



THE RIGHT TO REPARATIONS FOR SEXUAL AND GENDER-BASED VIOLENCE

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SUMMARY:

- International efforts to prevent and respond to sexual violence in conflict are under critical scrutiny for failing to adequately take account of the particular needs of victims.
- Women and girls experience unique harms during armed conflict and face additional barriers when seeking to access justice including reparations for conflict-related sexual violence (CRSV).
- The launch in October 2019 of a multi-stakeholder Global Survivors Fund (GSF) for survivors of CRSV aims to address the deficiencies of formal justice mechanisms by re-centring international resources around survivors of such atrocities.
- It is important not to confuse the GSF with reparations for to do so risks undermining the right of victims to reparation.
- States are responsible for international human rights violations attributable to them, including CRSV, and have a legal obligation to provide reparations to victims of those violations.
- Reparations for CRSV must be transformative in dimension: namely, they must be designed to promote gender equality and to prevent the commission of CRSV in the first place.
- The CEDAW Committee's approach to reparations that links the victim-centric human rights approach with structural or transformative change offers valuable insights.
- The Security Council's Women, Peace and Security agenda provides a gender-sensitive lens through which to understand the scope and content of States' obligations in respect of reparation to women and girls.
- The challenge for the international community is to address the immediate needs of victims, while ensuring that States are held accountable for HR violations attributable to them and that reparations for CRSV are transformative.



PART I: INTRODUCTION



Discriminatory practices are typically fuelled by and exacerbated in armed conflict leading to the amplification of gendered harms and the emergence of new ones.

Across the world, women and girls continue to experience a variety of gendered harms rooted in sex and gender-based discrimination. Discriminatory practices are typically fuelled by and exacerbated in armed conflict leading to the amplification of gendered harms and the emergence of new ones. These harms, such as lack of access to food, housing, educational and livelihood opportunities, sexual and reproductive health services and gender-based violence (GBV) – sexual, physical and psychological – have different and disproportionate adverse consequences for women and girls.

Preventing and responding to conflict-related sexual violence (CRSV) has dominated the international agenda for at least the last two decades. CRSV includes such acts as rape, trafficking, sexual enslavement, forced pregnancy, forced abortion, forced marriage, forced prostitution, forced sterilisation and forced nudity. The international community has focused much of its efforts on developing the normative and institutional architecture to hold individuals criminally accountable under international law exemplified by the establishment of the International Criminal Court (ICC). Tackling impunity has also moulded policy priorities including, for example, the UK government's Preventing Sexual Violence in Conflict Initiative (PSVI). Notwithstanding these measures and the huge resources that have been directed to advancing prosecutions, sexual violence in conflict remains an endemic feature of contemporary conflicts.¹ Moreover, for the victims and survivors of CRSV, the failure of international criminal justice to deliver, both by international and domestic courts, comes as a double blow.

This reality has galvanised those directly affected by CRSV, including victims, first line responders and women's rights advocates, to press for more international resources to be channelled into supporting the immediate and long-term well-being of survivors. In response to these appeals, the international community has begun to revisit strategies hitherto adopted around CRSV and to reassess whether the right balance has been struck between criminal versus civil proceedings and between the protection of political and civil rights over economic and social rights. As these debates have matured, the topic of reparations has become a matter of pressing public interest prompted largely by Nobel Peace Prize winners Dr Denis Mukwege and Nadia Murad who proposed the creation of an International Reparations Fund (IRF) for victims of CRSV.² The proposal was welcomed by the UN Secretary-General and is indirectly referenced in Resolution 2467 (2019), adopted by the Security Council pursuant to its Women, Peace and Security (WPS) agenda. The Resolution encourages "States and other relevant actors to give due consideration to the establishment of a survivors' fund".³ In October 2019 a multi-stakeholder Global Survivors Fund (GSF) for survivors of CRSV was launched by Denis Mukwege and Nadia Murad at the UN.⁴



This report highlights some important policy and legal issues and risks that should be taken into consideration in order not to confuse the GSF with reparations for so do so risks undermining the *right* of victims to reparations. The report is divided into seven sections. Section 2 identifies some of the benefits, challenges and risks that are posed by the GSF. Section 3 provides an overview of reparations in international law. Section 4 turns to examine gender-sensitive reparations and transformative reparations in the context of CRSV. Section 5 examines the approach adopted by the UN Committee on the Elimination of Discrimination against Women [hereinafter CEDAW Committee], among other bodies, to further the protection of women and girls from sexual and gender-based violence through reparations. Section 6 traces the interplay between the Security Council's WPS agenda and the international human rights obligations of States. Section 7 examines alternative reparation models that may more effectively resolve how the international community might negotiate the immediate and long-term needs of victims of CRSV while ensuring that States live up to their human rights obligations to survivors.

While men and boys also experience CRSV, this report is primarily concerned with the legal protections available to women and girls in conflict-affected environments.



PART II: GLOBAL SURVIVORS FUND FOR VICTIMS OF CRSV: BENEFITS, CHALLENGES AND RISKS

For the vast majority of survivors⁵ of CRSV, justice remains an empty promise. As the UN Secretary-General conceded in 2018, accountability for sexual violence crimes remains elusive at both national and international levels. Moreover, victims of CRSV who have received reparations for the harms caused remain an exception rather than the rule. Although still in its infancy, the GSF for victims of CRSV aims to secure meaningful justice for victims through the creation of a complementary mechanism to overcome the deficiencies of existing justice mechanisms, national and international, and to ensure that the specific needs of survivors would be met. As elaborated by its proponents, the GSF is:

a mechanism to raise and allocate resources for reparations programs and other forms of redress including where states or other parties responsible for the violence are unwilling or unable to provide reparations. The Fund will contribute to the development of those programs, provide technical advice, collect and disseminate good practices, and advocate for duty-bearers to assume responsibility.

A. BENEFITS

The GSF's emphasis on the need to adopt a survivor-centric approach to CRSV provides a timely reminder to States that the measures taken by States fail to fully address the needs and priorities of survivors in the aftermath of violence due to the failure to consult with survivors. By contrast, under the GSF "programs will be initiated at the local level to ensure they are survivor centric and contextualised for the local setting and address the specific needs of individual survivors or groups of survivors".⁶

To adopt a survivor-centric approach requires decision-makers to actively consult with survivors in the design and implementation of programmes. Although existing assistance programmes are becoming far more gender-sensitive in their design, it is usually in their implementation that inadequate attention is directed at the particular needs of women and girls who have been subjected to CRSV. The consequences of CRSV are always context-specific, gendered, complex and alter over time. Survivors often require immediate, life-saving surgery; comprehensive clinical support to manage injuries caused by rape and other forms of sexual violence; access to medication to prevent sexually transmitted infections, including HIV; clinical interventions to prevent unwanted pregnancies; and medical and other support resulting from giving birth in conflict-affected conditions.⁷ But as noted by the Mukwege Foundation, which has supported survivors of CRSV for over two decades, medical care is only one aspect of a far more holistic package of interventions that are necessary to begin to address the needs of victims.



The main functions of the GSF will be to allocate financial resources for programmes; provide technical advice; collect and disseminate good practice; and “advocate for duty-bearers to assume responsibility” in order to “improve access to reparations and other forms of redress”.

Survivors typically also require gender-sensitive psychosocial support to recover from the psychological and social impact of the violence and to mediate stigma; economic and social support to begin to rebuild their lives, including through securing access to livelihoods, especially when ostracised by family and community; and legal support to secure justice. The very specific, complex and long-term needs of women and girls who have children born of sexual violence are only beginning to be recognised and addressed.⁸ The GSF has the potential to provide those most in need with the essential and particular support that is currently beyond their grasp.

Importantly, and notwithstanding repeated references to reparations, the GSF does not claim to be a “reparations” fund as such. Rather, the main functions of the GSF will be to allocate financial resources for programmes; provide technical advice; collect and disseminate good practice; and “advocate for duty-bearers to assume responsibility” in order to “improve access to reparations and other forms of redress”. The GSF thus attempts to bridge the existing gap between legal obligations and the often dire record of States to live up to those obligations in practice. It is a Fund that seeks not only to provide practical and specific support to survivors but one that aims to promote law compliance by States.

B. CHALLENGES

One of the most daunting challenges for those who have advocated for the GSF is to deliver on what has been promised and to do so in a timely manner. Details of how the Fund will operate in practice appear to be still in their development stage. Determining who has ownership and oversight over the allocation of resources, articulating the specific criteria upon which decisions will be made, who is charged with deciding, creating and delivering on specific programmes and to whom, are critical to ensuring fairness and inclusion. In some jurisdictions, multi-stakeholder models have been established involving domestic actors and victim/survivor groups working collaboratively with international actors with different expertise, including in the field of gender analysis.⁹ To transfer decision-making to local committees does not in itself guarantee that the best interests of victims will be met, that gender will be fully integrated into the design, delivery and evaluation of programmes, and nor will it avoid competing interests among survivors.



Decisions over resource allocation for gross human rights violations always involves a degree of selectivity and the prioritisation of some victims over others given limited resources and the large constituency of persons who have experienced multiple and intersecting forms of violence in war time settings. To create an *international* fund that is accessible *only* to victims of CRSV, however egregious the offence, is, by definition, to exclude victims of other atrocities perpetrated in conflict-affected environments. Thus, one of the most problematic aspects of the initiative is the risk of creating hierarchies of crimes that results in the relegation, dismissal or complete erasure of other gendered harms that disproportionately affect women and girls. It also has the potential to limit the understanding of "conflict-affected" to that which has occurred during the conflict. Moreover, sexual violence that takes place in refugee camps or is experienced by internally displaced individuals in a post-conflict environment must be recognised as "conflict-affected". The CEDAW Committee has explained that sexual violence continues, even increases, post-conflict in ways appertaining to the conflict.¹⁰



One of the most problematic aspects of the initiative is the risk of creating hierarchies of crimes that results in the relegation, dismissal or complete erasure of other gendered harms that disproportionately affect women and girls.

One of the notable features of the GSF is that support will be available equally to men and women, boys and girls. The challenge would therefore be to ensure that those charged with the delivery of programmes do not lose sight of the fact that the adverse consequences of CRSV on women and girls are not only different but also disparate requiring careful consideration if such measures are to adequately and fairly meet the specific needs and priorities of all victims.

C. RISKS

The most serious risk posed by the GSF is to confuse or even equate the allocation of resources from the Fund to individuals or groups in the form of "compensation", services or material support with reparations. This is so for a number of reasons. First, conflating assistance with reparations poses the risk of weakening the international law doctrine of State responsibility. The concept of responsibility is at the core of all legal regimes and is inseparable from the legal order, legal norms and the rule of law. Reparations result when the legal responsibility that a subject owes to other subjects has been breached. In short, the duty to make reparation lies with the wrongdoer by virtue of their wrongdoing. In the context of State responsibility, where the wrongdoing is attributed to a State it is the obligation of *that* State to provide a remedy for the breach of the international obligation. Reparations serve as a material expression by the State that i) by its actions or omissions it breached a legal obligation; and ii) that it is committed to addressing the wrongdoing through reparation in one form or another.



To create an international reparation fund financed by actors other than the State that is responsible for the breach is to undercut the reasoning upon which the obligation to make reparation operates within the doctrine of State responsibility. Moreover, it is to risk misconveying to the State responsible that there are no legal consequences to its wrongdoing irrespective of to whom that obligation is owed. It is especially in the aftermath of serious human rights violations such as CRSV that a State should be held responsible for violations that are attributable to it. As the proponents of the GSF expressly note, “the support provided by the Fund is not intended to release states or other groups from their own responsibility to provide reparations”. That said, it is worth emphasising that no amount of support provided by the Fund can “release” a State from its legal obligation and to suggest otherwise is to seriously undermine the *right* of victims to reparations under international human rights law.



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A second related risk is that such a fund alleviates the pressure on the State responsible for the breach to provide reparations that are transformative in effect. The adoption and implementation of domestic policy and law to address the unequal social relations and discriminatory structural barriers, which contributed to and made possible the gendered harm in the first place are often times integral to the delivery of transformative reparations.

A third risk that warrants careful reflection concerns the financing of the GSF. Several options on how the Fund might be financed are under discussion. One such option includes funding “in conjunction with the private sector”.¹¹ While private sector actors may choose to contribute to such a fund, there is of course no legal obligation to do so. The same is true for those States and regional organisations that have already pledged financial assistance to supporting the GSF.¹² The fact that the Fund will only be able to operate on the basis of the goodwill of supporting States makes it highly vulnerable, as is already demonstrated by two other existing Funds, namely the Trust Fund of the International Criminal Court and the UN Voluntary Fund for Victims of Torture deserves further research [see section 3A, pg.10].



PART III: REPARATIONS IN INTERNATIONAL LAW

It is well established under general international law and the law of State responsibility that a breach by a State of an international obligation owed to another State gives rise to an obligation to provide adequate reparation for that wrongdoing. The obligation of reparation is formulated in the *Articles on State Responsibility* as the immediate corollary of a State's responsibility rather than as a right of an injured State.¹³ The obligation of reparation [referred to as a secondary rule] results from the international wrongful act [a primary rule] attributable to the State. Full reparation for the injury caused can take the form of restitution (to re-establish the situation which existed before the wrongful act was committed), compensation (to recompense for the damage caused to the extent that such damage is not made good by restitution) and/or satisfaction (insofar as the injury caused cannot be made good by restitution or compensation, the obligation to give satisfaction – such as an acknowledgement of the breach, an expression of regret, a formal apology – may be required).¹⁴

Prior to the advent of international human rights law, wrongs committed by a State against its own nationals were classed as a domestic matter. Wrongs committed by a State against nationals of other States could give rise to claims for reparation, but such claims could only be brought by the State of nationality asserting its own rights.

With the adoption of the Universal Declaration of Human Rights (1948) and subsequent international and regional human rights instruments, States recognised that human rights were no longer a matter of exclusive domestic concern. Gender-based and sexual violence have been recognised as such violations and the State is responsible when such acts are committed by State agents (police, security services, armed forces etc). The State is also responsible for such acts when committed by non-State actors (armed militias, private security personnel, terrorists etc) where it has failed to exercise due diligence to prevent, prosecute, punish and make reparations. The right of victims of human rights violations to pursue their claims for redress and reparation before national courts and, if necessary, before international justice mechanisms is now an integral part of the international legal architecture. Before turning to examine international human rights law, some mention of two other branches of international law – international humanitarian law and international criminal law – is warranted.



A. INTERNATIONAL HUMANITARIAN LAW (IHL)¹⁵ AND INTERNATIONAL CRIMINAL LAW (ICL)

Although the concept of war reparations between States is firmly embedded in IHL,¹⁶ there are differences in opinion among States and commentators as to whether IHL grants individual victims the right to reparations for breaches of the substantive rules.¹⁷ IHL treaties do not expressly identify who is entitled to reparations. Historically, the vast majority of agreements between States over war reparations have typically included a waiver of individual claims since individuals were not seen as rights holders but as "incidental beneficiaries" of an interstate system of rights and obligations.¹⁸ That there may be an emerging right in IHL to reparation for individuals is supported by more recent State practice, including the endorsement by the UN General Assembly in 2005 of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* [hereinafter *Basic Principles and Guidelines*], recommendations of UN Commissions of Inquiry, UN resolutions and through transitional justice mechanisms concluded in post-conflict environments.

A significant barrier for victims is that sexual violence has not typically been made a subject of criminal prosecution in international trials. This lacuna in the law has been partially addressed through the normative and institutional developments in international criminal law (ICL), which is primarily concerned with prosecution of serious international crimes and acts prohibited under IHL, such as grave breaches of the Geneva Conventions, war crimes, crimes against humanity and genocide.¹⁹ However, as with domestic criminal law, ICL has focussed predominantly on the accountability of perpetrators rather than on the rights of victims, other than as witnesses.

That ICL was failing victims was expressly recognised with the integration of the right of victims to reparation into the Rome Statute which established the International Criminal Court (ICC). The Statute gives the Court the authority to issue an order for reparation against a convicted person or through the Trust Fund for Victims (TFV).²⁰ To date, however, few victims have benefitted from this provision due to the restrictive eligibility conditions, prolonged litigation and problems with implementation.²¹ In particular, victims of CRSV have too often been deprived of their right to seek reparation principally as a result of flawed strategies adopted by the Office of the Prosecutor (OTP).²²

The TFV, which was created by the Rome Statute, is independent of the ICC. It is charged with several functions: it acts as a depository for assets seized from a suspect; it is responsible for administering and implementing the Court's reparation directions; and it is authorised to assist victims separately from ongoing investigations.²³ In this latter capacity the TFV has provided assistance to scores of projects in partnership with local NGOs and women's groups in the DRC and Uganda. Many of these projects are gender-sensitive and focus specifically on CRSV through the provision of physical and psychological rehabilitation for victims. Following the 2018 acquittal of Jean-Pierre Bemba, by the Appeals Chamber of the ICC,²⁴ for rape as a crime against humanity and war crime, the TFV announced it would accelerate the launch of its assistance mandate in the Central African Republic. However, these intervention measures should not be confused with Court-ordered reparations following a conviction.²⁵



While the Court has responsibility for developing the principles relating to reparations to victims “including restitution, compensation and rehabilitation”, ordering measures that are truly transformative such as guarantees of non-repetition is not within its powers. The Rome Statute clearly does not give the Court the power to direct States to undertake the type of redistributive activities and *structural* change that would disrupt the gender order to prevent the recurrence of conflict-related sexual and gender-based violence that is promised by transformative reparations.

B. INTERNATIONAL HUMAN RIGHTS LAW

The right to reparation is founded on the right to an effective remedy as set forth in international²⁶ and regional human rights treaties.²⁷ The obligation on States to ensure that victims have effective access to reparations is also found in regional treaties concerned with preventing and combatting violence against women whether perpetrated in peace time or in armed conflict.²⁸ States have the obligation to comply with international and regional human rights law, ie, human rights treaties to which they are parties and customary international law²⁹ including *jus cogens* norms.³⁰

“Soft” law instruments such as UN General Assembly resolutions together with international jurisprudence have clarified the disparate and sometimes vague language around reparations found in human rights treaties. In particular, the *Basic Principles and Guidelines*³¹ have contributed to the clarification and development of the law. As a soft law instrument, the *Basic Principles and Guidelines* are not legally binding as such. However, to the extent that the resolution emphasises that the instrument does “not entail new international or domestic legal obligations” the norms contained therein represent existing customary international law binding on all States.

The *Basic Principles and Guidelines* affirm that “[e]qual and effective access to justice”, “[t]he right to adequate, effective and prompt reparation for the harm suffered”, and “[a]ccess to relevant information concerning violations and reparation mechanisms” are the three core components of the right to a remedy.³² Although the instrument is concerned with gross human rights violations, the right to a remedy and reparation applies to all human rights violations,³³ in accordance with the doctrine of State responsibility. Principle 15 reaffirms the obligation of States to provide reparation to victims for acts or omissions which can be attributed to the State. In cases where a person or entity other than the State is found liable for reparation and is unable or unwilling to meet their obligations States should establish national reparation programmes for victims (Principle 16). States must also ensure that there are effective domestic mechanisms for the enforcement of reparations (Principle 17). Under customary international human rights law, State responsibility to provide reparation may also extend to acts committed by private actors in cases where the State has failed to “exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors”.³⁴

Principles 19-23 elaborate on the different forms of reparation recognised in international human rights law including restitution,³⁵ compensation,³⁶ rehabilitation,³⁷ satisfaction³⁸ and guarantees of non-repetition.³⁹ The prosecution of perpetrators and access to justice mechanisms for survivors are considered to be types of reparation as methods of satisfaction. Truth telling as well as the construction of memorials that recognise the losses suffered by the population are alternative ways for individuals and groups to gain recognition for the harms they have suffered. In short, reparations can be material or symbolic, individual or collective. Irrespective of form, reparations also provide recognition to victims as rights holders.



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The *Basic Principles and Guidelines* were adopted when States were increasingly turning to administrative reparation schemes as transitional justice mechanisms in the aftermath of conflict and widespread political violence. Administrative reparation schemes are commonly introduced by States as part of transitional justice programmes to more effectively respond to large-scale violations of international law perpetrated during armed conflict or widespread political violence.⁴⁰ The benefits of such programmes are that they can obviate common barriers confronted by victims in accessing formal justice processes including, for example, the high costs associated with litigation; satisfying judicial evidentiary standards; and the risks of re-traumatisation and secondary victimisation that come with judicial processes and cross-examination. Moreover, such schemes typically adopt a far broader and more fluid conception of who is entitled to reparations. Since many of these barriers to a remedy disproportionately exclude women and girls from accessing justice,⁴¹ administrative reparations can function as a vital lifeline for women and girls who are victims of CRSV.

These developments also coincided with the adoption of UN Security Council Resolution 1325 (2000) on Women, Peace and Security; international recognition of the prevalence of CRSV; and the mounting evidence that international law was still failing to register and respond to the particular experiences and needs of women and girls, not least in conflict.



PART IV: GENDERED HARMS, GENDER-SENSITIVE REPARATIONS AND TRANSFORMATIVE REPARATIONS

In armed conflict, civilian populations endure a vast range of material and non-material harms, including but not limited to: mass murder, sexual violence, torture, enslavement, displacement, lack of access to quality healthcare, degradation of the environment, which results in losses to water and food sources, and infrastructure destruction. Violence during armed conflict is often specifically directed at a person or group based on their race, ethnicity, nationality, religion and gender/sex. Typically, men and boys are targeted because of their gender, as are women and girls.

There is a direct link between a person's gender and how they experience harm and its consequences. A gender analysis is critical to understanding the lived realities and harms experienced by individuals during armed conflict and its aftermath if States are to respond effectively and comply with their human rights obligations.



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Work must continue in order to understand the embedded gender (and other intersectional) inequalities that affect women, men and non-binary individuals in unique ways during and post armed conflict. The effects of conflict-related sexual violence on transwomen and transmen must also be examined, as the assumptions around the gender differences between women and men's experiences have the potential to limit access to appropriate reparations. Applying an intersectional gender analysis to all situations of conflict-related sexual violence illuminates the breadth of inequalities people experience before, during and after conflict.⁴²



While women's rights groups have welcomed the increased attention that is being devoted to addressing the gendered harms confronted by women and girls in conflict, they have continued to express concerns over the obstacles that impede women and girls from accessing their right to a remedy for human rights violations and especially for CRSV. Thus, the adoption of administrative reparation schemes by States emerging from conflict was seen as a positive step to overcome traditional barriers for women.⁴³ However, the fact that most programmes have been concerned with reparation for violations of political and civil rights (for example arbitrary detention, summary execution, forced disappearance) which disproportionately affect men rather than the sexual and gender-based violence that more typically is perpetrated against women and girls has resulted in further marginalisation and gender discrimination.

Moreover, it is important that the right to a remedy is an additional right over and above the human rights entitlements of the entire population. This is especially true of economic and social rights which may overlap with forms of reparation, for instance access to healthcare services or education facilities. General welfare services – delivery of and access to economic and social rights - are not part of reparations to victims of violations of rights and must not be substituted for them.

A. GENDER-SENSITIVE REPARATIONS

In an attempt to draw attention to the gendered dimensions of reparations, in 2007, a women's civil society network drew up the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* [hereinafter *Nairobi Declaration*]. This sets out the measures that States should take to ensure that women and girls who have been subjected to CRSV are not discriminated against in accessing their right to reparation and that any reparations accorded are gender appropriate. The *Nairobi Declaration* expands on the *Basic Principles and Guidelines* and has helped to redefine reparation from a gender perspective. In particular, the *Nairobi Declaration* calls on States and other relevant bodies to ensure that women and girls are involved in the decision-making process, including the design of administrative schemes, and that they are able to determine what forms of reparation are best suited to their particular situations.

The *Nairobi Declaration* makes clear that for reparations to be just, adequate and effective an understanding of the gendered nature and consequences of the harm suffered due to CRSV is required. For example, redress for some harms such as loss of property, housing, health, education, employment may take the form of restitution. However, in such cases, gender-sensitive reparations may be adequate and effective only if victims of CRSV who cannot return to their own communities because of stigma or ostracism are relocated to alternative places of safety where they can rebuild their lives. In situations where compensation is awarded, a gender-sensitive approach requires that any barriers that women and girls face in accessing or keeping money safely must be fully addressed. Likewise, a gender-sensitive approach to rehabilitation for CRSV must at a minimum provide specialist health services to address the particular harms that women and girls experience including accessing safe abortion services and safe facilities for childbirth.⁴⁴ Rehabilitation may also include measures to fulfil the economic and social rights of victims that must take into account the specific gendered needs of survivors.



The *Nairobi Declaration* not only calls on States to ensure that victims of CRSV are provided with gender-sensitive reparation as redress for harms suffered but that reparations should provide a route through which to address the disadvantage and discrimination that contributed to and made possible the gendered harm in the first place.

B. TRANSFORMATIVE REPARATIONS

The *Nairobi Declaration* not only calls on States to ensure that victims of CRSV are provided with gender-sensitive reparation as redress for harms suffered but that reparations should provide a route through which to address the disadvantage and discrimination that contributed to and made possible the gendered harm in the first place. This latter conception of reparation is commonly referred to as “transformative” and is closely linked to the reparative principle of “guarantees against non-repetition”.

The concept of transformative reparation is encapsulated in the *Nairobi Declaration* with the assertion that “reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must address structural inequalities that negatively shape women’s and girls’ lives”. Transformative reparations thus seek to transform gender (and other) relations and social structures so as to address inequalities and reduce the likelihood of repetition.

Over the years, the UN system has engaged actively with the idea of transformative reparation and soft law instruments have been developed, most notably the 2014 *Guidance Note of the United Nations Secretary-General: Reparations for conflict-related sexual violence*.⁴⁵ The Guidance Note urges that any initiative designed to fulfil the right to reparations should be informed by the “potential to be transformative” with a view to “unsettling patriarchal and sexual hierarchies and customs”.⁴⁶ The Guidance Note, as with other interventions, has contributed to a more nuanced, gender-sensitive and ambitious understanding of reparation that strongly cautions against reparations that risk reinforcing pre-existing patterns of gender-based discrimination.

The Special Rapporteur on Violence against Women has also urged States to provide transformative reparations. She has noted 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 of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after the conflict.⁴⁷



PART V: TRANSFORMATIVE REPARATIONS AND THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) sets out the legal obligation on States parties to eliminate discrimination against women and to create equality between women and men. It is the only international human rights instrument exclusively concerned with women and girls. States parties are required to eliminate discrimination against women in the enjoyment of all rights, civil, economic, political, social and cultural. The CEDAW Committee has the task of interpreting the Convention as well as monitoring implementation by 189 States Parties to the Convention. The Committee has engaged with the topic of reparations in several different contexts, including through its General Recommendations; Concluding Observations to State Party reports; and its “communication” and inquiry procedures. In each of these contexts, it has provided valuable guidance to States on crafting and implementing reparations that are not only gender-sensitive but transformative in ambition.

A. GENERAL RECOMMENDATIONS

In elaborating on the core obligations of States (as set out in Article 2 of CEDAW) the Committee in *General Recommendation 28* (2010) notes that States parties are required to “provide reparation to women whose rights under the Convention have been violated.” The Committee further emphasises that “without reparation the obligation to provide an appropriate remedy is not discharged.” Such remedies should include “different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.”⁴⁸

In *General Recommendation 30* (2013) on “Women in Conflict Prevention, Conflict and Post-Conflict Situations” the Committee notes that for States parties to comply with their obligation to ensure that women are provided with adequate, effective and prompt reparations, “an assessment of the gender dimension of the harm suffered is essential” regardless of whether remedies are ordered by national or international courts or by administrative schemes. The Committee recommends that States ensure that reparations are gender-sensitive, promote women’s rights, and that women are involved in the design



of all reparation programmes. For the Committee, reparations should not only "respond to women's specific needs" but "should seek to transform the structural inequalities that led to the violations of women's rights...and prevent their reoccurrence."⁴⁹

Finally, in General Recommendation 33 (2015) on "Women's access to justice" the Committee builds on its previous analysis by providing far more granularity as to how States can deliver on gender-sensitive reparations to fully comply with their Convention obligations. In particular, in referencing the Nairobi Declaration, the Committee calls on States in cases of sexual violence in conflict or post-conflict situations to "mandate institutional reforms, repeal discriminatory legislation and enact legislation providing for adequate sanctions, in accordance with international human rights standards, and determine reparation measures, in close cooperation with women's organisations and civil society, to help to overcome the discrimination that preceded the conflict".⁵⁰

B. CONCLUDING OBSERVATIONS ON STATE PARTY REPORTS

Every four years, State parties must submit country reports to the Committee on measures taken to implement their Convention obligations. State parties are required to accept the authority of the Committee's guidance as set out in the Concluding Observations to State reports. The Committee has raised repeatedly reparations for CRSV in its Concluding Observations in response to country reports.

For example, in its 2019 Concluding Observations to the Democratic Republic of Congo, the Committee expressed serious concern about the increase in the number of women and girls who are victims of CRSV and the systematic failure by the State to prevent such violence and take measures to assist victims as required pursuant to CEDAW.⁵¹ The Committee recommends the State party to "ensure that victims and their family members have effective access to justice and remedies and receive adequate reparations, in particular by ensuring the immediate payment of the reparations established and provided for in judicial decisions issued by the courts, especially in cases in which a State agent or the State is found responsible, and establishing a comprehensive national policy to provide reparations to victims of sexual crimes and ensuring the availability of funding for its implementation". In addition, the State must ensure that "victims have access to comprehensive medical treatment, mental health care and psychosocial support".

C. COMMUNICATION/PETITION PROCEDURE AND INQUIRY PROCEDURE

The "communication" or petitions procedure and the inquiry procedure aim to encourage States parties to implement the Convention and were introduced in 1999 pursuant to the Optional Protocol to CEDAW (OP-CEDAW).⁵² The former procedure can be accessed by individuals or groups who claim to be victims of a violation by a State party to the Protocol; the latter procedure can be initiated by the Committee on receipt of reliable evidence indicating grave or systematic violations of the Convention. Both these procedures have enabled the Committee to further elaborate on reparations for sexual and gender-based violence as individual redress for violations and as a means of transforming social relations and tackling discrimination.

As detailed in the chart below, the Committee has made recommendations that address both the specific instances where the individual was harmed, as well as the broader structural issues present within the State. Individual redress generally takes the form of compensation



(for the victim and/or family); free counselling and therapy for victims and their families; and/or an independent investigation into the violation. Transformative reparations on the other hand require the State to address structural discriminations to benefit all women by preventing future violations. This may require the State to repeal legislation that is a barrier to eliminating gender discrimination; effectively investigate, prosecute and punish offenders; cooperate with NGOs to protect and support victims; provide training and education programmes to prevent recurrence and change attitudes; and provide gender specific health care and rehabilitation schemes. Importantly, CEDAW Committee recommendations are context specific, while simultaneously providing a holistic approach to gender-sensitive reparations.

D. ILLUSTRATIVE EXAMPLES OF GENDER-BASED VIOLENCE BEFORE THE CEDAW COMMITTEE

Communication	Violations found	Recommendations
<i>The Vienna Intervention Centre v. Austria</i> , Communication No. 6/2005, U.N. Doc. CEDAW/C/39/D/6/2005, 1 October 2007.	Articles 2 (a) and (c) through (f) and 3.	Individual redress <ul style="list-style-type: none">None (victim deceased) Transformative <ul style="list-style-type: none">Strengthen implementation of criminal law by providing sanctions for failure to act with due diligence to prevent violence against women.Prosecute perpetrators.Ensure enhanced coordination between law enforcement and judicial bodies. <p>Strengthen training and education on domestic violence, including CEDAW, for law enforcement and judicial branches.</p>
<i>TPF v. Peru</i> , Communication No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009, 25 November 2011.	Articles 1, 2(c) and 9f), 3, 5, 12.	Individual redress <ul style="list-style-type: none">Compensation for material and moral damages commensurate with the gravity of the violation.Rehabilitation Transformative <ul style="list-style-type: none">Legislate for effective access to therapeutic abortion that protect women's physical and mental health.Ensure that healthcare facilities observe the relevant provisions on reproductive rights set forth in CEDAW.Decriminalise abortion when the pregnancy results from rape or sexual abuse.



Communication	Violations found	Recommendations
Ángela González <i>Carreño v. Spain</i> , Communication No. 47/2012, U.N. Doc. CEDAW/ C/58/D/47/2012, 15 August 2014.	Articles 2 (a) to (f), 5 (a), 15 and OPCEDAW article 4 (1), (2) (c), and (e).	<p>Individual redress</p> <ul style="list-style-type: none">• Comprehensive compensation commensurate with the seriousness of the infringement.• Conduct an investigation into whether the State structures and practices led to the deprivation of protection. <p>Transformative</p> <ul style="list-style-type: none">• Ensure that prior acts of domestic violence are considered when making custody and visitation to protect both children and victims of violence.• Strengthen the legal framework in order to ensure due diligence is applied to situations of domestic violence.• Provide mandatory training on domestic violence, gender stereotypes, CEDAW and the Committee's work for legal personnel.
<i>R.P.B. v. Philippines</i> , Communication No. 34/2011, U.N. Doc. CEDAW/ C/57/D/34/2011, 12 March 2014.	Articles 1 and 2 (c), (d), (f).	<p>Individual redress</p> <ul style="list-style-type: none">• Monetary compensation, commensurate with the gravity of the violation.• Free-of-charge counselling and therapy for the author and affected family members.• Barrier-free education with interpreting. <p>Transformative change</p> <ul style="list-style-type: none">• Review and amend legislation on rape to make it human rights compliant.• Ensure all criminal proceedings involving rape and sexual violence be conducted in an impartial and fair manner free from prejudices or stereotypical notions regarding the victim's gender, age and disability.• Provide adequate and regular training on CEDAW to all legal professionals to ensure that stereotypes and gender bias do not affect decision-making.



Communication	Violations found	Recommendations
<p><i>Report of the inquiry concerning Canada pursuant to Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/OP.8/CAN/1, 30 March 2015.</i></p>	<p>Grave violations of CEDAW.</p>	<p>Specific/individual redress</p> <ul style="list-style-type: none">• Investigate and prosecute all cases of missing and murdered women.• Provide culturally-sensitive services to support families of missing and murdered women including legal and social counselling; compensation; and other forms of reparation such as truth-telling, public apologies, commemorations. <p>Transformative</p> <ul style="list-style-type: none">• Ensure that police are complying with their obligation to investigate without discrimination by introducing monitoring and complaints mechanisms, sanctions for misconduct.• Make disaggregated data collection by police mandatory.• Develop nationwide victim services and provide services to support the specific needs of aboriginal women, including shelters, counselling and rehabilitation programmes.• Develop rehabilitation, social integration and exit programmes specifically targeted at aboriginal women engaged in prostitution.• Take comprehensive measures to improve the socioeconomic conditions of aboriginal women.• Take specific measure to overcome the legacy of colonialism and eliminate discrimination against aboriginal women.• Establish an independent national public inquiry into missing and murdered aboriginal women and girls.



The views adopted by CEDAW have been influential in the jurisprudence of regional human rights courts. Drawing on the Committee's inquiry into the disappearance and killings of women in Ciudad Juárez, Mexico, in 2009, the Inter-American Court of Human Rights released a landmark judgment in which it "embraced the concept of gender-sensitive reparations with a transformative aspiration". In *Caso González y Otras v. Mexico* (the "Cotton Field" case),⁵³ the Court found Mexico had violated the rights under the Inter-American Convention of Human Rights (IACHR) of three women who had disappeared and whose bodies were tortured and murdered. It also found that their mothers' rights under the IACHR had been violated. In turning to the question of reparation, the Court stated:

the concept of "integral reparation" entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, *bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State, the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification*. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable. [emphasis added].

Mexico was ordered to provide a variety of reparation measures, including compensation, rehabilitation, satisfaction and guarantees of non-repetition. Family members and closely affiliated persons of the deceased who had self-identified as injured parties were also awarded reparations.



Case	Treaties violated	Reparation
Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico, Inter-American Court of Human Rights, Judgment, 16 November 2009.	IACtHR Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belem do Para Convention").	<p>Individual</p> <ul style="list-style-type: none">• Adopt all necessary judicial and administrative measures to complete the investigation, find, prosecute and punish the perpetrator/s.• Investigate and prosecute or sanction all public officials who committed irregularities during the investigation.• Publish the Court's judgment; publicly acknowledge its responsibility for the harm caused; erect a monument to commemorate the victims.• Provide free specialised medical and psychological treatment.• Provide monetary compensation (as determined by the Court) and reimbursement of costs. <p>Transformative</p> <ul style="list-style-type: none">• Continue standardising all laws and policy in accordance with the Istanbul Protocol and UN HR standards in respect of all crimes relating to the disappearance, sexual abuse and murders of women.• Continue implementing permanent education and training programmes for public officials on human rights and gender and on a gender perspective to ensure due diligence and to overcome stereotyping.• Conduct an educational programme for the general population.



PART VI: WOMEN, PEACE AND SECURITY AGENDA

Over the last two decades the Security Council has adopted a total of ten resolutions under its Women, Peace and Security agenda. Two themes have dominated the agenda: increasing women's participation in decision-making, including peace negotiations and peace-building, and preventing and protecting against CRSV. Insofar as the latter is concerned, the resolutions have repeatedly reiterated that States have the primary responsibility to respect and ensure the human rights of all persons within their territory and subject to their jurisdiction. They have called on States to prosecute offenders and to hold *individuals* criminally accountable for serious violations of international law. Although the resolutions have referred to the need to provide victims with access to health care, psychosocial support and legal assistance among other support, it was only with the adoption of Resolution 2467 in April 2019 that the Security Council has unambiguously framed such needs within a rights-based framework.⁵⁴

By encouraging States to adopt "a survivor-centered approach in preventing and responding to sexual violence in conflict and post-conflict situations" Resolution 2467 frames the obligations of States through international human rights law rather than through the criminal law, domestic and/or international. This repositioning – from offender to victim – means that Resolution 2467 is primarily concerned with States' obligations towards individuals and their corresponding rights, marking a significant departure from previous resolutions. In line with the survivor-centered approach and the WPS pillar related to women's participation in decision and policy-making, women's and girls' meaningful participation is also vital in the design and implementation of reparation programmes. Survivors are best able to determine priority needs and the ways to ensure their delivery.



Repositioning – from offender to victim – means that Resolution 2467 is primarily concerned with States' obligations towards individuals and their corresponding rights, marking a significant departure from previous resolutions.

The Resolution recalls and explicitly refers to "the applicable provisions of international law on the right to an effective remedy for violations of human rights". Although sexual and gender-based violence as a violation of international human rights law is the focus of the Resolution, as worded, the text recognises that the right to an effective remedy applies to all human rights violations be they civil, political, economic, social or cultural. More specifically the Resolution calls on States "to make such effective remedy and assistance available to victims of sexual violence in conflict, and post-conflict situations" in line with their respective legal obligations, including CEDAW for States parties to that Convention. The obligation of States to those whose human rights have been violated (irrespective of perpetrator) is to ensure that the victim's right to a remedy, right to reparation and right to access justice are fully respected.



The Security Council has referred to reparations in four previous WPS resolutions although in a relatively cursory manner.⁵⁵ In contrast, the human rights framing of Resolution 2467 enables the Council to expand on reparations, to remind States of their legal responsibilities to victims whose rights have been violated and to do so through a gender-sensitive lens, a policy commitment required by the WPS agenda. This interplay between legal obligation and policy is captured in the Resolution with the call on States “to ensure that survivors … receive the care required by their specific needs and without discrimination”. Likewise, the Resolution reminds States that CRSV is a rights violation that is not exclusively perpetrated against women and girls, whilst simultaneously recognising that they are disproportionately targeted.

By adopting a victim-centric gender-sensitive approach, Resolution 2467 approaches the prosecution of perpetrators as a method of satisfaction. Thus, while reminding States of the need to comply with fair trial guarantees under international law, the Resolution elaborates on what measures States should take to address the particular needs of survivors such as enacting victim and witness protection laws, introducing legal aid for survivors and removing procedural impediments for victims. Similarly, the Resolution urges States to strengthen access to justice for victims of CRSV through prompt investigation, prosecution and punishment of perpetrators, as well as reparations for victims.

As noted above, Resolution 2467 encourages States and other relevant actors to give due consideration to the establishment of a “survivors fund” for those who have been subjected to CRSV. The Security Council’s choice of language – not to describe it as a “reparation” fund – may have been intentional for the reasons elaborated above. After all, the obligation to pay reparations attaches to the wrongdoer for the violation of a norm. Under human rights law, it is the responsibility of the State to ensure reparations are made available and carrying the financial burden of reparations has in itself a reparative dimension.



PART VII: ALTERNATIVE APPROACHES

It is not uncommon for governments transitioning from conflict to claim that reparation programmes are unaffordable. However, the record shows that most governments that make this claim do so even before undertaking any effort to quantify costs. As the *UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence* notes, this fact simply exposes the “unwillingness to take seriously what is in fact a matter of legal obligation.”⁵⁶ What steps, if any, States should take to ensure law compliance by third States is a highly contested topic. Be that as it may, there are options available to States operating collectively, through international organisations such as the UN or international financial organisations (IFIs), to influence those States responsible for serious human rights violations, including CRSV, to deliver on their obligation to provide reparations for victims.

One such option is for IFIs to develop and integrate reparation programmes as a conditionality of budgetary support loans, grants and/or debt relief. Although IFIs typically condition the provision of financial assistance on implementation by the recipient country of policy reforms that are aimed at making fiscal and debt management sustainable and improving economic growth, there is no reason why reparations (and, in particular, gender-sensitive reparations) cannot be streamlined into such agreements. Thus, rather than only conditioning financial assistance or debt swaps/cancellation to fiscal and macroeconomic policies, recipient States could be required to ringfence a proportion of the annual budget to creating and operating a gender-sensitive reparations programme for victims of CRSV. Imaginatively designed and implemented, conditionality would reinforce the doctrine of State responsibility for rights violations, including for CRSV. For IFIs such as the IMF and World Bank, integrating gender-sensitive reparations conditionalities into financial assistance would correspond with their declared commitment to the Sustainable Development Goals, most notably Goal 5 on Gender Equality and Goal 16 on Peace and Justice.

Development projects that specifically seek to prevent and respond to sexual and gender-based violence should not be confused with reparations programmes. For example, the World Bank financed project to prevent and respond to gender-based violence in the Democratic Republic of Congo launched in 2018 and totalling \$100 million USD, while hugely welcome, does not absolve the State from its legal obligation to acknowledge responsibility for human rights violations and to provide reparations to survivors for the wrongdoing.⁵⁷



PART VIII: CONCLUSION, RECOMMENDATIONS AND FUTURE DIRECTIONS

There is no doubt that the international community is failing victims of CRSV. Prevention strategies have been narrowly conceived, placing too much emphasis on addressing accountability of perpetrators. Criminal prosecutions can be seen as an important reparative measure. But prosecutions alone are inadequate. A more holistic gender-sensitive approach is required, coupled with resituating the discourse around international human rights law that looks to the obligations of States to prevent and respond to CRSV.

A. CONCLUSIONS:

- Women and girls, in particular, continue to struggle to attain reparations for sexual and broader gender-based violations committed in armed conflict.⁵⁸
- In the quest for accountability, survivors' needs must be a primary consideration, which must include: providing victims with access to justice; protection and support before, during and post-trial; measures to facilitate truth telling; access to gender-sensitive transformative reparations.⁵⁹
- Providing reparations for those who have experienced sexual violence should not only include acts that address the specific instance(s) of sexual violence. Rather, reparations should also include measures that focus on the wider instances of harm and inequality that led to acts of sexual violence.
- Robust gender analysis can reveal the types of reparations that are suitable in different contexts, recognising that there is not a "one size fits all" approach.
- Survivors must be able to participate meaningfully in the design, creation and operation of all such local schemes as well as into any international mechanism. These issues are crucial for any international reparations scheme that seeks to mobilise government and organisational support.
- The creation of an international fund for survivors of CRSV may be warranted but such a fund should not be confused with the legal obligation on States to provide adequate, effective and timely reparations to victims of violations of international human rights law, including CRSV.
- States have obligations to provide reparations to individuals whose rights they have violated, pursuant to the human rights instruments to which they are parties.



B. RECOMMENDATIONS:

- When reparations are provided by States it is essential to prioritise transformative reparations, which must include a range of actions that address the continuum of harms women and girls experience during and after armed conflict.
- The Women, Peace and Security framework emphasises a “survivor-centred” approach, which must be adopted in this context.
- Women and girls survivors of CRSV in many instances suffer acute physical, emotional and psychological harm, which must be included in the definition of gender-based violence.
- Women in many instances of conflict and its aftermath also suffer from a lack of access to food, housing, educational and livelihood opportunities, sexual and reproductive health services, which also must be considered to be a part of the definition of gender-based violence.
- A holistic gender approach must be taken to reparations to individuals and groups in accordance with international human rights instruments, which includes reparations for violations beyond those of sexual violence.
- Transformative reparations must include a robust gender analysis that addresses intersectional inequalities which occur during and after armed conflict.
- Crafting imaginative ways to ensure that States are held responsible for rights violations, including CRSV, should be a priority. Reparations should not be an afterthought: the provision of reparations by the State responsible for rights violations is to reaffirm the doctrine of State responsibility and to recognise that victims are rights holders who are entitled by law to redress, but that is a first step.
- The CEDAW Committee offers all States valuable guidance on the potential of transformative reparations. Adopting domestic laws and policies to counter discrimination in all its forms, including gender-based discrimination and thereby transforming gender relations is necessary to prevent atrocities in armed conflict, including CRSV.
- The potential of IFIs to integrate gender-sensitive reparations conditionalities into budgetary support loans, grants and/or debt relief needs to be explored further.



REFERENCES

- ¹ *Report of The United Nations Secretary-General on Conflict Related Sexual Violence*, U.N. Doc. S/2019/280, 29 March 2019 [hereinafter CRSV Report].
- ² Dr. Denis Mukwege Foundation, "Reparations for Wartime Sexual Violence", available at <https://www.mukwegefoundation.org/project/global-reparations-system/>.
- ³ United Nations Security Council Resolution 2467, U.N. Doc. S/RES/2467, 23 April 2019.
- ⁴ See Global Survivors Fund, "Global Survivors Fund Concept Paper", October 2019, available at <https://www.globalsurvivorsfund.org/>; The Global Survivors Fund was launched during the commemorative events marking the 10th anniversary of the mandate on Secretary-General's Special Representative on Sexual Violence in Conflict.
- ⁵ "Victim" and "survivor" are terms that will be used interchangeably throughout this report.
- ⁶ "Global Survivors Fund Concept Paper", p. 5.
- ⁷ CRSV Report, para 21.
- ⁸ See Joanne Neenan, Closing the Protection Gap for Children Born of War Addressing Stigmatisation and the Intergenerational Impact of Sexual Violence in Conflict (LSE Centre for Women, Peace and Security and Foreign and Commonwealth Office, 2018) available at <http://www.lse.ac.uk/women-peace-security/assets/documents/2018/LSE-WPS-Children-Born-of-War.pdf>
- ⁹ International organisations play a pivotal part in collaborating with/ assisting on delivery, eg, in Nepal, the International Organization for Migration, Office of the United Nations High Commissioner for Human Rights, the Nepalese Ministry of Peace and Reconstruction and the District Administration Offices of the Ministry of Home Affairs jointly undertook a project to provide effective and transparent mechanisms for reparation to conflict victims.
- ¹⁰ CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, U.N. Doc. CEDAW/C/GC/30, 18 October 2013, para 35; "For most women in post-conflict environments, the violence does not stop with the official ceasefire or the signing of the peace agreement and often increases in the post-conflict setting".
- ¹¹ CRSV Report, para 29.
- ¹² France and the European Union have committed 6 million and 2 million Euros respectively to the Global Fund.
- ¹³ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, U.N. Doc. A/56/10, November 2001, Article 31.
- ¹⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Articles 34-37.



- ¹⁵ IHL is sometimes referred to as the Law of Armed Conflict (LOAC) or *jus in bello*.
- ¹⁶ The Hague Convention IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 07 December 1979, Article 91.
- ¹⁷ Domestic jurisprudence mirrors this divide with Greek and Dutch courts being receptive to individual claims while Japanese, German and US courts reject individual claims; See Tokyo District Court, Civil Division No. 6, *Sjoerd Lapré et al. v. Japan*, Claims for compensation from Japan arising from injuries suffered by former POWs and civilian internees of the Netherlands, Claim No. 1218 (Civil), Judgment, 30 November 1998, published in *Hanrei Taimuzu*, Vol. 991, p. 262, publication of the English version of the judgment in *Japanese Annual of International Law*, Vol. 42, 1999, p. 143; *Varvarin Bridge Case*, *35 citizens of the Former Federal Republic of Yugoslavia v. Germany*, Case No. III ZR 190/05, Appeal Judgment, 2 November 2006.
- ¹⁸ See *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Separate opinion of Judge Koroma and Separate opinion of Judge Keith, CGJ 434 (ICJ 2012) 3 February 2012.
- ¹⁹ United Nations General Assembly Resolution 260 A (III), *The Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Article 5; obliges States to provide effective penalties but is silent on the rights of victims. The draft Convention included a specific provision on reparations but was eventually dropped from the text prior to adoption in December 1948.
- ²⁰ *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, 17 July 1998, Article 75 (2) [hereinafter Rome Statute].
- ²¹ The only three cases that have reached the reparation stage are *The Prosecutor v. Lubanga*, *The Prosecutor v. Katanga* and *The Prosecutor v. Al Mahdi*.
- ²² See *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber Judgment, 14 March 2012.
- ²³ Rome Statute, Article 79.
- ²⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo (Jean-Pierre)*, Case No. ICC-01/05-01/08, Appeals Chamber Judgment, 8 June 2018.
- ²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Prosecution's observations of the Trust Fund for Victims' Filing on Reparations and Draft Implementation Plan, 18 December 2015, para 4.
- ²⁶ International human rights legal instruments that include reparations: United Nations General Assembly Resolution 217 A (III), *Universal Declaration of Human Rights*, U.N. Doc. A/RES/3/217, 10 December 1948, Article 8; United Nations General Assembly Resolution 2200A (XXI), *International Covenant on Civil and Political Rights*, 16 December 1966, Articles 2 and 3; United Nations General Assembly Resolution 34/180, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979; United Nations General Assembly Resolution 2106 (XX), *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Article 6; United Nations General Assembly Resolution 39/46, *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 10 December 1984, Article 14; United Nations General Assembly Resolution 44/25, *Convention on the Rights of the Child*, 20 November 1989, Article 39.



- ²⁷ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Article 13; Organisation of American States, *American Convention on Human Rights*, 22 November 1969, Article 25; Organisation of African Unity, *African Charter on Human and Peoples' Rights*, 27 June 1981, Article 7; European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, Article 7(1)(a)(25); League of Arab States, *Arab Charter on Human Rights*, 15 September 1994.
- ²⁸ Organisation of American States, *The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* (Convention of Belém do Pará) 9 June 1994, Article 7; Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence* (Istanbul Convention) 11 May 2011, Article 5; African Union, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (the Maputo Protocol) 11 July 2003, Article 4, para 2.
- ²⁹ Customary international law, which comprises State practice and *opinio juris*, are norms that are binding on all States.
- ³⁰ A peremptory norm of international law from which no derogation is permitted.
- ³¹ United Nations General Assembly Resolution, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. A/RES/60/147, 16 December 2005 [hereinafter *Basic Principles and Guidelines*].
- ³² *Basic Principles and Guidelines*, Principle 11.
- ³³ *Basic Principles and Guidelines*, Principle 26.
- ³⁴ CEDAW Committee, *General Recommendation No. 35, on gender-based violence against women, updating general recommendation No. 19*, U.N. Doc. CEDAW/C/GC/35, 14 July 2017, para 24 (b); U.N. Committee against Torture, *General Comment No. 3, "Implementation of article 14 by States parties"* ("General Comment No.3"), U.N. Doc. CAT/C/GC/3, 13 December 2012, para 7; Committee against Torture, *General Comment No. 2, "Implementation of article 2 by States parties"*, U.N. Doc. CAT/C/GC/2, 24 January 2008, para 15.
- ³⁵ Restitution are measures that should "restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property"; *Basic Principles and Guidelines*, Principle 19.
- ³⁶ Compensation should include "any economically accessible damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services"; *Basic Principles and Guidelines*, Principle 20.
- ³⁷ "Rehabilitation should include medical and psychological care as well as legal and social services"; *Basic Principles and Guidelines*, Principle 21.



³⁸ "Satisfaction should include, where applicable, any or all of the following: effective measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels"; *Basic Principles and Guidelines*, Principle 22.

³⁹ "Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: ensuring effective civilian control of military and security forces; ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; strengthening the independence of the judiciary; protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; promoting mechanisms for preventing and monitoring social conflicts and their resolution; reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law"; *Basic Principles and Guidelines*, Principle 23.

⁴⁰ Countries that are regularly cited for having introduced administrative reparation programmes include: Argentina, Colombia, Ecuador, Guatemala, Nepal, Sierra Leone, South Africa and Uruguay.

⁴¹ See CEDAW Committee, *General Recommendation No. 33, on women's access to justice*, U.N. Doc. CEDAW/C/GR/33, 3 August 2015.

⁴² See Forthcoming, Emily Jones, "Gender and Reparations: Seeking Transformative Justice" in Goetz and Ferstman (eds.) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (Brill, March 2020).

⁴³ Administrative programmes may not preclude victims of CRSV from obtaining reparations through courts.

⁴⁴ Human Rights Council, *Report of the Working Group on the issue of discrimination against women in law and in practice*, U.N. Doc. A/HRC/32/44, 08 April 2016, para 36.

⁴⁵ *Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence*, June 2014.

⁴⁶ *Ibid.*, p. 6 and 9.



- ⁴⁷ *Report of the Special Rapporteur on violence against women, its causes and consequences*, Rashida Manjoo, U.N. Doc. A/HRC/14/22, 23 April 2010, para 31.
- ⁴⁸ CEDAW Committee, *General Recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, U.N. Doc. CEDAW/C/GC/28, 16 December 2010, para 32.
- ⁴⁹ CEDAW Committee, *General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, U.N. Doc. CEDAW/C/GC/30, 18 October 2013, para 79.
- ⁵⁰ CEDAW Committee, *General Recommendation No. 33 on women's access to justice*, U.N. Doc. CEDAW/C/GC/33, 3 August 2015, para 19.
- ⁵¹ CEDAW Committee, *Concluding observations on the eight periodic report of the Democratic Republic of the Congo*, U.N. Doc. CEDAW/C/COD/CO/8, 6 August 2019.
- ⁵² OP-CEDAW is currently ratified by 112 States, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. A/RES/54/4, 6 October 1999.
- ⁵³ *Gonzalez, Monreal and Monarrez ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights Judgment, 16 November 2009.
- ⁵⁴ United Nations Security Council Resolution 2467, U.N. Doc. S/RES/2467, 23 April 2019; for a detailed analysis, see Christine Chinkin and Madeleine Rees, Commentary on Security Council Resolution 2467: Continued State Obligation and Civil Society Action on Sexual Violence in Conflict (LSE Centre for Women, Peace and Security and Women's International League for Peace and Freedom, 2019) available at <http://www.lse.ac.uk/women-peace-security/assets/documents/2019/Final-WPS-Commentary-Report.pdf>.
- ⁵⁵ United Nations Security Council Resolution 1888, U.N. Doc. S/RES/1888, 30 September 2009; United Nations Security Council Resolution 2106, U.N. Doc. S/RES/2106, 24 June 2013; United Nations Security Council Resolution 2122, U.N. Doc. S/RES/2122, 18 October 2013; and United Nations Security Council Resolution 2242, U.N. Doc. S/RES/2242, 13 October 2015.
- ⁵⁶ *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, U.N. Doc. A/69/518, 8 October 2014, p. 27.
- ⁵⁷ See The World Bank, "DRC - Gender Based Violence Prevention and Response Project", available at <https://projects.worldbank.org/en/projects-operations/project-detail/P166763>.
- ⁵⁸ See *Report of the Secretary-General on Conflict Related Sexual Violence*, U.N. Doc. S/2017/249, 15 April 2017; *Report of the Secretary-General on Conflict-Related Sexual Violence*, U.N. Doc. S/2018/250, 23 March 2018; *Report of the Secretary-General on Conflict Related Sexual Violence*, U.N. Doc. S/2019/280, 29 March 2019; *Report of the Secretary-General on women and peace and security*, U.N. Doc. S/2018/900, 9 October 2018.
- ⁵⁹ *Report of the Secretary-General on Conflict Related Sexual Violence*, U.N. Doc. S/2019/280, 29 March 2019, para 28.



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