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What is reparation? Challenges and avenues to reparation for survivors of sexual violence

REDRESS welcomes the opportunity to contribute to the Foreign and Commonwealth Office's Preventing Sexual Violence Initiative (PSVI).¹ REDRESS is a non-governmental organisation that focuses on achieving justice and reparation for survivors of torture and related international crimes. Its mandate is closely linked to various components of this initiative. Based on its experience, REDRESS wishes to highlight key components of the notion of *reparation for survivors of sexual violence* in armed conflict as well as to address some of the challenges and avenues to obtain reparation.

Remedy and reparation are two sides of a coin

Survivors of sexual violence suffer from severe physical and mental pain and anguish that affects almost every aspect of their lives. Sexual violence committed during armed conflict, while affecting women and girls disproportionately, can also target men and boys. Sexual violence is used as a weapon of war, terrorising and subjugating populations and devastating lives in the process. Women, girls, men and boys will experience such violations differently, with far reaching consequences not just for the direct victims, but also their families and communities. In addition to recovery from a range of often horrific physical injuries, survivors are affected in innumerable other ways, from stigmatisation and ostracisation by families and communities to the loss of social status, to having to bring up babies conceived through rape.

Redressing the harm done requires multi-faceted and multi-disciplinary responses, involving medical, psychological, social as well as legal measures that are gender sensitive. Victims' right to a remedy and reparation for victims of serious violations of international human rights and humanitarian law, as spelled out in numerous human rights treaties and developed in the jurisprudence of the European and Inter-American Courts of Human Rights as well as the Human Rights Committee and Committee Against Torture,² presupposes a holistic approach to redress.

Ultimately the process of seeking redress is to restore the dignity of the victim and this includes both her moral integrity in terms of acknowledging the violations that can be addressed through truth and justice seeking, as well as addressing her physical, psychological or social needs through a range of services and measures. Hence, the right to a remedy and reparation is articulated as an integrated right that consists of access to justice, compensation, rehabilitation and other forms of reparation. Mere compensation or the

¹ Within the Foreign and Commonwealth Office's Preventing Sexual Violence Initiative (PSVI), which was launched in May 2012 to strengthen international efforts to prevent and respond to sexual violence in conflict, REDRESS participated in a preparatory meeting organised in the context of the UK hosting the 39th G8 summit on the 17th and 18th June 2013. REDRESS provided this note, which was circulated to experts and State representatives involved in this process.

² See for example, the UN 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, UN General Assembly Resolution 60/147, 16 December 2005, E/CN.4/Sub2/1993/8; Article 2(3)(a) of the International Covenant on Civil and Political Rights provides that "Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"; and Article 14 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment that also provides that "Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".

provision of rehabilitation services will not satisfy the requirement of full and adequate reparation; particularly with regard to the most serious violations, where a judicial remedy is required.³

Reparation

The aim of reparation is usually 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. However, this is inappropriate where structural discrimination has led to the violation in the first place.⁴ Furthermore the most serious violations of human rights and humanitarian law are by their nature irreparable. One cannot undo multiple rapes of family members, or bring back to life those who have been killed. Mass violations in times of conflict render it difficult to repair each individual at a practical level. What is important to note, therefore, is that it is an international legal obligation that an internationally wrongful act be remedied to the fullest possible extent.

While restoring victims' dignity and their situation is the ultimate goal, as stressed by the *Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation*,⁵ restoring women and girls to their prior situation could mean restoring them to situations that are inherently discriminatory or that perpetuate inequalities that enable gender based violence. Reparation should therefore be transformative to address such circumstances, and may need to take a variety of forms:

- *restitution* aims at restoring the victim to the original situation before the violations occurred involving restoration of freedom, property, land, citizenship, employment or other legal rights;
- *rehabilitation* includes medical and psychological care as well as legal and social services;
- *compensation* can be awarded for any economically assessable damage resulting from the crime;
- *satisfaction* includes a range of symbolic measures, such as proper burials, public apology, commemorations, etc.;
- *guarantees of non-repetition*, involve law reform, reform of police or military or other measures.

For many victims, monetary compensation, while helpful, is not necessarily the first form of reparation that comes to mind. In many instances, victims will be living in dire physical, psychological or social conditions and have immediate as well as long term needs, both for themselves but also for their dependents. They may need services or the financial means to access services. However the mere provision of compensation or services would not amount to full and adequate compensation on account of the absence of recognition of wrongdoing.

Challenges to obtaining reparation

In conflict and post conflict contexts, in addition to most services being absent or disrupted, there are a number of obstacles for survivors of sexual violence to seek reparations at the domestic level. These include:

- *the lack of recognition of sexual violence* requiring adequate legislation criminalizing acts of sexual violence;
- *lack of information and difficulties to access courts*, requiring awareness raising and sensitisation to increase knowledge and awareness, reduce stigma, effective confidentiality and privacy provisions for sexual violence cases (closed hearings), provision of legal aid, removal of onerous court fees, etc;

³ Ibid.

⁴ IACTHR, *González et al. ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) (2009), para. 450.

⁵ *Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation*, 21 March 2007, available at <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>

- *discriminatory practices and laws and weak judicial systems*, requiring gendered law reform and support to increase capacities of judicial systems;
- *culture of intimidation* or reprisals requiring protection and assistance measures/bodies;
- *difficulties to progress claims in courts* due to lack of appropriate evidence, requiring increased capacities and evidence collection strategies adapted to local realities;
- *insufficiently gender-specific reparations awards* requiring further training on gender and reparations;
- *lack of enforcement of reparations awards*, necessitating increased political commitment to making reparation funds available, transparent disbursement procedures and voluntary contributions from donors (in addition to State contributions).

Avenues to seeking reparation

Until the establishment of the International Criminal Court,⁶ international criminal bodies pursuing justice for sexual violence crimes amongst others, had no mandate to provide reparations. This is/was the case of the *ad hoc* Tribunals for the Former Yugoslavia and for Rwanda, as well as hybrid courts such as the Special Court for Sierra Leone, apart from the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea. The International Criminal Court has a reparations mandate, with a Trust Fund for Victims built into the Court's infrastructure, enabling financing and implementation of reparations either using funds traced and seized from the convicted person, or using voluntary contributions where no funds are available. However, the Trust Fund for Victims is dependent on the cooperation of States and coordinated efforts to trace and freeze assets and significant and regular voluntary contributions are needed for the ICC's innovative approach to function.

Besides individual reparations through judicial processes, collective and administrative reparation programmes may address the consequences of widespread sexual violence. Such programmes must be formally established, involving survivors in their design, taking into account the special needs and priorities of survivors of sexual violence in a manner that acknowledges the wrong-doing and most importantly, addresses the harm suffered by survivors. Such programmes should not detract from victims' individual rights to a judicial remedy, or substitute reparation measures with development or humanitarian assistance.

Challenges pertaining to conflict and post-conflict contexts call for considering all relevant avenues to ensure that survivors of sexual violence obtain reparations including judicial and non-judicial mechanisms. While domestic processes may offer some remedies, too often the entire justice system must be reformed and resourced, with particular attention to gender dimensions, in order to address such crimes. Regional and international mechanisms have been underutilised to address cases of sexual violence and constitute complementary avenues to bring redress to victims. The attention given to *reparations* in post conflict contexts has, as yet, not sufficiently integrated victims' rights and needs and, even less so, the situation of survivors of sexual violence. There is a need for further commitments with regard to reparation for victims of sexual violence committed in times of war as well as for considering the full range of harm and consequences suffered to ensure reparation meets their objectives.

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⁶ See Rome Statute of the International Criminal Court, entered into force on 1 July 2002.