



By Natalie Hodgson

Reparations for sexual and gender-based violence

Lessons from the International Criminal Court

When it was created, the International Criminal Court (ICC) was celebrated for its gender justice mandate. But has this translated into gender-just outcomes for victims? This article examines the experience of the ICC to explore how reparations can be used to respond to sexual and gender-based violence. A number of lessons can be learned from the experiences and challenges of the ICC.

Throughout the world, reparations have been used as a response to mass violence and serious violations of human rights in countries such as Cambodia, Mexico and South Africa. In Australia, reparations schemes to redress the harms of the Stolen Generations have been implemented in New South Wales, Queensland, South Australia, Tasmania and Western Australia. Additionally, the Royal Commission into Institutional Responses to Child Sexual Abuse referred to reparations principles while formulating its recommendations for redress.¹ As such, it is increasingly important for Australian lawyers to understand how reparations can be used to secure justice for victims of human rights violations.

WHAT ARE REPARATIONS?

Reparations aim to redress and repair the harm done to a victim. Under international law, victims have a right to

‘adequate, effective and prompt reparation’ for gross violations of international human rights law and serious violations of international humanitarian law.²

Reparations can be awarded on an individual or collective basis. Individual reparations seek to remedy the harm caused to a particular person. Collective reparations seek to remedy the harm caused to the community as a whole. Thus, collective reparations are directed at benefitting the victims as a group, rather than individuals.

There are five main types of reparation,³ a combination of which are often needed to achieve justice for a victim. *Restitution* restores the victim to the situation they were in before the crime occurred. This includes reparations aimed at returning people to their place of residence or returning property to victims that was seized or damaged. *Compensation* provides monetary awards for economically assessable damage, including physical or mental harm, material damage

and moral damage. *Rehabilitation* refers to reparations involving medical and psychological care, and legal and social assistance. *Satisfaction* acknowledges victims' suffering and aims to restore their dignity. This may be achieved through truth-telling mechanisms, apologies, and memorials or tributes to the victims. Finally, *guarantees of non-repetition* are designed to prevent similar violations in the future. This may include legislative amendments and institutional reform to strengthen the justice system, and education to promote the importance of human rights.

The *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (Nairobi Declaration)* recognises that specific attention must be given to determining and addressing the reparative needs of women and girls, particularly where they have been victims of sexual and gender-based violence. To ensure that reparations are appropriate, the *Nairobi Declaration* emphasises that women and girls should be involved in the planning, design and implementation of reparations programs.⁴ Further, reparations should take into account the multi-dimensional and long-term consequences of sexual and gender-based violence for women and girls, their families and communities.⁵

The *Nairobi Declaration* acknowledges that sexual and gender-based violence stems from women's unequal social position. Women's economic, social and political inequality leads to women being targeted for violence, prevents women from being able to adequately protect themselves from violence, and can hamper women's recovery and reintegration into society. Accordingly, the *Nairobi Declaration* argues that in addition to remedying the harm that victims have suffered, reparations should be *transformative*; they should address the underlying structural inequalities that have enabled violence against women.⁶ Transformative reparations may include repealing discriminatory laws and enshrining gender equality in legal instruments, introducing parliamentary quotas for women, providing education and skills training to women and girls, and providing micro-credit projects for individual and collective groups of victims.

REPARATIONS AT THE INTERNATIONAL CRIMINAL COURT

The ICC was created to respond to 'the most serious crimes of concern to the international community as a whole'.⁷ It has jurisdiction over the crimes of genocide, war crimes and crimes against humanity⁸ occurring on the territory of states or committed by nationals of states who have accepted the ICC's jurisdiction, or over situations referred to the ICC by the United Nations Security Council.⁹

When the *Rome Statute of the International Criminal Court (Rome Statute)* was being drafted, there was a push from feminist academics, practitioners and civil society activists to include provisions that would ensure justice for victims, particularly victims of sexual and gender-based violence. This advocacy resulted in the ICC being granted 'the most advanced gender justice mandate of any international institution'.¹⁰ However, as will be seen below, this gender justice mandate has not always produced gender-just outcomes.

During the *Rome Statute* negotiations, drafters were influenced by trends in national, regional and international

justice systems where reparations were used to respond to human rights abuses. It was hoped that the inclusion of reparations in the *Rome Statute* would highlight the centrality and importance of the victim in international criminal justice proceedings, and enable the ICC to repair the harm caused to victims. By including reparations in the *Rome Statute*, drafters were also responding to criticisms that the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda had failed to adequately respond to and address harm to victims.¹¹

Article 75 of the *Rome Statute* provides that reparations can be awarded against a convicted person. Where a convicted person is unable to satisfy a reparations order (generally because he or she is indigent), the Court can order reparations to be paid out of the Trust Fund for Victims. Reparations can be awarded on an individual basis, collective basis, or both,¹² and can include (but are not limited to) restitution, compensation and rehabilitation.¹³

REPARATIONS IN THE LUBANGA CASE

Thomas Lubanga Dyilo was the first person to be convicted at the ICC. He was the President of the *Union des Patriotes Congolais* and its military wing, the *Force Patriotique pour la Libération du Congo*, an organised armed group involved in an internal armed conflict against other militia forces in the Democratic Republic of the Congo. Lubanga was found guilty of the war crimes of conscripting and enlisting children under the age of 15 and using them to participate in hostilities – that is, of using child soldiers. He was sentenced to a total of 14 years imprisonment.

Despite widespread evidence of sexual violence during the conflict in the Democratic Republic of the Congo, the Prosecutor failed to lay charges for these crimes. This was a decision that would shape the course of the trial, and the justice available to victims. Because sexual violence was not formally charged in the case, the Trial Chamber could not make any findings of fact on this point. This was despite efforts to draw the Chamber's attention to the sexual violence that had occurred – the victims' legal representative unsuccessfully sought to have the charges recharacterised to include sexual slavery,¹⁴ and the Prosecutor highlighted throughout the trial evidence of sexual and gender-based violence perpetrated against child soldiers.¹⁵

The absence of any findings of fact regarding sexual violence created complications when assessing harm for the purpose of reparations. For victims to be eligible for reparations, there must be a nexus between the harm suffered and the crime of which the accused was convicted. Because Lubanga was not convicted of sexual violence, the Court needed to consider whether reparations could nonetheless be awarded for these crimes.

At first instance, in the *Decision Establishing the Principles and Procedures to be Applied to Reparations*, the Trial Chamber recognised the need for the Court to 'formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence'.¹⁶ The Trial Chamber held that the damage, loss and injury that formed the basis of the reparations claims must have resulted from

the crimes of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities.¹⁷ However, this did not mean that reparations were limited to 'direct' harm or the 'immediate effects' of the crime.¹⁸ The Trial Chamber formulated a two-pronged test: first, there needed to exist a 'but/for' relationship between the crime and the harm; and second, the crimes for which Lubanga was convicted needed to be the 'proximate cause' of the harm for which reparations were sought.¹⁹ Thus, while this test excluded harm arising from the broader sexual and gender-based violence committed in the conflict, it may have included harm as a result of sexual violence committed against child soldiers. However, rather than making explicit findings on the harm which could be the basis of reparations awards, the Trial Chamber deferred this task to the Trust Fund for Victims.

The defence appealed this decision.²⁰ Among other grounds, it argued that the Trial Chamber was incorrect in recognising sexual violence crimes. As these were not charged or proved, the defence argued that they could not be taken into account for the purpose of a reparations order.

The Appeals Chamber found that the Trial Chamber was incorrect in declining to make findings on the harm in the case.²¹ The Appeals Chamber consequently identified the harm done to direct and indirect victims which would give rise to reparations. This harm did not include sexual violence.²² The Appeals Chamber held that because it was not established at trial that the acts of sexual violence were attributable to Lubanga, sexual and gender-based violence could not be defined as a harm resulting from the crimes for which Lubanga was convicted.²³ Thus, Lubanga could not be held liable for reparations for this harm.

In its decision, the Appeals Chamber also set out a number of principles to guide the Court's approach to reparations in future cases. These reiterated that reparations could be awarded individually, collectively, or as a combination of the two,²⁴ although the Chamber ultimately awarded only collective reparations. The principles also recognised that in addition to restitution, compensation and rehabilitation, other types of reparations could be awarded, including symbolic, preventative or transformative reparations.²⁵ Further, the principles recognised the need for a gender-inclusive approach

to reparations, and for reparations to be awarded without any adverse distinction on any basis, including as to gender.²⁶ Thus, the reparations principles developed by the Appeals Chamber hold some promise of justice for victims of sexual and gender-based violence. They appear to give scope to the Court to award the gender-just and transformative reparations proposed in the *Nairobi Declaration*. However, because of the Prosecutor's failure to charge sexual and gender-based violence, the Court was unable to deliver this justice in the *Lubanga* case.

THE RESPONSE TO THE LUBANGA REPARATIONS DECISION

Professor Louise Chappell argues that the *Lubanga* case is 'an exemplar of how *not* to secure justice through reparations for... sexual and gender-based violence'.²⁷ She argues that the initial decision not to include sexual violence charges triggered a 'gender injustice cascade' that flowed through the criminal justice process and prevented effective reparations for the victims of these crimes.²⁸ Thus, the *Lubanga* case demonstrates the importance of recognising and charging sexual and gender-based violence; without this, victims may be denied justice at every stage of the criminal process.

The *Lubanga* case was also criticised for its failure to award individual reparations. Dr Luke Moffett argues that collective reparations may compromise victims' right to a remedy by responding to the needs of the group rather than the needs of the individual. Collective reparations may fail to acknowledge that different groups of victims have different (or even opposing) needs.²⁹ Individual and collective reparations should not be awarded in isolation; both types of reparation are needed to complement each other.

The Office of the Prosecutor at the ICC has responded to criticisms of its charging decisions in *Lubanga* by developing a Policy Paper on Sexual and Gender-Based Crimes. This policy emphasises the commitment of the Office of the Prosecutor to pay particular attention to sexual and gender-based violence in all aspects of its operations: from preliminary examinations and investigations to charging decisions. The policy also recognises that the Office of the Prosecutor 'supports a gender-inclusive approach to reparations'.³⁰

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Sexual and gender-based violence charges have been included in subsequent cases at the ICC. The ICC's second trial, of Germain Katanga and Mathieu Ngudjolo Chui, included charges of rape and sexual slavery among other crimes against humanity and war crimes. This case involved crimes which occurred during an attack on the Bogoro village in the Ituri district of the Democratic Republic of the Congo. Although the Trial Chamber found that rape and sexual slavery had occurred during the attack, it determined that neither of the accused bore criminal responsibility for the crimes. Ultimately, Ngudjolo Chui was acquitted of all charges, while Katanga was convicted of other crimes.

Accordingly, similarly to *Lubanga*, when the Trial Chamber ordered reparations against Katanga, it was 'intrinsically bound' by the parameters of the conviction.³¹ Thus, the Trial Chamber was unable to award specific reparations for the sexual and gender-based violence that had occurred. However, in an improvement on the *Lubanga* decision, the Trial Chamber in *Katanga* did award reparations on an individual basis as well as a collective basis.³² This approach was advocated for in submissions made to the Trial Chamber by the victims, defence, ICC Registry, Office of the Prosecutor and several civil society and human rights organisations.³³

On 21 March 2016, the first conviction for sexual and gender-based violence crimes occurred at the ICC. Jean-Pierre Bemba Gombo, a military commander of the *Mouvement de Libération du Congo* forces in the Central African Republic, was convicted through the doctrine of command responsibility for a number of charges, including rape as a war crime and crime against humanity. While submissions on reparations have been made to the Trial Chamber, at the time of writing, the Chamber had not yet issued the *Bemba Gombo* reparations order. Thus, it remains to be seen whether and how the Court will use the *Bemba Gombo* case to build on the potential of the *Lubanga* reparations principles and award gender-just reparations for victims of sexual and gender-based violence.

CONCLUSION

Three key lessons emerge from the ICC's experience. First, the ICC demonstrates the valuable input lawyers can have in the design of institutions and redress programs. Lawyers, academics and civil society activists were instrumental in ensuring that reparations were included in the *Rome Statute*. Where human rights violations occur at a national level, it is similarly important for lawyers to contribute their legal expertise to discussions about appropriate redress, which may incorporate reparations principles. Second, the ICC indicates the importance of lawyers bringing attention to sexual and gender-based violence. Sexual and gender-based violence can often be overlooked, particularly where it occurs in the context of other violence or human rights abuses. Lawyers need to highlight this violence where it has occurred, so that the violence is legally acknowledged and victims can accordingly receive appropriate redress. Third, the ICC demonstrates the importance of ensuring that remedies are appropriate to the needs of the victims. Lawyers should be aware of the many types of reparative measures, and consider

which are necessary to provide justice in a particular case. This may include a combination of individual and collective reparations. Further, lawyers should also consider the potential of transformative reparations as a way to address the underlying causes of sexual and gender-based violence. ■

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Notes: 1 Royal Commission into Institutional Responses to Child Sexual Abuse, Redress and Civil Litigation Report, 2015, <<http://www.childabuseroyalcommission.gov.au/getattachment/f92be4d5-7045-4692-bc5a-d6cb094906ed/Final-report-Redress-and-civil-litigation>>, 128. 2 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res 60/146, 16 December 2005, art 15. 3 *Ibid*, pt IX. 4 *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*, International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007, <https://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf>, principle 2B. 5 *Ibid*, principle 2E. 6 *Ibid*, art 3. 7 *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9, preamble. 8 *Ibid*, art 5. Note that at the time of writing, discussions were due to occur at the Assembly of State Parties concerning whether to activate the ICC's jurisdiction over the crime of aggression. 9 *Ibid*, art 12. 10 L Chappell and A Durbach, 'The International Criminal Court: A Site of Gender Justice?' *International Feminist Journal of Politics*, 16, 2014, 533-7, 534. 11 L Chappell, *The Politics of Gender Justice at the International Criminal Court*, Oxford University Press, 2016, 135. 12 *Rules of Procedure and Evidence*, ICC-ASP/1/3 and Corr.1, part II.A, r 97(1). 13 *Rome Statute* art 75(1). 14 *Prosecutor v Lubanga*, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049, 14 July 2009; *Prosecutor v Lubanga*, Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 Entitled 'Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May Be Subject to Change', ICC-01/04-01/06-2205, 17 December 2009. 15 L Chappell, 'The Gender Injustice Cascade: 'Transformative' Reparations for Victims of Sexual and Gender-Based Crimes in the Lubanga Case at the International Criminal Court', *The International Journal of Human Rights*, 2017, 21, 1223-42, 1230. 16 *Prosecutor v Lubanga*, Decision Establishing the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/06-2904, 7 August 2012 [207]. 17 *Ibid*, [247]. 18 *Ibid*, [249]. 19 *Ibid*, [250]. 20 *Prosecutor v Lubanga*, Defence Document in Support of the Appeal Against Trial Chamber I's Decision Establishing the Principles and Procedures to be Applied to Reparation, Rendered on 7 August 2012, ICC-01/04-01/06-2919-ENG, 10 September 2012. The victims also appealed the decision, relating to the Trial Chamber's dismissal of applications for reparations. 21 *Prosecutor v Lubanga*, Judgment on the Appeals Against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012, ICC-01/04-01/06-3129, 3 March 2015. 22 *Ibid*, [191]. 23 *Ibid*, [198]. 24 *Prosecutor v Lubanga*, Order for Reparations, ICC-01/04-01/06-3129-AnxA, 3 March 2015 [33]. 25 *Ibid*, [34]. 26 *Ibid*, [16], [18]. 27 Chappell, above note 15, 1223. 28 *Ibid*, 1223. 29 Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, 2014, 180. 30 Office of the Prosecutor, *Policy Paper on Sexual and Gender-Based Crimes*, June 2014, <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf> [102]>. 31 *Prosecutor v Katanga*, Order for Reparations Pursuant to Article 75 of the Statute, ICC-01/04-01/07-3728-tENG, 24 March 2017 [147]. 32 *Ibid*, [281]. 33 *Ibid*, [282].

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