

Leaving Behind the Age of Impunity

VICTIMS OF GENDER VIOLENCE AND THE PROMISE OF REPARATIONS

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Abstract

As sexual violence in conflict – predominantly affecting women and girls – appears to increase in prevalence, gender justice advocates are calling for a reparations model that is not only restorative, but also, and more critically, preventative or *transformative*. This article asks whether the reparations mandate of the International Criminal Court (ICC) and the Trust Fund for Victims has the potential to address the pre-conflict structural inequalities that often contribute to the sexual violence and harm experienced during and post-conflict. Drawing on social theorist Nancy Fraser’s model of trivalent justice and the ICC’s first reparations decision in *Lubanga*, this article argues that the design of the ICC’s court-ordered reparations mandate, and the unrealistic expectations it raises, may make it untenable to support the key transformative elements of recognition, representation and redistribution essential to addressing structural inequities contributing to conflict-related sexual violence. It suggests however, that modifying initiatives of the ICC’s Trust Fund for Victims and a greater emphasis by the ICC on the notion of member state “reparative complementarity” may provide mechanisms for transforming conditions that trigger and perpetuate gender violence during conflict.

Keywords

conflict-related sexual violence against women, International Criminal Court, reparations, Nancy Fraser

Despite an increasing global focus on the urgent need to address conflict-related sexual violence, contemporary responses to this violence require revision. In 1998 the United Nations (UN) Commissioner for Human Rights, Mary Robinson, wrote:

Systematic rape and other forms of gender based violence are increasingly used as weapons of war . . . Furthermore, the use of rape to reinforce policies of ethnic cleansing and the establishment of camps explicitly intended for sexual torture and the forcible impregnation of women are tragic developments which mark a definite escalation of violence against women in situations of armed conflicts. (cited in Sajor 1998, 19)

Almost twenty years later these acts, increasing in scale and devastating in their consequences, “are defining characteristics of contemporary conflict” (True 2012, 3). Recent figures indicate that women represent 90 percent of victims of sexual violence in war and conflict (UN Women 2011; also see Duggan and Abusharaf 2006; True 2012). While figures on the question of prevalence may vary according to increased reporting (due to greater international focus on the issue), under- and misreporting of data (Palermo and Peterman 2011) or lack of reporting (due to perceived and actual impunity and the stigma associated with sexual violence) (Ward and Marsh 2006; Cohen, Green, and Wood 2013), the changing nature of warfare has increasingly placed the lives of women and girls at considerable risk (Ward and Marsh 2006). In addition to these acts of violence, the impact of armed conflict, such as displacement and disruption to social and economic infrastructure, is borne by women both during and after wars in ways that are specific to their gendered experience (UN Women 2011). This includes managing the stigma and despair that result from “having been irrevocably spoiled and damaged” (Urban Walker 2009, 30), and negotiating post-conflict lives often from a marginal socioeconomic and political position (Leatherman 2011). Further, the enduring psychological and physical consequences of sexual violence mean that women are frequently unable to take part in the opportunities that the end of conflict provides for the political, economic and social rebuilding of their countries, notwithstanding recognition in UN Security Council (UNSC) Resolution 1325 (2000) and subsequent women, peace and security resolutions of the importance of their participation in conflict resolution and prevention (Duggan and Abusharaf 2006; Rubio-Marín 2009; Manjoo and McRaith 2011).

One of the significant responses directed at addressing impunity for conflict-related crimes of sexual violence has been the call by gender justice actors for the adoption of a “transformative” approach to reparations, reflected in recent UNSC Resolution on Women, Peace and Security 2122 (2013a) and articulated most strongly in the 2007 Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation (“Nairobi Declaration”). The UN Guidance Note of the Secretary-General *Reparations for Conflict-Related Sexual Violence* acknowledges that “reparations have the potential to be transformative . . . in overcoming structures of inequality and discrimination” and that this potential should inform their “design, implementation and impact” (UN OHCHR and UN Women 2014). The reparations scheme established under the Rome Statute of the International Criminal Court (ICC or “Court”) has also been identified as an important instrument for pursuing transformative

reparations. The Pre-Trial Chamber decision of the ICC's first case against Democratic Republic of Congo warlord Thomas Lubanga Dyilo declared that "the success of the Court is, to some extent, linked to the success of the reparation system" (ICC 2006, para. 136) – a view reiterated by the Trial Chamber judges in their reparations ruling in *Lubanga*. Gender justice advocates contend that for the Court's reparations system to succeed, it must be available to female victims of sexual violence, historically marginalized under international law (ICC 2012b), and be based on reparations principles and programs capable of transforming the conditions fueling such violence (see, for example, Women's Initiative for Gender Justice [WIGJ] in ICC 2012b).¹

This article explores whether the ICC, working with member states, has the capacity to support such a transformative objective, and thereby "leav(e) the age of impunity behind" (ICC 2012c). It does so by exploring two fundamental questions. First it asks, what are the essential design features of a "transformative" reparations framework capable of addressing the structural causes of sexual violence? Second, through an analysis of the ICC's first reparations decision in *Lubanga*, it asks whether the ICC and/or its victims' assistance arm, the Trust Fund for Victims (TFV), are appropriate mechanisms to implement and enforce such a framework. In addressing these questions, we adopt Nancy Fraser's trivalent model of gender justice (2009) to begin the development of a framework that comprehensively addresses key factors that contribute to (and potentially reduce) sexual violence during and after conflict. The article does not propose to outline the specific content of transformative reparations – a task that requires detailed empirical research in specific conflict contexts. Rather, it offers a first step in addressing calls for transformative reparations by identifying critical areas to inform their content.

The first part of the article outlines the evolution of reparations in response to crimes of sexual violence and the feminist critique of these developments. The second part traces developments in the ICC's first reparations decision in *Lubanga*. The third part extends Fraser's trivalent model of gender justice to outline the contours of a transformative reparations framework necessary for challenging the structural foundations that lead to sexual violence in post-conflict settings. It also evaluates the application of this model to the ICC's court-ordered reparations system and the work of its TFV in redressing and potentially preventing sexual violence against women in conflict and post-conflict settings.

REPARATIVE JUSTICE AT THE ICC

In the past two decades the international community has recognized the need to address impunity for the most egregious crimes through a dual approach: attempting to hold individual perpetrators to account and offering collective measures of victim redress. Gender justice actors have also emphasized the need to couple prosecutions with victims-centered reparations (Rubio-Marín

2009; Manjoo and McRaith 2011). The Rome Statute, the foundation document of the ICC, creates a novel “hybrid” court that integrates retributive and reparative justice mechanisms, giving the Court powers to bring to justice individual perpetrators of international crimes and address the complex needs of victims through participation in trials and formulation of reparations (McCarthy 2012).

The Rome Statute’s reparations provisions allow the Court to award reparations following a conviction (Article 75) and establish a TFV (Article 79) that can make awards of general assistance before the conclusion of a trial, provided the ICC is active in a country (ICC Assembly of State Parties 2005, Regulation 50). These awards are generally directed at individual rehabilitation and material support: returning victims, as far as possible, to the situation they were in prior to the commission of violence; compensating their harm or damage incurred; and facilitating their reintegration into society, mainly through the provision of medical and psychological care.

The inclusion of these victims’ measures was in part a response to criticism directed toward the UN ad hoc tribunals for the Former Yugoslavia and Rwanda for failing to adequately recognize or address the victim experience (McCarthy 2012, 46).

They were also inspired by the 1996 South African and other truth and reconciliation tribunals, and the work of regional and international human rights bodies such as the European Court of Human Rights, the Inter-American Court of Human Rights (IACtHR) and UN bodies. The ICC’s reparations framework also reflected the evolution of international measures of victim redress codified in the 2005 UN 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 (“Basic Principles”). The Basic Principles, drawing on the foundational work of Theo van Boven (2003), give substance to the three primary measures included in the Rome Statute – restitution, compensation and rehabilitation – and elaborate two other key forms of reparations: *satisfaction* (acknowledgment via public apologies, judicial and administrative sanctions, commemoration and human rights training [principle 22]); and *guarantees of non-repetition* (broad institutional reforms, such as civilian control over military and security forces, strengthening judicial independence and the promotion of human rights standards across all aspects of law, politics and society [principle 23]).

A guarantee of non-repetition is central to transformative approaches to reparations given its focus on *preventative* measures. According to Megret (2009, 130), a guarantee of non-repetition is “a commitment made by the state (for what it is worth) to never engage again in the practices that led to violations, backed by a number of reform and restructuring initiatives to make good on that promise.” As UN treaty bodies and regional human rights courts have shown, the challenge for institutions employing this category of reparations is compliance and enforcement (Shelton 2002; van Boven 2003; Megret 2009).² Although not specified in the Rome Statute, non-repetition measures are not precluded (see Megret 2009; ICC 2012a, para. 222). In the ICC context,

individuals rather than states are held accountable, and are expected, where assets are available, to contribute to reparations orders. Where the convicted person is indigent the situation is especially challenging, as the Court cannot compel governments in relevant states to contribute to reparations orders.

Responses to the ICC Reparative Mandate

Support for development of the ICC's reparations regime has varied. Strong civil society support during the Rome Statute drafting process has continued throughout the ICC's first decade via the advocacy of victims' rights organizations, such as Redress and the Victims' Rights Working Group (VRWG) (see VRWG 2011). Certain ICC judges have also expressed support for the Court's reparations mandate, including those in the Pre-Trial and Trial Chambers in *Lubanga* (discussed below).

Others have been more skeptical. Academics and defense advocates and experts have cautioned that victims' measures in general could distract the ICC from its focus on prosecutions, interfere with fair trial rights (War Crimes Research Office [WCRO] 2010, 16) and limit actual opportunities for victims to access the Court. In relation to reparations particularly, ICC Judge Van den Wyngaert has observed that the Rome Statute's reparations provisions have the potential to complicate and delay proceedings and create inequalities between groups of victims. The system could, in her view, frustrate any real prospects of reconciliation in post-conflict sites with the consequence that "[r]eparations for victims risk being more symbolic than real" (Van den Wyngaert 2011, 491). Academic expert Luke Moffett argues that to be successful, the Rome Statute reparations system requires the Court and states to engage in "reparative complementarity," with ICC rulings providing a catalyst for states to implement reparative measures rather than leaving the ICC with the unrealistic expectation that it shoulder the full burden of devising and awarding reparations in conflict settings (2013, 368).

Although feminist actors advocated strongly for gender justice provisions in the Rome Statute (Copelon 2000; see Oosterveld 2014), many identified limitations when engaging legal processes to address and prevent sexual violence: the narrow frame in which sexual violence is articulated and understood within a legal context; the potential for reproducing and reinforcing the depiction of "victim" to understand women's experience of conflict; the risk of retraumatizing these victims in the courtroom due to insensitive questioning and procedures (Mertus 2004; Bell and O'Rourke 2007; see also Ní Aoláin, Haynes, and Cahn 2011). Nevertheless, feminists working through the Women's Caucus for Gender Justice argued that without the articulation of sexual and gender-based violence in the ICC's rules, the comprehensive recognition of crimes of sexual violence in international criminal law would be difficult to attain, with impunity for such crimes an ongoing feature (Copelon 2000; Oosterveld 2014).

Since the ICC commenced operation in 2002, the work of the Women's Initiatives for Gender Justice (WIGJ)³ and others has been bolstered by developments in the field, especially the Nairobi Declaration (2007). A civil society-led initiative, coordinated by the Coalition of Women's Human Rights in Conflict Situations, the Nairobi Declaration was aimed at rectifying the evident lack of focus on women's experiences, including of sexual violence, in a range of truth and reconciliation processes (Coulliard 2007, 447; Feinstein Center 2013, 22). It called for "meaningful participation of women in the determination of measures and policies intended for their benefit" (Coulliard 2007, 446) and emphasized the need for "post-conflict transformation of the socio-cultural injustices and the political and structural inequalities that shape the lives of women and girls" (Nairobi Declaration 2007, Section 3). Building on the Nairobi Declaration and the Rome Statute, the 2013 UN Security Council Resolution 2122 on women, peace and security reiterated the value of reparations for addressing impunity for sexual violence in armed conflict (S/RES/2122; S/RES/2106). The point of consensus across these various initiatives is that any comprehensive attack on impunity for crimes of sexual violence against women requires that victims of this violence participate in the design of effective measures of redress.

Feminist transitional justice scholars have theorized a participatory and transformative approach to reparations. They critique reparative measures of restitution, compensation and rehabilitation as having a retrospective focus that risks the return of women harmed in conflict to the structural inequalities that preceded, contributed to and, in many cases, endured post-conflict (Duggan and Abusharaf 2006; Rubio-Marin 2009; Manjoo 2010, 16; Manjoo and McRaith 2011; Ní Aoláin, Haynes, and Cahn 2011; Feinstein Center 2013). Their call is for measures that "unsettle preexisting gender hierarchies and undo the structural harms that may . . . be causal to the actual violence and harm experienced during a conflict" (Ní Aoláin, Haynes, and Cahn 2011, 187), potentially executed via guarantees of non-repetition (Rubio-Marin 2009; Manjoo and McRaith 2011). As noted by Rashida Manjoo (2010, 26), Special Rapporteur on violence against women:

Guarantees of non-repetition offer the greatest potential for transforming gender relations. In promising to ensure non-recurrence, [they] trigger a discussion about the underlying structural causes of the violence and their gendered manifestations and . . . about the broader institutional or legal reforms that might be called for to ensure non-repetition.

This emphasis on *transformative* reparations to address sexual violence is innovative; however, existing statements, including the Nairobi Declaration and the Special Rapporteur's reports, are largely silent as to the distinctive features – procedural and substantive – of a transformative approach. The central contribution of the extant literature is to emphasize the importance of *representative* forms of gender justice – through gender mainstreaming

and improving the numbers of women represented in parliament, in security forces and in peace processes (see UN Economic and Social Council [UN ECOSOC] 2005; Rubio-Marín 2006) – or *redistributive* measures to enhance gender economic equality (Ní Aoláin, Haynes, and Cahn 2011, 187; True 2012; Feinstein Center 2013). While the ICC has recognized the imperative of awarding transformative reparations, its first decision on reparations in the *Lubanga* case highlights the current lack of substance in determining the core features of a transformative framework of redress. The next section analyses the *Lubanga* decision and the ICC's initial redress efforts.

TRANSFORMATIVE REPARATIONS AND THE *LUBANGA* CASE

On 7 August 2012, Trial Chamber I handed down the ICC's first reparations decision in the *Lubanga* case (ICC 2012d), following Thomas Dyilo Lubanga's conviction in March 2012 of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities in the Democratic Republic of Congo (DRC).

This reparations decision came after a six-year trial in which a central point of contention was the failure of the Office of the Prosecutor (OTP) to include charges of sexual violence against Lubanga (ICC 2012a, 286–288), despite extensive evidence of such conduct (Amann 2012; ICC 2012b, 158–163). While the Prosecution and the Counsel for Victims made unsuccessful attempts to correct this omission (see Chappell 2011), the absence of charges of sexual violence resulted in the majority Trial Chamber judges failing to make any findings on the issue (Amann 2012, 813; ICC 2012e, para. 29). The third member of the bench, Justice Elizabeth Odio Benito, dissented from the majority decisions on both conviction and sentencing, arguing that sexual violence was an “intrinsic element of the criminal conduct” (ICC 2012a, para. 20) and should be a factor in the sentencing decision, given the violence “resulted in serious and often irreparable harm to the victims and their families” (ICC 2012f, para. 22). All three judges left open the question of whether conduct relating to sexual violence was “relevant to the issue of reparations” (ICC 2012f, para. 76).

The Court's reparations decision drew on a wide range of submissions from the OTP, Registry and Trust Fund for Victims and a number of civil society organizations, including the WIGJ, the International Center for Transitional Justice and UN Children's Fund (UNICEF).⁴ The WIGJ urged the Court to adopt a broad approach to harm and a lower burden of proof so as to extend the application of reparations to those victims of sexual violence who had not been recognized at trial (ICC 2012b). It also advocated for a combination of (limited) individual reparations with a primary focus on collective measures given their potential to *transform* conditions leading to sexual violence, arguing that reparative measures should aim “to both rehabilitate individual victims/survivors of gender-based crimes and to contribute to the

transition of society into a community based on non-violence and non-discrimination for all of its members” (ICC 2012b, para. 17).

In accordance with the principle of “do no harm” (ICC 2012g, para. 65), the TFV – the body ultimately responsible for implementing the reparations decision – encouraged the Court to “ensure that awards do not exacerbate the root causes of the conflict” (ICC 2012g, para. 66) and called on the ICC to use collective measures to advance a transformative approach to reparations that would “address structural inequalities that negatively shape women’s and girls’ lives” (ICC 2012g, para. 74).

The Trial Chamber’s reparations decision in *Lubanga* stood in stark contrast to the majority’s earlier verdicts on conviction and sentencing. The judges recognized for the purposes of reparations that sexual violence was an aspect of the harm suffered by child soldiers. Drawing on the submissions and the broader international reparations framework and jurisprudence, the judges advanced a gender-sensitive approach to the application of reparations (ICC 2012d, paras 202, 208). They unanimously recommended that the design of reparations be “integrated and multidisciplinary” and take account of the different consequences of crimes for men and women, boys and girls (ICC 2012d, para. 207). Importantly, the judges acknowledged the need to look beyond restitution, compensation and rehabilitation toward a reparations strategy aimed at addressing “underlying injustices” and the prevention of future conflicts (ICC 2012d, paras 192, 222 and 240).

At the time of writing, the Chamber’s decision on reparations in *Lubanga* is under appeal on various grounds. The Defense will contend that Lubanga has not been convicted of crimes of sexual violence (see Moffett 2013, 383); the Office of Public Counsel for Victims is appealing the Chamber’s decision not to award individual reparations. However, the Chamber’s recommendation that the ICC’s reparations strategy be directed at the prevention of recurrent sexual violence – that it have a transformative objective – has not elicited criticism from the parties. The absence of any objection may lie in the fact that the recommendation is aspirational, without direction as to the content of a reparations framework that might effectively “address structural inequalities that negatively shape women’s and girls’ lives.”

As more victims of sexual violence and their advocates focus on the ICC as a site to integrate a transformative approach to reparations, there is an imperative to give substance to the notion of transformation. The next section explores possibilities for the development of the content of transformative reparations for victims and survivors of crimes of sexual violence by reference to Fraser’s (2009) trivalent model of gender justice.

FOUNDATIONS OF A GENDER JUST REPARATIVE FRAMEWORK

It is now almost universally accepted that hierarchical, unequal, exclusionary and discriminatory economic, social and cultural practices are the cause and

consequence of violence against women before, during and after conflict (Merry 2009, 5; True 2012). If guarantees of non-repetition of human rights violations offer the most appropriate reparative mechanism for “transforming the underlying structural causes of the violence and their gendered manifestation” (Rubio-Marín 2009, 117), how might such a mechanism be designed? According to social theorist Nancy Fraser, transformative justice requires the realization of three interlinked concepts – representation, (re)distribution and recognition – that in combination seek to ensure “parity of participation” between people (2009, 16). Under Fraser’s trivalent model, representation is the political dimension of justice that establishes the rules and procedures that govern access to, and allocation of, economic resources and participation in economic production ((re)distribution) and the designation of social and cultural standing or status (recognition). This political dimension determines “not only who can make claims for redistribution and recognition, but also how such claims are to be mooted and adjudicated” (Fraser 2009, 17). If reparations are to have an enduring transformative effect for women victims of sexual violence post-conflict, they will require elements capable of “dismantling institutionalized obstacles that prevent” women from parity of economic participation and social interaction (Fraser 2009, 16).

In addition, any such framework will need to be sensitive to the specific context in which the violence has occurred (Manjoo 2010), including the reasons for, and the formal and informal rules which govern, the commission of the violence (see Cohen 2013). This includes identifying the intersectional position of women and of men in relation to ethnicity/race/clan, class, sexuality, nationality, dis/ability and employment status that cut across gender divisions of power and reinforce inequalities (Leatherman 2011, 67; Cohen 2013). Women’s vulnerability to such violence, their capacity to escape it and their complicity in it, will depend on their social, economic and political positioning within particular communities (Merry 2009; Leatherman 2011; True 2012). In order to be transformative, reparations measures – both in content and mode of implementation – must be devised by those who have an acute understanding of the context in which they will be applied. It is not the purpose of this article to determine the specific content of such measures, as these will necessarily vary from case to case, but rather to identify the political, economic, social and cultural foundations on which they must be built to achieve the objective of non-repetition.

Political Foundations

To date, a strong emphasis in the literature and initiatives on reparations has been directed toward addressing the political or *representative* dimensions of a transformative reparative mechanism (UN ECOSOC 2005; Duggan and Abusharaf 2006; Nairobi Declaration 2007; Feinstein Center 2013). Increasing women’s participation in political life is an essential first step for challenging

rules that entrench women's inequality in public and private life, often exposing them to violence in conflict and post-conflict environments without the political or legal means to address it. Unless this political objective is applied in the actual design of reparative initiatives, Rashida Manjoo cautions that "initiatives are more likely to reflect men's experience of violence and their concerns, priorities and needs regarding redress" (2010, 15; see also Bell and O'Rourke 2007, 30).

While including women's voices in post-conflict negotiations is also critical for transformation, the challenge here is to ensure that these representative fora yield substantive gender equality outcomes, including most importantly a recalibration of access to political power across gender and other political, economic and social divisions (see Bell and O'Rourke 2007, 34; Leatherman 2011, 65). At its most transformative, the representative dimension of any reparation framework will require a reconceptualization of political power where men and women share power equally, and the principles and procedures underlying state intervention in the private sphere extend to addressing violence against women during and after armed conflict (Bell and O'Rourke 2007, 43).

Economic Foundations

Maldistribution, or economic inequality, has been identified as a major factor contributing to sexual violence in conflict situations (Merry 2009, 170). True (2012, 121) argues that:

[A]ll forms of violence against women have a *material* basis that may, over time, become embedded in cultural practices. That is, they are rooted in and heightened by unequal social relations often in impoverished or destabilizing economic and political contexts characterized by stress, displacement, and struggles to obtain and distribute resources for survival or basic needs. (emphasis in original)

Structural economic problems can fuel sexual violence in conflict in different ways: impoverishment among male soldiers can give rise to "a sense of entitlement" to treat the women with whom they interact as they wish; where men are excluded from the economic spoils of war, resentment can further fuel such attitudes and be expressed through violence (True 2012, 122). Research has demonstrated how poverty can lead to women's involvement in militia and conflict-related trafficking and prostitution (Leatherman 2011, 110). Equally, women's disproportionate economic disempowerment resulting from lack of access to land, limited employment opportunities and unequal pay can leave them without the resources necessary to escape or protect themselves from sexual violence (True 2012, 122). Addressing economic inequalities across society and between men and women by "enhancing autonomy" (Manjoo 2010, 54) and creating access to the means for "sustainable liveli-

hoods” (True 2012, 133) – such as education and skills development and economic resources including land and financial resources – may contribute to the non-recurrence of sexual violence. But preventing violence against women in conflict and post-conflict settings also requires a deeper economic transformation, including equitable resource allocation between the sexes across all social groups, and a greater recognition of women’s paid and unpaid contributions to economic systems at local, national and global levels.

Social and Cultural Foundations

Much of the literature on the causes of violence against women in conflict settings emphasizes the role of social and cultural norms and practices. Intersecting with these social and cultural facets, including religious and ethnic divisions, are gender norms and roles that combine to allow for the perpetration of sexual violence. The example of hypermasculinity, where “the strictures against femininity and homosexuality are especially intense and . . . physical strength and aggressiveness are paramount” (Angela Harris in Ní Aoláin, Haynes, and Cahn 2011, 51), is seen as directly related to the use of sexual violence in conflict settings (Ní Aoláin, Haynes, and Cahn 2011, 51; True 2012; Leatherman 2011, 19–20). The association of women with the markers of femininity, which connotes purity as a central virtue, makes them especially vulnerable where hypermasculine norms are at work: enemy attacks on women send a signal to the wider group about the defilement of a culture (see Ní Aoláin, Haynes, and Cahn 2011, 160). Further, in societies where women hold subordinate positions within families, conflict-related sexual violence is “viewed primarily as a violation of the male’s (husband, father, etc.) property rights, not as a violation of the woman’s human rights” (Manjoo and McRaith 2011, 17). This view has debilitating consequences for women victims, including social stigmatization and ostracism by the family and/or community, loss of status and the possibility to marry and denial of access to communal resources (Manjoo 2010, 21).

Designing transformative reparations programs capable of combating these forms of social and cultural discrimination against women is particularly problematic. It requires the development of measures to address the stigma attached to those women who have suffered conflict-related sexual violence. An allied hurdle is overcoming discrimination against women in the family, including in resource allocation and inheritance laws post-conflict. This latter task is complicated by the increase in the percentage of female-led households after armed conflict, and the lack of recognition of women’s contribution to family incomes before, during and after conflict (Manjoo and McRaith 2011, 17).

Identifying distinct political, economic and social and cultural foundations necessary to build a transformative reparative system capable of addressing sexual violence against women is an important start. Fraser (2009) further

suggests that any operationalization of this model also requires the *integration* of each dimension of justice – representation, redistribution and recognition. It is the simultaneous consolidation and reinforcement of these components within a comprehensive reparations strategy that can best offer women victims of sexual violence in conflict the potential to recover from and minimize the prospect of violence post-conflict.

CAN THE ICC REPARATIONS REGIME PROVIDE TRANSFORMATIVE REPARATIONS?

Achieving gender justice based on Fraser's trivalent model requires extensive state-sponsored, collective measures to bring about equal gender representation in decision making, a significant redistribution of economic resources and the removal of socially and culturally embedded gender-biased practices. But how realistic is it to expect that the ICC's reparations system can promote such transformative measures given its reparations mandate and available resources?

Article 75 of the Rome Statute provides that the ICC may make an order for reparations "directly against a convicted person." The statute does not confer powers on the ICC to direct states to implement reparation awards, as is the case with the mandates of the IACtHR and others tribunals (Wierda and de Greiff 2004). Even if the ICC were to make such an order, its incapacity to enforce it further undermines any transformative objective. These limitations are magnified in cases of sexual violence against women where comprehensive measures to shift entrenched institutional discrimination across all areas of life are necessary and on a scale beyond the capability of a single individual.

A further limitation is the Court's inability to acknowledge the impact of a particular conflict beyond the identified victims of a case (McCarthy 2012, 71). Although at the reparations stage of proceedings in *Lubanga* the judges recognized some victims of sexual violence, victimization was still narrowly construed; it was connected only to the child soldier crimes for which the defendant was found guilty and not to the broader group of individuals affected by the widespread violence within the DRC.

A third impediment to transformative reparations is resource constraints. The resources of the ICC and more particularly, the TFV (through which reparations awards will be implemented) are barely sufficient to address the critical compensatory and restorative reparations, given that "the scale of the harm is almost always going to be greater than the resources available to remedy it" (McCarthy 2012, 68). Additionally, in most cases, the assets of the accused will either be unavailable or deficient to meet the cost of reparations for victims, with the TFV expected to be the primary source of funding for court-ordered measures.⁵

These problems suggest that even with the best intentions, the ICC will have difficulty creating a transformative court-ordered reparations regime for

women victims of sexual violence. This leads logically to another question: whether the creation of such a regime should be an objective of the Court. Of real concern is that attempts to pursue a transformative reparations agenda without the appropriate mandate or resources to achieve its objectives could lead to an exacerbation of harm in fragile post-conflict states. By raising (albeit unwittingly) the expectations of victims of sexual violence about the reach and contribution of the Court's reparations framework, the ICC could potentially leave victims more vulnerable where expectations are not met and disillusioned with justice processes that fail to deliver despite their promise. This is not to suggest that victims should abandon the Rome Statute system entirely; rather, the suggestion of ICC Judge Van den Wyngaert is perhaps pertinent: namely, to "detach" victims' reparations claims "from the criminal proceedings" and to concentrate attention on the work of the TFV (Van den Wyngaert 2011, 495).

The TFV currently plays a significant role in relation to victims. Its mandate "envisions the possibility for victims and their families to receive assistance separate from and prior to a conviction by the Court, using funds the TFV has raised through voluntary contributions" (International Center for Research on Women [ICRW] 2013, 11). The TFV's programs primarily involve physical and psychosocial rehabilitation and material support to victims of crimes within the jurisdiction of the ICC. Since commencing operations in 2008, the TFV has supported programs in states where the Court has opened investigations – the DRC, Uganda and, until the recent deterioration in the country, the Central African Republic.

While the focus of the TFV is primarily restorative, its capacity for developing transformative measures is perhaps less constrained than the ICC court-ordered reparations mandate in three distinct ways. First, the TFV can deal with a broader range of victims, beyond those participating in court proceedings. Its assistance activities are not linked to a conviction but aimed at helping those unable to participate in the judicial process directly (TFV 2010). Second, it has flexible procedures, including consulting with victims without prejudicing a particular case. Third, it enjoys less cumbersome and expensive processes, enabling it to conduct additional and independent needs assessments (Wierda and de Greiff 2004, 10). Judge Van den Wyngaert (2011, 495) suggests these benefits could be strengthened if the TFV operated as a commission, potentially leading to greater "victim empowerment."

Surveying the TFV's assistance projects in its first five years of operation – many of which have a clear gender justice objective – suggests some prospect for the delivery of transformative measures that approximate the primary components of Fraser's trivalent model. It has undertaken to "mainstream a gender-based perspective across all programming" (TFV 2013c), established a subsidiary fund dedicated to supporting its work on sexual violence, particularly the health and psychological impacts arising from conflict-related rape (see TFV 2012 for further details) and sought to implement pro-

grams to facilitate victim economic activity by, for example, establishing reintegration programs for former child soldiers, abducted girls and child-mothers, and providing school fees for child-mothers to attend education classes. An independent report on TFV activities found that its partners had achieved or surpassed their objectives in providing material support in areas including communal savings groups, microfinance initiatives, vocation training and literacy programs (ICRW 2013, 31).

Elements of the TFV's community-based projects that target entrenched structural economic and social gender discrimination in post-conflict settings correspond with Fraser's criteria for a transformative approach to gender justice. However, as with other aspects of the ICC's reparations system, the projects suffer from a lack of critical resources. An independent review of the TFV in 2013 noted that funding constraints have limited material programs, restricting, for example, the comprehensive integration of gender objectives and concerns at the design stage of all TFV programs and severely limiting sociocultural programs aimed at addressing the stigmatization of young women victims of conflict-related rape, especially those with children (ICRW 2013, 41). Whether this resource issue could be improved by converting the TFV into a commission, as suggested by Judge Van der Wyngaert, requires further analysis.

CONCLUSION

The judges in *Lubanga* importantly linked the success of the ICC to the success of its system of reparations. Reparations represent a tangible acknowledgement of the harm suffered by victims; they may also form the content of a commitment by states to prevent the non-recurrence of conditions that enable systematic human rights violations in a specific setting. It is the non-recurrence of violations that this article argues is essential to addressing impunity, particularly for crimes of sexual violence. This is also the dimension of reparations that gender advocates rightly suggest requires transformative capacity.

Building on Fraser's trivalent model of gender justice, this article suggests that transforming the conditions leading to sexual violence in conflict and post-conflict settings requires a reallocation of economic resources and parallel increased participation of women in economic activity; parity of representation in political, legal and social decision-making institutions and fora; and recognition in law and social and cultural practices of women's equal status with men. This transformation cannot be carried out by the ICC's court-ordered reparations system alone. Indeed, any suggestion that it can risks raising unrealistic expectations and potentially increasing tensions for such victims in post-conflict settings.

Strengthening the TFV to facilitate and expand its work is one avenue for pursuing options to transform the conditions leading to sexual violence.

Another avenue is to engage the complementary role of State Parties to the Rome Statute to implement reparations which seek to guarantee the non-repetition of sexual violence against women post-conflict, as suggested by Moffett (2013). This would include implementing programs of reparation directed at transformation; assisting the Court to take preemptive steps to preserve assets (of alleged accused) which may subsequently be forfeited and used for the benefit of victims; and engaging national human rights commissions and other appropriate public institutions to execute and reinforce transformative reparations awarded by the ICC (Moffett 2013).

Without State Party commitment to “reparative complementarity” and to providing the necessary funds to support a transformative reparations agenda, calls for the ICC to expand its reparations mandate – while undoubtedly necessary and appropriately urgent – may simply risk overburdening the Court while it struggles to meet the demands of its existing prosecutorial obligations. Perhaps a greater problem, given the scale and gravity of the issue requiring redress, is that without state-level support, any commitment to transformative reparations by the ICC in the absence of structures and resources to sustain them, risks fuelling resentment and further violence in already fragile and volatile situations, especially if anticipated reparations fail to eventuate.

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Notes

- 1 Some gender and security and transitional justice scholars argue that conflict-related violence against women is not “exceptional,” but part of a continuum of other forms of violence against women (social exclusion, financial control and exploitation and domestic violence) which combine to exacerbate their vulnerability (see Charlesworth and Chinkin 2000, 333; Urban Walker 2009, 28–33; Ní Aoláin, Haynes, and Cahn 2011; True 2012, 120, 199–122). The form and impact of violence women experience during conflict may differ in societies where political

history, race, class and culture or religion have determined social relations and the manifestation of power (El-Bushra 2003). What remains troubling is that until recently under international law, accountability and redress for the range of violent conduct experienced by women during conflict has been at best a marginal concern, leaving impunity for these crimes intact (Charlesworth and Chinkin 2000; Ní Aoláin, Haynes, and Cahn 2011).

- 2 In the decision of the case of *González et al. ("Cotton Field") v. Mexico*: Judgment of November, 2009, the IACtHR linked structural gender discrimination to crimes of sexual violence and called on the Mexican government to develop measures aimed at overcoming structural discrimination. The implementation of the decision was frustrated by the lack of state action, highlighting the difficulty of regional and international courts have in applying such reparative measures (True 2012, 85–86).
- 3 The WIGJ took over from the Women's Caucus for Gender Justice in 2002 and has remained the most prominent gender justice advocacy organization within the ICC's civil society community. In 2012, Brigid Inder, its long-term director, was appointed ICC Chief Prosecutor Bensouda's Gender Adviser.
- 4 The ICC reparations system is case-based and therefore its individual reparations rulings may influence but are not binding on future cases (ICC 2012d, para. 181).
- 5 Reporting in 2013, the TFV had a total of €5.4 million from which to fund any court-ordered reparations as well as its assistance programs (TFV 2013a). These funds will be boosted in 2014 by almost €6.5 million due to an increase in state donations from Sweden and other European countries (TFV 2013b); nevertheless, the need still significantly outstrips available resources.

Acknowledgments

This article is based on research supported by the Australian Research Council *Discovery Projects* funding scheme (DP140102274). Our appreciation goes to our colleagues in the UNSW Australian Human Rights Centre and particularly to Emily Waller for her meticulous and invaluable research assistance. We would also like to thank the anonymous reviewers whose engagement has contributed greatly to the article.

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