Collective Reparations and the International Criminal Court

Briefing Paper No. 2 (2011)

By Sylvain Aubry and María Isabel Henao-Trip

Edited by Dr. Clara Sandoval

ETJN, Reparations Unit
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Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparation Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

Briefing paper 1: Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

Briefing paper 2: Collective Reparations and the International Criminal Court (By Sylvain Aubry and María Isabel Henao)

Briefing paper 3: Prioritising Victims to Award Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

Briefing paper 4: The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

Briefing paper 5: The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

Briefing paper 6: Adverse Consequences of Reparations (By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel)

In the area of collective reparations, VPRS provided the ETJN with the following list of questions: What does collective reparation mean? Identify the main legal definitions of collective awards? What experience has there been with collective applications for reparation,
and how might this sit side by side with individual applications/claims? They also asked the ETJN to gather relevant procedural rules and case-law, including the jurisprudence of the Inter-American Court (IAC) and other courts in the area of collective reparations. This briefing paper provides important insights into these questions.

For more information on the ETJN, please visit http://www.essex.ac.uk/tjn/

Clara Sandoval
Colchester, July 2011
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Collective Reparations and the International Criminal Court

By Sylvain Aubry¹ and Maria Isabel Henao Trip²

I. Introduction

1. Effectively fighting impunity against international crimes requires repairing its victims for harm suffered. The International Criminal Court (ICC) Pre Trial Chamber I, in the case Prosecutor v. Thomas Lubanga Dyilo, recognised that “the success of the Court is, to some extent, linked to the success of its reparation system.”³ Collective reparations could be a key feature of this success. Indeed, the ICC may, pursuant to Article 75 of the Rome Statute and Rule 97 (1) of its Rules of Procedure and Evidence (henceforth “RPE”), “award reparations on an individualised basis or, where it deems it appropriate, on a collective basis or both”⁴, and “upon request or on its own motion in exceptional circumstances.”⁵

2. It is further specified in Rule 98 (3) that, “the Court may order that an award for reparations against a convicted person be made through the Trust Fund (TFV) where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate”. The ICC has thus been given a clear mandate to take into account the notion that reparations can be awarded collectively.

3. This brief intends to clarify the scope and meaning of awards granted “on a collective basis”, and to evaluate its relevance in the context of the cases before the Court. As collective reparations remains an unclear concept, this paper will first look at the meaning of collective reparation before focusing on its application and relevance to the specific issues before the Court.

II. The Difficulty in Providing a Definition

4. Despite a rapidly growing use of the concept of collective reparation at the national and international level⁶ it has not been defined under international law. It has been pointed out that the term is still ambiguous and it can be understood in several ways.⁷ A reparation measure can be said to be collective, firstly, because it is awarded for the violation of a collective right or for the violation of a right that has an impact on a

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³ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58 (ICC Pre-Trial Chamber I 110 February 2006), para. 136.
community. Secondly, a reparation measure may be collective when the subject of the reparation is a specific group of people. Thirdly, it can refer to the types of goods distributed or the mode of distributing them, such as an apology addressed to the victims in general.

5. A helpful characterisation of the concept is given by Friedrich Rosenfeld, who defines collective reparation as, “the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law”. He identifies four elements that constitute collective reparations: 1) the benefits given can take “very different forms”, and they are indivisible, in the sense that victims who receive the benefits are not able to enjoy them on their own; 2) the beneficiaries can be collectives; 3) it helps to undo a “collective harm”, which, to occur, implies that “the victims share certain bonds, such as common cultural, religious, tribal or ethnic roots”; and 4) there needs to be a violation of international law.

6. A main difficulty of the definition lies in the third element, the identification of the “collective”, necessary to have a “collective harm”. The Rabat report, which follows an international symposium on collective reparations, shows that there is no agreement amongst practitioners on the notion of “collective identity” that should exist within the group considered for collective reparations. Instead, the report indicates that it is “difficult to define what a collective or community is, as groups that emerge from conflict or repression are multidimensional.” While collective reparations can sometimes be understood narrowly as measures which address pre-existing groups tied by a cultural or ethnic link, the international practice is actually more flexible about this criterion, as will be shown below.

7. The Rome Statute and the RPE do not give any guidance as to what is meant by reparations “on a collective basis”, and there is no reason to assume a narrow scope. The reasons provided by Rule 98 (3) to justify the delivery of collective reparations through the Trust Fund are “the number of the victims and the scope, forms and modalities of reparations”. This seems to imply, that collective reparations should be

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8 See for instance (for instances or for instance?) the cases of the Inter-American Court of Human Rights (IACtHR) which deal with violations of the right to land of indigenous communities: IACtHR, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations and Costs, Series C No. 66 (31/08/2001); IACtHR, The Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Series C No. 125 (17/06/2005); IACtHR, The Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Series C No. 146 (29/03/2006).

9 See for instances e.g. the cases of the IACtHR that deal with violations of the right inmates of detention centers: IACtHR, Juvenile Institute’ v. Paraguay, Preliminary Objections, Merits, Reparations and Costs, Series C No. 112 (2/09/2004); IACtHR, Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela, Preliminary Objection, Merits, Reparations and Costs, Series C No. 150 (05/07/2006).

10 Ruth Rubio-Marín and Pablo de Greiff, supra n. 7, 335.

11 Rosenfeld, F. Collective reparation for victims or armed conflicts’ (2010) 870 International Review of the Red Cross 731, 732.

12 Ibid, 733-735.


14 Ibid, 58.

understood extensively – the intention being to give various tools to the Court in order to better respond to a wide range of situations. It is clear that the Court will have to adjudicate in very different circumstances, and it should therefore adopt an understanding of collective reparations able to encompass the specificities and cultural particularities of the cases it will deal with.

III. Brief Survey of the Practice and Jurisprudence on Collective Reparations: Different Forms of Reparation for Different Collectives

8. The Court may find guidance in the experience of transitional justice processes, relevant human rights case-law, notably from the Inter-American Court of Human Rights (IACtHR), whose “innovative provisions on reparations for victims – individuals or collectivities – place [its] jurisprudence on centre stage”, and in the practice of the Extraordinary Chambers in the Courts of Cambodia.16

   a) The Inter-American Court of Human Rights and the Extraordinary Chambers in the Courts of Cambodia

9. The IACtHR has regularly used “other measures” to redress non-pecuniary or immaterial damage, which include measures of satisfaction, rehabilitation and guarantee of non-repetition.17 In its decisions it has sometimes grouped these forms of reparations as measures of satisfaction, “seeking to repair the non-pecuniary damage [that has] public repercussions.”18

10. Collective reparation measures awarded by the Court have benefited discrete pre-existing communities linked by a strong tie. Initially, the IACtHR did not acknowledge collective harm, even though it sometimes granted reparations that in practice benefited a community. For example, in Aloeboetoe v. Suriname, a case involving seven members of a Maroon ethnic community killed by the military forces, the IACtHR refused to redress the moral damage alleged to have affected the community19, but it ordered the reopening and operationalisation of the medical dispensary and school in the village where most of the victims’ children lived.20

11. However, later, the IACtHR did grant reparations to communities and not only to individual victims.21 For instance, in the case of Saramaka People v. Suriname it went as far as naming the beneficiaries individually but recognising the collective as the victim

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17 See e.g. IACtHR, ‘Las Dos Erres’ Massacre v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Series C No. 211 (24/11/2009), paras. 255-274.
19 Ibid, para. 83.
21 Mayagna (Sumo) Awas Tingni Community v. Nicaragua, supra. n. 8, paras. 155 and 164; Plan de Sánchez Massacre v. Guatemala, supra n. 18, para. 62; IACtHR, Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15/06/2005), paras. 176 and 194; Yakye Axa Indigenous Community v. Paraguay, supra n. 8, paras. 188-189; IACtHR, Sawhoyamaxa Indigenous Community v. Paraguay, supra n. 8, para. 204.
in the case.\textsuperscript{22} Specific collective forms of reparation in these cases included the establishment of a development fund for health, housing, and education programmes;\textsuperscript{23} the provision of medical and psychological treatment;\textsuperscript{24} a public act of apology to the victims;\textsuperscript{25} the translation of the judgement of the Court in the community’s language;\textsuperscript{26} the construction or maintenance of a commemorative building;\textsuperscript{27} the delimitation, demarcation, and titling of the property of indigenous communities;\textsuperscript{28} the obligation to conduct environmental and social impact assessments;\textsuperscript{29} the delivery of basic services and goods to a community;\textsuperscript{30} a communication system for health emergencies;\textsuperscript{31} and the guarantee of safety for community members\textsuperscript{32}.

12. The IACtHR has awarded compensation to communities for pecuniary and non-pecuniary damages,\textsuperscript{33} as well as restitution measures regarding traditional lands,\textsuperscript{34} According to the Court, the notion of communities extends to peoples, indigenous or not,\textsuperscript{35} “who are connected by a strong and unique bond with their ancestral land that determines their culture, way of life, beliefs and survival”.\textsuperscript{36}

13. Beyond specific communities, the IACtHR has granted reparation measures that benefit “society as a whole”,\textsuperscript{37} where the expression appears to refer to society at the national level.\textsuperscript{38} The Court made explicit reference to, “society as a whole”\textsuperscript{39} when awarding

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{22} IACtHR, \textit{Saramaka People. v. Suriname}, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 172 (28/11/2007), para. 188.
\item \textsuperscript{23} \textit{Plan de Sánchez Massacre v. Guatemala}, supra n. 18, para. 110; \textit{Moiwana Community v. Suriname}, supra n. 21, para. 214; \textit{Saramaka People. v. Suriname}, ibid, para. 201 (in this case the fund ‘will serve to finance educational, housing, agricultural, and health projects, as well as provide electricity and drinking water’); \textit{Yakye Axa Indigenous Community v. Paraguay}, supra n. 8, para. 205; \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, supra n. 8, para. 224 (in this case the fund ‘will be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure’).
\item \textsuperscript{24} \textit{Plan de Sánchez Massacre v. Guatemala}, supra n. 18, para. 102.
\item \textsuperscript{25} \textit{Plan de Sánchez Massacre v. Guatemala}, supra n. 18, paras. 100-101; \textit{Moiwana Community v. Suriname}, supra n. 21, para. 217; \textit{Yakye Axa Indigenous Community v. Paraguay}, supra n. 8, para. 226.
\item \textsuperscript{26} \textit{Plan de Sánchez Massacre v. Guatemala}, supra n. 18, para. 102; \textit{Saramaka People. v. Suriname}, supra n. 22, paras. 196-197.
\item \textsuperscript{27} \textit{Plan de Sánchez Massacre v. Guatemala}, supra n. 18, para. 104; \textit{Moiwana Community v. Suriname}, supra n. 21, para. 218.
\item \textsuperscript{28} \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, supra n. 8, para. 164; \textit{Moiwana Community v. Suriname}, supra n. 21, para. 209-210; \textit{Saramaka People. v. Suriname}, supra n. 22, para. 194;
\item \textsuperscript{29} \textit{Saramaka People. v. Suriname}, supra n. 22, para. 194.
\item \textsuperscript{30} \textit{Yakye Axa Indigenous Community v. Paraguay}, supra n. 8, para. 219; \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, supra n. 8, para. 230.
\item \textsuperscript{31} \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, supra n. 8, para. 232.
\item \textsuperscript{32} \textit{Moiwana Community v. Suriname}, supra n. 21, para. 212.
\item \textsuperscript{33} \textit{Saramaka People. v. Suriname}, supra n. 22, paras. 198-202; \textit{Yakye Axa Indigenous Community v. Paraguay}, supra n. 8, paras. 194 and 205; \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, supra n. 8, para. 218.
\item \textsuperscript{34} \textit{Sawhoyamaxa Indigenous Community v. Paraguay}, supra n. 8, para.215.
\item \textsuperscript{35} \textit{Saramaka People. v. Suriname}, supra n. 22, para. 79.
\item \textsuperscript{38} The precedent was set in IACtHR, \textit{Trujillo-Oroza v. Bolivia}, Reparations and Costs, Series C No. 92 (27/02/2002), para. 110.
\end{enumerate}
\end{footnotesize}
certain reparations in relation to the right to the truth and in the context of impunity, including the obligation to investigate, try and punish perpetrators.40 Furthermore, several reparation measures based solely on the reparation provision (Article 63 (1)) of the American Convention on Human Rights arguably benefit the society as a whole, or at least a large section of the society.41 These are of direct relevance for the ICC and include measures of satisfaction and non-repetition"42 such as public apologies;43 the wide diffusion of the judgement using the media,44 including the radio and the television45; or the training of public officials.46 These cases, in addition to providing examples that could be understood as forms of collective reparation, are important as they clearly show how reparation measures can aim at addressing the "very social fabric [which] was torn apart by the violence"47 and the public trust which was gravely damaged as a direct result of the crimes' committed.

14. Furthermore, the Extraordinary Chambers in the Courts of Cambodia (ECCC), which can only order “collective and moral” reparations,48 despite being a criminal court, have clearly demonstrated that an individual perpetrator of a crime can also be called to provide reparations on a collective basis. In Case 001, the Trial Chamber of the ECCC granted collective reparations. It included all the names of civil parties and victims in its judgement, and ordered the compilation and publication of all statements of apology and remorse made by the perpetrator during the course of the trial.49 This reaffirms the position already developed by human rights courts like the IACtHR.

b) Transitional Justice Processes

15. Transitional justice processes at the domestic level have also established mechanisms that have awarded collective reparations to discrete communities linked by a pre-existing cultural bond, such as peasant or indigenous populations. This can include communities whose members may be former perpetrators, as in the Peruvian transitional justice process.50

16. Transitional justice practice is most remarkable, however, for having repaired a wide range of groups while taking into account the unique circumstances of each country. The Moroccan Equity and Reconciliation Commission (IER - Instance Équité et Réconciliation) suggested that some regions where secret detention torture facilities

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39 An author has considered it as constituting a third category beyond 'victims' and 'injured parties': 'beneficiaries'. Sandoval, C., supra n. 36, 274.
40 See Schonsteiner, J., supra n. 37, 141-143, where the cases are detailed.
41 Ibid, 153-159.
42IACtHR, Cantoral-Benavides v. Peru, Reparations and Costs, Series C No. 88 (03/12/2001), op.para. 7.
43 E.g. Ibid; Plan de Sánchez Massacre v. Guatemala, supra n. 18, para. 100.
44 E.g. Cantoral-Benavides v. Peru, supra n. 42.
48 ECCC, Internal Rules (Rev.5) (9 February 2010), Rule 23 quinquies.
were located should benefit from a program of socioeconomic development and memorialisation. The selected regions would benefit from development projects, the provision of public services, and symbolic measures such as the conversion of the former secret detention centres into sites of memory.\textsuperscript{51} Such focus was justified because these areas were affected and marginalised as a result of the presence of clandestine prisons.\textsuperscript{52} Hence, collective reparation measures can sometimes benefit groups of people identified according to their geographical location.

17. The Peruvian Truth and Reconciliation Commission (CVR) is particularly interesting as it explicitly recognised that “the armed conflict affected a larger universe: the family members of victims and groups of individuals who because of the concentration of massive violations in their midst suffered a collective harm and the violation of their collective rights.”\textsuperscript{53} In order to define the identity of victims in the context of groups, the CVR used “a set of indicators relating to the impact of the violence, including: the level of concentration of individual violations in the area, whether the community was razed, the existence of forced displacement, fractures in the community's institutional life (including killings of community leaders), and loss of family and community infrastructure.”\textsuperscript{54} The CVR thus suggested that, for instance, reparation measures should benefit in particular non-returning displaced people from affected communities.\textsuperscript{55}

18. In Colombia, the National Commission for Reparation and Reconciliation (CNRR), with the support of the International Organization for Migrations (IOM) and the United States Agency for International Development (USAID), carried out a Collective Reparation Pilot Plan process (PPRC), in seven communities who have been harshly affected by the violence of illegal armed groups.\textsuperscript{56} Communities to benefit from reparations were chosen according to “the impact of the violence, and on the basis of cultural, ethnic, geographic, and socioeconomic diversity”\textsuperscript{57}, and include, for example, the mothers of people who have disappeared during the course of the armed conflict showing how reparation programmes can address certain parts of the population directly affected by the violations, which can include women or children (see below part III - C).\textsuperscript{58} Similarly, in East Timor, the truth commission recommended a programme focused on women affected by the conflict, notably war widows and victims of sexual violence.\textsuperscript{59} Another way to repair collectively all the victims, is to implement group therapies, as was done in Chile for survivors of torture.\textsuperscript{60}

19. Collective reparations can thus potentially benefit many different types of groups. The experience of transitional justice processes further suggests that it is possible and

\textsuperscript{51} Ibid, 27.
\textsuperscript{52} Rabat report, supra n. 13, 26-27. See also IER, 'Synthèse du rapport final (résumé)', \url{<http://www.ier.ma/article.php3?id_article=1496>} accessed 19 June 2011.
\textsuperscript{54} Magarrell, Lisa, 'Reparations for Massive or Widespread Human Rights Violations' supra n. 47, 96.
\textsuperscript{55} Rabat Report, supra n. 13, 42.
\textsuperscript{57} Rabat Report, supra n. 13, 42-43.
\textsuperscript{58} Ibid, 42-43.
\textsuperscript{59} Magarrell, 'Reparations in Theory and Practice', supra n. 47, 6.
\textsuperscript{60} Ibid.
necessary to be creative in order to best fit the specific circumstances of a case, in particular the cultural dimension of the “collective”. In this context, it is worth noting that the participants of the Rabat conference agreed that, “practitioners should not try to find a single way to define what a collective victim is; instead, [they] must explore the available options—enriched with academic work on identity issues—in order to determine how to respond in particular contexts, while learning from the lessons derived from other experiences.”

IV. The Use of Collective Reparations in the ICC System

20. As seen above, collective reparations have been used in a variety of contexts. In addition, the concept has been recognised by different authoritative international documents. Although this briefing deals with collective reparations, it is important to stress that their application does not exclude the application of individual reparation measures, and that in fact they complement each other. There are violations that cause individual harms and that require individualised measures to repair them. Therefore, if the Court is to be guided by the principle of reparation in integrum, its jurisprudence should reflect a reparation system where both types of measures are potentially applicable.

a) Limitations and Challenges for Collective Reparations in the ICC System

21. The ICC has two major limitations in the Rome Statute and in the RPE for awarding collective reparations. First, the ICC following Rule 85 of the RPE, can only award reparations to victims “who suffered a harm as a result of the commission of any crime within the jurisdiction of the Court”. Therefore, the victim’s harm needs to have a nexus to the crime committed by the perpetrator. Second, according to Article 75 of

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61 Rabat Report, supra n. 13, 43.
62 UN Sub-Commission on the Promotion and Protection of Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report, submitted by Mr Theo van Boven, Special Rapporteur, UN (Doc.E/CN.4/Sub.2/1993/8, 2 July 1993), para. 14; UN, ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Addendum to the Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, (UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005), Principle 32; UN Commission on Human Rights, Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, (UN Doc. E/CN.4/2005/102, 18 February 2005), para. 61; Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.5) (9 February 2010), Rule 23 quinquies; 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’ (UN Doc. A/RES/60/147, 2005), Principle 13. See also Principle 8 according to which victims are defined as those persons ‘who individually or collectively suffered harm’, specifying that the term can also include ‘the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.’ In addition, examples of reparations are listed in Principles 22, including measures such as commemorations and tributes to the victims which can be considered as collective ones.
64 Prosecutor v. Thomas Lubanga Dyilo Case no.ICC-01/04-01/06 Redacted version of Decision on ‘indirect victims’, (ICC Trial Chamber I 8 April 2009), paras. 45-46.
the Rome Statute, the reparations ordered by the Court are to be provided by the person convicted (Article 75.2) for having committed the crime.

22. As a result of these limitations the ICC will face a number of constrains and/or challenges in ordering collective reparations. First, the victims that the court will be able to repair in a particular situation will be limited to those that resulted from cases prosecuted in the Court, following the principle of causality between the crime and the harm. Second, in cases where the number of victims is high, the individual perpetrator is unlikely to have the resources to repair all the victims that resulted from his or her illegal conduct.65 Third, some collective reparation measures require more than economic resources to be delivered, as in the case of infrastructure. For example, if the Court is to order the provision of health or psychological services, it will require doctors, medical facilities, and medication, among other things. In most cases, the convicted person will not be able to organise or provide such services. Therefore, there are clear limits to how a perpetrator can redress the crimes committed.

23. The TFV is the Statute’s response to the incapacity and the inability of a convicted person to implement many of the reparations measures ordered by the Court, particularly collective reparation and more extensive individual measures.66 Indeed, Rule 98 of the RPE establishes that collective reparations measures ordered by the Court against a convicted person may be implemented by the TFV. In practice, almost all collective reparation measures will require the involvement of the TFV and the cooperation of the State and non-governmental organisations, since most of the collective reparations measures, due to their nature, require the existence of an infrastructure for their implementation.67 Unfortunately, the TFV is suffering from financial limitations.68 Until 2009 the total income of the TFV was 4.5 million Euros.69 It is doubtful that this budget will be sufficient to deal with the TFV reparation mandate.

24. In addition to its reparation mandate, the TFV has been given the responsibility to give assistance to the victims, which encompasses both individual and/or collective assistance.70 Consequently, the TFV will be able to reach victims that do not have a direct nexus with the perpetrator or the crime for which he/she was convicted, but who nevertheless suffered as a consequence of the conflict and/or of the crimes committed during it.71 Nonetheless, such measures are not to be confused with reparation measures. Further, they might generate a sense of injustice in the community, as some victims will benefit from reparations measures, while others will

65 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 58.
67 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 58.
68 The TFV is financed primarily by voluntary contributions from States, international organizations, individuals and corporations and secondary by fines and forfeitures ordered by the Court and financial resources from the convicted perpetrator (Trust Fund Regulation 21). As a result of the voluntary nature of the contributions only a few number of States have funded the TFV.
71 Zegveld, L. supra n. 66, 89.
only receive humanitarian assistance without the acknowledgment of the harm suffered, and yet others will receive nothing.\(^\text{72}\)

25. As indicated above, the financial limitations of the convicted person and the TFV limit the potential of the ICC to award reparations. Collective reparations measures can be, in some cases\(^\text{73}\), an answer to these financial constraints, in particular when the number of victims is high.\(^\text{74}\)

26. In any case, the Court might have to award individual reparation measures even if financial means are limited.

27. Furthermore, most of the victims of the crimes envisaged by the Court are traumatised and “will often be living in the midst of on-going violence or in societies newly emerging from years of conflict and widespread atrocities, meaning resources may be scarce and tensions among groups of victims, or between victims and the government, may be high.”\(^\text{75}\) As a consequence of this trauma and lack of financial resources, many victims will not be able to participate in the ICC proceedings and/or file claims.\(^\text{76}\) To address this problem the Rome Statute and RPE gave the Court the power to order collective reparations measures acting on its own motion (Article 75). By awarding collective reparations the Court also addresses its inability to identify all the victims of a convicted person and attempts to repair as many victims as possible.\(^\text{77}\)

28. Moreover, the ICC should consider the implementation challenges for collective reparation measures. Firstly, collective forms of reparation are not easy to implement and monitor.\(^\text{78}\) Secondly, in some cases they might “be resisted by individual victims because they do not respond to the often quite intimate, individual nature of the violations and suffering,”\(^\text{79}\) hence the importance of the complementarity between collective and individual reparations.\(^\text{80}\)

\section*{b) The Need to Define Collective Reparations in Flexible Terms}

29. As previously discussed, there is no clear international definition as to what constitutes a “collective” that is entitled to reparations, and neither the Statute nor the RPE give any more detail. It has been seen how the practice of international human rights courts and transitional justice processes demonstrate that this definition

\textsuperscript{72} Magarrell, L., supra n. 50, 6.

\textsuperscript{73} Collective reparations are not suitable for all cases. For example the experience from the TFV in Uganda shows that most of the victims want an individual approach to reparations, due to the individual nature of the harm suffered by the victims. TFV, ‘Learning from the TFV’S Second Mandate: From Implementing Rehabilitation Assistance to Reparations: Programme Progress Report’ <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall.202010.pdf> accessed 24 January 2011, 38.

\textsuperscript{74} Rabat Report, supra n. 13, 10.

\textsuperscript{75} War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63.

\textsuperscript{76} War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 57 – 58.

\textsuperscript{77} War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 57 – 58; Zegveld, L., supra n. 66, 98 – 100.

\textsuperscript{78} War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63; Zegveld, L., supra n. 66.

\textsuperscript{79} Magarrell, Lisa, supra n. 50, 6.

\textsuperscript{80} Ibid, 6.

\textsuperscript{81} Ibid, 7.
depends on the unique circumstances of the situation, in particular cultural features of the “collective” and/or the claim of victims.

30. It is recommended that the ICC’s future jurisprudence adopt a wide and flexible understanding of what a collective is when awarding reparation, either when there is a collective claim or when the Court is acting *motu proprio*. The criteria for the recognition of a collective established by the ICC should take into account, but not be limited to, the cultural dimensions of the “collectives” it will repair. The Rome Statute and the RPE recognise the importance of tailoring each reparation process to the facts of the case by making it a duty of the Court to take into account the interests of victims (Article 75.2 Rule 97). A flexible definition of a collective, will allow the ICC to put in place a reparations system that takes into account the cultural dimension of the groups and communities, as envisaged by the drafters of the Rome Statute. This flexibility will be of crucial importance for new situations the ICC might decide to investigate.

c) Specific Collective Reparations Measures in the ICC System

31. According to Article 75 of the Rome Statute, the Court may use restitution, compensation and rehabilitation measures to repair the harm suffered by victims. The wording of the article allows the Court to order as many forms of reparations as it deems necessary to repair the harm *in integrum*. The Court should also include other measures, seeking guidance in the UN Basic Principles and international human rights jurisprudence, in accordance with Article 21 of the Rome Statute.

32. Reparation measures ordered by international human rights bodies are based upon the concept of State’s responsibility and not on individual criminal responsibility. States (at least most of them) have financial resources and existing infrastructures (for example health and education services) to try and repair, with diligence, human rights violations, particularly where the reparations consist of rehabilitation and satisfaction measures. The scenario is different for the ICC reparations system. As already noted the convicted person would have to provide reparations to victims as ordered by the Court. The Court can also order the TFV to repair the perpetrators victims, when the perpetrator cannot provide reparations due to a lack of financial and other resources. The ICC then must take into account the financial limitations faced by the convicted person, as well as the financial constraints of the TFV. However, this challenge should not result in the construction of a rigid concept of a collective.

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82 TFV, supra n. 73, 6-7.
83 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 57; Ibid, 6-7.
84 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 21; TFV, supra n. 73, 31; Rabat Report, supra n. 13, 10.
85 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 63. The concept of *restitutium in integrum* has been widely developed in the IACHR jurisprudence, including: Sawhoyamaxa Indigenous Community v. Paraguay, supra n. 8, para. 197; Moiwana Community v. Suriname, supra n. 21, para. 170; Plan de Sánchez Massacre v. Guatemala, supra n. 18, para. 100; Ituango Massacres v. Colombia, supra n. 63, para. 347.
86 Zegveld, L., supra n. 66, 101; TFV, supra n. 73.
87 War Crimes Research Office International Criminal Court Legal Analysis and Education Project, supra n. 63, 63; TFV, supra n. 73.
88 Ibid, 63.
33. It is recommended that the Court, in its reparation decisions, considers strengthening the collective projects that are being carried out by the TFV. Nevertheless, the Court will only be able to strengthen projects that are linked to the crime the person was convicted of, following Rule 85 of the RPE. As previously expressed, reparation measures, in contrast to assistance measures provided by the TFV, can only be awarded by the Court to victims who have a direct nexus to the crime for which the person has been convicted of. Taking into consideration the financial constraints of the ICC reparations system, the Court should award collective reparation measures from a convicted person, if finances are available and/or from the TFV which should act as a supplementary resource.

V. Recommendations for the Cases Currently before the ICC

34. The Court is close to ending its first two cases (Prosecutor v. Thomas Lubanga Dyilo and Prosecutor v. Jean Pierre Bemba). In both the Democratic Republic of the Congo (DRC) and Central African Republic (CAR), society as a whole, as well as specific communities, were widely affected by violence. In order to deal properly with the collective harm, a cultural, an ethnic and gendered approach from the Court is essential.

35. The experience from the TFV in the DRC and Uganda shows that the application of collective assistance measures are helping communities and individuals to heal and to reintegrate in their societies. Indeed, since 2008 the TFV has been able to support approximately 2000 former child combatants and abducted youth in both northern Uganda and DRC, including 500 girls subjected to rape, sexual slavery and other forms of sexual violence during their captivity. As the TFV experience shows, reintegration of children and youth combines individual and collective reparation measures. According to the findings of the latest TFV’s impact research in DRC “former child combatants and abductees expressed an overwhelming preference for a combined approach when asked whether victims’ assistance and reparations should be given to individuals, to communities or to both”. However, female victims leaned slightly towards an individual approach. In addition, the TFV’s findings show that “rehabilitation for former child combatants and abducted children depends in a large part on their successful reintegration into a community”, for which in many cases a collective approach is required.

36. The collective assistance measures applied in DRC and Uganda such as training of community peace builders in the promotion of victims’ rights, community counselling for reconciliation, creation of village savings groups, agricultural support, activities with communities and families to raise awareness on the effects of “stigma and discrimination as part of broader reconciliation efforts”, constitute important measures to taken into account in similar experiences.

89 Prosecutor v. Thomas Lubanga Dyilo, supra n. 64, paras. 45 – 46.
90 TFV, supra n. 73.
92 TFV, supra n. 73, 13.
93 TFV, supra n. 73, 13.
94 TFV, supra n. 73, 14.
95 TFV, supra n. 73, 24.
37. The efforts of the TFV have not only focused on collective assistance measures. Rather the TFV has implemented collective and individual assistance measures to respond to the victim’s needs. Lessons learned by the TFV on the complementarity between collective and individual assistance measures, namely that account should be taken of “the context of the situation, and needs of the victims and their communities”, should be the guiding principle for the Court when awarding reparation measures.

a) Democratic Republic of Congo: the Lubanga Case

38. Thomas Lubanga Dyilo was charged with the war crime of “conscripting and enlisting children under the age of 15 years into armed groups and using them to participate actively in the hostilities”, which took place in the region of Ituri District. The ICC will only be able to repair those who became victims as a result of Mr Lubanga’s criminal behaviour. As recognised by Trial Chamber I, children that were conscripted, enlisted and used in the hostilities (passive subject of the crime), as well as their families are victims of the crime.

39. According to the findings of the TFV in its collective assistance projects related to child soldiers in DRC, children have suffered from depression and post-traumatic stress, disintegration from the community and family, stigmatisation due to the label of “child soldier”, lack of access to health services, health and psychological problems related to sexual violence during their captivity and lack of access to educational services. In the case of “female former child soldiers and abductees who gave birth during the conflict”, they suffered “significantly higher rates of social stigma and poor treatment from the community”.

40. The following are some suggestions of the collective reparation measures that the Court could award to the victims of Mr Lubanga, if he is found guilty. They are based on the findings of TFV collective assistance projects in DRC, the reparation measures applied by the IACrtHR and the experiences of transitional justice processes (see section II).

   a) Establish a monument recognising the conscription, enlistment and use of child soldiers in the region of Ituri and how this illicit war tactic affected the community as a whole.

   b) Order Mr Lubanga to contribute financial resources, (even if as a symbolic measure) with the amount to be determined by the Court, to support the TFV to:

      i. Develop psychological rehabilitation programmes with the aim of reintegration of child soldiers into the community.

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96 TFV, supra n. 73, 30.
97 Prosecutor v. Thomas Lubanga Dyilo, Case no.ICC-01/04-01/06 Confirmation of charges (ICC Pre-Trial Chamber I 29 February 2007), para. 9.
98 Prosecutor v. Thomas Lubanga Dyilo, supra n. 64, paras. 47-48.
99 TFV, supra n. 73.
100 Las Dos Erres Massacre v. Guatemala, supra n. 17, para. 265.
101 Plan de Sánchez Massacre v. Guatemala, supra n. 18, paras. 102 and 110.
ii. Support the project(s) that the TFV is developing in DRC in relation to child soldiers. The TFV will have the duty to inform the victims that the services and/or assistance provided to them are the result of a criminal procedure, identifying the convicted person;

iii. Develop programmes to raise awareness and sensitisation in relation to child soldiers issues (for example radio programmes);\(^{102}\)

iv. Develop educational programmes for former child soldiers;\(^{103}\)

v. Create a communal development fund in favour of former child soldiers and victims of child soldiers;\(^{104}\)

vi. Create a programme for the search of children abducted and their families.

41. If Mr Lubanga is not found guilty, victims should still be able to access the assistance measures provided by the TFV under its assistance mandate. This does not mean that the acquittal of an accused should result in the non-recognition of victims’ status. Nevertheless, victims will not be able to request reparations from the alleged perpetrator under article 75 of the Rome Statute and 96 of RPE.

42. It is important to note that, while what was indicated in paragraph 40(b) is desirable, the Registrar Office accepted Mr Lubanga’s request for indigence entitling him to make use of the ICC legal aid.\(^{105}\) Therefore, even if found guilty, and unless assets are found, he will not have the financial resources to repair his victims.

43. The Rome Statute (Article 75), the RPE (rule 98) and the TFV Regulations do not mention that the TFV can act as a surrogate body to provide reparations to victims of a convicted person declared indigent by the Court. Indeed, following article 75 of the Rome Statute and rule 98 of the RPE, the responsibility of reparations lies on the convicted person. Nevertheless, according to the TFV regulation 42, “the resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.” Consequently, it is admissible for the Court to order the TFV to act as a surrogate body and repair victims of a convicted person that was declared indigent by the ICC.

44. In the case against Mr Lubanga, due to the limited amount of resources of the TFV, it is suggested that the Court give priority to reparation measures that strengthen TFV projects on child soldiers and develop physical and psychological rehabilitation

\(^{102}\) TFV, supra n. 73, 5.

\(^{103}\) Plan de Sánchez Massacre v. Guatemala, supra n. 18, para. 110; Moiwana Community v. Suriname, supra n. 21, para. para. 214; Saramaka People v. Suriname, supra n. 22, para. 201; Yakye Axa Indigenous Community v. Paraguay, supra n. 8, para. 205; Sawhoyamaxa Indigenous Community v. Paraguay, supra n. 8, para. 224.

\(^{104}\) Escué-Zapata v. Colombia, Interpretation of the Judgment of Merits, Reparations and Costs, Series C No. 178 (05/05/2008), para. 167.

programmes. Furthermore, these programmes should be developed in the region of Ituri District, and be culturally and gender sensitive.

b) Central African Republic: the Bemba Case

45. Jean Pierre Bemba was charged with crimes against humanity (murder and rape) and war crimes (murder, rape and pillaging). Mr Bemba committed these acts with the purpose of attacking particular communities (Bangui, Boy-Rabé, Point Kilomètre 12 (PK 12), Point Kilomètre 22 (PK 22) and Mongoumba). Most of the alleged victims of Mr Bemba are women and girls, who were raped and murdered, as a weapon of war. Therefore, the Court should order that the implementation of reparation measures follows a gender sensitive approach and be culturally sensitive to the role of women in the CAR society.

46. According to the findings of the TFV, in its projects related to sexual violence in Uganda, victims of sexual violence suffer from depression and post-traumatic stress, disintegration and stigmatisation from the community and family, health problems (physical handicaps) and lack access to health, psychological and education services.

47. The following are some suggestions of collective reparations measures that the Court could award to the victims of Mr Bemba, if he is found guilty. They are based on the findings of TFV projects in Uganda (related to sexual violence), and the reparations measures applied by the IACrTHR and some transitional justice processes (see section II):

a) Financial contribution by Mr Bemba to the construction of a Monument recognising the murder and rape from part of the MLC in CAR which affected the community as a whole. This monument should also recognise the use of rape and murder of women as weapon of war. Before the monument is built, victims should be consulted in order to address their desire for such a monument and its content.

b) Order Mr Bemba to contribute, financial resources, (even if as a symbolic measure) with the amount to be determined by the Court, to support the TFV to:

i. Develop psychological rehabilitation programmes to support the reintegration of victims into their communities and families. In particular, such programmes should be gender sensitive;

ii. Develop a programme to raise awareness and sensitisation in relation to the use of rape and murder of women as weapons of war (for example with radio programmes);

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106 TFV, supra n. 73, 38.
108 TFV, supra n. 73.
109 Las Dos Erres Massacre v. Guatemala, supra n. 17, para. 265.
iii. Develop a physical rehabilitation programme directed to address the physical harm suffered by direct and indirect victims; it should address, in particular, physical harm caused by sexual violence suffered by direct and indirect victims.\textsuperscript{112}

iv. Develop an education programme to empower victims. This programme should provide education services to the children born as a consequence of rape and the next of kin of murdered victims.\textsuperscript{113}

v. Create a communal development fund in favour of the Bangui, Boy-Rabé, Point Kilomètre 12 (PK 12), Point Kilomètre 22 (PK 22) and Mongoumba communities.\textsuperscript{114}

48. In contrast to the Lubanga case, Mr Bemba’s request for indigence was denied by the Registrar in 2008.\textsuperscript{115} Therefore, following the Rome Statute and RPE the Court should seize proceeds, property and assets of Mr Bemba, and, if the Court deems it necessary, transfer them to the TFV following Article 75 of the Rome Statute and Rule 98 of the RPE.

49. In 2008, the Court asked the Government of Portugal to freeze and seize property and assets of Mr Bemba in the country, in line with their obligations under the Rome Statute and the RPE. The defence of Mr Bemba requested to lift such measures in order for Mr Bemba to pay his defence services. This request was accepted by Pre-Trial Chamber. Unfreezing Mr Bemba’s assets might have a negative effect on the victims’ reparations, if all the financial resources of Mr Bemba are used for his legal defence.

50. All of the above programmes should be developed in Bangui, Boy-Rabé, Point Kilomètre 12 (PK 12), Point Kilomètre 22 (PK 22) and Mongoumba should be culturally sensitive.\textsuperscript{116} Due to the financial situation of Mr. Bemba it is most likely that most of the reparations measures ordered by the Court will be paid by the TFV. Because of the limited amount of resources, it is suggested that the Court give priority to reparation measures focused on physical and psychological rehabilitation programmes that address violence against women and facilitate their reintegration into the society.

VI. Concluding Remark

51. The purpose of this brief was to assess to viability of the award of collective reparations by the ICC, using as a legal basis; the Rome Statute, the RPE, the TFV

\textsuperscript{111} TFV, supra n. 73, 5.
\textsuperscript{112} TFV, supra 114.
\textsuperscript{113} Moiwana Community v. Suriname, supra n. 21, para. 214; Saramaka People. v. Suriname, supra n. 22, para. 201; Yakye Axa Indigenous Community v. Paraguay, supra n. 8, para. 205; Sawhoyamaxa Indigenous Community v. Paraguay, supra n. 8, para. 24.
\textsuperscript{114} Plan de Sánchez Massacre v. Guatemala, supra n. 18, para. 110; Moiwana Community v. Suriname, supra n. 21, para. 214; Saramaka People. v. Suriname, supra n. 22, para. 201; Yakye Axa Indigenous Community v. Paraguay, supra n. 8, para. 205; Sawhoyamaxa Indigenous Community v. Paraguay, supra n. 8, para. 224.
\textsuperscript{115} International Bar Association, supra n. 105.
\textsuperscript{116} TFV, supra n. 73, 38.
Regulations, international case law and experiences form transitional justice processes. This briefing has therefore concentrated on general recommendations and on possible collective reparation measures to be awarded in the Lubanga and Bemba cases. All the collective reparation measures suggested in this brief should be understood as complementary to possible individual reparation measures, such as physical rehabilitation, psychological rehabilitation, material support and compensation that the ICC might deem applicable in relation to individualised victims.\footnote{For further information on individual reparation measures implemented in DRC and CAR by the TFV assistance mandate see TFV, supra n. 73.}
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