REALIZING THE RIGHT TO REPARATIONS FOR GIRL SOLDIERS: A CHILD-SENSITIVE AND GENDERED APPROACH

AURORA E. BEWICKE*

INTRODUCTION

The 2012 guilty verdict issued by the International Criminal Court (ICC) in the *Thomas Lubanga Dyilo* case[1] has brought significant attention to the issue of child soldiering. Yet, despite global attempts to criminalize child soldier recruitment, armed groups' willingness to capitalize on children's inherent vulnerabilities and the proliferation of small arms have resulted in the continued use of large numbers of both boys and girls in armed conflict today.[2] These youths suffer physical injury and psychological trauma.[3] After the fighting

* Attorney-at-law and China Program Director, International Bridges to Justice (IBJ). This Article was drafted independently of the author's role with IBJ, and based primarily on her experiences as Lead Staff Attorney for Eritrea, appearing before the Eritrea-Ethiopia Claims Commission, as a U.N. Legal Officer appearing before the Kosovo Property Claims Commission, her work as an independent attorney representing accused and victims globally, and her research previously undertaken through the University of Oxford's Master of Studies program in International Human Rights Law. The author extends her deepest thanks to Michael Wessells, Susan McKay, and Milfred Tonheim, for their insight into the multi-faceted lives of girl soldiers around the world, and to C. Patty Blum, Patricia Sellers, and Fareda Banda for their useful guidance and comments during the drafting phase. Finally, this author expresses her sincere gratitude to the editors of the *Columbia Journal of Gender and Law*, whose fact-checking and editing helped refine this final, published version.

1 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012) [hereinafter *Lubanga* Judgment]. Another case involving allegations pertaining to child soldiers, *Prosecutor v. Mathieu Ngudjolo*, was also decided in 2012. Unlike in the case of Lubanga, despite finding widespread use of child soldiers in the relevant conflict, Ngudjolo was acquitted of any related responsibility. Case No. ICC-01/04-02/12, Jugement rendu en application de l'article 74 du Statut [Judgment pursuant to article 74 of the Statute] (Dec. 18, 2012). Unless the decision is reversed on appeal, any victims will not be able to claim reparations against this defendant. The situation is the same for the victims in the case of former co-defendant Germain Katanga. *See* Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled "Decision on the implementation of regulation 55 of the Regulations of the Court and severing charges against the accused persons" (Mar. 27, 2013) (severing the Ngudjolo and Katanga cases). On March 7, 2014 the trial chamber also acquitted Mr. Katanga on charges related to child-soldiering. Case No. ICC-01/04-01/07, Jugement rendu en application de l'article 74 du Statut [Judgment pursuant to article 74 of the Statute] (Mar. 7, 2014). At the time of writing, the appeal process in both cases is not yet complete.

2 Christy C. Fujio, *Invisible Soldiers: How and Why Post-Conflict Processes Ignore the Needs of Ex-*

has finished, they face further challenges reintegrating into civilian life.[4] Girl soldiers in particular frequently experience reproductive health problems and gender-specific stigmatization.[5] Yet, until recently, post-conflict justice mechanisms designed to address suffering and help populations transition have systematically failed to address the needs of both women and children, in particular the needs of girl soldiers. Even among programs initiated to reintegrate and rehabilitate child soldiers, very few have focused on girls,[6] and some have even excluded them from the process.[7] This Article will explore one of the main pillars of transitional justice, namely reparations, within this context.[8] Specifically, it will address how to more effectively realize the right to reparations for girl soldiers. December 2011 witnessed the world's first reparations judgment on the basis of unlawful child soldier recruitment, according to which Colombian paramilitary leader Fredy Rendón Herrera was sentenced and ordered to pay compensation for the illegal recruitment of minors, including girls.[9] Following the March 2012 verdict in the *Lubanga* case—unless the conviction is

---

Combatant Girls, 10 J.L. & SOC. CHALLENGES 1, 4 (2008); MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 18–19, 33 (2006); *see also* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Testimony of the Under-Secretary-General and Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict Radhika Coomaraswamy, Transcript of Record 20 (Jan. 7, 2010) [hereinafter Testimony of the SRSG]. While many NGOs and scholars cite numbers of approximately 250,000 to 300,000 child soldiers, with 25% to as many as 40% being girls, these figures are considered groundless by leaders in the field. Interview with Susan McKay, Professor of Gend. and Women's Studies, Univ. of Wyo., in Stavanger, Nor. (Mar. 14, 2012). Nevertheless, the numbers for both boys and girls participating in armed conflict remains high. *Id.*

3 WESSELLS, *supra* note 2, at 126.

4 *Id.* at 154–60.

5 ALCINDA HONWANA, CHILD SOLDIERS IN AFRICA 76, 78, 102–3 (2006).

6 Marc Sommers, *Youth and Conflict: A Brief Review of Available Literature*, USAID (May 2006), http://www.crin.org/docs/edu_youth_conflict.pdf.

7 Fujio, *supra* note 2, at 12–13.

8 *See* Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, *in* TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY 1, 2 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

9 Int'l Ctr. for Transitional Just., *Colombia's Landmark Ruling Orders Reparations for Former Child Soldiers* (Jan. 17, 2012), http://ictj.org/news/colombia-first-ruling-requiring-reparations-recruitment-minors; Tribunal Superior Del Distrito Judicial de Bogotá [T. Sup.] [Appellate Court of the Judicial District of Bogotá], Sala de Justicia y Paz diciembre 16, 2011, M.P: U.T. Jiménez López, Radicación 11001600025320078270l. Arguably, the *Case Concerning Armed Activities on the Territory of the Congo* could be classified as a case ordering reparations for unlawful use (training) of child soldiers. In that case, the ICJ:

overturned on appeal—we will now have the privilege to witness the ICC's first judicial reparations procedures unfold, even if the implementation of these reparations remains some time away.[10]

These initial steps towards securing victims' redress in the child soldier context are significant. How these decisions can best be implemented and how we might better secure these same rights for a more globally comprehensive set of victims—in particular, through a child-sensitive and gendered approach—is the focus of this Article.

In analyzing these issues, this Article will reflect on the experiences of existing reparations programs and relevant court cases. It will, furthermore, draw upon reports of

> F[ound] that the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, *trained child soldiers*, incited ethnic conflict and failed to take measures to put an end to such conflict; as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law[.]

Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, 279–80 (Dec. 19) (emphasis added) (vote of 16-1). Based on the finding, the court unanimously decided to order Uganda to make reparations to the DRC. *Id.* at 281. The reparations process, however, was turned over to the parties for negotiation, and leaves an opening for the court to deal with the issue in a later proceeding if the countries do not resolve the issue. *Id.* at 281–82.

10 In the *Decision establishing the principles and procedures to be applied to reparations*, the Trial Chamber largely turned over responsibility for determining the reparations process to the ICC's Trust Fund for Victims (TFV). Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations, paras. 281–89 (Aug. 7, 2012) [hereinafter Impugned Decision]. The Appeals Chamber, however, has suspended further reparations proceedings awaiting the appeal decision on the verdict itself. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the admissibility of the appeals against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparations* and directions on the further conduct of proceedings, para. 84 (Dec. 14, 2012) ("there is a clear need to suspend the enforcement of the Impugned Decision"). As such, as of the date of drafting, it is uncertain whether the TFV will retain its broad mandate for controlling the process and, if so, what process will be instituted. Even if the Impugned Decision had not been suspended, as the TFV mentioned, it is "still far from bringing reparations into effect since . . . a proper implementation phase also needs time." Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Observations of the Trust Fund for Victims on the appeals against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparations*, para. 12 (Apr. 8, 2013) [hereinafter TFV Second Observations].

non-governmental organizations (NGOs), academic literature, and two of this author's own experiences in the field of reparations: first, as a lawyer representing Eritrea before the Eritrea-Ethiopia Claims Commission (EECC), and, second, as United Nations (UN) Legal Officer appearing before the Kosovo Property Claims Commission (KPCC).

Part I will trace the history of the right to reparations and how it has evolved within the larger transitional justice movement. Part II will then address the challenges involved in providing reparations in the girl soldier context, before, in Part III, positing solutions and frameworks for addressing these concerns, using a child-sensitive and gendered approach. Finally, Part IV of this Article will critically assess how developments in the *Lubanga* case are dealing with these same issues, highlighting achievements and challenging the majority presumption that broad, holistic, community-based packages are the best option for providing reparations in this case.

I. Reparations

Reparations originated primarily as an attempt by ancient leaders to secure justice for victims as an alternative to vigilantism, allowing victims and perpetrators to settle wrongs while maintaining legal order.[11] Early examples of legal reparations schemes are evidenced in the Code of Hammurabi, the Assyrian Code, and provisions of Hittite Laws, which included both detailed compensation schemes and corporal punishments presumably meant to satisfy victims' desires for revenge.[12] Significantly, the Code of Hammurabi even provided for public reparations in cases where the perpetrator could not be found.[13] Other detailed reparations schemes can be found in early Roman Laws, based on a legal positivist approach, emphasizing rule of law over any moral justification.[14]

Over time, however, there was a shift away from victim-centric justice toward state-focused[15] retributive justice.[16] This trend commenced in the Middle Ages and marked the

11 ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNATIONAL LAW 14 (2004).

12 *Id.* at 14–17. The Code of Hammurabi is dated at 1750 B.C.E., the Assyrian Code at 1450–1250 B.C.E., and Hittite Laws at 1600–717 B.C.E. *Id.* at 15.

13 *Id.* at 16.

14 *Id.* at 18–23. Roman reparations laws have been discovered dating back to around 450 B.C.E. *Id.* at 19.

15 Here, I refer to "state" in the loosest sense, encompassing early forms of government, such as kingdoms or chiefdoms.

16 BOTTIGLIERO, *supra* note 11, at 13, 23–25.

start of the "gradual[] alienat[ion]" of the victim.[17] Reclassified as "crimes against the King's peace," this notion of states' primary interest in public order—and more or less victims' irrelevance—eventually spread across most of northern Europe and has lasted in varying degrees in Western criminal justice systems, particularly in common law systems, until modern times.[18]

Yet, beginning in the mid-twentieth century, there has been an increasing shift in focus back to the victim.[19] The modern resurgence is attributed to factors such as the expanded notions of humanism originating from the Enlightenment, the recognition of mass human suffering caused during the World Wars, the subsequent rise in international human rights law, and the creation of the relatively new field of victimology, during the 1960s–80s, in economically affluent nations.[20]

Notably, this growing recognition of the rights of the harmed individual corresponds to the rise of international justice, where the theory of "crimes against the King's peace"—originally employed to disempower these individuals—is rendered less relevant. Indeed, at the international level, reparations arose as an inter-state obligation justified under humanitarian law to redress wrongs between nations.[21] In tandem with the growing prominence of human rights law, however, there became a gradual recognition that the rights of individuals included the right to claim reparations, even at the international level. The Rome Statute of the ICC ("Rome Statute"), which entered into force in 2002, enshrined the right of victims to seek reparations before the first permanent international criminal court,[22] and, in 2004, the International Court of Justice (ICJ) confirmed victims' right to

17 *Id.* at 23.

18 *Id.* at 23–25.

19 *Id.* at 13, 25; M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 208 (2006).

20 Bassiouni, *supra* note 19, at 208–11.

21 Special Rapporteur on Violence Against Women, *Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. A/HRC/14/22 (Apr. 19, 2010) (by Rashida Manjoo) [hereinafter *Special Rapporteur Report*]; *see also* Liesbeth Zegveld, *Victims' Reparations Claims and International Criminal Courts: Incompatible Values?*, 8 J. INT'L CRIM. JUST. 79, 83–84 (2010).

22 Rome Statute of the International Criminal Court art. 75, *adopted* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; *see also, e.g.*, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Registrar's observations on reparations issues (Apr. 18, 2012) (providing "non-exhaustive lists" of international and comparative law sources related to reparations in annexes 1 and 2).

reparations against a state.[23] Yet, while this right has been recognized, its realization is more problematic, and "[t]he content of the obligation to provide reparations to the individual whose rights have been violated remains . . . far from clear."[24] This is particularly true in the transitional justice context, with respect to "gross violations of international human rights law" and "serious violations of international humanitarian law" committed on an often massive scale.[25]

A. Reparations in the Transitional Justice Context

Transitional justice refers to "the set of measures implemented in various countries to deal with the legacies of massive human rights abuses."[26] Under this rubric, reparations are one of the main tools, along with criminal trials, truth commissions, and institutional vetting.[27] Referencing numerous international instruments, regional conventions, UN declarations, and the Rome Statute, the UN General Assembly's 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") summarizes the international customary law of reparations in this context.[28]

According to the Basic Principles, the form of reparation measures can be diverse, falling into one or more of the following five categories: "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition."[29] Restitution is, by definition, a remedy designed to "restore the victim to the original situation."[30] Compensation is an often

---

23 Zegveld, *supra* note 21, at 82 (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131 (July 9)).

24 *Special Rapporteur Report*, *supra* note 21, at 6.

25 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter Basic Principles].

26 Pablo de Greiff, *A Normative Conception of Transitional Justice*, *in* POLITORBIS: DEALING WITH THE PAST 18 (2010) [hereinafter de Greiff, *A Normative Conception*].

27 Roht-Arriaza, *supra* note 8, at 2.

28 Basic Principles, *supra* note 25, at Preamble.

29 *Id.* at Part IX, para. 18–22.

30 *Id.* at Part IX, para. 19.

monetary remedy delivered to a victim for damages that are "economically assessable."[31] Rehabilitation "include[s] medical and psychological care as well as legal and social services."[32] Satisfaction covers a wide range of remedies, including memorials, apologies, judgments, investigations, and declarations.[33] Finally, guarantees of non-repetition include measures such as institutional reform, vetting, and human rights training for government officials.[34]

While there is no shortage of options regarding the form reparations may take, and while there also exists a steadily growing body of case studies that one might analyze, "a coherent theory and practice for remedies for victims of human rights violations does not yet exist under international law."[35] Both Research Director at the International Center for Transitional Justice (ICTJ), Pablo de Greiff,[36] in 2006, and remedies scholar and Deputy Director at the Praxis Institute for Social Justice, Lisa Laplante, in 2007, have lamented at the "relative paucity of academic writing and 'sufficient systematic attention' to this legal principle."[37]

Taking on this challenge, de Greiff, similar to the ancient rulers, urges the benefits of reparations as part of a "political project" designed to secure, this time, the post-transition governmental order. De Greiff advances the achievement of "recognition, civic trust and social solidarity" as the three goals of reparations.[38] He defines these aims, respectively, as (1) "return[ing] (or, in some cases . . . establish[ing] anew) the status of citizens to individuals," (2) "the formation or the restoration of trust among citizens," and (3) "the

---

31 *Id.* at Part IX, para. 20.

32 *Id.* at Part IX, para. 21.

33 *Id.* at Part IX, para. 22.

34 Basic Principles, *supra* note 25, at Part IX, para. 23.

35 *Special Rapporteur Report*, *supra* note 21, at 6.

36 *Pablo de Greiff*, INT'L CTR. FOR TRANSITIONAL JUSTICE, http://ictj.org/about/pablo-de-greiff (last visited Oct. 18, 2013).

37 Lisa Laplante, *The Law of Remedies and the Clean Hands Doctrine: Exclusionary Reparations Policies in Peru's Political Transition*, 23 AM. U. INT'L L. REV. 51, 55 (2007) (quoting Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, *in* THE HANDBOOK OF REPARATIONS 1, 3, 13 (Pablo de Greiff ed., 2006)).

38 Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS, *supra* note 37, at 451 [hereinafter de Greiff, *Justice and Reparations*]; de Greiff, *A Normative Conception*, *supra* note 26, at 21–29 (advancing these as the goals of all transitional justice measures).

strengthening or the generation of . . . the attitude of social solidarity."[39] Laplante similarly analyzes reparations through the lens of "social reconstruction,"[40] and, like de Greiff, chooses to focus primarily on the role of reparations schemes or administrative programs rather than judicial options.[41] Both judicial and administrative reparations schemes have their utility, however, and will be addressed here.

1. Judicial Approaches to Reparations

Judicial reparations refer to those issued by a court in a singular case, whether civil or criminal, and may or may not include high numbers of plaintiffs or victims.[42] Notably, this includes reparations ordered by regional human rights bodies in Europe, the Americas, and Africa.[43] It also includes victims' claims for reparations at the ICC[44] and those issued by domestic courts following a large-scale atrocity.[45]

In the transitional justice context, judicial approaches are typically criticized for one or more the following eight reasons: (1) domestic court systems, if used, are usually not yet functioning adequately post-conflict; (2) the criminal justice systems that are in place were not designed for mass claims; (3) neither civil nor criminal courts are adequate to deal with collective reparations; (4) procedural guarantees for defendants in the judicial system must take precedence over victims' needs; (5) the standards of evidence required by courts may be too high where records were destroyed; (6) non-judicial venues are better suited to collect resources from a wider spectrum of individuals; (7) in court, safeguards such as amnesties and statutes of limitations may block victims' ability to collect; and (8) courts may not offer comprehensive access to justice for poor or marginalized claimants.[46]

---

39 de Greiff, *Justice and Reparations*, *supra* note 38, at 460–64.

40 Laplante, *supra* note 37, at 58.

41 *Id.* at 58–59; de Greiff, *Justice and Reparations*, *supra* note 38, at 451–52.

42 Stef Vandeginste, *Reparations*, *in* RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 146, 150–52 (David Bloomfield et al. eds., 2003).

43 BOTTIGLIERO, *supra* note 11, at 128–59.

44 Rome Statute, *supra* note 22, art. 75.

45 *See, e.g.*, CÉCILE APTEL & VIRGINIE LADISCH, INT'L CTR. FOR TRANSITIONAL JUSTICE, THROUGH A NEW LENS: A CHILD-SENSITIVE APPROACH TO TRANSITIONAL JUSTICE 21 (2011) (discussing Colombia).

46 Vandeginste, *supra* note 42, at 152–53.

In Colombia, for example, following large-scale atrocities committed by both left-wing armed groups and right-wing paramilitaries—including the illegal recruitment of children to participate in hostilities—the government in 2003 signed a peace accord with one of the paramilitary groups.[47] Then, in 2005, as part of a broader movement to end hostilities, the country enacted the Justice and Peace Law.[48] This law, among other things, offered reduced sentences for members of any illegal armed group who willingly demobilized and provided the requisite degree of "cooperat[ion] with judicial authorities."[49] Relevant criticisms have included a low prosecution rate, translating into fewer reparations; lack of cooperation for fear of international prosecutions at a later date; reduced accountability for perpetrators; the failure of courts to protect victims; and, since the financial resources will come from the convicted, an uncertain pool of compensation funds.[50]

Despite challenges, however, judicial institutions remain precedent setting. Judicially ordered reparations can send a "strong signal" to perpetrators and victims alike.[51] They can also have a persuasive effect on governments, whether issued by national or international courts.[52] Finally, regardless of the existence of any administrative program, some victims may still resort to the courts.[53]

2. Administrative and Other Non-Judicial Programs

Administrative reparations schemes and other non-judicial programs vary in form. They may flow from the proceedings of a truth commission, as was the case in South Africa under the Reparation and Rehabilitation Committee of the Truth and Reconciliation Commission[54] and in Peru under the Integral Plan of Reparations issued in 2003 by the

47 APTEL & LADISCH, *supra* note 45, at 20; PAULA TORRES ET AL., INT'L CTR. FOR TRANSITIONAL JUSTICE, RESEARCH BRIEF, TRANSITIONAL JUSTICE AND DDR: THE CASE OF COLOMBIA (2009), *available at* http://ictj.org/sites/default/files/ICTJ-DDR-Colombia-ResearchBrief-2009-English_0.pdf.

48 TORRES ET AL., *supra* note 47, at 3.

49 APTEL & LADISCH, *supra* note 45, at 21–22; TORRES ET AL., *supra* note 47, at 3.

50 APTEL & LADISCH, *supra* note 45, at 20–25; TORRES ET AL., *supra* note 47, at 4.

51 Vandeginste, *supra* note 42, at 153.

52 *Id.*

53 *Id.*

54 *Id.* at 154. While the process began in South Africa in the mid-90s, the final reparations decision was not delivered by the government until 2003. Beth Goldblatt, *Evaluating the Gender Content of Reparations: Lessons from South Africa*, *in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS

Peruvian Truth and Reconciliation Commission.[55] Reparations programs may also take shape as national administrative bodies, such as national compensation commissions or trust funds, which may or may not relate to truth commission findings.[56] Notable examples of these include the compensation body established in 1991 in Argentina as the result of a "friendly settlement procedure" within the framework of the Inter-American human rights system and the 1995 Reparations Commission in Brazil.[57] There are also international reparations mechanisms, such as the UN Compensation Commission, relating to the Iraqi invasion of Kuwait, and international arbitrations, such as those held at the Permanent Court of Arbitration.[58] The latter may be particularly useful where conflicts spread across international borders.[59] Finally, there exist a wide variety of assistance schemes for victims and affected communities. For example, the ICC's Trust Fund for Victims (TFV) is authorized to offer "general assistance" to victims and uses "voluntary contributions from donors to provide victims and their families in situations where the Court is active with physical rehabilitation, material support, and/or psychological rehabilitation."[60] The TFV has already funded several assistance projects, including those involving former child soldiers and children associated with armed groups.[61] Disarmament, demobilization, and reintegration (DDR) processes may also offer victims resources framed in similar terms. For example, the DDR process in Colombia, after September 2006—under the 2006–2010 Development and Investment Plan—offered demobilized individuals living stipends, affordable health care, psychological care, education and training, and project development support.[62] A similar, pre-September 2006 plan focused more on minors and assisted

VIOLATIONS 49–50 (Ruth Rubio-Marín ed., 2006).

55 Laplante, *supra* note 37, at 53–54.

56 Vandeginste, *supra* note 42, at 155.

57 *Id.*

58 *Id.* at 153–54 (discussing the UN Compensation Commission). An example of international arbitration is the EECC, established under the Algiers Agreement. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., Dec. 12, 2000, 40 I.L.M. 260 [hereinafter Algiers Agreement].

59 *See, e.g.*, Algiers Agreement, *supra* note 58.

60 *See The Two Roles of the TVF*, THE TRUST FUND FOR VICTIMS, http://www.trustfundforvictims.org/two-roles-tfv (last visited Mar. 25, 2014).

61 *See Earmarked Support at the Trust Fund for Victims: Programme Progress Report Winter 2011*, THE TRUST FUND FOR VICTIMS 9–10 (2011), *available at* http://www.trustfundforvictims.org/sites/default/files/imce/TFV_Programme_Progress_Report_Winter_2011_USA_PRINTING.pdf.

62 TORRES ET AL., *supra* note 47, at 1–2.

a total of 2,968 former child soldiers.[63] The issue with assistance programs resembling development initiatives, such as these, is that they may provide benefits regardless of one's role as victim, perpetrator, or combination of the two. The Colombian DDR process, for example, provided assistance to voluntary adult combatants, and, furthermore, without regard to whether they committed crimes.[64] Some legal scholars, such as de Greiff, thus distinguish "development and social investment" programs from reparations, in the legal sense.[65] Beyond the inclusion of non-victims, de Greiff argues that these programs represent a separate obligation (or perceived obligation) to provide for basic economic, social, and cultural rights, and do not, therefore, advance the goal of restoring dignity to the victim by explicitly recognizing the violation of his or her rights.[66] Under de Greiff's view of reparations as part of a "political project," these programs, thereby, fail in one of their fundamental aims.[67] If, however, we are to conceive of reparations programs as truly victim-centric, it is also necessary to consider victims' desires for development-style reparations programs, even if they come at the expense of other options. In many transitional situations, female victims in particular express a preference for basic services and other development-style relief.[68] To override the express desires of the victim for their so-called benefit would be "to instrumentalize their plight, to use their victimization as a tool for a forward-looking project of social engineering."[69] In order to respect victims' viewpoints and consider a wide range of possibilities, this Article, therefore, will define reparations in a relatively broad sense. This will include DDR or development schemes, as possible options out of many, so as to analyze how they, along with others, can contribute to realizing victims' right to reparations.

Regardless of the type of non-judicial reparations mechanism employed, these processes still exist alongside both one another and court systems, which may act either

---

63 *Id.* at 2.

64 *Id.* at 1.

65 de Greiff, *Justice and Reparations*, *supra* note 38, at 469–71.

66 *Id.*

67 *Id.*

68 Ruth Rubio-Marín, *The Gender of Reparations: Setting the Agenda*, *in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, *supra* note 54, at 29 (Ruth Rubio-Marín ed., 2006).

69 Bashir Bashir & Will Kymlicka, *Introduction: Struggles for Inclusion and Reconciliation in Modern Democracies*, *in* THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES 24 (Will Kymlicka & Bashir Bashir eds., 2008).

as a review body or an alternative reparations venue.[70] Rather than simply duplicating efforts, however, many practitioners in the field point to the advantages of administrative programs. For example, they are able to be more cost-efficient, shorten delays, avoid the potential trauma of appearing in court, and provide better odds for victims to recover due to relaxed standards of evidence and other procedures tailored to help victims.[71] In the end, "[a] well-designed reparations program may distribute awards which are lower in absolute terms, but comparatively higher than those granted by courts."[72] Professor Ruth Rubio-Marín, who has published extensively on issues related to transitional justice and gender,[73] further promotes the ability of administrative reparations programs to better cater to the needs of the most vulnerable victims, such as those who may be illiterate and/or living in extreme poverty.[74] Administrative programs can also offer specialized reparations schemes, such as with land or property claims commissions, which may be desirable in certain situations.[75]

Whether judicial, administrative, or something in between, providing reparations in the transitional justice context is rife with challenges, from the design phase through to implementation. In the long history of reparations, we are only at the beginning of this ambitious endeavor. Some of the issues faced are form-specific, but others remain relevant regardless of whether they are judicial or administrative. Below, this Article will outline some of the main challenges involved in the conflict and post-conflict setting, and how they may specifically impact reparations for girl soldiers.

---

70 For example, decisions of the KPCC are subject to review by the Kosovo Supreme Court. Regulation No. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property, Chapter VI, UNMIK Reg. No. 2006/50 (Oct. 16, 2006), *available at* http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_50.pdf.

71 de Greiff, *Justice and Reparations*, *supra* note 38, at 459.

72 *Id.*

73 Ruth Rubio-Marín, CV, *available at* http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/RubioMarin/cvRuthRubio.pdf (last visited Mar. 25, 2014).

74 Ruth Rubio-Marín, *Introduction: A Gender and Reparations Taxonomy*, *in* THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 4–5 (Ruth Rubio-Marín ed., 2009).

75 INT'L ORG. FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES 1 (2008).

II. Challenges Providing Reparations in the Girl Soldier Context

Among the horrors of modern warfare has been the manipulation of hundreds of thousands of girls and boys, molded into machinery for use by warlords, terrorists, freedom fighters, and governments. It would be absurd to suggest that any judicial, social, or political project could wholly repair the wounds of war or recapture years lost. The challenge of attempting to do so may be a folly of imperfection, though nonetheless a worthy endeavor.

Here, as with any transitional justice context, politico-legal actors are attempting to provide "extraordinary justice," rather than simply "a special case of ordinary justice."[76] As such, in these cases, where harm was likely meted out in a "gross and systematic" manner, the "sheer number of victims and perpetrators may overwhelm the best efforts to provide redress."[77] In addition, judicial infrastructures may be weak, economic resources few, and competing goals—such as fostering peace and stability, ensuring justice, providing rehabilitation, and promoting reconciliation—must be considered.[78] Compromise, whether in designing reparations programs or providing redress through judicial avenues, is, therefore, virtually inevitable.[79]

Beyond the myriad challenges faced by all victims attempting to secure their right to reparation, child soldiers must overcome additional hurdles, due to their youth[80] and negative societal perceptions, based on their association with violence-perpetrating forces.[81] Furthermore, while there are similarities to the violence endured by all child soldiers, some of it is gender-specific.[82] Even if they are able to return home, former girl soldiers often face "resentment," "rejection," and "stigmatization."[83] Girls may be thought to be possessed

76 David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV 1043, 1050 (2010).

77 DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 389 (2006).

78 *Id.* at 388–89.

79 *Id.* at 389.

80 APTEL & LADISCH, *supra* note 45, at 4.

81 *See, e.g.*, Jamesina King, *Gender and Reparations in Sierra Leone: The Wounds of War Remain Open*, *in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, *supra* note 54, at 250. King does not claim that the women to whom she refers are necessarily "child soldiers." *Id.*

82 HONWANA, *supra* note 5, at 78.

83 Milfred Tonheim, *"Who Will Comfort Me?" Stigmatization of Girls Formerly Associated with Armed Forces and Groups in Eastern Congo*, 16 INT'L J. HUM. RTS. 278, 282–84 (2012). Tonheim quotes Anton Dijker

with a violent or evil "spirit."[84] It may be feared that they will attract militias back into the community.[85] Furthermore, they may be treated as "whores and prostitutes" because it is assumed they are in some way sexually tainted from their experience.[86] Thus, many former girl soldiers find themselves in a triple-marginalized position vis-à-vis other victims based on their status as youths, females, and as persons associated with armed forces.[87] This presents specific challenges in securing their right to reparations.

This Part will focus on five of the most salient issues involved in rendering "extraordinary justice," outlining both the general challenges and how these challenges play out in the girl soldier context.

A. "Structural Inclusiveness": Who Is a Girl Soldier?

A fundamental decision to be made in the design of a reparations program, or in issuing a reparations decision, is its "structural inclusiveness," or the "breadth of victims covered."[88] For example, the Argentine process is considered to have been inclusive, in that it covered a relatively broad range of victims who suffered under the military regime, whereas the Federal Republic of Germany's reparation program, designed to deal with the legacy of the Holocaust, has been criticized for its exclusion of many victims, including Roma and homosexuals.[89]

---

and Willem Koomen for her definition of "stigmatization" as: "the process by which an individual's or group's character or identity is negatively responded to on the basis of the individual's or group's association with a past, imagined, or currently present deviant condition, often with harmful physical or psychological consequences for the individual or group." *Id.* at 280 (quoting ANTON J. M. DIJKER & WILLEM KOOMEN, STIGMATIZATION, TOLERANCE AND REPAIR: AN INTEGRATIVE PSYCHOLOGICAL ANALYSIS OF RESPONSES TO DEVIANCE 6 (2007)).

84 *Id.* at 284.

85 *Id.*

86 *Id.* at 285.

87 For a discussion of the disparate impact of military recruitment on female youth in Northern Uganda and eastern DRC, see the TFV's summary of its study on cross-sector impact included in its First Report on Reparations to the ICC. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp–Trust Fund for Victims' First Report on Reparations, paras. 182–214 (Sept. 11, 2011), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1380655.pdf [hereinafter TFV First Report].

88 Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 293–94 (2009).

89 *Id.* at 274–75, 294.

In any given situation, the breadth of the eligible victim group will be determined by numerous defining criteria, including: type of harm suffered, degree of suffering, temporal jurisdiction, inheritance or other beneficiary issues, nationality of victims, geographical scope, and evidentiary thresholds. For example, in dealing with these matters at the Kosovo Property Agency, in order to recommend a claim for property restitution be granted by the KPCC, legal officers needed to establish that both the claimant and their claim met a number of eligibility requirements. They needed to have filed their claim within the proscribed period.[90] They must have lost their property because of the conflict (subject matter jurisdiction) and during the conflict (temporal jurisdiction).[91] In certain cases, however, even where the loss fell outside the statutory time period, the KPCC was empowered to grant claims where it is proven that the loss was, nevertheless, "directly related to and resulting from the armed conflict."[92] To recover, claimants did not need to establish an ownership right, but at a minimum must have established a "lawful right of use."[93] The property must have been immovable, however, requiring analysis as to whether structures had wheels or were easily collapsible.[94] Claimants further needed to be a "family household member" of the victim.[95] Through the jurisprudence of the KPCC, this included grandchildren and siblings of the victim, though not automatically step-relations.[96] Furthermore, because of the destruction of evidence, relaxed standards of proof were used. Nevertheless, decisions issued by "parallel courts" in Serbia were not deemed valid.[97] As demonstrated, some of these decisions are statutory, requiring determinations to be made up front, while others were left flexible for later interpretation. In the case of land reparations, the object of restitution is, for the most part, already in existence and the potential pool

90 Implementing UNMIK Regulation No. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property, §8, UNMIK/DIR/2007/5 (June 1, 2007), *available at* http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_50.pdf [hereinafter UNMIK Implementing Dir.].

91 *Id.* at para. 2.1. For example, one claim was denied because it was both related to a family dispute and outside the timeframe. Dec. No. KPCC/D/A/30/2008, Kosovo Property Claims Commission, Decision, para. 11 (Dec. 19, 2008), http://www.kpaonline.org/PDFs/KPCC_D_A_30_2008.pdf.

92 *See, e.g.*, Dec. No. KPCC/D/A/36/2009, para. 17, Kosovo Property Claims Commission (Apr. 23, 2009), http://www.kpaonline.org/PDFs/KPCC_D_A_36_2009.pdf.

93 UNMIK Implementing Dir., *supra* note 90, para. 2.1.

94 *Id.*

95 *Id.* §§ 1, 5.2.

96 *See, e.g.*, Dec. No. KPCC/D/A/30/2008, *supra* note 91, paras. 13–15.

97 *See, e.g., id.* paras. 12–15.

of victims can be expansive. In other situations, where monetary compensation will be awarded, however, the number of victims may need to be more limited. Difficult decisions must be made between offering a smaller amount of resources to more victims or more substantial resources to fewer.

Where children have been caught up in the machinery of war, hard choices will involve deciding whether to prioritize reparations to these individuals over other victim pools and, at the same time, deciding who is eligible to claim the status of child soldier, or other recognized victim status, given the particular context. Under international law, at a minimum, relief should be provided for those who have suffered "gross violations of international human rights law, or serious violations of international humanitarian law."[98] This baseline is not static; rather, it moves according to evolving standards of human rights and humanitarian norms. The emerging trend in the child soldier context is to recognize as eligible an ever-broader range of youth, according to age, supposed voluntariness in joining the armed group, and, particularly with regards to girls, their function within this group. This author asserts that there is no one correct answer to the question of who is a child soldier—or, likewise, to each element in the analysis—but, rather, the construction of the definition for reparations purposes should be context specific and, furthermore, should itself be used as a tool to help inform which type of reparations scheme is most appropriate. If broader definitions prove unfit, aid-style packages can still be considered to reach other seriously injured or affected individuals.

1. Age at Time of Recruitment

Age is a key factor in determining whether an individual can be considered a victim of "child soldiering" for the purposes of reparations. While the trend is towards rendering unlawful any enlistment or recruitment of individuals below the age of eighteen into an armed group, the current minimum age under international law remains fifteen, and the prohibition on military service only extends to those under eighteen who are forcibly used or recruited. The first international legal prohibitions on the use of child soldiers date back a mere four decades and set the minimum age for recruitment at fifteen.[99] When the Convention on the Rights of the Child (CRC) was adopted at the end of the 1980s, the

---

98 Basic Principles, *supra* note 25, para. 8.

99 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 77(2), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 609.

age for lawful enlistment remained unchanged.[100] At that time, however, many NGOs and some states found this low age threshold unacceptable and began lobbying for a protocol that would, *inter alia*, expand the category of unlawfully enlisted to include all persons under eighteen.[101] While drafting of this protocol began, the debate over the minimum age continued.[102] In the end, the final text of the Optional Protocol on the Involvement of Children in Armed Conflict ("Optional Protocol") failed to clearly alter the minimum standard even for signatories, although it is commonly interpreted to increase the age of voluntary enlistment to sixteen.[103] The protocol does, however, prohibit involuntary recruitment for all those under eighteen.[104]

In addition to the CRC and Optional Protocol, both international criminal law and state practice also indicate that voluntary enlistment in national armed forces under the age of eighteen continues to be acceptable. The first international criminal tribunal to charge an individual with the war crime of child soldier recruitment, the Special Court for Sierra Leone (SCSL), held the threshold at fifteen,[105] echoing the prohibition set forth in the

100 Convention on the Rights of the Child art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

101 Claire Breen, *The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, 25 HUM. RTS. Q. 453, 460–65 (2003).

102 *Id.* at 460–81.

103 Optional Protocol on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, art. 3, U.N. Doc. A/RES/54/263, (May 25, 2000) [hereinafter Optional Protocol]. The text of Article 3 does not expressly state any minimum age. The words "States Parties shall raise the minimum age," however, are often interpreted to set the minimum for signatories to age sixteen. Cris R. Revaz, *The Optional Protocols to the UN Convention on the Rights of the Child on Sex Trafficking and Child Soldiers*, 9 HUM. RTS. BRIEF 13, 16 (2001); *see also* HONWANA, *supra* note 5, at 36; WESSELLS, *supra* note 2, at 56. Nevertheless, looking at the *travaux preparatoires* it is less than apparent. For example, in relation to the same language contained in a draft version: "The delegation of Italy stated that . . . the revised text did not meet the requirement of setting a minimum age limit for forced or voluntary recruitment. . . . In practice, the current wording of article 3 allowed States to recruit children as of the age of 15." U.N. Commission on Human Rights, *Report of the Working Group on a Draft Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflicts on its Sixth Session*, para. 115, U.N. Doc. E/CN.4/2000/74 (Mar. 27, 2000).

104 Optional Protocol, *supra* note 103, art. 2. Similarly, the International Labour Organisation (ILO) Convention on the Worst Forms of Child Labour identifies conscription of those under eighteen as one of "the worst forms of child labour." Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour art. 3, June 17, 1999, 38 I.L.M. 1207 [hereinafter ILO Convention].

105 Statute of the Special Court for Sierra Leone art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 145; Warren Binford, *School Lessons in War: Children at Tuol Sleng & the Rise of International Prosecutions for Children at War*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 28, 70 (2008).

Rome Statute.[106] Furthermore, many countries, including the United States and the United Kingdom, allow or even encourage voluntary enlistment of under-eighteens into national armed forces.[107]

Still, proponents of a "Straight-18"[108] standard have had some success in advancing their view. As early as 1996, the UN Secretary-General's expert report on the Impact of Armed Conflict on Children asserted: "State practice suggests that a minimum age of 18 may already be an emerging norm of customary international law" and that she believed this age should be the "unequivocal" minimum.[109] Both the 1997 *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* ("Cape Town Principles") and the subsequent 2007 *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*—the so-called Paris Principles—urge a minimum age of eighteen. [110] In the regional context, the African Charter on the Rights and Welfare of the Child establishes an unequivocal eighteen-year-old minimum.[111] Furthermore, many scholars in the field and NGOs equally insist that a "Straight-18" position should be applied.[112]

---

106 Rome Statute, *supra* note 22, arts. 8(2)(b)(xxvi), 8(2)(e)(vii) (defining the following as a crime: "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities").

107 WESSELLS, *supra* note 2, at 17, 55–56.

108 David M. Rosen, *Who Is a Child? The Legal Conundrum of Child Soldiers*, 25 CONN. J. INT'L L. 81, 96–98 (2009). The Coalition to Stop the Use of Child Soldiers defines the "Straight-18" position as "prohibit[ing] the military recruitment or use of all children below the age of 18 years without exception or reservation." COAL. TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIERS GLOBAL REPORT 412 (2008).

109 U.N. Secretary-General, *Impact of Armed Conflict on Children*, para. 38, U.N. Doc. E/CN.4/1996/110 (Feb. 5, 1996).

110 United Nations Children's Fund (UNICEF), *Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa* (1999) (resulting from a symposium held on the issue in Cape Town, South African from 27–30 April 1997) [hereinafter *Cape Town Principles*]; *The Paris Principles: Principles and Guidelines on Children Associated With Armed Forces or Armed Groups*, paras. 1.14, 2.1, 6.4.1, 7.11, Feb. 2007, *in* 27 REFUGEE SURVEY Q. 225 (2008). The Paris Principles retain the same definition, but use the term "child associated with an armed force or armed group" rather than "child soldier." *Id.* para. 2.1.

111 African Charter on the Rights and Welfare of the Child arts. 2, 22(2), July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49.

112 WESSELLS, *supra* note 2, at 7; Lisa Alfredson, *Child Soldiers, Displacement and Human Security*, 3 DISARMAMENT F. 17, 17–24 (2002); Breen, *supra* note 101, at 461–81.

Thus, while both state practice and international legal instruments indicate that the global prohibition on voluntary enlistment continues to apply only to children under fifteen, the emerging trend is towards greater inclusiveness.[113] Until the legal norm has expanded, however, it is unclear that girls voluntarily recruited between fifteen and eighteen are among those whose rights were "seriously" or "grossly" violated—and thereby most deserving of limited, available resources—unless they are victims of some separate, recognized harm.

2. "Voluntary" Enlistment

Between the ages of fifteen and eighteen, therefore, relief may hinge on whether a child's participation is considered voluntary.[114] Surprising to some, so-called "voluntary" enlistment of children is rampant. For example, a study by the International Labour Organization (ILO) on under-eighteen-year-old child soldiers in four African countries indicated that as many as two-thirds could be categorized as volunteers.[115] Both boys and girls join military groups for a variety of reasons, commonly related to wartime circumstances, the effects of poverty, the lack of or a desire for education and/or employment, the influence of family and friends, the situational politics and ideology, the "specific features of adolescence," and cultural traditions.[116] In particular, some girls join to overcome negative gender expectations, avoid forced marriages, or escape domestic sexual violence.[117]

It is questionable whether enlistment under these circumstances should be construed as "voluntary." One authoritative list of criteria to establish "voluntariness" in this context is set forth in the Optional Protocol.[118] It requires the following four factors to be present: (1) the "recruitment is genuinely voluntary"; (2) the "recruitment is done with the informed consent of the person's parents or legal guardians"; (3) "such persons are fully informed of the duties involved in such military service"; and (4) "such persons provide reliable proof

---

113 This author takes no position on whether the "Straight-18" formula is the most advantageous. As Mark Drumbl has eloquently articulated, some of the discourse surrounding this formulation tends to infantilize older adolescence and may not be representative of their true state. *See* MARK DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 11–17 (2012).

114 *See* ILO Convention, *supra* note 104, art. 3; Optional Protocol, *supra* note 103, art. 2 (all discussing the legality of voluntary recruitment between these ages); HONWANA, *supra* note 5, at 36–37.

115 RACHEL BRETT & IRMA SPECHT, YOUNG SOLDIERS: WHY THEY CHOOSE TO FIGHT 1 (2004).

116 *Id.* at 9–39.

117 WESSELLS, *supra* note 2, at 90–92.

118 BRETT & SPECHT, *supra* note 115, at 115.

of age prior to acceptance into national military service."[119] In particular, with regard to the third factor, studies illustrate that many youth in war do not truly understand the nature of the ensuing tasks they will need to perform.[120] Where girls are raped or utilized as sex slaves, this debate should be moot.[121]

Therefore, while truly voluntary enlistees between fifteen and eighteen (in countries where this is still legally permissible) may not be eligible for status-based reparations, voluntariness standards must be set and measured, akin to the definition in the Optional Protocol, in order to fully evaluate whether someone in that age range was, nevertheless, a "child soldier," so as to fall into the category of prioritized victims.

3. Who Is a Soldier?

The definition of child soldier has two components, both equally important to determining status. One is age, in relation to the "child" portion, discussed above, and the other is the function or duties that make one a "soldier." When we hear the word soldier we may conjure up images of brave, usually masculine, warriors equipped with advanced weaponry marching against the enemy. Alternatively, we may picture a steadily advancing front of automatons moving towards our village to wreak havoc, destruction, and violence. Recent autobiographies by former child soldiers have grafted new dimensions onto the modern imagery of conflict.[122] Beatings, torture, and drug induced rampages meted out by and against potentially salvageable male youth appear as gang violence on a national scale.[123] These images, either romanticized or demonized, present only a fraction of the realities of modern armed conflict.[124] The legal definition of soldiering extends beyond popular conceptions of combatants, and, as with the other categories, is not static.

---

119 Optional Protocol, *supra* note 103, art. 3.

120 *See, e.g.*, BRETT & SPECHT, *supra* note 115, at 135.

121 *See* HONWANA, *supra* note 5, at 91–92.

122 ISHMAEL BEAH, A LONG WAY GONE: MEMOIRS OF A BOY SOLDIER (2008); EMMANUEL JAL & MEGAN LLOYD DAVIS, WARCHILD: A BOY SOLDIER'S STORY (2010).

123 *See, e.g.*, BEAH, *supra* note 122, at 121–25; *see generally* Elizabeth Braunstein, *Are Gang Members, Like Other Child Soldiers, Entitled to Protection from Prosecution Under International Law?*, 3 U.C. DAVIS J. JUV. L. & POL'Y 75 (1999) (discussing the similarities of child soldering with gang violence).

124 *See* DRUMBL, *supra* note 113, at 6–8 (discussing major narratives ascribed to child soldiers).

Many of the same proponents of the "Straight-18" view have argued for a broad categorization of duties. For example, the Cape Town Principles also includes persons who are "cooks, porters, messengers and anyone accompanying such groups, other than family members," as well as "girls recruited for sexual purposes and for forced marriage."[125] This definition has even been pushed further to include any individuals who are "member[s] of or attached to the armed forces or an armed group, whether or not there is an armed conflict,"[126] presumably to cover accompanying family members.

In contrast, the international criminal law prohibition remains narrower. The SCSL, for example, defined the "us[e]" and "participat[ion]" of an individual as a soldier according to language found in a footnote to a draft version of the Rome Statute,[127] which included "both direct participation in combat" and "active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints," but not "food deliveries to an airbase o[r] the use of domestic staff in an officer's married accommodation."[128]

At the forefront of the debate in the girl soldier context is—in order to be gender-sensitive—whether this definition should include sex slaves and non-consensual "wives" attached to an armed group. Importantly, this is not an either/or categorization, as many girls both perform combat duties and are victims of sexual violence.[129] As mentioned, the Cape Town Principles and many "Straight-18" proponents believe the definition should be extended to include these functions.[130] Yet, despite the prosecution's arguments in *Lubanga* in favor of a more encompassing definition,[131] the ICC held that "domestic work" would

---

125 *Cape Town Principles*, *supra* note 110, at 8; WESSELLS, *supra* note 2, at 7.

126 Alfredson, *supra* note 112, at 17 (quoting COALITION TO STOP THE USE OF CHILD SOLDIERS, *supra* note 108).

127 Kristin Gallagher, *Towards a Gender-Inclusive Definition of Child Soldiers:* The Prosecutor v. Thomas Lubanga Dyilo, 7 EYES ON THE ICC, 2010/2011, at 123–24.

128 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute for the International Criminal Court*, 21 n.12, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998).

129 Testimony of the SRSG, *supra* note 2, at 30.

130 *See, e.g.*, WESSELLS, *supra* note 2, at 7.

131 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Office of the Prosecutor's Closing Statements, Transcript of Record, 53–54 (Aug. 25, 2011).

only be considered soldiering within the meaning of the Rome Statute "when the support provided by the girl exposed her to danger by becoming a potential target."[132] Apparently, at least at the ICC, exposure to the risk of violence perpetrated from within the group—for example, sexual violence—remains insufficient to categorize a girl as a child soldier, without proof of more traditional soldiering duties.[133] This narrow reading was criticized by the dissent as "discriminatory," in that it "shows a clear gender differential impact from being a bodyguard or porter which is mainly a task given to young boys."[134] Likewise, this author agrees that if risk of violence or other harm is used as a determining factor for defining "soldiering," it should include risk of violence from within the group.

In addition to unresolved notions of which "duties" undertaken constitute "soldiering," the definitions of "enlistment," "recruitment," and even "hostilities" remain murky at best.[135] Depending on the particular case or situation, defining these terms may or may not be essential. Where they are important, there is a relative consensus that these will need to be analyzed on a case-by-case basis.[136] For example, when the SCSL considered the issue of enlistment, it did so by looking at the facts of the case within the specific cultural context, including analyzing whether recruiting children to be "hunters" was equivalent to recruiting them into an armed militia.[137] The existence of hostilities may depend on whether the violence was against a de facto government and whether the violence was "systematic" as opposed to "sporadic internal strife."[138]

Who is categorized as a child soldier for purposes of administrative and judicial reparations will be, therefore, governed by both evolving definitions and case-specific analyses. In the criminal law and certain other judicial reparations contexts, we will be bound by relatively narrow conceptions. This author is in favor of prohibiting recruitment of under-eighteen-year-olds, but until this is the international customary norm, we must

132 *Lubanga* Judgment, *supra* note 1, para. 882.

133 *Id.* para. 896 ("[E]vidence [of sexual violence] is irrelevant for the purposes of the . . . Decision.").

134 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, Separate and Dissenting Opinion of Judge Odio Benito, para. 21 (Mar. 14, 2012) [hereinafter *Lubanga* Dissent].

135 Breen, *supra* note 101, at 474; Binford, *supra* note 105, at 74 ("[T]he definition of 'hostilities' remains vague.").

136 *See, e.g.*, Rosen, *supra* note 108, at 105–11; Testimony of the SRSG, *supra* note 2, at 30.

137 Rosen, *supra* note 108, at 105–11.

138 Braunstein, *supra* note 123, at 84–87.

carefully analyze whether girls below the age of majority voluntarily consented to their participation in an armed group, before casually construing them as "victims." If under-fifteens and/or under-eighteens lacking informed consent can demonstrably be shown to have been brought into an armed group for any purpose, it is difficult to justify dissecting their daily routines, though this is necessary in a criminal case to protect the rights of the accused. Here, if risk of violence or harm were to become the determining standard, then soldiering should extend to those at risk of sexual violence perpetrated from within the armed group. A more prudent solution, however, may be to separate victims of violence from victims of child soldiering, and choose a reparations scheme that appropriately addresses both.

B. Access to Justice

In any reparations process, it is insufficient to simply decide which victims are entitled to redress. To render any selection meaningful, victims must also be aware of their right to claim for reparations, understand their right, and possess the resources necessary to claim their right. This requires, among other things, making information available in relevant languages, posting information in locations where victims are likely to see it, and offering free or inexpensive legal assistance to file a claim. Additional efforts are needed in the transitional justice context, where individuals may have fled to other cities or countries, where the literacy rate may be low due to wartime or other circumstances, where the original victim may be deceased, and/or where the victims might still be children.

Most all programs make some attempt at outreach. For example, Eritrea's team, preparing its case for the EECC, made claim forms available for victims in the capital city, Asmara, as well as in nine local government offices, through the post and Internet.[139] In Kosovo, the Kosovo Property Agency facilitated claim intake and outreach through offices in six Kosovar cities, including two offices in divided Mitrovica, and established four additional offices providing victims assistance through the UN High Commissioner for Refugees (UNHCR), with two in Serbia, one in Macedonia, and one in Montenegro.[140] In both situations, staff members were available to assist victims in multiple languages. If individuals could not read, the information was read aloud and explained.

---

139 GOV'T OF ERITREA, DISTRIBUTION OF EECC CLAIM FORUMS—OR ERITREAN CIVILIAN INTERNEES, EXPELLEES AND OTHER ERITREAN PROPERTY OWNERS (June 21, 2007), http://reliefweb.int/node/235747.

140 KOSOVO PROPERTY AGENCY, *About Kosovo Property Agency*, http://www.kpaonline.org/about.asp (last visited Jan. 25, 2012).

While these solutions solve some access issues, girl soldiers face particular obstacles to accessing reparations programs. In addition to similar problems regarding illiteracy and the unavailability of identity documents or other required evidence, they also often face shame or fear of stigmatization and fear of retaliation by their former military unit.[141] For girls who return to their families, parents may also contribute to the problem for similar reasons, lacking trust in the adjudicatory system, attempting to "avoid public scandal," or also fearing retribution from local commanders.[142] In particular, programs attached to a truth commission have been proven to serve as a barrier to many young girls not ready or willing to detail their experiences.[143] In some situations, even where girls have tried to access the system, implementing officials have interpreted gender-neutral laws to apply to boys alone, and denied benefits to girls based on their own cultural assumptions.[144] Discussing his work in the Congolese DDR program, one UN officer admitted that his team "wrongly considered girl soldiers as dependents of male soldiers, so they d[id] not have the same benefits as boy soldiers."[145] Considering the specific access to justice issues for girl soldiers will therefore be a necessary step in any reparations-planning process.

C. Victim-Perpetrators

Another important, but less-considered, challenge in providing post-conflict reparations is deciding how to respond to categories of victim-perpetrators. In her article on "complex political perpetrators," Professor Erin Baines of the Liu Institute for Global Issues and the Institute for Gender, Race, Sexuality, and Social Justice[146] discusses the ICC case against Dominic Ongwen, a former child soldier turned alleged perpetrator.[147] Baines highlights the important point that, in the transitional justice context, "[s]implistic categories of 'victim' and 'perpetrator' are assigned a moral value . . . .'[V]ictims' are frequently associated with

---

141 *See, e.g.*, Claudia Paz y Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations*, *in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, *supra* note 54, at 116–17 (discussing access problems for all female victims in Guatemala).

142 APTEL & LADISCH, *supra* note 45, at 21 (discussing access to the criminal justice system for children).

143 Rubio-Marín, *supra* note 68, at 34.

144 APTEL & LADISCH, *supra* note 45, at 9.

145 Fujio, *supra* note 2, at 13.

146 *Profile: Erin Baines*, LIU INST. FOR GLOBAL ISSUES, http://www.ligi.ubc.ca/?p2=/modules/liu/profiles/profile.jsp&id=9 (last visited Mar. 25, 2014).

147 Erin Baines, *Complex Political Perpetrators: Reflections on Dominic Ongwen*, 47 J. MOD. AFR. STUD. 163, 163 (2009).

the words 'pure' and 'innocent', and perpetrators with 'evil' and 'guilt'."[148] This does not, however, represent the messy reality of large-scale atrocity, where many victims of one crime may be perpetrators of another.

Gender stereotypes, such as those influencing the Congolese DDR process, "have served to establish and perpetuate woman's social position as noncombatant and man's identity as warrior."[149] In light of this, it might be assumed that reparations in the girl soldier context would escape the problems associated with victim-perpetrators. Yet, girls are also agents of atrocity in war.[150] Child soldiers eventually gain maturity and, as adults, may become brutal perpetrators. Ongwen's case exemplifies this scenario.[151] Even where girl soldiers do not commit acts of violence, they may be "suspected and accused of sympathizing with the opposing warring factions and passing on sensitive information."[152] Some forced "wives" and victims of rape, particularly where children result, settle down with the male perpetrator and may be considered tainted by local communities.[153] In Colombia when one former girl soldier was given lump-sum compensation, she "asked why she would receive . . . $5,500 . . . for causing harm to others."[154]

Laplante, one of the few authors to confront the issue of reparations for victim-perpetrators directly, submits that the "clean hands doctrine"—defined as the concept "that an injured party's wrongdoing may limit his or her claim to reparations"—should not be applied to victims of human rights violations and that doing so would violate principles of non-discrimination.[155] Conceding that there is no consensus in international law on the issue, Laplante focuses on the relevant provisions of the Basic Principles, which state that

148 *Id.* at 177.

149 HONWANA, *supra* note 5, at 77.

150 *Id.* at 92–97.

151 Baines, *supra* note 147, at 163–91. For a non-gendered but detailed discussion of the moral culpability and corresponding threat analysis of child soldiers, framed within the just war discourse, see JEFF MCMAHAN, KILLING IN WAR 198–202 (2009). McMahan's analysis also dissects different levels of moral culpability based on age, duress, and other factors. *Id.*; *see also generally* DRUMBL, *supra* note 113 (challenging typical notions of innocence and lack of agency assigned to the child soldiers within the international discourse, and proposing that re-inserting notions of responsibility could be beneficial to child soldiers and society).

152 King, *supra* note 81, at 250.

153 HONWANA, *supra* note 5, at 86–92.

154 APTEL & LADISCH, *supra* note 45, at 29.

155 Laplante, *supra* note 37, at 52.

victims possess a right to reparations and that this right must be applied "without any discrimination of any kind or on any ground, without exception."[156] She also cites the Inter-American Court of Human Rights decision in *Miguel Castro Castro Prison v. Peru*, which found Peru liable for reparations to at least some victims who were excluded due to their affiliation with "terrorist, subversive groups."[157] On the other hand, Laplante notes that the European Court of Human Rights continues to permit exclusion of victims based on their wrongdoing.[158] Nevertheless, the overall international trend appears to be moving towards an unqualified right to remedy. Still, in the context of any specific reparations scheme, there will be difficult choices to be made over limited resources. It may well be that so-called victim-perpetrators have the right to access reparations through the court system, provided they meet the relevant statute of limitations and evidentiary standards. Where an alternative program is established, however, to cater to a specific group of victims—offering extended statutes of limitations, relaxed evidentiary standards, free legal assistance, and/or specific reparations measures such as scholarships or counseling—some form of positive discrimination in favor of non-perpetrator victims may remain acceptable. Likewise, awards for victims of childhood recruitment must consider other victims, including victims of child soldiers' actions.

D. Allocation and Form

A fourth major challenge in providing reparations is to decide on allocation and form. As mentioned in the historical overview in Part I, reparations can take many forms: anything from money, scholarships, and monuments, to the ordering of investigations and declaratory judgments.[159] In a victim-centric approach, victims would be consulted as to the form of reparations in addition to the method of allocation. The results of case studies and research can, nevertheless, help inform victims of the advantages and disadvantages of any given option. In addition, victims' desires must also be weighed against the interest of other victims or victim groups (including victims of "victims," as addressed above). Where monetary resources are few, creative attempts to achieve justice should also be considered. It may be that a day of remembrance or renaming a street can both provide victims with a sense of restored dignity and require minimal resources.

156 *Id.* at 53, 59 (quoting Basic Principles, *supra* note 25, para. 25).

157 *Id.* at 75–89 (discussing Miguel Castro-Castro Prison v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, para. 470 (Nov. 25, 2006)).

158 Laplante, *supra* note 37, at 65.

159 PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS, TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 163–81 (2d ed. 2011) (offering examples of types of reparations).

Victims' desires should not, however, be assumed. In Argentina, one organization representing victims rejected the idea of reparations for the loss of family members, declaring in particular that economic reparations were a form of "prostitution."[160] Similarly, land restitution may only be a good option where victims are able or willing to resettle. In Bosnia and Herzegovina, the Commission for Real Property Claims of Displaced Persons and Refugees was established in 1995 as a partial response to the regional conflict.[161] Politicians invested in the success of the Dayton Peace Agreement decided upon property restitution in lieu of compensation in order to help "undo the ethnic cleansing and recreate a multi-ethnic society."[162] Victims' voices were largely silent in these discussions, however, and in practice there was a strong bias against those who did not return. Local authorities are reported to have denied restitution "to those they deemed as having no intention to return."[163] As these examples illustrate, victim consultation is important to rendering effective the right to reparation.

In the girl soldier context there are a host of specific dilemmas involved in deciding upon the form and allocation of reparations for these victims. As illustrated, cash payouts can be confusing for former combatants, if interpreted as a reward for harming others. If the former combatants are still minors, parental guardians may legally maintain control of their assets and there is no guarantee that these will be used for the child's benefit.[164] Payments can also negatively impact family reintegration if child soldiers resist turning over the money to parents, in violation of cultural expectations.[165] Laws in some countries may also prevent adult women from controlling their assets.[166] Even worse, payments for demobilization can incentivize children, sometimes under family pressure, to join armed groups in the first place.[167] While rehabilitation programs are essential,[168] they may not go

160 Waterhouse, *supra* note 88, at 278. Another group was in favor of optional reparations and in the end their viewpoint prevailed. *Id.*

161 INT'L ORG. FOR MIGRATION, *supra* note 75, at 14–17.

162 *Id.* at 16.

163 Charles B. Philpott, *From the Right to Return to the Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina*, 18 INT'L J. REFUGEE L. 30, 44 (2006).

164 APTEL & LADISCH, *supra* note 45, at 30.

165 *Id.* (discussing Liberia).

166 *See* Goldblatt, *supra* note 54, at 73.

167 APTEL & LADISCH, *supra* note 45, at 30.

168 Christophe Pierre Bayer, et al., *Association of Trauma and PTSD Symptoms with Openness to*

far enough to explicitly recognize the individual rights violation.[169] This is particularly so where these same benefits are given to former adult combatants.[170] Symbolic reparations involving individualized public recognition may also be problematic where victims of sexual violence or otherwise stigmatized former combatants may wish to hide their status. Finally, as a triple-marginalized community—as women, children, and those formerly associated with armed forces—these girl soldier victims may find it nearly impossible to have input in the process. Deciding upon the appropriate allocation method and form(s)—including the decision-making process—therefore, will be paramount to effectively realizing girl soldiers' right to reparations.

E. Transformative Justice: A Child-Sensitive and Gendered Approach

Finally, if we are to take a child-sensitive and gendered approach, and conceive of reparations as not only a legal right, but also, as a tool for transformation, we face the additional challenge of how to provide reparations in a manner leading to a better overall situation for both these girls and future society as a whole. At a minimum, this transformative layer requires transitional efforts, such as reparations, to "avoid reproducing and perpetuating unjust social structures."[171]

The relatively new and rapidly accepted notion that reparations should be transformative has been motivated largely by the realization that female viewpoints and their specific needs were being systematically ignored in transitional justice processes,[172] a problem compounded for female youth.[173] Specifically, here, many so-called "voluntary" girl soldiers enlisted to escape sexual abuse, poverty, and virtual slavery.[174] While many, if not most, become victims of worse crimes upon capture or recruitment, it is hardly a just

---

Reconciliation and Feelings of Revenge Among Former Ugandan and Congolese Child Soldiers, 298 J. AM. MED. ASS'N 555, 555 (2007) ("The psychological rehabilitation of child soldiers is an obligation, according to Article 39 of the United Nations Convention on the Rights of the Child.").

169 *See* de Greiff, *Justice and Reparations*, *supra* note 38, at 469–71.

170 TORRES ET AL., *supra* note 47, at 2 (discussing Colombia).

171 de Greiff, *Justice and Reparations*, *supra* note 38, at 471.

172 Rubio-Marín, *supra* note 68, at 23 ("[D]iscussion on the difference that gender should make when conceptualizing, designing, or implementing reparations has been practically absent up until now.").

173 Sommers, *supra* note 6, at 10–11.

174 WESSELLS, *supra* note 2, at 90–92.

solution to return them to their former situation.[175] In addition to women, children are also frequently marginalized in transitional justice processes.[176] There has been a "tendenc[y] to infantilize children and to regard them as passive."[177] Even many "passionate defenders of the rights of others" remain critical, or at least skeptical, of bestowing children with equal rights.[178] Yet, it is because of the unbalanced adult-child power dynamic that many commanders recruit children and are able to manipulate them.[179]

Beginning in the mid-'00s, however, there has been an emerging trend towards incorporating gendered, child-sensitive, and other transformational perspectives into post-conflict programming. In 2007, the aspirational civil society-authored *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* ("Nairobi Declaration") declared "reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives."[180] In 2009, taking a progressive rights-based approach, the Inter-American Court of Human Rights, in the hallmark *Cotton Field Case*, for the first time relied on this basic concept—the need for reparations to address "structural discrimination"—to modify the standard principle of *restitutio in integrum*.[181] That same year, Rubio-Marín is credited with adding a program's "transformative potential" to the reparations analysis,[182] going a step further than previous scholars by

175 Valérie Couillard, *The Nairobi Declaration: Redefining Reparations for Victims of Sexual Violence*, 1 INT'L J. TRANSITIONAL JUST. 444, 450–51 (2007).

176 APTEL & LADISCH, *supra* note 45, at 4.

177 WESSELLS, *supra* note 2, at ix.

178 Michael Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 INT'L J. CHILDREN'S RTS. 5, 6–7 (2007).

179 WESSELLS, *supra* note 2, at 35–36.

180 APTEL & LADISCH, *supra* note 45, at 10 (citing *Nairobi Declaration on the Women's and Girls' Right to a Remedy and Reparation* (2007), *available at* http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf [hereinafter *Nairobi Declaration*]).

181 Gonzalez et al. v. Mexico (Cotton Field Case), Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, para. 450 (Nov. 16, 2009); Impugned Decision, *supra* note 10, at n.407 (citing the Cotton Field Case); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Observations of the Women's Initiatives for Gender Justice on Reparations, para. 17 (May 10, 2012) [hereinafter Women's Initiatives Observation].

182 Chandra Lekha Sriram, Book Review, 21 EUR. J. INT'L L. 490, 492 (2010) (reviewing THE GENDER OF REPARATIONS, UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marín ed., 2009)).

placing transformation as a proactive goal.[183] Taking a gendered approach to reparations, she explained, means responding to the needs of women, empowering them in the process, and going beyond simply "restor[ing] victims to the status quo ante"—often, subjugation and peacetime violence.[184] Reports and handbooks published even more recently, by organizations such as the ICTJ, the International Organization for Migration (IOM), and the Victims' Rights Working Group, all echo these sentiments and mention the need to consider the particular concerns of women in transitional justice processes.[185] Referencing amicus briefs filed by Women's Initiatives for Gender Justice ("Women's Initiatives"), the UN Children's Fund (UNICEF), and others, the ICC has now also taken note of these concerns and progressive new voices in the field of reparations, discussed further below in the section on the *Lubanga* case.[186]

Given the newness of this endeavor, there remains a paucity of positive examples to draw from and it is too soon to analyze success rates. Many of the aspirational statements and cited best practices are still derived from lessons learned from the failures and pitfalls of predecessor programs. There is also a risk that policymakers will capitalize on this language of transformation to instill external values on the process, and thus "instrumentalize" victims.[187] Gendered approaches to reparations should empower women and girls as participants. Their voices and concerns should be present throughout the decision-making process, from the procedural and substantive design of the program to the form and allocation method of the reparations. Thoughts on how to best meet this challenge for girl soldiers, within an international human rights and humanitarian law framework, will be addressed below. In doing so, the analysis will consider how a transformative approach, when applied to reparation, might impact overall planning, definitional concerns, access to justice, dealing with the issue victim-perpetrators, and questions of allocation and form.

---

183 *Id.* at 492. Rubio-Marín defines "transformative potential of reparations" as "the potential of . . . reparative efforts to subvert, instead of reinforce, preexisting structural gender inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes." Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *in* THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS, *supra* note 182, at 66.

184 Bashir & Kymlicka, *supra* note 69, at 23; Rubio-Marín, *supra* note 74, at 74.

185 APTEL & LADISCH, *supra* note 45, at 9–10; INT'L ORG. FOR MIGRATION, *supra* note 75, at 2; VICTIMS' RIGHTS WORKING GROUP, THE IMPLEMENTATION OF VICTIMS' RIGHTS BEFORE THE ICC: ISSUES AND CONCERNS PRESENTED BY THE VICTIMS' RIGHTS WORKING GROUP ON THE OCCASION OF THE 10TH SESSION OF THE ASSEMBLY OF STATES PARTIES 12–21 DECEMBER 2011, 3, 5–6, 18, http://www.vrwg.org/VRWG_DOC/2011_VRWG_ASP10.pdf.

186 *See infra* Part III.

187 Bashir & Kymlicka, *supra* note 69, at 24.

III. Effectively Realizing the Right to Reparations for Girl Soldiers

While the right to reparation for girl soldiers is evidenced in numerous instruments, including the Basic Principles, the Rome Statute, and the CRC,[188] both paternalistic and patriarchal assumptions continue to contribute to the lack of its effective realization. Paternalistic ideologies, effectively excluding children and youths from political participation, weaken both boy and girl soldiers' ability to advance their own interests. Girl soldiers' "invisibility" based on stereotyped readings of women's roles in conflict[189] and the more overtly sexist prevention of women's equal political participation, furthermore, act in concert to undermine girls' rights.

Non-discrimination provisions in the UN Charter, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), however, make clear that the rights and interests of women and girls rights must be equally guaranteed.[190] Furthermore, girls' rights deserve extra protections, in order to overcome past discrimination against women and to respect children's unique vulnerabilities.[191]

This Part will focus specifically on the right to reparations and how reparations can be best used, ideally as one tool among many, to redress the wrongs committed against girl soldiers. Aimed at affirming their dignity and empowering them as an equal rights bearers—in order to meet the aims of, *inter alia*, the ICCPR, ICESCR, CRC, and CEDAW—this Part will draw from case studies and best practices to offer practical suggestions, taking a transformative approach, grounded in legal bases.

---

188 Basic Principles, *supra* note 25, at Part VII; CRC, *supra* note 100, art. 39; Rome Statute, *supra* note 22, arts. 8(2)(b)(xxvi), 8(2)(e)(vii), 75.

189 Fujio, *supra* note 2, at 1–21.

190 U.N. Charter art. 1; Convention on the Elimination of All Forms of Discrimination against Women art. 2, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; International Covenant on Civil and Political Rights art. 24, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights arts. 2, 3, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

191 *See* CEDAW, *supra* note 190, art. 4; CRC, *supra* note 100, at Preamble; ICCPR, *supra* note 190, art. 24; ICESCR, *supra* note 190, art. 10.

A. Planning Phase

From the beginning of transitional justice planning, the specific concerns of girl soldiers should be acknowledged and considered. As noted, children's interests, and girls' interests in particular, are entitled special protection under international law, and it has been demonstrated that where commitments to women's concerns are placed at the cornerstone of peace processes, including transitional justice planning, this has led to significant success in advancing women's rights and empowerment in the long term.[192] This type of commitment can and should be extended to girls.

Beyond addressing their concerns, transitional planning processes should also incorporate girl soldiers. The importance of females' full participation in public and political life is made explicit under CEDAW.[193] Within the conflict resolution context, this is also guaranteed under Security Council Resolution 1325, dealing with the roles of women and girls in armed conflict.[194] Similarly, under the CRC, children have the right to express their opinion on "all matters" affecting their rights and interests,[195] and the empowerment and integration of child soldiers specifically in peace processes is mandated under the terms of Security Council Resolution 1882, concerning children's involvement in war.[196] This can be accomplished, where possible, by literally inviting girl soldiers to the table, or, at a minimum, through inviting representative NGOs or experts who are in constant and direct contact with victims. For example, in Colombia, it was child-protection experts who advocated for "illegal recruitment of minors" to be enumerated as a crime under which victims could receive redress through the Reparations and Reconciliation Commission.[197] This method can be expanded to ensure that the particular situation of girl soldiers is also advanced. Including these young women in the process will have the double benefits of tailoring programs to their specific needs and empowering them with a sense of ownership in the new society.

---

192 *See* Paz y Paz Bailey, *supra* note 141, at 102.

193 CEDAW, *supra* note 190, art. 7.

194 S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

195 CRC, *supra* note 100, art. 12.

196 S.C. Res. 1882, para. 15, U.N. Doc. S/RES/1882 (Aug. 4, 2009).

197 APTEL & LADISCH, *supra* note 45, at 28.

Experience suggests that administrative programs, as opposed to judicial mechanisms, are better able to meet the needs of these young women.[198] Where established, these mechanisms should be designed to complement any pre-existing DDR or rehabilitation programs, to avoid wasting limited resources through overlap or inefficiency.[199] Programs should not, however, make testimony before a truth commission a prerequisite for reparations, or it may discourage those who suffered some of the greatest trauma from participating.[200] If judicial mechanisms are pursued, it is important to consider how inflexible, pre-determined definitions may result in the exclusion of individuals entitled to reparations, such as those discussed below.

B. Definitional Concerns and "Structural Inclusiveness"

While broadening the category of entitled recipients in any given program—to include older girls, so-called "voluntary" enlistees, and non-combatants—increases the pool of victims, thereby decreasing the per individual resources available, a relatively broad categorization in this context is warranted. First, international law encourages positive measures and enhanced protections for girls.[201] In addition, due to their youth, these young women have great potential to become long-term productive members of society or, if sidelined, lifelong sufferers unable to contribute to their communities.

In judicial reparations processes, ensuring this structural inclusiveness requires adequately charging and investigating these crimes as well as ratifying or judicially rendering more expansive definitions. The former ICC Prosecutor has been criticized for his failure to investigate or charge gender-based crimes, particularly those suffered by girl soldiers.[202] These decisions will logically impact reparations proceedings.[203] Secondly,

---

198 Rubio-Marín, *supra* note 74, at 4–5 (referring to women generally).

199 *See* King, *supra* note 81, at 261 (discussing Sierra Leone).

200 Goldblatt, *supra* note 54, at 76.

201 *See, e.g.*, CEDAW, *supra* note 190, art. 4; CRC, *supra* note 100, at Preamble; ICCPR, *supra* note 190, art. 24; ICESCR, *supra* note 190, art. 10.

202 Letter from Brigid Inder, Exec. Dir. Women's Initiatives for Gender Just., to Luis Moreno Ocampo, Chief Prosecutor, Int'l Crim. Ct. (Aug. 16, 2006), http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf (stating concern about the failure to investigate and charge gender-based crimes in the Lubanga case).

203 *Id.* This author posits that a separate definition of "child soldier" for the reparations proceedings would undermine the validity of the Court's Judgment.

inclusiveness also relates to the definition of the crime,[204] which can evolve through either statutory amendments or jurisprudence. Thus, state members of the Assembly of States Parties to the ICC,[205] expert witnesses such as the Special Representative of the Secretary General for Children and Armed Conflict (SRSG-CAAC),[206] and NGOs such as Women's Initiatives all have the ability to foster greater structural inclusiveness.

At present, however, administrative schemes will better accommodate an expansive view of child soldiering. Under these schemes, the definition of a victim need not be limited by the elements of the crime or involve a retroactive re-analysis of a crime's legitimate scope, which could violate the rights of the accused. In contrast to a witness or victim in a criminal trial, a claimant in a reparations process is, at some level, fundamentally different, because she is not in an adversarial position vis-à-vis a defendant. As victims' interests in this scenario do not stand as directly in contrast to the rights of another, the balance better favors greater definitional inclusiveness.

Importantly, as the customary normative definition of child soldier expands, those excluded from administrative programs should still be entitled to relief in domestic courts. If these systems fail them, organizations should assist these youths in pushing claims, perhaps collectively, to regional or other international courts.

Ideally, at a minimum, all under-eighteen year olds associated with armed groups, unless it is clearly established that their involvement was voluntary, should receive some form of remedy.

C. Access to Justice

In tandem with planning which reparations mechanisms to pursue and what corresponding eligibility criteria should apply, in order to realize girl soldiers' rights, their access to any established mechanisms must be ensured. This requires context-specific solutions. For example, where there are many refugees or internally displaced persons, available tools include setting up networks through the UNHCR, diaspora communities, and posting information online. Where language and literacy rates are an issue, pictorial and audio methods can be employed. Staff hired to deal with claim intake must be given

---

204 Goldblatt, *supra* note 54, at 80.

205 *Assembly of States Parties*, INT'L CRIM. CT., http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx (last visited Mar. 25, 2014).

206 Testimony of the SRSG, *supra* note 2.

gender-sensitive training.[207] In particular, for judicial reparations, procedures should be "[c]hild-friendly" to "mak[e] justice more accessible to children and to minimize the stress, trauma, and other possible harms associated with testifying during investigations or trials."[208] Whether administrative or judicial mechanisms are used, specifically tailored outreach and access to legal aid are essential so those eligible are aware and able to make a claim. Evidentiary thresholds and other program pre-requisites must also take girl soldiers into account, for example, by not requiring soldiers to turn in a weapon to qualify.[209] Finally, procedures must not be so burdensome as to effectively deny justice to those deserving.

D. Victim-Perpetrators

While some communities face difficulties recognizing former girl soldiers as victims, rather than perpetrators or conspirators, these individuals have suffered serious rights violations and thus have a legal right to reparations.[210] Though stigmatization should not be a barrier to accessing justice, the process must simultaneously recognize that, as soldiers, some of these children may have also committed violence, under varying degrees of duress or voluntariness.[211] Whether former child soldiers should be eligible for criminal prosecution through a juvenile court system or other penal sanction is beyond the scope of this Article. Notwithstanding the limits of duress, liability does not vanish upon the suffering of harm. Furthermore, restoring personhood and instilling citizenship in former child soldiers requires recognizing these individuals as responsible actors. Therefore, even if girl soldiers receive reparations, their own accountability must also be addressed somewhere in the process.

As discussed, the status of the right to reparations for victim-perpetrators under international law remains unclear. Therefore, administrative programs and judicial decisions will need to consider a balance of interests and the evolving legal standards to determine whether reparations for victim-perpetrator girl soldiers should be offset, excluded, or issued without regard to potential liability.

---

207 Couillard, *supra* note 175, at 449–50.

208 APTEL & LADISCH, *supra* note 45, at 21.

209 *See* Fujio, *supra* note 2, at 12–13.

210 Basic Principles, *supra* note 25, para. 8.

211 WESSELLS, *supra* note 2, at 74–76.

E. Allocation and Form

Finally, balancing victim and societal interests is similarly necessary when determining the appropriate form and allocation of reparations for girl soldiers. Where victims are still minors, the governing principle should always be the best interests of the child.[212] According to the Nairobi Declaration, reparations mechanisms should, ideally, "empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation"[213] and reparations should be delivered in "proportion[] to the gravity" of the harm.[214] Still, in making their decisions, girl soldiers and those advancing their interests should be equipped with results of studies and best practice guidelines.

Although perhaps the most traditional form of reparations, past experience has demonstrated problems, including the risk of incentivizing crime and often-patriarchal control of assets, suggesting monetary compensation schemes are often not the best choice of remedy for many girl soldiers.[215] Where payments are issued, awareness programs should be established to ensure that both girl soldiers and the wider community understand the symbolic purpose of the money, as recognition of a rights violation, rather than a reward for demobilization. Incremental payments and vested funds should be considered as an alternative to immediate lump sum cash distributions.[216]

Holistic packages of reparations, in contrast to isolated individual compensation, will better benefit most girl soldiers (as they would most populations). The reparations plan in East Timor, which did not include monetary compensation, is a good example of such a package.[217] Under this plan (1) social services are to be provided for victims, "including rehabilitation, skills training and access to microcredit for livelihood activities"; (2) a

212 *See* CEDAW, *supra* note 190, arts. 5(b), 16(d) (both discussing the best interests of the child generally); CRC, *supra* note 100, art. 3.

213 *Nairobi Declaration*, *supra* note 180, at Principle 1(D).

214 *Id.* at Principle 3(E).

215 APTEL & LADISCH, *supra* note 45, at 30 (arguing that women and girls should not be excluded from this option where monetary payments are offered to other victims, but rather, they should be presented with the risks and empowered to make an informed choice).

216 *Id.* at 10.

217 Galuh Wandita, et al., *Learning to Engender Reparations in Timor-Leste: Reaching out to Female Victims*, *in* WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS, *supra* note 54, at 312–13.

support fund is to be established to help community healing that has the potential to cover "activities such as healing workshops and other restorative work, including creative therapy and activities such as theatre, graphic arts, music, and prayer"; (3) a memorialization plan is to be initiated to fund both "commemoration ceremonies, dates, monuments and other initiatives to honor and remember victims" and "the development of educational materials on Timor-Leste's historic struggle to uphold human rights," as well as "an education program to promote a culture of nonviolent resolution of conflict"; and (4) "a national commitment" was made "to nonrepetition of violence."[218] Notably, the education program specifically addresses sexual violence in order to raise public awareness and "mitigate discrimination against victims."[219]

Any or all of the four initiatives set forth in the above plan would be appropriate in the girl soldier context, providing they were targeted towards victims' needs and tailored to the communities in which they reside.[220] The symbolic reparations under the memorialization plan, which could take the form of commemorative days, museum exhibitions, and renamed public spaces, could be relatively inexpensive, avoid the difficulties of claim filing, and benefit the wider community.[221] Any symbolic attempts, however, must be careful not to reinforce stigmatization or stereotypes.[222] Similarly, museums and other commemorative spaces should ensure that women's and girls' sacrifices are represented alongside those of men and boys.[223] In targeting their needs, education programs for former child soldiers, "should aim to help [youth] gather the tools, resources, and support they need to lead a productive life, for example by attempting to compensate for lost years of schooling through accelerated educational programs."[224] Schooling and training in accordance with CEDAW, however, "should not restrict the opportunities for girls to traditionally assigned roles, but rather should be designed with an eye toward opening new professional spheres."[225]

---

218 *Id.* at 310–12.

219 *Id.* at 312.

220 TFV First Report, *supra* note 87, paras. 303–44 (listing comprehensively possible forms of reparations to consider in the Congolese context for both male and female child soldiers, as well as their communities).

221 Ideally, community wide symbolic reparations would be used in addition to more individually targeted reparations.

222 APTEL & LADISCH, *supra* note 45, at 31.

223 Goldblatt, *supra* note 54, at 81.

224 APTEL & LADISCH, *supra* note 45, at 30.

225 CEDAW, *supra* note 190, art. 10; APTEL & LADISCH, *supra* note 45, at 10.

Finally, while holistic packages are beneficial in planning reparations targeted specifically to address violations of girls' rights, rather than packages addressing a spectrum of victims, it is important that redress for girls and women not simply be subsumed within the needs of the greater community. Otherwise, this fosters a conception of these girls as non-individuals or non-rights-bearers and undermines the symbolic significance of reparations based on the infringement of rights.

In order to realize not just an isolated right to reparations, but also the wealth of other rights and protections enshrined under international law, the "transformative potential" for reparations must be considered throughout the process, from including former girl soldiers in the planning phase to offering gender-neutral skills training. Specific concerns of women, children, and victims of violence must be acknowledged and addressed. In practice, this may include adopting specific guarantees for the protection of civil rights, such as: extending access to courts until girl soldiers are twenty-five, or older, to claim for redress; providing social services; offering free education and health services, including STI testing and treatment; establishing special bank accounts or trust funds; as well as guaranteeing citizenship and non-discrimination for children born to girl soldiers.

Former girl soldiers are the future mothers, educators, voters, artists, intellectuals, doctors, public officials, business leaders, and prime ministers of these countries, if—through reparations and other processes—wounds are healed and both individuals and communities are transformed.

These considerations go beyond mere aspirational language in documents such as the Nairobi Declaration or NGO statements. A combined reading of international legal instruments requires the full and equal participation of females in reparations processes and the provision of reparations in a manner that does not contribute to the continued marginalization of women or girls.

IV. Assessing *Lubanga*

The *Lubanga* case is monumental for many reasons. It is the ICC's first trial and first guilty verdict; it is also the Court's first opportunity to order reparations.[226] For the purposes of this analysis, the case is also significant in having produced the first judicial reparations order from an international criminal court aimed at offering redress to child soldiers, including girl soldiers.

226 *Lubanga Case*, COAL. FOR THE ICC (CICC), http://www.iccnow.org/?mod=drctimelinelubanga (last visited Mar. 25, 2014) (providing a comprehensive procedural summary of the case).

On February 10, 2006, a warrant was issued by the ICC for the arrest of Thomas Lubanga Dyilo for the war crimes of enlisting, conscripting, and using child soldiers in the Democratic Republic of Congo, according to the terms of the Rome Statute.[227] On March 17, 2006, the warrant was made public and, the same day, Lubanga was transferred to the Netherlands.[228] The charges were later confirmed by the Pre-Trial chamber, allowing the case to go to trial on the basis of those claims.[229] At the time, no specific mention was made regarding girls,[230] a decision that was heavily criticized by outside observers.[231] During the trial phase, however, the prosecution's argument and evidence included numerous incidents of female youth associated with armed groups, including, in particular, the sexual violence many suffered.[232] Beyond their participation as prosecution witnesses, some young women with similar stories applied to participate as recognized victims under the statute.[233] Both these individuals and the prosecution argued they were "child soldiers" for the purposes of the trial phase, relying in some instances on "domestic" and sexual duties as evidence of soldiering.[234] As referenced earlier, however, when the *Judgment pursuant to Article 74 of the Statute* ("Judgment") was handed down, finding Lubanga guilty as charged, the Court held that "domestic work"—which included providing sexual services[235]—was only considered soldiering within the meaning of the Rome Statute

---

227 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Warrant of Arrest (Feb. 10, 2006) (official translation).

228 *Lubanga Case*, *supra* note 226.

229 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Decision on the Confirmation of Charges (Jan. 29, 2007).

230 *Id.*

231 *See, e.g.*, Letter from Brigid Inder, Exec. Dir. Women's Initiatives for Gender Just., to Luis Moreno Ocampo, Chief Prosecutor, Int'l Crim. Ct. (Aug. 16, 2006), http://www.iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf (stating concern about the failure to investigate and charge gender-based crimes in the Lubanga case).

232 *See* Valerie Oosterveld, *Atrocity Crimes Litigation Year in Review (2010): A Gender Perspective*, 9 NW. J. INT'L HUM. RTS. 325, 337 (2011) (citing as one example Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcript of January 14, 2010, 61 (Jan. 14, 2010)).

233 *See, e.g.*, Lubanga Judgment, *supra* note 1, paras. 15–21.

234 *See, e.g.*, *id.* paras. 15–21, 574–78, 878–82; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Office of the Prosecutors Closing Statements, Transcript of Record, 53–54 (Aug. 25, 2011).

235 *See* Lubanga Judgment, *supra* note 1, paras. 878–82; Lubanga Dissent, *supra* note 134, paras. 15–21; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Summary of the Judgment pursuant to Article 74 of the Statute, para. 29 (Mar. 14, 2012).

"when the support provided by the girl exposed her to danger by becoming a potential target."[236] The Judgment specifically emphasized that sexual violence perpetrated against these girls was "irrelevant" in determining whether these girls could be considered victims of child soldiering.[237] At the time of writing, this Judgment is on appeal and all subsequent decisions have been suspended.[238]

On the very same day this guilty verdict was issued, this author, coincidentally, had the privilege to be in Norway presenting a prior version of this Article at a conference on reintegration challenges for child soldiers and children affected by war.[239] At that time, many of the reparations principles discussed in this Article had yet to be articulated as they might pertain to girl soldiers. Regardless of the Prosecutor's initial charging omission, it has been exciting to witness, in the year and a half following the Judgment, many of these budding ideas related to gendered and child-sensitive approaches quickly consolidate into testimonies, filings, and amicus briefs presented before the Court. As will be surveyed below, at least on paper, language concerning gender-sensitivity in this case has gone from silence at the charging phase, to a mantra of the TFV, certain NGOs, and, in the *Decision establishing the principles and procedures to be applied to reparations* ("Impugned Decision"), the Court itself. Child-sensitive approaches have also garnered significant attention during these later stages.

This Part will critically analyze the proceedings to date as they relate to reparations and the girl soldier. In particular, this Part will critique how they have, or have failed to, incorporate a gendered and child-sensitive approach, and, at the same time, challenge the idea that breadth is best in this instance.

---

236 Lubanga Judgment, *supra* note 1, para. 882.

237 The Court specified: "In the view of the Majority, given the prosecution's failure to include allegations of sexual violence in the charges, as discussed above, this evidence [of sexual violence and forced wives] is irrelevant for the purposes of the [Judgment] save as regards providing context." *Id.* para. 896 (emphasis added).

238 *See* text *supra* note 10 (discussing Decision on the admissibility of the appeals against Trial Chamber I's *Decision establishing the principles and procedures to be applied to reparations* and directions on the further conduct of proceedings, para. 84).

239 Aurora Bewicke, Realizing the Right to Reparations for Girl Child Soldiers: A Child-Sensitive and Gendered Approach at Child Soldiers and Other War-Affected Children: Possibilities and Challenges to Their Reintegration Process (Workshop Two) (Mar. 14, 2012).

A. Better Late than Never: Girls at the Table in *Lubanga*

In Part III.A above, the need for girl soldiers and their representatives to be involved in the initial phases of transitional justice was emphasized. The *Lubanga* case, in some ways, functions as yet another "lesson[] learned" in the recent history of transitional justice; it demonstrates the consequences of failing to involve girls' specific concerns from the outset. In formulating its initial charging decisions against Lubanga, the prosecution omitted the gender dimensions of the conflict and, as a result, charges related to gender-based violence and sexual slavery were not included.[240] This later forced the prosecution to argue for a more progressive definition of "duties" than the Court ultimately held was warranted under the statute, though the dissent disagreed with the more conservative majority.[241]

Now, at the reparations phase, the Court and many of the Participants are rushing to correct this initial failure by re-inserting disenfranchised girls' voices into the process. The NGO Women's Initiative has insisted that women and girls be fully "integrated into the consultation process, and have agency and a voice in the process."[242] UNICEF, in suggesting what sort of (collective) reparations to issue, asserts that experts should incorporate the "perspectives of different sectors in [the local area,] notably religious and traditional leaders, teachers and academics, government officials, civil society, and the different communities . . . including their children."[243] The TFV in its First Report highlighted the importance of a "gender sensitive approach"[244] and noted the particular needs of women and children[245] should be considered at every phase. Later in its Observations, the TFV listed "gender

---

240 During a conference celebrating ten years of the ICC, this author had the opportunity to ask then-Deputy Prosecutor Bensouda whether the trial-phase push for an expanded, gendered definition of child soldiering was due to the fact that they erroneously did not charge Lubanga with gender-based crimes and other crimes of sexual violence. Prosecutor Bensouda agreed that this formed part of the motivation. Fatou Bensouda, Gender Justice and the ICC: Progress and Reflections, Justice for All? (Feb. 14, 2012), *available at* http://www.iccwomen.org/videos/webcasts/Justice-for-All.php.

241 *See id.*

242 Women's Initiatives Observation, *supra* note 181, para. 34 (regarding who should benefit). *See also id.* para. 24 (regarding design and modalities of reparations), para. 56 (regarding form of any symbolic reparations).

243 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Submission on the principles to be applied, and the procedure to be followed by the Chamber with regard to reparations, para. 18 (May 10, 2012) [hereinafter UNICEF Submission] (emphasis added).

244 TFV First Report, *supra* note 87, paras. 27–36.

245 *Id.* para. 71.

equality" as one of five "distinct dimensions" to be considered at the reparations stage,[246] and exhorted the need for women, children, former girl soldiers, and their representatives to participate in planning.[247] One specific technique recommended by the TFV in its Observations is to utilize Barzas, local customary gatherings, to act as focus groups, and to include both former child soldiers and women in these meetings.[248] On the other hand, the prosecution's reparation-phase filing offers little in terms of a child-sensitive or gendered approach, though there is mention of the possibility for collective reparations to include "gender specific projects"[249] and account for the particularized harm suffered by "female recruits."[250] Mainly, they refer the Court to the TFV to determine the detailed planning of the reparations phase.[251]

Other access issues for girls have similarly garnered significant attention during these later proceedings. Many of the problems outlined earlier, in terms of girl soldiers accessing reparations, have been brought to the attention of the Court here.[252] Gendered solutions put forward for enhancing access to justice for girl soldiers and other female victims in this case have included: not limiting reparations to those who have applied for them,[253] using radio or other media to publicize reparations schemes,[254] reducing burdens of proof for evidence of harm and causation,[255] and conducting a gender-sensitive assessment related to procedural barriers for women.[256]

---

246 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, para. 186 (Apr. 25, 2012) [hereinafter TFV Observations].

247 *See, e.g., id.* paras. 24, 28, 31–34, 55, 178, 205.

248 *Id.* para. 205.

249 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-010/6, Prosecution's Submissions on the principles and procedures to be applied in reparations, para. 14 (Apr. 18, 2012) [hereinafter Prosecution's Submissions].

250 *Id.* para. 23.

251 *See generally id.*

252 *See supra* Part II.B; TFV Observations, *supra* note 246, paras. 23, 26–28, 32, 35–39, 103; UNICEF Submission, *supra* note 243, paras. 11(b), 33, 35(b), 37; Impugned Decision, *supra* note 10, para. 188.

253 Women's Initiatives Observations, *supra* note 181, paras. 22–23.

254 *Id.* para. 23.

255 *Id.* para. 46.

256 *Id.* para. 51.

The Impugned Decision reflects these efforts to both integrate girls into planning and facilitate better access to resulting processes. The Court noted: "A gender-inclusive approach should guide the design of the principles and procedures to be applied to reparations, ensuring that they are accessible to all victims in their implementation. Accordingly, gender parity in all aspects of reparations is an important goal of the Court."[257] Similarly, the Court held: "The views of the child victims are to be considered when decisions are made about individual or collective reparations that concern them, bearing in mind their circumstances, age and level of maturity."[258] Experts in the fields of both child soldiers and gender are to "oversee" the process.[259] Finally, the Court held that "affirmative action" efforts are appropriate for "particularly vulnerable victims," which includes those who suffered from sexual or gender-based violence.[260]

With regard to access, the Court in its decision rightly emphasized the critical nature of gender-inclusive outreach activities, and stated, "[t]he Court shall implement gender-sensitive measures to meet the obstacles faced by women and girls when seeking to access justice . . . ."[261] Given the TFV's joint commitment to this endeavor, it is hoped that this will be made a reality, to the extent possible.

The Court is to be commended for, at least at this stage, adopting a progressive approach and affirmative action plan. Still, the combination of the Prosecutor's initial omissions, and the Court's non-gendered interpretation of child soldiering has now given rise to a more philosophical conundrum, in which some of the same girl soldiers the Court determined are not direct victims of the crimes for which Lubanga was convicted[262] are being embraced in a preferential manner to receive reparations based on the very same conviction. Both the Participants and the Court are now attempting to stretch reparations theory to questionable limits in order to include more victims into this reparations order and repair more tenuous harm. Trying to insert the global best practices of administrative reparations programs into a criminal case against one man at the ICC has resulted in "kitchen-sink"-style proposals, calling into question whether the case-based approach is at all an appropriate mechanism

257 Impugned Decision, *supra* note 10, para. 202. The Court's insistence on parity as a goal could be seen at odds with the later discussion on affirmative action. *See id.* para. 200.

258 *Id.* para. 215.

259 *Id.* para. 265.

260 *Id.* para. 200.

261 *Id.* paras. 202, 205, 208–09.

262 *See* Lubanga Judgment, *supra* note 1, para. 628; Lubanga Dissent, *supra* note 134, paras. 15–21.

for providing relief to these affected populations.[263]

B. Throwing the Kitchen Sink in with the Child Soldiers

At the trial phase, the Court was bound by the terms of the Rome Statute in its analysis of whether a crime within its jurisdiction had been committed by Lubanga. Therefore, certain defining questions, such as the age of permitted recruitment, were already settled. Further limitations on the potential pool of direct victims were the result of the Prosecutor's charging decisions, which failed to include gender-based crimes and sexual violence in the initial allegations.[264] This would have provided an alternative avenue for the inclusion of girls associated with armed groups, whom the Court excluded from the definition of "soldier" based on its arguably non-gendered analysis of "duty."[265]

The more salient issue now is how the Court, and in practice the TFV, will interpret the breadth of beneficiaries eligible for reparations at this stage in the Lubanga case, separate from programs provided by the TFV through its non-case-based functions. Many have urged for large groups of the population to be included, including other ethnic communities and children who were not recruited.[266]

---

263 This by no means diminishes the possibility of offering relief through the TFV's non-case-based scheme.

264 *See also* Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 69 (Carla Ferstman, et al. eds., 2009) (citing SARA KENDALL & MICHELLE STAGGS, U.C. BERKELEY WAR CRIMES STUDIES CTR., SILENCING SEXUAL VIOLENCE: RECENT DEVELOPMENTS IN THE CDF CASE AT THE SPECIAL COURT FOR SIERRA LEONE (2005), *available at* http://wcsc.berkeley.edu/wp-content/uploads/Papers/Silencing_Sexual_Violence.pdf) ("In the Thomas Lubanga case before the International Criminal Court (ICC), the prosecution is focusing on the undoubtedly important use of child soldiers but is not pursuing the equally important issues of sexual violence. Some observers wonder whether this is another case of exclusion, and an unduly narrow focus for the Court's first case."). As an organ of the Court, the Prosecution was required to take a gendered perspective even at the initial charging stage. *See* ICC Rules of Procedure and Evidence, Rule 86, *in* Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, Sept. 3–10 2002 (ICC-ASP/1/3 and Corr.1) [hereinafter Rules of Procedure and Evidence] ("A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and *victims of sexual or gender violence*." (emphasis added)).

265 *See* Lubanga Judgment, *supra* note 1, para. 628; Lubanga Dissent, *supra* note 134, paras. 15–21.

266 For example, UNICEF, with regards to individual reparations, claims they are appropriate for those who have sustained a range of physical and psychological injury, with no mention of individual reparations

The Court has held that "it would be inappropriate to limit reparations to the relatively small group of victims that participated in the trial and those who applied for reparations,"[267] so we know that the benefitting population will be larger than those who have already filed applications. The Court's decision, however, vests the determination of victim status largely with the TFV,[268] though it outlines some principles to guide the process.[269] These guidelines are somewhat vague, but nevertheless provide us with an indication of the future process, allowing direct and indirect victims of child soldier recruitment,[270] family members as defined by local custom,[271] legal entities,[272] and those located in communities beyond those included in the case[273] to be the beneficiaries of Court-ordered reparations. Additionally, certain classes of girl soldiers are prioritized by the Court, in providing for preferential treatment to vulnerable victims, specifically including "the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members."[274] While permitting indirect victims to benefit, these individuals must be able to trace the origins of their suffering to conduct for

---

for those illegally recruited who fail to provide added indicia of particularized suffering. UNICEF Submission, *supra* note 243, para. 26. As regards to collective reparations, UNICEF contends that these should even extend to other communities including non-Hema (the primary ethnic group from whom Lubanga is convicted of illegal recruitment) former child soldiers, recruited by separate armed groups. *Id.* para. 36. They draw legal support for this broad mandate from Article 75 of the Rome Statute, on non-prejudicing "the rights of victims under national and international law." *Id.* para. 11. The five NGOs caution against including child soldiers while not including other children, as it may both lead to further stigmatization of child soldiers and act as a form of discrimination against other children. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/6, Observations relatives au régime de reparation, paras. 14–15 (May 10, 2012) (filed by Justice-plus, Terre des Enfants, Centre Pelican-Training for Peace and Justice/Journalistes en action pour la Paix, Fédération des Jeaunes pour la Paix Mondiale, and Avocats Sans Frontières) [hereinafter Five NGOs Observation].

267 Impugned Decision, *supra* note 10, para. 187.

268 *See id.* para. 289.

269 *Id.* paras. 194–201.

270 *Id.* para. 194.

271 *Id.* para. 195.

272 *Id.* para. 197; Rules of Procedure and Evidence, *supra* note 264, at Rule 85(b) ("Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.").

273 Impugned Decision, *supra* note 10, para. 282.

274 *Id.* para. 200.

which Lubanga was found guilty, using a "but for" analysis of causation.[275]

Indications of how this guidance will play out in practice may be gleaned from the filings of the TFV, which the Court has empowered to facilitate the process. The TFV has argued that, even while requiring a link in causation,[276]—due to the danger of further

---

275 *Id.* para. 250. At the trial phase, those who suffered at the hands of child soldiers were not considered victims for the purpose of participation. *See* TFV First Report, *supra* note 87, para. 41 (citing Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on "indirect victims," para. 48 (Apr. 8, 2009)). Girls recruited into armed forces to function as sexual slaves (if they did not also participate in other duties) are, by the Court's determination, not direct victims. If at this phase, these young women are permitted to recover based on the conduct of child soldiers, which is likely, it will bring the victim-perpetrator question back to the fore. The Court has yet to decide exactly how to resolve the issue of victim-perpetrators here, but there have been several related references. *See, e.g.*, *id.* para. 272 ("The danger of stigmatisation seems in particular true in the context of child soldiers: because of their relatively young age and the dual perception of child soldiers *as alleged perpetrators* and as victims they are a group particularly vulnerable to stigmatisation.") (emphasis added); Impugned Decision, *supra* note 10, para. 48 ("[I]ndividual reparations benefiting particular former child soldiers could be perceived as discriminatory, given part of the population believes these children committed crimes that should not be rewarded by the international community.") (citing Five NGOs Observation, *supra* note 266, para. 25); UNICEF Submission, *supra* note 243, para. 35(d) ("Collective reparations are also more likely to diffuse the perception at the community-level that children associated with an armed force or group, who may have themselves resorted to violence and participated in crimes, are being compensated."); Women's Initiatives Observations, *supra* note 181, para. 30 ("Individual reparations may also undermine community healing and cohesion. They may be seen as a 'reward' to child soldiers or other combatants by victims/survivors and communities, encouraging future enlistment, perpetuating stigma and preventing reconciliation, as also noted by other filings in this case.") (citing Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Legal Representatives of Victims, *Observations sur la fixation de la peine et les réparations de la part des victimes a/0001/06, a/0003/06, a/0007/06 a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08 , a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, et a/1622/10*, Apr. 18, 2012, paras. 15–17); *see also* Luc Walleyn, *The Prosecution of International Crimes and the Role of Victims' Lawyers*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 361 (Carla Ferstman et al. eds., 2009) ("In the Lubanga case, former child soldiers and their families are mainly participating because they want to be recognised as victims, not as perpetrators, and because they feel betrayed by those who pretended to be their leaders and representatives."). Many of these sentiments warn the Court against giving the perception that former child soldiers who may have committed violent acts should receive redress; this would be, however, a logical result of the verdict, as these individuals are indeed the direct victims of the charge for which Lubanga was found guilty.

276 *See* TFV First Report, *supra* note 87, para. 37; Regulations of the Trust Fund for Victims, reg. 46, ICC-ASP/4/Res.3 (Dec. 3, 2005) ("Resources collected through awards for reparations may only benefit victims as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the convicted person."); Rules of Procedure and Evidence, *supra* note 264, Rule 85(a) ("Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court).

stigma, especially for former girl soldiers and the possibility of refueling of conflict[277]—the legitimate beneficiaries of reparation awards include, for example: those who were excluded from the definition of child soldiers in the verdict (based on the theory that they were "child soldiers" despite the Court's holding);[278] "broader communities," including other ethnic groups;[279] and "localities not mentioned in the Judgment."[280] In other words, the TFV implies a gendered and child-sensitive approach mandating dilution of the causation standard, the expansion of the beneficiary pool, and the prioritization of indirect victims

277 TFV Observations, *supra* note 246, paras. 167, 141–42.

278 TFV Second Observations, *supra* note 10, para. 166. The TFV also argues for some of these same individuals to be included on the basis of other causal theories:

> The standard test is, whether during the course of those facts that are the basis of the charges, namely enlisting or conscripting or using children to participate actively in the hostilities, acts of sexualized violence were committed that are directly linked to, and are a component of, the acts and facts underlying the charges. In this regard, sexualised violence is one of the accompanying and inherently linked factual situations that are part of the reality of child soldiers. Sexual abuse, enslavement and exploitation are frequent occurrences in the course of the recruitment and use of child soldiers in hostilities. Thus, the harm caused through acts of sexualized violence is inherently connected to underlying facts of the charges, regardless of whether sexualized violence and sexual exploitation are specifically charged.
>
> The offences of Article 8 (2) (e) (vii) of the Statute are continuous crimes in nature. Trial Chamber I stated that "these offences end only when the child reaches 15 years of age or leaves the force or group[...]." Therefore, it is characteristic for these on-going offences that during the entire time of being directly or indirectly aligned with the armed forces, recruited children perform a wide-range of activities and fulfil many different duties. All of what the recruited children faced during their time with the armed group may cause a specific and multi-faceted harm that is thus directly linked to the continuous crimes under Article 8 (2) (e) (vii), whether or not additional and more specific crimes are or could have been cumulatively charged. As long as the harm suffered results from the facts that are underlying the charges under Article 8 (2) (e) (vii), the victim/survivor can establish their status as a victim pursuant to Rule 85.

Id. paras. 153–54 (internal citations omitted). This begs the question whether this sexual (or, to use the TFV's term "sexualized") violence needed to have been the perpetrated act of a child soldier under 15 years old. It is not clear that this would be true for the majority of individuals. We should also consider whether we want to put forward a theory suggesting the commission of sexual violence *by those under fifteen years old* is "inherent" to their participation as soldiers. *See id.* para. 166.

279 *Id.* para. 172 (as beneficiaries, rather than "victims" under the statute); TFV Observations, *supra* note 246, para. 141–42.

280 TFV Second Observations, *supra* note 10, paras. 173–74.

and other eligible beneficiaries over direct victims.

Myriad suggestions have also been made as to the form and allocation of reparations in this case. Reading through the filings and the Decision, it would seem that every possible form of reparation ever conceived has been suggested here.[281] Within this discussion, gendered and child-sensitive aspects have certainly been raised. For example, drawing from some of the same case studies referenced in Parts I.B.4 and II.D above, Women's Initiatives mentions the problem of property ownership for girls and women, indicating the need for further study as to whether women victims in Ituri would be culturally and/or legally able to retain ownership over compensation, without indicating definitively whether it is at issue in this case.[282]

The need to include girl soldiers in decisions of both allocation and form has also been noted.[283] Taking a relativist approach, UNICEF suggests the reparations be tailored "in a manner that respects local conceptions of rights, where the rights and obligations of individuals, especially of children and young adults, may not be clearly dissociated from collective rights and responsibilities of the community."[284] This stands in contrast to Women's Initiatives' more universal and transformative approach, reminding the Court: "when considering cultural and customary norms in reparations awards, care should be taken not to continue or reflect structural inequalities that perpetuate women's unequal status within the family and community."[285]

It is unsurprising that in their filings the Participants hesitate to limit options for reparations at this point, but rather provide relatively expansive surveys of the possibilities and pitfalls of various schemes. On the positive side, many of the suggestions leave determinations on form and allocation to victims and victims' groups, which will include girl soldiers if access to the process can be achieved. Yet, from a theoretical standpoint, many of these expansive proposals to provide a broad range of benefits to vast ranges of

281 *See, e.g.*, TFV First Report, *supra* note 87, paras. 303–44; Impugned Decision, *supra* note 10, paras. 103–19.

282 Women's Initiatives Observation, *supra* note 181, para. 35.

283 *See, e.g.*, TFV First Report, *supra* note 87, para. 28 ("Integrating a gender dimension to reparation orders will ensure that women are involved in the design, implementation and monitoring of the reparation process; and that reparations are responsive to the particularities of women's vulnerability and their roles vis-à-vis their communities.").

284 UNICEF Submission, *supra* note 243, para. 15.

285 Women's Initiatives Observation, *supra* note 181, para. 26.

the population do not necessarily serve girl soldiers well.

First, in analyzing the transformational dimension, as identified, the inclusion of child soldiers, including girl soldiers, into the decision-making process is key. In order to be truly transformative, the TFV and Court must caution, however, against too much relativism, such as that suggested by UNICEF, which may merely cloak structural inequities. In particular, UNICEF's proposal to tailor reparations to respect a system, which "especially" does not view children as autonomous individuals empowered with distinct rights, undermines progressive reparations theory aimed at reversing this very conception. UNICEF does not mention women here, but if women were also considered subsumed within the collective, not warranting reparations in their own right, this would promote the view that their suffered harm only deserves repair to the extent it belongs the greater community, rather than to the individual female.

To view these expansive, community-based proposals from an alternative perspective, we might hypothetically question, if the first ICC case, instead, involved a pool of adult male victims alone, whether the Court would have simply ordered individual monetary payments. Many of the reasons cited for this being inappropriate here is not that the former child soldiers, especially girl soldiers, could not possibly benefit from a monetary award, but rather—because they are already not considered full, rights-bearing citizens or qualified "victims" from the perspective of their law and/or culture—they would not be able to use the funds without fear of disenfranchisement or reprisals. In terms of the girl soldier, she may not come forward for an award because the community considers her culpable or "deviant,"[286] or as a woman or child she may not have control over her property. An even more cynical observer might suggest that underlying these relatively paternalistic, community-based approaches is an attitude indicating these (now adult) former soldiers do not possess the capacity to, themselves, determine how to best use more traditional monetary allocations.

This transformative dimension is, furthermore, tied directly to the issue of causation, and how directly linked Lubanga's criminal conduct should be to the reparations awardee. The looser the causation requirement, the stronger the corresponding assumption is that the child-soldier-as-victim is not the primary rights-bearer of the crime of child soldiering. Moreover, a tenuous causal connection instrumentalizes child soldier victims for the purpose of providing reparations to victims of crimes not charged by the Prosecutor (for which Lubanga still enjoys the presumption of innocence). An additional danger of broad interpretations of causation is that it will reduce the deterrent value, or at least miss the

286 *See* DIJKER & KOOMEN, *supra* note 83, at 6–7; Fujio, *supra* note 2, at 10–14.

opportunity to emphasize the particularized severity of the crime of child soldiering, signaling the specific charges against Lubanga are irrelevant to the reparations order. In other words, these broad suggestions to include other populations render the crime of child soldier recruitment interchangeable with any unlawful role in a conflict.

A better solution would be to take a narrower view of causation and, then, focus on selecting both appropriate and transformational modes of reparations, such as: memorials; sensitivity training programs for officials and awareness campaigns done in the name of the child soldier victims; clinics established in the name of child soldier victims; commemorative days; and the creation of a modest trust fund for projects initiated by former boy and girl soldiers and their families. This fund could be open for proposals on an incremental basis, allowing those newly empowered by emerging structural changes to increasingly benefit as societal progress is made.[287] If informed consent of possible risks could be achieved, former child soldiers who wish to come forward should also have the option of receiving some form of traditional monetary award, perhaps to vest at a later date if deemed preferable.[288]

While well-intentioned, we must strongly consider whether broad, holistic packages distilled from the administrative and development-aid experience are the most beneficial means of providing transformative justice or respecting the autonomy and dignity of these former child soldiers, including girls. While reparations in this case must be distributed within the confines of present circumstances, and should be careful not to put women or girls in greater danger, deference to structural inequalities would render the Court and TFV complicit in the continued disenfranchisement of women and girls. Instead, the best means of addressing the many concerns above may

---

287 The TFV has similarly mentioned the following possibility:

> If monetary compensation was to be considered as part of a reparations order, a gender sensitive approach would be to administer this type of compensation through a community savings scheme called "MUSO" (*la mutuelle de solidarité*) that already exists in the Democratic Republic of the Congo (DRC). The Trust Fund is now integrating this type of activity through its rehabilitation projects so that victim survivors (and often women and girls) organise savings groups to provide both a sustainable source of credit, and a source for emergency funds to cover personal emergencies as they arise.

TFV First Report, *supra* note 87, para. 36.

288 *See id.* While there are risks and dangers associated with lump sum or cash payouts to former child soldiers, and women in particular, it would be discriminatory and paternalistic not to allow this option where other more advantaged groups would no doubt have received this style benefit.

be the expansion of the TFV's non-case-based reparations projects, the increase of international aid packages to the region to implement the suggested activities, and, in the *Lubanga* case, the ordering of a narrow, well-tailored, and symbolically-clear reparations award for unlawfully-recruited child soldiers, both survivors and the deceased.

CONCLUSION

Attempting to repair the injuries of war is a daunting task, and trying to do so with limited resources, failed judicial systems, and a lack of institutional trust makes it all the more challenging. In these situations, it is often the most vulnerable victims who are left behind. The voices of girl soldiers have been almost silent until recently.

Given the priority placed upon them under international law, girls should be situated at the cornerstone of peace processes and transitional justice planning, including the planning of reparations mechanisms. While no mechanism, whether judicial procedures, administrative schemes, or aid-based relief, should be excluded from consideration—and girls themselves should be given a say in decision making—it is prudent to keep in mind past experiences indicate administrative programs and more holistic programs have generally served girls' interests better than alternative approaches.

In any transitional justice context, compromises must be made, and resource limitations mean not all affected persons, including girls, will be able to obtain reparations. Child soldiering is not the only serious rights violation occurring during wartime, and girls (and others) who have suffered other severe rights infringements must also be compensated. In defining who is a girl soldier, for the purposes of reparations, the definition in some cases may be limited to the current state of the law. Where there is room for interpretation, however, a broad definition is warranted, more or less presuming involuntariness for under-eighteen-year-olds and not limiting programs to include only male-stereotyped renditions of soldiering functions. If exposure to violence is to be the cut-off, this should include exposure to violence from within the armed group. Even where girls unquestionably fall within the relevant definition, access to justice must be ensured to render the process effective.

Other difficult tasks involve deciding the allocation and form of reparations, in addition to determining whether girl victims should also be penalized for any harm they may have caused. Empowering girls and respecting their dignity includes both recognition of their power to decide these matters, based on informed decision making, and the need for them to accept responsibility where necessary.

The *Lubanga* case is significant, both as an illustration of the potential problems caused by omitting girls at the outset and for the recognition it has brought, globally, to the issues of girls in war. Past and future decisions in this case will resonate for decades to come.

Former girl soldiers represent the future of their nations. If international law is to take seriously both the right to reparations and its commitment to non-discrimination for women and girls, it must secure this right for girl soldiers. Effectively realizing this right requires more than simply establishing DDR programs or delivering cash payouts; it entails giving these young women a respected voice in the transitional process and a recognised command over their futures. The solution is not a one-size-fits-all plan, and institutions, such as the ICC, need to carefully define their role, as one of many available mechanisms aimed at transforming societies after tragedy.