Lund University

European Master's Degree in Human Rights and Democratisation
A.Y. 2013/2014

# The Right to Reparations for Gross Forms of Sexual Violence

In Search of a Gender-Sensitive Concept

Author: Jennifer Meissner
Supervisor: Dr. Miriam Estrada-Castillo

**Abstract**

This paper explores the concept of reparations for gross sexual violence in international human rights and international criminal law. It analyses recent general comments and individual communications of international Human Rights Committees and resolutions from the broader international community as well as certain aspects of international criminal law. It specifically examines the practice of CEDAW, IACfHR and the ICC against the background of gender justice. The paper argues that international human rights law and international criminal law have broadened the concept of reparations in the last decades while still mostly neglecting reparations for social, economic and cultural rights. The specific analysis of CEDAW, the IACfHR and ICC illustrate that although the notion of gender-sensitive reparations is partially used, contributions lack more detailed information and focus on a binary approach to gender. Taking theoretical and practical gender analyses as a starting point, this paper argues that reparations must be complex. They need to include a combination of measures that offer maximum access and minimum exposure for victims while recognising the individual experienced harm simultaneously. Furthermore, the combination needs to transform the meaning of sexual violence within society, and finally strengthen the empowerment of the victim in its community.

*To Franziska,*

*who opened my eyes and taught me that sexual violence is not an act by the perpetrator alone but continues as an act by the society as such and all of us.*

## Acknowledgement

The submission of this thesis is the last part of a wonderful year of studying Human Rights and Democratisation in Venice and Lund.

It has not only been fulfilling in the way that I finally learned what I have been deeply interested in for a long time. Also, and maybe even more important, the programme has brought me into an environment that I deeply appreciate: People are not limited by disciplinary borders and jurists dare to reflect critically and express their doubts openly.

For the first time I have been surrounded by law students and teachers that seem to approach law and society in the way I do. This experience have strengthened my views and motivation and first and foremost it has helped me to overcome my trauma from the German legal education system in which I had to be in a constant fight with myself.

As to this thesis, I wish to express special thanks to my supervisor Dr. Miriam Estrada-Castillo who has inspired me very much. Not only in the way to deal with the subject but also in hearing her view on questions on society and life. Furthermore, I wish to thank the E.MA director Karol Nowak at Lund University who has given me the feeling to always be welcome to come along with questions and doubts.

Moreover, I thank my parents that have supported my ideas and plans and studies in various was. Without them, I would not have had the opportunity to participate in the program.

Finally, thanks to my friends that are the best friends in this world! I wish to particularly thank you, Justine, Julian, and Karla for supporting me during the process of my thesis writing!

# Table of Contents

**List of Abbreviations.....III**

**1. Introduction..... 1**

1.1 Aim.....3
1.2 Research Questions & Disposition..... 3
1.2.1 Research Questions..... 3
1.2.2 Deposition..... 4
1.3 Method and Material.....4
1.4 Delimitations.....5
1.5 Previous Research.....6
1.6 Theory..... 7
1.7 Terminology..... 8

**2. Reparations, Justice & the Harm of Gross Sexual Violence.....9**

2.1 The Specific Harm of Gross Forms of Sexual Violence.....10
2.2 Reparations & Justice..... 11
2.2.1 Liberal versus Communitarian Justice & Reparations.....12
2.2.2 Gender Justice & Reparations for Gross Violations of Human Rights..... 13

**3. International Human Rights Law.....14**

3.1 Reparations, Justice and the Role of the Victim..... 14
3.1.1 The International Community: The Basic Principles .....15
3.1.2 Gender-Neutral International Human Rights Treaty Bodies.....17
3.1.2.1 International Covenant on Civil and Political Rights.....18
3.1.2.2 Convention Against Torture ..... 19
3.1.2.3 Other Treaties..... 20
3.1.2.4 Conclusion.....21
3.1.3 The Regional Systems: The Case of the Inter-American Court of Human Rights.....22
3.2 Reparations for Victims of Gross Sexual Violence.....24
3.2.1 Convention on the Elimination of All Forms of Discrimination Against Women.....24
3.2.2 The UN on Gross Sexual Violence and Reparation..... 27
3.2.2.1 A Women's Movement for Human Rights.....27
3.2.2.2 Reparations for Gross Sexual Violence-A Matter of International Peace and Security?.....28
3.2.2.3 Recent Approaches to Sexual Violence in Conflict.....30
3.2.3 Conclusion..... 31
3.3 Regional Systems: The Example of the Inter-American Court.....31
3.3.1 Towards the Application of the Bélem do Pará Convention ..... 32
3.3.2 Acknowledging the Gender Specificity of Harm ..... 33
3.4 Conclusion: Reparations & International Human Rights..... 35

**4. International Criminal Law..... 36**

4.1 The Ad-Hoc Tribunals..... 37
4.2 Reparations for Victims of Sexual Violence at the ICC .....38

4.2.1 The Concept of Justice ..... 38
4.2.2 A Two-Fold Role for Reparations ..... 39
4.2.3 The Role of International Human Rights Law: Art. 21(3) ICC ..... 40
4.2.4 Victims & Vulnerable Groups ..... 41
4.2.4.1 Beneficiaries ..... 41
4.2.4.2 Recognising the Harm of Sexual Violence as a Matter of Vulnerability ..... 42
4.2.5 Forms of Reparations ..... 43
4.2.5.1 Restitution, Compensation, Rehabilitation ..... 43
4.2.5.2 Collective vs. Individual Reparations ..... 44
4.3 The Wider Framework: The Role of the Trust Fund for Reparations ..... 45
4.3.1 The Institutional Structure of the Trust Fund ..... 45
4.3.2 The Role of the Trust Fund for Court-Ordered Reparations ..... 46
4.3.3 The Role of the Trust Fund as an Independent Institution ..... 47
4.4 Conclusion: International Criminal Law & Reparations ..... 49

**5. Voices of Civil Society and Experiences on the Ground ..... 50**

5.1 A Women's Voice on Reparations: The Nairobi Declaration ..... 50
5.2 Women's Experiences from Truth Commissions: Challenges to Reparations for Victims of Sexual Violence ..... 52
5.2.1 Accessibility ..... 52
5.2.2 Social Stigmatisation ..... 53
5.3 Towards a Gender-Sensitive Concept of Reparations ..... 54
5.3.1 Avoiding the Exposure of the Individual: Ways of Distribution ..... 55
5.3.2 Engaging in Gender Structures ..... 55
5.3.2.1 Guarantees of Non-Repetition ..... 55
5.3.2.2 Measures of Satisfaction ..... 56
5.3.3 Collective Reparations as a Magic Tool? ..... 57
5.3.4 Empowerment & Participation ..... 58
5.3.5 Including Men, Boys & LGBT Persons ..... 59
5.3.6 Constraints of Resources ..... 59
5.4 Conclusion: Complex Reparations Programmes ..... 59

**6. Gender Sensitive Reparations & International Law ..... 60**

6.1 International Human Rights Law ..... 61
6.2 International Criminal Law ..... 62
6.3 Placing International Law Into Contextual Rethinking ..... 63

**7. Conclusion ..... 65**

**Bibliography ..... 68**

## List of Abbreviations

| | |
|---|---|
| CAT | Convention Against Torture |
| DRC | Democratic Republic of Congo |
| GA | General Assembly |
| HRC | Human Rights Committee |
| IACfHR | Inter-American Court for Human Rights |
| ICC | International Criminal Court |
| ICCPR | International Covenant of Civil and Political Rights |
| ICC St. | Statute of the International Criminal Court |
| ICESCR | International Covenant of Economic, Social and Cultural Rights |
| IGO | Inter-Governmental Organisation |
| LGBT | Lesbian, Gay, Bi- and Transexual |
| NGO | Non-Governmental Organisation |
| RPE | Rules of Procedure and Evidence |
| SC | Security Council |
| TFV | Trust Fund for Victims |
| VD | Vienna Declaration |
| UN | United Nations |
| UNCH | United Nations Charter |

# 1. Introduction

*"In our camp when we saw someone, we used to say, "'Hi, how are you.' Now when we see each other we ask, 'Were you raped today'?"*[1]

Maryam, a 37-year old single mother living in a camp
for internally displaced persons, Moghadishu, Somalia.

The World Health Organisation (WHO) indicates that 35% of women worldwide have experienced either intimate partner violence or non partner sexual violence in their lifetime.[2] In situations of conflict, post- conflict and displacement where state structures are weak, existing violence may exacerbate and new forms of violence against women often develop.[3] Situations arise in which being raped is normal, and not being raped is the exception. In situations of gross violence victims will hear about other's being raped on a daily basis. Rapes of others then stimulate a new trauma and violence becomes a life long repeated suffering.[4]

Still, the impact of sexual violence is not limited to the group of direct victims. In Rwanda it is reported that between 5000 and 20000 children are born from rape.[5] Mothers and children often face extremely difficult situations that lead to further violence and extreme social stigmatisation. One mother comments on her situation: "This is why I did not love my daughter-her father was the one who killed my family. I wanted to kill her, too".[6]

Gross forms of sexual violence occur where state structures are weak or the state itself is involved in the conduct. In any case, domestic justice mechanisms fail and a

1 Human Rights Watch (2014), p. 1.
2 WHO Fact Sheet No. 239 (October 2013).
3 Idem.
4 Human Rights Watch Report (2014), p. 1.
5 UN Action Against Sexual Violence in Conflict, website.
6 Hilsum (2014).

culture of impunity in which sexual violence can flourish, persists. Often, international justice mechanisms are the only hope for an improvement in life. Tragically, international law has been consistently ignorant towards sexual violence for a long time. As a traditional inter-state project international law has long labeled sexual violence as a private matter in which international law has nothing no bearing. Over the last decades however, international law has slowly but steadily acknowledged sexual violence as an issue of the international community. International humanitarian law has, for example, recognised rape as a "grave breach" under the Geneva Conventions. Furthermore, international criminal law incorporates rape as a possible form of torture and genocide.[7] The Rome Statute has codified sexual slavery, rape, enforced prostitution, pregnancy and sterilisation as an international crime. At the United Nations (UN) level, various documents declare sexual violence a universal phenomenon that is independent of geographical areas, social class or age and compels a universal response.[8]

At the same time, international law increasingly uses the notion of reparations as a form of redress. It has been stressed that states are responsible to redress individual under international human rights law and humanitarian law.[9] Recently, the International Criminal Court Statute (ICC St.) has introduced a reparation regime.

When it comes to reparations for victims of gross sexual violence the international community has been cited for lacking a normative framework.[10] Taking this statement as its starting point, this thesis explores the concept of reparations and strives to understand ways reparations must be understood in order to best serve victims of sexual violence.

The relevance of reparations in gross sexual violence is time relevant. In August 2014 the Istanbul Convention will enter into force. It will be the first internationally binding human rights instrument to, within its text, possibly incorporate reparations for

---

7 Human Rights Watch Report (2014), p. 1.

8 e.g. WHO, UN Special Rapporteur on Sexual Violence Against Women; Special Representative of the Secretary- General for Sexual Violence in Conflict.

9 Human Rights Watch Report (2014), p. 1; Art. 31 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10, 2001.

10 Saris & Lofts (2009), p. 98.

victims of all genders in sexual violence.[11]

## 1.1 Aim

The purpose of this study is to explore the concept of reparations in international human right law, international criminal law and the wider international community. It discusses the way reparations have been understood in the context of gross violations of human rights in general and in the case of sexual violence in particular. Secondly, the thesis examines how these approaches towards reparations affect the legal position of victims of sexual violence. The ultimate aim is to develop an understanding of how reparations need to be understood and designed to best serve individual and gender justice in the long-term perspective. In doing so, the thesis contributes to understanding how the concept of reparations in international law can and must be shaped to support such an objective.

## 1.2 Research Questions & Disposition

### 1.2.1 Research Questions

The following research question will guide the reader through the argument of the thesis:

In which ways do international human rights law and international criminal law understand victims' rights to reparations for survivors of sexual violence and how can they contribute to gender justice?

Subquestions:

1. How do international human rights law and international criminal law approach reparations in general?
2. Do they understand reparations to sexual violence as an answer to structural violence and gender-discrimination, and if so how?
3. How should reparations be understood in order to, on the one hand, strengthen the individual victims in their positions, and, on the other hand strive towards

[11] Art. 5(2) Istanbul Convention.

gender justice in the society at large? Are these objectives contradicting?

### 1.2.2 Deposition

The second chapter of the thesis will discuss the main concepts needed in order to situate the ensuing discussion on reparations. The third chapter will analyse the contemporary developments of reparations in international human rights law. It will explore the UN based system, the human rights monitoring bodies, and regional systems with the example of Latin America. It will pay special attention to sexual violence as a a form of gender-discrimination. The fourth chapter will analyse international criminal law and its contributions to a concept of reparations.

The fifth chapter (5) will address qualitative studies about what effect reparations have on women in practice. These will be experiences recounted from truth and reconciliation commissions recommendations and voices from civil society.

The sixth and final chapter will discuss the results of the examination and provides a suggestion what role these results can have on international human rights law and international criminal law.

## 1.3 Method and Material

Taking the contemporary developments in international law into account, this study will focus on those areas of international law where reparations have played an important role. This is for the reason that they offer the majority of material on how reparations are understood and employed. Therefore, this paper will focus specifically on international human rights law and international criminal law. Special attention will be paid to the decisions of treaty bodies in the context of individual complaint mechanism of relevant international human rights conventions and their general comments. As an example of regional mechanisms, experiences from Latin America will be explored for two reasons. Firstly, when dealing with reparations in situations of gross human rights violations the Latin-American experience offers valuable insights. Many human rights cases of the Inter-American Court are embedded in conflict or post-conflict societies. Secondly, a wide range of reparation measures used within the Inter-

American Court.[12]

Additionally, this study will incorporate documents from the "wider international community" of reparations in gross violence. Documented sources relevant to the issue will be used. General Assembly Resolutions will be analysed for their established legitimacy and wealth of insights into the international community as a whole. The study will explore Security Council resolutions, on the basis that the SC is an important actor in the context of massive human rights violations. What is more, the SC also has the mandate to decide on immediate enforceable action under Ch.7 UN Charter (UNCH).

Furthermore, documents entail the qualitative studies of truth and reconciliation commissions. They give insights into distinctive gender analyses of truth recommendations and administrative programmes on previous experiences on the ground. Lastly, the view of gender advocates will be looked at. The body of research will focus primarily on women, simply because women have been most visible at the level of the international community. Nevertheless, the researcher is aware of the fact that focusing exclusively on women can support the binary approach of law. Therefore, where possible, it will include a wider perspective on gender.

### 1.4 Delimitations

Granting reparations is dependent on an effective legal protection and on a successful prosecution. Essentially, it is important to establish the relevant facts during the investigations. Sometimes, this is an irreconcilable hindrance. First, in remote areas, the access for victims of sexual violence to medical examination is often limited or completely absent. Also, medical staff is not trained to deal with sexual violence. Secondly, police members are sometimes blind to evidence during the investigations of sexual violence. Often, sexual violence is not recognised in cases where it accompanies other forms of violence or analyses are exclusively addressed to rape.[13] In this way, the application of a gender-sensitive concept of reparations is dependent on a positive

[12] Evans (2012), p. 75.
[13] Rubio-Marín (2011), p. 1065.

prosecution and effective gatherings of evidence. Without these steps recognising the specific harm of sexual violence and its specific need for reparations is impossible. Advancement towards gender-sensitive prosecution vary dramatically from region to region and situation to situation.

This study will focus on the international level. The author is nonetheless aware of the fact that reparation issues are most effectively and even most of them, dealt with on the regional, national or local level. Nevertheless, the aim of this study is to analyse the response of the international community to the issue of sexual violence as a global problem that requires a comprehensive global positioning.

As essential studies on international customary law, international humanitarian law and state-communications of human rights committees are not taken into the analysis, this study does not provide a comprehensive approach to international law. Instead, the thesis will focus on those areas, where reparations are most present and offer insights on how the concept is being developed there. In this sense, the study cannot contribute to supporting the acknowledgement of a human right to reparations in general but rather, how it has been shaped as an issue of international human rights and -criminal law.

### 1.5 Previous Research

Previous research on reparations for victims of sexual violence have mostly focused on administrative reparations programmes in the setting of conflict and post-conflict situations. Among the most active contributors is the Centre for Transitional Justice. The New York based Non-Governmental Organisation (NGO) has conducted multiple research projects on reparations and published significant work. Pablo de Greiff, the director of research at the Centre for Transitional Justice has edited a much-cited *Handbook on Reparations* in 2006. Since 2011 he has published reports from his position as the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantee of Non-Recurrence. When it comes to the gender analysis of reparations, Ruth Rubio-Marín made a significant contribution to empirical and conceptual work.

Research on the right to reparations has been dealt with in a general sense. Christine Evans has recently published a comprehensive study on the right to reparations for

victims of armed conflicts and McCarthy published a study on reparations within the system of the ICC in 2012.

### 1.6 Theory

This study takes the *Reparative Justice*-perspective as a starting point. It assumes that reparations can contribute to justice by vindicating interests that have been injured.[14] Reparations serve an additional purpose in International Law. Because international law lacks a supranational enforcement authority the injured party, claiming for reparations, simultaneously upholds the public interest of the legal order by punishing and deterring wrong doings.[15] For this reason the concept or reparations in international law entails compensatory elements, such as restitutions and damages, as well as punitive elements such as satisfaction.[16] In the case of reparations for sexual violence the purpose of reparations must be on the one hand to vindicate the interest of the victim and on the other hand to uphold the moral order of a society without sexual violence. Human rights law is thus an obligation *erga omnes*, an obligation to the international community as a whole.[17]

From this perspective, monitoring bodies of international human rights law must provide remedies to the individual and remedies that uphold the legal order that the treaties create as a whole.[18] The theory of reparative justice in international criminal law challenges the concept of *Distributive Justice*. Distributive Justice sees criminal law as a matter of public interest only. By committing a crime it is the public moral that is violated. As a consequence, the state takes over the claim and engages with the victim as a witness. Reparative Justice theory challenges the passive role of victims. It aims to give the victim a more active role and to award reparations to the victim.

The second perspective of the thesis concerns the understanding of sexual violence. Here, the paper argues from a *gender perspective*. Gender is understood as a constructed identity that significantly contributes to the distribution of political and economic power

[14] Shelton (2005), p. 38.
[15] Ibid., p. 45.
[16] Garcia-Amador (1984), p. 567; Shelton (2005), p. 45.
[17] Shelton (2005), p.48.
[18] Ibid., p.49.

that plays a significant role in violence phenomenon. Identification with a certain gender, for example as hetero woman or man, or homosexual man, lesbian women, or transgender person significantly contributes to a position within society. These positions are not only influenced by gender identity and sex but as well by other factors such as race, class, ethnicity, physical disability and immigration status.[19] Accordingly, intersections of these factors can lead to multiplication of structural disadvantages.

Power structures in society are largely influenced by both male and female stereotypes in society and must thus both be considered when discussing reparation for sexual violence.

Consequently, this paper turns against a liberal approach that regards sexual violence as a gender neutral crime. Sexual violence is always an expression of both personal and structural violence. It is never only private but always public, systemic and political at the same time.[20] Structural violence can be understood as a form of violence that evolves in unequal power relations and unequal chances in life.[21] Therefore, sexual violence can be conceptualised as a violation against the individual as for example a violation against the physical integrity of the victim. But at the same time sexual violence must be regarded as a form of gender-discrimination.

### 1.7 Terminology

*Sexual Violence:* is defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality.[22]

G*ross violations:* No closed list exists for g*ross violations* of human rights.[23] Here, the notion refers to violations that occur on a massive scale and are brutal and systemic in nature.[24] A certain level of severity is needed; often the violations are perpetrated by members of the state themselves.[25]

[19] Chamallas (2013), p. 24.
[20] Charlesworth, (2000), p. 12.
[21] Elsuni, (2011), p.42.
[22] Duggan, Abusharaf (2006), p. 624.
[23] Grünfeld, Smeulers (2011), p. 25.
[24] Idem.
[25] Idem.

*Gender* refers to the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for each person.

*Female* refers to the socially constructed identity as what a "women" is supposed to be and act in society. *Male* for "men's" identity respectively.

*Remedy* is understood as the pair of formal and substantive rights, the access to legal remedies on the one hand, and *reparation* on the other hand. Redress is then understood as the action thereof.[26] This paper focuses on the substantive right.

*Individual reparations* are understood as any form of direct right, provided to an individual, a natural or judicial person that has a remedy thereto.

*Collective reparations* are used inconsistently in international law. One view understands collective rights as a right that can be exercised by groups as whole as discussed in the context of genocide.[27] Another view, as used here, understands collective reparations as reparations that address a group of persons that share a specific characteristic such as "being a woman" or being part of an indigenous community.[28] The right holder, is however, still the individual person.

*Pecuniary harm* is understood as the loss of economic losses, such as salaries etc. *Non-pecuniary harm* are those that are non-financial or non-economic in nature.[29]

Following terms commonly found in legal references, the terms *victim* and *survivor* are interchangeably used. These terms refer to persons whom are suffering indirect or direct harm from the violation.

## 2. Reparations, Justice & the Harm of Gross Sexual Violence

This segment will explore specific concepts that are important for the reader to situate the discussion on reparations in its context. Furthermore, it will depict the link between gender specific harm of sexual violence, gender-discrimination, different concepts of injustices and their influences on the forms of reparations.

---

[26] Evans (2012), p. 13.
[27] Rosenfeld (2010), p. 736.
[28] Idem.
[29] McCarthy (2012) p. 98.

## 2.1 The Specific Harm of Gross Forms of Sexual Violence

*"Massacres kill the body. Rape kills the soul. And there was a lot of rape."*
(Major Brent Beardsley, Peacekeeper in Rwanda)[30]

The harm of sexual violence is physical, emotional, and material. They are interlinked and reenforcing each other.[31] The harm varies from short-term suffering, such as vaginal injuries, to long-term harms. Long term harm entails HIV infection, social marginalisation, and socio-economical disabilities, such as the inability to work, traumatisation, and the loss of self-esteem. The extent of psychological harm depends on the society that the victim lives in and its role within it. In societies where the female role is strongly associated with the virtue of purity or being a wife and mother; female victims can often feel shame, and even guilt for extra-marital sex, pregnancies, and resulting children. Even more severe is the possible extent of social stigmatisation that women can be exposed to. Often, females end up in a domino-effect situation that produces a downward spiral of harm, loss and suffering and can lead to a complete loss of social status.[32] What is sometimes left to them is "indecent" work such as prostitution.[33] For male victims, harm is often presented in a crisis of masculinity. Being raped often goes hand in hand with a feeling of losing the "male" characteristics, such as being able to protect oneself for example. Men can have similar physical symptoms and experiences as women.[34] However, information about consequences to societies is far less accessible since male victims have been overseen for a long time.[35] When it comes to children the harm is especially disastrous in that their understanding of wrong and right is still being developed. As a result, sexual violence might influence their sexual identity sustainably.[36]

Harm inflicted by sexual violence can be direct or indirect. The label of "direct

[30] Examination-in-Chief cited in: Prosecutor v. Bagasora, Kabiligi, Ntabakuze, Nsengiyumva, ICTR, 20 January 2004.
[31] Duggan, Jacobson (2009), p. 126.
[32] Duggan, Jacobson (2009) p. 131; Urban Walker (2012), p. 20.
[33] Duggan, Jacobson (2009), p. 130.
[34] Mouthaan, (2013), p. 670.
[35] Mouthaan (2013), p. 666.
[36] UN Special Rapporteur on Children, UN Doc.: A/61/299, p.14.

harm" is employed for the direct physical and psychological attack on persons and its direct consequences. In opposition, indirect harm occurs as a consequence from the direct harm. For example, it occurs when a mother of a child that is born out of rape dies because of HIV that was transmitted during the rape. Another example is the social stigmatisation that a child born from rape experiences because rape is seen as an impure act.

Thus, the harm of sexual violence has two important dimensions. On the one hand, it has serious impact on the individual. This harm can be described as a violation of the right to physical integrity, health, the personal freedom, or other socio-economic and/or political positions. On the other hand, harm of sexual violence, because understood as a matter of gender hierarchy, implies a group harm that stems from societal structures that act on specific groups exponentially.[37] Not everybody is addressed by sexual violence, it is mostly those that can be placed at the intersection of certain gender identities and and other societal factors. Addressing the structures that produce the group harm is thus necessary to fight against sexual violence. [38]

Gross forms of sexual violence are those that happen on a large scale and reach a certain severity while being systemic in nature.[39] Often the violence coincides with weak state functions or conflict and post-conflict situations, as well as problematic socio-economic conditions. In this sense, the intersection of social class and gender is particularly important in this context.

### 2.2 Reparations & Justice

As discussed above, reparations imply the hope that they contribute to justice of the victim. In that way, the concept of justice indicates the route that reparations need to take. Therefore, the concept of reparations necessarily encompasses the debate about justice.[40]

The idea of justice is a universal philosophical category of which the meaning

[37] Elsuni (2011), p. 60.
[38] Idem.
[39] Smeulers, Grünfeld (2011), p. 25.
[40] Painter (2012), p. 1.

depends on context and time. The following section will briefly depict some different assumptions to its meaning. The UN secretary general has suggested the following definition as a working concept in the UN. Justice is:

> "...an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of the wrongs. Justice implies regards for the rights of the accused, for the interest of the victim, and for the well-being of society at large."[41]

This definition does not, however, imply how the interest of the victim or the well-being of society at large can be regarded. Therefore, the following section will provide a brief background on the possibilities to assume those interests. It is useful to evoke the debate because gender perspectives on reparations turn against the dichotomy of liberal versus communitarian theories, as discussed below.

### 2.2.1 Liberal versus Communitarian Justice & Reparations

International law has been widely criticised for using a liberal approach to justice.[42] The critique is that international law is a project of the modern "West" that lacks the view for other perspectives that do not understand the human being as an isolated individual. Liberal theories on justice see injustices when someone "has infringed unjustly on another's right to pursue what [the individual] values".[43] To restore injustices means to fill the disturbance with reparations. Accordingly, liberal justice theories see the individual freedom at the core of the analysis. Reparations are measures to give back rights, liberties and opportunities to the individual. Accordingly, they are to establish the situation that the individual was in, before the harm: They require full-restitution.

In opposition, communitarian theories on justice stress the role of the interrelations between the individuals. In that way, injustices are not only coming from another individual but they come from social relations as such and arise from domination, non-

41 UN Secretary General, Report to the SC, S/2004/616, (24 August 2004), para 7.
42 Critique has for example come from feminists and scholars with post-colonialist approach.
43 Boxhill cited in: Verdeja (2008), p. 209; also see Boxhill (2012), pp. 63-91.

recognition, and disrespect.[44] Thus, communitarian theories stress the victim in its cultural surrounding. They move from a merely material damages to symbolic wrongs.[45] Accordingly, communitarian theories stress symbolic reparations and other forms of recognitions to effectively validate the rights of the victims.

### 2.2.2 Gender Justice & Reparations for Gross Violations of Human Rights

While the thoughts mentioned above address reparations in general, it has been stressed that in the context of gross violations of human rights, full-restitution is not possible at all. Due to the harsh forms and the large scale of the violations a particular understanding of justice is needed. It is claimed that the judicial understanding of justice builds on the assumption that the violation of a norm is an exception and therefore is designed to provide justice on a case by case basis.[46] Since in the context of mass atrocities violations are rather the norm than the exception Pablo de Greiff argues for a concept of justice that consists of recognition, civic trust, and social solidarity for justice.[47] One of the main aims is "to return (or in some cases establish a new) status of citizenship."[48] To do so, it is important to recognise the individual and the individual's agency in general as well as the individual as a citizen specifically. Essentially, citizenship entails the understanding that all citizens are equal. In that sense de Greiff understands justice as aiming for "reestablishing equality".[49]

From a feminist perspective the respective approaches of liberal and communitarian theory are insufficient as well. Feminist positions have placed citizenship at the core of their understanding of justice. As victims of gross sexual violence usually never have enjoyed a full range of citizenship, it is important that reparations will contribute to create one. Therefore, Genevieve Painter has argued that reparations must be understood as a process towards gender justice.[50] She refers to Nancy Fraser's understanding of gender justice: It means that the social and cultural differences and positions that

44 Taylor (1992), p. 25.
45 Verdeja (2008), p. 211.
46 De Greiff (2006), p. 454.
47 Ibid., p. 453.
48 Ibid., p. 460.
49 Idem.
50 Fraser (1997), pp. 11-39; Painter (2012), pp. 24-27.

different genders are entitled to in society are recognised, it further entails that all genders are equally represented in any institutions that distributes socio-economic means; finally, it implies that redistribution creates equal economic power to all genders in order to make them able to exercise the latter two aspects.[51] Clearly, repairing victims of sexual violence can not imply to filling in all structural gender gaps that exist in society. But, Painter argues, by repairing sexual violence in a way that invests in the democratic participation and the empowerment of vulnerable groups reparations can contribute to a democratic process of gender justice.[52] By focusing on the empowerment of the individual the concept is sensitive to both the recognition of the individual and the human being as part of its community.[53]

Consequently, the feminist approach claims that justice cannot be achieved by reparations that address the community nor the individual itself as supported by the discourse of liberal versus communitarian reparations. Instead, the main character of reparations must be the triggering of a transformative empowerment process.[54]

## 3. International Human Rights Law

Having explored the theoretical debate around reparations and their contributions to justice the following chapter will explore how reparations are understood in the international human rights regime. As indicated, the role of reparations in international human rights is to vindicate the individual as well as uphold the interest of the public by defending a certain moral in the international community.

### 3.1 Reparations, Justice and the Role of the Victim

The international human rights regime has been characterised by varying understanding of reparations. Recently, attempts have been made to formulate a common understanding for reparations for gross human rights violations.

---

51 Fraser (1997), pp.11-39.
52 Painter (2012), p. 23.
53 Young (1990), pp. 15-16.
54 Painter (2012), p.23.

### 3.1.1 The International Community: The Basic Principles

In December 2005 the General Assembly (GA) adopted the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law (Basic Principles)[55] that were to contribute to clarifications about the meaning of remedies and reparations. Based on drafts by Bassioni and van Boven[56], they draw on existing international law. The Basic Principles point to the victims' rights to remedies. These should entail:

1. Equal and effective access to justice;
2. Access to relevant information concerning violations and reparation mechanisms;
3. Adequate, effective and prompt reparation for harm suffered.[57]

According to the Basic Principles reparations should be "proportional to the gravity of the violations and the harm suffered".[58] It includes the obligation for states and other entities such as individuals or legal persons to provide reparations to the victim. In cases when a liable party is unable or unwilling to do so, it is up to the state to endeavour national programmes for reparation and other assistance for victims.[59] In accordance with domestic and international law the individual circumstances of the victim need to be taken into account.

The Basic Principles list the following forms of reparations: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

*Restitution* refers to the traditional principle of full-restitution, restoring the victim "to the original situation before the gross violations"[60] had occurred. This can include a wide and comprehensive range of measures: 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.

55 General Assembly, A/RES/60/147, 16 December 2005.
56 Idem.
57 Ibid., para 11.
58 Ibid.., para 15.
59 Ibid., para 16.
60 Ibid., para 19.

*Compensation* concerns "economically assessable damages".[61] It addresses physical and mental harm, but as well lost opportunities, including employment, education and social benefits.[62] Compensations can also include all costs required for legal or expert assistance, medicine, and medical, psychological and social services as well as material damages and loss of earnings, even including its potential.[63]

*Rehabilitation* should include medical, psychological as well as legal and social services.[64]

When it comes to *satisfaction,* the list suggests measures as the following:[65]

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational

---

61 General Assembly, A/RES/60/147, 16 December 2005, para 20(a), (b).
62 Ibid., para 20 (c), (e)
63 Ibid., para 20.
64 Ibid., para 21.
65 Ibid., para 22.

material at all levels.

Finally, the guarantees of *non-repetition* should include any or all of the following:[66]

(a) Ensuring effective civilian control of military and security forces;

(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;

(c) Strengthening the independence of the judiciary;

(d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;

(e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;

(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;

(h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Thus, the Basic Principles provide a comprehensive list of possible reparations. The examples argue for a comprehensive understanding of what reparations entail but still do not clearly define them.

### 3.1.2 Gender-Neutral International Human Rights Treaty Bodies

The concept of reparations to individuals is a quite new concept. Traditional theory on international law regards states as the only subject of international law. With the human rights movement after WWII this principle has slowly softened and increasing

[66] General Assembly, A/RES/60/147, 16 December 2005, para 23.

attention is paid to the role of individuals under international law. But international human rights law does not necessary give the individual a direct right. The legal status of the mechanisms of human rights, general recommendations, concluding observations, opinion, and views are uncertain. None of them are legally binding under general international law.[67] Thus, the obligations of international human rights law rather provides an obligation to the state party to order reparations to the victim. The enforcement mechanism of human rights law remains limited. Neither the treaty bodies nor the political Human Rights Committee (HRC) can order states to provide specific forms of reparations.[68] However, the treaty bodies can contribute to developing a concept of reparations and they can depict a margin of appreciation to the national understanding of reparations. Also, the monitoring bodies can contribute to influence behaviour by creating an "international climate" of non-tolerance and the will of support.[69]

#### 3.1.2.1 International Covenant on Civil and Political Rights

Art. 2(3) provides a right to effective remedy. The text of the Convention does not entail any further specification what this remedy should entail. Compensation is only used in the context of unlawful arrest, detention and conviction in Art. 9(5) and 14(6).

The Committee usually uses standard language pointing out that the victim has a right to effective remedy, including compensation, and that the state party is under an obligation to prevent similar events from occurring again in the future.[70] Other times, the Committee uses terms as "adequate reparation" or "full reparation".[71] For a long time, there has been no specific statement of what effective remedy entails or how the state party should proceed in order to prevent reoccurrence of similar violations have existed.

In 2004 the Committee widened its position on reparations in the general comment No. 31. Here, the HRC has made clear that the right to remedy must be determined by

67 Chinkin, Freeman (2012), p. 23.
68 Shelton (2005), p. 106.
69 Ibid., pp. 113-114.
70 Evans (2012), p.47.
71 Idem.

competent judicial, administrative or legislative authorities of the state that has signed and ratified the Covenant.[72] Also, reparations are seen as a core part of remedy and entail measures such as restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.[73] Positive obligations are introduced in form of due diligence of the state parties: They need to show their efforts to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities of any violation.[74]

#### 3.1.2.2 Convention Against Torture

As the ICCPR, the Convention against Torture (CAT) remains limited in its information.[75] But Art. 14 CAT specifically mentions compensation including having an "enforceable right to fair and adequate compensation including the means for a full rehabilitation as possible". In cases of death the dependant shall be entitled to compensation. The CAT's General Comment No.3 provides detailed guidance in regard to what granting reparation concerns. It looks similar as the Basic Principles, but adds the notion of "adequate, effective and comprehensive reparation".[76]

The Committee also adds the notion that restitutions are not always possible. What is more, it refers to structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual orientation, disability, political or other opinions, ethnicity, age and religion, and all other grounds of discrimination.[77] Also, it points out that monetary compensation itself cannot be sufficient, but should be made where possible. These measures include medical expenses paid and provisions of funds to cover future medical or rehabilitative services needed by the victim.

Further measures can include pecuniary and non-pecuniary damages resulting from the physical and mental harm caused; losses of earnings due to disabilities caused by the torture or ill-treatment; and even lost opportunities such as employment and education.

---

72 CCPR General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (2004), para 15.
73 Ibid., para 16.
74 Ibid., para 8; further discussed in Clapham (2006), pp. 328-32.
75 Evans (2012), p. 53.
76 CAT, General Comment No.3, CAT/C/GC/3 (2012), para 6.
77 Ibid., para 8.

In addition, adequate compensation should provide for legal or specialised assistance as well as other costs for claims of redress.[78]

The Committee refers to rehabilitations as the restoration of function or the acquisition of new skills required by the changes of circumstances experienced by a victim in the aftermath of torture and ill-treatment.[79] The aim of rehabilitation is to restore as far as possible the independence, physical, mental, social and vocational ability and full inclusion and participation in society.[80] Moreover, the comment demands a long-term integrated approach and underscores the need to create a context of confidence and trust in which assistance can be provided in order to avoid a repeated trauma. Finally, it also addresses the need to take into account vulnerable groups.[81]

Furthermore, as seen in the Basic Principles, public disclosure is to be included in the reparations. While the Basic Principles refer to "verification of the facts", the CAT Committee announces a specific right to truth to the victim.[82] At last, the Comment suggests training for law enforcement officials as well as military and security forces on human rights law that includes the specific need of marginalised vulnerable populations and specific training on the Manual on the Effective Investigation and Documentation of Torture and other Cruel Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol) for health and legal professional and law enforcement officials. Once again the Comment underlines the importance to take into account the structural causes, suggesting measures such as amending relevant laws, fighting impunity, and taking effective preventive and deterrent measures.[83]

#### 3.1.2.3 Other Treaties

Art. 6 of the International Convention Against All Forms of Discrimination (CERD) affirms the right to reparations. Moreover, Art. 39 of the Convention on the Rights of the Child (CRC) and its Optional Protocols on children in armed conflict and on the sale

78 CAT, General Comment No.3, CAT/C/GC/3 (2012), para 9-10.
79 Ibid., para 1.
80 Ibid., para 11.
81 Ibid., para 15.
82 Ibid., para 16.
83 Ibid., para 18.

of children refer to reparations, encompassing physical and psychological recovery and social reintegration of a child victim. While the Committee has no competence to receiving individual petitions, this has not prevented it from giving recommendations in its state reports regarding reparations.[84]

What is more, Art. 24(4), (5) of the Convention for the Protection of all Persons from Enforced Disappearance, entered into force December 2010, introduced for the first time in international law the right to truth and a comprehensive definition of reparations in a legally binding treaty, reaffirming the five Basic Principles.

The Convention on the Prevention and Punishment of the Crime of Genocide does not provide any notion of reparations. Neither does the text of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) encompass any right to remedy.

#### 3.1.2.4 Conclusion

To conclude, the level of specification and application among international human rights treaties varies. Some treaties and treaty monitoring bodies do not call for reparations at all. Neither the ICESCR nor its optional protocol oblige states to provide reparations for violations of economic, social and cultural rights. The ICCPR demands remedies and has placed reparations at its core including all five forms of reparations. More recent treaties such as the CRC and the Convention for the Protection of all Persons from Enforced Disappearance suggest multi-faceted measures that cover the five types of reparations as suggested by the Basic Principles. The CAT monitoring body has a particularly detailed understanding of reparations. Certainly due to the nature of its mandate, which includes many disappeared and deaths it does not only recognise the impossibility of restitution but it also orders rehabilitation, including participation. It does cover the five elements as seen in the Basic Principles and even goes further where it finds it adequate. Thus, while states are obliged to provide reparations for violations against civil and political rights in specific forms, the obligation to provide reparations for violations of economic and social rights remains fragmentary. They are only partly

[84] e.g. in CRC Concluding Observations on Colombia (2006), CRC/C/COL/CO/3, para. 81.

covered through some provisions of the CRC and CAT.

### 3.1.3 The Regional Systems: The Case of the Inter-American Court of Human Rights

While the enforcement mechanism on the international level are limited, the Inter-American Court and the European Court for Human Rights give legally binding enforceable judgements with specific statements on reparations. Thereby, they can potentially offer more specific standpoints on how they understand the concept of harms and reparations.[85] Thus, it follows naturally that reparations are more specifically dealt with on the regional level. The following chapter will analyse how the Inter-American Court has understood reparations with specific attention to the five categories suggested by the Basic Principles and the question of collective reparations.

The Inter-American Court has jurisdiction over countries that have signed the Inter-American Convention on HR (ACHR). It reviews cases that are represented to it by the Inter-American Commission. Art. 25 ACHR contains the right to remedy. More specifically, Art. 63 of the ACHR orders a payment of fair compensation wherever the right to freedom is breached.

The Inter-American Court has ruled in cases of disappearances, killings, torture, massacres and other gross human rights violations. While the Court has developed jurisprudence covering various forms of reparations it has also specifically granted collective reparations where the community as a whole has been affected. Usually, the Court uses three conceptual divisions to reparations: pecuniary, non-pecuniary harm and other measures.[86] In the following, however, the analysis is done along with the Basic Principles.

The Court's decisions are based on the concept of full-restitution. As discussed, the concept means to restore the interests of the injured party. According to the IACfHR, restitution entails the indemnification for patrimonial and non-patrimonial damages, including emotional harm".[87] But its creativity goes far beyond this principle.

---

[85] Evans (2012), p. 36.
[86] Quintana Osuna (2008), p. 309.
[87] Velásquez Rodríguez v. Honduras, IACtHR, 29 July 1988, para 166-167; Velásquez Rodríguez v.

While granting compensations, the Court has stressed that compensations are not always sufficient, as in cases of torture for example. In its earlier jurisprudence on torture and arbitrary detention the Court developed the concept of *proyecto de vida* (life plan) in which it established the concept of damages that includes the victim's professional and personal development in the future.[88]

As to rehabilitation, the Court has granted a wide range of provisions such as free medical care and psychological services as well as the translation of the ACHR into indigenous languages and the establishment of an educational institution.[89] Moreover, the Court also uses measures of recognition to contribute to the satisfaction of the victims. Among them are public apologies, such as an apology in a major newspaper or a public speech in a village.[90]

Measures of non-repetition have, for example, entailed demanding the state to bring anti-terror legislation in line with the provisions of the Convention.[91] Further, non-repetition measures have included the incompatibility of amnesties with international human rights law obligation and the order of human rights training to military staff.[92] In addition to pecuniary compensation, the Court awarded collective reparations, setting up unavailable infrastructure such as a school and medical dispensary.[93] The *Massacre Plan de Sánchez v. Guatemala* case from 2004 recognised the entire community as beneficiary of collective reparations.[94]

To conclude, the Inter-American Court has applied a broad understanding of reparations taking into account the social-economic situation of the victim. Reparations have included specific measures of satisfaction, and guarantees of non-repetition. Also, collectives are recognised as beneficiaries. In sum, the broad concept of reparations suggest a concept of justice that goes beyond the pure liberal understanding of "full

Honduras, IACtHR, 21 July 1989, para 26.

88 Loayza Tamayo v. Peru, IACtHR, 27 November 1998, paras 147-150.

89 Plan de Sánchez Massacre v. Guatemala, IACtHR, 29 April 2004.

90 Idem.; Pasqualucci (2013), p. 205.

91 Loayza Tamayo v. Peru, IACtHR, 27 November 1998, para 5; Castillo Petruzzi et al. v. Peru, IACtHR 30 May 1999, para 14; Pasqualucci (2013), p. 215.

92 Pasqualucci (2013), p. 213; Rodríguez-Pinzó (2007), p. 1390.

93 Aloeboetoe et al. v. Suriname, IACtHR ,10 September 1993, para 96.

94 Plan de Sánchez Massacre v. Guatemala, IACtHR, 29 April 2004, para 62.

restitutions" and "individuals". Instead, the Court shows elements of communitarian understandings of justice that underline the social relations within a community and symbolic reparations.

## 3.2 Reparations for Victims of Gross Sexual Violence

The next section will first analyse the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for its mandate to make structural disadvantages visible. Also, it focuses on women who are the most frequent victims of sexual violence. It seems thus probable that CEDAW provides contributions on reparations for victims of sexual violence as understood by the present thesis. Then, the analysis will turn to the wider international community.

### 3.2.1 Convention on the Elimination of All Forms of Discrimination Against Women

In the 1960s many women were active in national self-determination movements. On the international level, these women saw how women were largely neglected. The way decolonisation was processed and the way negotiations of the two Covenants were conducted lacked the perspectives of women. As a consequence, advocates started to push for a convention that would focus on the special situation of women.[95] In 1979 a GA resolution adopted CEDAW. Two years later the treaty entered into force.[96]

CEDAW does not include any individual complaint mechanisms but only includes state communications. CEDAW does not contain any provisions on reparations to the victims. The only possible reference point for reparations could be seen in Art. 2 CEDAW which obliges the states to condemn discrimination against women in all its forms. It states that state-parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. Subparagraph (b) contains the obligation of state-parties to ensure that legislation prohibiting discrimination and promoting equality of women and men provides appropriate remedies for women who

[95] CEDAW preamble, para 6; for further discussion on the decolonisation see: Boserup Ester, Women's role on Economic Development (1970).

[96] CEDAW, UNGA Res 34/1980, 18 December 1979; Chinkin, Freeman (2012), p. 21.

are subjected to discrimination contrary to the Convention.

In 1992 the CEDAW Committee recommended to include sexual violence in the concept of discrimination. In its general recommendation No.19 the Committee claims that the understanding of discrimination includes gender-based violence "regardless of whether those provisions expressly mention violence".[97] The general recommendation opened the possibility to understand sexual violence as a form of gender-discrimination. Art. 1 defines a discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Thus, incorporating sexual violence into the application of discrimination entails an understanding that includes all rights, from civil and political rights to social, economic and cultural rights.[98] Consequently, CEDAW regards violence in a way that points to the individual as well as to a structural harm.

In 2000 the optional protocol to the CEDAW entered into force. Since then, the Committee has had the mandate to give recommendations to state parties in individual cases. The Committee has used the new mandate to strengthen the right to remedy for victims of sexual violence through its progressive interpretation.

In *Vertido v. Philippines* the Committee decided on a rape case where the judiciary had acted in a way that followed rape myths and other stereotypes that lead to the acquittal of the accused. The CEDAW Committee found that the judges' decision amounted to gender-discrimination.[99] The Committee implied the right to remedy in Art. 2(c) CEDAW, establishing the obligation for all states, "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against

[97] CEDAW, General Comment No. 19, (1992), para 6.
[98] For further discussion on the added value to economic and social rights, see Fredman, Sandra, Engendering Socio Economic Rights (2013).
[99] Vertido v. Philippines, CEDAW, No. 18/2008, 22 September 2010, paras 8-9.

any act of discrimination".

In its recommendation, the Committee acknowledged that the harm of the victim consisted of damage done by respectively personal and structural violence. On the one hand, it found that the woman's right to personal security and bodily integrity was breached and that the victim had lost her job.[100] On the other hand, it found moral and social damage: The excessive duration of the proceedings and the use of stereotypes during the process lead to a re-victimisation of the victim.[101] The Committee recommended pecuniary and non-pecuniary compensations commensurate to the gravity of the violation.[102] Additionally, the Committee recommended measures of non-repetition. The state should take specific measures into account, such as to review the definition of rape in the legislations and to provide regularly training on gender issues in general and CEDAW particularly for judges, lawyers and law enforcement officers.[103]

In 2010 the General Comment Nr. 28 introduced the general stand point of the Committee that obligations to ensure remedies mean to provide reparations to women whose rights have been violated.[104] Such reparations should include different forms of reparation, such as monetary compensation, restitution, rehabilitation, reinstatement, measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition. It further urges changes in relevant laws and practices and to bring justice to the perpetrators of violations of human rights of women.[105]

To conclude, CEDAW offers a concept of reparations to sexual violence that recognise both the personal and structural component of violence. However, so far, the Committee has not yet exemplified how to apply measures of rehabilitation and satisfaction as part of a comprehensive approach to reparations for victims of gross sexual violence.

What is more, CEDAW is limited by its binary approach to gender. It refers to the differences between men and women and is only addressed to the protection of the

[100] Vertido v. Philippines, CEDAW, No. 18/2008, 22 September 2010, paras 8.7, 8.8.
[101] Ibid., para 8.8
[102] Idem.
[103] Ibid., paras 8-9.
[104] CEDAW General Comment Nr. 28, CEDAW/C/2010/47/GC.2 (2010), para 32.
[105] Idem.

latter. Neither sexual violence as a form of discrimination against gender identity towards LGBT communities violence against men or boys are covered.

### 3.2.2 The UN on Gross Sexual Violence and Reparation

The following section will analyse to which extend the international community has understood sexual violence as phenomena that is inseparably linked to gender stereotypes and gender-discrimination consisting of personal and structural components.

#### 3.2.2.1 A Women's Movement for Human Rights

The discourse within the international community on sexual violence has evolved as a women's rights movement. A long path of advocacy lead to the Vienna Conference in 1993 and the adoption of its outcome document: the Declaration on the Elimination of Violence Against Women (Vienna Declaration) in the GA.[106] It recognises women's rights as human rights and provides a comprehensive understanding of sexual violence against women. It recognises violence against women as "a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women".[107] It further acknowledges sexual violence to be one of the crucial mechanisms by which "women are forced into a subordinate position compared with men".[108] Art. 1 of the Vienna Declaration defines sexual violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life." The VD also led to the adoption of a Special Rapporteur on Violence Against Women by the Human Rights Commission.[109]

A further advancement for women's rights occurred only two years later. The 4th international conference on women took place in Bejing. The resulting document, the Bejing Platform for Action, is often described as a benchmark for women's rights. It has

[106] Declaration on the Elimination of Violence Against Women, GA 48/104 (1993).
[107] Ibid., preamble.
[108] Declaration on the Elimination of Violence Against Women, GA 48/104 (1993), preamble.
[109] Qureshi (2013), p. 189.

the same comprehensive approach to sexual violence as the VD, seeing it as "a manifestation of the historically unequal power relations between men and women"[110] and regards it in its context of social pressures and cultural customs.[111] The outcome document gives concrete recommendations of action to 12 areas of concerns of which sexual violence is one. It further states that the low social and economic status of women can be both a cause and a consequence of violence against women.[112]

Thus, the platform of action does not rest on abstract obligations but sets out clear actions to be undertaken by different actors. The outcome document demands governments to adopt laws and reinforce existing law that punish police security forces or any other agents of the State who engage in acts of violence against women in the course of the performance of their duties, to review existing legislation and to take effective measures against the perpetrators of such violence.[113] However, any specific provision on remedy for victims of sexual violence is absent.

#### 3.2.2.2 Reparations for Gross Sexual Violence-A Matter of International Peace and Security?

The Security Council (SC) has paid increasing attention to sexual violence, for both the "impacts on women in armed conflict and commitment to women's participation in peace processes".[114]

The first SC Resolution 1325 on sexual violence has put the spotlight on the special needs of women in armed conflicts. Thereby, it has acknowledged the special risk of harm that women are exposed to in conflict situations. It calls upon the need for special legislations to protect women and girls from gender-based violence.[115] The resolution does not mention the right to reparation as such. Rather, it recognises the special needs of women and girls in rehabilitation. Furthermore, it also names the fight against impunity as a key issue. Sexual violence is to be excluded from amnesty laws "where

[110] Bejing Platform of Action (1995), para 118.
[111] Idem.
[112] Ibid., para 112.
[113] Ibid., para 124(o).
[114] Urban Walker (2012), p. 20.
[115] Security Council, S/RES/1325 (2000), para. 10.

feasible".[116] In its later resolution 1820 (2008) this exception is taken away. Thus, the way in which the SC has approached the issue of sexual violence is foremost a special needs approach towards women and girls that concentrated on the reestablishment of the the previous situation. The SC has been heavily criticised. Feminist scholars in particular have criticised the Security Council for applying an essentialist approach to sex and gender in its earlier SC resolution 1325 that reinforces power structures that are underlying the issue of sexual violence itself.[117]

In 2009 the SC launched the resolution 1888. Thereby it connected the fight against impunity to the prevention of future abuses, "drawing attention to the full range of justice and reconciliation mechanism".[118] It further refers to national, international, and mixed criminal courts, to tribunals and reconciliation commissions noting that they can contribute to promoting the right of the victims.

In 2013 the SC Resolution 2106 names for the first time the term "reparations". While not claiming a general human right of reparations for victims of sexual violence, it underlines the importance of civil society organisations to support survivors in accessing justice and reparations.[119] It also recalls the need to sanction perpetrators.

At first it appears that the resolution 2106 focuses more on administrative reparations programs than on a right to reparations. Upon closer look, it also stresses the importance of a "comprehensive approach to transitional justice in armed conflict and post-conflict situations, encompassing the full range of judicial and non-judicial measures".[120] Furthermore, it urges for the timely assistance of survivors of sexual violence by providing "non-discriminatory and comprehensive health services, including sexual and reproductive health, psychological, legal, and livelihood support and other multi-sectoral services for survivors of sexual violence".[121] It also calls upon donations etc.

What is more, the SC has recognised that sexual violence although mostly affecting

[116] Security Council, S/RES/1325 (2000), para 11.
[117] Shepherd (2011), p. 506.
[118] Security Council, S/RES/1888 (2009), preamble, p. 2.
[119] Security Council, S/RES/2106 (2013), para 21.
[120] Ibid., para 4.
[121] Ibid., para 19.

women and girls, can also affect men. Also in the recent resolution the SC refers to the capacity building activities of women for the first time. This is of crucial importance, as stressing the active role of women can contribute to their empowerment. The SC resolution has affirmed that "women's political, social and economic empowerment, gender equality, and the enlistment of men and boys in the effort to combat all forms of violence against women are central to long-term efforts to prevent sexual violence in armed conflict and post-conflict situations."[122]

To summarise, while sexual violence has been invisible in the documents of the SC, recently it has paid increasingly attention to the issue of sexual violence and its role in conflict and international peace. Still the SC does not take any form of structural component into account. What is more, the Security Council has launched all resolutions on sexual violence under Ch.6 UNCH; an implication of their non-direct enforceable character.[123] The Security Council has never used any sanctions under Ch.7 UNCH. This shows that the Security Council somehow does not treat sexual violence as an urgent issue that needs direct enforceable actions, despite the claim of urgency in action.

#### 3.2.2.3 Recent Approaches to Sexual Violence in Conflict

In April 2013 the G8 groups adopted a Declaration on Preventing Sexual Violence in Conflict. The document proclaims the urgency to act both to decrease the amnesty of perpetrators and to increase the access to justice to victims. Ministers emphasise that "more must be done, including challenging the myths that sexual violence in armed conflict is a cultural phenomenon or an inevitable consequences war or a lesser crime".[124]

Later that year the UK Foreign Secretary and the UN Special Rapporteur on Sexual Violence in Conflict launched a draft that built on the G8 declaration. In the 68th General Assembly 122 countries endorsed the Declaration of Commitment to End

[122] Security Council, S/RES/2106 (2013), preamble.
[123] An exception to this is the resolution S/RES/1960 where black listing is introduced for potential perpetrators of sexual violence.
[124] UK Foreign & Common Wealth Office UK G8, Declaration (2014).

Sexual Violence in Conflict (Declaration of Commitment). As the G8 declaration, GA Declaration of Commitment stresses the empowerment of women. It further states that both men and women must be recognised as victims of sexual violence in conflict. However, it does not make the connection between sexual violence and gender roles in general. Thus, although not being completely comprehensive, the Declaration of Commitment shows an understanding of sexual violence in its deeper context. The document points to an approach that takes empowerment of women and girls as a starting point instead of trying to protect women and girls as passive objects.

### 3.2.3 Conclusion

Contributions on reparations of sexual violence that respond to harm as a matter of personal and structural harm remain limited. CEDAW has recognised reparations but it does neither develop any further details on it nor does it imply other people than women. In that sense the Convention reflects the social values from its time. However, later on, the optional protocol has introduced the opportunity of individual complaints and CEDAW develops progressive interpretations of reparations that both address personal and structural harm.

In the international community, those documents that understand sexual violence as gender-discrimination scarcely incorporate a claim for reparations. What is more, the Security Council has moved from a policy of ignorance towards a policy that is more supportive for victims of sexual violence. Nonetheless, while naming reparations in its latest major resolution on sexual violence the focus of the Security Council remains on rather selective “services to the helpless” than on a comprehensive concept to reparations of sexual violence as a product of structural inequalities.

## 3.3 Regional Systems: The Example of the Inter-American Court

As presented, the Inter-American Court applies a concept of justice that goes beyond a pure liberal approach. The following chapter will analyse recent jurisprudence where the Court has granted reparations to victims of sexual violence. The section will analyse, how the Court understood the harm of sexual violence and reparations to it

were granted.

The most prominent instrument for the fight against gender-discrimination is the Convention on Preventing and Combating Violence Against Women and Domestic Violence (Bélem do Pará Convention). Adopted in 1994, the Convention provides a comprehensive tool to understand sexual violence as "any act or conduct based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere. In Art. 6(a) the Convention specifies that sexual violence includes the right to be free from discrimination. The state parties agreed that violence against women, "is an offence against human dignity and a manifestation of the historically unequal power relations between women and men".[125]

### 3.3.1 Towards the Application of the Bélem do Pará Convention

The first judgement where reparations for victims of sexual violence were given extensive attention is the *Massacre of Plan de Sánchez v. Guatemala* case from 2004. In that case Guatamala was held responsible to have missed relevant steps of investigation and punishment of members of the army and military that among other crimes had raped approximately twenty girls and young women.[126] The Court found that the harm endured by the raped women was still present in their families and communities. However, no gender specific harm was acknowledged by the Court.[127]

Only in 2006, the Inter-American Court has for the first time taken into account the gender specificity of the harm of sexual violence and applied the Bélem do Pára Convention.[128] In the *Castro Castro Prison v. Peru Case* the Court acknowledged the gender specificity of violence because some "acts of violence were directed specifically towards the women and others affected them in greater proportion than the men".[129] The amount of compensation depended on the offences, it was differentiated between victims that were pregnant and those that were raped and those that had experienced other forms of sexual violence.

[125] Organization of American States, Council of Europe (2014), p. 8.
[126] Massacre of Plan de Sánchez v. Guatemala, IACfHR, 29 April 2004.
[127] Rubio-Marín, Sandoval (2011), p. 1073.
[128] Castro Castro v. Peru, IACtHR, 25 November 2006, para 223.
[129] Idem.

### 3.3.2 Acknowledging the Gender Specificity of Harm

In 2009 the Inter-American Court applied for the first time the definition of sexual violence as outlined by the Belem Convention, seeing sexual violence as part of gender-discrimination.[130] It is also the first case in a context of generalised violence and discrimination against women.[131] In the *Cotton Field*-Case Mexico was found responsible for not having sufficiently investigated, prosecuted and punished with due diligence the disappearances and deaths of three girls at the age between 15 and 20 years in the city of Juarez, Mexico.[132] As a result, Mexico was held to have breached the obligation of non-discrimination under the American Convention.[133] The context of the case was the abduction, disappearance and killings of more than 300 women and girls by non-state actors since 1993 in the area of Juarez. These cases have been labelled as "feminicides" since the girls were victims of sexual violence before being killed or subject to mutilations and a general culture of gender-discrimination had played a crucial role.[134]

The Court applied the principle of full-restitution and subsequently adjusted it to the needs of a situation of general inequality between genders. It said that in a "context of structural discrimination,...,reparations must be designed to change this situation, so that their effect is not only of restitution but also of rectification".[135] The Court established the following focal points for the reparations of the present case. Reparations need to:

(1) refer directly to the violations declared by the Tribunal; (2) repair the pecuniary and non-pecuniary damage proportionately; (3) not make the beneficiaries richer or poorer; (4) restore the victims to their situation prior to the violation insofar as possible, to the extent that this does not interfere with the obligation not to discriminate; (5) be designed to identify and eliminate the factors that cause discrimination; (6) be adopted from a gender perspective, bearing in mind the different impact that violence has on men and on women, and (7) to take into account all the juridical acts and actions in the

[130] Rubio-Marín, Sandoval (2011), p. 1079.
[131] Ibid., p. 1077.
[132] Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, 16 November 2009, para 205.
[133] Rubio-Marín, Sandoval (2011), p. 1078.
[134] Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, 16 November 2009, para 144.
[135] Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, 16 November 2009, para 450.

case file which, according to the State, tend to repair the damage caused.[136]

Thus, the Court awarded reparations for pecuniary and non-pecuniary damages. The pecuniary damages included consequential secondary damages of economic loss as experienced by the victims. The Court ordered compensation for funeral expenses and expenses that the next of kin had to spend for searching the girls and for seeking justice. Loss of earnings was however only granted to the family members of the three deceased girls.

As to non-pecuniary compensations, the Court took into account the harm of non-adequate investigation, abduction and killing of the girls and threats that the next of kin were subjected to. It has been observed that non-pecuniary compensation has been slightly higher than in similar cases where the state lacked adequate investigation.[137]

Having stated that compensations are insufficient the Court also ordered measures of satisfaction and rehabilitation. The Court followed the demands of the Commission to near completion, and the representatives of the injured parties and foresaw the publication of the judgement and the state's public acknowledgement of an international responsibility. Still, it rejected the demand to establish a national day to commemorate victims of "feminicidos". Instead, the Court ordered physical and mental health programmes to the victims. Those included free access to medical and psychological services and medication according to the victims' needs for as long as necessary. Moreover, the personnel to provide those services must be trained to deal with consequences of gender violence.

Finally, the Court ordered guarantees of non-repetition. The Court obliged Mexico to continue the standardisation of its investigative protocols when investigating sexual violence.[138] It also ordered Mexico to follow the Istanbul -and Minnesota Protocols, and to provide the Court with a report on guarantees of non repetition annually for three

[136] Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, 16 November 2009, para 450.
[137] Rubin-Marín, Sandoval (2011), p. 1086.
[138] Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, 16 November 2009, para 497; The Minnesota Protocol refers to the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/.12 (1991); the Istanbul Protocol refers to the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2004).

years.[139] The Court further demands Mexico to create a national database with information of all missing women and girls and their genetic information.[140] The Court for example stresses the need for forensic analyses and prosecution to be harmonised with international standards.[141] Also, Mexico must make sure to train personnel to handle sexual violence in a gender sensitive way.[142] The state of Chihuahua has to implement policies to look for and find disappeared women and girls. Finally, the Court indicated to Mexico the parameters to be taken into account of rapid investigations when a women or a girl disappears.[143]

Nonetheless, the Court did not follow all demands of the Inter-American Commission and the representatives of the survivors. The Inter- American Commission demanded the Court to order effective longterm policies to avoid future violations. Mexico had argued that its current legislation was sufficient while the Commission persisted on its position that effective policies were missing. The Court decided that no prove had been given by the Commission that those policies were absent. Thereby, the Court placed the burden of prove on the side of the victims. Rubio-Marín has criticised this abstention.[144] She argues that due to the nature of reparations of non-repetition they should not be treated in the same way as backwards-oriented reparations. Instead, the Court should invert the burden of proof as it is often done with other systematic human rights violations.

To summarise, while the Court missed the last step to implement a concept of transformative reparations, it recognised both the insufficiency of compensation in cases of sexual violence and the need for reparations to be transformative. Thereby, it laid important grounds for reparations that contribute to gender justice.

### 3.4 Conclusion: Reparations & International Human Rights

The previous chapter indicates three points: Firstly, international human rights

[139] Gonzales et al. ("Cotton Field") v. Mexico, 16 November 2009, para 301.
[140] Ibid., para 512.
[141] Ibid., para 502.
[142] Gonzales et al. ("Cotton Field") v. Mexico, 16 November 2009, paras 451-452.
[143] Ibid., paras 301, 506.
[144] Rubio-Marín, Sandoval (2011), p. 1088.

monitoring bodies have increasingly used the concept of a right to reparation in their individual views and even more so in their general comments. Secondly, some of the human right monitoring bodies have included all five forms of the Basic Principles and the majority of them have widened its concept of reparations throughout the last decades. Thirdly, contributions to a comprehensive approach to reparations for victims of gross sexual violence remain limited. The CEDAW Committee has provided a comprehensive understanding of reparations for victims of sexual violence for women. However, it has not given recommendations on a case of gross violence yet. The SC, while having been ignorant to a comprehensive concept of reparations for sexual violence, has recently made steps towards underscoring the interrelation between gender roles, gender-discrimination and sexual violence and reparations thereto.

Lastly, the IACfHR has made a clear statement towards a more communitarian concept of justice that not only sees the victim as an individual but that takes her/his relations to the community into account. Moreover the IACfHR clearly demands a gender-sensitive concept; including reparations that looks at the reparative function to the past as well as a transformative potential to the future.

## 4. International Criminal Law

International Criminal Law is a relative new branch of international law. It has started off by the idea to punish individuals in order to fight against impunity during war times. The first time that individual were held accountable was after WWII with the Nuremberg and Tokyo Tribunals.[145] It was very clear to everyone that sexual violence had played a major role on all sides of WWII.[146] But it was seen as a side effect of the war and little was done to go after any of the perpetrators. The Nuremberg Tribunal did not take sexual violence into account in any way. Neither the Nuremberg nor the Tokyo Tribunal had provided specific provisions on sexual violence but the Tokyo Tribunal prosecuted rape under the charge of war crime, under inhumane treatment, ill-treatment

[145] De Brouwer (2005), p. 6.
[146] Askin (1997), p. 51; de Brouwer (2005), p. 7.

and the failure to respect the families' honour and rights.[147] However, the first time that sexual violence was charged in other ways than rape was during the ad-hoc tribunals in the 1990s.

### 4.1 The Ad-Hoc Tribunals

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the SC Resolution 827 of 1993. The resolution aims to establish a Tribunal for the purpose of "prosecuting persons responsible for serious violations" and "to contribute to ensuring that violations are halted and effectively redressed".[148] In 1994, the SC Res 955 introduced the International Criminal Tribunal for Rwanda (ICTR) Statute, establishing the international tribunal on Rwanda. For the first time, the preamble introduced the idea of reconciliation. The ad-hoc tribunals did not have any common standpoint on the purpose of justice and the jurisprudence was incoherent.[149] Most cases referred to deterrence and retribution.[150] Only in the Furundzija decision the ICTY named the concept of reconciliation and rehabilitation to the case of sexual violence.[151]

Neither the ICTY Statute nor the ICTR Statue grant reparations to victims of sexual violence. Only in cases of property they provide a legal basis for restitution.[152] What is more, state responsibility is absent and according to Art. 105 RPE victims are reliant on the prosecutor and cannot seek reparations by themselves. Thus, while the the ad-hoc tribunals somehow broadened the concept of justice it remained a fragmentary attempt. Reparations to the victims of sexual violence remained absent and the role of victims was passive.[153] Also, the tribunals have often been criticised for having used victims as witnesses.[154] In turn, this experience has created a strong movement for an improvement

147 Askin (1997), p. 180; de Brouwer (2005), p. 8.
148 Security Council, S/RES/827 (1993), p. 2.
149 Evans (2012), p. 89.
150 e.g. Prosecutor v. Tadiç, ICTY, 16 November 1998, para. 21; Prosecutor v. Akayesu, ICTR, 2 October 1998, para. 19.
151 Prosecutor v. Furundzija, ICTY, Judgement, 10 December 1998, para 288.
152 Art. 24(3) ICTY Statute., Art. 23(3) ICTR Statute.
153 Evans (2012), p. 90.
154 e.g. Chinkin (2012), p. 90.

of victims' rights when the Rome Statute was negotiated.

### 4.2 Reparations for Victims of Sexual Violence at the ICC

The Rome Statute constitutes a land mark when it comes to reparations and reparative justice.[155] In its first judgement in 2012 the Court convicted Thomas Lubanga for 14 years of imprisonments. Lubanga was the president of the *Union des Patriotes Congolais (UPC)* and commander-in-chief of the *Forces Patriotiques Pour la Libération du Congo* which took a major part in the Congolese conflict.[156] He was charged for using child soldiers. While no charges existed against sexual offences, the Court still recognised the evidence that sexual and gender violence had occurred.[157] With the Lubanga judgement the ICC also depicted for the first time some principles of reparation as foreseen in Art. 75(1) ICC St. Although the Court clarified that these principles are not binding to other cases they will certainly have an influence on the future jurisprudence of the Court.[158] In the following, the Rome Statute and the ICC's interpretation of it will be analysed.

#### 4.2.1 The Concept of Justice

At first, it seems that the Rome Statute reaffirms a distributive understanding of criminal justice. The preamble mentions the punitive role of criminal justice: “Crimes of interest of the international community must not go unpunished”. The ICC must fight against the impunity of perpetrators and thereby aims to contribute to the prevention of such crimes. However, in the Lubanga decision the Court claims a broader understanding of justice by quoting the UN Basic Principles: “The Statute and the rules introduce a system of reparations that reflects a growing recognition in international criminal law that there is a need to go beyond the notion of punitive justice, towards a solution which is more inclusive, encourages participation and recognises the need to provide effective remedies for victims”.[159] Furthermore, the Court emphasises the

[155] Evans (2012), p. 90.
[156] Chappell (2014), p. 187.
[157] Prosecutor v. Lubanga, ICC, 7 August 2012, para 200.
[158] Ibid., para 181; Spiga (2012), p. 1388.
[159] General Assembly Resolution, A/RES/60/147, 16 December 2005.

twofold purposes of reparations: to repair the harm that serious crimes cause and to enable the Chamber to ensure that offenders account for their acts.[160]

### 4.2.2 A Two-Fold Role for Reparations

The ICC Statute encompasses two tasks for reparations. Firstly, Art. 75(1) ICC Statute enables the Court to order reparations in response to a conviction. Secondly, Art. 79 ICC foresees the establishment of a trust fund that can generally support victims of crime in the jurisdiction of the Court. Further explanation is given in Rules 94-99 of the Rules of Procedures and Evidence (RPE).

Art. 75(1) empowers the Court "to establish principles relating to reparations to, or in respect of victims, including restitution compensation and rehabilitation". It also enables the Court to decide whether it is appropriate to grant these reparations through the Trust Fund, as provided in Art. 79. Measures can include direct forfeitures of the property of the convicted person. The appraisal of the kind and scale of reparations is under complete discretion of the judges.[161]

The general support of victims, as mentioned in Art. 98(5) RPE, is independent from the Courts's decision. Art. 48 of the Trust Fund for Victims Regulations (TFV) points to the second mandate of the Trust Fund, to "benefit victims of crimes",...,"who have suffered physical, psychological and/or material harms as a result of these crimes", as defined in Rule 85 RPE. The question whether, when and how is codified in Regulation 50(a). Accordingly, support is provided if the Board of Directors "considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families". The discretion of the board is extensive. In opposition to the Trust Fund acting on behalf of the Court, the Trust Fund can act quite freely when it develops reparation programmes for victims of crimes in which the Court is active. It simply needs to let the Court approve its program plan.[162]

[160] Prosecutor v. Lubanga, ICC, 7 August 2012, para 179.
[161] Art. 75(2) ICC St.
[162] McCarthy (2012), pp. 288-289.

### 4.2.3 The Role of International Human Rights Law: Art. 21(3) ICC

According to 21(3) ICC the Court must apply and interpret law in consistency with international human right law. Also, it must be done in a non-discriminatory way which includes a prohibition to distinguish on grounds of gender as defined in Art. 7(3) ICC. Here it says, “for the purpose of this statute 'gender' refers to the two sexes, male and female, within the context of society.” One must certainly welcome the inclusion of gender into the Statute because it recognises that the categories are socially constructed. Nonetheless, one cannot oversee the gender dichotomy that is anchored here. The definition was also a highly discussed subject during the negotiation process.[163] The compromised outcome negates the manifoldness of genders and negates for example a protection against gender identities that cannot be categorised as man or women such as sexual violence against transgender persons.

In the Lubanga decision the Court shows that it takes human rights seriously. It recognises reparation as a “well established human right”[164], that is anchored in human rights treaties and other documents. The Court quotes a wide range of human rights documents, ranging from the Basic Principles of Justice for Victims of Crime and Abuse of Power[165] to the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime[166], the Nairobi Declaration; the Cape Town Principles and the Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; as well as the Paris Principles.

Among the cited documents are not only soft law documents but also civil society declarations such as the Nairobi Declaration, a declaration of women's organisations and survivors of sexual violence.[167] In that way the Court strengthens the position of civil society in general and that of women's voices in particular. The Court also stresses the need to pay attention to include cross-cutting principles when applying Art. 21(3) ICC

[163] Osterveld (2012), pp. 59, 64.
[164] Prosecutor v. Lubanga, ICC, 7 August 2012, para 185.
[165] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.
[166] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/RES/40/34, 29 November 1985.
[167] A more detailed analysis of this document is provided in ch. 5.1.

such as gender-discrimination. However, the dissenting opinion of judge Odio Benito criticises the Court for not having done so in a sufficient way. She criticises that sexual violence is not given enough attention in the conviction although it should have played a key role. She claims that sexual violence is an intrinsic element of the crime of using child soldiers and "a direct and inherent consequence to their involvement with the armed group".[168] Furthermore, she stresses the impact that sexual violence had on female child soldiers: "Sexual violence and enslavement are the main crimes committed against girls and their illegal recruitment is often intended for that purpose".[169] Finally, she emphasises the gender specific consequences of unwanted pregnancies for girls that often lead to maternal or infants's death, diseases, HIV, psychological traumatisation and social isolation.

### 4.2.4 Victims & Vulnerable Groups

#### 4.2.4.1 Beneficiaries

The ICC St. uses a broad notion of victims. Pursuant to Art. 85(a) RPE victims mean "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." It includes affected persons but also family members within the jurisdiction of the Court.[170] The Court should determine whether there was a close personal relationship between the indirect and direct victim.[171] Additionally, pursuant to Art. 85(b) the notion of victim may also include "organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places of humanitarian purposes". Verification can be made by IDs or if that is not possible, through credible witnesses.[172]

The view of the victims must be included when the Court decides on the reparation principles. Art. 75(2) ICC St. foresees that the Court shall even take into account the

[168] Prosecutor v. Lubanga, Separate and Dissenting Opinion of Judge Odio Benito, ICC, 7 August 2012, para 20.
[169] Ibid., para 21.
[170] Rule 85 RPE; see also regulation 46 TFV.
[171] Prosecutor v. Lubanga, ICC, 7 August 2012, para 195.
[172] Ibid., para. 198.

perspectives of the convicted person, victims or interested persons or states. In the Lubanga process numerous NGOs presented their views to the Chamber before the Court decided on the Reparations Principles. Among them was the gender advocacy NGO Women's Initiatives for Gender Justice but also the Trust Fund and different victims' groups.[173]

#### 4.2.4.2 Recognising the Harm of Sexual Violence as a Matter of Vulnerability

As pointed out before, although the prosecutor did not include any charges of sexual offences the Court recognised in its reparations judgement that victims had experienced various forms of sexual violence. The Court further acknowledged that victims that have experienced sexual violence are in a "particularly vulnerable situation".[174] They may require urgent assistance in forms of, for example, medical care. The Court orders "measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations".[175]

The Court also addresses that reparations must be gender-sensitive.[176] They should include gender and ethnic-inclusive policies and communications between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance.[177] The Court addresses the need to meet the specific obstacles faced by women and girls.[178] The Court further recognises the far reaching and complicated consequences of the harm of sexual violence and includes, "women and girls, men and boys, together with their families and communities".[179] The Court also talks about the specific vulnerability and specific needs for child victims.[180]

Essentially, the Court states that it is not restrained by the conviction of certain crimes or by the charges of the prosecutor. It sees reparations as independent of the crimes for which the perpetrators was convicted. The reference point for reparations

[173] Prosecutor v. Lubanga, ICC, 7 August 2012, p. 2.
[174] Ibid., para 200.
[175] Idem.
[176] Ibid., para 202.
[177] Prosecutor v. Lubanga, ICC, 7 August 2012, para 205.
[178] Ibid., para 208.
[179] Ibid., para 207.
[180] Ibid., para 210.

principles is therefore the harm experienced by the victims alone. From a gender perspective, this is one of the most groundbreaking statements. It means that awarding reparations can be made without necessarily having to overcome the huge challenge of providing evidence of sexual violence to the nexus of the crime. It is thus sufficient to prove that the perpetrator is "responsible without reasonable doubt".[181] If the victim has suffered harm from sexual violence it is not necessary to prove the nexus to the crime itself. Instead, reparation programmes focus on the current need of the victim in its specific situation.

### 4.2.5 Forms of Reparations

Art. 75 ICC St. states that the Court "shall establish principles relating to reparations",...,"including restitution, compensation and rehabilitation". While mentioning explicitly those three forms, the Rome Statute leaves space for the Court to interpret reparations in other ways, as well.[182]

#### 4.2.5.1 Restitution, Compensation, Rehabilitation

The Court stipulates the principle of full-restitution where possible.[183] But at the same time the Court acknowledges that victims cannot always be restituted in cases of international crimes. Furthermore, compensations should be considered a) if the economic harm is sufficiently quantifiable, b) if an award of this kind would be appropriate and proportionate, and c) if the available funds make the results realistic. The Court claims that compensations should be granted on a gender-inclusive basis. These two principles seem to be under tension but the Court does not address the issue in its principles. What does it mean that harm is sufficiently quantified? Is not the risk for all forms of sexual violence to be regarded as badly quantifiable? Another restriction to compensation may be the funding. When the Court decided on the reparations principles the funding was unclear because the Court did not succeed in identifying any assets from the perpetrator. It means that all funding is dependent on a voluntary basis

[181] See Prosecutor v. Germain Katanga, ICC, 7 March 2014.
[182] Evans (2012), p. 103.
[183] Prosecutor v. Lubanga, ICC, 7 August 2012, paras 223-225.

from contributions of state parties or other donors.

In cases where the above mentioned restrictions do not apply, compensation should "encompass all forms of damage, loss and injury", examples include physical harm[184], non-material damage[185], material damage[186] as well as lost opportunities. The Court also orders rehabilitation in forms of medical care, psychological, psychiatric and social assistance, legal and social service[187], and includes a long-term view of reparations such as education, vocational training and sustainable working opportunities.[188] Health care measures should particularly treat HIV and AIDS.

What is more, the Court includes the problems of further victimisation of child soldiers and feelings of shame that former child soldiers often feel, especially when subjected to sexual violence.[189] Lastly, the Court also acknowledges that reparations programmes with transformative objectives can contribute to avoid future victimisation to a limited extent.[190]

To summarise, the Court did not order any concrete material nor symbolic reparations. Instead, it provided a broad framework for the Trust Fund to decide. Still, the Court interpreted reparations in a comprehensive way that stresses the creation of citizenship, including the specific contributions of gender norms to repairing sexual violence.

#### 4.2.5.2 Collective vs. Individual Reparations

Rule 97(1) RPE states that the Court may award reparations on an individual basis or, where it deems appropriate, collectively. In the Lubanga judgement, the Court shows empathy towards collective reparations. The Chamber recalls the features of collective reparations: "Reparations can be directed at particular individuals, as well as contributing more broadly to the communities that were affected."[191] It further notes

[184] The Chamber expressly included 'causing an individual to lose the capacity to bear children'; Prosecutor v. Lubanga ICC, 7 August 2012, para 230.
[185] The Chamber referred to physical, mental and emotional suffering.
[186] Prosecutor v. Lubanga, ICC, 7 August 2012, para 230.
[187] Ibid., paras 232-233.
[188] Ibid., para 234.
[189] Ibid., para 240.
[190] Ibid., paras 235-236.
[191] Ibid., para 179.

that individual and collective reparations are not mutually exclusive and may be awarded concurrently.[192] Furthermore, the Court clarifies that collective reparations "should address the harm the victims suffered on an individual and collective basis".[193]

The Court does not provide a clear definition of what to understand under collective reparation. It simply stipulated that regarding the number of victims, collective awards are more appropriate.[194] The Court considers specifically to provide medical services including psychiatric and psychological care, and housing, education and training.[195]

### 4.3 The Wider Framework: The Role of the Trust Fund for Reparations

As touched upon, reparations have two functions in the ICC regime: to be applied in connection with a conviction as an order by the Court and as developed in form of a reparations programme by the Trust Fund. The following section will analyse, how the respective role of the Trust Fund affects the victims' situation. Specifically, it will be discussed how the Trust Fund is able to approach sexual violence as a structural violence. Before that, a short introduction to the Trust Funds' institutional structure will be given.

#### 4.3.1 The Institutional Structure of the Trust Fund

The Trust Fund is founded by the the Assembly of States Parties based on Art. 79(3) ICC St. The Assembly consists of representatives of each signatory.[196] In 2005, the Assembly of States established a Board of Directors that created a Secretariat and adopted a set of regulations governing the conduct (TFV).[197] The Board is in charge of the management of the activities of the Fund. It is the Secretariat of the Board that creates policies that guide the Trust Fund and that oversees the implementation of the Court-ordered reparations. It does so by verifying the identity of potential victims and checking if they are part of the beneficial groups.[198] In case of collective reparations, the

[192] Prosecutor v. Lubanga, ICC, 7 August 2012, para 220.
[193] Ibid., para 221.
[194] Ibid., para 179.
[195] Ibid., para 221.
[196] ICC, General Assembly-Website.
[197] ICC Resolution, ICC-ASP/3/4/Res.3, 3 December 2005.
[198] Regulation 62 TFV.

Secretariat puts in place monitoring procedures.[199] In case of a Court order of reparations through organisations the Secretariat is in charge to check these organisations. The Secretariat is attached to the Registry of the Court.[200]

### 4.3.2 The Role of the Trust Fund for Court-Ordered Reparations

When the Court orders reparations to the Trust Fund which are funded by forfeitures of the perpetrator the Trust Fund serves as a pure implementation institution. If that funding is not available, regulation 56 TFV requires the Board to "determine whether to complement the resources collected through awards for reparations with other resources of the Trust Fund." It also shall advise the Court accordingly.

The Pre-Trial Chamber, however, strongly recommends that, before resorting to other activities or projects, the Trust Fund shall undertake a study evaluating and anticipating the resources which would be needed to execute an eventual reparation order pursuant to Art. 75 ICCSt. in the cases pending before the Court.[201] Pursuant to Regulation 55 TFV the Trust Fund shall take into account "the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group".

In the case of Lubanga the Court leaves it open to the TFV to come up with a reparation plan. As pointed out in the judgement, this plan should have five steps.[202] First, the TFV, the Registry, the Office of Public Council for Victims and the experts should establish which localities should be involved in the reparations process. Secondly, a process of consultation with the victims and the identified communities follows. Thirdly, an assessment of harm should be carried out during these consultations by a team of experts. Fourthly, public debate should be held in each community to explain the reparations principles and procedures and to address the victims' expectations. Lastly, proposals for collective reparations are going to be collected in each locality which then are to be presented to the Chamber for its approval.

[199] Regulation 72 TFV.
[200] ICC Resolution, ICC-ASP/3/Res.7, 3 December 2005.
[201] Decision on the Notification of the Board of Director of the Trust Fund for Victims, ICC, 11 April 2008, p. 7.
[202] Prosecutor v. Lubanga, ICC, 7 August 2012, paras 282-283.

Since Lubanga gave notice of his appeal against his conviction and sentence the decision is pending.[203] On 13 January the Appeals Chamber granted Lubanga's request to add an additional ground of appeal. The last hearing was on 20 May 2014 and responses from the prosecution were scheduled for 12 June 2014.

### 4.3.3 The Role of the Trust Fund as an Independent Institution

As pointed out above, according to Art. 98(5) RPE the Trust Fund can run programs in areas where the ICC is active. It means that the Court must have started investigations in relation to a certain situation. It does not need to have started an investigation against a specific person. Pursuant to Art. 98(5) RPE the Trust Fund may use "other resources", which are those that are not collected from awards for reparations, fines and forfeitures.[204] It means that those funds are dependent on voluntary contributions. Accordingly, the Trust Fund's disposal of funding in comparison to the numbers of victims is very limited and the Trust Fund must chose priority areas.[205] The Board of Directors does so by firstly determining if a reparations programme is "necessary to provide physical or psychological rehabilitation or material support for the benefits of victims and their families".[206] In its Uganda and Congo Trust Fund Notifications, the Court evoked three fundamental attributes to its decision: Firstly, the possession of human capabilities such as education, skills, health, and psychological orientation; secondly, the access to tangible assets and intangible assets; and thirdly, the existence of economic activities. The Board of Directors analyses the interaction of those three components to evaluate if victims can cope with and recover from the stress and shock of their victimisation.[207] The information is taken from formal surveys and questionnaires but also from informal interviews with the victims and by consulting victims' experts such as local and international NGOs, the international community and local authorities.[208]

---

[203] REDRESS (May 2014), p. 1.
[204] Regulation 47 TFV.
[205] McCarthy (2012), p. 286.
[206] Regulation 50(a)(1) RPE.
[207] DRC Trust Fund Notification, ICC, January 2008, para 23.
[208] Ibid., para 25.

A further issue of concern is the question if the crimes really have taken place. Here, the Trust Fund analyses previous decisions and material of the Pre-Trail Chamber I, as well as it consults NGO and IGO-reports. In the case of the DRC, all reports concluded that mass crimes within the jurisdiction of the Court had been committed after July 2002.[209] Lastly, in accordance with Art 50(a) RPE the Court must approve the outline of the planned projects in order to avoid that legal issues in questions are predetermined by the interference of the Trust Fund.

The current situation in Democratic Republic of Congo (DRC) is precarious and the Trust Fund cannot reach all victims. In 2010 many NGOs quote the UN Force Commander for the Eastern DRC who stated: "It is now more dangerous to be a women than to be soldier in modern conflict".[210] This quotation indicates that the current risk to be subjected of sexual violence is one of the highest globally. UN agencies estimate that since 1998 approximately 200000 women, children and men were raped in the DRC.[211] In 2008 the Chamber agreed on the 34 projects that the Trust Fund started running in cooperation with local NGOs in the DRC.[212] Currently, 31 of them are active and over 42000 victims profit from the general assistance of the Trust Fund.[213] The projects of the Trust Fund entail four main areas of assistance to:

- help victims to rebuild their communities;
- help victims of torture and/or mutilation;
- children and youth;
- victims of sexual violence.

The programmes on sexual violence comprise currently six projects that provide a wide range of activities: providing shelters and counselling for victims of sexual violence, vocational training and equipment. The majority of the programmes entail some elements of education either for victims such as girls that were abducted and bore children in captivity or a sensitisation and education programme for community

[209] DRC Trust Fund Notification, ICC, January 2008, para 27.
[210] e.g. Websites of Actionaid, Care International, Peacewomen.
[211] UN Action Against Sexual Violence in Conflict, a UN network of 13 UN entities working to end sexual violence in conflict.
[212] Trust Fund For Victims Website, Projects.
[213] Idem.

members. Also, one programme provides basic health care and another one distributes micro-credits to survivors.[214] All in all, one must say that the Trust Fund although making great efforts to reach out to as many victims as possible it is highly restrained by its limited resources.

To sum up, the Trust Fund is a quasi-judicial institution that faces a situation in which it does not have sufficient means to cover with the amount of victims. In that sense the Trust Fund has more of an administrative managing body than of a judicial institution: It runs programmes that overlap with those of international development agencies that address victims of sexual violence in particular.[215]

### 4.4 Conclusion: International Criminal Law & Reparations

The ICC has made large steps forwards when it comes to victims' redress. It has for the first time in international binding law clarified that punitive justice is not sufficient. From that starting point, the Court has developed wide ranging principles of reparations that not only give voice to the civil society in general but specifically introduce the idea of gender-sensitivity. Then, however, the Court does not specify in detail what gender-sensitivity means. Although acknowledging both a reparative past-allocated function of reparations as well as the potential of reparations to the future the emphasis lies on the first purpose.

The judicial concept of reparations has been regarded as less efficient to survivors than administrative reparations programmes.[216] One of the main factor is the time that final judgement takes. In fact, the ICC can be criticised for having extremely slow procedures and its first judgement is still pending. Combining the Court with a wider regime that can act in a more administrative way, providing interim measures, is an attempt to bridge this gap. The hope is not only that the Trust Fund helps victims directly but also that when Court-ordered reparations are effective, the Court can rely on the work that the Trust Fund has done and its specific experience on the ground,

[214] Microcredit Projects, TFV/DRC/2007/R2/036, TFV/DRC/2007/R1/001; Basic Healthcare e.g. TFV/DRC/2007/R2/029.
[215] e.g. UNDP in Congo, UNDP Website.
[216] e.g. De Greiff (2006a), p. 2; Rubio-Marín (2009), ch.1.

including important cooperations with local communities and NGOs. All of this seems to be a good system in theory. In practice however, the lack of fundings questions the meaning of the ICC as a whole.

# 5. Voices of Civil Society and Experiences on the Ground

So far neither international human rights law, nor the ICC have given any specific information of how to understand gender-sensitive reparations exactly. The question that needs to be approached in international law is the following: How should reparations be understood in order to on the one hand strengthen the individual victims in their positions and on the other hand strive towards gender justice in the society at large?[217]

To approach this question, the following part will turn to experiences of women. First, the Nairobi Declaration, a civil society document, will be analysed. Secondly, the chapter will turn to analyse qualitative studies on how reparations, as recommended in truth and reconciliation commission reports, have affected women's situations after conflicts. Lastly, this part will come up with a suggestion of which factors need to be included in a victim-oriented approach to reparations that strives towards gender justice for the community at stake.

## 5.1 A Women's Voice on Reparations: The Nairobi Declaration

The Nairobi Declaration was published as the outcome document of the International Meeting on Women's and Girls Right to a Remedy and Reparation held in Nairobi in March 2007.[218] In response to the Basic Principles several international legal and gender experts from the civil society as well as survivors of sexual violence from Africa, Asia, Europe, Central, North and South America met to discuss the challenge to provide reparations for female survivors of sexual violence in conflict situations. The outcome document draws on the Basic Principles but points to the special situation of women and girls. It stipulates a definition of sexual violence in a context of gender

[217] See sub-research question Nr. 3.

[218] The organisations responsible for driving this initiative are the Coalition on Women's Human Rights in Conflict Situation, Urgent Action Fund Africa, and Rights and Democracy.

power relations that predate the conflict or mass atrocity.[219]

The Declaration is divided in three parts: (1) the Basic Principles relating to women's and girls' right to a remedy and reparations, (2) the access to reparations, (3) and the key aspects of reparation for women and girls. In all three sections the Declaration stresses women's and girls' process towards a full citizenship. Empowerment is mentioned as one of the key methods to support women in their role as active citizens. Specifically, participation in decision making processes on reparations is seen as a key aspect. “Space should be made for the representation of women and girls' voices in all their diversity. Reconciliation can only be achieved with the participation of women and girls”.[220]

In order to make women heard and to make them sustainably participate in decisions, reparations programmes need to take the underlying structural inequalities into account.[221] These inequalities require structures that assist women and girls in the process of speaking out and claiming reparations.[222] Also, the victims' notion should be broad enough to not only include direct victims but also indirect victims.

Lastly, although aiming for structural measures, the Nairobi Declaration makes clear that reparations cannot be confused with development programmes. At no point, reparations programmes should be replaced by development programmes, since it makes a difference, if someone 'is poor or poor and raped'.[223]

A final claim, relevant to this context, concerns the concrete steps towards transformation: It needs disaggregated data according to aspects of gender, age, cultural diversity and human rights.[224]

To conclude, the Nairobi Declaration sees a just reparation programs as necessarily linked with the transformation of the society as a whole in which the participation of woman and girls play a crucial role to their empowerment on their way to a full

[219] Nairobi Declaration (2007), principle 3.
[220] Ibid., principle. 3(d).
[221] Ibid., principle 3(h).
[222] Ibid., principles 3(g).
[223] Saris & Lofts (2009), p. 90.
[224] Nairobi Declaration (2007), principle 2 (f).

citizenship.[225]

## 5.2 Women's Experiences from Truth Commissions: Challenges to Reparations for Victims of Sexual Violence

Recent gender analyses have pursued qualitative studies on women from different contexts of conflict and post-conflict situations. The following section will draw on these studies to carve out the positive and negative impacts that reparations can have on women.

Although all situations differ, two main consequences are especially frequent to victims of sexual violence: Firstly, the re-traumatisation of victims and the exacerbation of their harm; and secondly, a high risk for further social marginalisation and increased vulnerability.

### 5.2.1 Accessibility

To avoid a re-traumatisation of the victim and an exacerbation of harm, the process of reparations must be fair and accessible.[226] Experiences show that the vulnerability of women and girls often impedes their access to reparations. This can have multiple reasons. One reason is that compensation payments are often dependent on the identification of the victim. But victims of sexual violence often wish to remain anonymous and do not dare to reveal themselves to seek reparations.

Another risk is the problem of "silencing sexual violence", when insufficient attention is paid to the harm experienced by survivors.[227] Stereotypes on sexual violence can lead to the fact that although no official transparent hierarchy of treatment of victims exists, the harm of sexual violence is categorised as less important than other forms of violence. In Peru for example, although no hierarchy existed in the recommendations for reparation, the harm of sexual violence was unofficially categorised as less "urgent" than torture and disappearances.[228] Rape was considered as

[225] Couillard (2007), pp. 444-453, p. 450; Saris & Lofts (2009), p. 93.
[226] Sandoval (ed.) (2011), para. 17.
[227] Rubio-Marín (2012), p. 83.
[228] Guilleret (2006), p. 159.

producing the lowest harm because rape was considered not to end victims' lives, not to affect the ability to generate income nor to interrupt life projects as compared with murder, forced disappearances, imprisonment, and even other violations of physical integrity.[229]

When it comes to paying compensations, risks to the accessibility of women concern the meaning of money. It could be the case that the pure payment of money is considered as blood money and maybe rejected.[230] This was the case of the comfort women of Japanese territories during WWII. Only in 1990, 45 years after the end of WWII a Japanese official offered an apology for the violations.[231]

Another possibility is that money is considered to be a public good as it was the case in Canada where compensation payments were done to indigenous survivors.[232] The government had granted payments for victims of sexual violence that had occurred in the government sanctioned Indian residential schools, a mandatory education system to "civilise" the indigenous population in Canada. The money was used for the entire community and therefore failed to especially empower women in their actions. Finally, in South Africa the compensation money was spent very fast and women had little say inside the community how to use it.[233]

Another risk to the accessibility of reparations is the fact that many victims of sexual violence do not recognise themselves as victims. A study has shown how women raise their voices more on behalf of their husbands, children and family than on behalf of themselves.[234]

### 5.2.2 Social Stigmatisation

The other frequent adversed consequence is that reparations reinforce the social stigmatisation of the victims. In general, sexual violence is still perceived to be part of society and something that "happens". Paying compensations to victims of sexual

[229] Guilleret (2006), pp. 146-147.
[230] De Greiff (2006), p. 639.
[231] Rubio-Marín (2006), p. 23.
[232] Duggan, Jacobson (2009), p. 141.
[233] Duggan, Paz y Paz Bailey, Guillerot (2008), p. 143.
[234] Ibid., p. 204.

violence may “offend the patriarchal society” and survivors risk further discrimination.

The Guatemalan National Reparation Program (2003) for example granted quite high amounts of money in comparison to the Guatemalan income average for survivors of torture, rape, and other forms of sexual violence and even more for victims that had lost more than one family member and for victims that have suffered several human rights violations at a time. The way in which victims of rape were granted compensations was through state-sponsored community ceremonies were they were singled out and given a check were it said: “Victim of rape”.[235] Later, survivors have reported that they had been pressured by members of the community of willingly have given sex to the enemy for money.[236]

In Sierra Leone, the process of registration was gender segregated. As a consequence, women, that came, were asked in a relatively public settings to identify the harm for which they came to seek reparations.[237]

In Peru reparations in the form of life pensions for partial or full disability triggered a discussion about who is in and who is out. It had a divisive effect on communities.[238] Often reparations were accused for being politically manipulated and to be only distributed to elite urban families.[239]

As to measures of satisfactions, memorialisation and commemorations in patriarchal societies risk to reinforce adverse attitudes towards women. In the debate in South Africa, men have for example felt that the growing public emphasis on women's issues lead to the fact that women “have gained disproportionately from the transition relative to men”.[240]

### 5.3 Towards a Gender-Sensitive Concept of Reparations

The previous section has outlined that reparations programmes for women need to

[235] Interview with staff members of the Community Studies and Psycho-special Action Team, Guatemala City, Guatemala 6 May 2007, in: Duggan, Paz y Paz Bailey, Guillerot (2008), p. 208.
[236] Idem.
[237] Rubio-Marin (2012), p. 87.
[238] Duggan, Jacobsen (2012), p. 140.
[239] Duggan, Paz y Paz Bailey, Guillerot (2008), p. 210.
[240] Brander (2007), pp. 147-148.

consider the social role of women before drafting reparations programmes. The problem with that is that these social roles are often a product of gender-discrimination. To reinforce those would create a boomerang effect on repairing sexual violence. It would reinforce the underlying structures that nourish sexual violence itself. Thus, it seems that reparations programmes face a dilemma. Is it possible to decrease the discrimination that is on the one hand a further consequence of sexual violence but on the other hand a general societal reality that determines infrastructures to reach out for individual victims? In the following section some promising practices and their limits to the problem will be presented.

### 5.3.1 Avoiding the Exposure of the Individual: Ways of Distribution

As discussed above, unveiling to be a victim of sexual violence often leads to social marginalisation. Often, the only way is to avoid the exposure of victims.[241] In societies where patriarchal structures restrict the agency of women, paying small pensions over time increase the chance to make the money stay in the victims' hands, as has been experienced in Bosnia.[242]

Other reparation programmes have developed effective ways to provide services while avoiding to expose survivors. In the case of Timor-Leste the way to reach out to women was done through service institutions that women had to visit anyways. Mothers received a variety of services, including counselling, peer support, livelihood training and access to microcredit through the institution that distributed children funds.[243]

### 5.3.2 Engaging in Gender Structures

#### 5.3.2.1 Guarantees of Non-Repetition

Experiences suggest positive effects on gender-discriminating structures by introducing guarantees of non-repetition. Most commonly, this is done by changing the law. Most relevant laws to victims of sexual violence are laws on inheritance, property ownership as well as laws addressing violence against women and girls, such as

[241] Rubio-Marín (2012), p. 86.
[242] Ibid., p. 94.
[243] Duggan, Jacobsen (2012), p. 140.

abortion laws.[244] As a result of reparation processes, Rwanda, for example, has reformed its discriminatory inheritance rules under which women could not inherit; Guatemala has included land reform measures in its peace agreements.[245]

Against the background of gender justice, this reparation mechanism offers a great transformative potential. Assuming that sexual violence pinpoints to gender inequalities in society, legislative measures are tailored to attack the root causes of the problem. However, legislative measures might remain powerless if they are not implemented in an efficient way. Implementation can only be pushed forward if it is supported by the society. In societies where gender hierarchies are steep it means that the community needs to change its approach to gender-discrimination and the meaning to sexual violence in general. An answer to this might be to accompany legislative measures by education programs that address the community as a whole, including men.[246] First changes in the perception of sexual violence and gender norms have for example been achieved in Rwanda. The Rwanda Men's Center RWAMREC has developed education programs that not only underline the interrelations between the gender hierarchies and sexual violence but also gives opportunities to reflect on masculinity and its role in the issue of sexual violence.[247] The aim of the project is to show that certain consequences of cultural and social norms might be harmful to the community as a whole, to both women and men.

#### 5.3.2.2 Measures of Satisfaction

Another mechanism of reparations that can address the societal structure is the measure of satisfaction. According to the Basic Principles, measures of statisfaction recognise the suffering that the individual survivor is going through. But they can also help to change the meaning of sexual violence within society and thereby contribute to a slow shift of social norms towards a society that regards sexual violence as unacceptable.[248]

---

[244] Duggan, Jacobsen (2012), pp. 155-156.
[245] Idem.
[246] Rubio-Marín (2012), p. 100.
[247] Edouard Mumyamaliza, at the Time to Act Conference, 11 June 2014.
[248] Rubio-Marín (2012), p. 95.

One aspect of satisfaction is to memorialise and remember the destiny of victims of sexual violence. However, to memorialise and remember gender crimes in a context where sexual violence is still regarded as natural and where the roles of male and female are clearly defined it is a hard undertaking.[249] It must be done in a way that respects the persistency and power of social norms. As a consequence, while addressing structural gender inequalities, symbolic reparations may not always serve the survivor's well being in its concrete situation since the process of improvement may be too slow.[250]

### 5.3.3 Collective Reparations as a Magic Tool?

Often, it has been claimed that collective reparations are a key to justice.[251] The hope is that without having to identify individual survivors a big amount of beneficiaries can be reached. Collective reparations are designed to meet the needs of a specific group of victims. For example in the case of rape, special medical services would be provided that address HIV and other sexually transmitted diseases.

In fact, collective reparations offer specific advantages to survivors. Firstly, collective reparations offer minimal exposure which decreases the risks for social stigmatisation.[252] Secondly, the programme is able to reach out to those victims that otherwise might have remained invisible. As a result, the effectivity of reparations is improved.

What is more, by addressing a specific group that shares experiences and needs, collective reparations programmes can create safe spaces in which survivors can interact. In those spaces survivors can find common understanding and discussions and sometimes dare to break their silence. In that way collective reparations programs can contribute to social and political engagement and to the empowerment of women.[253] They have the potential to move from a victims-need approach to an approach that sees victims as full actors and that promotes their full citizenship.

While the focus on societal structures offers advantages they can push towards

[249] As discussed under Ch. 5.2.2; Hamber, Palmary (2012) p. 345.
[250] Idem.
[251] Contreras-Garduõ (2012), p. 1.
[252] Rubio-Marín (2012), p. 96.
[253] Idem.

adversed consequences, as well. Firstly, when victims do not unveil their identity the public discourse about offences of sexual violence in the broader society will not change and the culture of silence remains. Secondly, the survivors are not given any recognition for their individual suffering. Thirdly, the accessibility of the programme is limited to the area of action. If survivors have left that area they will be excluded from the program.[254]

As to the question of contributions to gender justice, collective reparations seem to be especially suitable to enlarge the access to reparations; thus to make sure that redistribution of reparations works in situations of gross violence. As shown, collective reparations may also contribute to pushing towards active representation if they succeed in empowering the survivor. What is however missing is an element to recognise the individual suffering. To conclude, collective reparations can contribute to repairing individual victims of sexual violence in a way that contributes to gender justice at large if they are combined with measures that guarantee the individual recognition.

### 5.3.4 Empowerment & Participation

Recognising the suffering of the individual survivor without reinforcing neither, stereotypes of female nor male roles in society remains a challenge. The Nairobi Declaration and feminist theories on reparations[255] have suggested that the key is to empower women and to give them a voice in the decision-making that influences their own destiny. By strengthening their active participation women are pushed towards a full citizenship. Giving them a voice essentially means to value and recognise their psychological and physical experiences and to give them the choice about their own lives. Examples can be to break the silence and to share testimonies to each other and in public. As to male victims, they must be offered an alternative way of thinking their role, as well. This might include to understand how gender-discrimination serves as a fertile soil to sexual violence and to make them understand that some gender roles have both a negative effect on men and women in the community.

[254] Rubio-Marín (2012), p. 98.
[255] See e.g. Painter (2012).

### 5.3.5 Including Men, Boys & LGBT Persons

As touched upon, men and sexual minorities must be recognised as victims. Men for example are forced to rape or witness the rape of their daughters, sisters, and wives or they are forced to have intercourse with dead bodies. Other harms can be castration, forced performance of fellatio, and forced intercourse in camps and detention centres.[256]

To include men and boys as well as the LGBT community in reparations is important not only because they deserve that their harm is recognised, but to underline the core of sexual violence as a harm to society as a whole. Not to do so reinforces the divide of sexual hierarchies.[257] Therefore, reparations programmes need to challenge dominant models of masculinity and offer an alternative identity model to both men and women.[258]

### 5.3.6 Constraints of Resources

From a survivors' perspective, it appears desirable that the notion of victims is conceived as large as possible. At the same time, it is important to make a realistic promise to victims. Unrealistic promises can easily lead to re-traumatisation and decreased trust in institutions.[259]

Rubio-Marín has suggested that priorities can be made in a way that first provide reparations in forms of rehabilitation and compensation and then tackle the meaning of sexual violence through for examples symbolic and material collective reparations.[260]

## 5.4 Conclusion: Complex Reparations Programmes

These gender perspectives have first and foremost shown that reparations programmes should be complex. It is unlikely that one measure covers individual and societal needs simultaneously. Instead, it is important that measures that reach out to the individual are combined with those that address the structural harm of sexual violence. Furthermore, reparations should be proportional to the gravity of the crimes, violations

[256] Wood (2006), p. 311.
[257] Rubio-Marín (2012), p. 89.
[258] Ibid., p. 100.
[259] Sandoval (ed.) (2011), p. 9.
[260] Rubio-Marín (2012), p. 90.

and harms suffered and all actors should be responsible, states, individuals and multinational investors.[261] To conclude, gender sensitive reparations should therefore offer:

1) minimum exposure of the victims while recognising the individual harm experienced and ensuring access to reparations, often implying to combine collective and individual reparations;

2) transform the meaning of sexual violence within society, including measures of satisfaction and non-repetition;

3) strengthen the empowerment of the victim according to victim's gender role in society.

## 6. Gender Sensitive Reparations & International Law

The three above mentioned elements of gender sensitive reparations programs are taken from the context of administrative reparations programmes. However, they can be relevant to international law in a variety of ways. First of all, supranational monitoring Committees and Courts may demand reparations to be complex. Reparations should also take extensive account of the situation and the voices of the survivor. Often, rehabilitation in forms of non-pecuniary measures is more accessible than paying lump sums. Furthermore, it should be clarified that re-establishing the situation in which the victim was before is neither possible nor satisfying. Victims must be empowered through participation in decisions to approach the full citizenship they may never have had.

The following section will discuss to which extent international human rights and criminal law have incorporated gender-sensitive concepts. It will investigate the role of international Human Rights Committees, Courts and the ICC. Thereby, this segment will reflect on how gender-sensitive understandings can play a role in the specific system of international human rights and criminal law. To conclude, this chapter will situate reparations for gross violence into the context of development.

[261] Nairobi Declaration (2007), principle Nr. 5.

## 6.1 International Human Rights Law

This study has indicated that international human rights Law has in some areas increasingly used a comprehensive concept of reparations that goes beyond the concept of full-restitution. These areas are however dominated by civil and political human rights. In contrast, reparations remain fragmentary aspects of restoring socio-economic and cultural rights. Thus, it seems that reparations are still mostly referred to in a framework of liberal justice.

Even so, by applying provisions of discrimination to sexual violence CEDAW has contributed to a comprehensive understanding of sexual violence. Additionally, the optional protocol has strengthened a wide understanding of reparations that essentially includes economic, social and cultural rights for women. Although having recently introduced the comprehensive language of the Basic Principles, the Committee has not yet applied this idea in any individual complaint. So far it has not developed any gender-specific understanding to reparations: The Committee has neither mentioned the need for complex reparations nor has it included the notions of transformative reparations, participation or empowerment. Thus, the Committee has not developed any adjustment of the concept of reparations to the specific situation of gender-discrimination.

Contributions to a gender-sensitive judicial understanding in international law has mostly been made on the regional level by the Inter-American Court of Human Rights. Claiming that the principle of full-restitution must be adapted to a context of gender-discrimination, the Court has introduced the idea of transformative reparations.

Naturally, the role of human rights committees and any other supranational human rights institution cannot be to fill in for domestic judiciary. It is impossible for most supranational bodies to take evidence. Therefore, the accuracy of supranational bodies is limited. Instead, the mandate of the supranational bodies is to monitor and accompany the state party on its way towards a general practice of human rights that develops consequent ways to deal with potential violations. Often, in situations of gross violations, the economic situation of the country is poor and the country might not be

able to implement all recommendations of the Committee immediately. A fortiori, it is important that the obligation of states entails the provision of gender-disaggregated data. Only with this form of data it is possible to monitor the journey of the state towards a better practice.

In the *Cotton-Field* Case the IACfHR has missed this chance. The Court has not inverted the burden of proof. It considered the author to be responsible for proving that Mexico has no effective policy against the violence in Juarez. It is thus the task of the author to provide data. However, to invert the burden of proof in cases of systemic violations has been practices elsewhere.[262] In that way, the Court did not carry out the last step needed to apply its concept of transformative reparations into practice.

Scholars have claimed that administrative reparations programmes and judicial understandings of reparations must differ because the latter is not designed for cases of mass atrocity. This raises the question if the results from studies of administrative reparations programmes are really applicable to the case by case practices of juridicial and quasi-judicial institutions. In the case of sexual violence, the assumption of the argument, that judicial bodies handle cases that are an exception to the otherwise widespread excepted social norm, is not completely suitable. If one assumes sexual violence to be, at least partially, a continuation of gender-discrimination that is accepted and even expected by society it seems that the concepts of reparations from administrative programmes might be suitable to judicial bodies, as well. Therefore, this paper argues that, in order to effectively repair sexual violence we must understand reparations for sexual violence in both situations in a transformative way.

### 6.2 International Criminal Law

The ICC has made significant steps towards a gender-sensitive concept. It rules from the factual position that full-restitution is not sufficient in the case of sexual violence. When it comes to the empowering potential of reparations, the Court refers to participatory elements: Women and girls should participate in a significant way in

[262] Rubio-Marín, Sandoval (2011), p. 1088.

designing and implementing any reparation.[263] The ICC has taken another important stance, seeking the division of reparations to be decided on the community level.

At the same time, the ICC has not demanded any of the components of gender-sensitivity as stated above, namely to avoid the exposure of the individuals while addressing structural causes at the same time.[264] It has not demanded a complex set of reparations to the survivors. Instead, it appears that the Court leaves these decisions to the Trust Fund that considers collective reparations as they best fit. Although the aspect of transformative objectives of reparations is mentioned in the Lubanga judgement, it appears that the Court does not award an as much weight to the future function of reparations as it did to their past-allocated function. The Court simply acknowledges that mechanisms of non-repetition that are characterised by transformative objectives *can* contribute to avoiding future victimisation in a limited extend.

To conclude, none of the analysed international law documents have mentioned the necessity to provide a complex reparations programme that encompasses both the personal and the structural harm of sexual violence. Focusing on collective reparations might be a matter of prioritisation. This can be legitimate -but only if the Court ensures that the short-term reparations programmes are embedded in a long term strategy that responds to the structural component of sexual violence. Therefore, the following section will stress the need to understand reparations to gross violations in the context of development.

### 6.3 Placing International Law Into Contextual Rethinking

Linking reparations to development offers significant advantages to the effectiveness of both measures. In fact, the system of the ICC has been criticised for not being operative on the basis of its lack to funding. The question, however, is what consequence one anticipates. Does it mean the project would have been better never started at all? Or does it imply advocating, waiting and hoping for a better future of the ICC; more funding and increased national support? This paper argues for the latter

[263] Prosecutor v. Lubanga, ICC, 7 August 2012, para 209.
[264] See ch. 5.4.

option. It proposes understanding the activity of Art. 98(5) ICC of the Trust Fund as a form of development. This paper argues that reparations must be considered as part of development rather than in competition with it. However, for a long time those two concepts have been looked at separately:[265]

In the area of transitional justice, there has been a constant fear of and urgent plea for exclusivity between development and reparations.[266] At the same time, requests for collective reparations mean a rapprochement towards development. The root of the fear lies in experience in which countries have sometimes used the development programmes instead of granting reparations.[267]

Instead of juxtaposing the two concepts against each other, development should be understood from a wider perspective that encompasses reparations as a matter of rule of law. Thus, development actors should understand reparations as part of development.[268] While one might criticise this position as being purely theoretical and irrelevant, it is in fact highly relevant. Development is not only a concept but it is a notion that is interlinked with huge monetary flows from development donors to recipient countries and organisations.

Until recently, the rule of law and reparations have been absent to the international discussion on development. The Millennium Development Goals (MDGs) did not entail any provisions on human rights nor the rule of law. Although experiences have shown that this can have harsh set backs for the democratic development of a country, nation-states are still reluctant to include dimensions of the rule of law into the post-2015 agenda of development that will come to determine the direction of monetary flows in the post-2015 future.[269] It shows that the international community is still determined by nation-states that prioritise the idea of sovereignty over the idea of universal human rights and international justice.

However, many actors in the field claim that reparations can contribute to

[265] Duggan, Paz, Guillerot (2008), pp. 211-212.
[266] e.g. Nairobi Declaration.
[267] e.g. Colombia as pointed out in: Sandoval, Clara (ed.) (2011), p. 16.
[268] Special Rapporteur on the Promotion of Truth, A/68/345, (2013).
[269] Special Rapporteur on the Promotion of Truth, A/68/345 (2013), p. 12.

developing renewed trust in democratic institutions among citizens.[270] At the same time, the example of the Trust Fund shows that, in reality, reparations are often bound by funding that can question entire reparations projects and even the ICC. Therefore, the protection of the individual against gross sexual offences by international human rights, as well as the implementation of international criminal law, must be understood in the context of development. It is precisely because the situations in which most gross human rights violations occur are characterised by situations of rule of law, socio-economic wealth and gender equality that the concept of reparation must be seen as interlinked with development and implore transformation to a better.

## 7. Conclusion

This analysis of human rights law has illustrated that reparations are increasingly understood in a way that goes beyond the concept of full-restitution. However, they are still largely understood from a liberal approach, concentrating on political and civil rights. The specific analysis of CEDAW illustrates expansion of the concept towards a comprehensive understanding of sexual violence as gender-discrimination; which allows the Committee to include social and economic rights of women. However, as it focuses on women only and has not included a demand for complex and transformative reparations, the Committee has not yet applied a gender sensitive approach to its individual communications on sexual violence.

The Security Council, an institution with a special mandate on gross violations as a part of peace and security, applies a binary approach to gender questions and largely lacks a comprehensive understanding of sexual violence. Here, sexual violence is still understood as a women's rights problem that lacks the linkage to wider societal power dynamics and discrimination at large.

So far, only the IACfHR and the ICC have developed a gender-sensitive understanding of reparations. International criminal law has made large contributions but the problem of funding may restrict its realisation. The situation of international law

[270] e.g. Roht-Arriaza, Orlovsky (2009), p. 2; Special Rapporteur on the Promotion of Truth, A/68/345 (2013), UN Women (2010).

can be seen as an indicator for the position of the international community as a whole. It seems that, the international community still does not approached the matter of gender inequalities as a matter of right's violation to gender-discrimination that requests clear statements for reparations of the victims. Despite recent expansions of the concept of reparations, to predict that a gender sensitive concept of reparations will be applied on the international level seems rather utopic.

These extreme impressions have proved false. Some weeks before the submission deadline for this study, after the core analysis had been researched and formulated, a glimmer of hope appeared This glimmer has the form of a short document published by the UN Secretary Ban Ki Moon: A Guidance note to Reparations for Conflict- Related Sexual Violence.[271] It aims to provide policy and operations guidance for UN engagement in the area of reparations for victims of conflict-related sexual violence. Here, the Secretary General takes an approach that acknowledges sexual violence as a complex phenomena consisting of personal and structural violence: "Sexual violence often results from and perpetuates patterns of pre-existing structural subordination and discrimination for both men and women".[272] It acknowledges the important roles that gender stereotypes and sexual identity play in the distribution of power and domination. In sum, the document completely confirms the findings of this thesis.[273] It reaffirms that reparations to victims of sexual violence must be understood as a combination of different forms of reparations, both collective and individual. Also, it states that reparations must first and foremost be transformative in order to address underlying structural inequalities. It further points to the need to involve survivors in the process and finally, it points to the relationship of development and reparations programmes. These guidelines refute the assumption of the paper, namely that a gender-sensitive concept of reparations for sexual violence is absent on the international level.

Also of crucial importance, the document situates the role of the ICC. Interestingly, the source that the UN Secretary refers to, when claiming transformative reparations, is

[271] UN Secretary General, Guidance Note, June 2014.
[272] Ibid., p.8.
[273] See for a list of guiding principles UN Secretary, Guidance Note, June 2014, p. 1.

neither the Nairobi Declaration nor a feminist scholar, it is the ICC.[274] This reference shows that even if the appeal of the judgement avoids a direct effect on survivors, it has pushed for development elsewhere. As the ICC has brought the topic to a general forum, gender-sensitive reparations are not exclusively discussed by women's groups and CEDAW. Thus, this document can be seen as a further indication that the issue of sexual violence is seeing movement from the standpoint of women's rights towards a universal human right. It gives hope that other actors of the international community will use the document or, even better, develop it further and possibly bring it to a General Assembly resolution that further pushes towards a universal comprehensive rights based approach to gross sexual violence.

[274] UN Secretary General, Guidance Note, June 2014, p. 9.

## Bibliography

### Books, Book Chapters and Articles


Askin, Kelly Dawn, *War Crimes Against Women, Prosecution in International War Crime Tribunals*, Leiden: Marinus Nihoff Publishers, 1997.

Boserup, Ester, *Women's role in Economic Development*, London: Earthscan, 1970.

Boxhill, Bernard, 'A Lockean Argument for Black Reparations', pp. 63–91, in: *Journal of Ethics* 7(1), 2003.

Chamallas, Martha,. *Introduction to Feminist Legal Theory*, New York: Wolters Kluwer Law & Business, 2013.

Chappell, Louise, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court', pp. 183-196, in: Political Research Quarterly, 67(1), 2014.

Charlesworth, Hillary; Chinkin, Christin, *The Boundaries of International* Law, Manchester: Manchester University Press, 2000.

Chinkin, Christin, 'The Protection of Victims and Witnesses', pp. 451-477, in: McDonald, K., Goldman, S. (eds.), *Substantive and Procedural Aspects of International Criminal Law*, The Hague: Kluwer Law International, 2000.

Chinkin, Christine, Freeman, Marsha A., 'Introduction', in: Freeman, Marsha A., Chinkin, Christine, Rudolf, Beate (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women, A Commentary*, New York: Oxford University Press, 2012.

Clapham, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press, 2006.

Contreras-Garduño, Diana, 'Defining Beneficiaries of Collective Reparations: The experience of the IACtHR', pp. 40-57, in: Amsterdam Law Forum, 4(3), 2012.

Couillard, Valérie, 'The Nairobi Declaration: Redefining Reparations for Women Victims of Sexual Violence', pp. 444-453, in: International Journal for Transitional Justice, 1(3), 2007.

De Brouwer, Anne Marie, *Supranational Criminal Prosecution of Sexual Violence, The ICC and the Practice of the ICTY and the ICTR,* Antwerpen: Intersentia, 2005.

De Greiff, Pablo, 'Justice and Reparations', pp. 452-471, in: De Greiff, Pablo, *Handbook on Reparations*, Oxford Scholarship Online, 2006.

De Greiff, Pablo, 'Introduction Repairing the Past: Compensation for Victims of Human Right Violations', pp. 1-16, in: De Greiff, Pablo, *Handbook on Reparations*, Oxford Scholarship Online, 2006.

Duggan, Colleen; Abusharaf, Adila, 'Reparations of Sexual Violence in Democratic Transition' in:

De Greiff, Pablo, *Handbook on Reparations*, Oxford Scholarship Online, 2006.

Duggan, Colleen; Paz, Claudia; Guillerot, Julie, 'Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru', pp. 192-213, in: *The International Journal of Transitional Justice*, 2, 2008.

Duggan, Colleen; Jacobson, Ruth, 'Reparation of Sexual and Reproductive Violence: Moving from Codification to Implementation', pp. 121-162, in: Rubio-Marín, *Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, Cambirdge: Cambridge University Press, 2009.

Elsuni, Sarah, *Geschlechtsbezogene Gewalt und Menschenrechte- Eine geschlechtertheoretische Untersuchung der Konzepte Geschlecht, Gleichheit und Diskriminierung im Menschenrechtssystem der Vereinten Nationen*, Baden-Baden: Nomos, 2011.

Evans, Christine, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press, 2012.

Fraser, Nancy, *Justice Interruptus, Critical Reflections on the Post-Socialist Condition*, New York: Routledge, 1997.

Fredman, Sandra, 'Engendering Socio-Economic Rights', in: Hellum, Anne; Aasen, Henriette Sinding, *Women's Human Righs: CEDAW in International, Regional and National Law*, Cambridge: Cambridge University Press, 2013.

Grünfeld, Fred; Smeulers, Alette, *International Crime and Other Gross Human Rights Violations*, Leidern: Martinus Nijhoff Publishers, 2011.

Guilleret, Julia, 'Linking Gender and Reparations in Peru, A Failed Opportunity', pp. 136-194, in: Rubio-Marín, Ruth (ed.), *What Happened to the Women*, New York: Social Science Research Council, 2006.

Brander, Hamber, 'Masculinity and Transitional Justice', pp. 375-390, in: An Explanatory Essay, in: *International Journal of Transitional Justice* 1(3), 2007.

Hamber, Brander; Palmary, Ingrid, 'Gender Memorialization, and Symbolic Reparations', in: Rubio-Marín, *Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, Cambirdge: Cambridge University Press, 2009.

Mouthaan, Solange, Sexual Violence Against Men and International Law- Criminalising the Unmentionable, pp. 665-695, in: International Criminal Law Review, 13(3), 2013.

McCarthy, Conor, *Reparations and Victims Support in the International Criminal Court*, Cambridge: Cambridge University Press, 2012.

Oosterveld, Valerie, 'The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?', pp. 55-84, in: *Harvard Human Rights Journa*l, Vol. 18, 2005.

Painter, Genevieve Renard, 'Thinking Past Rights: Towards Feminist Theories of Reparations' (2012), pp.1-18, in: *Windsor Yearbook of Access to Justice*, 30(1), 2012.

Pasqualucci, Jo. *The Practice and Procedure of the Inter-American Court of Human Rights,* 2nd edition, Cambridge: Cambridge University Press, 2013.

Quintana Osuna, Karla, 'Recognition of Women Rights Before the Inter-American Court of Human Rights', pp. 301- 312, in: *Harvard Human Rights Journal*, 21, 2008.

Qureshi, Shazia, 'The Recognition of Violence against Women as a Violation of Human Rights in the United Nations System', pp.187-198, in: *South Asian Studies, A Research Journal of South Asian Studies*, 28(1), 2013.

Rodríguez-Pinzón, Diego, Speech, at Conference on Reparations in the Inter-American System, American University, Washington, 6 March 2007, pp. 1390-1396, in: *American University Law Review,* 56, 2007.

Rosenfeld, Friedrich, 'Collective Reparation for Victims of Armed Conflict', pp. 731-746, in: *International Review of the Red Cross,* 92, 2010.

Roht-Arriaza, Naomi, Orlovsky, Katharine, 'A complementary Relationship: Reparations and Development', Research Brief, ICTJ, 07/2009, http://www.ictj.org/sites/default/files/ICTJ-Development-Reparations-ResearchBrief-2009-English.pdf

Rubio-Marín, Ruth; Sandoval, Clara, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the "Cotton Field" Judgement', pp. 1062-1091, in: *Human Rights Quarterly Johns Hopkins University Press*, 33, 2011.

Rubio-Marín, Ruth, 'Reparation for Conflict-Related Sexual and Reproductive Violence: A Decalogue', pp. 69-104, in: *Williiam & Mary Journal of Women and the Law*, 19, 2012.

Sandoval, Clara (ed.*) Adverse Consequences of Reparations,* Vol. 6, Essex: University of Essex, 2011.

Saris, Anne; Lofts, Katherine, 'Reparation Programmes: A Gendered Perspective', pp. 79-103, in: Fersman, Carla; Goetz, Mariana, Stephens, Alan (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Leiden: Martinus Nijhoff Publishers, 2009.

Shelton, Diana, *Remedies in International Human Rights Law*, Oxford: Oxford University Press, 2005.

Shepherd, Laura J., 'Sex, Security and Superhero(in): From 1325 to 1820 and Beyond', pp. 504-521, in: *International Feminist Journal of Politics*, 2011.

Spiga, Valentina, 'No Redress without Justice', pp.1377-1394, in: *Journal of International Criminal Justice*, 10, 2012.

Taylor, Charles, *Multiculturalism and The Politics of Recognition*, Princeton N.J.: Princeton University Press, 1992.

Urban Walker, Margaret, 'Gender and Violence in Focus: A Background For Gender Justice in Reparations', pp. 18- 63, in: Rubio- Marín (ed.), *Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, Cambirdge: Cambridge University Press, 2009.

Verdeja, Ernesto, 'A Critical Theory of Reparative Justice', pp. 208-222, in: *International Journal of Critical and Democratic Theory*, 15(2), 2008.

Wood, Elisabeth Jean, 'Variation in Sexual Violence', pp. 307-341, in: *Politics & Society*, 34(3), 2006.

Young, Iris Marion, *Justice and the Politics of Difference*, Oxford: Princeton University Press, 1990.

**Communications and Cases**

Aloeboetoe et al. v. Suriname, IACtHR, Ser. C No. 15, Judgment on Reparations and Costs, 10 September 1993.

Castro-Castro Prison v. Peru, IACtHR, Ser C No. 160, Judgment on Merits, Reparations and Costs 25 November 2006.

Gonzales et al. ("Cotton Field") v. Mexico, IACtHR, SER. C, NO. 205, 16 November 2009.

Loayza Tamayo v. Peru, ACtHR, Ser. C, No. 42, Judgement (Reparations), 27 November 1998.

A.T vs. Hungary, Nr. 2/2003, CEDAW, 26 January 2005, http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf.

Plan de Sánchez Massacre v. Guatemala, IACtHR, Ser. C, No. 105, Judgement, 29 April 2004.

Prosecutor v. Akayesu, Judgement, International Criminal Tribunal of Rwanda, No. 96-4 T, 2 September 1998.

Prosecutor v. Bagasora, Kabiligi, Ntabakuze, Nsengiyumva, International Criminal Tribunal of Rwanda, No. ICTR-98-41-T, Judgement, 20 January 2004.

Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgement, 10 December 1998.

Prosecutor v. Katanga , International Criminal Court, ICC-01/04-01/07, Judgement, 23 March 2004.

Prosecutor v. Lubanga Judgement, International Criminal Court, ICC-01/04-01/06, 7 August 2012.

Prosecutor v. Lubanga, ICC-01/04-01/06-2842, Separate and Dissenting Opinion of Judge Odio Benito.

Prosecutor v. Tadiç, Case No. IT-96-21-Y, Judgement, 16 November 1998.

Velásquez Rodríguez v. Honduras, IACtHR, Ser. C, No. 4., Judgement, 29 July 1988.

Velásquez Rodríguez v. Honduras, IACtHR, Ser. C, No.7, Judgement (Reparations), 21 July 1989.
Vertido v. Philipines, No. 18/2008, Final Views, adopted 22 September 2010.
Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, International Criminal Court, ICC-01/04-492, 11 April 2008.

**Treaties and International Instruments**

Basic Principles, General Assembly Resolution, A/RES/60/147, 16 December 2005, http://www1.umn.edu/humanrts/instree/res60-147.html.
Bassioni Report, E/CN.4/1999/65, 8 February 1999, http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.
Bejing Platform of Action, Outcome document: The Fourth World Conference on Women, Beijing from 4 to 15 September 1995, UN Women, http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf, accessed 8 July 2014.
Cape Town Principles and Best Practices, Adopted at the Symposium on the Prevention of Recmitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, UNICEF, 27-30 April 1997, http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf.
Committee Against Torture, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No.3, CAT/C/GC/3, 19 November 2012, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf.
CCPR, Human Rights Committee, General Comment No. 31, the Nature of General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement.
CEDAW, General Comment No. 19, 20 December 1992, http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19.
CEDAW, General Comment Nr. 28, CEDAW/CGC/28, 16 December 2010, http://www2.ohchr.org/english/bodies/cedaw/comments.htm.
CEDAW, UNGA Res 34/1980 , 18 December 1979.
CRC Concluding Observations on Colombia, June 2006, CRC/C/COL/CO/3.
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly, Resolution A/RES/40/34, 29 November 1985.
Declaration on the Elimination of Violence Against Women, General Assembly, GA 48/104, 20

December 1993, http://www.un.org/documents/ga/res/48/a48r104.htm.
ICC Resolution, ICC-ASP/4/Res.3, http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP4-Res-03-ENG.pdf, accessed 7 July 2014.
ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, reprinted in Report of I.L.C. of 53rd Sess., I.L.C. (2001), U.N. Doc. A/56/10, 2001.
Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, High Commissioner of Human Rights, New York 2004.Organisation of the American States, Council of Europe, Regional Tools to Fights Violence Against Women: The Bélem do Pará and Istanbul Conventions, February 2014, http://www.oas.org/en/mesecvi/docs/MESECVI-CoE-CSWPub-EN.pdf.
Minnesota Protocol, United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc.: E/ST/CSDHA/.12, 1991.
Organisation of the American States, Council of Europe, Regional Tools to Fights Violence Against Women: The Bélem do Pará and Istanbul Conventions, February 2014, http://www.oas.org/en/mesecvi/docs/MESECVI-CoE-CSWPub-EN.pdf.
Security Council, UN Doc.: S/RES/1325, 2000.
Security Council, UN Doc.:S/RES/1888, 2009.
Security Council, UN Doc.:S/Res/2106, 2013.
Van Boven, Preliminary Report submitted by Theodor van Boven, Special Rapporteur, E/CN.4/Sub.2/1990/10, 2 July 1993, http://www1.umn.edu/humanrts/demo/van%20Boven_1993.pdf.
UK Foreign & Common Wealth Office under the presidency UK G8 2013, https://www.gov.uk/government/topical-events/g8-2013, accessed 18 June 2014.
UN Secretary General, Report to the SC, S/2004/616, 24 August 2004, http://www.unrol.org/files/2004%20report.pdf.

**Reports**

Human Rights Watch Report; “We'll show you're women”, 2011, http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf accessed 19 June 2014.
Human Rights Watch Report on Somalia, “Here Rape is Normal”, February 2014, http://www.hrw.org/sites/default/files/reports/somalia0214_ForUpload.pdf, accessed 19 June 2014.
Special Rapporteur, Report: Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, De Greiff, Pablo, A/68/345, August 2013,

http://www.ohchr.org/Documents/HRBodies/SP/Facts_Figures2013.pdf.
World Health Organisation, Factsheet No. 239, October 2013, http://www.who.int/mediacentre/factsheets/fs239/en/, accessed 7 July 2014.
Women's Initiatives for Gender Justice, *Gender Report Card*, November 2012, http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf.
UN Women, UNDP, *Reparation, Development and Gender,* 2010, http://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf.
UN Special Rapporteur on Children, Report of the Independent Expert for the United Nations Study on Violence Against Children, UN Doc: A/61/299, 29 August 2006, http://www.unicef.org/violencestudy/reports/SG_violencestudy_en.pdf.

**Electronic Sources**

Actionaid website, http://www.actionaid.org/what-we-do/emergencies-conflict/conflict-and-protection.
Basic Healthcare Project, TFV, TFV/DRC/2007/R2/029, http://www.trustfundforvictims.org/projects, accessed 7 July 2014.
Care International, http://www.careinternational.org.uk/news-and-press/press-release-archive-2009/1245-it-is-now-more-dangerous-to-be-a-woman-than-to-be-a-soldier-in-modern-conflict-
ICC website, General Assembly, http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx, accessed 9 July 2014.
Hilsum, Lindsey, Rwanda 20 years on: the tragic testimony of the children of rape; The Observer in: The Guardian Newspaper, 7 June 2014, http://www.theguardian.com/world/2014/jun/08/rwanda-20-years-genocide-rape-children, accessed 8 July 2014.
Human Rights Watch, “We'll kill you If Your Cry: Sexual Violence in the Sierra Leone Conflict, New York, 2003.
Human Rights Watch Report; “We'll show you're women”, 2011, http://www.hrw.org/sites/default/files/reports/southafrica1211.pdf accessed 19 June 2014.
Human Rights Watch Report on Somalia, “Here Rape is Normal”, February 2014, http://www.hrw.org/sites/default/files/reports/somalia0214_ForUpload.pdf, accessed 19 June 2014.
ICC website, General Assembly, http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx, accessed 9 July 2014.

Microcredit Project TFV, TFV/DRC/2007/R2/036, TFV/DRC/2007/R1/001, http://www.trustfundforvictims.org/projects, accessed 7 July 2014.

Peacewomen, http://www.peacewomen.org/peacewomen_and_the_un/un-basics/useful-facts-and-figures.

REDRESS, Q+A The apeals in the Lubanga Case, May 2014, http://www.redress.org/downloads/1405qa-lubangaen.pdf, accessed 7 July 2014.

Trust Fund For Victims Webpage, (Projects), http://www.trustfundforvictims.org/projects, accessed 7 July 2014.

UN Action Against Sexual Violence in Conflict, website http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml.

UNDP DRC, http://www.undp.org/content/undp/en/home/ourwork/crisispreventionandrecovery/successstories/fighting-sexual-violence-in-the-democratic-republic-of-congo.html, accessed 17 June.

UN System Task Team, http://www.un.org/en/development/desa/policy/untaskteam_undf/.

**Oral Sources**

RWAMREC , Edouard Mumyamaliza, at the Time to Act Conference, 11June 2014, When Soldiers Come Home, CARE International, http://www.youtube.com/watch?v=qqa6aWqSqgA, 16 min-30 min.

Remark: If not indicated differently, all electronic sources have been accessed from the internett 10 July 2014.