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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

***SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE
OF THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public

Submission on reparations issues

Source: International Center for Transitional Justice

Decision/Order/Judgment to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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PROCEDURAL HISTORY

1. On March 14, 2012, the Court issued the *“Scheduling order concerning timetable for sentencing and reparations,”* and invited submissions

“on (a) the principles to be applied by the Chamber with regard to reparations and (b) the procedure to be followed by the Chamber (and in) n particular these should address:

 - (i) whether reparations should be awarded on a collective or an individual basis (see Rule 97(1) of the Rules);*
 - (ii) depending on whether there should be individual or collective reparations (or both), to whom are they to be directed; how harm is to be assessed; and the criteria to be applied to the awards;*
 - (iii) whether it is possible or appropriate to make a reparations order against the convicted person pursuant to Article 75(2) of the Statute;*
 - (iv) whether it would be appropriate to make an order for an award for reparations through the Trust Fund for Victims pursuant to Article 75(2) of the Statute; and*
 - (v) whether the parties or participants seek to call expert evidence pursuant to Rule 97 of the Rules.”*
2. On April 20, 2012, the Court issued its *“Decision granting leave to make representations in the reparations proceedings,”* and authorized ICTJ, among others, to file its submission on reparations.
3. Our submission will respond to the issues identified by the Court in its Scheduling Order, but will take into account the observations already made by the parties and the participating victims. In referring to country examples particularly, we will rely on both material published by ICTJ or internal reports from our program staff, including those working on reparations, on criminal justice and in our Democratic Republic of the Congo (DRC) country program. We will focus our submission on what ICTJ has distilled as ‘lessons learned’ in our work on reparations programs and the challenges involving the right to reparations in transitional justice settings.

SUBMISSIONS AND OBSERVATIONS

I.

Informed by and consistent with the 2005 UN Basic Principles and Guidelines on a Right to a Remedy and Reparation,¹ we respectfully submit that the Court's principles relating to reparations 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.

II.

Individual reparations may be appropriate for direct victims of the crime, including those victims who have suffered sexual violence and other human rights violations, while collective reparations may be offered to communities that experienced forced recruitment and other harm that can be linked to that crime.

III.

It will be important to make a reparations order against the convicted person both for its symbolic significance and potential material value, but it will be necessary to make an order for an award for reparations through the Trust Fund for Victims, given the absence of forfeited assets and in order to give effect to the principles of acknowledgement, access and enabling the right to reparations that we propose the Court to adopt.

DISCUSSION

I.

Consistent with the 2005 UN Basic Principles and Guidelines on a Right to a Remedy and Reparation, we respectfully submit that the Court's principles relating to reparations 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.

¹UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter UN Basic Principles], available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 2 May 2012].

4. This is the Court's first opportunity to consider to whom and in what form reparations may be ordered for victims of the crimes covered by the Rome Statute. But this is not the first (nor likely the last) time that Congolese victims have either asked for or been made to expect reparations through domestic or even international courts. Understanding the violence and brutality victims witnessed or experienced, the family, homes and livelihood they lost, the depths of their poverty, their daily struggle to stay safe, and their lack of access to justice – will help make the Court's principles and procedures more meaningful and less burdensome to those applying for reparations through the Rome Statute.
5. Since 2006², Congolese military courts have awarded damages in certain cases to victims for harm they have suffered due to the commission of war crimes and crimes against humanity by soldiers of the Armed Forces of the Democratic Republic of Congo (DRC). An ICTJ report³ found that, of the key cases that were surveyed, no victim has successfully obtained actual payment of compensation from either convicted perpetrators or from the State, which under Congolese law bears joint and solitary liability for damages arising from crimes committed by its agents. Victims have valued the recognition that the court judgments, by themselves, have offered. But the failure to enforce those judgments has eroded not only their faith in the justice system, but also their sense of having been acknowledged.
6. Acknowledgement can be conveyed materially or symbolically. It can be done by accompanying material benefits meant for victims with public gestures that unambiguously indicate that these are being offered to persons who have suffered harm as a result of criminal activity. Ideally, acknowledgement should convey the acceptance of responsibility by the perpetrator or by the State. Criminal trials will not be able to guarantee the acceptance of guilt by the accused. However, the formality of a verdict from a court of the ICC's status may of course compensate significantly for the lack of formal acknowledgment of guilt on

² See e.g., Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 12 January 2006, RP 086/2005 (first tribunal); Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 20 June 2006, RP 086/2005/RP 101/2006 (appeal tribunal); and Cour Militaire de l'Equateur (/CM de l'Equateur), 15 June 2007, RPA 015/2007 (final appeal); Tribunal Militaire de Bunia (/TMG de Bunia), 24 March 2006, RP 018/2006 (first tribunal); Cour Militaire de Kisangani (/CM de Kisangani), 4 November 2006, RPA 030/2006 (appeal); Tribunal Militaire de Bunia (/TMG de Bunia), 19 February 2007, RP 101/2006 (first tribunal); Cour Militaire de Kisangani (/CM de Kisangani), 28 July 2007, RPA 003/2007 (appeal); and Tribunal Militaire de Garnison de Mbandaka (/TMG de Mbandaka), 12 April 2006, RP 084/2005 (first tribunal); Cour Militaire de l'Equateur (/CM de l'Equateur), 7 June 2006, RPA 014/2006 (appeal).

³ ICTJ, *Judgment Denied: The Failure to Fulfil Court-Ordered Reparations for Victims of Serious Crimes in the Democratic Republic of Congo* (2012, Unpublished Report).

the part of the perpetrator. The threat of punishment and the absence of jurisdiction over States may mean that individual perpetrators who accept responsibility do so to mitigate punishment, while States cannot be held responsible at all. Nonetheless, the Rome Statute tries to overcome these limitations precisely by incorporating a reparations mandate and by permitting the presence and participation of victims in the proceeding.

7. The example of Canada's effort to provide reparations to children of indigenous communities forcibly taken from their families and placed in church- and state-run Indian Residential Schools may be useful in illustrating how acknowledgement can be conveyed to all victims, while addressing the individual needs of each eligible victim.
8. After years of lawsuits and negotiations, the Canadian government agreed in 2006 on a package of reparations for residential school victims. The agreement includes provisions for financial compensation, a truth commission and healing measures for residential school survivors.
9. To acknowledge all victims through compensation, a "common experience payment" was paid as a lump sum to all victims forced into the residential schools for at least part of one (1) year. A separate additional amount was paid for every additional year in which the children were forced to stay and a separate process to assess harm and determine rehabilitation measures for sexual and other abuse was also put in place. The reparations agreement also obligated the government of Canada to establish a truth and reconciliation commission "to provide a forum for survivors and to educate the public about the residential schools and their legacies."⁴
10. Obviously, the provisions of the Statute and the situation in the DRC are significantly different from the context of a developed country dealing with a legacy of abuse; but the example is meant to show the importance of acknowledging *all* victims in a given situation, while offering reparations measures that respond to the more particular experiences and needs of victims.
11. The Court may wish to anticipate and obviate some of the inequitable and burdensome aspects of litigation by ensuring, as a matter of principle, that victims have fair and meaningful access to requesting reparations from the Court. In human rights courts, such as

⁴ For a background on this example, see ICTJ, "Canada's Truth and Reconciliation Commission," at <http://ictj.org/sites/default/files/ICTJ-Canada-Truth-Facts-2008-English.pdf>

the Inter-American Court of Human Rights (IACHR) or in the civil courts of countries that allow victims to sue perpetrators of human rights violations committed abroad, it is often those victims with the financial resources, access to information and support of urban-based non-government organizations (NGOs) who are first heard or in line to receive reparations. Victims already marginalized because of their distance from government centers, their low literacy, their lack of access to information and communication, their gender, minority status, or identity may end up excluded.

12. Families of Peruvian victims of human rights violations committed during the 1980-2000 internal armed conflict and the Fujimori government who obtained favorable judgments from the IACHR received significant awards of compensation.⁵ But many other Peruvian victims of other violations did not. The IACHR decisions helped demonstrate the right to reparations. But many victims then had to wait for the truth commission to recommend⁶ and then for the government to establish an administrative reparations program. According to the CVR, victims from among the poorest, indigenous communities had been disproportionately targeted for violations. These communities have thus been prioritized in awarding collective reparations.⁷ This experience shows how court-ordered reparations can, on one hand, create the conditions for broader recognition of harms and the need for further remedies, but also lead to disparities between reparations received by victims who could access the court and those who could not.
13. Victims of the Ferdinand Marcos dictatorship in the Philippines filed a class-action suit under the Alien Tort Claims Act (ATCA) in the United States, representing more than 10,000 victims.⁸ They won a judgment against the Marcos estate exceeding US\$2 Billion. Rigid US litigation practice, however, led to the exclusion of around 3,000 victims, who were either not able to meet the deadline to confirm their participation in the class action or who were not able to sign 'powers of attorney' that allowed the American lawyers representing the class to

⁵ I/A Court H.R., Case of Neira-Alegría et al. v. Peru. Reparations and Costs. Judgment of September 19, 1996, Series C No. 29; I/A Court H.R., Case of Loayza-Tamayo al. v. Peru. Reparations and Costs. Judgment of November 27, 1998, Series C No. 42; I/A Court H.R., Case of Castillo-Páez. v. Peru. Reparations and Costs. Judgment of November 27, 1998, Series C No. 43.

⁶ Comisión de Verdad y Reconciliación. Informe Final de la Comisión de Verdad y Reconciliación. Lima-Perú, 2003, Tomo IX.

⁷ *Id.*

⁸ *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1460, 1464 (D. Haw. 1995), *aff'd sub nom Hilao v. Estate of Marcos*, 103 F.3d 767, 770 (9th Cir. 1996).

distribute compensation payments. Despite victims' reservations, the class action lawyers entered into a settlement with the Marcos family and designed a distribution plan that did not include any assessment of victims' needs nor an acknowledgement by the perpetrators of their responsibility for violations. Each eligible victim received US\$ 1,000, regardless of the nature of the violation they had suffered or its repercussions on survivors of torture or detention or families of those killed or disappeared.⁹ While the payments may have been of symbolic importance to victims, the lack of a needs assessment, the failure to consult victims and the absence of acknowledgement made the 'equal' payments seem unequal, unfair and unsatisfying.

14. 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. Article 3(3) of the Statute states that the Court "may sit elsewhere, whenever it considers it desirable." We respectfully suggest that the Court assess the feasibility of conducting a hearing on reparations in Ituri, with due regard for security and costs.

II

Individual reparations may be appropriate for direct victims of the crime, including those victims who have suffered sexual violence and other human rights violations, while collective reparations may be offered to communities that experienced forced recruitment and other human rights violations that can be linked to that crime.

15. Considering the inherent limitations of the Statute's reparations regime and the absence, so far, of assets that can be forfeited for reparations, the award of reparations in this case should prioritize the immediate and direct victims of the crime, i.e. the victims of forced recruitment committed by the convicted person, their immediate families and persons who suffered harm as a result of intervening to prevent victimization.¹⁰

⁹ Seth Mydans, "First payments are made to victims of Marcos rule," *New York Times*, March 1, 2011, available at <http://www.nytimes.com/2011/03/02/world/asia/02philippines.html>

¹⁰ In Paragraph V (8) of the *UN Basic Principles*, "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering,

16. 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.
17. To give effect to individual reparations for direct victims the Court may consider the following possible combination of measures:
 - (a) Award individual compensation to the victims of the crime who have so far applied (and are qualified) for reparations, as well as those who apply and qualify within successive periods of registration that the Court (or the TFCV) has to set. In turn, the following considerations may be taken to account in determining the amount and manner of providing compensation:
 - i. Compensation need not be directly proportional to the gravity of the violation, but should be appropriate to the circumstances of each victim, including the victim's capacity to absorb funds without being vulnerable to exploitation; a prior assessment to analyse the potential impact of direct financial award should be undertaken in this regard.
 - ii. If, in addition to the crime, the victim experienced sexual violence or other harm resulting from a crime, an additional amount representing moral damage should be considered;
 - iii. An award contributing financial assistance toward care for children born out of rape related to the crime should also be considered.
 - (b) Award individual measures of rehabilitation appropriate to each victim, including access to medical and psychological care (which in either case can be awarded through the TFCV), including medical care for HIV or other sexually-transmitted disease, equipment needed as aids to mobility or functioning for persons with disabilities;
 - (c) Access to skills training or financial assistance to continue education that was disrupted by the crime;
 - (d) Award individual measures of satisfaction to each former child-soldier victim or, if deceased, his next-of-kin, possibly including an official declaration in the appropriate local languages, to the effect that the person should not be held legally or morally responsible for his or her actions as a combatant during the conflict.
18. Victims who participated in the proceedings expect to be awarded a form of individual reparations. There are likely be more direct victims of the crime – those who were forcibly

economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."

recruited by the convicted person – who might come forward to apply for reparations, if they are informed or are given the opportunity. The promise of individual reparations, especially compensation, often creates expectations of money in sums that can significantly change lives. It is important to manage these expectations and to be transparent about the available resources and modest possibilities that the Court and the TFV can offer. But it is also equally important not to reflexively respond to unrealistic expectations about individual reparations by either proposing the concept of ‘collective reparations’ as a default approach or by proposing the payment of a lump sum of money that makes no distinctions among victims’ experiences and needs.

19. . In considering how individual reparations should be made, it is important to remember that victims’ needs may change over time. In a 2008 survey conducted by ICTJ and partner institutions, Congolese citizens living in the eastern part of the DRC were asked “what, if anything,” should be done for the victims, without framing the question in normative language. The respondents mentioned money (40%), housing (28%), food (28%), and other material compensation (40%).¹¹
20. But several years have passed since the conflict in Ituri. Families have sometimes left the region to secure a better life elsewhere, and victims may now find themselves in different socio-economic classes. This divergence of potential reparations beneficiaries and the different situations that they 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.
21. An equally important consideration before distributing individual (or even community) reparations is to ensure that the identification of recipients is grounded on empirical identification of as many eligible potential reparations recipients there might be, and the nature of reparations that they ought to receive.

¹¹ Patrick Vinck, Phuong Pham et al., *Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo* (August 2008)[hereinafter *Living With Fear*].

22. In a 2010 assessment¹² conducted by ICTJ on the impact of the Lubanga proceeding in Ituri for children and their child protection needs, one key finding was that the high-profile nature of the case prompted many commanders and families belonging to Hema communities to conceal children associated with the armed groups. As a result, many were excluded from the formal demobilisation process and did not receive disarmament, demobilization and reintegration (DDR)-related benefits. This group of former child combatants thus represents a vulnerable group that requires particular attention.
23. The 2010 ICTJ assessment states that “the criminalization of the use of children as combatants remains poorly understood by most in Ituri, including the Hema and the Lendu.”¹³ It adds that the “decision to charge Lubanga exclusively with the crime of recruiting and using child soldiers has also had pernicious effects due to the ethnic identity of the victims. Both Lubanga and the children recruited by Lubanga are or were Hema. The Hema community considers Lubanga a hero...(b)ut for the Lendu victims of attacks carried out by the UPC under Lubanga’s leadership, murder, rape, torture, looting, and destruction of property are seen as the “real crimes” committed by the UPC. The latter group is frustrated that Lubanga has not been charged with these crimes.” The report quotes a community member who says that “The Lendu have never understood the crime of recruitment—these are not the true crimes of Lubanga.”¹⁴
24. The report further notes that children forced into combat “are aware of their ambiguous status and, fearing prosecution, are apprehensive about coming forward to tell their stories.” It points out that “transitional justice mechanisms, notably truth commissions, may be a useful tool in dealing with children who have participated in crimes, sometimes under coercive circumstances. Such mechanisms may provide a space for a deeper acknowledgement, covering not only the responsibility of the children concerned, but also of their families and communities, and of the circumstances that led to their association with armed groups in the first place.”¹⁵

¹² *Through a New Lens: A Child-Sensitive Approach to Transitional Justice* (August 2011), <http://ictj.org/sites/default/files/ICTJ-Children-Through-New-Lens-Aptel-Ladisch-2011-English.pdf> [accessed 7 May 2012].

¹³ *Id.* at p. 23.

¹⁴ *Id.*

¹⁵ *Id.* at p. 25.

25. The need for truth-seeking finds support in the early efforts among civil society and community leaders to design a local mechanism as well as in the most recent consultations with Ituri-based NGOs and communities conducted by ICTJ's DRC country program. Without community-based truth-seeking, granting reparations to former child soldiers, ICTJ's DRC program has suggested, may "seem like a reward for impunity (and) is likely to create resentment on the part of other victims."
26. In South Africa, the Truth and Reconciliation Commission (TRC) recommended individual compensation payments [in installments of \$3000 USD a year over a six-year period], along with individually-accessible health care and education benefits. Symbolic reparations measures were also recommended. The TRC also adopted the proposal of Khulumani Support Group, the largest victims' organization that emerged from the TRC process, of "community-based reparations" that would fund housing and livelihood programs designed by victims' communities.¹⁶
27. However in 2003, the government instead paid a lump sum of US\$4000 to each of about 20,000 victims. These victims were part of a 'closed' list of persons who had filed reparations applications and registered with the TRC before it ended its work. This year, the government intends to use the same 'closed list' of victims as the universe of beneficiaries of free health care for victims and scholarships for their dependents. Khulumani and other civil society organizations, including ICTJ, have pointed out the fact that at least 3,000 victims had been denied inclusion in the 'closed' list because their applications were made after the TRC ended, while an unknown and potentially larger number had never even applied for registration because they may not have known about their right to do so.¹⁷
28. The government relied on the flawed assumption that paying equal lump sums to a small, closed list of known beneficiaries is more efficient and effective in providing reparations

¹⁶ See *Interim Final Report, Reparation and Rehabilitation Policy*, Volume 5, Chapter 5 (29 October 1998), available on-line at <http://www.polity.org.za/polity/govdocs/commissions/1998/trc/index.htm>, see *Final Report of the Truth and Reconciliation Committee, Administrative Report, Report of the Reparation & Rehabilitation Committee*, volume 6, section 2, chapter 8, p. 165 (2003), available on-line at http://www.info.gov.za/otherdocs/2003/trc/2_8.pdf. [accessed 7 May 2012].

¹⁷ See South African Coalition for Transitional Justice, Comments on the Draft Regulation Published by the Department of Justice Dealing with Reparations for Apartheid Era Victims (8 June 2011), <http://www.khulumani.net/reparations.html> [accessed 7 May 2012].

than recognizing that different victims of apartheid experienced different and multiple forms of violations, and did not have the same opportunities to access the truth commission.

29. By analogy, we respectfully submit that the Court ought not to base its reparations orders, whether directly against the convicted person or through the TFV, on the number and circumstances of those victims whose applications for participation and reparations have been admitted, or even on the number of those who might apply within an initial period for applications that the Court might set. 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 phases periods, and to retain the flexibility to adjust awards for reparations on the basis of mapping and needs-assessment results.
30. In deciding how courts can either constrain or promote the right of victims to reparations, a discussion of two seminal decisions, both involving the crime of forcibly-recruiting child soldiers, may be helpful. The 2007 *AFRC decision*¹⁸ of the Special Court of Sierra Leone (SCSL) was the first judgment by an international tribunal involving the crime of forced recruitment. The more recent (2011) *El Aleman*¹⁹ decision from the Bogota special court created under Law 975 (the Justice and Peace Law) in Colombia, on the other hand, appears to be the first decision of a domestic criminal court with jurisdiction over conflict-related violations that has awarded reparations for forced recruitment.
31. In the *AFRC* case, the SCSL referred to the victims of the crimes thus: "Men and women of all ages, (s)ome had one arm amputated, others lost both arms. For those victims who survived an amputation, life was instantly and forever changed into one of dependence. Most were turned into beggars unable to earn any other living and even today cannot perform even the simplest of tasks without the help of others. Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population."²⁰
32. But apart from sentencing the convicted persons to prison, the court did not, because it could not, award reparations. It was not until two years later, and on the basis of truth commission

¹⁸ 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].

¹⁹Tribunal 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.

²⁰ Prosecutor v. Brima *Appeal Judgment*, *supra*, ¶ 328.

recommendations rather than a court order, that the government of Sierra Leone established a reparations program, funded by a UN Peacebuilding Fund (PBF) grant of US\$3 Million.²¹

33. These reparations did not require any link to participation in or recognition from the SCSL. Uniform payments of approximately \$100 each was given to around 30,000 registered victims in the following categories: (a) amputees, (b) other war-wounded or injured, (c) victims of sexual violence, including children falling within these categories. No reparations were offered for victims of forced recruitment as such.
34. 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 as it is in the DRC -- victims are left to rely on unenforced domestic court judgments for reparations. This makes the Court's role in this case even more important: it can provide the impetus for reparations broader than what it might be able to directly order.
35. 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 through a criminal court. Law 975 confers jurisdiction over criminal cases involving members of illegal groups.²² It created a reparations fund consisting of the assets surrendered by accused paramilitary leaders in return for a conditional sentence of 5-8 years. Significantly, and similar to the Rome Statute, the Law does not allow the court to issue orders against the State.
36. In December last year, the court in Bogota convicted paramilitary leader Fredy Rendón Herrera, alias "El Alemán," of forced recruitment. It ruled on the following reparations issues:
37. As material damage, the 309 victims requested an amount for each child based on the minimum salary, multiplied by the period of recruitment until they reached age 18. The court rejected the request. It said that the idea of a 'minimum wage' could not apply to children who were not legally capable of working full time and earning a minimum salary.

²¹ For ICTJ's report on the Sierra Leone reparations program, see Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (December 2009), <http://ictj.org/publication/report-and-proposals-implementation-reparations-sierra-leone> [hereinafter ICTJ Sierra Leone Report][accessed 8 May 2012].

²² Law 975 of July 25, 2005

38. For moral damages, some concern was expressed over whether reparations for the recruited children sent a message that this was an incentive to join paramilitary groups, given that the conflict is still going on. The court granted reparations for moral damages to all victims of forced recruitment, but imposed the condition that victims should have completed the reintegration process.
39. The court also distinguished between direct victims and their families, and among victims based on their age. The youngest victims received more than those closer to 18 years when they were recruited. The court, however, did not uphold the victims' invocation of the IACHR concept of a 'life project' as the basis for compensation. It said that this was too speculative based on the evidence presented.
40. For girls who were recruited, the court ordered an additional amount, relying on documentary and testimonial 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.
41. Parents were awarded compensation equal to the amount awarded to the direct victims while siblings were awarded one-half that amount. The court also order rehabilitation in the form of individualized counseling for each of the victims, and health care for mental and physical injury, including prosthetics. Separately, the parents and caregivers were to be given access to a psychosocial program to help them understand and care for their children in their process of rehabilitation.
42. As guarantees of non-repetition, the Court requested (because it had no jurisdiction to order the State) that the government guarantee the State's presence in the municipalities 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.
43. When the convicted person and 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, (especially since, as the court observed, several of the victims expressed allegiance to Rendón during the hearings).
44. Instead the court 'requested' the State to build a community center in the former training center for the paramilitaries and to install plaques in different places with the names of the

victims and quoting from the testimonies that showed the consequences of forced recruitment.

45. There are two important aspects of the *El Alemán* case that we respectfully ask the Court to note. First, the Colombian court did not grant collective material reparations to the victims of forced recruitment. Compensation and rehabilitation was awarded to individual victims and their relatives. The court did not consider as a reason to treat victims as a 'collective' their having been commonly recruited into the same paramilitary group. The court did not think that the experience of each victim was the same or that the impact on each of them could be 'collectivized.' On the other hand, the court's 'request' to the State for reparations and guarantees of non-repetition were meant to benefit communities from which the victims were recruited. It is inherently a community-based request for reparations.
46. The Colombian court also 'requested' the State to investigate the complicity of a corporation that appears to have financially supported the paramilitary group involved in the *El Alemán* case. The court requested the government to identify and seize assets of a corporation ("Chiquita Brands), with the objective of using those assets to fund reparations for victims of the paramilitary groups operating in the Urabá region, where the *El Aleman* group operated. 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.
47. 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.
48. In Peru, the truth commission built the foundation for that effort, by identifying the provinces and rural communities that had suffered the most violence during the *Sendero Luminoso* conflict. That these communities were also the poorest and most economically neglected in Peru has meant that community reparations has often combined the symbolic

with the material, particularly by funding community infrastructure and agriculture projects but locating or naming them with historical memory in mind.

49. Similarly, the truth commission in Morocco understood from its work that certain communities were specifically excluded from development programs because they harbored individuals opposed to the former king. Thus, the Morocco reparations agency made it a point to design a community reparations program that identified these discriminated communities and prioritized them in the project-based system of funding community proposals for reparations.
50. While the Statute and the *UN Basic Principles* contain some guidance on the notion of the victim as an individual, there is no clear conception of what a “collective” is. In this, the ambiguity of the concept of a “collective” is an opportunity for the Court and the TFV to innovate as well as to learn from the practice of States.
51. 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. These examples also show the variations in how members of the community are involved in the process of reparations decision-making.²³
52. Many communities that have proposed projects have introduced symbolic elements in the material reparations program they seek funding for. The Morocco program asked communities to design proposals for livelihood and infrastructure projects – for instance a horse-breeding project in a region now promoting tourism that used to be a security exclusion zone. In another proposal, a boxing gym that had been closed by the former ruler because it was used for political meetings was refurbished and symbolically re-opened. In Peru, the government has allocated uniform, fixed budgets for projects that the community selects from a ‘menu’ of authorized projects; for example a community fish pond was funded and built in what was formerly the site of a massacre.²⁴
53. 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

²³ J. Guillerot and R. Carranza (ICTJ), *The Rabat Report: The Concepts and Challenges of Collective Reparations*, pp. 28-31 (February 2009), <http://ictj.org/search-results?search=rabat%20report>, [accessed 7 May 2012] [hereinafter Rabat Report].

²⁴ *Id.* at pp. 24-26

Indonesian government's development agency as a conduit because the communities' development requirements – destroyed by both conflict and natural disaster – overlapped. 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.²⁵

54. 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.²⁶
55. 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. In February 2009, an International Meeting on Collective Reparations was co-organized by ICTJ and the Moroccan Advisory Council on Human Rights (CCDH).²⁷ The Rabat meeting was attended by around 40 civil society activists and state reparations agency officials from Colombia, Indonesia, Liberia, Morocco, Peru, Sierra Leone, and Timor-Leste, all of whom were directly involved in designing, implementing, or monitoring community or collective reparations programs.
56. Our report on the meeting 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. One other perspective argued that some forms of reparations are inherently 'collective' and exclusive (e.g. health services for victims of torture or sexual violence) while some are community-oriented but not exclusive (e.g. schools serving a community). But there were many more

²⁵ *Id.* at pp. 15-17.

²⁶ Liberia, Truth and Reconciliation Commission, volume Three: Appendices: Title XII: Towards National Reconciliation and Dialogues: The Palava Hut or Peace Forums, <http://trcofliberia.org/>.

²⁷ Rabat Report

views that sought to blur the distinction, often because they see the distinction as having no practical value.”²⁸

57. **Gender and vulnerability considerations:** At the trial of Mr. Lubanga, evidence was presented that girl child-soldiers were also victims of sexual violence in the armed group commanded by the convicted person. While the majority of Trial Chamber I found it impermissible to base its judgment on this evidence, (since these facts were not included in the charging decision), the Chamber itself has suggested that these facts may be taken into account for the purposes of sentencing and reparations.
58. ICTJ supports the TFV and Office of the Public Counsel (OPCV) submissions, which note that the possibility to order reparations “in respect of” victims may enable the reparations judgment to benefit a broader category of victims - for example victims of sexual violence generally.
59. We would respectfully add that in considering the harm experienced by female victims and the corresponding measures of reparations, the Court should take care to 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 child soldiers who suffered from other types of violence, such as forced labor, or to the invisibility of boys as victims of sexual violence.
60. 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 that country’s registration process, the actual number of victims of sexual violence who came to register was fewer than what the truth commission estimated and what the reparations-implementing agency expected. On the other hand, the number of ‘war widows’ and women who claimed injury was higher than anticipated.²⁹
61. Forced disappearance was one of the most egregious violations in Nepal’s armed conflict. While wives of the disappeared and widows of those killed receive the same lump sum

²⁸ *Id.* at p. 44.

²⁹ ICTJ, Sierra Leone Report, p. 4.

amount, the 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.³⁰

62. 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. Since remote and displaced communities may not have immediate access to information about reparations, there may also be a need to conduct a series, rather than only a single, registration process over a longer period of time.

III.

It will be important to make a reparations order against the convicted person both for its symbolic significance and potential material value; it will be necessary to make an order for an award for reparations through the Trust Fund for Victims, given the absence of forfeited assets and in order to give effect to the principles of acknowledgement, access and enabling the right to reparations.

63. 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. It is common judicial practice in the DRC for the victim to request that the perpetrator make such a symbolic payment, particularly when a perpetrator is indigent, or where the victim does not require financial compensation. The payment thus represents a public acknowledgement of the prejudice a victim has suffered at the hands of the perpetrator, and a form of restoration of their dignity. The Court may thus consider ordering such a payment as a form of symbolic reparations, and as an alternative should investigations into the existence of potential assets yield no tangible results.
64. Symbolic reparations can be effective ways of acknowledging the loss and harm suffered by victims and survivors, particularly where the loss is irreparable and can never have an equivalent in compensation or other material forms of reparations. But symbolic reparations cannot be a substitute for all other forms of reparations. The economic and physical

³⁰ ICTJ, *From Relief to Reparations: Listening to the Voices of Victims*, p. 16 (2011), <http://ictj.org/publication/relief-reparations-listening-voices-victims> [accessed 8 May 2012].

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.

65. 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.
66. 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, and offers these insights. 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. We respectfully submit that community-based reconciliation activities, ideally joint, should be explored in Ituri, possibly through the Trust Fund for Victims.
67. There is continued frustration and skepticism over the perceived exclusion of violations committed against Lendu victims, such as murder, rape, torture, looting, and the destruction of property. A reparations order that is seen as focusing exclusively on Hema victims, which represent the bulk of direct victims of the crime in this case, may reinforce the frustration and skepticism. A reparations order that publicly and clearly acknowledges the suffering of all victims in Ituri can provide a powerful tool for reconciliation.
68. *The possibility of a public apology by the convicted person:* 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. In any event, the convicted person cannot be ordered to offer an apology or to personally participate in an event involving symbolic or other forms of reparations that require the perpetrator's presence or personal, non-monetary contribution.
69. Apologies – like the concept of 'reconciliation' in discussions about transitional justice -- are matters of personal decision in both their offer and their acceptance. We submit that the

Court can only facilitate the making and the accepting of an apology. Nevertheless, doubt may arise as to the convicted person's motivation for apologizing or agreeing to personal involvement in efforts to give effect to reparations orders.

70. All other forms of collective and community reparations, however, including both material and symbolic forms, will require that the award be made through the TFV. 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.

FOR THESE REASONS, the International Center for Transitional Justice respectfully requests the Trial Chamber to take due consideration of these submissions. The Center also states before the Court its willingness to offer technical assistance, policy advice and staff expertise on matters related to reparations or to the situation of victims and victims' communities in the DRC.



DAVID TOLBERT
President

Dated this 11th day of May 2012
At New York, NY, USA