

# Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue

Ruth Rubio-Marín

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## Repository Citation

Ruth Rubio-Marín, *Reparations for Conflict-Related Sexual and Reproductive Violence: A Decalogue*, 19 Wm. & Mary J. Women & L. 69 (2012), <https://scholarship.law.wm.edu/wmjowl/vol19/iss1/5>

# REPARATIONS FOR CONFLICT-RELATED SEXUAL AND REPRODUCTIVE VIOLENCE: A DECALOGUE

RUTH RUBIO-MARÍN\*

## INTRODUCTION

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## SUMMARY AND FINAL THOUGHTS

### INTRODUCTION

In the past and today, in the midst of conflict, women, girls, and sometimes men and boys are raped: penises, sticks and other objects violently entering their bodies.<sup>1</sup> Sometimes, the rapes are committed

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\* European University Institute, Florence.

1. See, e.g., Situation in the Dem. Rep. Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Observations of the Women's Initiatives for Gen. Justice on Reparations, ¶ 16 (May 10, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1410192.pdf> (discussing rape as a way to assert dominance over boys and girls); Fiona Lloyd-Davies, *Why Eastern DR Congo Is 'Rape Capital of the World'*, CNN, <http://www.cnn.com/2011/11/24/world/africa/democratic-congo-rape/index.html> (last updated Nov. 25, 2011) (detailing stories of women being raped with sticks and guns).

in public, in front of family members, friends, and villagers.<sup>2</sup> Sometimes, the rapes are committed by gangs or coerced family members.<sup>3</sup> In the past and today, in the midst of conflict, girls and women are forcefully recruited, removed from their communities, turned into sexual slaves, and forcefully sterilized or impregnated.<sup>4</sup> In the past and today, in the midst of conflict and in repressive regimes, women, and sometimes men, too, are sexually tortured and sexually mutilated. Breasts and testicles are cut off, wombs are torn apart, and fetuses are destroyed.<sup>5</sup> Broken bodies, torn lives, spoiled identities, ruined families, trauma, isolation, material destitution, and—in some cases—death are all too common legacies of armed conflict for thousands of victims of sexual and reproductive violence worldwide.<sup>6</sup>

In the present, unlike in the past, there is a growing awareness that these horrors have a public and a political dimension.<sup>7</sup> This rising awareness has impacted reparations discussions; post-conflict and post-authoritarian societies now are much less likely to minimize the relative importance of sexual and reproductive violence (henceforth, SRV) than were, until very recently, countries considering reparations as part and parcel of their transitional justice agenda.<sup>8</sup> The international community, civil society and the United Nations, deserves acknowledgment not only for their active role in bringing the issue of women's SRV to the fore, but also, as of recently, for calling

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2. See, e.g., Claudia Paz y Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations*, in *WHAT HAPPENED TO THE WOMEN?* 92, 97 (Ruth Rubio-Marín ed., 2006), available at <http://www.ssrc.org/publications/view/D6D99C02-EA4A-DE11-AFAC-001CC477EC70/> (discussing rape of women by military in public squares or markets).

3. See, e.g., Heidy Rombouts, *Women and Reparations in Rwanda: A Long Path to Travel*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 2, at 194, 207; Margaret Urban Walker, *Gender and Violence in Focus: A Background for Gender Justice in Reparations*, in *THE GENDER OF REPARATIONS* 18, 44 (Ruth Rubio-Marín ed., 2009) (discussing coerced incestuous rape in conflict).

4. See, e.g., Special Rapporteur on Violence Against Women, Its Causes and Consequences, *Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Human Rights Council, ¶ 26 add., U.N. Doc. A/HRC/14/22/Add.1 (June 2, 2010) (by Rashida Manjoo) [hereinafter Special Rapporteur] (documenting victims of coerced sterilization); Alice M. Miller, *Sexuality, Violence Against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 *HEALTH & HUM. RTS.*, 17, 17 (2004) (detailing the U.N. General Assembly's condemnation of the sexual slavery of girls).

5. See, e.g., Special Rapporteur, *supra* note 4, ¶ 323 (documenting sexual mutilation in areas of conflict); Lloyd-Davies, *supra* note 1 (discussing a woman forced to eat her murdered husband's genitalia in eastern Congo).

6. See, e.g., U.N. POPULATION FUND, *REPORT ON THE INT'L SYMPOSIUM ON SEXUAL VIOLENCE IN CONFLICT AND BEYOND* 4, available at <http://www.unfpa.org/emergencies/symposium06/> [hereinafter INT'L SYMPOSIUM ON SEXUAL VIOLENCE] (discussing the harm of sexual violence).

7. See *id.*

8. See, e.g., Ruth Rubio-Marín & Pablo de Greiff, *Women and Reparations*, 1 *INT'L J. TRANSITIONAL JUST.* 318, 318 (2007).

specific attention to the need for reparations and redress.<sup>9</sup> Pioneering this domain was the adoption of the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* (henceforth, the *Nairobi Declaration*) in March 2007 by women's rights activists and SRV survivors from all over the world.<sup>10</sup>

There are good reasons to celebrate the incremental perception of sexual violence as falling within the public realm, not in the least because of the devastating impact it has on women's lives and its crucial contribution to the perpetuation of a system of sexual hierarchies. Because the traditional exclusion of sexual violence from this realm came hand in hand with the "systematic privatization and parochialization" of women's concerns as opposed to the "ideological universalization of men's[.]"<sup>11</sup> the hope is now that the inclusion of

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9. The adoption of various United Nations Security Council Resolutions signifies a commitment to overcome the deficit in attention to gender issues in conflict, post-conflict and transition processes by the U.N. and its member states within issues of international peace and security. *See, e.g.*, S.C. Res. 1960, U.N. Doc. S/RES/1960 (Dec. 16, 2010); S.C. Res. 1889, U.N. Doc. S/RES/1889 (Oct. 5, 2009); S.C. Res. 1888, U.N. Doc. S/RES/1888 (Sept. 30, 2009); S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008); S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000). Resolutions 1820, 1888, 1889 and 1960 deal specifically with conflict-related sexual violence. *See* S.C. Res. 1960, *supra*, para. 3; S.C. Res. 1889, *supra*, ¶ 3; S.C. Res. 1888, *supra*, para. 3; S.C. Res. 1820, *supra*, para. 7. They underline the need for "sustainable assistance to victims of sexual violence," S.C. Res. 1820, *supra*, ¶ 13, and specifically mention the need for attention to conflict-related sexual violence in "justice and reparations" procedures post-conflict, S.C. Res. 1888, *supra*, ¶ 17. The 2011 U.N. Secretary-General Report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, pays particular attention to the question of reparation under the rubric of transitional justice. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 27, U.N. Doc. S/2011/634, (Oct. 12, 2011). The Report calls upon the Security Council to "encourage further attention to the rights of victims to a remedy and reparations, in particular the victims of conflict-related sexual and gender-based violence." *Id.* ¶ 68. Awareness of the importance of reparations for women is also increasing among women's rights global movements. *See, e.g.*, INT'L SYMPOSIUM ON SEXUAL VIOLENCE, *supra* note 6, at 13 (stating victims of sexual or gender-based violence should be entitled to reparations). Some of the global women's rights organizations which were key protagonists in bringing sexual and gender-based violence to the fore of the international criminal law agenda at the time of the adoption of the Rome Statute, such as the Women's Initiatives for Gender Justice, are now mobilizing to ensure that the reparations decisions that will soon be delivered by the International Criminal Court incorporate gendered lenses. *See* Situation in the Dem. Rep. Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Observations of the Women's Initiatives for Gender Justice on Reparations, ¶ 16 (May 10, 2012), *available at* <http://www.icc-cpi.int/iccdocs/doc/doc1410192.pdf>.

10. *See* INT'L FED'N FOR HUMAN RIGHTS, NAIROBI DECLARATION ON WOMEN'S AND GIRLS' RIGHT TO A REMEDY AND REPARATION 3 (2007), *available at* [http://www.fidh.org/IMG/pdf/NAIROBI\\_DECLARATIONeng.pdf](http://www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf) [hereinafter NAIROBI DECLARATION] (recommending the international adoption of principles relating to victims of gender-based violence and their rights to a remedy and reparation).

11. *See* Louise du Toit, *How Not to Give Rape Political Significance*, in *Confronting GLOBAL GENDER JUSTICE* 85, 85 (Debra Bergoffen et al. eds., 2011).

sexual violence in the transitional justice and reparations agenda will contribute to the breaking of long-standing taboos around it, as well as to its understanding as a manifestation of broader gender inequities still prevalent in most societies. Probably inspired by the strengthening of international norms against sexual violence during war, recent truth commissions, like those in Guatemala, Peru, Sierra Leone, and East Timor, have documented gender violence more carefully than earlier commissions and provided a platform for victims and witnesses willing to speak about their experiences.<sup>12</sup> Public debates, which often accompany the creation of reparations programs, are now providing a historic opportunity to discuss how to lay the groundwork for the social transformation of gender-discriminatory attitudes which underpin sexual violence in times of war and peace.<sup>13</sup>

Two important caveats should nevertheless accompany the optimism around the gradual, but consistent, incorporation of SRV in the reparations agenda. First, notwithstanding the growing perception that victims of SRV in post-conflict and post-authoritarian societies deserve reparations, little has actually been done for them around the globe.<sup>14</sup> Many reparations programs contemplating measures to benefit victims of SRV, whether recommended by truth commissions or designed by national governments and legislators, have remained, to this day, largely unimplemented.<sup>15</sup> Remedies to address large scale SRV through the court system have been equally, if not more, difficult to obtain.<sup>16</sup>

Second, regrettably, the need for reparations for victims of SRV seems to be gaining more and more visibility as an isolated item, instead of as part of a broader agenda on gender and reparations confronting the multiple forms of gender-specific harm that men and women experience in situations of conflict or authoritarian repression.<sup>17</sup> The prioritization of sexual violence suggests that sexual harm is universally the worst abuse and injustice that can happen to women and risks a reduction of women's lives to a sexual dimension and the entrenching of patriarchal systems of meaning which sanction

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12. See U.N. Secretary-General, *supra* note 9, ¶¶ 22–23.

13. See Colleen Duggan & Adila Abusharaf, *Reparation of Sexual Violence in Democratic Transitions: the Search for Gender Justice*, in THE HANDBOOK OF REPARATIONS 623, 637 (Pablo de Greiff ed., 2006).

14. See, e.g., Ruth Rubio-Marín, *The Gender of Reparations: Setting the Agenda*, in WHAT HAPPENED TO THE WOMEN?, *supra* note 2, at 20, 24.

15. See, e.g., *id.* at 26–27.

16. See, e.g., *id.* at 27–28.

17. An important exception to this trend is provided by the 2010 *Report of the Special Rapporteur on Violence Against Women*, which mostly focuses on women but does comprehensively address the subject of reparations for women subjected to violence. See Special Rapporteur, *supra* note 4, ¶ 19.

women's sexual purity or chastity as of utmost importance.<sup>18</sup> While the sexual violence focus in the human rights movement might have been an effective tool to make the gender-specific content of violence visible to key human rights bodies and actors who, until the late 1980s, had failed to pay attention either to women as rights holders or to sexual harm as a type of harm,<sup>19</sup> a "hyper-attention" to sex now risks doing further harm to women by deviating attention from other non-sexual forms of sex-specific harms.<sup>20</sup>

Mindful of this risk, this article spells out principles and guidelines which ought to guide reparations for conflict-related victims of SRV, paying particular attention to the risk of further entrenching patriarchy or further harming the victims. Taking into account the specificity of the harm that ensues from SRV, Part I outlines three meta-principles which should inspire SRV reparations initiatives so as to facilitate victims' access to adequate reparations. Focusing on reparations programs as arguably the most conducive venue to provide redress to victims of SRV in post-conflict settings, Part II then spells out ten specific guidelines indicating how the general principles spelled out under Part I can be best achieved.

#### I. HARM-CENTERED REPARATIONS: THE SPECIFICITY OF SEXUAL VIOLENCE-RELATED HARMS

As recognized by the 2011 U.N. Secretary-General Report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, the importance of reparations amongst other transitional justice mechanisms that societies confronting a legacy of mass human rights violations can put into place (including prosecutions, truth telling, and institutional reform) is that reparations are arguably the "most victim-centred justice mechanism available and the most significant means of making a difference in the lives of victims."<sup>21</sup> Choosing from a range of reparations modalities<sup>22</sup> and from a typology of

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18. See Miller, *supra* note 4, at 19.

19. See *id.* at 20–21.

20. See *id.* at 19.

21. See U.N. Secretary-General, *supra* note 9, ¶ 26.

22. *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* refers to the following reparation modalities: restitution, compensation, satisfaction, rehabilitation and non-recurrence, providing non-exhaustive examples of the kinds of benefits that can be encompassed under each of them. See G.A. Res. 60/147, ¶¶ 18–23, U.N. Doc. A/RES/60/147 (Mar. 21, 2006). According to the *Basic Principles*, restitution names those measures to restore the victim to his or her original situation before the violation, including measures for the 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. See *id.* ¶ 19. Compensation

benefits, including things as diverse as official apologies, pensions, educational opportunities, access to health services, individual payments, and collective reconstruction projects, post-conflict societies around the globe are identifying ways to provide redress to victims.<sup>23</sup>

In order to duly recognize victims and help them cope with the effects of violence and move forward properly, reparations must give primordial attention to the notion of harm and do so in ways which are adequate for the situations in which they operate. It has been rightly argued that in contexts of widespread and gross human rights violations, such as those that characterize armed conflicts, the focus on harm should not translate into an attempt to measure harm for the sake of compensating proportionately, which is an attempt likely doomed to fail.<sup>24</sup> Rather, in post-conflict settings, which typically combine scarce resources, a large universe of victims, daunting reconstruction needs, and unspeakable forms of physical, psychological, and material harm, the focus on the harm victims experience can serve other important functions. These include assisting in the decision of which types of violations of rights ought to be prioritized, who should be included in the circle of beneficiaries, and what types of benefits would be best suited to both recognize and assist victims.<sup>25</sup> The acknowledgment of harms experienced by victims, and an adequate correlation between the harms experienced and the foreseen remedies is therefore the first principle that should guide reparations initiatives in general, and not only those concerned with violations of sexual nature.<sup>26</sup>

Applied to this inquiry, this means that any meaningful conversation about reparations for SRV victims must start by recognizing the forms of SRV taking place in each conflict scenario, and seriously address both physical and psychological effects on victims.

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is foreseen for any economically assessable damage and must be appropriate and proportional to the gravity of the violation, including: physical or mental harm; lost opportunities, including employment, education, and social benefits; material damages; and moral damages. *See id.* ¶ 20. Measures of rehabilitation include medical and psychological care as well as legal and social services. *See id.* ¶ 21. Measures of satisfaction include, among others: the verification of the facts and full and public disclosure of the truth; the search for the whereabouts of the disappeared; public apologies; judicial and administrative sanctions against persons liable for the violations; and commemorations and tributes to the victims. *See id.* ¶ 22. Finally, guarantees of non-repetition include: measures to contribute to prevention, such as ensuring effective civilian control of military and security forces; protecting human rights defenders; providing human rights education; and reviewing and reforming laws contributing to or allowing gross violations of international human rights law. *See id.* ¶ 23.

23. *See* G.A. Res. 60/147, *supra* note 22, ¶¶ 18–23.

24. *See* Duggan & Abusharaf, *supra* note 13, at 458.

25. *See id.* at 456.

26. *See id.* at 457–58.

Long-term consequences of rape and other forms of sexual violence during conflict include trauma, depression, low self-esteem, AIDS and other sexually transmitted diseases, fistulas and vaginal or anal ruptures, incontinence, long-term bleeding, loss of reproductive capacity, unsafe abortions, unwanted pregnancies, and forced motherhood of children for whom victims may not be able, or may not wish, to care.<sup>27</sup>

If this multiplicity of harms ensuing from SRV is in itself challenging, even more challenging is the fact that the experience of sexual violence is typically accompanied by “social and symbolic multipliers of harm,”<sup>28</sup> in the form of stigma, ostracism, and rejection by actual or potential partners and family members.<sup>29</sup> Patriarchal societies generally attach a preeminent value to women’s chastity and reproductive capacity, seeing women’s reproduction as a way of guaranteeing the survival of both community and culture. A woman who is sexually violated, impregnated by enemies, or kidnapped into sexual and domestic enslavement is therefore often regarded as “disgracing family honor, being unclean or contaminated, [or] being a seductress.”<sup>30</sup> Through these socially blighting effects, as Walker accurately describes, the “original violation is extended, ramified, and augmented in multiple ways that significantly alter the women’s physical safety and well-being, social reintegration and status, economic survival, and eligibility for marriage.”<sup>31</sup> Thus, violations of a sexual or reproductive nature uniquely act as forms of “ongoing” violations in which the primary violation—the original act committed by the perpetrator—is often accompanied by a chain of harmful reactions from surrounding (and often loved) people, such as partners, family members, and villagers.<sup>32</sup> These reactions complete the victims’ negative experiences, rendering them comprehensively stained, spoiled, and devalued. The moral condemnation is shifted from the perpetrator onto the victim. Alternatively, the perception of victimization is displaced from the victim onto her partner or wider community, whose honor is deemed spoiled.

The way through which stigmatization functions, comprehensively spoiling identities, has a devastating effect on victims’ lives. As Goffman alerted us, a “spoiled identity” ends up cutting the stigmatized person off from society and from herself through a process whereby the stigmatized person, being generally perceived as less

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27. See Walker, *supra* note 3, at 53.

28. *Id.* at 52.

29. See *id.* at 53.

30. *Id.*

31. *Id.*

32. See *id.*



than fully human,<sup>33</sup> comes to encounter multiple forms of discrimination and to see her life chances severely reduced.<sup>34</sup> Moreover, stigma “enrolls the stigmatized person herself to enforce her discreditable status . . . self-discrimination, concealment, withdrawal and other forms of stigma management become a routine.”<sup>35</sup> Indeed, the shame of victims of SRV who correctly assume that they will be ostracized by their families, rejected by their husbands, or shunned by their neighbors is well documented.<sup>36</sup>

This complex set of destructive interactions between primary and secondary harms explains why reparations initiatives for victims of SRV, to be minimally effective, must simultaneously address the legacies of victims’ harms and the meaning of the violation for her surrounding community. This, then, is a principle that should specifically guide SRV reparations initiatives. In fact, one could say that in this specific domain, the aspiration of having reparations which are transformative<sup>37</sup> can only be adequately fulfilled when reparations manage to contribute meaningfully to subvert the system of meanings underlying the stigmatization of victims of SRV.

The difficulty, however, lies in synchronizing the timing of these objectives. Social meanings exist and are used by individuals or groups to “advance individual or collective ends,” their force depending in part “upon a certain uncontested, or taken-for-granted background

33. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (1963). See also MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 220–21 (2004).

34. See GOFFMAN, *supra* note 33, at 3.

35. Scott Burris, *Stigma, Ethics and Policy: A Commentary on Bayer’s “Stigma and the Ethics of Public Health: Not Can But Should We,”* 67 *SOC. SCI. & MED.* 473, 474 (2008).

36. Walker, *supra* note 3, at 52–53.

37. The notion of transformative reparations refers to the aspiration that reparations serve to transform rather than to reinforce or simply reinstate the structural conditions of inequality underlying the conflict. In the specific context of gender-sensitive reparations, it refers, therefore, to the intention to unsettle preexisting gender hierarchies which account for the gender-specific reasons, forms, and effects of violence. See Ruth Rubio-Marín, *Introduction: A Gender and Reparations Taxonomy*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 1, 17; Ruth Rubio-Marín, *The Gender of Reparations in Transitional Societies*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 63, 70. The aspiration of transformative reparations was advanced by the *Nairobi Declaration*, *supra* note 10, at princ. 3.H. The notion has been judicially endorsed as essential to advance gender sensitive reparations. See, e.g., *Cotton Field v. Mexico*, Preliminary Objection, Merits, Reparations and Legal Costs, Inter-Am. Ct. H.R. (ser. C), ¶ 450 (Nov. 16, 2009). It has also made inroads in the U.N. system. See, e.g., Special Rapporteur, *supra* note 4, ¶ 30; U.N. Secretary-General, *supra* note 9, ¶ 27 (underscoring the need to address the root causes of conflict related sexual violence). Most recently, it has been endorsed by the First Trial Chamber in its decision establishing the principles and procedures to be applied to reparations in the *Situation in the Dem. Rep. Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*. Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 222 (Aug. 7, 2012).

of thought or expectation.”<sup>38</sup> Yet, because past actions cannot be changed, the only way of changing their meaning is by addressing the context of interpretation through a process of “meaning (re)construction” primarily consisting of changing some of the associations that are made when the action takes place.<sup>39</sup> The problem, however, is that meaning reconstruction takes both time and consistency.<sup>40</sup> It would be, for instance, difficult to imagine a fruitful process of meaning reconstruction around the experience of sexual violence when impunity is still the norm in many transitional societies even *after* the conflict or violent period has officially ended.

The implications of the synchronization challenge for reparations initiatives are clear. Because the kinds of cultural interventions needed to alter collective meanings around SRV are unlikely to be of immediate effect, we can expect that many survivors, fearing stigma and discrimination, will hesitate to come forward and identify themselves to reach out for reparations. This, at least, will be the case if they think that they can keep the violations to themselves. Sometimes, keeping one’s victimization secret is simply no longer an option, given that rape and other forms of sexual atrocity are often committed publicly precisely to add to the future humiliation of victims in the eyes of their communities.<sup>41</sup> But victims who can avoid publicizing their experience may have good reasons to do so if they cannot reasonably expect to be truly perceived and treated as victims with prospects for rehabilitation, rather than as accomplices, or as irrevocably spoiled pieces of flesh.<sup>42</sup> For many survivors, minimizing harm, rather than maximizing assistance and redress, will be the logical and existential priority after the conflict has subsided.<sup>43</sup>

The key lesson, then, is that reparations initiatives dealing with SRV must not only live up to the *general principle* of maximum recognition of harm and an adequate correlation between harm and remedies (general in the sense that it should also apply to nonsexual violations), but also to two specific principles, namely, minimum exposure of individual victims of SRV (*first specific principle*) and maximum transformation of the meaning of SRV (*second specific principle linked to the transformative aspiration of reparations*). If the existing paths and mechanisms to access reparations fail to abide by these specific principles, it is easy to predict that the minimum guarantees

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38. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995).

39. *See id.* at 951–52.

40. *See id.* at 952.

41. *See* Walker, *supra* note 3, at 37.

42. *See id.* at 43.

43. *See id.* at 56.

for duly recognizing victims and helping them access reparations will not be satisfied, nor will the basic tenets of avoiding further harm to victims and seizing the window of opportunity to trigger deeper transformation be fulfilled. These three principles should therefore act as meta-goals when crafting reparations for victims of SRV. More specifically, they should help shape key procedural and substantive choices, including what reparations mechanisms to put into place, whom to recognize as a victim or beneficiary, and what types of benefits—material or symbolic, individual or collective—to grant victims.

## II. DECALOGUE FOR REPARATIONS OF VICTIMS OF SEXUAL AND REPRODUCTIVE VIOLENCE

It is my contention that, when crafting reparations for victims of SRV, ten guidelines could help in most real life scenarios to better achieve the goals of maximum recognition of the harm and an adequate correlation between harm and remedy, minimum exposure of victims, and maximum transformation of the meaning of SRV. These goals, I claim, are essential to facilitate the recognition of victims and their chances to access reparations, as well as to avoid harming victims through unintended effects of insufficiently thought out reparations initiatives.

### A. Administrative Reparations Programs

International human rights law and humanitarian law recognizes conflict-related sexual violence victims' rights to remedy and reparation under various international and regional instruments, which the victims should in principle be able to enforce judicially.<sup>44</sup>

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44. See, e.g., Universal Declaration of Human Rights, G.A. Res., 217 A(III), U.N. Doc. A/RES/217(III), art. 8 (Dec. 10, 1948); Int'l Covenant on Civil and Political Rights art. 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://www2.ohchr.org/english/law/ccpr.htm>; Int'l Convention on the Elimination of All Forms of Racial Discrimination art. 6, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195, *available at* <http://www2.ohchr.org/english/law/cerd.htm>; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85; Convention on the Rights of the Child, art. 39, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* <http://www2.ohchr.org/english/law/crc.htm>; Int'l Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61, art. 24, U.N. Doc. A/RES/61/177 (Jan. 12, 2007); Org. of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter), art. 7, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58; Org. of Am. States, Am. Convention on Human Rights, art. 25, Nov. 12, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Eur., art. 13, *opened for signature* Apr. 11, 1950, C.E.T.S. No. 5. In international humanitarian law one finds the right to reparation in the Int'l Comm. of the Red Cross. *Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning*

However, in many post-conflict scenarios, the combination of weak and insufficient judicial institutions and a large group of victims may make the prospects of judicial reparations slim, and I rather advise that countries design large-scale administrative reparations schemes.<sup>45</sup> Simplifying procedures, lowering the thresholds of evidence,<sup>46</sup> and sparing victims the trauma of cross-examination may be additional advantages offered by large-scale administrative reparations programs over judicial venues, especially criminal judicial procedures, as the latter may be necessarily limited in their flexibility by the need to ensure due procedural safeguards to the accused.<sup>47</sup>

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*the Laws and Customs of War on Land*, art. 3, 36 Stat. 2272 (Oct. 18, 1907), available at <http://www.icrc.org/ihl.nsf/intro/195?OpenDocument>; Int'l Comm. of the Red Cross, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, art. 91, 1152 U.N.T.S. 3 (June 8, 1977), available at <http://www.icrc.org/ihl.nsf/full/470?opendocument>; Rome Statute of the Int'l Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 3.

45. The High Commissioner for Human Rights makes the same recommendation. See U.N. Office of the High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, at 5, U.N. Doc. HR/PUB/08/1 (2008), available at <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>. A recent example of the many shortcomings of the criminal process as a path for victims to obtain reparations is provided by Colombia's 2005 Justice and Peace Law. L. 975, julio 25, 2005, DIARIO OFICIAL [D.O.] (Colom.). This law contemplates the reduction of sentences for perpetrators willing to give full confessions and articulates a procedure for awarding victims reparations, in the case of express petition by the victim. However, after almost six years of the Justice and Peace Law, no reparations have been paid through this process. See *Colombia: The Justice and Peace Law*, CTR. FOR JUSTICE AND ACCOUNTABILITY, <http://www.cja.org/article.php?id=863> (last visited Nov. 6, 2012). Among the many difficulties encountered by victims of SRV that we can mention are the fact that armed actors do not disclose involvement in offenses of sexual violence so that investigation has thus far focused on assassinations and disappearances, that judicial processes have concentrated in major urban areas, the excessive importance attached to testimonial and physical evidence by officials responsible for conducting investigations, the discouraging effect of the risk to safety of women and their families identifiable as participants in the Justice and Peace process, and the disincentive of the prospect of repeated contact with the perpetrator. See Catalina Díaz & Iris Marín, *Reparations in Colombia: Advancing the Women's Rights Agenda* (2012) (unpublished manuscript) (on file with author). Similarly, the persistent non-payment by perpetrators of reparations for sexual violence awarded by domestic courts in DRC, where it is estimated that thousands of women and girls have experienced various forms of rape, sexual assault and sexual slavery as a result of the conflict highlights the need for extrajudicial reparations in the country. U.N. Office of the High Comm'r for Human Rights, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, ¶ 7 (March 2011), available at [http://www.ohchr.org/Documents/Countries/ZR/DRC\\_Reparations\\_Report\\_en.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf).

46. For instance, an adequate treatment of evidence in cases of SRV may require relinquishing the idea that evidence must be based primarily on legal medical examination. Instead, the testimony of the victim, traceable consequences of her mental health, or simply a system of presumptions based on patterns of criminal conduct could be relied on as sufficient sources of evidence. See Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 79.

47. See Rubio-Marín & de Greiff, *supra* note 8, at 322.

Well-designed, large-scale administrative reparations programs can also avoid the difficulties and costs traditionally associated with litigation, including high expenses, lack of trust in the judicial system, the traveling of long distances, and the gathering of multiple documents.<sup>48</sup>

Whereas all of these obstacles can present important difficulties of access for women who are all too often over-represented among the illiterate, the poor, and those overburdened with family-related obligations,<sup>49</sup> for victims of SRV there is of course the additional difficulty of providing evidence about facts that often take place out of public sight, especially given that victims do not often report the crimes or secure medical evidence.<sup>50</sup> Similarly, there is the risk of overexposure and the fear that stigma or reprisal may follow.<sup>51</sup> It is therefore essential that victims' confidentiality be guaranteed throughout the entire reparations process, for instance, by allowing women to give testimonies or provide evidence in private, at a distance, or through proxy.<sup>52</sup> Confidentiality may be more difficult to safeguard in the context of criminal proceedings which, being perpetrator focused, are likely to attain a higher degree of visibility, especially those of international or hybrid nature.<sup>53</sup> Having said this, courts in charge of deciding reparations for victims of SRV should also—to the fullest extent possible—try to adopt flexible evidentiary standards in the investigation of conflict-related sexual violence.<sup>54</sup> Similarly, action should be taken to avoid victims' secondary victimization, including through the adoption of measures to protect

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48. *See id.*

49. *See id.*

50. *See id.* at 321.

51. *See id.* at 322.

52. Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 80.

53. *See id.*

54. Thus, although the lack of complaint or medical examinations can make collecting evidence more difficult, it cannot represent insurmountable barriers to making progress in investigating the cases. For example, circumstantial evidence has been increasingly accepted by international tribunals such as the Extraordinary Chambers in the Courts of Cambodia or the International Criminal Tribunal for Rwanda. Indirect evidence such as anthropological expert reports which evidence pertinent patterns could be used in proceedings leading to judicial reparations, relying on information such as gender roles in the region, an increase in the number of births during a given period, a higher number of displaced women in a given area, and the position and clothing of bodies in a grave. The ICC's First Trial Chamber in its decision establishing the principles and procedures to be applied to reparations in *Prosecutor v. Thomas Lubanga Dyilo* has decided that, in view of the difficulty victims may face in obtaining evidence, "a balance of probabilities" may be sufficient and proportionate to establish the facts that are relevant to an order for reparations when it is directed against the convicted person, as opposed to the "beyond reasonable doubt" standard applied in criminal proceedings. Situation in the Dem. Rep. Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures to be Applied to Reparations, ¶ 253 (Aug. 7, 2012).

and accompany victims, relying, when necessary, on the help of trained psychologists.

*B. Ensuring the Participation of Victims and Relevant Civil Society Actors*

There is an increasing consensus on the notion that to be legitimate, reparations initiatives must allow for societal involvement. This too speaks for supplementing judicial venues with administrative programs, as they may offer better channels for the participation of different groups of victims and victims' associations,<sup>55</sup> as well as other civil society actors which may get actively involved in preceding consultation processes, registration of victims, and design, implementation, and monitoring of reparations initiatives.<sup>56</sup> Judicial venues should, however, also be adapted, to the fullest extent, to maximize the participation of victims and civil society actors in reparations proceedings, including allowing public interest organizations to present *amicus curiae* briefs.<sup>57</sup>

In the past, women's involvement in reparations discussions during transitions used to be either through their involvement in victims' groups—in which women have traditionally had a leading role demanding truth and justice for their loved ones, especially in cases of disappearances and killings—or through sectorial associations representing a particular group of victims, such as widows' associations.<sup>58</sup> Yet, for reparations programs seeking to ensure a maximum fit between harm and remedy, having first-hand knowledge about victims' perceptions and needs is crucial.

If all the above is true of victim participation in general, the situation of victims of SRV presents specific challenges. Given the stigma attached to the experience of sexual violence, victims of sexual violence are not likely to be willing to identify themselves, go to court, or organize and mobilize publicly to claim reparations. The dignitary dimension socially recognized in women who mobilize as “mothers” and “family members” is often absent when it comes to victims of SRV.<sup>59</sup>

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55. See NAIROBI DECLARATION, *supra* note 10, at princ. 35.

56. See *id.* at princ. 32.

57. The ICC's First Trial Chamber, in its decision establishing the principles and procedures to be applied to reparations in *Prosecutor v. Thomas Lubanga Dyilo*, has also endorsed the view that the Court should enable women and girls in the affected communities to participate in a significant and equal way in the design and implementation of any reparations orders. *Prosecutor v. Dyilo*, ICC-01/04-01/06, Decision, ¶ 209.

58. Paz y Paz Bailey, *supra* note 2, at 104–05.

59. Julie Guillerot, *Linking Gender and Reparations in Peru: A Failed Opportunity*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 2, at 136, 146–47.

Specific efforts to reach out to victims, including through the involvement of women's groups, may therefore be necessary.<sup>60</sup> Equally crucial is the protection of victims' confidentiality throughout the procedure, and allowing victims to come forward and claim reparations when they feel psychologically prepared to do so by endowing the registration procedure with a certain open time frame.<sup>61</sup> The involvement of women's groups and associations, and not just victims' associations, is also particularly important if the specific concerns of SRV victims are to come to the fore. Until very recently, such involvement was generally lacking. "Dealing with the past" has traditionally been the domain of victims' groups and human rights' groups. The same was not necessarily true of women's groups, often sufficiently occupied with "dealing with the present" and its persistent patterns of gender violence. Unfortunately, the absence of those groups best suited to represent the voices of the most silenced can only contribute to their further silencing.<sup>62</sup> It also represents a missed opportunity to draw links and allow the identification of continuities between the past and the present and to tackle persistent structural problems. We can therefore celebrate that more recent reparations discussions, such as those taking place in Sierra Leone, Timor-Leste, and Colombia, have been more successful in including the voice of women and women's groups.<sup>63</sup> Unfortunately, the voices of children are still often unheard, as are those of male victims of sexual violence.

*C. Overcoming Silencing, Under-Inclusion, Undervaluation, and Under-Specification*

Increasing awareness of the seriousness and multiplicity of harms ensuing from SRV, as well as path dependency, largely account

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60. In Sierra Leone, the National Committee for Social Action (NACSA), a quasi-governmental institution has taken the lead in establishing a reparations program with a specific focus on victims of conflict-related sexual violence, following, to a significant extent, the recommendations of the Truth Commission's Report. See Jamesina King, *Gender and Reparations in Sierra Leone: The Wounds of War Remain Open*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 2, at 246, 271; *Sierra Leone Victims Receive Compensation*, INT'L ORG. FOR MIGRATION, (June 26, 2012), <http://reliefweb.int/report/sierra-leone/sierra-leone-victims-receive-compensation> (stating that 10,753 victims received reparations funds for human rights violations). In order to identify women victims of sexual violence, NACSA staff worked with women's organizations who already had links with women and women's groups at community levels but difficulties were still encountered, since some women, fearing stigma, would still not come forward, in part because they had not told their family members about the violence they had experienced. See King, *supra* note 60, at 273.

61. Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 75.

62. See *id.* at 75–77.

63. See *id.* at 76.

for the recent trend to include rape and other forms of sexual violence among the list of violations that deserve reparations in reparations programs.<sup>64</sup> Recent reparations initiatives, such as those in Peru, Guatemala, Sierra Leone, and Timor-Leste, have explicitly incorporated forms of sexual violence among the list of violations, including those affecting children.<sup>65</sup> In past programs, sexual violence used to be either omitted or covered only implicitly.<sup>66</sup>

Although we must certainly celebrate the gradual overcoming of what we could call the problem of *silencing* SRV in reparations discussions, several problems remain in the categorization of SRV, indicating that sometimes insufficient attention is paid to the type or the scope of the harms victims of SRV experience, or to the relative importance attached to this form of victimization. These insufficiencies can be categorized as problems of undervaluation, under-inclusiveness and/or under-specification.

SRV can be symbolically undervalued in a reparations scheme when the scheme includes SRV among a broader list of violations but then considers it as less serious than other violations, for the purpose of quantifying compensation, without any obvious justification related to the nature or the severity of harms that victims experience.<sup>67</sup> For instance, Guillerot has critically called attention to the fact that in Peru, inclusion of sexual violence in its national reparations program came at the price of its undervaluation.<sup>68</sup> Violations were ordered on a scale of gravity, and rape ended up at the bottom because it was thought that rape did not end victims' lives, affect their ability to generate income, or interrupt their life projects, as compared with murder, forced disappearances, imprisonment, and even other violations

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64. *See id.* at 78.

65. *See id.* at 78. *See also* Dyan Mazurana & Khristopher Carlson, *Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Against Girls and Boys During Situations of Armed Conflict and Under Authoritarian and Dictatorial Regimes*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 162, 177–85, for a discussion regarding children. In the context of the ICC's work, there is also increasing awareness about the need to address victims' rights to reparation. *See id.* at 183–84. Article 75 of the Rome Statute, which typifies many of the most recurrent forms of SRV during conflict as war crimes, genocide and crimes against humanity, allows the ICC to "may make an order . . . specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Rome Statute of the Int'l Criminal Court, art. 75, July 17, 1998, 2187 U.N.T.S. 3. The Court may do this "either upon request or on its own motion in exceptional circumstances." *Id.* Modalities are governed by Rule 97(1) of the Rules of Evidence and Procedure, stating that the Court may award individual or collective reparation or both. Rules of Procedure and Evidence, Doc. No. ICC-ASP/1/3, Rule 97 (Sept. 3–10, 2002).

66. *See* Rubio-Marín, *Gender of Reparations in Transitional Societies*, *supra* note 37, at 78.

67. *See id.* at 78–79.

68. *See* Guillerot, *supra* note 59, at 159.



of physical integrity.<sup>69</sup> Fortunately, the most recent trend goes in the opposite direction, and several reparations initiatives, including those in East Timor and Sierra Leone, have recommended, for the purpose of material reparation, prioritizing victims according to vulnerability and including victims of sexual violence amongst the prioritized categories.<sup>70</sup>

A different problem takes place when sexual violence is included as a category among the violations that trigger reparations, but the forms of it that are covered are too narrowly defined to match the lived experiences of women. This inevitably results in the inadequate recognition of victims and the harms they experience.<sup>71</sup> This problem can be exemplified with reparations programs that have included only rape or generically referred to the broader concept of sexual violence, but still privileged phallic-centric expressions thereof, leaving out many other egregious forms of sexual violence, such as mutilation of other sexual organs or, in certain contexts, forced nudity.<sup>72</sup> Guatemala's national reparations program has been criticized for its under-inclusiveness.<sup>73</sup> It refers to "rape and sexual violence," but the latter is not interpreted to include sexual slavery, forced union with captors, sexual torture, or mutilation of sexual organs.<sup>74</sup> Similarly, regarding violations affecting children, the program has been criticized for including enforced prostitution of male and female children but leaving rape out of other forms of sexual enslavement.<sup>75</sup>

Yet other expressions of under-inclusiveness can be related to narrowly conceived notions of what counts as "public" or "political" SRV violence, as opposed to "private," "ordinary," or "non-conflict-related" violence. One possible form of bias leading to under-inclusion consists of making the hinging factor for including or excluding SRV the location of *where* the sexual act is perpetrated (typically, whether it takes place in a domain considered "public"—such as a prison or even the street—or "private"—such as, typically, the home, where it is not uncommon to see SRV accompanying searches targeting different family members).<sup>76</sup> A different form of bias consists of focusing

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69. *See id.*

70. *See* King, *supra* note 60, at 263; Galuh Wandita et al., *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 2, at 284, 309–10.

71. *See* Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 79.

72. *See id.* at 78.

73. *See* Paz y Paz Bailey, *supra* note 2, at 106–07.

74. *See id.*

75. *See id.* at 107–08.

76. *See* Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 88.

on *who* the perpetrator is, to either exclude or prioritize only state actors.<sup>77</sup> This ignores the fact that in situations of large-scale civil strife, the violence perpetrated against women often comes from non-state actors, including members of the guerrillas and civilian self-defense groups, who, in some cases, are responsible for some of the most egregious and systematic forms of SRV, such as domestic and sexual enslavement, or forced abortion or sterilization.<sup>78</sup>

Finally, another problem of categorizing SRV in ways that pay due attention neither to the nature of harm as experienced by victims, nor to the need to convey the proper meaning for this form of violence, can take place through *under-specification*, understood as the insufficient differentiation between significantly distinct forms of violence, by lumping them together under a common and generic term, often making only the sexual connotation of the violation pre-eminent and neglecting its reproductive dimension.<sup>79</sup> In fact, the term “sexual violence” is commonly used to refer to a wide set of practices which are, in terms of impact and harm, as diverse as rape (which does not have to lead to an unwanted pregnancy in every instance), forced impregnation (which consists precisely of imposing a pregnancy and therefore, in many cases, the lifelong burden of motherhood) or forced sterilization (which deprives women of the very possibility of motherhood).<sup>80</sup> Identifying remedies that are well suited to the nature of the harm entailed by the violation arguably requires the use of proper victimization categories.<sup>81</sup>

#### *D. Finding the Right Balance Between Giving Visibility to Sexual and Reproductive Violence and Exposing Individual Victims*

Slightly different from the discussion about which forms of sexual and reproductive harm are substantively covered by reparations programs is the issue of whether references to sexual violations ought to be rendered more or less explicit. Explicit labeling, typically by making victims of sexual violence a separate category, seems to have become the trend.<sup>82</sup> Given the traditional silencing of

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77. *See id.* at 86–87.

78. In this regard, the approach endorsed by the UN Action against Sexual Violence in Conflict, Analytical and Conceptual Framing of Conflict-Related Sexual Violence, which defines conflict-related sexual violence as that which has a direct or indirect link with the conflict, seems more adequate. U.N. Secretary-General, *Conflict-Related Sexual Violence: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/66/657-S/2012/33 (Jan. 13, 2012).

79. *See* Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 80.

80. *See id.* at 81.

81. *See id.* at 81–82.

82. *Id.* at 78.

sexual violence,<sup>83</sup> this trend is both understandable and commendable, and it may certainly help to break ancestral taboos which relegate SRV to the private domain. At the same time, though, fearing stigma, victims may actually feel more ready to come forward and claim benefits if they can present their claims under other rubrics. This is especially the case in those instances in which victims have good reasons to fear that the procedure might not be fully confidential. In Sierra Leone, for instance, many victims of SRV, fearing stigma, chose instead to come forward as widows.<sup>84</sup>

Also, less explicit categories can have the added advantage of covering forms of sexual humiliation which are not likely to qualify as autonomous violations but can still have a severe impact on victims. In South Africa, for instance, where sexual violence was not conceptualized as a separate gross violation as defined by a 1995 act,<sup>85</sup> something which has been criticized as the main reason why victims of sexual violence fail to come forward,<sup>86</sup> assault to genitals and breasts, rape, beating leading to miscarriage, and sexual abuse were, to some extent, nevertheless subsumed under broader categories of “severe ill-treatment” or “torture.”<sup>87</sup>

There are, in other words, trade offs. And although these choices must always be made in a context sensitive way, it is important to state the general principle that heightening visibility for the sake of reconstructing social meaning should not come at the price of exposing victims. In the end, much will depend upon the degree of gender sensitivity shown by authorities in charge of implementing the reparations process, and on the extent to which they succeed in operationalizing registration and delivery procedures that respect victims’ rights to safety, dignity, and privacy, as endorsed by the

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83. Colleen Duggan et al., *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT’L J. TRANSITIONAL JUST. 192, 195 (2008).

84. In its recommended reparations program, the CAVR in East Timor suggested the category of *inan mesak* (in the Timorese Tetum language, literally “mother alone”). Wandita et al., *supra* note 70, at 309. This category was specifically chosen to include both mothers who were not legally married when their partners were killed or disappeared, and victims of sexual violence who bore children out of rape. *Id.* This was thought to be a way of accommodating the preferences of those women who do not want to “out” their children or “come out” as victims of sexual abuse. *Id.* Similarly, in order to ensure that access to reparations for victims of SRV did not come at the expense of exposing individuals who would otherwise prefer to remain unidentified, it was foreseen that mothers should receive a variety of services including counseling, peer support, livelihood training, and access to microcredit at the same service delivery organization that they would have to visit once a month in order to receive the funds for their children. *Id.* at 310.

85. See Beth Goldblatt, *Evaluating the Gender Content of Reparations: Lessons from South Africa*, in *WHAT HAPPENED TO THE WOMEN?*, *supra* note 2, at 60.

86. See *id.* at 60, 63.

87. Goldblatt, *supra* note 85, at 63.

Nairobi Declaration.<sup>88</sup> Unfortunately, in this regard, past experiences provide a wide set of negative examples. In Guatemala, for instance, victims of rape were singled out in state-sponsored community ceremonies and given compensation checks that said “victim of rape,” contributing to their stigmatization.<sup>89</sup> And in Sierra Leone, although the process of registration was helpfully gender segregated, when women came together in large groups they were asked in relatively public settings—surrounded by other women—to identify the harm they had experienced, which meant that rape victims had to state in a public setting that they had experienced sexual violence.

### *E. Bringing Men to the Fore*

Women and girls have so far been the almost exclusive focus of groups calling for reparations for victims of sexual violence.<sup>90</sup> Awareness about the disproportionate number of female victims in a world of scarce resources may partly account for this.<sup>91</sup> More plausibly, this may simply reflect the female-specific approach to sexual violence that has prevailed in the human rights world and to which the U.N. system has historically contributed: an approach dictated by a need to react against the traditional neglect of women’s issues in international law.<sup>92</sup>

Yet, a harms-centered reparations agenda cannot ignore the fact that men and boys, too, are often victims of sexual violence,<sup>93</sup> and that their victimization also deserves explicit recognition. Men in conflict are forced to rape or witness the rape of their daughters, sisters, and wives.<sup>94</sup> Forced intercourse with the dead, castration, forced performance of fellatio, and forced intercourse in camps and detention centers are some of the other violent sexual practices used during war against men.<sup>95</sup> The long-term effects of such violence, such as mental health problems, infertility, sexual dysfunction, and social ostracism,<sup>96</sup> are often invisible even to actors concerned with the phenomenon of sexual violence, including physicians and aid

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88. NAIROBI DECLARATION, *supra* note 10, at princ. 2E.

89. Duggan et al., *supra* note 83, at 208.

90. Lara Stemple, *Male Rape and Human Rights*, 60 HASTINGS L.J. 605, 605 (2008).

91. *See id.* at 627.

92. *See id.* at 606, 627.

93. *See id.* at 606.

94. Elisabeth Jean Wood, *Variation in Sexual Violence During War*, 34 POL. & SOC’Y 307, 314 (2006).

95. *Id.* at 311–12.

96. *See* U.N. High Comm’r for Refugees, *Working with Men and Boy Survivors of Sexual and Gender-Based Violence in Forced Displacement*, 10 (2012), available at <http://www.unhcr.org/refworld/pdfid/5006aa262.pdf>.

workers who are not typically trained to recognize the physical traces of rape in men, nor to provide psychological counseling to male victims.<sup>97</sup> Moreover, if shame, fear of reprisal, and stigmatization are behind women's under-reporting, several reasons also seem to underlie men's unwillingness to come out as victims of sexual violence. These include feelings of emasculation, embarrassment, and distress, as well as the fear that no one will believe in their inability to defend themselves, and, ultimately the belief that reporting itself compromises one's masculinity.<sup>98</sup> The reluctance to report is further compounded by the fact that sexual violence against men is often excluded from crime reports and from the scope of action of NGOs working on sexuality and reproductive issues, something which may induce victims to think of their experiences either as "aberration[s]" or as problems "unworthy of redress."<sup>99</sup> Reparations programs have varied; whereas some have made no distinctions between men and women, others have unfortunately left out male victims of sexual violence altogether.<sup>100</sup>

It is important to understand that much of the sexual violence which targets men harms women, too, as does the unwillingness to pay due attention to it and render it socially visible. Much, though by no means all, of the sexual violence in settings of armed conflict against men is perpetrated by men, and reproduces gendered hierarchies typifying a "gendered power-play of masculinized dominance and feminized subordination."<sup>101</sup> To a large extent, the dignitary harm inflicted by sexual violence targeting men consists of emasculating men by treating them as "one would treat women"<sup>102</sup> or by making them feel as though they are "failed men," unable to control the sexuality of "their women" or to protect them from their vulnerable condition.<sup>103</sup> This violence helps to normalize meanings around masculinity and femininity and to reinforce the connection between

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97. Stemple, *supra* note 90, at 612.

98. *Id.* at 637.

99. *Id.*

100. Discussions were held in Peru, Guatemala, Timor-Leste, and Sierra Leone concerning whether male and female victims of sexual violence should all be treated in the same way. Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 98. In Peru, for instance, there was a debate as to whether reparations for victims of sexual violence should be reserved for women. Guillerot, *supra* note 59, at 158. In the end, it was decided to include male victims as well. *Id.* In Guatemala, however, it was determined that only female victims of sexual violence would qualify for reparations. Paz y Paz Bailey, *supra* note 2, at 106–07.

101. Stemple, *supra* note 90, at 627.

102. Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 75.

103. Debra Bergoffen, *Exploiting the Dignity of the Vulnerable Body: Rape as a Weapon of War*, 38 PHIL. PAPERS 307, 317 (2009).

womanhood and sexual domination.<sup>104</sup> Also, to continue treating sexual violence as a “women’s only issue” in spite of the evidence that men constitute a small but sizable percentage of victims perpetuates norms that characterize women as victims, and as a certain type of victim only. Sexual violence, in other words, cannot be treated as a “women’s only issue,” nor can women’s issues be reduced to “sexual violence only.”

Moreover, in certain armed conflicts, men, as well as women, are sexually targeted precisely because of their nonconformity to gender and sexual roles.<sup>105</sup> For example, “Colombia’s paramilitary groups . . . are known to have persecuted prostitutes, gays, and HIV-carriers for the sake of sustaining order and morality in their controlled domains.”<sup>106</sup> When this is the case, failing to include men as victims of sexual violence reinforces the divide between dominant and subordinate masculinities,<sup>107</sup> relying on a phenomenon that anthropologist Gayle Rubin famously described as the rationalization of sexual privilege through a “hierarchical system of sexual value” which ranks those practicing what is considered bad, abnormal, or unnatural sex at the bottom.<sup>108</sup>

A different question, and clearly one more difficult to address, is whether, and how, reparations programs that include affected family members among the circle of beneficiaries should address the harm men experience as a result of the sexual violence performed on the women close to them, such as wives and daughters, as when they are left with feelings of “shame and guilt [for example,] for having failed in their role as protector and head of the family.”<sup>109</sup> Psycho-social measures to help men overcome such feelings may not only be necessary to ensure their rehabilitation, but are probably also the most conducive to protect the affected women from a process of displaced frustration.<sup>110</sup> However, where reparations schemes contemplate compensation, compensating men financially for the sexual harm done to “their” women risks entrenching patriarchal norms

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104. *See id.* at 318, 322.

105. *See* Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 87.

106. *Id.*

107. *See* R.W. CONNELL, *MASCULINITIES* 78–79 (2nd ed. 2005) (discussing gender relations of dominance and subordination between groups of men).

108. *See* Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 279 (Carole S. Vance ed., 1984).

109. Duggan et al., *supra* note 83, at 195.

110. *See* King, *supra* note 60, at 267–68. This has been recognized by some reparations initiatives, such as Sierra Leone’s TRC, which recommended including family members of surviving victims among the potential recipients of medical services, including physical healthcare and psychological support. *Id.*

that interpret the harm of sexual violence as harm done primarily to men's assets or reputation.<sup>111</sup>

*F. Starting with Services: Rehabilitation First!*

When asked about reparations, female victims generally have been known to prioritize services for themselves and their children.<sup>112</sup> It is difficult to imagine this being any different in the case of victims of SRV, given the devastating physical and psychological consequences survivors face,<sup>113</sup> including trauma, depression, anxiety, the contraction of sexually transmitted diseases, unwanted pregnancies, health complications resulting from botched abortions, and other injuries, such as fistulas, uterine problems, vaginal lesions, and scarring.<sup>114</sup> The degree of urgency with which these injuries and effects must be addressed is compounded by the fact that many of them, such as incontinence or the contraction of HIV, may in turn become triggers of further stigmatization and ostracism.<sup>115</sup> Because of this, provision of adequate health services and other rehabilitation measures should be prioritized, for without them, the rest of the conceivable reparations measures may be purely illusory.<sup>116</sup> Discussions about reparations for victims of SRV should therefore start with a mapping of the universe of victims and an estimation of the costs of foreseeable medical and psychological treatment that those victims may require, including, for instance, life-prolonging antiretroviral treatment, prophylaxis HIV treatment, and fistula surgeries. Special emphasis should be placed on reaching male victims who may have different and specific needs that are often neglected.<sup>117</sup> Attention should also be focused on "providing contextually specific and [culturally] appropriate interventions for mental health."<sup>118</sup>

The significance and potential of sexual and reproductive primary health services has been recognized by some commissions in

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111. Colleen Duggan & Ruth Jacobson, *Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 121, 137.

112. See King, *supra* note 60, at 255.

113. Anne-Marie de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 *LEIDEN J. INT'L L.* 207, 208 (2007).

114. *Id.*

115. See Duggan & Jacobson, *supra* note 111, at 124.

116. See CLARA SANDOVAL VILLALBA, *REDRESS, REHABILITATION AS A FORM OF REPARATION UNDER INTERNATIONAL LAW* 15 (2009) (discussing how rehabilitation is a means to help victims "attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.").

117. See Stemple, *supra* note 90, at 628.

118. Duggan & Jacobson, *supra* note 111, at 147.

charge of recommending reparations, such as Sierra Leone's Truth and Reconciliation Commission.<sup>119</sup> Moreover, awareness about the degree of urgency of addressing physical and psychological rehabilitation has sometimes prompted commissions in charge of recommending or delivering reparations to undertake interim or urgent relief reparations measures, duly prioritizing health measures for victims.<sup>120</sup> In East Timor, the Commission for Reception, Truth and Reconciliation (CAVR) put into place interim reparations for those most affected, which included victims of conflict-related sexual violence.<sup>121</sup> Victims benefitted from \$200 grants and access to services, and participated in healing workshops.<sup>122</sup> Unfortunately, in Sierra Leone, although \$100 grants were provided for victims of sexual violence as an urgent relief measure, time pressure did not allow for implementation of a wider set of planned measures, which included educational support to child victims, free fistula surgery and HIV/AIDS and sexually transmitted infection testing for rape victims, free health care, and psychosocial support.<sup>123</sup>

In view of the frequent rejection of victims of SRV by families and communities,<sup>124</sup> and the fact that victims are often responsible for children born out of rape<sup>125</sup> (themselves objects of stigma and discrimination),<sup>126</sup> due attention should also be paid to the housing

119. King, *supra* note 60, at 263.

120. In the case of judicially ordered reparations, courts could rely upon provisional measures in order to give urgent assistance to victims and witnesses. For instance, the Rome Statute of the International Criminal Court allows the Pre-Trial or Trial Chamber to take provisional measures, and such provisional measures could include measures to assist victims and/or witnesses involved in proceedings. See Rome Statute of the International Criminal Court art. 57(3)(e), July 17, 1998, 2187 U.N.T.S. 38544; Rules of Procedure and Evidence—Rule 99(1), Assembly of States Parties to the Rome Statute of the International Criminal Court, Sept. 9, 2002, ICC-ASP/1/3.

121. See COMM'N FOR RECEPTION, TRUTH AND RECONCILIATION IN TIMOR-LESTE, CHEGA! 43 (2005), available at <http://www.cavr-timorleste.org/en/cheгаReport.htm>.

122. See *id.*

123. See U.N. ENTITY FOR GEND. EQUALITY AND THE EMPOWERMENT OF WOMEN AND U.N. DEV. PROGRAMME, REPARATIONS, DEVELOPMENT AND GENDER: REPORT OF THE KAMPALA WORKSHOP DEC. 1–2, 2010 16 (2010), available at <http://www.unrol.org/files/Kampala%20workshop%202011-%20Reparations,%20Development%20and%20Gender.pdf> (stating that a \$100 urgent interim reparations grant was given to victims of sexual violence); SIERRA LEONE TRUTH & RECONCILIATION COMM'N, WITNESS TO TRUTH: REPORT OF THE SIERRA LEONE TRUTH & RECONCILIATION COMMISSION VOL. 2, 194–95, 252, 255, 256, 258 (2004), available at <http://www.sierra-leone.org/Other-Conflict/TRCVolume2.pdf> (listing the reparations measures that were originally planned by the Truth and Reconciliation Commission); King, *supra* note 60, at 258–59 (emphasizing the time and resource constraints faced by the Truth and Reconciliation Commission).

124. See King, *supra* note 60, at 263.

125. See *id.* at 267.

126. See R. Charli Carpenter, War's Impact on Children Born of Rape and Sexual Exploitation: Physical, Economic and Psychosocial Dimensions 35 (Sept. 16, 2012)



needs of survivors. This is especially important when, to escape societal harms, they relocate to other communities and cannot avail themselves of property or housing restitution measures that a reparations program may otherwise contemplate.<sup>127</sup>

*G. Breaking Away from False Dichotomies: Compensation, Too!*

The importance of social-service packages, such as preferential access to health, education, and housing for victims of SRV does not mean that, given proper resources, other reparations measures, such as compensation, should not also be considered. A priori, there is no reason to make victims choose between rehabilitation services and payments, in the form of cash transfers or pensions. In calculating compensation amounts, possible gender biases in the estimation of assessable damage must be overcome.<sup>128</sup> In the case of victims of SRV, this requires bringing to the fore the dimension of economic loss entailed by complex health issues, as well as by the ostracism, spousal, and/or communal rejection that often ensues.<sup>129</sup>

Much more thought also ought to be given to the opportunity costs and material implications of the inability to conceive, as well as to the often lifelong financial burden of raising unwanted children resulting from rape.<sup>130</sup> Regrettably, no reparations program to date has sought either to fully compensate mothers, or to restore them to their *status quo ante* condition by allowing them to place their children in public institutions or elsewhere.<sup>131</sup> Certainly this option raises complex moral issues, especially if one considers unwanted children themselves as victims. But by no means is it obvious that unwilling mothers will be able to ensure the best interests of the child, nor that women's individual well-being ought to naturally be sacrificed for that of the children of their rapist.

Compensation for victims of SRV has indeed been contemplated by some reparations programs, such as Guatemala's 2003 National Reparations Program (*Programa Nacional de Resarcimiento*), which has provided \$2,667 in cash payments, as well as psychosocial measures.<sup>132</sup> These measures have included counseling and other services for physical and/or mental rehabilitation for survivors of rape and

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(unpublished manuscript) (available at <http://people.umass.edu/charli/childrenbornofwar/Carpenter-WP.pdf>).

127. See King, *supra* note 60, at 263.

128. See Rubio-Marín, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 99.

129. See King, *supra* note 60, at 266–67.

130. See *id.* at 252.

131. See *id.* at 267, 276.

132. Duggan et al., *supra* note 83, at 200.

sexual violence.<sup>133</sup> Instead of disbursing one-time lump sums, other countries like Bosnia have explored the option of providing rape survivors with a monthly pension, an option which may increase the chances that the money actually stays in the women's hands.<sup>134</sup> Finally, other countries with scarce resources have instead prioritized services and income-generating skills and projects over payments, in the belief that this may be more conducive to women's long-term economic empowerment. In Sierra Leone, for instance, the National Committee for Social Action (NACSA) decided to spend the \$999,999 provided by the UN Trust Fund for the Elimination of Violence Against Women in 2009 on running specific programs for victims of sexual violence in skills training, toolkits, and start-up grants, as well as on fistula surgery and gynecological care and symbolic reparations.<sup>135</sup> Income-generating projects and schooling may also be particularly adequate for abused children, as well as for children of abused mothers, who may be in need of support if their mother is disabled, or has died or will die as a result of the diseases she contracted through the sexual violence she endured.<sup>136</sup>

In the end, different countries will inevitably confront different sets of opportunities depending on the nature of the post-conflict challenges and the quantity of material resources available. What is important, more than prescribing a fixed formula about the proportion of resources that should be destined to the provision of services or compensation, is to make sure that SRV, and its material consequences for victims, is not devalued when compared to other violations. Victims of SRV, like other victims of human rights violations, are *a priori* entitled to all forms of reparations, and to the extent that there are means available, no false trade offs should be established.

What some experiences have shown, though, is that giving large lump-sum payments to women may actually not be the best way to ensure that the money stays in their hands, or, even worse, may expose them in ways that threaten their safety. In situations where patriarchal structures or complex bureaucracies undermine women's agency, governments might consider granting small pensions over

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133. *Id.*

134. Selmin Calypkan, *Trauma Response and Prevention: Precondition for Peace and Justice*, 27 FORCED MIGRATION REV. 54, 54 (2007).

135. U.N. DEV. FUND FOR WOMEN (UNIFEM), UNIFEM ANNUAL REPORT 2009–2010 23 (2010), available at <http://www.unhcr.org/refworld/docid/4c3c0b5a2.html>; THE U.N. TRUST FUND TO END VIOLENCE AGAINST WOMEN, ANNUAL REPORT 2010 16 (2010), available at [http://www.unwomen.org/wp-content/uploads/2011/03/UNTF\\_AnnualReport2010\\_en.pdf](http://www.unwomen.org/wp-content/uploads/2011/03/UNTF_AnnualReport2010_en.pdf). See U.N. ENTITY FOR GEND. EQUALITY AND THE EMPOWERMENT OF WOMEN, TRUST FUND GRANTEES—14TH CYCLE (2009), available at [http://www.unifem.org/gender\\_issues/violence\\_against\\_women/trust\\_fund\\_grantees.php#africa](http://www.unifem.org/gender_issues/violence_against_women/trust_fund_grantees.php#africa).

136. De Brouwer, *supra* note 113, at 236.

time, as was done in Bosnia, instead of disbursing one-time payments<sup>137</sup> They might also explore other options including making survivors share-owners in microfinance institutions.<sup>138</sup>

If the option of monetary compensation is contemplated, thought must be given to the possibility that stigma might ensue and that confidentiality and other measures might be required to protect victims from further abuse. In Guatemala, for instance, some victims of SRV are being accused by members of their community of willingly giving sex to the enemy for money.<sup>139</sup> It certainly has not helped that the check is written out to "victim of rape," or that the measure of economic compensation to which only some victims are entitled has been implemented in isolation from the rest, thus provoking large-scale resentment.<sup>140</sup> Similarly, it has been noticed that in the case of forced wives, the payment may be seen as a reward for carrying out or supporting those who carried out atrocities, leading to resentment and increased tension and disharmony between the children and their return community.<sup>141</sup>

#### *H. Relying on Symbolic Redress to Create the Proper Interpretive Context*

The crux of the problem is that for reparations to successfully give victims due recognition and some form of repair, the proper interpretive context has to be in place first. This is rarely the case with sexual violence.<sup>142</sup> The prevailing perception of women and their bodies as commodities for sexual gratification and/or objects of merchandising naturally comes to occupy a space in the public imagination the minute money and what is perceived as sex, instead of violence, are put together. Not surprisingly, victims themselves have sometimes refused monetary compensation in the absence of a proper interpretive context.<sup>143</sup> A telling case in this respect is that of the so-called "comfort women," women who were exploited sexually by the Japanese army during the Second World War and who

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137. Calypkan, *supra* note 134.

138. See Anita Bernstein, *Tort Theory, Microfinance, and Gender Equality Convergent in Pecuniary Reparations*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 291, 293 (highlighting the benefits of payment of compensation in the form of shares in a microfinance institution over cash payments).

139. Duggan et al., *supra* note 83, at 210.

140. *Id.* at 208; Mazurana & Carlson, *supra* note 65, at 193.

141. Mazurana & Carlson, *supra* note 65, at 193.

142. See Miller, *supra* note 4, at 30.

143. See Duggan & Jacobson, *supra* note 111, at 139 (stressing the importance of ensuring that "the way in which . . . benefits are conceived and delivered ensures that the meanings conveyed will be proper to dignify victims").

have since insisted that monetary payments be accompanied by the proper form of apology.<sup>144</sup>

In other words, official apologies by the state and its agents, such as the military and the police, and not just fistula surgeries, may be called for to overcome prejudices about sexual violence and to facilitate the psychological rehabilitation of victims. Indeed, this has been recognized by some truth commissions, such as those in Sierra Leone, Ghana, and Timor-Leste, all of which have endorsed official apologies to women.<sup>145</sup> In the end, then, it may be essential to pair measures of material redress, whether in the form of services or payments, with symbolic measures of redress, whether of an individual or collective nature, precisely because symbolic forms of recognition can help in setting up the proper interpretive context as the necessary background for material forms of reparation.

From this we can conclude that, other things being equal, complex programs that do not limit themselves to the distribution of payments or services, but rather distribute a variety of measures, both material and symbolic, seem better tailored to meet the specific needs of victims, including those of victims of SRV. This is because the combination of material redress, in the form of services and payments, and symbolic recognition provides better chances for the kind of meaningful reconstruction necessary to combat stigma. The fact that complexity is indeed becoming more and more the trend in reparations programs is therefore to be celebrated. The synchronized implementation of the different types of measures is of crucial importance as well, and remains, in view of past experiences, a great challenge.

### *I. Creatively and Cautiously Endorsing Collective Reparations*

The combination of individual and collective reparations measures is also a reflection of the growing trend towards complexity,<sup>146</sup> as well as, in many situations, a concession to the need to reach out to a wide universe of victims with meager resources. In reality, the generic label of “collective reparations” can cover a wide variety of measures.<sup>147</sup> Sometimes the term “collective” is used to refer to

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144. See Brandon Hamber & Ingrid Palmay, *Gender, Memorialization and Symbolic Reparations*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 324, 369–73.

145. Duggan & Jacobson, *supra* note 111, at 151.

146. See Ruth Rubio-Marín, *Gender and Collective Reparations in the Aftermath of Conflict and Political Repression*, in *THE GENDER OF REPARATIONS*, *supra* note 3, at 381, 384 (noting the shift towards broader reparations programs).

147. See *id.* at 385.

measures that are put in place to reach victims—or different groups of victims—jointly, as when a collective apology is issued for victims or for a certain group of victims.<sup>148</sup> Other times, a “collective” approach to reparations refers to the singling out, for the purpose of advancing reparations initiatives, of regions that have been specifically targeted during the conflict, or locations with a high concentration of victims or identity groups, such as indigenous peoples, who might have endured group-specific forms of violence and harm.<sup>149</sup> Yet other times, the label of “collective” refers to the nature of the distributed benefits, public and non-excludable, such as measures to restore roads, public hospitals, schools, or markets.<sup>150</sup> In the implementation of collective reparations, it is common to rely upon bottom-up approaches, opening participatory paths and rendering resources available to let victims organize themselves and decide jointly what it is that would serve their collective needs for redress best.<sup>151</sup>

Although the specific set of circumstances should, in principle, guide the decision about the proper combination of individual and collective remedies in each situation, there are certain general considerations that speak in favor of endorsing collective reparations as a supplement to individual reparations, so as to reach, recognize, and avoid further harm to victims of SRV. Perhaps the most obvious advantage of collective forms of assistance is that they can ensure minimum exposure, as they have the potential to reach unidentified victims who, due to their stigmatization and/or social situation, cannot easily claim reparations through more formal or individualized procedures.<sup>152</sup> Being able to access treatment centers to avail themselves of physical, psychological, and medical assistance may, for instance, be particularly important for victims of SRV. The same can be said of schools built for abused children or the children of raped mothers.

Moreover, whereas symbolic measures in the form of individualized public apologies or memorialization for victims of SRV risk harming victims by “outing” them and exposing them to further stigma, collective apologies or memorialization may be important

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148. *Id.*

149. *See id.* at 385–86.

150. *See* Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in *THE HANDBOOK OF REPARATIONS*, *supra* note 13, at 560, 573.

151. *See* Valérie Couillard, *The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence*, 1 *INT’L J. TRANSITIONAL JUST.* 444, 451 (2007) (emphasizing the importance of involving women at all stages of planning, design, and implementation of reparations programs).

152. De Brouwer, *supra* note 113, at 233.

tools for meaning reconstruction,<sup>153</sup> and thus helpful to overcome prejudices about the private nature of sexual crimes and to facilitate the psychological rehabilitation of victims.<sup>154</sup> Several truth commissions, including those of Sierra Leone, Ghana, and Timor-Leste, have indeed recommended the use of official apologies by the state and its agents (such as the military or police) to women, including victims of SRV.<sup>155</sup>

Finally, given the common experience of stigma, isolation, and internalized guilt that many victims of sexual violence experience, collective reparations can channel funds and infrastructure to provide survivors with safe spaces, spaces of mutual recognition and self-help, or even platforms for social and political engagement. These spaces could allow survivors to travel the road from victims to agents of change, so as to reach out to other victims or to develop political-legal skills to lobby for reparations or for wider structural and legal reforms needed to tackle the sexual violence continuum.<sup>156</sup> An inspiring example is provided by the international NGO Project Counseling Services, which, acting with local partners, has focused on creating space for victims to set the agenda for their own course of recovery and pursuit of justice.<sup>157</sup> Victims decide who is to know the truth and when, and if and how justice should be pursued, including when to press their case through the court system.<sup>158</sup>

Collective reparations measures, as a supplement to individual redress measures, thus deserve serious consideration because, if duly implemented, they may maximize access and minimize exposure of individual victims of SRV. At the same time, they may also contribute to meaning transformation around sexual violence. They must not, however, be embraced unconditionally. In fact, certain specific risks can be identified. First, any process of dislocation and territorial decentralization of decision-making power to enhance the participation of the addressees must take into account the kinds of local constraints, including those deriving from customary or religious norms and rules of conduct, threatening women's empowerment.<sup>159</sup>

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153. See Duggan & Jacobson, *supra* note 111, at 150 (stating that individualized acknowledgments of victims of SRV is generally not feasible because of stigma and ostracism).

154. See Hamber, *supra* note 150, at 564.

155. See Duggan & Jacobson, *supra* note 111, at 151.

156. *Id.*

157. See *id.* at 148.

158. Duggan et al., *supra* note 83, at 205.

159. The Nairobi Declaration rightly points out that reparations programs must specifically address the needs of women and girls by being supportive of their empowerment and autonomy, notably by allowing them to determine the form of reparation that is adequate to their situation and by overcoming customary law and practices that keep women from deciding for themselves. NAIROBI DECLARATION, *supra* note 10, at princ. 1D.

Initiatives of collective reparations must therefore be duly accompanied by active efforts to reach out to men and women who might have been subject to sexual violence, following procedures that respect their confidentiality, and duly informing them about their rights and reparations entitlement, as well as possible venues and modalities of reparations available. The victim's ability to count on the support of those civil society groups closest to victims may be essential in this task. Attention must be paid to male victims who are, still to this day, much less likely to count on associational support.<sup>160</sup> Moreover, given traditional understandings around sexual violence harming community honor,<sup>161</sup> it is important that collective measures come to supplement, and not replace, individual benefits. Otherwise, we risk entrenching, rather than subverting, the understanding that it is the honor of the community that is in need of repair. Finally, collective measures targeting regions with high concentrations of victims may be ineffective in reaching those victims who, because of shame, stigma, or ostracism, have abandoned their communities of origin and relocated elsewhere.

A report assessing the gender sensitivity of collective reparations programs in Peru gives us few reasons for optimism.<sup>162</sup> Based on interviews in nine villages with beneficiaries of the Peruvian Collective Reparations Program, the report found that women affected by the conflict had been subjected more often to sexual violence than to murder, disappearance, or torture.<sup>163</sup> Yet, among the initiatives undertaken by the Program, the government failed to include measures that would allow the whole community to address the consequences of sexual violence or reduce the stigma surrounding it.<sup>164</sup> Women's overall participation in the design of the community projects was low, and women's organizations failed to propose any scheme of collective reparations.<sup>165</sup> Nor did the Program establish any provision to actively encourage women's participation in the definition of projects that would directly affect them.<sup>166</sup> In view of this, if collective reparations are to become more and more an essential tool in reparations initiatives around the world, it may be worth taking note of East Timor's CAVR recommendation to earmark fifty percent of resources available for female beneficiaries.<sup>167</sup>

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160. Goldblatt, *supra* note 85, at 76.

161. Duggan et al., *supra* note 83, at 195.

162. APRODEH, SITUACIÓN DE LAS MUJERES QUE HAN RECIBIDO REPARACIÓN COLECTIVA 21 (2010), available at <http://www.aprodeh.org.pe/images/stories/pdf/Reporte%203%20mujeres.pdf>.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 27–29.

167. Wandita et al., *supra* note 70, at 308.

*J. Structural Reform and Meaning Transformation Through Public Education: Guaranteeing Non-Repetition*

Victims of SRV are entitled to guarantees of non-recurrence. Conceptually, this is the reparations mechanism that offers the greatest potential for transforming gender relations because, in promising to ensure non-repetition, it forces societies to confront the underlying structural causes of the violence and their gendered manifestation.<sup>168</sup> Conversations about institutional or legal reforms that might be called for are particularly appropriate in view of the fact that, in all post-conflict societies, exposure to sexual violence continues to threaten women's daily lives, and that women and girls who have been victims of SRV in the past are often at increased risk of revictimization.<sup>169</sup>

In this way, reparations discussions can be seized as an opportunity to implement or trigger broader reforms to tackle impunity surrounding sexual violence. In fact, failure to do so means losing the opportunity to maximize both access and meaning transformation. It is hard to imagine survivors of sexual violence breaking the taboo about their victimization, gaining awareness about the public and political dimension thereof, and organizing and coming out to claim reparations when sexual violence still forms part of their ordinary lives or that of other women close to them; when perpetrators are not prosecuted; when, because of discriminatory criminal laws, procedures, and/or law enforcement agents, victims lack access to justice; when restrictive abortion legislation still imposes upon them the burden to carry through with pregnancies that result from rape; or when, in the case of men, both legislation and society entirely ignore its occurrence. Such a normative framework not only results in impunity but also, culturally speaking, reinforces sexually subordinating understandings which see sexual violence only as a women's issue, as well as a normal part of a woman's "private life," for which women are often held partly responsible, not worth the effort fighting against, and consequences thereof, when it translates into pregnancy, must be born by women.

More broadly, it can be argued that the right approach to SRV, when discussing transformative reparations, requires seeing such violence as a manifestation of larger gender inequities that exist in a given society.<sup>170</sup> Both the need to tackle the roots of the causes so

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168. *Id.* at 117.

169. Audrey K. Miller et al., *Self Blame Among Sexual Assault Victims Prospectively Predicts Revictimization: A Perceived Sociolegal Context Model of Risk*, 29 BASIC & APPLIED SOC. PSYCHOL. 129, 129 (2007).

170. Couillard, *supra* note 151, at 445. See also NAIROBI DECLARATION, *supra* note 10, at princ. 3H (stating that in the specific case of sexual violence, "[r]eparation must go



as to avoid repetition, and the need to address the situation of material destitution and insecurity that many victims of SRV confront, partly because of discriminatory legal systems, can thus be natural entry points for linking the reparations and the gender antidiscrimination agendas in transitional societies.<sup>171</sup> Some commentators have rightly argued that transformative reparations for victims of SRV should trigger legal reforms to ensure women equal opportunities to inherit and own land and property, the right to a safe abortion, and a life free of violence.<sup>172</sup>

Legislative reforms may, however, be insufficient to address the problematic meanings attached to SRV in many societies, for such legislative transformation, in general, is unlikely to succeed in the absence of “signs of a rising wave of cultural support.”<sup>173</sup> Because of this, reparations initiatives should be accompanied by wider educational campaigns.<sup>174</sup> Certainly, educating security sector officials and law enforcement agents about human rights in general, and women’s rights in particular, must be part of it. But the kind of transformation needed to avoid secondary victimization and transform the general climate of impunity surrounding sexual violence, as well as to allow men to come out as victims of SRV, requires wider educational strategies eliciting reflection about the relationship between gender structures and sexual domination.<sup>175</sup> for which reliance on mass media may be particularly appropriate. Essential to this purpose, if both men and women survivors are to gain due acknowledgment, is critical engagement with dominant models of masculinity, which prescribe physical violence and limit certain forms of emotional expression.<sup>176</sup> This will require the active engagement of men, and not only women, as current gatekeepers of gender

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above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women’s and girls’ lives”).

171. The 2011 UN Secretary-General Report on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, in recognizing the broader terrain of inequality in which systematic and serious human rights violations take place, affirms that reparations are an important vehicle to address gender inequality, formally viewed as a “root cause of violence against women and girls.” U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, *supra* note 9, ¶ 27. The Report links reparations for sexual and gender-based harms with efforts to eliminate economic and social marginalization, with specific emphasis on “increased access to health, education, property rights and positive redistributive measures.” *Id.*

172. See Duggan & Jacobson, *supra* note 111, at 156.

173. Lessig, *supra* note 38, at 1030.

174. Rubio-Marin, *The Gender of Reparations in Transitional Societies*, *supra* note 37, at 118.

175. See *id.*

176. Michael Kaufman, *Building a Movement of Men Working to End Violence Against Women*, 44 DEV. 9, 10 (2001).

orders.<sup>177</sup> The active and voluntary participation of male and female survivors, channeled through publicly broadcasted truth-telling platforms facilitated by the state and relying on modern technologies to ensure victims' anonymity, could serve two purposes. First, it could rehabilitate victims who seek to speak their truth. Second, it could bring to light the severity, pervasiveness, and harming nature of SRV on both men and women's lives, thereby breaking taboos that get in the way of both individual and collective trauma recovery.<sup>178</sup>

#### SUMMARY AND FINAL THOUGHTS

Rape, sexual mutilation, forced prostitution, sexual slavery, forced pregnancy, abortion, sterilization, and sexual torture are reported in many contemporary conflict contexts and have devastating effects on women, men, and children. Not only do these forms of violence translate into severe, sometimes life-threatening physical and mental harms, they also all too often lead to stigma, ostracism, and rejection by families and communities, leaving victims both emotionally and materially devastated. The increasing perception that sexual and reproductive violations are not just marginal side-effects inextricably linked to the opportunities and incentives provided by contexts of war or authoritarian regimes, but that they actually constitute central features of such scenarios and are serious violations of human rights calling for redress, is to be celebrated, even though until now many of the reparations initiatives which have included victims of SRV have remained dead letter. As the awareness of the inexcusability of failing to provide reparations to victims of SRV gains a foothold, one can only hope that women will not be further sexualized in the process and that the multiple forms of gender-specific and non-sexual harms that men and women experience in situations of conflict or authoritarian repression will not be neglected in the reparations agenda.

The incorporation of SRV into this agenda is already acting as an engine of cultural transformation by granting this form of violence and the disparate impact it has on women's lives both a public and a political dimension. It is women's citizenship, and not just women's bodies, which is at stake. Unfortunately, insufficient attention has been given so far to the ways in which SRV can also affect men and the impact both the violence and the taboos that surround it can have on men's mental and physical well-being. It is time to

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177. *Id.* at 11. See also U.N. DIVISION FOR THE ADVANCEMENT OF WOMEN, THE ROLE OF MEN AND BOYS IN ACHIEVING GENDER EQUALITY: REPORT OF THE EXPERT GROUP MEETING 3 (2004).

178. Duggan et al., *supra* note 83, at 195.

bring men to the fore, not only to give male survivors their due, but also to seize the opportunity to challenge dominant models of masculinity underlying sexual violence performed on both men and women, models of masculinity which continue to harm most women and many men in both “transitional” and “transitioned” societies.

A modest cultural transformation concerning the meaning of SRV, necessary to combat victims’ stigmatization as well as normalized impunity surrounding SRV, may be the most concrete gain from including SRV in the reparations agenda. Unfortunately, however, given that processes of cultural redefinition takes time, we can expect great difficulties in reaching out to actual victims of SRV who, fearing stigma and feeling shame, may forgo whatever benefits are put into place. When designing reparations initiatives for victims of SRV, it will therefore not be enough to make sure, as with reparations in general, that the benefits provided match the needs of victims, but also that the mechanisms and procedures are designed with an eye towards minimizing the actual exposure of victims.

In this Article, I have advanced the view that there are concrete ways in which reparations initiatives can simultaneously try to live up to the general principle of maximum recognition of harm and an adequate correlation between harm and remedies, as well as to two principles that should specifically inspire reparations for SRV: minimum exposure of individual victims and maximum transformation of the meaning of SRV. These principles, I contend, should be optimized if victims are to have a meaningful chance to access adequate reparations, without being exposed to further harm.

Summarizing, the Decalogue for reparations for conflict-related SRV articulated here contains the following guidelines:

- i) When possible, judicial venues should be supplemented with large scale administrative reparations programs which can simplify procedures, maximize victims’ confidentiality, lower standards of evidence, and overcome other well-known obstacles women and victims of SRV have traditionally experienced which prevent them from accessing the court system.
- ii) Administrative programs may also better lend themselves to ensure the participation of victims and other relevant civil society actors at every stage (design, implementation, monitoring) of a reparations process. This participation is now a generally accepted condition of legitimacy of reparations procedures, as well as a crucial requirement to ensure that the needs of the most silenced victims, including victims of SRV, are

duly taken into account. In particular, inviting women's groups and associations to reparations discussions is likely to contribute to the inclusion of SRV among the list of violations that ought to trigger reparations.

- iii) Once SRV has been taken up in reparations initiatives, it is equally important that it not be marginalized through under-inclusion, under-evaluation or under-specification. SRV should not be considered *a priori* a "less serious violation." Its definition should be sufficiently broad to match the lived experiences of both male and female survivors, and specific attention should be paid to the reproductive component.
- iv) While breaking the taboo around SRV and giving it due visibility in reparations initiatives is in principle to be applauded, creative design options and implementation procedures should nevertheless be explored to make sure that victims' confidentiality is duly preserved. This will minimize the chances of exposure of individual victims, who could otherwise be branded and stigmatized as "rape victims."
- v) Whereas this is certainly important to protect women's and children's safety, status, and material well-being, much the same can be said about male victims of SRV who have traditionally experienced great obstacles in stepping forward and claiming justice. Reparations initiatives should therefore not only make the inclusion of male victims explicit, but also rely on targeted outreach strategies to make sure that male survivors have access to their due redress. This would contribute to unsettling cultural idioms that harm women when they present sexual violence as an almost ontologically "female only" question.
- vi) The provision of adequate, and often urgent, health services and rehabilitation measures for victims of SRV should be prioritized because, failing this, any other conceivable form of redress may remain purely illusory. Housing and educational needs may also be essential to ensure the safety and social rehabilitation of victims, especially children and displaced victims.
- vii) However, no false dichotomies should be accepted. Lack of resources may impose hard choices, but victims of SRV are, in principle, entitled to both rehabilitative and compensatory measures. The need for the latter is obvious once the material consequences entailed by

SRV are brought to the fore, as they should be. Ensuring that compensation measures will not expose women to further threats and will instead enhance their decision making power requires thinking of ways to protect victims' confidentiality and delivery formulas, which can be women friendly.

- viii) Most likely, the objective of protecting victims who access compensation from further stigma will not be achieved unless the monetary redress of survivors of SRV is also accompanied by symbolic forms of reparation, which can contribute to shaping the proper interpretive context for economic compensation.
- ix) Individual forms of reparation should, in principle, be supplemented with collective reparations measures, as these can guarantee maximum access and minimum exposure of victims of SRV. Collective reparations mechanisms may also be particularly conducive to channeling the funds needed to put into place health and service centers, along with safe spaces (spaces of mutual recognition, self-help and mobilization), which may be essential to allow victims to overcome isolation and regain a sense of agency. Caution is needed to make sure that the actual needs of individual survivors of SRV are not simply sacrificed for the sake of recovering general infrastructure, and that the power to decide what forms of collective redress are most needed is not simply delegated to local, religious or traditional authorities, which may not duly consult with women.
- x) Finally, reparations of SRV seeking meaning transformation must explore ways to educate both state officials and the public at large about the links between human rights, women's rights and SRV. More importantly, SRV should be seen as a manifestation of larger systems of gender inequities. Both the need to address the roots of the causes so as to ensure non-repetition, and the need to give an answer to the situation of utter material destitution in which victims of SRV often find themselves (as a result of the combined effect of the experience of violence and sex-discriminatory legislation), should provide natural entry points to link reparations initiatives to broader conversations about the necessary structural, institutional and legal reforms that would allow the construction of more inclusive and sex-egalitarian democracies.