

Transformative Reparation: Should Reparation Change Societies?

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The objective of reparation in the classical sense is to repair harm and to return to the status existing before damage has occurred. After situations of armed conflict, this often seems insufficient. Here, the *status quo ante* is usually already marked by violence and unjust hierarchies. A return to this state is therefore not desirable. One pertinent example is widespread sexual violence in armed conflict. On the one hand, such sexual violence has complex and multifaceted consequences ranging from serious physical harm to trauma, from unwanted pregnancies to social stigmatisation and exclusion. On the other hand, sexual violence is not confined to conflicts, but takes place in everyday situations before and after conflict. It is deeply rooted in structures of social, political and economic inequality. How should we adequately respond to damages that go beyond what can be repaired by mere financial compensation? And how can we guarantee access to reparation for victims who are already marginalised and have few resources at their disposal?

One proposal on how to deal with these complexities has come to be known as transformative reparation. Instead of merely reinstating the *status quo ante*, transformative reparation seeks to change structures of unjust hierarchy and social inequality. It also promotes a fair and non-discriminatory reparation process. Scholars argue that such reparation should encompass three dimensions: political representation, economic redistribution and social recognition.¹

This is not just an academic debate. Women's rights advocates and activists first formulated principles in the 2007 *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*. These have since been taken up and expanded by other actors. For instance, a United Nations (UN) Guidance Note of the Secretary General of June 2014 on conflict-related sexual violence recommends the active involvement of victims in the repara-

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¹ One for many *S. Williams/E. Palmer*, Transformative Reparations for Women and Girls at the Extraordinary Chambers in the Courts of Cambodia, *International Journal of Transitional Justice* 10 (2016), 311 ff.

tion process for an empowering and transformative effect. Although many have talked the talk about transformative reparation, few institutions have attempted to walk the walk of implementation. In its pioneering *Cotton Field* decision in 2009, the Inter-American Court of Human Rights (IACtHR) asserted that, bearing in mind underlying structural discrimination, reparation must be designed to change the situation so that the effect is not only one of restitution, but of rectification.² Alas, the promised structural rectification has thus far not been implemented. The International Criminal Court (ICC) also opted for transformative reparation in its *Lubanga* case. The reparation plan drafted by the Court's Trust Fund for Victims and adopted by the Court in October 2016, intends to transform social norms concerning the recruitment of child soldiers.³ This is perhaps the first extension beyond the context of sexual violence.⁴

Despite all its promises, it is vital to take a critical look at the pitfalls of transformative reparation. As is often the case in international law, talk is cheap and progress hard. Up to now, the promises of transformation remain mere recommendations instead of concrete measures. The danger of unfulfilled promises is of course that people lose trust in the international legal system.

However, there are also substantive critical arguments regarding the goals, authors, and measures of transformative reparation. First, it risks distracting from the individual need for redress. *Margaret Urban Walker* rightly insists that reparation should, above all, be designed to recognise, relieve and support individual victims.⁵ Not only does the highly ambitious promise of structural transformation encounter limits of practical and political feasibility. But, she argues, advocates of transformative reparation underestimate the importance of individual redress and therefore threaten to displace reparative justice with "a different kind of justice".⁶

Doubts can indeed be raised regarding the legitimacy of the authors of plans for transformative reparation, i.e. international courts. International law is always susceptible to pursue political goals with legal instruments.

² IACtHR, *Gonzales et al. v. Mexico*, 16.11.2009, § 450.

³ Filing regarding symbolic collective reparations projects, 19.9.2016, ICC-01/04-01/06-322, § 18.

⁴ However, the ICC's reluctance to acknowledge damages caused by sexual violence in this case was highly criticised in the aftermath, see e.g. *L. Chappell*, *Conflicting Institutions and the Search for Gender Justice at the International Criminal Court*, *Political Research Quarterly* 67 (2014), 183 et seq.

⁵ *M. Urban Walker*, *Transformative Reparations? A Critical Look at the Current Trend in Thinking about Gender-Just Reparations*, *International Journal of Transitional Justice* 10 (2016), 108.

⁶ *M. Urban Walker* (note 5), 110.

First, there is a tension between the task of courts to serve justice to perpetrators and victims and the genuinely political question of just social norms. On the one hand, courts should be wary of over-stretching their legitimacy to enact far-reaching social change. On the other hand, delegating the responsibility to courts might eclipse the responsibility of societies to come to terms with past and present conflicts and structural injustice. In the worst case, courts would mandate transformative measures that remain hardly understood and inconsequential.

A second problem lies in the international dimension. Oftentimes, the goals and measures of transformative reparation are barely distinguishable from developmental assistance and civil society support. Just like them, court-ordered reparation has attracted criticism for being intrusive and paternalistic.⁷ But while developmental assistance and civil society support openly pursue political goals, international courts do not even have such an overtly political mission.

Despite these problems, the call for transformative reparation should not be dismissed too easily. The debate rightly points out the failure of the existing system of international justice to address the root causes of violent conflicts and of crimes perpetrated within those conflicts. As such, striving for the reduction and removal of social, economic and political injustices has an inherent connection to the goals of the law of armed conflict and human rights. Unfortunately, good intentions do not always translate to good ideas. Emancipation and social change cannot be ordered. The debate around transformative reparation evokes long-standing issues: The question of the possibilities and limits of international law in general and reparation in particular will not be readily solved through the introduction of new terms but stay with us as an actual dilemma.

⁷ L. Ullrich, Can Reparations Transform Societies? The Practice of “Transformative Justice” at the International Criminal Court (ICC), presentation at Oxford Transitional Justice Research Seminar, 9.3.2016, Podcast: <<https://podcasts.ox.ac.uk>>.

