Cambridge International Law Journal, Vol. 8 No. 1, pp. 39–59

Transformative reparations: changing the game or more of the same?

Brianne McGonigle Leyh*
Netherlands Institute of Human Rights, Utrecht, The Netherlands

Julie Fraser*
Netherlands Institute of Human Rights, Utrecht, The Netherlands

The traditional aim of reparations is to place the victim back in the position they would have been in had the harm not occurred. Academics and practitioners have criticised this traditional approach to reparations for serious crimes and human rights violations as failing to address socio-economic disparities and unequal power structures. The recent transformative reparations theories grew out of the belief that it is ineffectual to place marginalised victims back in positions of marginalisation following serious harm. The desire to transform the lives of victims as well as the power structures that sustain unequal relationships is compelling. As a result, this idea has been influential within academic and policy-making circles, and endorsed by the United Nations, the International Criminal Court, and regional and domestic jurisdictions. Despite this, it remains unclear what 'transformation' means in theory and in practice. The purpose of this article is to critically examine transformative reparations and explore whether the notion is in fact changing the game or rather more of the same. It questions the utility of the label 'transformative' and its suitability in specific contexts. It concludes that outside the international(ised) criminal context, and especially in the national and local context, there may be greater scope for reparations with transformative potential, but only when victims and affected communities play a central role in the decision-making, and when linked with other non-temporary, structural changes. Even under these circumstances, reparation authorities should be cautious of raising false expectations that reparations will be transformative.

Keywords: *reparations, human rights, transformation, International Criminal Court*

1 INTRODUCTION

Over the last few decades, there have been important developments around the world to try to ensure that victims of serious human rights or humanitarian law violations receive some sort of remedy. For instance, the right to reparation has been recognised

* Dr Brianne McGonigle Leyh is an Associate Professor and Dr Julie Fraser is an Assistant Professor with the Netherlands Institute of Human Rights (SIM), and both are members of the Montaigne Research Centre for the Rule of Law and Administration of Justice, Utrecht University, The Netherlands. This article was presented at the University of Cambridge, UK, on 17 November 2018 at a workshop entitled 'Rethinking Reparations in International Law', co-sponsored by the Lauterpacht Centre for International Law and the European Society of International Law. Thanks to Leila Ulrich, Elena Butti, Rachel Killean, SIM Colleagues, and the anonymous reviewers for their insightful comments on earlier drafts. Any mistakes or omissions are the authors'.

Journal compilation © 2019 Edward Elgar Publishing Ltd
The Lypiatts, 15 Lansdown Road, Cheltenham, Glos GL50 2JA, UK
and The William Pratt House, 9 Dewey Court, Northampton, MA 01060-3815, USA

as part of a victim's right to a remedy under international human rights law.[1] It has been enshrined in international treaties like Article 75 of the Rome Statute of the International Criminal Court (ICC), and supported by soft law documentation like the 2005 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 (Basic Principles).[2] The traditional idea of reparation is to attempt to place a victim back in the position they would have been in had the harm not occurred. Academics and practitioners have long criticised this traditional approach as failing to address socio-economic disparities and unequal power structures, which may have led to the victimisation in the first place.[3] The recent transformative justice movement, and transformative reparations in particular, grew out of the belief that it is ineffectual to place marginalised victims back in positions of marginalisation following serious harm.[4]

The desire to transform the lives of victims as well as the power structures that sustain unequal relationships is compelling. As a result, the idea of transformative reparations has been influential within academic and policy-making circles, especially those focusing on women's rights and sexual and gender-based violence.[5] Currently, the

1. See right to a remedy in Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 2017 A(III) (UDHR) art 8; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2; International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD) art 6; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 October 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) art 14; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 39; International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3 (CED) art 24. It is also protected regionally in Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 41; American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) OAS Treaty Series No 36 (ACHR) art 25; African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African (Banjul) Charter) art 7.

2. Rome Statute of the International Criminal Court (as amended) (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute); Basic Principles, UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147.

3. Lisa J Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework' (2008) 2 International Journal of Transitional Justice 331; Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2001) 12 International Legal Perspectives 73; Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339; Brianne McGonigle Leyh, 'Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations' (2017) 33 Utrecht Journal of International and European Law 44.

4. Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625.

5. See 'Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation', issued at the International Meeting on Women's and Girls' Right to a Remedy and Reparation (19–21 March 2007), Nairobi, Kenya; Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP, Cambridge 2009); Andrea Durbach and Louise Chappell, 'Leaving Behind the Age of Impunity: Victims of Gender Violence and the Promise of Reparations' (2014) 16 International Feminist Journal of

United Nations (UN), ICC, regional human rights courts, and domestic jurisdictions have endorsed the notion.[6] Despite such endorsements, it remains unclear what 'transformation' means in theory and in practice. For instance, what is the difference between positive (incremental) change and transformation? Who determines when a victim's life or society has been transformed? Who are the mandated and relevant actors to effect transformation? And, finally, are the promises of transformation realised in practice?

This article critically examines transformative reparations and explores whether the notion is in fact changing the game or more of the same. While some literature has critiqued transformative justice more generally,[7] this article looks specifically at transformative reparations and presents a critique in relation to both international human rights and criminal contexts. It begins by briefly examining the traditional idea of reparations and the development of transformative theories challenging these traditional norms. Focusing on human rights and international criminal bodies that deal with reparations including their legal processes and the discourses that surround them, the article explores the value of transformative reparations, both conceptually and practically. It then analyses the potential drawbacks of transformative reparations, questioning the utility of the label and its suitability in specific contexts. It argues that outside the international(ised) criminal context, and especially in the national and local context, there may be greater scope for reparations with transformative potential but only when victims and affected communities play a central role in the decision-making and when linked with other non-temporary, structural changes. Even under these circumstances, reparation authorities should be cautious of raising false expectations because, in reality, very few victims will receive reparations and even fewer will see their lives or communities transformed.

Politics 543; Louise Chappell, 'The Gender Injustice Cascade: "Transformative" Reparations for Victims of Sexual and Gender-Based Crimes in the *Lubanga* Case at the ICC' (2017) 29 The International Journal of Human Rights 1223.

6. See eg UN Committee on the Elimination of Discrimination Against Women (CEDAW), 'General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' (1 November 2013) UN Doc CEDAW/C/ GC/30, [77]; UN Women, 'A Window of Opportunity: Making Transitional Justice Work for Women' (2010) 3; *The Prosecutor v Thomas Lubanga Dyilo (Lubanga)* Trial Chamber I, Decision Establishing the Principles and Procedures to be Applied to Reparations ICC-01/04-01/06-2904 (7 August 2012) [222]; *Lubanga* Appeals Chamber, Judgement on the Appeals Against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2 ICC-01/04-01/06-3129 (3 March 2015) [202]; *The Prosecutor v Germain Katanga (Katanga)* Trial Chamber II, Order for Reparations Pursuant to Article 75 of the Statute ICC-01/04-01/07 (24 March 2017) [297]; *Case of González et al (Cotton Field) v Mexico* Inter-American Court of Human Rights Series C No 205 (16 November 2009) [450]; The Victims and Land Restitution Law (Victims Law) Law 1448 Diario Oficial (Colombia), art 28.

7. Rama Mani, 'Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development' (2008) 2 International Journal of Transitional Justice 253; Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Social Legal Studies 171; Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice' in Naomi Roht-Arriaza and Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century* (CUP, Cambridge 2006) 2.

2 TRADITIONAL APPROACH TO REPARATIONS

The idea that a victim who suffered harm should be remedied has a long tradition in legal systems around the world. Restoring individual victims to their position prior to the harm suffered is a principle in almost all domestic legal systems. This idea has also been reflected in international law.[8] Generally, under principles of tort law, it is the wrongdoer who is expected to remedy the harm suffered. Yet, when the wrongdoer is unable to remedy the harm, particularly when the harm results from criminal behaviour, authorities have long found ways to provide redress to victims. Compensation schemes date as far back as the Hammurabi Code.[9] These or similar types of reparation programmes have been used throughout the centuries, usually when the political costs of not establishing one is high. Following the Second World War, an increasing number of domestic systems provided reparations to war victims (though not always recognised as such), establishing public compensation schemes, usually in the form of one-off compensation payments, though also including restitution of property, satisfaction through criminal trials, the erection of monuments, and the creation of national days of remembrance.[10] In the post-war years, States increasingly established permanent compensation schemes for victims of domestic criminal offences when the wrongdoer was not able to provide the necessary satisfaction.[11] Importantly, due to financial and political constraints, all domestic compensation schemes are limited in what and who they will cover, and they typically adhere to the principle that victims should not benefit or become enriched from their suffering.[12] A radical change (or transformation) of their lives, for instance, could potentially be considered as a benefit or enrichment. Rather, the remedies are generally meant to place the victims back in the position they were in prior to the violation taking place – the *status quo ante*.

In line with developments at the domestic level, inter-governmental organisations, such as the UN and the Council of Europe, have strongly supported victim compensation processes. In the late 1980s, the Council of Europe adopted the *Convention on the Compensation of Victims of Violent Crimes*, which sets minimum standards for compensation policies.[13] Around the same time, the UN General Assembly passed

8. *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17.

9. Frédéric Mégret, 'Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes' (2010) 36 Brooklyn Journal of International Law 123, 130; UN Office for Drug Control and Crime Prevention, 'Handbook on Justice for Victims' (1999) 44 <https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.> accessed 15 March 2019. Viewed as 'the granting of public funds to persons who have been victimized by a crime of violence and to persons who survive those killed by such crimes', see Herbert Edelhertz and Gilbert Geis, *Public Compensation to Victims of Crime* (Praeger Publishers, New York 1974) 3.

10. See Ruti Teitel, 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69.

11. See 'Handbook on Justice for Victims' (n 9) 44; see Mégret (n 9) 130–132; see also Marion E I Brienen and Ernestine H Hoegen, *Victims of Crime in 22 European Criminal Justice Systems* (Wolf Legal Publishers, Tilburg 2000) 1057.

12. See 'Handbook on Justice for Victims' (n 9) 44; see also *Juvenile Reeducation Institute v Paraguay* Inter-American Court of Human Rights Series C No 112 (2 September 2004) [261]; *Moiwana Community v Suriname* Inter-American Court of Human Rights Series C No 124 (15 June 2005) [171]; *Yakye Axa Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C No 125 (17 June 2005) [182].

13. European Convention on the Compensation of Victims of Violent Crimes (adopted 24 November 1983, entered into force 1 February 1988) 1525 UNTS 37.

by consensus the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[14] Grounded in Article 8 of the Universal Declaration of Human Rights, which deals with the right to an effective remedy, the Declaration of Basic Principles was the first instrument to explicitly state that victims of serious crimes have a right to access to justice and to obtain reparation. Later, the UN General Assembly would again pass by consensus the 2005 Basic Principles.[15] These Principles stress that adequate, effective and prompt reparation involves providing a means through which victims, or their families and dependents, who suffer harm as the result of an international human rights or humanitarian law violation have access to reparations.

The 2005 Basic Principles outline five types of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The first three of these focus on the reparation to the individual, specifically noting that restitution is meant to restore the victims to their original situation.[16] When restitution is not possible, compensation is seen as a suitable remedy, but again the victim is not meant to become enriched from the harm. Rehabilitation is also seen as restoring the victims, as far as is possible, back to where they were mentally or physically prior to the harm. In contrast with the first three measures, satisfaction and guarantees of non-repetition recognise the more collective and structural impact of serious harms and crimes. These latter two forms of reparation, while more forward-looking than the others, still do not explicitly recognise the notion of transformation. Rather, this document and others focus on the cessation of violations, official investigations, apologies and institutional reforms (such as in the judicial or security sectors), all of which deal with important governmental and societal changes but not necessarily societal or individual transformation – if transformation is meant to represent something beyond how change is understood more generally. Accordingly, the 2005 Basic Principles anticipate important societal and structural changes but fall short of embracing transformation, either individually or collectively.

3 TRANSFORMATIVE THEORIES AND TRANSFORMATIVE REPARATIONS

Building upon ideas from the field of conflict transformation,[17] in the late 2000s, a number of scholars began to question the traditional tort rationale underpinning reparations for serious crimes. Daly, Lambourne, Laplante and others argued that transitional justice processes should address the structural conditions reinforcing socio-economic inequality, which often contribute to conflict.[18] By 2009, Uprimny Yepes was specifically advocating for 'transformative reparations', which he asserted have the potential to change the circumstances in which victims live.[19] Unlike ordinary reparations, transformative reparations question the underlying notion for reparations to restore

14. UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34.
15. Basic Principles (n 2).
16. Ibid [19].
17. See Kumar Rupesinghe, *Conflict Transformation* (Palgrave Macmillan, Basingstoke 1995).
18. Laplante (n 3); Wendy Lambourne, 'Transitional Justice and Peacebuilding After Mass Violence' (2009) 3 International Journal of Transitional Justice 28; Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 International Legal Perspectives 73; David C Gray, 'Extraordinary Justice' (2010) 62 Alabama Law Review 55.
19. See Uprimny Yepes (n 4).

victims to the *status quo ante*. Why should an already poor and marginalised victim be repaired back to a position of poverty and discrimination? This rationale, Uprimny argues, is both unfair and detrimental.[20] Given that reparations have been recognised as having the greatest potential to impact a victim's socio-economic conditions, it seems logical to move beyond the traditional tort rationale in order to improve their lives.[21] The paradigm of transformative reparations has since been taken up, to varying and limited degrees, in numerous legal settings, beginning especially in Latin America. Although the Inter-American Court of Human Rights (IACtHR) has signalled its endorsement of the traditional view on reparations,[22] it has slowly adopted more transformative language through its collective reparation awards. However, conceptually, many questions remain unanswered.

For example, the 2004 IACtHR case *Plan de Sánchez*, which dealt with a massacre of over 250 civilians (including mostly indigenous Mayan people) by the Guatemalan State, was hailed as a 'ground-breaking' decision.[23] In that case the Court ordered individual and collective reparations dealing with socio-economic measures such as a housing program, medical treatment and educational actions.[24] Likewise, in the 2006 *Pueblo Bello Massacre* case, which concerned the murder of six individuals and the enforced disappearance of 37 others by paramilitary groups, the IACtHR ordered the State to implement a housing programme for the next of kin.[25] This reparations award can be seen as an attempt to address the socio-economic needs of the victims and to facilitate their return to the community. Similarly, in the *Sawhoyamaxa* case, which concerned indigenous property rights over ancestral land, the IACtHR again focused on socio-economic awards by ordering Paraguay to create a community development fund with US$1 million to establish educational, housing, agricultural and health programmes, including water and sanitation projects.[26] In 2009, the Court explicitly called for transformative reparations in the *Cotton Field* case.[27] This case concerned the systematic disappearance, torture, sexual abuse and murder of numerous women. The IACtHR held that reparations must be designed to change the context of structural discrimination in which the facts of the case occurred in order to rectify the harms suffered.[28] Yet scholars have criticised the actual awards handed down by the Court for failing to reflect the Court's own concept of transformative reparations.[29] Nevertheless, the Court's now explicit stance and its growing

20. Ibid 632.
21. Gready and Robins (n 3) 347.
22. *Juvenile Reeducation Institute v Paraguay* (n 12) [261]; *Moiwana Community v Suriname* (n 12) [171]; *Yakye Axa Indigenous Community v Paraguay* (n 12) [182]; *Mapiripán Massacre v Colombia* Inter-American Court of Human Rights Series C No 134 (15 September 2005) [245].
23. Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP, Cambridge 2012) 158.
24. See *Plan de Sánchez Massacre v Guatemala* Inter-American Court of Human Rights Series C No 116 (19 November 2004).
25. *Pueblo Bello Massacre v Colombia* (*Pueblo Bello Massacre*) Inter-American Court of Human Rights Series C No 140 (31 January 2006) [276].
26. *Sawhoyamaxa Indigenous Community v Paraguay* Inter-American Court of Human Rights Series C No 146 (29 March 2006) [224].
27. *Cotton Field* (n 6) [451].
28. Ibid [450].
29. Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment' (2011) 33 Human Rights Quarterly 1062, 1090.

case law on collective reparations focused on socio-economic awards reflect an attempt to transform the living conditions of victims (viewed collectively) and to address the more structural inequalities experienced by the victims.

Domestically, too, States have taken up the idea of transformative reparations. The most well-known example is Colombia's 2011 Victims Law, which establishes a comprehensive programme for victims' rights in response to the more than 50 years of conflict between the State and non-State armed groups (most notably the FARC-EP). The Victims Law explicitly mentions the 'transformative character' of the reparations it aims to provide.[30] Although the law does not provide any specific guidance on how transformation should be achieved, the IACtHR has played an important role in monitoring the reparations processes.[31] Nevertheless, questions have been raised about its efficacy.[32] Likewise, the Peruvian Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación* – CVR) adopted a bold transformative mandate.[33] It 'took a strong stance that the CVR should address the root causes of conflict … and that it should utilize methodologies and a participatory process that would strengthen democratic citizenship and individually and collectively empower survivors and affected communities', for example through its extensive reparations plan.[34] Yet even this plan was criticised for its limited impact on gender-, class- and race-based inequalities.[35]

While much of the emphasis on transformation originated and developed within the Latin American context, it has been picked up in other regional systems and internationally. For example, the European Union (EU), as a major funder of transitional justice and reparation processes around the world, has noted in its transitional justice policy document that it supports forward-looking processes 'with the aim to transform the society by identifying and dealing with root causes of conflict and violence that may reside in discrimination, marginalisation or violation of social, economic and cultural rights'.[36] Internationally, following the publication and gendered critique of the UN's 2005 Basic Principles, a transnational coalition of women's NGOs developed in 2007 the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.[37] The Declaration stresses that 'reparation must drive post-conflict transformation of

30. The Victims and Land Restitution Law (Victims Law) Law 1448 Diario Oficial (Colombia) art 28.

31. Genevieve Lessard, 'Preventive Reparations at a Crossroads: The Inter-American Court of Human Rights and Colombia's Search for Peace' (2018) 22 The International Journal of Human Rights 1209.

32. See Sanne Weber, 'From Victims and Mothers to Citizens: Gender-Just Transformative Reparations and the Need for Public and Private Transitions' (2018) 12 International Journal of Transitional Justice 88.

33. Rebekka Friedman, 'Implementing Transformative Justice: Survivors and Ex-Combatants at the Comisión de la Verdad y Reconciliación in Peru' (2018) 41 Ethnic and Racial Studies 701, 702, 706.

34. Friedman (n 33) 706–707; the extensive reparations include, eg, a pension fund for victims.

35. See Jelke Boesten and Melissa Fisher, 'Sexual Violence and Justice in Postconflict Peru' (2012) United States Institute of Peace Special Report <https://www.usip.org/sites/default/files/SR310.pdf> accessed 16 December 2018.

36. Foreign Affairs Council Conclusions 13576/15 (16 November 2015) laying down the EU's support to transitional justice, commencing implementation of 'The EU's Policy Framework on Support to Transitional Justice' (annex to annex) [9] <http://data.consilium.europa.eu/doc/document/ST-13576-2015-INIT/en/pdf> accessed 1 October 2018.

37. Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 Harvard Human Rights Journal 97, 123.

socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls'.[38] This coalition included many women's rights advocates and activists who drew upon transformative equality theories.[39]

These advocates and scholars critiqued the traditional restitution concept of reparations, raising the concern that returning female victims (and by analogy other systemically marginalised or disadvantaged groups) to the *status quo ante* functions to 'recreate or reinforce conditions of powerlessness, inequality or insecurity'.[40] They challenged the idea that reparations 'are a neutral legal space, unfettered by the complexities of gender and other intersectional identities',[41] and sought to account for and address pre-existing structural inequalities. Rather than restoring and perpetuating these inequalities, reparations should transform the economic, social, cultural and political dynamics that oppress women and girls and often cause their victimisation.[42] This sentiment was echoed by the UN Committee on the Elimination of Discrimination Against Women, which has called for transitional justice mechanisms to 'secure a transformative change in women's lives'.[43] The Committee accused transitional justice mechanisms of failing women by inadequately delivering justice and reparation for all of their harms suffered.[44] The Committee stressed that reparations should aim to transform the structural inequalities in society that lead to violations of women's rights.[45] Similarly, in 2014, the UN Secretary General promulgated a Guidance Note on reparations for conflict-related sexual violence, underlining that the design, implementation and impact of reparations should aim to be transformative.[46] The Note highlights that, rather than reinforcing pre-existing patterns or structures of inequality or discrimination, reparations should endeavour to transform them.[47]

38. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (n 5) [3].
39. In the field of gender equality and non-discrimination, some scholars address transformative equality within the frame of substantive equality – see, for instance, Oddný Arnardóttir, *Equality and Non-Discrimination Under the European Convention on Human Rights* (Martinus Nijhoff, Leiden 2003) 18–20 – whereas others view it as a separate category. See eg Rikki Holtmaat and Christa Tobler, 'CEDAW and the European Union's Policy on the Field of Combating Gender Discrimination' (2005) 12 Maastricht Journal of European and Comparative Law 399, 404–409. Holtmaat and Tobler view formal equality as requiring an individual right's strategy. Substantive equality, however, requires a strategy for social support, and transformative equality goes further, requiring a strategy for structural change.
40. Margaret U Walker, 'Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations' (2016) 10 International Journal of Transitional Justice 108, 109. See also Ní Aoláin et al (n 37) 103; Rashida Manjoo, 'Introduction: Reflections on the Concept and Implementation of Transformative Reparations' (2017) 21 The International Journal of Human Rights 1193, 1195.
41. Ní Aoláin et al (n 37) 103.
42. Walker (n 40) 109; Guidance Note of the UN Secretary-General, 'Reparations for Conflict-Related Sexual Violence' (June 2014) 8 <https://www.ohchr.org/Documents/Press/GuidanceNoteReparationsJune-2014.pdf> accessed 1 October 2018; Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (n 5) [2].
43. UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations' (1 November 2013) UN Doc CEDAW/C/GC/30 [77].
44. Ibid [76].
45. Ibid [79].
46. Guidance Note of the Secretary-General (n 42) Guiding Principle 4, 1.
47. Ibid 5–6.

The idea of transformative reparations, or the transformative potential of reparations, has also been endorsed by the ICC. While the Rome Statute, in its Article 75, only explicitly lists restitution, compensation and rehabilitation, the Court has read this Article as non-exhaustive, noting that '[o]ther types of reparations, for instance those with a symbolic, preventative or transformative value, may also be appropriate'.[48] While the ICC has not elaborated further upon the idea of transformative reparations in its case law, submissions made to the Court by the Trust Fund for Victims (TFV) and gender-justice advocates have. For example, the NGO Women's Initiatives for Gender Justice noted transformation as one of the goals of reparation and underlined the importance of an approach 'that seeks to transform communal and gender relations'.[49] They identified a dual function for reparations as both rehabilitating the individual victim as well as contributing to societies' transition 'into a community based on non-violence and non-discrimination for all of its members'.[50] The TFV submitted in the *Lubanga* case that reparations should contribute to transformation and present an 'opportunity to overcome structural conditions of inequality and exclusion'.[51] It argued that this is particularly important for victims who have suffered irreparable harm and who are marginalised in their communities.[52]

These developments all point towards a new 'transformative' paradigm emerging within transitional justice more generally and reparations specifically.[53] However, as a new paradigm there are still many question marks around the subject and scholars are continuing to construct a definition of transformative reparations as well as determine its relationship to the broader transitional justice field. Notwithstanding its nascent nature, transformative reparations have met with a number of critiques and clear limitations. Some scholars have argued that the entire notion of transformation is too vague or too focused on the collective, which overlooks individual victim requests and rights.[54] Other scholars have cautioned against blurring the lines between reparation, assistance, development programmes and general public services.[55] The idea of transformation may, in fact, cause the entire endeavour of reparations to become 'analytically overstretched and impractical' by trying to deliver too much.[56] Considering the

48. *The Prosecutor v Thomas Lubanga Dyilo (Lubanga)* Trial Chamber I, Decision Establishing the Principles and Procedures to be Applied to Reparations ICC-01/04-01/06-2904 (7 August 2012) [222]; *Lubanga,* Appeals Chamber, Judgment on the Appeals Against the 'Decision Establishing the Principles and Procedures to be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations (Annex A) and Public Annexes 1 and 2 ICC-01/04-01/06-3129 (3 March 2015) [202]; *The Prosecutor v Germain Katanga (Katanga)* Trial Chamber II, Order for Reparations Pursuant to Article 75 of the Statute ICC-01/04-01/07-3728-tENG (24 March 2017) [297].

49. *Lubanga*, Trial Chamber I, Observations of the Women's Initiatives for Gender Justice on Reparations ICC-01/04-01/06-2876 (10 May 2012) [13], [17].

50. Ibid [17].

51. *Lubanga* Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012 ICC-01/04-01/06-2872 (25 April 2012) [72].

52. Ibid [76].

53. See Daly (n 3); Gready and Robins (n 3) 339–361; McGonigle Leyh (n 3).

54. Walker (n 40) 109–110; Manjoo (n 40) 1196, 1198.

55. Pablo De Greiff, 'Justice and Reparations' in Pablo De Greiff (ed), *The Handbook of Reparations* (OUP, Oxford 2008) 470. Cf Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of Congo (DRC)' (2016) 10 International Journal of Transitional Justice 88, 88.

56. Lambourne (n 18) 46, n 61; Waldorf (n 7); Roht-Arriaza (n 7) 2; Mani (n 7).

pros and cons of transformative reparations, the following sections delve deeper into whether they change the game or are more of the same.

4 GAME CHANGER? THE VALUE OF TRANSFORMATIVE REPARATIONS

The fact that the transformative agenda has been picked up internationally is largely due to the well-organised 'gender lobby', namely feminist scholars and activists, and those advocating sex- and gender-based equality.[57] In addition to their focus on addressing structural bias, a large part of the feminist critique addresses matters of inclusion.[58] The literature stresses the importance of broad and meaningful participation and consultation with women and girls, as well as other marginalised groups in the reparations process.[59] This includes in the early stages of planning, through the design, implementation and evaluation of reparations. The aim has been to recognise and represent women's and girls' experiences, which may differ in important ways to those of men and boys given gendered norms and social positions.[60] For example, reparations programmes may fail to deliver meaningful or useful reparations to women if they provide 'monetary payments to women who lack legal standing to control bank accounts or the social standing to make independent financial decisions'.[61] Women may also be disadvantaged or precluded from participating in or benefiting from reparations programmes by gendered impediments such as restrictions on mobility, limited literacy skills, burdensome care responsibilities, and vulnerability to social stigmas.[62]

Ensuring participation for all victims and focusing on process can be 'a tool of transformation precisely because, if carried out rigorously, it is potentially emancipatory' for those involved.[63] The right to participate is not simply about authorities providing a menu of options, but is an opportunity for victims to exercise their agency. It is about establishing a dialogue where victims share their views, needs and concerns, and have a say on how reparations are shaped. While it might be viewed as a side-effect, one of the consequences of developing genuinely inclusive and participatory processes around reparations is the resulting network and collaboration of local actors.

57. Manjoo (n 40) 1193; Carolyn Hoyle and Leila Ullrich, 'New Court, New Justice? The Evolution of "Justice for Victims" at Domestic Courts and the International Criminal Court' (2014) 12 Journal of International Criminal Justice 681, 691–693.
58. Karen Engle, 'Feminist Governance and International Law: From Liberal to Carceral Feminism' (2018) University of Texas School of Law, Public Law and Legal Theory Research Paper 690, 3. See also UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325 [1] and [2]; UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 30' (n 43) [30], [33(b)], [42]–[47] and [81(e)].
59. Sarah Williams and Emma Palmer, 'Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia' (2016) 10 International Journal of Transitional Justice 311, 325; Andrea Durbach, 'Towards Reparative Transformation: Revisiting the Impact of Violence Against Women in a Post-TRC South Africa' (2016) 10 International Journal of Transitional Justice 366, 386; Guidance Note of the Secretary-General (n 42) 1.
60. Williams and Palmer (n 59) 325; Walker (n 40) 111.
61. Walker (n 40) 111.
62. Ibid; for more on gender perspectives on transitional justice and reparations in particular see Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women', (2007) 1 International Journal of Transitional Justice 338, 338–354; Ruth Rubio-Marín (ed), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations* (CUP, Cambridge 2005).
63. Gready and Robins (n 3) 357.

Along these lines, transformation may also be useful as a language of demand and as an advocacy tool for victims and communities to call for more to be done to remedy their situations of victimisation as well as marginalisation/poverty. This language of demand has already been used to push for a greater focus on socio-economic rights across transitional justice mechanisms,[64] including transformative reparations.[65]

The desire to transform the lives of victims as well as the power structures that sustain unequal relationships and promote victimisation is compelling. It also aligns neatly with pre-existing human rights held by victims – as well as everyone else in society, including individuals not recognised as victims but who are nonetheless marginalised/impoverished. For example, both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination based on grounds including race, colour, sex, language, religion, political or other opinion.[66] The latter Covenant also obliges States Parties in Article 2(1) to ensure the progressive realisation of socio-economic rights for all those in their jurisdiction. States Parties to the Convention on the Elimination of Racial Discrimination (CERD) and the Convention on the Elimination of Discrimination Against Women (CEDAW) are specifically obliged to dismantle racial and sex discrimination in their jurisdiction.[67] The CEDAW further obliges States Parties

> [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[68]

Promoting transformative reparations can therefore be seen to synthesise or repackage a number of existing human rights obligations on States Parties and provide a holistic approach for victims to enjoy their indivisible rights. As such, it is less a game changer and more of an integrated approach. It provides a more comprehensive theoretical conception of reparations that incorporates a wider range of human rights (such as socio-economic rights) than traditionally considered relevant. Yet the difference is that human rights obligations performed by States Parties should transform and benefit all of society and not just individual victims or victim communities. While victims have specific rights to an effective remedy and to be repaired, all those within a State's jurisdiction have the right to freedom from discrimination (including in social and cultural norms and customs) and to socio-economic as well as civil and political rights.

As a result, the label of transformation is useful in that it reinforces steps to move beyond the traditional restitution and/or compensation model of reparations for individuals and to address more institutional and structural problems.[69] Moreover, the benefits of using the notion of transformative reparations include an emphasis on inclusive, participatory processes, a focus on socio-economic rights, and a language

64. See McGonigle Leyh (n 3).
65. For example, women-centred financial compensation or access to credit and productive resources 'may help enhance women's economic empowerment and autonomy and therefore be transformative', Guidance Note of the Secretary-General (n 42) 9.
66. ICCPR (n 1) art 2(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 2(2).
67. See eg CERD (n 1) art 2; Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 2.
68. CEDAW (n 67) art 5(a).
69. Manjoo (n 40) 1196–1197.

for advocacy purposes. As such, the concept of transformation is a welcome disruptor to the traditional approaches to reparation and a salient critique of the failings of transitional justice more broadly. However, in practice, the drawbacks may outweigh the benefits. While transformative reparations sound appealing and it is academically satisfying to present a more theoretically sophisticated concept, in both theory and practice, many issues remain. The following section addresses these issues and the drawbacks to the idea of transformative reparations.

5 POTENTIAL DRAWBACKS OF TRANSFORMATIVE REPARATIONS

There are several problems concerning theories of transformative reparations, ranging from conceptual to practical issues. These include issues with terminology, efficacy in practice, as well as limitations of mandate, which are discussed in turn below.

5.1 Opaque terminology

The first issue is the conceptual confusion regarding what exactly 'transformation' means in theory and in practice. 'Transformation' is a powerful term, which is part of its appeal and use in advocacy as noted above. However, it is also a loaded term and language matters. Therefore, much clarification is required. For example, is the transformation about individual transformation (from victim to survivor to citizen) or societal transformation, or both? Can an individual even be transformed if their society is not? Who gets to determine when someone's life or society has been (meaningfully) transformed?[70] Is it academics, political elites, or the victims and their communities? Surely, victims themselves should have a say about what type of transformation, if any, they want to see materialise, particularly if focused on individual reparation. This is why inclusive participation is so important. Furthermore, how much change constitutes transformation, and does that change have to be radical and occur quickly, or can it be an incremental change over time? If transformation results through the fulfilment (or progressive realisation) of already existing human rights obligations by States through an integrated approach, then why is the term useful/needed to identify something that is not actually new but, rather, is already required?

Determining how and whether 'transformation' is different from 'change' becomes highly relevant. The field of human rights has always been concerned about effectuating positive changes for individuals and as noted above some human rights frameworks have adopted a more assertive stance calling for transformation. Regardless of whether reparations are linked to the more structural changes required by the human rights treaties as detailed above, States Parties already hold these obligations, and framing reparations in this way does not create additional/new obligations. Yet some transformative theorists seem to be demanding more than just positive change for individuals and/or societies based on human rights implementation. Some seek to radically reform the politics and priorities of transitional justice processes, such as reparations, by challenging

70. For instance, an individual scholarship for a victim to study or train in a future career could transform that individual's circumstances. Yet the question remains whether their life is really transformed if they remain living within discriminatory social structures. For example, their society may have made important but not radical improvements to legal frameworks and have implemented human rights trainings for police officers, but not addressed structures of discrimination or marginalisation.

'unequal and intersecting power relationships and structures of exclusion at both the local and the global level'.[71] This view is thought-provoking and aspirational, but in many post-conflict situations it may also be destabilising or simply not possible given the State's fragile predicament. Here we see practical problems with implementing transformative reparations, which may or may not align with victims' own views and preferences, and may unnecessarily raise their expectations.

The critique of the traditional approach to reparations, which would return victims (where possible) to their prior position of marginalisation, is of course highly valid. However, arguably the 'corrective versus transformative debate is a false dilemma, because in practice reparations have already moved beyond the traditional focus on the *status quo ante*'.[72] Many reparations programmes today already adopt more progressive measures that go beyond restitution and compensation. For instance, they often include forward-looking measures aimed at societal change, such as guarantees of non-repetition through legal and economic reforms, as well as measures focusing on the individual such as rehabilitation (for instance focusing on mental health) to improve victims' situations.[73] From this perspective, reparations have already sought to bring about progressive, positive change in both society and the lives of individual victims. The push for transformative reparations is therefore not a game changer to the extent that reparation processes have largely moved beyond restoring the *status quo ante*.

The normative position for pursuing transformative reparations has been well argued, but less consideration has been given to practical issues or the actual business of affecting change.[74] Advocates of transformative reparations often address the subject matter in generalities, avoiding specific proposals or pathways for achieving such transformation.[75] Highlighting reparations' potential role in such transformation does not necessarily contribute to its achievement in practice, and may direct focus on the wrong type of change-facilitating processes (for example, temporary versus permanent processes) and create unrealistic expectations. This leads to the subsequent critique of efficacy in practice.

5.2 How effective are reparations in practice?

Before even addressing the issue of transformation, it is necessary to examine how effective traditional reparations are in practice. The efficacy of reparation programmes is determined by a number of factors including practical obstacles and, crucially, political will.[76] Regardless of the need, entitlements of the victims or the assets available, a lack of political will can undermine reparations processes. While some reparation programmes have enjoyed success (notably the early programmes in Chile and Argentina)

71. Gready and Robins (n 3) 340; Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275, 278.
72. Walker (n 40) 110, 117–118.
73. See eg the recent reparations decision by the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia (ECCC), Summary of Judgement, Case 002/02, Case File No. 002/19-09-2007/ECCC/TC, 16 November 2018 [66].
74. Lauren Marie Balasco, 'Locating Transformative Justice: Prism or Schism in Transitional Justice?' (2018) 12 International Journal of Transitional Justice 368, 373.
75. Walker (n 40) 115.
76. Ibid 110; Sarah Williams and Jasmine Opdam, 'The Unrealised Potential for Transformative Reparations for Sexual and Gender-Based Violence in Sierra Leone' (2017) 21 The International Journal of Human Rights 1281.

reparations programmes typically fall far short of expectations or recommendations.[77] An oft-cited example is the South African reparations programme following the end of Apartheid, which some say triggered a 'deep ambivalence with the entire transitional justice process'.[78] The fact remains that most victims around the world of gross human rights violations as well as serious violations of international humanitarian law still do not receive reparation.[79] The UN Special Rapporteur focusing on reparations has noted that '[t]his implementation gap is of scandalous proportions'.[80] There is a 'deep irony' in pursuing an agenda of transformative reparations 'when most victims go begging for the most elementary forms of direct relief'.[81]

More troubling is the fact that questions are raised regarding the efficacy of reparations even when they are awarded and delivered. Scholarship is lacking empirical studies demonstrating the efficacy of reparations in practice. Gray addresses the issue, noting that such programmes largely 'fail to achieve any demonstrative gain for victims'.[82] Over the years, traditional transitional justice practices have been criticised for their 'sweeping normative promises, mixed evidence of success and concomitant societal disillusionment'.[83] More robust empirical research is needed to determine the transformative potential of transitional justice processes like reparation.[84] In the absence of such scientific grounding, modesty should accompany not only academic discussions of reparation but more importantly legal and policy discourse.[85] This applies doubly in the case of transformative reparations.

This modesty is especially necessary for managing victims' expectations, which are (intentionally or otherwise) raised throughout consultation processes and participation in criminal trials, for example at the ICC. For instance, victims of sexual and gender-based violence may have reasonably assumed that they would receive reparation following Mr Lubanga's conviction for war crimes. However, because of the limited charges for which Mr Lubanga was convicted they were denied reparation,[86] as were all of circa 5,000 participating victims in the case against Mr Bemba who was acquitted on appeal.[87] While the assistance mandate of the TFV will be utilised to try to reach these victims, they are not eligible for reparations. It is therefore important

77. Walker (n 40) 123.
78. David C Gray, 'A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice' (2010) 87 Washington University Law Review 1043, 1049–1050. See also Lisa J Laplante and Kimberly Theidon, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29 Human Rights Quarterly 228, 242.
79. UNGA 'Note by the UN Secretary-General: Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence', UN Doc A/69/518 (14 October 2014) [81].
80. Ibid.
81. Walker (n 40) 123–124.
82. Gray (n 78) 1049–1050.
83. Balasco (n 74) 370.
84. Ibid 370–371.
85. Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing, Cheltenham 2017) 294.
86. While victims of sexual and gender-based violence were initially recognised as beneficiaries of reparations by the Trial Chamber, this was overturned on appeal: *Lubanga*, Appeals Chamber (n 48) [192]–[199]. See also the case against Mr Katanga, who was found not guilty of the charges of rape and sexual slavery and therefore the victims were excluded from reparations orders: *The Prosecutor v Germain Katanga* Trial Chamber II, Judgment Pursuant to Article 74 of the Statute ICC-01/04-01/07-3436-tENG (7 March 2014) 659.
87. See *The Prosecutor v Jean-Pierre Bemba Gombo* Appeals Chamber, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo Against Trial Chamber III's 'Judgment Pursuant to

to be realistic as to what a victim may be able to expect from such institutions, or there is a risk of harming victims further by raising false expectations of reparative outcomes.[88] There is also the damage to the institutions themselves, particularly when they are already overburdened and under-resourced. They may become bodies with aspirational goals of delivering transformative reparations that they will never be able to fulfil.[89] This expectation inflation is a problem with reparations processes generally, but particularly troubling when there are expectations of individual or societal transformation.

5.3 Misaligned mandates, capacities and aspirations

The third critique of transformative reparations relates to the mandates of the institutions responsible for reparation. For example, it can be seen as beyond their mandate for mechanisms that do not address State responsibility to aim nonetheless to facilitate institutional and societal changes within a State. Nowhere is this more evident than within the field of international criminal law and with institutions such as the ICC.[90] As a landmark development in international criminal law, the ICC is empowered in Article 75 of Rome Statute to make reparations orders for the benefit of victims. Such orders are specifically made against the individual convicted (and not a State), and must be directed to victims of harm resulting from the crimes convicted (and not victim communities generally).[91] As the focus on conviction indicates, reparations can only ever flow from charges brought by the Prosecutor and confirmed by the Judges. And as the case law to date has indicated, the ICC's reparations mandate is narrowly defined and strictly demarcated. The argument that transformative reparations fall outside such a mandate or represent functional overreach is premised on two ideas. The first is that criminal law institutions such as the ICC do not have the mandate or scope to undertake broad-based societal transformations as reparations flow from a single convicted person and not a State. The second idea is that transformative reparations may in fact be contrary to the mandate of such institutions, which are directed to repair individual victims of harm flowing from the crimes convicted, and not affected communities or societies more broadly. These two arguments are explored below.

Scholars have raised concerns that pursuing transformative reparations may not be a fitting objective for international criminal courts dedicated to adjudicating an accused's guilt, and not mandated with forging broader societal change.[92] For example, given the narrow scope of reparations at the ICC, its reparations order will only ever address a specific category of victims, necessarily excluding all those nonetheless harmed, but not by the exact crimes for which the accused was convicted. Despite the evidence of crimes and victimisation in a case, the Prosecutor may choose to limit the charges brought against an accused to only those more thoroughly documented, and

Article 74 of the Statute' ICC-01/05-01/08-3636 (8 June 2018); *The Prosecutor v Jean-Pierre Bemba Gombo* Trial Chamber III, Final Decision on the Reparations Proceedings ICC-01/05-01/08-3653 (3 August 2018).

88. Williams and Palmer (n 59) 330; Christoph Sperfeldt, 'Rome's Legacy: Negotiating the Reparations Mandate of the International Criminal Court' (2017) 17 International Criminal Law Review 351, 373.
89. Williams and Palmer (n 59) 330.
90. Hoyle and Ullrich (n 57) 695.
91. *Lubanga* Appeals Chamber (n 48) [64]–[76], [210]–[215].
92. Williams and Palmer (n 59) 314.

the judges may find that despite the harm suffered, it is not proven beyond reasonable doubt to be attributable to the accused. This creates a subcategory of 'deserving' or 'lucky' victims who suffered harm caused by the crimes of the convicted person who can receive reparations, from the larger category of victims who, despite suffering harm, will not be eligible for reparations. As such, expecting the ICC's reparations to transform socio-economic structures of inequality can be seen as well beyond its limited mandate of repairing specific victims. These institutional limitations regarding victim eligibility present significant obstacles to include transformative reparations within the mandates of bodies such as the ICC or the Extraordinary Chambers in the Courts of Cambodia (ECCC).[93]

In cases of convictions where victims are recognised and awarded reparations, the ICC's order is made against the convicted person only and not any other body or State.[94] The individual convicted cannot change laws, reprioritise national funding for education and healthcare services, or implement quotas for minorities in government entities. Such reparation measures are typically considered more transformational in nature (as guarantees of non-repetition) but are ones that a State can take, and in fact is obliged to take under international human rights treaties. Given that its mandate is individual and not State responsibility, the ICC cannot oblige States as part of a reparations order to perform such transformative reparation measures. This structural limitation will restrict the ICC's effectiveness in remedying victims' harm,[95] and certainly its ability to transform victims' lives. The ICC can engage with and request the State's cooperation in designing and implementing a reparations order, but it cannot compel or instruct a State. This is where international criminal courts differ from international human rights bodies, which do determine State responsibility and can make reparations orders/recommendations including State measures of satisfaction and guarantees of non-repetition. This reveals transformative reparations as more suited to the work of international human rights bodies and States, rather than international criminal courts and awards against convicted individuals.

It can also be seen as inappropriate for an international body to seek to effect transformative change in local communities. What authority or legitimacy does an international criminal body such as the ICC have to intervene domestically in a State or community and seek to disrupt and reshape social norms and customs? Such an intervention would arguably be an affront to the State's sovereignty, and likely an illegitimate and unwelcome interference in local communities.[96] Changing cultural norms and practices that represent or support inequalities is hugely difficult, and most successful when undertaken bottom-up by internal reform actors rather than imposed externally by foreign actors.[97] Furthermore, inequalities are typically maintained and

93. For specific analysis regarding the ECCC, see Williams and Palmer (n 59).
94. While the TFV plays a strong role in relation to reparations at the ICC (in addition to their assistance mandate), the Court cannot address reparations orders to anyone other than the convicted person: *Lubanga*, Appeals Chamber (n 48) [64]–[76]. See also Péter Kovács, 'Victims' Rights to Reparation in Light of Institutional and Financial Challenges' (2018) 1 East European Yearbook on Human Rights 100, 114; Luke Moffett, 'Reparative Complementarity: Ensuring an Effective Remedy for Victims in the Reparation Regime of the International Criminal Court' (2013) 17 The International Journal of Human Rights 368, 371–372.
95. Moffett (n 94) 368.
96. See eg Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 Harvard International Law Journal 201.
97. Abdullahi Ahmed An-Na'im, 'Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading

'reinforced by interlocking social, economic, legal, cultural and psychological structures that are unlikely to yield to singular interventions such as reparations'.[98] So, on the basis of efficacy, societal transformations are more likely to be effected internally over a longer period of time, and not based on an individual international court order. Also on the basis of principle, it can be seen as inappropriate for an international court to seek to transform a local community. This is particularly relevant given the critiques of the ICC as a neocolonial institution that serves again to justify Western, liberal intervention in Southern States.[99] Balasco notes that, like this article, '[m]ost of the literature on both transitional and transformative justice emanates from the global North, whereas most actual transitional justice initiatives and processes are implemented in the global South'.[100] While there is a role for outside actors to play in societal transformation, it should be a complementary and supportive role rather than a leading one.[101]

Finally, scholars have argued that pursuing transformative reparations detracts from the mandate of international criminal courts to repair victims of crime and undermines their rights. The premise of the critique is that transformative reparations that address structural inequalities provide collective goods across a society and can benefit those directly victimised as well as those indirectly victimised, those uninvolved in the conflict, and even those who perpetrated the harm. Such collective or broad-based reparations aim to repair societies as a whole, and can thus fail to grant individual recognition and remedy to victims as they are entitled under international law.[102] It is necessary to reiterate that '[t]he core stakeholders in reparations are the victims of harm'.[103] If transformative political, legal and socio-economic reforms do not provide direct relief to the harms suffered by victims, then they cannot be considered appropriate reparative measures for the purposes of international law. Those who promote transformative reparations as a higher objective than individually targeted reparations detract from the 'needs and dignity of the individual victim'.[104] While reparations are considered to be the most victim-centred transitional justice mechanism,[105] requiring them to be transformative arguably takes the emphasis off the individual victim and puts it onto the broader society.

Treatment or Punishment' in Abdullahi Ahmed An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Penn Press, Philadelphia 1992) 37; Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 Harvard International Law Journal 381.

98. Walker (n 40) 123.

99. See eg Abdullahi Ahmed An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice' (2013) 7 International Journal of Transitional Justice 197.

100. Balasco (n 74) 376.

101. 'The privileged outsider … can however become a valuable partner of the disempowered seeking transformative change, in a role as facilitator, advocate and interpreter at both the national and the international level', Gready and Robins (n 3) 360. See also Eva Brems, 'Reconciling Universality and Diversity in International Human Rights Law' in András Sajó (ed), *Human Rights with Modesty: The Problem of Universalism* (Martinus Nijhoff, Leiden 2004) 229; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2002) 34 George Washington International Law Review 483, 499, 513.

102. Manjoo (n 40) 1198.

103. Ní Aoláin et al (n 37) 133.

104. Walker (n 40) 115.

105. Ní Aoláin et al (n 37) 109.

This is all the more the case when victims do not articulate a desire for transformative reparations, but instead indicate a preference for more traditional one-off monetary payments (sometimes in combination with more assistance or development-like projects often categorised as collective reparations). While not synonymous,[106] the literature often portrays collective reparations as having transformative potential.[107] However, in the *Lubanga* and *Katanga* cases before the ICC, the *Habré* trial before the African Special Chamber, and the *Duch* case (Case 001) before the ECCC, many victims articulated a preference for individual reparations.[108] Victims in *Lubanga* noted that collective reparations would be unreasonable and potentially unjust given that while the Ituri community generally suffered from Mr Lubanga's crimes, it also accepted the 'behaviour … and supported the leaders who engaged in it'.[109] Twelve of the 14 victims interviewed considered individual financial compensation to be useful or even necessary.[110] Despite these communicated preferences, the ICC only awarded collective reparations in *Lubanga*.[111] In the face of victims requesting individual reparations, it appears inappropriate or patronising to promote instead collective/transformative measures affecting the broader community. Victims and their views should be respected, as well as their agency to identify and utilise reparations as they see fit.

5.4 What is left of transformative reparations?

In this way, transformative reparations have potential but only when: (i) requested by victims and victim communities; (ii) designed together in an inclusive process with victims and victim communities; and (iii) the State or implementing authority has a mandate and is in a position to actually deliver upon the promise of transformation. It also requires an understanding of what the key actors, and most importantly the

106. Collective and transformative reparations are not synonymous, as both individual and collective reparations can be transformative in nature – and both not. For example, individual pension schemes and education vouchers can be seen as transformative, whereas one-off payments cannot. Similarly, tax and judicial reforms could be seen as collective forms of transformative reparation, whereas an apology or the construction of new housing is not necessarily.
107. Diana Odier-Contreras Garduño, *Collective Reparations: Tensions and Dilemmas Between Collective Reparations with the Individual Right to Receive Reparations* (Intersentia, Cambridge 2018) 324–325.
108. Christoph Sperfeldt, 'The Trial Against Hissène Habré: Networked Justice and Reparations at the Extraordinary African Chambers' (2017) 21 The International Journal of Human Rights 1243, 1252: 'Noting the persistence of harm at the individual or family level and citing a lack of confidence in state structures, both claims [submitted by the victim groups] expressed a preference for individual financial compensation'. Regarding the ECCC, see Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Procedures* (Intersentia, Cambridge 2011) 197. Regarding *Katanga* see *The Prosecutor v Germain Katanga* Trial Chamber II, Legal Representatives of Victims, Observations of the Victims on the Principles and Procedures to be Applied to Reparations, ICC-01/04-01/07-3555-tENG (15 May 2015) [94]–[95].
109. *The Prosecutor v Thomas Lubanga Dyilo* Trial Chamber I, Legal Representatives of Victims, Observations on the Sentence and Reparations by Victims, ICC-01/04-01/06-2864-tENG (18 April 2012) [16].
110. Ibid [15].
111. *Lubanga* Appeals Chamber (n 47) Order for Reparations against Mr Lubanga, ICC-01/04-01/06-3129-AnxA (3 March 2015) [53].

victims themselves, see as the aim of transformation. Should it include their individual living conditions, those of their families, and/or the wider social environment? Inclusive participatory processes are key and this is also where questions of ownership and appropriateness need to be addressed.

Reparation proceedings must therefore be made accessible, public and transparent, and should rely upon and be sensitive to local knowledge, culture and resources.[112] Bear in mind, however, that 'local' does not equate to a homogenous category, nor one that is necessarily in favour of broader transformations.[113] There are strong calls in the transformative literature for including as many voices as possible, including respected local leaders but also less visible or marginalised members of societies. Yet, in transitioning societies where the past remains heavily contested, selective inclusion as well as broad exclusion of groups will remain problematic.

If transformative reparations are more than just meeting human rights standards and rebuilding the lives of victims and their societies, and if they are about challenging and changing existing legal, economic and social structures facilitating inequality and discrimination so that individual lives can transform, then a more integrated and holistic approach is needed at all levels.[114] We should not discuss transformative reparations without connecting these processes to the larger context of reform. Reparations, as one of the tools in the transitional justice toolbox, will only be a small part of a larger endeavour – an endeavour that must be driven by victims, society and the State. Like other tools and processes specifically designed to address poverty, inequality or corruption, reparations will be more optimal when linked with permanent State structures.[115] While international criminal bodies such as the ICC are unlikely to achieve transformation via their limited reparations mandate, this is more likely via 'reparative complementarity' with States Parties that also bear human rights obligations to victims.[116] And even then, reparations will likely always inherently play a modest role due to their temporary nature and often weak political backing.

Whether reparations cases serve as 'catalytic device[s]' for transformation depends largely on the extent to which victims and victim communities organise themselves into effective networks for change, and whether the reparations process is complemented by broader State actions addressing structural reforms.[117] Even then, regarding the transformative potential of reparations in the *Habré* case, Sperfeldt found that

112. Roger Mac Ginty, 'Gilding the Lily? International Support for Indigenous and Traditional Peacebuilding' in Oliver P Richmond (ed), *Palgrave Advances in Peacebuilding: Critical Developments and Approaches* (Palgrave Macmillan, Basingstoke 2010) 349–350.
113. Joanne Wallis, 'Building a Liberal-Local Hybrid Peace and State in Bougainville' (2012) 25 The Pacific Review 613, 631; see also Leila Ullrich, 'Beyond the "Global-Local Divide": Local Intermediaries, Victims and the Justice Contestations of the International Criminal Court' (2016) 14 Journal of International Criminal Justice 543.
114. Gready and Robins (n 3) 358–360; Gerd Junne and Willemijn Verkoren, 'The Challenge of Postconflict Development' in Gerd Junne and Willemijn Verkoren (eds), *Postconflict Development: Meeting New Challenges* (Lynne Rienner Press, Boulder 2005) 6.
115. See Brianne McGonigle Leyh, 'Truth Commissions and Social Justice: "Wishful Thinking or Not Very Thoughtful Wishing"' in Jeremy Sarkin (ed), *The Legacy and Impact of Truth Commissions* (Intersentia, Cambridge 2019, forthcoming); Isabel Robinson, 'Truth Commissions and Anti-Corruption: Towards a Complementary Framework?' (2015) 9 International Journal of Transitional Justice 33, 40.
116. Moffett (n 94) 368–369, 379.
117. Dustin Sharp, 'Prosecutions, Development, and Justice: The Trial of Hissein Habré' (2003) 16 Harvard Human Rights Journal 147, 176; Sperfeldt (n 108) 1254–1255.

'court-ordered reparations … hold limited transformative potential if they are restricted to financial compensation, target only a narrow constituency of survivors and do not address the responsibility of the state'.[118] Similarly, Moffett has argued that the role of the State is paramount if the transformative potential of reparation is to be realised, emphasising a broader view of complementarity for States party to the Rome Statute, for instance.[119] Chappell has also accepted that a transformative approach to reparations may be more suited to State-based processes rather than through court-ordered mechanisms.[120] Many actors will be involved in transforming societies, including non-State actors such as individuals, community leaders, religious groups, women's groups, NGOs and businesses.

It is important to recall that it is the State that 'bears the primary responsibility, not only for redressing past harms, but also for securing human, economic and social rights for all its population'.[121] If a State is lacking willingness or ability (or there is a clear lack of confidence on the part of victims in the State's willingness or ability), transformative reparations may become a hollow phrase. Only when the State and/or implementing authority has a mandate and is in a position to facilitate meaningful change can transformation (as defined by those meant to benefit) actually occur. Very likely, any type of broader transformation will require a full array of development or reform initiatives.[122] As such, if the transformative potential of reparations is to occur, a combination of approaches and actors is necessary. This is especially important when discussing transformative reparations because very often there is little political will to implement reparations and in practice they rarely occur, with States citing financial constraints as the main reason for not implementing reparations.[123]

6 CONCLUSIONS: THE FUTURE OF TRANSFORMATIVE REPARATIONS

The purpose of this article was to explore the notion of transformation when used in connection with reparations for serious human rights and humanitarian law violations. The article addressed the development of transformative theories and how the notion of transformation has been taken up by various human rights and criminal law bodies when dealing with reparations. It delved into whether the idea of transformation brings anything new or beneficial to the human rights and transitional justice table, or whether its adoption is largely an insightful way to approach the thinking behind reparations. The article concluded that transformative reparations as a concept is useful in that, like the reparations literature which preceded it, it rejects the traditional approach to reparations and encourages an integrated approach to human rights and reparation. It can also be useful as a language of demand, as an advocacy tool for victims.

Yet, as with all things that bring value, there still needs to be a critical reflection of the drawbacks that may come with it. Due to many practical considerations, including the limited ability of legal processes to deliver upon transformation promises (and the limited success of reparation processes more generally), the notion is not changing the

118. Sperfeldt (n 108) 1255.
119. Luke Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?' (2017) 21 The International Journal of Human Rights 1204, 1215.
120. Chappell (n 5) 1226.
121. Williams and Palmer (n 59) 331.
122. Ibid.
123. Waldorf (n 7) 177; see also McGonigle Leyh (n 115).

game of reparations. Transformative reparations may be appropriate but only when requested by and designed with victims and victim communities, and where the State or implementing authority has a mandate and is in a position to deliver transformation. This means that other, more permanent, changes and reforms need also to take place. While there is undoubtedly a role for outsiders to play in a process of societal transformation, it should be a complementary and supportive role rather than a leading one. Reparations are only one small part of a larger reform process. Without a shared, common understanding of the transformative goal, the notion of transformative reparations can be misused to inflate victims' expectations, causing frustration and disillusionment with the idea of the right to a remedy. The bigger the promises, the greater the expectations and the higher the risk that practice lags behind. This disillusionment has the potential to undermine human rights more generally.