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**REPARATION THROUGH TRANSFORMATION?
AN EXAMINATION OF THE ICC REPARATION SYSTEM IN CASES
OF SEXUAL AND GENDER-BASED CRIMES**

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The Bernard and Audre
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ABSTRACT

With the introduction of Article 75 to the Rome Statute, the ICC has set the goal to establish a reparation system for victims of mass atrocities. While processes of reparation for victims are only beginning to take shape at the Court, problems become particularly complex in the context of sexual and gender-based crimes. How can one adequately respond to damages that go beyond what can be repaired by mere financial compensation? And how can individual needs be addressed in mass atrocities? The limited legal mandate, legitimacy and funding of the ICC trigger doubts on the viability of its promises.

The intersection of these two problems, a coherent reparation practice and acknowledgement of sexual violence in international crimes stand at the center of this study. It argues that the reparation system of the ICC as it stands is overburdened with the idea of full-fledged reparation. Ultimately, it argues that the idea of reparative complementarity could offer a valuable alternative.

KEYWORDS

International Criminal Court; Reparations; Sexual Violence; Article 75; Reparative Complementarity

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Contents

I. Introduction.....	1
II. Sexual Violence and International Criminal Law.....	3
1. Consequences of Sexual Violence in Armed Conflict.....	3
2. Evolution in International Criminal Justice	4
3. Bemba – the ICC’s First Conviction for Rape	5
III. Sexual Violence and the Need for Transformative Changes.....	6
1. Nancy Fraser’s Trivalent Model of Reparative Justice.....	7
2. Transformative Approaches in International Law.....	8
IV. Reparations in International Criminal Law	9
1. The Foundational Principles of Reparations	9
2. Reparations in International Criminal Justice before the ICC	10
3. Framework for Reparations at the ICC	11
a. Article 75 of the Rome Statute – A Legal Basis yet to be Defined... ..	11
b. The TFV’s Double Mandate.....	12
4. The Court’s Reparation Decisions.....	13
a. Lubanga – An Example of Symbolic Redress.....	13
b. Katanga – The Combination of Individual and Collective Redress.....	14
V. Major Challenges for the ICC’s Reparation System.....	15
1. Problems of a Perpetrator-Centered Model	16
a. Sexual Violence – A Charge Likely to be Left Out	16
b. No Redress in Cases of Acquittals	17
c. Symbolic Conviction v. Full Restitution – An Asymmetric Approach	18
2. Can the Assistance Mandate of the TFV Fill Out the Gaps?.....	19
3. Sufficient Funding?.....	20
4. Can Reparations Be Transformative at the ICC?.....	21
a. The Legal Mandate to Transform Societies	22
b. Need of Individual Redress and Danger of Secondary Victimization.....	23
c. Neo-Colonial Ambitions?.....	24
VI. The Search for Pragmatic Solutions	24
1. Abandoning the ICC Reparation System altogether?.....	25
2. Transforming the TFV into a Reparations Chamber?	26
3. Reparative Complementarity	27
a. Legal Consistency	27
b. Legitimacy – The Example of Rwanda.....	28
c. Open Questions	29
VII. Concluding Remarks	30

I. Introduction

The establishment of the International Criminal Court (ICC) made a revolutionary promise: perpetrators of war crimes, instigators of genocide or crimes against humanity shall no longer be free from fear of prosecution and the victims of such crimes shall be given hope for justice and redress. Yet, from its inception, this very ambition of the ICC led to doubts about the viability of the ICC's promises and for debate about the appropriate scope of its jurisdiction. The intersection of two such problems stands at the center of this study. Both the incorporation of weaponized sexual violence in armed conflicts into international criminal law as well as the establishment of a mechanism of reparation for victims of international crimes have been marked by contradictions. Processes of reparation for victims of sexual violence are only beginning to take shape.

With Article 75 of the Rome Statute, the ICC has set itself the goal and given to victims the promise to install a system of reparations. The wording of Article 75 and the respective articles in the Rules of Procedure and Evidence (RPE) however remain quite vague: It is not clear what sort of reparations – individual or collective, concrete or symbolic – the Court is to grant to victims. It is the Court itself with the help of the Trust Fund for Victims (TFV) that needs to determine the policy of reparations on a case-by-case basis. Since the signature of the Rome Statute, years have passed and it becomes more and more apparent that creating a system of reparations for victims in mass atrocities in fact is a huge challenge. Yet, the Court has remarked in *Lubanga*:

“The reparation scheme provided for in the Statute is not only one of the Statute’s unique features. It is a key feature. The success of the Court is, to some extent, linked to the success of its system of reparations.”¹

Two decades after the signature of the Rome Statute and five years after the first reparation decision in *Lubanga*, reparations have not yet reached the hands of victims in conflict regions. On 21 October 2016, the ICC accepted the concrete reparation plan for former child soldiers as proposed by the TFV in the case of *Lubanga*.² This plan foresees mostly so called collective transformative reparations for victims and has been criticized for restricted eligibility of victims.³

In the tradition of international criminal justice, the inclusion of sexual violence has been a difficult process.⁴ While the Statute recognizes sex- and gender-based crimes as international crimes, it took the Court fourteen years to come to a first conviction under this norm. Only last year, with the

1 Order for Reparations, *Lubanga*, 3 March 2015, ICC-01/04-01/06-3129.

2 Filing on Reparations and Draft Implementation Plan, *Lubanga*, 21 October 2016, ICC-01/04-01/06-3223-Red 20-09-2016.

3 One for many, Louise Chappell, *Conflicting Institutions and the Search for Gender Justice at the International Criminal Court*, *Political Research Quarterly*, 1 (2014), p. 183-196.

4 See Valérie Suhr, *Feminism and the International Criminal Court – Still an Issue?*, *Völkerrechtsblog* (April 19 2017), <https://voelkerrechtsblog.org/feminism-and-the-international-criminal-court-still-an-issue/> (last visited 6 May 2017).

conviction of Jean-Pierre Bemba, a commander under whose control murder, rape and pillaging had largely been committed in the Central African Republic (CAR) between 2002 and 2003, the Court recognized rape for the first time as a war crime as well as a crime against humanity, committed under command responsibility.⁵ The conviction was welcomed as a great success. The case of Bemba however is not yet closed: A decision – and a concrete plan – have to follow up regarding reparations for victims.

While the Court thus made progress on the separate problems of reparations and sexual violence, there has been no award of reparations for victims of sexual violence to date. In the case of *Bemba*, the ICC ordered organizations to submit concrete proposals for the introduction of a reparations system,⁶ resulting in several submissions.⁷ In the context of a growing academic feminist debate on this matter, the notion of transformative reparations is attracting attention, because scholars see a need for reparations to “subvert instead of reinforce”⁸ existing gendered inequalities. However, some doubt whether the Court could or should have the mandate to transform societies of its State Parties. The ICC reparation system already brings about specific challenges related to awareness and societal needs. Sexual violence raises an additional level of complication.

The following study will examine the ICC reparation system in general and issues in the context of sexual crimes in particular. The second chapter examines the acknowledgement of sexual violence in International Criminal Law leading up to the conviction of Bemba (II). This study then focuses, third, on the proposal of transformative redress in the context of sexual violence (III). In a fourth chapter, it examines the role of reparations in international law in general and the current practice at the ICC in particular (IV). Fifth, it presents major challenges the Court encounters, both for reparations in general and in the context of sexual crimes in particular (V). As a response to these challenges, a sixth chapter examines proposals that have been made to reform the ICC reparation system (VI). The conclusion summarizes the discussion and provides an assessment on the likelihood of reforms (VII).

II. Sexual Violence and International Criminal Law

⁵ Jean-Pierre Bemba v. Prosecutor, Trial Chamber III Judgement 21 March 2016, ICC-01/05-01/08.

⁶ Court Order requesting submissions with regards to reparations, 22 July 2016, ICC-01/05-01/08-3410, § 7.

⁷ Submission by QUB Human Rights Centre on reparations issues pursuant to Article 75 of the Statute, 17 October 2016, ICC-01/05-01/08-3444. Submissions by REDRESS pursuant to Article 75 of the Statute, 17 October 2016, ICC-01/05-01/08; Submissions by IOM pursuant to Article 75 of the Statute, 17 October 2016, ICC-01/05-01/08.

⁸ Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, CUP 2009, 63-120 (66).

This chapter will argue that an understanding of the pervasiveness of sexual violence, particularly during international conflicts, is of utmost importance for international criminal justice. As such, it probes the reasons for the slow acknowledgment of such violence in ICTY and ICTR jurisprudence and posits that the ICC's ruling in Bemba is a progressive step forward in this field.

1. Consequences of Sexual Violence in Armed Conflict

The significance of international crimes reveals itself with regards to the widespread and long lasting consequences.⁹ Sexual violence can have physical, psychological and community-related consequences. For instance, sexual violence is spreading HIV drastically – as of 2016, approximately 13 % of all adults in CAR are HIV-positive, compared to 10,7 % in 1998.¹⁰

Women and men who are victims of sexual violence suffer different physical and psychological consequences. For women, pregnancy often is the consequence of rape. Raped mothers endure with social stigma and have to flee from their community. Children born as a consequence of rape also face stigma that may and continue over generations.¹¹ For men, a destabilized gender identity, sexual dysfunction and infertility are often cited consequences of sexual violence.

Some victims state that through sexual violence, their lives have been destroyed.¹² As Naomi Cahn puts it: “they are often scorned and treated by their communities as outcasts, while the soldiers who committed the crimes are welcomed home.”¹³ This means that violence continues for victims, even after the armed conflict is practically already over.¹⁴ Victims continue to live with traumas without recourse or recompense.

2. Evolution in International Criminal Justice

9 For a description see Submissions QUB (Fn. 7), p. 25; Anne Marie De Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families*, *Leiden Journal of International Law*, 20 (2007), p. 207-237.

10 *Statistic Country Review CAR*, p. 6, found in Submissions by QUB Human Rights Centre (Fn. 7), p. 26.

11 UN Guidance Note, p. 6.; see also quotation put forward by Janine Natalya Clark, *The first rape conviction at the ICC. An analysis of the Bemba judgement*, *Journal of International Criminal Justice* 14 (2016), 667-687 (684).

12 See Interview: “well, I don’t know what can help me because I have suffered so much and I have suffered from so serious events that I think there is nothing in life that can repair what I have suffered from and what I have lost’”.
<https://www.ijmonitor.org/2012/09/qa-with-paolina-massidda-principal-counsel-of-the-office-of-the-public-counsel-for-victims-at-icc-3/> (last visited 6 May 2017).

13 Naomi Cahn, *Beyond Retribution and Impunity: Responding to War Crimes of Sexual Violence*, *George Washington Law Publications and other Works*, Paper 332, 2004, 217 (220); found in Katherine Franke, *Gendered Subjects of Transitional Justice*, *Columbia Journal of Gender and Law*, 2006 (15), 813 (819).

14 Fionnuala A. Aolain, Catherine O’Rourke and Aisling Swaine, *Transforming Reparations for Conflict-Related Sexual Violence*, *Harvard Human Rights Journal* 28 (2015), p. 97-148 point at the distinction between conflict and post conflict violence and critically observe that the term of “post conflict violence” wrongly suggests that the performance of violence is over.

Despite its significant consequences, drafters of the Resolutions for the ad hoc tribunals, did not see sexual violence as a possible trigger of war crimes, genocide or crimes against humanity.¹⁵

The International Criminal Tribunal of Rwanda (ICTR) broke the ice with its conviction of *Akayesu* in which it held that sexual violence constituted a form of genocide under its statute when intended to destroy a particular group.¹⁶ Yet due to inadequate cross-examination and counseling for victims, insufficient confidentiality protection and lack of sanctions for improper judges, the judgement could not yet be celebrated as a major success of gender-justice.¹⁷ The International Criminal Tribunal for the Former Yugoslavia (ICTY) followed up with its judgements in *Kunarac*¹⁸ and *Tadic*.¹⁹ These decisions were subject to similar criticism as the *Akayesu* judgment of the ICTR. Victim witnesses felt disrespected and humiliated in proceedings, often cut off within their testimony after the immediate question of culpability of the accused.²⁰

Katherine Franke describes the acknowledgement of sexual violence in these judgments as more symbolic than revolutionary.²¹ The Tribunal found Rape to be a crime that violated a person's dignity and honor and thereby not found to amount to the same cruelty and violence as war crimes that occurred to men in armed conflict.²² Nevertheless, it should be acknowledged that these decisions are huge and symbolic steps with regards to recognition of sexual violence in criminal law. It is an open question whether this recognition can take over in domestic jurisdiction in the respective countries.²³

Following these first indictments and convictions, awareness was rising with regards to gender related crimes: this led to evidentiary and procedural rules including the appointment of a legal adviser for gender related crimes.²⁴ All of this ultimately led to the explicit inclusion of rape, sexual slavery, enforced prostitution, forced pregnancy, gender-based persecution, sexual enslavement, enforced sterilization, and sexual violence as war crimes and crimes against humanity in the Rome Statute. Back in 1998, many envisioned the Statute as almost "feminist" due to its clear emphasis on gender.²⁵

15 Franke (Fn.13), 817.

16 Prosecutor v. Akayesu, Judgement September 2nd 1998, Case No. ICTR-96-4-T, § 688.

17 See Human Rights Watch, *Struggling to Survive: Barrier to Justice for Rape Victims in Rwanda* § 4 (2004), <http://www.hrw.org/reports/2004/rwanda0904>, found in Franke (Fn. 13), p. 818.

18 Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-21/1, Judgement February 22 2001 (recognizing that rape could be used as an "instrument of terror")

19 Prosecutor v. Dusko Tadic. Case No. IT-94-1-L. Second amended indictment, Judgement May 7 1997.

20 Marie-Benedicte Dembour/ Emily Haslam, *Silencing Hearings: Victim-Witnesses at War Crimes Trials*, *European Journal of International Law*, 2004 (15), 151-162 (158), found in Franke (Fn. 13), p. 818.

21 Franke (Fn. 13), p. 820.

22 With reference to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, Aug. 12, 1949 declaring that "[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"), Franke (Fn. 13), p. 816.

23 At least with regards to Rwanda gender policies have significantly changed after the genocide. This will be discussed in depth at a later stage.

24 See for instance ICTY Rules of Procedure and Evidence, rule 96, U.N. Doc. IT/32 (1994).

25 Suhr (Fn. 4).

In the first conviction of *Lubanga*, however, none of this came into play, even though, as argued by Justice Elisabeth Odio Benito, sexual violence was an “intrinsic element of the criminal conduct.”²⁶ The harsh effect of this is that it creates double injustice: Not only have victims not obtained any acknowledgement of their harm through conviction, they could not claim reparations either. However, much has happened since that first conviction. The new chief prosecutor Fatou Bensouda made the importance of prosecuting sexual and gender based crimes very clear in her policy paper from 2014.²⁷ This shift in priorities was soon followed by a first conviction.

3. *Bemba – the ICC’s First Conviction for Rape*

With the ICC Judgement in *Bemba v. Prosecutor* in March 2016, for the first time, the ICC held rape to be both a war crime and a crime against humanity.²⁸ Jean-Pierre Bemba was the leader of the Movement for the Liberation of the Congo (MLC) troops that committed widespread murder, pillaging and rape in the Central African Republic between 2002 and 2003.

In its judgment, the Court tries to clearly define rape, after ad hoc tribunals have failed in establishing a consistent definition.²⁹ Different from the ICTY approach in *Kunarac*, the ICC does not rely on absence of consent, but sticks to the Rome Statute’s Elements of Crime in Article 8-2 lit. b. It points out that examining the victim’s consent would really underestimate the need to bring perpetrators to justice.³⁰ Instead, it relies on the coercive environment as set out in the Elements of Crime.³¹ It deserves particular attention that the Court thereby points out particular motives behind rape so as to “destabilize, humiliate, and punish suspected rebels and rebel sympathizers”³² and at socio-economic causalities leading up to commitment of crimes such as the despair and hunger of MLC soldiers.

Bemba was convicted on the basis of command responsibility, article 28 of the Rome Statute. Accountability for rape is always particularly hard to establish on the basis of superior responsibility – in other words: the commission of omission.³³ Janine Clark points out that the

26 Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo: Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, see Louise Chappell/ Andrea Durbach, Leaving behind the Age of Impunity, *International Feminist Journal of Politics* 4 (2016), 543 (549).

27 The Office of the Prosecutor, Policy Paper on Gender Based Crimes, June 2014, <https://www.icc-cpi.int/iccdocs/otp/otp-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf> (last visited 6 May 2017).

28 Jean-Pierre Bemba v. Prosecutor (Fn. 5).

29 In *Kunarac*, the ICTY put emphasis on sexual autonomy and the question of whether the victim was in a position to give consent, in *Akayesu*, the ICTR relied on coercive circumstances, see Clark (Fn.11), 673.

30 Bemba, (Fn. 5) § 105.

31 Clark (Fn.11), p. 670.

32 Bemba, (Fn. 5), § 565.

33 Clark (Fn. 11), p. 672. with reference at Elisabeth Jean Wood, *Armed Groups and Sexual Violence: When is Wartime Rape Rare?* *Politics and Society*, 36 (2009) 131 (162).

causality-based analysis of the Court strengthens the argument for command responsibility: If only the Commander had provided his soldiers with an adequate amount of food, soldiers might not have been as aggressive.³⁴

Another striking point in the ICC's analysis is that it recognizes that both men and women as victims of rape. Instead of interpreting rape as an act of sexual aggression against female honor, it describes it as a tool of suppression and warfare. Male victims of rape are humiliated and feminized and experience thus a form of violence that particularly belongs into the context of conflict and suppression.³⁵ This analysis is powerful in that it plausibly recognizes rape as war crime and crime against humanity.

Consequences of rape are addressed in the Bemba judgement at great length.³⁶ With regards to reparations in that case, several aspects become relevant: The number of the victims, their localities, their humanitarian context and, most importantly, the concrete form of reparations they claim. The Court will need to find an adequate response to all of these aspects.

III. Sexual Violence and the Need for Transformative Changes

Widespread sexual violence in armed conflicts does not take place in isolation. There is an inherent and symbiotic relation between everyday violence women experience and the specific violence in conflict settings. Both are rooted in structural social, political and economic inequalities. Based on this observation, it is obvious why any redress for the victims of sexual violence is difficult to achieve: Restitution in the classical sense of *restitutio ad integrum* does not suffice. In the case of women (or other disadvantaged groups), this would merely reinstall a status of injustice and violence. It is thus claimed that reparations should address the *status quo ante*. They need to be transformative.³⁷

This chapter engages Nancy Fraser's trivalent model of social justice that has been used as a theoretical foundation in the debate on gender-just transformative reparations. While the ICC itself has not employed gender-based transformative reparations so far, there is some precedent in international law.

³⁴ Clark (Fn. 11), p. 687.

³⁵ On the issue of sexual violence against men in the context of armed conflict, see Laura Adamietz/Nora Markard, Herausforderungen an eine zeitgenössische feministische Menschenrechtspolitik am Beispiel sexualisierter Kriegsgewalt, *Kritische Justiz* 3 (2008), 257-262.

³⁶ Bemba (Fn. 5), § 488.

³⁷ One for many: Wendy Lambourne/Vivianna Rodriguez Carreron, Engendering Transitional Justice: a Transformative Approach to Building Peace and Attaining Human Rights for Women, *Human Rights Review* 17 (2016), 71-93.

1. Nancy Fraser's Trivalent Model of Reparative Justice

Of course, the question of what actually constitutes a just society and how more justice can be achieved has occupied political philosophy and legal theory for generations. It is in this more general context and against the background of the history of the feminist movement, that Nancy Fraser has developed her trivalent concept of social justice.³⁸ She identifies socio-cultural and economic inequalities as a key factor of gender hierarchies and on that basis, puts forth dimensions of transformative change. Accordingly, social justice needs to encompass economic redistribution and socio-cultural recognition of marginalized groups. Political representation complements this as a third demand.

All three elements are relevant to achieve justice in the aftermath of sexual violence in armed conflicts. According to Fraser, particularly recognition and redistribution fulfill very different goals within court practice. A successful conviction with an adequate reasoning already gives victims some acknowledgement for the harm suffered, but does not go further than that. Recognition beyond the court-room, redistribution to enable equal social participation, and substantial political representation are harder to achieve as these goals depend on wider social changes.

Several scholars have adopted Fraser's model with regards to gender just reparations in international criminal law, albeit with different analytical findings.³⁹ Katherine Franke borrows Nancy Fraser's trivalent model in order to "illuminate the complexities" of sexual violence.⁴⁰ Sara Williams and Emma Palmer use Fraser's model as a blueprint to examine the success of the symbolic transformative reparation practice at the Extraordinary Chamber in the Courts of Cambodia (ECCC).⁴¹ Andrea Durbach and Louise Chappell similarly applaud Fraser's idea of a trivalent model, but take a critical stand towards the ICC's current system as a reasonable basis to bring about such change. They claim that the ICC is not the right institution for societal transformation and plead for a reform into the direction of state responsibility for reparation.⁴²

2. Transformative Approaches in International Law

38 Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Postsocialist" Age*, in *Justice Interruptus: Critical Reflections on the "Postsocialist Condition"*, Routledge 1996.

39 E.g. Chappell/Durbach (Fn.26), Franke (Fn. 13).

40 Franke (Fn. 13), 814.

41 Sara Williams/Emma Palmer, *Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia*, *International Journal of Transitional Justice*, 10 (2016), 311–331.

42 Chappell/Durbach (Fn.26).

On the international level, several attempts have been made to address these challenges. As pointed out within the Nairobi Declaration from 2007 Reparations “must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls.”⁴³ The UN Guide Note of the Secretary General on Reparations for Conflict Related Sexual Violence acknowledges in a similar manner that “reparations need to be transformative.”⁴⁴ This Guide note has brought about a first massive public attention to this topic. In recently published guidelines for court-ordered reparations, the International Center for Transitional Justice (ICTJ) goes into a similar direction and gives advice on how to adequately address gender-based crimes.⁴⁵

The Inter-American Court of Human Rights (IACtHR) is often referred to as model *par excellence* when it comes to transformative reparations.⁴⁶ The Court established this practice in its “Cotton Fields Judgement” in which the Court held Mexico accountable to change its laws and jurisdiction to ultimately subvert gender inequalities in the Mexican society.⁴⁷ The findings have been upheld and repeated within the subsequent decisions.⁴⁸

Also in academic writing, inspired by the jurisprudence of the IACtHR, transformative reparation has become a recent trend.⁴⁹ Ruth Rubio Marin and Clara Sandoval for instance contrast the backward looking aspect of restorative justice with the forward looking aim of transformative justice and pleads for spreading this model.⁵⁰ Margaret Urban Walker claims that the “prime areas” for a transformative reform are legalized access to safe abortion, reform of property and inheritance laws and criminalization of gender-based violence against women and children.⁵¹ However, she takes an overall critical outlook at its feasibility in international law. Apart from that, she points at practical difficulties in post conflict regions when implementing reparations programs: Women might not be able to control their bank accounts or make a legal claim for reparations.⁵² Her concerns are vital when thinking about whether the ICC should pursue transformative reparations.

43 Nairobi Declarations on Women’s and Girls’ Rights to Remedy and Reparation 2007, § 3.

44 UN Office of the High Commissioner for Human Rights (OHCHR) and UN Women. Un. Doc. 2014, UN Guidance Note of the Secretary- General: Reparations for Conflict-Related Sexual Violence, <http://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> (last visited: 6 May 2017).

45 Christian Correa, Getting to Full Restitution Guidelines for Court-Ordered Reparations in Cases Involving Sexual Violence Committed during Armed Conflict, Political Violence, or State Repression, ICTJ Doc., April 2017: <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Court-Reparations-2017.pdf> (last visited 6 May 2017).

46 Ruth Rubio Marin/Clara Sandoval, Engendering the Jurisprudence of the Inter-American Court of Human Rights: The Cotton Field Judgement, Human Rights Quarterly 4 (2011), p. 1062.

47 Gonzalez et al. (“Cotton Field”) v. Mexico, Inter-Am. Ct. H.R., No. 205, 16 November 2009.

48 See for example the recent Judgement “I.V. v. Bolivia”, Inter-Am. Ct. H.R., No.12655, 30 November 2016 on forced sterilization.

49 See Rubio Marin/Sandoval (Fn.46), Aoalin/O’Rourke/Swaine (Fn.14) in the context of the IACtHR, Palmer/Williams (Fn.41) in the context of the ECCC.

50 Rubio Marin/Sandoval (Fn.46).

51 Margaret Urban Walker, Transformative Reparations? A Critical Look at the Current Trend in Thinking about Gender-Just Reparations, International Journal of Transitional Justice, 10 (2016) p. 108(111)

52 Ibid.

IV. Reparations in International Criminal Law

The question of how to redress sexual violence at the ICC is a specific aspect within the larger context of the Court's reparation practice. Considering the foundational principles of reparations in international and domestic criminal law and the practice in international criminal justice before the ICC, it was not obvious for the Court to establish a reparation system at all. The system leaves open significant lacunae. They have been concretized so far in the first ICC decisions in *Lubanga* and *Katanga*.

1. The Foundational Principles of Reparations

In international law, claims for reparations classically stem from interstate relations. Already in 1927, the ICJ held in its "Factory at Chorzów" case that "it is a principle of international law that any breach of engagement involves an obligation to make reparation in an adequate form."⁵³ Individual claims for reparations can be found in norms of International Humanitarian Law⁵⁴ and in Human Rights Conventions.⁵⁵ The International Law Commission (ILC) in its 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts defines state responsibility in terms of reparations in form of restitution, compensation or satisfaction.⁵⁶ These three components are said not to be exclusive, leaving reparation practice open to further evolution.⁵⁷ In 2005, the UN General Assembly additionally adopted "Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" that intend to promote "justice by redress."⁵⁸ Reviewing this variety of norms, Christine Evans comes to the conclusion that state responsibility for reparation even constitutes a principle of customary law.⁵⁹

Reparations and criminal law, on the other hand, do not classically belong together. On a domestic level, the claim for *restitutio ad integrum*⁶⁰ stems from civil law relations between individuals. The common ground of tort and crime, in many cases, is the damage of an individual. Some domestic

⁵³ Factory at Chorzów (Germany v. Poland), 1927, PCIJ, Ser. A, No. 9, p. 21.

⁵⁴ e.g. Article 3 of the 1907 IV Hague Convention.

⁵⁵ e.g. Article 34 ECHR.

⁵⁶ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 34, Un Doc. 2001 A/ 56/10.

⁵⁷ With reference to rehabilitation and non-repetition, Luke Moffett, Reparative complementarity: ensuring an effective remedy for victims in the reparation regime of the International Criminal Court, *The International Journal of Human Rights*, 17 (2013), 368 (370).

⁵⁸ General Assembly, Principle 15, A/RES/60/147.

⁵⁹ Christine Evans, *Reparations for Victims in International Criminal Law*. 2010, p. 9.

⁶⁰ The situation the victim would be in had the damage not occurred

criminal law systems have – for reasons of efficiency – used this common ground to combine civil and criminal law proceedings. The French system of a *Partie Civile*⁶¹ gives an examples of this practice: Victims can make use of the relevant evidence from the criminal trial and file a civil lawsuit against the perpetrator. The German tradition of *Adhäsionsverfahren*⁶² works within the same logic.

The systems reflect a conjunction of civil law and criminal principles for reasons of efficiency, both for domestic courts and for victims. The German *Adhäsionsverfahren*, however, has often been criticized for being impracticable: Because convicts are often indigent, claims cannot be enforced so that, in the end, it is the state that bears the expenses.⁶³ Another common criticism is that such procedures have an impact on the rights of the accused to a fair and expeditious trial.⁶⁴ Common law systems pertain a separation between private and criminal law trials: Within criminal law, victims serve as witnesses and do not possess additional rights concerning reparation claims.⁶⁵

2. Reparations in International Criminal Justice before the ICC

International criminal law aims primarily at the prosecution of individuals and differs from classical international law in that regard. Reparations have therefore not been a priority matter in the evolution of ICL.⁶⁶ In case of the ICTY and ICTR, despite the large scope of human rights inspired procedural ruling with regards to the accused, human rights law concerning victims has barely been put into practice.⁶⁷ In the case of the ICTY, its founding Resolution no. 827 of 1993 states that the Tribunal establishes “compensation for damages incurred as a result of violations of international humanitarian law.”⁶⁸ The meaning of the term “compensation” was left open.⁶⁹ The ICTR for its part, has shown some progressive steps when it comes to medical assistance in conflict areas.⁷⁰ Both tribunals provide restitution of property to victims as remedial mechanism.⁷¹ However, none of

61 A general overview over rights and duties of the Civil Party found on the website of French public services, <https://www.service-public.fr/particuliers/vosdroits/F1454> (last visited 5 May 2017).

62 § 430 of the German Criminal Law Process Code.

63 Kerstin Spiess, *Das Adhäsionsverfahren in der Rechtswirklichkeit*, Lit Verlag Dr. W. Hopf Berlin (2008) (Translation: “Legal Reality of the Adhäsionsverfahren”)

64 Liesbeth Zegveld, *Victims Reparations Claims and International Courts – Incompatible Values?*, *Journal of International Criminal Justice* 8 (2010), 79 (111).

65 European Union Agency for Fundamental Rights, *Member State Approaches to Victims: Conceptualization of Victims and their Role in Criminal Proceedings*, <http://fra.europa.eu/en/publications-and-resources/data-and-maps/comparative-data/victims-support-services/approaches> (last visited 5 May 2017).

66 In the early stadium of the Nuremberg and Tokyo Tribunals, the question of reparations has not even been raised, see Evans (Fn. 59), p. 2.

67 *Ibid.*, p. 3.

68 SC Resolution, S/Res/827 (1993), p.4.

69 Evans (Fn. 59), p.6.

70 De Brouwer (Fn. 9), p. 211.

71 Evans (Fn. 59), p. 4 with reference to Rule 24(3) of ICTY RPE and 23 (3) of ICTR RPE.

them contains a mechanism for individual redress in physical or psychological matters.

The Tribunals were established for the sole purpose of prosecution.⁷² As critically pointed out by Former President of the ICTY Claude Jorda, the inclusion of reparations into international criminal justice actually contradicts its goal of granting a fair and expeditious trial to the accused.⁷³ For this reason, both drafters of the ICTR and the ICTY even addressed letters to the UN Secretary General to express their concerns about reparation procedures and in order to prevent such procedures from being established.⁷⁴

Unlike the ICTY and the ICTR, the ECCC has a reparation system under its statute. Replicating the Cambodian Civil Law System, the ECCC's statute foresees judicial awards of collective and moral reparations to civil parties. They shall be ordered against and borne by the convict.⁷⁵ This prevents individual redress and was considered to be necessary with regards to the high number of Khmer Rouge victims.⁷⁶ In this case, reparations fulfill a more symbolic than compensatory goal. The reparation process thereby has two limbs: Judicial reparations, ordered by the ECCC, and non-judicial reparations, ordered and developed by a Victims Support Section. There is no Trust Fund to provide sufficient funding. This leads to creative solutions for affordable reparations. One example is the simple apology as a form of redress to victims.⁷⁷ In relying on collective and symbolic mechanisms, the ECCC is also an important institution for transformative reparations – particularly with regards to victims of sexual violence.⁷⁸ Often, the practice of the ECCC is thought to serve as a role model for the ICC in facing challenges of mass claims, scarce funding and creativity in decision finding.

3. Framework for Reparations at the ICC

a. Article 75 of the Rome Statute – A Legal Basis yet to be Defined

The ICC should establish what the ICTY and the ICTR have not provided: an effective remedy system. Within the *travaux préparatoires*, the first ICL draft from 1994 did not stipulate a reparation system, but only mentioned the possibility of the establishment of a Trust Fund.⁷⁹ Under

⁷² Virginia Morris/ Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, 1995, 285

⁷³ Claude Jorda and Jérôme de Hemptinne, *The Status and Role of the Victim*, in Antonio Cassese et al (eds), *The Rome Statute of The International Criminal Court* (Oxford University Press, 2002) pp. 1387–1419.

⁷⁴ Evans (Fn. 59), p. 5.

⁷⁵ Rule 23(11), ECCC Internal Rules.

⁷⁶ See, Rule 23 quinquies (1), Internal Rules. In contrast to Article 75 of the Rome Statute.

⁷⁷ *Prosecutor v. Nuon Chea and Khieu Samphan*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01, 7 August 2014, § 1124; one could however very well question the honesty behind this apology.

⁷⁸ Williams/Palmer (Fn. 41).

⁷⁹ Evans (Fn. 59), p. 8.

the pressure of NGOs that formed a coalition to defend victims' rights for the "failure" of the ICTY and ICTR not to be repeated, article 75 was established.⁸⁰

Article 75 still reflects in its loose wording the lack of consensus and support among states.⁸¹ In its first paragraph, it states that the Court shall establish principles relating to reparations to victims, including restitution, compensation and rehabilitation taking up on the three forms of reparations from the 2001 ICL Draft Articles on State Responsibility.⁸² As the Rule 94 of the ICC RPE calling for "other forms of remedy" suggests, the wording is open to further interpretation.⁸³ This leaves room for collective and symbolic forms of reparations as seen in the ECCC practice.

The second paragraph states that the Court may make direct orders against a concrete person and that, where appropriate, the Court may order that the award for reparations be made through the TFV. This system of double liability reflects domestic criminal process practices of civil third parties, that rely on civil liability of the convict and often encounter difficulties in enforcement against him/her. However, it differs significantly from the initial *travaux préparatoires*' proposal to hold primarily states accountable.⁸⁴ The fourth and fifth paragraph of article 75 still touch upon state responsibility in cooperation and enforcement.⁸⁵

At the moment, both provisions on the nature of reparations as well as on the debtors of reparation claims leave significant lacunae. It is the Court's jurisdiction that will need to fill those and bring more legal clarity into the field of reparations.

b. The TFV's Double Mandate

The mandate of the TFV is twofold: On the one hand, the TFV follows concrete court orders (article 75-2), on the other hand, the TFV is an independent body to provide legal assistance to victims (article 79).⁸⁶ This second feature of the TFV, the feature of victim support, does not belong to the Court's reparation system, but is a distinct feature for the TFV to be more flexible in its work.⁸⁷ The flexible mandate to assist in conflict regions responds to the human rights obligation that harm needs to be addressed regardless of the successful conviction of a perpetrator.⁸⁸ This is why it is

80 Conor McCarthy, *Reparations and Victim Support in the International Criminal Court*, Cambridge University Press 2012, p. 78.

81 Evans (Fn. 59), p. 9.

82 ICL 2001 Draft Articles, Article 37 (Fn).

83 Moffett (Fn. 57), p. 370.

84 *Ibid.*, p. 371.

85 *Ibid.*, p. 385.

86 In this context see Rule 98-5 of the ICC RPE that states that the TFV may independently provide over any other resources than those laid down within the reparation system..

87 For a detailed observation of this distinct feature see McCarthy (Fn 80), p. 87.

88 Moffett (Fn.57), p.373.

referred to as the “Swiss Cheese Model”: Assistance is used to fill out *lacunae* of the legally restricted reparation process.⁸⁹ The TFV engages with victims in conflict regions and manages to concretize their needs sometimes even before the Court engages in proceedings. Its programs in Northern Uganda are one significant example.⁹⁰

Concerning reparation proceedings, the TFV’s specific task is to target individuals and their concrete needs. Beneficiaries of the TFV are selected on the basis of demographic data, targeted outreach and consultation with victims to identify those with the most need.⁹¹ The funding of the TFV depends on a variety of sources such as fines and forfeitures, awards for reparations as well as on purely voluntary contributions of the Assembly of the State Parties (ASP).⁹² This ties the TFV’s assistance work back to the funding of the ASP and makes it arguably less flexible in that regard.

With the engagement of the TFV in both fields of reparations and assistance, the distinction easily tends to get a little blurry – which can lead to confusion as to the nature of the reparations system.⁹³ The TFV, on the one hand, is flexible within its assistance mandate not to depend on the reasoning and lengthy decision making of the Court to address victims’ needs. On the other hand, it is still engaged in the process of decision making in reparation proceedings. It is important to keep divisions of labor in mind and not to take away from the importance of individual redress.⁹⁴ Assistance programs should therefore be distinguished from reparations strategies.

4. *The Court’s Reparation Decisions*

a. *Lubanga – An Example of Symbolic Redress*

Lubanga is the first reparation decision of the ICC – and thus the first concrete interpretation and application of article 75.⁹⁵ Because none of Lubanga’s assets were ever found, the Trial Chamber needed to hold another institution responsible. It decided to order reparations from the TFV which should come up with a concrete plan. It further decided that the nature of reparations should be collective for all victims – no matter whether they had participated in the proceedings or not.⁹⁶ The Appeals Chamber mostly upheld that decision, but overturned the TFV’s proposal to rely on

⁸⁹ Peter J. Dixon, *Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo*, *International Journal of Transitional Justice* 2016 (10), 99. 88-110 (102).

⁹⁰ See programs of the TFV as found on their website: <http://www.trustfundforvictims.org/programmes> (last visited 11 May 2017).

⁹¹ Dixon (Fn. 89) p.102.

⁹² *Ibid.*

⁹³ William Schabas thus proposed that states were better off spending their money on Oxfam, William A. Schabas, *The International Criminal Court at Ten*, *Criminal Law Forum* 22, 2011 (3), pp. 493–509 (501).

⁹⁴ Dixon (Fn. 89), p. 91.

⁹⁵ Trial Chamber I, Decision, 7 August 2012, ICC-01/04-01/06-2904

⁹⁶ *Ibid.*, a discussion on this decision: Naomi Roth-Arriazza, *In Lubanga, ICC sets out reparations principles*, *Intlawgrls-blog* (August 7 2012): <http://www.intlawgrls.com/2012/08/in-lubanga-icc-sets-out-reparations.html> (last visited 5 May 2017).

community based reparations only.⁹⁷ It requested the TFV to compile a list of victims, to assess the extent of the harm suffered by victims and to make proposals regarding the modalities and forms of reparation to be awarded.⁹⁸ The TFV issued a draft plan that was discussed in Court hearings in front of the ICC and was accepted on 21 October 2016.⁹⁹

The concrete plan the TFV provided is still mostly based on symbolic reparations. Reparations shall take “a range of forms, including written, audio, artistic, events or other mediums as well as initiatives”¹⁰⁰ in order to “reinforce the objectives of reconciliation and reintegration of former child soldiers with their families and their communities.”¹⁰¹ The Trust Fund proposed that symbolic reparations include public condemnation of the crimes of enlisting, conscripting and using child soldiers to participate actively in hostilities, as well as acknowledgment and discussion of the harms and continuing consequences of these crimes.¹⁰² They shall have a transformative effect with respect to issues related to recruitment of child soldiers. Concretely, such reparations can take the form of memorials to be built in honor of victims.¹⁰³ As to the Appeals Chamber’s order to additionally take into account individual redress, the TFV Plan remains mostly vague.¹⁰⁴

The plan is restricted to the concrete findings in the conviction and acknowledgement directed towards the recruitment of child soldiers.¹⁰⁵ Even though sexual violence played an important role as well, it is not even mentioned in the TFV’s plan.¹⁰⁶ The plan as it stands is ready to be implemented. Yet, four years after the first reparation decision of the ICC and more than one decade after victims made their first claims for reparations, still no redress has reached victims.¹⁰⁷

b. Katanga – The Combination of Individual and Collective Redress

On 24 March 2017, Trial Chamber II has issued a Court order for reparations in the Court’s second case, *Prosecutor v. Germain Katanga*.¹⁰⁸ The chamber considered preferences and needs expressed by victims and thus came to the decision to implement both individual and collective reparations.

97 Appeals Chamber Judgement, 3 March 2015, ICC-01/04-01/06-3129, §§ 156, 204.

98 Ibid.

99 Trial Chamber II, Order, 21 October 2016, ICC-01/04-01/06.

100 Filing regarding symbolic collective reparations projects with Confidential Annex: Draft Request for Proposals; 19 September 2016, ICC-01/04-01/06-322, p. 5 citing Draft Implementation Plan, §145.

101 Ibid.

102 Ibid., p. 13., § 24

103 Ibid., p. 13., § 25 lit. a.

104 Ibid., p. 10, § 19.

105 Critical of this Chappell (Fn. 3).

106 See Roth-Arriazza (Fn. 96) as one of the many critics of the lack of awareness towards sexual violence in Lubanga.

107 Critical Comment on the long time waiting for reparations: Gaele Carayon, Waiting, waiting and more waiting, for reparations in the Lubanga Case, IJMonitor, (19 February 2016), <https://www.ijmonitor.org/2016/02/waiting-waiting-and-more-waiting-for-reparation-in-the-lubanga-case/> (last visited 5 May 2017).

108 Trial Chamber II, Decision 24 March 2017, ICC-01/04-01/07; the decision is thus far only available in French: https://www.icc-cpi.int/CourtRecords/CR2017_01525.PDF (last visited 6 May 2017).

This was mostly possible because a group of victims could clearly be identified from the *Bogoro massacre* in 2003 for which Katanga had been convicted in front of the ICC.¹⁰⁹ After an evaluation of material, physical and psychological damages, the Court held that each victim should be granted the symbolic sum of \$ 250 US Dollar. It also ordered that additional TFV's resources could be attributed to victims at the TFV's discretion. Thereby, the Chamber did not express that this symbolic sum should respond to the personal harm suffered. Rather, it should be a personal add-on to spend in daily life.¹¹⁰ From the 3 million US Dollars that were held to be an appropriate sum to redress, Katanga should be held liable for 1 million US Dollars.¹¹¹

For collective reparations, the Chamber argued for services addressing individuals within their respective communities. It stressed means of economic and financial development. The outlook is that assistance will ultimately be individualized.¹¹² This time, the Court is thus not primarily focusing on methods of commemoration as done in *Lubanga*, but more on victim-focused needs. Apart from that, the TFV is not in the position of deciding on the concrete distribution within a reparation plan. This is a significant shift in its interpretation as to the nature of reparations.

V. Major Challenges for the ICC's Reparation System

The ICC has set itself the goal to adequately address victims' needs – including redress of sexual and gender-based crimes. A coherent practice has not been established yet. This chapter discusses obstacles for the introduction of a reparations system that is oriented towards transformative justice. Reparations are on the margins of a perpetrator-centered legal framework of the ICC. This is compounded by the lack of clarity of the TFV's assistance mandate and the general lack of sufficient funding. In consequence, it is unlikely—and indeed undesirable—for transformative reparations to be implemented in the current ICC reparation system.

1. Problems of a Perpetrator-Centered Model

A reparation system should mainly focus on victims' needs. The ICC, in the first place, is a criminal court in charge of prosecution of international criminals. The criminal system and its guarantee for

¹⁰⁹ Alexandra R. Harrington, ICC Reparations post-Katanga – Part 2, *intlawgrls* blog (19 April 2017): <https://ilg2.org/2017/04/19/icc-reparations-post-katanga-part-2/> (last visited 6 May 2017).

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

rights of the accused to a fair and expeditious trial remain the priority.¹¹³ This makes the Court a perpetrator-centered institution and leads, with regards to the reparation system, to inconsistencies.

a. Sexual Violence – A Charge Likely to be Left Out

One of the biggest challenges for reparations in international criminal law is the sheer quantity of victims in mass atrocities and the question of where to draw the line. Article 75-2 of the Rome Statute does not contain an explicit provision that reparations can only be granted on the charges of a conviction.¹¹⁴ Yet, it seems hard to establish a responsibility of the convicted where concrete harm has not been addressed within the judgment. Therefore, in practice, the success of victims in their reparation claims is bound to the particular findings as brought forward within the judgment.¹¹⁵

In international criminal justice cases, where reparations are meant to redress masses of victims, this can have quite restrictive effects on the eligibility of victims. Particularly redress for sexual violence, in the history of Court decisions, was left out of further consideration. In the *Lubanga* reparation decision, the Prosecution had initially called for sexual violence to be included within the reparation stage.¹¹⁶ Nevertheless, no additional evidence was presented so that victims of sexual violence were not addressed.¹¹⁷ The dilemma reappears in the *Katanga* reparation decision, where victims of rape claimed compensation which they were not granted on the basis that Katanga was acquitted on these charges.¹¹⁸ As for *Bemba*, even though sexual and gender-based crimes were addressed within the Court's judgment, they surprisingly do not explicitly appear in the submissions of the International Organization of Migration (IOM) for a reparation plan.¹¹⁹

It follows that for cases of sexual and gender based crimes, there is a danger that prosecutors neglect these crimes and cut off hopes of victims for redress.¹²⁰ This contradicts the principle that reparations should address the harm suffered and not depend on other circumstances as laid down in Article 9 of UN Basic Principles on State Responsibility from 2005.¹²¹ Moreover, it reflects that the reparation system is a phase merely added to a Court primarily concerned with prosecution of

113 For the ICTY and the ICTR, the rights of the accused have namely been the argument, *not* to introduce a reparations system, see Morris/Scharf (Fn. 72).

114 Luke Moffett, Reparations for Victims at the International Criminal Court: A New Way Forward?, *The International Journal of Human Rights* (forthcoming), p. 4.

115 See Part IV.1. on domestic law practices of *Partie Civile*.

116 Prosecution's Submissions on the principles and procedures to be applied in reparations, ICC-01/04-01/06-2867, 18 April 2012, §§ 19-20, found in: Moffett (Fn. 114), p. 5.

117 See for instance Carsten Stahn, Reporative Justice after the Lubanga Appeal Judgment, *Journal of International Criminal Justice*, 13 (2015) 801-813, p. 806, found in: Moffett (F. 114n), p. 5.

118 Harrington (Fn. 109).

119 Submission by the International Organization for Migration to the International Criminal Court (Fn.7).

120 Palmer/Williams (Fn. 41), p. 330 with reference to the equivalent situation at the ECCC.

121 UN Basic Principles 2005.

international crimes.¹²² This creates a structural disadvantage for redress in cases of sexual violence.

b. No Redress in Cases of Acquittals

In the *Ruto and Sang Cases (Kenya Cases)*,¹²³ another problem of this perpetrator-centered model becomes apparent: In cases where the accused is acquitted, victims have no right to claim reparations in front of the Court. Similar to the issue of eligibility of victims, this case marks a contradiction between criminal law and reparation practice: You can deny evidence for a conviction, yet you cannot deny harm suffered by victims.¹²⁴ Even more problematic is that these victims will often have participated as witnesses in court. They have come to The Hague with the aspiration to obtain a remedy for the harm they have suffered, yet they need to return home unsatisfied.¹²⁵

Luke Moffett uses this as an argument to point at the distinction between the Court's responsibility for criminal prosecution and a state's responsibility for reparations.¹²⁶ He refers to Judge Fremr who stated in the closing of the case, that denial of reparations certainly is disappointing for victims – but not a task of a criminal court.¹²⁷ This statement marks the ICC's priority for prosecution – victims' interests in reparations follow up. This priority is additionally manifested in the long time of victims waiting for redress that is tied to the success of the criminal proceedings. Judge Eboe-Osuji, in a dissenting opinion, pointed out the incompatibility of the reparation system with the perpetrator-centered model of the ICC: Establishing the guilt of a perpetrator lies beyond the influence of victims.¹²⁸ There is no general principle in international law demanding a conviction as prerequisite for reparations. As it was due to the lack of cooperation of the Kenyan government that guilt could not be established here, he calls for reparations on the national level.¹²⁹

The proposal of the Common Victim Legal Representative was that despite the legal liability of convict and, where adequate, of the TFV according to article 75 (2), Kenya should be held responsible for granting reparations.¹³⁰ It would only be consequent to grant an adequate reparation system in cases where the ICC is not able to provide reparations due to acquittals. A Kenyan

122 Stahn (Fn. 117), p. 807.

123 The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, closed on 5 April 2016, ICC-01/09-01/11.

124 Principle 9 of the UN Guidelines 2005.

125 Pointing at this issue of secondary victimization: Chappell/Durbach (Fn. 26), p. 554.

126 Moffett (Fn. 114), p. 9.

127 Ruto and Sang, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027-Red 5 April 2016, § 149, found in Moffett (Fn. 114), p. 9.

128 Ruto and Sang, Public redacted version of Decision on Defence Applications for Judgments of Acquittal, ICC-01/09-01/11-2027, Reasons of Judge Eboe Osuji, §§ 58-254; found in: Moffett (Fn. 114), p. 9.

129 Ibid., § 464.

130 Victims' Views and Concerns on the Issue of Reparation or Assistance in Lieu of Reparation Pursuant to the Trial Chamber Decision of 5 April 2016 on the Defence Motions on 'No Case to Answer, 15 June 2016, ICC-01/09-01/11-2035, §§ 40-41.

mechanism for reparations has thus far not been established and the majority of judges rejected to hold Kenya responsible.¹³¹ The rejection certainly has political reasons: Putting pressure on states, in the current credibility crisis of ICC in African States, could even further weaken its standing in the region. Apart from that, the Court depends on the funding by the State Parties.¹³²

c. Symbolic Conviction v. Full Restitution – An Asymmetric Approach

A third problem is linked to the nature of international criminal justice itself. Because the ICC is limited in its resources and because trials are lengthy and costly already, it only pursues the symbolic conviction of major leaders and commanders.¹³³ The symbolic conviction of one person sits ill with masses of victims hoping for full restitution. This creates an asymmetric approach.

It is often said that the Court's success ultimately manifests in the institution's effects on the ground and in its impact on victims and survivors.¹³⁴ However, if a conviction is found to be merely symbolic and the convict is the primary source of redress for victims, it is not likely for victims to obtain full restitution. This has been admitted by the Trial Chamber's findings within the *Katanga* reparation decision in which it was held that it would be unfair to hold *Katanga* accountable for all damages as he was not the only perpetrator.¹³⁵ This system differs from domestic systems of a *partie civile* in which victims can make claims directly against the perpetrator of their harm. This is part of the reason why the reparation decision in *Lubanga* turned out to be mostly symbolic – and why even the individual redress granted in *Katanga* consists only of a symbolic payment.¹³⁶

With regards to the upcoming reparation decision in *Bemba*, specific attention needs to be directed at sexual and gender-based crimes. For the Court to manifest impact on the ground, it might need to turn away from its perpetrator-centric system and rethink mechanism to reach out to victims' needs.

2. Can the Assistance Mandate of the TFV Fill Out the Gaps?

The TFV's assistance mandate in article 79 of the Rome Statute had been introduced to address

131 Ibid.

132 Moffett (Fn. 114), p. 11.

133 On this particular symbolism, Mark Kersten, A Turn to the Symbolic at the International Criminal Court, Justice in Conflict-Blog (October 5 2016), <https://justiceinconflict.org/2016/10/05/a-turn-to-the-symbolic-at-the-international-criminal-court/> (last visited 7 May 2017).

134 Ibid.

135 Harrington (Fn. 109).

136 Ibid.

victims' needs regardless of a conviction by the Court. It is a "Swiss-Cheese Model" in order to fill out the gaps the Court proceedings and restrictive legal definitions of victimhood leave open.¹³⁷ The Appeals Chamber noted that, in *Lubanga*, while victims of sexual violence were not eligible to obtain individual redress, it would be appropriate for the Board of Directors of the TFV to include those victims into the considerations within their assistance mandate.¹³⁸ In fact, it noted the concrete danger that the system "may be blurred in a manner prejudicial to the rights of the convicted person."¹³⁹ The plan presented by the TFV and adopted by the ICC in *Lubanga* indeed shows that the TFV is struggling to draw a clear line between individual redress and its broad discretion within assistance programs.

What does "assistance" in cases of sexual violence mean? Starting from 2008, the TFV is pursuing assistance programs in the DRC, Uganda and the CAR, where the Court has opened investigations. In its assistance programs, the TFV tries to specifically address issues of sexual violence, it is active in various African countries and transparently presents all costs involved.¹⁴⁰ In its strategic plan for 2014-2017, it promotes various gender mainstreaming perspectives.¹⁴¹ Some of the aspects correspond with Fraser's vision of economic and social change: the plans already seem much inspired by feminist debates on gender-just reparations.¹⁴² The TFV is flexible and can act where the ICC itself is restrained because of its criminal law nature. This is why Judge van den Wyngaert has proposed to reform the TFV into a Reparations Chamber that shall be competent in all questions concerning reparations.¹⁴³

The TFV as it stands, however, is not equipped to solve the problem. The resources used for the TFV's assistance mandate are "resources other than those collected from awards for reparations, fines and forfeitures," as defined in Regulation 47 of the Regulations of the Trust Fund for Victims.¹⁴⁴ Even though a subsidiary fund has been established for gender issues, its funding is even less stable than the resources granted for the TFV's reparations mandate.¹⁴⁵

Apart from that, if both resources for reparations and assistance are granted by the Fund, this makes

137 Dixon (Fn. 89), p. 110.

138 Appeals Chamber 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; 3 March 2015, ICC-01/04-01/06A A 2 A 3, § 199 and §§ 269-273.

139 Ibid, §§ 181-182.

140 See for instance the listing on the TFV's website, <http://www.trustfundforvictims.org/programmes> (last visited 7 May 2017).

141 TFV Strategic Plan, August 2014, p. 6, http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV_Strategic_Plan_2014_2017_approved.pdf (last visited 7 May 2017).

142 Chappell/Durbach (Fn. 26), p. 556.

143 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 (2011) p. 495-496

144 TFV Strategic Plan (Fn. 141), p. 19.

145 Chappell/Durbach, (Fn. 26), p. 555.

reparations difficult to be distinguished from humanitarian aid or mere charity.¹⁴⁶ A “Swiss Cheese Model” can fill up some gaps, but it would be misguided to believe that it comes close to filling up all. Particularly with regards to the consequences of sexual violence, it is hard to believe that individual redress can be easily substituted by a model of assistance. Moreover, the reliance on assistance bears the danger of diluting any meaningful redress to victims.¹⁴⁷

3. Sufficient Funding?

The Court’s insufficient resources are often brought up when criticizing the Court’s practice.¹⁴⁸ With regards to the challenges to be addressed in the context of sexual violence, this problem becomes particularly apparent. Victims of sexual violence often claim that they prefer a compensation sum as form of redress. Money leaves victims the individual choice of how to address their harm – it is the most neutral and yet effective ground for satisfaction.¹⁴⁹ At the same time, seizing money from a convicted international criminal will address economic inequalities and, at least for this very particular case, grant some sort of redistribution and recognition. In domestic criminal systems, the *partie civile* will obtain money primarily from the convicted criminal as a means of *restitutio ad integrum*.¹⁵⁰ Yet, the idea of a *restitutio* through individual address and concrete compensation of harm in money is much more plausible in domestic cases. In the international context of the ICC, issues arise both with regards to the assets of the convict and the funding of the TFV.

The problem in many trials is that the convict is indigent, as it was the case in *Lubanga*. According to article 93-1 lit. k of the Rome Statute, states are obliged to freeze money from the accused’s bank account for this money to be distributed to victims later on. However, accused might have developed sophisticated money laundering systems to save their money.¹⁵¹ States might be unable or unwilling to follow up the proceeds, they might be inclined to support the accused or reluctant to cooperate with neighboring countries. It is therefore possible that victims never get full restitution. Thus far, there have been only few attempts to improve this outcome.¹⁵²

Regarding questions of legal responsibility, another issue arises: The ICC’s interpretation of the

146 Moffett (Fn. 57), p. 378.

147 Moffett (Fn. 114), p. 8.

148 See for instance Peter Cluskey, Funding Cut May Curb the International Criminal Court, *The Irish Times* (9 February 2017), <http://www.irishtimes.com/news/world/europe/funding-cut-may-curb-international-criminal-court-1.2968407> (last visited 7 May 2017).

149 See Submissions of Queen’s University Human Rights Center Belfast (Fn. 7), § 56; See however Walker’s concern that not all victims dispose over bank accounts and can make use of the money (Fn)

150 In Germany for instance, there are clear set tables indicating compensations sums for any harm suffered, <http://www.schmerzengeldtabelle.net/> (last visited 7 May 2017).

151 Submissions QUB (Fn. 7), § 98 with reference to Gustavo Giraldo Garon and others, 18 May 2006, Sentencia C-370/2006.

152 Ibid. is one of them.

reparation mechanism excludes state responsibility. This does not seem coherent with responsibility for redress in established domestic and international reparation practices.¹⁵³ While in these practices, it is either an individual or a state that is held responsible for a certain misconduct, the ICC sets up a Fund that depends on the contributions of its State Parties. Moreover, the State Parties are held accountable to redress millions of victims. With regards to the growing discontent with the ICC's practice, voluntary contributions do not seem to be a stable resource. Scholars like Luke Moffett have pointed at inconsistencies that come with this system and pleaded for a reform.¹⁵⁴

4. Can Reparations Be Transformative at the ICC?

Within international criminal justice and particularly with regards to sexual and gender-based crimes, the term of transformative reparations is more present than ever before.¹⁵⁵ It was found that monetary compensation does not suffice when addressing issues of sexual violence – moreover one needs to address gender patterns as sources of structural inequalities.¹⁵⁶ Apart from the problems attached to the legal framework of the ICC reparation system, transformative gender-just reparations at the ICC raise additional concerns. It is for instance not clear whether the ICC at all has a legal mandate to transform social structures. Furthermore, transformative ambitions can lead to secondary victimization and can thus be criticized as “development interventionism”.

a. The Legal Mandate to Transform Societies

Transformation of gender structures is often perceived to be a desirable goal.¹⁵⁷ Proposals and challenges that come within transformative changes touch upon areas that normally belong to domestic economy, politics and justice.¹⁵⁸ These are classically areas of national sovereignty in which the ICC cannot intervene. Nancy Fraser points out in her trivalent model that inequalities are deeply rooted in public as well as in private relations. As Durbach and Chappell put it: “A fully grown system requires extensive state-sponsored, collective measures to bring about equal gender representation in decision making, a significant redistribution of economic resources and the

153 Moffett (Fn. 57), p. 379.

154 Ibid.

155 See Chappell/Durbach (Fn. 26), Palmer/Williams (Fn. 41), Walker (Fn. 51).

156 As discussed above: see Nairobi Declaration 2007 (Fn. 43).

157 See Chappell/Durbach (Fn. 26).

158 See the “three prime areas” proposed by Walker (Fn. 51).

removal of socially and culturally embedded gender-biased practices.¹⁵⁹ States, however, have arguably not signed up for being transformed when signing the Rome Statute.

The wording of Article 75 – and also the respective rules in the RPE – do not indicate the legal nature of reparations.. For an interpretation of the legal mandate, one needs to take into account the teleology and structure of the Statute. The conventional wording of “reparations” can imply several forms and is open-ended in its understanding.¹⁶⁰ Transformative reparations have been developed within the jurisprudence of the IACtHR. This Court however differs from the ICC in that states have submitted to it with the intent to create a common system of human rights standards.¹⁶¹ Another crucial difference between the two international bodies of jurisdiction is that the IACtHR has the competence to oblige state parties, different from the ICC that classically reaches out to individuals.¹⁶² Furthermore, American States convicted by the IACtHR have wide discretion in implementing transformative changes.¹⁶³ The ICC, on the other hand, presents its own plan to be practically complete and ready for enforcement.

With regards to the Rome Statute's principle of complementarity, the competences of the Court remain limited to situations in which domestic systems are either unwilling or unable to proceed. Having this in mind, attribution of jurisprudential competence as a mandate to transform societal inequalities can hardly be interpreted through the backdoor of reparations.

b. Need of Individual Redress and Danger of Secondary Victimization

The importance of individual redress has already been discussed in the context of the TFV's assistance mandate. In this chapter, it shall be pointed out that collective transformative reparations can even cause additional harm to victims.

Reparations have the distinctive feature of addressing harm suffered by an individual. This is what the Rome Statute promises – and what victims expect who travel to The Hague to support the Court proceedings as witnesses.¹⁶⁴ Most of them hope for individual acknowledgement not only of their harm, but also of the effort within court proceedings. Arguably, the moment that victims engage with the Court, their status changes from masses to individuals who make their respective claims. The institution of court hearings instrumentalizes memories in a very particular way. The Trial

¹⁵⁹ Durbach/Chappell (Fn.26), p. 554.

¹⁶⁰ Moffett (Fn. 57), with reference to non-repetition and satisfaction.

¹⁶¹ Miriam Cohen, Reparations at the International Criminal Court: Lessons from the Inter-American Court of Human Rights, *Revista do Instituto Brasileiro de Direitos Humanos*, 12 (2012), p. 295-321 (295).

¹⁶² *Ibid.*

¹⁶³ See for instance *I.V. v. Bolivia* (Fn. 48) where Bolivia was left a vast discretion as how to change its laws.

¹⁶⁴ On this aspect: Chappell/Durbach (Fn.26).

Chamber's decision in *Lubanga* to implement a system of exclusively collective redress, led to huge disappointment among victims and triggered several appeals by legal representatives of victims.¹⁶⁵ Chappell and Durbach argue that, without a surprise, unfulfilled promises can lead to reliving through the experience of violence and, ultimately, to even bigger damage.¹⁶⁶ This can reinforce powerlessness and amount to secondary victimization.¹⁶⁷

A further problem in the context of secondary victimization has been raised by Leila Ullrich who observes in her research on Northern Uganda similar criticism in the context of TFV assistance programs that aim at transforming societies.¹⁶⁸ She describes a different understanding among the concepts of transformative justice changing *structures* and transformative justice changing *people* in shaping their understanding. She claims that the TFV aims more at transforming people through psychological work with victims, particularly with regards to cases of sexual violence.¹⁶⁹ She argues that this can exert normative pressure on victims and concludes that transformative practices are quite dangerous in that regard. If really the Court aims at being a "Victims' Court" these are consequences of its practices it should have in mind.

c. Neo-Colonial Ambitions?

The ICC is often confronted with the criticism of being "neo-colonial" and a "tool of imperialism."¹⁷⁰ Leila Ullrich brings up this criticism in her research on the Court's reparation practice and the question of transformative reparations.¹⁷¹ Even though agreeing to the goal of transformative reparations in cases of sexual violence, she questions the Court's legitimacy to pursue what she calls "development interventionism."¹⁷² Based on her field work in Northern Uganda, she questions whether an allegedly neutral organization such as the TFV should at all be involved in practices of transformation.

She claims that the TFV works with societies and governments on the ground relying on the

165 Carsten Stahn, Reparative Justice after the Lubanga Appeals Judgment on Principles and Procedures of Reparation, EJIL-Talk Blog (7 April 2015), <https://www.ejiltalk.org/reparative-justice-after-the-lubanga-appeals-judgment-on-principles-and-procedures-of-reparation/> (last visited 8 May 2017).

166 Chappell/Durbach (Fn. 26).

167 Similar criticism: Silvain Aubry/Maria Isabel Henao, Collective Reparations and the International Criminal Court, in: Fiona Iliff/Fabien Maitre-Muhl/Andrew Sirel, Adverse Effects of Reparations, Reparations Unit, August 2011.

168 Leila Ullrich, Can Reparations transform Societies? The Practice of 'Transformative Justice' at the International Criminal Court (ICC), presentation at Oxford Transitional Justice Research Seminar, 9 March 2016, Podcast: <https://podcasts.ox.ac.uk/can-reparations-transform-societies-practice-transformative-justice-international-criminal> (last visited 7 May 2016).

169 In this context, Ullrich brings up the TFV's usage of the term "victim survivors".

170 See for example Tim van Ham, How Post-Colonial is the International Criminal Court? A Case Study on the Kenyatta and Ruto Case. 2015, <http://gpm.ruhosting.nl/mt/HG2014/2014MASG54HamTimvan.pdf> (last visited 7 May 2017).

171 Ullrich (Fn. 168).

172 Ibid.

doctrine of “local change agents” such as educators, the media and women’s grassroots organizations that shall be empowered to carry out transformations. Regarding women’s empowerment, she finds that all actors involved have very different ideas and understanding of what needs to be changed. The mostly Western idea of gender empowerment as envisioned by the TFV is not very likely to be taken up. The aim of transformation therefore needs to be criticized as interventionist. Chappell and Durbach join this criticism and claim a “lack of critical resources”¹⁷³ with regards to the ICC and, most importantly, the TFV assistance missions. As Ullrich claims herself, the motive behind transformative reparations, namely to subvert inequalities rather than to reinforce them, is a good one. The ICC, as it stands, dominated by industrialized and white states, is however not in a legitimate position to carry out this mission.

VI. The Search for Pragmatic Solutions

From the various aspects of criticism brought up in the context of reparations and sexual violence various challenges arise. Several proposals have been brought up as a response. While one could think about abandoning the ICC reparation system altogether or about a significant reform of the TFV into a Reparations Chamber, it shall be argued that the best solution would be a system of reparative complementarity that re-engages state responsibility.

1. Abandoning the ICC Reparation System altogether?

The examination of the ICC reparation system with regards to victims of sexual violence could lead to the impression that reparations and international criminal justice are in fact incompatible: The primary concern of criminal judges is criminal prosecution of the accused in a fair and expeditious trial, whereas the reparation stage seems to be a costly and lengthy add-on that can even distract from the primary goal of criminal prosecution. Mirjan Damaska is thus, in an evaluation of the reparation system, concerned that the ICC loses track of the actual “point of international criminal justice.”¹⁷⁴

The idea of recognition and redistribution through reparations, however, has an importance one should not underestimate. In the US, there is an ongoing debate on how the fact that there have never been reparations for slavery contributes to today’s racism.¹⁷⁵ A UN Panel has lately even

¹⁷³ Chappell/Durbach (Fn. 26), p. 556.

¹⁷⁴ See in the context the harsh criticism of Mirjan R. Damaska, *What is the Point of International Criminal Justice?* (2008). Faculty Scholarship Series. Paper, 1573; Zegveld (Fn.64), p. 108.

¹⁷⁵ See for instance the activist and scholar Angela Y. Davis, *Slavery and the Prison Industrial Complex* (4 May 2012):

stated the responsibility of the US government to pay reparations to black people to encounter its responsibilities.¹⁷⁶ For victims of sexual violence, it is equally important to get this acknowledgement. Many of the 124 state parties to the ICC do not have a reparation system of their own.¹⁷⁷ In case of the CAR for instance, there is no other mechanism to assist victims' claims. The ICC's conviction of Jean-Pierre Bemba already was an important step in giving a voice to victims. The course of events in the DRC shows that this would not have happened without international assistance: Between 2003 and 2006, Bemba was Vice President in the DRC, in 2006 he was candidate in presidential elections.¹⁷⁸ Without the involvement of the ICC, initiated through self-referral (Article 14 of the Rome Statute), victims would probably to this day remain without any recognition.

A reparation system at the ICC offers the opportunity of acknowledging harm suffered, of focusing on victims' concrete needs and of exploring possibilities of how to alleviate continuing suffering. Getting rid of the ICC reparation mechanism does not seem to be the right solution. One could moreover think about ways to transform existing structures and to engage state responsibility.

2. Transforming the TFV into a Reparations Chamber?

Some scholars have argued for the introduction of a separate Reparations Chamber to adequately address victims' claims for reparations.¹⁷⁹ Judge Van den Wyngaert argues for the importance of the TFV's assistance work in that it is not bound to the judicial proceedings of the ICC and materializes its work on the ground long before the Court comes to any finding, which became most apparent in the example of Northern Uganda.¹⁸⁰ She is, on the other hand, mostly critical towards victims' participation in trials since this leads in most cases only to symbolic redress and thereby creates the danger of secondary victimization. Her proposal is to detach reparations proceedings from criminal proceedings and to transform the TFV into a Reparation Commission. This means that there would be less restrictions as to the eligibility of victims and other issues that come with the perpetrator-centrism of the current practice. As Zegveld points out, victims have more to expect from civil than from criminal law courts. It would also mean that a high number of victims would be able to make

<https://towardsreparations.wordpress.com/2012/05/04/slavery-and-the-prison-industrial-complex-angela-davis/> (last visited 7 May 2017).

176 UN Human Rights Council, 18 August 2016, UN Doc., HRC/33/61/Add.2, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf?OpenElement> (last visited 7 May 2017).

177 Moffett (Fn. 114), p. 19.

178 Profile: Jean-Pierre Bemba, DR Congo's Ex-Rebel and Vice President, BBC News (16 October 2016): <http://www.bbc.com/news/world-africa-35845556> (last visited 8 May 2017).

179 Van den Wyngaert (Fn. 143); Zegveld (Fn.64), p. 108.

180 Ibid., p.495.

a claim in front of the TFV.¹⁸¹

Certain points remain rather contradictory and unspecified in Van den Wyngaert's proposal. First, while claiming the importance of individual redress, she proposes to turn more towards the TFV which under its current mandate is mostly responsible for collective mechanisms. This opens up, second, the question of feasibility with regards to the TFV's construction and funding. It would be almost naive to introduce an international system in which every victim is eligible for redress. A reparations chamber on a domestic level works like a court: Reparations are only granted when sufficient evidence is established. On an international level, this would almost certainly entail high costs and lengthy procedures. The danger would be even more complication and confusion. Van den Wyngaert's proposal would mean to add another giant to the giant, instead of searching for a limb.

The Irish scholar Luke Moffett is highly critical of Van den Wyngaert's proposal. He rightly claims victims' participation to be an indispensable feature of international criminal justice for the transparency of proceedings and the protection of victims' rights.¹⁸² This is why he would not go for the introduction of a distinct reparation chamber. He argues for minor reforms and engagement of the TFV in provisional measures to prevent death or irreparable harm.¹⁸³ In procedural terms, he also argues for a lower evidentiary burden for victims and the possibility to make symbolic court orders against the accused already before the conviction. He points out that in the *Lubanga* and *Katanga* decisions, the Trial Chamber has effectively already turned into a Reparations Chamber.¹⁸⁴ One could extend this even further in providing chambers with reparation experts. The proposals he makes are rather narrow compared to Van den Wyngaert's vision of a reformed TFV. However, with regards to the important distinction between assistance and redress and the institutional inability of the Fund to deal with judicial proceedings, these proposals seem to be more realistic.

3. *Reparative Complementarity*

Luke Moffett presents a model of reparative complementarity as a reform proposal for the ICC reparation system. He claims that as part of the principle of complementarity, it would make much more sense to relocate responsibility for a reparation system from the TFV back to the state level. In the following, it shall be shown why this model is promising for cases of sexual crimes – in terms of legal consistency and legitimacy, even though it leaves open some questions.

181 Ibid.

182 Moffett (Fn. 114), p. 19.

183 Ibid., p. 20 with reference to provisional measures in Article 62-3 of the Inter-American Convention of Human Rights.

184 Ibid., p. 21.

a. Legal Consistency

Moffett bases his vision of reparative complementarity mostly on a legal argumentation and detailed interpretation of the Rome Statute. He claims that there is no provision in the Rome Statute that would transfer responsibility for reparations to the ICC. Moreover, article 25-4, that states that “no provision (...) shall affect state responsibility under international law” demands a narrow interpretation of ICC competences in that regard.¹⁸⁵

What are state responsibilities towards reparations? According to general principles of international law, a state is responsible for the commission of any wrongful act. Responsibility for inaction arises in cases where a state fails to protect its citizens from the commission of international crimes or to prosecute and punish international criminals.¹⁸⁶ While international criminal courts have the duty to prosecute individuals, state parties are under the obligation to change their domestic structures in order to prevent future crimes.¹⁸⁷ With regards to reparations in cases of sexual and gender-based crimes, particularly transformative reparations, it is the state level that is addressed to bring about structural changes. This is true for the 2007 Nairobi Declaration, the 2014 UN Guideline Principles and the 2017 ICTJ Guidelines for court-ordered reparations.¹⁸⁸ Also within the jurisprudence of the IACtHR, the state is obliged to bring about certain structural changes with regards to gender relations, while maintaining broad discretion as to the concrete nature and enforcement of those changes. Maintaining state responsibility with regards to wide ranging structural changes is thus consistent with principles from international public law.

As the principle of complementarity in article 17 states in a *negative* way, that the ICC shall have jurisdictional competence only in cases where states are unwilling or unable to fulfill its obligation to investigate and prosecute international criminals, there is a *positive* assumption of a “pro-active cooperation aimed at promoting national proceedings”¹⁸⁹ in all other cases. Moffett observes that article 75 of the Rome Statute, in its fourth and fifth paragraph, touches upon state cooperation and enforcement.¹⁹⁰ From drafting procedures of the Rome Statute, one can see that these paragraphs were introduced because states are assumed to be better equipped to decide on concrete reparation mechanisms and procedures.¹⁹¹ As part of a multilateral treaty, these obligations constitute *erga omnes* obligations stemming from a collective interest. This means that for the enforcement of these

¹⁸⁵ Ibid.

¹⁸⁶ Ibid., p. 379 with reference to Article 146, Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; Velasquez Rodriguez, §. 32; Osman v. United Kingdom, App no. 23452/94 (ECtHR, 28 October 1998), § 115.

¹⁸⁷ Ibid.

¹⁸⁸ See Part III.2.

¹⁸⁹ Moffett (Fn. 57), p. 380 with reference to the Prosecutorial Strategy of 2009-2010, p. 5.

¹⁹⁰ Ibid.

¹⁹¹ Ibid. with reference to “Réparations dues aux victimes. Intervention de la France”, Rome Conference, March 1998, p. 3.

duties, any other state party could bring a claim in front of the ICJ.¹⁹² Under article 93 on cooperation, the ICC is competent to demand state compliance.¹⁹³ Article 109 on enforcement orders state parties to “give effect” to all fines and forfeitures ordered by the Court. These are hard law mechanisms to enforce cooperation. For a longer lasting system of domestic reparative justice, Moffett moreover envisions a soft law approach: A dialogue between Court and states that eventually leads to a system of reparative complementarity.¹⁹⁴

Moffett proposes to establish three liabilities under article 75: A first that goes against the convict, a second that, regardless of a conviction, obliges the state to establish a reparation system for victims and a third, where adequate, with the possibility of additional orders against the TFV.¹⁹⁵ This system would be consistent with stipulations under the Rome Statute on complementarity. It would manage to circumvent the current perpetrator-centered approach with all its disadvantages for victims’ claims and thereby empower states to come to responses at their own discretion. This corresponds with the ECCC’s findings on a responsibility of the Cambodian government to be in charge of a reparations system for the participating *parties civiles*.¹⁹⁶ Moffett’s model of reparative complementarity thus seems, from a legal point of view, quite persuasive.

b. Legitimacy – The Example of Rwanda

Moffett’s ideal of a reparation system is not only promising from a legal point of view. A model of state responsibility and reparative complementarity in cases of sexual violence seems promising also from a viewpoint of legitimacy. Nancy Fraser’s theory of trivalent justice with regards to gender inequality describes the need for recognition, redistribution and representation.¹⁹⁷ The elements of redistribution and representation are, as discussed before, touching upon state sovereignty and are hardly covered by an ICC mandate. Such a change can only be legitimately brought about on a state level.

Rwanda gives a powerful example of how gender inequality can be transformed on a domestic level. On a worldwide gender index, Rwanda currently occupies the sixth range and is thus more progressive than the US.¹⁹⁸ Applied to Fraser’s trivalent model, Rwanda reaches out to all limbs:

192 Ibid., p. 381.

193 Ibid. with reference particularly to Article 93-1 lit k on freezing a suspect’s assets.

194 Submissions (Fn. 7), § 109.

195 Ibid., p. 382.

196 Ibid. with reference to Duch, 001/18-07-2007/ECCC/TC, Judgment, §. 66; see in this context with reference to sexual violence Williams/Palmer (Fn. 41).

197 Fraser (Fn. 38).

198 Gender Gap Index, <http://reports.weforum.org/global-gender-gap-report-2015/the-global-gender-gap-index-results-in-2015/> (last visited 8 May 2017).

With 64 % of parliamentarians being female¹⁹⁹ and gender responsive budgeting projects to address socio-economic inequalities, Rwanda progresses both in terms of representation and redistribution.²⁰⁰ The reforms were introduced in 2004 in the attempt to transform Rwanda's economy and production. Despite the presence of UN peacekeeping missions in the country, the reforms are based on a purely domestic initiative.²⁰¹

The manifest changes come with the insight that gender equality adds to a country's overall progress. As President Paul Kagame stated, "gender equality is not just women's business, it is everybody's business and (...) gender equality and women's empowerment are crucial to sustainable socio-economic development."²⁰² Rwanda's gender strategy is legitimate and credible. Those reforms could have never been introduced through an ICTR mandate, yet the recognition of sexual violence by the Tribunal might have contributed to pave the way.

Rwanda currently advises neighboring countries in the region such as the DRC and the CAR on its gender policy. Its approach is very specific in that it came from the insight that gender equality actually contributes to a nation's wealth. It is not clear whether neighbor states are likely to adapt its policy model. It is important to mark that states have no obligation to go as far as Rwanda as states have wide discretion as to their reparation policy. Moffett therefore pleads for a narrow application of reparative complementarity, for the ICC not to be overburdened with a "superjudicial" function.²⁰³ The important lesson learnt from Rwanda, however, is that a reparative solution is much more likely to be accepted and successfully enforced when found on a local level.²⁰⁴

c. Open Questions

In theory, Moffett's model sounds very promising. Yet, some questions remain unanswered. First, it remains unclear which state is to be held accountable in a model of reparative complementarity. In the case of *Bemba*, two countries come into play, namely the CAR as country of victims and the DRC as home country of the convict. The underlying conflict is transnational and, with regards to the principle of complementarity, it is not obvious which country is to be held responsible for victims. In the submissions for a reparation decision, the Queen's University Belfast Human Rights

199 Gender Equality Strategy UNDP 2014-2017, p. 3, <http://www.rw.undp.org/content/dam/rwanda/docs/Research%20and%20publications/Gender%20Equality%20Strategy%20-%20UNDP%20Rwanda%20-%20Final.pdf> (last visited 8 May 2017).

200 Republic of Rwanda, National Gender Policy, Final Version from July 2010, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/94009/110188/F-1576743982/RWA-94009.pdf> (last visited 8 May 2017).

201 Ibid.

202 Opening address by President Paul Kagame, Gender, Nation Building and Role of Parliament conference report, 2007

203 Moffett (Fn. 114), p. 19.

204 In this context, one could also cite the successful conviction of Hisènne Habré, dictator of Chad, on the African continent which was welcomed as a highly legitimate trial, Human Rights Watch, A Dictator on Trial in Africa (12 November 2015), <https://www.hrw.org/news/2015/11/12/dictator-trial-africa> (last visited 8 May 2017).

Center does not make a distinction and holds that both governments should be in charge of a national reparation system.²⁰⁵ With regards to questions of responsibility in international law, it *does* arguably matter. The danger of not making the distinction would be that the obligation to introduce a reparation mechanism might be diluted to a general duty and taken less seriously by states.

A second practical concern is the question of whether a state has the “credibility, capacity or independence” to create a reparation system on its own.²⁰⁶ Moffett argues that states might need to prioritize reparation programs over e.g. expenses for defense and that other states could jump in financially to support capacity building.²⁰⁷ Both proposals, however, seem more idealistic than methodologically sound. To make sure that states are in a position to grant reparations to victims, one would need further developed and coordinated mechanisms of common funding. This might also help to further engage in dialogues on the question of reparations.

VII. Concluding Remarks

Reparations are an important opportunity for the ICC to focus on victims, to address their harm – and ultimately, to create a form of justice going even beyond the scope of a rightful criminal conviction. As the Court has pointed out itself, this is a key feature and linked to the success of the Court itself.²⁰⁸ With regards to sexual and gender-based crimes, redress is important and complex alike. The reparation proceedings in *Bemba* give the ICC an opportunity to create first precedent in that matter.

With the example of sexual violence, it becomes moreover clear that the ICC’s reparation system as it stands is dysfunctional and does not adequately address victims’ needs. Mere symbolic redress as presented in the reparations decisions in *Lubanga* and *Katanga* and pursued under the TFV’s assistance mandate does not seem to fulfill the transformative change that is needed to overcome structures of violence. The reform model of reparative complementarity, as proposed by Luke Moffett, is a promising proposal not only to relieve the Court from the current burden of a fully responsive reparation system, but also to improve its legitimacy. Finally, it conforms with the principle of state responsibility as drawn from international conventions, including the Rome Statute. For victims of sexual violence, domestic reparation systems could bring about structural change.

205 Ibid, § 109.

206 Moffett (Fn. 57), p. 382.

207 Ibid.

208 Lubanga Reparations Decision (Fn. 1).

Despite the logic in Moffett's reasoning, it is however not very likely that the ICC will follow suit. As shown in the reparation decisions in *Lubanga* and *Katanga*, the Court prefers to remain the "master" behind questions of redress. One could speculate about reasons: Perhaps the Court does not trust State Parties to bring up a coherent reparation system or a fear of obliging states and increasing their discontent with the Court. One could also just wait for an answer to come in the *Bemba* reparation decision.

As it stands, the reparation system is an opportunity for the ICC to engage with victims and State Parties and to redefine its standing in international law. It is up to the Court whether or not to embrace it.

