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# The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the *Lubanga* case at the International Criminal Court

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## ABSTRACT

In March 2012, Thomas Lubanga Dyilo from the Democratic Republic of the Congo was the first person to be tried and convicted by the International Criminal Court (ICC). The charges for which Lubanga was found guilty – the conscription, enlistment and use of child soldiers – belied a range of other crimes that were documented as part of the conflict in which Lubanga and his militia were involved, including acts of sexual and gender-based violence. The decision of the ICC's Office of the Prosecutor not to fully investigate, or include charges for, these latter crimes in the *Lubanga* case set in train what can be described as a 'gender injustice cascade' throughout the trial and reparations process. The ultimate effect of the cascade has been to limit victims of the sexual and gender-based crimes in this conflict from gaining direct access to any reparations measures, let alone the 'transformative' ones some advocates were searching for. This case highlights some key limitations of Court-ordered reparations for securing gender justice, let alone transformation, under the ICC's framework.

## KEYWORDS

Transformative reparations; sexual and gender-based violence; International Criminal Court; *Lubanga* case

## Introduction

The Rome Statute of the International Criminal Court (ICC) is almost unique in the world of international tribunals in including provisions for reparations for victims of those convicted for atrocity crimes. Both the ICC itself, and the statutorily independent Trust Fund for Victims (TFV or 'Trust Fund'), both play an important part in the reparations process. Negotiated late in proceedings, the Rome Statute includes many 'constructive ambiguities'<sup>1</sup> in relation to reparations, and as a result much of the ICC's reparations regime is being worked out in practice.<sup>2</sup> The first opportunity to define the contours of this relationship came with the Court's conviction of Thomas Lubanga Dyilo – 'Lubanga'. Throughout the lengthy trial and reparations hearings, this case has become an exemplar of how *not* to secure justice through reparations for a specific category of crimes – those of sexual and gender-based violence. The failure of the Prosecution from the outset to fully investigate, gather evidence or include charges for such crimes has led to a 'gender injustice

cascade'. While signs are emerging that the ICC has learnt from these initial errors, it is important to understand the full implications of the decisions taken in *Lubanga* so as not to repeat the same mistakes in future, and to avoid reinforcing gender biases of international law for victims of sexual and gender-based violence. This case also provides important lessons about the limits of a court-ordered reparations regime, especially its restricted capacity to deliver 'transformative' reparations for victims of such atrocities.

In March 2012, Thomas Lubanga Dyilo from the Democratic Republic of the Congo (DRC) was the first person to be tried and convicted by the ICC and to trigger the ICC's reparations framework. The reparations phase has been long and drawn out: the Trial Chamber handed down its initial reparations decision and order on reparations in August 2012,<sup>3</sup> which led to an appeal by the Defence and victims' legal representatives.<sup>4</sup> In March 2015 the Appeals Chamber issued its decision on the appeal and amended the Trial Chamber's reparations order.<sup>5</sup> The Appeals Chamber's decision confirmed that there would be no reparations for sexual and gender-based crimes in this case – a potentially devastating outcome for the female child soldiers in Lubanga's group who had allegedly been raped by their commanders. After the appeal, the Trust Fund was directed to submit a draft reparations plan to the Trial Chamber, which it did in November 2015,<sup>6</sup> with additional information in June<sup>7</sup> and September 2016.<sup>8</sup> At the time of writing in June 2017, the ICC has addressed the symbolic aspects of the reparations plan, but the TFV has yet to present the remainder of the plan to the Trial Chamber.

Understanding the reparations developments in the *Lubanga* case is important for several reasons. As the ICC's first case, it serves as an initial test of the Court's reparative framework. The test is significant, for the victims of this particular case, and also for those who follow. This is because the general reparations principles articulated in this first case can be 'applied, adapted, expanded upon, or added to by future Trial Chambers'.<sup>9</sup> Hence, the case has 'far-reaching consequences for the adjudication of reparations at the ICC'.<sup>10</sup> While Moffett's article in this special issue tackles some of the important legal aspects of the development of the ICC's reparations framework for victims of sexual and gender-based violence, this article tackles a more evaluative question: To what extent have reparations decisions in the *Lubanga* case contributed to challenging or maintaining some of the long-held, entrenched gender legacies of international law as it relates to reparations? Based on an analysis of this question, it also asks speculatively: What is the future transformative potential of the ICC's reparations framework to address gender injustices?

The argument presented in this article is that many of the decisions arising in the *Lubanga* case have served to maintain the gender *status quo* of international law. This is not only an outcome of the reparations process itself, but also extends back to earlier proceedings, including the initial warrant of arrest and charging stages, triggering what is referred to here as a 'gender injustice cascade'. Ultimately, the gender injustice cascade has contributed to a drawn-out appeal process and (at the time of writing) an almost six-year delay in processing the final reparations orders in this case – a delay which has compounded gender injustices for victims on the ground. It also suggests, based on the lessons from this case and the ICC's reparations mandate, that calls for transformative reparations at the ICC appear at best unrealistic, and at worst, potentially damaging.

The article proceeds in four parts. Part one links to the broader themes of this special issue, offering a brief outline of the link between gender and reparations, including

entrenched gender biases of international law, and the value of the notion of transformative reparations in this context. Part two provides the background to the ICC's reparations mandate. Part three details the phases of the *Lubanga* trial and reparations hearings, and the gender injustice cascade. Part four analyses these developments in light of claims for transformative reparations at the ICC.

## Part one: the gender dimensions of reparations

It has long been recognised that international criminal and humanitarian law is gendered. This gendering operates on at least two levels: as 'gender capture' where positions of power in the legal realm are dominated by men; and, through 'gender bias' that operates in various ways, including to amplify the experiences of combatants who have tended to be men, and diminish those of victims, especially those experiencing harms related to sexual and gender-based violence, who have tended to be women.<sup>11</sup>

Three sets of gender legacies have been identified as interfering with women in general, and victims of sexual and gender-based violence in particular, in accessing reparations processes. The first relates to recognition/definitional issues: crimes committed against women – especially sexual violence – have been treated as the 'collateral damage' of warfare, but not as grave enough to warrant repair; as a result these crimes have generally been left outside the ambit of reparation processes.<sup>12</sup> Second, 'gender capture' has meant women have been excluded from reparations processes: women have tended to be under-represented at the bench as adjudicators and at the bar as advocates, and have failed to appear as victims, due to a lack of rights information as well as social stigma attached to many of the types of crimes they have experienced.<sup>13</sup> Third, cases related to women's experiences of conflict have been inadequately prosecuted: where cases of crimes of against women have made it to court, they often collapse before any reparative process is invoked because of other entrenched gender biases including inadequate investigations, evidence gathering and charging strategies.<sup>14</sup> Each of these factors to a greater or lesser extent has influenced reparation processes during the *Lubanga* case.

In those instances where women have been able to access reparations processes, redistributive redress measures have also had gendered effects. A range of reparations measures exist and are now codified in the 2005 UN [*United Nations*] *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* ('the Basic Principles'<sup>15</sup>), with most reparations processes applying the principles of *restitution*, *compensation* and *rehabilitation*. However, as feminist legal scholar Rubio-Marín notes, such measures do little to undermine the structural problems contributing to crimes committed against women in conflict settings, and indeed can result in a return to the gendered *status quo* that provided the conditions for sexual violence in the first place.<sup>16</sup>

In response, many gender justice advocates have called for 'transformative' reparations measures that undermine the structural conditions – including political, social, cultural and economic – leading to the common forms of violence against women.<sup>17</sup> To dismantle these structural impediments, some scholars suggest drawing upon the Basic Principle of *guarantees of non-repetition* – which include *inter alia* the introduction of mechanisms to prevent and monitor social conflict.<sup>18</sup> This view was supported Rashida Manjoo in her

position as UN Special Rapporteur on violence against women, its causes and consequences:

In promising to ensure non-recurrence, such guarantees trigger a discussion about the underlying structural causes of the violence and their gendered manifestations and a discussion about the broader institutional or legal reforms that might be called for to ensure non-repetition.<sup>19</sup>

Non-repetition in this sense has preventative and, therefore, potentially transformative qualities.<sup>20</sup> This view is reflected in recent UN Security Council Resolutions on Women and Peace and Security, particularly resolution 2122 (2013) and civil society's 2007 *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* ('the Nairobi Declaration').<sup>21</sup>

Supporting a transformative approach to reparations may be a way to work around certain gender biases in reparations, but they may not suit all reparations mechanisms. For instance, they may be more suited to nation state-based transitional justice processes, where there is significant national investment, than through court-ordered mechanisms, especially courts such as the ICC, which lack the resources and local knowledge available to those working on the ground. As Durbach and Chappell argue: 'transformations [needed to secure structural change] 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'.<sup>22</sup>

Philosopher Urban Walker has taken the argument further, making a more general case against the call for transformative reparations to address gender injustice. In Urban Walker's view, it is enough to ask that reparations address individual forms of gender discrimination; indeed it is her view that such discrimination 'is often more than can be realistically accomplished even without attempting societal transformation'.<sup>23</sup> For Urban Walker: 'Fundamental social and economic, as well as political, transformation might be a proper goal of transitional justice, but it does not follow that reparations are the (or even a) mechanism through which to pursue that goal'.<sup>24</sup>

The argument advanced below has some sympathy with these concerns. As *Lubanga* highlights, even getting to the starting line, to have gender discrimination recognised, was itself a challenge. Under these circumstances, demands for the Court from civil society and the TVF to advance transformative reparations appear at best unrealistic, and at worst damaging, for victims in this case.

## Part two: negotiating the ICC's reparations framework

Accounts of negotiations to establish the Rome Statute of the International Criminal Court indicate that reparations considerations came relatively late in the day,<sup>25</sup> described by Moffett as being 'copy and pasted at the end'.<sup>26</sup> They were eventually included in part as a response to the failure of the UN *ad hoc* tribunals for the former Yugoslavia and for Rwanda to adequately respond to victims' experiences.<sup>27</sup> These negotiations also reflected a more general shift in emphasis in international criminal proceedings 'to healing the wounded as well as punishing the guilty, and, in practical terms, to enabling victim participation and access to reparations'.<sup>28</sup>

As with other aspects of Rome Statute negotiations,<sup>29</sup> the Women's Caucus for Gender Justice played an influential advocacy role along with other civil society organisations, including the Victims Working Group and REDRESS, on the inclusion of a reparations framework in the statute.<sup>30</sup> Together these groups pushed for collective and individual reparations orders, the inclusion of a broad definition of victims, including indirect victims, and lobbied negotiators to enable the court to 'order' states to contribute to reparations<sup>31</sup> – signaling a recognition that the scale and cost of reparations, especially collective reparations in the form of schools and health facilities,<sup>32</sup> were likely to be much greater than the resources at the disposal of any individual defendant.<sup>33</sup>

Many of the ultimate reparations provisions came to reflect this advocacy, incorporated in the Rome Statute and the Rules of Procedure and Evidence, as well as in the regulations of the Trust Fund.<sup>34</sup> The ICC's core reparations provisions are included in Article 75 of the Rome Statute. It provides the ICC with the capacity to develop 'principles' (Article 75(1)) and make 'orders' (Article 75(2)-(4)) for reparations, but these must be linked to a conviction (Article 75(2)). The Court has the capacity to develop principles 'relating to reparations to, or in respect of, victims, *including* restitution, compensation and rehabilitation' (Article 75(1), *emphasis added*). The use of the word 'including' suggests that 'the Statute has been designed to confer a significant degree of discretion upon the Court, enabling it to tailor a body of principles appropriately suited to the specific context in which it operates'.<sup>35</sup> This article has been interpreted by some commentators as allowing for *transformative* measures, such as those aimed at 'guarantees of non-repetition'.<sup>36</sup>

The ICC defines victims in broad terms.<sup>37</sup> Under Rule 85 of the Rules of Procedure and Evidence, victims 'mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court'.<sup>38</sup> The Rules also allow 'family members and other persons that are not direct victims of the crime to be entitled to reparations',<sup>39</sup> signalling that indirect victims may also be able to claim reparations on their own behalf.

For victims to be eligible for reparations through the Rome Statute system, Rule 85 stipulates that there must be a causal link between the harm (understood as damage, loss or injury) and the crime.<sup>40</sup> Maintaining the link between the harm and the justice process is seen to be 'the *raison d'être* of reparations'.<sup>41</sup> Importantly, the Rome Statute was silent on whether the Court should develop guiding reparations principles. In practice, it has decided not to; instead, principles are to be developed on a case-by-case basis. The result, according to ICC Judge Christine Van den Wyngaert, comes at a cost, placing 'a high burden on the shoulders of the judge'.<sup>42</sup>

In line with the Women's Caucus' negotiating position,<sup>43</sup> awards for reparations can be made on an individualised or collective basis, or both, taking into account the scope and extent of any damage, loss and injury (Rule 97). Collective reparations are essential to ICC efforts to achieve a measure of reparative justice, especially given 'the limited amount of funds that will be available for reparations awards when compared with the rights and needs of victims'.<sup>44</sup> The TFV is expected to manage the implementation of the reparation award, unless it is made directly by the convicted person to an individual (Rule 98). Funds for reparations are to be drawn from the forfeiture of the proceeds of crime, and may be complemented by resources of the Trust Fund (Rule 98).<sup>45</sup>

The independent TFV was created for the benefit of victims and of their families (Article 79), and is regulated through Rule 98 and under its own regulations. It acts as

a depository for any assets seized from a suspect for the eventual purposes of reparation and, once a reparations order is made, to administer and implement it according to court directions. To date, the TFV's work on reparations has been curtailed by slow court processes leading to few convictions. However, it also has an important second mandate which is to provide 'assistance' to victims: this involves the Trust Fund 'using voluntary contributions from donors to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation'.<sup>46</sup> In its first decade in operation, the TFV has assisted victims in ICC situation countries, including the DRC, Central African Republic and Uganda. Many of these programmes have had important gender dimensions, with TFV focusing specifically on victims experiencing sexual and gender-based violence, widows/widowers, former child soldiers/abducted youths, orphans and vulnerable children, and families suffering physical and/or mental trauma. Funds for these activities have come from earmarked donations from states parties.<sup>47</sup> While these activities may come closer to what feminist commentators see as transformative reparations, they are an adjunct to, not a result of, the ICC's court-ordered reparations regime.

As this brief outline indicates, the design of the reparations and assistance regime of the ICC came to reflect many of the priorities of the Women's Caucus, and in doing so addressed some longstanding gender injustices. The Rome Statute allows for an expansive interpretation of modes of reparation and assistance, as well as a broad definition of victims. It is also the case, however, that a number of the Caucus' core concerns were not addressed, limiting the role of victims at the ICC. Victims are able to apply for recognition in a case and appeal reparations orders;<sup>48</sup> however, they cannot trigger them. Moreover, while state parties have an obligation to cooperate and implement ICC orders, including in relation to asset tracing and freezing, they are not required to fund reparations (but could do so voluntarily if desired). States may create their own complementary reparations systems, but are not obligated to pay for reparations emerging from ICC cases.<sup>49</sup> The following section illustrates how the ICC's reparations regime and ongoing gender biases in the law have combined to shape developments in the ICC's first reparations hearings, in the *Lubanga* case.

### **Part three: the gender injustice cascade in *Lubanga***

Almost six years after Lubanga was convicted in March 2012, and over 11 years since his arrest in March 2006, no ICC reparations have been delivered to Lubanga's victims in the DRC. This reflects the other stages of the trial, where a range of victim-related problems emerged. The most important here concern the issues with the gender justice aspects of the cases, which emerged early in the case when the Prosecutor omitted sexual and gender-based violence crimes from the charges. As the following discussion illustrates, the influence of this decision cascaded throughout the trial and into the reparations phase, resulting in a range of gender injustices.

#### ***Gender injustice cascade I: the omission of charges***

A major contributing factor to gender injustices in reparations outcomes in the *Lubanga* case happened at the commencement of proceedings. Although then ICC Prosecutor Luis

Moreno Ocampo had publicly committed to ‘investigate all crimes related to the situation [in the DRC] in an impartial way’,<sup>50</sup> Lubanga was charged with a narrow range of child soldier war crimes but not sexual violence violations, which the Office of the Prosecutor (OTP) along with many others knew to be pervasive in this conflict.<sup>51</sup> During the trial, the Prosecutor’s stated reasons for this omission shifted: initially, the Prosecutor said he lacked the time and the evidence to link Lubanga to such crimes;<sup>52</sup> later, he suggested that crimes of sexual and gender-based violence did not meet the crimes against humanity threshold test of being ‘systematic’;<sup>53</sup> by the time of the closing trial statements, the Prosecutor’s statements suggested that the omission was intentional as he had wanted to present sexual and gender-based crimes as integral to the child soldier charges.<sup>54</sup>

At the time of Lubanga’s arrest in 2006, the Prosecutor committed to continuing the investigation into other crimes<sup>55</sup> including sexual violence, a commitment he later withdrew.<sup>56</sup> This occurred despite the presentation by the Women’s Initiatives for Gender Justice to the OTP of over 30 witness testimonies indicating that sexual and gender-based crimes were ‘systematic’ and ‘that sexual violence appeared to be an integral component of the attacks against the civilian population’.<sup>57</sup> During the pre-trial confirmation of charges proceedings, Women’s Initiatives intervened again, attempting to use the Statute’s *amicus curiae* provisions to request that the Pre-trial Chamber determine whether broader charges could be considered as provided under Article 61(7).<sup>58</sup> The Chamber rejected the request on technical grounds<sup>59</sup> and the case went ahead without any sexual and gender-based crimes included in the charges.

### ***Gender injustice cascade II: the trial phase***

During the trial, various parties attempted to address the lack of attention to sexual and gender-based crimes, especially after witness testimony emerged about the extent of these crimes. In May 2009, the victims’ legal representatives filed an application under Regulation 55 to have the facts recharacterised to include charges of sexual slavery and cruel and inhuman treatment.<sup>60</sup> While Trial Chamber judges Odio Benito and Blattman in the majority accepted this application,<sup>61</sup> it was overturned on appeal.<sup>62</sup> The effect of this appeal decision ‘tied the hands of the Trial Chamber at both the judgment and the sentencing stage’,<sup>63</sup> making it difficult to recognise crimes of sexual and gender-based violence. However, it did not prevent one of the trial judges, Justice Odio Benito, from continuing to question the Prosecution and expert witnesses<sup>64</sup> to draw out evidence about the different treatment of boy and girl soldiers in the DRC conflict, including the explicit sexual and gender-based nature of these experiences.<sup>65</sup>

During the trial, the Prosecution took a new approach, and sought to bring to the fore sexual and gender-based dimensions of the child soldier crimes. In his opening statement, the Prosecutor drew attention to the fact that ‘young girls were daily victims of rape by their commanders’<sup>66</sup> and sexual violence was a feature of their experiences as girl soldiers.<sup>67</sup> In the Prosecutor’s closing brief, he called on the Chamber to interpret ‘active participation’ of child soldiers broadly so as to include the recruitment of girls for sexual purposes and forced marriage.<sup>68</sup> The Trial Chamber judges responded to this argument with frustration. They questioned Ocampo as to why he had excluded specific sexual violence charges at the outset yet during proceedings sought to incorporate evidence of sexual and gender-based crimes.<sup>69</sup> As one commentator noted, it seemed as if the Prosecutor was



trying to ‘squeeze the sex crimes’ into the crime of using child soldiers, ‘instead of requesting an amendment of the charges’ which was possible before the commencement of the trial.<sup>70</sup>

### ***Gender injustice cascade III: the verdict and sentencing phase***

The Trial Chamber’s frustration with the Prosecution’s strategy on sexual violence was reflected in its verdict and sentencing decisions. In March 2012, the three-member bench was unanimous on the conviction, finding the accused guilty on all three counts – conscripting, enlisting and using child soldiers in the Ituri conflict,<sup>71</sup> with Judge Odio Benito submitting a dissenting opinion on the reasoning for the conviction (discussed below).<sup>72</sup> The majority verdict decision by Judges Fulford and Blattman found ‘that children, mainly girls, were used by Union of Congolese Patriots /Forces Patriotiques pour la libération du Congo commanders to carry out domestic work’ and that ‘girl soldiers were subjected to sexual violence and rape’.<sup>73</sup> However, they determined that because ‘[s]exual violence does not form part of the charges against the accused ... the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused’.<sup>74</sup>

In the *Lubanga* sentencing decision handed down on 10 July 2012, the Chamber was again forthright in its criticism of Prosecutor Ocampo’s treatment of sexual violence in this case. The Bench noted it ‘strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence’, criticising him for failing to include charges of sexual violence at any stage of the proceedings while still attempting to suggest ‘that sexual violence ought to be considered for the purposes of sentencing’.<sup>75</sup> Ultimately, Judges Fulford and Blattman in the majority argued that the Prosecution had not demonstrated that sexual violence against girl soldiers was ‘sufficiently widespread’ or that Lubanga had ‘ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability’.<sup>76</sup> The majority found that as a result of insufficient evidence linking Lubanga to sexual violence beyond a reasonable doubt, it could not reflect on these crimes in its sentencing decision.<sup>77</sup>

The third trial judge, Judge Odio Benito, presented a dissenting opinion in relation to both the verdict and the sentence. On the matter of the verdict, in Odio Benito’s judgment, the Prosecutor was right to see sexual violence as ‘embedded in the crimes of which Mr. Lubanga is accused’.<sup>78</sup> Her Honour saw this sexual violence as ‘an intrinsic element of the criminal conduct of “use to participate actively in the hostilities”’<sup>79</sup> and found that ‘it is discriminatory to exclude sexual violence which shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys’.<sup>80</sup> In her sentencing judgment, Judge Odio Benito again ‘strongly disagree[d] with the Majority of the Chamber’ arguing that even though Lubanga may not have deliberately discriminated against women, his crimes nevertheless achieved this effect, and should therefore be taken into account in sentencing.<sup>81</sup>

### ***Gender injustice cascade IV: reparations***

After charging, verdict and sentencing stages of the trial came the reparations proceedings. This triggered a series of events moving back and forth between the Trial Chamber, the

Appeals Chamber and the Trust Fund – each of which is outlined below – that at the time of writing, almost five years hence, have not yet been finalised.<sup>82</sup>

### ***Trial Chamber reparations ruling***

The Trial Chamber's reparations principles were the first phase of the *Lubanga* reparations process. When it came to laying down the reparations principles in this case, Trial Chamber I took a distinctly different approach to victims of sexual and gender-based crimes than it had in the final stages of the trial. In the five months between the sentencing and setting out these principles in August 2012, the Chamber called for submissions from interested parties, ultimately accepting filings from the prosecution and defence, the ICC Register, the victims' legal representatives, the ICC's in-house Office of Public Counsel for Victims and the Trust Fund, as well as four nongovernmental organisations (NGOs), including the Women's Initiatives. Reflecting the missteps in the recognition of sexual and gender-based violence throughout the trial, most of these submissions stressed the need for gender sensitivity in the design and implementation of the reparations principles, and the inclusion of girl soldiers and victims of sexual violence as beneficiaries.<sup>83</sup> Interestingly, and in line with the lack of obligation under the Rome Statute on states to address reparations, neither the DRC nor any other state party made a submission to the reparations proceedings.

The submission of the Women's Initiatives provided the most comprehensive overview of these gender issues, calling on the Chamber to include a gender perspective in the reparations principles and orders, to recognise the harm caused by sexual violence, and to consult widely with the victims.<sup>84</sup> Reflecting the Nairobi Declaration, the Women's Initiatives encouraged the ICC to institute both collective and individual 'transformative reparations' which 'address existing gender inequalities within communities'.<sup>85</sup> The Trust Fund expressed similar sentiments, submitting: 'that the transformative quality of reparations be explicitly addressed in the Court's principles with a view to eliminating the pre-existing structural inequalities that have led to or encouraged the [sexual and gender-based] violence'.<sup>86</sup>

Together Judges Fulford, Blattman and Odio Benito agreed that these gender concerns needed to be factored into the establishment of reparations principles in this case. Supporting this aim, the bench applied a broader 'proximate cause' standard to establish the nexus between the harm and the crimes,<sup>87</sup> in order to cover a wider range of victims than that recognised during the trial, and agreed that reparations may be granted to direct and indirect victims, including:

family members of direct victims; anyone who attempted to prevent the commission of one or more of the crimes under consideration; and those who suffered personal harm as a result of these offences, regardless of whether they participated in the trial proceedings.<sup>88</sup>

These measures opened a potential path for including victims of sexual and gender-based violence to be taken into account for the purposes of reparations.

In developing these reparation principles, the Trial Chamber also echoed the Women's Initiatives' submissions, and the earlier priorities of the Women's Caucus, that the modalities of reparations under Article 75 could extend further than restitution, compensation and rehabilitation. The Chamber held that reparations could also be symbolic, preventative and transformative, and should be gender sensitive,<sup>89</sup> including for victims of sexual

and gender-based violence.<sup>90</sup> It recommended the Trust Fund develop reparations initiatives in the DRC with a team of experts including specialists in child and gender issues.<sup>91</sup> As the Court had found Lubanga indigent, it found that the reparations would be ‘supported by the Trust Fund’s own resources’.<sup>92</sup>

Despite these developments and general language throughout the document about the need to include victims of sexual violence, the Chamber specified that ‘the “damage, loss and injury”, which form the basis of a reparations claim, *must have resulted from the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in the hostilities*’ (emphasis added).<sup>93</sup> This was in line with the underlying principles of the ICC’s reparations framework to link the conviction to the measures of repair. The consequence of these principles was to limit the reach of the reparations; with no charges or conviction for sexual and gender-based crimes, there is only a narrow window through which to provide repair for victims of these crimes – that is, child soldiers who suffered rape and other crimes of a sexual nature.<sup>94</sup>

The Trial Chamber’s reparations principles in the *Lubanga* case were subject to an appeal. In 2012, the Defence appealed the reparations along with the verdict and sentence.<sup>95</sup> Two of the four grounds of the Defence’s appeal against the reparation decision related to the recognition of sexual violence crimes. The Defence argued that the Chamber had no basis to award reparations for sexual violence in this case, given that it had previously rejected the argument that the crimes for which Lubanga was convicted would necessarily lead to the commission of sexual violence crimes.<sup>96</sup> It also challenged the Trial Chamber’s application of the ‘proximate cause’ standard on the basis that it interferes with fair trial rights.<sup>97</sup>

The victims’ legal representatives, seeking to ensure the best possible result for the victims, opposed the Defence’s arguments in their observations on the appeal. They accepted the Trial Chamber’s point that under the Rome Statute, reparations can only be awarded for the damage which resulted from the crimes for which the accused was convicted (which in Lubanga’s case, meant the war crimes of ‘conscripting’, ‘enlisting’ and ‘using’ child soldiers). However, they emphasised that the victims of those crimes included ‘many young girls who suffered sexual violence *as a result* of their recruitment into the militia’.<sup>98</sup> Hence, they argued that these girls were entitled to reparations for the damage caused by sexual violence, because this damage was the result of their conscription or enlistment into Lubanga’s group.

Here again, the ICC Prosecutor’s reluctance to include sexual violence charges against *Lubanga*, and the decision of the Trial Chamber majority to ‘not set forth any findings in regard to these charges for the purposes of establishing the responsibility of Mr Lubanga’,<sup>99</sup> had significant flow-on effects at the reparations phase: silences and omissions in the earlier phases of the trial gave the Defence strong grounds to challenge the Trial Chamber’s gender-sensitive reparations decision.

### ***Appeals Chamber reparations ruling***

Almost three years after the Appeal process began, on 3 March 2015, the Appeals Chamber handed down its reparations decision in the *Lubanga* case. It upheld the Trial Chamber’s decision to not to award individual reparations,<sup>100</sup> and confirmed *some* of the gender-sensitive aspects of the Trial Chamber’s decision, including the finding that any reparations ordered by the Court shall be granted to victims without adverse

distinction on the basis of gender, sexual orientation and other prohibited grounds.<sup>101</sup> This prohibition of discrimination on the basis of sexual orientation in reparations orders was particularly progressive, given that the Rome Statute does not expressly prohibit discrimination on this basis,<sup>102</sup> and given that certain majority Catholic and Muslim States were fiercely opposed to any protection of LGBTI rights during the negotiations for the Rome Statute.<sup>103</sup>

However, the Appeals Chamber judges also overturned several key aspects of the Trial Chamber judgement. They reasoned that because the Trial Chamber had not held Lubanga responsible for sexual violence crimes, and because it had also found that sexual violence was not an aggravating factor when determining Lubanga's sentence, then the Trial Chamber could not award reparations for the harms suffered as a result of sexual violence in this case.<sup>104</sup>

The Appeals Chamber attempted to soften its findings on this point by acknowledging that victims of sexual and gender-based crimes in the affected communities could still receive 'general assistance' from the Trust Fund.<sup>105</sup> In addition, the Chamber stressed that its findings regarding reparations for sexual violence were specific to the facts of *this case*<sup>106</sup> – an approach which left open the possibility that a person convicted of recruiting and using child soldiers where sexual and gender-based violence was present could potentially be ordered to pay reparations for these crimes in future ICC cases if charged appropriately.

While these points may have eased the blow for some victims and their supporters, they did not change the fact that, in this case, there would be no reparations for damage caused by sexual violence crimes, including where they had been committed against child soldiers. This finding was consistent with the Appeals Chamber's broader argument that the ICC's reparations mandate was closely tied to its role as a *criminal justice* mechanism. This decision has since been reinforced in the 2017 Katanga reparations judgement,<sup>107</sup> indicating that the emerging interpretation of ICC rules is that any reparations claims can only be strictly based on damage that the Court has attributed to the accused.

The Appeals Chamber's emphasis on the ICC's role as a criminal court also led it to overturn other parts of the Trial Chamber's reparations decision. For example, whereas the Trial Chamber had directed the Trust Fund to administer and cover the cost of the reparations, because Lubanga had been found indigent, the Appeals Chamber rejected this approach. It held that reparations orders must be directed 'against' the convicted person (even if the reparations would in fact be financed through the Trust Fund), in order to express the person's individual accountability for their crimes.<sup>108</sup> Again, this approach has also been reflected in the Katanga reparations judgement.<sup>109</sup> The Appeals Chamber amended the original reparations order in line with its findings, and directed the Trust Fund to submit a draft reparations plan to the Trial Chamber within six months.

After receiving an extension of time, the Trust Fund submitted a draft plan to the Trial Chamber in November 2015,<sup>110</sup> with additional information provided in June<sup>111</sup> and September 2016.<sup>112</sup> Together, these filings described a collective reparations programme that would require €1 million from the Trust Fund and would include: symbolic reparations aimed at promoting community healing and reducing the trauma and stigmatisation of former child soldiers (such as the construction of commemoration centres); medical and psychological treatment for recruited youths; livelihood support to increase the

economic mobility of victims (such as agricultural materials, vocational training and literacy programmes); and training on conflict resolution and gender-based violence prevention.

By the end of 2016, the delay in settling the reparations order was becoming a major concern. At the reparations hearing on 11 October 2016, Luc Walley, a victims' legal representative, reminded the Trial Chamber that some of the victims had been involved in the case for 10 years, and were 'extremely tired of this struggle'.<sup>113</sup> Brigid Inder, Executive Director of Women's Initiatives, also spoke at the hearing and noted the challenges the long process was creating for child soldiers, especially girls.<sup>114</sup>

On 21 October 2016, the Trial Chamber approved the Trust Fund's plan for symbolic reparations but left the remainder of the plan for a later date.<sup>115</sup> At the time of writing, it remains to be seen whether the Trial Chamber will approve the other parts of the Trust Fund's draft reparations plan. Importantly, these are to include important gender dimensions. For instance, committees responsible for designing commemoration centres and memorial events are expected to be 'gender-inclusive',<sup>116</sup> and memorial events are to address 'gender related topics including as to the various forms in which former child soldiers and their families experience stigma'.<sup>117</sup> Questions also arise as to how far these symbolic reparations will go in satisfying victims who may have been expecting much more given the principles initially set down by the Trial Chamber. As other examples of symbolic reparations demonstrate, such measures can provoke resistance and contestations on the ground, especially when seen as a way for those accountable for atrocities to shirk their responsibilities.<sup>118</sup>

#### **Part four: where to for transformative reparations at the ICC?**

The Appeals Chamber's reparations decision extinguished any remaining hope that victims of sexual and gender-based crimes would receive any direct reparations in the *Lubanga* case, reflecting the trend of the entire case.<sup>119</sup> It is the argument here that there has been a gender injustice cascade effect throughout the *Lubanga* case triggered by the Prosecutor's initial decision not to investigate and include charges for crimes of sexual and gender-based violence, despite evidence for these crimes. Although there were attempts by the Prosecutor's Office to 'correct' this initial decision mid-trial, these were much too little too late. Clearly, Judge Odio Benito was also open to considering the significance of these crimes, and was cognisant of the differential treatment of girls and boy soldiers, including in the use of sexual violence against them. However, in the interests of the rights of the accused, the majority judges felt their hands were tied, and could do nothing to expand the charges during the trial. In the absence of a conviction for sexual and gender-based crimes, it has been hard for victims' representatives to ultimately convince Chambers of the need for direct reparations for victims of sexual and gender-based crimes.

Attempts by the TFV, victims' legal representatives and key civil society groups such as the Women's Initiatives to bring broader gender justice issues into focus at the reparations stage of the trial have been well intentioned, and have had some impact. The inclusion of a gender dimension to any future symbolic reparations is unlikely to have occurred without the ongoing advocacy of these actors. However, this is far from the Women's Initiatives and the TFV's stated objectives for the ICC to provide 'transformative' reparations for

all the victims of Lubanga's crimes. Moreover, as noted above, symbolic reparations can come with their own challenges, especially where victims and their families are seeking more substantive forms of reparations.

The *Lubanga* case stands as an example of what *not* to do to develop a transformative approach to reparations for sexual and gender-based violence. The case has reflected each of the three historical forms of gender bias in reparations outlined in part one above, including problems of definition/misrecognition, poor representation in Court processes, and inadequate prosecution investigations and strategies. Even though the Rome Statute provides the ICC with a clear mandate to advance gender justice including in relation to reparations, it has failed in this case, largely because of the operation of these historical gender biases. The *Lubanga* case demonstrates gender concerns cannot be successfully retrofitted. They must be identified and articulated from the outset or they will be overridden by the biases that lurk under the surface of formal rules. These biases have profound effects, in this case reinforcing women's long-held exclusion from access to reparations for the crimes committed against them.

The process in *Lubanga* has been a significant problem, but so too has the outcome (to date). On the continuum of reparations, the ICC has landed at the point of a *symbolic* approach. This no doubt has something to do with its inadequate access to resources for carrying out its reparative mandate. Memorials and commemorations, including those with sensitivity to gender inclusion, may be part of securing the peace, but they may also provoke contestation; either way, alone they do little to support the types of *structural* transformations necessary to shift the gender order to prevent the recurrence of sexual and gender-based violence.<sup>120</sup>

The question is, will the ICC ever be a venue capable of advancing transformative reparations per se? There is good reason to think that it will be able to address the process issues – and silences – that so hampered gender-just reparative outcomes for victims in *Lubanga*. The *Bemba* case,<sup>121</sup> which at the time of writing has reached the reparations phase, in which the accused has been convicted of crimes of sexual and gender-based violence, will open the door to a broader range of victims and potentially secure gender-just reparations. Prosecutor Besouda's commitment to the investigation and charging of gender-based crimes, so obvious in the *Ongwen* case for instance<sup>122</sup> and in the OTP's Sexual and Gender-based Crimes policy document,<sup>123</sup> is an important sign that lessons from *Lubanga* have been learned and are being acted upon. Ongoing external pressure from Women's Initiatives, REDRESS and other civil society organisations, and indeed the TFV, will help keep the ICC focused on its gender inclusion mandate in regard to reparations. Ongoing pressure and constant vigilance will be key.

However, serious doubts remain about the ultimate outcome: whether the ICC can contribute to the gender transformation of situation countries to prevent conflict-related sexual and gender-based violence crimes. The problem here is twofold: resourcing and politics. In terms of resourcing, it is unlikely the ICC, through the Trust Fund, or any person convicted by the ICC will ever have the financial or staffing resources necessary to cover the costs of such reparative measures. Even if the ICC did have all the financial resources it needs, the Rome Statute does not give the court jurisdiction to direct states to undertake the types of redistributive activities that would disrupt the gender order – economically, politically and socially – so as to prevent future conflict-related sexual and gender-based violence. The Appeals Chamber's call in *Lubanga* for the Trust Fund to

use its assistance mandate to address some of the wider, societal-level needs of victims in the DRC is probably the best intervention the ICC can make to support the wider objective of non-recurrence of sexual and gender-based violence. But, again, given the Fund's resource deficit, its impact is likely to be only ever at the margins.

These significant hurdles are not to suggest the ICC ignore its reparations mandate, but rather for the Court itself, the civil society actors that surround it, and victims' groups and representatives to reassess claims about what the ICC's innovative reparations process can achieve. With the objective of 'doing no harm' in mind, it is necessary to pare back expectations of the *transformative* potential of the ICC's reparative regime, including for victims of sexual and gender-based violence, and to focus on what is possible within the court's limited reparations and assistance mandate. This more modest approach will serve to protect victims from serious disappointment or worse – such as a sense of abandonment after having their expectations raised unrealistically, leading to further unrest and possible conflict.

Although it may not be necessary to go as far as Urban Walker and reject the call for transformative reparations altogether,<sup>124</sup> it is certainly the case that advocates targeting courts, especially international courts such as the ICC, should be realistic about their expectations of transformation given their limited mandates, finances and political clout. This also does not let the ICC off the hook. As the Lubanga case demonstrated, the Court can do much to improve the gender-just outcomes of its reparations processes. It must also be clear to itself and its audience about the limited parameters in which its reparations regime operates. As an important starting point, because it cannot deliver on the promise of 'transformative' reparations, ICC and Trust Fund personnel should step away from using this language and encourage its interlocutors to do the same. Only then will victims be able to make a realistic assessment of the value of reparations processes, and determine whether the costs outweigh the benefits.

## Conclusion

A key lesson from *Lubanga* is that *post hoc* efforts to fit gender-justice concerns into the proceedings will always be problematic, leading to: an inadequate understanding of the nature and scope of the harms of such crimes; a narrow interpretation of the victims eligible for reparations; and delays in proceedings that threaten to undermine the Court's 'do no harm' operating principle. Ultimately, as this first case shows, the ICC's reparations mandate will have little value for victims of sexual and gender-based violence unless gender injustices are recognised at each and every stage of the investigation and trial process, and pursued with adequate resources. Yet-to-be announced reparations in the ICC's Bemba case, the first to include a conviction for sexual and gender-based crimes, may well prove to be an example of this point.

This article further suggests that in attempting to rectify the situation at the reparation phase, the Trial Chamber may have overreached in its language when it suggested that the court could provide 'transformative reparations' for *Lubanga's* victims, including those who experienced sexual and gender-based harms. It posits that this view in itself could potentially cause further harm to the victims; it cautions that in future ICC chambers, prosecutorial teams and external interlocutors should avoid overburdening the court with unrealistic expectations about what the ICC can deliver through its reparations

mandate, including to victims of crimes of sexual and gender-based violence. As practice gives greater definition to the ambiguities in the Rome Statute's unique reparations system, a cautionary 'less is more' approach by the ICC appears by far the best strategy.

## Notes

1. Christine Van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western Reserve Journal of International Law* 44, no. 1 and 2 (2012): 475–96.
2. Frédéric Mégret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes', *Brooklyn Journal of International Law* 36, no. 1 (2015): 123–204; see also Luke Moffett, this special issue.
3. *Prosecutor v Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparation, ICC-01/04-01/06-2904, 7 August 2012.
4. *Prosecutor v Lubanga*, Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation of 7 August 2012, ICC-01/04-01/06-2914-tENG, 3 September 2012.
5. *Prosecutor v Lubanga*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015.
6. *Prosecutor v Lubanga*, Redaction of Filing on Reparations and Draft Implementation Plan, Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015.
7. *Prosecutor v Lubanga*, Additional Programme Information Filing, Trust Fund for Victims, ICC-01/04-01/06-3209, 7 June 2016.
8. *Prosecutor v Lubanga*, Public Redacted Version of Filing Regarding Symbolic Collective Reparations Projects with Confidential Annex: Draft Request for Proposals, ICC-01/04-01/06-3223-Conf, Trust Fund for Victims, ICC-01/04-01/06-3223-Red, 19 September 2016.
9. *Ibid.*
10. Carsten Stahn, 'Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation', *EJIL Talk!* (Blog), 7 April 2015, <http://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/> (accessed February 9, 2016).
11. See Rashida Manjoo, this special issue; Louise Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford: Oxford University Press, 2016); Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000); Judith G. Gardam and Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001); Susana SáCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project?' *Michigan Journal of Gender and the Law* 18, no. 2 (2012): 297–359.
12. Carla Ferstman, 'Procedural and Substantive Obstacles for Reparations for Women Subjected to Violence through Judicial and Administrative Forums', *Panel Discussion on Reparations for Women Subjected to Violence, Palais Des Nations* (8 June 2010), 6, [http://www.redress.org/UNSRVW\\_July\\_2010.pdf](http://www.redress.org/UNSRVW_July_2010.pdf); Anne-Marie De Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', *Leiden Journal of International Law* 20, no. 1 (2007): 207–37; Colleen Duggan and Adila Abusharaf, 'Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice', in *The Handbook of Reparations*, ed. Pablo de Grieff (Oxford: Oxford University Press, 2006), 623–49; Fionnuala Ní Aoláin, Dina F. Haynes and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford: Oxford University Press, 2011), 6. Ruth Rubio-Marín, ed., *The Gender of Reparations: Unsettling*



- Sexual Hierarchies While Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009).
13. Chappell, *The Politics of Gender Justice*.
  14. Ní Aoláin, Haynes and Cahn, *On the Frontlines*; Carla Ferstman, 'Procedural and Substantive Obstacles', 6.
  15. These include the right to: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
  16. Rubio-Marín, *Gender of Reparations*.
  17. Rubio-Marín, *Gender of Reparations*; also see Jacqui True, *The Political Economy of Violence Against Women* (Oxford: Oxford University Press, 2012), 122; Andrea Durbach and Louise Chappell, "'Leaving Behind the Age of Impunity": Victims of Gender Violence and the Promise of Reparations', *International Feminist Journal of Politics* 16, no. 4 (2014): 543–62; Duggan and Abusharaf, 'Reparation of Sexual Violence in Democratic Transitions', 628; Cynthia Cockburn, 'The Continuum of Violence', in *Sites of Violence: Gender and Conflict Zones*, ed. Wenona Giles and Jennifer Hyndman (Berkeley: University of California Press, 2004), 24–45.
  18. Durbach and Chappell, 'Leaving Behind the Age of Impunity'.
  19. Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, its Causes And Consequences* (A/HRC/14/22) (New York: Office of the High Commissioner for Human Rights, 19 April 2010).
  20. Durbach and Chappell, 'Leaving Behind the Age of Impunity'.
  21. Article 3 (H) of the declaration states: 'Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and *structural inequalities* that negatively shape women's and girls' lives' (emphasis added).
  22. Durbach and Chappell, 'Leaving Behind the Age of Impunity'.
  23. Margaret Urban Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-just Reparations', *International Journal of Transitional Justice* 10 (2015): 108–32.
  24. *Ibid.*, 110.
  25. Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court', *International Criminal Law Review* 17, no. 2 (2017), 351–77.
  26. Luke Moffett, this special issue.
  27. Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*. (Cambridge: Cambridge University Press, 2012), 46; Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', *Leiden Journal of International Law* 15, no. 3 (2002): 667–86, 671.
  28. Anja Wiersing, 'Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court', *Amsterdam Law Forum* 4, no. 3 (2012): 21–39, 24.
  29. For a discussion of the gender justice negotiations generally, see Valerie Oosterveld, 'Constructive Ambiguity and the Meaning of "Gender" for the International Criminal Court', *International Feminist Journal of Politics* 16, no. 4 (2014): 563–80.
  30. McCarthy, *Reparations and Victim Support*, 52–3; Sperfeldt, 'Rome's Legacy'.
  31. McCarthy, *Reparations and Victim Support*, 53.
  32. *Ibid.*
  33. *Ibid.*
  34. International Criminal Court Assembly of States Parties, *Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3, ICC-ASP/4/Res.3*, 2005.
  35. McCarthy, *Reparations and Victim Support*, 255.
  36. ICC-01/04-01/06-2904, para. 222.; see also Frédéric Mégret, 'The International Criminal Court and the Failure to Mention Symbolic Reparations', *International Review of Victimology* 16, no. 2 (2009): 127–47.
  37. Womens' Caucus for Gender Justice, *Recommendations and Commentary for the March 1998 PrepCom Composition and Administration of the Court*. (18 March 1998 [original with author]), 1.

38. See De Brouwer, 'Reparation to Victims of Sexual Violence', 221.
39. Eva Dwertmann, *The Reparations System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Leiden: Martinus Nijhoff Publishers, 2010), 89.
40. *Ibid.*, 78.
41. REDRESS, 'Landmark ICC Decision Recognises Reparation is a Right Owed to Victims', Press Release, 7 August 2012, <http://www.redress.org/downloads/Lubangareparationsdecision-070812.pdf> (accessed April 7, 2014).
42. Van den Wyngaert, 'Victims Before International Criminal Courts', 486; also, at least in the *Lubanga* judgments, judges have passed this responsibility on to the Trust Fund for Victims (see Chappell, *The Politics of Gender Justice*).
43. Women's Caucus for Gender Justice, *Gender Justice and the ICC*, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June–17 July, Rome, Italy (New York: Women's Caucus for Gender Justice, 1998), 51.
44. Ferstman, 'Reparation Regime of the International Criminal Court', 675.
45. Conor McCarthy, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *International Journal of Transitional Justice* 3, no. 2 (2009): 250–71, 252.
46. Trust Fund for Victims, 'Trust Fund for Victims Receives over €5 Million Voluntary Contributions in 2014', Press Release, 23 December 2014, <http://www.trustfundforvictims.org/news/trust-fund-victims-receives-over-%E2%82%AC5-million-voluntary-contributions-2014> (accessed January 16, 2015); for further discussion see Chappell, *The Politics of Gender Justice*, chap. 5.
47. Chappell, *The Politics of Gender Justice*, 150–5.
48. Dwertmann, *Reparations System*, 261.
49. See Chappell, *The Politics of Gender Justice*, 139–40.
50. See in particular Articles 7(1)(g), 7(2)(f), 8(2)(b)(xxii), 21(3), *Rome Statute*, 1998; International Criminal Court Office of the Prosecutor, *Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps* (The Hague: ICC OTP, 12 February 2004), [http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf) (accessed January 13, 2015).
51. Louise Chappell, 'Nested Newness and Institutional Innovation: Expanding Gender Justice in the International Criminal Court', in *Gender, Politics and Institutions: Towards a Feminist Institutionalism*, ed. Mona Lena Krook and Fiona Mackay (Basingstoke: Palgrave, 2011), 163–80.
52. Pamela Yates, director, *The Reckoning* [Film] (Skylight Pictures: Brooklyn, NY, 2009).
53. Women's Initiatives for Gender Justice, *Gender Report Card 2006* (The Hague: WIGJ, 2006).
54. *Prosecutor v Lubanga*, Prosecution's Closing Brief, ICC-01/04-01/06-2748-Red, 1 June 2011, para. 139.
55. International Criminal Court Office of the Prosecutor, *Statement by Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court: Press Conference in Relation with the Surrender to the Court of Mr Thomas Lubanga Dyilo*, ICC 01/04-01/06-170, 18 March 2008.
56. *Ibid.*
57. Brigid Inder, 'Reflection: Gender Issues and Child Soldiers the Case of Prosecutor v Thomas Lubanga Dyilo', (2011), <http://www.lubangatrial.org/2011/08/31/reflection-gender-issues-and-child-soldiers-the-case-of-prosecutor-v-thomas-lubanga-dyilo-2/>, n.p. (accessed August 31, 2015).
58. Women's Initiatives for Gender Justice, *Gender Report Card 2011* (The Hague: WIGJ, 2011), 130.
59. *Ibid.*
60. *Prosecutor v Lubanga*, Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court, ICC-01/04-01/06-1891, 22 May 2009; Sienna Merope, 'Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC', *Criminal Law Forum* 22, no. 3 (2011): 311–46.

61. *Prosecutor v Lubanga*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, 14 July 2009.
62. *Prosecutor v Lubanga*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts may Be Subject to Change', ICC-01/04-01/06-2205, 17 December 2009.
63. Nina H.B. Jørgensen, 'Child Soldiers and the Parameters of International Criminal Law', *Chinese Journal of International Law* 11, no. 4 (2012): 657–88, 665.
64. *Prosecutor v Lubanga*, Trial Hearing, ICC-01/04-01/06-T-223-ENG, 7 January 2010.
65. Women's Initiatives for Gender Justice, *Gender Report Card 2010* (The Hague: WIGJ, 2010), 132.
66. *Prosecutor v Lubanga*, Procedural Matters Hearing, ICC-01/04-01/06-2748-Red, 21 July 2011 para. 22.
67. See for instance ICC-01/04-01/06-T-107-Eng, 10, 11; Women's Initiatives for Gender Justice, *Gender Report Card 2012* (The Hague: WIGJ, 2012), 160; Women's Initiatives for Gender Justice, *Gender Report Card 2009* (The Hague: WIGJ, 2009), 69–71; see also Jørgensen, 'Child Soldiers and the Parameters', 665.
68. ICC-01/04-01/06-2748-Red, para. 139.
69. See for example the tense exchange on these issues between the Prosecutor and the Bench in closing statements: *Prosecutor v. Lubanga*, Office of the Prosecutor's Closing Statements, ICC-01/04-01/06-T-356-ENG, 25 August 2011, 55.
70. Kai Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', *International Criminal Law Review* 12 (2012): 115–53, fn 138, 156.
71. *Prosecutor v Lubanga*, Judgment Hearing, ICC-01/04-01/06-T-359-ENG, 14 March 2012.
72. *Prosecutor v Lubanga*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, 14 March 2012.
73. *Ibid.*, para. 913.
74. *Ibid.*
75. *Prosecutor v Lubanga*, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, 10 July 2012, para. 60.
76. *Ibid.*, para. 74.
77. *Ibid.*, para. 75.
78. ICC-01/04-01/06-2842, para. 21.
79. *Ibid.*, para. 20.
80. *Ibid.*, para. 21.
81. *Ibid.*
82. ICC-01/04-01/06-2904; *Prosecutor v. Lubanga*, Defence Document in Support of the Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation Rendered on 7 August 2012, ICC-01/04-01/06-2948-Conf-tENG, 6 September 2012; ICC-01/04-01/06-2914-tENG, 3 September 2012; ICC-01/04-01/06-3129.
83. International Criminal Court Office of the Prosecutor, *OTP Briefing: Principles and Procedures of Reparation Process Established in Lubanga Case*, Issue #129, 8–27 August 2012, <http://www.icc-cpi.int/NR/rdonlyres/8A4D5456-4DA2-4D24-A338-591995AF727E/284861/OTPBriefing827August2012.pdf> (accessed January 16, 2014); Trust Fund for Victims, *Mobilising Resources and Supporting the Most Vulnerable Victims through Earmarked Funding: Programme Progress Report, Winter 2012* (The Hague: TFV, 2012).
84. *Prosecutor v Lubanga*, Women's Initiatives for Gender Justice Request for Leave to Participate in Reparations Proceedings, ICC-01/04-01/06-2853, 28 March 2012; *Prosecutor v Lubanga*, Observations of the Women's Initiatives for Gender Justice on Reparations, ICC-01/04-01/06-2876, 10 May 2012.
85. ICC-01/04-01/06-2853, para. 35; see also Women's Initiatives for Gender Justice, *Gender Report Card 2012*, 207–08.

86. *Prosecutor v. Lubanga*, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, ICC-01/04-01/06-2872, 25 April 2015, para. 77.
87. ICC-01/04-01/06-2904, para. 249.
88. *Ibid.*, para. 194.
89. *Ibid.*, para. 222.
90. *Ibid.*, para. 189, 207.
91. *Ibid.*, para. 264.
92. *Ibid.*, para. 269, 271.
93. *Ibid.*, para. 247.
94. Mariana Pena, 'The Lubanga Case and Reparations for Victims of Sexual Violence', *International Justice Central Blog*, 10 October 2012, [http://publicinternationallawandpolicygroup.org/wp-content/uploads/2012/10/WCPW\\_MASTER\\_102212.html](http://publicinternationallawandpolicygroup.org/wp-content/uploads/2012/10/WCPW_MASTER_102212.html) (accessed May 30, 2017).
95. ICC-01/04-01/06-2948-Conf-tENG; *Prosecutor v. Lubanga*, Mr. Thomas Lubanga's Appellate Brief against Trial Chamber I's 10 July 2012 Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2949-tENG, 3 December 2012; *Prosecutor v. Lubanga*, Defence Document in Support of the Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation, Rendered on 7 August 2012, ICC-01/04-01/06-2919-tENG, 10 September 2012.
96. *Prosecutor v. Lubanga*, Defence Document in Support of the Appeal against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation, Rendered on 7 August 2012, ICC-01/04-01/06-2919-tENG, 10 September 2012.
97. *Ibid.*, para. 5.
98. *Prosecutor v. Lubanga*, Response to the Defence Brief on the Appeal against the Decision Establishing the Principles and Procedures to be Applied to Reparations of 7 August 2012, Legal Representatives of Victims, ICC-01/04-01/06-3007-tENG, 13 April 2013, para. 58.
99. *Ibid.*, para. 37.
100. *Prosecutor v. Lubanga*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012, ICC-01/04-01/06-312, 3 March 2015, para. 147–57.
101. *Prosecutor v. Lubanga*, Order for Reparations (Amended), ICC-01/04-01/06-3129-AnxA, 3 March 2015, para. 16.
102. Rome Statute, Article 21(3).
103. See Valerie Oosterveld, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', *Harvard Human Rights Journal* 18 (2005): 55–84.
104. ICC-01/04-01/06-3129, para. 196–8; Stahn, 'Reparative Justice after the Lubanga Appeal Judgment'.
105. ICC-01/04-01/06-3129, para. 199.
106. *Ibid.*, para. 196–8.
107. International Criminal Court, 'Katanga Case: ICC Trial Chamber II Awards Victims Individual and Collective Reparations', Press Release, ICC-CPI-20170324-PR1288, 24 March 2017.
108. ICC-01/04-01/06-312, para. 64–76.
109. International Criminal Court, 'Katanga Case: ICC Trial Chamber II Awards Victims'.
110. *Prosecutor v. Lubanga*, Redaction of Filing on Reparations and Draft Implementation Plan, Trust Fund for Victims, ICC-01/04-01/06-3177-Red, 3 November 2015.
111. *Prosecutor v. Lubanga*, Additional Programme Information Filing, Trust Fund for Victims, ICC-01/04-01/06-3209, 7 June 2016.
112. *Prosecutor v. Lubanga*, Public Redacted Version of Filing Regarding Symbolic Collective Reparations Projects with Confidential Annex: Draft Request for Proposals, ICC-01/04-01/06-3223-Conf, Trust Fund for Victims, ICC-01/04-01/06-3223-Red, 19 September 2016.
113. *Prosecutor v. Lubanga*, Reparations Hearing, ICC-01/04-01/06-T-367-ENG, 11 October 2016, 42–3.

114. Women's Initiatives for Gender Justice, 'Presentation to Trial Chamber II Observations of the Women's Initiatives for Gender Justice', 11 October 2016, <http://www.4genderjustice.org/pub/Presentation-to-TC-II-Reparations-Hearing-October-2016.pdf> (accessed May 30, 2017).
115. *Prosecutor v Lubanga*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of August 7, 2012 with AMENDED Order for Reparations (Annex A) and Public Annexes 1 and 2, ICC-01/04-01/06-3129, 3 March 2015.
116. ICC-01/04-01/06-3223-Red 2, para. 36, 39.
117. *Ibid*, para. 41.
118. See for example the controversy over the Mexican el Campo Algodonero, Fregoso, Rosa-Linda, 2012, For the Women of Ciudad Juarez, <http://thefeministwire.com/2012/12/for-the-women-of-ciudad-juarez/> (accessed June 8, 2017).
119. Women's Initiatives for Gender Justice, 'ICC Issues First Appeal Judgment on Reparations: The Prosecutor v. Thomas Lubanga Dyilo', Press Release, 3 March 2015 (The Hague: WIGJ, 2015), [http://www.iccwomen.org/documents/ICC-issues-first-appeal-judgment-on-reparations\\_Lubanga.pdf](http://www.iccwomen.org/documents/ICC-issues-first-appeal-judgment-on-reparations_Lubanga.pdf) (accessed March 14, 2017), 2.
120. Rashida Manjoo, this special issue; Rashida Manjoo, *Report of the Special Rapporteur on Violence Against Women, its Causes And Consequences*; Durbach and Chappell, 'Leaving Behind the Age of Impunity'.
121. For information on the *Bemba* case (ICC-01/05-01/08), please see: <https://www.icc-cpi.int/car/bemba> (accessed July 20, 2017).
122. For information on the *Ongwen* case (ICC-02/04-01/15); please see: <https://www.icc-cpi.int/uganda/ongwen> (accessed July 20, 2017); *Prosecutor v. Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-red, March 23, 2016, pp. 39-61; International Criminal Court Office of the Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at the opening of Trial in the case against Dominic Ongwen*. (The Hague: ICC OTP, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=2016-12-06-otp-stat-ongwen> (accessed March 13, 2017).
123. International Criminal Court Office of the Prosecutor, *Policy Paper of Sexual and Gender-based Crimes*. (The Hague: ICC OTP, 2014).
124. Urban Walker, 'Transformative Reparations? A Critical Look'.

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