

Reparations, Responsibility

 Victimhood in Transitional Societies

BEYOND SILENCE AND STIGMA:

Crafting a Gender-Sensitive Approach
for Victims of Sexual Violence
in Domestic Reparation Programmes



March 2020

By Sunneva Gilmore,
Julie Guillerot and Clara Sandoval

Reparations, Responsibility & Victimhood in Transitional Societies

I lived 23 years, with that pain, I wasn't able to tell anyone, not even family members, because I only knew what happened to me, how humiliating and disgusting it would be to tell someone what happened, so it was only me that knew it, but at one point, by luck, I went to register my uncle to the registry of victims (and the registrar asked me) "how did you survive?". (I told her my story). . .She was the only one that understood me, and she hugged me and said that I wasn't guilty for what had happened to me.

Interview with a victim of conflict-related sexual violence in Peru, May 2019

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Acknowledgements

Our thanks to the victims and survivors who gave their time to speak to us. We are also grateful to all the lawyers, legal representatives of victims, as well as to civil society organisations that spoke to us, allowed us to know their work, the challenges they face but also how important what they do is, to give victims of sexual and gender based violence a voice and to empower them. In particular, we express our appreciation to the victims' groups and civil society associations who helped to facilitate our research and opened up their facilities to us. In Uganda we would like to thank Stephen Oola, the Women's Advocacy Network, the Justice and Reconciliation Project, and the Refugee Law Project. In Peru, we would like to thank the National Coordination for Human Rights (CNDDHH – Coordinadora Nacional de Derechos Humanos) and its Working groups, the Follow-up Group on Reparations for Forced Sterilization and DEMUS. In Colombia, thanks to Ruta de Mujeres, and Red de Mujeres Víctimas y Profesionales. In Guatemala we would like to thank Denis Martinez and Marvin Ramirez, our consultants in the project, and the help received from Mujeres Transformando el Mundo, and Judge Yassmin Barrios in particular. We would also like to thank the International Organisation for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), the International Centre for Transitional Justice (ICTJ) and Redress who co-hosted a series of reparations events on sexual violence in Geneva in June 2019 with the project team that helped to inform this report.

The report was reviewed before publication by three experts in the area: Colleen Duggan, Senior Program Specialist at the International Development Research Centre (IDRC) in Canada, Dr. Carla Ferstman, Senior Lecturer at the School of Law and Human Rights Centre at the University of Essex, and Dr. James Gallen, Lecturer at the School of Law and Government at Dublin City University. We are extremely grateful for their careful comments and insights, but any mistakes, oversights or errors are our own. Thanks also to Julia Firmin and Daniela Suarez Vargas for editing and proofing this report in English and Spanish, and Luke Moffett for his editorial work.

Methods

This report has been prepared as part of the Arts and Humanities Research Council (AHRC) funded project on *Reparation, Responsibility and Victimhood in Transitional Societies*, by Dr. Sunneva Gilmore, PhD researcher on the project and specialist registrar doctor in obstetrics and gynaecology, Julie Guillerot, expert consultant on the project, and Professor Clara Sandoval, Co-Investigator on the project, Professor at the School of Law and Human Rights Centre at the University of Essex and co-director of the Essex Transitional Justice Network, who in conjunction with other team members have undertaken fieldwork in seven countries emerging from conflict; including Colombia, Guatemala, Peru, Nepal, Northern Ireland, Uganda and South Sudan.

In order to explore complex theoretical and practical issues related to reparations, qualitative research was conducted and consisted of in-depth semi-structured interviews and focus groups with over 300 participants from a range of stakeholders, including victims, perpetrators, civil

society and reparation practitioners in courts and Domestic Reparation Programmes (DRPs).¹ This data collection was to provide general sentiments on the implementation of reparations, not to deliver representative or conclusive data, as such it is used to back up some of our findings and provide critical on the ground insights. Primary data collection was complemented by previous desktop research on the relevant literature, case law and international instruments on reparations. Interview transcripts were thematically coded, including on issues pertaining to reparations for sexual and gender-based violence.

To advance the discussion on key issues, the project team held meetings, workshops, and exchanges with other experts in the area including individuals working for the United Nations Office of the High Commissioner on Human Rights (OHCHR), UN Women, the International Organization on Migration (IOM), the International Center for Transitional Justice (ICTJ), REDRESS and other such international bodies or civil society organisations.² The report is also informed by the authors' previous expertise and practice on reparations and other forms of repair for sexual and gender-based violence.

In particular, the authors of the report wanted to understand how and by what means DRPs included a gender-sensitive approach when dealing with different forms of sexual violence; whether victims had been able to access domestic reparation programmes, when were they able to do so, and how they overcame stigma and ostracism. While the authors of the report acknowledge the existence of significant literature in recent years which has attempted to shed light on these issues, it is not always based on evidence from the field. Thus the attention was also to question some of the assumptions contained within the existing literature by listening to victims and to those helping them to fulfil their right to reparation. The research has received full ethical approval by Queen's University Belfast School of Law Ethics Committee prior to the start of the project.

1. Introduction

Sexual and gender-based violence (SGBV) can cause particular physical, psychological and social harms. Both the human rights violations that cause it, as well as the harms that ensue, require carefully crafted and sensitive reparations that not only aim to alleviate it, but also to reduce stigma and to avoid replicating the structural causes of discrimination and barriers to equality. There has been increasing attention to reparations for SGBV, such as the 2007 Nairobi Declaration, the 2014 UN Secretary General's Guidance Note on Reparations for Conflict Related

1 The interviews are anonymous and therefore have been coded by the Project team. We indicate the code, the location and date. If, however, this information risks identifying the interviewee, the location and date have been omitted.

2 A series of workshops and meetings were held during 'Geneva Reparations Week', 11-14 June 2019. Activities included a workshop on 'Reparations for Victims of Sexual and Gender Based Violence,' in partnership with OHCHR, IOM LPR and with the support of the UN SRSG SVC, at the Palais Wilson, 13 June 2019. Participants included, but were not limited to, representatives from the UN, civil society organisations, governmental bodies, practitioners, independent researchers and experts. A further workshop was conducted on 'The Role of Civil Society and Donors in Reparations,' in partnership with ICTJ, Redress and UN IOM, at the Open Society Foundations in New York, 11 December 2019.

Sexual Violence, and debates on the role of reparations as transformation.³ However, while there is some progress as a result of the development of these frameworks in the understanding of how to approach reparation for victims of SGBV, work remains to be done. In particular, greater attention is needed in respect of the implementation and good practices of translating and realising these norms into meaningful remedies for victims of SGBV.

Sexual violence can include rape, sexual slavery, forced abortion, contraceptive control, forced marriage and trafficking for the purposes of sexual exploitation. Gender-based violence is defined by the OHCHR as 'any harmful act directed against individuals or groups of individuals on the basis of their gender.'⁴ In times of conflict, authoritarianism or political upheaval, while attention is often captured by the perpetration of mass rapes carried out by armed groups, many victims are subjected to sexual violence within their own homes and places of work. These violations also need to be remedied due to the often lack of services or breakdown in law and order during such periods. The Office of the Prosecutor of the International Criminal Court has defined gender-based international crimes as 'those committed against persons, whether male or female, because of their sex and or socially constructed gender roles. Gender based crimes do not necessarily manifest as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender.'⁵ While this is a broad concept, it should be emphasised that gender crimes also take place against persons because their gender identity is non-binary.⁶ In addition, persons may be targeted due to their sexual orientation when it is perceived as transgressing societal norms around gender and reproduction.

This report recognises that gender-based violence goes beyond sexual violence and must be addressed. However, the focus of this report is on sexual violence as a form and expression of gender-based violence. This is not to undermine other forms of gender-based violence, but to try and make a useful contribution to an area where urgent answers are needed, especially given the complex type of stigma, at individual, family and community level, it produces. Indeed, the stigma that is generated through sexual violence and gender discrimination affects individual development and wider society.⁷ For example, those who suffer sexual violence can be perceived in their community as becoming "tainted" and unmarriageable, many of them are unable to provide for and take care of their families affecting parenting, but also broader family ties and life. Besides this impact on the social status of the victims of sexual violence, their economic status can also be affected: stigmatization inside the family and community can lead to the impossibility of accessing means and/or stable income. Furthermore, given the trauma and the physical injuries they suffer, victims may be unable to be economic agents in society and

3 Fionnuala Ní Aoláin, Catherine O'Rourke, Aisling Swaine, Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice, *Harvard Human Rights Journal* 28(1) (2015) 97-146.

4 Sexual and gender-based violence in the context of transitional justice, October 2014, available at https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf

5 Office of the Prosecutor of the International Criminal Court, Policy Paper on Sexual and Gender Based Crimes, June 2014, available at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>

6 Non-binary gender identity refers to those other than a man or woman.

7 Sanne Weber, *Guidelines on Transformative Reparations for Survivors of Sexual Violence*, Impunity Watch, (2019), p14

to pursue a life of their choice. As such, sexual violence (SV), in itself, further marginalises vulnerable groups, depriving them of educational and economic opportunities. This is not to undermine the agency and resilience of victims, many of those we spoke to had not received reparations yet still struggled for redress, but it is to reflect the barriers and compounding harm that sexual violence causes.

The report also considers that there is a dearth of significant experience in addressing sexual violence in an adequate manner in Domestic Reparation Programmes (DRPs), an issue that needs to be addressed. DRPs are administrative mechanisms established at the domestic level, often by the executive or parliament, to provide reparation to victims of serious human rights violations and violations of humanitarian law, by providing them access to a remedy through a lower evidential threshold than court claims and with the potential to be, if properly crafted, a more sensitive process to the harms they have suffered. Sexual violence also deserves special attention, especially since in armed conflicts it can be used as a weapon of war, as well as reflect pre-existing discriminations based on gender and other intersecting vulnerabilities. In this regard, the United Nations has pointed out that, while sexual violence affects both men and women during an armed conflict, women and girls are more likely to be victims of this abuse.⁸ However, fewer male victims may be the product of under-reporting. Hidden victimisation⁹ and statistics cannot be generalised in all contexts; male sexual violence is unique in its own right in terms of its impact on victims' masculinity and sexuality.¹⁰ Sexual violence across genders can also occur on a mass scale under authoritarian regimes.¹¹ We should also be conscious of the impact of historical institutional abuse resulting in mass sexual violence in settled democracies, which may often require transitional justice measures, in particular reparations, to address the multitude of harms.¹² The motivations for and experiences of sexual violence can be different for men and women, for members of the LGBTI community and for those with a different gender identity.¹³

International human rights law includes various international treaties as well as soft law instruments aimed at protecting women's rights alongside their right to adequate, prompt and effective reparation, such as the UN Convention on the Elimination of Discrimination against Women (CEDAW), the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, and the Istanbul Convention on Action against Violence against Women and Domestic Violence. This report is guided by such instruments, but equally

8 Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence, 2014, p.3.

9 See Amrita Kapur and Kelli Muddell, *When No One Calls It Rape: Addressing Sexual Violence Against Men and Boys*, ICTJ (2016).

10 See Chris Dolan, Letting go of the gender binary: Charting new pathways for humanitarian interventions on gender-based violence, *International Review of the Red Cross* (2014), 96 (894), 485–501.

11 See Colleen Duggan, Claudia Paz y Paz Bailey, Julie Guillerot, Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru *International Journal of Transitional Justice* 2(2) (2008), 192–213.

12 James Gallen, Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice, *International Journal of Transitional Justice*, 10(2) (2016), 332–349.

13 Henri Myrtilinen and Megan Daigle, When merely existing is a risk. Sexual and gender minorities in conflict, displacement and peacebuilding, *International Alert*, February 2017.

draws upon the jurisprudence developed by human rights bodies, such as the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the Inter-American Court of Human Rights (IACtHR), as well as by State practice. In addition, the progressive institutionalisation of a gender approach in national and international public agendas has influenced international human rights law in allowing the introduction of a perspective that recognises the different needs and situations experienced by men and women, and other non-binary gender identities, as a result of the gendered nature of human rights violations.¹⁴ Nevertheless, work remains to be done to ensure that, in particular, the rights of men and members of the LGBTI community are fully protected and that the gendered impact of sexual violence they suffer is fully recognised and addressed. Equally, the mainstreaming of a gender perspective in international human rights law should fully embrace the right to reparation.¹⁵ Such an approach requires victims accessing, participating in, and benefiting from, a reparation process, to ensure that it is meaningful and effective in remedying the harm caused, and in addressing the root causes that made gender violations possible in the first place.

The objective of this report is to contribute to how best to adopt a gender-sensitive approach to reparations for victims of SV, with a particular focus on the process and how this can transpire into the actual design and crafting of reparation in a DRP. While reparations are ordered or recommended by different bodies, such as courts (domestic and international), and administrative mechanisms, the focus of this report is on gender-sensitive DRPs, particularly in relation to procedural elements that they must have in place to enable reparation for victims of SV. This report outlines some best practices and limitations from DRPs. It begins by clarifying some of the conceptual tensions in the area around a gender approach to reparations in transitional justice, and the place of transformative reparations. The following section examines reparation processes, in relation to the underdeveloped areas of meaningful and gender-sensitive participation, eligibility and registration, which are crucial components to implementation. The final sections consider how to carry forward this gender approach in the crafting of appropriate forms of reparation measures, before concluding on recommendations on how best to create gender-sensitive DRPs that aim to respond in an adequate manner to SV.

14 An independent expert on sexual orientation and gender identity was appointed by the Human Rights Council. Additionally, the Security Council has adopted resolutions on the subject, such as Resolution 32/2 of 15 July 2016 on the Protection against violence and discrimination based on sexual orientation and gender identity.

15 The case of *Azul Rojas Marín and Other v. Peru* is currently pending decision before the Inter-American Court of Human Rights. The case concerns the arbitrary detention, torture and discrimination, among other violations, of Azul Rojas Marín by police personnel in Casagrande (Trujillo), as a result of his sexual orientation and as a form of punishment for it. In the case, the legal representatives of Marín and her mother have requested the Court to fully embrace a gender perspective when awarding reparations for the victims in the case. See Inter-American Commission on Human Rights, *Azul Rojas Marín and Other v. Peru*, Report on the merits, Informe No. 24/18, case 12.982, 24 February 2018. Clara Sandoval, an author of this report, is also one of the legal representatives of Azul in the litigation of the case before the Court.

2. Conceptual Clarifications

Gender-sensitive reparations for victims of sexual violence entail designing and implementing reparations that duly take into account and respond to their needs, harms and situation (individual, in the family, and/or, community and society). However, it requires clarification on two important and interconnected conceptual issues. First, how best to create a gender-sensitive transitional justice policy and reparations, and second, the extent to which reparations can be transformative for victims of SV.

a. Building a Gender-Sensitive Approach to Transitional Justice and Reparations

Transitional justice emerged in the late 1980s and early 1990s, mainly in response to political changes and demands for justice in Latin America and Eastern Europe.¹⁶ These political and legal responses sought to address the systematic abuses of previous regimes, without jeopardizing the ongoing political transformations, and acknowledging and understanding that the numerous problems that arise from massive and/or systematic violations of human rights of the past, are often too complex to be solved with a single action. Accordingly, transitional justice implies a plurality of complementary approaches, aimed at addressing the legacy of human rights violations in a comprehensive and holistic manner, encompassing truth, justice, reparation and guarantees of non-repetition, but also other parallel interventions such as development, humanitarian assistance and peace building measures.¹⁷

The comprehensiveness of a transitional justice process and the complementarity of its mechanisms are key to its success. In this regard, the first report, in 2012, of the former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, underlined the importance of adopting a comprehensive approach to addressing massive violations of human rights and grave breaches of international humanitarian law, combining the elements of truth-seeking, criminal justice initiatives, and reparations and guarantees of non-repetition, in a complementary manner.¹⁸ Recognising, from the beginning, the limited scope of each of the measures alone, he noted the interrelation that must exist between the four elements to compensate for their individual limitations.¹⁹ With this he argued that the 'various measures should be "externally coherent", meaning that they should be conceived of and implemented not as discrete and independent initiatives but rather as parts

16 Ruti Teitel, *Transitional Justice*, Oxford University Press (2000); and Paige Arthur, How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice, *Human Rights Quarterly*, 31(2) 2009, 321--367.

17 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 2012.

18 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 2012; and Report of the Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, Fabian Salvioli, A/HRC/42/45, 11 July 2019; and Pablo de Greiff, *Repairing the Past: Compensation for Victims of Human Rights Violations*, in P. de Greiff (ed.), *The Handbook of Reparation* Oxford University Press (2006), p.10-12 and 476.

19 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 2012, para.24.

of an integrated policy.²⁰ However, the issue of sequencing becomes an important one to be addressed when determining how to craft gender sensitive reparations, which requires gender to be mainstreamed into the policy development, institutional design, understanding of harm, needs, process, participation and outcomes of transitional justice.²¹ There is no one way to sequence a transition nor for a transitional justice toolkit to be applied to each context; however truth commissions and trials can add to the momentum to deliver reparations and map out violations, harms, victims and patterns, as well as responsible actors.

On one hand, and because it can occur separately from judicial processes through DRPs, reparation in a transitional justice process implies some sort of recognition by State authorities that human rights violations occurred and acknowledgment of wrongdoing and the victims' harm.²² The responsibility of an individual author is intrinsic in a condemnatory judicial process; it is not in a domestic reparations programme, where the State takes subsidiary responsibility to make reparations to victims for violations by all responsible actors.²³ A recent report on gender in relation to the period of the "Troubles" in Northern Ireland emphasises the significance of this distinguishing feature of reparations in contrast to other forms of repairs, like assistance. 'The acknowledgment is important, because it constitutes a form of recognizing the significance and value of persons as individuals, as victims and as holders of rights.'²⁴ While a truth-seeking and telling process '[...] rarely discloses facts that were previously unknown, they still make an indispensable contribution in officially and publicly acknowledging these facts.'²⁵ There could be a multidirectional relation between truth-acknowledgment-reparation but the relation may be more precise and effective if thinking in a chronological sequence, particularly in societies that resist official acknowledgement of certain violations and/or the gender dimension to past abuses. As such, De Greiff said that, 'just as reparations call for truth-telling if the benefits are to be interpreted as a justice measure, truth-telling calls for reparations if words are to be seen as more than inconsequential chatter.'²⁶ Thus, '[r]eparations provide the material form of the recognition [given by the truth-seeking and telling process] owed to an equal rights holder whose fundamental rights have been violated.'²⁷

Indeed, if we go back to the judicial dimension of transitional justice, even if the acknowledgment of responsibility is different to the acknowledgment of culpability, in a judicial process, the

20 Ibid, para.27.

21 See Gender Principles for Dealing with the Legacy of the Past, Legacy Gender Integration Group Belfast, September 2015, available at https://www.ulster.ac.uk/__data/assets/pdf_file/0009/66285/Gender-Principle-Report-Sept-2015_Final-Version.pdf

22 Although that is not always the case, as illustrated by the Victims and Land Restitution Law in Colombia, where the Law itself indicates (in Article 9) that measures of reparation under the Law cannot be understood as recognition of responsibility by the State.

23 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of Human Rights and Grave Breaches of International Humanitarian law, 2005, Principle 16.

24 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/21/46, 2012, para.30.

25 Ibid.

26 Ibid. para.24.

27 Ibid. para.30.

10 decision on reparation measures comes only after the judicial truth of the facts, crimes and responsibility have been established.²⁸ Some transitional justice processes in some countries have first established a truth telling process to illuminate the violations and harm incurred, such as in Guatemala, Peru and Tunisia. Such truth telling processes have permitted momentum to be built and have exerted pressure on States and stakeholders to then not only endorse a reparation programme, but also to include a gender-sensitive perspective in it.²⁹ However, as discussed below, when truth mechanisms do not reflexively adopt a proactive gender-sensitive approach, then the benefits of sequencing for such crimes could be lost or diminished.

As the OHCHR states:

[...], in the course of their work, truth commissions can compile information about the victims which may be important in the design and implementation of reparation programmes—information which may otherwise be missing. [...] The argument in favour of a chronological and sequential order for truth and then reparation can increase the gravity of the argument for designing gender-sensitive reparations to victims³⁰.

Yet a sequential approach may not always be possible,³¹ and it should be noted and cautioned that inextricably linking reparations and truth commissions 'alters the nature and purpose of truth seeking.'³²

This is not to say that victims should wait even for longer to be able to fulfil their right to reparation until a truth commission is established or completes its work. As such, it is important that any DRP be preceded by assistance measures, as well as by urgent forms of reparation, that aim to address the most serious harms; harms that cannot wait to be addressed in the future, such as medical treatment for sexually transmitted diseases or traumatic genital fistulae or psychological trauma.

Transitional justice has witnessed an important transformation of the gender approach in truth telling mechanisms. Unlike the first truth commissions that were established in Uganda,

28 In the judicial field, the granting of reparations must be understood in relation to the access to justice, where the incorporation of the gender perspective is fundamental, considering the numerous difficulties that women have in accessing justice and, consequently, to defend their rights. All the successive steps and actors must have a clear gender sensitivity from beginning to end of the judicial chain to reach the final sentence; that is to say, from the attention in the police stations (direct incidence on the inclusion / exclusion of acts of gender violence at the level of the complaint), through the police and fiscal investigations (direct impact on the inclusion / exclusion of acts of gender violence at the level of criminal complaint formulation, obtaining adequate evidence, the classification of the facts with a gender perspective, etc.), up to the procedural aspects of the trial and deliberations of the judges. It is this sum that will lead (or not) to a sentence (and therefore a decision on reparations) that has a gender perspective.

29 Cath Collins, Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the "Valech Commission" in Chile, *Journal of Latin American Studies* 49(1) (2017): 55-82, p79 and 81.

30 OHCHR, *Rule-Of-Law Tools for Post-Conflict States. Reparations programme*, 2008, p.11

31 See Luke Moffett, In the Aftermath of Truth: Implementing Truth Commissions' Recommendations on Reparations - Following Through for Victims, in J. Sarkin (ed.), *The Global Impact and Legacy of Truth Commissions*, Intersentia (2019), 143-168.

32 Collins *supra* n.33, p81.

11 Argentina, Bolivia or Chile,³³ those of South Africa, Guatemala and Peru chose to make gender violence visible in their work, even though it was not explicitly mentioned in their mandates. Subsequent truth commissions' mandates, such as those of the truth commission in Sierra Leone or in East Timor, have given powers to these bodies to deal with some forms of gender-based violence, such as sexual abuses, rape and other forms of sexual assault/harassment.³⁴ Contemporary truth commissions such as the Gambian Truth, Reconciliation and Reparation Commission³⁵ or the Colombian Truth Commission have gone a bit further. Both have been given clear mandates that incorporate a gender approach to their work but have also developed key tools to fulfil their mandate in this area. For example, the Gambian Truth and Reconciliation and Reparation Commission has provided special hearings on sexual and gender-based violence, as well as being empowered to provide reparation itself and interim measures to victims. The Colombian Truth Commission has made a gender approach central to its work, one that is not limited to recognising the disproportionate impact of armed conflict on women and girls but that explicitly includes members of the LGBTI community.³⁶ To that end, the Commission has established a specific group working on gender, with various powers. The Commission has also created spaces for victims to come forward and talk, across the entire country, and has provided training to civil society organisations so that they can help listen to victims, as happened in December 2019 with the LGBTI NGO, Caribe Afirmativo.³⁷

At the truth-seeking and telling level, this evolution means that the reports of truth commissions have progressed in their investigations and results. From barely no mention of women or sexual and gender-based violence to, now, the issue of sexual violence against women being the sole focus of reports, or at least, taking a broader gender dimension and confronting the difficulties of making this aspect visible once the commission is installed. In more contemporary mechanisms, such as the Centre for Historical Memory in Colombia,³⁸ these have progressed to taking into account, in a comprehensive manner, the specific and differentiated ways in which men and women, as well as members of the LGBTI community, are affected by systematic and massive human rights violations.

33 Although it is not the only area where recommendations on reparations are made, reparations programmes tend to be associated with truth commissions. "There seems to be a trend towards establishing truth commissions in post-conflict societies and societies in transition and entrusting them with making recommendations concerning reparations", OHCHR, "Rule-Of-Law Tools for Post-Conflict States. Reparations programme", 2008, p.11. See Luke Moffett and James Gallen, *From Truth to Repair: Implementing Truth Commissions' Recommendations for Reparations*, RRV Project (2020).

34 Sierra Leone Truth and Reconciliation Commission Act 2000, Section 6(2)c and East Timor CAVR report, 2006, Part 2: The mandate of the Commission.

35 Baba G. Jallow, The Gambian TRRC: Objectives, lessons learned and the future of truth commissions, Paper presented at the 3rd Continental Forum on the State of Transitional Justice in Africa. Addis Ababa, Ethiopia, 24 – 26 September, 2019.

36 Nicole Maier, Queering Colombia's peace process: a case study of LGBTI inclusion, *The International Journal of Human Rights* (2019), DOI: 10.1080/13642987.2019.1619551.

37 Comisión de la Verdad, available at: <https://comisiondelaverdad.co/en-los-territorios/enfoques/de-genero>, accessed on 12 February 2020. See also, Comisión de la Verdad, "La Comisión capacita a Caribe Afirmativo para la Toma de Entrevistas a Víctimas LGTBI," 27 December 2019, available at: <https://comisiondelaverdad.co/actualidad/noticias/la-comision-capacita-a-caribe-afirmativo-para-la-toma-de-entrevistas-a-victimas-lgbti>

38 For example, Centro de Memoria Histórica, *Ser Marica en Medio del Conflicto Armado*, 2019 and *Memoria Histórica con Víctimas de Violencia Sexual: Aproximación Conceptual y Metodológica*, 2019.

The recommendations on reparation made by truth and reconciliation commissions (TRCs) over time also show that, at first:

reparation programs for victims of flagrant violations of human rights have not dealt with the forms of specific victimization experienced by women, nor have they raised with minimal seriousness what procedural or substantive aspects are outlined as decisive in ensuring that reparation, whether it is material or symbolic, individual or collective, is not done with their backs to the needs, interests or visions of women.³⁹

Their recommendations of TRCs have also shown that the inclusion of women in the debate about reparation has been limited, in many cases, to broadening the catalogue of human rights violations worthy of reparation, so that rape, or, more broadly speaking, SV is not systematically relegated and other, non-sexual gender abuses, are made visible. Nevertheless, it is clear that both approaches are insufficient. The explicit incorporation of a gender perspective in DRPs is needed, not only to achieve reparation for SV, but also to identify all those reparation decisions that can have a differential impact between sexes and gender identities.⁴⁰ Getting to this point means that a more gendered truth naturally calls for, and could enable, a more gendered reparations approach in a transitional justice policy.

The need for a truth-seeking and telling process before reparation is even stronger when the conceptualization and implementation of a DRP are at stake, given that they should respond to key questions that will contribute towards the design of such programmes. These questions may be condensed into the following: What to repair (which violations)? Who to repair (which victims and beneficiaries)? How to repair (which measures)? And, how to implement reparations (including the ways of identification, registrations and the forms of delivery)? As such, answers to the *what, who, how to repair and implement reparations* can be enriched by a comprehensive truth-seeking process and understanding about the causes and consequences of the violence, in light of the broader social, economic, cultural and ethnic context. Approaching these questions from a comprehensive gender-sensitive angle can facilitate a gender-sensitive reparations process – both in its design and implementation.⁴¹

Recognising the existence of discrimination and invisibility of a sector of the population, as well as understanding that human rights violations often take place based on pre-existing situations of inequality (ethnic, social and gender, among others), hierarchical relations, and discrimination should allow a truth-seeking and reparation process to be more comprehensive from a gender-sensitive perspective. Fully scrutinising these in the work of a truth-seeking body, and considering how these factors impact women, girls, men and boys, and members of the LGBTI community

39 Ruth Rubio-Marín, *Mujer y reparación: apuntes para la reflexión*, in J. Guillerot (ed.), *Para no olvidarlas más. Mujeres y reparaciones en el Perú*, Lima, APRODEH-DEMUS-PCS, 2007, p.14.

40 Work is still needed so that the explicit incorporation of a gender perspective in reparations programmes means the explicit incorporation of differential impact between gender identities.

41 Ibid, *Mujer y reparación: apuntes para la reflexión*, in Guillerot, Julie, *Para no olvidarlas más. Mujeres y reparaciones en el Perú*, Lima, APRODEH-DEMUS-PCS, 2007, p.15.

in a different manner,⁴² could help to realise a gender-sensitive approach to reparations and to identify adequate forms of reparation for the differential harms that they suffered. In section 3(A) we explore the minimum that would be needed for truth seeking bodies to fully embrace a gender approach in their work.

While the potential benefits of conducting truth mechanisms prior to reparations has been described, irrespective of sequencing, the incorporation of non-official accounts of truth telling into reparation programmes should also be considered, such as NGO reports on human rights violations. They would be a key mechanism for victims and civil society organisations to participate of the truth telling process, but also could constitute, in themselves, a key form of satisfaction and symbolic acknowledgment of what victims have gone through. Such reports could have particular value if they are taken seriously by diverse transitional justice actors that are involved in the design and implementation of reparation measures, in terms of corroborating victims' claims, but also of parallel interventions, such as development projects and humanitarian assistance. An important example in this regard is the recent establishment of the Inter-ethnic Commission of Truth of the Pacific in Colombia (Comisión Interétnica de la Verdad de la Región del Pacífico - CIVP), which brings together various ethnic organisations and the Catholic Church in the region, which have been documenting the harm caused to the territory and to members of their communities for over 20 years. This Commission signed an agreement in May 2019 with the Colombian Truth Commission so that the work of one can feed into the other.⁴³ This is particularly salient where there is a public reluctance to disclose information to initial State-led mechanisms to address past abuses, given a breakdown in public trust, ensuring that victims are still able to receive formal acknowledgment through reparation programmes. Furthermore, gender-sensitive approaches in the early stages of societal transition, and at a time when truth mechanisms may be carried out, may be hindered by rigid notions of gender sensitivity that are based on assumptions regarding social roles. Therefore, a gender approach must be receptive to the wider social and cultural context and the impact of timing on truth-justice-reparation processes. In a broader sense this also speaks to transformative reparations.

b. Transformative Reparations

A substantial body of literature and soft law has emerged during the last fifteen years making a case for reparations to be transformative.⁴⁴ According to the 2007 Nairobi Declaration, 'reparation must drive post-conflict transformation of socio-cultural injustices, and political

42 Note persons who are lesbian, gay, bisexual, transgender and intersex can also identify as women and men. See Jamie Hagan, *Queering women, peace and security in Colombia*, *Critical Studies on Security*, 5(1) (2017) 125-129, p127.

43 See more on this Commission at: <https://verdadpacifico.org/> accessed on 12 February 2020.

44 See Paul Gready and Simon Robins (eds.), *From Transitional to Transformative Justice*, Cambridge University Press, (2019); Clara Sandoval, *Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition*, in R. Duthie and P. Seils (eds.), *Justice Mosaics* (ICTJ 2017), 166-201; and Rodrigo Uprimny, *Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice*, *Netherlands Quarterly of Human Rights*, 27(4) (2009), 625-647.

and structural inequalities that shape the lives of women and girls.⁴⁵ Equally, former Special Rapporteur on violence against women, Rashida Manjoo, also stated that:

adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strive to have a transformative potential. Reparations should aspire, to the extent possible, to subvert, instead to reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after conflict.⁴⁶

Given the importance of this concept, we would like to outline our position in relation to it.

These two statements aim for diverging goals. The Nairobi Declaration puts reparation at the centre of transformation of socio-cultural injustices and structural inequality, as if it was the most appropriate means to achieve that end. The second statement, by Manjoo, centring on its causes and consequences, is more nuanced. It recognises that reparation could not fully capture social transformation but that it can contribute to it. This approach has been acknowledged by the 2014 Guidance Note of the Secretary General on Reparations for Conflict-Related Sexual Violence, when indicating that 'Reparations should strive to be transformative, including in design, implementation and impact.'⁴⁷ We believe that the difference between these two positions is significant to victims. There is a distinction to be made between what could be achieved through reparation and what will be achieved, and it is crucial not to raise unfounded expectations of the effects of reparations amongst victims. Indeed, there is a substantial gap between the theory of reparation and their implementation.⁴⁸ The gap is even more critical in relation to persons that find themselves in a situation of vulnerability, such as victims of sexual violence, as they face stigma, ostracism and silence. As a result, these victims can often be marginalised in reparation debates and benefits. Reparations' designs and debates also struggle to include and fulfil a gender-sensitive approach for different reasons: from the presence of a masculine culture that invisibilises SGBV against women, men, girls and boys and, even worse, that also criminalises sexual violence against members of the LGBTI community, to the failure of States to set aside sufficient financial resources to fully develop such an approach. In light of these limitations, the concept of transformative reparation needs to be examined. Victims are entitled to demand gender-sensitive reparation. However, it is important to be realistic and informed on what has been achieved, what could be achieved, and the many challenges that will need to be overcome to get the desired goals. Civil society organisations, both local and international, can help to share practices and accompaniment, as well as provide much needed legal, psychosocial support and assistance to victims so that they can fulfil their right to reparation.

The DRPs we have analysed in our research project have aimed at being transformative, at least on paper, and have sought to develop a gender-sensitive approach to reparation. They include

45 Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation, 2007.
 46 Report of the Special Rapporteur, A/HRC/21/46, *supra*, n. 11, para.31.
 47 Guidance Note of the Secretary General, *supra*, n. 5, p. 9.
 48 Reports of the Special Rapporteur on the Promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 14 October 2014, para. 6.

some holistic dimensions to that end, such as various forms of reparation, as in the cases of Guatemala, Colombia and Peru. They have even emphasised, as in the case of Colombia, the need for the process and the forms of reparation to have a gender dimension.⁴⁹ Nevertheless, while the rhetoric articulates these words, practice fails to deliver on them. Of these three domestic reparation programmes, it is the Colombian one, under Law 1448/2011, known at the Victims and Land Restitution Law (Ley de Víctimas y Restitución de Tierras) that includes the most ambitious approach to transformative reparation. Indeed, the Law indicates that 'victims have a right to be redressed in an adequate, differential, transformative and effective manner for the harm they have suffered.'⁵⁰ The Law does not define what it means by "transformative", however, at least three features transpire when reading it: a comprehensive approach to various forms of reparation giving priority to certain victims over others; the existence of both assistance and reparation measures that coexist in time; and a differential approach aimed at providing special measures for particular victims, such as women and victims of sexual violence. This is to facilitate access to effective reparation, including forms of empowerment, such as preferential access to land restitution and productive projects. Nevertheless, despite its finesse on paper, after more than eight years of implementation of this Law, just over 10% of eligible victims have received any form of reparation, and consideration of gender and sexual violence is only a recent occurrence, as shown by the late adoption, in 2018, of the Strategy to provide reparation to victims of sexual violence in Colombia.⁵¹

We maintain that any consideration of transformative reparation needs to consider how already established DRPs and the forms of reparation they include for victims of gender based violence, including sexual violence, affect women, men, girls and boys, and members of the LGBTI community, as different measures impact victims differently depending on their socio-economic and cultural context, as well as the harms they have suffered. In essence, DRPs should consider how gender intersects with other forms of discrimination or identities (i.e. intersectionality) that can amount to different experiences of harm and perceptions on adequate repair. This task is yet to take place but addressing it could shed light on how best to craft reparations with a gender approach, and whether and how such reparations could have a transformative dimension. Our fieldwork and interviews with different stakeholders, including victims, indicate that there is no evidence to maintain that reparations could fundamentally transform societies in relation to the way it addresses gender.

However, based on our research project and our own expertise, we believe that a gender-sensitive approach to reparation could trigger important opportunities, ones that, even if small, could contribute to broader social change from a gender perspective.⁵² For example, truth recovery mechanisms and DRPs could shed light on and try to respond to structures of exclusion in

49 Clara Sandoval and Camilo Sanchez, Go Big or Go Home? Lessons Learned from the Colombian Victims' Reparations System, in C. Ferstman and M. Goetz (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity*, (Brill, 2020), 547-570, p.553.
 50 Victims and Land Restitution Law, Article 25.
 51 Sandoval and Sanchez, *supra*, n.54, and Unidad para las Víctimas, Estrategia de Reparación Integral a Mujeres víctimas de Violencia Sexual, 2018, https://www.minjusticia.gov.co/Portals/0/Tejiendo_Justicia/Publicaciones/Mujeres%20Victimas.pdf
 52 Sandoval, 2017, *supra*, n. 49, p.180.

society for women and other gender identities. Measures could be identified that may well help women to overcome such challenges in their communities and in their families, as well as for members of the LGBTI community and/or for men. For example, giving women access to economic activities they desire could enhance their autonomy and contribute to challenging existing patriarchal structures. The same applies for educational measures that could provide the knowledge and abilities/skills needed for them to have a presence in the public sphere.

With all reparation measures, there remains a need to exercise cultural sensitivity and minimise re-victimisation within families or communities, and to avoid promoting or propagating restrictions that are socially imposed on persons because of their gender identity. This ultimately requires time and broader cultural changes in society that go beyond the power and effect of reparations. Reparation programmes recommended by the truth commissions of Peru, Sierra Leone and East Timor, offer useful examples in relation to recommendations for transformation. Such programmes included the restitution of the right to identity,⁵³ and the possibility to ask for a declaration of ‘absence due to disappearance’ in order to overcome the legal limbo of disappearance, a declaration that allows survivors to inherit or to dispose of the property of the disappeared.⁵⁴ They also recommended: rehabilitation for physical and mental health, educational measures in terms of literacy or access to schooling for adults, or training of people on productive aspects or access to micro-credits.⁵⁵ All these types of measures have the potential to contribute to a transformative impact on women’s lives, if designed bearing in mind issues such as their preferences on support.

We perhaps also need to shift our understanding on transformation and reparations for SGBV. Transformation is a continuous process that might be reversed or undone if cessation of support occurs at a vital time in a person’s life, emphasising that individualised transformation takes on a different trajectory to structural transformation (or outcomes may be different). Among the medical actors and victims we interviewed, views were mixed on whether a person can be “transformed”, and if, by themselves, reparations were an appropriate vehicle for societal transformation for SV.⁵⁶ There are clear benefits of a transformative approach, if it helps to embed gender-sensitivity and to remove discrimination in how victims are treated within the culture of institutions, and, if the laws do not criminalise victims’ choices to healthcare, such as concerning contraception, and, importantly, that such societal change has a meaningful effect on individual victims. Healthcare providers interviewed in this project highlighted that psychological (or spiritual) support is often an important precursor to individuals feeling worthy enough to receive medical or surgical treatments. Once the restraints of self-stigma are released, this can have

53 Comisión de la Verdad y Reconciliación, Informe Final, Tomo IX, Lima-Perú, 2003, p. 192. Sierra Leone Truth and Reconciliation Commission, Report of the Sierra Leone Truth and Reconciliation Commission, Vol.2, Freetown, GCL, 2004, p250-257.

54 Comisión de la Verdad y Reconciliación, Informe Final, Tomo IX, Lima-Perú, 2003, p.190.

55 Ibid. p.175-184; 184-186, and 197. Sierra Leone Truth and Reconciliation Commission, Report of the Sierra Leone Truth and Reconciliation Commission, Vol.2, Freetown, GCL, 2004, p250-257. Commission for Reception, Truth and Reconciliation in East Timor, Final Report, Dili, CAVR; 2005, part. 11.

56 Interviews include: CO0205, Bogotá, September 2018; CO0206, Bogotá, September 2018; CO092, Bogotá (by telephone), October 2018; P04 Lima, May 2019; P14, Lima, May 2019; UG0177, Gulu, July 2018; UG0179, Gulu, July 2018; UG0180, Kampala, July 2018.

a transformative, multiplying effect, whereby victims adopt positive health seeking behaviours to improve life-limiting medical conditions.⁵⁷ However, the over-emphasis on “success stories” in relation to SV can neglect those who feel their life has been negatively transformed despite support and medical interventions. As such, the response to SV can eclipse other types of enduring violence, extreme poverty and governance issues, that have significant impacts on a person’s daily life and thus limit positive transformation.⁵⁸ In sum, we meaningful transformation is more individualised than structural, and is multi-dimensional and non-linear when it comes to reparations, which can be difficult to evaluate. Relatedly, even when structural changes occur, such as legislation on gender equality or reproductive rights, pervasive power imbalances and cultural norms may inhibit implementation, or effects in practice, for many years.

In order for reparations to increase their potential to modestly contribute to transformation, more work is needed internally - so that the symbolic, material, individual and collective measures given by a DRP reinforce each other - and externally - mechanisms that go beyond transitional justice ones, such as other forms of social intervention, for example, peace building, development and humanitarian assistance. As for the internal dimension, rehabilitation is of the essence here. The previous paragraph already demonstrates the importance and complexities of providing rehabilitation to victims within the health sphere, but it also shows the potential changes it can trigger for victims. If rehabilitation is also projected beyond the health sphere, so as to embrace education, vocational services, and certain core elements to provide the possibility of reparation ‘with dignity’ for victims, then this form of reparation could deliver more of its untapped potential and could have an impact in forming foundations of society that address the root causes of gender violence. As for guarantees of non-repetition, they can help to address structural causes of violations that allowed conflict and repression, by assisting in identifying those that trigger discrimination and inequality of women and other identities. Nevertheless, transitional justice experiences are yet to deliver on guarantees of non-repetition with a gender angle in order to subvert inequality and are often outside DRPs. For instance, reparations, in general, can only narrowly distribute resources to eligible victims and so risk detracting from addressing broader socio-economic inequalities.⁵⁹ To this end, transitional justice alone is not adequately equipped to tackle structural inequalities. Thus, it may be worth viewing guarantees of non-repetition as overlapping with non-transitional justice mechanisms that address gender inequality, such as economic opportunity and political empowerment, for structural transformation.⁶⁰

To-date few truth commissions have systematically addressed the root cause of inequality of women as a cause of conflict, and, therefore, the need to address it. However, the work of Colombia’s truth commission is currently ongoing having a historic opportunity to shed light on this, and the Centre for Historical Memory has published various reports on the violence that

57 Interviews: UG 0179, Gulu, July 2018; UG 0176, Gulu, July 2019.

58 D Hilhorst, and N Douma, Beyond the hype? The response to sexual violence in the Democratic Republic of the Congo in 2011 and 2014, *Disasters*, 42 (Suppl 1) (2018) 79–98, p.80.

59 Lars Waldorf, Anticipating the Past: Transitional Justice and Socio-Economic Wrongs, *Social & Legal Studies*, 21(2), (2012), 171–186.

60 Ibid., p.178; The World Economic Forum, Insight Report, The Global Gender Gap Report 2020, p5 and p17; Bila Sorj, Connecting economic and social policy: new approaches to gender equality, *Global Social Policy*, 16(1), (2016) 105–108.

women and the LGBTI community have experienced in the country that deal or at least shed light on inequality and related issues.⁶¹ As for development, the complex relationship that exists between it and collective reparation, or between the provision of rehabilitation measures related to health and education, should be considered and harmonised in tandem with clear public policies on how best to fulfil the right to education, health, and other socio-economic rights. Finding ways to harmonise interventions could maximise the potential of each intervention to contribute to transformations for women, girls, men and boys, and members of the LGBTI community that have suffered violations as a result of gender violence. The coexistence of these measures could also add to that process. Yet again, this is an area where data on existing experiences is missing and where reflection is urgently needed. Nonetheless, in the case of Colombia, the peace agreement between the government and the Fuerzas Armadas Revolucionarias de Colombia (FARC) constitutes an important attempt to make parallel interventions work together in a way where, at least, the situation of victims that have been most disadvantaged in the conflict is transformed. The peace agreement has prioritised 170 municipalities in the country where violence, poverty, exclusion and inequality have been rampant, and where specific development programmes, a total of 16, would be designed and implemented.⁶² However, reparations in the country, under the Victims and Land Restitution Law, would also need to act in a complementary manner to the development projects in those places. It is too early to assess whether the approach is delivering results and, more importantly, if it has been designed and implemented with a gender-sensitive approach and whether the approach has been able to capture adequately sexual violence as a form of gender-based violence.

3. The Reparation Process

The process of claiming and engaging with a DRP or judicial mechanism often entails a victim of sexual or gender-based violence making initial contact through a State institution. This requires the State's best efforts to ensure that the process does not cause further harm to victims. As such the reparation process offers a unique opportunity, from its outset, to provide reparative benefits to victims through treating them with respect and dignity, as well as facilitating the fast tracking, if they are deemed eligible, of access to assistance or urgent reparation (such as medical treatment), while their full reparations package is being determined. This section considers the reparation process and institutions involved in it, whether through a series of discrete reparation service pathways or in one administrative programme. We begin by showing how the work of DRPs can take a gender-sensitive approach, before turning to the complementary process of

61 Centro de Memoria Histórica, *Aniquilar la Diferencia: Lesbianas, Gays, Bisexuales y Transgeneristas en el marco del Conflicto Armado* (2015); and *Género y Memoria Histórica: Balance de la Contribución del CNMH al Esclarecimiento Histórico and La Guerra inscrita en el Cuerpo* (2017).

62 President of Colombia, Decreto 893/2017, through which the programmes of development with a territorial approach are created, available at: <http://es.presidencia.gov.co/normativa/normativa/DECRETO%20893%20DEL%2028%20DE%20MAYO%20DE%202017.pdf>, accessed on 12 February 2020. See also UNDP, "La Reparación de las víctimas es nuestro compromiso," 12 November 2019, available at: <https://www.co.undp.org/content/colombia/es/home/presscenter/articles/2019/11/la-reparacion-de-las-victimas-es-nuestro-compromiso.html>

providing victims with reparation while making them feel that they are being treated with dignity and as rights holders.

a. How to Build a Gender-sensitive Reparative Process?

Crafting gender-sensitive reparations depends to a great extent on the ability of transitional justice bodies, including DRPs and truth commissions, to gender sensitise their work, breaking the silence that women, men, girls, boys and members of the LGBTI community victims of SV face.⁶³ Their contribution can assist in more accurately illuminating the harms and ways forward for reparation programmes and peacebuilding. To this end, and based on our fieldwork and detailed consideration of our findings, we believe that the following tools could help to build a gender-sensitive process:

- ▶ The creation of a specialised research team within the body, which should include consultants, experts and practitioners – with efforts to include women, men and other non-binary gender identities, to bring their own views and experiences to their work - specialized in gender and SV. Gender balance alone is not enough to apply a sensitive analysis to gender issues. The recruitment process and training should safeguard against entrenched gender biases of staff and voluntary team members.
- ▶ Adequate training for the staff of the Transitional Justice mechanism (outreach workers, administrative staff, adjudicators on applications, and medical staff) on how to take a gender-sensitive approach, and of the impact of SGBV, in order to seek a transversal and adequate assessment and analysis of the different sources of information. This would permit engendering the redaction of the report related to SGBV, overcoming prejudices and maintaining objectivity. Training of staff should also include providing them with relevant information on the history of sexual and gender-based violence in the country.
- ▶ Interviewers and staff in charge of the database require appropriate training on the collection of testimonies and interviews. Staff should be prepared to deal with the reluctance and hesitancy of victims to talk. Communication skills training is key (on deciphering covert messages; knowing the implications of psychological, social and political coercion; how to pay special attention to behaviour and body language; examining the internal and external coherence of testimony). At the same time, interviewers should not underestimate the therapeutic value of the interview. However, interviews with this purpose should not be expected, or promised, to be therapeutic, as healing effects cannot be predicted and/or new harms completely avoided, but rather interview techniques should seek to minimise harm during the process, and access to adequate counselling services should be available before, during and after interviews. It is also important to clarify to the declarants the purpose and use of the information collected in the interview, its parameters and the limits of the delivery of reparations measures, in order to avoid the creation of false expectations. An environment of trust should also be created so that victims can tell their stories and (re)claim their dignity, or that of other victims, their families and their communities,

63 From lessons learned on how to incorporate gender into truth commissions see: Vasuki Nesiah et al. *Truth Commissions and Gender: Principles, Policies and Procedures*, (ICTJ 2006).

through an attitude of respectful and attentive listening.⁶⁴ However, a person should not be pressured into divulging any more information than they wish to. Personnel should also contemplate the need for victims to receive a pre and post interview accompaniment to channel the feelings and emotions that may be generated by speaking about a personal trauma. This is an important example of where urgent reparations could be instigated in the life of a truth commission. If victims in need of physical and/or mental health rehabilitation services are identified, this is an area where such services could already be made available to the victim.

- ▶ Emotional support should be available for personnel/professionals, particularly for those involved in the interviewing or statement taking process. Personnel obtaining or reviewing the testimony of applicants can be affected emotionally as a result of the nature of the facts they hear about and the suffering of those they interview. Such vicarious trauma is often increased when personnel feel unable to adequately help the victims. However, there may be a shortage of clinical psychologists and other mental health specialists to support victims and professionals in post-conflict settings, at a time when there is an overall increase in mental health needs.⁶⁵ Other measures should also be considered, such as explicit wellbeing policies, that allow staff to take extra leave, and that recommends and provides them with access to exercise or similar activities beneficial to their health.
- ▶ Technical support should be available for personnel/professionals as they often face problems such as database malfunctions, uncertainty about evidence meeting thresholds, and/or difficulties in deciphering testimonies, such as accents of victims during interviews, or handwriting of applicants on forms. It is also important that statement takers feel safe to conduct their tasks and are not coerced or threatened into filling in forms with incorrect or false information.⁶⁶ As such, supervision, mentoring and peer-support systems that are gender-sensitive can provide a space to discuss any challenges and provide advice on solutions.
- ▶ Truth commissions can also adopt complementing methods to statement taking in order to capture the diversity of gendered experiences of violence and assist in data collection for reparation claims. For example, gender hearings, household or organisational surveys, artistic representations and oral histories. While these methods may lack the standardisation required in registering for reparation, they can be part of a wider communication strategy and provide a foothold to expanding or incorporating alternative forms of testimony. Testimony that can, at least, be triangulated or used as supporting evidence in reparation applications, or, if deemed acceptable, provide automatic qualification for reparations. This will depend on truth commissions being operational before or during the time period of registration for reparation. Furthermore, each form will require training/expertise on the methodological approach alongside gender-specific training.

64 While the level of data acquisition is less, tips and techniques on creating a conducive environment when interviewing victims of sexual violence can be found in: Sara Ferro Ribeiro and Danaé van der Straten Ponthoz on behalf of the UK Foreign & Commonwealth Office. *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict Best Practice on the Documentation of Sexual Violence as a Crime or Violation of International Law*. (Second Edition, FCO, 2017), p.168-169.

65 World Health Organization, *Building Back Better Sustainable Mental Health Care after Emergencies*, 2013, p16, p17 and p52.

66 Applicants (and personnel if taking the testimony) should sign a statement of truthfulness.

- ▶ The design of a database that records not only rape but other forms of sexual violence, the violation of sexual and reproductive rights, secondary harms, such as forced pregnancy, forced abortion, and forced motherhood or parenthood, and their possible impact on the victim's relations with their environment (partner, family, community), noting the various harms that ensue as a result of these violations. Resources permitting, there may be the possibility to later add to statements, depending on the cessation of the truth commission or relevant judicial proceedings. A specific gender-sensitive approach will also analyse the gendered impact of non-sexual and reproductive violence. In general, there may need to be inter-organisation database sharing in order to minimise repeated assessment of victims, while, at the same time, ensuring data protection and the confidentiality of claimants' identities.
- ▶ On evidence and proof of violations that took place and who was harmed by them, the staff of truth commissions should rely on extensive lists of documents, including official and extra-official documents; certificates and medical histories made available to them by victims; photographs; testimonies; mental health status reports given by experts (only with the consent of the person being assessed); the reconstruction of general patterns in the commission of certain violations to mount an adequate system of presumptions and indicia, as well as on the information provided by possible informants, not limited to the victim and eyewitnesses, but also newspaper and NGO reports. The burden of proof should be on a balance of probabilities with presumptions of "good faith" to accept certain evidence for SGBV at face value.⁶⁷ Such a balance is required to ensure transparency and confidence in the DRP in order to minimise corruption but without being burdensome to victims who may have lost all documentation or be stigmatised for coming forward at this time.
- ▶ The design of an outreach strategy, clearly articulated with civil society organisations, that provide networks of support to victims of SGBV, aimed specially to inform women, girls, men and boys, and members of the LGBTI community, of the importance and means by which to come forward in conditions of safety, dignity and confidentiality, to give their testimonies and narrate their own experiences. It may be worth considering site-specific "safe spaces" in challenging environments, such as those connected to healthcare and counselling centres.⁶⁸ As such, safe spaces can provide information on issues related to the right to reparation, and may help victims to access support and to apply for reparations.⁶⁹ There should also be a carefully crafted media strategy that projects the gender-sensitive and dignified approach being used, in order to reassure those who wish to come forward.
- ▶ Accompaniment and supporting services for individuals considering participation should be implemented from the time of the outreach strategy. Preparatory or supporting materials to assist victims to complete some forms, or statement takers to do this for them, should be readily available. For instance, an explanation document and audio resource (in relevant languages) on the process should be provided, explaining the purpose of the questions in order to minimise confusion or offence regarding sensitive topics, such as SV. This should be accompanied with answers to "frequently asked questions" and information about the

67 Victims and Land Restitution Law, Article 5.

68 Şevkat Bahar Özvarış, and Hedvig Hricak, Safe spaces for women in challenging environments, *The Lancet* (8) (2019), 1004-1005.

69 United Nations Population Fund, *Women and Girls Safe Spaces. A guidance note on lessons learned from the Syrian crisis*, March 2015, p5.

services available to help victims through the process, including who to contact in the voluntary sector, and details of rehabilitation services.

These core elements should allow the sensitisation of men, women, children, persons with a different gender identity, victims and witnesses of SGBV, as well as the personnel of the institutions in charge. Such “tools” facilitate the evaluation and analysis of the information collected that includes and makes visible the necessary sexual-gender elements. In addition, many of the elements described are transferable to the registration of victims for reparation when the application includes the method of statement taking or semi-structured interviews.

b. Victim Participation and Consultation in the Design, Implementation and Monitoring of a Domestic Reparation Programme with a Gender Dimension

Victims should participate in the design, implementation and monitoring of any reparation programme where they ought to be beneficiaries. This is not only to fulfil their right to reparation but also to fine-tune measures so that they are adequate and effective when addressing harms. Participation is also an important indicator of political legitimacy,⁷⁰ and essential to rebuilding trust in State institutions. Victims need to know that they have rights, that their voice matters to the State, and their views will be/are duly taken into account as equal citizens.⁷¹

It is important to distinguish between participation and consultation of victims in the design, implementation and monitoring of a DRP. Participation refers to the different ways in which victims can both know about their rights, share their views, influence outcomes or decide, side-by-side with decision makers, on how a DRP would be designed, implemented and/or monitored. Therefore, participation denotes various ways in which victims can take part in the process. However, as noted by Arnstein, not all levels of participation include the same degree of influence on decision-making.⁷² As a general rule, victims can present their interests at different stages to help inform outcomes that affect them. On the other hand, consultation is a form of participation where victims are given the opportunity and the means to share their views on specific issues related to the design, implementation or monitoring of a DRP, but usually on a temporary basis or a single instance.⁷³ Victims may need legal representatives, or for their views and concerns to be articulated by victims’ groups leaders, to engage effectively and meaningfully in shaping such processes and outcomes.⁷⁴

70 See Principle 32, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005.

71 De Greiff *supra* n.21.

72 Sherry Arnstein, A ladder of citizen participation, *Journal of the American Institute of Planners*, 35 (4), July 1969, pp. 216-224, in Andrea Cornwall (Ed.), *The Participation Reader*, Zed Books, (2011).

73 *Ibid.*, p.4.

74 Rachel Killean and Luke Moffett, Victim Legal Representation before the ICC and ECCC, *Journal of International Criminal Justice*, 15(4) (2017) 713–740. See also Kieran McEvoy and Kirsten McConnachie, Victims and Transitional Justice: Voice, Agency and Blame, *Social and Legal Studies* 22(4) (2013), 489–513.

Victim participation should be clearly set out in regulations or the legal framework of the DRP so that victims know their rights and their role in proceedings and processes. Particular provision should be made for vulnerable victims so that there is effective outreach, representation, safeguarding and protective measures that can enable their views and concerns to be considered, and measures appropriately crafted for their harm. At the same time victims should not be penalised for taking a more indirect or non-engaged role in these processes, beyond filling in an application form. There is a need for a balance to ensure that those vulnerable or quiet victims are not drowned out by the voices of the more vocal. Participatory norms and regulations in a DRP should be attuned to the preference of victims to participate, which may differ for each victim, so an element of choice and inclusion should be made. Ultimately victim participation is about ensuring victims feel ownership, confidence and trust in the process to deliver reparations to them.

Equally it is important to consider what has happened in practice and what the outcome has been, particularly in relation to victims of SV, not only women and girls but also men and boys and members of the LGBTI community.⁷⁵ Indeed, ‘not having any participation in discussions about reparations may introduce gender bias into the shaping of reparations policies’⁷⁶ and this can be easily seen in relation to male victims and LGBTI victims of SV.

During our fieldwork, we were able to note that some women have been able to participate but are not always given clarity as to what the process is meant to achieve, similarly, women are not always allowed to have a clear effect or impact on the way forms of reparation, or their delivery, are determined. Male victims of sexual violence, as well as members of the LGBTI community, are often excluded in these processes because the violence they have suffered is not recognised and/or is invisibilised. This problem is accentuated by the fact that often they do not come forward to seek justice and reparation as, in many cases, they fear that their “manhood” will be taken away from them. Also, there is a real threat of being imprisoned as a result of male to male sexual violence, or as a result of being gay or a member of the LGBTI community, which makes it a crime under domestic law in various parts of the world. As one civil society actor told us, one male victim of sexual violence who came forward for medical assistance was stigmatised by a doctor who rejected his treatment for anal prolapse repair, as he was a ‘homosexual’ and would do it again.⁷⁷ This example, alongside broader discrimination and biases, create barriers as well as disincentives for victims coming forward that needs to be factored into the effectiveness of victim participation and the importance of training of staff and monitoring. In the DRPs we have studied, victims have had some opportunities to participate. However, participation in those processes remains largely embryonic and one-off in relation to gender-based violence and sexual violence.

75 Report of the Special Rapporteur, *supra* n.21, para. 63.

76 *Ibid.*

77 Interview UG11, Uganda, July 2011.

i. Victims Participation and the Role of Civil Society Organisations

Victims often require the expertise and experience of civil society organisations to mobilise other victims, articulate and advocate their demands so that they can be incorporated into the policy and legal language of institutions, as well as to facilitate the direct participation of victims in reparation processes.⁷⁸ At the same time, such organisations' role in victim participation can be time-consuming and resource-intensive, with no guarantee of a positive outcome, or can be unsustainable over a long period of time without donor support. However, they can function as key interlocutors on participation issues, as demonstrated in the fieldwork we carried out in Guatemala, Peru and Colombia.

Guatemala

The Programa Nacional de Resarcimiento (PNR) in Guatemala was established in 2003 through a Government Agreement (Acuerdo Gubernativo) to materialise the promises on reparation made in the Guatemalan Peace Agreements. Women participated in the various transitional justice initiatives and even during the peace negotiations. Indeed, in Guatemala, some of the most important and influential Guatemalan NGOs have been created by women. For example, GAM (Grupo de Apoyo Mutuo) was established in 1984 by women searching for the whereabouts of their loved ones who had disappeared during the armed conflict.⁷⁹ These and other organisations played a key role during the design of the PNR. However, these women were not talking about the harms they had suffered as women and for being women, but rather about the harms suffered by those they loved. This was reflected in the proposals they presented on reparation, that 'violence against women was not given specific attention in any of these proposals.'⁸⁰

Importantly, SV was not unnoticed in transitional justice efforts in Guatemala. Indeed, both the reports of the Commission on Historical Clarification in 1999 (Comisión de Esclarecimiento Histórico – CEH), as well as the report of the Church, Guatemala Nunca Más in 1998, included chapters on gender violence, including sexual violence. Nevertheless, the level of scrutiny that sexual violence had, was insufficient to make it clearly visible that 99% of the victims of sexual violence were women, and to ensure the adequacy of recommendations on how to redress the various harms caused by different forms of sexual violence, including rape.

The visibilisation of SV, even in the absence of women's groups considering the gender dimensions of the violations they suffered, had an impact in the way the PNR was designed, including, specifically, victims of sexual violence and rape.⁸¹ However, forms of sexual violence such as sexual slavery, amputation and mutilation of sexual organs, and forced pregnancy, were omitted

78 Killean and Moffett, *supra*, n.80, p.723.

79 Such is also the case of CONAVIGUA (Commission Nacional de Viudas de Guatemala) in 1988 or of FAMDEGUA (Familiares de Detenidos-Desaparecidos de Guatemala) in 1992.

80 Claudia Paz y Paz, Guatemala: Gender and Reparations for Human Rights Violations, in R. Rubio-Marin (ed.) *What happened to the Women? Gender and Reparations for Human Rights Violations*, (New York, Social Science Research Council, 2006), 92-135, p.103.

81 Executive Decree 619-2005.

from the text although they could be read as part of the term "sexual violence". Children born out of rape were also not explicitly included in the PNR and remain a largely undocumented harm in Guatemala.⁸² While in theory the PNR is a comprehensive reparation programme, much is yet to be done to ensure its effective implementation. According to Government Agreement 539-2013, one that extended the period of work of the PNR and reformed its rules, victims are meant to participate in the implementation process, at least keeping an eye on the projects, the results, activities carried out, etc. Through the design of the PNR, a National Commission of Reparation (Comisión Nacional de Resarcimiento) is the highest body responsible for reparations within it. Victims organisations are meant to appoint representatives that would participate in meetings four times a year with the Commission so as to be informed and consulted on issues such as the operational plan of the PNR, the budget and its implementation. This is not meant to be understood as simply informing victims organisations about the work of the PNR, but should also 'consult with communities and victims organisations, of indigenous peoples and human rights, the forms of reparation to be implemented.'⁸³ The PNR also indicated that the Commission should call upon organisations, committees and victims associations to trigger processes of information and consultation.⁸⁴ However, as noted by Martinez and Gómez, 'the Commission has not consulted victims organisations so far and victims do not have any participation in the definition of the programmes nor in the decisions of the PNR.'⁸⁵ This is part due to divisions amongst civil society groups as who to designate as a representative.⁸⁶

The lack of participation of victims in the implementation of the PNR, as well as the rampant impunity that has been present in Guatemala in relation to the human rights violations that took place during the armed conflict, prompted women organisations like Mujeres Transformando el Mundo (Women Transforming the World), to litigate at the domestic level cases like *Sepur Zarco*, a case where 15 indigenous grandmothers went to Court in Guatemala claiming that they had been subjected to forced labour and sexual slavery at the military rest outpost that was established in 1982 in Sepur Zarco. Two former military officers were convicted of crimes against humanity on the counts of rape, murder and slavery. The judgment made very clear the context under which women were subjected to such atrocious crimes and revealed the magnitude of the problem, ordering reparations against the convicted individuals and the Guatemalan State: this case is discussed further below.⁸⁷

82 Alison Crosby and M. Brinton, Lykes, *Beyond Repair?: Mayan Women's Protagonism in the Aftermath of Genocidal Harm*, Rutgers University Press (2019).

83 Government Agreement 539-2013, 27 December 2013, article 4 Bis.

84 Ibid, article 5 e and f.

85 Denis Martinez and Luisa Gomez, *Las Reparaciones para víctimas del Conflicto Armado en Guatemala: Una Promesa por Cumplir*, 2019, p.26, available at: <https://reparations.qub.ac.uk/assets/uploads/Guatemalan-Report-ESP-LR-1.pdf>

86 Paz y Paz *supra* n. 86, p.105.

87 Judgement C-01076-2012-00021, Tribunal Primero de Sentencia Penal, Narcoactividad y Delitos contra el Ambiente, Judge Iris Yassmin Barrios Aguilar, 26 February 2016.

Peru

In the case of Peru, as was the case in Guatemala, feminist organisations focused their demands on the sexual and reproductive rights of women, distancing themselves from the political violence context. Human rights NGOs provided support to the victims of the conflict, focusing on extra-judicial killings, disappearances, and torture in detention, but they did not look at the gender dimensions of the various human rights violations that took place against women. Organisations of victims and their relatives, mainly dominated by women were organized based on truth and justice demands for their relatives, which they claimed as 'mothers, daughters, wives or sisters. Whilst in the case of Guatemala, talk on reparation was present from the start of peace negotiations and are reflected in the peace agreement, with Peru reference to reparations happened with the creation of the truth and reconciliation commission.⁸⁸ Nevertheless, reparation was not a priority topic at the beginning of the work of the TRC. Indeed, it only arose during the second half of its work, when the recommendations had to be identified.⁸⁹ This highlights the missed opportunities to connect these two transitional justice mechanisms at a pivotal stage of the TRC's work, and to strengthen the position of any gender-sensitive reparation recommendations.

To this it must be added that the TRC's strategies did not include working directly with organisations of affected people, based on the assumption that they were dispersed and not very well coordinated, and that human rights NGOs could serve as intermediaries. However, while the Commission was collecting testimonies and holding public hearings, the organisations of affected people began to take on a more active role. Throughout a long period of lobbying they began to state their demands and proposals, reinforcing their role as valid interlocutors before the TRC despite their weakness and representation problems. Thus, it became increasingly clear that there was a need to create opportunities for dialogue, consultation and feedback, which would especially contribute to drawing up the recommendations for reparation.⁹⁰

Upon drafting its reparations proposals, in some instances the TRC Team on Reparations encouraged participation and consultation of human rights NGOs and victims organizations. The TRC consulted victims across the country on reparation through a partnership with the Coordinadora Nacional de Derechos Humanos, an umbrella NGO that brings together many civil society organisations in Peru, allowing the participation of more than 200 organisations

88 Prior to the setting up of the TRC the agendas of the organizations of affected people focused on the need to know what had happened to their relatives and on the investigation and punishment of those responsible. There was no clear demand for reparations. Their demands, which sought attention to the consequences of the violence, were not expressed in terms of HR violations and the consequent State obligation to repair the victims but were essentially centred on their basic needs (regarding health, education, employment or infrastructure). In the discourse of the organizations of affected people, the expectation of reparation as a right of the victims and a State obligation appeared parallel to the creation of the CVR' - Julie Guillerot and Lisa Magarrell, *Reparaciones en la transición peruana. Memorias de un proceso inacabado*, APRODEH-ICTJ-OXFAM (2006), Lima, Perú, p.101-102.

89 Interview P01, Lima, 4 May 2019.

90 More on the role of civil society in the process of drawing up the PIR can be found in Guillerot and Magarrell, *supra* n.94; and Cristián Correa, Julie Guillerot and Lisa Magarrell, Reparations and Victim Participation: A Look at the Truth Commission Experience, in C. Ferstman, M. Goetz and A. Stephens (eds.) *Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making*, Martinus Nijhoff Publishers, (2008), 385-414.

of victims.⁹¹ The process led to the organisation of an international meeting, under the title Civil Society and Truth Commissions: Toward comprehensive reparation for the victims and the follow-up of the TRC recommendations, in the city of Ayacucho, from 6 to 9 November 2002, and approval of the document called "Basic criteria for the design of a reparations program in Peru" by 25 institutions, both human rights NGOs and organisations of affected people, and in the presence of several members of the TRC. Indeed this document, based on the joint report work of the Asociación Pro Derechos Humanos (APRODEH) and the ICTJ "Parameters for Designing a Reparations Program in Peru", enabled the correction of the first approach of the Truth Commission to the topic which had more emphasis on victims' needs than on the right to reparation: this alternative proposal for the TRC's consideration included a rights based approach to reparation.⁹²

By the end of its mandate, under pressure from civil society, the TRC agreed to organise a workshop on the proposal for a national reparations plan that it was producing. This decision proved to be an important landmark in the process as it meant that the affected people were acknowledged as actors and allies and that their capacity to make proposals and contributions was also recognized.⁹³ The consultation took place in Chaclacayo, outside Lima, on 4 to 6 April 2003, and congregated over 100 people, 70 of whom were representatives of victims organisations and 36 members of NGOs – men and women. Of particular relevance at this meeting was discussion about education as a form of reparation, a topic that had not been included by the GPIP and that was finally included as part of the forms of reparation to be given by the DRP.⁹⁴ According to one civil society organisation member, the 'DRP was the result of active participation of victims.'⁹⁵ In addition throughout this consultation process, the approach to gender issues was limited to organising workshops described as having a "gender focus", which simply meant they were aimed at men or women only, as opposed to other workshops that were open to both.

The participation of women in reparations in Peru⁹⁶, evidenced in their spontaneous claims, were not always connected to the violations suffered, but rather to a needs-based approach, and this is perhaps related to the fact that the "profile" of the victims in Peru coincides with the most marginalised population. Women were demanding what they lacked as a vulnerable population, one that found itself in a situation of poverty: it is only after interventions by NGOs and the organization of a series of workshops across the country that the difference between development measures - due to all citizens - and reparation measures – due specifically to victims

91 Interview P01, Lima, May 2019.

92 Ibid.

93 Guillerot, and Magarrell *supra* n.94, p.106.

94 Ibid.

95 Interview P13, Lima, May 2019.

96 Julie Guillerot, Linking Gender and Reparations in Peru: A Failed Opportunity, in R. Rubio-Marín (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, (New York, Social Science Research Council, 2006), 136-183.

for the human rights violations suffered - starts to be clearer.⁹⁷ Indeed, from fieldwork carried out in Peru, which was also consistent across other case sites in the project, women mainly demanded health services (physical or mental) for themselves and their families, education for their children, and employment opportunities.⁹⁸

As the TRC finished its work, President Toledo set up the High-level Multisectoral Commission in charge of the State's Actions and Policies Related to Peace, Collective Reparations and National Reconciliation (CMAN). However, in practice, the CMAN has particularly focused its work on reparation, not just on collective reparations.⁹⁹ This Commission, besides representatives from State's institutions, includes various civil society stakeholders including la Coordinadora Nacional de Derechos Humanos, as well as other bodies, such as a representative of the country's universities.¹⁰⁰ At face value, this allows victims to have a voice at the highest organisation on reparation in the country. However, as reported by victims organisations during our fieldwork in Peru, in practice the level of input of victims has varied over time depending on the political will of the government.¹⁰¹ This has not stopped victims from ensuring that their voices are heard in order to shape the delivery of reparations in Peru. Indeed, at this stage, the capacity and will to engage directly on the topic on the part of victims organisations has increased. This is explained in the Peruvian context by the positive impact of the experience of participating with the TRC on the development, visibility, and agency of the victims organizations. Notably, the existence of the TRC revitalised existing organisations and in many cases motivated the creation of new ones.¹⁰² This led to victims organisations developing awareness of their rights and how these had been violated, of the State's direct responsibility or failure to protect its citizens, and, overall, the victims' status as rights-holders in society.

In the case of Peru, collective reparations have been the object of special focus for participation. Communities, be they peasant, native, or groups of Internally Displaced Persons (IDPs), that are victims of the armed conflict and are duly registered in the national registry of victims as a community,¹⁰³ are recognised as beneficiaries of the collective reparations programme. They are given the equivalent of 100,000 Peruvian Soles (approx. \$30,000 USD at the time of writing) to use on a project of their choice that could aim to develop the economic infrastructure of the community, to help the return or relocation of IDP communities, as well as to recover the infrastructure of the community in terms of public services (water, sanitation, education,

97 This, in practice, allows us to re-establish the connection with a crime: in this way the demands concerning the situation of abandonment and desertion refer to death and disappearance; those concerning the breakdown of a life plan refer to detention and displacement.

98 Some of the interviews include: P04, Lima, May 2019; UG0174, Gulu, July 2018; CO0204, Bogota, September 2018.

99 Julie Guillerot, *Reparations in Peru: 15 Years of Delivering Redress*, September 2019, p. 20-21. See also Ley N. 28592, July 2005.

100 <https://cman.minjus.gob.pe/quienes-somos/>

101 Interview with P21, Lima, 8 May 2019.

102 Between 1980 and 1990 three victims' organizations were created, while between 2000 and 2004 some 120 were identified. (The TRC operated from mid-2001 to the end of August, 2003). See, Oxfam-GB (ed.), *Mapeo de las organizaciones de afectados por la violencia política en el Perú*, Lima, April 2004.

103 Ministerio de Justicia y Derechos Humanos, Plan Integral de Reparaciones, Ley No 28592, Lineamientos Generales del Programa de Reparaciones Colectivas, May 2012, p.6.

electricity, etc.).¹⁰⁴ Collective reparations are dealt with through local authorities who carry out a communal assembly to consult victims as to the project they wish to pursue. During our fieldwork with members of the CMAN in Peru, when asked about women's participation in these assemblies, we were informed that women often attend these meetings, at times their number is even greater than that of men, but they do not always talk.¹⁰⁵ Indeed, during our visit to some peasant communities in Ayacucho that have received collective reparation, we were welcomed by the men of the communities, while women were in the background sorting out the produce. As we were told by the Director of a leading NGO in Peru, 'There was no equal participation of women on collective reparations.'¹⁰⁶ This shows the different challenges that are faced by transitional justice mechanisms that aim to involve the participation of women and/or other persons who find themselves in a vulnerable situation.

This lack of women participating led the CMAN to adopt, in 2018, "Guidelines for the adoption of differentiated actions in the implementation of the comprehensive reparations plan for women and LGBTI population,"¹⁰⁷ that includes strategies for (1) Proper attention; (2) Prevention; (3) The promotion of women's autonomy; and (4) Dissemination of rights; as well as actions and proposals to work on women's guilt, on violence and on violence prevention. Indeed, in the implementation of the collective reparations programme, the CMAN now requires that, on the day that a communal assembly takes place to consider collective reparations, the presence of all the men and women in the community. This is to ensure a democratic and participatory decision-making process, and that the process itself recognises and validates the harm suffered by the community concerned. The CMAN also requires that the Community Management and Surveillance Committee on the implementation of the collective reparations project, must be made up of equal numbers of men and women from the community (the parity principle). While these are important formal rules to try and generate more inclusion, it remains to be assessed how effective these tools are in subverting local patriarchal beliefs and cultures.

Colombia

In Colombia, victim participation which included women was strong before and during the drafting process of the Victims and Land Restitution Law, which was finally adopted in 2011. Indeed, as indicated by Paula Gaviria and Iris Marín, during the negotiations of the Victims Law, nine regional hearings took place in 2008, where more than 3,000 victims participated and expressed their views.¹⁰⁸ Again, during the negotiations in Congress of the Victims and Land Restitution Law, eleven regional dialogues took place that involved more than 3,000 victims, including women.¹⁰⁹

104 Ibid.

105 Interview with P05, Ayacucho, May 2019.

106 Interview with P24, Lima, May 2019.

107 Guidelines for the Adoption of Differentiated Actions in the Implementation of the Comprehensive Reparations Plan for Women and LGBTI Population, available at: https://cman.minjus.gob.pe/wp-content/uploads/2019/03/PIR_LineamientosMujeres_PoblacionLGTBI_060319.pdf

108 La Agenda de las Víctimas en el Congreso 2007-2009: Aprendizajes para la Incidencia desde la Sociedad Civil (2010).

109 Ibid.

The text of the Victims and Land Restitution Law also includes various articles that denote the importance or the consequence of victim participation. First, victim forums were set up in the municipalities and departments around the country, as well as a national victim forum.¹¹⁰ According to DeJusticia, there are 865 municipal forums, 32 departmental ones, one for Bogota and a national forum.¹¹¹ The national forum is meant to have representatives from all sectors in the country including women, members of the LGBTI community, disabled people, indigenous peoples, afro-descendants, and others.¹¹² However, participation has been limited for those groups of people that face stigma and ostracism, such as victims of sexual violence and members of the LGBTI community.¹¹³

Secondly, mechanisms have been established to consult victims on collective reparations through the election, by the communities, of representatives that are members of an "impetus" committee, one that is responsible for establishing a dialogue with State authorities. Regarding collective reparation for ethnic minorities, Roma and afro-descendants, a process of prior consultation is envisaged in the Law, following ILO Convention 169 of which Colombia is a party.¹¹⁴ It must be noted that the decrees that regulate reparation for these groups include norms aimed at ensuring the participation of women. For example, when indigenous groups are consulted, indigenous authorities must ensure that indigenous women can participate.¹¹⁵ However, a significant gap seems to exist between the wording of the Law and its implementation, both as a result of the inaction of the State to demand this from indigenous communities, but also because of cultural understandings of the role of women in various indigenous communities, perceptions that reproduce existing patriarchal hierarchies and discriminate against women.¹¹⁶ As Accord notes, even if discrimination against indigenous groups exist, 'formal barriers are even higher for indigenous women as a result of informal or customary boundaries within indigenous communities, the vast majority of which are male dominated. Customary rules, attitudes and norms on gender as well as patriarchal structures and institutions contribute layers of discrimination.'¹¹⁷

110 Articles 192-194 of the Victims and Land Restitution Law. See also the regulation of these tables in Decreto 4800/2011 and Resolution 0388/2013 that adopts the protocol on effective participation of victims, available at: https://www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/resolucion0388de10demayode2013_0.pdf

111 DeJusticia, *Submission to the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence in preparation for his report on DRPs and lessons learned*, 31 January 2019.

112 See Resolution 0388, Article 34 for example. Article 39 of the Resolution also orders the establishment of various thematic committees including one on victims of sexual violence, and another one on women.

113 Ibid.

114 Decretos Ley 4633 and 4635/2011.

115 Decreto Ley 4633/2011, Art. 133.

116 FOS, Observatorio de Reparación Colectiva y CODHES, *Retos para la Reparación Integral de Pueblos y Comunidades Afrodescendientes e Indígenas: Balance de la Implementación de los Decretos Ley 4633 y 4635 en Relación con el Programa de Reparación Colectiva*, Bogotá, (2017), p.8.

117 Accord Spotlight, *Indigenous Women and Colombia's Peace Process: Pathways to Participation*, June 2017, p.7. Available at: http://www.politicalsettlements.org/wp-content/uploads/2018/11/CRAccord_Indigenous-women-and-Colombia%E2%80%99s-peace-process.pdf

Finally, the impact of women's participation and civil society organisations defending their rights through a gendered approach can be seen in the text of the Victims and Land Restitution Law. Indeed, the Law recognises the disproportionate impact of armed conflict on women through different violations, including sexual violence, internal displacement, forced recruitment, loss of their loved ones, absence of the breadwinner at home, land destitution, discrimination, forced slavery, or children born out of rape. As a result, the Law includes various measures to ensure that women are protected and that they can access reparations in their various forms.¹¹⁸ For instance, Article 134 gives prevalence to women during the administrative and judicial process to obtain land restitution. Article 135 of the Law includes the need to provide victims with psychosocial services for as long as necessary, bearing in mind a gender perspective, as well as other relevant factors such as culture, religion and ethnicity.

ii. Enabling Participation

In light of these three case studies, while steps have been taken to improve participation of victims, particularly during the design of DRPs, much still needs to be done in order to have a more holistic approach to participation and consultation, and to deliver on the rationale of the laws and regulations that have been adopted in countries like Colombia or Peru. Therefore, the question remains, what could be done to enable their participation not only as victims, but particularly as victims of SV? This subsection considers this question and offers some reflections in relation to the way forward.

A holistic approach to effective participation and consultation of victims of sexual violence requires the early identification of obstacles that could stop them from coming forward and exercising their rights as equal citizens. Stigma can reinforce a culture of silence, with such sexual violence being viewed as a taint to their family and community honour, one which socially controls victims from speaking out. Therefore, the way stigma works in different contexts needs to be mapped out and understood to consider the best possible ways to help victims of SV to come forward to talk about the harms they have suffered. While it may be ideal for victims to speak out on these issues, to do so may place too much risk upon them, when the driver and root of stigma rests with the society and communities in which they live on a daily basis.

Linked to this stigma is the belief that some victims are to blame for what happened to them, as if what happened was not a crime or as if they were not rights holders. As a consequence it is very important to generate awareness campaigns to inform and explain to victims of SV, and their communities, that they are rights holders, that different forms of sexual violence constitute a crime (and in many occasions an international crime) and thus should be reported, investigated with due diligence, and that they have a right to reparation. A range of mediums should be used, such as community mobilisation events, radio broadcasts, SMS messaging, anonymous helplines or contact centres, and newspaper notices. Engagement with victims, victims associations and affected communities should be made in accessible and understandable terms, including in local languages, and, where appropriate, using mediums such as visual representations

118 Victims and Land Restitution Law, Articles 13 (differential approach), 114 and 136.

and storytelling for those who are illiterate. The networks of support victims have had over the years are essential to validate the messages the State is sending to them through these means. A consistent thread throughout this project's empirical research was the importance of psychological support and networks of solidarity, whether this is within family units, support groups, medical centres or spiritual organisations. Victims need the affirmative work of those they trust to help interiorise their rights and reinforce the prohibition and unlawfulness of sexual violence under domestic and international law. Thus, identifying support and solidarity networks, including civil society organisations, religious groups, and community associations that could help them come forward, is also essential to ensure participation. Such groups can better reach victims given their role in communities and at the grassroots level, and can assist them in understanding what has happened, provide them with early support, breakdown the legal complexities of DRPs, and help them get their voices heard. Through such sensitisation and engagement, civil society can also assist victims and their communities to shift responsibility to the perpetrators and away from those victimised.

In countries where the right conditions exist, civil society groups could cooperate with the State in a more formal manner in meeting victims' needs and rights. For example, if victims trust them, and the civil society groups have the required expertise, they could help with the collection of testimonies, given the trust that victims have in them as opposed to the distrust they might have towards State personnel and institutions.¹¹⁹ The State could fund case workers within these independent organisations or they may be self-funded with donor support, such as in Northern Ireland where victims groups are funded by the Victims and Survivors Service to provide a range of services to their clients. However, organisations are often divided along community affiliation lines meaning that some individuals may not have a local organisation that they identify as trustworthy.¹²⁰ Indeed, State funding may come with conditions that may undermine the independence of the civil society organisation or discourage victims from accessing them when they remain distrustful of the State due to its role in their harm. Furthermore, civil society organisations and those with a strong link to the State may inhibit or discourage disclosures due to entrenched gendered hierarchies.¹²¹

Access to prompt, adequate, accessible, and quality health systems for mental and physical harm as a result of sexual violence should be available to direct and indirect victims, such as women who faced forced pregnancy and for the children born out of rape, to enable their effective participation. Victims of SV may not come forward due to having endured serious harm to their health, both physical and mental, so that they feel this limits or restricts their ability to engage and interact with others.¹²² Some health impacts can reinforce the silence, such as

119 In Colombia, personnel from human rights agencies are permitted to fill out forms for victims.

120 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, on his mission to the United Kingdom of Great Britain and Northern Ireland, 17/11/2016 A/HRC/34/62/Add.1, para.105-106.

121 Gallen *supra* n.12, p349; and Expert Report on Reparation, Presented to the Trial Chamber III of the International Criminal Court, Situation in the Central African Republic, in the case of the Prosecutor v. Jean Pierre Bemba Gombo, ICC.01/05-01/08-3575-Anx-Corr2-Red 30-11-2017, 20 November 2017, available at: https://www.icc-cpi.int/RelatedRecords/CR2017_07036.PDF, paras. 116-117.

122 Interviews UG0176, Gulu, July 2018; UG0177, Gulu, July 2018.

stigma surrounding mental health or urinary and faecal incontinence.¹²³ Our fieldwork indicated that years go by before victims of SV have access to health services for the harms they have suffered; in the meantime, coping with these effects can seem all consuming of their day-to-day existence.¹²⁴ Moreover, in countries like Guatemala, Peru and Colombia, where rehabilitation for victims, including victims of SV, has been included within their DRPs, it remains an undelivered promise in terms of comprehensive services and regional and local reach. Therefore, when designing participation, a healthcare pathway should be designed in conjunction with participation models.

The State will need to agree on the level of support, but as a minimum this should encompass a list of approved State-led healthcare providers and humanitarian assistance (in the relevant regions) that should be advised to the victim, as well as psychological support throughout the process. The State should also take all the necessary measures to ensure that victims have access to such healthcare providers and if they do not exist, as happens in many places devastated by conflict, the State should find ways to make such services available to victims. For example, the establishment of mobile medical units, agreements with international organisations and/or civil society organisations or humanitarian organisations working in the area that could provide such health services.¹²⁵ These support measures, as well as disability accommodations (e.g. accessible venues for public meetings), should be promoted in an awareness campaign to empathetically encourage those with sensitive and serious health conditions to come forward.

Victims participate in transitional justice processes in a myriad of forms. Through surveys, meetings, consultations, or focus groups. However, such forms of participation may not be appropriate for victims of SV, who, years after their violation, may still be subject to stigma and discrimination. Protection measures based on "camouflage" and confidentiality could be an important tool throughout the process, from design to application and receipt of certain forms of reparations. "Camouflage" refers to providing outreach and engagement on reparations in an inconspicuous way in order to minimise stigma and secondary harm. We acknowledge that camouflaging might not work in certain contexts and with some victims as sometimes camouflage is impossible given the structure of the community or prevailing cultural beliefs. Sometimes camouflaging is undesirable as, by hiding the violation, it might reinforce the idea that SV is acceptable. However, in some contexts it might provide victims with alternatives to be able to seek justice, find their voice, and be ready in their own terms and time to claim justice and reparation. This discretion can be crucial to enabling victims of SV access to reparations, given that stigma will not disappear instantaneously at the end of hostilities or with regime change. Stigma is the result of social, cultural and religious beliefs that are deeply rooted in societies and communities and which take generations to be changed. Therefore, it is essential to find ways to navigate through stigma, enhancing as best as possible the protection of victims and their access to justice and reparation. As such, confidentiality and anonymity measures are important as they provide victims with the certainty that their identities will not be released and that they can talk about what has happened to them without public disclosure. To this end different tools

123 UG0179, Gulu, July 2018.

124 Interview UG0177, Gulu, July 2018 and Interview UG0174, Gulu, July 2018. Interview CO01, Bogotá, February, 2019.

125 Such as the World Health Organisation, the International Organization for Migration or Médecins Sans Frontières.

exist that could be used. For example, when DRPs are in the process of being designed, victims of SV can provide confidential and anonymous statements to specific civil society organisations they trust about what happened to them and indicating how they see reparations happening. Such statements should not indicate the name of the person, but they could indicate age, sex and place where the facts took place, bearing in mind the danger that collecting such data could risk some individuals being identified. Thus, while these measures are important to enable participation and generate trust in State institutions and systems, it is equally important to also have in place a robust data protection policy, such as data encryption, consent from victims on further disclosure to other bodies, and monitored access to those accessing the data.

Civil society organisations could organise meetings with victims of SV, if they are happy to disclose their identities and harms to other victims, which could be camouflaged under the name of some other activity that usually takes place in the community, such as health screening or a religious gathering. Meetings could also be one to one and remain private. On this point, it is important to remember that different forms of SV bring different issues to the table that need to be taken into account when considering how best to reach out to victims and to get them to come forward in anonymous and confidential spaces. For example, in our work we have found that many women who were forced to have children born out of rape have maintained “protective silences” not to disclose to these children how they were conceived. These victims will not come forward, not only because of stigma, but because speaking out could have implications for their child, other children, and the wider family, in terms of truth. Put simply, if victims have chosen to keep secret their having suffered sexual violence and about a child born out of rape, they want to prevent it from being known and avoid any harm that can ensue for their children and their families as a result of what occurred. Situations like this require careful consideration as to what is the most conducive way to truth and how best to mitigate risk for victims trying to access reparations, and what support is in place to protect both mother and child, as well as any family members who may be affected.¹²⁶

The early appointment of representatives of victims of SV, that could be active interlocutors with key power institutions, such as victims units, ministers of health, institutions responsible for international cooperation, ministries of justice, and other such entities (some of them victims of sexual violence themselves), is also important to ensure participation, and that victims are given a voice and can influence the process. Again, civil society organisations in close collaboration with State authorities could have a fundamental role in ensuring that representation at various levels in society (from the local to the national) takes place, and the voices of victims of sexual violence are heard.

126 Joanne Neenan, *Closing the Protection Gap for Children Born of War: Addressing Stigmatisation and Intergenerational Impact of Sexual Violence in Conflict*, LSE, 2018, p.42.

c. Eligibility and Registration

i. Victimhood and Harm of Sexual Violence

In the specific case of a DRP, where the mandate of the body in terms of eligible harms/violations and persons is decided beforehand, it is important not to lose sight of the fact that the definition of beneficiary, and the list of violations that are included for reparation, give rise to inclusions and exclusions. Therefore, it should be remembered that it is not a mere technical decision, but a political one with implications for the reproduction (or not) of patterns of gender discrimination.

Most DRPs have established the notion of victim around gross violations of international human rights law, of serious violations of humanitarian law or through international crimes. This is suggested by the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims.¹²⁷ Serious or flagrant violations of typical occurrence in the context of an armed conflict or of systematic human rights violations are: forced disappearances; extrajudicial executions; arbitrary detentions and torture. The direct victims of these violations are often men. Whilst for several years literature and jurisprudence on these issues centred on the male victims of these violations, indirect victimhood is now more recognized, understanding that, for example, victims of an enforced disappearance are not only the men directly involved, but also their family and, potentially, others, such as their communities or witnesses.¹²⁸ An understanding of how prevalent SV is during such atrocities, as well as the fight for gender equality and women rights, has translated into better recognition in transitional justice processes, of the violations that women suffer and their particular gender dimension, as well as the various forms of victimhood that ensue from them. This has meant that an expansive group of crimes and human rights violations are included in transitional justice, ones that go beyond the right to life or personal liberty, and that include the right to humane treatment - and within it, acknowledgement of violation through sexual violence -, and/or other more complex violations, such as internal displacement. They have also allowed visibility over various violations that occur in tandem with violations of the right to life or enforced disappearances, such as sexual violence and other forms of torture.

One of the most important consequences of this shift in approach to violations is the recognition of harm and indirect victimhood. While indirect victims of violations such as arbitrary or extrajudicial killing, as well as enforced disappearance, have long been acknowledged, traction for indirect victims of torture or sexual violence has only been more recent. This is the case even though the next of kin of victims of SV also suffer the consequences of the harms caused to their loved ones, both material and immaterial. This would also be the case for children born out of rape and women who have been pressured into motherhood after forced pregnancy, and for the families of men who were subjected to rape or other forms of sexual violence. This is a significant step that has visibilised the harms caused by SV and now contributes to crafting adequate and

127 A/RES/60/147.

128 Clara Sandoval, The Concept of Victims and Injured Party in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations, in C. Ferstman, A Stephens, and M. Goetz (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (The Netherlands, Brill, 2008), 243-282.

effective forms of reparation.¹²⁹ While progress has taken place, various issues remain to be addressed in relation to who qualifies as victim. For example, in Guatemala reparation was only for female victims of sexual violence, not male victims.¹³⁰ The criminalisation of homosexuality in some countries, and the exclusion of certain gender (and non-binary) identities, not only discourages such victims from coming forward, but also reinforces social constructions of sexual violence only affecting women, and strengthens attributed notions of femininity.¹³¹

Similarly, complex victims can be excluded, that is to say, victims who were also perpetrators, such as a female FARC fighter who committed grave breaches of humanitarian law, but who was herself subjected to forced abortion or sexual slavery by her own troops. Such victims can be excluded because they were members of a non-state armed group yet suffered sexual and gender-based violations. This is apparent in Peru, which excludes members of the Shining Path (Sendero Luminoso) or the Revolutionary Movement Tupac Amaru (Movimiento Revolucionario Túpac Amaru) from the denotation of victim and therefore access to the DRP.¹³² However, in 2019 the Colombian Constitutional Court issued a landmark decision in the case of *Helena*, which acknowledged that ex-combatants can also be victims of reproductive violence (in this case, forced abortion and contraception) within a non-state armed group and therefore entitled to reparation.¹³³ While such individuals should be held responsible for causing the violations against others, it does not mean that they should be completely ineligible for reparations, as they have also suffered serious international crimes which at times also constitute human rights violations.¹³⁴ More broadly, eligibility for reparation may have a gendered dimension, which needs to be deconstructed to ensure accessibility for victims of SV violations. As such, reparations for even complex victims play an important expressive function in reinforcing the norms and values of such a scheme, which under a human rights approach is one that recognises the rights and dignity, no matter the background, of the victim to an effective remedy.

ii. Eligibility

The question about the requirements that victims must fulfil to benefit from DRPs becomes crucial to providing effective and real access to victims and the fulfilment of their right to reparation. DRPs have been established precisely to ensure that victims have prompt and easier

129 Ruth Rubio-Marín and Clara Sandoval, Engendering the Reparations Jurisprudence of the Interamerican Court of Human Rights: The Promise of the Cotton Field Judgment, *Human Rights Quarterly* 33 (2011), 1062-1091.

130 Colleen Duggan and Ruth Jacobson, Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation, in R. Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations*, (Cambridge, CUP, 2009), 121-161, p138.

131 See Olivera Simic, Engendering Transitional Justice: Silence, Absence and Repair, *Human Rights Review* 17(1) (2016) 1-8.

132 Article 4 of the PIR Law.

133 República de Colombia, Corte Constitucional, Expediente t 6.991.657, sentencia su-599/19.comunicado no. 50 11 de diciembre de 2019.

134 Luke Moffett, Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* 10 (1) (2016) 146-167.

access to reparations than if they had to go through a judicial process.¹³⁵ DRPs aim to provide reparations to victims of certain types of human rights or humanitarian law violations. For victims to benefit from them, they must meet certain criteria, and as such should be simple and flexible. DRPs, for example, should be structured using lower standards of evidence than those required by courts, such as whether the events described by victims occurred across testimonies, and reconstructing patterns of conduct of human rights violations in specific places and times, rather than on individual evidence of harm. However, if individual evidence of crime is to be considered, then medical reports could constitute evidence of the violation, but forensic evidence should be interpreted with care. For instance, there may be no obvious signs of genital trauma or that physical injuries were sustained by sexual violence: such injuries may have healed by the time an intimate examination is performed. If medical reports do not exist or are not possible to produce, given the passage of time, reports made by experts on gender violence and sexual violence should count as evidence of broader patterns of the violation suffered. Equally, statements and accounts given by victims should be given full value and taken in good faith by State authorities, unless there are clear reasons as well as consistent and reliable evidence - the burden of proof should rest on the State authorities- that the alleged victim might be lying in order to trigger reparation. It is also for State authorities to provide these accounts with credibility, based on the work carried out by other transitional justice mechanisms, such as truth or missing persons commissions.

DRPs should be designed to recognise that people suffer different types of violations and harms and that they experience that harm in a distinctive manner, transforming in profound ways how they would relate to the process of providing information about what happened to them. This does not mean that DRPs should provide different forms of reparation based on different types of harms, but that they should be attuned, during the process of obtaining reparation, to understanding the different harms suffered by victims and the ways that affects their interaction with the programme. Some victims might be outspoken about harm, but the more stigma and silence there is about some violations, like SV, the harder it may be to get victims to talk about what happened to them and, thus, to obtain sufficient evidence. Cultural beliefs may also determine the manner in which victims tell their accounts of fact and of violations, and to whom.

For the sake of ensuring that a DRP can deliver on its goals and provide prompt and effective reparation to victims, the system should not expect victims to provide pieces of evidence that they do not have, such as evidence of ownership of land or housing, medical evidence that sexual violence took place, e.g. forensic examination, or evidence of identity, particularly in places where victims have never had access to identity cards or similar documents, as happens with indigenous peoples or Afro-descendants in Colombia. DRPs should be designed bearing in mind the local context and culture so as not to impose an undue burden on victims. Nevertheless, as recalled by the ICTJ, victims are often required to provide DRPs with documents to corroborate

135 The judicialization of reparation claims generates various challenges for victims of mass atrocities, and particularly for victims of SV. A judicial process demands strong evidence of violations and harm suffered, having to pay the cost of lawyers, and having to wait for years for a case to be decided and, if decided in their favour, to obtain a judgment on reparation that would need to be enforced by the State or those responsible for the crime, which again will take several years before full implementation takes place. Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo to the Human Rights Council, A/HRC/14/22, 23 April 2010, paras.34-40.

identity or relationship to the direct victim, indication of the violations that took place, harms suffered, applicants' needs, sources of livelihood of the applicant, as well as information about potential grounds of vulnerability or disability.¹³⁶ Here it must be remembered that if a truth-seeking process predates the work of a DRP, then that process could be permitted to cross reference official and unofficial information and to identify the existence of general patterns in terms of where and how violations, including sexual violence, occurred. Moreover, reports by NGOs, newspaper reports, and even witness testimony, can be accepted as corroborating evidence for DRPs.¹³⁷ All of this information would be crucial for DRPs during the registration process.

In the case of Peru, it must be noted that the registration process has been relatively simple. Regarding the criteria for registration of victims and beneficiaries, the Reparation Council approved a document called the "Regulation of registration to the RUV" (i.e. the Registro Único de Víctimas - the Unified Victims Registry)¹³⁸ that contains the operative concepts, and the criteria and general guidelines necessary for the evaluation and qualification of the victims. Direct victims include people who suffered rape, and people who suffered forms of sexual violence other than rape, such as sexual slavery, forced union, forced prostitution, and forced abortion. Indirect victims include sons and daughters born out of rape. The Regulation includes a broad and flexible consideration regarding the question of proof to be provided, trying as much as possible to respond to the socio-economic realities of the victims as well as their ethnic-cultural and gender realities. It considers for example that 'Cases in which it is not possible to obtain documents proving the alleged violation or, in the absence of witness statements, may be qualified with the context of violence corresponding to the district and date where the affectation occurred.'¹³⁹

When describing criteria and required documents for victims of rape and victims of sexual violence, the regulation specifies that 'the affidavit of the applicant has an important weight. The evidence may be provided by the victim or collected by the officials of the Reparations Council'¹⁴⁰ and positively draws attention to the use of the reconstruction of context and patterns of behaviour in the period and place of the facts alleged by the victim, and the internal and external consistency of the testimony, even in the absence of any documentation¹⁴¹. Regarding children

136 ICTJ, *Forms of Justice: A Guide to Designing Reparations Application Forms and Registration Processes for Victims of Human Rights Violations*, (2017) p.53-54.

137 Carla Ferstman and Mariana Goetz, Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings, in C. Ferstman, M. Goetz, and A. Stephens (eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009), 313–350, p323. Uganda Situation, Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, ICC-02/04-101, 10 August 2007, para.14; and A/HRC/42/45, paras.57-58.

138 Reglamento de Inscripción en el Registro Único de Víctimas de la Violencia a Cargo del Consejo de Reparación, available at: http://www.ruv.gob.pe/archivos/Todos_Los_Nombres_MINJUS.pdf

139 It has to be sustained by: Information on damages that occurred in the populated centres of the district inscribed in RUV Book II, as collective beneficiaries; Information on declaration of state of emergency in the area; Information of the pre-existing registries recognized by the regulation; Information on the records of other individual victims of the district where the incident occurred. Ibid. Article 10.

140 Ibid., art. 16 and 17.

141 Ibid.

born of rape, the regulation is also relatively flexible as any document or declaration, even of a witness, can be taken as evidence, although the condition of previous recognition of the mother as a victim of rape, is necessary¹⁴².

For our project we interviewed staff at the Unified Victims Registry. They indicated to us that the registration process is seen as a form of reparation in which those registering victims should be sensitive towards beneficiaries' situations. Victims go to the RUV to register and can do this directly in their municipalities where RUV offices were opened to this end. The government entered into 240 agreements with municipalities to ensure that such offices were in place. A person takes the statement given by victims and digitalises it. The Registry of Victims includes all relevant information for the analyst to be able to corroborate, in good faith, what victims have said, such as information from the Truth Commission and Reconciliation in Peru and newspaper articles. The presumption of truth of what victims have said applies and those responsible for assessing the information assess it as either: "positive registration"; as an application that does not qualify; or, as "pending application" if information is missing or the specialist has not been able to corroborate details. Pending applications could be completed by victims. In relation to victims of SV, we were told that the testimonies of the victims, together with the context of where the situation happened, are sufficient to prove that the victim suffered the violation, if they are both convincing.¹⁴³

In Colombia, the Victims and Land Restitution Law was designed bearing in mind a gender approach and with particular sensitivity towards victims of SV. For example, any person within the path to reparations (known as "Ruta de reparación") who enters into contact with victims of SV, should have adequate training in dealing with such victims and should provide victims with additional information about the process of obtaining reparation and rehabilitation.¹⁴⁴ The registration process is similar to the Peruvian one. Victims can go to local representatives of the Public Ministry (Ministerio Público), or to consulates if they are abroad, to declare before State authorities what has happened to them. The system also allows for victims to provide their declarations on-line if access to the internet is available to them. If victims are already part of any of the victims registries, as the one for IDPs, they do not need to register again unless there are new violations that need to be reported. Once the information is collected, the Victims Unit studies the application, looking at the National Network of Information of Attention and Reparation of Victims (Red Nacional de Información para la Atención y Reparación a las Víctimas). Based on this, the Unit takes a decision within 60 working days.¹⁴⁵ Once the person is registered, the person is fully eligible for reparation. This system has been applied to victims of sexual violence, however, we were informed during our fieldwork that the fact that victims have to give their accounts to other people who take note of their declarations, did not necessarily encourage victims to come forward and could lead to re-victimising. The possibility to apply on-line does help to address this problem, at least in relation to those victims of SV that can read, and have access to a computer and the internet.

142 Ibid.

143 Interviews with P08 staff, Lima, May 2019.

144 Victims and Land Restitution Law, Articles 35 and 137.

145 Victims and Land Restitution Law, Article 156.

In Guatemala, there is no registry of victims, which constitutes a problem when seeking clarity about the number of victims, the amount of human rights violations suffered, and when planning the execution of the PNR in the country. The only recorded number is that of the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico) which has registered 1,465 cases of SV but also acknowledges that this number does not capture the reality as many cases remain unregistered.¹⁴⁶ Therefore, in practice, many victims of sexual violence have been excluded from reparation and their testimonies have been questioned, generating new victimization.¹⁴⁷

According to the Manual that regulates the eligibility criteria in Guatemala, victims provide their account to the PNR about the violations and harm suffered. The PNR has to attest the veracity of the information, consulting - as in Colombia or Peru - information already available, such as the Truth Commission Reports in Guatemala (the Guatemala Memoria del Silencio or Guatemala Nunca Más), exhumation reports from INACIF (Instituto Nacional de Ciencias Forenses de Guatemala – National Forensic Institute of Guatemala) or other sources.¹⁴⁸ If information is not available in such documents, victims can corroborate information using church registers, and in cases of sexual violence and torture, through a sworn affidavit before a Public Notary.¹⁴⁹ While the system in Guatemala appears to be lenient to victims, practice says otherwise. During our fieldwork we heard that there is no sensitivity towards victims of SV from persons working with the programme, who, very often, question and doubt the testimonies given by the victims.¹⁵⁰

Peru, Colombia and Guatemala denote a very conventional form of registering victims and checking eligibility. This approach to registration and eligibility could be problematic if statement takers are not properly trained in how to deal with sensitive issues when working with victims of sexual violence, and how to avoid re-victimization. In this regard, while reparation for victims of SV in Kosovo was not legally recognised until 2014,¹⁵¹ the system that has been envisaged for victims consists of access to the monthly payment of 230 Euros, as facilitated by the Government Commission for the Recognition and Verification of the status of victims of sexual violence of the Kosovo Liberation War. This Commission is responsible for reviewing applications and deciding eligibility. However, the process also recognises that four local NGOs (the Kosovo Rehabilitation Centre for Torture Victims (KRCT), Medikat Gjakova (MGJ), Medika Kosova (MK) and the Centre for the Promotion of Women's Rights (CPWR), are entitled to provide assistance to victims during the completion of the application forms, as well as with securing supporting evidence. As a consequence, if they want to register in person, the first part of the registration process takes

146 Commission for Historical Clarification, Guatemala, Memoria del Silencio, Chapter 2, Vol III, para.39.

147 Denis Martinez and Luisa Gomez, *A Promise to be Fulfilled: Reparations for Victims of the Armed Conflict in Guatemala, Reparations, Responsibility and Victimhood in Transitional Societies*, RRV, 2019, p.23; and Actoras de Cambio (ECAP and UNAMG), Recommendation to PNR.

148 PNR, Manual para la Calificación de Beneficiarios del Programa de Resarcimiento, Article 7.

149 PNR, Manual para la Calificación de Beneficiarios del Programa de Resarcimiento, Article 8.

150 Interview with G07, Guatemala City, May 2018.

151 Law No. 04/L-172 on Amending and Supplementing Law No. 04/L-054 on the Status and the Rights of the Martyrs, invalids, Veterans, Members of Kosovo Liberation Army, Sexual Violence Victims of the war, Civilian Victims and their Families and Regulation (GRK) No. 22/2015 on Defining the Procedures for Recognition and Verification of the Status of Sexual Violence Victims During the Kosovo Liberation War.

place in areas and with people that victims of sexual violence know and trust, alternatively they simply need to fill in a form. Using civil society organisations closer to victims is a significant step in the right direction. However, since the Commission was set up, the number of victims coming forward has been less than expected. By June 2018, four months into the application process, only 530 applications had been received.¹⁵² This is partly explained by the victims' fear of stigma and discrimination, which underlines the need to put other conditions in place to ensure that victims of sexual violence can speak out.

Relatedly, safe and discreet spaces for victims of sexual violence that also act as "access points" could allow victims to have their views and concerns heard while helping to minimise any further public stigma they may face in coming forward. This may be through a trusted, neutral and discrete community worker, such as a health provider, and as part of regular health check-ups, using appropriate coding and training. These may be direct access points where registration can be performed or initiated by an administrative staff member, or electronic referral systems, information hubs and query services that can advise on the nearest registration centre if it cannot be performed on site, as well as providing guidance on transport options, reimbursement or childcare services, and accompaniment options (such as to interviews or to help complete forms). There should be opportunities for approved personnel such as medical professionals (or their administrators/clerks) to log supporting documentation or evidence under anonymous codes for victims, in order to reduce the burdens and risks of victims physically delivering and transferring personal evidence to registration centres. Likewise, unnecessary repetition of details should be reduced where a history of the violence has previously been taken (or many of the essential elements). The sensitisation and training of key healthcare providers about SV may represent a more appropriate disclosure method than using untrained administrators to record a range of violations. Use of clinical data as evidence to support a reparation claim needs the full and informed consent of the victim involved.

Drawing upon empirical qualitative data from our research project, the impact of health needs arising from SV was frequently cited as a strong incentive to apply to reparation or assistance programmes, as well as a prioritised form of reparation amongst victims.¹⁵³ Therefore, as a minimum, registration should have certain "fast-track" services to medical rehabilitation or third parties delivering assistance (for example, the charity Mercy Ships). However, where provisions are made under law (Colombian Laws 1448 and 1719) medical cultures of practice that stigmatised victims became a newly constructed barrier that dissuaded victims and provoked them to look to international support.¹⁵⁴ To many victims, the distinction of whether certain specialised care is provided under formal reparation or assistance was irrelevant, reinforcing the argument for a complementary or integrative approach to health needs arising from violations. Nonetheless, victims expressed concerns about fluctuating interest in the issue of SV, whether humanitarian

152 Balkan Transitional Justice, Kosovo War Rape Victim Registration Process Falters, 12 June 2018, available at: <https://balkaninsight.com/2018/06/12/kosovo-war-rape-victim-registration-process-falters-06-11-2018/>

153 Interviews UG 0179, Gulu, July 2018; UG 0176, Gulu, July 2019; Interview C002, Bogota, September, 2018; Interview P01, Lima, May 2019.

154 Interviews C0206, September 2018; C00211, September 2018 and Interview UG11, Gulu, July 2018.

assistance will be granted access by authorities, as well as the sustainability of services once humanitarian organisation leave and where long-term care is required for many victims.¹⁵⁵

iii. Registration

A core component to registration is the construction of an official record of data (about the applicants) in the form of a single and dedicated victims register. This should contain the expected amount of detail required for the decision-making authority to determine which victims are eligible, based on set criteria.¹⁵⁶ Details are typically contained in two modes: a registration form (paper based and/or digitalised) completed by the victim or registry personnel; and the supporting evidence to verify the claim. A well-designed victim register can represent an opportunity to re-establish civic trust by taking seriously victims of sexual violence, through impartial, gender and sexual sensitive procedures. The resources involved in creating a victim registry can include: a co-ordinated team of personnel; a research instrument to collect information, such as a registration form (completed by registrars or victims); and data storage systems, which will feed into a decision-making process or tools for allocation of reparation.¹⁵⁷ Consequently, a victims registry is a key part in the implementation and administration of a reparation programme. The main objective in the design of registration processes should centre upon ensuring accessibility to reparation. However, a number of secondary aims can arise and impact victims of SV. A victims register can become an important archive that catalogues a potentially diverse range of data that can be compared to, or complement, truth-seeking processes.¹⁵⁸ As such, victims registers and the registration process have been construed as symbolic reparation.¹⁵⁹ In Colombia, administrative procedures are cast as such, with a notice of registration outcome in the form of a paper or electronic certificate, and a further letter once reparations are initiated.¹⁶⁰ For victims of SV who may encounter victim-blaming, a State document acknowledging the wrongdoing they personally endured and their entitlement to reparation may promote social reintegration and self-esteem. A good example is the recent adoption in Peru of the Guidelines for the Adoption of Differentiated Actions in the Implementation of the Comprehensive Reparations Plan for Women and LGBTI Population, and the sample apology letter it includes, as well as the other measures it foresees as relevant to mark the differential consequences of sexual violence on women and members of the LGBTI community.¹⁶¹

155 Unni Karunakara, Challenges in international humanitarian aid, *Brown Journal of World Affairs* 21(2) (2015) 252–263, p.260.

156 Jairo Rivas, Official Victims' Registries: A Tool for the Recognition of Human Rights Violations, *Journal of Human Rights Practice*, 8(1) (2016), 116–127, p.124.

157 Ibid. p.118.

158 ICTJ *supra* n.142, p.8-9.

159 A registrar refers to an employed person who occupies a role in creating or administering the victims register. This can involve a range of activities, from data entry after the taking of statements to liaising with other institutions for evidence (with the applicant's consent). See ICTJ 2017 and interview with P08, Lima, May 2019.

160 Rivas *supra* n.163, p.124.

161 CMAN, Lineamientos para la Adopción de Acciones Diferenciadas en la Implementación del Plan Integral de Reparaciones a Mujeres y Población LGTBI, p 12 and annex 3, available at: https://cman.minjus.gob.pe/wp-content/uploads/2019/03/PIR_LineamientosMujeres_PoblacionLGTBI_060319.pdf

In recognition that reparations should provide prompt and effective reparation, victims registers can also provide information on vulnerable groups and where urgent support is required. As such, if interim reparations are to be instigated then eligible victims can be identified, as well as alternative support, such as assistance or humanitarian aid. By way of example, in Colombia, given its large number of internally displaced people, the initial response was to address promptly their situation through humanitarian assistance under Laws 387/1997 and Law 418/1997. Subsequently, the experience with IDPs permitted the adoption of the Victims and Land Restitution Law in 2011, which includes both measures of assistance and measures of reparation. Finally, victims registers can inform the design of reparation measures identifying unexpected or prevalent consequences, such as *self-reported* psychological or emotional distress that may need additional mental health service provision. As conflict can have far reaching public health implications, registers offer another source of qualitative information in understanding the direct and indirect health impacts as well as spatial patterns. However, registers are not designed to ascertain health outcomes as a result of conflict and some harms may not manifest until years after the events took place or the registers have been closed. The complex task of understanding the short- and long-term health impacts require consideration of multiple variables of which registers may be able to contribute towards.

Victims may be keen to claim reparations and often DRPs are only created through their advocacy and struggle with civil society allies, but the registration process itself, and uncertainties around confidentiality and sensitivity, can discourage persons from coming forward. As such, some victims of SV will calculate the risk of further re-victimisation as being too high, despite a proportion of them living with debilitating medical conditions and socio-economic hardship as a result of their injuries or ostracism.¹⁶² While it cannot be assumed that registration will invariably lead to re-traumatisation for all persons, this is a recognised significant risk, given that the application to register typically involves: recounting details of the event; a verification process; and a possible assessment of their injuries and vulnerability, in order to determine the forms of reparation required, as well as the level of urgency.

The application process may not be a *comfortable or conducive* method of initial disclosure of sexual violence, particularly when persons do not feel ready to disclose to DRPs, especially if the violence has been State-perpetrated. Some individuals may wait for a variable amount of time after the opening of the registration period in order to determine the risks faced by those who have attempted registration (within victims groups or for other sensitive violations like torture), particularly before embarking on what may be a lengthy journey to registration centres and a noticeable absence from their community. While these precautions are reasonable, victims registers that are open only for a fixed period of time can leave many victims of sexual violence outside of the process, ones who may wish to avail of their right to reparation and benefit from specific support. For some children or adults, they may not have been aware that violence committed to them amounted to a form of sexual violence or they might have developed harms that were only known to them later after the violence occurred. Accordingly, the registration of victims of sexual violence ideally *should not be time-barred* and a continuous space should be

162 Interviews with N22 Nepalgunj and N25 Gulariya, April 2018.

created for victims to document their harm, as well as any secondary victimisation (such as stigma) that delayed them coming forward.

There should be reasonable accommodation for specific groups who may have suffered SV and other violations, in order to assist with application. For children who suffered sexual violations, (who may still be underage at the time of application), they will require adequate aids, such as access to age-appropriate information which bears in mind the trauma that they have undergone, as well as possibly requiring representatives of welfare institutions to accompany them. Even the question of whether a family member should be with them, for example, a parent, should be carefully considered in certain situations, when it may not be in the best interest of the child (e.g. complicity in violations, where the child may feel particularly uncomfortable). Other groups who may require adequate aids during the information gathering process are those with disabilities and the elderly. Allocating the responsibility of form filling to these individuals and their families can give rise to undue burdens, and therefore, in such instances, the option of having a registrar assistant or advisor (e.g. disability advisor), as well as any other practical aid to help fill in the form, should be a minimum requirement. All support personnel should possess the communication skills required of statement-takers. Forms should be processed in a timely manner, with staff trained to communicate with victims in an appropriate and gender and culturally sensitive way.¹⁶³

For indigenous groups this will require communicating with them in their own language and, as far as possible, with an appreciation of their cosmivision. Irrespective of the modality of information gathering questions, questions should be constructed in a neutral way without stigma or jargon.¹⁶⁴ Alternative or supporting forms of testimony, such as storyboards or artistic depictions, should be accommodated in registration. The limitations of language, cultural differences in expression, as well as receptive communication disorders, need to be considered when collecting information from victims for registers. To ensure there is no socio-economic disadvantage or incentives by third parties, there should be no registration fee or costs for obtaining copies or supporting evidence to verify claims if victims are expected to present these.

Registration processes that publicly categorise violations can exclude victims of sexual violence due to social repercussions or the risk of them having to designate themselves. In East Timor, the Commission for Reception, Truth and Reconciliation (CAVR) recommended that the categories of single mothers, widows, and children born out of rape, were used to provide reparation to victims of conflict-related sexual violence (CRSV), under the assumption that they would be more willing to claim reparations if their harm was treated with some confidentiality.¹⁶⁵ Despite efforts to maximize reparative reach, this approach may be unhelpful in discreetly encompassing victims of sexual violence who were married or single and did not bear children born of rape, but some of whom may have been children themselves at the time of the violence. As such, camouflage

163 REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations*, July 2014, para.61. Available at - <https://redress.org/wp-content/uploads/2017/12/submission-to-special-rapporteur-on-reparations-programmes-public.pdf>

164 Where jargon is unavoidable, this needs to be accompanied with an explanation.

165 Chega!, *The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste Report, Part 11: Recommendations*, p.43.

measures can also have limitations, despite best intentions to prevent or minimise exposure of victims to revictimization, and need to be combined with other proactive strategies to ensure an inclusive process for such victims. Nevertheless, even for children in this situation who suffered sexual violence or who were born out of rape, open categories for reparation such as children survivors could offer important tools to access reparation without exposure to further stigma and ostracism.¹⁶⁶

In Sierra-Leone, the process of registration for reparations was sex-segregated; however, when women came together in large groups they were asked to publicly identify the harm they had experienced.¹⁶⁷ As a result, many women registered as “widows” as opposed to “rape victim” due to the belief that they would receive support for their family and children as well as themselves, and because of prevailing issues of stigma amongst the same gender or identity group. Nonetheless, some community members envied victims of sexual violence who received such treatment and also viewed them with suspicion, due to the lower evidential threshold required in making a claim.¹⁶⁸ The lower evidential burden also allowed for corruption, whereby community leaders claimed family members suffered conflict-related sexual violence in order to obtain benefits.¹⁶⁹ Thus a fine balance must be found between ensuring access for victims of sexual violence and trying to ensure the integrity of a process that requires verification of victims’ harm. As discussed above in relation to Colombia, an example of this includes the use of good faith presumptions on a balance of probabilities.

The option to register in alternative categories (widow rather than victim of sexual violence) as suggested above, requires a clear explanation on what the implications of this may be. For example, victims can only claim for one violation, which may have different entitlements to the different forms of reparation. By completely omitting SV as a registration category or discrete subcategory, this may only reinforce stigmatising notions around sexual violence and further obscure the reality of it, arguably impacting on attempts for guarantees of non-repetition.

An important feature of the Peruvian DRP is that registration is not limited in time as registration processes often are. In Peru the Registry remains open and can continue to include new victims in it even if more than 15 years have already passed since the DRP began to be implemented.¹⁷⁰ This feature becomes essential with victims of SV given that they may remain silent and afraid to talk about what happened to them due to the fear of discrimination and ostracism. In our fieldwork in Nepal, Colombia, Northern Ireland, and Uganda victims and civil society organisations highlighted that victims of SV for historic violations continue to come forward as social understandings have changed, there is an increased awareness of new programmes or activities speaking out on such issues, and/or their health has declined with age and they

166 Neenan *supra* n.132, p.44.

167 Ruth Rubio-Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, *William and Mary Journal of Women and the Law* (2012) 19(1) 69-104, p.87.

168 Eva Ottendoerfer, *Translating Victims’ “Right to Reparations” Into Practice: A Framework for Assessing the Implementation of Reparations Programs From a Bottom-Up Perspective*, *Human Rights Quarterly*, 40(4) (2018), 905-931, p.927.

169 *Ibid.*

170 Eligibility for certain forms of reparation such as compensation have already closed.

continue to have chronic medical problems. However, without a DRP victims are left reliant upon bringing civil claims, in or outside criminal complaints, or are reliant on civil society for support.

In our fieldwork, two examples were encountered that attest to the need to be flexible in respect of the timeframe in which to register victims of sexual violence. The first was the case of *Sepur Zarco* in Guatemala that stems from events, which took place in 1982. Many women were subjected to sexual slavery by members of the military. Women were seen as sexually available given that they had lost their partners, who had been disappeared or killed by the military. While the events took place in 1982, the women subjected to sexual violence were silent about what had happened to them. It was partly due to the work of the Alliance Breaking the Silence and Impunity (Alianza Rompiendo el Silencio y la Impunidad), created by civil society organisations supporting victims of sexual violence like Women Transforming the World, that some of the women spoke out and sought justice for what they had suffered.¹⁷¹ What is also striking about this case is that, throughout the whole judicial process, women appeared in Court covering their faces, so as to protect their identity and ensure their safety and non-discrimination. While the women eventually removed their mantas from their faces after they won the case, it took them more than three decades for them to feel able to do this. This case shows that the passing of time jointly with other factors, such as justice taking due course, help victims of SV to come forward.

We encountered a similar case in Peru, the case of *Manta y Vilca*, concerning sexual violence committed by the military in that zone while it exercised the military and political power in the fight against the Shining Path (1983-1995). Some women reported events to the truth commission in Peru.¹⁷² However, while many women in this part of the country were subjected to sexual violence, only 24 talked about what happened to them in Manta y Vilca. For DEMUS, one of the NGOs representing some of the victims in the case currently under investigation in Peru, it was hard to get the victims to talk. Indeed, only nine of the women who talked before the TRC are today part of the criminal case. It took DEMUS at least three years of permanent contact with the victims (between 2004 and 2007), to gain their trust so that they could begin the fight for justice.¹⁷³

In Colombia, as opposed to Peru, the registration process was time barred. According to the Law, the registration in the RUV was meant to happen within four years of the enactment of Law 1448, if the facts took place before the Law was enacted, or within two years if the facts happened after the Law was approved.¹⁷⁴ This was certainly a problem for victims of SV, given that the conflict is still on-going, and also, because of the nature of the violence, victims who do come forward to speak may only do so long after the facts took place, and, consequently, can easily be excluded from reparation. This situation has recently been changed through a historic decision handed down by the Colombian Constitutional Court. It considered unconstitutional the application of this period to victims of SV and ordered the RUV to register, without any time limits, any victims

171 Alianza Rompiendo el Silencio, *Caso Sepur Zarco: La Lucha de las Mujeres por la Justicia*, 2016, available at: <https://www.mpd.org/sites/default/files/160210-dossier-alianza-rompiendo-silencio.pdf>

172 TRC, *Unidad de Investigaciones Especiales*, Huancavelica, January 2003, p. 96-98.

173 Interview with P24, Lima, May 2019.

174 Article 154.

of sexual violence as a result of the armed conflict. The facts of the case known by the Court relate to a woman called 'Carmen' who was subjected to sexual violence by paramilitary forces in the municipality of La Esperanza in 2004, informing the authorities in October 2015, more than eleven years after the event and more than four years after the Law entered into force.¹⁷⁵

These cases illustrate how difficult it is for victims of SV to come forward and tell others what happened to them, and the challenges that women face when speaking out. The situation is even worse with men and members of the LGBTI community, who do not even dare to come forward. This means that if registration must happen within a particular timeframe, many victims of sexual violence will be excluded from a DRP. Therefore, DRPs should be designed bearing in mind how best to enable access for victims of sexual violence to registration processes, not only women, but also men and members of the LGBTI community.

A probably consequence of SV and conflict is that victims might be rejected by their families and communities and might relocate to other parts of the country or leave to seek asylum in other parts of the world. By way of example, this was seen in the case of *Jean Pierre Bemba* in the Central African Republic, who was prosecuted and eventually acquitted by the Appeals Chamber of the International Criminal Court.¹⁷⁶ In this case, there were many victims of sexual violence, including men and children. Victims faced ostracism in their communities and had to leave, placing them in a situation of even greater vulnerability as they lost their social and emotional networks, for some whilst being pregnant as a result of rape, or having contracted sexually transmitted diseases such as HIV-aids. All these harms generated additional opportunities for re-victimisation and discrimination.¹⁷⁷

Therefore, it is also crucial that registration processes take note of the contextual situation, and generate mechanisms that enable access of these victims to registration processes and thus to reparation. If registration processes are time barred, it must be considered, in light of the specific circumstances of SV, whether an extension to the initial timeframe should take place. Equally, if it is known that SV happened in particular places in a systematic manner, but that stigma and insecurity inhibits victims from breaking their silence, camouflaging reparations may allow victims in communities with a high incidence of sexual violence to avail of reparation. However, it may impede the delivery of some forms of reparation. If victims are not able to fulfil their right to reparation through DRPs, some of them will ultimately use criminal or civil claims, with the consequence that only a small number of victims will benefit if the case succeeds, arbitrarily "penalising" those who cannot find sufficient support, evidence, satisfy higher evidential thresholds, identify responsible actors, and/or who do not have access to a relevant legal forum to bring a case. As de Greiff argues, judicial based reparations tend to disaggregate victims and

175 Corte Constitucional de Colombia, T-211/2019, Magistrate: Cristina Pardo Schlesinger, 20 May 2019.

176 International Criminal Court, In the case of the Prosecutor against Jean Pierre Bemba (situation in the Central African Republic), Appeals Judgment, ICC-01/05-01/08, 8 June 2018.

177 Expert Report on Reparation, Presented to the Trial Chamber III of the International Criminal Court, Situation in the Central African Republic, in the case of the Prosecutor v. Jean Pierre Bemba Gombo, ICC.01/05-01/08-3575-Anx-Corr2-Red 30-11-2017, 20 November 2017, available at: https://www.icc-cpi.int/RelatedRecords/CR2017_07036.PDF, paras.42-51.

reparations, by creating unequal access to and benefits of such measures.¹⁷⁸ Accordingly a DRP can be more inclusive, comprehensive and generous in its reach and access for victims.

4. Forms of Reparation

Reparations in international human rights law have been defined as including five forms: restitution, compensation, rehabilitation, measures of satisfaction, and guarantees of non-repetition.¹⁷⁹ These measures are intended to complement each other, given that just one form of reparation would not be able to wipe out all the harm caused by SV. However, in the administrative experience of reparations programmes,

reparations refers to the attempts to provide benefits directly to the victims of certain types of crimes. In this sense, programs of reparations do not take truth-telling, criminal justice, or institutional reforms, as parts of reparations. The categories used in the context of the design of programs in order to analyse reparations are different from those proposed by international law. In this context the two fundamental distinctions are between material and symbolic reparations, and between the individual and the collective distribution of either kind.¹⁸⁰

Alongside the comprehensiveness of forms of reparation, measures distributed by a DRP must not directly or indirectly discriminate. However, it is not that simple. Comparative experience shows that the formulation of reparations measures must be accompanied by a nuanced effort to understand the complexity of the prejudices suffered by victims of SV and their consequences in the daily lives of such victims. This section of the report refers to the DRPs in countries such as Guatemala, Sierra Leone, Peru and East Timor, in order to show the complexities of identifying and implementing different forms of reparation for victims of SV, including the various issues that come to light in such processes. Overall, the lesson learned is that, while important efforts have taken place in recent years to provide victims of SV with different forms of reparation to respond to the harm they have suffered, those designing such processes have not always included a full gender approach to the topic, one that includes an understanding of the patriarchal structures embedded in culture, politics and religion, the way such structures would impact the delivery of reparations for victims of SV, and how such victims experience their healing process.

In Guatemala, the PNR included various forms of reparation, including: material restitution; individual compensation; psychosocial reparation and rehabilitation; the dignification of victims; and cultural reparation to communities. However, the PNR has basically prioritised compensation measures. The purpose of the material restitution measures is to restore the victim to the situation prior to the violation of human rights, or, to compensate for the losses that resulted

178 Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.), *Handbook of Reparations*, (OUP 2006) 451-477, p458.

179 These are the forms of reparation contained in the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of Human Rights and Grave Breaches of International Humanitarian law.

180 De Greiff, *supra* n.185., p453.

from said violation. The focus is on restitution of land, housing and productive investment. However, neither the victims of violence or rape, nor the victims of torture, qualify for these measures. This is despite the fact that victims can lose material assets and/or productive opportunities as a result of rape and sexual violence, and/or because of the direct consequences of such harms: ostracism, isolation, inability to marry, and/or, an obligation to educate a child born of rape.¹⁸¹

With respect to individual compensation in Guatemala, the amounts established are Q24,000 (US \$ 3,200, at the time of writing) for extrajudicial execution, massacre or forced disappearance and Q20,000 (US \$ 2,700) for torture, violence or rape. Although the criteria for determining the amounts are not clear, the decision to compensate rape and sexual violence is a step forward since they are also among the most serious crimes.¹⁸² On the other hand, in the cases of families with more than one fatal victim, or in the cases of a person against whom several crimes had been committed, compensation due for each violation can be received up to a maximum of Q44,000 (US \$5,900). This allows the continuance of individualizing and making visible each type of violation of human rights and, therefore, gender violence. Importantly, the PNR has prioritised compensation for widows,¹⁸³ elderly people, and indigenous victims of rural areas. Unfortunately, progress in the design and implementation of psychosocial repair and rehabilitation measures, as well as dignification and cultural repair, are so minimal that they do not allow further analysis in this report.

In Peru, the Comprehensive Reparation Plan is made up of a symbolic reparations programme; a health reparations programme; a programme of reparations in education; a programme for the restoration of citizen rights; an economic reparations programme; and a collective reparations programme. Whether as direct victims, as a beneficiary family member, or as a member of a beneficiary group, men, women, girls and boys, should have access to the full range of measures included in the PIR. On the other hand, there is no measure of reparation exclusively designed in favour of women, including reparation for rape: the programmes simply do not specify the gender of the beneficiary and no measure is proposed singly in favour of one or the other, except in very specific exceptions. These exceptions include the public gestures component of the Symbolic Reparations Programme, for which the TRC foresees that violations of women's human rights are considered as a cross-cutting component. In that sense 'all (public gestures) should devote a significant moment to the explanation of the facts and abuses that occurred in their homes or communities, in the barracks or in the penalties, which directly undermined sexuality, honor and dignity of women.'¹⁸⁴ We find another exception with the acts of recognition of this same programme, with respect to which the TRC indicates the importance of incorporating, in the lists, the women who assumed leadership roles during the conflict.

Except in the health reparations programme, the PIR does not explicitly consider either the stigmatising effect of crimes - whether for men or women - nor the potential stigmatising effect of receiving individual aid in contexts where the communal and the collective take precedence.

181 Paz y Paz *supra*, n.86, p.110.

182 *Ibid*, p.111.

183 *Ibid*.

184 Peruvian TRC, vol. IX, p.169.

However, in an attempt to protect women, who usually have a vulnerable position within these groups, the TRC specified, in the Collective Reparations Programme, that women should be given 'a preferential treatment within the measures to be implemented'.¹⁸⁵ However, it does not transfer this approach to the proposed participatory mechanism to encourage the definition of the content of each of the components of this programme. Moreover, the first component recommended in the Collective Reparations Programme, institutional consolidation - understood as the return and restitution of respect, authority and leadership to traditional organizations - could result, not only in the invisibility of women in this program, but also in a loss of the leadership role played by them and their organizations during the conflict.

The TRC recommended that the economic reparations programme included:

- ▶ a combination of one-time compensation and a pension for the relatives of the dead and disappeared persons;
- ▶ a life pension for the disabled;
- ▶ a one-time compensation for people unjustly imprisoned;
- ▶ a one-time compensation for persons who suffered rape;
- ▶ and, a pension until the age of 18 for the children born as a result of a sexual rape.¹⁸⁶

In order to set the scale of the amounts for the one-time compensation, the TRC established a scale of assessment and gradation among the violations, where death and disappearance was deemed to be the most serious violations because they affected the right to life; followed by disability, as it implies a loss of capacity to generate income; and by detention, as it implies a rupture of the life project. Rape was relegated to the lowest scale category because, in the understanding of the TRC at that time, it would not directly produce any of these harms. This approach does not take into account the consequences that rape can have on the social status of the victim and that those who suffer it often experience repudiation from their partners, reduced marriage prospects, stigmatization within the community, etc., resulting in victims' inability to access resources for their livelihood. Nor are any eventual consequences considered as aggravating elements, such as unwanted pregnancy or unwanted motherhood, the contraction of sexually transmitted diseases or loss of reproductive capacity, etc. The "dismissal" of the impact of rape on the ability to access stable income for women, men or children, reveals a gender bias. If the actual impact of rape on victims and their social status had been examined with a more sensitive look, the TRC should have recommended a monthly economic pension rather than one-time compensation for victims of SV.¹⁸⁷

185 Comisión de la Verdad y Reconciliación, Informe Final, Tomo IX, p.200.

186 Ibid, p.194-198.

187 Julie Guillerot, *Para no olvidarlas más. Mujeres y reparaciones en el Perú*, Lima, Aprodeh-Demus-PCS, (2007), p109.

The compensation scheme in Peru provides that the spouse or partner, children, and parents receive an aliquot (2/5, 2/5 and 1/5 respectively). Since the children must distribute equally two-fifths of the total amount of compensation and that the parents must do the same with the fifth part, the distribution allows the spouse or partner - usually a woman - to receive the majority of the compensation. Compensation in this way is to remedy the situation of economic difficulty generated by the absence of the dead or missing relative.

Finally, if implemented, the measures of other PIR programs could have a transformative impact on the lives of women, men, boys and girls, who have suffered gender-based violence, both at a practical level and in the sense of raising their self-esteem and signifying a real shortening of the existing gender gaps that allow victims to advance their position in front of their community, family and themselves. This is the case, in particular, for the restoration of the right to identity through documentation, and the declaration of absence due to disappearance, that would allow women to formalize new relationships, secure inheritance, have property titles, etc. It would have been preferable if the TRC, beyond mentioning the gender approach as a transversal axis for the implementation of the PIR, had developed specific guidelines. These would help to ensure that both the process of identification of victims and beneficiaries, as well as the execution of reparation measures, both individual and collective, had started with the recognition of the inequalities between men and women in the different social, economic and political processes, and would aid the creation of special conditions to overcome them.¹⁸⁸

In Sierra Leone, considering the financial limitations that the government was facing, the TRC decided to prioritize certain categories of victims.¹⁸⁹ To do this, it used the concept of "vulnerability" and defined that amputees, people wounded by war, victims of sexual violence, children, and widows of war, were the victims with the greatest need for urgent attention. Regarding reparation measures, the TRC recommended a combination of comprehensive medical care, pensions, education, training, micro-credits, collective reparation and symbolic reparation. All persons who suffered an amputation, a war wound (meaning a loss of 50% or more of their ability to generate income), and victims of sexual violence, were entitled to a monthly pension of at least US \$20.

Medical care for physical and mental health (including surgery, orthopaedic implants, medications, occupational therapy and adjustments, etc.) seeks to help victims deal with their disabilities autonomously. The benefits also extend to caregivers who are often female relatives of injured male victims.¹⁹⁰ However, there were concerns that women with access to these health care measures would use them less for themselves, since they were more likely to seek assistance for their families than for themselves. It should be noted positively that members of the immediate family of people who suffered an amputation also have access to free comprehensive medical care, which is especially significant for women caregivers. In the case of people who suffered

188 Ibid, p.91.

189 Sierra Leone Truth and Reconciliation Commission Report, 2004, vol.2, pp.256-259.

190 Jamesina King, *Gender and Reparations in Sierra Leone: The Wounds of War Remain Open*, in R. Rubio-Marín, Ruth (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, (New York, Social Science Research Council, 2006), 246-283, p.265.

injuries and experienced a 50% or more reduction in their income-generating capacity, family members' access to medical care is only given to children under 18 years and to wives. This suggests a certain gender bias in assuming that the victims in this category are mostly men and that wives, who may also be direct victims, do not financially contribute to their home. In reality, women are the providers of basic household needs,¹⁹¹ and, as such, it would have been useful to contemplate women's access to a pension to compensate for the economic consequences that caring for family members can generate, especially when these members are unable to care for themselves.

Regarding victims of SV, on the one hand, it is worth noting that free medical care includes surgery if necessary (in particular for victims suffering from genital fistula), testing for human immunodeficiency virus (HIV) and other sexually transmitted infections, and treatment if disease positive.¹⁹² On the other hand, their access to a pension, and the evaluation of the amount of said pension, is linked to the decreased ability to generate income. That is to say, the evaluation of the amount of pension to be paid may not take into account the dimensions of shame and rejection experienced by the victims on a daily basis, including that associated with HIV. As such, determining the amount of compensation based on an eventual loss of income generation capacity does not adequately factor in moral harm. In addition, some women expressed criticism as the Sierra Leone TRC assumed that all women who became pregnant from rape and gave birth to such children wanted to raise them, rather than contemplating that some women and girls were forced into motherhood. As abortion was (and is) not legal in cases of rape, reparations, often years later, should at least consider how best to support them, such as psychosocial support and financial assistance.¹⁹³

Within the TRC, the granting of medical care or pensions is not recommended for war widows, but only for the government to provide support to organizations and institutions that provide capacity development workshops, so that widows can attend these workshops and be trained. It would have been more effective for such women to receive a pension to allow them to more immediately meet the needs of their families, especially in cases where the husband was the only source of economic support.¹⁹⁴ However, in general terms, the inclusion of capacity building, development and micro-credit projects in reparation programmes, as long as they implicitly have a transformative dimension, can contribute to the empowerment of women.

As regards symbolic reparations, the Sierra Leone TRC recommended that the President, as "Father of the Nation" and head of State, publicly acknowledge the damages suffered by women and girls during the conflict, and offer unambiguous apologies on behalf of the different governments of Sierra Leone.¹⁹⁵ Other measures were also recommended to complement symbolic reparations, such as commemoration ceremonies, symbolic burials, declaring a day of national reconciliation, the building of national and regional memorials, etc. The measures linked

191 Ibid.

192 Sierra Leone TRC, *supra* n., vol.2, p.257.

193 King, *supra*, n.197, p.267.

194 Ibid, p.268.

195 Sierra Leone TRC, *supra* n., 2004, vol.2, p.267.

to the identification of the remains of the victims and to (re)burials with religious and traditional ceremonies, are of paramount importance to the family members – especially to women who are often the survivors - because they provide the satisfaction of conducting a duty to loved ones.¹⁹⁶

The variety of reparation measures proposed by the TRC recognizes some of the primary and secondary harms that victims of SV have to face. However, the measures are still far from adequate to meet the immediate and substantial financial, medical and psychological support needed by victims, or from contributing to sustainable employment that victims require on account of male members being deceased or seriously injured, as well as their reduced marriage prospects and personal injury.¹⁹⁷ Many victims of sexual violence did not benefit from the interim-relief payment or donor sponsored medical and psychological support, and those that did found it to be inadequate.¹⁹⁸

In East Timor, the CAVR recommended both a reparations programme and an urgent reparations programme, as during its investigative work, it found that many victims were still suffering from the impacts of the violations. The scheme of urgent reparation consisted of providing compensation (the same amount for all, regardless of the number of family members affected or the severity of the damage suffered); supplying funds to local organizations so that they can provide basic services to victims; implementing as a pilot project a collective reparations programme in cooperation with three NGOs; actively referring victims to existing basic services, particularly in relation to health; and conducting mental health rehabilitation workshops. According to Wandita, the workshops allowed the creation of a respectful environment where men and women were able to meet and discuss some of the most significant events in their lives. More than 505 of the participants were women and one of the workshops was aimed only at women. The major contribution of these workshops for women was the creation of a "safe space" where they could talk about their experiences as direct victims and feel recognition and acceptance.¹⁹⁹

In the case of the CAVR, urgent reparations were considered for the human rights violations of murder, disappearance, detention, torture, rape and other forms of sexual violence, due to the severity and longevity of their impact on victims. The inclusion of gender-based violence, as well as the immediate family members of dead or missing persons, clearly allows many women to qualify for the programme. Another qualification criterion relates to victims with increased severity and persistence of suffering resulting from human rights violations. In principle, this criterion should allow the most vulnerable people within each category to access the programme with priority and it was assumed that the most vulnerable women (such as widows or women with disabilities or affected by severe trauma) would be able to benefit first.²⁰⁰ However, this

196 King, *supra*, n.197, p.269.

197 Ibid, p.267.

198 See Eva Ottendörfer, Assessing the role of hope in processes of transitional justice: mobilizing and disciplining victims in Sierra Leone's truth commission and reparations programme, *Globalizations*, 16(5) (2019), 649-663.

199 Galuh Wandita, et al., Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims, in R. Rubio-Marin (ed), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, (New York, Social Science Research Council, 2006), 284-225, p.306.

200 Ibid, p. 303.

presumption proved wrong because of the internal and external obstacles that women suffered when testifying which had an impact on their access to urgent reparations.²⁰¹

The reparations programme finally recommended by the CAVR to parliament includes gender equity as one of the five transversal axes and seeks to repair, as far as possible, the damages caused by violations in the life of victims, through access to social services for vulnerable victims, as well as symbolic and collective measures to recognise and honour victims. In application of this transversal axis, the CAVR recommends that 50% of the resources of the reparations programme be allocated to women. Thus, the CAVR recognised the different types of human rights violations women and men faced, the barriers they faced in overcoming the impacts of such violations, as well as the responsibilities women have for their families when male members are seriously injured, missing or deceased. According to Wandita, this gender approach seeks to ensure that the body in charge of the implementation of reparation measures challenges itself and adopts policies and directives focused specifically on women overcoming the various cultural barriers.²⁰² This is what the CAVR itself did, leading it to anticipate that 30% of the testimonies it would collect would be testimonies from women about their own experiences. The CAVR forced the Commission to integrate, from the beginning of its operation, a gender perspective to its work, and to hire women as interviewers. Despite this, the CAVR did not reach the 30% that was expected, but only 21.4%. It is thought that, had this goal not been conceived and attempted to be enforced, the CAVR would not have even reached 21%,²⁰³ illustrating how difficult it is to encourage women to come forward and talk about the harms they have suffered and to seek reparation, and highlighting, once again, the need to keep registration processes open so that victims can come forward when they feel it is the right time to speak out about what happened to them.

Regarding reparation measures, the CAVR recommends, among others, support for mothers (single mothers, widows, victims of rape) via school scholarships for their children until the age of 18 years. In order for the children to access these scholarships, the mothers have to travel once a month to the district agency in charge of the implementation to receive the funds, as well as to gain access to other services, such as health, legal advice, peer support groups, training workshops for income generation, micro-credits, and so forth. In this way, it seeks to favour the effective access of women to reparation measures, factoring in that they often give priority to their relatives over their own needs.²⁰⁴ The implementation of reparations may, in some cases, reveal to others the type of violation suffered, potentially leading to double victimisation. Therefore, the CAVR recommends that, in its collective component, the reparations programme include a public education programme on violence, and, in particular, on sexual violence. In this way, it seeks to mitigate discrimination and ostracism, making it clear that the perpetrators are to blame for their actions.²⁰⁵ However, despite these innovations, East Timor did not implement

201 Ibid, p.307 and 317.

202 Ibid, p.317.

203 Ibid, p.314.

204 Ibid, p.310 and 312.

205 Ibid, p.312.

many of these measures, providing instead some assistance to victims, which did not provide official acknowledgement of victims nor cater for the specific harms of victims of SV.²⁰⁶ With the State having encouraged victims to come forward, those who did were often women who had experienced sexual vio thus only serving to support a State, gendered-narrative of violence: the victimhood of women and the glorification of veterans, men who were justified in receiving more benefits.²⁰⁷ In light of the different experiences of the forms of reparations available, the following principles can help to guide choices as to which forms are appropriate for SV.

a. Principles to Guide the Crafting of Forms of Reparation for Victims of Sexual Violence

Comparative experience shows that some dimensions are fundamental to ensuring that standards and parameters of the DRPs do not incorporate sexist preconceptions, or gender biases. At the outset, victim participation in the design and implementation of the forms of reparations is key, this speaks to the importance of the victims' role in reparation programmes and procedural justice, by treating them with respect and taking their interests into account in decision making.²⁰⁸ Therefore, along with foremost considering victims' own perspectives on reparations, we suggest that three guiding principles are adopted in the process of identifying and implementing suitable forms of reparation. Taken into account should be:

- ▶ the potential stigmatising effect of crimes. This should be explicitly considered, meaning, giving due account to the primary and secondary effects of crimes;
- ▶ the potential stigmatising effect of the reparation's measures; and
- ▶ the potential transformative effect of some benefits or ways to implement them.

Regarding the stigmatising effect of crimes, besides the immediate physical and moral harm suffered as a result of SV per se, rape, for example, can have the consequences (i.e. secondary effects) of forced pregnancy, sexually transmitted infection(s), the loss of reproductive capacity, or unwanted motherhood (with all the harms that ensue for children born out of rape and for their mothers). A gender-sensitive approach should consider these secondary effects and consider them as aggravating factors at the moment, in order to define reparation measures. This has been done in Croatia, where victims of CRSV are entitled to 100,000 kuna (about €12,200 at the time of writing) and if there are aggravating circumstances, such as forced pregnancy, forced abortion, childbirth, or sexual violence committed against a minor, this

206 See Naomi Kinsella and Manuela Leong Pereira, *Unfulfilled Expectations Victims' perceptions of justice and reparations in Timor-Leste*, ICTJ (2010), p10.

207 Amy Rothschild, *Victims versus Veterans: Agency, Resistance and Legacies of Timor-Leste's Truth Commission*, *International Journal of Transitional Justice*, 11(3) (2017) 443-462.

208 See *Procedural Justice in International Criminal Courts: Assessing Civil Parties' Perceptions of Justice at the Extraordinary Chambers in the Courts of Cambodia*, *International Criminal Law Review* 16 (1) (2016) 1-38; and Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Intersentia, 2011).

can be increased to 150,000 kuna (about €18,400).²⁰⁹ Victims are also entitled to a monthly allowance that is determined in the State budget each year.²¹⁰ Children born of rape should also be considered, but, given the passage of time between the violation and the implementation of redress, consideration should be given on their past harm and present needs, such as education, citizenship, and healthcare.²¹¹

In relation to the potential stigmatizing effect of reparations measures, this involves, on the one hand, considering the consequences of receiving an individual reparation measure, and the social and cultural contexts where victims reside. Individual forms of reparation might oblige the victim to make him/herself visible, which may make them vulnerable to revictimization. For instance, if compensation is granted in the case of rape, the message can be one of monetization of the body, and prostitution. Indeed, in calculating compensation, it is important to take into consideration traditional gender roles in society that monetary awards may reinforce. For instance, in many communities, for women who work at home looking after family, or working on family land, where they do not receive any income, the harm caused cannot be simply quantified on the basis of absence of income.²¹² As a result of forced disappearance or killings of male family members, women (and children) may aim to fulfil multiple roles that were previously undertaken by men, sometimes whilst enduring their own health problems as a result of sexual violence.²¹³ Compensation itself can represent a gendered concept in cultures where it is not equated with loss, but rather where it is perceived as an entitlement or affiliation with women victims of SV. Schulz found that in Northern Uganda, where hegemonic masculinities prevail, a small minority of male victims of sexual violence considered compensation as a similar form of dowry or customary payment related to a sexual relationship.²¹⁴ Compensation may risk placing male victims in a feminising position they wish to avoid,²¹⁵ and reinforce that a “relationship” occurred above any coercive element. A gender-sensitive approach must also consider the framing and terming of compensation, given the socio-cultural implications for victims.

Collective forms of reparation might appear to be a good complement or alternative to compensation. However, instead of finding alternative forms of reparation for victims of SV, it might be important to consider the role that camouflage can play in protecting victims of SV when considering forms of reparation. It is possible to conceive a DRP that includes forms of reparation for such victims, including compensation, but that delivers them to the victims in a manner that does not publicly reveal, to their communities, that they have suffered sexual violence. For instance, as seen by the creation of broad categories of victimhood, such as widows,

209 Ibid. p.45.

210 In 2016 this amounted to 328 EUR. Ibid.

211 See Eithne Dowds, Children Born of Sexual and Gender-Based Violence in Conflict: The International Criminal Court, Ecological Environments and Human Development, *Children and Society* 33(3) (2019), 226-238 and Tatiana Sánchez Parra, The hollow Shell: Children Born of War and the Realities of the Armed Conflict in Colombia, *International Journal of Transitional Justice* 12(1) (2018), 45-63.

212 The World Bank, World Development Report: Gender Equality and Development, (2012), Chapter 5.

213 Interview with NI07, Belfast, May 2018.

214 Philipp Schulz ‘Luk pe Coo’ or Compensation as Dowry? Gendered Reflections on Reparations for Conflict-Related Sexual Violence against Men, *International Journal of Transitional Justice*, 12(3) (2018) 537–548.

215 Ibid

in Sierra Leone, or, as recommended by CAVR in East Timor, the suggestion that loved ones, like their children, receive an education as a form of reparation.

Regarding the potential transformative effect of some benefits or ways to implement them, we would emphasize that, for victims of SV, it is closely linked with and depends upon framing the measures as the re-establishment of a person's dignity, citizenship and reputation.²¹⁶ For example, rehabilitation may centre on a quality of life that contributes towards a dignified life, such as regaining an acceptable level of control (even if not a complete cure) over urinary or faecal continence, disorders that may perpetuate ideologies of rape victims being viewed as “unclean” and “impure”, as well as aiding in the ability to undertake desired tasks or social activities.²¹⁷ Restitution of rights and dignity may be closely interwoven with rehabilitation measures to improve the victims' quality of life and provide some sort of normalcy.

The sensitivity and taboo of subjects of a sexual nature may problematise reparations measures as there may be a tendency to reference pre-existing gendered values, rather than an invigorated discussion on women's citizenship and reproductive rights. For instance, in the case of forced sterilisation, subfertility or infertility relating to complications from forced abortion or sexually transmitted infections, the passage of time from violation to reparation programmes, can make it difficult for women to be able to naturally conceive some years down the line.²¹⁸ Rehabilitation in such context and in front of such harms, may need to include access to adoption services, surrogacy and reproductive technologies.²¹⁹ Yet these pathways may be cost-intensive and an anathema to local or cultural norms. However, recognition of individual's rights may assist for them to work towards autonomy by recognising them as right holders and treating them with respect and dignity, which in turn could help to challenge these pre-existing values. The important thing in such situations is not to avoid considering such options, as they clearly fit within rehabilitation as a form of reparation,²²⁰ but to consider how to reconcile such services that assist women in recovering from harm, with cultural ideologies, and here, again, camouflage could become an important tool for the provision of such services. For instance, in Uganda a programme is proposed to provide birth certifications to children born during captivity of the Lord's Resistance Army.²²¹

The transformative potential of individual reparation measures can also be limited by a lack of autonomy. In South Africa, the implementation of compensation required that the beneficiaries had a bank account. However, most people living in poverty did not have bank accounts, and married women, under customary rules, were considered minor in commercial matters (until 1998) therefore not being able to carry out financial transactions themselves. Women had to

216 Duggan and Jacobson, *supra* n.136, p154.

217 Janine Natalya Clark, ‘Leaky’ Bodies, Connectivity and Embodied Transitional Justice, *International Journal of Transitional Justice*, 13(2) (2019) 268–289.

218 Sunneva Gilmore and Luke Moffett, Redressing Forced Sterilisation: The Role of the Medical Profession, forthcoming 2020.

219 Sunneva Gilmore, Reparations for Conflict Related Sexual and Reproductive Violence. PhD Thesis 2020. On file with the author.

220 Ibid.

221 Carol Natukunda, Gov't to register children born during LRA war, *New Vision*, 12 May 2019.

authorize, through a written declaration, that the compensation be deposited into the bank account of a man. Today the South African agency in charge recognises that there is no way to be sure that women had access and control over the use of this money. However, reparations can avail of opportunities to at least denounce deeply entrenched patriarchal norms. For instance, in Morocco, compensation was awarded to men and women on an egalitarian basis, which deviated from Shari'a inheritance rules.²²²

DRPs depict a certain vision of past violence via the harms as a result of the violations they chose to respond to, but also in their attempts to redress the root causes of violence and patterns of discrimination. This may be through school curricula, public education and memorialisation. Therefore, reparations contain a descriptive and normative vision of violence, and of the way in which it has disrupted people's daily lives by causing and acknowledging certain harms, and what people need to return to "normalcy". A DRP may resonate the moral value of victims and the importance of remedying their harm in society. A gender-sensitive reparation programme constitutes a moral and political judgment about the severity of sexual violations and the need to modify behaviour. In relation to the objectives of recognition, solidarity and civic confidence to which reparations should contribute, it is essential that a reparations programme publicly denounces these forms of violence that especially affect women, but that it recognises their political nature.

Symbolic measures for SV can be important in awakening society to the consequences of such violations and, in turn, 'facilitate the process of victims' psychological and social rehabilitation'.²²³ While a fine balance has to be struck in protecting victims' privacy, measures of satisfaction publicise the wrongful nature of rape and try to engender social solidarity with the victims' plight. Symbolic measures can help to restore the dignity of victims by publicly acknowledging the wrongfulness of the harm they have suffered and affirming their rights as human beings.²²⁴ They likely require more than one modality to appeal or relate to the majority of victims. The publicising of sexual violence needs to be culturally-sensitive, balancing their right to privacy and the stigma that a form of satisfaction can also bring with it. However, awareness raising should not be so abstract that the message becomes lost, misconstrued or reinforces constrictive gender norms, such as the woman in a nurturing caring role. It is crucially important to bear in mind that victims of SV may feel uncomfortable with their names being included in national memorials to all victims of the conflict.²²⁵ Equally, caution needs to be exercised in memorials or similar public structures, as they can become contested sites. However, if adequate consultation of victims takes place, memorials could allow civil society or sub-groups of victims to narrate as

222 Julie Guillerot, *Morocco: Gender and the Transitional Justice Process*, ICTJ (2011), p.10-11.

223 Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in R. Rubio-Marín, *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing human rights violations*, CUP (2009), 63-120, p.114.

224 The IACTHR in the *González et al. ('Cotton Field') v. Mexico* ordered a monument of 'commemoration of the victims of gender-based murder', on the basis that it was 'a way of dignifying them and as a reminder of the context of violence they experienced, which the State undertakes to prevent in the future.' *González et al. ('Cotton Field') v. Mexico*, preliminary exceptions, merits, reparations and legal costs, 16 November 2009, para.471.

225 Interview with N25, Gulariya, Nepal.

they wish the victimising events they have lived.²²⁶ That said, domestic reparation programmes may not provide memorialisation or guarantees of non-repetition measures, as at least with the former they are often created by victims and civil society as informal repair²²⁷ and with the later by the State and other responsible institutions.

Symbolic measures for SV, also called measures of satisfaction in international human rights law, can also include apologies, as highlighted above. A meaningful apology delivered effectively continues to be prioritised by some SV victims, like the Comfort Women of Korea.²²⁸ For victims of sexual slavery by the Lord's Resistance Army in Uganda, an apology had little value when they needed compensation and medical rehabilitation.²²⁹ The elements and value of an apology required for SV remains under-explored. While material reparation, such as compensation or comprehensive rehabilitation, can transmit certain symbolic messages, through their material attempt to repair by responsible parties, more unequivocal statements may be particularly valuable at dispelling the taboo nature of sexual violence and breaking the silence of these crimes from those responsible.

In summary, forms of reparation could be mutually reinforcing if adequately conceived. Compensation can be more effective when linked with a comprehensive and gender-based rehabilitative healthcare programme (e.g. so victims do not use their compensation to pay for private, specialised healthcare for themselves), or a public apology and other symbolic measures that denounces sexual violence in general and avoids disclosing the names of victims. Thus, helping societies understand who is to blame for such harms and how important it is to embrace its victims.

5. Conclusions

Transitional justice pillars, namely truth, justice, reparation and guarantees of non-recurrence, do not operate in a sufficiently coherent manner to adequately illuminate the spectrum of SV and associated root causes. In part, this may be due to the paucity or inconsistencies in applying a comprehensive gender-sensitive approach and mandate from the conception of such processes. While more research is required on phasing or sequencing of transitional justice measures, in some contexts there may be merit in advocating for official truth-seeking and criminal justice mechanisms as a precursor to reparations, providing that other forms of emergency support are available such as assistance or/and urgent reparation.²³⁰ The advantage from a truth-

226 Luke Moffett, Dacia Viejo Rose and Robin Hickey, *Shifting the Paradigm on Cultural Property and Heritage in International Law and Armed Conflict: Time to Talk about Reparations?* *International Journal of Heritage Studies* (2020).

227 Sunneva Gilmore and Luke Moffett, *Finding a way to live with the past: Self-Repair, Informalism and Reparations*, working paper 2020.

228 Ethan Hee-Seok Shin, *The Comfort Women Reparation Movement: Between Universal Women's Human Right and Particular Anti-Colonial Nationalism*, *Florida Journal of International Law* 28(1) (2016), 87-158.

229 Interview with UG29, Gulu, July 2018.

230 See Moffett and Gallen., *supra* n.37.

reparation order only applies when a gender-sensitive approach is initiated in the truth-seeking processes, taking into account the principles established in section three of this report. In doing so, it gives the conceptual and informative basis to the DRP designers to incorporate a comprehensive gender perspective. Also, in this search for truth from a gender perspective, the silence to which sexual violence victims have been relegated is gradually broken; the manner in which SV is recalled begins to change: victims go from being totally invisible, or from being considered as private damage or collateral damage, into full light. Thus, it contributes to public discussion on underlying discriminatory patterns/structures in a way that supports positive societal transformation.

Transformative Reparations

Looking at reparation as a door for transformation requires a careful consideration of individual views and responses to opportunities, as well as of the structural conditions that reject social change and prevent victims of sexual and gender-based violence from accessing justice and enjoying reparation. Individual transformation is more subjective than structural reforms, due to its personal nature and can only be evaluated from the person's perspective. Often the participation in processes where individuals and groups are treated with respect, and their interests taken into account in shaping appropriate outcomes, can serve as an important driver to individual transformation; thus, this report advocates for strengthened victim participation. Importantly, reparations should not be expected to wholly transform individuals or society, nor should reparations advertise this objective, given that raising expectations can incite further harm. However, reparations should be designed in a way to promote and contribute, within acknowledged limitations and challenges, to transformation, whether this is personal, structural, or both. Their individual transformative potential lies in raising victims' self-esteem and signifying a real shortening of the existing gender gaps that allow women, girls, men, boys, or members of the LGBTI community, to advance their position in front of their community, family and themselves. While their structural transformative potential, lies in embedding a gender-sensitive approach and contributing to subverting gender structures, and through better coordination with development and other social interventions, in order to create a culture of gender-sensitivity and non-discrimination.

Participation

Not all forms of participation have the same impact on decisions regarding reparations. DRPs should design participation models bearing in mind that not all participants will wish to make direct contributions to decision-making, given the perceived burden of responsibility attached to this or the exposure that it implies. While this report adds to our understanding and implementation of participation, the authors also call for further research and clarity on participation, forms of participation, and lessons learned from the processes where they have taken place, both positive and negative.

Participation should take place throughout the reparation process, from the design to the implementation and monitoring phases of reparations, in order to detect and resolve any unanticipated problems or harms, to generate ownership in those who DRPs aim to benefit, and

to ensure that such programmes can deliver, in the best possible way, reparations. Further still, participation needs to be accessible to all victim identities in relation to SV, particularly members of the LGBTI community, children born out of rape, as well as partners and family members, and those with disabilities.

A variety of participation forms are possible but enabling a gender-sensitive approach to participation should involve an assessment of barriers - such as stigma, criminalisation, etc. - and any potentially inhibitory factors to engagement within the given context in coming forward where desired. A gender-sensitive truth process, as well as reports from governmental and non-governmental sources, can help identify geographical areas of violence in high concentration, as well as the spectrum of victims to be included.

In order to elevate participation, particular standards or pre-requisites should apply. For instance, as there is often a breakdown in public trust, when States are designing DRPs they should bear in mind that victims may need assurances that they will be treated with dignity and respect, and one way of performing this is through a trusted third party, such as civil society organisations. Equally, victims should not feel obligated or coerced to directly participate before they feel ready to, or if at all, especially in relation to SV. Instead, alternatives forms of representation and participation should be offered with confidentiality measures and camouflaging.²³¹ Among these options is the early appointment of representatives from a range of sectors (such as health, social care, legal) who have been endorsed by victims of sexual violence. This should be made known and adequately informed to victims and relevant stakeholders.

Standards or pre-requisites should include, in the very first place, informing on the scope and limits of the participation and its real impact on the process. Also, informing citizens on what acts of violence are considered international crimes, as well as their rights, including that of reparation. Additionally, a dialogue is required on what fulfilling the right to reparation means to victims. As found in our Reparations Responsibility and Victimhood in Transitional Societies research project, there is a diversity of meanings that can then impact upon the expectation of reparations upon delivery²³². As social mobilisation can be key at exerting pressure to implement reparations and for certain forms, victims groups and civil society networks should equally be supported in this endeavour.

Registration

The registration process in DRPs should be intuitive and easily accessible to victims, so as to avoid being legally technocratic or complex. An official register is an integral step to ensuring implementation, recording eligible victims, as well as providing reasons for application rejection. For victims of SV, there are specific considerations in order to safeguard them from re-traumatisation and to streamline the process. First, in comparison to judicial processes, a lower standard of evidence is set to proving that a person is a victim of SV, but once the violation

231 See section on 'Enabling Participation' for more detail.

232 The question on 'what does reparations mean to you?' was asked to every participant in this project which revealed a diverse array of responses

is proven, the harm is assumed to have taken place. Such standard of evidence can vary from only a statement taken in good faith (Peru) to the submission of supporting material through testimonies provided by witnesses (Kosovo) or through medical or psychological reports. As it may be difficult for victims of SV to produce supporting evidence, for those registers requiring such material, there should be flexibility depending on the circumstances of the violence. For instance, registrars should be able to triangulate testimonies with other sources, such as patterns of violence and regions affected revealed in truth commissions, and other reliable data reports. In the case of access to medical records - while it is clear it should not be an indispensable requirement for registration - it requires the consent of the applicant as it may contain other personal and irrelevant details that they may not wish to be known.

Second, technical assistance should be available throughout the registration process and, in part, this will depend on the specific needs and requests of the person(s). As with participation of any form, there should be a minimum of psychological and social support. Registers may also be able to identify those eligible applicants who are “especially vulnerable” based on pre-defined criteria factoring in gender and sexual sensitivities. This may range from those with urgent health needs requiring referral to healthcare to be seen within an acceptable time-frame, to socio-economic hardship (e.g. victims of sexual violence ostracised from their family) who may benefit from interim relief, or urgent reparation within a short time frame without any further administrative delays.

Third, for victims of SV there may be imposed time restrictions in which to register claims. We are of the idea that these restrictions should not exist, however, if they cannot be avoided, these should not be too narrow and represent a reasonable timeframe, according to feedback during the design process. Dismantling the social stigma around sexual violence can take time affecting those coming forward, even with safeguards, such as registering through discrete routes (e.g. mobile register units, to “safe spaces”, or online) and data protection measures. In addition to temporal restrictions, there needs to be important spatial adaptations. Victims who have been forcibly displaced, are living in refugee camps, or migrated to other countries, need access to registries and to DRPs that should be provided by States, such as embassies, consulates, international think tanks or civil society organisations, that could help with registration, or online platforms where victims can register their claim. Finally, all personnel involved in the registration process should receive training on gender and sexual sensitivity, in addition to appropriate professional support to carry out their work. If the registration process involves a statement-taking approach, then interviewers should receive specific interview training.

Forms of Reparation

Some DRPs have adopted concepts of degree of vulnerability of victims or severity of violations as criteria to provide a pragmatic response to a large universe of victims and prioritise among them. Vulnerability – if it is not gender biased – on the basis of urgency and immediate needs, can be useful at mitigating further harm through urgent relief while administrative tasks are conducted. The Timorese Reparations Programme is illustrative in terms of priority groups and a gender lens. It recognizes: Victims of torture; Persons with physical or mental disabilities; Victims of sexual violence; Children, widows and single mothers. The broad definition of “sexual violence” is to be noticed as it does not include just rape, but also sexual slavery, forced marriage

and all other forms of sexual violence. The inclusion of children affected by conflict as a category of priority victims should work in favour of the mothers who are, in general, their careers. The category “single mothers” opens the possibility of access to female victims who were not legally married but whose companions have been killed or are missing, and to women who have had a child as a result of rape, while giving them some form of protection and confidentiality. Also, it is widowed women who are considered in the categories to be prioritized, not widowers. This differentiation might have aimed at providing greater access for widowed women who, in fact, tend to be in a more extreme poverty situation than widowed men, but also to officially acknowledge that most men get married again soon after becoming widowed, but this is the case of women. Finally, illustrating a global understanding of the primary and secondary damages, one more element was used over these categories: the degree of vulnerability due to victimization, including as a criterion, secondary damage inflicted by the community, such as discrimination or stigmatization of widows and victims of sexual violence.

Assessing the severity of violations and potential consequences calls for the incorporation of a gender lens to appreciate the magnitude of harms. As demonstrated in the forms section of this report, compensation awards by DRPs can perpetuate discrimination by not seriously reflecting the gendered implications of sexual and other violence. For example, compensation in the form of a one-time payment to victims of SV could be insufficient when a person has reduced earning potential due to: stigma and ostracism; injuries; increased financial costs; generational harm from children born from rape; rebuilding or finding a new home due to property damage; and, unpaid labour in the home, such as carers of those injured.

While a person may not be affected by all these repercussions, a gender-sensitive approach prompts consideration for the social aftermath, which is a crucial factor in deciphering the impact and in formulating beneficial forms of reparation. Examples of gender-sensitivity can include a pension for carers, which can acknowledge domestic work traditionally fulfilled by women and girls, in combination with vocational/occupational rehabilitation, if desired by victims, (and/or the entitlement transferred to other family members). It is also important to issue forms of reparation such as measures of satisfaction (e.g. a public apology with an integrated gender perspective).²³³ While reparations should be designed to be mutually reinforcing or internally coherent, not all victims will be entitled to each form (or wish to avail of them) emphasizing that each one should be designed in a gender-sensitive manner in order to be meaningful.

If reparations are to be effective, they need to attend to a range of harms and adopt a comprehensive approach. To facilitate comprehensiveness in a gender-sensitive manner, reparations should strengthen connections with investigations into the violations and harms (like truth commissions), while being attuned to the stigmatising effect of the violations themselves and their consequences. There are clear implications for the intersection of healthcare, reparations and rehabilitation, which will be explored in a later report as part of this project. Accordingly, the forms of reparations should be designed and implemented to ensure victims avoid further stigma and re-victimisation, as well as followed up by monitoring. On a final note,

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 233 Report to the general Assembly on report on apologies for gross human rights violations and serious violations of international humanitarian law, A/74/147, 12 July 2019, p.4-6.

every opportunity should be taken to contribute to transformation, albeit in modest ways, and with the input and inclusion of victims. However, reparation by itself is insufficient to guarantee non-recurrence, such as ensuring women and other vulnerable groups have autonomy over funds, or at denouncing notions of victim blaming. While individual benefit is important, such crimes committed on a widespread and systematic scale, require explicit acknowledgement of wrongdoing and accountability. Crafting gender-sensitive reparations to respond to the harms caused by violations should trigger a multi-sectorial and institutional response to examine the ways in which gender may lead to inequalities. This is to ensure that these practices are not perpetuated in the name of reparations, and become normalised in development, transitional justice and conflict transformation agendas.

SV is often hidden and victims often silenced. Greater effort can be made by States in DRPs to proactively repair victims' harm and contribute to transforming society to mitigate stigma and gender-based violence, rather than relying on victims to speak out at a time when they face further victimisation. Reparations can play an important part in responding to SV, but should allow victims the choice to remain anonymous or to be vocally active, whether women, men, girls, boys, or members of the LGBTI community, with the burden on dealing with stigma placed firmly on society to prevent its recurrence. A gender-sensitive approach can better inform DRPs to more effectively respond to sexual violence and can help to build the foundations for a more inclusive society.

Future Research and Work

We began to research for and write this as a report on reparation for victims of SV, one which went beyond women and girls and clearly included men, boys, and members of the LGBTI community. While we made our best efforts to obtain relevant information on men, boys, and members of the LGBTI community, we were unable to secure the same level of comparable information to that obtained in relation to women and girls. As a result, the report, while trying to include all of them and to capture their experiences, has focused particularly on SV suffered and experienced by women and girls. The reason why information was more readily available in relation to them is, perhaps, because women are better organised through civil society organisations and because their voices have increasingly gained an audience in most parts of the world, even in relation to topics such as SV (although, if not in relation to all of them), something that cannot be said about men, boys, and members of the LGBTI community who experience it. The lack of existing data on the harms they have suffered, whether they have been consulted or not on reparation, and the access they have had to a DRP, constitutes a warning for all of us undertaking work in the area. It is essential to continue raising awareness, and visibilising the harms that men, boys, and members of the LGBTI community undergo as a result of SV. Work needs to be done to ensure that their harms are adequately captured, that forms of reparation are properly crafted to respond to their specific needs, that networks of support and safety are established so that they can secure justice and reparation, and, to ensure that all necessary measures are taken, in law as well as in practice, to ensure that the structures that have invisibilised their harms are subverted and transformed.

Transformative reparations have also become a term of art. As noted in this report, various DRPs have implicitly (Guatemala) or explicitly (Colombia) articulated it, however, they are yet to deliver

on such promises. It is crucial to generate detailed analysis and research of how various forms of reparation, designed to be transformative for victims in general, but particularly for victims of sexual violence, have worked in practice. Specific case studies of particular victims in certain communities would be important to shed light on the challenges, but also on the achievements of such programmes in subverting discrimination and masculine structures. What made them transformative? Who were the agents of social change? Is it possible to establish any correlation between victim participation, the crafting of DRPs and transformative reparations? Finally, it is also important to note how DRPs are interacting and reinforcing (or were reinforced) by, other parallel interventions like development or humanitarian assistance and how that relationship impacted on potential transformation of structures of gender violence.

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Reparations, Responsibility



Victimhood in Transitional Societies

BEYOND SILENCE AND STIGMA:

**Crafting a Gender-Sensitive Approach
for Victims of Sexual Violence
in Domestic Reparation Programmes**

March 2020

Dr. Luke Moffett
School of Law
Queen's University Belfast
Main Site Tower
University Square
BT7 1NN
t: 028 90973893
e: info@reparations.qub.ac.uk
w: <https://reparations.qub.ac.uk>

(Print): 9781916256163
(Digital): 9781916256170