

Procedural and Substantive Obstacles to Reparations for Women Subjected to Violence through Judicial and Administrative Forums

Carla Ferstman, Director, REDRESS [www.redress.org]

Mandate of the Special Rapporteur on Violence Against Women, Its Causes and Consequences -
Panel Discussion on Reparations for Women Subjected to Violence

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It is an honour to be part of the Special Rapporteur's panel discussion which follows the submission of her first thematic report to the Human Rights Council.¹ The theme of the Special Rapporteur's Report – Reparations for Women Subjected to Violence – is both timely and appropriate, taking into account the multiple challenges faced by women subjected to violence in seeking reparations through recourse to judicial and other less formal mechanisms of redress.

REDRESS has a strong interest in the issue and welcomes the Special Rapporteur's emphasis on it. We provide support and legal assistance to survivors of torture and related international crimes to assist them to access justice and other forms of reparations for the harm they suffered and work to reform the laws and end the practice that foster impunity for such practices in countries around the world. Many of the individuals who fall within our mandate are women and girls.

The torture of women and girls is a worldwide practice even though it is not often talked about. When one speaks of torture, one has a certain image in mind – that of a male detainee in a police cell subjected to electric shocks or repeated beatings, the use of stress positions, mock executions or other like practices. But, the experiences of women and girls provide an added dimension to the problem and deserve closer scrutiny. Women can be tortured in their homes, whilst in police or other official custody and are regularly subjected to torture during periods of conflict as part of the strategy of warring parties.

In the private sphere, the UN Special Rapporteur on Torture has noted that ‘... there is no exhaustive list of forms of violence that may constitute torture or cruel, inhuman and degrading treatment - rather it may encompass different types of so-called traditional practices (such as dowry-related violence, widow-burning, etc.), violence in the name of honour, sexual violence and harassment, as well as slavery-like practices often of a sexual nature...’² In the home in particular, torture is typically characterised by the state's failure to protect women and girls from the worst forms of violence of their husbands, fathers or relatives³ or carried out by their employers when working as domestic

¹ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/14/22 of 19 April 2010

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3 of 15 January 2008, para. 44.

³ In *Opuz v Turkey*, ECtHR (Application no. 33401/02) 9 June 2009, a case which related to years of domestic violence suffered by the complainant and her mother and the inadequate protection by police and prosecuting authorities

labourers.⁴ Here, the violence is typically wielded as a way to exert control, to dominate and to encourage submission. The state act of torture is derived in such circumstances from the state's explicit or implicit sanctioning of the violence and/or its failure to take sufficient steps to protect the victims from such acts.

In a custody situation, women can face the same or similar abuses as men in detention, with the regular dimension of sexual violence perpetrated by investigators or prison guards, or by male detainees, where there is no sex-based separations in the detention facility. The UN Special Rapporteur on Torture has noted that '[c]ustodial violence against women very often includes rape and other forms of sexual violence such as threats of rape, touching, "virginity testing", being stripped naked, invasive body searches, insults and humiliations of a sexual nature, etc.'⁵In *Aydin v. Turkey*, the European Court of Human Rights described rape in detention by a state official as 'an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim'.⁶

During conflict or protracted situations of lawlessness and insecurity, women and girls are often used as part of the arsenal of the conflict. They are maimed, sexually mutilated, enslaved, raped - often repeatedly, as part of warring parties' strategy of breaking the will of the civilian population.⁷

Women and girls also suffer particularly when a member of their family has been tortured or disappeared (they become the caregivers, the breadwinners, but at the same time have to deal with the horror of the torture of their loved one- which often translates into trauma, despair and given the changed family dynamics, often further abuse.

The Right to a Remedy and Reparation for Women and Girls Subjected to Violence

leading to the murder of the complainant's mother, the European Court of Human Rights recognised that there had been a violation of Article 3 of the Convention (torture and other prohibited ill-treatment) "as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband." [para. 176]

⁴ For example, the Migrant Workers Convention obliges States Parties to protect regular and irregular migrants against violence by public officials or private individuals. See, UN Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990, Art. 16(2).

⁵ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3 of 15 January 2008, para. 34.

⁶ *Aydin v. Turkey*, ECtHR Application No. 57/1996/676/866, 25 September 1997, para. 83.

⁷ See, the report of Rakhika Coomaraswamy, then Special Rapporteur on violence against women, its causes and consequences entitled 'Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000)', UN Doc. E/CN.4/2001/73 of 23 January 2001 in which she refers to the 'unimaginable brutality' suffered by women and girls. [paras. 44-45]

The right to a remedy and reparation has been affirmed by a range of treaties,⁸ United Nations treaty bodies,⁹ regional courts,¹⁰ as well as in a series of declarative instruments.¹¹ The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.¹² However, it is clear that the most serious violations of human rights are by their nature irreparable and any remedy will be disproportionate to the harm suffered. Nonetheless it is an international legal obligation that an internationally wrongful act be remedied to the fullest possible extent.¹³

Human rights abuses are difficult to repair in the ‘best’ of circumstances. Courts can be inaccessible to the victims of human rights violations who typically come from marginalised sectors of society and have difficulties generally to exercise rights. When the abuses are state-sanctioned, in many societies without independent judiciaries the apparatus of the law can serve as a cover for the crimes, fostering impunity. Procedural hurdles such as inordinately short limitation periods within which victims can file claims, immunities of state officials barring criminal and civil action, the protection of the most senior officials from scrutiny and high evidentiary thresholds impede justice for victims.

In the case of violence against women and girls, it can be even more difficult for the victims to obtain reparations. Some of the main challenges are canvassed below.

i) Definitional barriers

Often there can be a failure to recognise that violence against women and girls gives rise to a right to a remedy and reparation under international law. This is a substantive barrier linked to how

⁸ For example, the International Covenant on Civil and Political Rights (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1965) (Art. 6); Convention of the Rights of the Child (1989) (Art. 39); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) (1984) (Art. 14); and Statute of the International Criminal Court (1998) (art. 75). It has also figured in regional instruments, e.g. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Arts. 5(5), 13 and 41); the American Convention on Human Rights (ACHR) (1969) (Arts. 25, 63(1) and 68); and the African Convention on Human and Peoples’ Rights (ACHPR) (1981) (Art. 21(2)). See also, the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), of 2006, not yet entered into force (Art. 24). At time of writing, the Convention has 73 signatures and 4 ratifications.

⁹ See, for example, Human Rights Committee (HRC), General Comment (GC) No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant* 26/05/2004, (U.N. Doc. No. CCPR/C/21/Rev.1/Add.13, at paras. 15-17; United Nations Committee against Torture (CAT), GC No. 2, *Implementation of Article 2 by States Parties*, (U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007).) at para. 15.

¹⁰ See, e.g., *Velasquez Rodriguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) (Judgment of 29 July 1988) at para. 174. See also *Papamichalopoulos v. Greece* (Art. 50) (1995), (Appl. no. 14556/89) ECHR Judgment (31 Oct. 1995) at para. 36.

¹¹ 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, Res’n 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)) and GA Res’n 60/147 (UN Doc. No. A/RES/60/147 (2006)). See also the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 Nov. 1985; and the Universal Declaration of Human Rights (UDHR) (1948) (Art. 8).

¹² UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

¹³ *Chorzow Factory case*, Permanent Court of International Justice, Ser. A, No. 9 at 21 (1927).

violence against women is perceived and the extent to which the range of practices that give rise to such violence are recognised as giving rise to a right to reparation.

Many human rights violations give rise to a right to a remedy and reparations. For instance Article 2(3) of the International Covenant on Civil and Political Rights, provides that States Parties must ensure that those whose Covenant rights are violated have an effective and enforceable remedy. Yet, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, one of the key interpretive guidelines on the subject, cater specifically to 'gross violations of international human rights law' and 'serious violations of international humanitarian law'¹⁴. The UN Basic Principles do not define these terms however they were defined in the Special Rapporteur's initial draft text. Professor van Boven, in his initial study published in 1993, notes that

[n]o agreed definition exists of the term "gross violations of human rights". It appears that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the word "gross" is also related to the type of human right that is being violated [fn omitted].¹⁵

The Special Rapporteur provides that '[g]iven also the indivisibility and interdependence of all human rights, gross and systematic violations of the type of human rights [cited above] frequently affect other human rights as well, including economic, social and cultural rights. Equally, systematic practices and policies of religious intolerance and discrimination may give rise to just entitlements to reparation on the part of the victims',¹⁶ noting as well that the notion of 'gross violations of human rights and fundamental freedoms' is not fixed and exhaustive.¹⁷ He then goes on to state that they 'include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.'¹⁸ Many years later, Professor van Boven has reflected that whilst there were a range of views on whether the principles should be limited to 'gross violations', eventually also incorporating 'serious violations of international humanitarian law', the evolving view was that the principles should focus on the 'worst' violations.¹⁹

¹⁴ 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, Res'n 2005/35 (UN Doc. No. E/CN.4/RES/2005/35 (2005)).

¹⁵ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with which the Sub-Commission has been Concerned, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report submitted by Mr. Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8 of 2 July 1993, at para. 8.

¹⁶ *Ibid.*, para. 12.

¹⁷ *Id.*, para 13.

¹⁸ *Id.*

¹⁹ See, T. van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds.) *Reparations for Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, Martinus Nijhoff, The Netherlands (2009), pp. 32-34.

It is clear that certain aspects of violence against women would fit within the Basic Principles and Guidelines' definitions of 'gross violations of international human rights law' and 'serious violations of international humanitarian law' particularly rape, and other gender based violence carried out in a context of conflict, though it is perhaps less clear whether domestic violence and certain cultural practices amounting to violence against women would equally fall within the definitions. The Special Rapporteur on Torture has noted that there are certain benefits of incorporating women-specific violence, if the acts fall under the definition of torture, within the definition of torture 'in order to strengthen women's claims with regard to prevention, protection and rehabilitation',²⁰ but it would seem that a similar argument could be made with respect to reparation, that including women-specific violations into the definitions of torture and/or other violations recognised as 'gross' or 'serious' could strengthen women's claims for reparation.

ii) Difficulties to access court

Despite the fact that women and girls are often the victims of violence, they are less likely to bring claims for reparation to courts or other formal decision-making bodies. Indeed the number of claims lodged by and on behalf of women does not correspond to the number or scale of the violations perpetrated against them. The reasons for this are multifold. Abuses against women and girls tend to be downplayed by women and girls themselves, and within their families. The shame associated with certain types of abuses militates against seeking some form of redress; the victims are faced with the unenviable and difficult choice of maintaining harmony within their families and communities or addressing the harm suffered, the power relations and community structures dictate that they choose the former. Women and girls are typically conditioned to sacrifice for the good of the family or community as opposed to pursue justice for what happened to them specifically.

Also, women and girls' relative lack of political or public voice has meant that they typically have less information on rights – what remedies might be available to them and how to access them. Few countries have adequate victim and witness protection structures and this too impedes claims from being advanced. Even in those countries which do have structures in place to support victims, these typically do not cater to the special needs of women and girls. With gender based violence, police rarely take the protection needs of women and girls seriously, and some of the risks can emanate from within the house, requiring different forms of protection.

Local human rights groups working on legal challenges for victims rarely adopt a gendered approach to their work and consequently women are typically less able to benefit from their programmes and services, having a knock on effect on the numbers of women's and girls' cases taken up by such groups.

²⁰ Overview of the discussions from the expert workshop organised by the Office of the High Commissioner for Human Rights on behalf of the Special Rapporteur on the question of torture on 'Strengthening the protection of women from torture', 24 September 2007, at: <http://www2.ohchr.org/english/issues/torture/rapporteur/issuesfocus.htm>.

Similarly, whilst there have been important advances in the international criminal law sphere in the recognition of certain forms of violence against women perpetrated during conflict as war crimes, crimes against humanity and genocide, there remains a problem of inadequate charging due to the insufficient emphasis on gender in investigations. Investigators tend to follow leads that are easiest to access and investigating gender based violence can be difficult and time-consuming. In those international criminal courts and tribunals that entertain reparations claims, these are available for victims who suffered harm as a result of the crimes for which the perpetrator was convicted. Thus, the dearth of gendered based violence charges also limits these victims' access to reparations.

iii) Difficulties to progress claims in court

In the relatively small number of cases that come to court, there are further challenges to procure sufficient evidence to prove the harm. Forensic capacity to prove rape and related sexual violence can be limited in many countries. There is no 'relaxed standard' that is applied because of such evidentiary challenges, there are simply less convictions. This, coupled with the reluctance or other challenges impeding victims from obtaining a timely medical examination makes it extremely difficult to procure a conviction or other reparative result. In some countries, victims continue to risk being penalised for sex outside of marriage (zina) when raising rape allegations, and multiple eye-witnesses (aside from the victim herself) are required to substantiate the allegations in court.²¹

iv) Reparations ultimately awarded is inadequate to redress the experiences of women and girls

The UN Basic Principles and Guidelines list five main forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Of these, restitution is often understood to be the principal aim of reparation – to restore the person to his or her former position prior to the violation. Yet, as violence against women is often a manifestation of historically unequal power relations between men and women, restoring the victims to the position before the violation (restitution) when this is what gave rise to the violation, is a feeble end goal. Furthermore, reparations programmes that place emphasis on restitution for material losses to the detriment of other forms of reparation may impede benefits from flowing to women and girls, given that they often have less material assets and property to begin with.

This and other related gaps in the normative framework regarding women's and girls' experiences of violence and needs for reparation led women's rights activists to consider afresh the goals of reparation from the special perspective of women's and girls. This led to the formulation and adoption in Nairobi, Kenya in 2007, of the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.²² Critically, the Declaration provides that ' ... Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim

²¹ See, e.g., in relation to Sudan, REDRESS, *Time For Change: Reforming Sudan's Legislation on Rape and Sexual Violence*, November 2008, available at: <http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf>.

²² Adopted in March 2007. The text of the Declaration is available from the website of the Coalition for Women's Human Rights in Conflict Situations, at: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

to address the political and structural inequalities that negatively shape women's and girls' lives'. The Declaration also underscores the importance of women's role in the articulation of and distribution of reparations. The empowerment of women through the taking of positive and special steps to enable their active participation in processes that affect is recognized as an essential component of a reparations process that affirms and restores dignity.

Whether and to what extent women and girls will benefit from reparations will also be determined by what acts of human rights violations are prioritized for reparative measures. As indicated earlier, the act of privileging can take place at the early investigations phase with long-term ramifications for reparations which follow the results of criminal trials. In other contexts, such as reparations linked to truth commissions, the acts that will be privileged for reparations will depend on what emerges through the truth-seeking process; women's voices in such processes need to be solicited and heard for the society to recognize their particular suffering and accord it the status it deserves. Experience demonstrates that the reliance on gender-'neutral' processes to uncover violence against women and girls is insufficient.