

BACKGROUND PAPER

WOMEN'S RIGHT TO REPARATION

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Coalition for Women's Human Rights in Conflict Situations

Rights & Democracy

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LIST OF ABBREVIATIONS

CAT	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CAVR	Commission for Reception, Truth and Reconciliation in Timor-Leste
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEH	Commission of Historical Clarification
CERD	International Convention on the Elimination of All Forms of Racial Discrimination,
CNVR	National Truth and Reconciliation Commission, Chile
CONADEP	National Commission on the Disappearance of Persons, Argentina
ETWAVE	East Timor Women Against Violence and Care for Children
FARG	Fund for Assistance of Genocide Survivors
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Right
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former-Yugoslavia
ILO	International Labor Organization
JSMP	Judicial System Monitoring Programme, Timor Leste
KOTA	Klibur Onan Timor Aswain (Association of Timorese Warrior Sons)

PNTL	National Police Service of Timor-Leste
RPF	Rwanda Patriotic Force
SCIU	Serious Crimes Investigation Unit, Timor Leste
SPSC	Special Panel for Serious Crimes, Timor Leste
TNI	Tentara Nasional Indonesia (Indonesian National Army)
TRC	Truth and Reconciliation Commission, Peru
UDHR	Universal Declaration of Human Rights
UDT	Uniao Democratica Timorese (Timorese Democratic Union)
UNTAET	United Nations Transitional Authority in East Timor

INTRODUCTION

Compensation was and is still considered an adequate form of reparation when the victim of violation(s) is an individual or a small group of individuals. The principle of payment of compensation by the state or the person(s) responsible for the harm or loss suffered by another is well established both ethically and legally. However, compensation does not fully meet the needs of victims of the gross violations of human rights that are so common in the wars and armed conflicts that have recently occurred or are occurring today. Thus, rather than speaking of compensation (financial), an increasing number of people, many of them women, speak of reparation and the fact that it is more than monetary compensation. Reparation has come to mean repairing victims in an integrated way – physically, emotionally, psychologically, legally and materially. In some cases of conflict, reparation is seen to apply not only to the individual but to the community. For women, it is very important that the work to achieve reparation be based on the principle that the loss or harm suffered did not occur in isolation and entailed violations of women's fundamental human rights.

Some post-conflict justice mechanisms such as international criminal tribunals and special courts have made progress in the recognition of crimes against women. They have integrated gender sensitive rules and procedures to make justice accessible to women. Various national truth and reconciliation commissions (TRCs) have become a means of dealing with such post-conflict issues as justice, truth and reconciliation. With the exception of Sierra Leone and Timor Leste, however, they have not been as successful in documenting crimes of gender and sexual violence and the impact of violations on women. Also, they have not been consistent in the formulation of recommendations to address the specific needs of women and forms of reparation. The lack of reference to crimes against women in

the mandates and working methods of Truth and Reconciliation Commission is largely responsible for the near neglect of the needs and interests of women in the truth and reconciliation process.

This project on gender and reparation involves a study of post-conflict mechanisms of truth, justice and reconciliation. Particular attention has been given to recommendations related to reparations that emerged from such processes and their analysis from a gender perspective. The study was conducted in seven post-conflict situations in various stages of the establishment and functioning of truth, justice and reconciliation mechanisms, as well as the implementation of the recommendations they have made (Chile, Guatemala, Peru, Sierra Leone, Timor Leste, Rwanda, South Africa). Victims, survivors of gross human rights violations, victims of sexual violence, human rights activists, women's rights and peace activists, indigenous women, commissioners of the TRCs, and others participated in the study and shared their experiences, views and concerns on a range of issues related to reparation. The scope of the study is limited to the truth, justice and reconciliation mechanisms established in the past couple of decades. Analysis of gender issues arising from reparation for historical wrongs is not included.

During the field visits in each of the above-mentioned countries, data was collected through semi-structured interviews. The interviews were recorded with a digital audio recorder and transcribed by the main researcher. The transcripts and audio recordings are kept on file at Rights and Democracy, preserving the privacy and anonymity of respondents. Likewise, attending conferences and meetings on women's rights and reparation issues provided an important source of information during field work, particularly in Peru, Chile, Sierra Leona, Timor and Rwanda.

The main objective of this document is to raise the level of understanding of the gendered dimension of reparation policies. The study's objectives are:

- to give voice to women's needs, expectations and aspirations with regard to reparation in post-conflict situations;
- to provide a gender analysis of the constitution, mandate and functioning of existing post-conflict mechanisms, including implementation of their recommendations;

- to provide a gender analysis of the extent to which these bodies address, neglect or undermine the needs of women victims of gross violations of human rights;
- to place women's expectations of reparation policies within an international law perspective.

The key areas addressed during the field missions and in this document are:

- women's views on the meaning and understanding of reparation in post-conflict contexts;
- priorities for women with regard to reparation and regional specificities of these priorities, if any;
- forms of reparation that are most useful to women or the ones that help women in the process of reconciliation;
- women's positive and negative experiences as beneficiaries of reparation policies;
- gaps in the reparation policies of the longer-standing TRCs (e.g. Chile and South Africa);
- the procedural challenges women face in gaining access to reparation mechanisms.

The hope is that the analysis provided will shift the conceptual focus of reparation in ways that addresses the realities of women victims and survivors.

The study discusses some of the issues related to, for example: (a) the basic concept of reparations; (b) the difficulties encountered in terms of financing and implementing reparation policies; (c) responsibility for reparation; the limited financial resources of some states in the post-conflict period, which make reparation a lower priority compared to other issues. Various forms of reparation are analysed for their gender effectiveness based on the views of women victims and experts, along with proposals for alternative approaches. Procedural obstacles preventing women's access to reparation are also highlighted.

The points discussed in the paper with regard to gender, reparation and alternatives are not exhaustive and do not cover all aspects of reparation. Neither do they reflect the reparation needs of all women victims and survivors. Rather, the points noted are examples of the kind of issues that reparation policies must address.

The terms victims and survivors are used interchangeably despite the debate on the terms. There are two reasons for the use of both terms. First, "victims" includes those who did not survive – those killed or who were disappeared. Second, references to "survivors" is intended to promote the use of the term and to support its inclusion as a legal definition -- persons with a right to remedy.

WOMEN AND CONFLICT: VIOLATIONS AND THEIR IMPACT

There is significant difference between women victims of sexual violence and other victims who are not directly victims. It is much harder for victims of sexual violence to express their situations, to come to terms with their reality. It is much harder for them to express themselves, to talk about what happened to them. A woman who lost her husband and is left with children to support can talk about it freely and openly. But if a woman is raped, she won't necessarily be able to speak about it. Victims of rape and sexual assault are not the ones who come forward and say that they are victims. It is their families who do that. ((Interview - Maria Alphonso de Jesus, La'o Hamutuk (Walk Together), The East Timor Institute for Reconstruction, January 2006)

It is generally acknowledged that post-conflict societies are faced with a disproportionately large number of women victims and survivors. It is also recognized that the violations women experience during conflict are distinct from those that men face and the impact of the violations on women and men are different. The violations against women include, among other things: victimization for no reason or because of the political activities of male relatives; imprisonment, torture (including rape); sexual slavery; eviction from lands and homes; intimidation and threat; being

deliberately infected with HIV, as part of the warring factions strategy, etc.¹

Some of the consequences of the violence against women during conflict are specific to the country or region in which the conflict has taken place. There are consequences, however, that can be among most if not all of the women who are victims of conflict-driven violence. These consequences include:

- harm to the woman's reproductive and sexual organs;
- a subsequent inability to have a normal sex life;
- a high risk of HIV infection and, because of lack of adequate medication, the associated risk of developing AIDS;
- a sense of shame or loss of honour;
- a sense of guilt for: (a) having been unable to protect family members and/or themselves; (b) not committing suicide before the rape and abuse could occur; (c) having survived when other family members were killed;
- an inability to face society, knowing that the pregnancy is the result of rape;
- the fewer prospects for marriage and a normal life in future for the girls who have been raped or sexually assaulted ;
- a woman's inability to face her children because she was unable to protect them from sexual abuse or, perhaps, because they witnessed her rape and sexual abuse;
- long-term feelings of insecurity and vulnerability.

It is important to acknowledge that men are subjected to some of the same humiliations as women, including sexual violence. Reports indicate, however, that male victims often emerge from their experiences as heroes and martyrs while fully knowing that their treatment was an injustice. Women, on the other hand, emerge from their abuse with a feeling of loss, guilt and shame; and the reality of displacement, destitution and impoverishment. It is also true that many women see their experience of sexual violation as an extension of the abuse they experience in their

¹The violations perpetrated against women during conflicts have been documented in detail through the field missions of the UN Special Rapporteur on Violence against Women, Its Causes and Consequences. The reports of these field missions (Haiti, Rwanda, East Timor, Colombia, et al) are available on the website of the Office of UN High Commissioner for Human Rights: www.ohchr.org.

homes and daily lives in non-conflict times. As a result of this, they are unable to recognize the abusive behaviour and actions during times of conflict as violations of their human rights.

They (victims of sexual violence) were called the scraps or the dirt of the militias. The militia would not just use them sexually but they would bring them to dances or parties and walk together in the evenings. The community interpreted women accompanying militia men for dances, parties and walks as women wanting it. Because of this they are known as militia's scrap. The women did not want it - they were just under threat or were raped. (Interview - Manuela Pereira, Executive Director, Fokupers, Timor Leste, January, 2006)

There is no specific article in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention) dealing with violence against women. In an effort to address both the discriminatory character of this violence and the need to provide relief and compensation, the Committee on the Elimination of Discrimination against Women (CEDAW) issued General Recommendation No. 19 in 1992. There are three aspects of this Recommendation that are relevant to the impact of violence against women during conflict.

First, General Recommendation No. 19 defines gender-based violence as a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on the basis of equality with men. The Recommendation also states that violence is gender-based when it is directed against a woman because she is a woman or affects women disproportionately.

Second, the Recommendation recalls that, under the Women's Convention, the scope of responsibility for acts of discrimination, including gender-based violence, is not restricted to action by or on behalf of states. Responsibility is understood to include any act of discrimination *by any person, organization or enterprise*. States can be held responsible for private acts (e.g. non-state armed groups, militias, etc.) if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence. States are also responsible for providing *compensation to victims*.

Third, the Recommendation considers that violence against women violates rights guaranteed in standard international human rights law and specific treaties, including the prohibition of torture and the rights to life, *equal protection through humanitarian norms in situations of armed conflict (internal or international)*, equal protection of the law, equality in the family,

the highest attainable standard of physical and mental health and just and favourable conditions of work.

It should also be noted that through General Recommendation No. 19 traditional attitudes by which women are regarded as subordinate to men and which often lead to violence are specifically seen to be within the scope of the Women's Convention.

REPARATION: WOMEN'S PERSPECTIVES

One of the victims of sexual violence asked those working with me: 'How can I have reparation – not only in terms of the law. I have been spoilt and how can I be repaired?' The question is therefore what are we repairing? How does one talk about women or men's bodies in ways that is different and what are its implications for the victims? (Interview - Participant, Reparation Conference, Peru, November 2005)

The challenge of reparation policies is not only to rehabilitate, reconcile, compensate and/or dignify. It is also necessary to think of and to understand reparation differently and to address the factors that led to the violations in the first place. The purpose of reparations, as explained by jurisprudence, is to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” (see section on international law). This understanding does not quite work as far as women are concerned. Re-establishing the conditions that existed prior to the violation would mean restoring the gender status quo. In many situations, women would continue to have only some rights or no rights at all. Thus, for women, to “re-establish the [previous] situation” would often mean endorsing and perpetuating practices (e.g. discrimination, bias against women) that deprive them of their fundamental human rights.

If there is no justice, the culture of violence spreads and continues. Femicides are blatantly happening now because nobody was prosecuted for what happened during the conflict. Now sexual violence is perpetrated by everybody and not only by the military and the army; but by civilians, by the father, the cousins to very young girls and to grandmothers as well. And that's because there is no example of justice. (Interview – Representative,

Sexual Violence Project, Peru, November 2005)

Reparation policies that are relevant and meaningful for women must challenge and change the gender status quo. In a post-conflict society or a peace-negotiating society there is often a phase of political transition in which there is an effort by the international community to secure that ratification of all major international human rights treaties and instruments. At the same time, a great deal of effort is put into processes aimed at elaborating a new constitution or revising an existing one, as well as the reform of the civil and criminal codes. As women see it, the transitional phase is particularly conducive to the enactment of laws eliminating discriminations against women and public education campaigns aimed at changing the attitudes and prejudices in society against women.

These points, among others set out later in this study, must be borne in mind when considering the meaning, formulation and implementation of reparation measures. Failure to include these considerations in the thinking on this issue will likely result in programmes that remain unresponsive to the specific wishes and needs of women who have experienced human rights violations in the context of war and conflict.

UNDERSTANDING REPARATION

Reparation is about repairing the harm or the loss an individual has suffered as a result of violations to and destruction of the person and/or the property of the individual. It has been variously understood as being: (a) psychological -- acknowledgement, satisfaction, according dignity to the person wronged; (b) social -- rehabilitation, reconciliation, restitution; (c) economic -- compensation, indemnification; (d) religious or moral -- forgiveness, atonement, pardon; (e) political -- balance of power, democracy, freedom; (f) legal -- obligation, responsibility, rights, claims and justice.²

Some of these terms emphasize the means of reparation (compensation); others, on the purpose it should serve (reconciliation, balance of power); and yet others, on the consequences to which it should lead (satisfaction, justice). Some place the needs of victims and survivors at the forefront (satisfaction, rehabilitation, restitution, justice); others emphasize the needs of the community or the state (reconciliation, democracy, balance of power); and yet others, emphasize the obligations of those responsible for the violations (acknowledgment, atonement). These understandings of reparation have been informed by and respond to the reparative needs of victims and survivors of gross violations around the world.

Most of the terms used to signify reparation carry with them a moral and ethical imperative -- viz. those who have caused suffering must actively do something to alleviate that suffering. Some of the more recent truth commissions have reflected these moral and ethical aspects in their understanding of reparation:

² See Redress's publication on Torture Survivor's Perspective on Reparation (TSPR) (www.redress.org). The document provides a comprehensive list of the various understandings and definitions of reparation and also the history of its evolution.

Thus we understand reparation to mean a series of actions that express acknowledgement and acceptance of the responsibility that falls to the state due to the actions and situations presented in this report. The task of reparation requires conscious and deliberate action on the part of the state." (National Truth Commission Report, Chile, Feb. 1991)³

For the TRC, reparation means reversing the climate of indifference with acts of solidarity that contribute to overcoming discriminatory approaches and habits, that have not been free of racism. Applied evenhandedly, reparation must also generate civic trust, re-establishing the damaged relationship between citizens and the State, so that democratic transition and governability are consolidated and new scenarios of violence are prevented.⁴ (Truth & Reconciliation Final Report, Peru).

3 Report of the Chilean National Commission on Truth and Reconciliation, Part Four, Chapter One, Introduction:

www.usip.org/library/tc/doc/reports/chile/chile_1993_pt4_ch1.html.

4 Final Report of Truth and Reconciliation Commission, Peru, August 2003, para 166:

www.cverdad.org.pe/ingles/ifinal/conclusiones.php

JUSTICE AND RECONCILIATION

For a long time, all women were talking about is justice, as in perpetrators being tried at a court. But of late, they have begun talking about justice in broader terms -- i.e. being able to send their children to school, fixing their houses or getting some money so they can live well. Sometimes NGOs talk about justice in the narrow sense of the word whereas victims talk about justice in a very broad term -- i.e. social justice. At the end of articulating all of social justice, they add about the people responsible being taken to court. (Interview - Olandina Caeiro, Former Commissioner of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), Current KVA commissioner, founder and director of East Timor Women Against Violence and Care for Children (ETWAVE), January 2006.

Perceptions of justice among victims and survivors vary, depending on their individual and, sometimes, collective situation. Priority is often given to the prosecution and punishment of perpetrators by those who: (a) have suffered the most severe harms; (b) are suffering from the long-term impact of the violation; (c) have lost loved ones; (d) experience a permanent harm; (e) attach a high value to their loss. Those who have suffered material loss often want their loss to be compensated and do not necessarily seek punishment for the wrongdoer.

Among the legal justice mechanisms that have been put in place in post-conflict transitional societies are international tribunals and other avenues for justice at international level, national legal processes, truth and reconciliation commissions and traditional/alternative justice systems. While the aim of the first two is to end a culture of impunity and hold those responsible accountable, the objective of the latter two is to bring about reconciliation in the society.

A gender sensitive justice mechanism, whether national or international, must be designed to eliminate discrimination and to make justice a realizable goal for women.

The International Criminal Court (ICC) is the first international judicial mechanism that recognizes a range of crimes against women as serious crimes.

Article 7 of the Rome Statute of the ICC deals with crimes against humanity. Specifically:

- Article 7.1(g) includes in crimes against humanity “Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity”;
- Article 7.2(c) states that “ ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, *in particular women and children*”; (emphasis added);
- Article 7.2(f) states that “ ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy”;

The Statute also deals with war crimes and states, in article 8.2(b)(xxii) and (c)(vi), that “Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence are also constituting a grave breach of the Geneva Conventions.”

In order for national systems to ensure justice for women, they must:

- recognize a range of crimes -- namely, rape, sexual assault, forced pregnancy, forced sterilization, enforced prostitution, sexual slavery, forced nudity and other forms of sexual violence -- as war crimes, crimes against humanity and as a means to commit genocide;
- ensure that rules and investigative procedures do not further victimize women;
- include in their rules a recognition of the context of the crime and measures that do not impose impossible evidentiary requirements;
- ensure that rules do not question the credibility of women;
- ensure that rules do not presuppose the sexual availability of women;

- permit the defence of consent to be questioned;
- include rules that protect the identity of victims and witnesses.

Unlike national or international justice systems, truth and reconciliation commissions mainly document and gather and preserve information about the conflict. Typically, the recommendations of the more recent TRCs emphasize the importance of rehabilitation, restitution, the restoration of dignity, compensation and reconciliation. With the exception of the process in Timor Leste and Sierra Leone, none of the TRCs reviewed for this project addressed sexual violence, the extent of sexual crimes and the reality of women victims and survivors.

REPARATION AND INTERNATIONAL LAW

Reparation under national laws and international law has for a long time been synonymous with compensation. Courts have used tort laws and provided civil remedies by ordering the state or the individual violator to pay compensation to the victims or their families. International human rights law recognizes victims' right to compensation in various treaties and conventions. For example:

- Universal Declaration of Human Rights, article 8: "Everyone has a right to an effective remedy...."
- International Covenant on Civil and Political Rights (ICCPR), each State Party undertakes, in article 2(3)(a): "To ensure that any person whose rights or freedoms [as recognized in the ICCPR] are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;" and article 2(3)(c): "To ensure that the competent authorities shall enforce such remedies when granted."
- The Convention on the Elimination of All Forms of Racial Discrimination, article 6: "State Parties shall assure to everyone within their jurisdiction effective protection and remedies..... as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage..."
- The Convention Against Torture, article 14: "Every State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."

Several of the regional human rights instruments also have provisions related to the right to remedy.⁵

International humanitarian law also recognizes the right to reparation. Article 3 of the 1907 Hague Convention states that "A belligerent Party which violates the provisions of the said Regulations (annexed to the Convention) shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Article 91 of the 1977 Protocol Additional to the 1949 Geneva Convention, relating to the Protection of Victims of International Armed Conflicts (Protocol I), states that: "A Party to the conflict which violates the provisions of the Convention or this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

Generally, courts and laws have focused almost exclusively on compensation. According to international jurisprudence "Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."⁶ This 1928 statement does not focus on the means but the purpose of reparation. In more recent times, other theories and understandings of reparation have been developed which reflect more precisely the experience and needs of victims and survivors.

In 2005, in resolution 60/147, United Nations General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. The General Assembly recommended that "States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of members of the executive bodies of government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general."⁷

⁵See, for example: article 10 of the American Convention on Human Right: www.oas.org/juridico/english/treaties/b-32.htm; article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: www.conventions.coe.int/Treaty/en/Treaties/Html/005.htm.

⁶Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13)

⁷The full text of the GA resolution and the Principles and Guidelines is available through the Office of the United Nations High Commissioner for Human Rights : www.ohchr.org

Section VII of the Principles and Guidelines addresses victims' right to remedies for gross violations of international human rights law and serious violations of international humanitarian law, and includes the victim's right to the following as provided for under international law:

- equal and effective access to justice;
- adequate, effective and prompt reparation for harm suffered;
- access to relevant information concerning violations and reparation mechanisms.

Section IX of the Principles and Guidelines deals with reparation for harm suffered. The Principles and Guidelines state, among other things:

- adequate, effective and prompt reparation is intended to promote justice by redressing gross violations;
- reparation should be proportional to the gravity of the violations and the harm suffered; in cases where a person, a legal person, or other entity is found liable for reparation to a victim, that party should provide reparation to the victim or compensate the State, if the State has already provided reparation to the victim.

Section IX also deals with such matters as:

- in certain instances, establishment of national programmes for reparation and other assistance;
- in domestic laws, effective mechanisms for the enforcement of reparation judgements;
- restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition as elements of full and effective reparation;
- 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;
- compensation;
- inclusion of medical and psychological care as well as legal and social services in rehabilitation programmes;
- satisfaction, including effective measures aimed at the cessation of continuing violations, verification of the facts and full and public disclosure of the truth;
- restoration of the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

- judicial and administrative sanctions against persons liable for the violations;
- effective civilian control of military and security forces;
- review and reform of laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

The Principles and Guidelines are not a convention or covenant. As a consequence there is no mechanism for their direct implementation and enforcement. Neither is there a committee or other body to monitor the behaviour of states and governments and the extent to which they use the Principles and Guidelines in the formulation of programmes and policies. The fact that the General Assembly adopted the Principles and Guidelines, however, underlines their importance and the international community's expectation that states will respect them in both spirit and letter.

The same principles have been included in the Rome Statute of the International Criminal Court. Article 75(1) of the Statute states that, "The Court shall establish principles relating to reparation to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."⁸

Even with the legal provisions and principles, the question still arises as to who is responsible for reparation.

*The existence in international law of a universal right to reparation for gross and systematic human rights violations is contested. In defining the legal grounds for reparation, a distinction is necessary between the right of an individual to reparation and the obligation of an individual, corporation, or state to provide that reparation.*⁹

There are four areas that need to be considered when discussing responsibility.

First, under international humanitarian law, states have an obligation to make adequate reparation for wrongful acts. The obligation is between states, however, and not between a state or states and individuals.

⁸Rome Statute of the International Criminal Court : www.icc-cpi.int/about.htm

⁹Essay by Genevieve Painter, outlining a feminist critique of reparations, p. 14.

Second, a number of international human rights treaties include in their articles the right to remedy. The treaty-monitoring bodies that regularly review a state's compliance with its treaty obligations do not have the power, however, to order reparations. They can make recommendations but these are not legally enforceable.

In contrast to the international treaties, regional human rights mechanisms have a more direct means by which to address the issue of reparations. "Article 50 of the European Convention on Human Rights and Article 63(1) of the American Convention on Human Rights create the possibility that an international court might directly require a wrongful state to make reparations to the injured individual."¹⁰ One of the cases from the Inter-American Court which addressed reparations directly is the *Velásquez Rodríguez* case.¹¹ In paragraph 26 of its judgement, the Court stated that full restitution includes "the restoration of the prior situation, the reparations of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."

Third, the statutes of the International Criminal Tribunals for Yugoslavia and Rwanda recognize the right of victims to redress. The Tribunals can only order restitution of unlawfully taken property. As Painter notes in her essay, however:

... the former registrar of the International Criminal Tribunal for Rwanda (ICTR) initiated a modest assistance programme in 2000 targeted at witnesses and potential witnesses. It was not strictly a victim reparations programme. The programme provided legal assistance, housing, and psychological assistance, via Rwandan women's NGOs. The most infamous project, the construction of a peace village in Taba, was designed to give something back to the women from Taba who had testified in the watershed Akayesu trial (in which rape was recognized as an act of genocide).

The programme was a token recognition of the need for reparations for victim-witnesses, but it was roundly criticized. In Rwanda, critics complained that only 50 per cent of the promised amounts were transferred,

¹⁰Painter, p. 17, citing Riccardo Pisillo-Mazzeschi, "International Obligations to Provide for Reparations Claims?" in Randelzhofer & Tomuschat.

¹¹See *Velásquez Rodríguez Case, Reparations (Honduras)* (1989) Inter-Am. Ct. H.R. (Ser. C.) No.7.

and that the selection of the people for the 23 houses built in Taba was unfair.¹²

Fourth, in contrast to the *ad hoc* tribunals, the Rome Statute of the International Criminal Court

*... recognizes the right of victims to obtain reparations and provides mechanisms expressly for this purpose. ... The Rome Statute's approach to reparations includes three mutually supporting elements: the active participation of victims and their families in the proceedings, the creation of a Victim and Witness' Unit within the Court, and the establishment of implementation procedures for the right to reparation, including the formation of a Trust Fund.*¹³

Reparation is a legal concept that gives rise to entitlements and claims and it is important to establish who is responsible for the violations. This responsibility does not have to be addressed, however, only through a trial process in a court of law. As it has been demonstrated by the work of some of the TRCs, the question of responsibility for the purpose of reparation can be addressed by them. While the reports of truth commissions have often detailed violations, root causes, ways forward and, sometimes, the names of those responsible for the violations, survivors of violations generally believe that the responsibility for reparation lies with the state. The difficulty has been, and likely will continue to be, getting outside forces (e.g. private militias, cartels, paramilitaries, social and non-governmental institutions, corporations, other states) to accept responsibility and contribute to the reparation programme.

¹²Painter, p. 20.

¹³Ibid.

REPARATION: A CONCEPTUAL CORRECTION

We say that reparation is all about restitution of rights but the argument goes as to what rights? Some of these groups had no rights to begin with. It is a discussion of cause and consequences of the conflict. It is very difficult to go around this issue and say that reparation is to restore and establish rights. This is the political position we took eventually because for example, the conflict produced two million internally displaced people but they did not have their IDs. So we heard people saying how could one know the accuracy of the numbers of the internally displaced people. Now the number may be increased to five million. The increase was caused not only because of the conflict but because we live under a state that does not serve everyone. We are trying to work on these two themes of no discrimination and democratic reforms of the state. (Interview - Erika Bocanegra Torres, Area de Comunicaciones, Coordinadora Nacional de derechos Humanos, Peru, November 2005)

There is a general understanding that reparation is, in effect, restitution. This understanding is inadequate. Reparation helps to repair but it does not necessarily restore - as in restoring the victim to her material and physical condition prior to the violation. In this context, two things should be noted.

First, reparation cannot really restore victims to their physical condition prior to the violation. If a victim's family consisted of spouse, parents, brothers and sister prior to the violation, reparation cannot bring back any member killed in the war and make the family a whole again. Reparation cannot replace loss caused to the victim by death. Neither can it re-

store the use of, for example, arms or legs which may have been lost as a consequence of the violation suffered in the war. Also, as a result of sexual violence a woman particularly never regains what she loses as a result of rape - not her virginity or her reputation. She always remains "that woman who was sexually violated." Similarly, if the victim was economically and materially well off and has lost everything in the war, reparation cannot bring her back to her pre-war economic status. Even if all aspects of reparation are adequately implemented the victim may end up in a state of minimal well being because, often, post-conflict circumstances are extremely debilitating.

Second, reparation should not to be understood as merely restitution of victims. Returning victims to a status prior to the violation is restrictive and has the potential to endorse discrimination and prejudice against marginalised populations.

Reparation that restores therefore merely pulls the victim from a degraded survival to a status of difficult survival. It restores the victim to her previous state of marginalization and discrimination. Thus, any state reparation measure that seeks to make amends for violations or other harm but does not address the previously existing marginalization and discrimination fails to meet obligations under international human rights law. A full and effective programme for reparations does not entail the establishment of new or different rights. It does entail full implementation of existing human rights - civil, cultural, economic, political and social

REPARATION OR DEVELOPMENT

It is very difficult in a country that is poor and where the population is very poor. You find that argument in the academic world or the public administration authorities. We are in tension with some people from the government because it is so easy to say we will build a school and that's it. There is a thin line between reparation and development. We have been struggling for the last three years with the TRC commission to make the case that reparation is different and development is different. And we are not against development because there is a right to development. But at the same time we need to make the case that it is one thing to be poor and another to be poor and be violated or raped. (Interview - Erika Bocanegra Torres, Area de Comunicaciones, Coordinadora Nacional de derechos Humanos, Peru, November 2005)

Countries emerging from conflict, particularly where the war lasted many years or decades and/or where it took a massive toll on the human, material and other resources of the country, are poor countries. They are struggling for resources to meet the basic rights and needs of the people. They are heavily dependent on aid from other countries and international financial institutions. The funds provided by donor countries may be used, for example, to establish systems and institutions of governance, to improve law enforcement, to strengthen public administration, and to develop infrastructure. In some or most cases, however, donor countries specify that the funds may not be used for reparation.¹⁴

Transitional governments -- from conflict to peace -- are left to raise their own funds internally for reparation. The difficulty in achieving this

¹⁴ This information came from a source in Rwanda that requested confidentiality.

causes some governments in post-conflict states to ignore their responsibility to establish and implement a reparation programme. Also, in some cases, the task of meeting the reparational needs of a large number of victims and survivors in terms of the details, time and efforts involved in the process is huge. In those situations, the government and authorities may decide to characterize development initiatives as reparation. This course of action is justified on the basis that all the people are victims of the conflicts either directly or indirectly. Therefore, when the people as a whole benefit from the development process, they are reintegrated in the mainstream of the nation's productive activities. They argue that development activities as reparation will raise the economic status of the victims and, thus, can serve as compensation for suffering.

The difficulties raised by the intermingling of development processes with reparation is compounded by the fact that reparation often falls into one of two categories: individual or collective. Collective forms of reparation are meant to heal the community and help with reconciliation. These are initiatives that benefit the community as a whole. The misunderstanding arises because development projects also benefit the community as a whole. If the victims' community wants a school built because the school was burnt down during the war, the rebuilding of the school can be called reparation. If a school is built as the government's development goals of building "x" number of schools within "y" time, however, it cannot be passed off as reparation to the victims of the community. Similarly, the building of a road to end the isolation of a village cannot be called reparation for the people of that village because building and maintaining roads are the duty and responsibility of the state. Governments can implement collective reparation measures -- e.g. building infrastructure such as roads, schools, clinics, houses -- and *add* that to the development goals or call them development. Governments cannot, however, do development and call it reparation. This practice deprives victims and survivors of their right to effective remedy for the gross human rights violations they suffered and which are recognized in international law.

CHALLENGES TO OBTAINING REPARATION

By and large most of the recent TRCs have recommended some reparation for victims. In a number of cases, these recommendations did not receive the support of the government or the leadership, casting serious doubt about their full implementation. For example, the authorities of both Timor Leste and South Africa stated that liberation from occupation or apartheid was itself a reward, compensating for all the suffering the people experienced. This way of thinking reflects, to some extent, the distance between the leadership's understanding of the reality of victimization. The assumption seems to be that in engaging in liberation or other forms of struggle, some violations of human rights are inevitable. The voluntary engagement of women and men in such struggles does not imply, however, an agreement on their part to have their fundamental human rights violated. It also has to be noted that many women who were caught in the struggles did not voluntarily agree to engage in the struggle in the first place. Their rights were violated simply because they were women, or women from the "enemy" camp or because of the political activities of male relatives.

Additional challenges include, for example:

- denial on the part of authorities and/or perpetrators;
- lack of understanding of the gendered aspects of reparations;
- lack of resources;
- lack of political will.

The question that also comes in when considering challenges is how to repair the irreparable.

Reparation does not mean that what has been lost can be replaced. It is to

show that the government and the society are sensitive to what happened to victims. Second, it is a way of consoling victims. In Rwanda, people lost lives and property in a very short time during the genocide. They know it is very difficult to get back what they have lost. But the least they want is that the society show them a certain sensitivity about what they have lost. (Interview - IDGL (Human Rights Organisation), Rwanda, March 2006)

If reparation cannot really restore or replace, victims and survivors understand very well that reparations can help heal and alleviate their conditions. Reparation as rehabilitation, compensation, justice, restitution, reconciliation and justice respond to the needs that victims and survivors have identified for themselves. At the very least, all reparation policies responding to victims of mass violations must include education, health and financial/livelihood measures. The measures must also correspond to the wishes and realities of the victims and survivors, as well as those identified by activists working with the victims and survivors in affected areas.

In the case of states that argue that there are no resources to provide reparation, reflecting their unwillingness to allocate a portion of the national budget for reparation or an inability to secure contributions from sources that are responsible for the violations and/or from donor countries (if it is accepted that there is no statute of limitation for reparations), then measures can be implemented as and when resources are available. Reparation can also be made in phases, addressing the most urgent cases first and grading the phases in order of the need and the resources available for them. It is important however that all the plans about the contents of the reparation policies, the plans for implementation, the phases and priorities are communicated to the beneficiaries through a widespread public communication campaign.

ACCOMMODATING PERPETRATORS VS REPAIRING VICTIMS

The Latin American governments usually pay the compensation. They usually build the monuments. The states that accept responsibility usually have a public gathering where they ask for pardon. Sometimes they do the part on education. What they never ever do is to investigate those responsible for violations. This is because I believe they are not in a position to do so. For example, Guatemala recognised their responsibility for the massacre and then they proceeded to request protection and provisional measures for those who recognised their responsibility. This is the situation and we know that there will be no investigation. (Interview – Cecilia Medina, Director, Institute of Human Rights, University of Chile, Chile¹⁵, November 2005

In 1983, the military junta in Argentina relinquished power. Following democratic elections, the new government established the National Commission for Forced Disappearances (CONADEP) in December 1983. The National Commission collected evidence of crimes that were committed during the “Dirty War”, including nearly 11,000 cases of disappearance. Other human rights violations that were documented related to torture, murder and kidnappings. Nine members of the military junta were charged, as well as some guerrilla leaders. Jorge Rafael Videla, head of the junta and a number of generals were convicted of human rights crimes. In 1990, President Carlos Menem pardoned all of them. For some, the pardons reflected a move towards national reconciliation and an effort to avoid a backlash from the military and possible unrising. Others

¹⁵ Cecilia Medina is also a judge at the Inter-American Court of Human Rights.

condemned the pardons as unconstitutional. Still others held the view that the presidential privilege of granting pardons was inappropriate and should be abolished. The view that it was necessary to avoid a confrontation with the military was one that was shared by a number of states and there was little interest in pressing the government of Argentina to hold those responsible for the violations accountable.

The events in Argentina led a number of activists and non-governmental institutions to initiate vigorous programmes opposing impunity for perpetrators of human rights violations. Their efforts contributed in large measure to the establishment of the International Criminal Court. The efforts also persuaded the United Nations Commission on Human Rights, beginning in 1998, annually to adopt a resolution on the issue of impunity. In the 2005 resolution (2005/81), the Commission, among other things:

- emphasized the importance of combatting impunity for the prevention of violations of human rights and international humanitarian law;
- recognized that amnesties should not be granted to those who commit violations of human rights and international humanitarian law that constitute crimes;
- emphasized that the work of truth and reconciliation commissions and other commissions of inquiry can be complementary to the essential role of judicial mechanisms in protecting human rights and combatting impunity;
- encouraged states to involve, as appropriate, civil society, victims, human rights defenders and persons belonging to minorities and vulnerable groups, in all efforts to combat impunity, including judicial processes and the design of truth and reconciliation commissions and other commissions of inquiry, the selection of commissioners and the drafting of relevant legislation, with efforts to ensure that men and women participate on an equal basis;
- urged states to bring to justice those responsible for gender-related crimes and crimes of sexual violence, including those that constitute, in defined circumstances, genocide, crimes against humanity, or war crimes;
- urged states to provide the victims of violations of human rights and international humanitarian law that constitute crimes with a fair, equi-

table, independent and impartial judicial process through which these violations can be investigated and made public;

- also urged states to encourage victims to participate in judicial as well as truth and reconciliation processes, including by taking measures to ensure the protection of, and support and assistance to, victims as well as witnesses, paying special attention to crimes of sexual violence;
- referred to the updated Set of Principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102 and Add.1) as a guideline to assist States in developing effective measures for combating impunity.

While the international community and national processes remain committed to reconciliation, the annual resolutions by the Commission on Human Rights (now the Human Rights Council) make it clear that reconciliation may not be achieved at the expense of the needs and rights of the victims and survivors of violations. International standards do not allow compensation to be paid to para-military forces while their victims receive nothing (e.g. Guatemala). Neither do the standards necessarily permit large-scale commutations of sentences because the number of perpetrators is too great to imprison them all (e.g. Rwanda).

GUIDING PRINCIPLES FOR REPARATION

The Principles and Guidelines on the right to remedy that are summarized in section VI are of general application. It is intended that both women and men be the beneficiaries when the measures set out in the Principles and Guidelines are implemented. It is important to underline, however, that women often define reparation somewhat differently from accepted meanings under international and domestic law and do not see reparation as a means to remedy the effects of current violations. Women also view reparations as a means to establish laws, policies and practices to eliminate conditions that contributed to their situations during and after conflict.

From women's perspectives, the key principles that must be borne in mind when devising reparation policies, programmes and procedures include:

Non-discrimination on the Basis of Sex or Gender¹⁶

All aspects of reparation must be based on the principle of non-discrimination on the basis of sex or gender to eliminate existing inequalities. This principle must be explicitly stated in the policies and measures establishing a programme of reparation. Factors that prevent the non-discriminatory application measures include attitudes based on the notions that:

¹⁶ "Sex" refers to the biological difference between men and women. "Gender" refers to the socially determined roles of women and men.

- crimes against women are inevitable collateral damage of war and do not need to be investigated;
- the testimony of women cannot be trusted and is not credible and, therefore, their claims for reparation are questionable;
- women can be represented by men of the family;
- women do not need to be consulted on anything, or if they are, the consultation deals only with matters that exclusively concern women;
- women do not or should not have an opinion on issues of peace, reconciliation and rehabilitation;
- certain forms of reparations (e.g. land) cannot be awarded to women.

In order to overcome the prejudice and discrimination against women, a policy dealing with crimes for which reparation is granted must include crimes against women. If a memorial is established, steps must be taken to ensure that women victims and survivors are acknowledged. Reparation in the form of rehabilitation must give priority to skills training for women and education for girls. Compensation for crimes against women must take into account the social significance of being sexually violated and the historic discriminations against women.

Compliance with the Standards Established in International Human Rights Instruments

Measures must be taken to ensure that reparation policies, programmes and procedures comply with international human rights treaties and conventions.¹⁷ Reparation programmes may not impair women's enjoyment of the rights they are already entitled to exercise. Ensuring that reparation policies, programmes and procedures are not contrary to the provisions of existing human rights treaties and conventions may not be enough. It is important, therefore, for states and the international community to ensure that reparation measures are designed and implemented in such a way as to guarantee women the enjoyment of the rights that the international human rights instruments say they had prior to the conflict. As such, measures cannot perpetuate customs and practices that

¹⁷The core human rights instruments are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, The Convention against Torture, the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

inherently discriminate against women and prevent them from fully exercising all of their rights.

Women's Autonomy

Devising reparation policies, programmes and procedures on the principle of women's autonomy is important to overcome those aspects of customary and religious law and practice that prevent women from being in a position to make decisions about their own lives. States must empower women to make their own decisions and must not allow any customary, cultural and/or religious law or practice to pre-empt the right of women to determine for themselves what kind of reparation is best suited to their situation.

Available and Accessible Justice

It is vital that, in the post-conflict period, justice be both available and accessible for women. The understanding of justice must also take into account women's understanding of the term, viz. social justice. Gender-integrated reparation measures should reflect this understanding by:

- giving priority to women and girls in education programmes;
- providing skills training for women;
- ensuring that housing is provided for female heads of families;
- ensuring that compensation is paid to all women survivors;
- providing health services that include care related to sexual and reproductive health;
- providing counselling to help women deal with the trauma they have experienced.

The pursuit of justice through legal proceedings (criminal and civil) against perpetrators of crimes against women is also an important component of reparation policies. The tendency of national legal systems to accord low priority to the investigation and prosecution of crimes against women must be effectively countered.

The structural and administrative obstacles in justice systems, which impede or deny women's access to criminal and/or civil remedy, must be addressed in reparation programmes, bearing in mind the potential of a positive long-term effect. Law reform, either as an integral part of repara-

tion or as a commitment to be honoured in the post-conflict, transitional period, should address such areas as:

- inheritance laws that discriminate against women;
- recognition of crimes against women as crimes against humanity;
- increasing acceptance of sexual violence as a crime;
- elaboration and implementation of rules to prevent the re-victimization of women during the investigation and prosecution of crimes of sexual violence.

Efforts to eliminate the administrative obstacles faced by women in gaining access to justice should address such areas as:

- the requirement that a birth certificate be provided where none exists, or the showing of a death certificate of a disappeared relative before access to compensation is granted;
- the failure to recognize women as heads of households;
- the lack of acceptance of women as guardians of children;
- the requirement that identity papers be provided, particularly in light of the likelihood that these papers were either lost or destroyed during the conflict, or had not been issued to some women in the first place;
- the failure to accept a woman's family name or insistence that the husband's family name be used.

Affirmative Action

In some countries, opposition to the concept of "affirmative action" has grown in recent years, partly on the basis that it is a form of "reverse discrimination", disadvantaging some in order to benefit others. One response to this claim has been to assert that "affirmative action" is "positive discrimination" and intended, at least in part, to right past wrongs. The working definition used by the Special Rapporteur of the United Nations Sub-Commission on the Promotion and Protection of Human Rights¹⁸ stipulates that "affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the

¹⁸Report of Marc Bossuyt, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/21.

position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”

The Special Rapporteur noted that, as a legal concept, “affirmative action” takes a place in both international and national law but is a concept without a generally accepted legal definition. The absence of a legal definition, however, does not negate the concept, which is supported in a number of international human rights and related instruments.

Article 4 (1) of the Convention on the Elimination of Discrimination against Women states:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined [in this Convention], but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 5 of International Labor Organization (ILO) Convention No. 111 on employment and occupation is one of the first articles in an international treaty to permit explicitly “special measures of protection or assistance”. The UNESCO Convention against Discrimination in Education refers to the establishment or maintenance of separate educational systems in specific contexts. Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination provides for measures to be taken in favour of certain racial or ethnic groups or individuals in order to ensure to them equal enjoyment or exercise of human rights and fundamental freedoms. Article 9(2) of the UNESCO Declaration on Race and Racial Prejudice (1978) requires that special measures be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. The 1975 ILO Declaration on Equality of Opportunity and Treatment for Women Workers states that positive special treatment during a transitional period aimed at effective equality between the sexes may not be regarded as discriminatory.

Given the above, a reparations programme that includes aspects of “affirmative action” is not contrary to accepted international human rights norms. Forms of reparations that favour women’s access to education, employment and adequate health care (in the context of social justice) would be consistent. So too would measures to ensure that women are included in any land-allocation process or that they participate in the

post-conflict transition through, for example, membership in political parties, having positions in government, and enjoy access to important social organizations.

The principles of non-discrimination and affirmative action must be interpreted and applied in ways that ensure effective equality for women and achieve the goals of social justice and equality¹⁹.

¹⁹ See articles by Mary E Becker, Patricia A Cain, Christine A Littleton, Diana Majury, Catharine A MacKinnon, Ruth Colker, and Martha Minow in the chapter 'New Approaches to Equality and Differences' in Weisberg D.Kelly's (Ed.) *Feminist Legal Theory - Foundations*, Temple University Press, Philadelphia, 2003

FORMS OF REPARATION

It is important for reparation processes to be designed and established in consultation with victims and survivors. The success of a gender-integrated reparation process depends on women and girls having access to the programme and deriving benefits from it in ways that help to change their material conditions.

Through the fieldwork that was undertaken as part of the project on gender and reparations, various forms of reparation were identified by women as being important to their lives.

Restoring Dignity, Providing Satisfaction

It is important that the dignity of victims be restored, not only for its own sake but to redeem the memory of the dead. Measures to restore dignity also help to keep the memory of the violation alive, hopefully creating a political and social environment in which the violation(s) cannot be repeated. Such measures also acknowledge publicly the sacrifice of the victims and survivors. The effectiveness of efforts to restore dignity and ensure that the violations are not repeated will depend, at least in part, on the establishment of adequate training programmes for the army, the police and other state agents. The programmes must address sexual crimes, equality, and women's rights. It is also important to ensure that school curricula include the subjects of women's rights specifically and human rights education more broadly.

There is a need for post-conflict transitional societies to devise creative dignification measures to restore the dignity of women victims of sexual violence. The measures could include, for example: (a) a memorial that contains a public apology to women who survived sexual violence; (b)

acknowledgment by public authorities of their failure to prevent the violence; (c) an expression of thanks to those who spoke about the violations and an acknowledgment of the existence of others who are unable to speak about it; (d) condemnation of those who continue to prey on the victims; (e) steps to honour the pain and suffering of victims, as a contribution to the reconciliation process.

Women, while not totally rejecting the importance of memorial, have identified more practical ways of dignifying the dead or survivors. They have suggested, for example, the re-naming of schools or hospitals, naming roads after individual victims or villages in which massacres took place.

Victims may also feel a sense of satisfaction if those responsible for the violations acknowledge their acts and apologize for them. This may involve an individual perpetrator asking pardon from the victim for the violation he has caused or a state official apologizing on behalf of the state.

Physical and Psychological Health Services

Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes that everyone has the right "to the enjoyment of the highest attainable standard of physical and mental health."

It has been well-documented that, in conflict situations, women are specifically targeted. Rape and other forms of sexual violence against women are not only common but, in some cases, a deliberate policy by combatants. There is also ample evidence that some armed groups employ a policy of sending their members, who are known to be HIV positive, on "rape campaigns" in order to increase the infection rate among women associated with their enemy.

In the past, some reparation programmes have included measures to address health-related issues. One such measure is the provision of a health card making the holder eligible for free health care. In order for this approach to be effective, however, it is necessary that: (a) the health card issued to victims is recognized and accepted at all the public and private health clinics; (b) the card must also ensure access to any emergency health care that may be needed, including surgery, medication for infections of any kind, prosthetics for amputees and anti-retroviral drugs.

A health-related programme of reparations must:

- give special attention to, specifically provide for and separately refer to access to specialized health care for women, particularly for their reproductive and sexual health needs;
- ensure women's access to counsellors and healers to help deal with the trauma, on both an immediate and long-term basis;
- not disqualify or obstruct the performance of healing rituals that are practised by indigenous women.

Reparations, as distinct from development projects, should also include either the rebuilding, repairing or restoration of the health care infrastructure (e.g. clinics, medical equipment) and ensure access to needed medications on a reliable and regular basis.

Compensation

As compensation, one-time payments or regular pensions, for example, are the most recognized form of reparation for harms, loss or violations. Compensation paid without consultation with the victims groups, however, often raises questions from victims and survivors. One of the key questions is: how to measure or attach value to the loss, harm or a violation. Attaching value, particularly to death or to loss of a limb, is seen by some victims as a measure that devaluates or reduces the gravity of their loss.

Compensation plans based on one figure and the same payment to all victims and survivors have also raised questions. It has been noted, for example, that compensation for a survivor with one dependent cannot be the same as for a survivor with five dependents. Similarly, compensation for a victim who has lost an arm and at least part of her earning capacity, cannot be the same compensation for a survivor who lost both arms. It has also been argued that compensation for a woman who is young and has been sexually violated, thereby reducing her prospects for a marriage, ought to be different from a victim who was not sexually violated. These and other difficulties arising from both the notion and practice of compensation contributed to the development of a more expansive understanding of reparation that includes rehabilitation, reconciliation and restoration of dignity.

It is important that all economic compensation programmes ensure that the valuation of the compensation is gender sensitive. Factors that may be used to determine appropriate levels of compensation include:

- the value of the material loss suffered;
- the violation or harm caused to a person;
- the loss caused to a person by the death of another;
- the loss of possible income over the life of a person;
- the loss of the economic opportunities as a result of the harm, loss or violation;
- the mental anguish caused by the harm, loss or violation.

The impact of sexual violence goes beyond the immediate physical and psychological distress. Compensation in such cases must take into account other consequences of the violation when setting the valuation. These consequences include: loss of self-esteem; feelings of guilt; feelings of shame and being dishonoured; fear of sexual intimacy; long-term damage to reproductive organs; the lifelong stigma that is often attached to the woman and the subsequent damage to her reputation.

Compensation for women must address the impact when the primary wage-earner in the family is lost during conflict, as well as the increase in women's responsibilities. The point is not that compensation must be paid for life but, rather, that it enables women to meet their additional responsibilities. It must also contribute to the capacity of women to contribute to the reconstruction of their community and to rebuild relationships within the community. Economic compensation may involve a payment of some money coupled with provision of a source of sustainable livelihood (e.g. a job, a market outlet for products the women and their families produce) or a pension.

Other aspects of compensation that must be taken into account include:

- in cases where men who are killed or disappeared have left behind more than one family, the payment to both (or all) wives and their families;

- the potential to establish, for children eligible for compensation, trust funds (interest-bearing accounts) that will be released when the child turns 18;²⁰
- the need to ensure that the compensation paid actually gets to the woman who is entitled to it and is used for the purpose for which it has been provided -- i.e. to assist the woman.²¹

Land, Housing and Shelter

Article 17 (1) of the Universal Declaration of Human Rights states that “Everyone has the right to own property alone as well as in association with others.” Section 2 of this article states that “No one shall be arbitrarily deprived of his[/her] property.

Article 11(1) of the ICESCR sets out the right of everyone “to an adequate standard of living for himself [*sic*] and his [*sic*] family, including adequate food, clothing and shelter, and to the continuous improvement of living conditions.”

Women are considered legally minors in many cultures and do not have the right to own, buy, sell or deal in land or other kinds of property or real estate. In some places where they do have the right, it is severely regulated and controlled. In those cases, for example, women can only own a certain type of property; can only sell to individuals within a certain circle, or can only deal in property with the permission of male relatives.

It is important, therefore, that a gender-integrated reparation programme include measures to enable women to return to their lands in a safe and secure environment. Other reparation measures could include: (a) provision of houses for those who lost their homes; (b) re-building or repairing houses that were destroyed; (c) provision of a basic start-up kit with all the necessary items to enable women and their families to adapt to life in a new home.

²⁰Article 1 of the Convention on the Rights of the Child stipulates that “For the purposes [of the Convention], a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”

²¹In some societies women do not deal in the public place, or are considered legally minors or do not have bank accounts. In those cases, compensation would not be paid directly to them but, rather, to a male member of the family on the woman’s behalf. The money often does not get to the woman and does not meet the goal of providing reparation to the woman for her loss. Cases have also been documented in which, when the payment is made in a lump sum and to the male members of the family, they often spend it on personal leisure and needs.

Education Subsidies and Scholarships

Women almost never articulate education as a reparation they seek for themselves. They emphasize the need for education in terms of being provided with the capacity to send their children to school. While this is critically important, focus should also be placed on improving the access of women themselves to education and skills training. This is important because survivors who were children when the conflict began probably were not able to take advantage of opportunities that may have existed to receive an education. Adult education courses are, therefore, a form of reparation for opportunities that may have been lost years before.

When considering education within the context of reparation, however, it is important to bear in mind that under article 13 (1) of the ICESCR everyone already has the right to education. Section 2 of the article stipulates that

- (a) Primary education shall be compulsory and available free to all;*
- (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; ...*
- (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.*

As noted earlier, work related to development may not be confused or inter-mingled with reparation programmes. Thus, the institution of education policies and implementation of development projects that were already promised and planned (e.g. the building of new schools or increasing the material resources provided to schools) cannot be re-characterized as reparation. The provision of reparation must be over and above the benefits that result from development projects in the field of education.

Reparations in the form of education may include: scholarships, skills training for young people, adult literacy programmes, allocating a certain number of enrollment places in secondary and post-secondary schools for victims and survivors.

Sustainable Livelihoods

Very often, victims and survivors want nothing more than to be independent and able to provide for themselves and their families. Provision of opportunities for sustainable livelihoods is one measure that would give many women a feeling of relative independence and allow them to take back control of their lives and self esteem. It should also be borne in mind that a reparation programme that includes measures on sustainable livelihoods is one that will likely have an impact that last a lifetime.

Providing opportunities for sustainable livelihoods involves, among other things: (a) identifying areas and industries that need labor and skills; (b) registering the skills and talents of the victims and survivors and matching the needs to the availability; (c) absorbing labor into the reconstruction activities the state undertakes and allocating a certain percentage of available jobs for victims and survivors of the conflict. It is important to ensure that any livelihood project is tailored to the situation, relates to the needs of the victim and produces tangible benefits for her.

Provision of sustainable livelihood is a long-term reparation measure that must be continued and carried out over a period of time.

CONCLUSION

The evolving nature of the understanding of reparation has been outlined above. The interviews conducted during field missions also made it clear that women have a broad definition of reparation that goes well beyond the traditional emphasis on financial payment. The interviews also underlined the importance of linking reparation to women's human rights. The need for an inclusive and representative approach to reparation is clear. There are several areas related to reparations, however, that pose particular challenges. The main ones that were identified during field missions include:

Procedural Aspects of Reparation Claims

There are a number of procedural provisions that victims have encountered in situations where reparation programmes have been implemented. These provisions have made access to reparation difficult, particularly for women. In order to improve both access to and the effectiveness of future reparation programmes, the design of the programme should ensure that, *inter alia*:

- the eligibility requirements for reparation do not include one requiring victims to consent to having their names published;
- testimony before a TRC is not a prerequisite for being identified as a victim and, therefore, eligible for reparation;
- latitude is given for women to testify to women's groups about sexual violence;
- witness protection is provided to those who do choose to testify before a TRC;

- the list of the crimes to be investigated is expansive enough to ensure that sexual violence and other violations against women are included in the process, irrespective of where the crimes occurred;

Evidence of Violation

Another problem common to situations of mass violence is that victims are unable to produce evidence of their violations. Evidence required to meet the standards of a court of law cannot be applied to the question of eligibility of victims to reparation. In some cases, it may be necessary for the commission or other body simply to accept women's testimony of sexual violence as torture.

The overall conclusion that can be drawn from the interviews that were conducted during the field missions and the related research phase is that for women, reparation is not only about money. Neither is it restoring them to the situation that existed before the conflict, or could have reasonably been expected to exist. Reparation is an acknowledgment of the wrong done. It is a restoration of dignity to victims and survivors. It is holding those responsible - whether state or non-state - to account for their actions.

But reparation is also a way forward. It is, or should be, the means to advance the cause of human rights and to eliminate the obstacles to women's full enjoyment of their human rights. Reparation may acknowledge the past but it must have a significant impact on the future: the realization of civil, cultural, economic, political and social rights for women.

Who is a Victim?

The question of who is or can be considered a victim is not simple or straightforward. In most reparation programmes a victim is defined as a person who has suffered directly or indirectly gross human rights violations, or relatives of that person. It is unstated but generally understood that a victim is a non-combatant civilian.

Generally, those who participated in violations cannot be considered victims. The difficulty arises because, in some cases of mass violence, people are forced at gunpoint to associate with a rebel or other armed entity. It is also the case that in some situations girls are kidnapped or coerced into joining armed groups, becoming girl soldiers. It is important, therefore,

that reparation programmes include mechanisms to identify the *actual* perpetrators of the violations and to eliminate them from the list of persons eligible for reparations.

Definition of Family

In some cases, the traditional definition of the family as a nuclear unit consisting of married spouses, children and sometimes parents of the man is not adequate in the context of reparations. Procedures also tend to recognize only civil marriages and not other forms of customary or tribal marriages. Both assumptions leave women in extended families or non-traditional marriages unrecognized as wives eligible for reparation. Thus, the option of defining one's family must be left to the victims and survivors. It is vital that the definition of the family be open and be based on the specific reality of victims and survivors.

ANNEX I

Comparative notes on national truth and reconciliation mechanisms

Argentina

The National Commission on the Disappearance of Persons (CONADEP) was established in 1983 in Argentina and was one of the earliest such bodies to be set up. The objective of this commission was not to establish truth and work towards reconciliation. It was mandated to investigate and report on what had happened to those who had been detained and disappeared during the Dirty War. At the time, the concept of a gender perspective had not emerged and no specific mention of crimes committed against women were included in the mandate of the National Commission.

Chile

The National Truth and Reconciliation Commission (CNVR) that was established in 1990 in Chile was the first commission that functioned as a mechanism: (a) to investigate situations of mass violations; (b) to establish the truth(s) of the conflict; and (c) to move the society towards reconciliation. It sought to investigate specified crimes, find the truth, work towards reconciliation and propose reparation for the victims. While it was a good beginning with regard to establishing truth, gender awareness did not figure in the work of the Commission, nor was a gender perspective used by subsequent commissions.

Guatemala

The National Programme for Reparations was set up in Guatemala on the basis of recommendations made by the Commission of Historical Clarification (CEH).²² The National Programme is an example of an integrated and comprehensive reparations programme. Its aims are to indemnify, dignify, restore land and housing, repair psycho-social damage, restore loss or damage to culture, art and heritage, repair harm to victims and support vulnerable groups of individuals affected by the decades-long internal armed conflict.

The programme is intended to provide reparations to victims who have directly or indirectly suffered violations of human rights or crimes against humanity during the internal armed conflict, individually and collectively. In terms of individual beneficiaries, priority has been given to widows, orphans (boys and girls), persons with disabilities, the elderly. Benefits will be based on the gravity of violations and the respective social and economic situation of victims. Collective benefits can be accessed by organized groups of victims and indigenous peoples, again on the basis of the gravity of the violations and the social and economic standing of the group. The violations that are eligible for reparations are: (a) forced disappearance; (b) extrajudicial execution; (c) physical and psychological torture; (d) forced displacement; (e) forced recruitment of minors; (f) sexual violence and sexual violation; (g) violations against children; (h) genocide. Psycho-social reparation and rehabilitation, restoration of dignity to the victims, cultural recuperation, material restitution and economic indemnification are the measures that are used.

For the most part, the programme is all encompassing. There is recognition that the harm victims suffer has to be redressed in more than one way. As a result of the armed conflict being waged by the state against a largely indigenous population, the need to restore the culture of the affected peoples is recognized as an important reparation measure that could alleviate the feeling of alienation of the indigenous peoples. Those responsible for the programme have made efforts to consult with the population by including seven representatives of civil society, representing different "interest groups", in the reparations commission.

²² Commission for Historical Clarification (CEH) was established in Guatemala and began operating after the signing of the Agreement on a Firm and Lasting Peace (29 December 1996).

From a gender perspective, the programme, though relatively better than others, has incorporated only two aspects of interest for women victims and survivors of the internal armed conflict, namely: (a) the identification of sexual violence and sexual violations as crimes eligible for reparation; and (b) inclusion of a representative of a women's group in the 13-member reparation commission responsible for implementation of the programme.

The programme fails, however, on a number counts:

- there is no recognition that victims of sexual violence experience the impact of the violation, in social life, throughout their lifetimes;
- priority is not given to the psycho-social care of women victims and survivors of sexual violence and it fails to identify them as persons needing special attention as individual beneficiaries;
- there is no specific mention of health care for physical ailments or education measures though it is implied that these may be provided as part of the required support services;
- the programme will provide reparation only for 13 years beginning in 2003; it should be noted that up to mid-2006, the programme had not made any reparation because the processes of identifying and registering victims, and putting systems and policies in place had not been completed.

The Guatemalan TRC recommended measures to create a culture of mutual respect and observance of human rights, as well as measures to strengthen the democratic process.²³ Despite these recommendations, there have been no legal, administrative or institutional reforms undertaken: (a) to eliminate discriminations against women; (b) to increase women's social, economic and political participation; (c) to establish public education against social prejudices against women.

Activists strongly believe that the police and army should be trained on the issues of sexual violence. They also insist that the kinds of sexual violence crimes that occurred during the internal armed conflict must be recognized in national criminal law.

²³ Victor Espinoza Cuevas et.al. Comparison of Truth Commissions in Chronological Order: Argentina, Chile, El Salvador, Guatemala and South Africa, pps.

South Africa

The composition of the Truth and Reconciliation Commission (TRC)²⁴ of South Africa included a five member Committee for Reparations and Rehabilitation, implying that the TRC considered reparations an integral part of the process of truth and reconciliation. The objectives of the Commission were: (a) to promote national unity and reconciliation; (b) to investigate crimes; (c) to offer compensation to victims; and (d) to grant amnesty to some perpetrators in exchange for truthful confessions.

The crimes to be investigated were: (a) murders by State agents (domestically and abroad); (b) disappearances; (c) torture and abuses by the Army and police; (d) army incursions into neighbouring countries to attack opponents; (e) murders caused by bombs and land mines; (f) abuses in detention camps for opponents in foreign countries; and (g) violence by individuals for political motives.

The founding documents of the TRC are absolutely and totally gender blind. The legal framework for the Commission specifically refers to the Convention against Apartheid and Convention against Torture. The Convention on Elimination of All forms of Discrimination against Women (CEDAW) is not noted. The crimes to be investigated did not include sexual crimes or gender-based violence. As a consequence, women who testified at the TRC hearings tended to emphasize the abuse and violations suffered by men and recounted their own experiences of abuse only to the extent they were similar to those experienced by men.

A submission was made to the TRC by the Gender and Truth and Reconciliation Commission which stated that the "Failure to approach the experience of human rights abuses through a gendered lens will lead to the neglect of women's experience of abuse and torture, for these are often seen as a male preserve."²⁵

The TRC issued a gender statement in response to the submission.²⁶ The TRC accepted that "violence against women and the specific sensitive na-

²⁴ Truth and Reconciliation Commission was established in South Africa pursuant to the Act Promoting National Unity and Reconciliation, 26 July 1995. The Commission submitted its report on October 29, 1998 to President Nelson Mandela. The report is available online : www.doj.gov.za/trc/report/index.htm

²⁵ Gender and Truth and Reconciliation Commission, A submission to the Truth and Reconciliation Commission, prepared by Beth Goldblatt and Shiela Meintjes, May 1996, available online : www.doj.gov.za/trc/submit/gender.htm

²⁶ South Africa: TRC and Gender Date distributed (ymd): 960823, Truth and Reconciliation Commission statement, August 15, 1996

ture of the types of violations against women warrant close attention by the TRC." It also reported recommendations of a workshop conducted by the TRC seeking suggestions on women's hearings and how to conduct them. Among the recommendations were: (a) a special hearing for women be held in each region; (b) the work be conducted with sensitivity to cultural norms on gender; (c) women and others be encouraged to speak out; (d) commissioners receive gender training; (e) that the reparations policy should not be gender blind.

Despite these recommendations, an evaluation of Summary of Reparation and Rehabilitation Policy, Including Proposals to be considered by the President, prepared by the Reparations and Rehabilitation Committee of the TRC, shows that rehabilitation policy and the Policy Framework on Urgent Interim Reparations Measures are virtually gender blind. The words "women", "gender", "sexual violence" and "sexual abuse" do not appear even once in these documents.

The total neglect of gender issues by the TRC and in the reparations policies did not imply an endorsement and the perpetuation of discrimination against women. The new constitution includes guarantees of gender equality and non-discrimination on the basis of race and gender. A Gender Equality Commission has been set up and legislation has been introduced on the prevention of domestic violence and rape. A series of measures also have been introduced that improved services for women, including access to health, land and economic opportunities.

Rwanda

Since the cessation of genocide in July 1994 and the take-over of government by the Rwanda Patriotic Force (RPF) there have been many measures instituted at the national level to address the post-genocide issues of justice, rehabilitation and reconciliation. However, none of the measures are seen as part of reparation policies or measures.

The state did recognize, however, the immense need of the people for rehabilitation and established the Fund for Assistance of Genocide Survivors (FARG). The Fund is established by law to assist the most vulnerable of genocide survivors especially but not only: the elderly, orphans, persons with disabilities and elders who have been abandoned. The mandate is to assist persons belonging to these groups with education, health, shelter and emergency aid. The law establishing the FARG was later

amended to include human moral rehabilitation (e.g. trauma counseling, emergency aid, income-generating projects).

The Fund does not give priority to assistance for survivors of sexual violence or girls but neither are they excluded from assistance. The Fund spends most of its resources (60 per cent) on education, about 20 per cent on health and 5 percent on emergency aid. The balance is spent on other forms of assistance.

The functions of the Fund and its sources of revenue are about the same as the reparations programmes and policies in other post-conflict situations. The use of term “assistance”, however, connotes a part of the state’s benevolent duty towards the survivors. The term “reparations” would connote an entitlement of the genocide survivors to assistance. In addition, by giving priority to the most vulnerable of the survivors, the Fund is not mandated to assist all genocide survivors. The law establishing FARG and other policy documents contain no analysis of the violations women faced during the genocide. As a consequence, there is no mention of any special attention being paid to the needs of women survivors.

The first law establishing the Gacaca courts and jurisdiction for justice for genocide survivors contained some provision about reparations. In the subsequent amendment to the law, provisions about reparations were removed. Article 75 of the current law on Gacaca vaguely states that “Defendants who committed offences relating to property, are only sentenced to the civil reparation for what they have damaged.”

A draft bill of on reparations was discussed in Rwanda for two years.²⁷ In the draft bill, reparation is understood only as monetary compensation and the purpose of the bill is to establish a reparations fund to provide financial compensation.

The government has instituted reforms and formulated new policies to enable women to play a significant role in the nation-building and reconstruction processes.

²⁷ The last draft of Law Project for the Creation, Organization and Operation of a Compensation Fund for Victims of Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994.

Timor Leste

The Commission for Reception, Truth and Reconciliation in Timor Leste (CAVR) was established as an independent authority by the United Nations Transitional Authority in East Timor (UNTAET). The authority was subsequently recognized in article 162 of the Timor Leste constitution.

The mandate of the CAVR was: (a) to establish truth about the human rights violations during the period of the Indonesian occupation; (b) to investigate the causes of the violations and the motives of those who were identified as being responsible; (c) to address issues related to accountability; (d) to recommend reforms and prosecutions; (e) to promote reconciliation and human rights; and, (f) generally to assist in restoring the dignity of victims. The foundational document did not list the crimes to be investigated but discussions on sexual violence figured prominently in the findings of the Commission.

It can be said that the CAVR, being the latest among the TRCs, learned from the experiences of the previous such bodies, particularly in the area of neglect of, or only partial attention being given to, gender issues. The CAVR identified gender as one of the four guiding principles for a reparations programme in Timor Leste.

In explaining this principle, the Commission stated that:

... the programme [of reparations] should take gender differences into account because the conflict in Timor Leste affected men and women differently.... When women became victims of detention, torture, and other violations, they suffered disproportionately from sexual violence and faced ongoing discrimination as victims. Women also suffered when their husbands, sons, fathers experienced human rights violations. They became primary care givers.... [They] also became increasingly vulnerable to sexual violence when the traditional 'protector' of the family was absent.

The Commission recommended that at least 50 percent of programme resources be directed to female beneficiaries. It also identified "victims of sexual violence" and "widows and single mothers" as two separate categories of beneficiaries. Where communities collectively apply for reparations, gender balance among beneficiaries is specified as criteria for eligibility.²⁸

²⁸ Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), Executive Summary, p. 18-19, 116-123, 200-209.

The CAVR received testimonies of serious crimes and lesser crimes but its mandate was to deal only with the lesser crimes. Any testimony of a serious crime was passed on to the Prosecutor of the Serious Crimes Investigation Unit (SCIU) for further investigation and then to the Special Panel for Serious Crimes (SPSC) for prosecution. Sexual violence crimes were considered serious crimes. However, the SPSC can only try cases of sexual violence that occurred between January 1 and October 25, 1999 and not those that were committed throughout the entire period of occupation (since 1974). The SPSC has a mandate to try all other crimes during this period (except murder), leaving the victims of sexual crimes with no recourse to justice. It also needs to be noted that the SCIU does not reach out to women victims of sexual violence in remote areas. Women in those areas do not have the resources to reach the Unit with their cases, effectively making justice inaccessible to them.

Efforts have been made by the government to establish new systems to secure democracy, respect, equality and human rights. The constitution guarantees equality and women's rights and women did participate in the constitution-making process. Also, there are the millennium development goals and a number of other tools in place to help women achieve their goals.