



## Foreword: special issue on ‘transformative reparations for sexual violence post-conflict: prospects and problems’

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FOREWORD



## Foreword: special issue on ‘transformative reparations for sexual violence post-conflict: prospects and problems’<sup>†</sup>

In 2012, the Australian Human Rights Centre at the University of New South Wales, Sydney, Australia hosted an international conference which marked the first ten years of operation of the International Criminal Court (ICC). The conference, *Justice For All? The International Criminal Court – Ten Year Review*, brought together a wide range of distinguished ICC experts, scholars and practitioners from Africa, the Asia Pacific, the United States (US) and Europe, including the then President of the ICC, Judge Sang-Hyun Song and Registrar of the ICC, Silvana Arbia, Deputy (now Chief) Prosecutor, Fatou Bensouda and then Assembly of States Parties President Tiina Intelmann. A key objective of the conference was to examine the role and success of the ICC in ensuring that gender justice informed its mandate, practice and procedure. Tied to this focus was consideration of the contribution of the ICC (and similar tribunals) towards curtailing impunity for the perpetrators of crimes of sexual violence and preventing its occurrence post-conflict.

The dual objectives of ending impunity for crimes of sexual violence and preventing its repetition, particularly in post-conflict settings, via the design and implementation of so-called transformative reparations has been the theme of exploration of a three-year Australian Research Council funded project conducted by the editors of this special edition. More particularly, our research has sought to test the claim by some gender justice advocates and transitional justice scholars that court-ordered reparations – such as at the ICC and the Extraordinary Chambers in the Courts of Cambodia, among other tribunals – can serve both a remedial and a transformative function for victims of conflict-related sexual and gender-based violence.<sup>1</sup> The transformative dimension of reparations envisaged not only addressing the rehabilitative and compensatory needs of victims, but potentially also adjusting or eroding the structural conditions (economic, social, political and cultural) that might have enabled the violence during conflict and, in many cases, sustained its recurrence post-conflict.

The call for transformative reparations for victims of conflict-related sexual violence found some application in the ICC in the first reparations hearings in *Lubanga*, which occurred between 2012 and 2016. The submissions of the Women’s Initiatives for Gender Justice<sup>2</sup> and the ICC’s Trust Fund for Victims<sup>3</sup> urged the court to consider developing principles for transformative reparations applicable to all victims in the case, including women and girl victims of sexual violence in the relevant region of the Democratic Republic of Congo. This call was further developed in the Guidance Note of the United Nations (UN) Secretary-General entitled *Reparations for Conflict-Related Sexual Violence* (2014) which aims to complement the work of UN bodies engaged in the development of reparations for victims of conflict-related sexual violence.<sup>4</sup> The Guidance Note asserts that ‘[d]ecisions on and the delivery of reparations should ... not reinforce pre-existing patterns of gender-based discrimination, but rather strive to transform them’.<sup>5</sup> In addition, the principles outlined in the Guidance Note urge that ‘any initiative designed to fulfil the victims of sexual violence

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right to reparations<sup>6</sup> should be informed by the ‘potential to be transformative’ with a view to ‘unsettling patriarchal and sexual hierarchies and customs’.<sup>7</sup> These principles assert that the transformative potential of reparations can best be executed via the reparative principle of ‘guarantees against non-repetition’ which ‘impl[ies] the need for structural and institutional reforms’.<sup>8</sup> In addition, the ICC’s Policy Paper on Sexual and Gender-Based Crimes released in June 2014 by The Office of the Prosecutor ‘supports a gender-inclusive approach to reparations’<sup>9</sup> which takes ‘into account the gender-specific impact’<sup>10</sup> and harm to victims and is ‘intended to promote reparations that are transformative and contribute to advancing gender equality’.<sup>11</sup>

While the ICC struggles to project a cohesive and coherent approach to its reparative framework in further reparation rulings, notably in the *Katanga* case (2017), the right to remedy, restorative or transformative, remains critically out of reach for victims of sexual and gender-based violence crimes.<sup>12</sup> Rather than assessing this lack of application as a failure of the ICC to fully implement what is arguably an ambitious and resource-intensive mandate, our project has sought to explore two fundamental questions that the ICC’s approach to date clearly signals: first, what form transformative reparations might take if they were to contribute to both addressing the harms of victims and preventing the repetition of sexual violence post-conflict; and second, whether international criminal justice institutions (and analogous domestic mechanisms, such as special courts and truth commissions) are equipped to give effect to the call for a transformative response to sexual violence against women post-conflict via awards of reparation?

The manifestation or expression of this ‘new and rhetorically powerful idea ... that gender-just reparations should be “transformative”’,<sup>13</sup> continues to evolve, with advocates of transformative reparations claiming that they need to go beyond the indicators customarily associated with the Van Boven reparative principle of *guarantee against repetition*,<sup>14</sup> such as effective civilian control of military and security forces, enhanced independence of the judiciary, protection of human rights defenders, provision of human rights education and the reform of laws that may contribute to gross violations of international human rights law.<sup>15</sup> Rather, as Margaret Urban Walker has suggested, the design of such reparations should be based on the human rights principle of non-discrimination and seek to ‘evade, contest or subvert patriarchal norms that disempower or disadvantage women’.<sup>16</sup> Urban Walker however challenges arguments in support of transformative reparations that advocate ‘structural changes that contribute to dismantling sex oppression and inequality’, suggesting that this more ambitious aspiration may not be practically and politically feasible, but may also risk demoting the recognition of the centrality of victims ‘as bearers of rights and subjects of justice’ and ‘their standing to claim accountability and repair for violations to their individual persons’.<sup>17</sup> Luke Moffett in his contribution to this special issue goes a step further, asserting that ‘using victims’ claims for reparations as a means of social engineering risks exploiting their suffering to improve the legitimacy of the Court and the State’. Importantly, Urban Walker asks whether reparations (in contrast perhaps to the objective of transitional justice) are the appropriate ‘mechanism through which to pursue [the] goal’ of transformation.<sup>18</sup>

This special issue brings together experts on international criminal law, reparations, transitional justice and gender justice to continue the exploration of the meaning, realisation and viability of transformative reparations for victims of sexual violence in post-conflict contexts. In particular, it considers various approaches to the design and implementation of reparations via criminal justice and analogous institutions – such as domestic courts, truth and reconciliation commissions and women’s hearings – in different contexts and evaluates their capacity to erode the recurrence of sexual violence against women post-conflict. The situations examined in this collection range from international and hybrid criminal justice tribunals, such as the

ICC, the Extraordinary African Chambers, the International Tribunal for the former Yugoslavia (ICTY) and the Special Court for Sierra Leone, to more informal ad hoc mechanisms such as women's hearings within a state-sponsored structure such as the South African Truth and Reconciliation Commission, or external initiatives, such as the Tokyo Tribunal or the Guatemalan Court of Conscience. Additionally, in settings where crimes of gender-based violence may be obscured and under-reported and where impunity is prevalent, such as in Northern Ireland and Sri Lanka, the transformative component of reparations may simply be confined to giving visibility to the pervasive and enduring harm of sexual violence and acknowledging its perpetration as conflict-related. Additionally, these forms of reparative measures may ultimately emerge via non-judicial initiatives to bolster women's economic, social and political rights, contributing, perhaps incrementally but collectively, to the broader goal of gender equality, and potentially to the reduction of violence against women.

The special issue opens with an introduction by Professor Rashida Manjoo who, during her tenure as UN special rapporteur on the causes and consequences of violence against women from 2009 to 2015 affirmed the significance of reparations for gender justice particularly where they addressed 'underlying gender inequalities that render women vulnerable to human rights violations'.<sup>19</sup> In her introduction, Manjoo traces a ten-year history of her own interest in the notion and evolution of 'transformative reparations' for acts of violence against women. She examines the important critical conceptual shift from reparative to transformative reparations in both process and substance for victims of sexual violence post-conflict but concludes that the aspiration underlying transformative reparations has not translated into their effective realisation and may require a specific UN treaty on violence against women to progress this objective.

The role of international criminal justice mechanisms in realising aspirations to transformative reparations as a means to undermine the recurrence of sexual violence post-conflict is a key focus of the contributions from Luke Moffett and Louise Chappell. Moffett asserts that 'at the crux of the debate on reparations at the ICC rests the challenge of delivering justice to victims of international crimes against the limited capacity and jurisdiction of the Court'. This limited capacity is reflected in Article 75 of the Rome Statute, which provides that the ICC may only make an order for reparations 'directly against a convicted person', unlike the mandate, for example, of the Inter-American Court of Human Rights which can direct states to implement reparation awards. To address this constraint, particularly in the case of accused with minimal or divested assets, Moffett revisits his notion of 'reparative complementarity',<sup>20</sup> which sees the ICC encouraging state parties to 'create a domestic reparations programme to complement any reparation awards by the Court'.<sup>21</sup>

Examining the case of Thomas Lubanga Dyilo, which was the first case before the ICC in which its reparations mandate was applied, Chappell argues that the 'decision of the ICC's Office of the Prosecutor not to fully investigate, or include charges for [sexual and gender-based violence] crimes ... set in train ... a "gender injustice cascade"' which 'extinguished' the prospect of accessing reparations by the many victims of sexual and gender-based crimes during the conflict in the Democratic Republic of the Congo. Acknowledging the limitations of the ICC's reparations mandate in securing gender justice, Chappell argues that while 'supporting a transformative approach to reparations may be a way to work around certain gender biases in [Court ordered] reparations', the lack of critical resources and political clout present very real barriers to the achievement of transformative objectives.

The limitations of the ICC reparations framework highlight the role and responsibility of the state and regional actors in addressing violence against women post-conflict. Christoph Sperfeldt's analysis of the role of the development of regional alliances to bolster state capacity to try former Chadian President Hissène Habré, demonstrates the significance of what he

terms forms of 'networked justice' in providing 'pathways to accountability for mass atrocity crimes'. The prosecution of sexual violence at the trial emerged as one example of 'networked justice' in action and Sperfeldt concludes that despite a narrow focus on financial compensation as reparation, the 'emancipation and empowerment of survivors and their associations' through the networked justice process had a clear transformative impact at the local level.

The emergence of non-judicial tribunals to address human rights violations has been a feature of many countries in the aftermath of political conflict. While the extent to which these transitional justice mechanisms, such as the South African<sup>22</sup> and Sierra Leone Truth and Reconciliation Commissions, have investigated women's experiences of sexual violence during conflict has been uneven, these processes and civil society responses to them, have generated reparative measures that seek to address the enduring harm of women victims of sexual violence. Andrea Durbach and Lucy Geddes argue that critical to the appropriate formulation of these measures and their transformative potential is that they are 'informed by women's experiences and needs in fora designed, and proceedings determined, by women'. By reference to a number of case studies in countries that have emerged from conflict, Durbach and Geddes consider the origins and impact of women's hearings on the design and implementation of reparations in post-conflict environments. They conclude that while the enforcement of reparative measures from these processes is often tenuous, the hearings may serve to spur state justice initiatives that begin to transform women's lives and trigger criminal prosecutions in contexts where impunity has persisted for acts of wartime sexual violence.

The criticism of the South African Truth and Reconciliation Commission for failing to 'adequately capture the story of thousands of women ... who experienced the brutality of the apartheid system' influenced the development of other transitional mechanisms and their approach to gender-based violence. This influence was evident in the drafting of the founding legislation of the Sierra Leone Truth and Reconciliation Commission (Sierra Leone TRC), which had a clear mandate to address crimes of sexual violence. Sarah Williams and Jasmine Opdam's exploration of the Sierra Leone TRC reveals that its significant recommendations in addressing sexual and gender-based violence crimes extended beyond restorative and rehabilitative measures, indicating a commitment to transformative reparations and mechanisms. However, competing demands of post-conflict reconstruction and development (and the added impact of the outbreak of the Ebola virus), coupled with the waning long-term commitment of the international community to implementing social and economic transformation, have diminished any real prospect of preventing the recurrence of sexual and gender-based violence in Sierra Leone.

The prospect of transforming the 'underlying gender inequalities that render women vulnerable to human rights violations' is more challenging in settings where crimes of sexual violence during political conflict are obscured and under-reported. Catherine O'Rourke and Aisling Swaine's article on gendered harm during Northern Ireland's transitional justice process is an account of a struggle to accord formal acknowledgement of sexual violence as a significant feature of the conflict. The deficient illumination of conflict-related sexual violence (CRSV) has meant an 'undercutting [of] an essential basis for effective reparations design and delivery in the future'. Instead, O'Rourke and Swaine point to the application of 'a criminal compensation model... with a welfarist approach' to address claims of sexual violence which has combined to 'obscure broader gender patterns of harm in the conflict'. Asserting the importance of context, the authors conclude that recognition and redress of CRSV via a formal reparations process 'could in itself be deeply transformative for the many women affected by the conflict'.

The emergence of measures of redress for sexual violence against women post-conflict in the absence of an internationally recognised and transparent transitional justice process is the focus of the article by Sara Davies and Jacqui True. Against the backdrop of the legacy

of harm following the Sri Lankan civil war (1983–2009), extensive under-reporting of crimes of sexual violence, widespread and ongoing impunity, and government reluctance to pursue a ‘heavily judicial transitional justice response’, Davies and True examine the relationship between enduring structural gender inequalities and conflict and post-conflict-related sexual and gender-based violence. They suggest that the possibility of transforming the position of women who remain at risk of post-conflict sexual violence exists in an ‘economic reparative approach’ which, in combination with measures of justice such as reduced impunity and increased gender security, fosters women’s economic empowerment and political participation.

A consistent claim permeating many of the articles in this special issue is that the voices of victims, informed by their historical, political and cultural contexts and the nature of the harm they have incurred, are central to the effective and appropriate design and implementation of a reparative process and outcome. In ‘Notes from the Field’, leading international crimes prosecutor Maxine Marcus confirms the centrality of the victim experience and the need to ‘bringing meaningful, reparative, restorative, empowering justice to survivors of mass atrocities and their communities’. Her work in Guatemala, Sierra Leone and Chad, among other conflict sites, investigating and prosecuting crimes of sexual violence reaffirmed her conviction that the ‘transformative impact’ of transitional justice processes ultimately ‘depends upon the proximity to and engagement with the affected communities’.

The collection concludes with a review by Niamh Hayes of *Prosecuting Conflict-Related Sexual Violence at the ICTY*, edited by Serge Brammertz and Michelle Jarvis (Oxford University Press, 2016). While acknowledging the ICTY’s extraordinary historical contribution to the prosecution of conflict-related sexual violence crimes, Hayes also underlines more recent manifestations of this legacy, and its impact: the first international criminal prosecutions involving sexual violence committed against men and boys; and the ‘fact that more individuals have now been tried domestically [in the domestic courts of Bosnia and Herzegovina] for conflict-related sexual violence than in the entire history of the ICTY’.

This collection clearly highlights in equal measure the prospects and problems associated with court-ordered transformative reparations as a mechanism to address crimes of sexual violence post-conflict. The overriding observation is that while the practical realisation of transformative reparations remains somewhat elusive, the aspirational underpinnings of these measures, namely, to ‘strive to transform’ rather than reinforce pre-existing norms that disempower and disadvantage women, has considerable value. A transformative lens is useful, at the very least, in influencing the appropriate formulation of reparations, be they restorative or rehabilitative. As the UN secretary general’s report on rule of law and transitional justice recommends, ‘reparations for survivors of sexual and gender-based violence must link redress for individuals with efforts to eliminate economic and social marginalization, including through increased access to health, education, property rights and positive redistributive measures’.<sup>23</sup>

The problems and criticisms however that attach to transformative reparations speak of the lack of resources and sometimes the lack of jurisdiction to support their implementation, create an over-whelming burden on courts or tribunals which significantly adds to their task of determining redress. These problems and the long timeframe often taken by tribunals to decide reparative measures also serve to raise the expectations of victims, and demote victim rights and ‘their standing to claim accountability and repair for violations to their individual persons’.<sup>24</sup>

Through our exploration of the normative claims about the transformative potential of reparations awarded by criminal and transitional justice mechanisms in different geographical, political and cultural contexts, we hope to have brought greater clarity about the concept and its potential value to victims of sexual violence post-conflict. This critical analysis and

engagement with gender justice scholars and practitioners suggest that reparations can offer beneficial transformative outcomes if there is a confluence of the following fundamental elements: formal acknowledgment of the crime of sexual and gender-based violence in conflict and post-conflict settings; a commitment by relevant courts, tribunals and commissions to integrate a gender perspective and analysis across all aspects of their work, from investigation to prosecution and reparation, in particular in relation to conflict-related sexual and gender-based crimes; the commitment to the elimination of a culture of impunity for these crimes; the provision of a justice mechanism that is appropriately designed and staffed to determine culpability and the nature and extent of the harm requiring redress; ensuring and fostering victim participation in transitional justice processes; developing and implementing a framework to address the immediate needs of victims, as well as the broader systemic economic, political, and cultural factors that underlie inequality and are linked to the perpetration of violence against women; increased awareness of the enduring impact of conflict-related sexual violence and gender-based crimes by national governments and their commitment to facilitate political participation and economic empowerment of women.

Combining different configurations of these elements to give effect to an appropriate reparations regime aimed at preventing the recurrence of sexual violence against women post-conflict can strengthen gender-just responses to violence against women and have a positive, if incremental, impact.

## Notes

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2. *Prosecutor v. Lubanga, Observations of the Women's Initiatives for Gender Justice on Reparations*, ICC Doc. No. ICC-01/04-01/06, 10 May 2012 (The Hague: International Criminal Court).
3. *Prosecutor v. Lubanga, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, Trust Fund for Victims*, ICC Doc. No. ICC-01/04-01/06-2872, 25 April 2012 (The Hague: International Criminal Court); see also: *Prosecutor v. Lubanga, Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo: Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims First Report on Reparations*, ICC Doc. No. ICC-01/04-01/06-2803-Red, 1 September 2011 (The Hague: International Criminal Court).
4. United Nations, *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, June 2014. <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> (accessed 27 July 2017).
5. *Ibid.*, 5.
6. *Ibid.*
7. *Ibid.*, 9.
8. *Ibid.*
9. International Criminal Court Office of the Prosecutor, *Policy Paper of Sexual and Gender-based Crimes* (The Hague: ICC OTP, 2014), para. 11.
10. *Ibid.*, para. 11.

11. *Ibid.*, para. 102.
12. The forthcoming reparations decision in the *Bemba* case, in which the accused has been found guilty on a range of sexual and gender-based violence crimes, may provide an opportunity to shift this trajectory towards a more transformative approach to reparations for victims of these crimes.
13. Margaret Urban Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations', *International Journal of Transitional Justice* 10, no. 1 (2016): 108–125, 109.
14. See, for example: Fionnuala Ní Aoláin, Dina Francesca Haynes and Naomi Cahn, *On the Frontlines: Gender, War and Post-Conflict Process* (Oxford: Oxford University Press, 2011); Fionnuala Ní Aoláin, Catherine O'Rourke, and Aisling Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice', Legal Studies Research Paper Series Research Paper No. 15-02, University of Minnesota Law School (2015), 23; Ruth Rubio-Marín and Pablo de Greiff, 'Women and Reparations', *International Journal of Transitional Justice* 1 (2007): 318–37; Colleen Duggan and Ruth Jacobson, 'Reparations of Sexual and Reproductive Violence: Moving from Codification to Implementation', in *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, ed. Ruth Rubin-Marín (Cambridge: Cambridge University Press, 2009), 121–61; and 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.
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21. Moffett, this special issue.
22. Andrea Durbach, 'Towards Reparative Transformation: Revisiting the Impact of Violence against Women in a Post-TRC South Africa', *International Journal of Transitional Justice* 10 (2016): 366–87.
23. United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies Report of the Secretary-General*, UN Doc. S/2011/634 (12 Oct 2011), para. 27. <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ROL%20S2011%20634.pdf> (accessed 27 July 2017).
24. Urban Walker, 'Transformative Reparations?', 110.

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