



*Ending Torture. Seeking Justice for Survivors*

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**PARTICIPATION IN TRANSITIONAL JUSTICE PROCESSES BY  
SURVIVORS OF SEXUAL AND GENDER-BASED VIOLENCE**

**Submission to the Office of the High Commissioner for Human Rights**

**18 March 2014**

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## I. INTRODUCTION

1. REDRESS is an international human rights organisation whose mandate is to seek justice and reparation for survivors of torture and related international crimes. It has expertise in representing individual survivors at national and international levels and in providing legal assistance to representatives of survivors, including in cases where rape and sexual violence amount to torture in conflict settings. Additionally REDRESS contributes through research, capacity-building, outreach activities and advocacy to promoting victims' rights to participation, access to justice and reparation in the context of transitional justice processes and at the regional and international levels. This includes the International Criminal Court (ICC) and collaborating with the UN Office of the High Commissioner for Human Rights (OHCHR) and with the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.
2. REDRESS welcomes this opportunity to transmit relevant information to the OHCHR within the context of the drafting of the analytical study requested by the Human Rights Council (HRC) in its Resolution 21/15 on "Human rights and transitional justice" and to be submitted prior to its twenty-seventh session.
3. This submission focuses on **ways to ensure the effective participation of victims of sexual and gender-based violence in justice processes in conflict and post-conflict situations**. In doing so, it considers participation in both ordinary domestic justice systems, and transitional justice mechanisms, as the two should be mutually reinforcing.
4. The submission does not address in detail the overarching right to an effective remedy and reparation that victims of all serious human rights violations hold,<sup>1</sup> and which has been emphasised by REDRESS in a number of prior submissions and which has recently formed the subject of other work by the OHCHR and other UN agencies.<sup>2</sup> However, we note that ensuring participation of victims of gender-based and sexual violence is an essential part of guaranteeing the right to reparation on two fronts. First, ensuring that discriminatory barriers to participation in justice processes are overcome is vital to provide *equal* access to an effective remedy. Second, the way in which victims are able to engage in justice processes is a form of restoring victims' dignity – an important goal of reparation in itself.<sup>3</sup>

## II. BARRIERS TO PARTICIPATION IN JUSTICE PROCESSES

5. Victims of human rights violations often face serious obstacles to access justice. Some are specific to accessing court proceedings, but others apply to any justice mechanism.
6. These difficulties are compounded in conflict and post-conflict contexts, and made more acute by discriminatory attitudes and cross-cutting marginalisation affecting many victims of gender-based and sexual violence. A number of commonly seen barriers which impede victims of gender-based and sexual violence from participating in justice processes include:

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<sup>1</sup> See, eg. *Universal Declaration of Human Rights* (1948), Art. 8; *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147 (2006) (hereafter "Remedy and Reparation Principles"). See also *International Covenant on Civil and Political Rights* (ICCPR) (1966) (Arts. 2(3), 9(5) and 14(6)); *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) (1965) (Art. 6); *Convention on the Elimination of Discrimination Against Women* (1979) (Arts. 2 and 15); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT) (1984) (Art. 14); *Convention of the Rights of the Child* (1989) (Art. 39); *Statute of the International Criminal Court* (1998) (Art. 7); *Convention for the Protection of All Persons from Enforced Disappearances* (2006) (Arts. 2, 20, 24).

<sup>2</sup> See, Security Council Resolutions 1820 (2008), para. 4; 1888 (2009), para. 8; 1960 (2010), preamble; 2106 (2013), para. 4. See also, Human Rights Council, 'Report of the Special Rapporteur on Violence Against Women, Rashida Manjoo', A/HRC/14/22, 19 April 2010; OHCHR, 'Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights', March 2011, at: [www.ohchr.org/Documents/Countries/ZR/DRC\\_Reparations\\_Report\\_en.pdf](http://www.ohchr.org/Documents/Countries/ZR/DRC_Reparations_Report_en.pdf); Victoria S. Rames, *Healing The Spirit: Reparations For Survivors Of Sexual Violence Related To The Armed Conflict In Kosovo*, 2013, at: [www.unifem.sk/uploads/doc/Study\\_OHCHR\\_ENG\\_Final\\_HQ.pdf](http://www.unifem.sk/uploads/doc/Study_OHCHR_ENG_Final_HQ.pdf); UN Women and UNDP, *Reparations, Development and Gender*, October 2012, at: [www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf](http://www.unwomen.org/~media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06A-Development-Gender.pdf).

<sup>3</sup> See e.g., Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3, 13 December 2012.

- **The effects of gender-based and sexual violence on individuals' lives are acute: immediate medical and psychological harms** may need to be addressed before victims can contemplate participating in any justice process.
- **Lack of information about rights and procedures to claim them.**
- **Discriminatory social structures** which prioritise the interests and rights of one group (eg. men, heterosexual persons, dominant ethnic group) may be reflected in the violations that are considered important enough to pursue through justice mechanisms, and may determine who pursues them, and who speaks for a group.<sup>4</sup>
- **Certain groups, including women in many societies, may have more difficulty reaching the public sphere and interacting with the state**, including justice processes, which impacts adversely on their ability to pursue their rights.<sup>5</sup>
- **Financial issues:** The costs of hiring a lawyer or paying court fees may be prohibitive. Women will often not have influence over the family budget; their interests and rights to justice are typically not prioritised within the family and in the wider community.
- **Geographical isolation** may physically restrict access to courts and other mechanisms, particularly where hearings are held sporadically in city centres over extended periods.
- **Social stigma** about certain crimes, including sexual violence whether committed against females or males, may make it difficult for victims to come forward without risking social and/or family ostracisation.
- **Systemic inadequacies in the timely and professional collection of medical or other evidence**, for example of sexual assault, may limit a victim's prospect of even having a complaint registered.<sup>6</sup>
- **Justice procedures** frequently do not protect the confidentiality, dignity and privacy of victims, and may lead to re-traumatisation. Procedures often do not provide for the participation of victims other than as a witness.
- **Security issues** may physically restrict victims from coming forward, or lead to concerns about reprisals. These are very often at the forefront in conflict and post-conflict settings.<sup>7</sup>
- These difficulties can be compounded by **restrictions on victims' groups and civil society organisations** that could otherwise assist victims to become aware of their rights and to access remedies.<sup>8</sup>
- The **sheer number of victims in situations of mass violations** puts enormous pressures on justice systems and can lead to severe delays where complaints are brought individually. Dealing with such cases individually may also mean that collective and structural (such as their systematic nature) aspects of the crimes are unexplored.
- **Corruption and extortion within the judicial system** can prove a key barrier to justice for victims of gender-based and sexual violence.<sup>9</sup> Corruption can lead to difficulties or

<sup>4</sup> In relation to reparations programmes see, e.g., *Report of the Special Rapporteur on Violence Against Women*, Rashida Manjoo (n. 2), para. 43.

<sup>5</sup> *Ibid.*, para. 40.

<sup>6</sup> See, eg. Vahida Nainar, 'Litigation Strategies for Sexual Violence in Africa', REDRESS, 2012, available at: <http://www.redress.org/downloads/publications/VAW%20Manual%2027%20Aug%202012%20UPDATED.pdf>, p. 9 (Sudan), p. 10 (Uganda), p. 13 (Democratic Republic of Congo).

<sup>7</sup> See, REDRESS, 'Access to justice for survivors of sexual violence in DRC: Shadow report to CEDAW', 2013, paras. 22-24, available at: [www.redress.org/downloads/publications/131001REDRESS%20submission%20to%20CEDAW%20on%20DRC%20-%20Final.pdf](http://www.redress.org/downloads/publications/131001REDRESS%20submission%20to%20CEDAW%20on%20DRC%20-%20Final.pdf).

<sup>8</sup> See, e.g., SIHA and REDRESS, 'Access to Justice: Submission to the CEDAW', 2013, para. 18, available at: [www.redress.org/downloads/publications/Access%20to%20justice%20-%20SIHA%20and%20REDRESS%20-%20final.pdf](http://www.redress.org/downloads/publications/Access%20to%20justice%20-%20SIHA%20and%20REDRESS%20-%20final.pdf).

added expense in accessing judicial mechanisms, pressure to withdraw claims, concerns about protection of victims and witnesses and the violation of the right to a fair trial.

- **Lack of clarity within legislation** as to what amounts to a crime (for example, of rape) can allow for wide interpretation in line with the personal perspectives of police, prosecutors and judges, and poses a barrier to justice for gender-based and sexual violence where those perspectives are coloured by discriminatory attitudes.<sup>10</sup>
- **Laws which may criminalise complainants:** This is a significant issue in countries where rape laws impose a high burden of proof or imposes corroboration requirements on female complainants; if this standard is not met complainants may face charges for adultery.<sup>11</sup>
- **Short limitation periods for sexual violence and immunities for state officials** may exclude many victims from justice processes.

### III. PARTICIPATION IN JUSTICE PROCESSES: FRAMEWORKS

7. Challenges to access justice are especially acute in conflict and post-conflict situations as formal justice systems may no longer exist or may be inefficient or ineffective.<sup>12</sup> Transitional justice mechanisms including truth commissions, ad hoc international or hybrid criminal courts and reparation programmes are often designed precisely to address these obstacles and make access to justice achievable for large numbers of victims. In doing so, and by linking to institutional reforms, they can provide impetus for lasting changes within the regular justice system to increase access to justice and participation in justice processes.
8. The notion of victim participation in justice processes has developed differently in civil law and common law systems, with different understandings of how best to ensure victims' agency in proceedings while at the same time guaranteeing the rights of the defence. Progressively, there has been an increased recognition of the need for victims to be able to engage independently in justice processes, and this has resulted in a reinforcement of civil party systems in countries with a civil law tradition, and in the introduction of key participatory elements in common law systems: such as the use of victim impact statements, the ability for victims to challenge decisions not to proceed with an investigation or prosecution and the ability to seek reparation in some circumstances at the end of a criminal trial. Similarly, in other kinds of legal, quasi-judicial and administrative proceedings, victims' participatory rights have been given effect through the progressive clarification of norms relating to access to justice. These normative developments have been incorporated into a variety of international standard-setting texts such the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, the Revised *UN Impunity Principles*,<sup>13</sup> the *UN Guidelines on Justice for Child Victims and Witnesses of Crime*<sup>14</sup> and the 2012 European Union (EU) *Directive on minimum standards on the rights, support and*

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<sup>9</sup> For a detailed examination of corruption in judicial systems see Transparency International, 'Global Corruption Report 2007: Corruption in Judicial Systems', 2007 available at: [http://www.transparency.org/publications/gcr/gcr\\_2007#book](http://www.transparency.org/publications/gcr/gcr_2007#book).

<sup>10</sup> For example, the lack of specificity in the definition of rape and understanding of consent has proved a barrier to justice for women and girls in Sudan: see Nainar, 'Litigation Strategies' (n. 6), p. 8. Another example is Public Order legislation in Sudan, which is defined in wide and vague terms, allowing police to prosecute women on charges which violate their human rights. See SIHA, 'Women in the Horn of Africa Are Still Bending their Heads: A Report to the 52nd Session of the African Commission on Human and People's Rights', 2012, pp. 3-9, available at: <http://www.sihanet.org/sites/default/files/resource-download/report%20to%20the%2052nd%20session%20of%20the%20achpr%20final.pdf>. In the case of DRC, some judges interpret the medical certificate referred to in the 2006 law against sexual violence as a vital and required piece of evidence to prove rape despite the fact that the law also considers other types of evidence.

<sup>11</sup> See, eg. KCHRED and REDRESS, 'Time for Change: Reforming Sudan's Law on Rape and Sexual Violence', 2008, p. 33, available at: <http://www.redress.org/downloads/publications/Position%20Paper%20Rape.pdf>.

<sup>12</sup> CEDAW, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, CEDAW/C/GC/30, 1 November 2013, para. 10.

<sup>13</sup> *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, Annex.

<sup>14</sup> The Guidelines were adopted by ECOSOC Resolution 2005/20 of 22 July 2005, Doc. E/2005/INF/2/Add.1 of 10 August 2005.

protection of victims of crime.<sup>15</sup> Similarly, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*,<sup>16</sup> international treaty bodies, regional human rights courts and UN special procedure mandate holders recognise that effective remedies require the effective participation of victims in the process.<sup>17</sup>

9. Relevant standards have also found their way into international criminal law frameworks, notably article 68(3) of the ICC Statute, as well as regulations for the Extraordinary Chambers for the Courts of Cambodia and the Special Tribunal for Lebanon. For instance, the Rome Statute mandates the ICC “to protect the safety, physical and psychological well-being, dignity and privacy of victims” and to permit the participation of victims at all “stages of the proceedings determined to be appropriate by the Court”.<sup>18</sup> The ICC has developed sophisticated modalities for participation of victims during trials. Chambers have recognised the link between examining witnesses and their mandate to determine the truth, supporting the “presumption in favour of a neutral approach to questioning on behalf of victims”.<sup>19</sup> Victims’ legal representatives have questioned all types of witnesses, including defence witnesses,<sup>20</sup> expert witnesses,<sup>21</sup> and insider witnesses.<sup>22</sup> Victims may also express their “views and concerns” by challenging the admissibility of evidence<sup>23</sup> or by submitting evidence themselves<sup>24</sup> - both oral and documentary evidence.<sup>25</sup> Even if victims are not parties as such, “their participation may be an important factor in helping the Chamber to better understand the contentious issues of the case in light of their local knowledge and socio-cultural background.”<sup>26</sup>
10. Furthermore, truth commissions and other transitional justice processes can play an important role in filling gaps in justice delivery in the aftermath of conflict. However, these processes are not without their challenges. It has been noted that “The most egregious and pervasive violations which have occurred during conflict, often remain unpunished in transitional justice mechanisms and are ‘normalized’ in the post-conflict environment. Despite efforts to strengthen and/or complement domestic justice systems, transitional justice mechanisms have and continue to fail women by not adequately delivering justice and reparations for all. ... Transitional justice mechanisms have not succeeded in fully addressing the gendered impact of conflict and in taking into account the interdependence and interrelatedness of all human rights violations which have occurred during conflict. For most women, post-conflict justice priorities should not be limited to ending violations of civil and political rights but should include violations of all rights including economic, social and cultural rights.”<sup>27</sup> The importance of enabling and facilitating victims to participate in the process leading to the conceptualisation and development of reparation programmes, as well as throughout their implementation and during the monitoring and assessment phase has

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<sup>15</sup> Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereafter “EU Victims’ Directive”).

<sup>16</sup> Remedy and Reparation Principles, para. 12.

<sup>17</sup> See, e.g., CAT, General Comment No. 3.

<sup>18</sup> Article 68(3) of the ICC Statute.

<sup>19</sup> Decision on the Manner of Questioning Witness by the Legal Representatives of Victims, *Lubanga* (ICC-01/04-01/06-2127), Trial Chamber I, 16 Sept. 2009, para. 28. See also, Decision on Directions for the Conduct of the Proceedings, *Bemba* (ICC-01/05-01/08-1023), Trial Chamber III, 19 Nov. 2010, para. 15.

<sup>20</sup> Decision on the Defence observations regarding the right of the legal representatives of victims to question defence witnesses and on the notion of personal interest on the defence application to exclude certain representatives of victims from the Chamber during the non-public evidence of various defence witnesses, *Lubanga* (ICC-01/04-01/06-2340), Trial Chamber I, 11 March 2010.

<sup>21</sup> Transcript of 7 January 2010, *Lubanga* (ICC-01/04-01/06-T-223-ENG), Trial Chamber I, 7 Jan. 2010, p. 25, line 17 - p. 31, line 11; See, Report for the ICC: Document, *Lubanga* (ICC-01/04-01/06-1655-Anx), Trial Chamber I, 20 Feb. 2009.

<sup>22</sup> Decision (i) ruling on legal representatives’ applications to question Witness 33 and (ii) setting a schedule for the filing of submissions in relation to future applications to question witnesses, *Bemba* (ICC-01/05-01/08-1729), Trial Chamber III, 9 Sept. 2011, para. 15.

<sup>23</sup> Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 101; Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 January 2010, para. 104.

<sup>24</sup> Transcript of hearing on 17 June 2009, *Lubanga* (ICC-01/04-01/06-T-193-ENG), Trial Chamber I, 17 June 2009, p.8, lines 15-25; Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 Jan. 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008.

<sup>25</sup> Decision on the Modalities of Victim Participation at Trial, *Katanga & Ngudjolo* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 Jan. 2010, para. 101.

<sup>26</sup> Directions for the conduct of the proceedings and testimony in accordance with rule 140, *Katanga & Ngudjolo* (ICC-01/04-01/07-1665-Corr), Trial Chamber II, 1 Dec. 2009, para. 82.

<sup>27</sup> CEDAW, General Recommendation No. 30, para 76.

been underscored in the Revised *UN Impunity Principles*<sup>28</sup> and the *Nairobi Declaration on Women and Girls' Right to a Remedy and Reparation*.<sup>29</sup> In relation to truth commissions, for example, the Impunity Principles provide that:

To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought. Special efforts should be made to ensure that men and women participate in these deliberations on a basis of equality.<sup>30</sup>

The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* expressly states that in respect of women who are subjected to violence through violations of their rights to life, integrity and security of the person, States are obliged to create mechanisms to increase the participation of women in planning, formulation and implementation of post-conflict reconstruction and rehabilitation.<sup>31</sup> The Committee on the Elimination of Discrimination Against Women has also recently adopted a General Recommendation emphasising the importance of participation of women in the design and implementation of redress procedures in conflict and post-conflict settings.<sup>32</sup>

11. As these various texts underscore, participation is not only essential to understand and identify the specific interests and needs of survivors of sexual violence but it is an important means to ensure victims' agency – which is a central goal in and of itself, and a first step in reversing patterns of discrimination. It is also a fundamental condition for the implementation of the other rights of victims such as the right to adequate, effective and prompt reparation reflecting the various dimensions of harm suffered.
12. The norms relating to victim participation can be framed as including:
  - **Non-discrimination:** The principle of non-discrimination requires that special measures may need to be taken to overcome barriers to justice. Particular attention must be paid to the barriers to access justice faced by groups who are discriminated against or marginalised, and positive steps to overcome them;<sup>33</sup>
  - **Access to information:** In order to participate effectively, victims must be provided with information about their rights, about justice processes which directly impact them and information about their progression;
  - **Effective representation:** Victims should have access to lawyers or others who are capable of representing their specific interests;
  - **Capacity and facility to participate:** This includes ensuring that victims have the means to participate and that they are not unduly inconvenienced by doing so;
  - **That victims' safety, dignity and privacy is assured:** Special mechanisms to safeguard victims' interests and protect them from secondary victimisation, trauma, stigma and reprisals, and ensure that they receive sufficient support throughout the proceedings;
  - **That there is meaningful and transparent impact:** Decision-makers must incorporate into the procedure a way in which victims' concerns may be taken into account.<sup>34</sup>

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<sup>28</sup> *Updated Impunity Principles* (n. 13).

<sup>29</sup> Available at: <http://www.redress.org/downloads/publications/Nairobi%20Principles%20on%20Women%20and%20Girls.pdf>

<sup>30</sup> *Updated Impunity Principles* (n. 13) Principle 6.

<sup>31</sup> Maputo Protocol, As adopted by the Meeting of Ministers, Addis Ababa, Ethiopia on 28 March 2003, and the Assembly of the African Union at the second summit of the African Union in Maputo, Mozambique, 21 July 2003. Arts. 4 and 10.

<sup>32</sup> CEDAW, General Recommendation No. 30, paras. 42-46; 81.

<sup>33</sup> Remedy and Reparation Principles, par. 12 (b)-(d) and 13. CAT, General Comment No. 3, paras.29, 32-33; CEDAW, General Recommendation No. 30, para. 38(c).

<sup>34</sup> See C. Correa, J. Guillerot and L. Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience', in Ferstman et al. (eds.) *Reparation for Victims of Genocide, War Crimes and Crimes against Humanity*, Leiden: Martinus Nijhoff, 2009, p. 389.

#### IV. VICTIM PARTICIPATION IN RELATION TO GENDER-BASED AND SEXUAL VIOLENCE IN CONFLICT AND POST-CONFLICT SETTINGS: SOME KEY ISSUES

13. Bringing these standards and best practices together, as they relate to participation of victims of gender-based and sexual violence in conflict and post-conflict settings, a number of key issues can be highlighted.

##### **i) Non-discrimination**

14. Internationally, it has been recognised that discrimination, in its different manifestations, can be motivated by multiple factors. For example, the CEDAW Committee has stated in this regard that: “Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional groups such as race, ethnic or religious identify, disability, age, class, caste or other factors. Such discrimination may affect these groups of women primarily, or in different ways than men. State parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them”.<sup>35</sup>
15. The CEDAW Committee has recognised that gender based violence is itself a form of discrimination,<sup>36</sup> and that this discrimination is exacerbated by conflict. A central tenet of the principle of non-discrimination in relation to the participation of victims of gender-based and sexual violence in justice processes concerns the need for the justice processes to adapt their procedures to the realities faced by this particular marginalised group, and “to address all violations of women’s rights as well as the underlying structural sex and gender-based discrimination that underpinned such violations. Besides providing redress to women for gender-based violations suffered during conflict, transitional justice mechanisms have the potential to secure a transformative change in women’s lives”.<sup>37</sup> The CEDAW Committee recognises that not only should policies be non-discriminatory, but they should neither harm women nor create or reinforce gender inequality.<sup>38</sup> Affirmative measures must be taken to address inequities facing this class of victims which contribute to their initial victimisation and continue by impeding access to justice processes and effective participation in such processes. In particular, the Nairobi Declaration has recognised that the principle of non-discrimination is an over-arching principle that must inform all strategies and interventions, and “support for women’s and girls’ empowerment by taking into consideration their autonomy and participation in decision-making”.<sup>39</sup>

##### **ii) The right to information**

16. Victims have both the right to information about the fact that an investigation, prosecution or other judicial or quasi-judicial process is underway and ways in which they can participate, and the right to be informed of key developments in the case. As is set out in the Nairobi Declaration “Governments and other actors must ensure that women and girls are adequately informed of their rights”.<sup>40</sup> A failure to do so frequently frustrates women’s access to justice.<sup>41</sup> It is important to emphasise that, given women’s and children’s often greater difficulties in accessing the public sphere, information outreach must also be targeted specifically to women and children, and gender-sensitive mechanisms provided for them to seek and obtain further information. Equally, giving the stigmatisation of sexual violence and certain other forms of gender-based violence, every care must be taken to ensure that outreach to victims and providing information about justice processes does not further

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<sup>35</sup> United Nations, Committee on the Elimination of Discrimination against Women, *General Recommendation 25, Temporary Special Measures*, U.N. Doc./CEDAW/C/2004/I/WP.1/Rev.1 (2004), section II, para. 12.

<sup>36</sup> CEDAW, General Recommendation No. 30, para. 34

<sup>37</sup> *Ibid*, para. 77.

<sup>38</sup> *Ibid*, para 31. See also, para 81(d).

<sup>39</sup> Nairobi Declaration, Principle 1 (a) – (d).

<sup>40</sup> *Ibid*, Principle 2 (a).

<sup>41</sup> See for example Case No.151463/16,115, Prosecutor v CE for Coercion, San Rafael, Mendoza, Argentina (14 August 2009).

stigmatise or lead to secondary victimisation. This may require careful planning of information provision strategies with local groups already engaged with such victims.

17. The right to information requires that at the outset a **common conceptual framework** is developed, so that victims and governments alike start from a common understanding of what justice or quasi-judicial processes are and what they are trying to achieve. In Peru, preliminary research through a key report was an aid to “knowledgeable participation”, which helped to “establish common ground for the debate on reparations more generally. It also helped, to some degree, to clarify expectations and the challenges that implementation of a reparations plan would entail”.<sup>42</sup> In other situations – including South Africa and Nepal – a lack of consultation and large divergences between the visions of what the processes are trying to achieve led to increasingly adversarial positions being adopted by government on one side and civil society on the other.<sup>43</sup>
18. If the right of victims to participate in justice proceedings is to be effective, victims must first be aware of their rights so they can take informed decisions about whether and how to exercise them. According to a Panel of Experts considering victim participation before the ICC, “[e]arly outreach should include a general description of what participation before the Court involves, the participation process and what victims who apply to participate can expect. Providing accurate information at an early stage will build knowledge and trust in the ICC, which is essential for victims to engage, and manage expectations. It is also essential to prevent frustration if progress in a situation or case is slow”.<sup>44</sup>
19. The Panel of Experts made the following recommendations on information, many of which are relevant to other justice processes. According to the Panel,<sup>45</sup> the ICC should:
  - Inform victims and affected communities generally about the ICC, its proceedings and the rights of victims before the ICC as early as possible in the ICC’s work in a situation, including during preliminary examinations;
  - Develop standard outreach messages and materials on participation, adapted to different media, to inform victims about what participation involves, the participation process and what they can expect;
  - Develop innovative outreach strategies for reaching communities in remote areas, women and girls, and people from marginalised groups, taking into account lessons learned and the infrastructure available in each situation;
  - Develop strategies and materials to reach out to children, including in relation to participation.
20. Whether involved in justice processes as individuals or as part of a group, keeping victims informed of developments in proceedings (even where there is little or no progress) can be challenging. However, victims must be informed – in a way that is easy for them to understand - in order to be engaged. Assumptions as to which issues victims will want to present their views and concerns on should be avoided. Specific strategies should be developed to reach women and to ensure that they are able to follow the proceedings. It should not be assumed that information communicated to community leaders will be passed on to all members of the community. In some contexts, women may be excluded from this channel of communication and decision-making.<sup>46</sup> Consultation with victims on how they want to be kept informed may help to identify cases where obvious communication channels would be inappropriate.

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<sup>42</sup> Correa et al (n 34) pp. 395-96.

<sup>43</sup> Ibid. p. 395 (in relation to South Africa).

<sup>44</sup> ‘Independent Panel of experts report on victim participation at the International Criminal Court’, July 2013 (‘Victim Participation Report’) <http://www.redress.org/downloads/publications/130711%20panel%20report%20FINALfor%20dissemination.pdf>.

<sup>45</sup> Ibid., p. 15.

<sup>46</sup> Panel of Experts Victim Participation Report, pp. 31-2.



### iii) Effective representation and capacity and facility to participate

21. Representation for victims of conflict-related sexual violence or other forms of gender-based violence is vital to their effective participation in legal or other transitional justice processes.
22. When victims participate in justice processes, legal representation is key. Lawyers can constitute the buffer between the victim and other actors and are essential to assist the victim to relay interests and concerns to the body in question. The main challenges to secure effective representation relate to the lack of experienced counsel with expertise in addressing the particular forms of discrimination which underpin gender-based violence cases in particular. In many countries where there is structural discrimination against women and girls which is so deeply entrenched that it is almost imperceptible, there is a dearth of qualified counsel with the precise experience of representing these interests. In REDRESS' experience, the lack of specialised counsel can result in lawyers not appreciating the importance of pursuing these kinds of cases, lawyers dismissing or failing to register victims' approaches or requests for assistance, or that lawyers view the pursuit of such cases as simply a lost cause. In order to address these problems, a variety of approaches are needed, including the pro-active involvement of law societies, professional training for lawyers, judges and law enforcement officers "in understanding crimes of rape and other sexual offences in a gender-sensitive manner so as to avoid revictimization of women having reported rape cases".<sup>47</sup> Other necessary approaches include inculcating lawyers interested to develop this kind of expertise, sharing of experience on successful case strategies across countries and regions, dissemination of national and international jurisprudence which address sexual violence and other forms of gender-based violence, translated in relevant languages, to lawyers working in countries where litigation expertise is lacking. The CEDAW Committee has also recommended "the provision of legal aid; establishment of specialized courts, such as domestic violence and family courts, providing mobile courts for camps and settlement settings as well as for remote areas...".<sup>48</sup>

#### *Representation of groups*

23. Another key challenge (which can at times be a distinct benefit) with respect to effective representation concerns cases in which large numbers of victims are represented jointly. Joint representation can concern: (i) group applications in which collective rights may have been violated<sup>49</sup> and the collective brings a claim for the infringement of the rights of the group as a whole, for example indigenous peoples' rights. In such instances, the group has been recognised as having standing to claim in its own right for the violation of its collective/community interests;<sup>50</sup> (ii) under certain systems, NGOs or individuals are entitled to file complaints on behalf of a group of victims, without necessarily being linked to the victims themselves,<sup>51</sup> and without having to list the individual victims who may have suffered;<sup>52</sup> and (iii) instances in which individual victims may decide to file their claims jointly or are requested by the Court/Body considering their claims to group themselves in order to facilitate the administrative handling or decision-making of the claims.<sup>53</sup>

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<sup>47</sup> *Vertido v. The Philippines*, Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 18/2008 adopted on 16 July 2010, para. 8.3. The Committee further stressed that "stereotyping affects women's right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general", para. 8.4.

<sup>48</sup> CEDAW, General recommendation 30, para 81(k). See also the jurisprudence of the Inter-American Court of Human Rights in this regard referred to in Inter-American Commission on Human Rights, Access to Justice for Women Victims of Sexual Violence in Mesoamerica, OEA/Ser.L/V/II.,Doc. 63, 9 December 2011, particularly paras.79-100.

<sup>49</sup> See, e.g. *Rochela Massacre v. Colombia*, (Merits, Reparations and Costs), Int-Am Ct HR, 11 May 2007, Series C No.163; *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Int-Am Ct HR, 28 Nov. 2007, Series C No.172.

<sup>50</sup> *Case of the Saramaka People*, *ibid*.

<sup>51</sup> This type of action, also called *actio popularis*, is possible before the African Commission on Human and Peoples' Rights. See, *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea*, ACHPR Comm. 249/2002 (2004).

<sup>52</sup> Art. 28(e), *Rules of Procedure of the Inter-American Commission on Human Rights*, as mod. 2 Sept. 2011.

<sup>53</sup> See, for an analysis of class action procedures in the United States, Rule 23 of the US Code Annotated Federal Rules of Civil Procedure for the US District Courts, and Canada - Appendix D of Schedule "D" *Independent Assessment Process (IAP) For Continuing Indian Residential School Abuse Claims*, [http://www.residentialschoolsettlement.ca/Schedule\\_D-IAP.PDF](http://www.residentialschoolsettlement.ca/Schedule_D-IAP.PDF). For a review of ICC

24. International, hybrid and domestic formal justice processes should allow for the bringing of collective claims to facilitate participation by large numbers of victims. However, the possibility of group claims should never negate individuals' right to bring an individual application. Victims rarely speak with one voice. Each will typically have different interests and will have experienced victimisation in a unique way. Experiences of mass violations are gendered with women and girls experiencing disproportionately higher rates of sexual violence and will also invariably experience other forms of violence differently, as individuals and as mothers, spouses, carers or dependents. For example, in Uganda, while victims' groups often undertake joint advocacy, members' views differ on fundamental issues of amnesty, reparation, and criminal trials. Victims of LRA crimes may have different views and objectives if family members were also abducted, and went on to commit crimes. Children may have ended up in militia groups for different reasons – to defend their ethnic group, with the tacit consent of elders and parents, or under the powerful influence of militia leaders; driven to enlist as a result of abject poverty, after suffering terrible losses in conflict; and others will have been abducted and forcibly conscripted.<sup>54</sup> The circumstances will impact on the willingness and ability of demobilised children to constitute themselves into groups as they do not perceive their victimisation in the same way. Individuals' recollections of their suffering may also differ, making it difficult for a common factual narrative to be agreed amongst a large group of victims.
25. In rape cases, the views, expectations and fears of victims may differ depending on whether the violation led to pregnancy. Circumstances such as whether the victim was reintegrated in her community, or whether the victim may have relocated away from the conflict zone or outside of the country impact on the desire for, and expectations of justice and reparation. Victims may agree on a general strategy during trial but may want different reparations. Or, they may agree on association in the criminal action (as participant or civil party), but have different views in relation to the aggravating and extenuating circumstances relevant to the guilt of the accused. This can be the case for victims who have suffered harm at the hands of their own tribe, political party, and community.
26. **Assessing whether within the diversity, there are common positions, and equally, determining fundamental areas of division, requires extensive consultation, not least to ensure that any diversity is not lost through a collective approach.** Challenging terrain, poor infrastructure and transportation can impede victims from communicating with each other and organising themselves. There is a risk that women and girls will be under-represented in victims' groups. There is also a risk that victims of sexual and other forms of gender based violence may be part of a group claim but that the claim does not cover that aspect of the victimisation. Many past truth commissions and ad hoc tribunals struggled to enable such victims to convey what happened to them,<sup>55</sup> with girls having almost no voice or recognition of harms suffered.<sup>56</sup> As a result, commission reports and tribunal jurisprudence rarely adequately captured or reflected the realities of sexual violence during conflict.<sup>57</sup> Victims who suffered from more than one crime may be reluctant to mention sexual and other forms of gender based violence in addition to the other crimes suffered. Some victims will believe that such practices are so 'normal' that they are not worth mentioning. There may also be a tendency by group leaders or family members to omit references to sexual violence, as potentially bringing shame to the group/family. Yet, in groups where only

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procedures, see: REDRESS, 'The Participation of Victims in International Criminal Court Proceedings - A Review of the Practice and Consideration of Options for the Future', October 2012, available at:

[http://www.redress.org/downloads/publications/121030participation\\_report.pdf](http://www.redress.org/downloads/publications/121030participation_report.pdf). For procedures at the ECCC, see Art. 2, *Practice Direction on victim participation, 02/2007/Rev.1*; Application form for victims, App. A and ECCC Internal Rules (Rev8), rev. 3 Aug. 2011, Rules 23(3)(a) and (5), 12(ter)6 and 23 *ter*.

<sup>54</sup> REDRESS, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, September 2006, available at <http://www.redress.org/downloads/publications/childsoldiers.pdf>.

<sup>55</sup> R. Rubio (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, NY: Social Science Research Council, 2008.

<sup>56</sup> D. Mazurana and K. Carlson "Reparations as a Means for Recognizing and Addressing Crimes and Grave Rights Violations Committed Against Children during Situations of Armed Conflict and Under Authoritarian Regimes," in R. Rubio (ed.), *The Gender of Reparations: Unsettling Gender Hierarchies while Addressing Human Rights Violations*, Cambridge University Press, 2009.

<sup>57</sup> *Ibid.*

victims of sexual violence are represented, there is potential to attract further stigma, just by being part of or associated with the group.

27. Numerous persons may claim to speak “on behalf of a group”. Where victims’ groups are already constituted, legitimacy concerns have sometimes arisen with regards to who the group purports to represent, and whether the person representing the group is a legitimate representative. Victims’ groups may be dominated by political figures with certain issues treated as important only when they served political ends. Victims’ poverty and illiteracy makes them susceptible to manipulation. In certain countries where REDRESS has worked, ‘leaders’ have made false promises in exchange for assisting victims to take part in legal proceedings.
28. There may be challenges for victims to agree on a common representative. There is sometimes a perception that group leaders lack capacity, that they may benefit more from the process, creating tensions internally. In cases where only a few testify on a behalf of a group, tensions and jealousies have arisen, often reinforced by a lack of information.
29. **Procedures to select group representatives must be carefully crafted to ensure satisfaction with group representatives, and adequate representation of those who may not usually have a voice in decision-making processes. Steps should be taken to ensure that members of victims’ groups who are not formal representatives are also included in proceedings, eg. by ensuring delegations of victims attend court hearings.**
30. Difficulties of participation, including who is seen as representing victims’ views, can be amplified when trying to ensure participation in the design of transitional justice mechanisms.<sup>58</sup> Drawing on lessons learned from experiences in Peru and Chile, Correa et al have concluded that “[a] **mixed strategy of smaller and larger representative channels, forms of direct communication to the larger constituencies, and different avenues of formal and informal participation that are transparent and evaluated periodically to adapt to evolving conditions, may be the best practice in the face of significant obstacles.** Imperfection is likely, but is not a reason to discount the importance of finding a way to implement participatory policies. Governments need to be aware of the advantages that participation offers and not see only the obstacles they must confront to establish this type of channel”.<sup>59</sup>
31. Correa et al. point to a number of general lessons about representation and victim groups, summarised as follows:
  - Victim heterogeneity should not be ignored, even while space for communication across groups should be encouraged where possible;
  - Support should be offered to strengthen victim groups’ organizational capacity and to facilitate communication;
  - Victim groups need information that is accessible and trustworthy;
  - Channels of communication and participation need to be both local and national;
  - Human rights organizations and other NGOs play an important role as advocates for victim rights and should be involved, with the understanding that they may well have similar challenges in ensuring that their communication to and from victim groups is effective;
  - Participation that is flexible in terms of representation and that takes place over time will have a better chance of reflecting growing capacity of victim groups.<sup>60</sup>

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<sup>58</sup> See further C. Correa et al. (n.34), pp. 391-94.

<sup>59</sup> Ibid, p. 394.

<sup>60</sup> Ibid.

#### iv) Ensuring victims' safety, dignity and privacy

32. The CEDAW Committee has recognised that “[c]onflict-related gender-based violence results in a vast range of physical and psychological consequences for women, such as injuries and disabilities, increased risk of HIV infection and risk of unwanted pregnancy resulting from sexual violence. There is a strong association between gender-based violence and HIV, including the deliberate transmission of HIV, used as a weapon of war, through rape.”<sup>61</sup> It has recommended States to mobilise and allocate adequate resources to ensure medical, mental health care and psychosocial support, develop and operationalise referral pathways to facilitate treatment and support.<sup>62</sup>
33. In addition to the physical, psychological and other support needs that are necessary to enable victims to engage with justice processes, victims of sexual and other gender-based violence will also need facilities where victims can provide information in a safe and confidential environment. They will also need to be protected from intimidation and retaliation. While this may be the case for all victims of serious violations of human rights and international humanitarian law, victims of sexual violence and some other forms of gender-based violence carry with them extreme forms of stigma which leave the victims and sometimes their families at risk of social ostracisation and isolation or exposure to further victimisation. Where the State fails to provide protection, they may refrain from coming forward. In light of these experiences, treaties addressing the issue of violence against women require States to adopt policies and measures to provide protection and support services to victims.<sup>63</sup> The UN Human Rights Council, in its recent resolution: *Accelerating efforts to eliminate all forms of violence against women: preventing and responding to rape and other forms of sexual violence*:

affirm[ed] the need for States to take practical steps to ensure women’s access to justice, including by creating an enabling environment where women and girls can easily report incidents of violence, including sexual violence, through, inter alia, victim services, testimonial support and the possibility of publication bans, by improving victim and witness protection, protecting confidentiality and privacy rights, and providing law enforcement officials and first responders with human rights training.<sup>64</sup>

34. Certain countries have enacted witness protection legislation,<sup>65</sup> however any legislative framework would need to be backed up with practical measures which are appropriate in the context and relevant to the particular situations of victims of sexual and other forms of gender-based violence. The CEDAW Committee has recommended States to establish special protection units and gender desks in police stations.<sup>66</sup> What will work will depend on the particular operating environment and involving affected persons in the conceptualisation of protection measures is vital; victims will not employ measures that do not suit their purposes. Finding secure ways to communicate and store information has been a challenge for courts and victims’ groups alike. In some countries there is a risk for victims perceived to be associated with specific justice processes, which might require holding meetings outside of the victims’ community, or identifying suitable venues to do so which do not attract attention.<sup>67</sup> Contacting victims for follow up after initial intake can be difficult in the absence of a centralised way to safely store contact details in the field. In one Asian country, testimonies of victims were recorded and sent to the National Human Rights

<sup>61</sup> CEDAW General Recommendation 30, para 37.

<sup>62</sup> Ibid., para 38(3).

<sup>63</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Para” (1994) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (2011).

<sup>64</sup> A/HRC/RES/23/25 (2013).

<sup>65</sup> E.g., recently, Kenya. See, Witness Protection Act, Chapter 79, revised edition of 2012, original Act commenced on 1 September 2008, available at [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/WitnessProtectionAct\\_No16of2006.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/WitnessProtectionAct_No16of2006.pdf).

<sup>66</sup> CEDAW General Recommendation 30, para 81(h).

<sup>67</sup> Urgent Request by the Victims' Representative, 29 Feb. 2012, ICC-01/09-01/11-392-Red, para 50.

Commission. However, there was no central organisation or record of how to contact victims whose testimonies had been recorded. When the political context changed and there were security concerns, there was no way to check whether any of the victims had faced reprisals as a result of the testimonies, and to intervene if necessary.

35. Protecting victims and witnesses should be a central concern of justice mechanisms and victims' groups. Security risks need to be taken seriously, including finding secure ways to communicate with victims and store information, for victims' to report any threats made against them, and for responses to be made to any such threats. Group claims and belonging to victims' groups can in some contexts increase victims' feeling of security when pursuing justice, but the organisations or individuals representing them must also be suitably trained to manage security risks.

#### **v) Meaningful participation**

36. Victim participation can fulfil a range of purposes, depending upon the context. Centrally, it can help victims to develop agency and an independent voice in relation to issues that affect them, which has a transformative potential. It also ensures that justice processes benefit from the input of key stakeholders; that procedures take into account the realities facing victims and are devised with them in mind. Victim participation also helps ensure that their perspectives on factual events or broader contextual matters are known to decision-makers, and equally that decision-makers can appreciate the impact of particular acts on victims. Also, victim participation may be a route to obtaining acknowledgment of the harm suffered, compensation or other forms of reparation. Each of these aspects is relevant to victim participation.
37. In order for victim participation to be meaningful, it should be capable of fulfilling these various goals, while respecting the interests of (other) parties in proceedings. Within domestic or international criminal proceedings, victim participation is relevant from the earliest phase of proceedings. Meaningful participation would enable victims to provide their views and concerns on any decisions taken by investigators or prosecutors to end a particular investigation or line of inquiry or to withdraw charges. This is particularly important for cases that concern sexual or other forms of gender-based violence, where there have been regular failings of officials to collect evidence and pursue prosecutions.<sup>68</sup> The participation of victims is important to ensure that gender myths and stereotypes do not infect the trial process. Participation remains relevant at the confirmation of charges, throughout the trial proceedings, during the sentencing phase and reparations. Crucially, victims must be kept informed in a timely way about developments throughout the proceedings in order to exercise their right to participate in relation to matters which affect their interests. While victims' ability to participate in criminal proceedings must not detract from the rights of the defense to a fair and speedy trial, the assumption that victim participation will necessarily so detract, is not warranted by experiences to date.
38. With respect to truth commissions and reparation processes, victim participation is crucial throughout the process. A first key moment is the definition of the mandate of any truth commission or of the group of crimes falling within the reparation programme. At this point "participation of feminist organizations or organizations that defend the rights of women, as well as women victims, in the definition of the mandate and the operations of a truth commission can help ensure an appropriate framework and establish from the beginning the methodology and criteria that can ensure inclusion of the forms of victimisation suffered by women".<sup>69</sup> Positive experiences in this respect have been noted in Timor-Leste and Ghana.<sup>70</sup> Second, just as for court proceedings, truth commissions need to ensure gender-sensitive and comprehensive outreach, logistical considerations, sensitive procedures and protection

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<sup>68</sup> See, in relation to international criminal proceedings, e.g., V. Oosterveld, 'Gender-Sensitive Justice and the International Criminal Tribunal for Rwanda: Lessons Learned for the International Criminal Court' (2005-6) 2 *New Eng. J. Int'l & Comp. L.* 119; S. SáCouto & K. Cleary, 'Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17(2) *Journal of Gender, Social Policy & the Law*, p. 339.

<sup>69</sup> C. Correa et al. (n.34), p. 398.

<sup>70</sup> *Ibid.* pp. 398-9.

measures to ensure that victims can participate in the processes of the truth commission itself. A third key moment is in the definition of reparations policy, to ensure that that proposed reparations respond to the interests of victims and are perceived by them as adequate.<sup>71</sup> In this respect the experience in Peru has shown how a dialogue can be established between truth commission mechanisms and NGOs, and then direct contact with victims' groups. Workshops were organised by the truth commission and NGOs with victims in various parts of the country to learn about the harms victims had suffered, collect information about their expectations of reparations, draft joint proposals for reparations and commit to working together towards implementation by the state. This led to a national meeting where a wide array of NGOs and victims groups approved a document on the "Basic criteria for the design of a reparations programme in Peru".<sup>72</sup> As the truth commission developed its proposal, victims were involved in a consultative workshop on it, which resulted in the addition of a new programme in line with victims' priorities, and also sensitized victims to the difficulties faced by the truth commission in defining appropriate measures.<sup>73</sup> Fourth, **participation of victims is crucial in the implementation of reparation measures: both in the design of particular collective reparation measures, and in new efforts to identify and certify the status of victims so that reparations can be made and delivered.**<sup>74</sup> Here, both implementing bodies and victims' groups can be important.

39. The participation of victims of gender-based violence in specific justice processes should also be seen in the broader context of the role of women in post-conflict environments. As emphasised by the CEDAW Committee:

The immediate aftermath of conflict can provide a strategic opportunity for States parties to adopt legislative and policy measures to eliminate discrimination against women in the political and public life of the country and to ensure that women have equal opportunities to participate in the new, post-conflict structures of governance. [H]owever, ... [t]he full participation and involvement of women in formal peacemaking and post-conflict reconstruction and socioeconomic development are often not realized on account of deeply entrenched stereotypes, reflected in the traditionally male leadership of State and non-State groups, which exclude women from all aspects of decision-making, in addition to gender-based violence and other forms of discrimination against women.<sup>75</sup>

*The crucial importance of women and girls participating in reparation*

40. When it comes to discriminatory violations international human rights law recognises that the very process of accessing justice and appropriately crafted reparation measures have the potential to be transformative to address underlying inequalities, which led to the violation in the first place.<sup>76</sup>
41. In order to understand and respond to the harms suffered full and effective participation of the victims is key. This was underlined by the Nairobi Declaration which recognises, in relation to women and girl victims of gender-based and sexual violence, that:

the particular circumstances in which women and girls are made victims of crimes and human rights violations in situations of conflict require approaches specially adapted to their needs, interests and priorities, as defined by them; and that measures of access to equality (positive discrimination) are required in order to

<sup>71</sup> Ibid., p. 402.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid., pp. 402-3.

<sup>74</sup> Ibid., p. 408.

<sup>75</sup> CEDAW, General Recommendation 20, para.43.

<sup>76</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation; Report of the Special Rapporteur on violence against women, its causes and consequences, (2010) A/HRC/14/2, para. 78; IACtHR, *González et al. ("Cotton Field") v Mexico* (Preliminary Objection, Merits, Reparations, and Costs) (2009) paras. 450-451; CEDAW, General Recommendation No. 30, para. 77.

take into account the reasons and consequences of the crimes and violations committed, and in order to ensure that they are not repeated.<sup>77</sup>

42. Grounded in the experience of victims' groups and civil society organisations, the Nairobi Principles stress, among other things, that:

- Full participation of women and girls victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making;
- Structural and administrative obstacles in all forms of justice, which impede or deny women's and girls' access to effective and enforceable remedies, must be addressed to ensure gender-just reparation programmes;
- Practices and procedures for obtaining reparation must be sensitive to gender, age, cultural diversity and human rights, and must take into account women's and girls' specific circumstances, as well as their dignity, privacy and safety;
- Indicators that are sensitive to gender, age, cultural diversity and human rights must be used to monitor and evaluate the implementation of reparation measures;
- Ending impunity through legal proceedings for crimes against women and girls is a crucial component of reparation policies and a requirement under international law.<sup>78</sup>

43. The Special Rapporteur on Violence Against Women, in her report on reparations, stressed that:

the importance of women's participation in reparations discussions and processes cannot be overestimated. Without the participation of women and girls from different contexts, initiatives are more likely to reflect men's experience of violence and their concerns, priorities and needs regarding redress. Additionally, without such participation, an opportunity is missed for victims to gain a sense of agency that may in itself be an important form of rehabilitation, especially when victims come to perceive themselves as actors of social change. Finally, such participation is important for women and society in general to draw the links between past and present forms of violence and seize the opportunity provided by reparations discussions to press for more structural reforms.<sup>79</sup>

## V. THE LINK TO INSTITUTIONAL REFORM

44. Institutional reform can form part of reparations provided to victims, but can also be carried out alongside other processes. Involving victims of sexual and gender based violence in such endeavours is important as an avenue to identify and address particular barriers to justice they face and to allow them to participate in processes that affect them. In this way, institutional reform can lead to real change in the way domestic justice processes deal with gender-based and sexual violence in the long-term, and the discrimination underpinning them.

## VI. CONCLUSION

45. Ensuring participation of victims in transitional justice processes is challenging, but vital to their success and to achieving rights guaranteed to victims under international human rights law. For gender-based and sexual violence specific steps need to be taken to address

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<sup>77</sup> Nairobi Declaration, para. 7.

<sup>78</sup> See also Remedy and Reparation Principles, Sections 1 and 2.

<sup>79</sup> Human Rights Council, 'Report of the Special Rapporteur on Violence Against Women, Rashida Manjoo' (n.2), para. 9.

discriminatory barriers to justice that victims face, and to ensure that participatory mechanisms involve the perspectives of marginalised groups. International courts, ad hoc mechanisms, truth commissions, and domestic procedures are developing a growing body of good practices to enable informed and effective participation in an array of justice processes. The experiences of these processes in a particular conflict or post-conflict context should also be fed back to institutional reform to enable greater participation and access to justice for victims of gender-based and sexual violence in the ordinary domestic justice system.