by the convicted person will likely not be seen by victims as a sufficient form of reparations. Apologies are matters of personal decision in both their offer and their acceptance.
28. **The role of the Trust Fund for Victims.** Given its experience in providing assistance to victims *during* the trial and its institutional role in the Rome Statute system, the TFV is in the best position to confer legitimacy to symbolic measures and to navigate the often difficult and sensitive process of consulting and persuading communities in divided societies to agree on the forms of collective reparations.