

**REDRESSING FEMALE VICTIMS OF SEXUAL VIOLENCE:
POSSIBILITIES FOR GENDER-SPECIFIC REPARATIONS AT THE
INTERNATIONAL CRIMINAL COURT**

Pia Christina Kalus



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Supervisor: Professor Lovell Fernandez

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REDRESSING FEMALE VICTIMS OF SEXUAL VIOLENCE: POSSIBILITIES FOR GENDER-SPECIFIC REPARATIONS AT THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

This paper is about the reparations regime of the International Criminal Court and reparations possibilities for victims of sexual violence. It will contain a legal analysis of the reparations system of the Court, including the Trust Fund for Victims of the International Criminal Court. In a second step, the needs of women who experienced conflict related violence will be examined. The central question, which this paper will try to answer, is whether the ICC reparations regime has the ability to provide gender-sensitive reparations and thus make a contribution to the improvement of women's lives in post-conflict societies.

KEY WORDS

Reparations, International Criminal Tribunal for the Former Yugoslavia (ICTY) /International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), Trust Fund for Victims of the International Criminal Court, Restorative Justice, Human Rights Violations, Sexual Violence, Rape, Unwanted Pregnancy, HIV/Aids

DECLARATION

I declare that

REDRESSING FEMALE VICTIMS OF SEXUAL VIOLENCE: POSSIBILITIES FOR
GENDER-SPECIFIC REPARATIONS AT THE INTERNATIONAL CRIMINAL COURT

Is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signature: _____

Pia Christina Kalus



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LIST OF ABBREVIATIONS

BoD	Board of Directors of the Trust Fund
CAR	Central African Republic
CAVR	<i>Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste</i> (Commission for Reception, Truth and Reconciliation in East Timor)
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court
ICC RPE	Rules of Procedure and Evidence of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
Joint Application Form	Application Form For Individuals - Request for Participation in Proceedings and Reparations at the ICC
Nairobi Declaration	Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation
NGO	Non-governmental organisation
OTP	Office of the Prosecutor
PrepCom	Preparatory Committee for the Rome Conference
SC	Security Council of the United Nations
Standard Application Form	Standard Application Form for Reparations Before the International Criminal Court for Individuals and Person Acting on Their Behalf

Sierra Leone TRC	Sierra Leone Truth and Reconciliation Commission
STD	Sexually Transmitted Disease
TFV	Trust Fund for Victims (of the International Criminal Court)
TFVR	Trust Fund for Victims Regulations
TC	Truth Commission
Van Boven/Bassiouni Principles	Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law
Working Group	Working Group on Procedural Matters at the Rome Conference

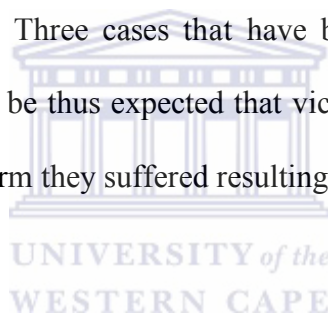


CHAPTER ONE

INTRODUCTION, RESEARCH QUESTION AND METHODOLOGY

1. Research Question and Objectives of the Study

The International Criminal Court [hereinafter: ICC or ‘the Court’] is currently exercising its jurisdiction in six situations: Sudan, Uganda, the Democratic Republic of the Congo [hereinafter: DRC], Libya, the Central African Republic [hereinafter: CAR] and Kenya. In five of six situations sexual violence on a mass scale has been reported by the media.¹ Allegations of rape and sexual violence have been made in five of six situations, against 13 accused persons in total so far.² Three cases that have been opened at the Court contain charges of primarily rape.³ It can be thus expected that victims of sexual violence will claim reparations at the Court for the harm they suffered resulting from these crimes.



¹ Compare ‘Kenyan leader summonsed over post-election violence’ http://articles.cnn.com/2011-03-08/world/kenya.suspects.icc_1_ethnic-violence-raila-odinga-opposition-leader?_s=PM:WORLD ; ‘Darfuri women live ‘nightmare,’ Harvard backed study says, http://articles.cnn.com/2009-05-31/world/darfur.rape.study_1_refugee-camp-sexual-violence-sudan-and-chad?_s=PM:WORLD (accessed 3 April 2011).; ‘Thousands fall victim to sexual violence in Central African Republic’ <http://www.un.org/apps/news/story.asp?NewsID=25725&Cr=central&Cr1=africa> (accessed 31 October 2011).; ‘Uganda: Sexual abuse survivors in north denied justice - Amnesty’ <http://www.irinnews.org/Report.aspx?ReportId=75620> (accessed 31 October 2011).; ‘Democratic Republic of Congo: Rape as a Weapon in North Kivu, <http://www.doctorswithoutborders.org/news/article.cfm?id=1836> (accessed 31 October 2011).

² For the DRC: Germain Katanga, Mathieu Ngudjolo Chui and Callixte Mbarushimana; for the CAR Jean-Pierre Bemba Gombo; for Uganda Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen; for Darfur, Sudan Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al Rahman and Omar Hassan Ahmad Al Bashir; for Kenya Francid Kirimi Muthaura, Uhuru Muigai, Kenyatta and Mohammed Hussein Ali. Source: ICC Website: <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Cases/> (accessed 31 October 2011).

³ In the situation in the DRC compare *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, sexual slavery under art 8(2)(b)(xxii) and rape under art 8(2)(b)(xxii) as war crimes; and rape under art 7(1)(g) and sexual slavery under art 7(1)(g) as a crime against humanity; In the situation of CAR *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; rape under art 7(1)(g) as a crime against humanity and rape under art 8(2)(e)(vi) as a war crime.

Although international criminal tribunals are nothing new, the ICC is the first international criminal justice instrument endowed with a reparations scheme enabling the Court to address human rights violations committed in the shape of international crimes.

Article 75(1) of the Rome Statute of the International Criminal Court [hereinafter ICC Statute] reads:

‘The Court shall establish principles relating to reparations, to, or in respect of, victims, including restitution, compensation and rehabilitation.’

The reparations regime of the ICC has been said to be, finally, one that could adequately address the needs of victims of sexual violations of international criminal law. Women’s experience and gender-specific harm, such as unwanted pregnancies and unwanted children, social ostracization and HIV/Aids Infections could be repaired through the reparations scheme of the Court.⁴

The purpose of the research paper is to apply the example of victims of sexual violence directly to the reparations regime of the Court. Can it address gender-specific harms experienced by women during conflict in a way that will bring about an improvement for those who suffered?

The question so far only been addressed superficially in the literature. Although some comprehensive studies have been made on Art 75 of the ICC Statute and its related provisions, namely the Rules of Procedure and Evidence of the International Criminal Court [hereinafter: ICC RPE] and the Regulations and the Regulations of the Trust Fund for Victims

⁴ De Brouwer AM ‘Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families’ (2007) 20 *LJIL* 207

[hereinafter: TFVR], non of the studies takes a concrete example and applies it directly to the reparations scheme of the Court. In order to move away from abstraction, this research paper will address reparations possibilities at the ICC for victims of sexual violence by focusing on the gender-specific needs of women who experienced violence in conflicts. It thereby will answer the question, whether reparations provided by the ICC could improve women's lives in post-conflict societies.

2. Significance of the Study

The thesis will make a twofold contribution. First of all, by using a concrete example in examining the reparations regime at the ICC, it will be possible to highlight its chances and limitations in a specific case where harm results from sexual violence. At the same time, because it will be examined in the light of recommendations for gender-sensitive reparations made by Truth Commissions [hereinafter: TCs], it will be possible to make recommendations for reparations for victims of sexual violence at the Court.

3. Research Methodology

The study will be based on the provisions in the ICC Statute, the ICC RPE, the TFVR, and the case law the Court has developed on the definition of victims. Additionally, a comprehensive review of the literature on the subject will be undertaken.

Regarding recommendations by TCs for reparations for victims of sexual violence, the study will be primarily based on their reports and findings.

In relation to gender-specific reparations, the study will reference, *inter alia*, the work of Ruth Rubio-Marín, who has edited two books on the subject and is the leading scholar in the field. The results will be juxtaposed with each other to make recommendations for reparations for victims of sexual violence at the International Criminal Court.

4. Reparations

There is an inconsistency with the use of the term ‘reparations’. Often it is used to describe both, the practice of (international) judicial bodies who decide individual cases, but also to refer to ‘reparations programmes’ that are adopted by states in the post-conflict context and aim at redressing a large number of victims.⁵

According to the ‘2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law’ [hereinafter: Van Boven/Bassiouni Principles] reparations include amongst others, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁶

Reparations enumerated in the Van Boven/Bassiouni Principles are identical with those formulated by the International Law Commission regarding responsibility of states for international wrongful acts.⁷ Thus, reparations under international law do not necessarily follow any national scheme or model.

For the purpose of this study, an emphasis has been put on reparations programmes instead of individual cases, a decision that will be further dealt with in chapter five.

⁵ Saris & Lofts (2009:83).

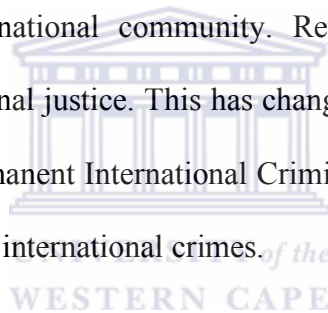
⁶ Van Boven/Bassiouni Principles no 19.

⁷ Tomuschat (2002:160).

CHAPTER TWO

REPARATIONS IN INTERNATIONAL CRIMINAL LAW

The violation of international crimes thus triggers a number of legal consequences ranging from criminal punishment, to the liability for reparations/damages and state responsibility.⁸ In the last 20 years, the international community has focused on the punishment of individual perpetrators.⁹ The establishment of the two ad hoc tribunals for the former Yugoslavia and Rwanda by the UN Security Council [hereinafter: SC], the creation of a permanent International Criminal Court and several so-called ‘internationalised’ or ‘hybrid’ courts and tribunals,¹⁰ are evidence of the effort to end impunity for those who violate crimes which protect the values of the international community. Reparations played no role in the renaissance of international criminal justice. This has changed with the adoption of the Rome Statute and the creation of a permanent International Criminal Court, which contains the first reparations scheme for victims of international crimes.



1. Reparations at UN *ad hoc* Tribunals

In the early 1990s, the SC, acting under Chapter VII of the United Nations Charter, established two International Criminal Tribunals as subsidiary organs.¹¹ International criminal justice was revived for the first time since the International Military Tribunals for Nuremberg and Tokyo.¹² The International Criminal Tribunal for the Former Yugoslavia [hereinafter: ICTY] was established in 1993,¹³ and one year later, the International Criminal Tribunal for

⁸ Werle (2009:41).

⁹ Zegveld (2010:79).

¹⁰ Werle (2009:26).

¹¹ Werle (2009:15).

¹² Werle (2009:15).

¹³ UN Doc S/Res/827 (1993).

Rwanda [hereinafter: ICTR].¹⁴ The UN *ad hoc* tribunals are not vested with the power to make an order for reparations for victims of crimes within their jurisdiction. However, provisions for the restitution of property were inscribed in their statutes. Art 24(3) ICTY Statute and Art 23(3) ICTR Statute, respectively, authorise the *ad hoc* tribunals to order the restitution of property acquired through criminal conduct from the rightful owner as a penalty in addition to imprisonment.¹⁵ The concept of restitution orders has its origin in the creation of the ICTY. The SC considered this ‘type of measure [...] in the nature of a civil remedy [...]’¹⁶ to be an appropriate penalty in the light of deprivation of property as part of the ethnic cleansing policy carried out in the former Yugoslavia.¹⁷

The procedure is specified in the Rules of Evidence and Procedure [hereinafter: RPE] of both the ICTY and ICTR.¹⁸ The restitution of property is, in accordance with Art 24(3) ICTY Statute and Art 23(3) ICTR Statute, respectively, only possible upon a specific finding in the judgement against the accused.¹⁹ In such cases, the prosecutor or the trial chamber acting *proprio motu* can initiate a special hearing for the restitution of property,²⁰ to which all parties affected should be summoned.²¹ The tribunals can only order restitution in cases where the rightful owner can be determined.²²

Apart from restitution of property no other forms of reparations could be made directly at the *ad hoc* tribunals.²³ Rule 106 common to the RPE of the ICTY and ICTR set out that victims

¹⁴ UN Doc S/Res/955 (1994).

¹⁵ De Brouwer (2005:395).

¹⁶ Morris & Scharf (1995:283).

¹⁷ Morris & Scharf (1995:284).

¹⁸ Rule 105 ICTY RPE, ICTR RPE

¹⁹ Rule 98^{ter}(b) ICTY RPE, Rule 88(b) ICTR RPE.

²⁰ Rule 105(a) ICTY RPE, ICTR RPE.

²¹ Rule 105(c) ICTY RPE, ICTR RPE.

²² Rule 105(d)-(f) ICTY RPE, ICTR RPE.

²³ Jorda & De Hemptinne (2002:1391).

have to turn to a national or other competent body to obtain compensation.²⁴ Victims, when applying for compensation to a national or other competent body, could rely on a guilty verdict of the tribunal for the crimes alleged.²⁵ To this day, the *ad hoc* tribunals have not used their power to order the restitution of property.²⁶

The lack of reparations possibilities, especially compensation, has become a key issue of the *ad hoc* tribunals. Former Chief Prosecutor for the ICTY and ICTR, Carla Del Ponte, former ICTR Judge Navathem Pillay, and former ICTY President Judge Claude Jorda addressed the matter in letters to the SC.²⁷ Del Ponte suggested to compensate victims with the money of the accused persons that has been traced and frozen by the Office of the Prosecutor [hereinafter: OTP] through a compensation scheme administered by the *ad hoc* tribunals.²⁸

This proposal was, however, only welcomed in principle. In a letter to the SC, Judge Jorda spoke out against administering reparations claims at the *ad hoc* tribunals because they were not prepared to administer such claims.²⁹ He argued that while there are legal constraints, which could theoretically be overcome,³⁰ the administration of reparations claims would affect the work of the tribunal negatively from a practical point of view.³¹ Instead, he suggested the setting up of an international claims commission for the benefit of the victims of the wars in the former Yugoslavia.³²

²⁴ Rule 106(b) ICTY RPE, ICTR RPE.

²⁵ Jorda & De Hemptinne (2002:1391).

²⁶ De Brouwer (2005:397). There have been attempts at the ICTR by the Rwandan government, the Belgian government and African Concern (an African NGO) to be admitted as *amicus curiae* to make submissions on restitution of property. The attempts however failed due to procedural hurdles arising from the fact that the restitution of property constitutes a form of penalty.

²⁷ Ferstman (2002:667:672).

²⁸ Del Ponte C 'Address to the Security Council by Carla Del Ponte' *Press Release Office of the Prosecutor* 24 November 2000 available at: <http://www.icty.org/sid/7803> (accessed 31 October 2011)

²⁹ Jorda (2000:12).

³⁰ Jorda (2000:12).

³¹ Jorda (2002:14).

³² Jorda (2002:16-7).

In a letter to the SC dated from 2009, ICTY President Judge Patrick Robinson called victim compensation a remaining issue at the ICTY.³³ The fact that it remained unresolved to this date ‘constitutes a serious failing in the administration of justice to the victims of the former Yugoslavia.’³⁴

2. Overview of the Reparations Scheme of the ICC

‘The reparation scheme provided for in the Statute is not only one of its unique features. It is also a key feature. In the Chamber’s opinion, the success of the Court is, to some extent, linked to the success of its reparation scheme.’³⁵



2.1 Historical Background

The lack of reparations possibilities at the *ad hoc* tribunals had an impact on the creation of a permanent International Criminal Court. The drafters of the Rome Statute endowed the ICC with a reparations regime for the benefit of the victims of crimes and their families within the jurisdiction of the Court.³⁶ The recognition of victims’ rights, however, was not merely an act of kindness by the drafters of the Statute. NGOs such as Redress Trust, Women’s Caucus for Gender Justice, Human Rights Watch and the European Law Students Association took an active role in promoting the interests and rights of victims and advocated for a reparations scheme administered by the ICC.³⁷ Indeed, the initial draft statute of the ILC contained no

³³ Robinson (2009:16).

³⁴ Robinson (2009:16).

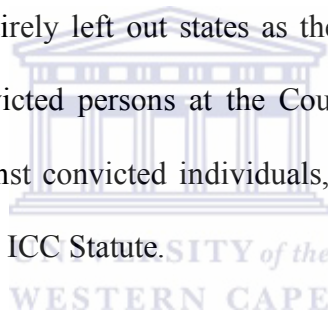
³⁵ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58 (10 February 2006) 136.

³⁶ Jorda & De Hemptinne (2002:1399). MacKay F (2000:166).

³⁷ Van Boven (1999:83); F MacKay F (2000:168).

provisions on reparations.³⁸ As a consequence, the Preparatory Committee for the Rome Conference [hereinafter: PrepCom] negotiations regarding the reparations regime became one of the hot issues in the establishment of the ICC.³⁹

The most controversial issue was whether the Court should be able to pronounce on state responsibility and award reparations against states.⁴⁰ The French and British PrepCom delegations, both pro-reparations, played an important role in the negotiations for the inclusion of a reparations scheme.⁴¹ In August 1997, the French delegation came up with two proposals, which were both rejected on the grounds that their wording would allow for direct and binding orders against states.⁴² In December 1997, the United Kingdom delegation introduced a proposal, which entirely left out states as the addressees of reparations orders and instead focused on the convicted persons at the Court.⁴³ The core idea of the British proposal, reparations orders against convicted individuals, was finally adopted at the Rome Conference in what is now Art 75 ICC Statute.



Reparations orders are, however, not as has been initially discussed at the PrepCom and the Working Group on Procedural Matters at the Rome Conference [hereinafter: Working Group] meetings, a form of penalty that can be imposed against the individual perpetrator.⁴⁴ Thus, Art 75 ICC Statute is placed in Part VI ‘The Trial, and not under Chapter VII ‘Penalties’.⁴⁵

Despite the fact that reparations can only be ordered against convicted individuals, the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the

³⁸ Ferstman (2002:670); Van Boven T (1999:82); MacKay F (2000:167).

³⁹ Donat-Cattin (1999:1402).

⁴⁰ Muttukumaru (1999:267).

⁴¹ Muttukumaru (1999:264:270); Donat-Cattin (1999:1402).

⁴² Muttukumaru (1999:265).

⁴³ Muttukumaru (1999:266).

⁴⁴ MacKay F (2000:169).

⁴⁵ McCarthy (2009:257).

then Draft Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Violations of Human Rights and Humanitarian Law were of great influence in the creation of the reparations regime of the ICC.⁴⁶ Several references to both are made in the *travaux préparatoire* of Art 75 of the ICC Statute and the reports of the Working Group.⁴⁷

2.2. Overview of Article 75 ICC Statute: The Reparations Scheme

The heart of the reparations scheme is Art 75 of the ICC Statute. Art 75(1) ICC Statute sets out that the Court shall establish principles relating to reparations for either the victims themselves or in respect of victims. These principles shall include restitution, compensation and rehabilitation. On the basis of such principles, the Court may determine⁴⁸ the scope and extent of any damage, loss and injury. In such determination, it will state the principles on which it is acting.

The Court may order reparations directly against a convicted person, specifying what kind of reparations are to be made.⁴⁹ Where appropriate, the Court may order that the award for reparations be made through the Trust Fund for Victims of the International Criminal Court, which was established through Art 79 of the ICC Statute.⁵⁰ Before making a reparations order, the Court may invite the convicted person, victims and other interested persons or interested states to make representations. If it so does, it shall take these representations into account.⁵¹ The Court has the power to seek measures on the identification, tracing and freezing of assets of crime in order to give effect to reparations orders, but only once a person is convicted.⁵²

⁴⁶ Donat-Cattin (1999:1402-3).

⁴⁷ Donat-Cattin (1999:1402-03); Lewis & Friman (2001:478); Muttukumaru (1999:270).

⁴⁸ Art 75(1) 2nd sentence ICC Statute.

⁴⁹ Art 75(2) 1st sentence ICC Statute.

⁵⁰ Art 75(2) 2nd sentence ICC Statute.

⁵¹ Art 75(3) ICC Statute.

⁵² Art 75(4) ICC Statute.

states parties are obliged to give effect to the reparations orders of the Court.⁵³ Art 75 ICC Statute does not affect any existing rights of victims under national or international law.⁵⁴

2.3. Overview of Article 79 ICC Statute: The Trust Fund

The Trust Fund is an independent organ of the ICC and has a broader mandate than the administration of reparations orders. It can launch activities and projects that offer rehabilitation and material support to victims of crimes within the jurisdiction of the Court independent of a reparations order.⁵⁵ By Summer 2011, the TFV supported 28 active projects in Northern Uganda and the DRC.⁵⁶

It was established by the Assembly of States Parties in 2002 and shall be managed by a Board of Directors [hereinafter: BoD] consisting of five members serving on a *pro bono* basis.⁵⁷ Furthermore, in 2004, a Secretariat for the TFV was established, and is attached to the Registry of the ICC.⁵⁸ The broader mandate is reflected in the Art 79(1) of the ICC Statute, where it reads ‘for the benefit of victims [...] and of the families of such victims’.

The TFV shall be funded by voluntary contributions from governments, international organisations, individuals, corporations and other entities,⁵⁹ money and property collected through forfeiture, fines transferred to the TFV through Court orders made under Art 79(2) ICC Statute,⁶⁰ resources collected through reparations awards,⁶¹ and other resources that the

⁵³ Art 75(5) ICC Statute.

⁵⁴ Art 75(6) ICC Statute.

⁵⁵ Resolution ICC-ASP/4/Res.3 ‘Regulations of the Trust Fund for Victims no 50(a)(i).

⁵⁶ TFV Programme Progress Report Summer 2011 (2011:4).

⁵⁷ Resolution ICC-ASP/1/Res.6 ‘Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and the families of such victims.’ Annex no 1 & 2.

⁵⁸ Resolution ICC-ASP/3/Res.7 ‘Establishment of the Secretariat of the Trust Fund for Victims.’

⁵⁹ TFVR, no 21(a).

⁶⁰ TFVR, no 21(b).

Assembly of States Parties decides to allocate to the Fund.⁶² The TFV is likely to play a crucial role in the administration of reparations orders by the Court.⁶³

3. The Significance of the Reparations Scheme of the International Criminal Court in the Light of Human Rights Law and Restorative Justice Theory/ Reparative Justice Theory

3.1. The Right to Reparations

The reparations scheme of the ICC has been called a ‘historical possibility to the world community to recognise and enforce the right of victims to reparations, which is a constitutive part of the right to justice.’⁶⁴ Others called the Rome Statute ‘[...] an advancement of the rights and status of victims of serious crimes against international law [...]’.⁶⁵

Whether individuals have a direct right to reparations under international law is, however, contested.⁶⁶ In traditional human rights law, explicit reference made to a duty to repair damage resulting from violations of human rights is made for example in the International Covenant on Civil and Political Rights [hereinafter: ICCPR],⁶⁷ which can be described as an expression of the ‘substantive *duty* to provide reparations.’⁶⁸ The Human Rights Committee, however, has expanded this duty by using Art 2(3) ICCPR which embodies the term

⁶¹ TFVR no 21(c).

⁶² TFVR no 21(d).

⁶³ De Greiff & Wierda (2005:228).

⁶⁴ Donat-Cattin (2009:1400).

⁶⁵ Lewis & Friman (2001:474).

⁶⁶ Tomuschat (2002:183).

⁶⁷ Art 9(5) and Art 14(6) of International Covenant on Civil and Political Rights (ICCPR), adopted by the UN General Assembly in 1966, gives rise to compensation in cases of unlawful detention and miscarriages of justice. Art 14 of the 1975 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment obliges State Parties to ensure that victims of torture receive adequate compensation including the means for full rehabilitation.

⁶⁸ Rombouts *et al* (2005:365).

‘effective remedy’ and concluded that it also encompasses the right to receive reparation in the case any of the ICCPR provisions is breached.⁶⁹ This picture changed further with the establishment of International Human Rights courts, such as the Inter-American Court for Human Rights or the European Court on Human Rights. Both courts have ruled that states must comply with their obligation under the respective human rights instruments to restore the violated rights of victims and provide compensation to them.⁷⁰

The situation is different with regard to International Humanitarian Law. Despite the wording in Art 91 of the Additional Protocol I to the Geneva Conventions protecting civilians, which obliges states parties to pay compensation in case of a violation of the provisions, states are to this date unwilling to accept the existence of an individual’s right for reparations in case of breach.⁷¹ This is perfectly reflected in the denial of national courts to grant individuals claimants standing when suing states for reparations.⁷² It is only recently that the International Court of Justice pronounced on the issue and held that Israel had to pay compensation for the breaches of international humanitarian and human rights law resulting from the construction of a wall in the Occupied Palestinian Territory to ‘all natural and legal persons having suffered any form of material damage as a result if the wall’s construction.’⁷³

Whether the ICC reparations system will indeed have a positive effect on status of the right to reparations in international law cannot be estimated at this stage, because the Court does not have the power to pronounce on state responsibility but can only order reparations against

⁶⁹ *Des Four v. Czech Republic* Communication no 747/1997 (30 October 2001) 9.2.

⁷⁰ *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R., (Ser. C) No. 4 (1988) (29 July 1988) 29 July 1988) 166.

⁷¹ Zegveld (2010:83).

⁷² Zegveld (2010:84).

⁷³ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ICJ Rep 136e (9 July 2004) 153.

natural persons. However, as we have seen, the Court could express its *views* with regard to states (emphasis added).

3.2. Reparations and Restorative/Reparative Justice Theory

The reparations system of the ICC can be understood as a possibility to deliver justice ‘in the wider sense’,⁷⁴ focusing not only on wrongdoers and their conduct, but also on the victims of crimes and their material and moral needs. The discussions at the Rome negotiations show that delegates thought setting up a permanent International Criminal Court due to its retributive and deterrent function could already constitute a form of reparations for the victims.⁷⁵

However, as could be seen from the failure to compensate victims at the ICTY/ICTR, retributive justice does not suffice to satisfy the interests of victims.⁷⁶ Indeed, it has been argued on many occasions that retributive justice addresses the needs of victims inadequately.⁷⁷ ‘Criminal justice [...] is, in the end, a struggle *against perpetrators* rather than an effort made *on behalf of victims*.’⁷⁸

Reparative, or restorative, justice presents itself as an alternative to retributive justice.⁷⁹ Instead of focusing on the blameworthiness of the wrongdoer, *ergo* his deeds and his guilty mind, it focuses on what the wrongdoer could and should do to ‘repair’ the consequences of

⁷⁴ Muttukumaru (1999:264).

⁷⁵ Muttukumaru (1999:264).

⁷⁶ Robinson (2009:16).

⁷⁷ Mani (2005:62).

⁷⁸ De Greiff (2006:2); emphasis added.

⁷⁹ Kelly (2011:194).

the crime.⁸⁰ The aim is to make the victim the central figure of the criminal proceedings, as opposed to the sovereign or the state.⁸¹

In reparative justice theory, the criminal trial is constructed in a way that enables the actors to address the full complexity of the harm done.⁸² Moreover, it aims to create a certain sense of victim ownership over the criminal dispute.⁸³ It also takes a different approach over what consequences should flow from a guilty verdict.⁸⁴ Punishment, in the case of a criminal conviction, focuses on society's needs for protection from, and the correction of the anti-social behaviour of the accused.⁸⁵ Reparations, on the other hand, focus on the needs of the victim, taking into account the complexity of the harm, and focus on the restoration of the victim.⁸⁶

It has been argued, that the provisions governing reparations for victims and victim participation at the ICC strongly reflect elements of reparative justice theory.⁸⁷ However, although the ICC may order reparations against an individual, reparations do not constitute a penalty under the ICC Statute and can thus be disconnected from the perpetrator if this is deemed necessary. Moreover, because reparations do not constitute the basis of the ICC, which is still retributive justice, it rather should be described as a victim centred approach than an element of reparative justice.⁸⁸

⁸⁰ Kelly (2011:194).

⁸¹ McCarthy (2009:252).

⁸² McCarthy (2009:253).

⁸³ McCarthy (2009:253).

⁸⁴ McCarthy (2009:253).

⁸⁵ McCarthy (2009:253).

⁸⁶ McCarthy (2009:253).

⁸⁷ McCarthy (2009:254); De Brouwer (2007:218).

⁸⁸ Vasiliev (2009:677-8).

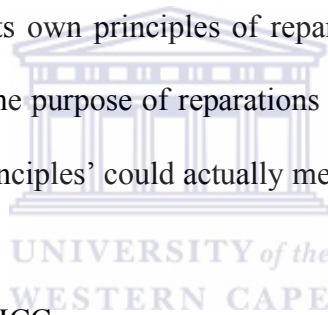
CHAPTER THREE

LEGAL ANALYSIS OF THE RELEVANT REPARATIONS PROVISIONS OF THE ICC STATUTE

In the previous chapter we have seen that the reparations scheme of the ICC is a novelty in the field of international criminal law. This chapter will therefore provide a legal analysis of the reparations scheme and the reparations procedure at the ICC, including the role of the TFV in the implementation of reparations orders.

1. The Reparations Regime of the International Criminal Court

The ICC will have to establish its own principles of reparations it will subsequently apply. This part will therefore look on the purpose of reparations at the ICC, the applicable types of reparations, and discuss what ‘principles’ could actually mean.



1.1 Purpose of Reparations at the ICC

As pointed out earlier, reparations are not a form of penalty that the Court can order in addition to punishment. This, however, does not necessarily negate the objectives of restorative justice on the side of the victims,⁸⁹ such as focusing on the complexity of the harms suffered by the victim. The subsequent reparations of these harms can thus be regarded as one of the main aspects of reparations at the Court. Indeed, the crucial element of the ICC’s victim definition is the harm a person suffered.

It has thus been held that ‘it seems appropriate that the ICC reparations serve purposes that focus on the restoration of victims’ dignity, improvement of living conditions, as well as

⁸⁹ Dwertmann (2010:42).

broader reconciliation.⁹⁰ Reparations at the ICC consequently complement the criminal accountability of the person prosecuted by the Court, and acknowledge that those individuals found responsible for committing international crimes have a duty to repair the harms they have caused,⁹¹ and should moreover have a positive effect on the victims' lives.

1.2. Types of Reparations

The applicable types of reparations, restitution, compensation and rehabilitation, are set out in Art 75(1) of the ICC Statute. There are, however, no definitions of these terms in the Rome Statute. Therefore recourse must be taken to the Van Boven/Bassiouni Principles.⁹²

Restitution should, whenever possible, restore the victim to the original situation he or she was in before the violation occurred. It includes, appropriately, the restoration of liberty, enjoyment of human rights, identity, family life, citizenship, return to one's place of residence, restoration of employment and return of/to property.⁹³ Compensation should be provided for an economically assessable damage resulting from a violation of person's right. Such damage may include physical or mental harm, lost opportunities, including employment, education and social benefits, material damages, loss of earnings, moral damage, and the costs incurred for legal or expert assistance.⁹⁴ Rehabilitation should include medical and psychological care, as well as legal and social services.⁹⁵ The wording of Art 75(1) indicates, that the list of types of reparations is not exhaustive. In line with the Van Boven/Bassiouni

⁹⁰ Dwertmann (2010:42).

⁹¹ Dwertmann (2010:43).

⁹² MacKay F (2000:170).

⁹³ Van Boven/Bassiouni Principles no 19.

⁹⁴ Van Boven/Bassiouni Principles no 20.

⁹⁵ Van Boven/Bassiouni Principles no 21.

Principles, the Court can, when establishing principles of reparations, pronounce on satisfaction and guarantees of non-repetition.⁹⁶

1.3. Establishing 'Principles' of Reparations

The wording of Art 75 of the ICC Statute leaves open which organ of the Court will be responsible for the establishment of reparations principles.⁹⁷ The Court is composed of the Presidency, the Chambers, the OTP and the Registry.⁹⁸ Accordingly, every organ of the Court, or the Court as a whole, could possibly be responsible for the adoption of reparations principles.⁹⁹ A contextual and historical interpretation places the responsibility of adopting the principles of reparations with the Trial Chamber, or with the Chambers in general.¹⁰⁰

The principles will have an important guiding function on the undertakings of the ICC.¹⁰¹ The Court has the chance to ensure fairness and legal certainty through the adoption of principles of reparations,¹⁰² which will be necessary in the light of the expected large numbers of claims. Whether, in practice, such fairness and legal certainty can be achieved depends on how the Court chooses to rule on such principles. It could do so in a general manner,¹⁰³ or on a case-by-case basis.¹⁰⁴

⁹⁶ FIDH (2010:5).

⁹⁷ Dwertmann (2010:47).

⁹⁸ Art 34 ICC Statute.

⁹⁹ Dwertmann (2010:47).

¹⁰⁰ Dwertmann (2010:47).

¹⁰¹ Dwertmann (2010:46).

¹⁰² Dwertmann (2010:46).

¹⁰³ Henzelin *et al* (2006:317:330).

¹⁰⁴ Donat-Cattin (1999:1403).

It has been argued that reparations principles of a general nature would be ‘more in line with the language and underlying policy rationale of Art 75.’¹⁰⁵ Support can be found in the wording of the second sentence of Art 75(1), which suggests that ‘on the basis’ of once and for all established general principles the Court may assess damage, harm and loss.¹⁰⁶ The Court, moreover, must ‘state the principles on which it is acting.’¹⁰⁷ Abstract and general principles, however, run the risk of being too broad and thus having no guiding effect.¹⁰⁸ It would indeed be difficult for the Court to presume all different scenarios of harm that victims could endure in order to enact principles.¹⁰⁹ Donat-Cattin therefore suggests that ‘principles relating to reparations’ will be part of each verdict and contain prescriptions on the right of reparations, even if the Court chooses not to rule on the quantum of reparations.¹¹⁰

Principles established on a case-by-case basis, however, run the risk of resulting in different outcomes emanating from similar factual situations.¹¹¹ The risk of competing principles is high, as the Trial Chambers will have no guidance on how to establish uniform reparations principles.¹¹² However, because the Court did not establish abstract principles so far it is likely that it will do so on a case-by-case basis.¹¹³

¹⁰⁵ Henzlin *et al* (2006:331).

¹⁰⁶ Dwertmann (2010:47) fn 193.

¹⁰⁷ Art 75(1) 2nd sentence ICC Statute.

¹⁰⁸ Dwertmann (2010:48).

¹⁰⁹ Dwertmann (2010:48).

¹¹⁰ Donat-Cattin (1999:1403).

¹¹¹ Dwertmann (2010:48).

¹¹² Dwertmann (2010:48).

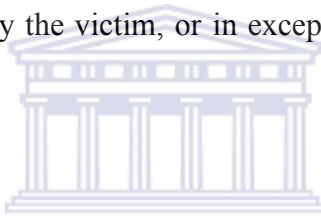
¹¹³ Dwertmann (2010:48).

2. Reparations Order

Reparations procedures can only take place after an accused is finally convicted of one or more crimes by the Court.¹¹⁴ This flows from the wording of Art 75(2) of the ICC Statute, where it says that the Court orders reparations against a convicted person.¹¹⁵

2.1 Initiation of Reparations Procedure

The Court may, upon the principles it has established, determine the scope and extent of any damage, loss and injury and state the principles on which it is acting.¹¹⁶ This procedure, however, can be initiated either by the victim, or in exceptional circumstances, by the Court acting *proprio motu*.¹¹⁷



The Rules of Procedure and Evidence specify the reparations order of Art 75(1) ICC Statute. Rule 94 ICC RPE regulates the ‘procedure upon request’ for reparations filed by the victims. Such request shall be made in writing and filed with the Registrar.¹¹⁸ For the purpose of reparations claims, the Registry prepared the ‘Standard Application Form for Reparations before the International Criminal Court for Individuals and Person Acting on Their Behalf’,¹¹⁹ [hereinafter: Standard Application Form], which has in ? been replaced by the ‘Application Form For Individuals - Request for Participation in Proceedings and Reparations at the ICC’ [hereinafter: Joint Application Form].¹²⁰

¹¹⁴ FIDH (2010:10).

¹¹⁵ FIDH (2010:10), fn 29.

¹¹⁶ Art 75(1) 2nd sentence ICC Statute.

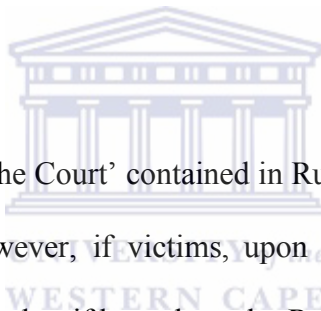
¹¹⁷ Art 75(1) 2nd sentence ICC Statute.

¹¹⁸ Rule 94(1) ICC RPE.

¹¹⁹ FIDH (2010:11); available in FIDH (2010:42).

¹²⁰ Available at: <http://www.icc-cpi.int/NR/rdonlyres/48A75CF0-E38E-48A7-A9E0-026ADD32553D/0/SAFIndividualEng.pdf> (accessed 31 October 2011).

If, however, victims cannot obtain such forms they may file their claims by other written means.¹²¹ In case a victim is illiterate or is in any other way unable to file a written claim, she or he may make an application according to Rule 102 ICC RPE in audio, video or other electronic form.¹²² The request shall contain details about the claimant¹²³ and the incident,¹²⁴ as well as a description of the injury, loss or harm incurred.¹²⁵ The applicant should also describe what reparations she or he is seeking.¹²⁶ Moreover, the application should be accompanied by supporting documentation, to the extent that this is possible.¹²⁷ Rule 94 ICC RPE has been drafted in a way that allows the Court to encourage victims to file their claims as soon as possible, even if the identity of a wrongdoer at the time of the application is still unknown.¹²⁸ It will thus be up to the Court to link the reparations claims to defendants/debtors at the Court.¹²⁹



The ‘procedure on the motion of the Court’ contained in Rule 95 ICC RPE is distinct from the ‘procedure upon request’.¹³⁰ However, if victims, upon notification by the Registrar, file applications, they will be considered as if brought under Rule 94 ICC RPE.¹³¹

¹²¹ FIDH (2010:11).

¹²² FIDH (2010:11).

¹²³ Rule 94(1)(a) ICC RPE.

¹²⁴ Rule 94(1)(c) ICC RPE.

¹²⁵ Rule 94(1)(b) ICC RPE.

¹²⁶ Rule 94(1)(d)-(f) ICC RPE.

¹²⁷ Rule 94(1)(g) ICC RPE.

¹²⁸ Lewis & Friman (2001:480).

¹²⁹ Lewis & Friman (2001:480). FIDH (2010:13). It is task of the Registry to gather the applications and submit them to the relevant chambers.

¹³⁰ Rule 95 ICC RPE.

¹³¹ Rule 95(2)(a) ICC RPE. Rule 95 also provides for the case that a victim requests the Court not to make an order for reparations. The Court shall then not proceed with reparations proceedings in that particular case, Rule 95(2)(b) ICC RPE.

2.2 Reparations Proceedings

The reparations proceedings will take place before the completion of the trial. Nevertheless, because claims can be filed at an early stage of the proceedings, the Registrar shall notify an accused person at the beginning of his or her trial whether claims for reparations have been filed against her or him.¹³² The Registrar shall, at the same stage of the proceedings, also notify any interested persons or interested states.¹³³ Those notified will have time to file representations, which shall then be taken into account by the Court before making an reparations order.¹³⁴

Once the trial is almost completed, the Registrar shall, according to Rule 96(1) ICC RPE, notify the victims including their legal representatives and the person or persons concerned that reparations proceedings are about to commence. The Registrar is moreover obliged to seek the widest possible publicity to the reparations proceedings.¹³⁵

Evidence and submissions for reparations shall be made during a further hearing intended to hear additional evidence or submissions relevant to the sentence before the completion of the trial.¹³⁶ For the purpose of such hearing, the legal representatives of the victims may question witnesses, experts and other persons concerned.¹³⁷

¹³² Rule 94(2) ICC RPE.

¹³³ Rule 94(2) ICC RPE.

¹³⁴ Art 75(3) ICC RPE.

¹³⁵ Rule 96(1) & (2) ICC RPE.

¹³⁶ Art 76(3) ICC Statute.

¹³⁷ Rule 91(4) ICC RPE.

2.3 Reparations Awards

The Court may award reparations on an individual, or, where it deems this more appropriate, on a collective basis.¹³⁸ It can, however, also choose to do both.¹³⁹ According to Rule 98(1) ICC RPE, individual awards of reparations shall be made directly against a convicted person. However, the Court may order that an award for reparations against a convicted person be made through the Trust Fund, in particular, where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate.¹⁴⁰

3. Role of the Trust Fund in the Reparations Process

The role of the TFV was, for quite some time after the adoption of the ICC Statute, obscure. It has therefore been suggested at an early stage already that reparations should be entirely delegated to the TFV and an independent committee of experts.¹⁴¹

It becomes clear from a reading of Articles 75(2) and 79(2) ICC Statute that the TFV's role in the reparations regime will be twofold.¹⁴² The Court, according to Art 75(2) ICC Statute may, in exceptional circumstances, order that reparations be made *through* the TFV.¹⁴³ The TFV, however, also functions as a depository.¹⁴⁴ According to Art 79(2), money and other property collected through fines or forfeiture imposed in addition to imprisonment¹⁴⁵ may be transferred by Court order to the TFV. In addition to that, the Court may order that individual reparations awards made against a convicted person be deposited with the TFV where it is

¹³⁸ Rule 97(1) ICC RPE.

¹³⁹ Rule 97(1) ICC RPE.

¹⁴⁰ Rule 98(2) ICC RPE.

¹⁴¹ Jorda & De Hemptinne (2002:1415).

¹⁴² Ingadottir (1999:14)

¹⁴³ Rule 98(3) ICC RPE.

¹⁴⁴ Ingadottir (1999:14)

¹⁴⁵ Art 77(2) ICC Statute.

impossible or impracticable to make them directly to each applicant.¹⁴⁶ The property from such a reparations order shall be separated from other resources and funds of the TFV.¹⁴⁷

The relationship between the TFV and the Court with regard to reparations is further set out in the TFVR. When the Court orders an award for reparations in accordance with Rule 98(2)-(4) ICC RPE, the Secretariat of the TFV shall prepare a draft plan to implement the order and submit the plan for approval by the BoD.¹⁴⁸ In determining the nature and the size of the awards, the Trust Fund must take into account the nature of the crimes, the particular injuries or harm the victims have suffered, and the nature of evidence available to the victims to prove the harm and injuries.¹⁴⁹ The BoD will then determine whether the funds collected through awards of reparations shall be supplemented with other resources of the TFV and communicate its findings and advice to the Court.¹⁵⁰ These supplementary funds are of particular importance for the reparations regime and the BoD must take them into account when managing other activities, using the TFV's budget.¹⁵¹ With regard to individual awards to victims deposited with the Trust Fund pursuant to Rule 98(2) ICC RPE, the draft implementation plan shall set out the names and locations of the beneficiaries and the methods of disbursements of the order.¹⁵² Where the Court orders individual awards, but does not specify the names of the beneficiaries and the identification of each beneficiary would be unrealisable, the Secretariat shall set out the demographic and statistical data about the group of victims and list options for determining missing details for approval by the BoD.¹⁵³

¹⁴⁶ Rule 98(2) ICC RPE.

¹⁴⁷ Rule 98(2) 2nd sentence ICC RPE.

¹⁴⁸ TFVR no 54.

¹⁴⁹ TFVR no 55.

¹⁵⁰ TFVR no 56.

¹⁵¹ TFVR no 56.

¹⁵² TFVR no 59.

¹⁵³ TFVR no 60.

Such options may include targeted outreach and the consultation of victims or other competent or interested person, states and organisations.¹⁵⁴ It is also up to the TFV to determine the modalities of the disbursement of reparations awards,¹⁵⁵ and it may decide to use intermediaries to facilitate their disbursement.¹⁵⁶ Intermediaries may include interested states, intergovernmental organisations and well as national or international NGOs working in close proximity with the beneficiary groups.¹⁵⁷ Upon receipt of reparations awards, beneficiaries shall acknowledge receipt in writing or by other means of identification.¹⁵⁸

With regard to collective awards ordered under Rule 98(3) ICC RPE, the draft plan prepared by the Secretariat shall set out the precise nature of the collective awards, where the Court did not already do so, as well as methods for the plan's implementation.¹⁵⁹ The Court has to approve the determinations made by the Secretariat.¹⁶⁰ In order to determine the nature of the collective award and methods for their implementation, the BoD may consult victims, their legal representatives, their families and any competent expert or expert organisation.¹⁶¹

The Court may order that an award for reparations be made through the TFV to an approved intergovernmental, international or national organisation.¹⁶² The TFV is responsible for approving such organisations.¹⁶³ The procedure for approval, however, is not specified.¹⁶⁴

¹⁵⁴ TFVR no 61(b) & (c).

¹⁵⁵ TFVR no 66.

¹⁵⁶ TFVR no 67.

¹⁵⁷ TFVR no 67.

¹⁵⁸ TFVR no 68.

¹⁵⁹ TFVR no 69.

¹⁶⁰ TFVR no 69.

¹⁶¹ TFVR no 70.

¹⁶² Rule 98(4) ICC RPE.

¹⁶³ FIDH (2010:27).

¹⁶⁴ FIDH (2010:27).

CHAPTER FOUR

ANALYSIS OF HARMS SUFFERED BY WOMEN RESULTING FROM CRIMES OF SEXUAL VIOLENCE COMMITTED IN ARMED CONFLICT

Women experience all kinds of harms in conflict situations: ‘Women, too, lose homes, land, possessions, sources of income, local networks of material and emotional support, and family members, or whole families.’¹⁶⁵ Sexual violence, however, can have consequences that go beyond material and moral losses, and, as we shall see, often continue even after the actual hostilities have ceased.

This chapter does, however, not suggest that the harms women suffer as a result of sexual crimes committed against them in peacetime or in post-conflict situations are less severe, nor that such harms deserve less attention than harms suffered in the course of conflict.

1. Shifting the Focus from Crimes to Reparations: A Concept of Gender-specific Harms

When the terms ‘sexual’ and ‘gender-based’ are used in connection with ‘violence’, this almost exclusively refers to women.¹⁶⁶ Whereas women might be disproportionately affected,¹⁶⁷ men and boys can become victims of sexual violence, too.¹⁶⁸

The implications of this undifferentiated use of terms are that gender-based and even sexual violence become politicised,¹⁶⁹ and are used by interests groups to highlight the suffering of

¹⁶⁵ Urban Walker (2009:19).

¹⁶⁶ See for example: Beijing Declaration and Platform of Action (1995) (D). ‘The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life [...]’. But see Carpenter (2006:86) pointing out that most definitions of ‘gender-based violence’ are inclusive and do capture violence against men and boys.

¹⁶⁷ See CAVR-Sexual Violence (2003:6); Carpenter (2006:94) warns that such findings or assumptions can be the result of incorrect or incomplete data collection, if the focus is primarily on sexual violence against women.

¹⁶⁸ Lewis (2009-10:6).

women only. This carries the risk of rendering gender-based and sexual violence against men and boys invisible. Moreover, this may obscure the complexity of sexual or gender-based violence as observed by Margaret Urban Walker: '[R]ecently won attention to sexual violence against women might be at the expenses of a fuller and more nuanced understanding of women's losses, injuries and suffering.'¹⁷⁰

At the ICC, sexual violence is as an act of a sexual nature committed by force or by threat of force or coercion,¹⁷¹ and is thus gender-neutral. The ICC therefore offers a unique possibility to shift the gender-perspective from crime to reparations.

According to Robin West, 'women sustain physical, emotional, psychic and political harms in daily life-indeed for many women on a daily basis-which have no or little counterpart in men's lives.'¹⁷² West's understanding of gender-specific harm will serve as the foundation for this analysis because it allows us to take into account that women and men do experience harm differently, and permits us to conceptualise better *why* this is the case.¹⁷³ This chapter will therefore look at gender-specific harms resulting from sexual crimes committed against women. Although 'gender-sensitive, gender-equitable, or gender-just' reparations are, however, a relative novelty,¹⁷⁴ there is a great deal of literature about gender-specific harms women suffer as a result of sexual violence.

¹⁶⁹ Carpenter (2006:86).

¹⁷⁰ Urban Walker (2009:60).

¹⁷¹ Elements of Crimes (2011) Art 7(1)(g)-6.

¹⁷² West (1999:100).

¹⁷³ Carpenter (2006:96) argues that a form of gender-based violence is the secondary victimization of men who have to the rapes of family members, resulting in trauma. If applied broadly, a gender-specific understanding of reparations can address such harms, without necessarily entering the superfluous discussion about it is a crime against men or women.

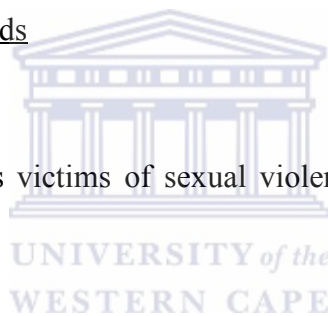
¹⁷⁴ Urban Walker (2009:22).

2. Gender-specific Harms Resulting from Crimes of Sexual Violence

Harms resulting from sexual violence are complex and interconnected. A categorisation is therefore likely to create tensions. In order to analyse gender-specific harms and develop possibilities for reparations at the ICC to address these harms, the different kinds of harm will first be assessed separately and only later be looked at as a whole. The following analysis is by no means exhaustive and focuses primarily on individual cases based on truth commission reports, reports of human rights organisations and examples found in the literature.

2.1 Harms relating to Physical Well-being: Physical Integrity, Psychological Problems, Reproductive Health, and HIV/Aids

This section addresses the harms victims of sexual violence suffer affecting their physical well-being.



2.1.1. Physical Integrity

Sexual violence affects women's physical integrity, especially where it is accompanied by genital mutilation or the insertion of sharp or dangerous objects into the genital organs of the victim.¹⁷⁵ According to Amnesty International, almost all survivors of sexual violence in Sierra Leone had to be treated for physical injuries resulting from rapes.¹⁷⁶ A common phenomenon in the Sierra Leonean context was the occurrence of 'fistulas', a rupture between either the bladder and the vagina or between the rectum and the vagina.¹⁷⁷ Rectal injuries

¹⁷⁵ Nduwimana (2004:19); Injuries resulting from such practice are also documented for male on male sexual violence Lewis (2010:12).

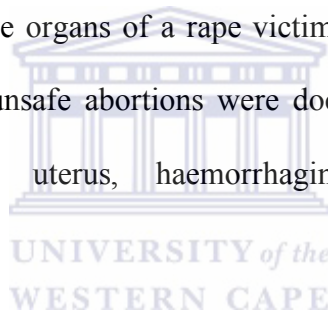
¹⁷⁶ Amnesty International Sierra Leone-Rape (2000:2).

¹⁷⁷ Sierra Leone TRC-Report (2004:256).

inflicted through anal rape could also occur.¹⁷⁸ Young girls who fell pregnant as a consequence of rape could sustain permanent damage such as incontinence through muscle injuries in the course of giving birth.¹⁷⁹ *Médecins sans Frontières* reported a case in Sudan in which the rape of a pregnant woman resulted in a miscarriage.¹⁸⁰

2.1.2. Reproductive Health

The rape with sharp and dangerous objects can have a severe impact on the reproductive health of victims. Although not specifying the nature of the sexual violence, Amnesty International reported the case of a 16-year-old girl who had to undergo a hysterectomy after repeated rape.¹⁸¹ The reproductive organs of a rape victim can also be damaged through an unsafe abortion.¹⁸² In Rwanda, unsafe abortions were documented to have caused ‘uterine infections, rupturing of the uterus, haemorrhaging, and other gynaecological complications.’¹⁸³



2.1.3. Psychological Problems

Sexual violence, especially if committed repeatedly and violently, results in trauma and stress. Studies found that survivors are troubled by so-called flashbacks of the experienced events.¹⁸⁴ Psychological consequences include ‘anxiety, depression, nightmares, anger and fear [...]’¹⁸⁵

¹⁷⁸ McKay S (1998:385).

¹⁷⁹ McKay S (1998:385).

¹⁸⁰ *Médecines Sans Frontières* (2005).

¹⁸¹ Amnesty International Sierra Leone-Rape (2000:2).

¹⁸² McKay S (1998:385).

¹⁸³ Human Rights Watch (1996:46).

¹⁸⁴ McKay S (1998:385).

¹⁸⁵ Amnesty International Sierra Leone-Reparations (2007:10).

Physical signs of stress include headaches, back and stomach pain.¹⁸⁶ Survivors can, moreover, have trouble to engage in intimate relationships.¹⁸⁷

2.1.4. HIV/Aids and other Sexually Transmitted Diseases

Rape might result in the transmission of sexually transmitted diseases [hereinafter: STDs] such as syphilis, gonorrhoea and vaginitis.¹⁸⁸ What is critical is the transmission of HIV/Aids, which requires a lifelong medical treatment due to its chronic character. In contrast, other STDs are often only acute, requiring only a once-off medication.

HIV/Aids infections are said to be prevalent in areas affected by conflict.¹⁸⁹ Rwandan survivors were said to show an infection rate of 70-80%.¹⁹⁰ A comparative study from 2007, however, found that no significant increase of HIV/Aids infections had taken place in Rwanda despite the 1994 genocide.¹⁹¹ Similar findings were made with regard to other conflict-affected areas in Africa.¹⁹² Although the study compared available data only and therefore warned about possible incompleteness, the findings are surprising and will be of concern for assessment of reparations at the ICC.

2.2. Harms Relating to Social Status: Social Ostracization and Poverty

In addition to harms affecting physical well-being, sexual violence can result in harms relating to the social status of the victims.

¹⁸⁶ Amnesty International Sierra Leone-Reparations (2007:10).

¹⁸⁷ McKay S (1998:385).

¹⁸⁸ Human Rights Watch (1996:45).

¹⁸⁹ De Brouwer (2007:212).

¹⁹⁰ De Brouwer (2007:212).

¹⁹¹ Spiegel *et al* (2007:2191:2193).

¹⁹² Spiegel *et al* (2007:2191).

2.2.1. Social Status / Social Ostracization

Depending on the cultural background of the person, sexual violence can result in the loss of social status for survivors. If a woman's identity is connected to her virginity, loss of virginity through rape can result in a loss of social status if as a result the community regards survivors as unfit for marriage.¹⁹³

In many cultures women who are raped are ostracised. IRIN cites the case of a woman in the DRC, who was abandoned by her husband after she told him that she had been raped.¹⁹⁴ Similarly, in Rwanda a woman explained it as follows: 'They [the community] didn't respect you, they isolate you, people said that we [rape survivors] were no different from prostitutes because we accepted having sex with any man who wanted to have sex with us [...].'¹⁹⁵ The stigma attached to rape also holds survivors back from seeking medical and psychological assistance.¹⁹⁶

2.2.2. Poverty

As a result of social ostracization, survivors may find it hard support themselves. An Amnesty International report on about Sierra Leone cites the case of a former girl soldier who went through a Disarmament, Demobilization, and Reintegration program and who said that the

¹⁹³ Mukamana & Brysiewicz (2008:382); see also Amnesty International Sierra Leone-Reparations (2007:8).

¹⁹⁴ IRIN Web Special (2004:8).

¹⁹⁵ Mukamana & Brysiewicz (2008:382); Human Rights Watch (1996:47).

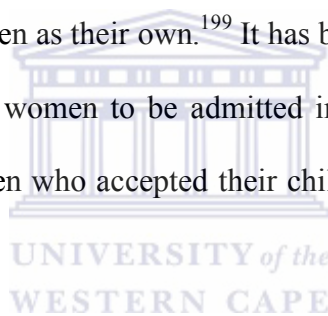
¹⁹⁶ Amnesty International Sierra Leone-Reparations (2007:7).

program did not prepare her sufficiently on how to provide for herself, after which she decided to engage in prostitution.¹⁹⁷

2.3. Children Born as a Result of Rape

‘Women’s bodies can also, of course, be impregnated, while men’s cannot. As a consequence, both sexual assault and unwanted pregnancies are central and defining harmful experiences for women in ways that have no correlate in men’s daily lives.’¹⁹⁸

Women who fell pregnant as a result of rape may decide not to have an abortion, or find themselves at a stage of the pregnancy where abortion is not possible anymore. Women face difficulties in accepting the children as their own.¹⁹⁹ It has been reported that associating these children with rape has led some women to be admitted into hospitals anonymously.²⁰⁰ But there are also reports about women who accepted their children.²⁰¹ Children born out of rape may also face stigmatisation.²⁰²



3. The Complexity of Gender-specific Harms

The proposed categorisation distinguishes roughly between harms affecting the physical well-being of female victims of sexual violence and harms affecting their social status.²⁰³ The third category, namely children born as a result of rape, is not conceptualised as ‘harm’ here; it does, however, alter the victim’s material and social position. These categories, however, are

¹⁹⁷ Amnesty International Sierra Leone-Reparations (2007:14).

¹⁹⁸ West (1999:101).

¹⁹⁹ Human Rights Watch (1996:46).

²⁰⁰ Human Rights Watch (1996:47).

²⁰¹ Mukamana & Brysiewicz (2008:382).

²⁰² CAVR-Sexual Violence (2003:100).

²⁰³ See for other categorisations Duggan & Jacobson (2009:124): ‘emotional, spiritual and material losses’. See also Urban Walker (2009:23) ‘gender-normative violence; sex-, reproduction and care-specific violence; gender-skewed violence; gender-multiple violence’ and related harms.

likely to overlap. Loss of reproductive capacity, for example, will affect a woman's ability to get married, as she will no longer be able to deliver children. The same applies to an HIV/Aids infection.²⁰⁴ Out of fear of losing their social status, many women do not get tested which, consequently, will affect their physical wellbeing.²⁰⁵

Moreover, women experience harm differently when gender intersects with 'class, ethnicity, cast, religion' or other factors.²⁰⁶ Thus rural or indigenous women may suffer different harms than women in urban areas.

Consequently, the culture and social fabric in which sexual violence takes place determines what harms women experience, and how they experience them. This applies to harms resulting from sexual violence and those resulting from 'non-gendered' crimes or abuses. A society's concept(s) of 'woman' should be scrutinised closely. Violence, whether sexual or not, that is inflicted upon women 'because they are women' will inevitably and consequently result in harms that women suffer 'because they are women'.²⁰⁷

²⁰⁴ Mukamana & Brysiewicz (2008:382).

²⁰⁵ Human Rights Watch (1996:45).

²⁰⁶ Urban Walker (2009:55).

²⁰⁷ Urban Walker (2009:56).

CHAPTER FIVE

REPARATIONS FOR VICTIMS OF SEXUAL VIOLENCE IN THE POST-CONFLICT SETTING: OVERVIEW OF SCHOLARSHIP AND TRUTH COMMISSION RECOMMENDATIONS

This chapter looks at how reparations can be used to address these harms in a way that can help women rebuild and improve their lives. Attempts to craft reparations in a way that facilitates this purpose have been undertaken in the context of transitional justice.

This chapter will then look into how reparations can be ‘engendered’. For this purpose, the reparations recommendations for victims of sexual violence by the Truth Commissions of Sierra Leone and East Timor will be examined, of which some were gender-neutral, others gender-specific.



1. Transitional Justice and Reparations: Between Accountability and Possibilities for Change

Although the term ‘transitional justice’ is ill-defined,²⁰⁸ it can generally be understood to refer to a ‘set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law.’²⁰⁹

Reparations in this context have a backward-looking or reparative purpose that aims at compensating victims for past wrongs, and a forward-looking or political purpose as a part of a state’s reconciliation and nation building policy.²¹⁰ Moreover, reparations constitute an accountability mechanism because they involve an element of responsibility for past

²⁰⁸ Roht-Arriaza (2006:1).

²⁰⁹ Roht-Arriaza (2006:2).

²¹⁰ Teitel (2000:127).

wrongdoings.²¹¹ Reparations can lay the foundation for a ‘new political community’²¹² through the recognition of victims as citizens,²¹³ and the creation of trust between individuals and between them and the new state.²¹⁴

According to Pablo de Greiff, transitional societies should thus adopt administrative reparations programmes.²¹⁵ By providing reparations through administrative programmes, it is possible to reach large numbers of victims,²¹⁶ including those living in rural areas and those who are less educated.²¹⁷ Moreover, reparations programmes can, in particular where resources are scarce, be used to distribute the funds available in a way that will benefit all victims,²¹⁸ and can also take into account harm that has been suffered collectively. Finally, through reparations programmes victims can be exonerated from producing ‘hard’ evidence in order to obtain reparations, which in many cases will be impossible.²¹⁹

It could thus generally be useful for the ICC to look into how reparations have been conceptualised in the context of transitional justice.²²⁰ The ICC will deal with large numbers of victims, typical for post-conflict situations.²²¹ Secondly, the ICC should take the Van Boven/Bassiouni Principles into account when assessing reparations. As we have seen, the principles follow the reparations concept that has no correlate in national systems, and as we shall see, Truth Commissions frequently rely on them when designing their reparations recommendations. Lastly, ‘what needs to be redressed in the aftermath of systematic crime is

²¹¹ Teitel (2000:127).

²¹² Rubio-Marín (2009:69).

²¹³ De Greiff (2006:460).

²¹⁴ De Greiff (2006:462).

²¹⁵ De Greiff (2006:459).

²¹⁶ De Greiff (2006:458).

²¹⁷ De Greiff (2006:458).

²¹⁸ De Greiff (2006:456).

²¹⁹ De Greiff (2006:459).

²²⁰ De Greiff & Wierda (2005:232).

²²¹ De Greiff & Wierda (2005:232).

not only individual harm but human and social relations that have been violently destroyed.²²² Although this seems to apply only in the state's context, reparations at the ICC will also aim at the related concepts of improving victims' lives, the restoration of dignity and broader reconciliation.²²³

2. Gender-specific Reparations: A Theoretical Framework

Gender-specific reparations are reparations that are defined in a way that addresses gender-specific harms adequately and, moreover, aim at improving women's lives. In the following, the theoretical framework for gender-specific reparations will be sketched.

2.1. The Transformative Potential of Reparations for Women

According to Ruth Rubio-Marín, gender-specific reparations have the potential 'to subvert, instead of reinforce, pre-existing structural gender inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes.'²²⁴

One reason for this is that transitional societies often find themselves in a condition in which everything needs to be rebuilt from scratch.²²⁵ This is particular true for states that have been affected by a long-lasting conflict. Where it is claimed that women are disproportionately targets of sexual violence, men are disproportionately targets of killings.²²⁶ Conflicts can change the demographics of whole areas and '[W]ith the absence of men from traditional public spaces, women fill vacuums and increasingly occupy a diversity of spaces and roles

²²² De Greiff & Wierda (2005:233).

²²³ Compare above 17.

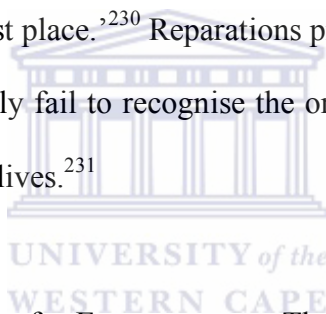
²²⁴ Rubio-Marín (2009:66).

²²⁵ Duggan & Abusharaf (2006:629).

²²⁶ Carpenter (2006:88).

[from markets to government], often providing for the welfare and security of their families.²²⁷ The absence of men can therefore increase the suffering of women who now find themselves being the sole bread winner of the family,²²⁸ but it also ‘opens up ‘historic opportunities for the redefinition of gender roles.’²²⁹

Reparations in the state context should therefore not only encompass ‘the recognition of the violation of a victim’s right and the acknowledgment of state responsibility for these violations’, but they also the raise the issue of the consequences these infringements have and make a ‘serious attempt to help victims cope with some of the effects of the violations and to subvert, however minimally, the structures of subordination that might have led to the violations of their rights in the first place.’²³⁰ Reparations programmes that aim at reverting to the *status quo ante* will necessarily fail to recognise the origin of gender-specific harms and are unlikely to improve women’s lives.²³¹



2.2. Reparations and the Possibility for Empowerment: The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation

At an international meeting in March 2007 in Nairobi, Kenya, women’s rights experts and survivors of sexual violence in conflict situations adopted the ‘Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation’ [hereinafter: Nairobi Declaration].²³²

The Nairobi Declaration does not create new obligations under international law,²³³ but understands itself as a supplement to the van Boven/Bassiouni principles by re-defining

²²⁷ Duggan & Abusharaf (2006:629).

²²⁸ Rubio-Marín (2009:91).

²²⁹ Duggan & Abusharaf (2006:629).

²³⁰ Rubio-Marín (2009:71).

²³¹ Rubio-Marín (2009:71).

²³² Couillard (2007:445).

reparations in the post-conflict setting from women's point of view.²³⁴ The Nairobi Declaration demands reparations programmes that are all-encompassing, including an acknowledgment of accountability and a design that aims at transforming socio-cultural injustices and political inequalities.²³⁵ According to the Nairobi Declaration, reparations must be designed in a non-discriminatory way, comply with existing reparations standards on the international and regional levels, and contribute to women's empowerment by taking into account women's participation in decision-making.²³⁶

Moreover, the Nairobi Declaration gives detailed recommendations on the content of reparations in general, and for women and girls specifically. First of all, the Nairobi Declaration calls upon governments to take reparations seriously, and not undertake development instead.²³⁷ Reparations should be just, effective, prompt and proportional to the gravity of the harm suffered.²³⁸ Reparations should 'go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives.'²³⁹ Reparations programmes should thus be designed in way that takes women's interests and needs into account. They should moreover guarantee full participation of women at all stages of reparations, including design, implementation, evaluation and decision-making,²⁴⁰ whereby 'women' should be represented according to their age and cultural diversity.²⁴¹ Finally, governments should 'take into account the multi-dimensional and long-term consequences of these crimes to women and girls, their families and their communities, requiring specialized,

²³³ Couillard (2007:448).

²³⁴ Couillard (2007:449).

²³⁵ Nairobi Declaration *Declaration 3* and 5.

²³⁶ Nairobi Declaration, no 1A, 1C and 1D.

²³⁷ Nairobi Declaration no 3B.

²³⁸ Nairobi Declaration no 3E.

²³⁹ Nairobi Declaration no 3H.

²⁴⁰ Nairobi Declaration no 2B.

²⁴¹ Nairobi Declaration no 2A.

integrated, and multidisciplinary approaches.²⁴² The Nairobi Declaration thus promotes reparations as a ‘transformative process that is both participatory and empowering’ for women.²⁴³

2.3 Obstacles Encountered

Apart from the problems that may arise from the selection of crimes that should be included as reparable crimes in reparations programmes,²⁴⁴ and who the beneficiaries should be,²⁴⁵ one encounters a number of structural problems with regard to reaching out to the women.

First of all, the stigma attached to sexual crimes and the fear of ostracization may hold women back from obtaining reparations if reparations programmes or reparations measures require women to ‘come out’ as victims of sexual violence.²⁴⁶ It could therefore be useful to create safe spaces for women who want to testify or talk about sexual violence, guaranteeing their anonymity.²⁴⁷

Another problem is the existence of a plurality of legal regimes, which means the nation state’s law and customary laws.²⁴⁸ Chances are high that, although national laws provide formal equality or grant women particular rights, unfavourable customary law rules may jeopardise their rights to gain access to court or to private property.²⁴⁹ If women cannot own or inherit property, reparations that aim at the restitution of property or of land will not benefit

²⁴² Nairobi Declaration no 3E.

²⁴³ Saris & Lofts (2009:39).

²⁴⁴ Rubio-Marín (2009:71). Rubio-Marín points out that closed list approaches or definitions that are too narrow may deprive some victims of sexual violence from obtaining reparations. (2009:81).

²⁴⁵ Duggan & Jacobson (2009:137). As pointed out below, some TCs include children of victims of sexual violence in the list of beneficiaries, although they do not qualify as victims as such.

²⁴⁶ Duggan & Abusharaf (2006:633).

²⁴⁷ Rubio-Marín (2009:80).

²⁴⁸ Duggan & Abusharaf (2006:632).

²⁴⁹ Duggan & Abusharaf (2006:632).

them,²⁵⁰ and are likely to overlook women's needs.²⁵¹ Moreover, if compensation is calculated on the 'lost earnings' formula, women could also be left behind, in particular if they did not pursue any activity that was remunerated as is typical for men.²⁵²

In some societies, women are 'valued' by attributes such as virginity or sexual purity, which cannot be restored through restitution.²⁵³ Moreover, such female 'qualities' are based on discriminatory stereotypes and patriarchal values.²⁵⁴ Reparations programmes should therefore not rely on these standards as guiding principles, otherwise they might run the risk of 'perpetuating discrimination' at the expense of re-conceptualising a compensation mechanism that can be accessed by women.²⁵⁵

Evidentiary proof of one's victim status is yet another obstacle. Although administrative programmes can lower the standard of proof in comparison to courts, some women might still face difficulties in obtaining 'hard' evidence such as medical reports.²⁵⁶ It has therefore been suggested that reparations programmes should value the testimonies of victims as much as traceable mental health consequences, or 'simply a system of presumptions based on patterns of criminal conduct could be relied on as sufficient sources of evidence.'²⁵⁷

²⁵⁰ Rubio-Marín (2009:104).

²⁵¹ Rubio-Marín & De Greiff (2007:332).

²⁵² Rubio-Marín & De Greiff (2007:332).

²⁵³ Duggan & Jacobson (2009:139).

²⁵⁴ Duggan & Jacobson (2009:139).

²⁵⁵ Rubio-Marín (2009:105).

²⁵⁶ Rubio-Marín (2009:79).

²⁵⁷ Rubio-Marín (2009:79).

3. Gender-specific Reparations Recommendations by Truth Commissions: Sierra Leone and East-Timor

Many countries in which gross human rights violations or violations of international humanitarian law have been committed opt for the establishment of truth commissions (TCs) that process the past. Although TCs never order or distribute reparations themselves, they usually have the mandate to make recommendations that may or may not serve as the basis for a reparations programme or legislation by the state.²⁵⁸ Two TCs stand out for having recommended detailed gender-specific reparations measures for victims of sexual violence: those of Sierra Leone and East Timor. Both TCs developed their recommendations by taking into account the Van Boven/Bassiouni Principles.²⁵⁹

3.1. Gender-specific Reparations in East Timor

The *Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste* (Commission for Reception, Truth and Reconciliation in East Timor, commonly known by its Portuguese acronym CAVR) was established in 2001 under the United Nations Transitional Administration in East Timor. Its mandate was to inquire into human rights violations perpetrated by all sides between 1974 and 1999 and to help to reconcile the communities, *inter alia* with justice for the people liable for lesser crimes. It devoted a whole chapter of its report to the issue of sexual violence, and large parts of the recommendations as to reparations focused in particular on female victims of sexual violence.²⁶⁰

²⁵⁸ Mani (2005:63).

²⁵⁹ Sierra Leone TRC-Report (2004:231); CAVR-Reparations (2003:37).

²⁶⁰ CAVR-Reparations (2003:41) ‘Victims of sexual violence are those women and girls who were subjected to acts such as rape, sexual slavery, forced marriage or other forms of sexual violence; and boys and men who suffered sexual violence.’

The reparations programme in East Timor encompassed an urgent reparations scheme that was implemented by the TRC directly, and a long-term reparations scheme that was recommended to Parliament.

The urgent reparations scheme consisted of five different projects: Monetary compensation and referral of those victims who were identified in the statement-taking process to existing services; the organisation of healing workshops; the allocation of funds to local organisations that provided services; and the implementation of a collective reparations program provided together with three NGOs.²⁶¹ The latter constituted a novelty in the field of reparations and practically turned out to be a process in which NGOs and victims designed collective reparations programmes together.²⁶² The ‘pilot project’ helped to build a community education centre in one community, and in another community vegetables were planted and ‘marketing networks for farmers were developed.’²⁶³

Although these measures do not affect women’s lives directly, indirectly they obviously have a reconstructive impact for them.²⁶⁴ Moreover, victims of sexual violence actively participated in the design process of the collective measures.²⁶⁵ Lastly, the healing workshops for which the urgent reparations measures provided funds benefited victims of sexual violence and one workshop was declared a ‘women’s only’ workshop.²⁶⁶

²⁶¹ Wandita *et al* (2006:302).

²⁶² Wandita *et al* (2006:305).

²⁶³ Wandita *et al* (2006:305).

²⁶⁴ Rubio-Marín (2009:95) point out that women suffer most when communal resources and infrastructure is destroyed in course of conflict.

²⁶⁵ Wandita *et al* (2006:305).

²⁶⁶ Wandita *et al* (2006:306).

The final recommendations of the CAVR for East-Timor were guided by the principles of ‘feasibility, accessibility, empowerment, gender, and prioritisation based on need.’²⁶⁷ The Commission justified the inclusion of ‘gender’ as a guiding principle by stating that the ‘conflict in Timor-Leste affected men and women differently.’²⁶⁸

In general, no monetary compensation was recommended, but rehabilitation measures in the form of service packages, collective measures, and symbolic measures.²⁶⁹ Moreover, the CAVR stated that 50 per cent of the resources should be allocated to women.²⁷⁰ Another interesting feature of the recommendations is that a two-year window period was left open for victims who, for whatever reason, did not come forward to the commission during the statement-taking phase.²⁷¹

The CAVR was especially concerned with single mothers not being able to provide for their children. Therefore the beneficiaries group of *inan mesak*, meaning ‘mother alone’, was established, which covered women with children born as a result of rape alongside those not legally married or whose partner had died or disappeared during the conflict.²⁷² The language chosen is unbiased and women must not necessarily come out as rape victims in order to qualify for reparations.²⁷³

The recommendations made for *inan mesak(s)* encompassed a scholarship for school children, which should continue until they reach the age of 18.²⁷⁴ Government agencies and/or NGOs were charged with the financial administration of the programme.²⁷⁵ Very importantly in this

²⁶⁷ CAVR-Reparations (2003:39).

²⁶⁸ CAVR-Reparations (2003:39).

²⁶⁹ CAVR-Reparations (2003:40).

²⁷⁰ CAVR-Reparations (2003:39).

²⁷¹ Wandita *et al* (2006:309).

²⁷² Wandita *et al* (2006:309).

²⁷³ Wandita *et al* (2006:3099).

²⁷⁴ CAVR-Reparations (2003:43).

²⁷⁵ CAVR-Reparations (2003:43).

regard was also the provision that in order to receive the funds, mothers were expected to come to designated ‘service delivery organisations’ where they could obtain other services, such as counselling, access to micro-credit, and livelihood skills training.²⁷⁶ Apart from this, another programme was recommended that allows survivors of sexual violence and widows to benefit from social services, including rehabilitation, skills training and access to micro credit to eke out a livelihood, which would be conducted by government agencies, specialised NGOs and community-based NGOs.²⁷⁷ Generally, the CAVR also recommended a number of collective and symbolic reparations, which, however, did not include a particular gender element.²⁷⁸

3.2. Gender-specific Reparations in Sierra Leone

Prior to the formulation of reparations recommendations a number of women’s rights NGOs made a submission with regard to gender-specific reparations to the Sierra Leonean Truth and Reconciliation Commission [hereinafter: Sierra Leone TRC].²⁷⁹ Some victims of sexual violence even approached the Ministry of Social Welfare, Gender, and Children’s Affairs, pointing out that they wanted the government to show a particular interest in children born as a result of rape.²⁸⁰

²⁷⁶ CAVR-Reparations (2003:43).

²⁷⁷ CAVR-Reparations (2003:43).

²⁷⁸ CAVR-Reparations (2003:43). Communities could make collective applications for reparations, setting out how the community was affected by the conflict and a general description of the violations experienced, and a concrete project to alleviate the harm suffered, as well as a list of beneficiaries that would be involved in the project. Gender-balance is one of the criteria for eligibility for community reparations.

²⁷⁹ King (2006:258)

²⁸⁰ King (2006:258).

The Sierra Leonean TRC adopted comprehensive recommendations for the victims of the civil war that lasted for more than 10 years.²⁸¹ Its report, *Witness to Truth*, states that those victims who came forward to the commission requested service packages instead of monetary compensation.²⁸² The reparations program adopted by the Sierra Leone TRC is based on feasibility and practicability,²⁸³ and the categories of beneficiaries were formed on the basis of their degree of vulnerability.²⁸⁴

Witness to Truth also contains special recommendations for victims of sexual violence.²⁸⁵ Victims of sexual violence were those who were subjected to rape, sexual slavery, mutilation of genital parts or breast and forced marriage.²⁸⁶ Its approach to sexual violence was gender-neutral, so that boys and men could also qualify as beneficiaries.²⁸⁷

Particularly interesting is the approach taken by the Sierra Leone TRC not to calculate reparations for victims of sexual violence by using the 'reduction of earning capacity test' and thereby acknowledging that some victims, due to the stigma attached to sexual crimes, might face difficulties in sustaining themselves in the future.²⁸⁸

In line with their approach not to recommend individual monetary compensation, the TRC held that victims of sexual violence should get free medical health care with regard to medical injuries/harm that resulted from sexual violence.²⁸⁹ Beneficiaries are to be assessed by a

²⁸¹ Sierra Leone TRC-Report (2004:248). In particular for injuries that occurred between the 23rd of March 91 and the 1st of March 2002.

²⁸² Sierra Leone TRC-Report (2004:245).

²⁸³ Sierra Leone TRC-Report (2004:241).

²⁸⁴ Sierra Leone TRC-Report (2004:242).

²⁸⁵ Sierra Leone TRC-Report (2004:250).

²⁸⁶ Sierra Leone TRC-Report (2004:250).

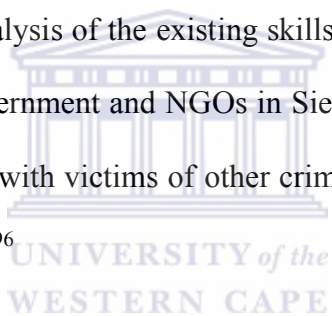
²⁸⁷ Sierra Leone TRC-Report (2004:250).

²⁸⁸ Sierra Leone TRC-Report (2004:250).

²⁸⁹ Sierra Leone TRC-Report (2004:255). The TRC expanded this even to the children of female victims, and the wives of male victims of sexual violence.

government doctor in order to become eligible.²⁹⁰ The TRC further recommended that a particular hospital in Freetown be equipped to be able to perform free fistula surgeries.²⁹¹ It also recommended free HIV/Aids and other STD testing and free medical HIV/Aids treatment for identified victims of sexual violence.²⁹² With regard to counselling, it recommended that services should be made available at the hospitals that perform fistula surgeries and other health facilities that treat women, for example, reproductive health centres.²⁹³ In addition, the TRC recommended that adult victims of sexual violence be eligible for a pension of not less than US\$ 20 per month.²⁹⁴ As to child victims of sexual violence and children of victims of sexual violence, the TRC recommended that they receive free secondary school education.²⁹⁵

Lastly, the TRC conducted an analysis of the existing skills training and micro-credit lending possibilities provided by the Government and NGOs in Sierra Leone, and recommended that victims of sexual violence, along with victims of other crimes, should be given skills training and access to micro-credit loans.²⁹⁶



The TRC did not recommend any particular symbolic or community (collective) reparations for victims of sexual violence, but put an emphasis on the participation of beneficiaries when deciding on some symbolic and community reparations.²⁹⁷

²⁹⁰ Sierra Leone TRC-Report (2004:255).

²⁹¹ Sierra Leone TRC-Report (2004:256). And to employ more international surgeons.

²⁹² Sierra Leone TRC-Report (2004:257).

²⁹³ Sierra Leone TRC-Report (2004:259); King (2006:281) en 62.

²⁹⁴ Sierra Leone TRC-Report (2004:259). The implementing body that was also recommended by the TRC should calculate the exact amount of the pensions.

²⁹⁵ Sierra Leone TRC-Report (2004:261).

²⁹⁶ Sierra Leone TRC-Report (2004:262).

²⁹⁷ Sierra Leone TRC-Report (2004:264-5).

CHAPTER SIX

TURNING VICTIMS INTO BENEFICIARIES: REPARATIONS POSSIBILITIES FOR GENDER-SPECIFIC HARMS RESULTING FROM SEXUAL VIOLENCE AT THE ICC

This chapter will first look at the criteria for general eligibility of qualifying as a victim at the ICC to finally see, whether gender-specific harms resulting from sexual violence can be adequately addressed by the Court. It will then look at what forms of reparations could be ordered for female victims of sexual violence, and what the role of the Trust Fund in designing and implementing such reparations could and should be. This Chapter will conclude with a set of recommendations.

1. General Eligibility: Claiming Victim Status at the ICC

To be able to claim reparations at the ICC, a person must be a victim in the sense of Rule 85 ICC Rules of Evidence and Procedure (RPE). According to Rule 85(a) ICC RPE victims are ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’²⁹⁸ Organisations or institutions can, as per Rule 85(b) ICC RPE, likewise be victims if they ‘have sustained direct harm to any of their property’ given that this property had a religious or societal purpose.²⁹⁹

1.1. Harm

The definition of victim as natural persons is broad and the determination whether a person qualifies as a victim is conditional on a subjective test in which the suffered ‘harm’ is a central element. Those who suffered harm resulting from *any* crime within the jurisdiction of

²⁹⁸ Rule 85(a) ICC RPE.

²⁹⁹ Rule 85(b) ICC RPE: ‘[...] dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’

the Court qualify as victims. There is, however, no definition of harm in the ICC Statute, nor in the ICC RPE. The Trial Chamber of the ICC, in the *Lubanga* case, therefore found that it should take recourse to the Van Boven/Bassiouni Principles when interpreting the term ‘harm.’³⁰⁰ According to the Van Boven/Bassiouni Principles, harm can be suffered personally or collectively and can include ‘physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights of victims.’³⁰¹ In the view of the Trial Chamber ‘this principle provides appropriate guidance.’³⁰² The Court so far assessed the notion of ‘harm’ in Rule 85(a) ICC RPE only with regard to victim participation, and looked at harms resulting from crimes with the jurisdiction of the Court on a case-by-case basis. The Court did not rule on a certain threshold for harms.³⁰³ So far, no assessment of harms resulting from sexual crimes has been made by the Court.

1.2. Causation and Standard of Proof for the Victim Status

In its decisions on victim participation, the ICC has stated that there must be a causal link between the crime and the harm suffered.³⁰⁴ But it left open what the applicable standards of causation and proof should be in order to qualify as a victim before the Court.

In its decision of 17 January 2006 Pre-Trial Chamber I of the ICC ruled that the standard of proof for victim participation in situation stage must be ‘grounds to believe’ for victims to meet the criteria of Rule 85(a) ICC RPE including the causal link between the harm suffered

³⁰⁰ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on Victim’s Participation (18 January 2008) 92 [hereinafter: *Prosecutor v. Lubanga* (18 January 2008)].

³⁰¹ Van Boven/Bassiouni Principles no 8.

³⁰² *Prosecutor v. Lubanga* (18 January 2008) 92.

³⁰³ Ferstman & Goetz (2009:326).

³⁰⁴ *Situation in the DRC* (17 January 2006) 79.

and the crimes within the jurisdiction of the Court.³⁰⁵ It came to this conclusion because ‘grounds to believe’ is the lowest applicable standard of proof throughout the preliminary stage of the proceedings.³⁰⁶ Accordingly the standard of proof would become gradually advanced.³⁰⁷

Single Judge Politi of Pre-Trial Chamber II found that because there is no real reference to causality as such in the wording of Rule 85(a) ICC RPE, apart from the words ‘as a result of’, adopted a ‘pragmatic, strictly factual approach’ in which he would hold that the causality requirement is met ‘when spatial and temporal circumstance surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.’³⁰⁸ The Single Judge acknowledged that it will not always be possible for victims to ‘fully substantiate their claim.’³⁰⁹ Thus, as a general principle of law ‘indirect proof’ would be admissible if the claimant is ‘hampered by objective obstacles from gathering direct proof of a relevant element supporting his or her claim.’³¹⁰ By referring to the Corfu Channel case of the International Court of Justice it held that ‘indirect evidence appears to be based on a series of facts linked together and leading logically to a single conclusion.’³¹¹

Trial Chamber I held that because there is no statutory or regulatory provision on the standard of proof in order to see whether a person qualifies as a victim before the Court, it will ‘merely

³⁰⁵ *Situation in the Democratic Republic of the Congo* ICC-01/04 Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (17 January 2006) 99 [hereinafter: *Situation in the DRC* (17 January 2006)]

³⁰⁶ *Situation in the DRC* (17 January 2006) 99.

³⁰⁷ Dwertmann (2010:94).

³⁰⁸ *Situation in Uganda* (10 August 2007) 14.

³⁰⁹ *Situation in Uganda* (10 August 2007) 15.

³¹⁰ *Situation in Uganda* (10 August 2007) 15.

³¹¹ *Situation in Uganda* (10 August 2007) 15.

ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of the crime committed within the jurisdiction of the Court.³¹²

1.4. The Scope of Beneficiaries

For the purpose of victim participation, the Pre-Trial Chamber in the *Lubanga* case held that there must be a link between the harms suffered by the applicant and the crimes set out in the arrest warrant against the accused.³¹³ On the other hand, the Trial Chamber in *Lubanga* held that the wording of Rule 85(a) ICC RPE does not contain any limitation in this regard.³¹⁴ The Appeals Chamber upheld the above decision of the Pre-Trial Chamber decision, however stating that this limitation does not flow from Rule 85(a) ICC RPE, but from Art 68(3) ICC Statute, which allows for victim participation.³¹⁵

The fact that reparations can only be ordered against a person that is already convicted by the Court suggests that the same applies to the reparations phase.³¹⁶ Whether the Court will broaden the scope of beneficiaries by following the Trial Chamber decision, or whether it will adopt a literal approach by referring to the wording of Art 75(1) ICC Statute, or even find that Art 68(3) ICC Statute is applicable in the reparations phase,³¹⁷ will be of crucial importance. The issue is best illustrated by the *Lubanga* case, the only charge being the conscription or enlisting of children under the age of fifteen into armed forces or using them to participate

³¹² *Prosecutor v. Lubanga* (18 January 2008) 99.

³¹³ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 (29 June 2006) 6/9.

³¹⁴ *Prosecutor v. Lubanga* (18 January 2008) 93.

³¹⁵ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06 Judgement on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victim's Participation of 18 January 2008 (11 July 2008) 58 [hereinafter *Prosecutor v. Lubanga* (11 July 2008)].

³¹⁶ Dwertmann (2010:93).

³¹⁷ Ferstman & Goetz (2009:330). Arguing that Art 68(3) ICC Statute could theoretically apply at the reparations stage because it can be understood as a 'stage of the proceedings' in the meaning of that article.

actively in hostilities.³¹⁸ If the Court decided to broaden the scope of beneficiaries, victims of sexual violence of ‘child soldiers’ could apply for reparations.³¹⁹

2. Crimes of Sexual Violence in the Rome Statute

Sexual crimes under the Rome Statute are rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other acts of sexual violence of comparable gravity.³²⁰

Although forced pregnancy and enforced sterilisation are understood as sexual crimes, they target the reproductive capacity of the victim and could therefore also be understood as reproductive violence.³²¹ The Rome Statute explicitly lists sexual crimes as crimes against humanity,³²² and war crimes.³²³

Like sexual violence, rape under the Rome Statute is defined gender-neutrally, the elements of the crime being a physical assault on the victim’s body that results in penetration.³²⁴ The crime of rape is not limited to the penetration with a sexual organ, but encompasses insertion of objects into the vagina and anus of the victim as much as the insertion of a penis into the mouth of the victim.³²⁵

³¹⁸ Ferstman & Goetz (2009:330).

³¹⁹ Ferstman & Goetz (2009:331).

³²⁰ Art 7(1)(g), Art 8(2)(b)(xxii) & Art 8(2)(e)(vi) ICC Statute.

³²¹ Rubio Marin & De Greiff (2007:319).

³²² Art 7(1) 1st sentence ICC Statute: ‘[w]hen committed as a part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.

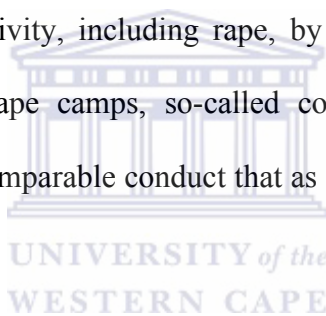
³²³ In the context of war crimes, the ICC Statute distinguishes between sexual violence committed during an international armed conflict (Art 8(2)(b)(xxii) ICC Statute) and an internal armed conflict (Art 8(2)(e)(vi) ICC Statute). They contain the same non-exhaustive list of sexual crimes, with the difference that the catch-all term ‘any other form of sexual violence’ in the former case must also constitute ‘a grave breach of the Geneva Conventions’, and in the latter ‘a serious violation of article 3 common to the four Geneva Conventions Werle (2009:394). The concept of ‘rape as genocide’ is omitted here due to the fact that the ICC did not yet pronounce whether it deems it applicable. But see Werle (2009:266:268)

³²⁴ Werle (2009:323).

³²⁵ Werle (2009:323).

Forced pregnancy as a crime against humanity means the ‘unlawful confinement of a woman forcibly made pregnant with the intent to affect the ethnic composition of any population or carrying out other grave violations of international law’.³²⁶ It is important to note that it is not rape or the forcible impregnation that constitutes the element the crime, but the unlawful confinement.³²⁷ Rape is thus not the only means by which a woman can be impregnated forcibly,³²⁸ and the *actus reus* of the crime is even completed if the woman was impregnated by someone else than the person who confines her.³²⁹

With regard to sexual slavery, Pre-Trial Chamber I held that it ‘encompasses situations where women and girls are forced into “marriage”, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors.’³³⁰ It thus includes cases of detaining women in rape camps, so-called comfort stations, forced temporary marriages to soldiers and other comparable conduct that as such violates the peremptory norm of the prohibition of slavery.³³¹



3. Reparations for Crimes of Sexual Violence: Possibilities and Limitations

Whether the ICC will grant gender-specific reparations will largely depend on the Courts ability to subsume gender-specific harms as ‘loss, damage and injury’ within the meaning of art 75(1) ICC Statute.

³²⁶ Art 7(2)(f) ICC Statute.

³²⁷ Markovic (2007:442).

³²⁸ Markovic (2007:442).

³²⁹ Werle (2009:326).

³³⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07 (30 September 2008) 431.

³³¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (30 September 2008) 431.

3.1. Gender-specific Harms

The outdated Standard Application Form contained several points that explicitly mentioned harms resulting from sexual violence. The Joint Application Form, however, is entirely silent about it. Because there is no other official document issued by the Court that deals with the matter, the following analysis will be based on the Standard Application Form.

3.1.1. Harms Affecting the Health of the Victim

Harms affecting the physical integrity, the psychological state of mind, the reproductive health and HIV/Infections and infections with other STDs have been identified as harms women suffer from sexual violence in armed conflict.

These harms are arguably directly connected to crimes of sexual violence. The standard application form for reparations explicitly lists sexual and reproductive health problems as physical injuries reparations may be sought for.³³² The standard application form also lists mental pain and anguish, emotional problems, mental problems and physical reactions including behavioural changes as repairable harms.³³³ Moreover, there is a separate category of ‘pain, complaints and/or concerns related to the experience of sexual violence’.³³⁴ Applicants are also supposed to describe the harms they suffer in order for the Court to be able to assess reparations for those harm. HIV/Aids and other STDs are not mentioned in the standard application form.

³³² Standard Application Form Part F2.

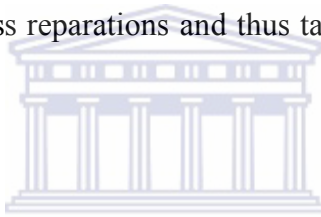
³³³ Standard Application Form Part F3.

³³⁴ Standard Application Form Part F3.

3.1.2. Harms affecting the Social Status of the Victim

The standard application form mentions the loss of social status in the category ‘other damage’.³³⁵ It is, however, not mentioned as a loss that resulted from the commission of sexual crimes, nor is it specified that ‘loss of social status’ could or should be understood in a gendered way. Then again, victims are supposed to describe the loss of status in the application form. The question arises on whether victims of sexual violence would know how to make use of the possibility to describe their situation as a ‘loss of social status’.

On the other hand, there is no reason for the Court not to interpret the loss of social status in a gendered way once it has to assess reparations and thus take into account that sexual crimes may result in it.



No particular reference is made to poverty. The standard application only lists the loss of income or other losses connected to employment.

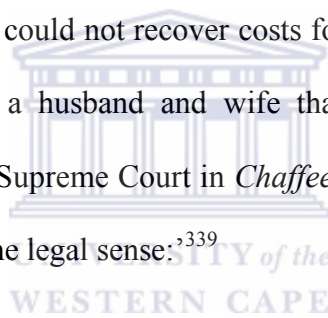
3.2. Children Born as a Result of Rape

The standard application form is silent about any reparations that may be sought for the life-altering situation that a woman might fall pregnant as the result of rape. Victims may, however, specify in both application forms, what kind of reparations they want.³³⁶ It is thus at least theoretically possible that financial assistance will be sought for bringing up unwanted children.

³³⁵ Standard Application Form Part F5.

³³⁶ Joint Application Form Part E; Standard Application Form Part F.

This could become a serious issue for the Court. According to the wording of Art 75(1) ICC Statute, the Court will have to fit ‘harm’ into the category of ‘damage, loss, and injury.’ In national jurisdiction, the question whether an unwanted child (so-called ‘wrongful birth’ cases) constitutes ‘harm’ in the legal sense and would therefore turn child-rearing, as opposed to pregnancy and child-bearing, costs recoverable as damages has been decided inconsistently.³³⁷ The facts underlying these decisions normally are a negligently performed sterilisation or incomplete or negligent advice with regard to fertility, and are thus not comparable to the question of children born as a result of rape. It is, however, to a certain extent a question that touches upon dignity and costs of human life. Some jurisdictions therefore follow the House of Lords decision in *McFarlane v. Tayside Health Board* holding that parents of an unwanted child could not recover costs for bringing up the child against the doctor who negligently advised a husband and wife that a vasectomy had rendered the husband infertile.³³⁸ The Indiana Supreme Court in *Chaffee v. Seslar* in 2003 held human life cannot be declared ‘an injury in the legal sense.’³³⁹



‘A child, regardless of the circumstances of birth, does not constitute a “harm” to the parents so as to permit recovery for the costs associated with raising and educating the child. We reach the same outcome as do the majority of [U.S.] jurisdictions, and hold that the value of a child’s life to the parents outweighs the associated pecuniary burdens as a matter of law.’³⁴⁰

German and Italian courts, on the other hand, generally regard costs recoverable and therefore consider unwanted children as damage.³⁴¹ The German Constitutional Court (*Bundesverfassungsgericht*) held that the approach taken by the BGH (*Bundesgerichtshof*) to

³³⁷ Brügge-meier (2006:227-8).

³³⁸ *Macfarlane and Another v. Tayside Health Board* (Scotland) [1999] UKHL 50; [2000] 2 AC 59 [1999] 4 All ER 961 (25 November 1999).

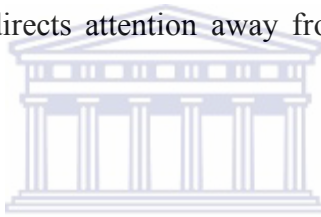
³³⁹ *Chaffee v. Seslar* 2003 (10) 786 N E 2d 705 Indiana Supreme Court.

³⁴⁰ *Chaffee v. Seslar* 2003 (10) 786 N E 2d 705 Indiana Supreme Court.

³⁴¹ Brügge-meier (2006:227).

declare child-rearing costs recoverable did not violate the child's human dignity protected by Art 1 GG (*Grundgesetz*).³⁴²

Also, the Australian High Court in *Cattanach v. Melchior*, after discussing *McFarlane* in detail, decided for the recoverability of child-rearing costs by stating that the parents did not suffer the relevant damage from 'the existence of the parent-child relationship' but from 'expenditure that they have incurred or will incur in the future.'³⁴³ It further stated that 'The unplanned child is not the harm for which recompense is sought in this action; it is the burden of the legal and moral responsibilities which arise by reason of the birth of the child that is the contention. The expression 'wrongful birth' used in various authorities to which the Court was referred is misleading and directs attention away from the appropriate frame of legal discourse.'³⁴⁴



In the German context with regard particularly to children born as a result of rape it has been argued, that all costs should be fully recoverable as 'economic consequential damage' (*ökonomischer Folgeschaden*) from the person who violated a woman's this case the (primary) right to personal autonomy (*Persönlichkeitsrecht*).³⁴⁵

Theoretically this reasoning could be adopted by the Court, in particular because international crimes also protect individual interests.³⁴⁶

³⁴² *Bundesverfassungsgericht* Beschluss 1 BvR 479/92 & 307/94 (12 November 1997) 67.

³⁴³ *Cattanach v. Melchior* HCA 38 [2003] 67.

³⁴⁴ *Cattanach v. Melchior* HCA 38 [2003] 68.

³⁴⁵ Brüggeemeier (2007: 224). § 823 I BGB or § 823 II BGB in connection with § 177 StGB.

³⁴⁶ Werle (2009:293:362) in the context of crimes against humanity and war crimes; in the context of genocide this is disputed (2009:257).

3.3. Assessment

It seems that the Standard Application Form has been drafted on a very literally understanding of Rule 85(a) ICC RPE. This means that only close harms have been included into the standard application form. Whereas on first sight this seems to make sense, we have seen that women sustain numerous and complex harms than just physical injuries and psychological damage. It would thus be very narrow to interpret harms resulting from, for example, rape to be related only to the act of penetration. More life-altering harms and developments, such as HIV/Aids or unwanted children, are not listed, although they can be linked to the commission of a crime under the statute, even if they might be only consequential or remote.

The Standard Application Form addresses the loss of status, however not in a gendered way. The issue of poverty as a result of sexual violence has been left out completely.

From the Standard Application Form it is, moreover, not clear how remote harms resulting from sexual violence can be in order to stay repairable. Reproductive health problems that do not directly result from sexual violence, but from an unsafe abortion, for example, could pose challenges to the victims.

Whereas the Standard Application Form at least contained some descriptions of harms resulting from sexual violence, even if not addressed adequately, the Joint Application Form is silent on the issue of harms resulting from sexual violence. Although it will not prevent the Court from ruling on gender-specific harms, it could prevent victims from describing their harms in a gendered way.

4. Standard of Proof for Reparations Claims

Another problem that is yet to be solved is the applicable standard of proof to sustain a reparations claim, as the ICC Statute and the RPE are silent about it.³⁴⁷ When the RPE were negotiated, the issue of standard of proof was discussed but could not be resolved, but left to the Court once it would establish ‘principles or reparations’.³⁴⁸ It was generally agreed that the standard of ‘beyond reasonable doubt’ would be too high and should therefore not be applicable. It was agreed that a causal link between the harm suffered and the crimes within the jurisdiction of the court must nevertheless be established by the victims.³⁴⁹ The Canadian delegation suggested ‘balance of probabilities’ as an applicable standard, which was rejected because other states delegations found such standard to be alien to their domestic systems and difficult to understand.³⁵⁰ Similar suggestions were also made in the literature.³⁵¹ Thus, despite the fact that Art 75 ICC Statute is placed in ‘the Trial’ section of the Rome Statute, which speaks for the application of ‘beyond reasonable doubt’ as the applicable standard of proof,³⁵² the preparatory works speak for the adoption of a lower standard, even if they failed to agree upon one.

Pre-Trial Chamber II, however, indicated that the determination of the causal link between a crime and a subsequent harm could become subject to close scrutiny for the purpose of a reparations order,³⁵³ which would most likely also raise the standard of proof for the

³⁴⁷ Henzelin *et al* (2006:325).

³⁴⁸ Lewis & Friman (2001:486).

³⁴⁹ Lewis & Friman (2001:485).

³⁵⁰ Lewis & Friman (2001:485).

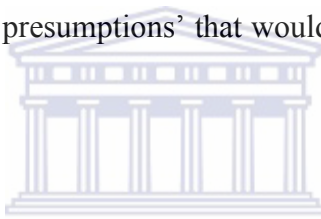
³⁵¹ Jorda & De Hemptinne (2002:1415) ‘prima facie’; Shelton, (1999:10) ‘preponderance of the evidence’, ‘balance of probabilities’ or ‘*conviction intime*’.

³⁵² Dwertmann (2010:228).

³⁵³ *Situation in Uganda* (10 August 2007) 14.

victims.³⁵⁴ The Single Judge did, however, not specify what the applicable standards of causation and proof could be.

There are good reasons for the Court not to adopt a standard of proof that is too rigorous. International claims commissions, for example, mostly adopt a relaxed standard of proof, due to the difficult circumstances in which they and the applicants find themselves.³⁵⁵ In a comparative analysis of mass claims tribunals, Jacomijn J. van Haersolte-van Hof found that there is a general trend to adopt a relaxed standard of proof and that many tribunals or commissions use the ‘plausibility’ test,³⁵⁶ in which the applicant must show that it is plausible that she or he is entitled to compensation. Sometimes this test was even further simplified through the adoption of a certain ‘presumptions’ that would ‘apply in the absence of evidence to the contrary.’³⁵⁷



The UNCC for category B claims accepted witness statements, affidavits or medical reports as sufficient proof of causation for personal injury and also had a medical expert who could confirm that damage matched the applicant’s claim.³⁵⁸ It also adopted evidentiary patterns in which it examined reports of international organisations to see whether any patterns of violations against the claimant’s national group so that the story told by the claimant is more likely to be credible.³⁵⁹ The Court’s judgments could qualify ‘reports’ in the above mentioned sense.

³⁵⁴ Ferstman & Goetz (2009:333).

³⁵⁵ Kristjánsdóttir (2009:189).

³⁵⁶ Van Haersolte-van Hof (2006:13). The First Claims Resolution Tribunal for Dormant Accounts in Switzerland, for example, adopted this approach and simultaneously acknowledged that proving claims after the Second World War will pose serious difficulties to the applicants. (van Haersolte-van Hof (2006:17).

³⁵⁷ Van Haersolte-van Hof (2006:18-9). The Second Claims Resolution Tribunal for Dormant Accounts in Switzerland adopted this approach that served as an alternative for the adoption of a general description of how plausibility could actually be met.

³⁵⁸ Singh (2006:73).

³⁵⁹ Singh (2006:76).

A relaxed standard of proof will be of particular importance for victims of sexual violence who might not have medical evidence because medical service was either unavailable or the victim did not dare to seek the service. Moreover, in case the ICC accepts HIV/Aids Infections as consequential damage, it will be impossible for the victim to prove.³⁶⁰ The situation is a bit different with children born out of rape because it is theoretically possible to count back the days of conception. The UNCC, for example, accepted circumstantial evidence rather than direct evidence in cases of sexual violence.³⁶¹

5. Forms of Reparations

As we have seen, the Court can order individual reparations and collective reparations. It is therefore important to see which types of reparations will best meet the needs of victims of sexual violence.



5.1. Individual Reparations: Restitution and Compensation

Individual reparations, which are supposed to be the default at the ICC,³⁶² can encompass restitution, compensation. In contrast, rehabilitation, satisfaction and guarantees of non-repetition will, in the context of large-scale violations, have a rather collective character.

It is a well-established principle in general international law that reparations should ‘wipe-out all the consequences of the illegal act and re-establish the situation which would, in all

³⁶⁰ Nduwimana (2004:13); Human Rights Watch (1996:45): ‘[i]mpossible to reach any firm conclusion about the transmission of AIDS during the genocide because of the difficulty of ascertaining when a given individual was exposed to the virus.’

³⁶¹ Singh (2006:72-3).

³⁶² Compare below 63.

probability have existed if the act had not been committed.³⁶³ It has been argued that the reparations regime of the ICC will be guided by the principle of *restitutio in integrum*.³⁶⁴

As could be seen in chapter five, restitution as the guiding principle for reparations could obstruct a dynamic interpretation of reparations that will be necessary to address gender-specific harms in a way that will improve women's lives, because they ignore the fact that women might not have been in an advantageous position already prior to the rights violation.³⁶⁵

It has, however, been suggested that the ICC could rule on the restitution of property for victims of sexual violence.³⁶⁶ It is unlikely that the restitution of property will become a viable reparations option due to three reasons. Loss of property is not a harm that results from the commission of sexual crimes, but other crimes under the Rome Statute. The issue has indeed come up in the context of Guatemala, where survivors of rape and sexual violence encountered problems with regard to the restitution of property, which only became an option in cases of human rights violation that were connected to the loss of property such as "displacement or massacre."³⁶⁷ Secondly, one problem that could be encountered is the fact that in many countries women cannot inherit or own property, which means that this restitution will not benefit them directly.³⁶⁸ Finally, it is generally acknowledged that the restitution of property by the ICC will pose the additional challenge of a state's cooperation,

³⁶³ *Factory at Chorzów* (Germany v Poland) 1928 PCIJ (ser A) no 17 (13 September 1928) 125.

³⁶⁴ Donat-Cattin (1999:1402) Henzelin et al (2006:331) Dwertmann (2010:37) McCarthy (2009:256:258).

³⁶⁵ Kristjánsdóttir (2009:183). '[...] [w]ould in effect 'restore' victims to abject poverty and marginalisation'.

³⁶⁶ De Brouwer (2007:226).

³⁶⁷ Paz Y Paz Bailey (2006:110).

³⁶⁸ Compare above 39.

which is needed to give effect to any such orders.³⁶⁹ With regard to gender-specific reparations at the ICC, the focus should therefore not be on restitution.³⁷⁰

Compensation is another possible option which indeed has been used by international claims commissions,³⁷¹ but also in national reparations programmes. The van Boven/Bassiouni Principles mention physical and mental harm, as much as moral damage as compensable.³⁷² The United Nations Compensation Commission, which was established by the SC through Resolution 687,³⁷³ compensated victims of sexual violence with \$5000.³⁷⁴ Sexual violence fell into the ‘Category “B”-Claims’ that encompass serious personal injury, including mental pain and anguish.³⁷⁵ In Guatemala the *Programa Nacional de Resarcimiento* (National Reparations Programme-NPR) awarded a sum of approximately US\$2667 to each survivor of rape and sexual violence.³⁷⁶ Compensating female victims for sexual violence could be an option for the ICC, but it is doubtful whether it will have a positive effect on women’s lives.³⁷⁷

Whether the ICC will pronounce on the issue of children born as a result of rape is yet to be seen. If it does, it would probably do so within the ambit of compensation for consequential losses that are secondary to the primary violation of rape, the crime of forced impregnation, or sexual slavery. There are compelling reasons for the Court to take this matter seriously, despite the legal difficulties of a child as legal loss. Not only are there studies that have found that victims actually wish to receive funds in order to bring up their children, but it should

³⁶⁹ Dwertmann (2010:133).

³⁷⁰ It has generally been acknowledged that restoring the victim to her or his original situation will be impossible. Ferstman & Goetz (2009:340).

³⁷¹ Kristjánsdóttir (2009:183).

³⁷² Van Boven/Bassiouni Principles no 20.

³⁷³ Singh (2006:63).

³⁷⁴ Shelton (1999:10).

³⁷⁵ Singh (2006:66).

³⁷⁶ Paz Y Paz Bailey (2006:111).

³⁷⁷ Wandita *et al* (2006:304); Kristjánsdóttir (2009:183): ‘Monetary compensation may moreover be of limited use in places where there is nothing money can buy.’

also be kept in mind that in many countries ‘children are (the) only source of social security later in life [...].’³⁷⁸

5.2. Collective Reparations: Rehabilitation, Satisfaction and Guarantees of Non-Repetition

Rehabilitation is another possibility to redress female victims of sexual violence. Rehabilitation focuses specifically on the health of the victim and rehabilitative measures are therefore understood to include services rather than money.³⁷⁹ Rehabilitation is a unique feature of reparations in international law in the state context, aiming at the *provision* of services, not compensation for costs arising out of them, and understood as a collective measure.³⁸⁰

Whether the Court should assess reparations on an individual or a collective basis has been debated in the PrepCom.³⁸¹ Although the Court, through Rule 97 ICC RPE, can now choose whether to award reparations on an individual or on a collective basis or both,³⁸² the wording of Rule 97(1) ICC RPE permits one to conclude that the individual reparations should constitute the default in the reparations assessment of the Court.³⁸³

What exactly collective reparations are is not really clear.³⁸⁴ They do, however, aim at reaching ‘a new balance in society without necessarily focusing on *restitutio in integrum* or on the situation that existed prior to the violations.’³⁸⁵ One form of collective reparations is

³⁷⁸ Kristjánsdóttir (2009:184).

³⁷⁹ Van Boven/Bassiouni Principles no 21.

³⁸⁰ Rombouts *et al* (2005:460). Emphasis added.

³⁸¹ Lewis & Friman, (2001:483).

³⁸² See Rule 97(1) ICC RPE: ‘[...] the Court *may* award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.’ Compare above.

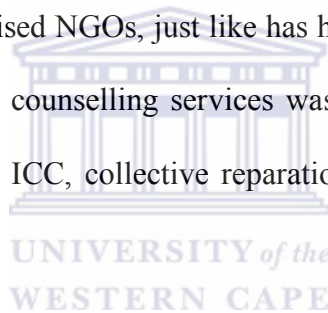
³⁸³ Lewis & Friman, (2001:483).

³⁸⁴ Rubio-Marín (2009:385).

³⁸⁵ Rombouts *et al* (2005:461).

reparations services, which have become popular in the context of gross and systematic human rights violations.³⁸⁶ A perfect example of this are the recommendations made by TCs in Sierra Leone and East Timor.³⁸⁷

In the state context, they run the risk of rendering reparations meaningless, especially because states are under a general obligation to render basic services.³⁸⁸ Moreover, the Nairobi Declaration has cautioned that states should take reparations seriously and not substitute them with development.³⁸⁹ These reservations do not necessarily apply for the ICC. As the Court is not a state, and collective reparations such as services are ordered against the accused or made through the Trust Fund, they do not affect the general obligations of states mentioned above. It could do so by utilising specialised NGOs, just like has happened in the case of East Timor where the delivery of health and counselling services was partly undertaken by NGOs and partly by the state. Thus, for the ICC, collective reparations could become a viable tool to reach a large number of victims.



Collective reparations could be a way to respond to group-based violence,³⁹⁰ simply through group-based reparations. Whereas so far collective reparations have been a topic with regard to ethnic, national or other groups that have become the subject of human rights violations and discrimination, it is possible to conceptualise ‘women’ as a group that could receive collective reparations. In the state context, it has been argued that such reparations should address structural and cultural inequalities through legal reforms and gender mainstreaming in

³⁸⁶ Rombouts *et al* (2005:460).

³⁸⁷ Compare above 38.

³⁸⁸ Rombouts *et al* (2005:461).

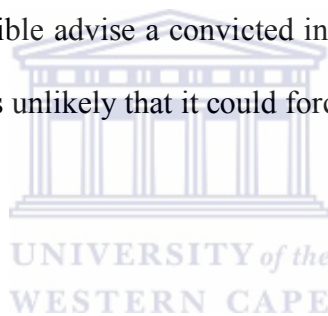
³⁸⁹ Compare above 41-6.

³⁹⁰ Rubio-Marín (2009:385).

administrative and political spheres, because it has a transformative effect on women's status in society.³⁹¹ This, however, would indeed be difficult to achieve for the Court.

Nevertheless, the ICC could take rehabilitation in the form of medico-psychological assistance for victims of sexual violence into account. It could also think about ordering the construction of buildings that could be used for purposes of service delivery for female victims of sexual violence, such as women's centre in which services such as counselling and even skill-training could be offered.

With regard to satisfaction and guarantees of non-repetition, the possibilities of the ICC will be rather limited.³⁹² It could possibly advise a convicted individual to make a public apology as a measure of satisfaction, but is unlikely that it could force the perpetrator to apologise.



5.3 Assessment

Restitution as a guiding principle for reparations at the ICC will most likely overlook women's needs. Moreover, experiences with monetary compensation for victims of sexual violence are generally unsatisfactory,³⁹³ not only because money is quickly spent.³⁹⁴ It is never certain who will in the end benefit from the money awarded to the victims, and customary rules may even prevent women from becoming the owners of the funds. But the ICC is well-positioned to order collective reparations, which can be designed in a gender-specific way. Thus, the ICC should definitely consider collective reparations as an option for victims of sexual violence.

³⁹¹ Rubio-Marín (2009:395).

³⁹² Van Boven/Bassiouni Principles no 22 & 23.

³⁹³ Duggan & Jacobson (2009:138-43).

³⁹⁴ Wandita *et al* (2006:304).

6. Reparations Administered by the Trust Fund

As indicated in chapter three, the TFV is likely to play an important role in the administration of reparations claims.

In its other activity, the TFV selected a number of projects in countries over which the Court is exercising its jurisdiction and has sought to have victims participate in those projects.³⁹⁵ Moreover, it has identified existing projects whose financing it has supplemented with available funds.³⁹⁶ Some have criticised this approach since it risks blurring the line between the general activity of the TFV and its future role in implementing reparations orders, in particular because general provisions and services might ‘even benefit the perpetrators.’³⁹⁷ On the other hand, the TFV’s mandate is set out clearly enough to allow at least for a legal distinction of its general and its reparations mandate, so that it can be expected that this distinction will be maintained in practice.³⁹⁸

Using the TFV could offer a great deal of possibilities for victims to participate in the design of reparations.³⁹⁹ We have already seen victim consultation in the context of reparations programmes designed by TCs. The TFVR provide for the possibility to consult victims in the determination of the nature and the implementation of collective reparations awards.⁴⁰⁰

It has been suggested that the principles the Court lays down ‘should form the basis of a framework for reparations, and which seek to give the contours of guidance to the TFV,

³⁹⁵ Kristjánsdóttir (2009:174).

³⁹⁶ Kristjánsdóttir (2009:174).

³⁹⁷ Kristjánsdóttir (2009:174).

³⁹⁸ Kristjánsdóttir (2009:175).

³⁹⁹ De Greiff & Wierda (2005:236).

⁴⁰⁰ Compare above 24.

which will subsequently work out the details.⁴⁰¹ As can be seen from the Regulations, the role of the TFV in reparations proceedings has been expanded. Moreover, it has been suggested that the TFV could assess the needs of victims even before the Court orders reparations,⁴⁰² which indeed has happened in the context of reparations for former ‘child soldiers’.⁴⁰³

In its other activity of assisting victims and their families before making a reparations order, the Court has started some gender-specific programmes for victims of sexual violence. These projects are guided by the Nairobi Declaration and the IASC’s Gender Handbook and thus address women’s and girls’ specific needs and promotes their empowerment.⁴⁰⁴ The TFV has a four-fold approach, comprising material support, referrals to services, psychological rehabilitation, and community sensitisation.⁴⁰⁵ An innovative approach has been taken with regard to material support, which includes micro-credits for survivors of sexual violence.⁴⁰⁶ Victims of sexual violence use these credits to start small income-generating activities.⁴⁰⁷ The TFV does not provide these services directly, but supports organisations that provide services for victims.⁴⁰⁸ Through one of the organisations, the TFV indirectly supports a ‘safe haven’ part of a hospital in the DRC that treats victims of sexual violence and those who cannot return home after their treatment.⁴⁰⁹ The TFV also supports organisations that offer counselling and psychological treatment to victims of sexual violence, and moreover also

⁴⁰¹ De Greiff & Wierda (2005:240).

⁴⁰² De Greiff & Wierda (2005:240).

⁴⁰³ TFV Programme Progress Report Summer 2011 (2011:31).

⁴⁰⁴ ‘Assistance To Victims Of Sexual Violence’ <http://www.trustfundforvictims.org/success-stories/assistance-victims-sexual-violence>. (last accessed: 31 October 2011)

⁴⁰⁵ ‘Assistance To Victims Of Sexual Violence’.

⁴⁰⁶ Assistance To Victims Of Sexual Violence’.

⁴⁰⁷ Assistance To Victims Of Sexual Violence’.

⁴⁰⁸ Assistance To Victims Of Sexual Violence’.

⁴⁰⁹ Assistance To Victims Of Sexual Violence’.

undertake community sensitisation by raising awareness about sexual and also gender-based violence through the use of the media and workshops.⁴¹⁰

Thus, the TFV operates from a gender-sensitive background and is well aware of the special needs of female survivors of sexual violence.

7. Recommendations

In sum, the Court needs to:

(1) Pronounce on gender-specific reparations in general terms, pointing out the complexity of women's suffering in particular with regard to existing socio-cultural structures that produce and re-produce inequality, moreover pointing out the possibility to address these inequalities with fair and gender-specific reparations, and take into account the Nairobi Declaration.

(2) Establish general principles of reparations addressing the right to individual and collective reparations and make use of the TFV to design and implement the order. The TFV will be better placed to assess individual cases and collective reparations because it can interact with victims and victim groups, but also because it can conduct research into the role and status of women in a particular society.

(3) Adopt a relaxed standard of proof such as plausibility and use of own resources to gather supplementary evidence from the victims. As regards female victims of sexual crimes this could encompass affidavits, witnesses statements from other persons, health workers who

⁴¹⁰ Assistance To Victims Of Sexual Violence'.

treated the victim previously and probationary reports by medico-psychological personnel on the background of the beneficiary group.

(4) Emphasize collective, gender-specific reparations which, after careful evaluation, are most likely to have a positive effect on women's lives as they can be innovative and encompass skills-training, counselling, etc. and simultaneously restore the dignity of victims.

(5) Pay serious attention to consequential harms such as HIV/Aids infections and children born as a result of rape or other crimes under the Statute. The Court should decide that they qualify as 'harms resulting from a crime within the jurisdiction of the Court' in the first place, because for women these are life-altering events as they affect their social status.



CONCLUSION

This thesis demonstrated that female victims of sexual violence have specific needs that must be taken into account when reparations are assessed, no matter whether this happens in the state or the international context. Since women's suffering is to a large extent determined by the society they live in, reparations should address these harms in a way that will not reproduce discrimination. If reparations are guided by the principles such as *restitutio in integrum*, they are likely to overlook women's need and even produce undesirable results for the individual victim. Therefore, reparations need to be re-thought from a gendered perspective. Scholarship and Truth Commissions have demonstrated that this is possible and have delivered a framework for gender-specific reparations that could be used as a basis for the Court to assess harms resulting from sexual violence.

The Court, however, will still have the task of assessing these harms from a purely judicial perspective, which can lead to a number of problems such as how to conceptualise gender-specific harms as 'damage, loss or injury' within the meaning of Art 75(1) ICC Statute and how to pronounce on harms that are 'merely' consequential.

The Court should, however, not forget its broader reparations mandate, that is, improving the lives of victims and restoring their dignity. Thus, an approach that is too rigid with regard to the definition of 'harm' and a rigorous standard of proof could obstruct this mandate.

One way of overcoming these difficulties could be to keep as flexible as possible the 'principles of reparations' that the Court will establish and to leave the implementation entirely to the TFV. The TFV could gain a valuable experience with regard to gender-specific assistance that could be translated into gender-specific reparations. The key to this is the legal

distinction between its general activity and its mandate to implement reparations orders, and that reparations are, in the end, ordered against the convicted individual, even if they are made or supplemented with funds from the TFV.



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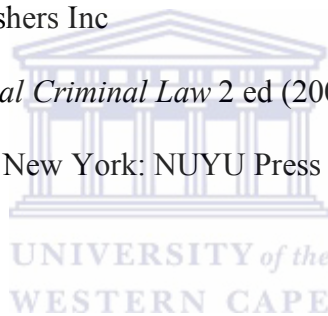
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