

# Reparations for Sexual and Other Gender-Based Violence

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## Abstract

This chapter considers the legal framework related to reparations for sexual and other gender-based violence. It describes the way in which the legal framework has evolved over time and the challenges for victims of sexual and other gender-based violence to access reparation in practice.

## I. Introduction

The Special Rapporteur's report on gender perspectives of torture assesses the applicability of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international law to the unique experiences of women, girls, and lesbian, gay, bisexual, transgender, and intersex persons.<sup>2</sup> He determines that "The torture protection framework must be interpreted against the background of the human rights norms that have developed to combat discrimination and violence against women."<sup>3</sup> A part of that protection framework is the obligation to afford reparations for torture. Taking that as a starting point, this article analyses the normative content of the right to reparation for torture from a gendered perspective. It considers acts of gender-based violence that may amount to torture under applicable international law standards, and assesses the challenges for victims of such crimes to access meaningful and appropriate reparations for the harm suffered.

Not all acts of gender-based violence will amount to torture, though this does not make those that do not fit within the definition less problematic or important to address. Moreover, fitting within the definition of torture is not the only entry-point for victims of gender-based violence to obtain reparation. The right to reparation is increasingly recognised as applicable to all human rights violations.

Nonetheless, torture is one of the lenses through which gender-based violence can be understood. It is an important lens because of the status and weight given to torture under international law. Nevertheless, considering gender-based violence through this torture lens is not a perfect fit. This is because of the way in which torture has been historically understood –

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<sup>2</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/31/57, 5 January 2016

<sup>3</sup> Ibid, para 9

as an offence that is carried out by or at the instigation of, or with the consent or acquiescence of, public officials, usually in the context of detention, to exert force, subvert the will of the victim, or to obtain a confession. Gender-based violence is broader in scope than this definition. Also, until relatively recently, gender-based violence was largely overlooked by human rights instruments altogether because of the general marginalisation of such acts and their victims. Acts and victims of gender-based violence were not seen as sufficiently ‘serious’ or important and, because of the traditional focus of human rights instruments on public acts, gender-based violence was largely understood as something which took place in the private sphere, carried out by private actors.

There are at least three ways in which these classical understandings about torture and gender-based violence are changing:

- 1) It has increasingly been recognised that acts of torture must be analysed through a gendered lens. Persons who are tortured are often subjected to particular forms of violence linked to their gender or sexual orientation, including rape, mutilation of sexual organs, forced nudity, and the use of interrogation techniques which focus on sexual humiliation. The gendered element of the crime can be crucial to understanding the purposive element of torture, which can be linked, for example, to discrimination or humiliation on the basis of gender, sexual orientation, and transgender identity, meant to instil fear in communities, and/or undermine the heterosexual ‘masculinity’ of the victim. Identifying gendered elements of the crime is also essential in understanding the impact of the crime on the victim and how the harms might best be remedied. In the *Čelebići* case, the International Criminal Tribunal for the former Yugoslavia recognised that it was ‘difficult to envisage circumstances in which rape, ... could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation.’<sup>4</sup>
- 2) The public-private distinction in human rights law is progressively being blurred. There is increased recognition that States are responsible when they fail to exercise due diligence to prevent or respond to violence occurring in the private sphere. States have been found to be in breach of the prohibition of torture and ill-treatment when they exposed persons to acts of violence perpetrated by private actors. Furthermore, International jurisprudence on

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<sup>4</sup> ICTY, *Prosecutor v. Mucić et al.*, Trial Chamber, Judgment, 16 November 1998, para 495

States' due diligence obligations has placed particular emphasis on various forms of gender-based violence, including killings and mutilations of women,<sup>5</sup> domestic violence,<sup>6</sup> and in some cases, the denial of reproductive rights.<sup>7</sup>

- 3) International criminal law standards do not limit acts of torture to conduct perpetrated by, at the instigation of, or with the consent or acquiescence of public officials. A range of non-State actors have been found liable for torture as an underlying offence within the context of the perpetration of war crimes, crimes against humanity, and genocide. When torture operates as one of those underlying offences, the definition diverges from the one applicable to torture as a discrete crime under human rights law, in that there is no need for the involvement of a public official.<sup>8</sup> This phenomenon is not limited to the jurisprudence of international courts or tribunals; increasingly, domestic anti-torture statutes are grappling with definitions of torture, which include acts by non-State actors.<sup>9</sup> While this practice has its critics, it affords additional avenues to pursue acts of sexual and other gender-based violence under the frame of torture.

The right of victims of torture to reparations is well-established, though often un-implemented. As Professor Van Boven, the former Special Rapporteur on torture and principal author of the United Nations (U.N.) *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*<sup>10</sup> has indicated, "In spite of the existence of relevant international standards . . . the perspective of the victim is often overlooked. It appears that many authorities consider this perspective a complication, an inconvenience and a marginal phenomenon."<sup>11</sup> The reasons for the lack of implementation are multiple and are

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<sup>5</sup> Inter-American Court of Human Rights, *Case of Gonzalez et al. ("Cotton Field") vs. Mexico* (Preliminary Objection, Merits, Reparations and Costs), 16 November 2009

<sup>6</sup> European Court of Human Rights, *Opuz v Turkey*, Application No. 33401/02, 9 June 2009

<sup>7</sup> *KL v Peru*, UN Doc CCPR/C/85/D/1153/2003 22 November 2005

<sup>8</sup> ICTY, *Prosecutor v Kunarac et al.*, IT-96-23-T & IT-96-23/I-T, Trial Chamber Judgment, 22 February 2001, paras 495-496; ICTY, *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, Appeals Chamber Judgment, 20 June 2002, para 148; ICTR, *Prosecutor v. Semanza*, ICTR-97-20, Trial Chamber Judgment, 15 May 2003, paras 342-343; UN Committee Against Torture, General Comment No 2, UN Doc CAT/C/GC/2, 24 January 2008, para 18

<sup>9</sup> E.g., the Ugandan *Prevention and Prohibition of Torture Act*, 2012, of 18 September 2012, defines torture in Art 2(1) as applying to ... 'any person whether a public official or other person acting in an official or private capacity'.

<sup>10</sup> UN General Assembly (2005), 'UN 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', UN GA Res 60/147, adopted by the General Assembly 16 December 2005

<sup>11</sup> Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report, submitted by Theo van Boven, Special Rapporteur, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993, para 132-133

discussed below. These reasons are compounded for victims of gender-based violence that may amount to torture.

## **II. Context**

Reparations for victims of gender-based violence is a subject which is getting increasing attention by academics, policy-makers and activists. However, there is a tendency for this focus to be narrowly construed--most of the attention has focused on the rape of women and girls during conflict. Sometimes these rapes occur in public, in front of family members or villagers. They may be carried out as an official policy of the warring factions to destabilise communities, but are often also carried out by civilians acting opportunistically against vulnerable persons caught up in difficult situations.

While this phenomena of conflict rape deserves our attention, the overly narrow focus on conflict gives the impression that it is the conflict which is the cause for this aberrant behaviour, as opposed to structural discrimination and impunity, which are present in both conflict and peace times. Also, the focus on rape leaves out a range of other behaviours which may amount to gender-based violence during conflict such as: mutilation or burning of sexual organs, forced sterilisations and pregnancies, knowingly infecting another with HIV/AIDS, sexual exploitation, sexual slavery, and forced marriage. Rashida Manjoo, the former Special Rapporteur on violence against women, has raised concerns about this exclusive focus on sexual violence, which she says runs the risk of “sexualizing women”:

The current explicit inclusion of sexual violence in many reparations programmes is a victory against a tradition that minimizes its importance as collateral, private or non-political damage. Nevertheless, the forms of sexual violence that are included are often limited in range and other forms of victimization with a disparate gender impact are also not included. Often excluded have been forms of reproductive violence (including forced abortions, sterilization or impregnations), domestic enslavement, forced “marital” unions, forced displacement, abduction and forced recruitment. Gross violations of social, economic and cultural rights have also been excluded, even when they result in the loss of health, life and death of culture, or when such violations are specifically related to systematic forms of discrimination, including based on sex, ethnicity or sexual orientation.

Forced domestic labour, often taking the form of forced conscription or forced marriages, has also traditionally been left out. This tendency to include a narrow range of forms of sexual violence in such programmes runs the risk of sexualizing women, if it is not accompanied by a serious effort to encompass a broader notion of harm.<sup>12</sup>

The notoriety of rape of women and girls during conflict can also play into gendered stereotypes about the ownership of women. The crime is often perceived locally as one which impacts spouses, communities and families, even more so than the impact it clearly has on the direct victims. Likewise, the focus on rape as a weapon of war can de-link that conduct from the more tolerated forms of violence that persist in peacetime. Conflict-related violence can be fostered by discriminatory and stereotypical attitudes towards women and girls in society (which operate in both peacetime and during conflict), and often towards race and class. Gender-based violence during peacetime can be a method to enforce social expectations about how individuals should behave. For instance, domestic violence may be used as a tool to exert control over women's behaviour in the home, and rape and other forms of sexual violence may be used to 'punish' individuals for their sexual orientation and/or transgender identity.

While reparations for gender-based violence is increasingly talked about and recognised as important, it is rarely implemented, even for those categories of violence that have received most attention.

### **III. The Legal Framework for Reparations**

It is a basic principle of international law that when an international obligation is breached, a State must provide reparation.<sup>13</sup> The obligation to afford reparations is set out in human rights

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<sup>12</sup> UN Human Rights Council, 'Report of the Special Rapporteur on violence against women (Reparations for women subjected to violence)' UN Doc A/HRC/14/22, 23 April 2010, para 44

<sup>13</sup> *Chorzów Factory (Germany v Poland)* (Jurisdiction) PCIJ Rep Series A No 9, 21

treaties<sup>14</sup> and their interpretive bodies,<sup>15</sup> in declarative texts,<sup>16</sup> by independent experts<sup>17</sup> and in judicial decisions. This obligation is also reflected in international humanitarian law treaties, notably, in Article 3 of the *Hague Convention IV*,<sup>18</sup> largely reproduced in Article 91 of *Protocol I of the Geneva Conventions*.<sup>19</sup> Declarative texts, such as the U.N.'s *Basic Principles and Guidelines*<sup>20</sup> and the International Law Association's *Declaration of International Law Principles on Reparation for Victims of Armed Conflict*,<sup>21</sup> also consider reparation for international humanitarian law violations and emphasise victims' "right" to reparation.

In human rights law, reparations entails two aspects: the right to a domestic remedy and the right to adequate and effective forms of reparation. The connection between the procedure by which reparation is sought and the ultimate award is understood as indivisible. The U.N. *Basic Principles and Guidelines* explain the obligation to respect, ensure respect for, and implement international human rights law and international humanitarian law as giving rise to a duty, *inter alia*, to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation."<sup>22</sup>

The procedural remedy has been understood to require States to afford effective access to fair processes in which arguable claims for reparations can be determined. Jurisprudence and

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<sup>14</sup> International treaties include, *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976), art 2(3); *Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010), arts 18, 20(2), 24(4); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987) art 14(1); *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (adopted 25 May 2000, entered into force 18 January 2002) art 8; *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (adopted 18 December 1990, entered into force 1 July 2003) art 16(9)

<sup>15</sup> E.g., Human Rights Committee, General Comment 31, UN Doc CCPR/C/21/Rev.1/Add.13 29 March 2004; Committee Against Torture, 'General comment 3', UN Doc CAT/C/GC/3, 13 December 2012; CEDAW Committee, 'General Recommendation 28' UN Doc CEDAW/C/GC/28, 16 December 2010, para 32

<sup>16</sup> E.g., Universal Declaration of Human Rights, UNGA Res 217(A)(III) (10 December 1948) art 8; *Basic Principles and Guidelines* (n 10); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985), 4; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005, 31; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ESC Res 1989/65, UN Doc E/1989/89, 24 May 1989, 20; Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, 13 September 2007, art 8(2); Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, 19-21 March 2007, available at: <[www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf)>

<sup>17</sup> See also, Reparations for women subjected to violence (n 12); UNGA, 'Report of the Special Rapporteur on trafficking in persons, (The right to an effective remedy for trafficked persons)' UN Doc A/66/283, 9 August 2011; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' UN Doc A/HRC/20/14, 4 June 2012, paras. 49-62; UN Human Rights Council, 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence' UN Doc A/HRC/21/46, 9 August 2012; UNGA, 'Interim report of the Special Rapporteur on torture' UN Doc A/55/290, paras 24-30, 11 August 2000; UNGA, 'Report of the Special Rapporteur on torture' UN Doc A/58/120, 3 July 2003, paras 29-35; UNGA, 'Report of the Special Rapporteur on torture' UN Doc A/HRC/4/33, 15 January 2007, paras 61-68

<sup>18</sup> *Convention Respecting the Laws and Customs of War on Land* (adopted 18 October 1907, entered into force 26 January 1910)

<sup>19</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (adopted 8 June 1977, entered into force 7 December 1978)

<sup>20</sup> *Basic Principles and Guidelines* (n 10) 11

<sup>21</sup> International Law Association, 'Declaration of International Law Principles on Reparation for Victims of Armed Conflict' Res 2/2010 (74th Conference, The Hague, 15-19 August 2010) Art 6, 30

<sup>22</sup> *Basic Principles and Guidelines* (n 10) 3(c). See also, Vienna Declaration and Programme of Action, (World Conference on Human Rights, Vienna, 25 June 1993) UN Doc A/CONF.157/53, para 27

standard-setting texts also recognise the need to consider the quality of victims' access to and experience of justice processes. They specify the need to ensure that victims receive adequate information<sup>23</sup> and are assisted to access justice. Victims, including those with particular vulnerabilities, must be treated with humanity and dignity,<sup>24</sup> and their privacy and safety, both physical and psychological, must be safeguarded.<sup>25</sup>

The types of reparation that have been understood as required include: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>26</sup> This has been underscored by the Committee against Torture in its General Comment no. 3 on Article 14 of the Convention.<sup>27</sup>

The standards which relate to reparations for gender-based violence can be determined in several ways.

Firstly, because of States' due diligence obligations, just about all forms of gender-based violence will engender States' general obligations to prevent, prohibit and remedy harms arising from acts of gender-based violence. For instance, the International Covenant on Civil and Political Rights recognises that a breach of the Covenant entails an obligation to afford reparation to victims.<sup>28</sup> However, many forms of gender-based violence, particularly those that have traditionally been associated with the private sphere, have not been translated into a human rights framework at the domestic level.

Secondly, they can be extrapolated from other recognized norms of human rights and international humanitarian law, to the extent to which gender-based violence forms part of those other recognized norms. As indicated, this is an imprecise exercise given that not all acts of gender-based violence will fall within the definitions of other crimes or human rights violations such as torture. The same is true for the U.N. *Basic Principles and Guidelines* whose provisions are tailored to "gross violations of international human rights law and serious

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<sup>23</sup> *Angelova v Bulgaria* App no 38361/97 (ECtHR, 13 June 2002); *Zontul v Greece* App no 12294/07 (ECtHR, 17 January 2012) [115]; Recommended Principles and Guidelines on Human Rights and Trafficking, (20 May 2002) UN Doc E/2002/68/Add.1, 9.2

<sup>24</sup> *AT v Hungary*, UN Doc CEDAW/C/32/D/2/2003 (CEDAW Committee, 26 January 2005) para 9.6(II)(vi); HRC, General Comment 31 (n 15) para 15; UN Committee on the Rights of the Child, 'General Comment 5' General Measures of Implementation of the Convention on the Rights of the Child (3 October 2003) UN Doc CRC/GC/2003/5, para. 24; *Basic Principles and Guidelines* (n 10), 12(c); *Aksoy v Turkey* App no 21987/93 (ECtHR, 18 December 1996) [98]

<sup>25</sup> *Basic Principles and Guidelines* (n 10) 10, 12(b)

<sup>26</sup> *Ibid*

<sup>27</sup> (n 15) para 6

<sup>28</sup> HRC, General Comment 31 (n 15), paras 16, 17

violations of international humanitarian law.” Are all forms of gender-based violence sufficiently “gross” or “serious” to fall within these parameters? The answer is not clear or obvious, particularly for domestic legislatures. Additionally, while shoe-horning gender-based violence in this way will gain these forms of violence entry into a privileged club where specific rights and obligations flow from a breach, the articulation of those rights and obligations does not account for the gendered nature of the violence, or the gendered impact of the harm. A “neutral” framing of rights and obligations tends to ignore or take insufficient account of the specific experiences of women and other marginalized groups. The resultant “neutral” reparations may not adequately reflect the specificities of the harm.

Thirdly, standards for gender-based violence reparations can be extrapolated from the growing number of standards and related texts that deal with gender-based violence specifically. A number of mechanisms have sought to develop a more precise understanding of what reparations should entail to adequately incorporate a gendered lens.

The U.N. Committee on the Elimination of All Forms of Discrimination against Women has by far taken the broadest view of States’ obligations to afford reparations for gender-based violence. Its General Recommendation no. 33 on access to justice requires that States: “Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement); compensation (whether provided in the form of money, goods or services); and rehabilitation (medical and psychological care and other social services). Remedies for civil damages and criminal sanctions should not be mutually exclusive.”<sup>29</sup> Similarly, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women requires States Parties to “establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies.”<sup>30</sup>

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<sup>29</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation no 33 on Women’s Access to Justice*, UN Doc CEDAW/C/GC/33, 23 July 2015

<sup>30</sup> Adopted 6 September 1994, entered into force 3 May 1995, art 7(g)

## IV. The Standards of Reparation Reinterpreted from a Gendered Lens

### *1. Restitution Reinterpreted: The need for transformative reparations*

Restitution comprises measures aimed, as far as possible, at restoring the situation that existed prior to the violation. In the context of gender-based violence, this might include the release of victims from detention and dropping criminal charges against such persons. This might be applicable to persons who claim that they were raped. In some societies, if a claim of rape cannot be substantiated, the woman or a man filing the complaint may be prosecuted either for adultery or for wrongful accusation of adultery.<sup>31</sup> This dis-incentivises rape victims from lodging complaints and fosters impunity for sexual offences. For trafficking victims in particular, restitution measures might include, in addition to releasing trafficking victims from State detention or confinement by non-State actor traffickers, the return of travel and identity documents, recognition of citizenship, safe and voluntary repatriation to the individual's country of origin, and help to facilitate the individual's integration.<sup>32</sup>

But, it has increasingly been recognised that where a situation of discrimination contributed to the violations in the first place, reparations should not seek to put the victim back to that situation of disadvantage; reparations should be designed to eliminate the pre-existing disadvantage. The notion of transformative reparations was articulated in the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*,<sup>33</sup> by the Special Rapporteur on Violence Against Women,<sup>34</sup> and has since been taken up in the U.N. Secretary-General's 2014 guidance note on reparations for conflict-related sexual violence,<sup>35</sup> in jurisprudence,<sup>36</sup> and in the Committee against Torture's General Comment no 3.<sup>37</sup> The Inter-American Court of Human Rights has recognised that a situation of discrimination which contributed to the violations could only be repaired by reparations "designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable."<sup>38</sup> The UN Special Rapporteur on trafficking in persons, especially women and children, Joy Ezeilo, has also recognised that trafficking victims should be provided with

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<sup>31</sup> See, REDRESS and KCHRED, *Time for Change: Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008, pp 32-36

<sup>32</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/63/283, 9 August 2011, para 14

<sup>33</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (n 16)

<sup>34</sup> Reparations for women subjected to violence (n 12)

<sup>35</sup> June 2014, available at : <http://www.ohchr.org/Documents/Issues/Women/WRGS/PeaceAndSecurity/ReparationsForCRSV.pdf>

<sup>36</sup> *González et al. ("Cotton Field") v Mexico* (n 5), para 450

<sup>37</sup> *Ibid*, para 8.

<sup>38</sup> *Ibid*

“temporary or permanent residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed, may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests,” as a form of transformative reparation.<sup>39</sup> Similarly, restoring the safety and security of domestic violence victims has been recognised as crucial. Victims of domestic violence will require restraining orders for those who perpetrated violence against them, and access to shelters for abused women.<sup>40</sup>

What is transformative will depend on the situation of vulnerability and discrimination requiring transformation. In practice, the measures awarded draw upon the types of reparation measures that have traditionally been associated with satisfaction and guarantees of non-repetition – described more fully later in this chapter, such as strengthening laws, providing services, improving structures for accountability, and memorialisation of the victims. What is important is that the measures identified align with victims’ needs and choices, and do not inadvertently undermine victims’ safety, privacy and dignity. Consulting with and involving victims in devising appropriate forms of reparations and in determining the modalities for their implementation is therefore crucial.

## *2. Compensation: The need to take full account of the harms that result from gender-based violence*

Compensation is an important form of reparation for gender-based violence, and must be prompt, fair, adequate, as well as sufficient to compensate for any economically assessable damage resulting from the crime, whether pecuniary or non-pecuniary.<sup>41</sup> It is important for courts to appreciate the severity of the harms caused by gender-based violence, which, particularly for psychological harm, can be under-valued and may result in low awards. In most cases, financial compensation will not alone be sufficient.

At the domestic level, claims for reparations against both private and State actors can in theory be pursued through civil claims for damages, although the high costs of such proceedings tend to make them inaccessible to the majority of victims. In predominantly civil law jurisdictions, claims for damages tend to be joined to criminal complaints. This can present certain

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<sup>39</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/66/283, 9 August 2011, Annex: Draft basic principles on the right to an effective remedy for trafficked persons, principle 6(b). See also, para 16 of the report.

<sup>40</sup> Committee against Torture, Concluding Observations on the third periodic report of Kuwait (CAT/C/KWT/3), 8-9 August 2016, para 28(g)

<sup>41</sup> UN Committee Against Torture, General Comment no. 3 (n 15), para 10

advantages because the prosecution will be responsible for taking the case to court and the victim will only have to demonstrate the harm suffered in connection to the crime. However, a negative aspect is that usually the sole form of reparation on offer is financial compensation. Furthermore, compensation is only available if the accused person is convicted. Also, the enforcement of compensation awards can be complex and the barriers to enforcement may be so great that the victim does not obtain the actual judgment.

In the case of *Gerasimov v Kazakhstan*, the U.N. Committee against Torture determined that, “notwithstanding the evidentiary benefits to victims afforded by a criminal investigation, a civil proceeding and the victim’s claim for reparation should not be dependent on the conclusion of a criminal proceeding. [The Committee] considers that compensation should not be delayed until criminal liability has been established. A civil proceeding should be available that is independent of the criminal proceeding, and necessary legislation and institutions for such civil procedures should be in place. If criminal proceedings are required by domestic legislation to take place before civil compensation can be sought, then the absence or undue delay of those criminal proceedings constitute a failure on behalf of the State party to fulfil its obligations under the Convention.”<sup>42</sup>

Because of the challenges involved in pursuing domestic civil claims, and the broader limitations of the criminal justice system, victims may not pursue cases due to a fear of being re-traumatized by the process of serving as a witness, because they do not wish to be identified as a victim, or because they have no faith in such processes. After all, many criminal prosecutions of sexual and other gender-based violence do not result in convictions. This can result in victims or their families resorting to customary dispute resolution approaches, which tend to reinforce gender stereotypes and emphasize the restoration of the family’s honour, as opposed to the individual victims’ honour within the family. For instance, a perpetrator may be required to give an animal to the victim’s family, or the victim may be forced to marry the perpetrator.

Thus, it is important for States to afford other routes to compensation. Some States have put in place criminal injury compensation schemes, which are administrative mechanisms to which victims can apply and require very low thresholds of proof for a victim to become eligible for

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<sup>42</sup> *Gerasimov v. Kazakhstan*, UN Doc. CAT/C/48/D/433/2010, 10 July 2012, para 12.8

compensation payments. The U.N. *Basic Principles and Guidelines* stipulate that “the establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.”<sup>43</sup> Similarly, the Committee for the Convention on the Elimination of all Forms of Discrimination against Women has recommended that “states should create specific funds to ensure that women receive adequate reparation in situations in which the individuals or entities responsible for violating their human rights are unable or unwilling to provide such reparation.”<sup>44</sup>

### *3. The Centrality of Rehabilitation: The need to afford access to rehabilitation regardless of whether a judicial process was initiated*

Measures of rehabilitation are typically critical for victims of gender-based violence. Numerous human rights bodies have underscored the importance of providing victims of sexual violence with access to free psychological care.<sup>45</sup> However, it is important for facilities to be available to victims, irrespective of whether their claim goes to court or whether the alleged perpetrator is prosecuted and convicted. It is well known that victims who have faced sexual violence are unlikely to report the abuse, sometimes even to their families, because of the fears of being ostracized and that no one will believe them. This hiding away can compound the victim’s suffering, which could be alleviated through appropriate treatment and support. Moreover, delayed medical interventions, like specialised reproductive care or fistula repair, can be both traumatic and dangerous for victims.

It is important that rehabilitation be available to all victims who need it, not only to a certain category or subset of victims with a particular immigration status,<sup>46</sup> or who cooperated with law enforcement,<sup>47</sup> or filed claims, or whose cases were brought to court and/or resulted in convictions. The victim’s status as a victim (and entitlements as a victim) does not depend on the juridical recognition of a perpetrator: “A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”<sup>48</sup> This is particularly important for cases of gender-based violence, which rarely result in convictions.

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<sup>43</sup> *Basic Principles and Guidelines* (n 10), Preamble

<sup>44</sup> CEDAW General Recommendation No 33 (n 29) paragraph 19(d)

<sup>45</sup> See, e.g., *RPB v the Philippines*, Communication No. 34/2011, CEDAW/C/57/D/34/2011, 12 March 2014, para. 9

<sup>46</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/63/283, 9 August 2011, Annex: Draft basic principles on the right to an effective remedy for trafficked persons, principle 9(b)(i)

<sup>47</sup> *Ibid*, para 17

<sup>48</sup> *Basic Principles and Guidelines* (n 10), para 9

The Committee against Torture has recognized that “access to rehabilitation programmes should not depend on the victim pursuing judicial remedies.”<sup>49</sup>

Forcing victims of sexual and other forms of gender-based violence to reveal themselves individually in order to access services may act as a deterrence for some. As the Office of the High Commissioner for Human Rights has noted in relation to Timor-Leste, “rather than singling out victims of sexual violence, the Commission for Reception, Truth and Reconciliation (CAVR) recommended that the reparations be available to categories including single mothers, widows, and children affected by conflict, as well as survivors of gender-based and sexual violence, adding a layer of protection and confidentiality to female victims coming forward.”<sup>50</sup>

#### *4. Satisfaction: Must be tailored to the particular needs of victims of gender-based violence*

Measures of satisfaction are designed to help restore victims’ dignity. These may involve actions aimed at cessation of violations, criminal prosecutions, acknowledgment of the wrong done to the victim and that it is not her fault, truth seeking, public apologies, and commemoration or memorialisation projects. For gender-based violence, it is crucial that measures are tailored to take into account the victims’ particular needs for dignification, which may be different than for other human rights violations or crimes, given cultural stigmas, the possible relationship between a victim and a perpetrator, and the likelihood of re-victimisation if measures are ill-conceived. Judicial proceedings regardless of their nature should take due account of victims’ particular needs for privacy and safety. Rashida Manjoo has underscored that:

Judicial arenas for obtaining reparations are, however, riddled with difficulties. Procedural obstacles that victims of sexual violence have traditionally encountered in the judicial arena can amount to an experience of re-victimization, exposing women not only to psychological harm but also to reprisal, stigma and communal and family ostracism. Crucial here are both the evidentiary standards relied upon and the degree of confidentiality upheld during the reparations process.<sup>51</sup>

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<sup>49</sup> UN Committee Against Torture, General Comment no. 3 (n 15), para 15

<sup>50</sup> OHCHR, ‘Analytical study focusing on gender-based and sexual violence in relation to transitional justice’ UN Doc A/HRC/27/21, 30 June 2014, para 48

<sup>51</sup> Reparations for women subjected to violence (n 12), para 35

### *5 Guarantees of non-repetition: Requirement for structural changes*

Guarantees of non-repetition comprise the range of broad structural measures aimed to bring about a lasting change in the situation so that violations do not repeat themselves. These may involve changes in policies, legal or institutional reforms, and the promotion of human rights standards. With respect to gender-based violence, there is a need to ensure that all forms of gender-based violence are criminalised, including marital rape and domestic violence. Procedures for lodging complaints should be simplified and accessible to victims, and barriers, such as the production of medical certificates in rape cases, should be removed as a requirement for pursuing investigations. Gender-sensitive training and capacity building for security sector and law enforcement institutions to respond to gender-based violence cases are essential, as are measures designed to change attitudes in society, in addition to providing practical measures, such as putting in place gender advisors in police stations to receive complaints from victims.

## **V. Victims' Active Participation in Justice Processes: Applicable Procedural Standards for Victims of Gender-Based Violence**

With respect to violence against women occurring during conflict, the U.N. Security Council's resolution 1325, and subsequent resolutions on women, peace, and security all underscore that States must ensure women's active participation in post-conflict peace-making, peace-building, and reconstruction processes. The active participation of women in defining and implementing solutions is crucial to their empowerment, and a necessary precondition to eradicate marginalisation.

Victims' active participation has also been recognised as a crucial component to justice processes, which include, but are not limited to, reparations processes. In his 2015 report, Pablo de Greiff noted that "the participation of victims, in particular women and girls, in the early stages of debates on the design of reparation programmes contributes to ensuring that serious gender-related violations are not excluded from the range of rights that, if violated, will trigger reparation benefits."<sup>52</sup>

Indeed, when done well, justice can be empowering and reparative for victims. It can give them a voice and enable them to be heard by an official decision-making body. The converse is also

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<sup>52</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc A/HRC/30/42, 7 September 2015, para 70.

true. Processes which ignore victims' concerns and treat them as passive observers tend to have a deleterious impact on victims' well-being and their sense that justice has been achieved. Where victims are not treated with respect, and are subjected to re-traumatising examinations, this can impact their overall experience with the justice process, and can deter others from coming forward.<sup>53</sup> As the Inter-American Court of Human Rights has held, "it is essential to provide support to a rape victim from the beginning of the investigation in order to ensure her safety and provide an appropriate context to refer to the abuse suffered and to facilitate her participation, as simply and as carefully as possible, in the investigation procedures."<sup>54</sup> This obligation extends not only to the investigation, but throughout any judicial procedure that follows, including reparations.

The stigma that surrounds sexual violence can lead to female victims being abandoned by their families and ostracized from their communities, causing victims to hide or isolate themselves. But for some victims of sexual violence, testifying can sometimes be an act of defiance, an act to reclaim power over the events, though an extremely painful process nonetheless. Khadidja Zidane, who testified in the *Hissène Habré* case about her experiences of rape by *Habré* himself, explained that after she came back from giving her testimony, she was threatened with death, physically attacked by strangers in the street, and abused in her own home. "The whole thing is because I went and told the truth. Why shouldn't I tell the truth? I have every right. An injustice has been done to me. I was not alone. Hissène Habré destroyed all of us. I don't have anything to lose. I have to speak. I don't care."<sup>55</sup> After having heard evidence from Khadidja Zidane and other victims of sexual violence, the trial judges added sexual violence to *Habré's* charge sheet, and sexual violence was drawn specific attention to in the verdict and in the award for reparations.<sup>56</sup> Moreover, the judges determined that the sexual violence perpetrated against the women amounted to torture, crimes against humanity, and sexual slavery. While the conviction and sentence were upheld on appeal, one count of rape committed against Khadidja Zidane by *Habré* himself was thrown out on procedural grounds, as it was added to the charge sheet once the trial was already underway.

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<sup>53</sup> Anne-Marie de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, 2005, 272-275

<sup>54</sup> *Rosendo Cantú et al. v. Mexico* (Preliminary Objections, Merits, Reparations and Costs), 31 August 2010, para 189

<sup>55</sup> Ruth Maclean, "I told my story face to face with Habré: courageous rape survivors make history", *The Guardian*, 18 September 2016

<sup>56</sup> Judgment of 30 May 2016, available at: [http://www.chambresafricaines.org/pdf/Jugement\\_complet.pdf](http://www.chambresafricaines.org/pdf/Jugement_complet.pdf)

In the *Bemba* case before the International Criminal Court, Pulchérie Makiandakama, the first victim appearing before the Chamber, who was raped by two soldiers, testified without the usual protection measures, such as face and voice distortion, because, as she said, “I cannot ask for my voice or image to be distorted. I want it to be natural, be myself and say before the Judges and before the whole world what I suffered.” When her counsel asked her what she was expecting from the ICC, she replied: “I am a human being. Judges need to pay attention to my situation. Judges have to rule on this case and give me justice. This is all I want from the ICC.”<sup>57</sup>

The *Basic Principles and Guidelines* make it clear that access to remedies must be fair and non-discriminatory, and procedures must be accessible and suitable to take account of victims’ particular needs. In practise, discrimination and marginalisation can inhibit access to justice or associated reparations processes. Often, key documents are not translated into local languages, and information dissemination does not reach remote areas or those who cannot read. Outreach and awareness-raising activities are necessary preconditions for victim participation in justice processes, whether before courts or administrative programmes.<sup>58</sup> Structures to ensure safety, privacy, and dignity are needed but are not usually in place, which can discourage women and others who experience stigma from coming forward.<sup>59</sup> The *Basic Principles and Guidelines* underscore that measures should be taken to “minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims.”<sup>60</sup>

In a post-conflict context, the regular justice institutions may not be functioning or will be under extreme strain. Even in the best of circumstances they would be ill-equipped to deal with a flood of conflict victims that have experienced multiple harms. Practically, this has meant that in such circumstances specialist judicial or administrative structures are needed to give effect to victims’ rights to lodge claims for reparations. The *Basic Principles and Guidelines* recommends courts to refer to such possibilities, indicating that “[i]n addition to individual

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<sup>57</sup> As reported in Victims’ Rights Working Group, ‘Victim testifies publicly in the Bemba trial: “I lost my dignity”,’ Bulletin, Issue 20, Spring 2012, 2.

<sup>58</sup> OHCHR, ‘Analytical study focusing on gender-based and sexual violence in relation to transitional justice’ UN Doc A/HRC/27/21, 30 June 2014, para 47.

<sup>59</sup> Catherine O’Rourke, Fionnuala Ni Aolain and Aisling Swaine, ‘Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice’ (2015) 28 Harvard Hum RJ 97, 137-139

<sup>60</sup> *Basic Principles and Guidelines* (n 10) Art 12(b)

access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.”<sup>61</sup>

## **VI. Implementation: How far have we come?**

The rights framework has become much clearer with respect to victims of gender-based violence, their right to reparations, and what reparations should entail, particularly for sexual violence perpetrated during conflict. This has led to this phenomena being considered by claims commissions and other transitional justice processes as well as a small number of courts. Nonetheless, the implementation of this framework remains piece-meal and largely inadequate. As noted, the challenges for victims to achieve reparations are multiple and include a variety of practical access hurdles, procedural barriers, and gaps in the law. Furthermore, victims who submit their cases to justice processes are still sometimes forced to confront prosecutors and judges who judge the victims on the basis of discriminatory stereotypes and narratives about gender, which impede victims from realising fair and equitable justice.<sup>62</sup>

When reparations follow criminal law proceedings, problems to secure convictions translate to problems to secure reparation. The low number of investigations, prosecutions, and convictions in cases of alleged rape and other forms of gender-based violence, coupled by insensitive cross-examination procedures and poor witness protection, also undermine victims’ confidence in the justice system and lead to them rejecting judicial approaches altogether.

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<sup>61</sup> Ibid, Art 13

<sup>62</sup> *Vertido v. The Philippines*, UN Doc CEDAW/C/46/D/18/2008, 1 September 2010