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Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice

Fionnuala Ní Aoláin, Catherine O'Rourke, Aisling Swaine*

The United Nations Secretary-General's adoption of a Guidance Note on Reparations for Conflict-Related Sexual Violence (2014) marks an important supplement to recent normative developments in the area of gender-sensitive reparations. Despite these progressive normative advances, there remain conceptual gaps in the legal and policy framework for reparations addressing conflict-related sexual violence and, consequently, ongoing challenges in the implementation of gender-sensitive reparations, which this Article identifies. Challenges include the exclusion of women from legal remedies due to definitional, operational, and enforcement bias in the creation and implementation of reparation regimes. Moreover, a limited understanding of who can be the victim of sexual harm means that violence against men is often unseen and unaccounted for when states and other international actors conceive and implement reparations. This Article comprehensively reviews international and domestic practices, addressing legal rules, policy debates, and reparations programming for conflict-related sexual violence. In doing so, the analysis mediates the gap between norm and implementation by surveying common approaches and promising innovations in reparations delivery. The Article concludes that a commitment to transformative reparations is critical to gender-sensitive reparations. Transformative reparations address the immediate reparative needs of survivors of sexual harm, while also being fully cognizant of the social and economic barriers to full equality for women in many societies. Thus,

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transformative reparations go beyond the immediacy of sexual violence, encompassing the equality, justice, and longitudinal needs of those who have experienced sexual harms. To this end, we propose ten practice-based principles to inform future reparations practice in judicial, peacemaking, and programming contexts for conflict-related sexual violence.

INTRODUCTION

This Article addresses the critical matter of reparations for conflict-related sexual violence (“CRSV”) in a global context where sexual violence has gained substantial recognition and has mobilized states to political action.¹ The United Nations Secretary-General has defined CRSV as “sexual violence occurring in a conflict or post-conflict setting that has a direct or indirect causal link with the conflict itself.”² CRSV includes manifestations of violence that may reach the tactic of war threshold³ as well as sexual violence against civilians within the wider context of the conflict. These forms of violence affect women, girls, boys, and men.⁴ While recognizing broadly defined CRSV, the Article focuses primarily on the experiences of women, drawing on the parallel experiences of men when relevant. CRSV can be individual and collective, and the harms that ensue are physical, moral, emotional, social, immediate, and intergenerational.⁵ Acts falling within the definition of CRSV include rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, and forced nudity.⁶ Research across conflict zones reveals both the perniciousness of sexual violence and the limited knowledge of the forms and patterns of sexual targeting.⁷ There is a deficiency in understanding not

1. See Press Release, Office of the Special Representative of the Secretary-General for Sexual Violence in Conflict, 122 Countries Endorse Historic ‘Declaration of Commitment to End Sexual Violence in Conflict,’ U.N. Press Release (Oct. 2, 2013), available at <http://www.un.org/sexualviolenceinconflict/press-release/122-countries-endorse-historic-declaration-of-commitment-to-end-sexual-violence-in-conflict/>, archived at <http://perma.cc/Z744-U3LH>.

2. U.N. Secretary-General, *Rep. of the Secretary-General on the Implementation of Security Council Resolutions 1820 (2008) and 1888 (2009)*, ¶ 5, U.N. Doc. A/65/592-S/2010/604 (Nov. 24, 2010) [hereinafter *Rep. of the Secretary-General on Implementation of 1820 & 1888*].

3. MARIA ERIKSSON BAAZ & MARIA STERN, SEXUAL VIOLENCE AS A WEAPON OF WAR? PERCEPTIONS, PRESCRIPTIONS, PROBLEMS IN THE CONGO AND BEYOND 45–46 (2013).

4. See *Rep. of the Secretary-General on Implementation of 1820 & 1888*, *supra* note 2, ¶¶ 5, 8.

5. See Ruth Rubio Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 WM. & MARY J. WOMEN & L. 69, 74–76 (2012); see also U.N. Secretary-General, *Conflict-Related Sexual Violence: Rep. of the Secretary-General*, U.N. Doc. A/66/657-S/2012/33 (Jan. 13, 2012) (discussing implementation of United Nations initiatives and providing information on continuing violations); U.N. Dep’t of Econ. and Soc. Affairs Div. for the Advancement of Women, *Sexual Violence and Armed Conflict: United Nations Response*, WOMEN2000 (Apr. 1998), available at <http://www.un.org/womenwatch/daw/public/cover.pdf>, archived at <http://perma.cc/ZD6U-C9BA>.

6. U.N. Action Against Sexual Violence in Conflict, Analytical & Conceptual Framing of Conflict-Related Sexual Violence 1 (2011), available at <http://www.pakresponse.info/LinkClick.aspx?fileticket=QMSWiCA4rUw%3D&tabid=71&mid=433>, archived at <http://perma.cc/D97Z-YJDC>.

7. See, e.g., SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS (Elizabeth D. Heinemann ed., 2011); Maria Eriksson Baaz & Maria Stern, *The Complex-*

only of the functionality of sexual violence but also of its linkages to the regularized and socially embedded violence that women experience across jurisdictions. This deficiency inhibits our ability to respond adequately to the contemporary scale and forms of CRSV.⁸ Moreover, victims of CRSV are invariably among the most marginalized of those affected by armed conflict, experiencing long-term and sustained stigma, rejection by families and communities, and enduring physical and mental harms during and after conflict. The vast majority of victims are civilians,⁹ though female and male combatants are also subject to sexual violence during and after hostilities.¹⁰ Appropriate reparations must map onto the breadth and depth of different manifestations of harm and their short-, medium-, and long-term consequences.

Although the term “reparation” is used in many contexts, in international law it generally refers to the measures adopted to redress harms resulting from crimes or breaches of state responsibility.¹¹ Reparations generally fall under the headings of restitution, compensation, and satisfaction.¹² State responsibility has historically not addressed gendered human rights violations.¹³ Thus, normative understandings of state responsibility must be adapted through applied analysis and practice in order to attach it to violations of sexual integrity. Crucially, most international human rights

ity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo (DRC) (Swed. Int'l Dev. Coop. Agency, Working Paper, art. no. SIDA61275en 2010), available at <http://nai.diva-portal.org/smash/get/diva2:319527/FULLTEXT02.pdf>, archived at <http://perma.cc/8UME-ZFZ2>.

8. See generally Monica McWilliams & Fionnuala Ní Aoláin, “There is a War Going on You Know”: Addressing the Complexity of Violence Against Women in Conflicted and Post Conflict Societies, 1 TRANSITIONAL JUST. REV. 2 (2013) (performing a case study of sexual violence in Northern Ireland).

9. See Press Release, Security Council, Security Council Presidential Statement Condemns Sexual Violence in Conflict, Post-Conflict Situations, Urges Complete, Immediate Cessation of Such Acts, U.N. Press Release SC/10555 (Feb. 23, 2012), available at <http://www.un.org/press/en/2012/sc10555.doc.htm>, archived at <http://perma.cc/Y3G9-6B3M>.

10. See, e.g., MEGAN BASTICK, KARIN GRIMM & RAHEL KUNZ, SEXUAL VIOLENCE IN ARMED CONFLICT: GLOBAL OVERVIEW AND IMPLICATIONS FOR THE SECURITY SECTOR 11 (Geneva Centre for the Democratic Control of Armed Forces ed., 2007), available at http://www.dcaf.ch/content/download/35405/526027/file/sexualviolence_conflict_full.pdf, archived at <http://perma.cc/Y8TA-BCYC>.

11. See Report of the International Law Commission, on the Work of its Fifty-Third Session (April 23–June 1 and July 2–August 10, 2001), [2001] 2 Y.B. Int'l L. Comm'n 2, U.N. Doc. A/CN.4/SER.A/2001/Add.1 [hereinafter Draft Articles]; see also DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 51 (2d ed. 2005); Pablo de Greiff, *Justice and Reparation*, in THE HANDBOOK OF REPARATIONS 451, 452 (Pablo de Greiff ed., 2006).

12. See Draft Articles, *supra* note 11, art. 34.

13. For example, the lack of a gender component is illustrated by the terms of reference and operations of the United Nations Compensation Commission (“UNCC”), created in 1992 as a subsidiary organ of the United Nations Security Council. Its mandate was to process claims and pay compensation for damage suffered as a result of Iraq’s unlawful invasion and occupation of Kuwait, and the Commission did not include rape or sexual violence within the formal categories of harm subject to its oversight and review for remedy. See Home, UNITED NATIONS COMPENSATION COMMISSION, <http://www.uncc.ch>, archived at <http://perma.cc/6DHM-2CHF>. The UNCC received approximately 2.7 million claims seeking approximately US\$352.5 billion in compensation for death, injury, loss of or damage to property, commercial claims, and claims for environmental damage resulting from Iraq’s unlawful invasion and occupation of Kuwait in 1991. *Id.* Awards of approximately US\$52.4 billion have been approved in respect of approximately 1.55 million of these claims. *Id.*

law (“IHRL”) and international humanitarian law (“IHL”) treaties provide for the right to a remedy.¹⁴ These treaty obligations include processes that are supported by procedural rights to fair hearing and fair process. In the context of gross violations of human rights and humanitarian law, rehabilitation and guarantees of nonrepetition have emerged alongside restitution, compensation, and satisfaction as vital elements of remedy. However, as this Article explores, remedies under both IHRL and IHL systems have developed without reference to gendered violations in general or to the harms and challenges faced by women in particular.

The specific challenge of CRSV reparations has been the subject of fledgling normative development in recent years. The Guidance Note of the Secretary-General on Reparations for Conflict-Related Sexual Violence,¹⁵ launched in 2014, is paradigmatic of expanding policy attention to this area. Moreover, repeated mention of reparations within recent Security Council resolutions addressing women, peace, and security¹⁶ evidence the high-level attention to the question of gender-sensitive reparations. Finally, the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) Committee’s *General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations* recommends that states ensure that reparations are gender-sensitive, promote women’s rights, and include women in the design of programming,¹⁷ evidencing efforts to situate normative and policy attention to CRSV within a broader framework of women’s human rights.

The Women, Peace, and Security (“WPS”) Agenda has been the site of the most prominent and progressive normative attention to CRSV at global policy levels. It preempts recent policy developments, while continuing to prompt increasing political and normative attention to the issue of sexual harm in conflict. The Security Council launched this agenda by adopting Resolution 1325 (“UNSCR 1325”) on October 31, 2000.¹⁸ This resolution reaffirms the important role of women in the prevention and resolution of conflicts, in peace negotiations and peacekeeping, in humanitarian response, and in post-conflict reconstruction. It likewise asserts the importance of women’s equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.

14. See *infra* Part III. See generally SHELTON, *supra* note 11.

15. U.N. Secretary-General, Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence, 2–3 (June 2014), available at <http://www.ohchr.org/Documents/Press/Guidance-NoteReparationsJune-2014.pdf>, archived at <http://perma.cc/F7RR-B2QK> [hereinafter Guidance Note].

16. See, e.g., S.C. Res. 1888, ¶ 17, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 2106, ¶ 21, U.N. Doc. S/RES/2106 (June 24, 2013); S.C. Res. 2122, ¶ 13, U.N. Doc. S/RES/2122 (Oct. 18, 2013).

17. U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, ¶¶ 74, 79, 81, U.N. Doc. CEDAW/C/GC/30 (Nov. 1, 2013) [hereinafter CEDAW General Recommendation No. 30].

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

The adoption of UNSCR 1325 was significant for several reasons. As one of our authors noted elsewhere, “it formally acknowledged and addressed, at least rhetorically, the need to incorporate women into processes intended to secure peace.”¹⁹ Moreover, “because the U.N. Security Council is recognized and understood as the key global actor in the security arena, an actor whose resolutions are both determinative and binding as legal, political, and normative pronouncements, it was a powerful signal to the world that women’s security and protection was to be taken seriously.”²⁰ The advancements contained in the resolution “acknowledged the particular vulnerabilities of women in conflict settings, and affirmed that parties to armed conflict were obliged to fully respect the international law applicable to the protection of women and girls, especially as civilians.”²¹ Finally, Resolution 1325 created extraordinary momentum toward greater Security Council action. Subsequent Resolutions created political and legal space to address the harm of sexual violence, including the necessity to make domestic and international accountability mechanisms work for women.²² Various parts of the WPS Agenda have been advanced over the past fifteen years.²³ Addressing sexual violence has become a central plank of the WPS Agenda, and the Security Council has adopted specific resolutions focused on CRSV following UNSCR 1325.²⁴ These developments have important practical consequences for the themes explored in this Article.

However, despite greater rhetorical attention to the necessity of *protecting* women and girls *from* sexual harm in conflict,²⁵ much less policy and legal

19. Dina Francesca Haynes, Naomi Cahn & Fionnuala Ní Aoláin, *Women in the Post-Conflict Process: Reviewing the Impact of Recent U.N. Actions in Achieving Gender Centrality*, 11 SANTA CLARA J. INT’L L. 189, 197 (2012).

20. *Id.*

21. Fionnuala Ní Aoláin, *The Needle in the Haystack: Finding the Women, Peace and Security Norms in the Gaza Conflict*, JUST SECURITY (August 7, 2014, 11:00 AM), <http://www.justsecurity.org/13741/gaza-women-peace-security-norms-operation-protective-edge/>, archived at <http://perma.cc/4AUW-9GTB>.

22. See Dianne Otto, *A Sign of “Weakness”? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325*, 13 MICH. J. GENDER & L. 113, 139 (2006) (reviewing the impact of the resolution on women’s engagement in the peace and security agenda and the momentum created by the engagement with the Security Council through a gender perspective).

23. Notably, a high level, fifteen-year review of UNSC 1325 is currently underway. The study’s lead author is Radhika Coomaraswamy, a Sri Lankan diplomat, former Special Representative of the Secretary-General on Children and Armed Conflict, and former Special Rapporteur on Violence Against Women. See U.N. Women, *New Study to Examine Women’s Role in Peace and Security over the Past Fifteen Years* (Sep. 10, 2014), <http://www.unwomen.org/en/news/stories/2014/9/launch-of-global-study-on-resolution-1325>, archived at <http://perma.cc/45KY-ZK6U>. Findings are to be completed by mid-2015, in advance of the high level review scheduled for October 2015. *Id.* Seventeen people have been appointed to the advisory group for the study. See U.N. Women, *High-Level Advisory Group for Global Study on SCR 1325* (2000), <http://www.unwomen.org/~media/headquarters/attachments/sections/news/in%20focus/open%20debate%20on%20wps%202013/finalized%20list%20of%20high%20level%20advisory%20group-%20161014%20vr.pdf>, archived at <http://perma.cc/2DP9-MAZP>.

24. See, e.g., S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010); S.C. Res. 2106, U.N. Doc. S/RES/2106 (June 24, 2013).

25. See generally Dianne Otto, *The Security Council’s Alliance of Gender Legitimacy: The Symbolic Capital of Resolution 1325*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY* 239 (Hilary Charlesworth & Jean-

attention has been directed at supporting and directly *remedying* the harms to women, girls, men, and boys who have experienced sexual harm in conflict. We perceive a particular gap between the rhetoric and the reality of remedies for women, cogently illuminated by close examination of reparations practice. As a result, while this Article acknowledges the myriad and overlapping harms experienced by women, girls, men, and boys, its primary preoccupation lies with teasing out the experiences, complexities, and barriers to reparations for women and girls. Reparations have been marginalized in the conversation aimed at ending impunity and stigma for CRSV internationally.²⁶ This relative marginalization of reparations is part of a consistent pattern of disjunctive responses by law to women's needs. There is an ongoing gap between legal repair and material repair, whereby legal rules may be instituted, but there is a consistent failure to ensure that economic and social benefits from those rules are meaningfully transferred to women. The sidelining of reparations in peace processes, institutional priorities, and state practices remains part of the chasm between piecemeal and holistic responses to the experience of gendered harm for women and girls.²⁷

Recent normative developments are novel and practically relevant, constituting a significant point of redress to the gender-blindness of existing reparations-related frameworks.²⁸ In that context, this Article maintains that unimaginative legal reform will be insufficient to address the harm of CRSV; rather, a transformative approach is necessary, couched in the position that remedies for sexual violence must take into account the preexisting structural inequalities that women face as a routine and accepted part of their lives in many societies. Women experience vulnerabilities resulting from: express social and employment discrimination; prohibitions on female ownership of and access to real property; limitations on women's access to public space due to insecurity and gender-based movement restrictions; cultural conventions regarding female chastity and honor; health and education access gaps for women and girls; and the undulating exposure of women to intimate violence across all societies.²⁹

Comprehensively integrating these layered vulnerabilities women experience into our understanding of the form and shape of remedies for CRSV is

Marc Coicaud eds., 2010) (arguing that the focus on sexual violence has performed a legitimizing function for the Security Council but that the cost of this political gain has been a retreat from feminist advocacy on peace and pacifism).

26. See Ruth Rubio-Marín, *The Gender of Reparations: Setting the Agenda*, in *WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS* 20, 22 (Ruth Rubio-Marín ed., 2006) (exploring the traditional prosecutorial focus of post-conflict societies).

27. See generally *id.* (describing the potential for reparations to either reinforce or subvert preexisting structural gender inequalities).

28. See *infra* Part III(b) (discussing the 2005 Basic Principles).

29. See U.N. Women, Report of the Expert Group Meeting on Prevention of Violence Against Women and Girls, 8–10 (2012), available at <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/11/Report-of-the-EGM-on-Prevention-of-Violence-against-Women-and-Girls.pdf>, archived at <http://perma.cc/QFS9-YSKU>.

an essential foundation for advancing transformative reparations. It would be naïve to expect that this move could be undertaken without tackling entrenched patriarchies and privileges that advantage men to the detriment of women. Thus, if legally grounded reparations proceed from a principle of an idealized return to the status quo ante, the resulting policy would be insufficient to address gender-based harms. Specifically, if the return to the status quo ante means returning women to their prior unequal status, reparations programs that seek merely to reinstate the status quo ante would be contrary to the broader objectives of human rights treaties with regard to remedy and reparation.³⁰ Without a readiness to address the broader context of women's equality in the planning, execution, and enforcement of reparations, there is a fundamental defect in the promise of remedy for victims of CRSV. Thus, close attention to the gendered conceptualization of remedy reveals one of the primary fault lines of dominant human rights approaches to remedy and reparation: there is an underlying presumption that remedies are a neutral legal space, unfettered by the complexities of gender and other intersectional identities.

Crucially, accounting for intersectional identities in the context of harm mandates paying attention to markers that make individuals more vulnerable, including age, sexual orientation, race, ethnicity, religious affiliation, maternity, disability, and maternal status.³¹ Paying attention to these categories reveals that legal remedies often function to exacerbate the harms experienced by women rather than provide redress. This Article brings those fault lines into view and also sets out principles that can transform both our conceptual understanding of reparations and the legal enforcement that follows. Our analysis grounds its theoretical and conceptual approach by paying close attention to implementation in some of the most fraught post-conflict situations in the world. This analysis benefits considerably from a comprehensive study on reparations for CRSV undertaken by the authors between 2011 and 2012, which involved primary and secondary research and enabled access to numerous national and international actors

30. Here we remain attuned to Pamela Scully's concerns about the dangers to human rights protections for women when sexual violence alone dominates the conversations concerning gender-based harms:

I suggest that an exclusive focus on sexual violence against women and girls limits our ability to understand the root causes of sexual violence, and to build different and sustainable futures for women and men. I explore the implications of the figure of the vulnerable woman for post-conflict reconstruction, arguing that an exclusive focus on sexual violence against women and children leads to the articulation of rights in ways that might actually hinder the objectives of human rights.

Pamela Scully, *Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence*, 23 EMORY INT'L. L. REV. 113, 113 (2009).

31. See Eilish Rooney & Fionnuala Ní Aoláin, *Underenforcement and Intersectionality: Gendered Aspects of Transition for Women*, 1 INT'L J. TRANSITIONAL JUST. 338, 340 (2007) (exploring the ways in which intersectionality is relevant to the experiences of women in conflict and post-conflict settings).

working on issues of reparations in legal, judicial, administrative, and policy contexts.³²

Part I explores the meaning and practice of CRSV, paying particular attention to the definitional formulas used by international organizations and policy actors. It gives a fulsome depiction of the scale and forms of sexual violence, underscoring the scale and the complexity of providing reparations to the victims of harm generally and of sexual violence particularly. Part II advances our claims about the meaning and scope of transformative reparations. By articulating fully the barriers women face in most societies to full and equal participation in social, economic, and political life, the scale of the task for transformative reparations is underscored. Part III sets out the dominant legal frameworks, with an emphasis on the extent to which gendered harms have (or have not) figured in the theoretical and practical construction of legal remedies in international law and practice. It exposes the lacuna of attention to female-specific harms as well as the lack of tailored remedies to “fit” the experiences of women victims. By revealing current limitations, we lay the groundwork for a transformative approach to CRSV, which is more likely to meet the demands of victims for consultation, inclusion, symbolic and financial remedy, as well as holistic response to the range of emotional, physical, financial, and communal needs that follow from sexual violence in the context of armed conflict between and within states. Part IV provides a global overview of the practice of reparations at the ground level, drawing from a comprehensive study of selected post-conflict sites where gender-based violence has figured prominently in the experience of communal violence. We address conception, design, consultation, and delivery of benefits as key elements of success or failure in providing reparations to women who have experienced sexual violence. Part V concludes by offering a set of Principles based on the totality of knowledge gleaned from our study to guide further legislative action, institutional action, and programming enforcement on reparations in post-conflict sites.

I. UNDERSTANDING AND FRAMING THE CONTEXT OF CONFLICT-RELATED SEXUAL VIOLENCE

With the broad definition of CRSV set out in the Secretary-General’s Guidance Note to the fore,³³ we now delve further into the definitional and contextual domain enclosing legal responsibility for acts of sexual violence and harm to women. Evidently, complex delineations follow from the dis-

32. FIONNUALA NI AOLAIN, CATHERINE O’ROURKE & AISLING SWAINE, REPARATIONS FOR CONFLICT RELATED SEXUAL VIOLENCE (2012). This Study was undertaken for U.N. Women and the OHCHR and submitted in July 2012 (on file with authors).

33. Guidance Note, *supra* note 15, at 2; see also *Report of the Secretary-General on Implementation of 1820 & 1888*, *supra* note 2, ¶ 5.

inction between “conflict” and “post-conflict” spaces. These include: determining what constitutes the end of hostilities; the maintenance of a wartime political economy in peacetime; and the generally slow changes to political and legal institutions, making it difficult to delineate conflict from nonconflict. The terms “conflict” and “post-conflict” tend to obscure the continuum of violence from ordinary times, to time of conflict, and into post-conflict settings, thereby creating false fissures in the capture of violent experiences. For women, the experience is often continuous rather than disjunctive.³⁴ Feminist scholars note that a binary approach to the categorization of experience functions as a form of expressive masculinity that delegitimizes and obscures women’s experiences of violent harm.³⁵ Women’s marginality is evident when examined in a number of the operational contexts of conflict, peacemaking, and addressing accountability and causalities of violence. Women have been largely absent or excluded from peace making processes.³⁶ Women have been marginal to decision making and excluded from processes of Disarmament, Demilitarization, and Reintegration (“DDR”).³⁷ Disarmament has a high crossover with political decisions and compromises involving amnesty for IHRL and IHL violations, including amnesty for crimes involving sexual violence or wider forms of violence against women. To make the obvious point: in contexts where women are the least likely to be present at the negotiation, deals are struck that include amnesty for crimes involving sexual violation, mutilation, reproductive harms, the transmission of sexually transmitted diseases (such as HIV/AIDS), and forced impregnation.³⁸

In addressing what “conflict-related” means, our analysis is applicable to those situations of armed conflict meeting the formal requirements for the

34. See generally AISLING SWAINE, *TRANSFORMING TRANSITION: UNDERSTANDING CONFLICT-RELATED VIOLENCE AGAINST WOMEN* (forthcoming 2016).

35. See, e.g., Naomi Cahn & Fionnuala Ní Aoláin, *Hirsch Lecture: Gender, Masculinities, and Transition in Conflicted Societies*, 44 *NEW ENG. L. REV.* 1, 3–4 (2010). See generally Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 *CAL. L. REV.* 381, 397–98 (2012) (exploring how feminist critical theory borrowed from critical legal theory to expose the lack of neutrality and objectivity in law, with emphasis on the role of binary thinking to both mask and reinforce existing hierarchies); CHRISTINE SYLVESTER, *WAR AS EXPERIENCE: CONTRIBUTIONS FROM INTERNATIONAL RELATIONS AND FEMINIST ANALYSIS* (2012) (applying feminist critical theory to challenge traditional theories of international relations).

36. See generally CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* (2000) (discussing peace agreements generally).

37. See Fionnuala Ní Aoláin, *Women, Security and the Patriarchy of Internationalized Transitional Justice*, 31 *HUM. RTS. Q.* 1055, 1074–76 (2009) (outlining the exclusions of women from security sector reform processes generally and DDR in particular, and the resultant consequences for gender security).

38. See, e.g., *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Sierra Leone-Revolutionary United Front of Sierra Leone, Annex I arts. 9, 37, July 7, 1999*, available at <http://www.sierra-leone.org/lomeaccord.html>, archived at <http://perma.cc/B2RC-RNCH> (establishing a blanket amnesty, including for offences of sexual violation, without including any women or women’s groups in the negotiations, as evidenced by the signatories to the Agreement).

application of Article 2 common to the Four Geneva Conventions,³⁹ and Additional Protocol I to the Four Geneva Conventions. “Conflict-related” also includes those situations that meet requirements to activate Additional Protocol II to the Geneva Conventions, which “develops and supplements Article 3 common to the Geneva Convention of 12 August 1949.”⁴⁰ We take “conflict-related” to include lethal intergroup violence (whether or not there has been a formal declaration of hostilities) and incorporate communal violence above the threshold of sporadic disturbances and tensions (whether or not a state actor is involved in the violence experienced). Irrespective of the conflict thresholds that activate IHL, our analysis underscores that the right to reparation and remedy endures. There are many limits to the existing law of armed conflict terminology, not least that the failure of a harm to fall within the “conflict-related” box can exclude victims from a range of legal remedies and social care. We acknowledge these limitations and deploy the open-ended “conflict-related” terminology as a way to explore the legal and political terrain in which claims for reparations are presently located, while underscoring the need to widen rather than narrow the context in which claims for reparations can be made.

However, our framing of CRSV differs from the principal policy guidelines in a number of respects. While we recognise CRSV as a violation experienced by men and women, girls and boys, we start from the position that women and girls are the primary targets for such violence and that a generic gender-focused approach can operate to obscure the range and consistency of harms experienced by women.⁴¹ The available evidence suggests that CRSV has been a persistent feature of conflicts through millennia, and that contemporary manifestations are consistent with historical patterns of violence against women in times of conflict between and within states.⁴²

39. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention III]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention IV].

40. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II] (“This Protocol . . . shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 . . . and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.”).

41. See U.N. Women, Progress of the World’s Women: In Pursuit of Justice, 83 (2011), *available at* <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>, *archived at* <http://perma.cc/KVG3-KFJS> (“While men are more likely to be killed, women are always disproportionately singled out for sexual violence and abuse. In Sierra Leone, some men reported sexual abuse to the Truth and Reconciliation Commission, but all cases of rape and sexual slavery were reported by women.”).

42. See *generally* SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS (Elizabeth D. Heineman ed., 2011).

Contemporary studies of nonconflict settings indicate that “the overwhelming burden of partner violence is borne by women at the hands of men.”⁴³ While regional prevalence varies, general (reported) rates of sexual violence experienced by women in nonconflict settings by unknown assailants stands globally at 7.2%, and at 30% for intimate-partner violence.⁴⁴ Some studies evidence that women experience heightened levels of both sexual violence by unknown assailants and violence by intimate partners during conflict.⁴⁵

We take the empirical preexisting pattern of gendered violence against women as indicative of an ascendancy of gendered harm that women might experience during conflict, compared with men. Our approach thereby also stresses two other dimensions. First, we underscore that there is evidence of a pervasive and symbiotic relationship between conflict violence and the everyday violence that women experience as part and parcel of daily life. In this respect, by addressing the structural realities of everyday violence in women’s lives and its relationship to the forms of violence against women that emerge in times of conflict, we advance a transformative vision of reparations, and create the conditions conducive to addressing pervasive gender-based violence more fully. We recognize that disaggregating “pre” conflict violence from the immediacy of conflict-related violence is not a simple task at either the aggregate or individual level. However, we maintain that better understanding (and data collection) would assist in addressing the complexity of both phenomena as well as the relationship and enablement of violence among preconflict, conflict, and post-conflict phases. Second, our analysis underscores the connection between structural economic and social inequalities for women, which create the conditions conducive to the production of violence in everyday life. Economic insecurity, gender inequality, and lack of economic opportunities contribute to the vulnerabilities of women to violence in both ordinary and exceptional times.⁴⁶

Because our framing of CRSV locates these harms within a broader understanding of structural gender inequality, we require a wider lens to cap-

43. WORLD HEALTH ORG., *WORLD REPORT ON VIOLENCE AND HEALTH* 89 (Etienne G. Krug et al. eds., 2002), available at http://whqlibdoc.who.int/publications/2002/9241545615_eng.pdf?ua=1, archived at <http://perma.cc/VTG5-L5Y3>.

44. WORLD HEALTH ORG., *GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE* 31 (2013), available at http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua=1, archived at <http://perma.cc/T268-9W5M>.

45. Lindsay Stark & Alastair Ager, *A Systematic Review of Prevalence Studies of Gender-Based Violence in Complex Emergencies*, 12 *TRAUMA VIOLENCE & ABUSE* 127, 130–32 (2011).

46. See Donny Meertens & Margarita Zambrano, *Citizenship Deferred: The Politics of Victimhood, Land Restitution and Gender Justice in the Colombian (Post?) Conflict*, 4 *INT’L J. TRANSITIONAL JUST.* 153, 189–206 (2010); ILJA A. LUCIAK, *AFTER THE REVOLUTION: GENDER AND DEMOCRACY IN EL SALVADOR, NICARAGUA, AND GUATEMALA* 55–57 (2001) (discussing the importance of including women’s equality measures in Guatemalan peace accords and mentioning the need to redress women’s unequal economic footing and access to opportunities). See generally BERMA KLEIN GOLDEWIJK & BAS DE GAAY FORTMAN, *WHERE NEEDS MEET RIGHTS: ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN A NEW PERSPECTIVE* (1999).

ture the terrain upon which reparations take form. To address CRSV holistically, these harms must be considered in the context of an inclusive understanding of conflict-related gender-based harms. Thus, although our focus lies with sexual harm, there are intrinsic links between sexual violence and a host of other harms with gender dimensions, including but not limited to: torture; deprivations of the right to life; violations of basic social and economic rights that include the right to shelter, food, and water; and group rights violations based on identity and membership of specific cultural, linguistic, or other minorities. We recognize the gendered nature of conflict and the differentiated ways that men and women experience conflict,⁴⁷ including the processes employed to resolve and deal with its impact. In advancing a transformative role for reparations with respect to CRSV, it is critical to account for such harms as part of a spectrum of gendered experiences and harms that occur in conflict, rooted in preexisting gendered inequalities that manifest in acute ways during armed conflict. We maintain that it ought to be possible to incorporate an analysis and accommodation of preexisting structural disadvantage into reparations planning, design, programing, and delivery, particularly with respect to measures that are designed to bring effective compensation directly to women. Fundamentally, this means that the calculus of “harm” for the purposes of reparation needs to be cognizant of three factors—the “before,” “during,” and “after” of the specific harm—layered into the social and economic context in which the subject of harm was positioned.

Importantly, in stating our position in respect of women’s experiences of harm related to armed conflict, we also acknowledge that while overarching empirical patterns remain unknown, there is increased evidence and awareness of the sexual harms experienced by men in situations of armed conflict.⁴⁸ The long-term effects of such violence for men include mental health

47. See Veena Das, *Introduction: Communities, Riots, Survivors—The South Asian Experience*, in *MIRRORS OF VIOLENCE: COMMUNITIES, RIOTS AND SURVIVORS IN SOUTH ASIA* 1, 29–34 (Veena Das ed., 1990); CHRIS COULTER, *BUSH WIVES AND GIRL SOLDIERS: WOMEN’S LIVES THROUGH WAR AND PEACE IN SIERRA LEONE* 9–10 (2009). For a wider study of women and war, see generally CHARLOTTE LINDSEY, *INT’L COMM. OF THE RED CROSS, WOMEN FACING WAR* (Oct. 17, 2001), available at https://www.icrc.org/eng/assets/files/other/icrc_002_0798_women_facing_war.pdf, archived at <https://perma.cc/CKS5-ULT2>. For a comprehensive study of women’s experience of war across a range of thematic issues including combatancy, women’s vulnerability as a result of war, women’s safety, health, livelihood, and shelter, see generally EVA BROWNE, HUMA HAIDER, FREYJA ODDSDOTTIR, BRIGITTE ROHWERDER & ANNA LOUISE STRACHAN, *GENDER IN FRAGILE AND CONFLICT-AFFECTED SITUATIONS: RAPID LITERATURE REVIEW* (Governance and Social Development Resource Centre ed., 2014) (providing a comprehensive international survey on the differences of conflict and post-conflict experiences for men and women).

48. See, e.g., CHRIS DOLAN, *INTO THE MAINSTREAM: ADDRESSING SEXUAL VIOLENCE AGAINST MEN AND BOYS* (2014), available at http://www.refugeelawproject.org/files/briefing_papers/Into_The_Mainstream-Addressing_Sexual_Violence_against_Men_and_Boys_in_Conflict.pdf, archived at <http://perma.cc/DK32-EY4Q>; MARIA ERIKSSON BAAZ & MARIA STERN, *SEXUAL VIOLENCE AS A WEAPON OF WAR? PERCEPTIONS, PRESCRIPTIONS, PROBLEMS IN THE CONGO AND BEYOND* 34–36 (2013); Sandesh Siyakumaran, *Sexual Violence Against Men in Armed Conflict*, 18 *EUR. J. INT’L L.* 253 (2007); Rosemary

problems, infertility, sexual dysfunction, and social ostracization.⁴⁹ These acts are often invisible even to actors concerned with the phenomenon of sexual violence, and male sexual violence victims may lack access to specific and tailored services.⁵⁰ Moreover, while significant political attention has been generated for sexual violence against women, tailored intervention to address male-centered sexual harms remains elusive and marginalized.⁵¹ We affirm that there are commonalities of experience for both male and female victims, such as where reporting of sexual violence meets substantial barriers across all jurisdictions and conflicts, resulting in significant obstacles for the inclusion of victims of sexual violence in all aspects of the conceptualization, registration, and design of reparations programs. Civilians predominate as victims of CRSV,⁵² though female and male combatants may also be subject to sexual violence both during and after hostilities.⁵³ In sum, having a thicker understanding of the phenomena of CRSV—both in terms of the visible and unseen subjects of harm as well as the interplay of structural factors creating and perpetuating exposure to violence—better prepares the conceptual terrain to prevent, acknowledge, and repair the damage and hurt done.

II. FRAMING REPARATIONS: THE POSSIBILITIES AND LIMITS OF REPAIR

As we apply the concept in this article, “reparations” encompass measures that aim to repair or redress the impact of harm to provide remedy for the systematic violation of human rights commonly associated with armed conflict. Reparations are noted to be the most victim-centered of existing transitional justice mechanisms⁵⁴ and encompass material and symbolic forms of redress; these are awarded individually and often collectively through judicial or administrative mechanisms.⁵⁵ As we will discuss in

Gray & Laura J. Shepherd, “*Stop Rape Now?*” *Masculinity, Responsibility, and Conflict Related Sexual Violence*, 16 *MEN AND MASCULINITIES* 115 (2013).

49. DOLAN, *supra* note 48, at 3–4.

50. *Id.* at 2.

51. See, e.g., FOREIGN & COMMONWEALTH OFFICE, CHAIR’S SUMMARY: GLOBAL SUMMIT TO END SEXUAL VIOLENCE IN CONFLICT (2014), <https://www.gov.uk/government/publications/chairs-summary-global-summit-to-end-sexual-violence-in-conflict/chairs-summary-global-summit-to-end-sexual-violence-in-conflict>, archived at <https://perma.cc/RQX4-3QQH> (describing the breadth of participation in the summit and global attention to the issue of sexual violence).

52. See Press Release, Security Council, Security Council Presidential Statement Condemns Sexual Violence in Conflict, Post-Conflict Situations, Urges Complete, Immediate Cessation of Such Acts, U.N. Press Release SC/10555 (Feb. 23, 2012); see also HELEN M. KINSELLA, *THE IMAGE BEFORE THE WEAPON: A CRITICAL HISTORY OF THE DISTINCTION BETWEEN COMBATANT AND CIVILIAN* (2011).

53. See U.N. Women, *supra* note 29.

54. See U.N. WOMEN, *A WINDOW OF OPPORTUNITY: MAKING TRANSITIONAL JUSTICE WORK FOR WOMEN* 16 (2d ed. 2012), available at <http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf>, archived at <http://perma.cc/Q65W-WJEW>.

55. STEPHANIE WOLFE, *THE POLITICS OF REPARATIONS AND APOLOGIES* 19–52 (2014) (examining the evolution and dynamics of reparation politics and justice).

more detail below, reparations encompass the principles of restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrecurrence.⁵⁶

Our starting point as we think about conceptualizing and enforcing remedies for CRSV is that any measures must be sensitive, flexible, and encapsulate gender-appropriate approaches. Their flexibility also requires a capacity to take account of the broader social and economic context in which the harm was occasioned, being cognizant that there is not only country-specific variability but also regional and other domestic disparities within national territories. This multidimensional approach is required because the victims of CRSV are invariably the most marginalized during and after conflict, experiencing enduring physical, moral, emotional, and social harms with primary and inter-generational impacts.⁵⁷

There are important characteristics and features to CRSV that any effort to promote redress or reparation must take into account, and which may delimit or influence the nature, content, and reach of reparations initiatives. Many of these features are related to the impact that sexual violence has on victims, including:

- (i) physical health impacts, which for women can entail, for example, unwanted pregnancy, sexually transmitted infections such as HIV/AIDS, and reproductive health consequences such as fistula;⁵⁸
- (ii) mental health problems, including cumulative trauma and its repercussions;⁵⁹
- (iii) distinct social and economic harms and those that arise from or are the intended outcomes of sexual violence, such as preclusion from employment or marriage as a result of the physical and social impact of these harms;⁶⁰

56. See *infra* Parts III–IV.

57. See Pamela Scully, *Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence*, 23 EMORY INT'L L. REV. 113, 114 (2009) (describing rape as a form of abuse with intergenerational effects); ISIS – WOMEN'S INT'L CROSS-CULTURAL EXCH. & URGENT ACTION FUND – AFRICA, RESTORING HOPE: ADDRESSING THE INTERSECTION BETWEEN GENDER BASED VIOLENCE AND HIV & AIDS IN CONFLICT AND POST CONFLICT SITUATIONS IN AFRICA 8 (2009) (highlighting the lack of access to land, food, treatment, and care for survivors of gender-based violence in conflict zones); AGENCY FOR COOPERATION AND RESEARCH IN DEVELOPMENT, PROTECTION AND REPARATION UNDER CONGOLESE LAW FOR SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE 13 (2010) (noting that survivors of sexual violence in the Democratic Republic of the Congo are encouraged to remain silent and that impunity for crimes relating to sexual violence continues).

58. See Guidance Note, *supra* note 15, at 12 (reviewing various physical health impacts of sexual violence).

59. Ann M. Rasmusson & Matthew J. Friedman, *Gender Issues in the Neurobiology of PTSD*, in GENDER AND PTSD 43, 43 (Rachel Kimerling et al. eds., 2002) (highlighting the link between PTSD and rape for women survivors of sexual violence).

60. See Karen Engle, *The Grip of Sexual Violence: Human Security*, in RETHINKING PEACEKEEPING, GENDER EQUALITY AND COLLECTIVE SECURITY 23, 38 (Gina Heathcote & Dianne Otto eds., 2014); HUMAN SECURITY REPORT PROJECT, SIMON FRASER UNIVERSITY, HUMAN SECURITY REPORT 1, 19–21 (2012) (providing an overview of harms inflicted on victims of rape and sexual violence during war); Eleni Coundouriotis, "You Only Have Your Word:" Rape and Testimony, 36 HUM. RTS. Q. 365, 385 (2013)

- (iv) stigma, which can result in reinforced stereotypes, rejection, and ostracization from family and community, with resulting isolation, destitution, and enhanced vulnerability to further exploitation and abuse, particularly for women.⁶¹

Another complex intersection we acknowledge is the way in which greater attention to sexual violence in conflict further exacerbates the stigma of sexual harm, rather than diminishing it.⁶² As rhetorical claim-making about rape as the “worst” harm and a “fate worse than death” operates in theory to deter and underscore the need for punitive action, its unintended consequence can be to reinforce gendered tropes of purity, damaged goods, and spoiled virtue for women victims of sexual harm.⁶³ Conceptualizing reparations for CRSV means not only taking account of wide-ranging impacts but also contending with the concrete and long-standing taboo that is attached to crimes of sexual harm in many societies.⁶⁴ Adjudicating reparations through a public reparations process poses considerable difficulties for victims, not least due to assumptions related to victimhood, vulnerability, and stigma for both men and women, which may compound rather than remedy harm.⁶⁵ This breadth and depth of harm as well as the social construction of such harms exacerbate victims’ experiences of CRSV, causing immediate, medium-, and long-term consequences for women, men, boys, and girls.⁶⁶

For women in particular, the continuation of structural inequalities and sociocultural norms that specifically discriminate against them in the post-conflict period fuels their subordination, compounds their exclusion, and

(describing the stigma of rape); Guidance Note, *supra* note 15, at 15 (describing social and economic harms suffered by victims of CRSV). See generally KIMBERLY THEIDON, *INTIMATE ENEMIES: VIOLENCE AND RECONCILIATION IN PERU* (2012) (addressing the legacies and stigma of violence, including sexual violence in the course of internal armed conflict in Peru).

61. CEDAW General Recommendation No. 30, *supra* note 17, ¶ 50 (“HIV-related stigma and discrimination [are] also pervasive and have profound implications for HIV prevention, treatment, care and support, especially when combined with stigma associated with gender-based violence.”).

62. See Karen Engle, *The Force of Shame*, in *RETHINKING RAPE LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 76, 77–79 (Clare McGlynn & Vanessa Munro eds., 2010).

63. See *id.*

64. See, e.g., Atina Grossmann, *The “Big Rape”: Sex and Sexual Violence, War, and Occupation in Post-World War II Memory and Imagination*, in *SEXUAL VIOLENCE IN CONFLICT ZONES: FROM THE ANCIENT WORLD TO THE ERA OF HUMAN RIGHTS* 137, 143 (Elizabeth D. Heineman ed., 2011) (reviewing historical instances of the taboo of discussing sexual violence).

65. Rubio-Marín, *supra* note 26, at 34 (reviewing examples of reparations processes in South Africa and Timor-Leste that forced women to “come out” as victims). See generally Solange Mouthaan, *The ICC and Victim Participation for Victims of Gender-Based Crimes: A Conflict of Interest?*, 21 *CARDOZO J. INT’L & COMP. L.* 619 (2013).

66. See U.N. Office for the Coordination of Humanitarian Affairs, *The Shame of War: Sexual Violence Against Women and Girls in Conflict* 11–37 (2007), available at <http://lastradainternational.org/lsidocs/IRIN-TheShameofWar-fullreport-Mar07.pdf>, archived at <http://perma.cc/RN99-ZNWF>. See generally Mathias Onsrud, Slobjørg Sjøveian, Roger Luhiriri & Dennis Mukwege, *Sexual Violence-Related Fistulas in the Democratic Republic of Congo*, 103 *INT’L J. GYNECOLOGY & OBSTETRICS* 265 (2008).

leaves open the possibility of revictimization to violence.⁶⁷ It is notable that reparation has been predominantly formulated as an individual entitlement, “flowing from an individualized conception of harm.”⁶⁸ We underscore that women experience global discrimination in access to justice and justice outcomes that directly impacts their potential to achieve the right to reparation.⁶⁹ A serious concern for female victims of CRSV is that the idea of individual reparation and individualized legal entitlements is difficult to realize in political and legal contexts where “both in law and practice, women’s legal autonomy, and by extension the system of individual entitlements available to them, continue to face serious obstacles.”⁷⁰ Policymakers thereby cannot assume that formal equal citizenship and social status in conflict and post-conflict settings inevitably allows women and men to access reparations on an equal footing. Designing reparations (whether judicial or administrative) to respond to communal and group violations also presents challenges, as there is risk of making women’s specific gendered experiences invisible or further compounding essentialisms and stereotypes.

In addition, women’s reproductive roles, and the possibility that they may be specifically targeted for forced pregnancies through CRSV, demands specific consideration. Lack of access to post-rape medical care or abortion services in many conflict-affected settings may mean that women are at risk of having unsafe abortions or bearing unwanted pregnancies to term.⁷¹ Moreover, children born of rape may be subjected to specific stigmas and experience longer-term identity and discrimination challenges.⁷² As we start to outline the framework for transformative reparations, the need to include redress for both mother and child—specifically including the right to education, health, medical services, and inheritance as part of the bundle that constitutes reparative redress for women—becomes obvious. On closer inspection, the maternal dimension of the WPS Agenda is demonstrably

67. See generally FIONNUALA NÍ AOLÁIN, NAOMI CAHN & DINA HAYNES, ON THE FRONTLINES: GENDER, WAR AND THE POST-CONFLICT PROCESS (2011); V. SPIKE PETERSON, A CRITICAL REWRITING OF GLOBAL POLITICAL ECONOMY: INTEGRATING REPRODUCTIVE, PRODUCTIVE AND VIRTUAL ECONOMIES (2003).

68. Anne Saris & Katherine Lofts, *Reparations Programmes: A Gendered Perspective*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 79, 84 (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009).

69. See U.N. Women, *supra* note 41, at 8–9 (setting out the ways in which a lack of access to justice has multiple and nefarious effects on women’s lives).

70. Colleen Duggan & Adila M. Abusharaf, *Reparation for Sexual Violence in Democratic Transitions: The Search for Gender Justice*, in THE HANDBOOK OF REPARATIONS 623, 631 (Pablo de Greiff ed., 2006).

71. JOAR SVANEMYR, NORWEGIAN AGENCY FOR DEV. COOPERATION, SEXUAL VIOLENCE IN CONFLICT AND THE ROLE OF THE HEALTH SECTOR 12 (2011), available at http://www.norad.no/en/tools-and-publications/publications/norad-reports/publication/_attachment/410230?_download=true&_ts=143d80bc8e9, archived at <http://perma.cc/W7YB-3M6A>.

72. See DONNA SETO, NO PLACE FOR A WAR BABY: THE GLOBAL POLITICS OF CHILDREN BORN OF WARTIME SEXUAL VIOLENCE 14 (2013); Aisling Swaine, *Book Review*, 22 INT’L J. CHILDREN’S RTS. 676 (2014) (reviewing DONNA SETO, NO PLACE FOR A WAR BABY: THE GLOBAL POLITICS OF CHILDREN BORN OF WARTIME SEXUAL VIOLENCE (2013)); Kimberly Theidon, *Hidden in Plain Sight: Children Born of Wartime Sexual Violence* (unpublished manuscript) (on file with authors).

under-specified in respect of the reparations dimensions of post-conflict settlement.⁷³ We further claim that reproductive harms as a result of sexual assault, such as inability to conceive for women and infertility for men,⁷⁴ and associated lifelong reproductive health tribulations also need to be accounted for in reparations for CRSV.

Understanding the complexity of CRSV, the contexts that produce it, and the multiplicity of ways in which it is internalized by victims and survivors, underscores the value of intentional and thoughtful reparative practices. At minimum, the maxim “do no harm” should be a stark warning against overly eager remedy construction. Thus, to better respond to the actual and not perceived needs of victims, any action in the universe of reparations should be starkly attuned to the dangers of worsening the material conditions of those who have experienced trauma and violence, of exposing them to public gaze without their consent, and of proceeding without listening to the lived experiences of harm in a conflict setting.

III. THE CURRENT STATE OF INTERNATIONAL LEGAL FRAMEWORKS ADDRESSING REPARATIONS FOR CONFLICT-RELATED SEXUAL VIOLENCE

A. *International Treaty Law*

The legal right to a remedy is affirmed under IHRL, IHL, and international criminal law. International legal sources for reparation include the Universal Declaration of Human Rights,⁷⁵ the International Covenant on Civil and Political Rights,⁷⁶ the International Convention on the Elimination of All Forms of Racial Discrimination,⁷⁷ the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,⁷⁸ the Convention on the Rights of the Child,⁷⁹ the Hague Convention IV 1907,⁸⁰ Protocol I Additional to the Geneva Conventions,⁸¹ and the Rome

73. Fionnuala Ní Aoláin, *Maternal Harm in the Context of the Women, Peace and Security Agenda* (2014) (unpublished paper) (on file with authors).

74. DOLAN, *supra* note 48, at 3.

75. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) art. 8 (Dec. 10, 1948).

76. International Covenant on Civil and Political Rights art. 2, ¶ 3, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

77. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352.

78. Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

79. Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M.1448.

80. Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

81. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, Dec. 7, 1979, 1125 U.N.T.S. 3.

Statute of the International Criminal Court.⁸² In addition to these diverse international law norms, regional human rights treaties also provide for a right to a remedy, including the European Convention on Human Rights,⁸³ the Inter-American Convention on Human Rights,⁸⁴ and the African Charter on Human and Peoples' Rights.⁸⁵ Unsurprisingly, none of these sources address the gender-specific dimensions of remedy. Like many other aspects of IHRL and international human rights practice, they are ripe for a sustained feminist critique, not least because an apparently neutral set of rules often function to hide gender bias and disparate impact on women.⁸⁶

Under international law, the term "reparation" generally implies measures for the redress of harms resulting from certain crimes or breaches of state responsibility.⁸⁷ While historically state responsibility has not specifically addressed gender-based violations,⁸⁸ analysis can be used to read in state responsibility for such violations.⁸⁹ Remedies under both IHRL and IHL developed without specific reference to gendered violations; therefore, from a gender perspective, the obligation to provide reparation for the harms and challenges faced by women in particular remains a "work in progress." A lack of deep engagement with the gendered dimensions of remedy creates obvious challenges to progressing a vision of transformative reparations that addresses the complexity and specificity of women's situated experiences.

Given the deep lacunae in existing human rights law norms, feminists turned to specialized norms to expand and develop women's rights.⁹⁰ Early examples of norm entrepreneurship include the Declaration on the Elimination of Violence Against Women ("DEVAW") requiring states to develop penal, civil, labour, and administrative sanctions within domestic legislation to punish and redress the wrongs caused to women as a result of violence.⁹¹ DEVAW requires states to provide legal redress, access to justice,

82. Rome Statute of the International Criminal Court arts. 68, 75, July 17, 1998, 2187 U.N.T.S. 90.

83. European Convention on Human Rights art. 41, Nov. 4, 1950, 213 U.N.T.S. 221.

84. Inter-American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123.

85. African Charter on Human and Peoples' Rights art. 7, June 27, 1981, 1520 U.N.T.S. 217.

86. See Hilary Charlesworth, Christine Chinkin & Shelly Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621-34 (1991).

87. See Draft Articles, *supra* note 11, art. 1; Pablo de Greiff, *supra* note 11, at 452.

88. See *infra* Part IV(c) (discussing the significant positive developments emerging in the practices of the regional human rights systems).

89. See Felice D. Gaer, *Rape as a Form of Torture: The Experience of the Committee Against Torture*, 15 CUNY L. REV. 293, 297 (2012) ("There have been ongoing discussions over whether acts committed by private individuals ever trigger state responsibility under the CAT."). See generally Ruth Rubio-Marín & Clara Sandoval, *Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 HUM. RTS. Q. 1062 (2011).

90. See Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 495-96 (1990).

91. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

and effective remedies for harm.⁹² This requirement should, we suggest, frame a national and international institutional understanding that accountability measures in post-conflict societies must be informed by obligations to prevent and punish violence against women during peacetime, particularly when criminal sanction is pursued.⁹³ The state is also under an obligation to make women aware of their right to redress.⁹⁴ The requirement to provide remedies and to make women aware of their legal rights finds a regional parallel in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women.⁹⁵ As we start to build the basis for a transformative vision of reparations for women, there are robust treaty and state practice foundations to build upon, meaning this building process does not operate in a normative desert.

Broadly framed international treaty provisions on equality and nondiscrimination should *prima facie* require states to respond directly to women's experiences when reparations for CRSV are being adjudicated, offered, and implemented. In practice, advocates for women's equality have found it difficult to implement these neutral standards and ensure equality for women in legal enforcement. While CEDAW articulates the overall legal context in which the rights of women to nondiscrimination are measured, it is notably not explicit with respect to women's right to remedies, reparation, or compensation.⁹⁶ The CEDAW Committee's General Recommendation 19, does, however, interpret state obligations. Though referring only to compensation, it recommended that "effective complaints procedures and remedies, including compensation, should be provided."⁹⁷

The CEDAW Committee's adoption of General Recommendation 30 in 2013,⁹⁸ which highlights the exclusion of women's concerns from multiple facets of conflict prevention, significantly addressed conflict resolution and post-conflict reconstruction. General Recommendation 30 affirms the applicability of CEDAW in conflict and post-conflict settings.⁹⁹ It confirms that during these periods women's human rights must be actively advanced.¹⁰⁰ General Recommendation 30 parallels the approach of General

92. *Id.* art. 4(d).

93. We are also cognizant of and sympathetic to the turn to carceral politics in international law, a move roundly critiqued by a number of scholars. See, e.g., Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. (forthcoming 2015).

94. *Id.*

95. Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women arts. 7, 8, June 9, 1994, 27 U.S.T. 3301, 1438 U.N.T.S. 63.

96. See generally Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

97. U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19 on Violence Against Women, ¶ 24(i), U.N. Doc. A/47/38 (1993).

98. CEDAW General Recommendation No. 30, *supra* note 17.

99. *Id.* ¶ 9.

100. *Id.* ¶ 1.

Recommendation 19,¹⁰¹ and falls in line with the Basic Principles and Guidelines on a Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,¹⁰² whereby states may be held responsible for acts of violence and for providing compensation (again, only compensation) where due diligence is not observed. General Recommendation 30 highlights States Parties' obligations to protect women's human rights in contexts affected by conflict and affirms the need to advance substantive gender equality through transition-related initiatives, including reparations.¹⁰³

Importantly, the General Recommendation underlines that transitional justice mechanisms, including reparations, "have the potential to secure transformative change in women's lives."¹⁰⁴ It specifically emphasizes the need to go beyond a focus on civil and political rights violations arising from conflict to include violations of economic, social, and cultural rights.¹⁰⁵ It urges a gendered assessment and understanding of harm and its impacts. Stated clearly in the General Recommendation are States Parties' obligations to tackle the underlying structural discrimination and inequalities impacting women that gave rise to gendered harms during conflict, and to establish "adequate and effective reparations for violations of their rights under the Convention" through court-ordered or administrative programs.¹⁰⁶

The CEDAW Committee has responded to a small number of individual complaints under the Optional Protocol by recommending compensation for victims of sexual harms.¹⁰⁷ For example, in *A.S. v. Hungary*,¹⁰⁸ a case involving forced sterilization of a Roma woman, it added a specific recommendation for financial compensation to the unusual articulation that the state should take measures to ensure that health officials give information to

101. See generally U.N. Comm. on the Elimination of Discrimination Against Women, *supra* note 97.

102. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 7, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles].

103. CEDAW General Recommendation No. 30, *supra* note 17, ¶¶ 75, 81(a)–(e).

104. *Id.* ¶ 77.

105. *Id.*

106. *Id.* ¶ 79.

107. See ALICE EDWARDS, VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW 124–30 (2011) (addressing the procedural basis for the Committee's work and the barriers to successful claims under the CEDAW norms for women). Notably, in its conclusions on State Party reports, the CEDAW Committee has recommended compensation for victims of forced sterilization. See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, List of Issues and Questions with Regard to the Consideration of Periodic Reports: Czech Republic, ¶ 27, U.N. Doc. CEDAW/C/CZE/Q/3 (Feb. 22, 2006).

108. See generally U.N. Comm. on the Elimination of Discrimination Against Women, *A.S. v. Hungary* Communication No. 4/2004, U.N. Doc. CEDAW/C/36/D/4/2004 (Aug. 29, 2006).

patients and obtain informed consent.¹⁰⁹ This type of institutional reform recommendation moves the practice of reparations from a narrowly tailored individual remedy toward meaningful institutional change, preventing harm to future victims. Institutional remedies are a powerful mechanism to strengthen guarantees of nonrepetition. These institutional reform threads also bear enormous symbolic significance. In *Maria de Lourdas da Silva Pimentel v. Brazil*, where the failure to provide appropriate reproductive healthcare resulted in the death of a Brazilian women of African descent, the Committee recommended that Brazil provide reparations, including monetary compensation, to her family.¹¹⁰ Although neither of these cases is conflict-related, they do provide general guidance for the utility of CEDAW in advancing reparations for sexual violence-related harms arising in conflict settings. They underscore the innovative capacity of reparations to provide remedies that involve more than simple direct financial compensation to the victim, and engage transformative repair in multiple dimensions.

B. Soft Laws: The United Nations General Assembly's Basic Principles and Guidelines

We now move from treaty standards to address other authoritative legal standards in the form of principles, guidelines, and declarations that explicitly activate treaty and customary law through state practice and key institutions. Here there is a greater specificity and acknowledgment of women's harms, which provide a glimpse into the kind of tailored remedies that help build a theory and practice of transformative reparations. Although a reliance on "soft" over "hard" law holds specific pitfalls for women¹¹¹ because of gaps in treaty articulation, soft law norms provide some of the normative footholds that allow us to build a transformative vision and practice of gender-sensitive reparations.

The United Nations General Assembly issued the most comprehensive set of existing guidelines on reparations in 2006.¹¹² The Basic Principles and Guidelines on a Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles")¹¹³ do not create

109. *Id.* at 27.

110. U.N. Comm. on the Elimination of Discrimination Against Women, Communication No. 17/2008, U.N. Doc. CEDAW/C/49/D/17/2008 (Sept. 27, 2011).

111. See Fionnuala Ní Aoláin, *International Law, Gender Regimes and Fragmentation: 1325 and Beyond*, in *NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS* 53, 61 (Cecilia M. Bailliet ed., 2014).

112. See generally Basic Principles, *supra* note 102.

113. *Id.* The Basic Principles have a long history. In the early 1990s, Professor Theo Van Boven was appointed by the Sub-Commission on Human Rights to consider the right to restitution, compensation, and rehabilitation of gross violations of human rights and fundamental freedoms. *Prof. Dr. Theo Van Boven*, City of Nuremberg Human Rights Office, http://www.nuernberg.de/internet/menschenrechte_e/jury_vanboven_bio_en.html, archived at <http://perma.cc/HUW7-P25A>. He concluded a study

new international or domestic legal obligations, but rather identify “mechanisms, modalities, procedures, and methods for the implementation of existing legal obligations under [IHRL] and [IHL]” relevant to reparations.¹¹⁴ The Basic Principles define “victims” as “individuals who individually or collectively suffered harm,” including “the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or prevent victimization.”¹¹⁵ The Basic Principles state that for such victims, “[r]eparation should be proportional to the gravity of the violations and the harm suffered.”¹¹⁶

The Basic Principles define the contours of state responsibility in relation to the delivery of justice to victims post conflict including, *inter alia*, ensuring “effective access to justice”¹¹⁷ and the provision of “effective remedies to victims, including reparation.”¹¹⁸ In accordance with international and domestic legal obligations, states must provide reparations for “acts or omissions which can be attributed to the state.”¹¹⁹ States should ideally also ensure provision of reparations in circumstances where those responsible are not in a position to do so, and ensure enforcement of reparations arising from domestic and international legal judgments.¹²⁰ This emphasis on the state’s responsibility is consistently echoed in victim narratives insisting on the necessity of acknowledgement by the state of the harm caused by sexual violence.¹²¹ State acknowledgement is central to lifting and combating stigma and restoring the victim to a position of value in the domestic political order.¹²²

The Basic Principles, which are the primary basis for international approaches to reparations, affirm that reparation can be addressed under the following principles: restitution,¹²³ compensation,¹²⁴ rehabilitation,¹²⁵ mea-

that served as the basis for the first draft of principles and guidelines, and further revised versions were prepared up until 1997. REDRESS, IMPLEMENTING VICTIMS’ RIGHTS, available at <http://www.redress.org/downloads/publications/Reparation%20Principles.pdf>, archived at <http://perma.cc/2EXB-LF24>. In its 1998 session, the Commission on Human Rights adopted Resolution 1998/43 in which it appointed Independent Expert Professor M. Cherif Bassiouni to prepare a revised version of the draft Basic Principles, with a view to their adoption by the General Assembly. *Id.*

114. Basic Principles, *supra* note 102, pmb1.

115. *Id.* ¶ 8.

116. *Id.* ¶ 15.

117. *Id.* ¶ 11(a).

118. *Id.* ¶ 3(d).

119. *Id.* ¶ 15.

120. *See id.* ¶¶ 15, 17.

121. *See* discussion *infra* Part III.

122. *See* U.N. Comm. on Hum. Rts., Resolution 2005/35 on 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. E/CN.4/2005/35 (Apr. 13, 2005); Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in *THE GENDER OF REPARATIONS: UNSETTLING GENDER HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS* 63, 67–72 (Ruth Rubio-Marín ed., 2011).

123. Basic Principles, *supra* note 102, ¶ 19 (stating that restitution includes: 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).

asures of satisfaction,¹²⁶ and guarantees of nonrepetition.¹²⁷ We conclude that these constituent aspects of reparation should be interpreted and applied with respect to women and girls, and more broadly to male and female victims of CRSV of all ages. In this Part, we undertake a generous reinterpretation of these principles in order to elucidate their effective application to CRSV.

With respect to restitution, the concept is set out in the Basic Principles as a process to “restore the victim to the original situation” before the violations occurred.¹²⁸ The nature of the harm inflicted by sexual violence¹²⁹ is such that restoration to the situation ante is generally impossible given the extent of the health and psychological harm inflicted through sexual violation. In this context, we recognize that women’s positioning in many societies remains highly determined by their conformity with cultural and social standards of chastity, honor and purity. And while progressive commentators may struggle with de facto recognition of these values through reparation, to ignore them would be to dismiss identity and communal belonging as intrinsic values to the women who have been harmed. An inability to regain this form of status because of sexual harm requires nuanced understanding of the layered nature of penetrative or other sexual violence and the complexity of the reparative responses. Particularly problematic is the notion that restitution constitutes a “return” to pre-conflict conditions that, for female victims of sexual violence, ignores the structural and endemic forms of gendered violence to which women were subjected before the conflict, which frequently inform CRSV.

One particularly important emphasis in the context of restitution is a focus on land and property ownership rights for women. The plurality of harms entangled in women’s economic marginalization means that sexual harm is multiplied and the severity of specific physical violations is com-

124. *Id.* ¶ 20 (stating that compensation includes compensation for “any economic assessable damage,” including lost opportunities in employment, education, and social benefits, as well as material and moral damages).

125. *Id.* ¶ 21 (stating that rehabilitation includes medical and psychological care as well as social and legal services).

126. *Id.* ¶ 22 (stating that measures of satisfaction include measures aimed at ceasing violations, verification of facts and full and public disclosure, judicial and administrative sanctions against persons liable for harm, the search and recovery of those disappeared, public apologies, commemorations and tributes to the victim, and inclusion in IHRL of an accurate account of what occurred).

127. *Id.* ¶ 23 (stating that nonrepetition includes measures that contribute to prevention, such as effective civilian control of the military and security forces, protecting human rights defenders, and providing human rights education).

128. *Id.* ¶ 19.

129. *See, e.g.,* Tol A. Wietse, Vivi Stavrou, M. Claire Green, Christina Mergenthaler, Mark van Ommeren & Claudia García Moreno, *Sexual and Gender-Based Violence in Areas of Armed Conflict: A Systematic Review of Mental Health and Psychological Support Interventions*, 7 CONFLICT AND HEALTH 16 (2013) (addressing the mental and psychosocial needs of populations exposed to sexual and other forms of gender-based violence in conflict zones).

pounded by inequality, destitution, and social dislocation.¹³⁰ Women's lack of ownership capacity (as a matter of law and of practice) in many states means that women lack a fundamental security of tenure, resulting in economic insecurity, uncertainty, and marginalization.¹³¹ Given the deaths and family separation engendered by conflict, women's lack of land and property ownership considerably weakens the capacity of female-headed households to meet their subsistence needs or to achieve any degree of economic empowerment in post-conflict settings.¹³² Thus, the linkage of reparations processes with land and property reform, in support of the revitalization of national legal systems on the basis of international nondiscrimination norms is, in our view, a core element of a transformative approach to reparations.¹³³ Restitution should also be envisaged as ensuring that victims enjoy "family life" in its fullest sense.¹³⁴ This is relevant to victims of sexual violence who are often denied this entitlement due to the stigma they experience and the ostracization from intimate partners, family, and community members that often results.¹³⁵

Compensation figures prominently in national and international discussions concerning reparations. The Basic Principles provide that compensation "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation," including for physical and mental harm and for "moral damage."¹³⁶ These provisions could be interpreted to include the physical and psychosocial harms that arise as a consequence of sexual assaults. It is important that our understanding of economically assessable damage, education, and social benefits

130. See generally Diana Sankey, *Gendered Experiences of Subsistence Harms: A Possible Contribution to Feminist Discourse on Gendered Harm?*, 1 SOC. & LEGAL STUD. 8 (2014).

131. See generally Special Rapporteur on Housing and Property Restitution in the Context of Refugees and Other Displaced Persons, *Final Rep. of the Special Rapporteur: Principles on Housing and Property Restitution for Refugees and Displaced Persons*, ¶¶ 4.1–4.3, U.N. Doc. E/CN.4/Sub.2/2005/17 (Jun. 28, 2005) (prepared by Paulo Sérgio Pinheiro) (emphasizing the importance of ensuring security of tenure, equality of property rights for women, and positive practices to guarantee that land and property policies do not disadvantage women in the context of state action with respect to refugees).

132. See U.S. AGENCY FOR INT'L DEV., GENDER AND PROPERTY RIGHTS WITHIN POST-CONFLICT SITUATIONS (2005), available at <http://www.oecd.org/countries/rwanda/36137340.pdf>, archived at <https://perma.cc/KN8B-3BVD?type=pdf>; Sharanya Sai Mohan, Note, *The Battle After the War: Gender Discrimination in Property Rights and Post-Conflict Property Restitution*, 36 YALE J. INT'L L. 461, 464–65 (2011).

133. See Diana Sankey, *Towards Recognition of Subsistence Harms: Reassessing Approaches to Socioeconomic Forms of Violence in Transitional Justice*, 8 INT'L J. OF TRANSITIONAL JUST. 121, 128 (2013) (describing the particular hardship to displaced women in societies where they are denied land rights); see also Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice: Realizing Justice for Violations of Economic and Social Rights*, 32 NETH. Q. HUM. RTS. 183, 192 (2014) (arguing that addressing direct violations of rights also requires addressing "structural and societal inequalities").

134. Rep. of the Hum. Rts. Comm'n, 61st Sess., Mar. 14–Apr. 22, 2005, U.N. Doc. E/2005/23, ¶ 19; U.N. ESCOR, 61st Sess., Supp. No. 3 (2005) (identifying the enjoyment of family life as one goal of restitution).

135. See COULTER, *supra* note 47 (discussing the inability of women—in this case former combatants—who have been sexually violated to be accepted back into to their families); see also *infra* note 131 and accompanying text.

136. See Basic Principles, *supra* note 102, ¶ 20.

be gender-sensitive, taking full account of how the birth of children as a result of rape, inability to conceive, infertility for men, complex pregnancy, and lifelong reproductive health problems are calculated and understood as a dimension of economic loss and economic capacity. Compensation could therefore cover the costs of psychological and medical treatments, as well as legal services required as a result of such assaults. This is in addition to and distinct from the wider harms requiring compensation, such as loss of property and livelihoods. In calculating compensation for moral damage, the stigma and ostracization resulting from CRSV, as well as the impact on women accessing marriage and social benefits—based on an assessment of women’s role and status in the specific societal context—should be considered.

Rehabilitation is a core part of the existing conceptual terrain occupied by reparations. The Basic Principles find that rehabilitation “should include medical and psychological care as well as legal and social services.”¹³⁷ Similar to the previous form of reparations, rehabilitation care and legal services could be interpreted and tailored to the disaggregated and collective needs of male and female sexual violence survivors of different age groups. The Basic Principles request that states ensure that, under domestic law, victims receive specific treatment to avoid retraumatization.¹³⁸ Rehabilitation might also include broader victim empowerment strategies through, for example, access to formal and informal education.

Another layer of the Basic Principles framework is the concept of satisfaction. Satisfaction for victims of CRSV should include effective measures to end the ongoing trauma of sexual violence in situations of armed conflict. Satisfaction includes efforts to establish the truth through gender-sensitive truth processes, find the disappeared, and ensure effective commemoration of victims.¹³⁹ Gender parity in commemoration should be encouraged, recognizing the dense bedding of narratives and emotionally laden symbols in post-conflict settings and that women are often entirely absent from formal public commemoration and unconnected to formal memorialization processes.¹⁴⁰ It is striking, too, that conflict memory work elevates the masculinity of action, and if women appear at all, they do so in marginal and highly essentialized ways. Such essentialized tropes primarily focus on women as victims and women as the repositories of particular kinds of harms that are coded feminine in societal perceptions. Moreover, emotional harms remain locked away, as does a distinct vocabulary of fe-

137. *Id.* ¶ 21.

138. *Id.* ¶ 10.

139. *See id.* ¶ 22.

140. *See* Kris Brown & Fionnuala Ní Aoláin, *Through the Looking Glass: Transitional Justice Futures Through the Lens of Nationalism, Feminism and Transformative Change*, 9(1) INT’L J. TRANSITIONAL JUST. 127, 127–49 (2015); Brandon Hamber & Ingrid Palmay, *Gender, Memorialization and Symbolic Reparations*, in *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS*, *supra* note 122, at 324, 331.

male-specific harms. More often than not, direct physical violence, and specifically sexual harms, dominate memory narratives about women, but in ways that serve to elevate the values of purity, chastity, and honor.¹⁴¹ This creates a circular trap for women's status and identity in the unreconstructed masculine practices of warrior memorialization.¹⁴²

A study in the Central African Republic surveying attitudes to reparations found that women were more likely than men to demand apologies and punitive measures for those responsible for violations and to demand recognition of their suffering.¹⁴³ In the Democratic Republic of the Congo ("DRC"), victims have acknowledged the importance of symbolic reparations and public apology, but at the same time have underscored the need for "tangible benefits to address the more concrete needs of victims, to which a symbolic component might be attached."¹⁴⁴ In one study by the Trust Fund for Victims in the Central African Republic, it was found that women prefer individual over collective approaches to reparations.¹⁴⁵ If "satisfaction" is taken to include a substantial measure of victim-centered input in the outcomes and benefits of reparations, then the preferences of both men and women need to be factored into what constitutes "satisfaction" within transitional justice and reparations outcomes. Acknowledgement of the gendered differences in what may constitute meaningful "satisfaction" as a result of reparations is key, particularly with respect to women's and men's differing experiences of CRSV.

The final dimension of the Basic Principles is the guarantee of nonrepetition. This includes: the adoption of measures and establishment of independent institutions post conflict, with the aim of preventing a recurrence of violations by avoiding impunity; the establishment of the rule of law; and the operational functionality of legal institutions.¹⁴⁶ To this end, many elements of reparations, especially in process and substance, are organically connected to parallel transitional justice efforts in post-conflict societies. Ensuring that institutional reforms (including, for example, reforms to the courts, judiciary, civil service, police, and military) in post-conflict societies reflect the meaningful inclusion of women, as mandated by UNSCR 1325, is one means to link guarantees of nonrepetition to protections grounded in representation and participation for women. A fundamental element of non-

141. See generally WOMEN, ETHNICITY AND NATIONALISM: THE POLITICS OF TRANSITION (Rick Wilford & Robert L. Miller eds., 1998).

142. *Id.*

143. U.N. Women, *supra* note 41, at 98.

144. U.N. Office of the High Comm'r for Human Rights, Rep. of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights, ¶ 150 (Mar. 2011) [hereinafter Panel Report].

145. See generally KRISTIN KALLA & PETER DIXON, THE TRUST FUND FOR VICTIMS, REVIEWING REHABILITATION ASSISTANCE AND PREPARING FOR DELIVERING REPARATION: PROGRAMME PROGRESS REPORT (2011), available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Summer%202011.pdf>, archived at <http://perma.cc/XL6U-JPKK>.

146. Basic Principles, *supra* note 102, ¶ 18.

repetition is that sexual harm does not continue in the post-conflict arena. There is emerging data in some post-conflict zones suggesting that a rise in intimate violence follows for women after “peace” is theoretically won.¹⁴⁷ This data is not sufficiently consistent and validated to prove a general pattern and could instead reflect increased reporting of the issue. It is possible that effective rule of law reform and institutional strengthening of the police and the courts may, for example, encourage more women to report intimate violence in post-conflict settings. Nevertheless, politically and legally addressing the persistence of sexual harms for women in post-conflict societies should be a central element of meaningfully engaging a gendered application for nonrepetition of harm.

Despite our generous reinterpretation of the Basic Principles, when these norms were created, the doctrinal language and its interpretation distinctly lacked attention to gender issues and to the specific situations of women and girls. This pattern of exclusion, found even in the more tailored international legal standards, is a persistent fault in international lawmaking, whereby neutral technical responses to the shortcoming of generalized treaty norms often repeat the same patterns of gendered exclusion that exist in the hard law norms themselves. In the aftermath of the Basic Principles’ publication, a transnational coalition of women’s civil society organizations developed the Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation to promote a gendered approach to the implementation of the Basic Principles and to fill the gaps that the Basic Principles exposed.¹⁴⁸

The Nairobi Declaration demands that policies and measures related to reparations “must be explicitly based on the principle of nondiscrimination.”¹⁴⁹ Underpinning nondiscrimination is recognition of the rights of women and girls to autonomy and participation in decisionmaking, so that women themselves decide what forms of reparation are best suited to their situation.¹⁵⁰ The Declaration holds that “reparations must go above and

147. See Tristan Ann Borer, *Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa*, 15 *VIOLENCE AGAINST WOMEN* 1169, 1171 (2009). See generally FIONA ROSS, *BEARING WITNESS: WOMEN AND THE TRUTH AND RECONCILIATION COMMISSION IN SOUTH AFRICA* (2003).

148. INTERNATIONAL MEETING ON WOMEN’S AND GIRLS’ RIGHT TO A REMEDY AND REPARATION, *NAIROBI PRINCIPLES ON WOMEN AND GIRLS’ RIGHT TO A REMEDY AND REPARATIONS* ¶ H (2007) [hereinafter *Nairobi Principles*], available at <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>, archived at <http://perma.cc/EW3C-4DNM?type=live>. There is an oddly familiar pattern to the ways in which the “core” documents of international law are produced through torturous political negotiations and the moderation of regional and cultural views, and the way in which they systematically miss gender dimensions. This persistent marginalization of women’s perspectives and views is one of the undulating challenges of working within what Hilary Charlesworth has described as “the United Men’s Club.” See Hilary Charlesworth, *Transforming the United Men’s Club: Feminist Futures for the United Nations*, in *GENDER AND INTERNATIONAL LAW* 297 (Sari Kouvo & Zoe Pearson eds., 2014).

149. Nairobi Principles, *supra* note 148, ¶ B.

150. *Id.* ¶ D.

beyond the immediate reasons and consequences of the crimes and violations; they must address structural inequalities that negatively shape women's and girl's lives."¹⁵¹ The Basic Principles can be implemented in ways that address the concerns raised in the Nairobi Declaration and constitute a basis for using reparations in a transformative manner, but a critical dimension involves adopting the gender-sensitive approaches to implementation advocated for by the women at Nairobi.

Finally, closer application of the Security Council's resolutions on women, peace, and security also offer concrete framing for the ways in which the Basic Principles might respond to gender issues.¹⁵² Unlike the Basic Principles, the Security Council's resolutions on women, peace, and security specifically address the reparation needs of victims of CRSV. They also have enforcement power that extends beyond the "soft" law status of the Basic Principles and have the ability to shape the day-to-day actions of international actors on the ground. For example, the resolutions clearly encourage post-conflict processes that enhance "criminal accountability, responsiveness to victims and judicial capacity"¹⁵³ and contribute to ending impunity for CRSV. In highlighting the need for access to justice for victims, the resolutions underscore the broader interconnectivity of reparations with transitional justice mechanisms. The five resolutions that deal specifically with CRSV—United Nations Security Council Resolutions 1820, 1888, 1889, 1960, and 2106—underline the need for "sustainable assistance to victims of sexual violence."¹⁵⁴ United Nations Security Council Resolution 1888 specifically mentions the need for attention to CRSV in "justice and reparations" procedures post-conflict, and the most recent Resolution 2106 also references the need to "support[] survivors in accessing justice and reparations."¹⁵⁵ Under these resolutions, the international community is expected to ensure that victims have access to health, psychosocial, and legal assistance, and that victims' socioeconomic and reintegration needs are addressed, "particular[ly] in rural areas."¹⁵⁶ The resolutions may be used instrumentally in advancing enhanced approaches to gender-sensitive reparations. Efforts to improve data collection on sexual violence have already been established, as have mechanisms to monitor its prevalence and

151. *Id.* ¶ H.

152. See S.C. Res. 1960, U.N. Doc. S/RES/1960 (Apr. 30, 2010); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000). They should also include reference to other measures proposed and adopted by the Secretary-General. See, e.g., U.N. Secretary-General, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, U.N. Doc. ST/SGB/2003/13 (Oct. 9, 2003).

153. S.C. Res. 1888, *supra* note 152, ¶ 8 (b).

154. S.C. Res. 1820, *supra* note 152, ¶ 13.

155. S.C. Res. 1888, *supra* note 152, pmb., ¶ 12; S.C. Res. 2106, ¶ 21, U.N. Doc S/RES/2106 (June 24, 2013).

156. S.C. Res. 1888, *supra* note 152, ¶ 13. Similar requirements for services to victims/survivors post conflict are outlined in S.C. Res. 1889, *supra* note 152, ¶ 10.

responses to it.¹⁵⁷ The United Nations Secretary-General has also proposed a specific UNSCR 1325 indicator relating to reparations, which provides a further tool for accountability on gender-sensitive reparations at international and national levels.¹⁵⁸

IV. THE MISSING PIECE: GLOBAL OVERVIEW OF REPARATIONS IN PRACTICE

For the purposes of critically analyzing current global approaches to the practice of reparations for CRSV, the authors undertook primary and secondary data collection to map out existing initiatives and identify key trends and practice.¹⁵⁹ In mapping the practice of reparations, we identified a range of entities engaged in defining, enforcing, and overseeing reparations. Key actors include: national and international courts; national legislatures; international bodies creating legal norms intended to shape state practice; international organizations and their specialist agencies; and national administrative agencies and their personnel. The data collection included normative policy frameworks issued by various entities of the United Nations system, country-specific NGO assessments, and policy guidance from United Nations agencies. In addition, broader secondary academic research on the issues of reparations and CRSV was considered from multi-disciplinary fields of law and political science.¹⁶⁰

Furthermore, efforts were made to gather empirical primary data by liaising and conducting interviews with key actors involved in designing and implementing reparations programs globally. These included staff members of international organizations involved in policy development, program implementation, and technical advisory support on reparations delivery in a range of countries, including Colombia, the DRC, Nepal, and Sierra Leone. We acknowledge that there are limitations to the data underpinning our analysis. First, many of the initiatives on reparations are in initial stages of

157. On the challenges of data collection in conflict and post-conflict settings, see Fionnuala Ní Aoláin, *The Gender Politics of Fact-Finding in the Context of the Women, Peace and Security Agenda*, in *THE FUTURE OF HUMAN RIGHTS FACT-FINDING* (Philip Alston & Sarah Knuckey eds., forthcoming 2015).

158. U.N. Secretary-General, *Women and Peace and Security: Rep. of the Secretary-General*, ¶ 118, U.N. Doc. S/2010/498 (Sept. 28, 2010).

159. All three authors brought to the research a mix of extensive scholarly and practitioner experience in the field of international law, transitional justice, and the policy and practice of addressing gender-based violence. Through the literature review, a mapping of organizations involved in reparations programming was completed and representatives of these organizations were approached for interviews. As U.N. Women and the OHCHR commissioned the original study, contacts with key informants were initially made through the networks of those organizations. Through the interviewing process, additional informants were identified. The research and mapping identified the majority of international organizations implementing reparations programming and all of these were included in this study.

160. See generally *THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS*, *supra* note 122; *REPARATIONS: INTERDISCIPLINARY INQUIRIES* (Rahul Kumar & Jon Miller eds., 2007); *THE HANDBOOK OF REPARATIONS* (Pablo de Greiff ed., 2006).

design and implementation in national settings, and it was difficult to secure concrete data on program activities, impacts, and outcomes. Assessment thus comes at an early point of progress and may not be fully reflective of the capacities of newly undertaken initiatives, nor of the difficulties that may emerge once fully-fledged programs are underway.

On the basis of this extensive research, we conclude that the practice and implementation of reparations programs in conflict and post-conflict contexts is extremely patchy. Not a single comprehensive administrative program encompassing substantive and adequate reparations for CRSV has been initiated in any post-conflict setting since the inception of UNSCR 1325. We also have been unable to find evidence of any consistent practice of gender-sensitive reparations for war-related gendered harms before that date by national or international agencies or administrative bodies. Domestic judicial practice is intermittent and nascent; enforcement of judicially mandated measures remains an ongoing site of contestation in post-conflict sites experiencing infrastructure and resource challenges.¹⁶¹ We contend that understanding the regulatory, conceptual, and practical gaps in reparations provision provides a basis for identifying entry points in advancing a transformative and practical vision of repair for victims of CRSV. Addressing these gaps may also assist judges in gaining a greater appreciation of what may or may not work when the mandates to provide reparation follow from court proceedings.

To this end, we move here from discussing the conceptual basis of reparation to providing an overview of reparations programs identified through our data collection. For the purposes of our analysis, we have taken gender as a key conceptual lens, which is critical to assessing and understanding women's experiences of conflict-related harms and the ways in which structural inequalities might inform women's exclusion from, access to, or decision-making power over their right to reparation. Our review of current practice encompasses a beginning-to-end approach in respect of the project cycle—from the conception of reparations programs to the completion of delivery of benefits. We provide an overview of current reparation practice from a gender perspective, specifically focusing on exposing the lacunae in practice in respect of women's access to reparation and the gendered barriers women face in multiple conflict and post-conflict sites. We start with conception, move on to address the design phases of reparation, and then complete our review by scrutinizing the procedural and administrative means by which reparations are delivered to victims.

161. See, e.g., COLUMBIA SCHOOL OF INT'L AND PUBLIC AFFAIRS, BARRIERS TO JUSTICE: IMPLEMENTING REPARATIONS FOR SEXUAL VIOLENCE IN THE DRC 5, 17 (2013), available at https://sipa.columbia.edu/sites/default/files/PHR_Report.pdf, archived at <https://perma.cc/V3QX-EDM5> (examining mobile court systems in the DRC) [hereinafter BARRIERS TO JUSTICE].

A. Conception

Through our data collection, we identified a range of ways that reparations programs may be conceived of and developed; we now examine where and how reparations programs or CRSV may arise at a grassroots level. Reparations in post-conflict contexts do not emerge in a political vacuum. They are a legal and political product of the outcome of violent conflicts, specifically those conflicts that have reached a particular level of systematic violence sufficient to engage in accountability, acknowledgment, and compensation.¹⁶² There are many conflicts that do not reach these thresholds, or that fail to incite the interest of other states, the public, or international organizations, in which the scale of human rights violations and sexual and other harms to women in particular may be nevertheless immense.¹⁶³ A challenge to addressing transformative reparations is not only to construct measures that offer women routes to overcome the cumulative realities of structural discrimination—combined with the specific damage that has been layered on by sexual violence—but also to break down binary constructions about the places, spaces, and kinds of harms that count toward getting reparations, such as the distinction between sexual violence perpetrated in armed conflict by a combatant and sexual violence perpetrated within the violent and militarized context of armed conflict, but by a noncombatant.

Processes of transition offer a range of entry points for establishing reparations for CRSV, including through negotiations between military and political parties to a conflict, the recommendations of truth commissions, and routine legislation. These are important access points that enable reparations to be on the table. However, the significant literature on peace agreements demonstrates that political settlement sites remain exclusionary and highly inaccessible spaces for women.¹⁶⁴ Although the WPS Agenda has foregrounded participation in peace negotiations as the *sine qua non* of advancing women's interests in post-conflict settings, reliable inclusion remains a distant aspiration.¹⁶⁵

Some peace agreements have addressed repair, albeit in ways that are not particularly pertinent to women's harms. For example, in Colombia, reparations were conceived at the peace agreement stage. This case demonstrates the utility of domestic rights protections and international law as a basis for

162. See, e.g., Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783, 792 (1995) (stating that armed conflicts reaching a certain level of violence will trigger the protections of the Geneva Conventions).

163. See Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in THE GENDER OF REPARATIONS: UNSETTLING GENDER HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS, *supra* note 122, at 21.

164. See Christine Bell & Catherine O'Rourke, *Peace Agreements or 'Pieces of Paper'?*, 59 INT'L & COMP. L. Q. 941, 948 (2010); Ní Aoláin, Cahn & Haynes, *supra* note 67.

165. Bell & O'Rourke, *supra* note 164 (reviewing the very uneven provision for women within peace agreements signed since the adoption of UNSCR 1325).

the conception of reparations.¹⁶⁶ The Justice and Peace Law of 2005 (*Ley de Justicia y Paz*), which gave legislative effect to the negotiated demobilization of pro-state paramilitaries, included provision for demobilized paramilitaries to compensate victims from their illegally earned gains.¹⁶⁷ However, though providing a critical opportunity to insert reparations into conflict-resolution efforts in Colombia, the provision was highly partial, particularly as it addressed only the victims of irregular armed groups and not conflict victims more broadly. The Justice and Peace Law imposed no duty on the state to provide reparations to victims.¹⁶⁸ The Colombian Constitutional Court found this element of the Justice and Peace Law to be unconstitutional and contrary to the state's obligations under IHRL to provide reparations.¹⁶⁹ The Constitutional Court's decision forced some revisions to the 2005 law, ensuring that in cases in which perpetrator's assets were insufficient to fund full reparations to individual victims, the state would be required to provide the necessary funds. Additional actions have also been taken, including the provision of landmark reparations awards to victims of conflict violence in Colombia by the Inter-American Court¹⁷⁰ and to victims of CRSV by the Colombian Constitutional Court. Although the Colombian example shows that reparations are making an appearance in the compacts made between political and military elites in conflict settings, the Colombian case also illustrates that "deals" on reparations remain highly exclusionary to women's needs and experiences. There is, as we explore further below, a capacity to pivot these opportunities and make gains.

In Timor-Leste, the delivery of reparations has primarily been linked to a domestically driven truth commission: the Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor*, "CAVR").¹⁷¹ CAVR is a bilateral truth process between the states of Indonesia and Timor-Leste, and the Timor-Leste Commission of Truth and

166. See CATHERINE O'ROURKE, GENDER POLITICS IN TRANSITIONAL JUSTICE 183 (2013) (noting the consideration of reparations provisions during the peace accords process).

167. L. 975, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.), available at <http://www.cepal.org/oig/doc/col2005ley975.pdf>, archived at <http://perma.cc/7XBD-WX8H> (establishing that the reparations fund will be constituted in part by goods obtained from the illegal activities of paramilitaries); see also Decreto 3391, 29 septiembre, 2006, DIARIO OFICIAL [D.O.] (Colom.), available at http://200.75.47.45:8081/Normograma/docs/decreto_3391_2006.htm, archived at <http://perma.cc/8FSJ-WY7Q> (outlining the reparations process for obtaining reparations from armed paramilitary groups).

168. See generally O'ROURKE, *supra* note 166, at 183–89 (describing the evolution of the reparations processes in Colombia).

169. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at <http://www.corteconstitucional.gov.co/relatoria/2006/c-370-06.htm>, archived at <http://perma.cc/NXZ9-SHJQ>.

170. See *Mapiripán Massacre v. Colombia*, Merits, Reparations, and Costs, Inter-Am. Ct. H. R. (ser. C) No. 134, ¶¶ 355.7–355.17 (Sept. 15, 2005); *19 Merchants v. Colombia*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶¶ 283–84 (July 5, 2004).

171. See generally COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, CHEGA! FINAL REPORT OF COMMISSION FOR RECEPTION, TRUTH AND RECONCILIATION IN EAST TIMOR, pt. 10 (2005), available at <http://www.cavr-timorleste.org/en/chegaReport.htm>, archived at <http://perma.cc/UC2F-7B3F> [hereinafter CAVR].

Friendship (“CTF”).¹⁷² Although they each related very differently to victims, the final reports of both bodies recommended reparations for victims of CRSV, and both notably highlight the range and impact of sexual violence on women and girls.¹⁷³ The link between reparations programming and truth commission outcomes reaffirms the importance of ensuring that truth recovery processes adequately and fully acknowledge gender violence in their analysis and reporting.¹⁷⁴

During the course of its operations, the CAVR established an urgent reparations program with funding from the World Bank.¹⁷⁵ The program prioritized violations that targeted those considered most vulnerable—people with disabilities, widows, victims of sexual violations, and women affected by severe trauma.¹⁷⁶ A balance of women and men made up a “Working Group on Victims Support” that oversaw the process and involved women’s organizations in the design and delivery of the reparations program.¹⁷⁷ Reparations included provision of monetary support to individual victims, referral to existing services, facilitation of healing workshops, and individual and collective reparations support through local NGOs.¹⁷⁸

There has been sufficient political consensus in the government to establish a more comprehensive scheme for social assistance and compensation to veterans.¹⁷⁹ In addition to the truth processes, in 2006 the Timorese parliament passed the Veterans Law, which granted pensions and other benefits to veterans.¹⁸⁰ Also relevant is Article 11 of the Timor-Leste Constitution,

172. Terms of Reference to the Truth and Friendship Commission, Indon.-Timor-Leste, ¶9, Mar. 9, 2005, available at <http://www.etan.org/et2005/march/06/10tor.htm>, archived at <http://perma.cc/R8W8-BMQ2>.

173. See CAVR, *supra* note 171, ch. 7.71 ¶¶ 1–2, 8–10 & ch. 11.4.1. Of note is that a two-part reparations bill has been proposed and submitted to parliament to enact the recommendations of both truth processes for a national reparations program. One bill proposes a framework for a national reparations program, while the other proposes the creation of an institute on public memory. AMNESTY INT’L, TIMOR-LESTE, REMEMBERING THE PAST: RECOMMENDATIONS TO EFFECTIVELY ESTABLISH THE “NATIONAL REPARATIONS PROGRAMME” AND “PUBLIC MEMORY INSTITUTE” (2012), available at <http://www.amnesty.org/en/library/asset/ASA57/001/2012/en/0b8a04c1-6b7d-4f05-adb9-5171e2b647e9/asa570012012en.pdf>, archived at <http://perma.cc/W26L-VD85>.

174. Another important comparative reference is the Truth Process in Liberia and the linkage made between truth and gendered or sexual harm. See TRUTH AND RECONCILIATION COMMISSION OF LIBERIA, FINAL REP., VOL. II: CONSOLIDATED FINAL REP. § 17.3 (2009), available at http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf, archived at <http://perma.cc/Q6CP-H946>.

175. Galuh Wandita, Karen Campbell-Nelson & Manuela Leong Pereira, *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims, in WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS*, *supra* note 26, at 288, 304 n.78 (Ruth Rubio-Marín ed., 2006) (describing the reparations program of the CAVR).

176. See CAVR, *supra* note 171, pt. 11, at 12–13, 40–41 (noting the particular vulnerabilities of the women accessing the reparations program).

177. Wandita, Campbell-Nelson & Pereira, *supra* note 175, at 301.

178. *Id.* at 292, 295, 305, 302 (describing the active involvement of women in the CAVR).

179. See WORLD BANK, DEFINING HEROES: KEY LESSONS FROM THE CREATION OF VETERANS POLICY IN TIMOR-LESTE 1 at ¶ 2 (2008); SUSAN HARRIS-RIMMER, GENDER AND TRANSITIONAL JUSTICE: THE WOMEN OF EAST TIMOR 141–42 (2010).

180. The Statute of the National Liberation Combatants (Law No. 3/2006) (Timor-Leste).

which declares that veterans must be compensated.¹⁸¹ The Veterans Law awarded benefits in accordance with number of years of service.¹⁸² It also provided pensions and free access to public services to the surviving immediate family members of those killed while fighting.¹⁸³

There has been much criticism of these programs, however, due to their exclusion of Timorese women who fought in the Timorese resistance.¹⁸⁴ Again, we see a persistent pattern of distribution of material compensation that emerges at the end of a conflict, wherein even programs vaunted for their progressive character have a curiously consistent gender blind spot. Much of the debate focuses on a perception that women did not “fight” in the resistance but were associated with the fighting forces, playing broader roles.¹⁸⁵ Women’s own testimony affirms that they actively fought alongside men, and despite the fact that twenty-five percent of the registered combatants were female, the empirical documentation reveals that female veterans have not benefitted from the various DDR programs that have been implemented.¹⁸⁶ To date, thirty-eight percent of pension recipients are women; however, the majority of these women receive benefits due to their relationship with a deceased male combatant.¹⁸⁷

The Timor-Leste case illustrates that truth recovery processes are an important entry point for reparation and that building political consensus around the need for reparations to victims of CRSV is a necessary step to effective programs. Central to the enabling story that emerges here was the critical role that domestic civil society and international law played as allies to the domestic process. Both Colombia and Timor-Leste demonstrate the potential for discriminatory policies that ignore or overlook the particularized needs of women even in their earliest stages and prevent effective access to reparation for women victims of CRSV.

181. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF TIMOR-LESTE May 20, 2002 art. 11 (declaring that veterans need to be compensated).

182. The Statute of the National Liberation Combatants art. 21 (Law No. 3/2006) (Timor-Leste).

183. *Id.* art. 23.

184. INT’L CTR. FOR TRANSITIONAL JUSTICE, UNFULFILLED EXPECTATIONS: VICTIMS’ PERCEPTIONS OF JUSTICE AND REPARATIONS IN TIMOR-LESTE 8–9 (2010), available at <https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Unfulfilled-Expectations-2010-English.pdf>, archived at <https://perma.cc/639W-79NQ> (“The veterans’ program does not encompass all the victims by any means. Women are marginalized because it was mostly men who held formal positions within the armed wing of the resistance, Falintil, and the clandestine network.”). Cf. Hilary Charlesworth & M. Wood, *Women and Human Rights in the Rebuilding of East Timor*, 71 NORDIC J. INT’L L. 325, 347 (2002).

185. See Lia Kent & Naomi Kinsella, *A Luta Continua (The Struggle Continues)*, INT’L FEMINIST J. POL. (2014), available at <http://www.tandfonline.com/doi/pdf/10.1080/14616742.2014.913383>, archived at <http://perma.cc/3ZDD-NUSU>.

186. LIA KENT, INDEPENDENT EVALUATION: COMMISSION ON CADRES OF RESISTANCE 9, 11, 21 (2006).

187. Kent & Kinsella, *supra* note 185, at 4.

B. Design

Reparations often constitute a multifaceted legal, political, economic, and cultural package.¹⁸⁸ Needs and experiences vary from one society to another and, invariably, the key elements of the design aspects of reparations programs also vary, influencing the overall success of approaches to and delivery of reparations for CRSV. With respect to administrative reparations programs, essential considerations for determining the practice of reparations requires ascertaining who has ownership and oversight of programs, and who are the stakeholders involved in deciding, creating, and delivering reparations in situ. Quality design requires broad stakeholder involvement from the outset, the securing of longer-term and sustainable funding, and the employment of creative ways to ensure fairness and inclusion in the design of reparations benefits. All of these must be undertaken in gender-sensitive ways, accounting for the structural exclusions that work against both men and women's opportunity to participate and have their views heard.

To deliver comprehensive reparations and establish an integrated response to victims, there must be a clear normative, institutional, and operational framework. In Colombia, a 2010 assessment of reparations programming to date found that the agency charged with administering the reparations program, *Acción Social*, had not completed a single claim presented by a displaced person in its three years of operation.¹⁸⁹ *Acción Social* officials attribute this failure to gaps in the regulation of the decree establishing the administrative reparations program.¹⁹⁰ The absence of clear criteria to recognize and pay compensation to the displaced within the legal framework—which provides only that those already registered as displaced will be automatically included in the administrative reparations program—has created practical obstacles to providing reparations to displaced persons.¹⁹¹ The obvious takeaway is that the relationship between different institutions with post-conflict repair mandates must be made clear, with specific institutions explicitly given discrete responsibilities.

Comparative study reveals that national ownership of administrative reparations initiatives is critical at design stages to ensure that reparations programs are nationally owned and responsive to national priorities and realities. For instance, a vital component of reparations programming that United Nations Women (“UN Women”) and the Office of the High Commissioner for Human Rights (“OHCHR”) initiated in the DRC was accounting for the context in which the program would operate. In the DRC,

188. Pablo de Greiff, *Introduction*, in *THE HANDBOOK OF REPARATIONS* 1, 1–3 (Pablo de Greiff ed., 2006) (describing the variety of reparations programs).

189. PROCURADURÍA GENERAL DE LA NACIÓN, *INFORME DE SEGUIMIENTO AL PROGRAMA DE REPARACIÓN INDIVIDUAL POR VÍA ADMINISTRATIVA* 40 (2010).

190. *Id.* at 41.

191. *Id.*

there had already been some judicial response to CRSV.¹⁹² In some cases, victims had secured convictions and been awarded damages on the basis of civil claims through domestic courts.¹⁹³ In practice, however, the weakness of the domestic judicial enforcement system meant that none of these awards were likely received.¹⁹⁴

Thus, the DRC case study illustrates another constant faulty link in the reparation matrix: the paltry rule of law capacity in states emerging from conflict, and the failure of law to consistently deliver reparation for women victims. In this arena, particularly in conflicts that have attracted international oversight and intervention,¹⁹⁵ international actors have the opportunity to strengthen existing attempts at reparations. Here, the programming initiated by UN Women and the OHCHR accounted for this reality by strengthening the judicial system and encouraging state responsibility to deliver on its obligations. International organizations should be cognizant of the overall need to respect and uphold national-level responsibility for the delivery of reparations, and in the context of the WPS Agenda, states arguably have an obligation to underscore the obligations of domestic legal systems in this regard.

From the outset, it is important for international organizations to identify and work closely and collaboratively with key national and international stakeholders. Well-thought-out practice in Nepal illustrates the benefits of ongoing collaboration, partnership, information sharing, and consultations between actors. There, the International Organization for Migration (“IOM”), the OHCHR, 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.¹⁹⁶ Formal planning and agreements drawn up between actors and interested stakeholders can optimize these types of partnership and joint approaches. Collaborative United Nations agency initiatives, such as those between UN Women and the OHCHR in the DRC, provide a potential model wherein joint ventures are designed and planned on the basis of agreed memoranda of understanding and clear delineation of roles.¹⁹⁷ Joint approaches also exploit the potential

192. See BARRIERS TO JUSTICE, *supra* note 161, at 5.

193. Panel Report, *supra* note 144, at 50 (noting that no payment has been received by the victims).

194. See BARRIERS TO JUSTICE, *supra* note 161, at 28–29.

195. See Fionnuala Ní Aoláin, *Women, Security and the Patriarchy of Internationalized Transitional Justice*, 31 HUM. RTS. Q. 1055, 1059 (2009).

196. INT’L ORG. FOR MIGRATION (“IOM”) & OFFICE OF HIGH COMM’R FOR HUMAN RIGHTS (“OHCHR”), PROJECT INFORMATION SHEET (2010), available at <http://mptf.undp.org/document/download/7164>, archived at <http://perma.cc/QWA7-2HMN>; Rep. of the Admin. Agent of the U.N. Peace Fund for Nepal, Jan. 1–Dec. 31, 2011, *Fifth Consolidated Annual Progress Report on Activities Implemented Under the United Nations Peace Fund for Nepal* (May 29, 2012); U.N. Nepal Information Platform, <http://www.un.org.np/iom>, archived at <http://perma.cc/XD2G-PXB5>.

197. U.N. Office of the High Comm’r for Human Rights, Memorandum: Request to Create GTA P3 Post on Remedies and Reparation for Victims of Sexual Violence in the DRC for 11 Months (July

of combining the varied expertise of different organizations—in this case, the gender equality-focused mandate of UN Women with the rights-based approaches of OHCHR. An overall United Nations approach to reparations may be maximized through coordinated planning, for example through United Nations Development Assistant Frameworks where these relationships already exist at country levels.¹⁹⁸ Coordinated approaches have been a key goal of the WPS Agenda, but their application to reparations has been less evident and less consistent.¹⁹⁹ There is a significant opportunity to leverage coordination mechanisms to compensate for the limitations that are part and parcel of the post-conflict legal landscape in fragile and conflict-recovering states.

Lessons from Sierra Leone demonstrate that multi-stakeholder and collaborative oversight mechanisms contribute to ensuring that broad ownership is generated at design stages for reparations initiatives. The National Committee for Social Action (“NaCSA”), a quasi-governmental institution, was established to lead government-initiated reparations programming in Sierra Leone.²⁰⁰ Its oversight committee is made up of a broad range of stakeholders that not only oversee its work, but also ensure that it is managed in inclusive and transparent ways.²⁰¹ The committee uses the recommendations of the Sierra Leone Truth and Reconciliation Commission to guide its work.²⁰² The Sierra Leone experience underlines the necessity to ensure that a range of stakeholders provide input to national reparations programs, that there is a balance of participation from males and females on oversight bodies, and, where appropriate and possible, that there is representation from victims for whom the programs will be designed.²⁰³

The core stakeholders in reparations are the victims of harm. Not unsurprisingly, in the processes of design and implementation, they are the people most likely to be left out of analysis, engagement, and referral.²⁰⁴ Reparations are likely to work better and be perceived as more relevant to

19, 2011); see also Panel Report, *supra* note 144, ¶ 22 (citing cooperation with UN Women to implement the recommendations of the Panel’s report on the consultations in the DRC).

198. On Development Assistance Frameworks, see generally UNITED NATIONS DEVELOPMENT ASSISTANCE FRAMEWORK (UNDAF), available at <http://www.undg.org/?P=232>, archived at <http://perma.cc/8FW3-VB4Q>.

199. The first resolution to address the need for redress was not passed until 2009. See S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009). Security Council resolutions did not include specific mention of reparations until 2013. See S.C. Res. 2106, U.N. Doc. S/RES/2106 (June 24, 2013); S.C. Res. 2122, U.N. Doc S/RES/2122 (Oct. 18, 2013).

200. See Cecily Rose, *An Emerging Norm: The Duty of States to Provide Reparations for Human Rights Violations by Non-state Actors*, 33 HASTINGS INT’L & COMP. L. REV. 307, 334 (2010).

201. Cf. generally NATIONAL COMMISSION FOR SOCIAL ACTION, ANNUAL REPORT (2009) (on file with author) (highlighting local ownership efforts).

202. *Id.* at 10.

203. Anonymous interview, Nat’l Comm. for Soc. Action, in Freetown, Sierra Leone (Oct. 2011) (interview notes on file with journal).

204. See Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth & Transition*, 16 UCLA WOMEN’S L.J. 229, 248–49, 265 (2007) (discussing the exclusion of victims from truth telling processes).

victims if the harms that matter to victims are included from the outset.²⁰⁵ Consultation processes enable victims of CRSV to have input in the design of reparations programming.²⁰⁶ Much of the work of international organizations in contexts where the need for reparations for CRSV might arise purports to ensure local ownership of initiatives, and the rhetoric of international humanitarian interveners consistently stresses the best interests of the locals.²⁰⁷ In reality, “[m]any programmes are formulated in foreign offices instead of being built around local realities and so fail to respond to real needs.”²⁰⁸

Even those programs led by international actors that work through and with local partners result in questionable genuine ownership of those initiatives, either by the local partner organizations or by the individual beneficiaries of the programs.²⁰⁹ In practice, efforts toward ensuring ownership also come up against the reality of gendered obstacles, assumptions, and exclusions. This includes the endemic and systemic barriers that inhibit women’s access to consultation and decisionmaking processes with local populations on project design as well as the “imported patriarchy” that exists within much of the work of international organizations.²¹⁰ Drawing the complexity of sexual harm into this analysis, it becomes evident that consultation may be seen not just as a critical feature of the design of successful reparations programs, but also as an aspect of the reparation process that women must successfully navigate if these programs are to be tailored to meet their specific needs.

Victims of CRSV face substantial barriers of stigma associated with the disclosure of their victim status, and consultation with such populations requires careful and considered approaches. In a context such as the DRC,

205. See Cristián Correa, Julie Guillerot & Lisa Magarrell, *Reparations and Victim Participation: A Look at the Truth Commission Experience*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY 385, 393–94 (Carla Ferstman et al. eds., 2009) (describing the importance of victim participation to ensure victims derive a substantive benefit); see also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 92 (1998) (“The authorizing legislation directed the TRC reparations committee to assemble requests and proposals from individuals and communities.”).

206. Rubio-Marín, *supra* note 5, at 81 (noting the benefits of consultation processes).

207. See generally Diane Orentlicher, *Settling Accounts Revisited: Reconciling Global Norms with Local Agency*, 1 INT’L J. TRANSITIONAL JUST. 10 (2007); Rosalind Shaw & Lars Waldorf, *Introduction: Localizing Transitional Justice*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 3, 3 (Rosalind Shaw & Lars Waldorf eds., 2010).

208. Dorothea Hilhorst, *Being Good at Doing Good? Quality and Accountability of Humanitarian NGOs*, 26 DISASTERS 193, 200 (2002) (quoting Dawit Zawde, *Changing the Approach to Capacity-Building*, THE NEWSLETTER OF THE INTERNATIONAL COUNCIL OF VOLUNTARY AGENCIES (Sept. 12, 2001)); see also SÉVERINE AUTESSERRE, PEACELAND CONFLICT RESOLUTION AND THE EVERYDAY POLITICS OF INTERNATIONAL INTERVENTION 12–13 (2014).

209. In an ideal world, operational standards for humanitarian action during and post conflict require participation and consultation with the affected population for the delivery of services and benefits. See THE SPHERE PROJECT, <http://www.spherehandbook.org/en/core-standard-1-people-centred-humanitarian-response/>, archived at <http://perma.cc/C7NN-ARF7>.

210. Fionnuala Ní Aoláin & Michael Hamilton, *Gender and the Rule of Law in Transitional Societies*, 18 MINN. J. INT’L L. 380, 399–400 (2009).

where it is not always possible for victims to identify perpetrators of abuses, and where there is persistent nonpayment by convicted perpetrators of reparations awarded by domestic courts, the need for extrajudicial reparations is apparent.²¹¹ In August 2010, the United Nations High Commissioner for Human Rights appointed a High-Level Panel with the mandate to consult with victims of CRSV in the DRC to assess existing mechanisms and provide recommendations for reparation.²¹² The consultation process itself was framed around the Basic Principles and resulted in a substantial report documenting the findings and resulting recommendations.²¹³ The High-Level Panel consultation process is instructive in demonstrating appropriate ways to approach and undertake consultative processes. For example, lessons from the process underlined: the need for consultations to be undertaken by technically trained staff in safe ways, such as through trusted service providers that have existing relationships with victims; for processes to adhere to ethical standards for engaging in research and consultation with victims of sexual violence; and for processes to take account of the need for sex- and age-disaggregated approaches where relevant.²¹⁴ The process also demonstrated that it is imperative to ensure that participants can avail themselves of culturally appropriate psychosocial services by making them concretely available during and after consultation processes.²¹⁵

It is reasonable to surmise that consultation processes such as these generate expectations among victims that reparations programs will actually be forthcoming and in a timeframe that meets their immediate needs. This may be particularly problematic for victims of CRSV, whereby consultation processes may generate a risk of exposure of their victim status without a guarantee that reparations will be provided. It is therefore important that the intention to deliver on reparations is in some way certain from the outset and that any resulting responses are generated in a timely and appropriate manner. It is critical to generate parallel governmental commitment so that provision of funding for reparations programs may be nationally instigated, owned, and sustainable.

Expertise matters for both the design of reparations programs as well as the delivery aspects that we examine next. In the context of advancing material and symbolic reparations for sexual violence, knowledge and knowledge transfer are essential dimensions of ensuring meaningful repair for women. National-level institutions and international organizations engag-

211. See SHARANJEET PARMAR & GUY MUSHIATA, INT'L CTR. FOR TRANSITIONAL JUSTICE, JUDGMENT DENIED: THE FAILURE TO FULFILL COURT-ORDERED REPARATIONS FOR VICTIMS OF SERIOUS CRIMES IN THE DEMOCRATIC REPUBLIC OF THE CONGO 4–5 (May 2012), available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-DRC-Reparations-2012-ENG.pdf>, archived at <https://perma.cc/K4M6-WSQN>.

212. See Panel Report, *supra* note 144, ¶ 1.

213. *Id.* ¶ 6.

214. See, e.g., WORLD HEALTH ORG., ETHICAL AND SAFETY RECOMMENDATIONS FOR RESEARCHING, DOCUMENTING AND MONITORING SEXUAL VIOLENCE IN EMERGENCIES 9, 14, 27 (2007).

215. *Id.* at 12.

ing in reparations programming could—and should, where necessary—avail themselves of technical expertise and support in the design and delivery of their reparations initiatives. Sensitivity to and awareness of women’s distinct and specific needs is an underappreciated aspect of making reparations available and useful to victims of CRSV. The importance of accessing technical support and expertise from a credible and experienced organization was a key finding in the study of the reparations program in Sierra Leone.²¹⁶ NaCSA received three million USD from the United Nations Peacebuilding Fund to cover its operational costs and secure technical expertise, advice, and training from IOM to facilitate the substantive delivery of the program.²¹⁷ In particular, *specific expertise on CRSV is required* so that reparations are designed with sexual violence-centered approaches.

C. Delivery of Benefits

The modality of delivery is one of the primary considerations of reparations programming, be it administrative or judicial. Although reparations are distinct from both humanitarian aid and development assistance in international law,²¹⁸ the country studies reveal that in practice, some countries blur the lines between reparations programs and international development aid.²¹⁹ Coupling the provision of rehabilitative services to victims of CRSV with development assistance from international actors to support the broader strengthening of state services facilitates the delivery of reparations benefits, but it also runs the risk of diluting provision of social benefits more generally.²²⁰ Since there is potential to establish policy and programming across a range of public-service sectors, this approach supports states in meeting their ongoing socioeconomic treaty obligations without undermining a state’s specific reparation obligations to conflict victims. However, there is a danger that states may elide the distinction between reparations and social and economic rights treaty obligations. Reparations—particularly if they are broadly based or communal in form—may appear to provide the same kinds of benefits to communities that would arise from a state’s responsibility to advance socioeconomic rights protections. However, states are still bound by treaty obligations, whether or not those obligations require reparations, and no substitution should be tolerated. Substitution risks undermining the integrity of reparations and

216. INT’L CTR. FOR TRANSITIONAL JUSTICE, REPORT AND PROPOSALS FOR THE IMPLEMENTATION OF REPARATIONS IN SIERRA LEONE 13 (2009).

217. *Id.* at 1–2.

218. See generally Rama Mani, *Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development*, 2 INT’L J. TRANSITIONAL JUST. 253 (2008).

219. See, e.g., INT’L CTR. FOR TRANSITIONAL JUSTICE, REPARATIONS IN THEORY AND PRACTICE 6–7 (2007), available at <http://ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf>, archived at <http://perma.cc/M7LY-A7VY> (citing the case study of Peru as an example of a country blurring the lines between reparations and development).

220. *Id.* at 7.

waters down the basic provision to all citizens of social and economic rights. Merging reparations with preexisting treaty obligations erodes their distinct functions of repair to specific individuals and communities. Thus, keeping reparations and treaty obligations separate compliments and extends socioeconomic capacity rather than merely providing a minimal threshold of support to certain designed groups within the state.

Our research illuminates how challenging the delivery of reparations-related benefits is in practice. The delivery of benefits to victims of CRSV requires approaches that are cognizant of the intersectional identities of the individual recipients as well as the context in which reparations are delivered. This includes key social determinants such as gender, sex, age, disability, and education level. Additionally, the recipients' domestic context—from their multifarious rural and urban locations to the context of social stigma particular to a locale—is also an important consideration.

The first challenge to the practical implementation of reparations programming is ensuring that registration processes actively facilitate the inclusion of victims of CRSV. The Colombian experience reveals widely differing levels of success in registration for both judicial and administrative reparations. An inadequate publicity campaign—carried mainly in the national daily newspaper *El Tiempo*—hampered the judicial reparations process, which failed to reach the regions most affected by the conflict.²²¹ Thus, appropriate, effective, and comprehensive information campaigns are critical to successful registration.

Literacy levels also pose particular challenges for registration. The Colombian judicial reparations process required victims to complete forms in order to register offenses by armed groups and actors.²²² The displaced population has relatively high levels of illiteracy, with even higher rates among displaced women.²²³ The Victims Law may offer a potential redress to this problem by allowing victims to make claims orally,²²⁴ though, at the time of this writing, it is still unclear how this innovation will proceed in practice. Flexible procedures for recording and disseminating information are

221. Inter-Am. Comm'n H. R., Rep. on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings, ¶ 58, OEA/Ser.L/V/II, doc. 3 (Oct. 2, 2007).

222. COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, ¿SOY UNA VÍCTIMA? TENGO DERECHOS 23–24 (2007), available at <http://www.corteidh.or.cr/tablas/27327.pdf>, archived at <http://perma.cc/997E-V527>.

223. SISTEMA NACIONAL DE ATENCIÓN INTEGRAL A LA POBLACIÓN DESPLAZADA, INFORME DEL GOBIERNO NACIONAL A LA CORTE CONSTITUCIONAL SOBRE LOS AVANCES EN LA SUPERACIÓN DEL ESTADO DE COSAS INCONSTITUCIONAL DECLARADO MEDIANTE LA SENTENCIA T-025 DE 2004 42–43 (2010), available at http://www.acnur.org/t3/uploads/media/COI_2813.pdf?view=1, archived at <http://perma.cc/>.

224. COMISIÓN DE SEGUIMIENTO A LA POLÍTICA PÚBLICA SOBRE DESPLAZAMIENTO FORZADO, BALANCE APROXIMATIVO DE LA LEY DE VÍCTIMAS APROBADA POR EL CONGRESO DE LA REPÚBLICA 7 (2011), available at <http://pclslatin.org/porta/images/documentos/Tierra-y-Territorio/documentos-relacionados-tierras/despojo-restitucion-retorno/50-Balance-aproximativo-ley-victimas-aprobada-Congreso-Republica.pdf>, archived at <http://perma.cc/T5SC-FAN7>.

important for genuine victim involvement and are essential to addressing and including women, whose situated capabilities in society—where inequality and exclusion pervade—will inevitably be lower than comparably placed men.²²⁵

There are specific difficulties faced by rural dwellers obliged to attend judicial and registration proceedings in urban areas. In Colombia, transport subsidies have been a useful and practical measure to ensure the inclusion of rural victims and claimants.²²⁶ In addition, several state agencies are empowered to accept applications, including mayoral and municipal offices, regional offices of the Attorney General, regional offices of the Ombudsman, regional offices of the National Commission for Reparation and Reconciliation, the Justice and Peace Unit of the Prosecutor's Office, and *Acción Social* (the principal state agency providing humanitarian assistance to the displaced population).²²⁷ Designating multiple agencies, in multiple locations, to register claimants substantially improved the system and eased the burden of requirements in the judicial process for victims who travel to urban centers. This has functioned effectively to register a large number of claims (approximately three hundred thousand), the vast majority of which have come from women (eighty-seven percent).²²⁸

Proactive and creative outreach strategies are necessary to ensure access to registration by men, women, boys, and girls who are victims of CRSV and who live in a range of conflict-affected geographic areas. The Sierra Leonean case demonstrates the importance of a robust approach to sensitization and information-sharing campaigns during a registration processes. The process of registration in Sierra Leone was helpfully sex-segregated, but when women in large groups came together, they were asked in relatively public settings (surrounded by other women) to identify the harm they had experienced.²²⁹ This meant that rape victims had to publicly identify their victim

225. On the particular need for flexibility of reparations programming for women victims in Colombia, see generally MESA DE TRABAJO POR UN PLAN INTEGRAL DE PROTECCIÓN A VÍCTIMAS Y TESTIGOS DE GRAVES VIOLACIONES A DERECHOS HUMANOS E INFRACCIONES A DERECHO INTERNACIONAL HUMANITARIO, CON ENFOQUE DIFERENCIAL DE GÉNERO, PROPUESTA PARA EL CUMPLIMIENTO DE LA SENTENCIA T-496 DE 2008: DOCUMENTO DE RECOMENDACIONES (2008), available at <http://www.aecid.org.co/?idcategoria=1520#>, archived at <http://perma.cc/F2GK-MLQ7>.

226. See WORKING GRP. TO MONITOR COMPLIANCE WITH AUTO 092 OF 2008 OF THE COLOMBIAN CONSTITUTIONAL COURT, ACCESS TO JUSTICE FOR WOMEN VICTIMS OF SEXUAL VIOLENCE 53 (2011) (noting transport subsidies are important to obtaining judicial reparations) [hereinafter WORKING GRP.].

227. ACCIÓN SOCIAL, MINISTERIO DEL INTERIOR Y DE JUSTICIA, COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, PROCEDIMIENTO ESENCIAL PARA SOLICITAR REPARACIÓN INDIVIDUAL POR VÍA ADMINISTRATIVA 1 (2008), available at http://arboleda-narino.gov.co/apc-aa-files/65333561323634653665623530363437/documento_personaiarboleda.rtf, archived at <http://perma.cc/2ZMC-2KAM>.

228. PROCURADURÍA GENERAL DE LA NACIÓN, INFORME DE SEGUIMIENTO AL PROGRAMA DE REPARACIÓN INDIVIDUAL POR VÍA ADMINISTRATIVA 12 (2010). Anecdotal evidence is that one-third of reparations claims for CRSV have come from men. FRANÇOISE ROTH, TAMY GUBERK & AMELIA HOOVER GREEN, USING QUANTITATIVE DATA TO ASSESS CONFLICT-RELATED SEXUAL VIOLENCE IN COLOMBIA: CHALLENGES AND OPPORTUNITIES 56 (2011).

229. See Rubio-Marín, *supra* note 206, at 87.

status. The obvious problem of stigma and layered stigmatization resulted.²³⁰ Registration processes must be sensitive to the intensely personal and stigmatized nature of CRSV. In addition, during the registration process, there were miscommunications or misunderstandings that led many women to assume that using the status of “widow” rather than “rape victim” would result in support to family and children as well as the victim.²³¹ The International Centre for Transitional Justice estimated in their analysis of the program that many women victims may have registered as a widow rather than as a victim of rape; consequently, no reparations are forthcoming to this group to date.²³² Officials must take care to effectively communicate comprehensive and accurate information on the specific category of harms relevant for remedies in each specific program and related benefits to potential claimants.

A persistent issue in the award of judicial reparations to victims of CRSV is the lack of sensitive and comprehensive investigation of claims. In Colombia, the officials responsible for conducting investigations attach excessive importance to testimonial and physical evidence.²³³ This excludes innovative methods to gather evidence of sexual harm, which could include the sophisticated use of indirect evidence. An increase in the number of births in a region, unusual patterns of early marriage, and a higher number of displaced women in a given area may all serve as indirect evidence of CRSV.²³⁴ Investigators can use these markers to discern shifts in gestation and birthing patterns, providing the basis for a claim of systematic or strategic rape, and removing the burden on individual women to testify explicitly to sexual violations.²³⁵ Additionally, investigations of particular patterns of warfare, such as identifying chains and patterns of command and control over soldiers, can provide evidence of the probability of certain kinds of harm, including sexual violence to a civilian community.²³⁶ Furthermore, investigators should be sensitive to the cultural and linguistic barriers that may occlude direct statements about sexual violence. Investigators must understand that a unique lexicon emerges in conflict sites to communicate particular forms of harm, including sexual violence; however, these expressions do not mirror the words and phrases commonly deployed by courts, legal officials, and nonlocal experts.²³⁷ Moreover, the security of

230. *Id.*

231. MOHAMED SUMA & CRISTIÁN CORREA, INT’L CTR. FOR TRANSITIONAL JUSTICE, REPORT AND PROPOSALS FOR THE IMPLEMENTATION OF REPARATIONS IN SIERRA LEONE 5 (2009), available at <https://www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf>, archived at <https://perma.cc/ML8E-W6LC>.

232. *Id.*

233. See WORKING GRP., *supra* note 226, at 42.

234. See Roth, Guberek & Green, *supra* note 228, at 65–66; NíAoláin, *supra* note 195.

235. Roth, Guberek & Green, *supra* note 228.

236. *Id.* at 61.

237. THEIDON, *supra* note 60, at 105–08 (addressing the complexity of testimony and the forms of language and expression used by conflict-affected communities to communicate sexual harm, a language

the victim is a paramount concern throughout the investigation of claims. Requiring displaced victims to return to the place where the sexual violence took place as part of the investigation imposes an additional financial burden and makes victims vulnerable to reprisal, retraumatization, threat, or intimidation by perpetrators.

In addition, within the Colombian administrative reparations program, there is evidence that officials left the investigation of more complex claims of CRSV until after the resolution of other claims that did not present difficulties or complexities.²³⁸ Standards of fairness derived from the due process norms of international law should apply to the investigation of claims for CRSV in administrative reparations programs, thereby ensuring that victims of conflict related harms enjoy due process. Appropriate training of investigative personnel, accompanied by flexible evidentiary standards, can ameliorate the additional complexity of investigating reparations claims for CRSV.

The final issue we address is the balance and complexity of material and symbolic reparations for CRSV. Material reparations can include financial compensation, dedicated rehabilitative services to victims, and the restitution of land and property assets. Cash transfers can be one-off or periodic payments, such as pensions. Rehabilitative services can include medical services, educational benefits, and psychosocial amenities. Restitution activities typically prioritize land and housing. Symbolic reparation may include the creation of memorials, monuments, and symbolic gestures such as apologies.²³⁹ In an optimal reparative model, both material and symbolic reparations would be meaningfully present and engaged in ways that would be relevant and responsive to the victims of harms. Frequently, resource limitations mean that there are persistent trade-offs between one form of reparation over another, and there is genuine tension between the two. In the DRC, victims have acknowledged the importance and significance of symbolic reparations and public apology, but at the same time underscored the need for “tangible benefits to address the more concrete needs of victims, to which a symbolic component might be attached.”²⁴⁰ In a model system advancing integrated and responsive reparations, this trade-off would be unnecessary, and both material and symbolic reparation would have syner-

that is local, specific, hides as much as it reveals, and is impenetrable to external experts). See generally Kristina Minister, *A Feminist Frame for the Oral History Interview*, in *WOMEN'S WORDS: THE FEMINIST PRACTICE OF ORAL HISTORY* 27 (Sherna Berger Gluck & Daphne Patai eds., 1991).

238. PROCURADURÍA GENERAL DE LA NACIÓN, INFORME DE SEGUIMIENTO AL PROGRAMA DE REPARACIÓN INDIVIDUAL POR VÍA ADMINISTRATIVA 34 (2010).

239. For example, in 2010, as a result of a recommendation made by the Truth and Reconciliation Commission in Sierra Leone, the government issued an apology to women who were victims of sexual violence during the conflict. See *World Report: Sierra Leone*, TRANSITIONS 4 (May 2010), available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Newsletter-May-2010-English.pdf>, archived at <https://perma.cc/VY6T-6MZ8>.

240. Panel Report, *supra* note 144, ¶ 150.

gies that would enable the variable and changing needs of victims to be fully met.

V. THE TRANSITIONAL JUSTICE INSTITUTE'S PRINCIPLES FOR TRANSFORMATIVE REPARATIONS²⁴¹

Sexual violence perpetrated in situations of armed conflict is a complex and multifaceted phenomenon. Its manifestations are manifold, and its perpetrators include state, nonstate, and private actors. Its victims are primarily women and girls from all walks of life, but increasingly, men and boys are also visible as victims. The experience of sexual violence is profoundly debilitating to its victims; it destroys physical and mental health, obliterates family and communal bonds, perpetrates long-term stigma and exclusion, and compounds social and economic inequalities. Reparations are thus essential to addressing the multiple and interlinked harms caused by the immediate violation of sexual violence and its aftermath.

Reparations are a right firmly established and recognized under international law and have been further elaborated through the jurisprudence of international courts and within legal and policy frameworks emerging from organs of the United Nations.²⁴² Our analysis reveals a lack of specificity in international legal frameworks and treaties. There is also limited overall interpretative innovation by human rights courts and bodies in capturing and addressing, through reparation, the experience of women generally and the particular experiences of victims of CRSV specifically. Persistent lacunae in the legal framework for reparations have been met by substantial normative development. To enable meaningful reparations for women and men who experience CRSV, these and related areas for advancement need to be further exploited and built upon with a focus on effective implementation.

Operationalizing reparations for CRSV requires approaches that are in keeping with the specific qualities of these harms. Not only is a victim-centered approach required, but also one that places sexual violence as a multifaceted harm at its core. Reparations procedures must be designed in ways that empower victims and take care not to entrench or multiply the harms resulting from sexual violence. It is essential to ensure that processes aimed to repair do not further stigmatize or traumatize victims. Applying a rights-based approach—the core conceptual basis of remedy underpinning IHRL, which treats reparations as a human right and not merely an entitlement—to the provision of reparations is fundamental to ensuring that the state recognizes its role in the provision of reparations, acknowledges the

241. These Principles were developed by three researchers associated with the Transitional Justice Institute based in Belfast, Northern Ireland and drew significantly on the collective scholarly and policy experiences of our colleagues and the jurisdiction.

242. See Part III, *supra*.

responsibility of perpetrators, and fulfills its legal responsibilities to victims.

We now offer the following set of practice-based Principles to guide state and international institutional action with respect to reparations. These Principles are in line with the vision of Ulster University's Transitional Justice Institute ("TJI")—of which we are all members—and aim to advance and inform transitional justice in practice by applying the expertise of scholars who have extensive experience with research in conflict and post-conflict societies.

1. *Be Transformative*

Sexual violence in situations of armed conflict—whether a method of war, the opportunistic exploitation of gendered vulnerability, or the likely consequences of elevating and rewarding certain kinds of masculine behaviors—is intimately linked to structural discrimination and exclusion on the basis of gender. Reparations programs must employ broad approaches meeting both the practical and strategic needs of victims. Reparations must endeavor to address the immediate physical, emotional, economic, and social harms for women and men. Reparations also must take a broader approach that tackles the structural discriminations that enable sexual violence to take place and that determine additional and subsequent harms. Reparations have the capacity to provide a bridge to transformative social, political, and economic outcomes for women and men who have been targeted, marginalized, and stigmatized by sex-based harms.

2. *Ensure Fairness and Nondiscrimination*

There must be a specific focus on the needs of victims of CRSV to overcome the risk of exclusion on the basis of stigma and other gendered barriers. Fairness considerations should be central to addressing the complex terrain of the victim–perpetrator interface as well as in navigating the potential to create distinctions and hierarchies between victims' groups in the distribution of reparations. Both the procedures that determine who might be eligible for reparations as well as the substantive content of any reparations program must ensure parity across multiple dimensions, including race, ethnicity, disability, marital status, sexual orientation, gender identity, maternal status, and age. Officials must apply reparations without discrimination. Reparations grounded in IHRL and international human rights practice must adopt a rights-based approach to processes and outcomes. Fairness of outcomes requires attention to every element of the procedure, including: determinations of what constitutes sexual violation for the purposes of reparations; the approach to the conception and design of programs; and other aspects like consultation, advocacy, participation, implementation, and the delivery of benefits. Each element has to meet inter-

nationally recognized standard of fairness, transparency, and equitable outcome.

3. *Address Bias and Stigma*

Sexual violence marginalizes its victims, compounding the exclusions produced by stereotypes, cultural norms, and endemic sex-based discrimination in many societies. Women's preexisting structural inequality in society may make them additionally vulnerable to sexual harm. Pregnancy, STDs, HIV/AIDS, reproductive health issues, fistula, and physical scars compound and further expose victims to stigma and bias in all aspects of their social and communal interactions. Stigma acts as a multiplier of need and underscores the necessity of reparations. The processes that accompany reparation distribution should "do no harm" and work to counter negative stereotypes and stigma associated with sexual violence for men, women, boys, and girls. Sensitive and appropriate delivery of reparations counters stigma by redirecting "blame" for this violence to the perpetrators, which incentivizes reporting of sexual violence, which then in turn helps reveal the scale of the violence, the harms done to individuals and communities, and the resilience of survivors. Reparations should not function to further compound, stigmatize, or set victims of sexual violence apart in a way that makes them socially ostracized.

4. *Respond in a Timely Way*

Timing matters to identifying the forms and scale of sexual violence perpetrated in conflict. The immediate needs of victims of sexual violence are paramount, and international and national intervention and legal processes must address those needs as soon as possible. Without reparations, many victims will be unable to participate in parallel processes of accountability and truth recovery. Thus, states, international actors, and officials should engage with reparative action quickly and stay engaged for the long term. Experience tells us that men and women who have experienced sexual violence and sexual coercion during war may take years to disclose such experiences. As sexual violence causes long-term and often irreparable harms, the process of repair may be long, involved, and complex.

5. *Consult and Inform*

Victims who have experienced sexual violence in armed conflict have lost autonomy over their bodies, integrity, and dignity. It is imperative that a process of repair follows the victim's experience in his or her cultural and social context. Reparations programming must entail contextually tailored provisions that encounter the local where it is located and are not based on an idealized vision of what is appropriate to victims' needs. Reparations processes must actively listen to victims from multiple jurisdictions with

complex and contextual identities and use their views to inform the design and implementation of programs. Listening means hearing what the victim wants and not superimposing the intervener's solution to the harm experienced. Adopting a rights-based approach to reparations includes informing and educating victims about their rights and entitlements as well as implementing consultative approaches that empower victims. International organizations should work through and with national organizations. There must be coordinated and collective approaches to victim consultation to ensure that victims are not subjected to repeated exposure to consultative processes and that officials minimize their potentially detrimental effects.

6. *Employ Processes that are Mindful of Fragile and Challenging Societal Contexts*

Conflicts create a multitude of victims with pressing and immediate needs. Conflicts frequently occur in the most economically fragile and dysfunctional economies, where states struggle to meet the basic needs of their population. The extremity and harm of sexual violence demands that the most vulnerable and most marginalized victims be prioritized above others. This includes young women, boys, widows, single-headed households, victims made pregnant by rape, disabled victims, and victims with fistulas and other chronic physical conditions resulting from rape. Geographical marginalization compounds experiences of sexual harm due to a lack of medical access, reporting capacity, and enclosed sociocultural spaces. Thus, reparation programs must reach the margins of the state, attending to women and men marginalized by their rural, inaccessible, or remote location. Outreach beyond the urban concentrations of state infrastructure and international presence is necessary to achieve meaningful reparations coverage. Communication through multiple modalities and through local languages that are understood by victims is essential to combat victim marginalization.

7. *Work at Multiple Levels and in Different Ways*

Sexual violence directly affects individuals. Sexual violence also directly affects families, communities, and nations. When sexual violence is widespread and systematic, reparations will need to respond both to individual and communal needs. The diversity of conflict settings and experiences means that reparations must always be nimble and agile, responsive to context. Even within national systems, there will be a variation in needs from place to place. Reparations should work synergistically with development planning and priorities in their local, regional, and national dimensions, but development strategies and support are not a substitute for individual reparations. Reparations must offer specific recognition and acknowledgment of conflict-related harm and loss, and engage each state's political and

financial commitments for restitution at the individual, communal, national, and international level.

8. *Generate National Ownership*

Victims of sexual violence insist that states acknowledge, through reparations, states' responsibility to redress the harms they experienced. State responsibility is central to placing the victim in a situation of meaningful compensation and support. It functions to undo stigma, consolidate the personal situation of those harmed, and prevent recurrence. Asserting the centrality and nondeniability of state responsibility for reparations is essential to make reparations work in practice. Efforts to address reparations for sexual violence should be positioned within national frameworks and policies that address overall post-conflict rehabilitation as well as those specifically addressing gender equality. States must comply with their international human rights treaty obligations and be encouraged to use the Basic Principles on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, in tandem with the Nairobi Declaration, in crafting national reparations programs. Local and international actors should use instruments such as CEDAW, the CEDAW Committee's General Recommendation No. 30, and United Nations Security Council Resolutions 1325, 1820, 1888, 1889, 1960, 2106, and 2122 to advocate with national governments to deliver reparations to victims of sexual violence on the basis of substantive gender equality norms. Reparations must meaningfully advance and enforce the principle of complementarity by supporting national legal systems and judicial bodies. This will aid states in taking reparations seriously and will support their technical needs and knowledge gaps. To do so will advance the successful implementation of reparations capacity in a practical manner.

9. *Balance Material Reparations and Symbolic Reparations*

Victims need both gender-sensitive practical reparations and symbolic acknowledgement of their experiences. Both are necessary to achieve a cohesive, unitary, and structurally engaged response to sexual violations in conflict. Symbolic reparations can undo stigma, remake citizenship and social status, and provide a formal, lasting testament to deeply felt harm. Symbolic reparations, however, are not a substitute for individualized monetary and social benefits to victims. Tangible benefits without societal and state acknowledgment marginalize the victim politically and socially. Consultation, engagement, participation, design, and implementation of reparations require interweaving both elements in any reparations program.

10. *Work Alongside and in Tandem with Other Transitional Justice Processes*

Reparations can only be designed and delivered in situations of meaningful and gendered security. States must ensure the safety of victims to enable victim engagement in reparations consultation, design, and implementation. States and international organizations must ally reparations with genuine and effective accountability processes. These include criminal trials (national and international), truth recovery processes, transparent and human rights-compliant amnesty, institutional reform, rule of law initiatives, lustration, and vetting.

CONCLUSION

In advancing these Principles, we underscore the capacity to transform contemporary conceptualization and practice on reparations for CRSV. In doing so, we hope to move victims of CRSV from the margins to the mainstream of repair and accountability, and close the gap between strong rhetoric on addressing gender-based violence and practice, which, currently, does little to address the short-, medium-, and long-term needs of victims. Closing that gap is the start of a process of transformative repair and restoring dignity and recognition to the victims of sexually violent harm.