

Vernacular Silences

*Testimony and the right to the truth in reparation of
conflict-related sexual and reproductive violence*

By

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Dedication

For my family.

Who I come from,
To whom I am destined.

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List of acronyms and abbreviations

CAT – Committee Against Torture
CEDAW – Committee on the Elimination of Discrimination Against Women
CEJIL – Centro por la Justicia y el Derecho Internacional; Centre for Justice and International Law (El Salvador)
CESCR – Committee on Economic, Social, and Cultural Rights
CRSV – Conflict-related sexual violence
CRSRV – Conflict-related sexual and reproductive violence
CVR - Comisión de la Verdad y Reconciliación (Perú), Truth and Reconciliation Commission of Peru
DAESH – Arabic language acronym for ISIL/ISIS
FEDADOI – Fondo Especial de Administración del Dinero Obtenido Ilícitamente; Special Fund of Administration of Illicitly Obtained Money (Peru)
FIGO – International Federation of Gynaecology and Obstetrics
FSS – Feminist Security Studies
GAD – Gender and Development
GDP – Gross Domestic Product
HIPC – Heavily Indebted Poor Country
IAWG – Inter-Agency Working Group
ICC – International Criminal Court
ICC-TFV – International Criminal Court – Trust Fund for Victims
ICL – International Criminal Law
IACHR – Inter-American Commission on Human Rights
IACtHR – Inter-American Court of Human Rights
ICPD – International Conference on Population and Development
ICRC – International Committee of the Red Cross
ICTJ – International Center for Transitional Justice
IDP – Internally Displaced Person
IHL – International Humanitarian Law
IHRL – International Human Rights Law
ISIL – Islamic State of Iraq and the Levant
ISIS – Islamic State of Iraq and Syria
HIV/AIDS – Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome
LGBTI – Lesbian, Gay, Bisexual, Transgender, and Intersex
MCH – Maternal and Child Health
MDGs – Millennium Development Goals
MRTA – Movimiento Revolucionario Túpac Amaru (Peru)
NGO – Non-Governmental Organization
OECD - Organisation for Economic Co-Operation and Development
OHCHR – Office of the United Nations High Commissioner for Human Rights
PCP - SL – Partido Comunista del Perú - Sendero Luminoso; Shining Path (Peru)

PIR – Plan Integral de Reparaciones; Integral Reparations Plan (Peru)
SDGs – Sustainable Development Goals
TRC – Truth and Reconciliation Commission
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNGA – United Nations General Assembly
UNHCR – United Nations High Commissioner for Refugees
UNFPA – United Nations Population Fund
UNICEF – United Nations Children’s Fund
WAD – Women and Development
WEF – World Economic Forum
WHO – World Health Organization
WID – Women in Development

Abstract

Vernacular silences

Testimony and the right to the truth in reparation of conflict-related sexual and reproductive violence

Conflict-related sexual and reproductive violence (CRSRV) against women and girls is a persistent and pervasive form of warfare. It is applied in diverse forms in different contexts. But its perpetration depends, invariably, on similar practices of silencing – by force, threat, coercion, or any other means – prior to, at the time of, or consequential to the violation itself, in order to prevent the victim or witness from speaking out, seeking, and obtaining justice. This thesis examines the recording of, and responses to, CRSRV in the literature and in law to make the case for application of the right to the truth therein, as both a reparative and preventative measure. The right to the truth, and in particular acts of testimony, hold profound potential to inform and sustain processes of redress, and to displace the silences involved.

To this effect, the truth represents a number of interrelated objectives, including but not limited to setting down a historical record of past violence, disruption of cultures of impunity through prosecution of perpetrators, and redress for victims. This research locates the subject of CRSRV within a rights-based approach to development, but views the discourses of WID and WAD as insufficient in light of CRSRV, and calls for inclusion of the right to the truth within this framework in order to uphold a victim-centred perspective. The methodology is oriented in a narrative view of history, in protection of a victim-centred perspective, and relies on testimonies of victims, as well as witness accounts, within Truth and Reconciliation Commissions, or other forms of documentation. Practices of CRSRV are contextualised within three case studies, regarding Peru, El Salvador, and Iraq. Reference to different conflict settings furthermore demonstrates with absolute clarity a common practice of silencing underlying all forms of CRSRV. But regardless of the common application of this method of silencing, the silences of victims are not identical. Testimonies of victims reveal their experiences in the vernacular. This thesis, in response, sets out two complementary proposals. First, a reconsideration of the term “conflict-related sexual violence,” proposing its extension to “conflict-related sexual and reproductive violence”. This extension would, first, better reflect the extent of harm experienced by victims as evidenced in their testimonies and, second, encourage more appropriate forms of reparation in light of their right to the truth. But protection of the right to the truth of victims is, in turn, dependent on a second extension, which proposes that the truth, in this vein, should be extended from its original conception of the right to *know*, to the right to *testify*, to actively contribute to the construction of the truth surrounding rights violations.

A new mouth emerges for my mouth

An Introduction

I. Opening

The exact date isn't given. The year was 1989. In Comas, capital of the province of Concepción, in the region of Junín in central Peru, a blind girl hid among the shadows inside a barn. They found her there, the soldiers – or rebels, it seemed – and aimed at her with a stick. One of the rebels drew her hand to the cool metal so she would know, by touch, that it was a weapon. He took her by the arm. Led her towards a side of the entrance where there was straw piled up and pushed her to the ground. And while he lifted her skirt, another rebel commanded, “If she screams, kill her!”¹

The civil war ended in El Salvador some twenty-five years ago, but it left a country ravaged by violence amid a legacy of re-aggravated poverty, inequality, social exclusion, gender discrimination and gang violence. As the years pass, entire streets and neighbourhoods are abandoned as inhabitants flee, heirs of poverty, discrimination, and revenge. Trees begin to grow inside houses. Rooves part, open to the sky. Blood marks the streets. The thought of the future is already a memory. By day, members of armed groups ‘disappear’ adversaries. By night, they rape indiscriminately women and girls whose bodies become the merchandise of their black trade in power. Girls who fall pregnant and attempt to abort, or who suffer obstetric complications resulting in involuntary abortion, are reported to officials and often sentenced up to 30 years in prison for the crime of aggravated homicide. The law offers no protection, only condemnation. Countless women are silenced, unable to testify, or forced or coerced into giving false testimony to crimes they did not commit: *When I arrived at the hospital, I was unconscious, and while I was there, when I came to, the doctors began to ask me things. They*

¹ The scene is recounted by a witness. Comisión de la Verdad y Reconciliación del Perú (CVR), Final Report, 2001. See p. 282. Testimony 303364. Anexo de Talhuis, distrito de Comas, provincial de Concepción, departamento de Junín, 1989. My translation.

*asked me a bunch of things like what I had done with the child I had had. ... When they began to take my statement, I was just coming out of the anaesthesia that they had given me.*²

Known as the Islamic State, or referred to here by the acronym IS, the self-proclaimed Caliphate, controlled territories stretching along the Turkish border, from the city of Mosul northern Iraq to northern Syria, holding the Syrian city of Raqqa as its headquarters between 2013 and 2017. The militant Islamist group is also called ISIL or ISIS, Islamic State of Sham/Syria and the Levant, or Daesh by its Arabic acronym, for Ad-Dawlah al-Islamiyah fil Iraq wa sh-Sham. The group, however, insisted they be called simply “Ad-Dawlah,” or The State by members. Any divergence or reference to Ad-Dawlah by any name other than that was met with strong opposition and punishment.

Preceding advancement into new territory, IS would send cadres ahead to gather intelligence, recruit local informants and gain immediate control. To consolidate their presence and dominance in conquered territory, IS established slave markets in Raqqa, Syria, and in the city of Mosul in Iraq, where captured Yazidi and Christian girls were taken wearing price tags.³ The UN envoy on sexual violence has said that, in the slave markets of IS, girls have been sold for “as little as a pack of cigarettes.”⁴ IS is reported to have contracted gynaecologists to examine the abducted women and girls to confirm virginity or to determine whether they were pregnant. Women found to be pregnant were then subjected to enforced abortions. After leaving captivity, one Yazidi girl told how she witnessed another young woman, about three months pregnant, being brutally examined by IS doctors, and taken into another room where the doctors told her not to speak as the baby was removed from her womb.⁵ Afterwards, she bled profusely, experienced intense pain and “she could not talk or walk.”⁶ Some girls attempted to commit suicide by swallowing rat poison, but were taken by their captors to a hospital to have their stomachs cleaned and were told, “We will not let you die so easily.”⁷ A

² Rosmery’s account. Appears in, Center for Reproductive Rights and the Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico, *Marginalized, persecuted and imprisoned. The effects of El Salvador’s criminalization of abortion*. New York, 2014. See p. 33.

³ See CNN, ‘Treated like cattle: Yazidi women sold, raped, enslaved by ISIS,’ 30 October 2014. Available <https://edition.cnn.com/2014/10/30/world/middleeast/isis-female-slaves>

⁴ *The Guardian*, Isis slave markets sell girls for ‘as little as a pack of cigarettes’, UN envoy says, 9 June 2015. Available <https://www.theguardian.com/world/2015/jun/09/isis-slave-markets-sell-girls-for-as-little-as-a-pack-of-cigarettes-un-envoy-says>

⁵ See CNN, ‘ISIS forced pregnant Yazidi women to have abortions,’ 6 October 2015. Available <https://edition.cnn.com/2015/10/06/middleeast/pregnant-yazidis-forced-abortions-isis/>

⁶ Ibid.

⁷ Ibid.

witness statement described how other girls, captured and raped by IS fighters, have committed suicide by jumping from Mount Sinjar.⁸

There have been recent reports of five freed Yazidi women and one fourteen-year old girl who, after seeking refuge in Canada, began to receive threats of death and rape from IS fighters by phone. Recordings of the calls have been handed over to police, including screen shots which reference IS with pictures of armed jihadis and beheadings. In one recording, for instance, a man laughs and says in Arabic, “I am the man who fucked you. I am your rapist.”⁹

II. Context

This thesis, in the abstract, is a reference to silence in the vernacular. It responds to the silence by which conflict-related sexual and reproductive violence (CRSRV) is perpetrated against women and girls, and the stigma attached to it which so often prevents victims from speaking out. Its primary purpose is to demarcate the right of victims to reparation, and it goes about this by way of examining the recording of and responses to CRSRV. The work details representations of this form of violence in the literature and law, in transitional settings. It is informed by legal theory and located within the field of feminist security studies (FSS), and draws also on a framework of rights-based development to make the case for application of the right to the truth therein, as both a reparative and preventative measure.

III. Point of departure

Sexual and reproductive violence is a weapon of war. It is applied in diverse forms in different contexts. But its perpetration depends, invariably, on common practices of silencing – by force, threat, coercion, or any other means – prior to, at the time of, or consequential to the violation itself, in order to prevent the victim or witness from speaking out, seeking, and obtaining justice. Since the perpetration of CRSRV depends on practices of silencing, so too should reparation depart from a premise of displacing and redressing this silence.

⁸ See Rudaw, Hevidar Ahmed, ‘The Yezidi exodus, girls raped by ISIS jump to their death on Mount Shingal,’ 14 August 2014. Available <https://rudaw.net/english/kurdistan/140820142>

⁹ See *CTV News*, ‘Former ISIS sex slaves sheltered in Canada threatened with phone calls, texts,’ 4 February 2019. Available <https://www.ctvnews.ca/w5/former-isis-sex-slaves-sheltered-in-canada-threatened-with-phone-calls-texts-1.4282796>

Prosecution of perpetrators has traditionally been heralded as the most effective means to end and prevent CRSRV.¹⁰ But this perspective frames prosecution as precedent to the rights of victims, in other words, the right to reparation becomes, in this context, largely dependent on prosecution of perpetrators. Such dependence may protect aspects of victims' right to the truth, but it may also perpetuate elements of the silence involved in the perpetration of violations. This thesis does not deny the importance of prosecution of perpetrators, but argues that it cannot prevail in absence of reparation for victims.

The conviction that victims must remain central to practices of repair can be traced to Bassiouni, Egyptian legal theorist and practitioner and "father of international criminal law."¹¹ The specificities of whether victim abuse has occurred in an international or domestic setting, or, for example, as a result of police brutality outside of conflict would in a legal analysis be secondary to the importance, Bassiouni advises, of the issue of torture framed from the victim's perspective. Essentially Bassiouni argues that legislation in international law has been largely conflict-centric and proposes (and it is a proposal which will be drawn on heavily as the thesis unfolds) a victim-centred perspective in reparations, in which violations are framed from the victim's perspective. He says:

From a purely legal perspective, victims' fate and the punishment of violators vary and depend on whether lawyers apply international human rights law, international humanitarian law, international criminal law or domestic criminal law. Such distinctions are of little significance to victims in their quest for redress.¹²

The remedy would require a total reinterpretation of crimes, or their "redefinition" as Bassiouni puts it, so that they are contextually dependent on the nature of the victim's suffering, rather than on the nature of the conflict or violations from which they derive.¹³ This thesis extends Bassiouni's proposal for a victim-centred perspective in reparations on the grounds of the right

¹⁰ See, *inter alia*, United Nations General Assembly, 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. 21 March 2006. ARES/60/147.

For an in depth discussion, see Chapter 7 of this thesis regarding the right to the truth as a means to protect and implement elements of reparations for CRSRV, and as protecting the right of victims to reparation over and above the prosecution of and responsibility of perpetrators therein.

¹¹ *Washington Post*, 'M. Cherif Bassiouni, "father of international criminal law," dies at 79,' available https://www.washingtonpost.com/local/obituaries/m-cherif-bassiouni-father-of-international-criminal-law-dies-at-79/2017/09/26/7a5e736c-a2c5-11e7-8cfe-d5b912fab99_story.html?noredirect=on&utm_term=.ae5d34ccbf19

¹² Cherif Bassiouni, 'International Recognition of Victims' Rights,' p. 205. *Human Rights Law Review* (2006) 6 (2): 203-279. Oxford University Press.

¹³ Cherif Bassiouni, 'International Recognition of Victims' Rights,' pp. 203-279. *Human Rights Law Review*, Vol. 6, No. 2, 2006. Oxford University Press. See p. 204. Refer to Chapters 2 and 5 of this thesis for further discussion on this proposal.

to the truth, extended from its traditional protection of the right of relatives to *know* the truth surrounding human rights violations to the right to *testify*, thereby enabling victims and witnesses to actively contribute to the construction and recording of violations.

In admonition of current recordings and representations of CRSRV, and in order to demarcate possible paths for a victim-centred perspective in reparations, referent to the right to the truth, this thesis asks the following questions.

- a) What is the influence of the recording of conflict-related sexual violence on responses to, and reparations for, violations and victims?*

And as auxiliary questions, in pursuit of a solution to the primary question,

- b) Which rights, in theory and in practice, are recognised as violated in the perpetration of CRSRV?*
- c) Does representation of these rights extend adequate response to and redress for victims?*

IV. Structure of the thesis

This is a thesis in three parts, each part consisting of three chapters, exclusive of separate chapters for the introduction and conclusion. The Introduction, Chapter 1, sets the scene and describes the contents and purpose of the thesis.

Part I lays the foundations of the thesis by detailing the subject of CRSRV, and outlining the composition, and key concepts of this research.

Chapter 2 comprises a review of the relevant literature regarding feminist security studies (FSS). It details broadly the subject of CRSRV, and observes the recording of and responses to CRSRV within the literature, relevant law and, by contrast, acts of testimony. From this discussion, gaps in the literature on FSS are identified and the research questions derived therefrom.

Chapter 3 delimits the theoretical framework. It locates the research within rights-based development, drawing links between established discourses on women in development (WID),

women and development (WAD), and gender and development (GAD), and explains why and how this approach, in response to CRSRV, should be extended to incorporate a right to the truth in order to address the limits of FSS to CRSRV and, ultimately, to protect a victim-centred perspective in reparations.

Chapter 4 explains the methodology, namely application of textual analysis and a narrative view of history. It outlines the relevance of these methods to the subject of CRSRV, and their purpose within a rights-based development framework and to the protection of a victim-centred perspective in reparations. It furthermore describes how and why each case study was chosen.

Part II observes the rights which lie at the heart of the subject of CRSRV. It extends the conceptual core of the thesis, giving further depth to three different yet, in this case, interrelated rights.

Chapter 5 presents the sexual and reproductive rights of women and girls in times of conflict. It sets out key concepts applied in the thesis, and draws contrast between theoretical protection accorded to these rights and their subsequent violation in light of responsibility of states and other international bodies of protection.

Chapter 6 presents the right to reparation. It considers in detail Bassiouni's proposal for a victim-centred perspective in reparations, the importance of which should take precedence at all times, and under all circumstances, over prosecution of perpetrators.

Chapter 7 looks in depth at the existing status, composition, and possible extensions of the right to the truth, which this thesis considers integral to the right to reparation for victims of CRSRV. It pays particular attention to its intersections with acts of testimony as pertinent to a victim-centred perspective. It also makes the link between methods of silence involved in the perpetration of CRSRV and the potential of the truth to disrupt and displace these. It furthermore proposes extension of the truth as a procedural right to a right in itself, able to be violated and thus meriting redress.

Part III observes the violations derived of CRSRV. It is comprised of three case studies, each of which sheds light on a different context and aspect of sexual or reproductive violence, and illustrates a different kind of victim. Despite their differences, common practices of silencing are exposed in each. The right to the truth as reparation, and its importance to historical justice and development, is considered in each case through the presence, or absence, of victim or witness testimony and its relation to the recording of CRSRV.

Chapter 8 examines the context of Peru towards the close of the internal armed conflict in the late 1990s, regarding the enforced sterilisation of indigenous women. It questions the work of the Truth and Reconciliation Commission in the recording of CRSRV, particularly its privileging of victims of rape, and considers whether this may have resulted in exclusion of other forms of violence experienced by women, namely enforced sterilisation as a form of reproductive violence and, therefore, excluded these victims from the possibility of obtaining reparation.

Chapter 9 examines the criminalisation of abortion in El Salvador. Chosen because it is not a traditional example of CRSRV, nor a traditional setting of conflict, to demonstrate the complexity of such violations, the imprisonment of innocent women in this context and absence of testimony represents institutionalised violence on the part of the law and presents a further example of the ways in which CRSRV is recorded, misrepresented, or unrepresented, shedding further light on the method of silence at work in violations of this nature.

Chapter 10 turns to Iraq and the rise of the IS, or ISIL, under which sexual and reproductive violence became indispensable weapons of war. This case observes CRSRV perpetrated against Yazidi women and girls. Since the fall of IS, many thousands of women remain missing. Some have been accepted back into their communities, but not in cases where they bear children of the enemy. This chapter reiterates the reproductive consequences of sexual violence, and questions the silence involved in this pursuit. It outlines responsibility for violations by act or omission, and draws an economic link between CRSRV in this context and international responsibility whereby investment in and protection of the sexual and reproductive rights of women and girls in this setting was null, but arms sales reached unprecedented levels. Exposure of the truth here could set a precedent for reparation and prevent future violations of a similar nature.

Chapter 11, in conclusion, returns to the discussion of reparations and culminates in a proposal for reparations for victims of CRSRV. The proposal continues in the vein of FSS, in an attempt to redefine meanings of security from vernacular perspectives. It centres, primarily, on extension of rights-based development to incorporate the right to the truth which, in reparations for CRSRV, holds the potential to displace the silences inherent in violations of this nature and whose application should become, above any transitional or juridical force it might acquire, customary. From the acts of testimony examined in the thesis emerges the call for reconsideration of the recording of and responses to CRSRV as they exist in current terminology, literature and legal frameworks. It therefore makes a second proposal for extension of the term ‘conflict-related sexual violence’ to ‘conflict-related sexual and

reproductive violence’ in order to better reflect the harm suffered by victims, although sexual in origin so often and intentionally reproductive by consequence, and to extend more appropriate forms of reparation thereby protecting fundamental elements of the right to the truth.

V. Closing

History is rendered by various accounts, inextricably linked, vying in a stranglehold to represent the truth. To be believed. And to live on. The relationship between victim, witness and perpetrator defines the violence which shapes contexts of insecurity and consequences of impunity. The right to the truth is of profound significance to victims of CRSRV in order to displace the methods of silencing by which this form of violence is perpetrated, and reframe its memory and reparation from a victim-centred perspective. Nevertheless, the right to reparation is based on evidence of a violation. And presenting evidence of CRSRV requires not only the ability to speak, but the will to listen. It is a question of solidarity whereby we must become, in the words of Qabbani, *a tribe*.¹⁴ We must summon the courage to speak of violent histories, at once and altogether, so that:

A new mouth emerges for my mouth

A new voice emerges for my voice

And my fingers

Become a tribe.

¹⁴ Nizar Qabbani, from ‘Damascus, what are you doing to me?’ Translation by Shareah Taleghani.

Part I

A discussion of reparation

This thesis opens to a discussion of reparation. It presents, broadly, the subject of conflict-related sexual and reproductive violence (CRSRV) and, as it sets out the violations of rights derived from such forms of violence, it establishes the precedent for reparations. Part I states that, since the perpetration of CRSRV depends on practices of silencing, so too should reparation depend on the right to the truth of victims, particularly acts of testimony, as a means to displace and redress the silence.

To speak of violent histories

A literature review

Introduction

The perpetration of conflict-related sexual and reproductive violence (CRSRV) involves the explicit violation of sexual and reproductive rights, but it depends on methods of silencing. So it further violates, implicitly, the right to the truth where this would enable, *inter alia*, the victim to speak out, contest, and demand redress for the violence inflicted. A response to the violation of both bodies of rights requires analysis of the complex intersections they traverse, namely protection of sexual and reproductive rights, the right to reparation, and the right to the truth. Each of these concepts, though touched on here, comprise their own separate discussions, in Part II of this thesis.

This literature review limits itself to a broad discussion of the subject, and examines the recording of, and responses to, conflict-related sexual and reproductive violence. In this vein, it is divided into three parts. Firstly, the chapter outlines CRSRV as a weapon of war, detailing its representations in the literature, with particular reference to Feminist Security Studies (FSS) and, to a lesser extent, legal theory. Early representations of CRSRV in the contexts of the former Yugoslavia and Rwanda provide contextual examples. In continuation, the second part contextualises the recording of CRSRV within the vernacular turn in security studies. Particular attention is paid to the narration of violence in acts of testimony and, inversely, to the presence and function of silence in the spaces between trauma and memory. The third part identifies the gaps in the exiting literature, and sets out the research questions which demarcate the paths for the remainder of the thesis. Preliminary assertions of this review sense that the recording of and responses to CRSRV in the literature, and other frameworks, have been limited in scope and that this narrow representation has contributed to specific and exclusive renderings of victim, and therefore reparations. If a revision of this narrative were undertaken based on an antithetical view of the writing (what has not been recorded of CRSRV), in other words a reading of the silences at play, it may be possible to cull alternative, vernacular representations of CRSRV, and demarcate reparations for these forms of violence.

Part I
Locations of violence

I. Representations of CRSRV in the literature: A weapon of war

This section observes representations of the violence in the literature on the subject of CRSRV. It observes primarily literature from the field of Feminist Security Studies (FSS) and puts to the test its potential, as a supposedly ‘open’ space able to challenge dominant frameworks, conceptions and terminology, to represent wider forms of CRSRV, to respond to the presence and practices of silence involved in its perpetration, and to therefore account for the diverse identities of victims beyond those represented by the currently common recording of and responses to CRSRV, and the silences which enshroud it. By “recording” of CRSRV I mean the ways in which violations are set down, and ultimately represented, in text and in history, noting that its representation can become reality. By “responses” to, I refer to the ways in which its framing substantiates and/or negates its presence, existence and consequential damage, as well as the need for its repair. And by “silences” I refer to that which is unsaid, inferred, literally silenced, but not absent.

I.a. Where it occurs

Practices of CRSRV derive from, and define, contexts of insecurity. Stern, who we are vs who we are not, the search for protection, for the provision of security invites danger, creates contexts of insecurity. See final para of ‘Who’ section below.

Sexual and reproductive violence is perpetrated in times of peace as well as in times of conflict, or war. When perpetrated in times of war, it is never incidental, nor coincidental, but rather integral to the conflict itself and represents, therefore, a form of warfare. The forms of violence pertaining to this practice are not openly or officially recognised as a military strategy or tool of dominance, by the military, or other individuals or entities in dominant positions. But they do render themselves to these purposes, tirelessly and unashamedly. We can see, in this vein, as the analysis unfolds, reading between the lines both in the literature and in technical legal frameworks, clear patterns of silencing in its perpetration.

CRSRV refers to acts or patterns of sexual or reproductive violence against women, girls, men or boys occurring in conflict or post-conflict settings, which bear direct relation to the conflict itself, or which occur in contexts unrelated to conflict but are nevertheless of significant concern, for instance in contexts of political repression.¹⁵ CRSRV is a method of war of historical significance. Its historiography is identical to and as long as that of the engagement of humanity in warfare¹⁶ and is not confined to a particular time, nor to a particular geography.

The contexts of conflict or repression described as scenes where CRSRV occurs represent the illiteral locations of CRSRV, at least by comparison to its literal disposition within which the body comprises the battlefield.

1.b. Why it occurs

It occurs, silently and persistently, in order to spread fear, to subordinate, to shame,¹⁷ to reward soldiers,¹⁸ or to eradicate ethnic or religious minorities.¹⁹ The violation of the rights of an individual victim are furthermore extended, and subordinated, to the collective shame of the community to which she belongs. According to Dorothy Thomas and Regan Ralph,

Soldiers can succeed in translating the attack upon an individual woman into an assault upon her community because of the emphasis placed – in every culture in the world – on women’s sexual purity and the fact that societies define themselves, in overt or less clear-cut fashions, relative to their ability to protect and control that purity. It is the protection and control of women’s purity that renders them perfect targets for abuse.²⁰

¹⁵ See United Nations ‘Analytical and Conceptual Framing of Conflict-related Sexual Violence,’ p. 3. June 2011.

¹⁶ Rhonda Copelon, ‘Surfacing gender: Reconceptualizing crimes against women in time of war,’ p. 63, in Lois Ann Lorentzen and Jennifer Turpin, eds. *The women and war reader*. London, New York University Press, 1998.

¹⁷ For discussions on conflict-related sexual and reproductive violence perpetrated in order to instil fear, shame, and subordinate, see Megan Bastick, Karin Grimm, and Rahel Kunz, *Sexual violence in armed conflict: Global overview and implications for the security sector*. Geneva, Geneva Centre for the Democratic Control of Armed Forces, 2007.

¹⁸ Donna Pankhurst, ‘Sexual violence in war,’ pp. 148-160, see especially pp. 152-153, in Laura J. Shepherd, ed. *Gender matters in global politics: A feminist introduction to international relations*. London, Routledge, 2010.

¹⁹ See Catherine A. MacKinnon, ‘Rape, genocide, and women’s human rights (Croatia and Bosnia-Herzegovina),’ *Op. cit.*; Sherrie L. Russell-Brown, ‘Rape as an act of genocide’ pp. 350-374, in Berkeley Journal of International Law, Vol. 21, Issue 2, 2003; Also, Gladys Prins, ‘Mass rape and genocide: International law and the increased need for deterrence regarding war crimes committed during civil conflict.’ Master’s thesis. Harvard Extension School, 2017.

²⁰ Dorothy Q. Thomas and Regan E. Ralph, ‘Rape in war: Challenging the tradition of impunity,’ pp. 82-99, in *SAIS Review*, Vol. 1994. Johns Hopkins University Press.

Furthermore, when she belongs to an enemy community, the notion of the “perfect target of abuse” harks back to Stern’s location of violence within the marker of ‘who we are not’.

Violations which occur within the framework of CRSRV, are experienced by both women and girls, men and boys, yet are perpetrated disproportionately against the former. In addition to their being disproportionately targeted, women and girls are affected and victimised on multiple grounds.²¹ As will become clear, recognition of women’s experiences of conflict-related violence is largely centred on sexual violence, and particularly on rape, as evidenced in the widely accepted and used term ‘conflict-related sexual violence’. This research uses, from and as its point of departure, the term ‘conflict-related sexual and reproductive violence’ (CRSRV) in line with a victim-centred perspective, and as a primary reference for reparation. Actual experience, as presented throughout this thesis and particularly in the case studies, demonstrated through testimony of victims and witnesses, tells that the practice of reproductive violence is also perpetrated against women, that it persists as consequential to sexual violence as an intentional, pervasive but relatively unspoken form of violence in times of conflict, post-conflict, and ‘peace’.

It occurs and reoccurs because it is accepted. And its acceptance is set precisely at those weighty pillars of protection and control, as Thomas and Ralph note. Because, quite simply, considers Catherine A. MacKinnon, perpetrators are “allowed”:

Whether understood, one man to another, as an excess of passion in peace or the spoils of victory in war, or as the liberties, civil or otherwise, of their perpetrators. They are legally rationalized, officially winked at, and in some instances formally condoned. Whether or not they are regarded as crimes, in no country in the world are they recognized as violations of the human rights of their victims.²²

Forms of sexual and reproductive violence, in conflict or war, are furthermore very often inextricable with the imposition of protection and control required for the advancing into, and taking of, territory. It is the conquerors’ “metonymic celebration of territorial acquisition,” writes Spivak.²³ And it is the epitome of war itself.

²¹ UN Human Rights Council, ‘I lost my dignity: Sexual and gender-based violence in the Syrian Arab Republic,’ hereinafter *The Report*, or ‘I lost my dignity,’ see p. 1 and p. 4. Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic. Available at <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-37-CRP-3.pdf>

²² Catherine A. MacKinnon, ‘Rape, genocide, and women’s human rights,’ *Op. cit.*, p. 7.

²³ In reference to group rape. See Gayatri Spivak, ‘Can the subaltern speak?’ pp. 271-313, in C. Nelson and L. Grossberg, eds., *Marxism and the interpretation of culture*. Basingstoke, Macmillan Education, 1988. See p. 303.

I.c. How it occurs

Each of the purposes and intents of CRSRV listed above is dependent on silence as a method of its perpetration. As described explicitly, or inferred implicitly, in the testimonies later studied in this thesis, the method of silencing in the perpetration of CRSRV is applied diversely and unsparingly; it consists of physical force, threat, coercion, or any other means. Silence can be used prior to, at the time of, or in the aftermath of the violation itself in order to instil fear, subordinate, shame, or prevent victims from speaking out and from seeking redress. Recognition of the presence and role of silence within violence against women, particularly when this violence is sexual in nature, has an important place in much of the literature on this subject and is discussed in detail below. This thesis, as it unfolds, examines specific methods of silencing within practices of CRSRV and regards the right to the truth, in line with a victim-centred perspective and within the lens of a rights-based approach to development, as an indispensable reference to, and point of departure in, the reparation and prevention of CRSRV.

I.d. ‘Who’

Before delving into the nature of the violence itself, an inquiry into ‘who’ it is perpetrated against helps to uncover some of the logic underscoring practices of CRSRV, and the objectives it serves. The field of Feminist Security Studies has mapped much initial terrain in this regard.

At its core, Feminist Security Studies is a response to the contexts of insecurity which dominate the lives of so many, and in particular so many women. Maria Stern frames the paradoxical relationship between security and insecurity around an inquiry into “how the promise of a secure subject is inscribed in discourses of (in)security.”²⁴ She looks at how the identity ‘we’ as a subject of security, drawn from a specific collective who shares a common experience of violence.²⁵ As she attends to what she calls a “modern logic or grammars of security”, Stern uncovers the ultimate paradox of security and reveals that “when people

²⁴ See Maria Stern, ‘We’ the Subject: The power and failure of (in)security,’ pp. 187-205, in *Security Dialogue*, Vol. 37, No. 2. June, 2006.

²⁵ Ibid. In this research Stern’s inquiry centres on the Mayan women of Guatemala in their struggle for security, in a context of resistance.

attempt to protect themselves and to create a sense of security, they also produce danger, fear and harm.”²⁶ And, of utmost importance, she acknowledges:

Furthermore, people seek security in direct relation to *who* they are – sometimes with devastating consequences. Attempts to secure a notion of ‘who we are’ invite violence when these notions are not shared by members of the community in question, when ‘who we are’ must be forcibly instilled through disciplinary tactics, when ‘who we are’ also depends on belligerently defining and even killing ‘who we are not’.²⁷

As will be seen in further examples as this chapter unfolds, the sense of ‘who’ is precisely the marker which determines the objective of violence, with regards to ethnic cleansing and genocide, and the justification for the destruction of identities and the forging of vulnerabilities, with regards to gender-based violence and CRSRV specifically.

The complexity of ‘who’ as a subject of (in)security is not to be underestimated. This can be evidenced in the ways in which insecurity and violence are experienced and how victims identify with, and are shaped by, experiences of harm, and reflects furthermore what Maria Stern et al have described as “the political stakes involved in fluid processes of categorizing injury.”²⁸ A recent article written by Maria Stern, Harriet Gray and Chris Dolan, seeks to reconcile the distance between “the wide repository of knowledge about conflict-related sexual violence that now exists” and “a lack of understanding about how victims/survivors of such violence themselves make sense of and frame their experiences in conversation with global and local discourses.”²⁹ Problematically, the sense-making of subjects themselves (how violence is internalized, or healed) is not easily formed outside the framing of violence by external influences (how it is interpreted, represented and redressed). As Stern et al put it, “making sense of such violence, and of one’s self in relation to it, also becomes a process of *remaking*, or *reforming* oneself as a subject.”³⁰ In terms of seeking redress for such violence, they determine a need to reflect on “how people chose and reflected upon the labels under which they sought support, both individually and collectively,” while also acknowledging that “clearly distinguishing and mapping these influences remains a difficult, if not impossible task.”³¹ Yet despite its difficulty or impossibility, this task remains immensely important in the

²⁶ Ibid., p. 187. Original emphasis.

²⁷ Ibid., pp. 187-188.

²⁸ Maria Stern, Harriet Gray, and Chris Dolan, ‘Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence,’ pp. 197-216 in *Review of International Studies*, Vol. 46, No. 2, 2020.

²⁹ Ibid.

³⁰ Ibid., p. 202. Original emphasis.

³¹ Ibid.

protection of the ‘who’ as a subject of violence and also in the protection of a victim-centred perspective in reparations, for no redress can be met in disregard of who exactly it is meant for.

A similar line of thought can be traced to previous research conducted by Stern which deals with subjects of violence in relation to identity. In this work, using the example of a three-fold identity marker, “Mayan-women-poor”, Stern reflects that:

these narratives underscore that attention to identity – even multiple identities – as possible ‘subjects’ of or vehicles for attaining security seems to repeat familiar and potentially violent logics. The notion of securing even multiple identities is written out of an underlying grammar that presupposes that complete representation and securing of a subject is possible.³²

She elaborates, “I am not suggesting that there is *one* universal logic of security that underwrites all struggles for security,” not least because experiences of violence differ, however, “grammars of security are powerful insofar as they inform how people believe they need to seek safety and avoid harm, as well as the choices that they make based on those beliefs.”³³

If there is a need to acknowledge the responsibility for adequate representation of subjects of violence (victims), there is a simultaneous need to acknowledge an inherent danger therein. The danger lies, in part, in misrepresentation, but also in the impossibility of the task. Stern cautions that “representing and securing the subject” becomes an (im)possible task for two reasons:

First, insecurity is the inevitable supplement to security. Second, ‘we’ can never be fully represented (and therewith secured). Arguably, violence occurs (in part) through the concealment of these two inherent (im)possibilities, and resistance to violence through the failure of this concealment located in the refusals or the cracks within supposedly coherent discourses.³⁴

But this failure is not entirely hopeless for it encloses “the possibility to disrupt the dominant logic of (in)security in its repetitions of violence” by “paying close attention to how people live the necessity for identity and security in their daily lives, and also how they resist some of the

³² Maria Stern, ‘We’ the Subject: The power and failure of (in)security,’ *Op. Cit.*, p. 188.

³³ *Ibid.* Original emphasis.

³⁴ *Ibid.*, pp. 201-202. Original emphasis.

totalizing moves that inhere in their struggles.”³⁵ This is none less than a demand to cast our attention toward the vernacular, but it is a point to which we return later in the chapter.

A final note in this regard points to the vessel of ‘who’ as an indispensable reference in the study of representations and recordings. The recognition that a violation has taken place, or that a right to reparation is owed, is insignificant if not moored in the concept of ‘who’ it was perpetrated against, and ‘who’ must be redressed. In this context, that of reparations for CRSRV, the subject of ‘who’ is represented, adequately I believe although by no means entirely, by the concept of victim. The concept and use of the terminology for victim is discussed in further detail below. Here, its design should be raised in correlation with the objective of protecting a victim-centred perspective in reparations. Stern et al also shed light on the importance of representing “the ways in which victims/survivors narrate their experiences of violence” and conceptualise the narration of violence, which is examined in relation to acts of testimony in this thesis, “as performative acts through which they remake their worlds and themselves as agentic subjects.”³⁶ This chapter advances the discussion on the location of the victim at the core of reparations for CRSRV, departing from the design of Stern’s inquiry into the paradox of (in)security whereby the attempt to create and maintain a site of security and sovereignty in the consolidation of identity regarding ‘who we are’ also raises an inevitable, contradictory and potentially dangerous assertion of ‘who we are not’. The assertion of the *not* is precisely the site from which violence derives, and represents, therefore, the location where violations occur.

I.e. From the perspective of Feminist Security Studies

Feminist Security Studies (FSS) arose in response to the need for feminist oriented perspectives on, and critiques of, traditional security studies. It has been called by some a sub-field of security studies; others argue it represents a field in its own right, multi-disciplinary by nature, providing “innovative and timely insights” comprised of research relating to war, conflict, peace, security, and far more.³⁷ A prominent pair in early FSS research, Maria Stern and Annick Wibben have made the important distinction that while Feminist Studies has a long and

³⁵ Ibid., p. 202.

³⁶ Maria Stern, Harriet Gray, and Chris Dolan, ‘Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence,’ *Op. Cit.*, p. 204.

³⁷ Maria Stern and Annick TR Wibben, ‘A decade of feminist security studies revisited,’ pp. 1-6 in *Virtual Collection Security Dialogue*. Sage, 2018. See p. 1.

rich history in each of these domains, Feminist Security Studies maps new terrain and offers an alternative security dialogue regarding gender within Security Studies.³⁸

Originally conceived of as “gender and security,” dating back to initial research in a special issue of this title in 2004 compiled by Hansen and Olsson,³⁹ the field of inquiry has transformed into “feminist security studies” in reflection of its increasingly innovative nature. Where “gender and security” may have seemed limited to discussions with an overarching focus on gender, FSS centres on feminist forms of interrogation. As Stern and Wibben frame it, FSS not only pays

attention to the workings of gender in order to ask questions about security; it also includes scholarship that refuses any line of distinction that separates ‘security’ from the workings of gender. As such, FSS is located at the crossroads of security studies, feminist international relations and feminist theory (which considers gender as one of many intersecting relations of power).⁴⁰

In addition to “gender and security”, and preceding the consolidation of FSS, there emerged in the early 1990s the category of “human security”. The location of the human at the fore of theories and practices of security rose to prominence with the United Nations Development Report of 1994, which framed the concept as “Freedom from fear and freedom from want.”⁴¹ At the time, the reference to humanity was meant to challenge and override the state-centred discourse of security studies, drawing on a more humane interpretation of security with a discourse around the conditions needed to feel secure.⁴² It sought, further, to “contextualise human security threats” aligning the severity of threats with “the magnitude or prominence of harm”.⁴³ In this vein, the concept of “humanity” within human security was conceptualised as an inclusive and open space to set out the multilayered problems in the face of international, and increasingly internationalised, security issues.

In 2005, however, Heidi Hudson raised concerns over the conceptualisation of human security as such. In a feminist reading, she cautions of the masking of difference in this framing, and calls for the recognition and contextualisation of different identities and experiences in any

³⁸ Ibid.

³⁹ L Hansen and L Olsson, eds. Special Issue. Gender and Security. *Security Dialogue* 35(4). 2004.

⁴⁰ Maria Stern and Annick TR Wibben, *Op. Cit.*, p. 2.

⁴¹ United Nations Development Programme, Human Development Report 1994. Oxford: Oxford University Press, 1994.

⁴² See Garry King and Christopher J L Murray, ‘Rethinking human security,’ pp.585-610, in *Political Science Quarterly*, Vol. 116, Issue 4. 2001.

⁴³ James Busumtwi-Sam, ‘Contextualizing human security: A “deprivation-vulnerability” approach,’ pp. 15-28 in *Policy and Society*, Vol. 27, Issue 1. 2008.

notion and operationalisation of human security.⁴⁴ In further interrogation of the “human” at the core of human security, Natasha Marhiah in 2013, retakes some of the questions voiced by Hudson. She considers that the universality of the human harbours exclusions produced along gendered, as well as raced and classed, lines.⁴⁵ The troubled waters of the humanity at the core of human cannot, in this lens, be interpreted as an adequate representation of war as witnessed or experienced by women. It is from within this context that Catherine A MacKinnon poses the unsettling question, “But are women human?”⁴⁶ and that the emergence of FSS as a related yet distinct field of inquiry is consolidated.

I.f. Preliminary representations of CRSRV in situ

There are underlying practices or aspects common to all acts of CRSRV, including but not limited to their function as a weapon of war, or the dependence on methods of silencing in their perpetration. There are similarly specificities in any given context relative to, *inter alia*, the nature of a particular conflict, cultural differences or religious practices which may define a local setting, the extent to which perpetrators carry out violence, the extent of impunity, experiences of victims, and the preservation or destruction of a record of the violence.

Early literature on CRSRV is oriented in the context of Bosnia, former Yugoslavia. The urgency with which this particularly violent episode in modern history was recorded resonates with the general spirit of the times as it coincided with the emergence of feminist voices across the globe speaking out against injustices with the aim of framing violence against women as human rights violations. Such commitments further consolidated some of the thought pertaining to FSS as discussed above.

The conflict in this setting occurred between 1992 and 1995, arising mainly in response to the vision of a “greater Serbia” founded on the exclusion and cleansing of a perceived enemy, the Bosnians. This enemy had an antecedent in the Kosovo Albanians. As early as 1981, the Serbian media fuelled nationalist discourse in its representation of the uprising of the Kosovo Albanians, at the time seeking autonomy from Serbia. The uprising was met with immediate

⁴⁴ Heidi Hudson, ‘Doing security as though humans matter: A feminist perspective on gender and the politics of human security,’ pp. 155-174, in *Security Dialogue*, Vol. 36, No. 2. Sage Publications, 2005.

⁴⁵ Natasha Marhiah, ‘Some humans are more *human* than others: Troubling the human in human security from a critical feminist perspective,’ pp. 19-35, in *Security Dialogue*, Vol. 44, No. 1. Sage Publications, 2013.

⁴⁶ In reference to the title of her article: *Are women human? And other international dialogues*. Cambridge, MA: Harvard University Press, 2006.

suppression by Serbian forces, but the Serbian population was fed rumours of an Albanian genocidal plot against ethnic Serbs involving atrocities such as mass rapes against the local Serbian population in Kosovo.⁴⁷ These accusations, though exceedingly exaggerated, united the Serbs in solidarity against the Albanians, stirring ethnic hatred first toward Albanians and, later, toward all non-Serbs. Against this backdrop, the most zealous advocate of Serbian nationalism and the Albanian genocidal campaign, Slobodan Milosevic, rose to power, took full control of national media, and consolidated his plans for a greater Serbia.⁴⁸ When, on 3 March 1992, the Muslims and Croats of Bosnia-Herzegovina declared independence, the Serbian propaganda machine of Milosevic was in full force. National television aired scenes of “Muslims or Croats raping Serbian women,” when, in actuality, they revealed Serbs raping Muslim and Croat women.⁴⁹

During the 1990s, “rape camps” were established by Serb forces in which Bosnian Muslim women, and to a lesser extent Croat Catholic women, were subjected to systematic and repeated forms of torture, including rape, sexual slavery, forced pregnancy and “other crimes of sexual violence.”⁵⁰ Amnesty International, among other organisations, has compiled reports based on testimonies of victims. Despite recognition by Amnesty International of the reproductive violence involved in the perpetration of these crimes, the term “sexual violence” prevails. Other representations point more clearly to the reproductive consequences of the rape of Bosnian women, as part of recognition of the genocidal intents of the violence. Todd A Salzman, in this vein, says that such acts were not randomly carried out by “a few dissident soldiers,” but were organised, intentional and constituting “an assault against the female gender, violating her body and its reproductive capabilities as a ‘weapon of war’.”⁵¹ This representation of CRSRV against Bosnian women is of particular importance as it contains not only explicit reference to the reproductive violence which results from acts of sexual violence, but also recognition that its result is an intentional aspect of the destruction exacted in order to achieve ethnic cleansing or genocide. In other words, it exposes not only the presence of reproductive violence, but also its purpose.

⁴⁷ Todd A Salzman, ‘Rape camps as a means of ethnic cleansing: Religious, cultural, and ethical responses to rape victims in the former Yugoslavia,’ pp. 348-378, in *Human Rights Quarterly*, Vol. 20, No. 2, May 1998. See p. 352.

⁴⁸ *Ibid.*, pp. 352-353.

⁴⁹ *Ibid.*, p. 353.

⁵⁰ Amnesty International, *When everyone is silent: Reparation for survivors of wartime rape in Republika Srpska in Bosnia and Herzegovina*. Report. London: Amnesty International Publications, 2012. See p. 3.

⁵¹ Todd A Salzman. *Op. Cit.*, see p. 349.

Estimates of wartime rapes in the former Yugoslavia fall between the extensive range of 12,000 to 50,000 victims; the exact numbers remain unknown, not least due to the silence and stigma attached to such forms of violence and its tendency to elude historical records.⁵² Since 1995, little reparation for victims has been enacted, and the investigation of perpetrators of crimes under the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in The Hague has resulted in the prosecution of fewer than 40 cases. The investigation and prosecution of perpetrators of crimes under international law is an obligation of states and a right of victims as a component of reparation. Nevertheless, criminal justice comprises only one element of satisfaction as part of reparation. This thesis privileges the right to truth over the prosecution of perpetrators. While the former is not meant to replace the latter, it holds greater potential, when interpreted in certain ways, to protect a victim-centred perspective in reparations, which will become clearer as the thesis unfolds.

Writing in response to the atrocities of Bosnia-Herzegovina, but in resonance with the subject of CRSRV on a global scale, and as a human rights problem, Catherine A. MacKinnon further probes the lines of interrogation advanced by FSS and asks how much of what, or who, is considered to be human is applicable to women. “Human rights,” she contends, “have not been women’s rights.” And she continues:

Rights that human beings have by virtue of being human beings have not been rights to which women have had access, nor have violations of women as such been part of the definition of the violation of the human as such on which human rights law has traditionally been predicated.⁵³

This is not, as she reflects, “because women’s rights have not been violated,”⁵⁴ but rather because “what is done to women is either too specific to women to be seen as human or too generic to human beings to be seen as specific to women.” It would seem, therefore, that “you cannot be a woman and be a human being at the same time.”⁵⁵ Many of the human rights violations experienced by women are also experienced by men. But women also experience violations specific to their identity as women. For example, both men and women can suffer harm resulting from conflict-related sexual violence, but only women are subject to the reproductive consequences of such forms of violence.

⁵² See Amnesty International, *When everyone is silent. Op.Cit.*

⁵³ Catherine A. MacKinnon, ‘Rape, genocide, and women’s human rights (Croatia and Bosnia-Herzegovina),’ pp. 5-16, in *Harvard Women’s Law Journal*, Vol. 17, Spring, 1994. See p. 5.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p. 6.

The right to reparation for victims of CRSRV, and it is necessary to reiterate the “*and reproductive*” within this acronym as it is applied in this thesis, reaffirms the need for a strong reference to human rights in this framework, and does so in accord with MacKinnon “out of a refusal to believe that the reality of violation we live with is what it means for us to be human – as our governments seem largely to believe.”⁵⁶ To transcend this reality, the representations of it must traverse the ways in which it is recorded.

I.g. Prevalence in other contexts and times

Additional to accounts of CRSRV in the former Yugoslavia, another early record sheds light on similar atrocities in the context of Rwanda. Over three months, April to July 1994, close to 1 million Rwandans were killed in what has been recognised as among the most extensive genocides of our time. The genocide did not represent an isolated act, or series of acts, of violence but was rather:

the culmination of a century of ethnic discrimination and violence, and four years of civil war. Neighbours murdered neighbours; family members murdered family members. sexual violence was systematically used by Hutu extremists towards Tutsi women and girls as a method of war, not only to inflict pain and humiliation but also to spread HIV – and thus ensure the end of the Tutsi people.⁵⁷

As in the former Yugoslavia, extremist propaganda fuelled ethnic divisions and violence. Within three months during the timeframe of the genocide in 1994, sexual violence against Tutsi women was perpetrated on a massive scale. The exact number of women raped will never be known, but it is estimated that some 350,000 acts of rape were perpetrated primarily by members of the infamous Hutu militia groups known as the *Interahamwe*, but also by soldiers of the Rwandan Armed Forces, the *Forces Armées Rwandaises* (FAR), including the Presidential Guard, and to a lesser extent by other civilians.⁵⁸ It was frequently the case that Tutsi women were raped after witnessing the torture or killings of relatives, and the destruction

⁵⁶ Catherine A. MacKinnon, ‘Rape, genocide, and women’s human rights (Croatia and Bosnia-Herzegovina),’ *Op. Cit.*, p. 6.

⁵⁷ Karen Brounéus, ‘Truth-telling as talking cure? Insecurity and retraumatization in the Rwandan gacaca courts,’ pp. 55-76, in *Security Dialogue* Vol. 39(1), 2008. Sage Publications. See p. 55.

⁵⁸ Human Rights Watch, *Shattered Lives: Sexual violence during the Rwandan genocide and its aftermath*. September 1996. Available <https://www.hrw.org/reports/1996/Rwanda.htm>

and looting of their homes.⁵⁹ They were raped individually, gang-raped, and raped with objects such as sharpened sticks or gun barrels. Rapes were sometimes followed with sexual mutilation of the victim, including mutilation of the vagina and pelvic area with machetes, knives, sticks, boiling water, and in one known case, acid.⁶⁰ Women were repeatedly singled out at checkpoints or other sites where people were being tortured, and held there for personal sexual service. The militiamen, making use of the unfailingly effective method of silence, would force women into submission by threatening them that they would be killed if they refused. This form of sexual slavery, where women were held in captivity by militia, was referred to locally as “marriage.” The forced marriages lasted anywhere from a few days to the duration of the genocide, or months, and in some cases, longer.⁶¹

The acts of CRSRV, and in particular the systematic use of rape, in this context did not merely coincide with the genocide, but were consciously enacted as a form of warfare and a part of the genocidal violence. Rape was used to terrorise the Tutsi population, shame them, and assert Hutu dominance over them to achieve political power.

As a result of CRSRV in this context, women and girls bore, and continue to bear, devastating physical and psychological damage. They contracted sexually transmitted diseases, including HIV/AIDS, were subjected to enforced impregnation, experienced complications from poorly performed abortions, suffered lasting physical injury from rape, such as fistula or incontinence, or from bearing children born of rape; they have been retraumatised, stigmatised and isolated from their communities.⁶² Many victims still have urgent and unattended to medical needs, and lack food, shelter, health care and education for their children. Reparation has in most cases remained an unfulfilled promise.

As with the case of the former Yugoslavia, the International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council in 1994. It included jurisdiction over genocide, crimes against humanity, and violations of international humanitarian law committed in Rwanda, and neighbouring territories, from January 1 1994 to December 31 1994. In its landmark judgment in the case of *Prosecutor v. Akayesu*, the ICTR made the

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

decision that rape can be a constitutive act of genocide under international law.⁶³ Despite it, the court has not followed up this decision with vigorous prosecution of rape cases.⁶⁴

In response to the perpetration of rape within the genocidal campaigns of the former Yugoslavia and Rwanda, both international legal response and academic research on CRSRV underwent a shift, at least theoretically, in terms of increased and stronger international accountability mechanisms. There was furthermore recognition of not only the gendered aspects of such violence, but its underlying ethnic and political intentions,⁶⁵ in resonance with the thinking and shift from “gender and security” to FSS.

The recording of CRSRV observed thus far demonstrates, at least, the far-reaching effects of these forms of violence which, although gender-based in origin, extend to and serve economic, social, political and military ends. As a weapon of war, CRSRV can only be read as derived of and defined, though never justified, by struggles of exclusion, dire poverty, degeneration and desperation. If the concept of reparation is to map redress and development, responsibility and accountability, the violent histories which precipitate the violence must be reckoned with. Far from what its representation suggests, it is not in fact so much the sexual origins of this violence, but its reproductive consequences which reinforce such far-reaching and irreversible effects. But where the violence may be considered irreversible, it should never be deemed irreparable. Nevertheless, the measures of reparation extended to victims are heavily influenced by the ways in which CRSRV is recorded. In this vein, comprehensive reparation depends on comprehensive representation and interpretation of the violence.

I.h. An over-representation of rape

Despite recognition of the wider origins and implications (reproductive) of the forms of violence perpetrated against women in conflict settings, the term Conflict-related sexual violence (CRSV) prevails. Under this term, acts of ‘sexual’ violence are predominantly represented by rape. As seen from the cases of the former Yugoslavia and Rwanda, rape as a

⁶³ See International Criminal Tribunal for Rwanda (ICTR), *The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A. 1 June 2001.

⁶⁴ Human Rights Watch, *Struggling to Survive: Barriers to Justice for rape victims in Rwanda*. September 30, 2004. Available <https://www.hrw.org/report/2004/09/30/struggling-survive/barriers-justice-rape-victims-rwanda>

⁶⁵ Alliya Anjum, ‘Moving from impunity to accountability – Women’s bodies, identity, and conflict-related sexual violence in Kashmir,’ in *Economic & Political Weekly*. Dec. 1, 2018. Athena Information Solutions Pvt. Ltd.

weapon of war enacts indescribable violence and has extremely pervasive and damaging effects on victims, not least in its genocidal performance within conflicts.

In her thoughtful and provocative reading of CRSRV in Kashmir, a setting with the most militarised presence in the world, Alliya Anjum reconsiders how the representation of women's bodies and identities delimits interpretation of violations against them. She perceives the representation of rape as the most prevalent and pervasive form of 'sexual violence' against women counterproductive to imagining the reality of victims' experiences of violence and acknowledges, in her premise to move from impunity to accountability in regards to CRSRV, its predominant status. Rape, she says,

has often been used as a euphemism for sexual violence in conflict. At the same time, historical evidence from victim accounts illuminates how women suffer such violence in forms including and other than rape, for example, sexual slavery, forced pregnancy and sexual humiliation among others.⁶⁶

In its tracing of other related forms of violence of comparable gravity, this passage alludes to an over-representation of rape in the literature and thinking on the subject. Anjum further argues that the use of the term 'conflict-related sexual violence' (CRSV) by the UN is in fact a recognition of the broader strain and context of violence and an extension from the previously more common term 'wartime rape'.⁶⁷ Where wartime rape refers to armed conflict alone, the term CRSV alludes to wider definitions of violence relating directly or indirectly to conflicts. But although its terminology may account for wider readings of 'conflict', it does not necessarily represent wider interpretations of violence pertaining to conflict.

The framing, both in the literature and in discourse and practice, of the wartime rape of women and girls as the most significant form of violence they are subjected to in conflict settings, reiterates use of the term 'sexual violence' as exclusive of, or at least dominant over, 'reproductive violence,' and reinforces age old perceptions of the female body, and a female's identity, as sexual objects.

Dorothy Thomas and Regan Ralph shed light on the "strategic function" of wartime rape, arguing that it is not a byproduct of war, but an intentional instrument of subordination and domination. That rape is consequential to war is a depiction largely condemned in the wider literature on the subject, as has become clear. But Thomas and Ralph voice concerns that

⁶⁶ Ibid.

⁶⁷ Ibid.

condemnation has, “attached much significance to ‘mass rape’ and ‘rape as genocide.’”⁶⁸ The emphasis on the scale of the violation dictates recognition of rape as meriting redress, and therefore “distorts the nature of rape in war by failing to reflect both the experience of individual women and the various functions of wartime rape.”⁶⁹

When rape is committed, in the context of the Peruvian armed conflict, against a blind girl who, because she is unable to see, is forced to feel and understand by touch that a soldier aims a firearm at her before pushing her to the ground to abuse her while another warns: “If she screams, kill her,”⁷⁰ it may be a strategic weapon of war because she belongs to a certain ethnic group, but it also constitutes a human rights violation against her, herself as an individual victim.

When rape is not perpetrated, but evidence emerges that, in 2015, ISIL executed nineteen Yazidi women for refusing to have sex with them,⁷¹ the threat of rape and punishment of death represent part of a mandate of ethnic cleansing and collective violations, but each death also constitutes a violation of the physical and personal integrity, and life, of each individual victim.

Certain forms of violence in conflict settings, such as murder or torture, have long been regarded war crimes, while Thomas and Regan state that “rape has been downplayed as an unfortunate but inevitable side effect of sending men to war,”⁷² and thus not regarded a human rights violation. Further, it:

Has long been mischaracterized and dismissed by military and political leaders – in other words, those in a position to stop it – as a private crime, a sexual act, the ignoble conduct of one occasional soldier, or, worse still, it has been accepted precisely because it is so commonplace.⁷³

They consider that the fact that rape functions, almost invariably, in accordance with the same calculated methods as other forms of torture or cruel and inhumane treatment makes it all the more striking that it has not been recognised as or prosecuted like any other abuse:

⁶⁸ See Dorothy Q Thomas and Regan E Ralph, ‘Rape in war: Challenging the tradition of impunity,’ *Op. cit.*

⁶⁹ *Ibid.*

⁷⁰ Comisión de la Verdad y Reconciliación del Perú, CVR, Final Report, 2001. See p. 282. Testimony 303364. Anexo de Talhuis, distrito de Comas, provincial de Concepción, departamento de Junín, 1989. My translation.

⁷¹ Daily Mail, ‘ISIS executes 19 girls for refusing to have sex with fighters as UN envoy reveals how sex slaves are “peddled like barrels of petrol”,’ 6 August 2015. Available <https://www.dailymail.co.uk/news/article-3186229/ISIS-executes-19-girls-refusing-sex-fighters-envoy-reveals-sex-slaves-peddled-like-barrels-petrol.html?ito=social-facebook>

⁷² Dorothy Q Thomas and Regan E Ralph, ‘Rape in war: Challenging the tradition of impunity,’ *Op. cit.*

⁷³ *Ibid.*

The differential treatment of rape underscores the fact that the problem – for the most part – lies not in the absence of adequate legal prohibitions, but in the community's willingness to tolerate the subordination of women.⁷⁴

MacKinnon furthermore makes reference to rape as a humiliation rite, whereby men related to the victims are made to feel humiliation and guilt for being unable, or having failed in their duty, to protect their women.⁷⁵

Recognition of rape as a war crime is fundamental to the application of an effective and adequate remedy, and to any conception or implementation of reparation. It must be recognised as a weapon of mass violations, and also as violating the individual human rights of victims; as a form of gender-based violence which violates sexual and reproductive rights, the violation of which has comparable gravity with other violations, and it must therefore be redressed as such. Recognition and redefinition of the full extent to which CRSRV prevails (linked to, but not solely defined by rape) should comprise part of accountability. This recognition, and ensuing commitment to redefine the violence generally, violations specifically, and victims in particular, should furthermore be framed as an aspect of the right to the truth for victims, with the purpose – as will be outlined as the thesis unfolds – of serving reparations for past violence and prevention of future violence in important ways. Its viability resides within a simple, yet fragile, protection of a victim-centred perspective, which would (and does) reveal the truth of the extent of violations which, while sexual in origin, are so often and utterly intentionally reproductive by consequence.

1.i. A call for recognition of sexual and reproductive violence

In 2008, Colleen Duggan, Claudia Paz y Paz Bailey and Julie Guillerot published an article with the premise of questioning the existence and application of reparations for victims of CRSRV in Peru and Guatemala.⁷⁶ The authors refer to the problem by the term 'sexual and reproductive violence' (SRV), suggesting therefore that reference to wider forms of violence

⁷⁴ Ibid.

⁷⁵ Catherine A MacKinnon, *Are women human? And other international dialogues*. Cambridge, MA: Harvard University Press, 2006. See p. 223.

⁷⁶ Colleen Duggan, Claudia Paz y Paz Bailey, and Julie Guillerot, 'Reparations for sexual and reproductive violence: Prospects for achieving gender justice in Guatemala and Peru,' pp. 192-213, in *International Journal of Transitional Justice*, Vol. 2, Issue 2. 2008.

experienced by victims is required in the elaboration of comprehensive recognition of and redress for damage. They argue, based on this understanding, that forms of SRV perpetrated against women during war or under authoritarian regimes represent “one of the most severe manifestations of gender-based violence.”⁷⁷

In this same vein, in the title of her 2012 article, Ruth Rubio-Marin, a prominent and progressive theorist on the subject of reparations for victims of CRSRV, defines the premise of “Reparations for conflict-related sexual and reproductive violence.”⁷⁸ She retakes the above statement of SRV constituting a manifestation of gender-based violence and signals the hope that:

the inclusion of sexual violence in the transitional justice and reparations agenda will contribute to the breaking of long-standing taboos around it, as well as to its understanding as a manifestation of broader gender inequities still prevalent in most societies.⁷⁹

The “breaking” of taboos would seem a noble pursuit, however, in the face of the persistence of the term ‘sexual violence’. It is on this front that a concern rises that the *exclusions* wrought by this term would also seem to contest or to erase the *inclusion* of ‘sexual violence’ within transitional justice and reparations. Without explicitly stating this apparent contradiction, but nevertheless in correction of it, Rubio-Marin proffers use of the term SRV.⁸⁰ This thesis stands by it, but extends it to CRSRV. In defence of her reference to sexual and reproductive violence, Rubio-Marin explains:

The prioritization of sexual violence suggests that sexual harm is universally the worst abuse and injustice that can happen to women and risks a reduction of women’s lives to a sexual dimension and the entrenching of patriarchal systems of meaning which sanction women’s sexual purity or chastity as of utmost importance. While the sexual violence focus in the human rights movement might have been an effective tool to make the gender-specific content of violence visible to key human rights bodies and actors who, until the late 1980s, had failed to pay attention either to women as rights holders or to sexual harm as a type of harm, a “hyper-attention” to sex now risks doing further harm to women by deviating attention from other non-sexual forms of sex-specific harms.⁸¹

⁷⁷ Ibid.

⁷⁸ Ruth Rubio-Marin, ‘Reparations for conflict-related sexual and reproductive violence: A Decalogue,’ pp. 69-637, in *William and Mary Journal of Women and the Law*, Special Issue: Gender and Post-Conflict Transitional Justice, Vol. 19, 2012.

⁷⁹ Ibid., pp. 71-72.

⁸⁰ Ibid. Used from p. 70 forwards in her article.

⁸¹ Ibid., see p. 73.

However, as discussed in the Introduction to this thesis, use of the term ‘conflict-related sexual violence’ prevails, apparently exclusively, in dominance of the discourse in practice and theory, notably within UN documents related to the issue.⁸² In this same vein, the act of rape also continues to command the subject of reparations for victims of CRSRV. Such renderings of violence are not only limited in scope, and offer insufficient representations of violations, but impose further silence on violent histories and consequently preclude prevention of the repetition of similar acts.

In line with Rubio-Marin and the wider reading of violence proposed by Anjum as discussed above, this thesis makes the call for use of the term conflict-related sexual and reproductive violence (CRSRV). The call for recognition of sexual *and* reproductive violence in conflict is not limited to establishing wider definitions of violence in conflict, but extends to the premise of establishing wider definitions of victims derived of the conflict.

Part II

Locations of silence

II. Silence in the vernacular

Having established, in the previous section, some of the ways in which CRSRV is recorded in the literature and shed light on the tendency to privilege certain forms of violence (sexual) as predominant over others (reproductive), this section now turns to how the experience of violence is recalled and recorded by victims. It looks in detail at the presence and influence of the right to the truth in voices outside the literature, specifically regarding testimony. Though not without profound complexity, acts of testimony can be read as sites beyond silence and expressions of violence in the vernacular.

⁸² See, most recently, Guidance Note of the Secretary-General, Reparations for Conflict-related Sexual Violence, *Op. cit.*, pp. 2-3.

II.a. A vernacular turn in security studies: Towards a rewriting of sites of insecurity

A preliminary reference to the vernacular denotes reiteration of the previously established recognition that violence is experienced and expressed in different ways. This recognition, in this section, is extended to the concept that silence is simultaneously a form of experience and a form of expression. There is consequently a need to read silence in the vernacular. As a form of experience, it could represent the methods of coercion, force or threat by which CRSRV is perpetrated. As a form of expression, it could, but does not necessarily, represent an absence of recognition of violations. Where it does represent an absence, it may signify that expression of the violence has been denied or silenced, or it may alternatively stand for the silence of a memory not wished to be recalled. Where it does not represent absence, it may signify an intentional expression of violence *by* silence, suggesting that silence has become an effect of violence and should, therefore, be read as testimony.

The vernacular turn in security studies departs from quieter expressions of violence, is a reference to everyday experiences of violence, and testimony to the silences involved in insecurity. It performs vernacular interpretations of human and feminist security, while also drawing on international relations and post-colonialism. As a relatively new shift in security studies, it must contend with what Lee Jarvis has identified as “its conceptual emptiness,” which, rather than a disadvantage, he perceives as advantageous in its potential to allow for “genuinely inductive research into public experiences, understandings, anxieties, and fears.”⁸³

From its origins, vernacular security is a term coined by Nils Bubandt in 2005. In an article from 2005, Bubandt argues for a reconceptualization of security, stating that it is “conceptualized and politically practised differently in different places and at different times.”⁸⁴ Tracing these differences to “historically sedimented ontologies of uncertainty,”⁸⁵ security becomes the means to make certain, to secure a sense of history and identity. From this context, he suggests the term “vernacular security” in order to reflect the “onto-politics” of security which have “global, national, and local refractions, the interplay between which deserves detailed analysis.”⁸⁶

⁸³ Lee Jarvis, ‘Toward a vernacular security studies: Origins, interlocutors, contributions, and challenges,’ pp. 107-126, in *International Security Studies Review*, Vol. 21, Issue 1. March 2019.

⁸⁴ Nils Bubandt, ‘Vernacular security: The politics of feeling safe in global, national, and local worlds,’ pp. 275-296, in *Security Dialogue*. September 1, 2005. See p. 291.

⁸⁵ Ibid.

⁸⁶ Ibid., p. 292.

For Croft and Vaughan-Williams, a vernacular turn describes the experiences of violence at local and individual levels, and on an everyday scale, as opposed to at state and international levels. They identify an “alternative genealogy of the everyday” as encompassing “non-elite constructions, meanings and experiences of (in)security and their attendant rhythms and scales,”⁸⁷ which coincides with some of the purposes of feminist security thought.

Within a traditional security lens, Stevens and Vaughan-Williams expose a corrective tendency to “speak for” rather than “speak to” subjects of insecurity, which could be displaced by what they call the “disruptive potential of non-elite knowledge.”⁸⁸ In arguing for vernacular interpretations of (in)security, they consider that

Security studies in both ‘traditional’ and ‘critical’ guises has for the most part privileged the rhetoric, speech acts and (in)securitizing moves of politicians, policymaking communities, security professionals, private security companies and other elites: the views, cultural repertoires of knowledge and testimonies of the political subject of (in)security remain largely invisible.⁸⁹

The disruption of silence through acts of testimony would lend insight into the multiple ways in which violence is experienced and the multiplicity of violations stemming from such experiences. Acts of CRSRV, as already acknowledged, violate sexual and reproductive rights, and also violate other related rights, including the right to the truth. This reality has remained largely below the surface in much of the literature on the subject, but its presence in the vernacular speaks volumes. Nevertheless, its surfacing must confront competing and profound political and ethical concerns involved in truth telling, and the inherent problems, or silences, at play in narrating violent histories.

II.b. Narrations of violence, acts of testimony

Other responses and other “frames” have been imagined and implemented drawing on

⁸⁷ Stuart Croft and Nick Vaughan-Williams, ‘Fit for purpose? Fitting ontological security studies “into” the discipline of International Relations: Towards a vernacular turn,’ in *Cooperation and Conflict*, 11 July 2016.

⁸⁸ Daniel Stevens and Nick Vaughan-Williams, ‘Vernacular theories of everyday (in)security: The disruptive potential of non-elite knowledge,’ in *Security Dialogue*, 14 October 2015.

⁸⁹ Ibid.

vernacular expressions of violence,⁹⁰ and other “narrative approaches” applied.⁹¹ Judith Butler, for example, in her *Frames of War*, presents a compelling response to violence and war, or ultimately the violence of war, arguing that the portrayal of war by the Western media is integral to how the West prosecutes its wars. Further, she considers that the ways in which war is framed by Western media condition the ways in which we come to understand or accept what is grievable, and thus the ways in which we grieve. She calls for a feminist reconceptualization of the effects of arbitrary military intervention and resistance to it. Annick TR Wibben, in a complementary vein, offers an alternative way of framing the violence of war, in the form of a “narrative approach” based on accounts which would represent lived experience, or violations from *other* perspectives, namely from a feminist one. She says, “the world is accessible to us only through interpretations.”⁹² And explains further that, “We interpret and tell stories about our experiences, about who we are or want to be, and what we believe.”⁹³ The narrative process, as Wibben describes it, conforms not only to interpretation of what exists, or what has happened, in order to make sense of our place, but also involves an affirmative and creative role of constructing our beliefs in order to locate ourselves in history.

In this vein, testimony comprises an invaluable source of knowledge.⁹⁴ As James E Young contends, “it is almost as if violent events – perceived as aberrations or ruptures in the cultural continuum – demand their retelling.”⁹⁵ He continues that, “upon entering narrative, violent events necessarily reenter the continuum, are totalized by it, and thus seem to lose their ‘violent’ quality.”⁹⁶ While the final point regarding loss of violent quality inadequately reflects the reality of the testimonies recorded in this thesis, Young makes a further remark which holds some resonance here: “Once written, events assume the mantle of coherence that narrative necessarily imposes on them, and the trauma of their unassimilability is relieved.”⁹⁷ The interpretation of testimony, however, lies beyond the recording of the spoken word or the reading of the written word, and depends on more than language itself.

⁹⁰ See Judith Butler, *Frames of war: When is life grievable?* London: Verso, 2009.

⁹¹ Annick T R Wibben, *Feminist Security Studies: A narrative approach*. London: Routledge, 2011.

⁹² *Ibid.*, p. 43.

⁹³ *Ibid.*

⁹⁴ Jennifer Lackey, ‘Learning from words: Testimony as a source of knowledge,’ January 2008. Available https://www.researchgate.net/publication/287833614_Learning_From_Words_Testimony_as_a_Source_of_Knowledge

⁹⁵ James E. Young, ‘Interpreting literary testimony: A preface to rereading Holocaust diaries and memoirs,’ pp. 403-423, in *New Literary History*, Vol. 18, No. 2, *Literacy, Popular Culture, and the Writing of History*. The Johns Hopkins University Press: Winter, 1987. See p. 404.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

Elizabeth Jelin, considering a darker side of the truth, notes a series of interrelated issues within the possibility or impossibility of the production of testimony. Firstly, it involves the possibility that survivors can speak of what they lived through. Secondly, “the impossibility of constructing a narrative and the symbolic lapses and voids involved in trauma are relevant in this issue.”⁹⁸ The silences inherent in the memory of violence, and by consequence in the testimony of violence, result not solely from the victim, but also from the listener who extracts meaning.⁹⁹ This creates, whether voluntarily or involuntarily, a dialogue within a “shared space”,¹⁰⁰ which to some degree displaces or decentralises the role of silence, and centralises it within the experience of the victim. These represent silences inherent in remembering and the act of retelling. Then, another “deliberate silence” is involved, in which limitations imposed by external factors influence, at times control, the production of testimony, the voice in its use and also the listeners who extract its meaning.¹⁰¹ Jelin considers:

When dialogue becomes possible, he or she who speaks and he or she who listens begin the process of naming, of giving meaning and constructing memories. Both are needed, each is indispensable to the other, interacting in a shared space.¹⁰²

The relationship between the two is not necessarily reciprocal, however, but negotiated. Although testimony may issue from a single voice, it creates dialogue, whether externally or internally, in oral or written form, and thus translates into a collective act.

Reference to, and analysis of, the testimonies of CRSRV included in this thesis acknowledge that there is much to be gained, as there is also much to be lost, when “expressions of human suffering are translated into a standardized language of human rights,” and that “this translation makes human suffering both legible and illegible.”¹⁰³ The use of testimony as a form of documentation of the truth would uphold Bassiouni’s call for a victim-centred perspective in this frame. However, as Elizabeth Jelin reflects, “the impossibility of

⁹⁸ Elizabeth Jelin, *State repression and the labors of memory*. Translated by Judy Rein and Marcial Godoy-Anativia, p. 61. Minnesota, University of Minnesota Press, 2003.

⁹⁹ Ibid.

¹⁰⁰ Ibid., p. 64.

¹⁰¹ Ibid.

¹⁰² Ibid., p. 64.

¹⁰³ See Rebecca Saunders, ‘Lost in translation: Expressions of human suffering, the language of human rights, and the South African Truth and Reconciliation Commission,’ in *Sur. Revista Internacional de Direitos Humanos*, Vol. 5, No. 9, December 2008. São Paulo.

constructing a narrative and the symbolic lapses and voids involved in trauma are relevant in this issue.”¹⁰⁴

Regardless of the circumstances, or the conditions under which they occur, acts of CRSRV are a source of profound shame and a reference which, almost without exception, influences or controls the narration of the violence. All forms of CRSRV, against whomsoever they are committed, represent furthermore violations of individual and collective honour. This sense of shame, derived of violations of honour, completes and perpetuates the methods and cycles of silence inherent in practices of CRSRV. But not all silences are identical; silence represents, both implicitly and explicitly, a vernacular presence. And the sense of, and response to, silence must similarly be considered in the vernacular.

Ruth Rubio-Marin notes a further silence in the exclusions of victims in particular, and women generally, from discussions on reparations. She says,

Although we must certainly celebrate the gradual overcoming of what we would call the problem of *silencing* SRV in reparations discussions, several problems remain in the categorization of SRV, indicating that sometimes insufficient attention is paid to the type or the scope of the harms victims of SRV experience, or to the relative importance attached to this form of victimization. These insufficiencies can be categorized as problems of undervaluation, under-inclusiveness and/or under-specification.¹⁰⁵

Rubio-Marin questions the transformative promise within reparations for victims of CRSRV as it intersects with what she identifies as primary harm (the violations constituting acts of CRSRV), and secondary harms (resulting from the stigma and shame related to and produced by CRSRV, including exclusion of a victim from her community or family, self-discrimination or withdrawal, and material destitution). The notion of transformative reparation would address and redress both sets of harm. She says,

The aspiration of having reparations which are transformative can only be adequately fulfilled when reparations manage to contribute meaningfully to subvert the system of meanings underlying the stigmatization of victims of SRV.¹⁰⁶

But it is not without complication:

¹⁰⁴ Elizabeth Jelin, *State repression and the labors of memory*, *Op. cit.*, p. 61.

¹⁰⁵ Rubio-Marin, ‘Reparations for conflict-related sexual and reproductive violence: A Decalogue,’ *Op. Cit.*, see p. 84.

¹⁰⁶ Rubio-Marin, ‘Reparations for conflict-related sexual and reproductive violence: A Decalogue,’ *Op. Cit.*, see p. 76.

The difficulty, however, lies in synchronizing the timing of these objectives. Social meanings exist and are used by individuals or groups to ‘advance individual or collective ends,’ their force depending in part ‘upon a certain uncontested, or taken-for-granted background of thought or expectation.’ Yet, because past actions cannot be changed, the only way of changing their meaning is by addressing the context of interpretation through a process of ‘meaning (re)construction’ primarily consisting of changing some of the associations that are made when the action takes place. The problem, however, is that meaning reconstruction takes both time and consistency. It would be, for instance, difficult to imagine a fruitful process of meaning reconstruction around the experience of sexual violence when impunity is still the norm in many transitional societies even *after* the conflict or violent period had ended.¹⁰⁷

The aim would be that truth telling destabilises impunity by setting down a record of the violence and contesting previous accounts, or disrupting silence, and, furthermore, that the record would re-shape meanings of violence and violations. The absence of truth-telling, both collectively and individually, can be perceived as limiting the representations and interpretations of CRSRV. Its inclusion, on the other hand, could broaden and vernacularise representations of CRSRV and reparations for it. So, silence represents both a problem for testifying, and for delimiting reparations.

As Fiona C Ross considers, recent decades have witnessed an emergence of new forms of enquiry into violent histories, which, under the framework of transitional justice, draw on human rights discourse as an accompanying narrative to traditional trials, tribunals, commissions of enquiry, and other institutionalised responses.¹⁰⁸ As a mechanism of transitional justice, the truth commission draws on victim and witness testimony, among other material, to inform the documentation of violent histories, to record different interpretations of the truth, and to suggest possible forms of redress.

The truth, in this framework, protects the rights of victims of CRSRV on a number of grounds. Its adequate protection would counter and displace much of the silence and stigma attached to these particular forms of violence, and appropriate implementation would enforce a victim-centred perspective in the enactment of reparation. Of all the different manifestations the right to the truth may take, the act of giving testimony is accorded privileged status here with respect to the role of victims in relaying their experiences. Testimony could be given officially, for instance in an open or closed court session or as part of trials or the work of truth

¹⁰⁷ Ibid., pp. 76-77. Original emphasis.

¹⁰⁸ See Fiona C. Ross, *Bearing witness: Women and the Truth and Reconciliation Commission in South Africa*. London, Pluto Press, 2003.

commissions, though this often brings a host of complexities. It could alternatively comprise an informal source of evidence, such as written or oral documentation by civil society, the work of truth commissions, other organisations, or individuals. Testimony should, regardless of the form it takes, comprise an indispensable reference for other manifestations of the right to the truth, such as truth commissions or official apologies, as it should be an element of an effective remedy and part of a rights-based approach to development. It represents an important platform for victims to speak of violations experienced and a means to document CRSRV.¹⁰⁹

Truth commissions have also provided independent and thorough recommendations for the implementation of reparations for victims of conflict, including CRSRV. Nevertheless, where reparations have been recommended by truth commissions, they have remained largely unimplemented by governments and legislators.¹¹⁰ Remedies through court processes have been equally, if not more, difficult to obtain.¹¹¹ Despite this, truth commissions have provided a historic opportunity to speak of such violence. While such truth-telling mechanisms do not and cannot replace other complementary forms of redress, I argue that acts of truth telling are reparative in a number of ways, not least in their potential to uphold the right to the truth of victims, where the right to know is extended to the right to testify, to participate in transitional processes and the construction of the truth.

II.c. The victim in the construction of the truth

The role of the victim is central to the construction of the truth, and should be considered thus at all times. As seen above, evidence drawn from testimony can aid in processes of confronting violent pasts, and provide a source of documentation; it can lead to prosecution of perpetrators, identification of victims, the elaboration of official apologies, or establishment of memorials.¹¹² It can also lead to new forms of human rights practice. Reliance on information gathered and presented by the state, international community, or other official monitoring bodies is insufficient. The assertion of alternative versions of the past, and explicit inclusion in accounts of the conflict of voices which otherwise may not be heard, may aid in displacing the

¹⁰⁹ Including from countries such as Sierra Leone, Peru, Guatemala, and East Timor.

¹¹⁰ Rubio-Marin, 'Reparations for conflict-related sexual and reproductive violence: A Decalogue,' *Op. Cit.*, see p. 72.

¹¹¹ *Ibid.*

¹¹² Elisabeth Baumgartner, Brandon Hamber, Briony Jones, Grainne Kelly, and Ingrid Oliveira, 'Documentation, human rights and transitional justice,' p. 1, in *Journal of Human Rights Practice*, Vol. 8, 2016, pp. 1-5. Oxford University Press.

authority which stems from institutionalised violence, as a primary concern of vernacular security. However, a culture amenable to the act of giving testimony should precede the conditions for the construction of the truth and protect the role of the victim in doing so. Protection of victims is paramount in the recording of vernacular histories or silences of CRSRV.

Testifying, particularly in public spaces, is not always a healing experience and can in fact be retraumatising. The security that truth-telling intends to foster in such cases, can therefore reinscribe states of insecurity. This final part of the chapter makes reference to the example of Rwanda studied above, and the case of the Rwandan *gacaca* courts,¹¹³ to illustrate this paradoxical complexity. Described by Karen Brounéus as “a traditionally based *functional equivalent* to a truth and reconciliation commission,”¹¹⁴ the *gacaca* courts take place at a national level, involving the entire country. Each village or neighbourhood has its own *gacaca* presided over by locally elected judges and mandatory participation by the villagers. This mandatory participation is based on acts of truth telling and giving testimony, as either victim of, or witness to, the violence of the genocide. On the day of the *gacaca*, held weekly, the judges, villagers, accused and witnesses assemble for the trial which consists of the witnesses giving their testimony and the accused giving their account. The villagers also have the right to speak, and the judges to ask questions, after which a verdict is determined on the accused.¹¹⁵

The assumption, as Brounéus puts it, underlying much of the literature on reconciliation as a form of peacebuilding is that truth telling is healing or cathartic, and that the truth leads to forgiveness.¹¹⁶ Derived, in part, from theological origins and heralding a spiritual dimension, especially where Desmond Tutu headed the South African truth and reconciliation commission, the idea that revealing the truth and sharing the burden of pain can lead to reconciliation and peace holds sway at a national and regional level. The reality can differ, however, for individual victims. While the nation may heal as a “whole”, the suffering of individual victims may be prolonged and heightened greatly by being required, encouraged or forced, to relive violent experiences. Brounéus, for her part, sets about to question this in the context of the Rwandan *gacaca* courts, specifically regarding testimonies of victims of CRSRV, and finds that the risks of retraumatisation are immense. She says, traumatised, ill-health, isolation, and insecurity

¹¹³ ‘Gacaca,’ means ‘grass’ in Kinyarwanda, and the courts were called thus in reference to the tradition of assembling outside on the grass for the proceedings.

¹¹⁴ Karen Brounéus, ‘Truth-telling as talking cure? Insecurity and retraumatization in the Rwandan *gacaca* courts,’ *Op. Cit.*, p. 57. Original emphasis.

¹¹⁵ *Ibid.*

¹¹⁶ References.

“dominate the lives of the testifying women.”¹¹⁷ From testimonies of the women interviewed by her, a dire sense of the reality can be gleaned as they reveal the consequences and extent of suffering involved in the atrocities:

Health problems were a large difficulty for the women. A number of women had genital problems, such as severe damage to the uterus or fistulas as a result of sexual violence. Several live with chronic headaches and sleeping disorders. ... Three had been infected with HIV through genocidal rape. Two had children from rape and had been ostracized from their families as a consequence. These two women were 15 and 16 years old, respectively, at the time of the genocide; both were mass raped. They gave birth alone, one in a hut, one in hospital. Both spoke of the agony of not being able to love their children enough.¹¹⁸

Brounéus identified security as one of the largest problems faced by the women testifying in the *gacaca* courts. She notes that, without exception, for all 16 women interviewed, “harassments and threats started *after* they began giving testimony.”¹¹⁹ One woman recalled:

Before giving testimony, things were better. I tried to forget the past... to live with these horrible experiences but continue with life. But after the *gacaca* everything has changed, because they even dare destroy my house, break my windows. I reported this to the council member of the sector, but he has some family members who participated in the genocide, so consequently he did not give much weight to my complaint.¹²⁰

From other interviews, the feeling of insecurity repeats and intensifies. In her research, Brounéus documented how

At night, people throw stones at their doors; several of the women had had their windows broken. One woman, who lost her entire family in the genocide, described how one of her perpetrators looks through her keyhole at night and asks her if she knows when the Interahamwe are coming. Another woman came with her hand bandaged in a sling. One month earlier she had been attacked in her house, battered and cut by a machete. Her son was also beaten up.¹²¹

¹¹⁷ Karen Brounéus, ‘Truth-telling as talking cure?’ *Op. Cit.*, p. 57.

¹¹⁸ *Ibid.*, p. 66.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*, pp. 66-67. Recorded as: “Interview 4: husband killed in genocide, all four children survived, has three adopted children as well.”

¹²¹ *Ibid.*, p. 67.

Broken houses and broken windows represent not only physical but also psychological insecurity. The violation of looking “through her keyhole at night” speaks of a physical and psychological intrusion, such that violence adheres to no boundaries and is both inside and outside with no way to shut it out. Owing to the public nature of the *gacaca* courts, everyone in the village knows the truth, and victims are left with no place to hide, with no sense of security.

There were other accounts of distorted truth whereby victims expressed a desire to testify, but were prevented from doing so properly. One woman, infected with HIV through rape during the genocide when she was aged 19, said:

When I wanted to testify, they did not want me to give correct testimony. They made me be quiet... Then I kept quiet because I saw that I was not safe enough... They attacked my home three times successively... First, we told the coordinator of the sector that we do not have safety, but he didn't want to take this into consideration... When the coordinator sees me, he says he will come and give me safety, but we have waited and he has not come... Before giving testimony, there was neither insecurity nor attacks. ...Since the attacks, I am afraid. I am afraid... I cannot go outside after 6pm, and I do not wake up early in the morning so as not to meet anyone outside.¹²²

Brounéus found that many women were ill in the days before giving witness in the *gacaca*, as well as during, and after the hearings. The same woman who spoke of safety in the preceding excerpt recalled:

The days before giving testimony, I felt ill. I could not sleep... I kept thinking that if I give testimony, they will persecute me. Because the man who raped me, we met, and he said, “You, have you been resuscitated?” The first time I gave testimony, the prisoners were there; the man who raped me was there, and he said he had wronged against me... But, that day I felt very ill at ease... He told everything: what he did to hurt me; how he killed my child – I carried one child on my back; he told how he bet him with a club, the other child how he had cut with a machete...He told everything. ...I could not hear, because I fainted and fell on the ground. They carried me home.¹²³

This woman fainted and her testimony thereby ceased. Perhaps the detailed account of his actions, given by the perpetrator himself, serves as an example of sabotage of the victim's testimony. Unable to bear the memories evoked by his account, the victim fainted. It is unclear

¹²² Ibid., p. 68. Recorded as: Interview 7: raped in genocide, husband and six children were killed, one survived.

¹²³ Ibid., pp. 68-69.

whether she herself had chosen to testify about the violence her family had lived, or the rape she had been subjected to. Very few women do.¹²⁴

Another woman, who had been infected with HIV during the genocide and had lost four of her six children and her husband, was no longer permitted to give testimony. She said:

When I gave testimony, I had a psychological crisis. ...When you give testimony surrounded by people who have killed your family... you feel ill; you feel insane... Now, they do not let me speak at the gacaca. They say I am insane.¹²⁵

No victim can safely participate in such proceedings where perpetrators retain the power to intimidate or harass her. The outcome may be different, and potentially more positive or transformative, in different, less public settings. Protection of witnesses and victims is discussed in detail in Chapter 7 of this thesis. The recording of testimonies in truth commissions, as an alternative, for example, could be given orally and then transcribed to the written word to give an account, where necessary anonymous, of the history of violence.

Over 20 years have passed since the Rwandan genocide. But its legacies, not least those of sexual violence are still unravelling and pervade the lives of victims. Victims of CRSRV who live this reality are not only those who have survived rape or other related atrocities, but also their children born of rape. Elie, now in his early 20s, was born to a Tutsi mother after she was raped in the genocide in 1994. One perspective considers the healing side of silence in cases such as this, and the benefits of leaving aspects of the past unsaid. An article in *The Conversation* asks, “How do families like Elie’s that are formed from violence decide what to say and leave unsaid? Is it always good to talk about violent pasts?”¹²⁶

There exists, in this regard, an inevitable yet nonetheless painful tension between speech and silence. When Elie talked about his life, “he expressed a deep ambivalence about whether it is better to talk about or conceal his past.”¹²⁷ For one part, he appeared to want to know who his father was, and whether he was still alive. But this did not override the fact he also wanted to conceal the circumstances of his birth from his community. As this research indicated,

¹²⁴ Ibid., p. 69.

¹²⁵ Ibid. Recorded as: Interview 16: HIV from rape in genocide, four children and husband killed in genocide, two children survived.

¹²⁶ *The Conversation*, ‘Silence can be healing for Rwandan youth born of genocide rape,’ August 7 2018. Available at <https://theconversation.com/silence-can-be-healing-for-rwandan-youth-born-of-genocide-rape-96493>

¹²⁷ Ibid.

silence and concealment are accepted and expected modes of dealing with hardship in Rwandan social worlds. ...Social expectations like these shouldn't be interpreted as a sign that Rwandans need more encouragement to open up about their distress or that their communication practices are inadequate. Rather, the value that young Rwandans born of rape placed on silence alongside speech should give us pause and raise questions about the singularly positive status of open talk in the aftermath of genocide and other violent conflict.¹²⁸

Rubio-Marín has also considered the sensitivity required to speak of histories of CRSRV. The secrecy sought by many victims cannot always be thought of as a necessary barrier to change or question. She refers to the many different overlapping elements at play in the equation, and in the altering of meanings and interpretations of violence:

Because the kinds of cultural interventions needed to alter collective meanings around SRV are unlikely to be of immediate effect, we can expect that many survivors, fearing stigma and discrimination, will hesitate to come forward and identify themselves to reach out for reparations. This, at least, will be the case if they think that they can keep the violations to themselves. Sometimes, keeping one's victimization secret is simply no longer an option, given that rape and other forms of sexual atrocity are often committed publicly precisely to add to the future humiliation of victims in the eyes of their communities. But victims who can avoid publicizing their experience may have good reasons to do so if they cannot reasonably expect to be truly perceived and treated as victims with prospects for rehabilitation, rather than as accomplices, or as irrevocably spoiled pieces of flesh. For many survivors minimizing harm, rather than maximizing assistance and redress, will be the logical and existential priority after the conflict has subsided.¹²⁹

The premise of minimising harm as more important than maximising the object of reparation is unquestionable, yet nonetheless concerning. The representations of CRSRV, in the literature, and in testimonies and recordings of such violence outside the literature, have the potential to disrupt this imbalance, yet, as seen, in many cases they reinscribe harm or memories of violence. Rubio-Marín attempts to locate a response in saying that:

The key lesson, then, is that reparation initiatives dealing with SRV must not only live up to the *general principle* of maximum recognition of harm and an adequate correlation between harm and remedies (general in the sense that it should also apply to nonsexual violations), but also to two specific principles, namely, minimum

¹²⁸ Ibid.

¹²⁹ Rubio-Marín, 'Reparations for conflict-related sexual and reproductive violence: A Decalogue,' *Op. Cit.*, see p. 77.

exposure of individual victims of SRV (*first specific principle*) and maximum transformation of the meaning of SRV (*second specific principle linked to the transformative aspiration of reparations*). If the existing paths and mechanisms to access reparations fail to abide by these specific principles, it is easy to predict that the minimum guarantees for duly recognizing victims and helping them access reparations will not be satisfied, nor will the basic tenets of avoiding further harm (...). These three principles should therefore act as meta-goals when crafting reparations for victims of CRV.¹³⁰

The irony of the experience of survivors frequently resides in the insecurity created by their very survival. In the case of Rwanda, for instance, those who survived were sometimes told that they were being allowed to live only so that they would “die of sadness.”¹³¹ And another victim expressed sorrow in reflecting on use of the term survivor, saying, “It makes me sad to hear them call me a ‘genocide survivor.’ I am not a survivor. I am struggling (to survive).”¹³²

II.d. Renderings of victim

In a reading of the insecurity produced by contexts of gender-based violence, Maria Stern deconstructs grammars of security. She observes how the “impossible promise (or the ultimate failure) of securing identity” unfolds among those whose voices often remain unheard in writings on security. An example she refers to is the securing of power through violent means. Her example is applicable to the reading of insecurity, and the restoration or establishment of security; in contexts where CRSRV is perpetrated, this form of violence intersects with other interests (ethnic), and serves other purposes (political) that are all, ultimately, imperative to the idea of “securing identity”. These complexities, reflects Stern, “invite reflection over failure as an opening for rethinking (in)security identity.”¹³³

The use of rape, as an aspect of CRSRV, represents a weapon to terrorise and degrade a particular community, and to achieve a specific political end. Its use as a weapon of war is defined and justified by its intent to inflict terror with political ends. And it is at this intersection that gender serves as a tool to enact violence along ethnic, religious, social, and ultimately political lines. Yet, as seen, it is not an exclusive form of violence. Recognition of more diverse

¹³⁰ Ibid., pp. 77-78.

¹³¹ See Human Rights Watch, *Shattered Lives: Sexual violence during the Rwandan genocide and its aftermath*. September 1996. *Op. Cit.*

¹³² S.K., Kanzenzi district, February 20, 2004. Cited in Human Rights Watch, *Struggling to Survive: Barriers to Justice for rape victims in Rwanda*. *Op. Cit.*

¹³³ Maria Stern, ‘We’ the Subject: The power and failure of (in)security,’ pp. 187-205, in *Security Dialogue*. Vol.37, No. 2. June, 2006.

forms of victims depends, in great part, on representation of the violence in the terminology, law and literature. This would, in turn, serve the purpose of elaborating more appropriate responses including, protecting the right to the truth and to reparation, and enacting more appropriate forms of reparation proportionate to the damage suffered. An over-representation of rape as the most predominant and damaging form of violence under the framework of CRSRV reinforces sites of silence in which CRSRV occurs, acts as a further imposition of silence by preventing disclosure of damage from a victim-centred perspective, precludes wider interpretations of victim, and, as a result of all of the above, denies adequate reparation.

II.e. Between the existent and the inexistent, the questions

The recording of CRSRV has profound influence over the representation of, and responses to, violations and victims. Setting down a record of violent pasts is an indispensable part of redress; however, protection of a victim-centred perspective in reparations and their right to the truth may not reside exclusively in speech, but may also be found in sites of silence. It is from this context that a caution is issued before current recordings of CRSRV, and the reading of silence in the vernacular is called for to delve deeper into violent histories, or the violence of history, and the influence its recording holds over the present, and over the future and questions of reparations and development. Against this backdrop, it is necessary to further probe the surface in order to exact the extent of the influence – and this in essence the primary research question asks,

What is the influence of the recording of conflict-related sexual violence on responses to, and reparations for, violations and victims?

And in order to answer this question, it will be necessary to hone in a little closer,

Which rights, in theory and in practice, are recognised as being violated in the perpetration of CRSRV?

And closer,

Does representation of these rights extend adequate response to and redress for victims?

If, in hypothesis, the recording of CRSRV accounts for certain forms of violence, while rendering others silent, a premonitory response moves closer towards, and takes refuge in, Bassiouni's proposition for a victim-centred perspective in reparations. If recognition of the rights violated in the perpetration of CRSRV were extended to silence as violatory, and as violating the right to the truth in particular, then in asking what reparations for the violations should consist of, inclusion of the right to the truth cannot be disregarded.

Conclusion

This chapter has reviewed the recording of, and responses to, CRSRV in relation to the relevant literature on the subject. It has found that the recording of these forms of violence has profound influence over responses to violations, including interpretations of the violence and reparations for victims.

In regard to the perpetration of CRSRV, and the methods of silencing on which it depends, this chapter has traced locations of violence. It described the framing of violations of this nature in relation to academic debates and terminology within technical and legal frameworks. It shed light on the dominant discourse on acts of rape, and the reasons which underlie it. The literature also demonstrated much overlap between sexual and reproductive rights and, in this same vein, redress for victims has similarly been referent on this convergence. The framing of violations and reparations for victims as is currently practiced has, as such, frequently proved inadequate. Both the literature and practical response should comprehend how definitions of the terms "sexual violence" and "reproductive violence" are distinct from one another, yet very often interrelated and at times inextricable, and determine when it may be beneficial to identify convergences and divergences between the forms of violence in order to better redress victims.

The discussion then turned to locations of the truth, and looked at the vernacular turn in security studies in its attempt to privilege alternative experiences of violence and versions of history. The importance of protecting the testimonies of violence experienced by women is a necessary aspect of protecting a victim-centred perspective in reparations for CRSRV. Within

such a perspective, however, it became clear that it is also necessary to consider the silence inherent in the perpetration of CRSRV and, by contrast, the right to the truth as a means to disrupt the silence. If the right to the truth is to be applied as a sealant to remedy the lacuna between the experience of victims and the representation of acts of CRSRV, it must address the silence as applied in the perpetration of the violence, and as reapplied in its representation. It can already be sensed that silences of differing degrees apply to the perpetration of sexual violence (which has implicit reproductive intentions, in other words the primary silence), and the representation of this violence (which similarly names it exclusively sexual, or the secondary silence), and furthermore the silence involved in speaking of violent histories (the vernacular silence, which may be imposed by external forces in order to obstruct testimony or prevent or destroy a record of violence, but which also may be an internal and intentional silence as part of the difficulty involved in its recollection).

Since the perpetration of CRSRV depends on practices of silencing – by force, threat, coercion, or any other means, prior to, at the time of, or in the aftermath of the violent act itself – the right to the truth for victims would serve to redress past violence and, also, potentially, to prevent future violence. Silence is also a transliteration of testimonies of such violence, since they so often remain unspoken or unheard. Acts of testimony, as an aspect of the right to the truth, represent an indispensable method to unsay these forms of violence. The imposition of history, the ascription of rights, and imposition of violations must be spoken and heard antithetically, in the vernacular.

Chapter 3

The truth as a reference for redress

A theoretical framework

Introduction

This chapter sets out the theoretical framework of the thesis. On the basis of the assertions put forward in the literature review, namely that current recordings of CRSRV offer inadequate responses to reparations for victims, this chapter orients the problem within two complementary theories: aspects of the theory of rights-based development, and the theory of the right to the truth. Where FSS, as presented in the literature review, provides the general lens through which to observe and respond to this problem, rights-based development in alliance with the right to the truth provides the point of departure by which to frame the right of victims to reparations specifically, and a response to violent histories more generally.

To this end, the chapter first establishes the precept for a victim-centred perspective in reparations within a development framework, and demarcates a preliminary link between development and human security as outlined by the UNDP report of 1994. Second, drawing on aspects of theories of rights-based development, it observes existing theoretical representation of women's rights within the traditional theories of women in development (WID), women and development (WAD), and gender and development (GAD), noting the protection they extend, where they fall short, and their potential with regards to right to the truth in response to violations and reparations. Third, the chapter proposes extension of rights-based development, where it offers protection of women's rights, to include the right to the truth. The theory of the right to the truth is discussed regarding vernacular interpretations and applications of security as derived of acts of testimony. Finally, in reference to the hypothesis that the right to the truth

should comprise an indispensable reference in the production of alternative recordings of and responses to CRSRV, the chapter discusses how alliance between both theories could protect a victim-centred perspective in the elaboration of reparations.

I. No development without history, no redress without the truth

To begin, it is necessary to define what the concept of development means in this work, and the weight of its significance on the objective of protection of a victim-centred perspective in reparations for CRSRV. Since CRSRV derives from contexts of insecurity, it is necessary to consider development and international legal frameworks as part of redress. This point of departure is based on the perspective, which might be seen as a post-development one but will in due course be located as rights-based, that development is only ever necessary in contexts where there have occurred massive violations of human rights and so would better be termed, with regards to problems such as CRSRV at least, reparation. The crux, here, resides in the conviction that there can be no consideration of development without consideration of histories of conflict, and no redress without reference to the truth. It is at this point where, and why, the two theories of rights-based development and the right to the truth converge. The aspiration the convergence harbours is the premonitory potential of the truth to protect a victim-centred perspective in reparations.

This thesis responds to victims of CRSRV who are women and girls, and stems from theories of feminist security studies, but it also refers to a human rights framework regarding its intent to value victims as essentially and primarily *human*. Though not entirely reconciled with it, and standing at a discernible angle of contention from it, the idea that development comprises a human right is a binding principle in the divide between violent histories in which rights violations occur and reparation for the violations. Any consideration of economic, political or social unrest which development purports to resolve, has its origins in conflict. In other words, the roots of underdevelopment are inextricable from histories of inequality and exploitation, from exclusion and subordination, from unrest and conflict, from violence and silencing.

However, a rights-based theory of development, as it currently stands, offers inadequate interpretation of, or responses to, CRSRV. As discussed in the literature review, the right to the truth holds the potential to remedy this in numerous and profound ways. It is, therefore, the in-existent right to the truth which comprises the essence of the extension required of rights-

based development to respond to CRSRV. In this vein, the purpose of the chapter is to demarcate a link between this subject and rights-based development, and to suggest *that* (but not quite yet *how*) the orientation of CRSRV within this framework holds the potential to displace the practices of silence involved.

This thesis considers the forms by which different manifestations of the right to the truth – for example, acts of testimony – are imperative to development in transitional periods, times of conflict, times of post-conflict, and to the disruption of silence. In this vein, the thesis acknowledges the comprehensive body of work on sexual violence and gender,¹³⁴ as it also acknowledges previously elaborated and important rights-based approaches to development.¹³⁵ But it lends another perspective which views the procurement and protection of the right to the truth with respect to human rights violations as indispensable elements of historical justice, reparation, and development. The right to the truth upholds an especially important reparative measure regarding CRSRV in light of protection of victims' right to testify where victims have been silenced prior to, at the time of, or in the aftermath of violations. An important contribution this thesis makes is extension of a theory of rights-based development in reference to CRSRV, and the inclusion within this of the right to the truth as both a reparative and preventative measure.

The UNDP Development Report of 1994 made significant advances in redefining the concept of development to incorporate meanings of security. It refers to a “crisis of underdevelopment” as a “silent crisis,” and goes on to say that: “Without peace, there may be no development. But without development, peace is threatened.”¹³⁶ It seeks to equate development with the basic need for security, and to equate security with a sense of freedom to be found in the protection of human rights.

¹³⁴ See, for example, Ruth Rubio-Marín, ‘Women and reparations,’ pp. 318-337, in *International Journal of Transitional Justice*, Vol. 1, Issue 3, December 1 2007; and edited by her, *What happened to the women? Gender and reparations for human rights violations*. International Center for Transitional Justice, The Social Science Research Council, 2006. Sexual violence is also considered by various United Nations bodies, *inter alia*, a form of gender-based violence. See OHCHR, ‘Sexual and gender-based violence in the context of transitional justice,’ available https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender-based_violence.pdf; UNFPA, ‘Gender-based violence in humanitarian settings,’ available <https://www.unfpa.org/resources/gender-based-violence-humanitarian-settings>
Guidance Note of the Secretary-General, ‘Reparations for conflict-related sexual violence,’ 2014; Rashida Manjoo, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 2010 A/HRC/14/22

¹³⁵ Namely those of Amartya Sen and Martha Nussbaum, as discussed in further detail below.

¹³⁶ United Nations Development Programme (UNDP), *Human Development Report 1994*. UNDP: Oxford, 1994. See p. iii.

In resonance with a vernacular turn in security, the Report recognises that, “For most people, a feeling of insecurity arises more from worries about daily life than from the dread of a cataclysmic world event.”¹³⁷ The quotidian worries it describes are formulated as a series of interrelated questions, among them, “Will they and their families have enough to eat? Will they be tortured by a repressive state? Will they become a victim of violence because of their gender?”¹³⁸ In response, a sense of security finds articulation in the absence of these threats:

In the final analysis, human security is a child who did not die, a disease that did not spread, a job that was not cut, an ethnic tension that did not explode in violence, a dissident who was not silenced. Human security is not a concern with weapons – it is a concern with human life and dignity.¹³⁹

Further, absence of conditions which imperil dignity and life would, on theoretical grounds, annul the call for, and use of, weapons. Until this series of absences transpires, or until contexts of underdevelopment can be translated into contexts of development where security prevails, human security will continue to be subject to the influences of poverty, deprivation, desperation, conflict, and violence. Within such contexts, as already discussed in the literature review, the notion that “human security is a universal concern,”¹⁴⁰ and the notion that human security comprehends all of humanity falls short of the specific realities experienced by certain individuals as a result of, *inter alia*, their gender. The point of departure here is the conviction that development is a human right,¹⁴¹ and more broadly that it represents human rights, interpreted here as inclusive of sexual and reproductive rights of women in times of conflict. A detour now has to be taken along the lines of Catherine A. MacKinnon’s assertion that, “Human rights have not been women’s rights – not in theory or in reality, not legally or socially, not domestically or internationally.”¹⁴²

To contextualise the subject of CRSRV within the framework of a rights-based approach to development, it is necessary to consider meanings of security for women. This discussion, as it unfolds, commences from a consideration of the protection of the human rights of women. The following section considers how the human rights of women have traditionally

¹³⁷ Ibid., p. 22.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ UN, General Assembly Resolution, Declaration on the Right to Development, 4 December 1986. See Art. 1. A/RES/41/128.

¹⁴² Catherine A. MacKinnon, ‘Rape, genocide, and women’s human rights (Croatia and Bosnia-Herzegovina),’ pp. 5-16, in *Harvard Women’s Law Journal*, Vol. 17, Spring, 1994. See p. 5.

been interpreted in a rights-based development framework, and where such protection falls short with regards to practices of, and responses to, CRSRV.

II. Protection of women's rights within a rights-based development framework

Acts of CRSRV perpetrated against women and girls pose a direct threat to their security, and to their right to development. Responses to violations, framed as the right to reparation, are coexistent with their right to development. Theories of rights-based development have sought to address, among other inequalities in the realisation of human rights, gender imbalances. This section presents and discusses some of the important attempts which have been made over the years in this regard and the main proponents to advocate for protection of women's rights within a rights-based development framework.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, referred to as the Convention of Belem do Pará, recognises that “the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life.”¹⁴³ It acknowledges, furthermore, that discrimination against women

Hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity.¹⁴⁴

The Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs), respectively, dedicate much work to the eradication of violence and discrimination against women and girls, and therefore intend to act as preventative measures.¹⁴⁵ The prevention of violence in any form against women and girls is essential to their own development, as it is

¹⁴³ Inter-American Commission, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, ‘Convention of Belem do Pará,’ Preamble. Available at <http://www.oas.org/juridico/english/treaties/a-61.html>

¹⁴⁴ OHCHR, Convention on the Elimination of All Forms of Violence Against Women, Introduction, 18 December 1979. Available <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

¹⁴⁵ See, for example, MDG 3 ‘Promote gender equality and empower women,’ and MDG 5 ‘Improve maternal health.’ Also SDG 5 ‘Gender equality.’

also to the development of society and humanity at large. There can be no notion of development without the development of women and girls.

The neglect of women in society is in great part manifestation of the consequences of the differences, both biologically factual and socially perceived, between the sexes, and relative to what is socially and culturally expected of women and what is accepted of men. The social division demarcated by gender differences has been historically pervasive and corresponds, to a great extent, to economic concerns. To take into account the sheer magnitude of this division, it is necessary to consider not only what or who is present, but also absent.

Mahmoud Fathalla, Egyptian obstetrician and fierce advocate for women's rights, once exclaimed, "The one hundred million missing females are dead: Let it happen never again."¹⁴⁶ He refers to the women who risked death, and died, to give life. Although he said it should never happen again, maternal mortality persists, and is caused in part, and aggravated by, social conditions such as social unrest, economic strife and armed conflict. Maternal mortality is not the only form of violence or rights violations experienced by women due to neglect. The extent of this neglect has undeniably violent consequences for women, and represents very often violations for which different forms of redress should be available. Other forms of neglect, in peace and war, also lead to the prevalence of acts of sexual and reproductive violence against women. These are unspoken – although their relative silence as subjects of health, human rights and development speaks volumes – for primarily social and economic as opposed to purely medical reasons. Fathalla's declaration of the 100 million missing women is drawn from an earlier example of Amartya Sen, who concluded that, 'More than 100 million women are missing.'¹⁴⁷ Sen extracts this number from a comparison of existing female to male ratios and those figures which would have been available had social (medical, nutritional, economic) conditions more favourable to women prevailed in given societies. His provocations begin thus:

To get an idea of the number of people involved in the different ratios of women to men, we can estimate the number of "missing women" in a country, say China or India, by calculating the number of extra women who would have been in China or India if these countries had the same ratio of women to men as obtain in areas of the world in which they receive similar care. If we could expect equal populations of the two sexes,

¹⁴⁶ Mahmoud F. Fathalla, 'The one hundred million missing females are dead: Let it never happen again,' Editorial, pp. 101-104, in *International Journal of Gynecology and Obstetrics* (46), 1994. Fathalla's reference of "one hundred million" missing females is drawn from an earlier estimate of Amartya Sen in his article 'More than 100 million women are missing.'

¹⁴⁷ Article title of Amartya Sen, 'More than 100 million women are missing,' in *The New York Review of Books*, December 20, 1990.

the low ratio of 0.94 women to men in South Asia, West Asia, and China would indicate a 6 percent deficit of women; but since, in countries where men and women receive similar care, the ratio is about 1.05, the real shortfall is about 11 percent. In China alone this amounts to 50 million “missing women,” taking 1.05 as the benchmark ratio. When that number is added to those in South Asia, West Asia, and North Africa, a great many more than 100 million women are “missing.” These numbers tell us, quietly, a terrible story of inequality and neglect leading to the excess mortality of women.”¹⁴⁸

Sen’s resounding argument closes as follows:

The numbers of “missing women” in relation to the numbers that could be expected if men and women received similar care in health, medicine, and nutrition, are remarkably large. A great many more than a hundred million women are simply not there because women are neglected compared with men. If this situation is to be corrected by political action and public policy, the reasons why there are so many “missing women” must first be better understood. We confront here what is clearly one of the more momentous, and neglected, problems facing the world today.¹⁴⁹

Sen was writing in 1990. Twenty years later, in 2010, the FIGO General Assembly resolved that, “Women’s health is often compromised not by lack of medical knowledge, but by infringements on women’s human rights.”¹⁵⁰ Another decade later and countless women are still subject to severe forms of neglect and human rights violations. Investment in women’s sexual and reproductive health and rights requires consideration of the economic merits of a specific group; in other words, it requires justification. Former Secretary-General, Ban Ki Moon, discusses reproductive health in relation to the MDGs, and remarks that, “Achieving MDG-5 targets A and B is not expensive, especially compared to many other development commitments. But it requires far more resources than are currently available.”¹⁵¹

In times of conflict specifically, the sexual and reproductive health of women falls far behind other priorities in funding, spending, and conceptual recognition. The basic sexual and reproductive rights and needs of women in conflicts, particularly armed conflicts, are left wanting upon unjustifiably prohibitive economic grounds. According to a recent report by the World Economic Forum (WEF), women now have many of the same opportunities with respect

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ International Federation of Gynaecology and Obstetrics, FIGO General Assembly, Washington D.C., September 2010.

¹⁵¹ United Nations Secretary-General, Secretary-General’s remarks at High-Level Forum on Accelerating MDG 5. 23 September 2013. Available <https://www.un.org/sg/en/content/sg/statement/2013-09-23/secretary-generals-remarks-high-level-forum-accelerating-mdg-5>

to education and healthcare, with the gender parity scores signalling 96.1 percent and 95.7 percent, respectively.¹⁵² However, women lag far, far behind men with respect to economic participation, where the gender parity score signals 58.8 percent, and political empowerment, for which it is a lowly 24.7 percent. Overall, the report predicts that women must wait an unsayable 257 years to close the gender gap for economic parity.¹⁵³

Fathalla says, “Where women are undervalued, and particularly where resources are scarce, societies will not allocate the necessary resources needed for women’s health.”¹⁵⁴ He has also claimed, “Women are not dying of diseases we can’t treat, they are dying because societies have yet to make the decision that their lives are worth saving.”¹⁵⁵ The social neglect of women seamlessly, with quiet intention, paves the way for their economic and legal exclusion. Once again, the concept of human rights within this context is questionable by virtue of its neglect of women.

Commitment to and realisation of the objective of protection of women’s human rights reflects the scope and purposes of a rights-based approach to development, which proposes a shift away from a purely economic conception of development to address human rights as essential elements for the conditions necessary to protect and promote development. Sen, for example, outlines a capabilities approach to development, in which he does not deny the close links between “deprivation of individual capabilities” and the “lowness of income,” but proposes a shift in attention from an exclusive concentration on income poverty to the more inclusive idea of capability deprivation “in order to better understand the poverty of human lives and freedoms.”¹⁵⁶

Martha Nussbaum, co-architect alongside Sen of the capabilities approach to development, departs slightly from Sen’s analytical ordering of capabilities, arguing that “all the capabilities are equally fundamental,” although agrees with him on the point that “economic

¹⁵² World Economic Forum. Global Gender Gap Report 2020, 16 December 2019. Available http://www3.weforum.org/docs/WEF_GGGR_2020.pdf

¹⁵³ Ibid. See also Al Jazeera, ‘Women may have to wait more than 250 years for economic parity,’ 17 December 2019. Available <https://www.aljazeera.com/ajimpact/women-wait-250-years-economic-parity-191216085721194.html>

¹⁵⁴ Mahmoud Fathalla, ‘The one hundred million missing females are dead: Let it never happen again,’ *Op. cit.*, p. 101.

¹⁵⁵ Mahmoud Fathalla, ‘A world where no woman is denied access to her right to health and life,’ The Allan Rosenfield oration: Women’s Health and Unsafe Abortion Congress, Bangkok, January 21, 2010. See p. 30. Available at <https://www.figo.org/sites/default/files/uploads/PublicationsandResourcesFathallafiles/A/3%20A%20world%20where%20no%20woman%20is%20denied%20access%20to%20her%20right%20to%20health%20and%20life.pdf>

¹⁵⁶ Amartya Sen, *Development as Freedom*, pp. 19-20. *Op. cit.*

needs should not be met by denying liberty.”¹⁵⁷ This is a return to the concept of freedom as fundamental to development, whether it be framed in a positive or negative sense, for example in representation of the freedom to act (positive freedom), or in representation of the right to be free from a negative influence or from violence (negative freedom).

In this vein, and not disregarding that economic equality underlies extremely important aspects of protection of human rights and defines important parts of development, but given that women may have to wait more than 250 years for economic parity,¹⁵⁸ there are more urgent matters at hand. The human rights violations pertaining to CRSRV, for instance, preclude the development of women and society, and should pose an urgent concern for development. The elimination of violence against women, relative but unequal to economic concerns, lies at the core of a response to this matter. Wei and Aitong, for instance, identify peace as a common element between “the foundation of the preservation of human rights and promotion of development.”¹⁵⁹ The absence of violence provides the foundations for peace, as seen above in the wording of the 1994 Development Report, and the preconditions and conditions for protection of human rights.

Sengupta has extended the notion that development and human rights are not separable but complementary, and are in fact inseparable, by framing the right to development as a human right,¹⁶⁰ as it has been by the UN Declaration on the Right to Development in the definition that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.¹⁶¹

However, the reality of conflict imperils the physical and psychological safety of women and girls, directly influencing the conditions necessary for a capabilities approach. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has recognised that existing gender inequalities are exacerbated within conflict settings, “placing women at a

¹⁵⁷ Martha Nussbaum, *Women and human development*, pp. 11-12. Cambridge: Cambridge University Press, 2000.

¹⁵⁸ See WEF Report, *Op. cit.*

¹⁵⁹ Zhang Wei and Zhang Aitong, ‘The relationship between human rights and development: An analysis of Chinese scholars’ perspectives and the practice of the Chinese government,’ pp. 57-72, in *The Right to Development, Sustainable Development and the Practice of Good Governance*. Series: Chinese Perspectives on Human Rights and Good Governance, Vol. 3. Brill, Nijhoff, 2019. See p. 57.

¹⁶⁰ Arjun Sengupta, ‘Right to development as a human right,’ pp. 2527-2536, in *Economic and Political Weekly*, Vol. 36, No. 27, July 2001.

¹⁶¹ UN, General Assembly Resolution, Declaration on the Right to Development, Art. 1, *Op. cit.*

heightened risk of various forms of gender-based violence, by both State and non-State actors.”¹⁶² The CEDAW Committee has further observed that:

Sexual violence occurs within all conflict-affected settings, including war or conflict, during displacement, and in transit or refugee settings and is perpetrated by state actors, non-state actor groups, and private individuals.¹⁶³

With regards to CRSRV, violations, as seen in the previous chapter in relation to acts of rape, are rarely framed as violations. This is not because theoretical recognition and protection of the sexual and reproductive rights of women in times of conflict does not exist, but because of a lack of political will to address and redress violations of this nature. This is an issue intricately related to development, and particularly to rights-based approaches to development. Its resolution rests on determination of the significance of the concept of human within rights, or to put it more commonly, on the concept and application of human rights as development. But it must make specific reference to protection of women’s right within this framework.

III. From women in development (WID) to gender and development (GAD)

Further discussions on the struggle of women and women’s rights within development discourse came to prominence in the movement of ‘women in development’ (WID). The term WID arose in the early 1970s, coined by a Washington-based network of female professionals who believed, based on their respective overseas experiences, that modernisation had a different impact on men and women. These women began to challenge traditional theories of development, which, in their view, did not appear to be improving the rights and social status of women, but was rather contributing to the deterioration of their position.¹⁶⁴

Other feminist movements were similarly revived during the 1970s, including the demand for equal rights, employment, and citizenship for women in the United States, and elsewhere in the global north. This focus was adopted in other “third world” contexts as well, and witnessed a rupture in previous post-war development discourse which had framed women

¹⁶² CEDAW Committee, General Recommendation No. 30 on *Women in conflict prevention, conflict and post-conflict situations*, para. 34. CEDAW/C/GC/30, 1 November 2013.

¹⁶³ Ibid.

¹⁶⁴ Carol Miller and Shahra Razavi, *From WID to GAD: Conceptual shifts in the women and development discourse*. UNRISD Occasional Paper, No. 1. Geneva: United Nations Research Institute for Social Development, 1995. See p. 2.

as wives and mothers, thus restricting women's policy and welfare to concerns such as home economics and nutritional education.¹⁶⁵

The WID movement reacted against such restrictions. After its inception in the United States, another formative architect in the WID movement was the Danish economist, Ester Boserup. Her *Women's Role in Economic Development*, published in 1970, reconsidered the welfare approach to women and shed light on the importance of women to agricultural economy in developing contexts. It questioned post-colonial agricultural policies and dominant Western conceptions of productivity. This work, beyond its agricultural setting, questioned the role of women and their status vis-à-vis their male counterparts.¹⁶⁶ The WID movement as it expanded and consolidated drew greatly on her thinking, as it did from Marxist inspired thinking which argued, among other things, that capitalism leads to the exploitation of women.

Based on the WID line of thinking, though departing slightly from it, emerged the idea of "women and development" (WAD), which saw, foremost among obstacles to women's development, a series of interrelated problems which should be overcome in order to incorporate women into development policy and practice. These problems included:

- traditions and attitudes preventing women's participation
- legal barriers to their participation
- limited access to education and high levels of female illiteracy
- the time-consuming nature of women's work perceived as 'chores'
- the health-related burden of frequent pregnancies
- malnourishment
- lack of access to land, credit, and other technical services related to agricultural production
- inadequate research and information on women.¹⁶⁷

However, despite the advances made by the WID and WAD theories, the emphasis placed on women's productive roles meant that the subordination of women was viewed primarily through an economic lens, and that, similarly, the means for overcoming this subordination were viewed as predominantly economic. By the late 1970s, the limitations of this perspective could no longer be ignored.

A new shift in the WID and WAD movements began to demarcate cultural ideologies by which to measure difference in status between women and men. The idea of the social

¹⁶⁵ Ibid., p. 3.

¹⁶⁶ Ibid.

¹⁶⁷ See Eva Rathgeber, 'WID, WAD, GAD: Trends in research and practice,' pp. 489-502, in *The Journal of Developing Areas*, Vol. 24, No. 4, July 1990.

construction of gender entered into play, along with the idea that response to the subordination of women was not a women's problem alone, but must be dealt with in relation to, and recognised as, a men's problem. This reflected another turn in the discourse and, as the question of gender rose to occupy a central position, its theoretical name changed to "gender and development" (GAD).

Naila Kabeer became a strong voice in the GAD literature. She argues that one dimension of power relates to agency, which she sees as:

More than observable action; it also encompasses the meaning, motivation and purpose which individuals bring to their activity, their *sense* of agency, or 'the power within'. While agency tends to be operationalized as 'decision-making' in the social science literature, it can take a number of other forms. It can take the form of bargaining and negotiation, deception and manipulation, subversion and resistance as well as more intangible, cognitive processes of reflection and analysis.¹⁶⁸

In her piece, *Reversed Realities*, Naila Kabeer examines alternative categories for analysing gender hierarchies. She identifies the household as the site in which the construction of power relations and gender inequalities originate, and argues that the meaning of reproductive choice lies at the core of the matter.¹⁶⁹ Kabeer's call for broader interpretations of gender inequalities, beyond purely economic renderings of exclusion, resonates with Sen and Nussbaum's capabilities approach and certainly denotes a rupture in the notion of women as entitled and expected to uphold and benefit from productive roles. By virtue of their humanity, women are entitled rights bearers and deserve adequate conditions in which to actively participate in society.

Nevertheless, in its confrontation of patriarchal traditions, the GAD discourse does not address practices of CRSRV as a key element of the perpetuation of patriarchy and violence against women. It frames the development of women as a matter of power which, in its relation to men and gendered hierarchies, touches on the reproductive question, but still speaks predominantly of the domestic, social, and economic subordination of women. Given that violence against women comprises both a conceptual and practical resource in the subordination of women, the GAD framework somewhat misses the point. It certainly does so in reference to forms of CRSRV, the perpetration of which depends on the subordination of

¹⁶⁸ Naila Kabeer, 'Resources, agency, achievements: Reflections on the measurement of women's empowerment,' pp. 435-464, in *Development and Change*, Vol. 30, Issue 3, 1999. See p. 438. Original emphasis.

¹⁶⁹ See Naila Kabeer, *Reversed Realities: Gender hierarchies in development thought*. London, Verso, 1994.

women (by methods of silence), and the consequences of which perpetuate this same subordination (by silence). Given that CRSRV represents one of the most pervasive forms of violence against women, and comprises among the most profound obstacles to their development, its absence in any discussion of women's rights within a development frame poses a significant problem to both the development discourse and the human rights discourse.

IV. Extension of rights-based development to incorporate the right to the truth

Two complementary theoretical frameworks provide the foundations for this thesis. As noted, the first relates to a rights-based approach to development; and the second, to the right to the truth. The purpose of both can be defined as commitment to a victim-centred perspective within reparations for victims of CRSRV. The theory underlying the right to the truth represents broad, complex and transdisciplinary concepts, and is discussed in detail in Chapter 7 as part of the theoretical core of this thesis. The final part of this chapter, as such, does not offer an indepth discussion on the right to the truth itself, but rather outlines its relation to, and purpose within, the extension of theories of rights-based development. Here, in concrete terms, the right to the truth provides the benchmark for extension of rights-based development where the latter falls short of adequate protection of women's rights and responses to violations, regarding CRSRV specifically. It is perceived that extension of rights-based development to incorporate the right to the truth could achieve more adequate protection of women's rights. The alliance between rights-based development and the right to the truth could achieve greater protection of victims by lending alternative recordings of CRSRV and therefore yielding more adequate responses to CRSRV.

This study lies *in* the field of development studies, but it is not based *on* traditional development theory. Instead, it reconsiders the foundations and purposes of development concepts related to the subject of CRSRV, but insufficient to respond to it. There can be no viable or sustainable conception of development in absence of redress for victims. This reconsideration has drawn on theories of 'women in development' (WID), and 'gender and development' (GAD), and extended to rights-based theories of development, which depart from purely economic conceptions of value and extend to consider the question of human rights. However, the arguments framed by the WID (that women must be incorporated into development processes) and GAD discourses (that the exclusion and subordination of women must be considered in light of gender relations) do not explicitly recognise the violence inherent

in the forms of exclusion and subordination experienced by women. Similarly, the traditional rights-based development framework is relatively blind to what measures it would take to protect the human rights of women in the face of very real violent threats which reinforce and perpetuate their contexts of underdevelopment, including CRSRV.

In this vein, the truth represents a number of interrelated objectives, including but not limited to setting down a historical record of past violence, the return to or establishment of democracy, an aid to development, the means by which to obtain historical justice, disruption of cultures of impunity through prosecution of perpetrators, and redress for victims.¹⁷⁰ The origins of the right to the truth can be found in the right of relatives to know the fate of loved ones, disappeared or tortured, and the circumstances surrounding human rights abuses. However, this thesis traces its evolution to encompass broader objectives of transitional justice, reparation and development as outlined in the paragraph above and as discussed further in the following chapters. Pertinent to this evolution, this thesis adopts a victim-centred perspective which regards acts of testimony as indispensable aspects of the right to the truth, and extends its function to the right of victims to participate in the construction of the truth. Attributed to Bassiouni, as previously seen, a victim-centred perspective in reparations would redefine human rights violations so that they are less dependent on the nature of the conflict or context from which they derive, and are more relative to a victim's experience, or the violation framed by the victim's perspective.¹⁷¹

The validity and scope of the truth with regards to the objective of protecting a victim-centred perspective in reparations, relate to the divergent perspectives on the truth as concept, pursuit, knowledge, fact, reality, experience or right. Extension of the right to the truth from the right to know to the right to testify, and the evidence drawn from acts of testimony furthermore sheds light on the reproductive aspects of violations of this nature, and supports the proposal that the term conflict-related sexual violence (CRSV), as it is commonly applied, should be extended to conflict-related sexual and reproductive violence (CRSRV). The construction of the truth, as an aspect of the presence and function of testimony outlined in the literature review, also importantly serves to displace the methods of silence involved in the perpetration of CRSRV. Its function, in this vein, is therefore reparative (in that it offers a way of enabling alternative and vernacular recordings of CRSRV, as well as yielding broader

¹⁷⁰ See Yasmin Naqvi, 'The right to the truth in international law: fact or fiction?' pp. 245-273, in *International Review of the Red Cross*, Vol. 88, No. 862, June 2006. This discussion is extended in Chapter 7 of this thesis.

¹⁷¹ Cherif Bassiouni, 'International Recognition of Victims' Rights,' pp. 203-279. *Human Rights Law Review*, Vol. 6, No. 2, 2006. Oxford University Press. See p. 204. Refer to Chapters 2 and 5 of this thesis for further discussion on this proposal.

interpretations of violence and consequently more inclusive forms of reparation), and preventative (in that it culls vernacular responses to violence, displacing methods of silencing and disabling the facility by which, and elements of the impunity with which, CRSRV is practiced).

The hypothesis that absence of the right to the truth is the presence which lies in the way of the construction of vernacular recordings of CRSRV, and therefore precludes adequate responses to, and reparation for, these forms of violence, arises to the fore in light of current theoretical frameworks, including those stemming from FSS as discussed in the literature review, and those informing rights-based development as presented in this chapter. The tentative conclusion, therefore, rests within the conviction that the right to the truth, and acts of testimony protected by it, must comprise a fundamental reference in reparations for CRSRV.

V. Approach to reparations used in this thesis

I close this chapter with briefly outlining the approach to reparations used to uphold the main argument of this thesis. The concept and nature of reparations, along with their scope and scale specific to CRSRV, is discussed in a dedicated chapter to the subject, found in Chapter 6 of this thesis. Here, it is necessary to mention that reparative measures are broad and complex. They are to be applied in correlation, not isolation, at times sequentially, and at times simultaneously. At all times, they are to be conceptualised and applied as a response to the specific context and, above all, to the violations and victims requiring redress. That said, this thesis looks primarily at one aspect of reparation – the right to the truth as a reparative measure for victims of CRSRV. Extended from its original conception of the right to know the truth surrounding human rights violations to its conception as the right of victims to testify and actively contribute to the construction of the truth, it performs a task of both a reparative and preventive nature. It holds the potential to restore to the victim a sense of dignity, to reverse methods of silencing used in the perpetration of violations, and to reinterpret historical records of violence. In doing so, it furthermore holds potential to prevent recurrence of violations of the same nature by setting down a record of their prevalence and pervasiveness, by shedding light on the existence and intent of perpetrators, by challenging cultures of impunity, and by framing reparations as a victim-centered endeavor.

Conclusion

This chapter has presented the theories underlying aspects of rights-based development and the right to the truth as they respond to the subject of CRSRV. The chapter has considered how traditional renderings of rights-based development, including the discourses on WID, WAD and GAD, fall short of protecting the human rights of women, but affirms that they hold the potential to do so by extension of this approach to incorporate an understated, although indispensable, reference to the right to the truth.

It has explained how dual application of theories of rights-based development and the right to the truth, and the alliance between them, could offer alternative and vernacular recordings of and responses to CRSRV, namely how their alliance protects a victim-centred perspective as it intersects with testimony, as well as a more comprehensive interpretation of security and application of development which references and seeks to redress violent histories. There can be no development without reference to the past; and, no reparation in absence of the truth. In this vein, the right to the truth comprises an indispensable precedent to, and a necessary aspect of, development.

Chapter 4

Methods of silence in the perpetration of conflict-related sexual and reproductive violence

A methodology

Introduction

The methodology of this thesis is oriented in an undertaking of a reading of the recording of, and responses to, CRSRV. This process draws on existing bodies of literature and legal frameworks, but depends to a far greater extent on a reading of the testimonies of victims and witnesses in order to shed light on vernacular accounts of CRSRV, and on the silences involved therein. This brief chapter describes the meanings of and the methods behind these readings as they inform the objective of protection of a victim-centred perspective in reparations. The chapter first outlines the positionality, ontology and epistemology which inform the work. It then contextualises the task of the reading of recordings of CRSRV within the concept of a narrative view of history. This, by way of synthesis, leads to a discussion on the application of testimony and textual analysis within the case studies used in this thesis. Since redress depends on discerning the ‘truth’, it infers accounting for not only what has transpired – by act or omission – but also for what has not been done, what remains unsaid or has been rendered silent.

I. Positionality

I did not set foot in any of the territories of the contexts examined in this thesis, at any stage during its preparation or elaboration. The substance of the thesis, and its methodology, has remained, therefore, theoretical, descriptive, and analytical. In what follows in this brief section on positionality, I reveal little of myself. My position, though it may be read as contradictory, is that positionality within this work, and within the work of writing generally, is superfluous to it. I perceive my origins and substance as the author of this work as having sought refuge within Barthes' concept of "death of the author."¹⁷² What the author is, or who she has been, do hold significance to the writing of the work, but to what is ultimately written the author is little more than dead. The repose of this description reflects not only my view of the role of the author within writing, but also the objective of protecting a victim-centred perspective in this piece whereby the work, as far as possible, is left to speak for itself.

I will allow for a few small details, however. In the time it has taken to write this piece, the thesis itself was always of secondary concern to my family, to my role as a mother, and my work at home. In the month I set out to begin this thesis, my twin daughters were born. Much of the thinking that shaped this thesis was 'thought' while holding infants in my arms; while feeding, consoling, putting to sleep, cleaning, and cooking. These activities represent implicit aspects of this thesis. Much of the research and its writing, which comprise the explicit aspects, took place at night, while my children slept, in the sanctuary (or confinement) of my home. It was written under the light of a single bulb, at a white table, or on red carpets woven by my grandmother. It was interrupted by waking children, and sustained by untold quantities of sweet black tea (which appears amber, really, when seen through a transparent glass under certain lights).

What is written here stems from the experience, imagination, and interrogation of *what* this world is for girls to live in. I had been a mother to a son long before my girls were born, and for many reasons – some of which are easy, some of which are difficult to understand, and all of which demand interrogation – the world appears to hold different promises for sons and daughters. These pages respond to some of the ways in which this world unfolds, present reflections on the plethora of stories which vie for a place in its history, and cull alternative sources of truth.

I did not set out to write about conflict-related sexual and reproductive violence. In an abstract sense I wanted to respond to the history of humanity, which is a history of wars. My

¹⁷² Roland Barthes, 'The death of the author,' pp. 142-148, in *Image, Music, Text*. Translated by Stephen Heath. London: Fontana, 1977.

grandparents lived through different wars, and I was fed on their stories growing up. I wanted to ask how to make amends, and this led to the subject of reparations. I wanted to pose this question in response to forms of violence experienced by women in times of war, or conflict. That this question inevitably leads to the subject of CRSRV is disgraceful. That shame and silence are indelible imprints within the work of such violence, and that they represent the indispensable methods by which it is perpetrated, called, I thought, for a response. This thesis rests on the right to the truth for victims of CRSRV, and, in particular, on the use of testimony, as a method to displace the silence inherent in these forms of violence.

II. Ontology and Epistemology

As a core set of concepts this thesis adopts, in broad terms, the right to the truth in order to demarcate alternative angles for a rights-based approach to development. The abstract sense of the ‘truth’, and the rather more concrete right to the truth, as baselines, comprise the knowledge which informs the theory and method of this thesis.

The concept of the truth, its framing as a right, and the suggestion of its use as a method to displace practices of silencing on which the perpetration of CRSRV depends, fall within a constructivist epistemology. Introduced by Peter Berger and Thomas Luckmann in 1966, in their influential text *The Social Construction of Reality*, the term speaks of a knowledge *unknown* before it is *constructed*. They speak of what is known of reality, asserting that “reality is socially constructed and that the sociology of knowledge must analyse the process in which this occurs.”¹⁷³ This framework is therefore both subjective and objective, its philosophical inquiry articulated by concerns pertinent to “*What is real? How is one to know?*”¹⁷⁴ In accordance with this perception, and perhaps in response to these questions, “our identity originates not from within but in reaction to the world outside and from our social interaction.”¹⁷⁵

A constructivist framework, for the purposes of this thesis, denotes knowledge and truth as “constructed”, not discovered,¹⁷⁶ the consequence of which is a reality defined by

¹⁷³ Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality, A Treatise in the Sociology of Knowledge*, p. 13. New York, Penguin Books, 1966.

¹⁷⁴ Ibid., p. 16. Original emphasis.

¹⁷⁵ Pedram Pirnia, ‘Cultivating ownership of development aid: The role of civil society in the Pacific,’ p. 16. PhD thesis. Victoria University of Wellington, 2016.

¹⁷⁶ Tom Andrews, ‘What is social constructionism?’ in *Grounded Theory Review, An International Journal*. University College Cork. Vol. 11, Issue 1, June 2012.

questionable, shifting and fundamentally social elements. This framework furthermore holds particular relevance to the presence and function of testimony within the right to the truth as it upholds the promise and recognition of a plurality of truths, and thereby serves the objectives of redefining the scope of a rights-based approach to development, assessing and articulating the need for reference to the right to the truth within development, extension of the right to the truth from the right to “know” to the right to “testify” and actively contribute to its construction, and, finally, conclusively, extension of the term “conflict-related sexual violence” to “conflict-related sexual *and* reproductive violence” in reflection of the experiences, or truths, of victims.

III. A narrative view of history

A great part of the process of uncovering the truth surrounding human rights violations lies in a review of history, specifically the historical events in which the violence occurred, or which gave rise to the violations. And the truth imparted by the testimonies of victims, in light of their experiences of CRSRV, calls for alternative interpretations of history. In the methods of interpreting violent histories, this thesis draws on Hayden White’s narrative view of history.

If we imagine that the role of the author is interchangeable with that of “historian” (as White refers to the role in acts of interpretation described in the passage below, and disregarding, in reference to the historian, White’s exclusive use of “his”), then the method applied to the reading and interpretation of history – which can in this case be applied to the reading and interpretation of testimony – can be seen to frame the same process adopted by this thesis. White says,

The historian has to interpret his materials in order to construct the moving pattern of images in which the form of the historical process is to be mirrored. And this because the historical process is both too full and too sparse. On the one hand, there are always more facts in the record than the historian can possibly include in his narrative representation of a given segment of the historical process. And so the historian must “interpret” his data by excluding certain facts from his account as irrelevant to his narrative purpose.¹⁷⁷

¹⁷⁷ Hayden White, *Tropics of discourse: Essays in cultural criticism*. London: The Johns Hopkins University Press, 1978. See p. 51.

To include all available information and accounts on CRSRV would indeed be at once “too full and too sparse.” In the case of this thesis, the “narrative purpose” described by White can be located within a victim-centred perspective which attempts to locate alternative sources of the past and cull vernacular versions of the truth. White elaborates on this process:

On the other hand, in his efforts to reconstruct “what happened” in any given period of history, the historian inevitably must include in his narrative an account of some event or complex of events for which the facts that would permit a plausible explanation of its occurrence are lacking. And this means that the historian must “interpret” his materials by filling in the gaps in his information on inferential or speculative grounds. A historical narrative is thus necessarily a mixture of adequately and inadequately explained events, a congeries of established and inferred facts, at once a representation that is an interpretation and an interpretation that passes for an explanation of the whole process mirrored in the narrative.¹⁷⁸

From White’s perspective, and within this narrative view, the vernacular experience, over and above established fact, becomes the primary reference by which to interpret the historical event. Although it contains both adequately and inadequately explained events, it accounts for and represents versions of the truth, and is thus integral to the narrative and to history. And interpretation, therefore, becomes an indispensable tool in the process of reading and creating meaning, and in the analysis of text.

IV. Testimony and textual analysis

The adoption of a narrative view of history serves the purpose of protecting a victim-centred perspective within reparations and, furthermore provides a lens through which to undertake the reading of testimonies of violence.

Since this is a descriptive and analytical piece, which did not rely on travel, nor the collection of data within interview based methods or anything similar, formal ethical approval was not required. However, the work does treat the texts it includes and testimonies it refers to ethically and is therefore based on broad ethical dimensions. It relied, in part, on the recollection of conversations with women from different origins whose lives, and the lives of those they have loved, have been marked by war or conflict. Their stories provide indispensable references for, and the emotional fabric of, this thesis. The intellectual fabric of this work also

¹⁷⁸ Ibid.

required the use and analysis of other more traditional sources, including written and oral texts, and the research has followed a number of steps in collecting, collating, presenting, and analysing its information, based on a narrative view of history as described above.

The use of textual records is an important part of the theoretical scope of this research; analysis of these same records is similarly an important part of its methodology. Different and complementary sources are used including primary and secondary sources, based on predominantly qualitative data. The primary sources used include personal testimonies of victims of CRSRV, as well as witness accounts, which have been found within Truth and Reconciliation Commissions, in human rights reports, in journalistic reports, or in oral form within documentary films or video recordings. The testimonies were sourced via online searches related to the location, context, historical timeframe, and subject in question. The selection criteria for the testimonies are discussed further below in the section on case studies.

The use of secondary sources refers to academic literature on the subject of CRSRV, first within the areas of human rights law, and international law with respect to the rights to the truth and to reparation, and then in relation to approaches to rights-based development. Analysis of secondary sources has also relied on news reports obtained through the media within online sources available publicly. It has furthermore included legislation, official reports by the United Nations or other governing entities or independent agencies, UN declarations, conventions or other official consensus documents outlining internationally recognised responsibilities under International Humanitarian Law, International Human Rights Law, International Refugee Law, and International Criminal Law.

This information is largely available in the public domain. It has been included to contextualise, to present the facts or establish the ‘truth’ surrounding human rights violations, to include vernacular accounts of CRSRV, and to expose the methods of silencing by which the violations are perpetrated. Analysis of the sources also serves in the purpose of reiterating the right to reparation and strengthening a rights-based approach to development in light of the right to the truth for victims of CRSRV, as well as reiteration of the need for extension of the term conflict-related sexual violence (CRSV) to include explicit reference to reproductive violence, whereby it would become conflict-related sexual and reproductive violence.

Examination of different settings has required access to sources in a number of languages, predominantly English and Spanish, and to a lesser extent Arabic. In many cases, English translations of the original are available; in others, they are not. Where this has been the case and where necessary, I have provided English translations, either in text or in footnotes.

Testimonies, whether in written or oral form, included in such texts are important and, further, frequently represent the only means of communicating the truth surrounding human rights abuses experienced by women who may, for the many reasons explained in this thesis, be excluded from traditional access to, and methods of, justice. The empirical elements of this research are based on the experiences of women within three different case studies, described below, informed by different and complementary textual materials.

An important purpose of this thesis, in its response to CRSRV, is to expose and explain methods of silencing in the perpetration of CRSRV (by way of recognition of the violence inherent in the forms of exclusion and subordination experienced by women), and to observe how different manifestations of the truth, through acts of testimony, can inform and sustain processes of redress (in order to address what measures it would take to protect human rights within rights-based development), and ultimately lead to a reconsideration of representations of CRSRV, responses to it and reparation for it.

In this vein, it is useful to fall back on the reasoning behind the proposition of Stern et al that in tracing a reconsideration it is “emphatically *not* to suggest that there is a falsehood to participants’ narratives engendered by their engagement with these categories; but rather that the existing categories of harm become part of the landscape through which survivors make sense of, and narrate, their experiences of violence.”¹⁷⁹ To challenge dominant modes of representation in the recording of violence, including those which have emerged as dominant in the literature review and theoretical framework, it becomes necessary, as Judith Butler suggests, “to call the frame into question.” She elaborates by saying that:

to call the frame into question is to show that the frame never quite contained the scene that it was meant to limn, that something was already outside, which made the very sense of the inside possible, recognizable. The frame never quite determined precisely what it is we see, think, recognize, and apprehend. Something exceeds the frame that troubles our sense of reality; in other words, something occurs that does not conform to our established understanding of things.¹⁸⁰

Part of the methodology of this work involves a process of recognition which discerns the violent act, begins to name the senses which awaken to the violence, and initiates the search for adequate representations of and responses to it. The method of reading, seen under this

¹⁷⁹ Maria Stern, Harriet Gray, and Chris Dolan, ‘Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence,’ *Op. Cit.*, pp. 201-202.

¹⁸⁰ Judith Butler, *Frames of war: When is life grievable?* London: Verso, 2009. See p. 9.

light, comprises a practical framework for how we can theorise, and *see* acts of CRSRV, set before the reasons why we can no longer turn a blind eye.

V. Use and treatment of case studies

The use of case studies enhances the qualitative lens of this thesis and provides empirical evidence of the forms of violence examined. As Yin notes, the case study “does not imply the use of a particular type of evidence.”¹⁸¹ Nor does it “imply the use of a particular data collection method,” for example, the result of ethnographies or of participant observation.¹⁸² In regard to this research, and as outlined above, the data collection involved textual analysis of written or oral testimonies of victims or witnesses of CRSRV. And in this vein, in the words of Yin, a case study represents “a research strategy, to be linked to an experiment, a history, or a simulation,”¹⁸³ and within this research, each study located and then disclosed practices of silence within the perpetration of CRSRV.

Three different case studies or contexts are observed in the final part of the thesis, each of which illustrates different instances of CRSRV of comparable gravity and describes different kinds of victims. The case studies open with the context of Peru, describing CRSRV pertaining to its civil war, and discussing a post-conflict era which has made seemingly arbitrary distinctions between victims of rape and victims of enforced sterilisation in the enactment, or absence, of reparations. The reading of recordings and representations of CRSRV in this context was based on testimonies of victims and witnesses drawn mostly from the Peruvian Truth and Reconciliation Commission, and also found within an oral history project named Quipu in which victims relayed their experiences. All testimonies that were found within these two formats were revised. The criteria for inclusion of the testimonies in this thesis was the commitment to refer to and draw on a wide range of victims, and experiences of violence in order to challenge and extend firstly, traditional representations and understandings of conflict; secondly, forms of CRSRV and their extension from purely sexual to reproductive in nature; and thirdly, identities of victim. The testimonies given in the Truth Commission were in Spanish language and I have translated these into English. For those included in the Quipu project, English translations were mostly available and I have used these as they appeared in

¹⁸¹ Robert K. Yin, ‘The case study crisis: Some answers,’ pp. 58-65, in *Administrative Science Quarterly*, Vol. 26, No. 1, March 1981. Cornell University. See p. 58.

¹⁸² *Ibid.*, p. 59.

¹⁸³ *Ibid.*

the original transcripts. Whether a text is presented in its original language or in translation, and by whom it has been translated, is always indicated in a footnote.

The second context draws on the criminalisation of abortion in El Salvador. This context was chosen precisely because it does not represent a traditional example of a “conflict” setting or civil war, in order to challenge and extend conventional representations of conflict and contexts in which CRSRV occurs. The country is, furthermore, simultaneously a setting of post-conflict with respect to its legacy of violence derived of a colonial history and a previous civil war, and is also a setting of conflict with respect to social unrest, state violence and unprecedented injustice, human rights abuses some of which fall within the category of CRSRV, and the imposition and consequence of silence on citizens. The testimonies of victims of CRSRV in El Salvador were sourced from studies conducted by various national or international rights organisations. Most were published in English, and included already translated texts, which I have used. When a translation is my own, this is signalled in a footnote. Again, all material was available in the public domain and found online via searches related to the subject, context, and timeframe in question. All material that these searches yielded was revised. The testimonies included in this thesis were those which challenged predominant conceptions of CRSRV and victims, and those which, despite their very different context and form, shed light on the common practice of silencing (employed in a very different way) underlying the perpetration of violence of this nature, as well as the reproductive consequences of what is traditionally termed sexual violence.

The third and final context studied is that of sexual slavery of Yazidi women held in captivity by ISIL militants in northern Iraq and Syria, and the reproductive consequences of these violations. The testimonies included in this case study were sourced online, but were in this instance found mostly within journalistic or media reports dating from the inception of the rise of ISIL in 2014 to the present. For the most part, English translations of the Arabic original were available and when or whether the translations are used is always indicated in a footnote. The selection criteria for the testimonies used in this case study was based on the same commitment outlined earlier to uphold a victim-centred perspective and trace vernacular accounts of CRSRV, and to extend understandings of sexual violence, and the reproductive consequences of sexual violence. Of all the material revised, I sought once more to include testimonies which demonstrated with clarity, and exposed different aspects of, the method of silencing at play in the perpetration of CRSRV.

The depth of the study as a whole, it should be noted, resides in examination of the subject of CRSRV, and not of a specific context. The focus is placed on the need to recognise

its practice as human rights violations requiring redress. The case studies are comparative in the sense that they draw on multiple and sometimes contrasting meanings of victim, multiple forms of violations experienced, multiple interpretations of conflict, and plural definitions of rights - both those violated, such as human rights of a sexual or reproductive nature, and those termed procedural resulting from previously violated rights, such as the right to reparation and the right to the truth.

<i>Context of Case Study</i>	<i>Use of Texts</i>
Peruvian civil war: Reparations for CRSRV in post-conflict Peru	Victim and witness testimony within the Peruvian Truth and Reconciliation Commission, and oral testimony within video documentary
El Salvador: Criminalisation of abortion in a context of civil unrest, state violence and political oppression	Testimony extracted from reports by Amnesty International and other independent national and international organisations
Iraq and Syria – ISIL: Sexual slavery of Yazidi women and girls, and children born of rape under ISIL	Testimony from personal accounts, and testimony extracted from interviews within journalistic, media and news reports

Table 1. Context of case studies and use of texts in their analysis

The decision to examine different settings rests on various reasons. First, although some comparisons can be drawn as mentioned above, the research does not intend to present a comparative analysis so much as it intends to reflect the prevalence and pervasiveness of forms of CRSRV and to map their occurrence with systemic repetition across historical, geographical, and cultural divides. In doing so, it extends understandings of the nature of the violations arguing for a need for stronger reference to reproductive violence in relation to sexual violence; it also extends conventional perceptions of conflict, which traditionally reside within definitions of war or armed conflict, but should also address situations of clear and serious political unrest or oppression, as in the case of contemporary El Salvador. These examples shed light on the different ways in which the violence is manifest, and extend traditional interpretations and representations of ‘conflict’, and ‘sexual and reproductive violence’, and

‘victim’. This all reflects the objective of examining different recordings of CRSRV and their influence over responses to and reparations for the violence and for victims.

Second, the different case studies and, in particular, the testimonies pertaining to them, illustrate the reality of victims’ respective experiences of violence. The truth they impart further explains the importance of extension of the term “conflict-related sexual violence” to include reference to, and reparation for, reproductive violence also.

Third, reference to different conflict settings gives rise to evidence of different forms of violence against women and girls. But it also demonstrates with absolute clarity a common practice of silencing underlying all forms of CRSRV, and the immediate need to displace this silence.

As stated above, the research treats the texts it includes and testimonies it refers to ethically and is therefore based on broad ethical dimensions. In this vein, it was also a conscious and ethical decision in dealing with testimonies of CRSRV to largely exclude the use of academic literature from the case studies. I acknowledge this as a weakness within the framework of a PhD thesis, but it can also be seen as a strength of this piece of work. As seen, the measures of reparation extended to victims are heavily influenced by representations of CRSRV through its different recordings, including within literature and law. The intention of this thesis is to reconsider interpretations of this form of violence and the victims resulting from it, and to reframe traditional representations and recordings of the violence, violations, and victims from the perspective and experience of victims and witnesses. The case studies draw on and extend arguments established earlier in the thesis, but then depart from these and refer, first and foremost, to testimonies of victims and witnesses to provide alternative and vernacular sources of the truth. I included some background literature to introduce and contextualise each case study. However, I decided not to include context-specific scholarly literature in relation to the testimonies themselves, not because this theory lacks relevance or importance, but to honour the voices and silences of victims and witnesses. The studies do not intend to disconnect from and contradict this literature so much as to contrast it, and to demonstrate specifically that testimony provides a contrast, and a necessary one, to theory. In this vein, comprehensive reparation depends on comprehensive representation and interpretation of crimes. And this, in line with Bassiouni’s proposal, represents the commitment to protect a victim-centred perspective within the framing of the right to the truth, and in reference to the right to reparation.

The case studies were selected, furthermore, because each represented and yielded very different insights into practices of CRSRV. For the most part, for the reasons described above,

the testimonies themselves were not analysed. Rather, they were used to give empirical evidence of practices of CRSRV, and were contextualised within different representations of violence, all of which shed light on the common practices of silencing involved. It is the modes of representation, and the responses they condition, which were subject to analysis. I analyse the context in which, and the conditions under which, violations occurred. In reiteration, it was therefore a conscious and ethical decision to analyse and critique the recording of, and responses to, CRSRV and to do so instead with the methods of silencing which enable their perpetration, as it was also a conscious and ethical decision not to do so with the testimonies of victims. These I have left largely intact, to speak for themselves. Any alteration, extensive discussion, or analysis of the details of the testimonies, or their comparison with or relation to literature, would detract from the vernacular nature of their narratives and dilute the integrity of the truths they impart. The decision to let the testimonies speak for themselves at once reflects and challenges White's view that the role of the historian is to "interpret his data".¹⁸⁴ For the purpose of this thesis generally, and the case studies specifically, the data is represented by testimonies, and those included were interpreted through their location in certain contexts, histories, and narratives, and as they were threaded through the overarching argument of the right to the truth and all its undercurrents. They served to reinterpret the nature of crimes, the prevalence of violations and the methods of their perpetration, the existence and identity of victims, and versions and records of the truth. There was no need to interpret them in relation to literature, and doing so would have subtracted from their discourse, not added to it. This position, as I see it, is in keeping with the objective of protecting a victim-centred perspective, and in line with the premise of respecting the presence and function of vernacular truths, whether in representation of testimony or silence.

Conclusion

Foreshadowed by the theoretical and methodological frameworks presented thus far, this thesis sets about to read, represent, and interpret alternative versions of CRSRV, and draws on a methodology of the right to the truth as a means to contest the silences inherent in CRSRV, to contextualise these silences in the vernacular, and to displace the practice of silencing on which the perpetration of crimes of this nature depends. Seen under this light, the right to the truth

¹⁸⁴ See Hayden White, *Op. Cit.*, p. 51.

comprises an indispensable reference for a rights-based approach to development, in which it represents not only a reparative but also a preventative measure.

The thesis rests on the conviction that reparation for CRSRV must respond to, and be based upon, the truth divulged from the testimonies of victims and witnesses. This is a conviction arrived at by an extensive reading of representations, including testimonies, of CRSRV. Protection of the right of victims to testify would also extend comprehension of the practice of conflict-related sexual violence and its relation to reproductive violence, and impel a shift in perceptions of such violence and the stigma attached to it. The readings of testimony find that the method of silencing by force, threat, coercion, or any retaliatory act, can occur prior to, at the time of, or after the violent act itself and is used to prevent the victim or witness from speaking out, seeking and obtaining justice. It concludes that since the method of silencing is indispensable to the perpetration of CRSRV, so too should the right to the truth become an indispensable reference for the right to reparation.

Part II

A discussion of rights

Part II departs somewhat from the discussion of reparations for CRSRV initiated in the first part of the thesis and delves further into the theoretical core with regards to the rights in question, tracing the significance of each of these for victims and perpetrators. Firstly, it outlines protection of sexual and reproductive rights in times of conflict; secondly, it presents the right to reparation; and, thirdly, the right to the truth.

This part of the thesis speaks primarily to the legal literature, in reference to the three rights it defines, in order to frame the origins, significance, and purpose of reparations for CRSRV in light of victims' right to the truth. These founding concepts are then, in Part III of the thesis, applied to different manifestations of the truth in specific contexts.

Chapter 5

Protection of sexual and reproductive rights in times of conflict

Introduction

The opening part of this thesis observed recordings of CRSRV in the literature, and how in turn these representations impose responses to the violence, and ultimately prescribe definitions of victims. An overrepresentation of rape as the most prevalent and pervasive form of CRSRV has begun to surface, and with greater subtlety, the preclusive silencing of the “truth” surrounding violations of this nature. This chapter continues along the same lines of interrogation, regarding the framing of CRSRV in legal and technical frameworks. In this vein, theoretical protection of sexual and reproductive rights is held against its practical application in times of conflict. The chapter first defines the key concepts used in this thesis and, in doing so, questions their ability to represent and respond to the experiences of victims. It then traces the emergence of sexual and reproductive rights and contextualises their protection within three distinct yet complementary bodies of international law (International Humanitarian Law, International Human Rights Law, and International Refugee Law). This section puts to the test the weight of the intention behind the wording of terminology and definitions, to adequately respond to the violence that these legal frameworks purport to represent. A possibility emerges from this review that the terminology used to refer to acts of CRSRV holds equal potential to condemn and displace it, as it does to reinforce the silences the violations depend on.

I. Definitions, terminology, and the indivisibility of rights and violations

Women's experiences of sexual and reproductive violence are inextricable from their sexual and reproductive rights. Terminology on said rights provides a means for recognition of their existence, their need for protection, and their need for reparation in case of violation. In this vein, rights and violations are indivisible. In observation of the naming of violence, Maria Stern et al have drawn the conclusion that, "In any setting, the terms to which one has access shape the ways in which an experience is made sense of."¹⁸⁵ In this regard, the terminology employed in defining rights, violations, and victims holds great influence over their protection, comprehension, and reparation.

I.a. Definition of conflict

A definition of conflict traditionally resides within situations of war or armed conflict. However, this research extends such conventional perceptions, under the premise that the term conflict should reflect the broad and complex nature of contexts in which violations occur and the diverse experiences of victims within these settings. Contexts of insecurity, in their various and complex forms, give rise to human rights violations, among these are violations which constitute acts of CRSRV. In accordance with the Guidance Note on Reparations for Conflict-Related Sexual Violence, "conflict-related sexual violence refers to incidents or patterns of sexual violence against women, men, girls or boys occurring in a conflict or post-conflict setting that have direct links with the conflict itself or that occur in other situations of concern such as in the context of political repression."¹⁸⁶ The definition of conflict used in this thesis, in relation to the perpetration of and reparations for CRSRV, therefore, refers to settings of conflict and post-conflict, and extends to address situations of clear and serious political unrest, instability, insecurity, or oppression.

¹⁸⁵ Maria Stern, Harriet Gray, and Chris Dolan, 'Torture and sexual violence in war and conflict: The unmaking and remaking of subjects of violence,' *Op. Cit.*, p. 201.

¹⁸⁶ Guidance Note of the Secretary-General, *Reparations for Conflict-related Sexual Violence*, p. 2. See also, UN Analytical and Conceptual Framing of Conflict-Related Sexual Violence, June 2011.

I.b. Definition of truth

For the purposes of this thesis, the term truth represents two distinct yet interrelated intentions. The first is the truth as a concept, and the second is the truth as a right. While giving some theoretical background as to the origins and significance of the truth as a concept, this research focuses on the construction of the truth as a legal right. For victims of CRSRV, this right represents an element of reparation, which incorporates the right to testify. In this thesis, as is the subject of Chapter 7 on the Right to the Truth, the right must be extended from its original conception as the right to know the truth surrounding human rights abuses to the right of victims to testify and actively contribute to the construction of a record of these violations. The truth, as a right, is subject to interpretation in different ways in diverse contexts. But it is also defined by its status as an absolute right, the existence of which determines that it cannot be interfered with, and no limitations can be placed upon it. Although in practise, the opposite very often happens, that premise characterises and remains its theoretical intention. Both its theoretical protection and its practical application will be strengthened by its gradual recognition and inclusion within customary law. The desired result of this aspiration is that individual states would enshrine, enact, and repair violation of the right to the truth. However, in the first instance, the right must seek representation in the various bodies of International Law, then to become customary. That redress for victims of CRSRV refers to the right to the truth, and particularly the right to testify, signals a method to displace the silence involved in the perpetration of violations of this nature.

I.c. Definition of vernacular

The vernacular is an indispensable reference in protection of the right to the truth. Since redress depends on discerning the truth, as part of evidence, it infers not only accounting for what has transpired, by act or omission, but also for what has not been done, for what has been ignored, or silenced. Extension of the right to the truth to include the right to testify intends to reframe the memory and representation of the violence from the perspective of the victim, thereby offering an account and record in the vernacular. Both the presence and interpretation of narrative, as part of a victim-centred perspective and acts of testimony, contest traditional

meanings, impositions, and denials of security to arrive at alternative sources of the truth. In this regard, the term vernacular is used to denote the voice and language spoken by one's own tongue in reference to one's own experiences, and not those imposed by another. It protects the perspective of the victim within the right to the truth. It also includes the silences which impart other senses of truth, where speaking of violence remains impossible or undesirable.

I.d. Definition of victim

A victim is someone who has suffered harm by result of a violation carried out by another,¹⁸⁷ as well as any other individual who has suffered indirectly by result of the violation, including relatives and descendants of the direct victim where the effects are intergenerational,¹⁸⁸ or witnesses to the crime, or potentially those who have tried to aid the victim or offer protection in some form. The UN General Assembly Basic Principles and Guidelines, has expressed in its article 8 that:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.¹⁸⁹

The latter consideration is further illustrated in practice by a judgement of the Inter-American Court of Human Rights (IACtHR) in the case of the enforced disappearance and murder of several street children in Guatemala, in its decision that it was "impossible not to include, in

¹⁸⁷ The legal identity of victim can also extend to organisations or institutions dedicated to art, science or religion, historic monuments, and structures such as hospitals or schools, which have been damaged, particularly in times of conflict.

¹⁸⁸ OHCHR, International Convention for the protection of all persons from enforced disappearance. Article 24.1 General Assembly RES/47/133, 18 December 1992.

¹⁸⁹ OHCHR, 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, art. 8. General Assembly Resolution 60/147, December 16 2005.

the enlarged notion of victim, the mothers of the murdered children.”¹⁹⁰ This reasoning has been applied by the IACtHR in other similar cases.¹⁹¹

In this same vein, victims of CRSRV may “include persons who, individually or collectively, suffered such violence but also family members, such as children or partners, and children born as a result of pregnancy from rape.”¹⁹²

This thesis uses the term ‘victim,’ not in opposition but as complementary to, and with certain privilege over, the term ‘survivor’ in reference to women and girls, and others, who have experienced CRSRV. The privilege is based, partly, on the discussion centring on subjects of reparation, who may or may not be survivors of violence. There are no grounds for cessation of the right to reparation in the case of an individual not surviving a violation; rather, the victim is recognised and the ensuing right to reparation is passed on to next of kin or associated collectives. Hence the term ‘victim’ is considered to reflect a wider range of subjects of reparation, which is a primary concern of this thesis. Often, crimes of a sexual or reproductive nature perpetrated against women and girls are framed as violating collective rights, those of their families, communities and societies at large, as this form of violence invokes deep collective shame.¹⁹³ Recognition of individual victims is therefore imperative for women and girls, since the stigma attached to the violence tends to reinforce perceptions surrounding their place and obligations within family, community, nation and more extensively “world,” as objects, opposed to subjects in their own right.

I.e. Definition of sexual violence

According to the United Nations ‘Analytical and Conceptual Framing of Conflict-related Sexual Violence,’ sexual violence is constituted by:

Any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.¹⁹⁴

¹⁹⁰ Inter-American Court of Human Rights, *Villagran-Morales, et al.*, (ser. C) No. 63, // 177, 253.4. November 19, 1999. See Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli.

¹⁹¹ See, *inter alia*, IACtHR, *Bámaca Velásquez v. Guatemala*, (ser. C) No. 70, pp.159-166, 230.2, November 25, 2000; IACtHR, *Mapiripán Massacre v. Colombia*, (ser. C) No. 134, pp. 140-46, 335.1, September 15, 2005; IACtHR, *Pueblo Bello Massacre v. Colombia*, (ser. C) No. 140, p. 163, 296.3, January 31, 2006.

¹⁹² Guidance Note of the Secretary-General, Reparations for Conflict-related Sexual Violence, *Op. cit.*, p. 3.

¹⁹³ See Thomas and Ralph, *Op. cit.*

¹⁹⁴ See UN Analytical and Conceptual Framing of Conflict-related Sexual Violence, June 2011.

Sexual violence within the framework of the United Nations has been accorded a wider definition as described by the Office of the High Commissioner for Human Rights, by which it constitutes:

A form of gender-based violence and encompasses any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. Sexual violence takes many forms and includes rape, sexual abuse, forced pregnancy, forced sterilization, forced abortion, forced prostitution, trafficking, sexual enslavement, forced circumcision, castration and forced nudity.¹⁹⁵

This description, which provides a definition of 'sexual violence', identifies specific kinds of victims who exist consequential to crimes pursuant to CRSRV, describes their relationship to perpetrators and, especially, their right to reparation. From it arises the need to illustrate three important points. Firstly, the description of sexual violence does make explicit reference to the practice of reproductive violence and includes reproductive consequences of sexual violence. Secondly, despite reference to reproductive violence, the practice is subsumed by the term 'sexual violence,' which does not explicitly account for the diverse forms of violence it purports to cover. Thirdly, there emerges a need for reconsideration of the term, and its extension to 'sexual and reproductive violence' in order to adequately reflect the diverse forms of violence experienced by victims.

As seen from the literature review, in reference to violence experienced by women in conflict settings, the term 'conflict-related sexual violence' appears most consistently. Among other measures, there exists a strong body of response to conflict-related sexual violence by United Nations tools.¹⁹⁶ It is a common conception, and this is certainly the case in relevant UN documents and responses, that the term sexual violence incorporates other related forms

¹⁹⁵ OHCHR, 'Sexual and gender-based violence in the context of transitional justice,' available https://www.ohchr.org/Documents/Issues/Women/WRGS/OnePagers/Sexual_and_gender_based_violence.pdf;

¹⁹⁶ See, for example, UN Analytical and Conceptual Framing of Conflict-related Sexual Violence, June 2011; Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010; UN DPA Guidance for Mediators: Addressing Conflict-related Sexual Violence in Ceasefire and Peace Agreements, 2012; UN Women, 'A Window of Opportunity: Making Transitional Justice Work for Women', 2012; OHCHR Rule of Law Tools for Post-conflict States on Truth Commissions, HR/PUB/06/01, including Prosecution Initiatives, HR/PUB/06/04; Vetting: An Operational Framework, HR/PUB/06/05; Reparations Programmes, HR/PUB/08/01; Maximizing the Legacy of Hybrid Courts, HR/PUB/08/02; Amnesties, HR/PUB/09/01; National Consultations on Transitional Justice, HR/PUB/09/02; Guidance Note of the Secretary-General, Approach to Rule of Law Assistance, April 2008.

of violence, extending to reproductive violence also. However, though intended to be represented by the term ‘conflict-related sexual violence’, these ‘other’ forms of violence, such as reproductive violence, are frequently subsumed under its umbrella. The importance of recognising forms of sexual violence and the ensuing right to reparation is undeniable, but failure to recognise or explicitly denounce other related forms of violence experienced by women and girls in conflicts, such as reproductive violence, disregards the dignity of victims and fails to frame certain acts as violations which, at best, complicates elaboration of appropriate reparation, and at worst, completely denies the grounds for truth and reparation.

I.f. Definition of reproductive violence

Reproductive violence in times of conflict or repression, with few exceptions,¹⁹⁷ stems from, and is consequential to, acts of sexual violence, yet it also poses different risks to victims and therefore requires different responses. Reproductive violence is thus related to, is at times inextricable, but also distinct from sexual violence, though it is of comparable gravity. As is becoming clear, the distinction between the forms of violence is seldom made. The lack of clarity is apparent, for instance, in the UN Guidance Note of the Secretary General on ‘Reparations for Victims of Conflict-related Sexual Violence,’ which describes various instances of human rights violations, some of which appear to be reproductive in nature, as forms of ‘sexual violence’:

Conflict-related sexual violence takes multiple forms such as, inter alia, rape, forced pregnancy, forced sterilization, forced abortion, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, forced nudity or any other form of sexual violence of comparable gravity. Depending on the circumstances, it could constitute a war crime, a crime against humanity, genocide, torture or other gross violations of human rights.¹⁹⁸

This framing is common and facilitates a general understanding of violations, and furthermore a general administration of reparations in one way, although it also fails to recognise reproductive violence as an interrelated yet distinct practice of violence and, therefore,

¹⁹⁷ An exception may include, for example, enforced sterilisations or enforced abortion, but not enforced pregnancy the perpetration of which also involves sexual violence.

¹⁹⁸ Ban Ki Moon, Guidance Note of the Secretary-General, Reparations for Conflict-related Sexual Violence, pp. 2-3. United Nations, June 2014.

precludes adequate reparation for individual victims and diminishes comprehensive historical justice.

Concrete examples of reproductive violence in conflict settings include enforced sterilisation, enforced pregnancy, enforced abortion, and by extension, rape. Acts of rape are a violation of sexual rights, among other human rights, and therefore a form of sexual violence. But such acts also frequently and intentionally have reproductive consequences; they therefore also violate reproductive rights and constitute reproductive violence. Where explicit recognition and acceptance of this truth is denied, this form of sexual and reproductive violence additionally violates, on multiple grounds, the victim's right to the truth.

I.g. Definition of rape

The definition of rape, as outlined in the International Criminal Court Elements of Crimes, integrates jurisprudence of international tribunals and requires three cumulative elements:

(i) the perpetrator acted with intent or knowledge, or both; (ii) the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body; (iii) the invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁹⁹

The constitution of rape as a violation is complex and is a source of diverse further resulting violations. It can, in some circumstances, amount to an act of genocide, with profoundly damaging effects for entire communities. It has numerous and irrevocable consequences for children born of rape and their mothers who may face stigma and ostracisation, for instance, and for generations to come whereby their social, cultural, and genetic composition has been irreparably altered, posing a threat to their present and future existence. Acts of rape, furthermore, as seen most clearly in the third constitutive element, rely on the method of silence in their perpetration, described by the Court as, *inter alia*, threat, coercion, abuse of power, or lack of consent. However, the framing of rape as a form of sexual violence despite its

¹⁹⁹ See International Criminal Court, *Elements of Crimes*, The Hague, Netherlands, 2011. See Arts. (7)(1)(g)-(1) and 8(2)(b).

undeniably reproductive intentions and consequences, holds limited resonance with the experience of victims and, without explicit recognition of the reproductive effects surrounding violations, there is little hope of extending adequate reparation.

I.h. Convergences between sexual and reproductive violence

After clarifying the most important definitions used in this thesis, this section reviews the convergences and divergences between sexual and reproductive violence as practised within conflict settings. A further effect of the silences inherent in the perpetration of CRSRV, additional to the methods of silencing used in order to initiate and perfect its perpetration, is the subsequent denial of the reproductive consequences of wartime rape. Clearer demarcations of the convergences and divergences between sexual and reproductive violence would help to displace some of the effects of this silence.

There exists much overlap between sexual and reproductive rights. As seen above, in relation to the inextricability between rights and violations, especially pursuant to practices of CRSRV, redress for victims is similarly referent on this convergence. In many ways, convergence is obvious with regard to certain forms of sexual and reproductive violence. The most prevalent and pervasive form of wartime violence experienced by women has historically been, and continues to be, rape as a weapon of war. As already apparent, rape constitutes not only a crime of a sexual nature but also has reproductive implications and frequently violates the reproductive rights of victims as seen in various ways, such as pregnancy as a result of rape, the struggle to ensure the right to safe abortion for victims of wartime rape, and specific rights bestowed on children born of wartime rape. Wartime rape is widespread and indiscriminate. Further, as a weapon of war it rests on discrimination against women and girls reinstating seemingly intractable patriarchal norms and dominance. Despite convergences between sexual and reproductive violence derived of wartime rape of women, the latter, as seen, is usually framed simply as an act of sexual violence. The framing of violations and reparations for victims should comprehend how definitions of the terms ‘sexual violence’ and ‘reproductive violence’ are distinct from one another yet very often interrelated and at times inextricable, and determine when it may be beneficial, and necessary, to identify convergences and divergences between the forms of violence in order to better redress victims.

I.i. Divergences between sexual and reproductive violence

This thesis does not by any means deny the importance and necessity of recognition of sexual violence against women and girls in times of conflict, but perceives danger in the ascription of women and girls as victims of sexual violence as isolated from other forms of violence, not least because of the historic status of women as sexual objects. This problem is of particular relevance to female victims of CRSRV due to the reproductive capabilities and rights of women and girls, which are inextricable from their sexual rights as they are also from practices of sexual or reproductive violence. The thesis thus asserts the need for a more extensive interpretation of sexual violence, both as a concept and a practice or ‘weapon of war’. Although recognition of convergences between sexual and reproductive violence is necessary, especially in order to explicitly incorporate the former within reparative measures for victims, it is equally important to recognise divergence and distinctions between the forms of violence in order to enact adequate reparation for victims.

As seen in the extract from the Guidance Note of the Secretary-General above, many forms of violence against women and girls in conflict settings stem from sexual violence and are reproductive in nature. Other related forms of violence should inform interpretations of the diverse violations which stem from sexual violence, such as reproductive violence, including maternal mortality and morbidity, existence of child brides, enforced pregnancy and children born of rape, the purpose of which is to suggest that a wider reading of sexual violence will assist in consolidating a more inclusive understanding of the practice and the far reaching damage it inflicts and will, therefore, be able to better redress victims, and prevent recurrence of violations.

I.j. The right to reparation

Despite existing preclusions in implementing the legal remedies available for CRSRV, which will be discussed in detail in subsequent chapters, victims are by law entitled to the right to reparation. As Bassiouni frames it, the right to reparation stems from original recognition of the need for a remedy in response to violation of a right.²⁰⁰

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provides that:

²⁰⁰ See Cherif Bassiouni, ‘International Recognition of Victims’ Rights,’ *Op. cit.*, p. 204.

In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation.²⁰¹

Within such frameworks, the existence of the victim as a legal identity automatically carries the right to reparation. There is, therefore, no concept of victim without an ensuing right to reparation.

I.k. Obligation to redress

The measure of reparation refers to an obligation to redress to the extent necessary and possible the violation of a right, including through restitution, rehabilitation, satisfaction, and guarantees of non-repetition.²⁰² The right to the truth, furthermore, comprises a fundamental element of each of these measures. Part of the obligation to offer redress to harm resides within a mandate of reparation to establish individual criminal responsibility for violations. This is not always possible given, *inter alia*, continued political instability or cultures of impunity, or for reasons relating to causing potential further damage to victims. In any case, absence of prosecutions must not mean absence of redress for victims. Thus, ultimate responsibility to redress falls to states for two principal reasons: for involvement in or for sanctioning, by act or omission, violations that have transpired in their territories; and, regardless of the first reason, by virtue of its existence as an institution which bears primary responsibility for protecting the fundamental human rights of its citizens and upholding principles of international law.

II. The emergence of reproductive rights

²⁰¹ OHCHR, Basic Principles and Guidelines, *Op. cit.*

²⁰² UNHCHR, International Convention for the protection of all persons from enforced disappearance, *Op. cit.*, Article 24, paras. 4 and 5.

The sexual and reproductive rights of women and girls comprise one aspect of their human rights. They are therefore subject to the same degrees of protection as any other rights, as they are also entitled to reparation in case of violation. This body of rights has undergone profound transformation in recent years, both in terms of theoretical representation and practical application. Sexual and reproductive rights are closely related, yet at times distinct from one another. Transition from a purely maternal comprehension of women's health to a human rights oriented perspective provided the foundations for the emergence of the concept of reproductive rights. As human rights, reproductive rights pertain to both women and men, the distinction being that each has different reproductive functions and needs and, therefore, the scope of these rights responds accordingly.

II.a. Definition of reproductive rights

Reproductive rights are “grounded in and draw their meaning from fundamental human rights.”²⁰³ They include, but are not limited to, the rights to health, life, freedom, dignity, non-discrimination, privacy, information and education.²⁰⁴ They are also strongly linked to the rights to freedom from torture and ill treatment.

The CESCR, in its General Comment No. 22 (2016), dedicated to the right to sexual and reproductive health, has outlined some of the normative content of the right.²⁰⁵ Due to women's reproductive capacities, the “realization of women's right to sexual and reproductive health is essential to the realization of the full range of their human rights”²⁰⁶ and its protection and application with non-discrimination is essential to their autonomy. The Committee further notes:

Women's experiences of systemic discrimination and violence throughout their lives require comprehensive understanding on the concept of gender equality in the right to sexual and reproductive health. Non-discrimination on the basis of sex, as guaranteed in Article 2.2, and women's equality guaranteed in Article 3 of the Covenant, require the removal of not only direct discrimination but also indirect discrimination and ensuring of formal as well as substantive equality.²⁰⁷

²⁰³ Center for Reproductive Rights, *Reproductive rights are human rights*, Report, p. 5. USA, 2009.

²⁰⁴ See UNHCR, Sexual and reproductive health and rights. Available <https://www.ohchr.org/EN/Issues/Women/WRGS/Pages/HealthRights.aspx>

²⁰⁵ CESCR, General Comment No. 22 (2016) on the Right to sexual and reproductive health, see Section III.

²⁰⁶ Ibid., See B.25. Special topics of broad application, Equality between women and men and gender perspective.

²⁰⁷ Ibid., B.26.

Discriminatory practices against women which occur outside the realm of health itself profoundly influence the theoretical protection, and women's practical enjoyment, of sexual and reproductive rights. In this vein:

Seemingly neutral laws, policies and practices can perpetuate the already existing gender inequalities and discrimination against women. Substantive equality requires that the laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health. Gender-based stereotypes, assumptions and expectations of women as men's subordinates and of women's role as only caregivers and mothers in particular, are obstacles to substantive gender equality including the equal right to sexual and reproductive health and need to be modified or eliminated, as does men's role only as heads of the household and breadwinners. At the same time special measures, both temporary and permanent, are necessary to accelerate de facto equality of women and to protect maternity.²⁰⁸

A series of international conferences and the consensus documents arising from them in the 1990s consolidated a clear and unprecedented understanding of the need for women's sexual and reproductive health to be placed within a broader framework of human rights.²⁰⁹ Commitment to redefinition of women's rights was reflected in the term "sexual and reproductive health," as it has come to be understood and used since. However, that identical concerns border application of the right to reproductive health some twenty years later suggests that, despite conceptual advancement, practice of these rights has not become customary. The CESCR expressly states that grave violations of the right to sexual and reproductive health of women continue.²¹⁰ To understand why this is so in practice, we first need to consider some of the theoretical ideas which emerged under the framework of these initial international conferences.

²⁰⁸ Ibid., B.27.

²⁰⁹ See International Conference on Population and Development (ICPD), Cairo, September 1994. Programme of Action; Fourth World Conference on Women, Beijing. Beijing Declaration and Platform for Action. Available at <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>

²¹⁰ Ibid., see I.4. which states, "In its General Comment No. 14 on the right to the highest attainable standard of health (2000), the Committee has already addressed in part the issue of sexual and reproductive health. Considering the continuing grave violations of the right to sexual and reproductive health, however, the Committee views that the issue deserves a separate general comment."

II.b. In the framework of international conferences

The decade of the 1990s saw a renewed recognition of reproductive health and its subsequent accordance as a human right. Women's rights were articulated and enshrined in official documentation for the first time at the Vienna Conference on Human Rights in 1993. The Vienna Declaration and Programme of Action arising from the Vienna Conference affirmed the equal status and human rights of women.²¹¹

The following year, in 1994, the International Conference on Population and Development (ICPD) held in Cairo articulated the existence and need for women's reproductive rights in relation to their health and their human rights. Women's reproductive rights, the Programme of Action recognised, are not new rights but are already existent and need only to be applied to how sexuality and reproduction are understood. They "embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents."²¹²

In 1995, the Fourth World Conference on Women held in Beijing, and its ensuing Beijing Platform for Action, committed to uphold women's rights to access sexual and reproductive health services as aspects of their human rights.²¹³ It was further affirmed that:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.²¹⁴

Essentially, these conferences recognised reproductive rights within the framework of human rights and elevated the right to reproductive health to an international setting. The health services which fall under the articulated right to reproductive health are identified as family planning, access to safe and legal abortion, post-abortion care, treatment for sexually transmitted infections, antenatal care, delivery and post-partum care, which all comprise essential measures in protection of freedom from discrimination and violence.

²¹¹ OHCHR, *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna, 25 June 1993. See Section 3, 'The equal status and human rights of women,' paras. 36-44.

²¹² ICPD, Programme of Action, para. 7.3.

²¹³ See Beijing Declaration and Platform for Action.

²¹⁴ Ibid., para. 86.

II.c. A compromise between maternal and reproductive health

Commitments professed in the international conferences also precipitated a compromise between the terms and practices of maternal and reproductive health. The terms maternal and reproductive health are marked by a series of convergences and divergences. Mahmoud Fathalla, remarks:

The needs of women have been traditionally addressed within the concept of maternal and child health (MCH). The needs of the woman were submerged in the needs of the mother. MCH programs and services have played and continue to play an important role in promotive, preventive and curative health care of mothers and children. MCH services tend to focus on the healthy child as the successful outcome. While mothers care very much for this successful outcome because of the investment they make in the process of reproduction, this focus resulted in less emphasis being put on caring for the health risks to which mothers are liable during pregnancy and childbirth, and on putting in place the essential obstetric functions and facilities to deal with them. As a result, the tragedy of maternal mortality in developing countries has now reached dimensions that can no longer be ignored.²¹⁵

The risks which befall women in violation of reproductive rights include maternal mortality, but extend to and derive from, *inter alia*, rape, other forms of sexual abuse or torture, enforced pregnancy, and enforced sterilisation. The compromise which places maternal health within a broader frame of reproductive health, namely within human rights, derives from the Cairo Agenda. The Programme of Action itself formed a consensus and compromise among 179 governments, UN agencies, and NGOs, covering the following twenty years of actions concerning population and development and, in this context, the rights protected under maternal health were redefined by the term “reproductive health”. This term acknowledges the relationship among reproductive health, population, poverty alleviation, women’s empowerment, development, and human rights. It further affirms that promotion and protection of reproductive rights are fundamental, not only to individual women, but to the economic and social development of communities and nations as a whole,²¹⁶ which implicates looking

²¹⁵ Mahmoud Fathalla, ‘Health and being a Woman,’ p. 2. Forty-third Session of the UN Commission on the Status of Women, United Nations, New York, March 3, 1999.

²¹⁶ Paul Hunt and Judith Bueno de Mesquita, *The rights to sexual and reproductive health*. Human Rights Centre, University of Essex, 2006.

beyond health to other spheres, including political, economic and social, and adopting policy which addresses underlying social conditions obstructing equality in access to health and protection of the fundamental human rights of women.

In this vein, reproductive health as it was framed in the ICPD and applied thereafter has been interpreted in diverse and sometimes divergent ways. Despite conceptual advances, in much of the world, in many settings women still do not exercise control over their bodies. Decisions regarding when or whether they are able to leave the home, engage in work, and seek health care all too often reside with males, while governments extend little or no protection from such forms of control, or from domestic violence. Ethnic minorities remain subject to involuntary sterilisation and other measures undertaken to fulfil aims of population reduction or ethnic cleansing.²¹⁷ The poorest women continue to suffer the highest rates of maternal mortality.²¹⁸ Consensus on the importance and urgency of reproductive health, therefore, has not struck global accord without complication, nor has it significantly altered the risks deeply enmeshed in women's health and lives. All of these problems exist in times of peace, but are intensified in times of conflict.

III. Protection of sexual and reproductive rights in conflict settings

Although sexual and reproductive rights continue to exist in armed conflicts and are protected by various bodies of international law, recognition of violations is minimal and, therefore, so too is reparation for victims. The latter concern is approached toward the end of this chapter. The present section details three complementary branches of international law – International Humanitarian Law, International Human Rights Law, and International Refugee Law – and observes, in light of the ways in which the sexual and reproductive rights of women and girls are represented therein, the extent to which, specifically in armed conflicts, application is protected. It also observes the predicament of internally displaced persons (IDPs) regarding sexual and reproductive rights in absence of refugee status or protection of any specific body of law.

²¹⁷ Refer, for one example, to Chapter 8 of this thesis which looks at enforced sterilisation during the Peruvian armed conflict.

²¹⁸ Women frequently represent the poorest of the poor for reasons related to complex and interdependent social factors, such as their role as mothers, their place in the home and restrictions in terms of work, property ownership, economic status, and general decision making.

III.a. Protection under International Humanitarian Law

International Humanitarian Law (IHL) is the body of law which protects the rights of civilians during times of armed conflict specifically. Non-discrimination and equal representation are core principles of IHL prohibiting distinctions based on sex, among other grounds, in its protection of civilians.²¹⁹ IHL provides that all persons *hors de combat*, including the sick and wounded, must be treated humanely in all circumstances.²²⁰

Conflict reinstates pre-existing structures of discrimination and prevailing inequalities in any given context,²²¹ with women and children among the most vulnerable. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has recognised that:

Conflicts exacerbate existing gender inequalities, placing women at a heightened risk of various forms of gender-based violence, by both State and non-State actors. Conflict related violence happens everywhere, such as in homes, detention facilities and camps for internally displaced women and refugees; it happens at any time, for instance, while performing daily activities such as collecting water and firewood or going to school or work.²²²

IHL provides minimum obligations with respect to protection against conflict-related sexual violence and access to reproductive health care. The UN Security Council has in the past 15 years passed several resolutions on women and armed conflict.²²³ The CEDAW Committee has further commented that “sexual violence occurs within all conflict-affected settings, including war or conflict, during displacement, and in transit or refugee settings and is

²¹⁹ ICRC, 2016 updated Commentary on the First Geneva Convention, art. 12, para. 1392 and art. 3, para. 578.

²²⁰ Common Article 3. Also, Geneva Convention I, art. 12; Geneva Convention II, art. 12; Geneva Convention III, art. 13; Geneva Convention IV, arts. 5 and 27; Additional Protocol I, art. 75(1); Additional Protocol II, art. 4(1). Note that persons *hors de combat* refers to “(a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.” ICRC, Customary IHL Database, Rule 47, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule47

²²¹ UN Secretary General, *Report of the Secretary-General on women, peace and security*, paras. 5-7. UN Doc. S/2002/1154 (Oct. 16, 2002).

²²² CEDAW Committee, General Recommendation No. 30 on *Women in conflict prevention, conflict and post-conflict situations*, para. 34. CEDAW/C/GC/30 (2013).

²²³ See, for example, Security Council Resolution on Women, peace and security: Understanding the implications, fulfilling the obligations, S/RES1325 (2000); Resolution on Women, peace and security: Sexual violence during wars, S/RES1820 (2008); Resolution on Women, peace and security: Sexual violence in conflict, S/RES2106 (2013); Resolution on Women, peace and security: Sexual violence in conflict, S/RES2467 (2019).

perpetrated by state actors, non-state actor groups, and private individuals.”²²⁴ This problem refers to women’s sexual rights, among others, but not specifically to reproductive rights.

Although IHL does not explicitly address the right to reproductive health of women, it does incorporate important obligations with regards to the treatment of women in armed conflicts, in particular pregnant women. In 2015, a UN Inter-Agency report found the estimated lifetime risk of maternal mortality to be 1 in 54 in countries experiencing conflict, compared to a 1 in 180 global lifetime risk.²²⁵ Yet violations of the right to reproductive health have not been the subject of integral reparation for victims of armed conflict. The focus lies on reparation for conflict-related sexual violence. As seen, aspects of reproductive rights are included within a general understanding of the term conflict-related sexual violence, yet are, almost invariably, not accorded redress for violation.²²⁶

With respect to IHL specifically, the Geneva Conventions and Additional Protocol I require that parties to an armed conflict treat women and nursing mothers with particular care, including with respect to medical assistance.²²⁷ Also included in its definition of the wounded and sick is “maternity cases” and “other persons who may be in need of immediate medical assistance or care, such as... expectant mothers.”²²⁸ Though more appropriate terminology could be employed, a degree of protection is extended in theory.

An obligation of states outlined by IHL is the provision that women survive pregnancy and childbirth, including by ensuring access to adequate pre- and post-natal care, emergency obstetric services, and skilled birth attendants.²²⁹ The CEDAW Committee has also called on states generally to ensure access to “maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care,” and to respond to “complications of delivery or other reproductive health complications, among others.”²³⁰

Although there may exist, within IHL, the need for a stronger and more explicit recognition of the reproductive rights of women in armed conflicts, this branch of law does

²²⁴ See CEDAW Committee, General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, para. 34. CEDAW/C/GC/30 1 November 2013.

²²⁵ WHO, UNICEF, UNFPA, World Bank Group, and the United Nations Population Division, Trends in maternal mortality: 1990-2015, at 15, 26 (2012).

²²⁶ See Introduction and Chapter 3 of this thesis for definitions on conflict-related sexual and reproductive violence.

²²⁷ Geneva Convention I, art. 12; Additional Protocol I, art. 8(a); ICRC, 2016 Commentary on the First Geneva Convention, art. 12, para. 1432 (2016).

²²⁸ Additional Protocol I, art. 8(a).

²²⁹ CEDAW Committee, General Resolution No. 24, Women and Health, A/54/38 (1999), paras. 26-27; CESCR, General Comment No. 22, para. 45.

²³⁰ CEDAW Committee, General Recommendation No. 30, para 52(c).

establish minimum obligations to provide care for pregnant women as well as for victims of sexual violence. Obligations of IHL have been originally thought to apply only to states, as opposed to International Human Rights Law, which applies to all parties to a conflict.²³¹ This is, however, a view which may be evolving to incorporate other responsible bodies,²³² and therefore extend modes of protection. Part of the future evolution of norms relating to responsibility under IHL should include a commitment to recognition and protection of women's reproductive rights, and redress for violations as related to but distinct from conflict-related sexual violence, given that experience demonstrates prevalent and continued violations of both sexual and reproductive rights in times of conflict, which are very closely related and at times inextricable, yet nevertheless invariably distinct, forms of violence.

III.b. Protection under International Human Rights Law

There exists significant and extensive guidance for states under International Human Rights Law (IHRL) regarding the sexual and reproductive rights of women and girls generally, and in conflict settings specifically.²³³ IHRL applies at all times and is not specific to, although continues to apply within, times of armed conflict. The obligations which arise therefrom are complementary to and should reinforce the forms of protection and obligations existent in IHL. Both branches of law depart from the objective to protect life and dignity. Similarly, both prohibit torture, other cruel or inhumane treatment, and notably discrimination.²³⁴

States must continue to uphold internationally recognised human rights during armed conflicts. Under strict conditions, derogations from certain obligations can apply in relation to resource availability of economic, social or cultural rights. Obligations may also be limited in relation to certain civil and political rights. However, certain core minimum obligations remain

²³¹ See, for example, Marco Sassoli and Yuval Shany, 'Should the obligations of states and armed groups under international humanitarian law really be equal?' in *International Review of the Red Cross*, pp. 425-436, Vol. 93, No. 882, June 2011; Cordula Droegge, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict,' *International Law Forum*, The Hebrew University of Jerusalem, Vol. 40, No. 2, pp. 310-355, 2007.

²³² Ibid.

²³³ See UN Security Council Resolutions, *supra* note 25. See also Center for Reproductive Rights, *Breaking Ground* (2016), available at https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/GLP_TMB_Booklet_2016_Web.pdf

²³⁴ ICRC, 'International Humanitarian Law and International Human Rights Law: Similarities and Differences,' January 2003. Available at <https://www.icrc.org/en/download/file/1402/ihl-and-ihrl.pdf>

non-derogable including in such extreme circumstances.²³⁵ Even where derogations are permissible, they cannot derive from discriminatory practice, including discrimination on the grounds of sex.²³⁶

The Committee Against Torture (CAT) and the Human Rights Committee have found that, in certain circumstances, denial of access to abortion services can lead to physical or mental suffering which amounts to ill-treatment.²³⁷ The CAT has further considered that complete bans on abortion may constitute ill-treatment or torture,²³⁸ especially denial of abortion services to women raped in war,²³⁹ and, therefore, a violation of the right to reproductive health is constituted. This further emphasises the need for reparative measures in response to conflict-related sexual *and* reproductive violence.

The Committee on Economic, Social and Cultural Rights has acknowledged the negative impact of discrimination on the right to access sexual and reproductive health care and services, stating, for example, that “Due to numerous legal, procedural, practical and social barriers, people’s access to the full range of sexual and reproductive health facilities, services, goods and information is seriously restricted.”²⁴⁰ The Committee further observes that for

Certain individuals and population groups that experience multiple and intersecting forms of discrimination that exacerbate exclusion in both law and practice, such as lesbian, gay, bisexual, transgender and intersex persons (LGBTI) and persons with disabilities, the full enjoyment of the right to sexual and reproductive health is further restricted.²⁴¹

Absent from this observation is expression of concern for risks of women and girls in conflict settings. Of comparable import to other non-derogable minimum core obligations of states in

²³⁵ “States cannot derogate from certain *jus cogens* norms, such as the prohibitions on torture, genocide, and slavery, even during situations of armed conflict.” UN Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, para. 7. Minimum core obligations with respect to economic, social, and cultural rights are not subject to resource availability and are at all times non-derogable. See too, OHCHR, ‘Protection of economic, social and cultural rights in conflict,’ Report of the High Commissioner for Human Rights, 4-5 (2015), available at <http://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf>

²³⁶ Ibid., UN Human Rights Committee, CCPR General Comment No. 29. See, para. 8.

²³⁷ See CAT Committee, *Concluding Observations: Poland*, para. 23, UN Doc. CAT/C/POL/CO/5-6 (2013); K.L. v. Peru, Human Rights Committee, Comment No. 1153/2003, UN Doc. CCPR/C/85/D/1153/2003 (2005).

²³⁸ See, for example, CAT Committee, *Concluding Observations: Paraguay*, para. 22, UN Doc. CAT/C/PRY/CO/4-6 (2011); El Salvador, para. 23, UN Doc. CAT/C/SLV/CO/2 (2009); Nicaragua, para. 16, UN Doc. CAT/C/NIC/CO/1 (2009).

²³⁹ CEDAW Committee, General Recommendation No. 30, para. 52(c); CEDAW Committee, *Concluding Observations: Syria*, para. 40, UN Doc. CEDAW/C/SYR/CO/2 (2014).

²⁴⁰ CESCR, General Comment No. 22, See I.2.

²⁴¹ Ibid.

conflict settings is the obligation to provide and ensure reproductive maternal (pre-natal as well as post-natal) and child health care as basic internationally recognised human rights.²⁴² The CEDAW Committee has found that failure to provide services that only women require in order to meet their reproductive health needs amounts to a form of discrimination,²⁴³ and has emphasised that state obligations with respect to these principles of IHRL are non-derogable and continue to apply in conflict settings.²⁴⁴

III.c. Protection under International Refugee Law

The sexual and reproductive rights of refugee populations are recognised within International Refugee Law (IRL). However, refugee populations are particularly vulnerable during times of conflict and face large and very specific barriers²⁴⁵ to accessing fundamental human rights, including sexual and reproductive rights. Once accorded the status of refugee, an individual's basic human rights are theoretically protected under the jurisdiction of the state which has conceded refuge.

IRL outlines a series of basic obligations to protect women and girls affected by conflict.²⁴⁶ The 1951 Refugee Convention, for example, protects the fundamental human rights of refugees, including education, employment and access to justice.²⁴⁷ As part of the ICPD, states recognised that refugee women and girls are entitled to equal treatment as nationals with

²⁴² CESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12) 11 August 2000, see para. 43; CESCR, General Comment No. 3, The nature of States Parties' obligations (Art. 2, Para. 1) 14 December 1990, see para. 10.

²⁴³ CEDAW Committee, General Recommendation No. 24: Article 12 of the Convention (Women and Health), paras. 17, 26. UN Doc. A/54/38/Rev.1 (1999)

²⁴⁴ CEDAW Committee, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 (16 December 2010), para. 11, CEDAW/C/GC/28; CEDAW General Recommendation No. 30, para. 4.

²⁴⁵ Among these, economic and linguistic barriers take precedence. Different cultural or religious practices also inform different understandings of human rights, to whom they apply and how they should be accessed. Due to the transitory nature of asylum seekers or internally displaced persons in particular, access to fundamental human rights such as health care is further complicated.

²⁴⁶ See Convention relating to the Status of Refugees, Geneva, 29 July 1951, 189 U.N.T.S. 137, entered into force 22 April 1954, hereinafter '1951 Refugee Convention'; Protocol relating to the Status of Refugees, New York, 31 Jan. 1967, 606 U.N.T.S. 267, entered into force 4 Oct. 1967; United Nations High Commissioner for Refugees (UNHCR), *Handbook for Protection of Women and Girls*, 2008, <http://www.unhcr.org/en-us/protection/women/47cfa9fe2/unhcr-handbook-protection-women-girls-first-edition-complete-publication.html>

²⁴⁷ 1951 Refugee Convention, arts. 13, 16, 22.

regard to public relief and assistance.²⁴⁸ UNHCR, for its part, notes that every refugee should have access to medical care.²⁴⁹

These levels of protection do not necessarily transpire in practice, and adequate application of basic human rights, including sexual and reproductive rights, is far from the truth for asylum seekers who, as the term suggests, seek but have not been accorded refugee status. In this vein, the Committee for Economic, Social and Cultural Rights in its General Comment No. 22 (2016), recognises that refugees, stateless persons, asylum seekers and undocumented migrants, among others, represent groups with specific needs that require states to take particular steps in enabling access to their rights to sexual and reproductive health.²⁵⁰ Over 100 million people worldwide are in need of humanitarian assistance, of them an estimated 26 million are displaced women and girls of reproductive age.²⁵¹ Women and girls affected by conflict include civilians and combatants, internally displaced persons, refugees, and asylum seekers.

The Inter-Agency Working Group on Reproductive Health for Refugees (IAWG) was formed in 1995 to determine standards for reproductive health care for refugees and others affected by conflict. In 1999, the IAWG published an Inter-Agency Field Manual on Reproductive Health in Refugee Situations, revised in 2010. The Manual affirms the right of all people, including those living in humanitarian settings, to reproductive health, and considers the best way to guarantee reproductive health services meet the needs of the affected population to be through involvement of the community in every phase of the development of those services.²⁵² A further revised version of the Inter-Agency Field Manual was released in 2018.

²⁴⁸ ICPD, Programme of Action *Op. cit.*, para. 10.25.

²⁴⁹ UNHCR, Refugee Protection: A guide to international refugee protection and building state asylum seekers. Handbook for Parliamentarians No. 27, 2017. See pp. 45-9.

²⁵⁰ See CESCR, General Comment No. 22, para. 31.

²⁵¹ UNFPA, Shelter from the storm, State of world population 2015. A transformative agenda for women and girls in a crisis-prone world. Available at <https://www.unfpa.org/swop-2015>

²⁵² Inter-Agency Working Group on Reproductive Health in Crises, Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings, 2010 Revision for Field Review. See p. 1. The group comprised of academic institutions, governmental and non-governmental organisations, and UN agencies. The Manual addresses key components of reproductive health in emergency settings, including safe motherhood, family planning, management of complications arising from spontaneous or unsafe abortion, sexual violence, sexually transmitted infections including HIV/AIDS, and elimination of the practice of female genital mutilation. It identifies a Minimum Initial Service Package, outlining action to be taken at the early stage of an emergency to respond to the reproductive health needs of a population. Among the measures identified are prevention of excess neonatal mortality, and maternal mortality and morbidity. Available at www.who.int/reproductivehealth/publications/emergencies/field_manual_rh_humanitarian_settings.pdf?ua=1

Among the key revisions it includes is explicit incorporation of safe abortion care into the chapter on the Minimum Initial Service Package.²⁵³

A further important development in terms of inter-agency guidance on the subject is the Reproductive Health Response in Conflict Consortium,²⁵⁴ regarding four technical areas of sexual and reproductive health: safe motherhood including emergency obstetrics, family planning, sexually transmitted infections including HIV/AIDS, and gender-based violence. The UNFPA Humanitarian Action 2019 Overview also offers important insights and recommendations regarding sexual and reproductive rights and health and a response to gender-based violence in some of today's most vulnerable settings.²⁵⁵

In refugee populations, access to maternal and reproductive health services varies and is contextually dependent. There are contexts in which maternal morbidity and mortality has been documented as considerably lower than in the host population given the special care accorded to refugees.²⁵⁶ In other situations, health outcomes may be extremely poor. In any case, a multi-sectoral response is required involving the health sector, water and sanitation, nutrition, housing, and education, among others. However, these practices are still not custom in most emergencies.

The CEDAW Committee has reaffirmed the right of refugee or asylum seeker women “to be granted, without discrimination, the right to (...) health care and other support (...) appropriate to their particular needs as women.”²⁵⁷ This affirms that, at least in theory, obligations under IHL and IHRL, notwithstanding some exceptional circumstances,²⁵⁸ are

²⁵³ Inter-Agency Working Group on Reproductive Health in Crises, 2018 Inter-Agency Field Manual on Reproductive Health in Humanitarian Settings, available <http://iawg.net/wp-content/uploads/2019/01/2018-inter-agency-field-manual.pdf>

For a discussion of its details and merits, see Angel M. Foster, Dabney P. Evans, Melissa Garcia, Sarah Knaster, Sandra Krause, Therese McGinn, Sarah Rich, Meera Shah, Hannah Tappis and Erin Wheeler, ‘The 2018 Inter-agency field manual on reproductive health in humanitarian settings: revising the global standards,’ pp. 18-24, in *Reproductive Health Matters*, Vol. 25, 2017, Issue 51: Humanitarian Crises: advancing sexual and reproductive health and rights.

²⁵⁴ Reproductive Health Response in Conflict Consortium, formerly Reproductive health for Refugees Consortium. 2003. Available at https://www.womensrefugeecommission.org/images/zdocs/rh_eval.pdf

²⁵⁵ These include Syria, Yemen, Nigeria, Iraq, Turkey, DRC, Sudan, Bangladesh, Ethiopia and South Sudan. See UNFPA, Humanitarian Action 2019 Overview. Available https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_HumanitAction_2019_PDF_Online_Version_16_Jan_2019.pdf

²⁵⁶ See M. Hynes, O. Sakani, P. Spiegel, and N. Cornier, ‘A study of refugee maternal mortality in 10 countries, 2008-2010,’ in *International Perspective on Sexual and Reproductive health*, 38(4), pp. 205-213, December 2012.

²⁵⁷ CEDAW Committee, General Recommendation No. 32, paras. 33-34.

²⁵⁸ CEDAW Committee, General Recommendation No. 30, para. 22; CESCR, General Comment 20, para. 30.

applicable to all within a given state's territory, regardless of their status as citizens, that is, including refugees and asylum seekers.²⁵⁹

III.d. Protection within the framework of Internally Displaced Persons

Among the most vulnerable women in conflict settings are those within internally displaced populations. Although a recognised category, internally displaced persons (IDPs) do not fall under the protection of a branch of law specific to their existence or particular needs. Aspects of their needs are covered by IHL and IHRL. Nevertheless, services to internally displaced populations are especially poor, and often inexistent. Where, in some circumstances, refugee populations receive health care and services they otherwise would not through, for instance, humanitarian intervention, women within internally displaced populations who lack refugee status face the inherently weak systems of their own state, the potential continuation of hostilities in the territory they reside in, and often the conditions of remote and underserved locations to which they have fled,²⁶⁰ isolated from their own communities.

Disruption of access to reproductive health services in such settings poses severely negative consequences for individuals as well as for communities and entire populations. Sexual and reproductive rights in this frame also comprise a collective concern.²⁶¹ Lack of adequate nutrition and housing among internally displaced women further contribute to such problems.²⁶²

Although unprotected by a specific branch of law, internally displaced women have the same sexual and reproductive rights as all other women in line with IHL and IHRL, yet they

²⁵⁹ CEDAW Committee, General Comment No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 12, UN Doc. CEDAW/C/GC/28 (2010); also CEDAW Committee, General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, para. 7, UN Doc. CEDAW/C/GC/32 (2014).

²⁶⁰ Judy Austin, Samantha Guy, Louise Lee-Jones, Therese McGinn and Jennifer Schlecht, 'Reproductive health: A right for refugees and internally displaced persons,' pp. 10-21 in *Reproductive Health Matters*, Vol. 16, 2008, Issue 31: Conflict and Crisis Settings.

²⁶¹ This is so because it requires collective action in order to mobilise reproductive rights in social settings, see for example Mandira Paul, Brigitta Essen, Salla Sariola, Sharad Iyengar, Sunita Soni, and Marie Klingberg Allvin, 'Negotiating collective and individual agency: A qualitative study of young women's reproductive health in rural India, in *Sage Qualitative Health Research*, pp. 311-324, Vol. 27(3), 27 February, 2017. And it also rings true in so far as the collective value of investing in reproductive rights benefits not only the individual woman but society at large in terms of health, education, economic development, and other concerns.

²⁶² Armed conflicts affect maternal and reproductive health primarily due to a deterioration of state structures, including the health care system. This is further exacerbated by poor access to clean water, sanitation and by under- and malnutrition. See Primus Che Chi, *Impact of armed conflict on maternal and reproductive health in sub-Saharan Africa*, unpublished PhD thesis, Faculty of Medicine, University of Oslo (2016), p. 7.

also have particular needs which must be contextualised within, and met under, special circumstances. Additional to the health services outlined above, women in conflict settings have a right to be free from all forms of violence and coercion. The risk of intimate partner violence, and rape in times of “peace” as well as war prevails.

As seen, the subject of rape as a weapon of war has been given particular attention in the literature,²⁶³ and the right to reparation for victims has been articulated.²⁶⁴ The importance of this subject is undeniable. However, that reparation is owed to women who have suffered morbidity or mortality by consequence of violations of their reproductive rights remains to be sufficiently articulated. Its articulation would, this thesis argues, support a wider understanding of conflict-related sexual violence and its consequences. Consideration of the inclusion of reproductive violence in reparative measures would better comprehend victims’ experiences of violence and right to redress in relation to IHL, IHRL and IRL, as well as provide a fundamental aspect of transitional justice without which no consideration of development can unfold.

IV. Protection as a precept for the obligation of reparation

As seen in the previous section, protection of sexual and reproductive rights, as distinct yet closely related, is considered an obligation of states under IHRL and an obligation of state and non-state actors under IHL. Protection is also given weight in relation to refugee and internally displaced populations. In synthesis, this closing section considers who may be called responsible for violations, why this may or may not be of import for reparations, and why it should comprise a development concern.

²⁶³ See Inter-Agency Standing Committee Task Force on Gender and Humanitarian Assistance, *Guidelines for gender-based violence interventions in humanitarian settings, Focusing on prevention of and response to sexual violence in emergencies*. Geneva: September 2005. Available at www.unhcr.org/453492294.pdf; United Nations High Commissioner for Refugees, *Sexual and gender-based violence against refugees, returnees and internally displaced persons*, May 2003. Available at https://www.unicef.org/emerg/files/gl_sgbv03.pdf.

²⁶⁴ See, for example, Guidance Note of the Secretary-General of the United Nations, *Reparations for conflict-related sexual violence*, June 2014.

IV.a. Regarding obligations of individual perpetrators

Individual perpetrators of crimes of CRSRV should be held accountable. There exist concrete frameworks under international criminal law (ICL),²⁶⁵ to aid in the trial and prosecution of individuals. However, justice for victims in general and for victims of CRSRV especially is not always easy to obtain under such mechanisms. Difficulties arise, regarding the latter, from the secrecy with which such violence is perpetrated, the silence imposed on victims which prevents them from speaking out for fear of retribution, the lack or destruction of physical evidence of such crimes,²⁶⁶ and cultures of impunity which often continue into transitional periods.

Notwithstanding such difficulties, lack of will to prosecute or the inability of individual perpetrators to pay some form of compensation should never result in absence of reparation for victims. Transitional justice programmes, including administrative reparations and other developmental concerns, can help to counterbalance impunity in this regard. Where reparation for victims is unobtainable by any other means, the obligation to redress falls to the state as the institution which bears primary responsibility for protection of human rights under its jurisdiction.

IV.b. Regarding obligations of states

State obligations to protect the human rights of citizens under IHRL are equally applicable in times of conflict as they are in peace, and are operational on complementary levels to IHL obligations. Protection of sexual and reproductive rights, including accountability for sexual and reproductive violence, are crucial in these settings not only to effective humanitarian

²⁶⁵ Refer to mandate of the ICC which deals specifically with the obligation of individual perpetrators to redress victims. See Rome Statute of the International Criminal Court, Art. 75. A/CONF.183/9. See also Clara Sandoval and Miriam Puttick, *Reparations for the victims of conflict in Iraq: Lessons learned from comparative practice*, *Op. cit.*

²⁶⁶ See Chapter 5 of this thesis, sec. V.c., pp. 19-20, for a discussion on kinds of evidence needed for framing acts of sexual or reproductive violence as crimes, including medical or DNA tests, or testimonies of victims and witnesses. There are, however, less likely to be witnesses to such violence, and victims will – for complex reasons – be less willing to speak out. Similarly, it is less likely that there will exist a “paper trail” of such crimes, as well as the possibility of any evidence which does or did exist having been destroyed intentionally or unintentionally during hostilities. Therefore, in reference to conflict-related sexual and reproductive violence, a lower standard of proof than would normally be required to prosecute crimes of a different nature is necessary.

responses but also to the fulfilment of fundamental human rights and humanitarian law obligations.²⁶⁷

Although the General Comment No. 22 of the CESCR discussed in this chapter does not draw an explicit link between sexual and reproductive violence and conflict, it does recognise violations of sexual and reproductive rights. In doing so, the Committee first details what it perceives to constitute violations,²⁶⁸ and in its final paragraph addresses the need for remedies. The Committee recognises that perpetrators may arise under “direct action of States or other entities insufficiently regulated by States.”²⁶⁹ The state therefore may be considered responsible, either directly or indirectly, and held accountable for violations. The Committee considers also that, “States must ensure that all individuals have access to justice and to a meaningful and effective remedy in instances where the right to sexual and reproductive health is violated.”²⁷⁰ Access to justice is hindered by prevailing inequalities. Underlying economic, social, cultural or political conditions surrounding discrimination against women in the exercise of their sexual and reproductive rights, overrules any theoretical representation and protection of these rights.

Fathalla remarks that, “Inequalities in health are a fact of life. Inequalities in health become unequitable when they are unfair.”²⁷¹ Inequalities become unfair when they derive from preventable or changeable factors, differential availability and access to healthcare services and differential treatment or exposure to risk factors. Equity means provision of equal healthcare services for all those with equivalent needs, and provision of more enhanced services for those with greater needs.²⁷²

²⁶⁷ Center for Reproductive Rights, Briefing Paper. *Ensuring sexual and reproductive health and rights of women and girls affected by conflict*. New York, 2017. See p. 6.

²⁶⁸ CESCR, General Comment No. 22 (2016), see Section V. Violations, paras. 54-63. Violations, by act or omission, include failure to enact and enforce relevant laws, failure to ensure formal and substantive equality in the enjoyment of the right to sexual and reproductive health, State interference with an individual’s freedom to control his or her own body and the ability to make free, informed and responsible decisions in this regard. Instances of violation include legal barriers to impede access to sexual and reproductive health services, criminalisation of abortion or of consensual sexual activity between adults. Also noted are withholding or misrepresenting information related to sexual and reproductive health, and coercive or forced medical interventions, such as enforced sterilisation, virginity or pregnancy tests.

²⁶⁹ Ibid., para. 54.

²⁷⁰ Ibid., Section VI. Remedies, para. 64.

²⁷¹ Mahmoud Fathalla, ‘Towards a woman-friendly healthcare system,’ p. 27. Egon and Ann Diczfalusy Foundation Meeting, Szeged, Hungary, November 10, 2009. Available at <http://www.figo.org/sites/default/files/uploads/PublicationsandResourcesFathallafiles/A/6%20Towards%20a%20woman%20friendly%20healthcare%20system.pdf>

²⁷² See D Brown, A Donini, and P Knox Clarke, Engagement of crisis-affected people in humanitarian action. Background Paper of ALNAP’s 29th Annual Meeting, 11-12 March 2014, Addis Ababa. London: ALNAP/ODI.

A state is responsible for human rights violations to have occurred within its jurisdiction, by act or omission.²⁷³ In many cases, the state may be directly responsible for such violence, but even where it is not it should be held accountable for failing to prevent, investigate or punish such violence. For example, a recent Inter-American Court of Human Rights judgment against Venezuela found the Venezuelan State responsible “because of its gross omissions” for “failing to prevent, investigate or punish extreme violence against a young woman who was kidnapped, raped and tortured in 2001.”²⁷⁴ The Court, in this case, ruled the state guilty of acquiescence and so responsible for violence committed by a non-state actor. Though the case applies solely to Venezuela, it sets a historic precedent for assumption of state responsibility and ensuing compensation for victims.²⁷⁵

When a state fails either by intention, misconduct, or negligence, in its role to extend protection to citizens, or others including refugees or asylum seekers within its territory, obligations relating to the protection of human rights shift to the international community which must then offer humanitarian assistance.

IV.c. Regarding collective obligations in light of humanitarian assistance

Collective obligations to condemn and redress violations commonly refer to the role of the international community. Under this framework, humanitarian assistance in its diverse forms provides a concrete response to urgent situations. Humanitarian assistance should be politically neutral, although this does not mean it should not voice opposition to hostilities which endanger civilian populations. It does not provide long term reparation, but can extend immediate redress to victims and their families in conflict zones or other humanitarian crises. In addition to state obligations, humanitarian assistance plays an important role in ensuring the provision of basic services and goods in times of conflict, and reversing or alleviating some the effects of violations.²⁷⁶ This role should be complementary to that of states, however, in given circumstances, the humanitarian imperative of protection of civilians may contradict state

²⁷³ See United Nations General Assembly, Human Rights Council, The role of prevention in the promotion and protection of human rights. A/HRC/30/20.

²⁷⁴ See Al Jazeera, ‘Venezuelan rape-survivor-turned-lawyer finally gets justice,’ 17 November 2018. Available <https://www.aljazeera.com/news/2018/11/venezuela-rape-survivor-turned-lawyer-finally-justice-181117000627036.html>

²⁷⁵ Ibid.

²⁷⁶ Both IHL and IHRL recognise a key role for humanitarian organisations. IHL, in particular, obligates parties to a conflict, and third states, to facilitate passage of humanitarian relief to civilians in need.

policy or practice. This becomes a necessary contradiction in instances in which state practice may forgo certain international standards or norms in armed conflicts to the effect of violation of civilian human rights.

Humanitarian funding, programmes and policies must be driven by, beneficial to, and accountable to the individuals directly affected by them. Further to the scarcity of funds for sexual and reproductive services for women and girls in conflict settings, those denied by omission resulting in restricted or denied access to services, and those women or girls who face mortality or morbidity by consequence, as well as their relatives, seldom find themselves in circumstances favourable to seeking justice and remedies for the violations experienced. Violations of sexual and reproductive rights suffered by intentional act face compounded stigma and silence. In this vein, the humanitarian imperative also asserts a right to the truth. The OHCHR has expressed:

To ensure that programs are accessible to the most vulnerable requires agencies and donors to monitor and collect data disaggregated on a number of different grounds, including, but not limited to, gender, age, ethnicity, religion, and geographic location.²⁷⁷

The collection or destruction of information is another, yet inextricably related, area in which state practice may be uncomplimentary to humanitarian imperative. Without recognition or recording of rights violations, no form of reparation can be imagined or enacted. Therefore, the right to the truth, as will be discussed further in the following chapters of this thesis, comprises an indispensable and foundational aspect of reparation.

Closing, The cost of silence at the expense of reparation

The theoretical grounds of sexual and reproductive rights of women and girls, as aspects of their human rights, exist and are protected under various interrelated bodies of law. Protection applies in times of peace and times of conflict, and furthermore entails a series of obligations by which individuals, states, and the international community are bound. However, as evidenced in this chapter, the ways in which these particular rights are recorded and represented

²⁷⁷ OHCHR, *A human rights-based approach to data: Leaving no one behind in the 2030 development agenda* 6-7 (Feb. 19, 2016). Available <http://www.ohchr.org/Documents/Issues/HRIndicators/GuidanceNoteonApproachtoData.pdf>

in theory is fundamental to their practical protection. One important problem identified is absence of explicit recognition of the violation of reproductive rights, despite limited representation of reproductive rights in discourse. Adequate framing of the rights, including the terminology used to describe them, in literature on the subject and in legal discourse is subject to practices of discrimination on the grounds of sex, economic status and complexities related to refugee or asylum seekers. Evidence of the practice of discrimination in light of sexual and reproductive rights in times of conflict provides two important references: firstly, it obstructs theoretical protection; secondly, it actively serves in the practice of violations. There is significant reference to the principle of non-discrimination in relation to protection of sexual rights for women and girls. Given that discrimination is a direct cause of silence, protection of the principle of non-discrimination could help to displace the methods of silence involved in the perpetration of CRSRV by deconstructing and destabilising the grounds on which it is practised. However, in order to raise the practical status of sexual and reproductive rights to human rights and therefore explicitly frame these rights as able to be violated, the scope of sexual violence comprehended by the Committee on Economic, Social and Cultural Rights in its General Comment No. 22 (2016), among other internal UN documents, and understandings of the wider international community must be extended to explicitly include reproductive violence. Explicit reference to armed conflict or other forms of oppression within these documents is also necessary to address the use of sexual and reproductive violence as weapons of war, to reflect the experience of victims, contest the discrimination which characterises their experience, and to appropriately contextualise means of justice and reparation.

In this sense, the representation of CRSRV, the terminology used in its description, and the recording of violations holds great potential to protect sexual and reproductive rights of women and girls in times of conflict, but inadequate application perpetuates and reinforces the methods of silencing its perpetration depends on. Wider readings and explications of sexual and reproductive rights would consolidate alternative interpretations of CRSRV, lead to better representations of violations, and ultimately lend more appropriate forms of reparation. This explication is also precedent to and part of processes of truth which are necessary to dispel the silence involved in practices of CRSRV. The cost of an absence of reparation for victims of CRSRV, or the practice of its silencing, will far exceed the cost of its recognition and inclusion within reparative measures. This is essentially the ‘silence’ that will speak.

Chapter 6

Reparations for human rights violations: The responsibility of perpetrators, but the right of victims

Introduction

A review of grave human rights violations perpetrated against women and girls in times of conflict leads to the subject of CRSRV. This is not a review which can disregard the call for reparations. This chapter, therefore, heeds that call and examines the subject, nature, and scope of the right to reparation for victims of human rights violations. It does so, mostly, by broad consideration of the subject of reparations in order to outline the concept and, to a lesser extent, intermittently, by direct relation to practises of CRSRV in order to exact to some degree the scope and scale of the right as owed to this kind of victim. This chapter departs from an analysis of the concept of reparations as derived of their legal origins. But it extends this analysis to transitional justice and development frameworks, in order to contextualise the practice of reparations within transitional times and in the aftermath of armed conflicts or violent pasts. The concept of development in an exclusive pursuit of progress can be seen to compromise the integrity of reparations, a constant reference of which is historical injustice. However, for all practical intents and purposes, location of reparations within a development frame could also hold an important, and potentially transformative, promise for victims, although only where victims remain central to processes of justice. Given that the defining purpose of the thesis is commitment to a victim-centred perspective in reparations, the idea that the responsibility to enact reparation resides with perpetrators is held up against the right of victims to reparation, and is held under the role of protection which states, the international community, and practices of rights-based development in transitional periods must extend.

I. The case for a victim-centred perspective

The conviction that victims must remain central to practices of repair can be traced, as already seen, to Bassiouni, who argues that legislation in international law has been largely conflict-centric. He proposes a shift to a victim-centred perspective.

The final paragraph of the United Nations 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 similarly states a commitment to “adopting a victim-oriented perspective,”²⁷⁸ the intentions of which lie with provisions of justice and reparation owed to victims; that is, the victim remains an object of reparation. However, little or no reference is made to provisions for hearing victims or enabling their participation as “subjects” in processes of justice or reparation, including those which might involve truth telling mechanisms. This is of greater concern, though, to the argument of the following chapter which looks at the right to the truth. The Basic Principles and Guidelines do, nevertheless, make clear the need for privileging the rights of the victim over the obligation to prosecute perpetrators. Para 9 provides that:

A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and victim.²⁷⁹

The concept of reparation in International Human Rights Law and International Humanitarian Law comprises an internationally recognised right for victims of armed conflict,²⁸⁰ and intersects with many other commitments of the international community. However, a shift to a

²⁷⁸ United Nations General Assembly, 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. 21 March 2006. ARES/60/147. Hereinafter referred to as ‘Basic Principles and Guidelines’.

²⁷⁹ *Ibid.*, para. 9.

²⁸⁰ See, for example, the right to reparation enshrined within numerous international human rights instruments, in particular Art. 8 of the Universal Declaration of Human Rights, Art. 2 of the International Covenant on Civil and Political Rights, Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 14 of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Art. 39 of the Convention on the Rights of the Child. Within International Humanitarian Law, the right is found in Art. 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), Art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Protocol I), and Arts. 68 and 75 of the Rome Statute of the International Criminal Court.

victim-centred perspective would require redefinition of international crimes so they become dependent on the victim's suffering rather than on the nature of the conflict or context of violations. The specificities of whether victim abuse has occurred in an international or domestic setting, or, for example, as a result of police brutality outside of conflict would in a legal analysis be secondary to the importance, Bassiouni advises, of the issue of torture framed from the victim's perspective.²⁸¹ Many overlapping sources of law apply to this victimisation, and it is useful to recall a statement already referenced in the Introduction to this thesis made by Bassiouni in this regard,

From a purely legal perspective, victims' fate and the punishment of violators vary and depend on whether lawyers apply international human rights law, international humanitarian law, international criminal law or domestic criminal law. Such distinctions are of little significance to victims in their quest for redress.²⁸²

The precept established within this statement is that the experience of the victim must be read antecedent to and interpreted as having greater weight than the context or event in which the violation occurred. From this perspective, the representation of the victim, of the violation, and even of the period of history to which they pertain is framed by the vernacular and is, therefore, observant of a different form of justice, one not commonly framed or protected by law but nonetheless deserving or requiring of the law's protection.

II. Justice by any other name

Two principal traditions have consolidated meanings of reparation and the significance of reparation as an internationally recognised right. The first derives from juridical origins, and the second from a transitional justice perspective. A discussion of both reveals differences in meaning of the term reparations as it is applied in diverse contexts and to different subjects. However, it also identifies a commonality underlying the different interpretations; that is, a common conception of its substance directed toward a common finality of justice. In its most basic interpretation, reparation signifies return to an original state. This "return", or *restitutio in integrum*, to the victim's circumstances as they existed prior to harm poses a practical

²⁸¹ Cherif Bassiouni, 'International Recognition of Victims' Rights,' *Op. cit.*, p. 204.

²⁸² *Ibid.*, p. 205.

impossibility. Yet, further to the literal limitations it imposes, it is centred on the terms and contracts of justice which reparation enacts. Ultimately, reparation should always be proportional to the gravity of the violations and injury incurred. Prior to examining how it does this, we need to delve into the origins of the term reparation itself.

II.a. As derived of juridical justice

Within a juridical framework, reparation signifies redress of an injury or amends for a wrong inflicted.²⁸³ The term establishes a set of normative conditions of redress for application within international law and national jurisdictions, usually in relation to individuals. Pablo de Greiff concedes that “if there is such a thing as a ‘common’ or ordinary understanding of reparations, it is heavily influenced by a ‘juridical’ understanding of the term.”²⁸⁴ The principle of redress is furthermore a basic principle of law. As discussed below, the development and consolidation of the juridical concept of reparations has varied within different branches of law. The primary task for this section is to outline exactly what these differences entail under specific branches of international law and contend their shifting practices with the common end of emending justice.

International Humanitarian Law does not recognise a victim without an accompanying recognition of a remedy or redress owed to the victim. That is, the existence of the victim as a legal identity is accompanied by the right to reparation; or, in other words the right to reparation is conditional on recognition of the victim.²⁸⁵ Although, in contemporary international law, emphasis lies on individual rights and responsibilities, this was not always custom. International law by tradition is based on the principle of sovereignty developed between states, and thus its interests originally unfolded at state level rather than in relation to individuals. The occurrence of interactions between individuals and compensation awarded to individual victims derive from the original framework of inter-state relations. As Vattel expressed in the late 1700s, “Quiconque maltraite un citoyen offense indirectement l’état qui doit protéger ce citoyen.”²⁸⁶ This expresses the rationale informing the established principle of redress in

²⁸³ See The Law Dictionary, ‘Reparation,’ available at <https://thelawdictionary.org/reparation/>

²⁸⁴ Pablo de Greiff, ‘Justice and Reparations,’ in *The Handbook of Reparations*, pp. 451-477, edited by Pablo de Greiff. Oxford: Oxford University Press, The International Centre for Transitional Justice, 2006. See p. 451.

²⁸⁵ Basic Principles and Guidelines, *Op. cit.*

²⁸⁶ Vattel, *Le Droit des gens, Principes de la loi naturelle appliquée à la conduite des affaires des nations souverains* (1773) at 289. “Whomsoever mistreats a citizen indirectly offends the State that should protect this citizen.” My translation. Cited in C. Bassiouni, ‘International Recognition of Victims’ Rights,’ *Op. cit.*, p. 212.

international law signifying that breach of an international obligation imposes on states a duty to cease and to redress the harm suffered by another state.²⁸⁷

The past sixty years, however, have elaborated links between jurisprudence, treaty law and customary law to the effect of affirming the right of the individual against the state,²⁸⁸ and essentially individuals as subjects of the right to reparation in order to redress, primarily, violations of rights protected by international human rights law or international humanitarian law. Post-war Germany provided an initial case for a controversial evolution of international law regarding reparation, which saw a shift from inter-state reparations, to reparations owed by society or individual perpetrators to certain sectors of society or individual victims.²⁸⁹ The shift to recognising individual victims as recipients of reparation derives from the atrocities committed during WWII, and ultimately formed a response to the situation of the Jewish people, made stateless, and the promise and foundation of, additional to monetary compensation, the State of Israel.²⁹⁰

Early international human rights treaties did not explicitly enshrine the right to reparation. Within the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, implicit in the obligation of States Parties to “provide an effective remedy for rights violations,”²⁹¹ lies the provision of compensation.²⁹² Although the right of individuals to obtain reparation for injury as a result of violations does not comprise a strict norm within these frameworks, the treaties do establish a general obligation on the part of states to provide adequate and effective remedies for violations. The right to reparation falls under this obligation, and has, by certain bodies, been interpreted as an explicit obligation in and of itself.²⁹³ The UN Human Rights Committee in its General Comment No. 31 (80) on the International Covenant on Civil and Political Rights, has, in this regard, outlined the intrinsic

²⁸⁷ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, Art. 1. Vol. II (Part two). General Assembly Resolution 56/83, 12 December 2001. Corrected by document A/56/49(Vol. I)/Corr.4.

²⁸⁸ C Bassiouni, *Op. cit.*, pp. 457-73, and pp. 580-94.

²⁸⁹ Richard M. Buxbaum, ‘A legal history of international reparations,’ pp. 314-346, in *Berkeley Journal of International Law*, Vol. 23:2, 2005. See p. 314. This initial pre-World War II practice of reparations as a payment by the vanquished State to the victorious one comprised one of many elements that were part of peace negotiations.

²⁹⁰ *Ibid.*, p. 341.

²⁹¹ UN General Assembly, International Covenant on Civil and Political Rights, Art. 2; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, Art. 2, para. 3.

²⁹² UN General Assembly, International Covenant on Economic, Social and Cultural Rights, see Art. 9, para. 5, and Art. 14, para. 6.

²⁹³ UN Human Rights Committee, General Comment No. 31 (80) on the International Covenant on Civil and Political Rights, The nature of the general legal obligation imposed on States Parties to the Covenant, adopted 29 March 2004. CCPR/C/21/Rev.1/Add.13

relationship between an effective remedy and reparation, stating that the integrity of the former is compromised in absence of the latter:

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.²⁹⁴

More recently, the right to reparation has been applied to the right of victims to redress in relation to violations of International Human Rights Law and International Humanitarian Law under armed conflicts or in contexts of repression. Two General Assembly resolutions have provided a framework: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,²⁹⁵ and the 2006 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.²⁹⁶ The UN International Convention for the Protection of All Persons from Enforced Disappearances also incorporates the right to reparation, outlining that, “Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.”²⁹⁷

Responses to human rights violations, however, should transcend redress in a purely juridical sense and seek to restore, or create, some sense of a political order which recognises a common history of violence and provides adequate reparation to victims. The political project that reparations uphold, further to their juridical origins, is found with further clarity in contexts of transitional justice to which we now turn.

²⁹⁴ Ibid. The Comment continues, in Art. 16, that “The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”

²⁹⁵ United Nations General Assembly. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. 29 November 1985. A/RES/40/34 Available <http://www.un.org/documents/ga/res/40/a40r034.htm>

²⁹⁶ UN Basic Principles and Guidelines, *Op. cit.*

²⁹⁷ United Nations Committee on Enforced Disappearances, International Convention for the Protection of All Persons from Enforced Disappearances. Drafted 29 June 2006, entered into force 23 December 2010. See Art. 24.4. Available <https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx>

II.b. As derived of transitional justice

Reparations derived of transitional justice apply specifically to contexts in which countries are emerging from periods of conflict or political repression. Transitional justice thus refers to the methods these countries adopt, including but not limited to reparation, to address legacies of large scale or systematic human rights violations “so numerous and so serious that the normal justice system will not be able to provide an adequate response.”²⁹⁸

Transitional justice, as defined by the United Nations, corresponds to the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”²⁹⁹ It consists of juridical, judicial and non-judicial measures rooted in accountability and redress for victims by recognising their dignity as citizens and human beings.³⁰⁰ Reparations within a transitional justice frame are not necessarily alternative to juridical reparations, but complementary to them.

What is problematic about a juridical understanding of reparations is, states de Greiff, not its juridical nature *per se* but the fact “it is an understanding that has been developed, for good reasons, with an eye to the resolution of relatively isolated cases,”³⁰¹ and in relation to individuals. The juridical origins of the right to reparation may shed light on how justice is conceded in individual cases, but a broader look into its application in transitional contexts will extend the idea and put its normative strength to the test beyond interactions exchanged between, and injury done to, individuals. The individual is not intended to lose value in a transitional frame; however, the victim’s injury becomes part of a collective violence and is contextualised within a historical and political frame. In this vein, de Greiff affirms that reparations in transitional periods seek to constitute or reconstitute a political community and are therefore best conceived as a political project.³⁰² The constitution of a new political community is in essence the understanding of a transition, as it is also in diverse forms the application of justice to the transition.

Although reparations in a transitional frame may be guided or monitored by the international community, as a political project they should essentially remain the product and

²⁹⁸ See International Center for Transitional Justice (ICTJ), ‘What is transitional justice?’ Available at <https://www.ictj.org/about/transitional-justice>

²⁹⁹ UN Secretary-General, Report, ‘The rule of law and transitional justice in conflict and post-conflict societies,’ 2004. See para 8. S/2004/616. Available <https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>

³⁰⁰ ICTJ, ‘What is transitional justice,’ *Op. cit.*

³⁰¹ Pablo de Greiff, *Op. cit.*, p. 451.

³⁰² *Ibid.*, p. 454.

responsibility of a national jurisdiction. Reparative measures enacted within transitional periods share with juridical reparations a common conception of justice and the objective of restoring victims to the closest approximation of their original state, but they are defined by a transition from political repression or a conflict to a post-conflict era and purport to resolve collective as opposed to individual cases. This does not mean individual victims will not benefit from transitional justice; rather, reparations here address in some form the root causes of the conflict or political upheaval which led to the widespread, and therefore collective, violations in the first instance.

The reference or requisite of a “transition” can be so simple as a question of whether an opportunity has presented itself to address massive violations, however limited this opportunity may be.³⁰³ Similarly, such an opportunity may be present within restricted sectors of society before it emerges in the nation as a whole, and may not necessarily extend to a national project, since the political, social, and legal conditions in a country will dictate the nature and scope of measures and the timing of their application.³⁰⁴

A common application of reparations within a transitional frame takes the form of administrative reparations programmes. Although administrative reparations programmes may contain juridical elements, they essentially refer to an out-of-court process employed by states “to provide reparation to massive numbers of victims of gross violations of international human rights law and/or serious violations of international humanitarian law.”³⁰⁵ In this frame, reparations can be ordered by national or international courts especially established for the purpose, against a state, or another liable entity, or against individual perpetrators of the crime. Prosecution, however, is not indispensable to administrative reparations. The primordial concern is recognition of the harm suffered, without its subordination to a criminal trial and other concomitant elements such as determining criminal responsibility of the perpetrator, which makes administrative reparations more accessible than traditional courts and juridical reparations, and thus potentially more inclusive. By virtue of this inclusivity, they also tend to be more victim centred.

Read thus, transitional justice represents a broader conception of reparation than a juridical definition, incorporating legal, political, social, economic, and historical elements, among others. The term reparations in transitional justice comprises a series of different yet

³⁰³ ICTJ, ‘What is transitional justice,’ *Op. cit.*

³⁰⁴ *Ibid.*

³⁰⁵ Ban Ki Moon, Guidance Note of the Secretary-General, Reparations for Conflict-related Sexual Violence, p. 6. United Nations, June 2014. Henceforth referred to as ‘Reparations for Conflict-related Sexual Violence.’

interrelated measures aimed at procuring justice, including access to justice for victims in the aftermath of violations,³⁰⁶ protection of women and marginalised groups and ensuring them a role in the reconstruction of a just and democratic post-conflict society, respect for the rule of law and (re-)establishing confidence in state institutions, accountability for rights violations, criminal trials and prosecutions, processes of reconciliation, historical justice in the form of truth commissions, and reparations.³⁰⁷

In concrete terms, transitional measures of reparation comprise of restitution, compensation, rehabilitation, and satisfaction and guarantees of non-recurrence. Pablo de Greiff considers that “far from being isolated pieces, these ‘mechanisms’ should be thought of as parts of a whole.”³⁰⁸ Here, it is useful to consider some of the details each of the measures consists of.

Restitution refers to the most basic principle of reparations; that is *restitutio in integrum*, also return to the *status quo ante*,³⁰⁹ or the victim’s original condition prior to the violation of rights which altered it. Various means are employed to achieve restitution, each of which is essentially symbolic in nature since return to an original state poses a practical impossibility. The most proximate measures taken in this regard attempt to reinstate, in varied senses, the human rights of victims and their rights as citizens in relation to their national provenance. However, both the former and latter can in some circumstances pose further threat to victims since recognition of certain minority groups as citizens has historically provided impetus for conflict. For instance, the status of the Rohingya community as a stateless people, unrecognised by the government of Myanmar although they have maintained a presence in this territory for generations, has meant they have been denied not only rights which recognised citizens of Myanmar enjoy, but also practical protection in light of basic internationally recognised human rights. A similar situation applies to the Hazara community of Afghanistan,³¹⁰ as it does to Palestinians within Israeli occupied territories. The right to citizenship, restoration of freedom of movement, and return to one’s origins, including to property or land, are important in the context of restitution; but this reparative measure further extends to work and other forms of

³⁰⁶ The provision of legal aid is a necessary aspect of access to justice, for all victims, and especially for victims of conflict-related sexual violence who may be among the most vulnerable in terms of economic and social resources, not least when they are women and girls. See UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, principle 4. A/RES/67/187.

³⁰⁷ ICTJ, ‘What is transitional justice,’ *Op. cit.*

³⁰⁸ Pablo de Greiff, ‘Theorizing Transitional Justice,’ pp. 31-77, in *Transitional Justice: Nomos LI*, edited by Jon Elster, Rosemary Nagy and Melissa S. Williams. New York, New York University Press, 2012. See p. 31.

³⁰⁹ Pablo de Greiff, ‘Justice and Reparations,’ *Op. cit.*, p. 452.

³¹⁰ Although an officially recognised minority under the new Constitution, Hazaras continue to face persecution, discrimination, and rights violations within Afghan society.

economic support. Land restitution has provided a common form of reparation given its link to the generation of income, with many countries establishing transitional programs centred on return of land or property. This also illustrates the interrelated nature of reparations, coinciding specifically with satisfaction and historical justice, as unequal access to land and its concentration have traditionally been sources of conflict in diverse contexts. Nevertheless, armed conflicts create conditions for further displacement in which return, even within policies of land restitution, is not always possible. In Colombia, forced displacement as a consequence of the internal armed conflict is most prevalent around territories rich in resources. In such a climate, demands for land restitution are often resolved by assassination.³¹¹ Javier Giraldo considers this measure one part of a triple-alternative imposed by the paramilitary: “Work with us, leave, or die.”³¹² When land falls into possession of armed groups, the guerrilla or paramilitary forces, it invites dispossession, appropriation, and illegal property transactions, further imperilling objectives of restoring the rule of law and democratic practice in a transitional frame. In post-conflict Sri Lanka, land restitution policies have evolved within complex government plans on the use and management of land, posing questions around how issues of land, human rights, and rule of law relate to transitional justice and whether key principles of governance would be disregarded in the aim of fulfilling economic development.³¹³

Compensation as a form of reparation seeks to quantify harms suffered to cover victims for loss, and is thus a form of material reparation. However, quantification of loss also extends beyond material or economic understandings of harm to encompass physical and mental harm, as well as moral injury. Monetary reparations offer an inadequate response to loss of lives or land, yet financial assistance is necessary in the reconstruction of individual lives, communities, or nations. Although transitional measures are not isolated but interrelated, governments have tended to believe different measures can be traded off against each other,³¹⁴ in which case a cash payment may be seen to cover multiple senses of justice. Bass warns that in post-conflict societies, it is “politically necessary to provide some tokenistic measure of justice or reparation in order to mollify the victims enough that they will participate in the

³¹¹ Semana, Nación, ‘Lo que piensa Alejandro Reyes sobre la restitución de tierras,’ 29 March 2012. Available <http://www.semana.com/nacion/articulo/lo-piensa-alejandro-reyes-sobre-restitucion-tierras/255651-3>

³¹² Javier Giraldo, Seminario Internacional, ‘Colombia: Conflicto y derecho internacional humanitario,’ p. 11. Madrid, Ediciones GPS, 2009. My translation.

³¹³ Bahvani Fonseka and Mirak Raheem, *Land in the Eastern Province: Politics, Policy and Conflict*, p. 13. Colombo, Centre for Policy Alternatives, 2010.

³¹⁴ Pablo de Greiff, ‘Theorizing Transitional Justice,’ *Op. cit.*, p. 36.

normal political life of their country and their region.”³¹⁵ Aspects of compensation can transcend payments and encompass rebuilding peace in order to provide secure working conditions. Lemaitre and Vargas argue, for example, that the Development Plan of the Santos government (2010-2014) in Colombia had as a central component the generation of income for victims of forced displacement and, therefore, made explicit the connection between reparations and poverty alleviation.³¹⁶

Rehabilitation of victims is realised through measures which provide social, psychological, and medical services. The provision of legal services is also considered to aid in processes of rehabilitation. The precept of rehabilitation as a form of reparation emerges from the 1985 UN Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT). Article 14 provides that “each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”³¹⁷

Satisfaction implicates fulfilment of the measures considered necessary in a given case of reparation, to the effect that victims are satisfied, and the procedures of reparations undertaken can be understood to have reached their ultimate objective and conclusion. Satisfaction should lead to guarantees of non-recurrence, or non-repetition, which is a particularly broad category.

Guarantees of non-recurrence, also referred to as non-repetition, are heavily reliant on exposure of rights violations, prosecution of perpetrators, truth telling and a common conception of the truth surrounding a violent past.³¹⁸ The right to the truth in itself provides an essential reference for each of the aforementioned transitional justice measures. As with the concept of reparations, the truth with respect to past rights violations can manifest in legal or non-legal interpretations. The legal truth serves an important role in criminal tribunals as an objective which can lead to establishment of guilt or innocence of the accused and prosecution; in this sense, Yasmin Naqvi considers the legal truth as “merely a by-product of a dispute

³¹⁵ Gary J. Bass, ‘Reparations as a noble lie,’ pp. 166-179, in *Transitional Justice: Nomos LI*, edited by Jon Elster, Rosemary Nagy and Melissa S. Williams. New York, New York University Press, 2012. See p. 167.

³¹⁶ Lemaitre Ripoll, J. & Vargas Gómez, J. ‘En búsqueda de una vida digna, Organizaciones de base de mujeres desplazadas en Colombia,’ pp. 47-93, in Lemaitre, Bergtora & Vargas, *Organización comunitaria y derechos humanos: La movilización legal de las mujeres desplazadas en Colombia*. Bogotá, Universidad de Los Andes, 2014. See p. 87.

³¹⁷ United Nations General Assembly, Treaty Series, Convention Against Torture and Other Cruel, Inhumane or degrading Treatment or Punishment, art. 14.

³¹⁸ See Alexander Mayer-Rieckh, ‘Guarantees of non-recurrence: An approximation,’ pp. 416-448, in *Human Rights Quarterly*, Vol. 39, No. 2, May 2017.

settlement mechanism.”³¹⁹ Applied in non-legal settings, the purposes and effects of the truth are arguably more comprehensive. Here, its significance extends to processes of national reconciliation, restoration and maintenance of peace, satisfaction of victims’ needs and rights, and reaffirmation of the principle of legality.³²⁰ Non-repetition may mean, in the first instance, cessation of violations, but it also implicates verification of facts, procurement and disclosure of the truth, official apologies, or efforts to identify and locate the disappeared or dead, and other measures realised to the extent which similar atrocities are prevented from recurring in the future. In some cases, one of these measures in isolation may be sufficient to attain satisfaction; other cases may require application of plural and simultaneous measures. In many cases, judicial rulings may provide a needed or desired accompaniment. A judicial process would lead to restoration of the victim’s dignity and reputation and might extend to sanctions for perpetrators of crimes specifically and reconstruction of the legal and public order generally, known as institutional reform. The task of transitional justice, and judicial mechanisms, is to make tangible the right to the truth through comprehensive measures to ensure that violations are discontinued and not repeated, and redressed to the greatest degree possible.

At times, countries adopt parallel transitional mechanisms, one aimed at prosecutions, the other at a narrative of the past or the truth surrounding violations. Vermeule notes, with respect to justice, that “reparations proposals are no more than roughly just, but that is chronically true of the ordinary legal system, as well.”³²¹ Pablo de Greiff reflects on the importance of reparations within transitional justice in recognising victims and protecting their right to reparation, stating they should “refer to measures that provide benefits to victims directly.”³²² As seen, administrative reparations seek to uphold this promise. However, this form of reparation should not preclude victims from obtaining other forms of reparations. Both juridical and administrative reparations as transitional justice measures should be available to victims as part of their right to reparation. The viability of both, however, is diminished without reference to the responsibility of perpetrators.

³¹⁹ Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’ *Op. cit.*, p. 246.

³²⁰ *Ibid.*

³²¹ Adrian Vermeule, ‘Reparations as Rough Justice,’ pp. 151-165, in *Transitional Justice: Nomos LI*, edited by Jon Elster, Rosemary Nagy and Melissa S. Williams. New York, New York University Press, 2012. See p. 152.

³²² Pablo de Greiff, ‘Justice and Reparations,’ *Op. cit.*, p. 453.

II.c. As applied to the responsibility of perpetrators

The responsibility of perpetrators is examined, in relation to violations of International Human Rights Law and International Humanitarian Law, under International Criminal Law. The obligation to provide reparation is recognised under International Criminal Law in the Rome Statute of the International Criminal Court (ICC), in which Article 75 outlines the right of victims of international crimes under jurisdiction of the court, expressly crimes against humanity, war crimes, genocide and aggression, to reparation.³²³ The right recognised therein refers to three forms of reparation, including restitution, compensation, and rehabilitation. The jurisdiction of the ICC is, however, limited to reparations owed to victims by perpetrators, not owed by states or non-state armed actors.³²⁴

The ICC Trust Fund for Victims, on the other hand, notes that redress should involve multiple forms of reparation and be guided by their potential to be transformative.³²⁵ This would appear to uphold a victim-centred perspective insofar as the notion of a transformation should disrupt pre-existing patriarchal and cultural hierarchies within which victims experience violations, and offset effects of violations, thus contextualising this aspect of repair within the responsibility of perpetrators to cease harm, and initiate and maintain change.

Despite the emphasis on prosecution of perpetrators in juridical contexts, an underlying principle of reparations in any framework establishes that they be provided by a state for acts or omissions attributable to it which are found to violate its obligations under international human rights law or international humanitarian law.³²⁶ Such a provision does not intend to absolve perpetrators of individual criminal responsibility, but rather protects the right of victims to reparation in the absence of prosecutions or in the event that individual perpetrators, legal persons or other responsible entities, are unable or unwilling to provide reparation. In such cases, the right of victims to reparation should not accede to absence of prosecution of perpetrators but, rather, should fall to the state.³²⁷

³²³ Rome Statute of the International Criminal Court, Art. 75. A/CONF.183/9, 17 July 1998, entered into force 1 July 2002. Available https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

³²⁴ Clara Sandoval and Miriam Puttick, *Reparations for the victims of conflict in Iraq: Lessons learned from comparative practice*. Ceasefire Centre for Civilian Rights and Minority Rights Group International, November 2017. Available at <http://minorityrights.org/wp-content/uploads/2017/11/Reparations-in-Iraq-Ceasefire-November-2017.pdf>

³²⁵ ICC, Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, Prosecutor v. Thomas Lubanga Dyilo, paras. 49-66. ICC-01/04-01/06-2872, 25 April 2012.

³²⁶ See Reparations for Conflict-related Sexual Violence, *Op. cit.*, p. 4.

³²⁷ See Basic Principles and Guidelines, *Op. cit.*, principles 15 and 16.

II.d. As applied to reparation for victims

The role of the state in upholding the right of victims to reparation, in absence of prosecution and the entailing responsibility which would befall perpetrators, is of utmost importance in ensuring access to justice for victims. The state, in this regard, should take into account the immense barriers many victims face in their pursuit of justice or redress. Victims of conflict-related violence in any form are often more likely to have been among the most vulnerable prior to a conflict and will therefore, potentially have considerably lower levels of education and economic resources to initiate or sustain processes involved in speaking out against violence and obtaining reparation.

This is particularly so for victims of CRSRV, especially those who are women and girls. In addition to the barriers outlined above, and compounded with the devastating physical, psychological, and social effects of such violence, the stigma attached to it very often prevents victims from seeking or obtaining redress.³²⁸ Victims tend, voluntarily or involuntarily, not to disclose the facts surrounding such abuses for fear of being abandoned or further victimised by their families, community, or political community. They, as individuals, as well as their children, partners or other family members, face situations which can result in consequential destitution. In such contexts, states must not only uphold the right of victims to reparation, but facilitate truth telling mechanisms, and become sensitised to the gender-based nature of the need for specific kinds of reparation,³²⁹ for, as has been discussed, redress is not a single, isolated or prescribed act, but a series of different, complementary, simultaneous, and interrelated forms of reparation.

III. Forms of reparation

The literature demarcates four different yet interrelated forms of reparation. These are symbolic, material, individual, and collective reparations, which are not exclusive but complementary. In fact, in order to achieve integral reparation, it is imperative to enact multiple forms of reparation either in succession or simultaneously. Whatever its form, a reparative

³²⁸ Reparations for Conflict-related Sexual Violence, *Op. cit.*, p. 5.

³²⁹ See Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation. United Nations, 21 March 2007.

measure should be proportionate to the gravity of the harm suffered by direct and indirect consequences of the violation and victims should remain the central reference to its process.

III.a. Symbolic reparation

All reparations are symbolic in the sense that they can never completely reverse rights violations or the injury suffered by victims. Reparations, whether juridical or administrative, and the symbolism they enact refer to the recovery of aspects of memory in adherence to historical justice. “Reparations should not be understood as an isolated solution” to past atrocities, there is also a need to acknowledge responsibility and preserve historical memory,³³⁰ which is linked to symbolism and often the concept of collective reparations. Symbolic reparations intended for specific collectives of victims aim to redress collective violations of rights and preserve a sense of collective memory. They can include measures conceived of as sites of memory, such as museums, displays of public art, or monuments. These are not necessarily entirely innocuous but ask, whose memory, which truth is represented?

In Iraqi Kurdistan, for instance, a monument was constructed in memory of victims of the Anfal campaign conducted by Saddam Hussein. In 1988, the Iraqi government committed the crime of genocide against the Kurdish population in the town of Halabja and surrounding Kurdish villages. The campaign included summary executions, disappearances and widespread use of chemical weapons killing thousands, mainly women and children. Some 2,000 villages were destroyed, described in official documents of the government who committed the crimes as having been burned, demolished and purified.³³¹ The overlord of the Kurdish genocide, Ali Hassan al-Majid, was an Iraqi politician, spy chief and military commander under Saddam Hussein. He was, in addition to this high ranking profile, first cousin to the President. He came to be known, in Iraq, as “Chemical Ali” for his repeated use of outlawed chemical warfare. Al-Majid deployed security and civilian apparatus of the Iraqi State “to solve the Kurdish problem and slaughter the saboteurs.”³³² On 25 January, 2010, al-Majid was executed for crimes against humanity following a trial for genocide, in the country’s highest profile execution since the hanging of Saddam Hussein three years earlier.³³³ A memorial was later constructed at the site

³³⁰ ICTJ, *The Rabat Report, The Concept and Challenges of Collective Reparations*, Report, 2009, p. 41.

³³¹ Human Rights Watch, ‘The Anfal Campaign: Introduction,’ available <https://www.hrw.org/reports/1993/iraqanfal/ANFALINT.htm>

³³² Ibid. In the words of al-Majid.

³³³ The Guardian, ‘Iraq executes Chemical Ali,’ January 25, 2010. Available <https://www.theguardian.com/world/2010/jan/25/chemical-ali-execution-iraq-kurd>

of the killings in memory of the victims. On March 2004, however, the 18th anniversary of the gas attack, hundreds of members of the local Kurdish community vandalised the memorial and set fire to it, arguing that Kurdish leaders had exploited Halabja for political ends. In their view, although the community was without electricity or running water, the government had adequate resources to erect a monument there; funds from foreign donors during a time of transition from the Saddam Hussein regime had not translated into better schools, roads, or basic living needs.³³⁴ Reparations in this instance had remained largely symbolic, and held little restorative and seemingly no transformative effects.

On April 15 1994, in Rwanda, Ntamara Church, considered sacred and safe, was converted into a massacre ground. There, some 5,000 Tutsi civilians who had taken refuge in the church during the first weeks of the genocide were massacred by Hutu paramilitaries. The priest is said to have orchestrated the series of events leading to the massacre, and to have handed the civilians over to the paramilitaries.³³⁵ Over the course of around 100 days, an estimated 800,000 Tutsis were killed. The church is now a memorial site, stacked with remains of the victims; skulls, bones, and clothes line the interior of the structure in symbolic memory of the crime.

Although not technically framed as reparation, in a similar symbolic gesture the old prison of Valparaíso, Chile, in use until 1994, has been converted into a cultural centre. Parque Cultural Ex-Cárcel houses an art gallery and makes available at no cost its former cells for local art, theatre or music projects under the auspices of the regional government. The aesthetic structure of the prison cells and history of torture and suffering resonate from within the building as sources of memory and identity. As a cultural centre, it is transformed into a public space of collective and anonymous property,³³⁶ thereby displacing and reversing a previous authoritarian power.

Additional to their symbolism and reference to historical justice, each of these examples demonstrates either that reparations have performed, or should have performed, a transformative task. The question which arises now is to what extent such transformation holds in mind the experience of victims, and indeed whether the objective and consequence of reparation should invariably be *restitutio in integrum*, when the prior state was often one of

³³⁴ Dawn, 'Anger boils in Halabja, the 'town of martyrs,' 9 April 2006. Available <http://www.dawn.com/news/208819/anger-boils-in-halabja-the>

³³⁵ Al Jazeera, 'Remembering Rwanda's Genocide,' 1.7.2012. Available <http://www.aljazeera.com/indepth/features/2012/07/20127113823416137.html>

³³⁶ Laura Jordán, 'La Cárcel y el parque: la transformación de la Ex-Cárcel de Valparaíso en Centro Cultural,' *Bifurcaciones Revista de estudios culturales urbanos*, 6(2006).

marginalisation and repression.³³⁷ In none of the instances discussed above would a return to the *status quo ante* have provided an adequate response to violations. Application of the term in practice would have translated into return to undesirable circumstances which had laid the foundations for violations in the first place. Where a transformation occurs in response to violation, it has also raised a challenge to the status quo. Symbolism runs the risk of remaining purely symbolic, but it also contains the possibility of memorialising a violent past and restoring a sense of dignity, collective and individual, thereby transforming aspects of the past, present and future. Its practical application should, however, be complemented with material reparative measures.

III.b. Material reparation

Material reparation commonly refers to compensation in the form of monetary reparations. As seen, compensation originally occurred as a transaction between sovereign states, but is in contemporary custom awarded to individual or collective victims as a means of remedying violations. Material reparations, however, should not be simplified to purely monetary terms; they seek to compensate victims in proportion to the harm suffered. Compensation therefore comprehends material and moral damages. If a person loses their land or property as a result of a violation, they are entitled to compensation not only for economic assets, but also for physical, mental or psychological damages suffered by consequence, comprehensive of loss of wages (since land provides a livelihood), medical expenses and rehabilitation, damages to reputation or dignity, and legal aid in the undertaking of these processes.

Compensation in the form of monetary payment, however, has the potential to bring with it certain risks of further victimisation. In a transitional Guatemala, for instance, men were ineligible for reparations of sexual violence since rape was defined as an act perpetrated by a man against a woman.³³⁸ Further, in an example of how reparations should not be delivered, female victims in Guatemala were given monetary compensation in the form of cheques which bore a message stating that the recipient was a victim of sexual violence.³³⁹ Awarding large

³³⁷ ICTJ, *The Rabat Report*, *Op. cit.*, p. 52.

³³⁸ See Paz y Paz Bailey, 'Guatemala: Gender and reparations for human rights violations,' pp. 106-7, in *What happened to the women? Gender and reparations for human rights violations*. Edited by Ruth Rubio-Marín. International Center for Transitional Justice, The Social Science Research Council, 2006.

³³⁹ The Guardian, 'Sexual violence in war: women must get reparations, says head of UN Women,' June 2014. Available at <https://www.theguardian.com/global-development/2014/jun/11/ending-sexual-violence-conflict-summit-reparations-un-women-mlambo-ngcuka>

sums of money can also potentially create rifts among communities and other social orders and could thus renew prior patterns of mistrust and violence. In South Africa, one-off compensation payments of thousands of dollars meant for female victims were deposited into bank accounts of male relatives or spouses since women were less likely to have their own accounts.³⁴⁰

Although not always possible, a common financial source of reparations is the handing over of assets by perpetrators. The relationship between the extent of corruption in a country and that same country's human rights record is mutually reinforcing.³⁴¹ The International Criminal Court's Trust Fund for Victims (ICC-TFV) operates on the basis that transitional justice measures are strengthened by confronting impunity and establishing a framework of accountability for corruption and economic crimes, and thereby rechannels funds for reparations to victims.³⁴²

Contrarily, some countries have refused to contribute to reparations payments believing it may be perceived as accepting accountability.³⁴³ Italy, on the other hand, agreed to pay Libya a sum of five billion dollars by way of reparations for colonial injustices in order to amend their 32 year-long occupation of Libyan territory ending in 1943. Silvio Berlusconi, then prime minister of Italy, called the act "a material and emotional recognition of the mistakes that our country has done to yours during the colonial era."³⁴⁴ Yet, the "friendship treaty" agreed on the reparations in return for greater Libyan co-operation in preventing illegal migration to Italy.³⁴⁵ The Italy-Libya treaty is presently inoperative and suspended.

Foreign donors typically fund international development projects but not usually reparations, influenced in part by controversy over what role the international community should play in the context of a sovereign state's transitional justice measures, including reparations programmes. One opinion asserts that reparations should be state funded as it is essentially the responsibility of individual states³⁴⁶ to offer redress for human rights violations

³⁴⁰ Ibid.

³⁴¹ Ruben Carranza, 'Plunder and pain: Should transitional justice engage with corruption and economic crimes?' pp. 310-330, in *The International Journal of Transitional Justice*, Vol. 2, 2008. Oxford University Press. See p. 311.

³⁴² Ibid.

³⁴³ France, for example, refused in 2013 to pay reparations to Haiti for the role of the state-owned CDC bank in the slave trade, see The Local, 'France refuses to pay slavery reparations,' available <https://www.thelocal.fr/20130510/france-refuses-to-pay-slavery-reparations>. Similarly, the United States has refused on numerous occasions to pay different forms of compensation to descendants of African slaves, see Peter Flaherty and John Carlisle, Monograph, *The case against slave reparations*. National Legal and Policy Center, 2004. Available www.nlpc.org

³⁴⁴ New York Times, 'Italy Agrees to \$5 Billion Libya Reparations,' 31.8.2008 http://www.nytimes.com/2008/08/31/world/africa/31libya.html?_r=0

³⁴⁵ BBC, 'Italy and Silvio Berlusconi face Libya Dilemma,' 1.3.2011 <http://www.bbc.com/news/world-europe-12612405>

³⁴⁶ ICTJ, *The Rabat Report*, Op. cit., p. 57.

which have occurred in their own jurisdictions. This could differ in contexts where states are underdeveloped or in great debt. For instance, Ghana leveraged its status as a HIPC under the World Bank and IMF programmes³⁴⁷ to allocate to reparations what would have been used for repayments in foreign debt.

Foreign donors should not take ownership over reparations programmes they might fund; programmes should seek to be victim centred, participatory, and involve local communities. Such involvement does however involve complex relationships and cultural nuances. International cooperation and assistance in this vein should not substitute the role that states must play in addressing past wrongs and enacting reparations. States must acknowledge and take responsibility for violations, as well as open space for dialogue with victims.

There is, in principle, no conflict between material and symbolic reparations. All material forms of compensation or reparations are also symbolic. No amount of money can return the loss of a limb, it cannot return the dead or disappeared, the loss of health, sanity, or memory.

III.c. Collective reparation

Differences between reparations for collective victims and reparations for individuals reflect, to a degree, differences seen in the cultures of juridical reparations and transitional justice discussed earlier. Where juridical reparation provides a mechanism to address individual and isolated cases of rights violations, transitional justice provides a framework to confront a legacy of large scale and widespread human rights violations against collectives, such as entire nations or specific communities or groups within national jurisdictions, and usually with historic prevalence. Within collectives, however, individual victims also merit recognition. Individual versus collective reparations touch on who is considered a victim and who a perpetrator in light of responsibility and accountability. But we begin with a discussion on the ways in which symbolic and material forms of reparation think through how this responsibility may be enacted and what it should involve.

From this context arise two important questions. Firstly, how can the conception of justice as an objective of reparations from its juridical origins that serve individual cases translate to enacting justice collectively? Secondly, is the primary criterion for collective

³⁴⁷ HIPC stands for a Heavily Indebted Poor Country, of which there are currently 37, as of 2019), and which are eligible for special assistance from the International Monetary Fund (IMF) and the World Bank.

reparations a collective identity? If so, what does this identity consist of and how should it be described?

Although not necessary, a collective identity often derives from common geographical ties. The fundamental condition, with respect to reparation, is an identity formed by certain violations or experiences which result in a collective memory. Pierre Nora imagines that through its creation, a *lieu de memoire* will “have become a symbolic element of the memorial heritage of any community.”³⁴⁸

A collective identity will usually exist prior to such experiences. However, its formation may also result consequentially, or be reinforced by consequence. Victims of CRSRV provide an important example. Where rape has been used as a weapon of war, for instance, victims will comprise a collective consequentially, by virtue of the violation, although they will probably also have belonged to the same community prior to it. Specific communities of women are often targeted for wartime sexual violence precisely because of their common identity, such as ethnic or religious provenance, or political affiliation. The rape of an estimated 75,000 women of predominantly Muslim minority communities in the 1947 Partition of India in order to shame and contaminate pure “Muslim” identities through the impregnation of women is illustrative; the so called “rape camps” established by Serb forces for the intended violation of Bosnian Muslim women as gender-based and ethnic violence in the 1990s; more recently, the rape of Syrian women and girls, also men and boys in some instances, as a weapon of war by the Assad regime and by members of opposition groups; sexual slavery against Yazidi women and girls with the rise of ISIL, and so on.

The collective identities formed consequential to violent histories pose serious problems to the premise of return to an original state as an element or objective of reparation: if victims are to be “returned”, their very existence – the foundations of their collective identity as an historical subject – would be undone in the process. In this instance, the desired outcome may be reparations which reverse some, not all, of the effects of the violation. An example would be the case of the comfort women of South Korea whose demand manifested first and foremost in recognition of a wrong, followed by an official apology, and compensation in the form of monetary reparation.³⁴⁹ The possibilities of the scope of reparation in such contexts are also referent on time, for instance, what is the historicity of the violation, how long ago did

³⁴⁸ See Pierre Nora, ‘Between memory and history: Les lieux de mémoire,’ pp. 7-24, in *Representations*, No. 26. Special Issue: Memory and Counter-Memory. Spring, 1989.

³⁴⁹ See UN OHCHR, Japan / S. Korea: “The long awaited apology to ‘comfort women’ victims is yet to come” – UN rights experts. Available <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17209&LangID=E>

it occur, what has changed contextually (politically, socially, economically, emotionally) since. All these factors will determine the form and scope of reparation which can be enacted.

In the hope of advancing accordance on a more conceptual understanding of collective reparations, a conference on the theme was organised in Rabat, January 2009, between the International Center for Transitional Justice (ICTJ) and the Moroccan Human Rights Council. It was attended by governments and victims' advocates of seven countries in the process of implementing or planning collective reparations programmes.³⁵⁰

The conference distinguished two principal approaches which inform the theory and method of collective reparations. The first departs from the concept of a common or shared history as what binds a group of victims. In theory, this approach recognises that "groups may be bound by a common identity, experience or form of violation."³⁵¹ A court can then apply a very practical method in ordering collective reparations. This is applied by identification of victims as collectives rooted in common circumstances, for instance, common location or geographical origin of victims, common ethnic, cultural or religious identities, common indicators in measuring the extent of harm or impact of violations suffered. Regarding practical implementation, common identity could rest on experiences of destruction or displacement of rural or indigenous communities, gender-based violence, testimonies of survivors of massacres, efforts undertaken with the aim of memorialisation of the dead or disappeared, or civilian organisations made targets of crime.

The second approach perceives collective reparations as a means to simplifying delivery of reparations in various contexts that pose certain practical limitations. This extends to circumstances "when concern exists about distinguishing between classes of victims or between victims and non-victim groups."³⁵² In a similar vein to the first approach, this method prioritises the importance of a common identity which would bind a group and essentially legitimise its collective nature. Here, though, the purpose is to avoid a potentially disruptive effect on individual reparations, particularly when they might consist of compensatory measures in the form of money, and thus further divide an already fragile social fabric as discussed above regarding material forms of reparation.

In many countries where reparations are delivered collectively to communities as a whole, there exists a danger that they may end up benefiting perpetrators as well as victims.³⁵³

³⁵⁰ These were Colombia, Peru, Indonesia – Aceh, Timor-Leste, Liberia, Sierra Leone, and Morocco.

³⁵¹ The Rabat Report, *Op. cit.*, p. 10.

³⁵² Ibid. With reference to Lisa Magarrell, *Reparations in Theory and Practice*, pp. 5-6. International Center for Transitional Justice, 2007.

³⁵³ Ibid., p. 11.

Transitional justice contexts are layered and complex; in some instances, distinctions may not be so easily drawn, and perpetrators of certain crimes could be victims of other rights violations to have occurred in the framework of the same conflict. There may be a reason not to differentiate between perpetrators and victims in a way that excludes the former, for instance in the case of child soldiers or offenders. Emphasis should, where possible, fall on “integration of communities,” with a process that provides ex-combatants space to show remorse,³⁵⁴ though balanced with and never at the expense of protection of victims’ rights.

Collective reparations can furthermore be seen as a way to redress poor economic conditions as a result of conflict or state repression, or redress for the denial of public services. This transcends the notion of reparations addressing human rights violations and touches on the idea of a collective victim as having experienced neglect by the state. Ultimately, reparation is owed for violation by act or omission.

The state as an institution with certain duties before its citizens illustrates a conceptual dilemma of the point where reparations and development meet.³⁵⁵ It presents complex practical challenges. Collective reparations appear attractive where reparations have to compete with other state obligations, such as upholding fundamental human rights enshrined in a political Constitution or initiating development programmes. In this sense, they can comprise a strategy for not providing individual reparations.

Victims in contexts of poverty, or comprising part of already socially and economically vulnerable groups, invariably suffer disproportionately during conflicts in comparison to other groups. They may be further victimised, whether as deliberate targets of armed groups or indiscriminately harmed by conflict. The demands of these victims in post-conflict periods may comprehend reparations as a way to secure basic elements of survival, such as housing, food, health care, or means of livelihood. In this sense, reparations, or at least victims’ expectations of reparations, intersect with the right to development and a state’s duty to fulfil the most basic needs of its citizens.³⁵⁶ Addressing the lack of such basic rights can of course also address the root causes of a conflict. In relation to international human rights declarations, these needs furthermore comprise rights, and while they benefit communities, they also benefit individuals in a general sense. In this frame, collective and individual are complementary.

³⁵⁴ Ibid., p. 41.

³⁵⁵ Ibid., p.10.

³⁵⁶ Ibid., p. 9.

III.d. Individual reparation

Although collective reparations are complementary to individual reparations, they tend to serve different purposes. Under no circumstance can the former provide a substitute for the latter.³⁵⁷ Reparations for isolated cases between individuals enforced through a court, especially a criminal court, are limited in that they offer selective coverage of the past,³⁵⁸ set against a primarily juridical conception of the events. Strictly speaking, in international law, the resolution of isolated cases of rights abuses consists of seeking redress for harms suffered by victims as a consequence of the actions of perpetrators of crimes and the effects of the crimes.

The collective nature of reparations is important in establishing some truth of the general context, nevertheless this thesis maintains the imperative of recognising violations perpetrated by individuals against individual victims. This is especially important for victims of CRSRV. Given the nature of such violations and the stigma surrounding them, women are often blamed for the abuse they suffer as individual injury. The shame inflicted furthermore extends to collective shame suffered by her family, and sometimes her community. Thus, while it is important in a transitional frame to recognise the collective suffering and historical context in which violations occur, it is of utmost importance that, complementary to such processes, juridical reparations ensure adequate punishment for individual perpetrators but protect first and foremost the right of individual victims to reparations.

IV. Development and transformation

Reparations provide a response to human rights violations and historical wrongs. There has been a tendency in transitional contexts to frame reparations, a right owed to victims to redress violations, as development projects. This final section argues that the task of upholding fundamental human rights of citizens should not be subsumed within development policy or practice. However, it also cautions that neither should reparations be limited in their intent to address historical wrongs (*restitutio in integrum*), but should open a dialogue with respect to

³⁵⁷ See para. 32, which states with respect to reparation that “collective measures do not exclude the individual right to redress.” UN Committee Against Torture (CAT), General Comment No. 3, 2012: Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. Implementation of article 14 by States parties, 13 December 2012.

³⁵⁸ Ruben Carranza cited in ICTJ News, ‘After guilty verdicts in Khmer Rouge tribunal, broader struggle for accountability continues in Cambodia,’ 21.8.2014. Available <https://www.ictj.org/news/verdict-khmer-rouge-tribunal-struggle-accountability-cambodia>

redress and reform structural injustices and should, ultimately, be conceived of as transformative, and in this vein concomitant to and coexistent with development concerns.

IV.a. Return to an original state vs transformative interpretations of justice

The objective of reparations, as seen, has been described as a return to an original state.³⁵⁹ For victims, this poses a practical impossibility and the potential to inflict further injury in the provision of redress for the initial harm. As put by Ban Ki Moon, “Reparations should strive to be transformative, including in design, implementation and impact.”³⁶⁰ This suggests that methods of reparation should look not only to the past as an aspect of historical justice, but also to a future which could be interpreted as the possibility of justice. Certeau describes the poetics of approximating a theoretical future,

The future is no longer the object of scientific discourse; it is only marked by *current choices* for which discourse states the urgency or the opportunity. The future is an empty place that the prospective opens up on the basis of three current references: what is objectively *plausible*, what is subjectively *imaginable*, and what *can really be decided*. Essential to the prospective being mapped out are a practice of *difference* and a referral to *decisions* recognized as possible. Here we note two connected forms of an irreducible alterity: that of the future that remains unpredictable since it is different, and that of choices enacted today within a society. Through these characteristics, the new futurology cuts loose from the securities tied to the scientific positivism of the past. It recognizes its limits.³⁶¹

Within this statement lie the contradictions inherent in positing reparations at a crossroads between two temporal markers: a past where the violation occurred, and a future where justice becomes the tangible result of redress for the violation. As seen earlier in the chapter, a “transition” comprises the necessary conditions for this process to unfold. Within transitional justice, questions arise around how to ensure that reparations are not subsumed by development policies or humanitarian aid, and that they are seen, first and foremost, as a response to human rights violations.

³⁵⁹ See De Grieff, ‘Justice and Reparations,’ *Op. cit.*

³⁶⁰ UN, ‘Reparations for Conflict-related Sexual Violence,’ *Op. cit.*, p. 1.

³⁶¹ Michel de Certeau, *Culture in the Plural*. Translated by Tom Conley; Introduced by Luce Giard. Minnesota, University of Minnesota Press, 1997. See p. 126, original emphasis.

IV.b. Demarcations of justice

In the first instance, some necessary distinctions must be made regarding the respective objectives of reparations and development as each comprises an element of transitional justice. Simply put, reparations comprise an immediate response or a short-term agenda though they may face delay or may be delivered over a long period. Development represents a long-term agenda.³⁶² Although reparations should have long lasting, and as is argued here transformative, effects on the rights, lives, and histories of victims, they occur, as acts, within a time limit. Reparations should also help to return a state to a more conventional approach to development.³⁶³

The International Centre for Transitional Justice considers the importance of “getting interventions right,”³⁶⁴ in reference to the temporal, historical and contextual constraints which determine the scale of justice that can be applied. For instance,

It will sometimes be prudent not to try to do too many things at the same time. Clearly it will be in the interests of some to seek to use these factors as a way to delay justice measures forever. The ‘art’ of transitional justice is balancing the pursuit of justice in the face of resistance and the risk linked to fragility.³⁶⁵

A part of this pursuit of justice rests on accounts of the historicity of violations. It may be necessary, for example, to employ immediate responses of a temporary or limited duration in order to redress and alleviate harm in need of urgent repair and to “avoid irreparable harm.”³⁶⁶ This may be the case for victims of CRSRV who have experienced violations which pose a grave threat to their rights to, *inter alia*, health and life. In the ‘art’ of such measures applied within transitional justice, the victim must remain central to the process, with or without accompanying prosecution of perpetrators, or commitment of perpetrators to enact reparation.

³⁶² Expressed by a participant at the 2009 Conference on the Concept and Challenges of Collective Reparations, *The Rabat Report*, *Op. cit.*, see p. 49.

³⁶³ *Ibid.*

³⁶⁴ See ICTJ, ‘What is transitional justice?’ *Op. cit.*

³⁶⁵ *Ibid.*

³⁶⁶ UN, ‘Reparations for Conflict-related Sexual Violence,’ *Op. cit.*, p. 1.

IV.c. The victim ad core

The existence of and relationship between victims and perpetrators are, in many senses, inextricable yet the rights of the victim should remain at the core of reparations, even where this means they preside over prosecution of perpetrators. Absence of prosecution may complicate enactment of certain aspects of reparation, but should not preclude reparation *per se*. If redress for victims were entirely dependent on prosecution of perpetrators, and upon establishment of the legal “truth” surrounding the crime or events which led to the violation, the viability and significance of reparations would be diminished.

As seen, the right to the truth comprises a preventative measure as it intersects with guarantees of non-repetition. By exposing violent pasts, it is hoped that we learn from history and do not repeat the same mistakes. But the right to the truth also contains a reparative measure in itself. In this vein, it should provide a method by which to protect the right of victims to reparation by hearing them testify on human rights violations. Furthermore, forms and acts of testimony should be diverse and broad. The establishment of alternative versions of the truth in such a framework not only seeks to restore to some degree the dignity of the victim, but should also extend a platform upon which to claim reparation by providing evidence of violations. In this vein, it represents both a return to an original state and a transformation. The right to the truth as reparation would also strengthen a return to or the establishment of a democratic society in transitional settings, and is therefore both antecedent and integral to development.

Conclusion

The right to reparation can be traced to juridical origins, has an integral part in transitional justice and extends to development concerns. Within different interpretations and applications of reparation, the concept upholds a common objective of justice. Very often, this objective has been interpreted as *restitutio in integrum*, or return to an original state, but this chapter has argued that such an ideal of return should not rule out the potential of reparation to transform and reform underlying historical and structural injustices, the existence of which led to violations in the first instance.

Although reparations and development represent separate rights, correlation between them has the potential to strengthen the role of each, especially with regard to enacting

sustainable and transformative reparations since both strive toward societal transformation governed by respect for the rule of law and protection of human rights.³⁶⁷ Where juridical reparations seek to redress individual victims and provide a mechanism for prosecution of individual perpetrators, reparations within a transitional frame refer to a wider reading of the historical and collective context in which violations occurred. Both are important and complementary. Similarly, the different forms of reparation, including symbolic, material, individual and collective, should seek to reinforce redress for violations by virtue of their complementarity.

In processes of enacting reparations, the rights of victims must, at all times, prevail over the responsibility of perpetrators. Not because the latter should be absolved of any responsibility, but because the former cannot be deprived of the right to reparation in the event that it proves impossible to allocate or assume responsibility for violations. States have an obligation to deliver reparations as they have an obligation to address structural problems from a developmental perspective. The two concerns may be closely related as structural injustices frequently lie at the heart of the reasons why conflicts arise, and it is worth noting that, although history will always leave cases in which individual perpetrators may not be held accountable, there will similarly always be victims who remain to be redressed.

With regard to their transformative power, decisions on, and the delivery of, reparations should not reinforce pre-existent or historic patterns of gender based discrimination, but seek to address, redress and reform them. This is especially important for victims of CRSRV due to the great stigma attached to violations perpetrated in particular against women, and the difficulties victims face in speaking out and obtaining a remedy, including reparation. Empirical evidence of the complex relationship between victim and perpetrator, examined subsequently in various contexts in the case studies of this thesis, demonstrates the need for vernacular forms of truth telling and alternative means to repair which are not exclusively reliant on prosecution, or even responsibility, of perpetrators. There are methods of evidence gathering to which perpetrators are not indispensable. These methods privilege the rights of victims without which no transformation and no form of development should prevail. And to all of these alternative means the right to the truth remains integral.

³⁶⁷ Ibid., p. 9.

The right to the truth

In remedy of conflict-related sexual and reproductive violence

Introduction

With the death of former Yugoslav leader, Slobodan Milosevic, the *Milosevic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) was closed and “history” was “deprived of the full truth.”³⁶⁸ Bosnian Muslim leader, Sulejman Tihic, affirmed that, for the “victims, truth and justice, it would have been better if he had lived to the end of the trial.”³⁶⁹ Although the presence of Milosevic inarguably formed an integral element of the proceedings, the closure of the trial subsequent to his death nevertheless suggests, as other similar acts have done,³⁷⁰ that the role of the perpetrator in determining responsibility for violations takes

³⁶⁸ *BBC News*, ‘In quotes: Milosevic death. Former Yugoslav President Slobodan Milosevic has died in the detention centre at the Hague tribunal: Reaction to the news,’ 12 March 2006. Available <http://news.bbc.co.uk/2/hi/europe/4796704.stm#world>

³⁶⁹ Ibid.

³⁷⁰ In the case of Pinochet’s Chile, the ex-leader was arrested for human rights crimes as he awoke from a back operation at The Clinic, a private London hospital on October 16, 1998. Despite recognition of some 35,000 victims, including those who had been subjected to torture, enforced disappearance or extra-judicially killed under his rule, Pinochet was not extradited to Spain for trial, but instead returned home to Chile a free man in 2000 after a controversial medical test which indicated he was not fit to stand trial due to poor health. The idea of international justice was, however, forever altered since upon the day of his return to Chile, dozens of judicial requests began against him. Pinochet’s death effectively meant absence of prosecution as he died a fugitive from justice, but numerous victims have since been granted some compensation. See Amnesty International, ‘How General Pinochet’s detention changed the meaning of justice,’ 16 October 2013. Available: <https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/>; *The Guardian*, ‘Chile identifies 35,000 victims of Pinochet,’ 15 November, 2004. Available <https://www.theguardian.com/world/2004/nov/15/chile.jonathanfranklin> More recently, despite the hopeful precedent set by the case of Chile, victims of the Guatemalan and Salvadorian civil wars respectively confront amnesty for war crimes as legislative initiatives are reviewed which would free war criminals; many of the victims from both countries have never received recognition of, or reparation for, the violations they suffered, a prospect which appears even more remote with impending legislative change in favour of those who committed the atrocities. See *Al Jazeera*, ‘Central Americans confront amnesty for war crimes,’ 7 March 2019, available <https://www.aljazeera.com/news/2019/03/central-americans-confront-amnesty-war-crimes-190306220652220.html>

precedence over the experience of victims in recognition of the right of the latter to reparation. Indeed, another response to Milosevic's death recognised that it "does not change or alter in any way the need to come to terms with the past, with the legacy of which Slobodan Milosevic has been a part."³⁷¹ This chapter observes the origins, normative content, and scope of the right to the truth. Evolution of the right is traced from its origins in the right to a remedy to its practical application which includes some of its "loftier" aspirations as coextensive with, although not limited to, access to justice as a fundamental principle of law, setting down a common historical record of a conflict, determining the occurrence and prevalence of violations and elaborating a response, such as the disclosure of information surrounding enforced disappearances or extra-judicial killings, acts of sexual violence or other forms of torture. Different recordings of the truth, as both concept, right, and remedy, greatly influence the ways it is applied in response to rights violations. This concern reflects the need to displace the responsibility of perpetrators in processes of truth telling and elevate the importance of the right of victims to reparation. The chapter locates the premise to do so within *extension* of the right to the truth from its traditional inception as the right to *know*, to the right of victims to *testify* and actively contribute to its construction.

I. Preamble, or The grounds to extend

Prior to examining the content, scope, and scale of the right to the truth, a brief assertion must be made regarding its extension. It proves necessary to articulate this assertion here in order to later comprehend how the right to the truth is to be applied as a remedy, both reparative and preventative, in response to acts of CRSRV.

There is substantial normative evidence, as seen previously, of the commitment to a victim-centred perspective in reparations. But there also exists, contrary to its conceptual advances, evidence of its absence beyond theoretical representation and, consequently, restrictions on its practical application. The previous chapter opened with reference to the final paragraph of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which outlines a commitment to "adopting a victim-oriented

³⁷¹ As put by Ursula Plassnik, Austrian Presidency of the EU. See BBC News, 'In quotes: Milosevic death,' *Op. cit.*

perspective.”³⁷² In this regard, despite recognition of the need to adopt a victim-centred perspective, no explicit provisions are included for hearing victims or enabling their participation as “subjects” in the processes of uncovering and establishing a record of the truth; neither in processes of justice or reparation.

Paragraph 24, for example, refers to the right of the general public, and in particular of victims, to information, and the ensuing responsibility of states to inform. It furthermore establishes the entitlement of victims and their families to “seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.”³⁷³ While this paragraph provides for explicit protection of the right to the truth for victims and next of kin, it frames the right as a right to be presented to, if not owed to, victims and *not* as comprising an aspect of justice which victims have the right and obligation to actively construct, which appears counter to a victim-oriented perspective. This is the lacuna, after delving into some of the philosophical origins of the concept of the truth, on which the rest of the chapter and indeed the thesis bases and asserts the need for an extension of the right. The extension of the conceptual framework and the practical application of the right to the truth, therefore, is oriented within the shift from the right to *know* to the right to *testify*. Acts of testimony as aspects of the right to the truth are not intended to displace the import of knowledge of the truth, but to strengthen it.

I.a. What comes before: the right to the truth as a procedural right

For the right to the truth to be of any significance, it must represent relation to the violation of another previously existing right. It therefore comprises a procedural right, i.e., a right arising in response to violation of another right. In this vein, the truth cannot be dislocated from its contextual moorings and is used to ascertain, verify and contest information relating to specific circumstances. In other words, the existence of the truth is consequential to interpretation.

As a procedural right, the right to the truth procures, *inter alia*, to restore a victim's

³⁷² United Nations General Assembly, 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. 21 March 2006. ARES/60/147. Hereinafter referred to as ‘Basic Principles and Guidelines’.

³⁷³ Ibid., para. 24.

dignity as a response to violations, and guarantee non-repetition as a preventative measure to stave off future violations. In common law cases, the truth is a method of “offering evidence that proves guilt or innocence.”³⁷⁴ The methods used by different legal organs in the determination of the truth (as an aspect of the right to the truth), as well as by extra-legal means such as by acts of giving and recording testimony, imply that acts of interpretation precede the truth as established fact. Thus, the truth is evidential. However, as discussed in further detail later in this chapter, given the sensitive nature of crimes which fall within the framework of CRSRV, evidence must be treated in regards to a lower standard of proof than would be applied in relation to crimes of a different nature. As this chapter unfolds, in addition to its status and function as a procedural right, a proposal is made in regards to the performative nature of the right to the truth within the extension to the right to testify, for the right to comprise a right in and of itself as related to but distinct from its status as a procedural right.

1.b. What comes after: aspirations and consequences of the truth

The right to the truth comprises an integral yet understated reparative measure for victims of armed conflicts, and other human rights violations, including for victims of CRSRV. Victims, both individuals and collectives, have the right to information related to the perpetration of violations derived of such contexts. Disclosure of this information destabilises cultures of impunity related to the perpetration of violations, and the destruction of such information or obstruction of access to the truth. In this vein, the return to or establishment of a democratic society comprises another aspect of the right to the truth in transitional and post-conflict settings, or in the aftermath of large scale human rights abuses by conceding “access to essential information for the development of democratic systems.”³⁷⁵

In international criminal law the significance of the legal truth retains its conceptual purpose as a procedural right, but also borders loftier aspirations, such as restoration and maintenance of peace, reconciliation of divided societies, satisfaction of victims’ needs and rights, enacting reparations, re-establishing the rule of law, and ensuring state accountability. It thus addresses important aspects of historical justice by “setting down a historical record

³⁷⁴ Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’ *Op. cit.*, p. 246.

³⁷⁵ See IACtHR, Order of the Court, *Bámaca-Velásquez v. Guatemala*, (ser. C) No. 70, T 197. 25 November 2000.

with a legal imprint.”³⁷⁶

In her commentary on the Eichmann trial, Hannah Arendt questioned this use of a historical premise, extending to potentially political and educational aspirations, in a criminal trial. “The purpose of the trial is to render justice,” she remarks,

and nothing else; even the noblest ulterior purposes – ‘the making of a record of the Hitler regime...’ can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.³⁷⁷

Arendt makes an interesting point, arguably valid with respect to the criminal trial. But the question of truth upsets the balance. As we look into the aspirations of a right to the truth in criminal proceedings and regarding reparations more broadly with an eye to transitional justice and development, a series of concerns arise. Aren’t historical objectives essential to the truth? In other words, is it not essential to recognise the truth in a legal setting as having para-legal purposes, as purporting justice in pre-legal and post-legal terms also (namely, in terms of historical justice and development)? The truth seeks to overcome, through interpretation, the reductivism which law enacts, i.e., punitive objective. The premise of this chapter is to investigate the extent to which the right to the truth, as a legal concept and an aspect of transitional justice and development, has influence over wider social aspirations for justice as they manifest in the concept of reparation.

I.c. Interstitial considerations: method and the truth in historical justice

The truth is integral to the universally recognised right to an effective remedy, which forms the basis of reparations. An effective remedy borders a number of important points which, as temporal markers, cover precedent, consequent, and interstitial considerations pertinent to the right to the truth.

However, *after* the need for the truth surrounding rights violations has been identified but *before* it can comprise an effective remedy consequential to the right, the truth constitutes a general principle of law, or what we will refer to here as an interstitial consideration. That which falls between. That which bridges the gap. By general principle of law, we can

³⁷⁶ Ibid.

³⁷⁷ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, p. 253. New York, Penguin Books, 1994.

understand a basic rule whose content is general and abstract in nature, reducible to a maxim or simple concept. While general principles of law have not been incorporated within formal sources of law, they are considered a part of positive law and form an important legal reference irrespective of the specific legal system to which they pertain, if only as a subsidiary reference tool. Julio Barberis argues that by virtue of their universality, general principles of law are a source of international law. He states there are certain elements common to every juridical order, whether public or private, which are, among others, the acquisition of a personality, the manifestation of will, the celebration of an agreement, the breach of an obligation, the acquisition of property, the cession or extinction of a right.³⁷⁸ The reasoning behind their meaning and implementation in diverse contexts to the same effect provides a kind of universal law.³⁷⁹ According to Christine Korsgaard, universal law provides a formula which tells us “never to act on a maxim that we could not at the same time will to be a universal law. A maxim which cannot be conceived as a universal law without contradiction is in violation of a strict and perfect duty, one which assigns us a particular act or omission.”³⁸⁰

In other words, there is an underlying truth value that each imparts, recognisable by diverse interpretive means. The purpose of interpretation is to enable implementation. Where the truth provides an essential concept or premise constitutive of a general principle of law, it must be interpreted according to specific contexts in order to enable its implementation as a right to the truth as a response to a violation and as a form of redress. A principle of law may be general, but a right is the specific interpretation of its abstraction. The right to the truth is coextensive with protection of fundamental human rights and coincidental to a state’s response to violations of them. What follows of this chapter is an analysis of how such processes unfold, and to what resolution.

³⁷⁸ Julio A. Barberis, ‘Los principios generales de derecho como fuente del derecho internacional,’ pp. 11-41, in *Revista Instituto Interamericano de Derechos Humanos*, Vol. 14. Julio-Diciembre 1991. See p. 12.

³⁷⁹ *Ibid.* p. 13.

³⁸⁰ Christine M. Korsgaard, ‘The Right to Lie: Kant on Dealing with Evil,’ pp. 212-235, in *Deontology*. Stephen Darwall, ed. Oxford: Blackwell Publishing, 2003. See p. 214.

II. Reflections on the concept of truth

Before we can attempt to draw conclusions as to the processes and resolution the right to the truth might induce, we need to define what is meant by the truth. Understanding some of the origins of the truth as a philosophical concept will facilitate the endeavour.

II.a. Truth's essence

The search for the truth has traditionally provided the foundations of extensive philosophical inquiry. The introductory notes to this chapter have intimated the importance of interpretative methodologies of the truth as it is applied to specific contexts, such as in the aftermath of armed conflicts or in criminal trials. In his essay 'On the Essence of Truth,' Martin Heidegger illuminates the essential aspect of the question of truth which disregards specificities and "attends to the one thing that in general distinguishes every 'truth' as truth."³⁸¹ He refers to essence. No sooner than we have read these lines, though, does Heidegger turn on them:

Yet with this question concerning essence do we not soar too high into the void of generality which deprives all thinking of breath? Does not the extravagance of such questioning bring to light the groundlessness of all philosophy?³⁸²

A point of convergence between two seemingly opposed objectives is required (the philosophical and the empirical). Heidegger locates this point within time, positing that the question of truth relies upon a philosophical empiricism of 'where we stand today.' We can interpret this temporal marker as meaning that while the truth may exist as a philosophical concept, it may only be understood in practical terms, that is in agreement with a general principle relative to a specific circumstance arising from a given time. "We call for the goal," Heidegger writes, "which should be posited for man in and for his history. We want the 'actual' truth." So, truth's essence, under the light of this expression, is to presently restore to humanity its sense of history.

³⁸¹ See Martin Heidegger, 'On the essence of truth,' translated by John Sallis. 1961.

³⁸² Ibid.

II.b. Original truth vs. practical consequence

Conceptually, the truth derives from divine origins. In the West, the idea of the truth, or what is considered ‘true’, ‘correct’ or ‘right’ in modern secular societies, conforms to the Christian doctrine and theological principles of truth. The word “orthodoxy” in reference to the Christian faith suffices to explain this point, as it derives from two Greek words meaning “right doctrine.”³⁸³

In Hinduism, the concept of *satya* or truth appears as the origin and objective of faith and law simultaneously, there being little or no distinction between the two. Similar to Heidegger’s notion of the truth as a principle representing that which ‘is,’ *satya* from the Sanskrit verb “to be” also “implies a connection between truth and existence. Truth, in this sense, is what is.”³⁸⁴ Extended to *satyagraha*, it becomes the essence of Gandhi’s non-violent struggle³⁸⁵ for self-rule, a call for an end to the colonial powers of the British Raj. Gandhi’s struggle for truth was essentially a religious one that further sought development, or sincerity, the unfolding of the self without (foreign) intervention. But it is also intent on defying the rule of law where it institutionalises injustice. It is the force that retakes what is rightfully one’s own, what can be perceived of as truth. Thus, *satya* conforms to both a legal definition of a right and an obligation which approximates the Islamic interpretation of the truth as a duty, similar to the ideals enshrined within *jihad*. The Arabic word for right (a legal right), *al-Haq*, also translates as right (that which is correct, or true), as well as justice and the law itself, although the latter is also expressed by the word *qanun*.³⁸⁶

In light of the foregoing remarks, we may now understand the concept of an original truth as derived of faith or belief in the divine, and its practical consequences as establishment of law, the institutionalisation of rights, morality, and correct action or responsibility. If one is free to decide for oneself, it is reasonable to think some degree of the truth can be ascertained. Contrarily, if the actor is not free, for instance under conditions of coercion (colonial rule, confession by torture, threat of harm or death), they cannot be found to be in a position to state

³⁸³ See *Encyclopaedia Britannica*, ‘Orthodox, Religious Doctrine.’ Available <https://www.britannica.com/topic/orthodox>

³⁸⁴ Mark Juergensmeyer, *Gandhi’s Way: A Handbook of Conflict Resolution*. Berkeley, University of California Press, 2005. See p. 18.

³⁸⁵ The word *satyagraha* has been translated as “holding onto truth.” See p. 1 of María José Bermeo, ‘Mahatma Gandhi: The Power of the Non-Violent Fight,’ pp. 1-25, in *Non-Violent Coexistence: Moving Communities Beyond Fear, Suspicion and the Weapons of War*. Kumar Rupesinghe and Gayathri Fernando, eds. Sri Lanka, The Foundation for Co-Existence, 2007; Alternatively, Mark Juergensmeyer translates the concept as “truth force,” or “grasping onto principles.” See Juergensmeyer, *Op. cit.*

³⁸⁶ Discussed in Yasmin Naqvi, ‘The right to the truth in international law: fact or fiction?’ *Op. cit.*, p. 250.

the truth. This use of reason comprises a constituent part of contemporary legal practice. Rationalisation implies an accord with the senses, a deductive inquiry into what is and what is not. The truth emerges thus. We are now more proximate to what the truth might mean in a legal sense. The following section deals with the consolidation of the truth as a legal right and its evolution in international law.

III. Evolution of the right to the truth in international law

Foremost among the most effective ways for the truth to be translated into reparation is its consolidation as a legal right. This signifies that states have a concrete idea of what the truth implies and their corresponding obligations in upholding the truth, or in according reparation with regard to the truth in response to human rights violations.

III.a. Empirical origins

The empirical origins of the right to the truth in international law derive from the demands placed by a collective of mothers, known as the *Madres de la Plaza de Mayo*, in Argentina.³⁸⁷ In 1977, in an act of resistance, mothers of those who had been “disappeared” during the Videla dictatorship gathered in the plaza to dance with photographs of their sons. The women demanded that the Argentinian State respond to their right to know the truth regarding circumstances surrounding the disappearances of their sons. Despite the kidnapping and disappearance of several people two days prior to its release in an attempt to deter dissemination, their public demand for the truth appeared in the Argentine newspaper *La Prensa* on December 10, 1977.³⁸⁸ Entitled, ‘For a Peaceful Christmas – We Demand Only the Truth,’ it reads as follows:

His Excellency the President of the Nation, General Jorge Rafael Videla, in a recent press conference held in the United States, expressed: “*He who tells the truth shall do so without fear of punishment.*” To whom shall we turn to know the fate of our sons?

³⁸⁷ Mothers of the *Plaza de Mayo*, or May Square.

³⁸⁸ First published 5 October, 1977. Addressed to His Excellency the President, the Supreme Court of Justice, the High Commanders of the Armed Forces, the Military Junta, the Religious Authorities, and the National Press, the solicitude was signed by some 800 families. See *Memoria Abierta Argentina*, http://www.memoriaabierta.org.ar/materiales/documentos_historicos.php#solicitada

We are the incarnation of the anguish of hundreds of *mothers and wives of the disappeared*.

On the same occasion, the President also promised “a peaceful Christmas” – *peace* must begin with the *truth*. *The truth* we demand is to know if our *disappeared are alive or dead and where they are*.

When were the complete lists of the *detained* published? Who has fallen victim to the *excess of repression* the President referred to?

We can no longer bear this most cruel form of torture for a mother, the *uncertainty* of the fate of her children. We demand for them a legal process in which their guilt or innocence may be proven, and consequentially, that they may be judged or freed.

We have exhausted all means of establishing *the truth*, therefore today publicly, we require the aid of those who are good, who really *love truth and peace*, and *all those who authentically believe in God and in the Final Judgement, from which nobody shall be exempt*.³⁸⁹

The statement represents the first documented occasion an entity of victims³⁹⁰ organised itself collectively in public with a common objective. It presents an example from within a dictatorship – rather than a society in transition to democracy – yet it was nevertheless the ideal of a transition which moved them and set a precedent for the collective mobilisation of victims of other kinds of social unrest, such as armed conflict, in other contexts. Latin America has provided a historical setting of transitional societies, the earliest examples appearing in the Southern Cone as transitions from dictatorship to democracy. In more recent decades, other countries have provided additional examples representing states in transition from armed conflict to post-conflict. These Latin American contexts have been pivotal in the realisation of

³⁸⁹ ‘Por una Navidad en Paz – Solo Pedimos la Verdad,’ published 10 December, 1977 in *La Prensa*. This translation is my own. The italicised words appear in the original as capital letters. Spanish original available at <http://www.memoriaabierta.org.ar/materiales/solicitada1977.php>

³⁹⁰ Although the mothers of the disappeared do not represent direct victims, they can be understood as victims since the term extends to next of kin. See, for example, UN General Assembly, Basic Principles and Guidelines, art. 8, which states that “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” Also, *Villagran-Morales, et al.*, Inter-American Court of Human Rights, (ser. C) No. 63, // 177, 253.4. November 19, 1999. See also Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli as referred to earlier in the Introduction to this thesis.

fundamental principles of international human rights law in response to violations,³⁹¹ and in exposing and elevating the importance of the right to the truth in these proceedings.

Other contexts have subsequently mirrored the actions of the *Madres de la Plaza*. In Turkey, for instance, internally displaced Kurdish women in response to human rights violations (namely the disappearance of relatives) by the Turkish State against communities and individuals believed to hold ties with the PKK³⁹² have been named the “Saturday Mothers”. Similar to the *Madres de la Plaza*, the Saturday Mothers organised silent gatherings every Saturday since 1995 at a public square in central Istanbul.³⁹³ One of their principal demands has been the “establishment of the truth concerning the atrocities committed during the state of emergency.”³⁹⁴ They wish to know the whereabouts of disappeared relatives, demand recognition of their right to burial, and call for prosecution of perpetrators.

The objectives guiding a need for exposition of the truth, however, hark further back than these empirical examples, and are initially expressed in the form of the right to a remedy. A few preliminary remarks on the foundation of this right should be made, taking into account its shifting conceptual nature and the tenuity of its practical application.

III.b. Historical antecedents: The right to a remedy

The period directly succeeding the Second World War structured the sphere of international law as it exists today. It established a set of principles which responded to atrocities committed during the War, which are still in force. Among these are the obligation to punish genocide; the obligation to make punishable in internal law the act of torture; that of trying and punishing war crimes under the Geneva Convention; the inapplicability of due obedience as a defence in cases of illegal orders; the non-applicability of statutory limitations to crimes against humanity; the non-applicability of defense of political crime in cases of extradition for such crimes, as

³⁹¹ Juan E. Méndez, ‘Derecho a la verdad frente a las graves violaciones a los derechos humanos,’ pp. 517-540, in *La aplicación de los tratados sobre derechos humanos por los tribunales locales*. Argentina, Editores del Puerto, 1997. See p. 517.

³⁹² Partiya Karkerên Kurdistanê, Kurdistan Workers’ Party, based in Turkey and northern Iraq, is an organisation engaged in ongoing armed conflict with the Turkish State since 1984 until the present.

³⁹³ In the mid 1990s the demonstrations ceased for a time due to excessive use of force by police. Until the early 2000s they remained out of public sight after which the movement acquired legal status under the rubric of the “Association of Solidarity and Assistance for the Families of Missing Persons.”

³⁹⁴ Dilek Kurban, ‘Reparations and Displacement in Turkey: Lessons learned from the Compensation Law,’ p. 10, *Case Studies on Transitional Justice and Displacement*. International Center for Transitional Justice, July 2012.

well as the obligation to extradite or charge.³⁹⁵ At their core, these measures provide a remedy for rights violations.

The right to a remedy can be found in all major international human rights treaties. In international law, a remedy should not only be legally viable, but also accessible and tangible in practice. The United Nations 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 defines a remedy as “equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparations mechanisms.”³⁹⁶

The right to the truth intersects with each of these concerns on different levels. Said document recalls prior declarations in their commitment to ensuring entitlement to remedies and reparation for victims.³⁹⁷ The right to the truth is increasingly considered integral to remedy and reparation under international law. As it emerges through the right to an effective remedy, the truth has important precedent objectives. Indeed, what objectively justifies the existence of the right to the truth are the principles of justice and reparation. Truth provides the means through which these principles are to be implemented.

III.c. Present status of the right to the truth

The origins of a right to the truth *per se* in international humanitarian law respond, in the first instance, to the right of families to know the fate of relatives, recognised by articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949.³⁹⁸ The right also intersects with the obligation that befalls states to search for persons reported as missing, particularly in regard to enforced disappearances,³⁹⁹ although it comprises no explicit article

³⁹⁵ Juan E. Méndez, *Op. Cit.*, p. 520.

³⁹⁶ United Nations General Assembly, 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. 21 March 2006. ARES/60/147 See para. 11. Henceforth referred to as Basic Principles and Guidelines.

³⁹⁷ Ibid., ‘Basic Principles and Guidelines,’ see Preamble, which states earlier references as, *inter alia*, article 7 of the African Charter on Human and Peoples’ Rights, art. 25 of the American Convention on Human Rights, and, art. 13 of the Convention on the Protection of Human Rights and Fundamental Freedoms.

³⁹⁸ International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, see arts. 32 and 33.

³⁹⁹ In particular, the Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances, and the UN Human Rights Committee have made

of a human rights treaty.⁴⁰⁰ In this vein, it has been argued that the right to the truth may form part of the right to reparation for victims.⁴⁰¹

As a legal right, the truth is relative to the obligation of states in the provision of information to victims or their families, or society at large, regarding serious violations of human rights. The right to the truth has been considered an emerging norm in international law. This present status of the right, presupposed, entails recognition that it does not equate to a norm clearly described in any international treaty and whose applicational force is, therefore, not unquestionable.⁴⁰²

Precisely owing to its questionability, a right to the truth has been the subject of diverse and divergent interpretations in different contexts. It has been interpreted as coexistent with numerous fundamental human rights, including the rights to life, dignity, and freedom from torture.⁴⁰³

III.d. State responsibility

State responsibility comprises an indispensable element of the scope and function of the right to the truth. In this guise, the right functions as a safeguard against impunity and has been used to contest the validity of amnesty laws which have, in many cases, provided shelter and shielded against conviction of perpetrators of human rights violations.⁴⁰⁴

Protection of the right to the truth is exercised by states through establishment of the truth regarding human rights violations, inclusive of reasons (facts which led to their occurrence), the progress of any investigations (information which comes to light during investigations), the fate and whereabouts of victims (divulgence of particular circumstances which begin to establish trends in order to map massive and systematic violations in a given

reference to the right to the truth in upholding and vindicating other human rights, namely the right of access to justice, and the rights to an effective remedy and reparation.

⁴⁰⁰ Its closest approximation would be art. 24(2) of the draft International Convention for the Protection of All persons from Enforced Disappearances, stating that “each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.” The United Nations Basic Principles and Guidelines comprise a present reference for justice, in the form of remedies and reparations for victims.

⁴⁰¹ See Principle 11 of the Basic principles and guidelines on the right to remedy and reparation, *Op. cit.*

⁴⁰² Juan E. Méndez, *Op. cit.*, p. 3.

⁴⁰³ As expressed in judgments of the IACtHR, including, *Bámaca Velásquez v. Guatemala*; *Mapiripán Massacre v. Colombia*; *Villagran-Morales, et al. v. Guatemala*.

⁴⁰⁴ Discussed further below. See section IV of this chapter, ‘Manifestations of the truth,’ in subsection ‘D. Amnesty Laws’.

period or context), and in some cases, the identity of perpetrators. The Updated Set of Principles for the Promotion and Protection of Human Rights through action to combat impunity is somewhat less ambiguous in its classification of the truth regarding perpetrators and its relation to a collective right by employing the term “people”. It reads:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes.⁴⁰⁵

Note that it is questionable that “circumstances and reasons” of perpetrations could be revealed without disclosing the identity of the perpetrators themselves. Contrarily, it has been stated that victims of all human rights violations are entitled to “find out the truth about those acts, know who the perpetrators of such acts are and to obtain appropriate compensation.”⁴⁰⁶ However, it could be argued that reference is made here strictly to the individual’s right to know the identity of perpetrators, and not necessarily for the identity of perpetrators to be made public, thereby satisfying only an individual right rather than any collective right which society might be owed.

The prosecution and punishment of those responsible for human rights violations upholds the principle of non-recurrence and comprises an important commitment on the part of states, not only to redress but also to prevent future violations.

III.e. Knowledge and the duty to prevent

Further to the responsibility incumbent on states to promote and protect the right to the truth, the right entails an obligation to prevent.⁴⁰⁷ In fact, prevention has been considered an aspect of the promotion and protection of human rights.⁴⁰⁸ Response is needed not only in relation to committing or ordering a crime, but also in reference to instances in which it was known rights

⁴⁰⁵ See the Updated Set of Principles for the Promotion and Protection of Human Rights through action to combat impunity (E/CN.4/2005/102/Add.1), Principle 2.

⁴⁰⁶ See, for instance, Human Rights Committee, Concluding Observations of the Human Rights Committee on Guatemala. 3 April 1996. CCPR/C/79/Add.63. See p. 5, para. 25.

⁴⁰⁷ The Inter-American Court has maintained that States hold “a legal duty to take responsible steps to prevent human rights violations.” See *Velázquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, (Ser. C), No. 4, 29 July 1988. The obligation of States to prevent human rights violations is expressly formulated in the Convention on the Prevention and Punishment of the Crime of Genocide, art. 1. See UN General Assembly, 9 December 1948, entered into force 12 January 1951.

⁴⁰⁸ UN Human Rights Council, The role of prevention in the promotion and protection of human rights, see para. 2. A/HRC/RES/24/16. 8 October 2013.

violations would occur and nothing was done by way of prevention. Acts of omission also constitute violation and incur the right to reparation.

Prevention can include either direct or indirect measures. Direct prevention evolves from a culture of respect for human rights within good governance, adequate legal, policy and administrative frameworks, and a strong civil society environment, among other factors. Indirect prevention is seen to hold commonalities with non-recurrence in that it is realised after a violation has occurred. It aims to identify and address causes of human rights violations to prevent their recurrence, including investigation, prosecution, and access to the right to the truth for victims and society at large.⁴⁰⁹

State responsibility, in the protection and implementation of the right to the truth, thus borders three interconnected objectives. First, recognition and exposure of past human rights violations; second, reparation for victims of human rights violations; and third, methods of accountability in the achievement of transparent governance. The state, and state officials, are responsible where they may have committed, ordered, ignored or tolerated violations of human rights. There exists, in this vein, an explicit duty to prevent human rights violations where knowledge is possessed of their potential realisation prior to their occurrence.

IV. Interpretations of the truth

The right to the truth is subject to, and is the product of, various complex interpretations, with its theoretical recording influencing its practical application. It has been described as an inalienable right⁴¹⁰ necessary to the protection of other fundamental human rights and to development. It constitutes, as seen, a procedural right derived of a response to past violations and thus presents a remedy or a form of redress. It comprises furthermore a preventative measure in the recurrence of similar violations and in relation to protection of other human rights. Its importance has been interpreted as correlative to and coexistent with, *inter alia*, the rights to seek information and be informed, to be free of torture and other maltreatment, and the rights to physical integrity, freedom, and life. This section summarises some of these interpretations of the right to the truth generally, before observing how they apply to CRSRV

⁴⁰⁹ Ibid., pp. 5-6.

⁴¹⁰ Louis Joinet, 'Question of the impunity of perpetrators of human rights violations (civil and political),' Final Report pursuant to decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1., Annex 1, Principle 1.

by way of exposing violations and, therefore, versions of the truth.

IV.a. Historical renderings

The truth as an aspect of the past and memory is subject to different historical renderings. In the interpretation of history, Derrida has expressed that acts of writing are not confined to the written word but are indicative of processes of memory involving “texts”. This is a reading of Derrida’s assertion that “*Il n’y pas de hors-texte*.” Early translations of the phrase read, “There is nothing outside the text,” while more recently it has been argued the original meaning is in fact, “There is no outside-text.”⁴¹¹ In other words, text is all encompassing; all is text. Or, there is no meaning outside language. The writing of history, therefore, refers not only to written accounts but also to non-traditional, and even non-verbal and non-linguistic, accounts of the past. Oral histories are, however, more difficult to record and preserve, and as such are more vulnerable to the passage of time. It is the written word that assumes dominance in modern story telling cultures, its dominance at times posing a direct threat to alternative versions of the truth.

Processes by which history, and in particular violent histories, are recorded in the form of texts (whether written, visual, or oral) further complicate the issue. In 1997 in Burundi, for instance, UNESCO led a project entitled “Writing the history of Burundi,” the purpose of which was the elaboration of an official, scientific, and agreed on account of the history of Burundi from its origin to the year 2000, “so that all Burundians can interpret it in the same way.”⁴¹² This particular historical rendering of the truth leaves little room for alternative histories or references to historical justice. Different methods of historical analysis therefore influence that which is remembered, documented, written, or said to be true. Such processes, in turn, affect and control access to justice.

⁴¹¹ See Derrida, *De la grammatologie*, pp. 158-9, Paris, Éditions de Minuit, 1967; *Of Grammatology*, translated by Gayatri Chakravorty Spivak, Baltimore, Johns Hopkins University Press, 1976; and for a later translation, J.G. Merquior, *From Paris to Prague: A critique of structuralist and poststructuralist thought*, p. 220. London, Verso, 1986.

⁴¹² As expressed in the Arusha Agreement, Art. 8, Protocol I, Para. 1(c), 28 August 2000. The Agreement resulted from the Conference on the History of Burundi, convened by UNESCO in 1997.

IV.b. Access to justice

The Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances, and the UN Human Rights Committee have made reference to the right to the truth in upholding and vindicating other human rights, namely the right of access to justice. Establishment of the truth provides evidence and historical acknowledgement of rights violations. Its absence denotes further injustice. The right to the truth is therefore fundamental and precedent to access to justice in its diverse forms.

IV.c. The desire to know

Since 1974, numerous resolutions of the UN General Assembly on the rights of families of missing persons or regarding enforced disappearances have made reference to “the desire to know” as a basic human need.⁴¹³ This reference gave rise to Article 32 of Protocol I additional to the Geneva Conventions. It bears direct relation to the elaboration of a right to the truth regarding the crime of enforced disappearances as elaborated by the UN Working Group on Enforced and Involuntary Disappearances,⁴¹⁴ and the Inter-American Commission on Human Rights.⁴¹⁵

In this sense, the right to the truth represents an individual right and a collective right. Collectively, it extends to families or relatives of victims as a whole entity, and to society at large.⁴¹⁶ Law 975 of 2005 in Colombia recognises a right to the truth and defines it as belonging to society.⁴¹⁷ Luis Joinet, independent expert on impunity appointed in 1997 by the UN Commission on Human Rights, found an inalienable right to the truth.⁴¹⁸ He further attributes

⁴¹³ See for example, UN General Assembly, Assistance and Cooperation in Accounting for Persons Who are Missing or Dead in Armed Conflicts, Resolution 3220 (XXIX) of 6 November 1974; International Convention for the Protection of All Persons from Enforced Disappearance. 18 December 1992. RES/47/133.

⁴¹⁴ UN Working Group on Enforced or Involuntary Disappearances, ‘Report of the working group on enforced or involuntary disappearances,’ para. 187. E/CN.4/1435, 26 January 1981.

⁴¹⁵ Annual Report of the Inter-American Commission of Human Rights, 1985-1986, p. 205. OEA/Ser.L/V/II.68, Doc. 8, rev 1, 28 September 1986.

⁴¹⁶ See Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al. v. El Salvador*, para 221. The same has been expressed by then UN High Commissioner for Human Rights, Mary Robinson, ‘Rebuilding Societies emerging from conflict: a shared responsibility,’ *Op. cit.*

⁴¹⁷ Colombian National Assembly, Law 975 of 25 July 2005, Issuing provisions for the reincorporation of members of illegal armed groups who effectively contribute to the attainment of national peace, and other provisions for humanitarian accords are issued. Or, commonly referred to as the ‘Law of justice and peace.’ *Op. cit.*, see Art. 7.

⁴¹⁸ Louis Joinet, *Op. cit.*, whose final report reads: “Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.”

application of the right to both the individual victim and their family as a collective right. The latter incurs an obligation on the part of the state to remember, to “be forearmed against the perversions of history that go under the name of revisionism or negationism, for the history of its oppression is part of a people’s national heritage and as such must be preserved.”⁴¹⁹

As Joinet expresses, the right to the truth intersects with the desire to know not only as an obligation of the state to communicate with immediacy the whereabouts and fate of victims, but to remember the circumstances in which rights violations were committed against them, and to record these as part of the collective historical identity of a nation, so preserving in some form the national heritage therein.

However, in cases in which a state fails to assume the obligations the right to the truth entails, either by intentionally concealing information or by omission, other human rights organisations have traditionally stepped in. At times, too, the right to the truth supersedes the written word, and relies on numerical accounts to relay pertinent evidence. The generation of statistical information relating to human rights violations, and the collection and analysis of data are essential to prevent and address discrimination against certain groups.⁴²⁰ In Colombia, for instance, the Jesuit priest Javier Giraldo, together with a group of twenty-five Catholic provincials founded the Intercongregational Commission of Justice and Peace, the principal task of which is the collection and dissemination of information regarding victims of human rights violations in the Colombian conflict, particularly the right to life.⁴²¹ Giraldo describes the counting of victims as “a painful and controversial task.”⁴²² Disclosure of information relating to human rights violations demonstrates protection of the right to the truth and is a direct instance of respect for the right to life.

IV.d. The right to life

As noted, the truth assumes importance in relation to other human rights violations,⁴²³ as well as in relation to the recognition and protection of human rights. The right to the truth has been drawn on to uphold the right to life. The European Court of Human Rights has held that a

⁴¹⁹ Ibid., para 17.

⁴²⁰ The Role of Prevention in the Promotion and Protection of Human Rights, *Op. cit.*, see para. 33, p. 12.

⁴²¹ Javier Giraldo S.J., *Colombia: The genocidal democracy*, pp. 13-14. Maine, Common Courage Press, 1996.

⁴²² Ibid., p. 13.

⁴²³ Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al.*, para 221.

state's omission to conduct an effective investigation with the aim of clarifying whereabouts and fate of "missing persons who disappeared in life-threatening circumstances" constitutes a continuing violation of its procedural obligation to protect the right to life.⁴²⁴

V. Manifestations of the truth

Different interpretations of the truth result in different manifestations of the truth. Interpretive practices pertinent to the truth represent its conceptual value, while how it becomes manifest according to interpretation is representative of the truth's practical methodology.

V.a. The truth commission

The truth commission has come to light as a prominent manifestation of the right to the truth. It is a means of documentation that has been used as part of transitional justice measures following armed conflicts or periods of political unrest, for societies to comprehend and come to terms with histories of violence or oppression, and serious violations of human rights arising therefrom.

Often referred to as Truth and Reconciliation Commissions, they represent "the right of nations to learn the truth about past events. Full and effective exercise of the right to the truth is essential if recurrence of violations is to be avoided."⁴²⁵ The truth commission in this sense, helps societies to confront not only human rights violations specifically, but the underlying causes of conflict and violence. It is a tool of documentation and historical analysis and further intersects with the principles of satisfaction and non-repetition as part of reparation by its objective to promise non-recurrence of rights violations.⁴²⁶

The truth commission originated in the Southern Cone of South America, in Argentina and Chile, following decades of repressive political regimes and human rights abuses under the countries' respective dictatorships. Since, truth commissions have been adopted in many nations with the aim of addressing violent pasts, often armed conflicts, and with an air to

⁴²⁴ See, for example, European Court of Human Rights, judgement of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94, para 136. See also, Article 2 of the European Convention on Human Rights.

⁴²⁵ Mary Robinson, 'Rebuilding Societies emerging from conflict: a shared responsibility, *Op. cit.*

⁴²⁶ See UN General Assembly, 'Basic Principles and Guidelines,' Preamble, *Op. cit.*

national reconciliation, without forgetting past atrocities. This concern is expressed by the Sierra Leone Truth and Reconciliation Commission:

The Commission's findings force us as a nation to confront the past. They reinforce the belief that the past cannot, indeed must not, be forgotten. Forgetting or ignoring the past means we cannot learn its lessons and are at greater risk of repeating it.⁴²⁷

The right to the truth has been attributed a legal basis in Peru and Guatemala in the establishment of their respective truth commissions.⁴²⁸ However, a Truth Commission cannot “be accepted as a substitute for the State’s obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim.”⁴²⁹ Truth Commissions may be aided by public trials, and consolidated by disclosure of state documents, management of archives, and the provision of public access to information. The creation of new documents, such as establishment and protection of the truth in the form of Truth Commissions potentially protects against amnesia, corruption and impunity in cultures where the destruction of archives has been practiced as part of war.⁴³⁰ They are thus a form of social recognition of the existence of human rights violations and represent a desire to amend violent histories.

V.b. An apology

A significant part of satisfaction of the right to the truth lies in recognition and acceptance of the truth by guilty parties. In cases in which the state assumes responsibility for human rights violations, this can be realised by way of an official apology. Marrus identifies four features of a “complete apology”:

1. An acknowledgement of a wrong committed, including the harm that it caused,
2. an acceptance of responsibility for having committed the wrong,

⁴²⁷ Sierra Leone, Truth and Reconciliation Report, presented 5 October 2004. See ‘Foreword,’ Bishop J C Humper, Chairman of the Commission, Vol. 1, p. 2. Available <http://www.sierraleonetr.com>

⁴²⁸ See Decreto Supremo Peru, No. 065-2001-PCM of 2 June 2001, Preamble, para. 4; See also, Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, Oslo, 23 June 1994, Preamble, para. 2.

⁴²⁹ Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al. v. El Salvador*, para. 230.

⁴³⁰ See Ramón Alberch i Fugueras, *Archivos y derechos humanos*. Spain, Trea Ediciones, 2010.

3. an expression of regret or remorse both for the harm and for having committed the wrong,
4. a commitment, explicit or implicit, to reparation and, when appropriate, to non-repetition of the wrong.⁴³¹

Apologies comprise part of a process, but cannot alone constitute a resolution. In the contemporary climate of making amends with the past, and citing Maier, Marrus notes “a retreat from transformative politics.” Marrus then elaborates that the tendency of retreat is linked to absence of a “commitment to radical improvement.” What surfaces, triumphant, is an obsession, almost, with “the past, past wrongs, past catastrophes, past sufferings, and lessons that we must draw from all of these. In this environment, justice is more concerned with settling old quarrels than speculating about tomorrow. Communities ruminate on their heritage, rather than their ambitions.”⁴³² The truth nevertheless has the potential to transcend its reference to the past. Reparation based on the right to the truth should seek to be preventative and set new precedents for limits not to be surpassed with respect to the protection of fundamental human rights, which comprises its direct relation to and coexistence with a rights-based approach to development.

V.c. Court processes

The truth in court processes has a specific nature, referent to a given time. It responds categorically to the timeframe of the violation in question, including a specified period preceding and following the crime.

Court hearings which operate upon truth finding processes in relation to credible and reliable evidence have as their premise the determination of individual criminal responsibility. They are based on the idea that prosecution of perpetrators of violations of international human rights law and humanitarian law would contribute to the restoration of peace and security. They are also, in many cases, a necessary step in the process of awarding reparation to victims. However, they should not, in the event of failure to prosecute, obstruct the right of victims to reparation where reparation may be obtainable by alternative means. Efforts should be made to forge alternative means for victims to obtain reparation. The judicial truth in a court setting relies primarily on presentation and refutation of evidence, rather than historical circumstance.

⁴³¹ Michael R. Marrus, ‘Official apologies and the quest for historical justice,’ pp. 75-105, in *Journal of Human Rights*, Vol. 6, Issue 1, 2007. See p. 83.

⁴³² Ibid. p. 94.

In other words, concrete evidence in this context invariably holds greater weight than alternative means of presenting the truth or alternative versions of truth telling.

V.d. Amnesty laws

Truth-seeking processes and judicial processes should be complementary, yet practically this can be complicated by the concession of amnesty. The question of amnesty does not alter the argument of state responsibility to properly investigate crimes, but it does consider whether there may exist any circumstances in which it could be considered right to conceal, disregard, or supersede the truth.

In some cases, the value of the truth may be such that it is used to pardon, or in the very least justify the decision not to prosecute, or even investigate, alleged perpetrators of rights violations. This exchange is known as “amnesty for truth”, or “use immunity.” It means, ultimately, that witnesses who testify are able to request that information revealed in the process may not be used to prosecute them.

The Inter-American Court has generated an important discourse on the use of amnesty laws and the incompatibility of their inherent impunity with the obligations of states as these obligations intersect with the right to the truth for victims of armed conflict or political oppression. The Court maintains that the obligation of states to prevent, investigate, punish and redress human rights violations remains at all times unquestionable.⁴³³ Some amnesties have been ruled invalid by international bodies as violating the right to the truth by preventing exposure of human rights crimes and prosecution of their perpetrators.⁴³⁴ Amnesty laws frequently find justification in the precept of reconciliation, which would, some actors argue, in the event of prosecution and continued cycles of conflict, be impossible. But the question remains as to whether amnesties invariably impart a degree of impunity.⁴³⁵

⁴³³ See IACtHR, Case of *Velásquez Rodríguez v. Honduras*, para. 174: “The State has a legal duty to take responsible steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”

⁴³⁴ IACtHR, *Garay Hermosilla et al. v. Chile*, Case 10.843, Report No. 36/96, October 15 1996.

⁴³⁵ See, for example, Yasmin Naqvi, ‘Amnesty for war crimes: Defining the limits of international recognition,’ pp. 583-626, in *International Review of the Red Cross*, Vol. 85, No. 851, 2003; James L. Gibson, ‘Truth, justice, and reconciliation: Judging the fairness of amnesty in South Africa,’ in *American Journal of Political Science*, pp. 540-556, Vol. 46, No. 3, July 2002; Kieran McEvoy and Louise Mallinder, ‘Amnesties in transition: Punishment, restoration, and the governance of mercy,’ pp. 410-440, in *Journal of Law and Society*, Vol. 39, No. 3, September 2012.

In the case of *Ellacuría et al. v. El Salvador*, agents of the State of El Salvador went to great lengths to conceal the truth surrounding the extra-judicial killings committed, including the facts surrounding the events and the identity of both the intellectual and material perpetrators.⁴³⁶ The case dealt with six Jesuit priests in El Salvador who called for a peaceful end to the Salvadoran armed conflict, among them Ignacio Ellacuría accused by the State of creating the concept and theory of *guerrilla* rebellion and supporting subversion, along with two women, who were a mother employed as a cook at the priests' residence and her fifteen-year old daughter. All were extra-judicially executed on November 16, 1989, by agents of the State. Of those tried, the only persons found guilty by the Salvadoran courts were pardoned by the amnesty decree which "provides that all persons who have been convicted must be released immediately, and that those against whom proceedings are underway, or who were in any way involved in serious violations of human rights, may not be investigated, prosecuted or punished, nor sued in civil courts,"⁴³⁷ a decree which the Inter-American Commission judged to surround "these grave human rights violations with impunity."⁴³⁸ The State of El Salvador argued that the amnesty law "constituted a necessary measure for overcoming the state of violence and acute confrontation experienced by Salvadorans during the armed conflict, and for reconciling and reuniting them within the Salvadoran family," further adding that "the obligation to repeal the amnesty law under the pretext of discovering the truth is not a part of international law and the international law of human rights."⁴³⁹ The Inter-American Commission responded that the law "disregards the legitimate rights of the victims' next of kin to reparation. Such a measure will do nothing to further reconciliation."⁴⁴⁰

The international community in the establishment of certain norms of international human rights law, plays an important role in maintaining that crimes against humanity fall under a moral category presided over by international law which condemns such actions. Regarding the moral premise of justice, the responsibility of truth telling demarcates important boundaries within which it is important to recognise transfer of responsibility. The possibility of justice (reconciliation or reparation) is therefore subject to practical justification; it must be held under the light of the consequential risks its absence would imply.

⁴³⁶ The Truth Commission of El Salvador found that the lawyer Rodolfo Antonio Parker sot (sic. Referring to 'Soto'), a member of the Honor Commission, had altered statements of witnesses in order to protect high-ranking officers. See Inter-American Commission, Case of *Ignacio Ellacuría et al. v. El Salvador*, para. 72.

⁴³⁷ Ibid., para. 215.

⁴³⁸ Ibid.

⁴³⁹ Ibid., para. 244.

⁴⁴⁰ Ibid., para. 215.

V.e. Protection of victims and witnesses

Although acts of testimony facilitate exposition of the truth and constitute an essential element of the right to the truth, especially from the perspective of victims, in many cases testifying may further endanger the physical safety or emotional wellbeing of victims or witnesses. Prevention of further harm is imperative in their protection and implies respect for fundamental principles and methods of work under the framework of human rights.⁴⁴¹

The primary responsibility underlying protection of victims, witnesses, sources of information and other persons cooperating in some way with investigations of human rights abuses, lies with the state.⁴⁴² Yet the appropriate approach will depend upon contextual factors within the political and security environments,⁴⁴³ and the viability of necessary measures frequently falls short of adequate application due to negligence, lack of political will, or acquiescence of crimes on the part of the state itself.

It is important to note that the state bears primary responsibility for the protection of all persons under its jurisdiction, in addition to the responsibility of special protection it must extend to those living under special circumstances, such as in the aftermath of political unrest or armed conflict, who testify as victim or witness regarding a violent act arising therefrom. Protection refers to measures taken to prevent or minimise risks of harm or threats which could endanger the life or physical integrity of the person who testifies. An eye-witness account is more likely to experience a higher risk of reprisal than a secondary source and, therefore, different levels of protection are necessary in different cases.

There are cases in which victims may also be perpetrators. Given the sensitivity of information divulged, protection of witnesses is essential. This can be done in the controversial form of “use immunity,” as seen above regarding amnesties. It may be sufficient to maintain strict respect for confidentiality, a breach of which can have serious consequences leading to harm. Confidentiality can simply cover the identity of the victim or witness or other person implicated, but can also extend to the information provided by this same person. It may also be necessary for authorities to provide urgent and interim measures such as government protection

⁴⁴¹ UN OHCHR, Manual on Human Rights Monitoring, Chapter 14, ‘Protection of victims, witnesses and other cooperating persons,’ p. 11. Available <https://www.ohchr.org/Documents/Publications/Chapter14-56pp.pdf>

⁴⁴² Ibid., p. 4.

⁴⁴³ Ibid. See p. 4 and p. 9.

or protection by local police, used sometimes for witnesses who testify at war crime trials. Under no circumstances should acts of intimidation or reprisals against those who have testified constitute methods of extracting information.⁴⁴⁴

The fact that victims, witnesses, or other sources may comprise part of a vulnerable group, such as children, victims of sexual violence or persons with disabilities, and may therefore have special needs, should also be accounted for.⁴⁴⁵ Some of these persons may fall within more than one of these groups, for instance child victims of sexual violence. Children testifying must be able to do so in an appropriate, child-friendly way. They may also be unaware of protocol around confidentiality and consent. It is the responsibility of officials involved in the case under the duress of the state to ensure children or other vulnerable persons comprehend these concepts. It is at the discretion of these same authorities to assess potential implications of disclosing information obtained through testimony of children and to refrain from doing so should such action endanger the person involved. Provision of information could follow a general pattern, without revealing the identity or other details classified as confidential to the child or person involved. At all times, the safety of the victim or witness outweighs the need for disclosing information or evidence, or other related interests, even where this may hinder the process of prosecution of perpetrators.⁴⁴⁶

Victims of CRSRV frequently face other retaliatory acts of violence upon disclosing the truth. For instance, rape victims commonly face shame, threats, honour killings, ostracization, dispossession, and destitution. They may be directly targeted by such retaliatory acts, but their children are also likely to suffer the consequences. The need of protection, therefore, is far greater than in response to other cases.⁴⁴⁷ In arguably most conflict settings where sexual and reproductive violence occurs, the response of the state has been silence. In many cases, state agents, including police or military, will have, among others, actively participated in the perpetration of such forms of violence. Protection of victims or witnesses who testify against such violence is further complicated by this relationship and the likelihood that their testimonies will, at best, not be accepted as credible, and at worst, spark reprisals. Forms of reparation which would counter such responses to victims' acts of truth telling include, but are not limited to, monetary compensation, or other forms of support

⁴⁴⁴ United Nations Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. 12/2 Cooperation with the United Nations, its representatives and mechanisms in the field of human rights, para. 1. A/HRC/RES/12/2, 12 October 2009.

⁴⁴⁵ UNHCHR Manual, *Op. cit.*, p. 12.

⁴⁴⁶ *Ibid.*, p. 8.

⁴⁴⁷ *Ibid.*, p. 17.

comprehending medical, housing, and educational services for women and their children. Such processes must also incorporate as an aspect of transformative reparation a commitment to construct a political and social view of unacceptability of such crimes, and the shift of blame from victim to perpetrator.

V.f. A lower standard of proof

Judges are required by law to apply standards of proof in court proceedings.⁴⁴⁸ This relates to testimony whereby the truth expressed therein becomes evidence. The truth surrounding CRSRV, where testimony is given in court processes, should require a lower standard of proof than would other crimes of comparable gravity. This is due to the sensitive nature of the violations in question, the stigma attached to these which may prevent or obstruct victims' willingness or ability to speak out, the secrecy by which they are practised, and the possibility that concrete forms of evidence will be difficult to obtain. There is much less likely to exist a paper trail of crimes of sexual or reproductive abuse, for instance.

CRSRV can, however, be verified by a number of different kinds of proof. Testimony provides a necessary and central reference. Acts of testifying provide not only subjective accounts of violence but also contextualise violations within the direct experience of victims, and give insight into harm suffered. Testimony could furthermore be useful in outlining an objective sense of a common or collective experience of violence whereby sexual or reproductive violence was used as a systematic weapon of war and where other forms of proof, such as medical records or witness statements, are difficult to gather or present, or where they have been intentionally or unintentionally destroyed during hostilities. Wherever possible, testimony should be complimented by such evidence as medical records of harm suffered by victims, official documents containing orders to commit certain acts as evidence, and witness accounts.

States are obligated to cooperate and contribute to the gathering and dissemination of evidence relating to crimes which have occurred in their jurisdiction. This refers not only to

⁴⁴⁸ This may include regulating decisions about the sufficiency of evidence, for example, with reference to time limits for decision-making, or the existence of certain rules preventing certain information from being presented as evidence. With this in mind, the judge is required to establish the facts of a case with the objective of reaching a conclusive "truth" surrounding the events. See Daniela Accatino and Cath Collins, 'Truth, evidence, truth: The deployment of testimony, archives and technical data in domestic human rights trials,' pp. 85-6, in *Journal of Human Rights Practice*, Vol. 8, 2016, pp. 81-100.

sexual or reproductive crimes committed during conflicts, whether at the behest of state or non-state actors, but also to crimes by omission. For instance, states have the responsibility to report statistics on maternal mortality, in times of peace and war,⁴⁴⁹ which should be considered part of the right to the truth for victims who are next of kin. Maternal mortality and morbidity increase in times of conflict and should be understood as a result of it, and therefore as a subject of reparation.

Such evidence, if a lower standard of proof is applied, may be able to completely discredit previous information used to conceal the truth surrounding events or human rights violations and reverse impunity. A lower standard of proof could include:

- Using statements given during preliminary phases of judicial proceedings as evidence in court
- Disclosing information which may lead to identification of the victim, witness or other person informing on the abuse, only at the latest possible stage of proceedings, or releasing only select details, or only to the accused and the defence counsel
- Excluding the media and public from the trial, all or in part; or, allowing the media access in a way in which public identification of the victim is prevented.
- Using methods such as video-conferencing which would allow the victim or witness to testify from another room in the court building or a different location entirely
- Obtaining a court order to protect the identity of the victim or witness throughout the trial and after, particularly in cases of sexual violence.⁴⁵⁰

In countries where violations have been perpetrated by the police or military, a certain degree of normalcy or the transition to a post-conflict phase may be a necessary antecedent to these measures. Similarly, the right to the truth has the potential to encourage democratic practice within transitional settings. Evidence as a component of the right to the truth could aid in the prosecution of perpetrators and identification of other victims, although its primary concern

⁴⁴⁹ See UN OHCHR, Department for International Development, 'How to reduce maternal deaths: rights and responsibilities.' February 2005. Available

https://www2.ohchr.org/english/issues/development/docs/rights_maternal_health.pdf

⁴⁵⁰ UNHCHR Manual, *supra* note 77, p. 47.

should rest with upholding the right of victims to reparation, which would require promotion and protection of a victim-centred perspective.

V.g. Reparation

Reparation should not simply rest on the premise of a return to the victim's original state, but should seek to be transformative in scope and function. The Report of the Chilean National Commission on Truth and Reconciliation described the truth as "an indispensable basis for measures to repair."⁴⁵¹ Reparation, in any form, is impossible without protection of the right to the truth.

As Barkan has noted, the right to reparation does not only refer to material compensation. Its immaterial significance is paramount to recognition of victims' suffering. "The call for reparation," he states, "is as much a call for repentance and mourning as it is for restitution."⁴⁵² In this vein, the right to the truth surfaces as a means to achieve such objectives and also bears relation to the right to mourning recognised by judgements of the Inter-American Court with regard to enforced disappearances and massacres.⁴⁵³

The right to the truth would uphold recognition of the nature of different violations committed against victims, particularly for victims of CRSRV. It would encourage extension of this term to reflect the practice of reproductive violence in reference to the "truth" or extant realities of these forms of violence as expressed through the testimonies of victims. Regarding information, as observed earlier in this chapter, the truth comprises an indispensable aspect of the evidence required in the determination of a basis for reparation. This is its fragmentary existence as an element of reparation; but it has also been attributed a more complete function as a remedy in itself.

⁴⁵¹ Report of the Chilean National Commission on Truth and Reconciliation, Vol. I/II, Part 1, Chapter 1. Indiana, University of Notre Dame Press, 1993.

⁴⁵² Elazar Barkan, *The Guilt of Nations: Restitution and negotiating historical injustices*, p. 288. Baltimore and London, Johns Hopkins University Press, 2000.

⁴⁵³ See, for example, Inter-American Court of Human Rights, or Corte Interamericana de Derechos Humanos, *Caso de Masacre Plan de Sánchez Vs. Guatemala* (Reparaciones), Sentencia de 19 de noviembre de 2004. The right to the truth comprises a right of victims belonging to the community which will aid in prosecution of perpetrators (para. 90e, p. 93), as it does a collective right of society (para. 98, p. 98). However, the truth is framed not only as a right to "know" (para. 97, p. 98), but also bears relation to the right to mourning since absence of the truth alters the processes of grieving (see 'e' pp. 22-23).

V.h. And a remedy in itself

The Inter-American Commission on Human Rights is the sole human rights organ to have presented the right to know the truth as a direct remedy in itself. In *Ellacuría et al. v. El Salvador*, discussed above, the Inter-American Court ruled that the right to the truth was an obligation of the State which served as a remedy in itself to assuage the suffering of the victims' relatives, the community to which they belonged, and society in general, by at least providing certainty regarding the circumstances surrounding their fate.⁴⁵⁴

The Commission concluded that the State of El Salvador had violated the right to know the truth in accordance with Articles 1(1), 8(1), 25 and 13 of its Convention.⁴⁵⁵ The truth maintains its distinctive character as a procedural right by the Commission's reference to article 25 of the Inter-American Convention which presents it as an aspect of justice necessary to initiate any other rights demands. But, in doing so, it elaborates that a state party is "obliged to respect the rights enshrined in the Convention, and to guarantee their full and free exercise,"⁴⁵⁶ thereby framing the truth not only as precedent, but furthermore integral to realisation of other human rights. The right to the truth arises as "a basic and indispensable" instrument, "since lack of the facts relating to human rights violations means, in practice, that there is no system of protection capable of guaranteeing the identification and eventual punishment of those responsible."⁴⁵⁷

The Commission thus considers the right to the truth essential in determining violation of human rights and ensuring adequate compensation. It further considers that compensation cannot be satisfied by monetary measures alone; the uncertainty of the fate of victims must be known, i.e., "the truth must be made known, fully and publically,"⁴⁵⁸ especially as the truth becomes a means of preventing future violations,⁴⁵⁹ and so frames its restoration as a remedy in itself. It would seem, following on from this, that the right to know the truth should be complemented with, and strengthened by, the right to testify, to tell the truth and partake in its construction, the process of which would provide further remedy to the violation.

⁴⁵⁴ Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacuría et al. v. El Salvador*, para. 221 and para. 227.

⁴⁵⁵ Ibid., para. 4. The Commission found the right to the truth to have been violated in addition to the right to life in reference to Article 4 of the Convention, the right to judicial guarantees and effective judicial protection for the relatives of the victims and the members of the religious and academic community to which the victims belonged in relation to Articles 8(1) and 25.

⁴⁵⁶ Ibid., para. 222.

⁴⁵⁷ Ibid., para. 223.

⁴⁵⁸ Ibid., para. 227.

⁴⁵⁹ Ibid., para. 228.

Conclusion

The right to the truth has traditionally comprised a procedural right, the primary reference of which is another previously violated right. In this vein, it illustrates the need for and right to reparation for the initial violation, and traces its origins to the right to an effective remedy. Diverse interpretations of the truth have led to different manifestations of the right, including truth and reconciliation commissions, official apologies, amnesties, and different forms of reparation, while retaining its original intent to remedy serious rights violations.

As a remedy, the right to the truth refers in the first instance to the right of families to know the fate of their disappeared or those who have been extra-judicially executed. The responsibility of states to inquire into and report on violations has been extended to offer an official and public historical account on rights violations surrounding enforced disappearance, torture, extra judicial killings, and the responsibility to prove accountability, foster reconciliation and peace, and to ensure reparation. It therefore represents both an individual and a collective right, protection of which lies with the responsibility of the international community as well as individual states.

This chapter has argued that the right to the truth not only comprises an indispensable reference to different forms of reparation, but furthermore comprises a remedy in itself. The truth is important not only as it represents information or evidence, but by the way in which it leads to justice. It is both preventative and reparative by nature. Additionally, violations, for example those relating to CRSRV, which depend on methods of silencing should also be redressed for additional violation of the right to the truth.

The right to the truth protects a series of fundamental human rights of victims of human rights violations, and can therefore, in addition to its function as a remedy, translate into reparation. This is so not least because it cautions against impunity but also because it has the potential to transfer the imbalance of power inherent in violations to protect the victim. But despite its transformative potential, and in order to protect a victim-centred perspective in practice, the right to the truth as framed presently is insufficient as a response to human rights violations. The right to the truth should be framed, not only as the right of victims or relatives *to know* the truth as it has been substantively until now, but as also comprehensive of the right of victims and witnesses *to tell* the truth and actively assist in processes of its disclosure. The right to the truth should by reflection be extended to explicitly incorporate the right of victims

to testify and to recognise testimony of violations, especially regarding CRSRV, as integral to documentation and condemnation of human rights violations, and indeed to the truth as a remedy which in turn gives rise to further reparative and preventative measures, and as an integral part of rights-based development.

The right to the truth for victims of CRSRV draws on the relationship between victim and perpetrator on two important grounds. First, the truth establishes a standard by which the right to a remedy is measured against a perpetrator's action. The second ground establishes the victim's indispensability to this standard, whereas the perpetrator should be considered secondary to it. The use of testimony in establishing the truth would support a victim-centred perspective in the enactment of reparations and assist in reconsideration of the term conflict-related sexual violence and its incorporation of reproductive violence by reflecting – through testimony – the experiences of victims. This would elevate and confirm the status of the truth not only as a procedural right, but as a right and a remedy in itself, integral to protection of the right of the victim to reparation over and above the prosecution of perpetrators.

This recognition finds resonance in the observation that, following the death of Milosevic and the closure of the case in the ICTY, “Now history will have to judge Milosevic.”⁴⁶⁰ But it is a judgement that reflects the need for, as Bassiouni has put it, reference to the nature of the victim's suffering. It is to the contours and depth of this suffering, and the extent of its protection, to which the following and closing part of the thesis turns.

⁴⁶⁰ In the words of (then) President of Serbia-Montenegro, Svetozar Marovic. See BBC News, ‘In quotes: Milosevic death.’ *Op. cit.*

Part III

A discussion of violations

Part III draws on the theoretical concepts and rights previously defined and applies these to different manifestations of the truth, with regard to violations of CRSRV, in specific contexts. Its primary objectives are to expose and explain methods of silencing in the perpetration of CRSRV, and to observe how different manifestations of the truth, through acts of testimony, can inform and sustain processes of redress. It finds that the truth is imperative to reparation, and to rights-based development in transitional settings. Protection of the right to the truth would furthermore uphold a victim-centred perspective in the elaboration and implementation of reparations as both precedent and integral to development.

The right to the truth serves to displace the methods of silence inherent in the perpetration of CRSRV, and provides both a reparative and preventative measure in response. There is no development in absence of redress for victims, and no redress in disregard of the truth.

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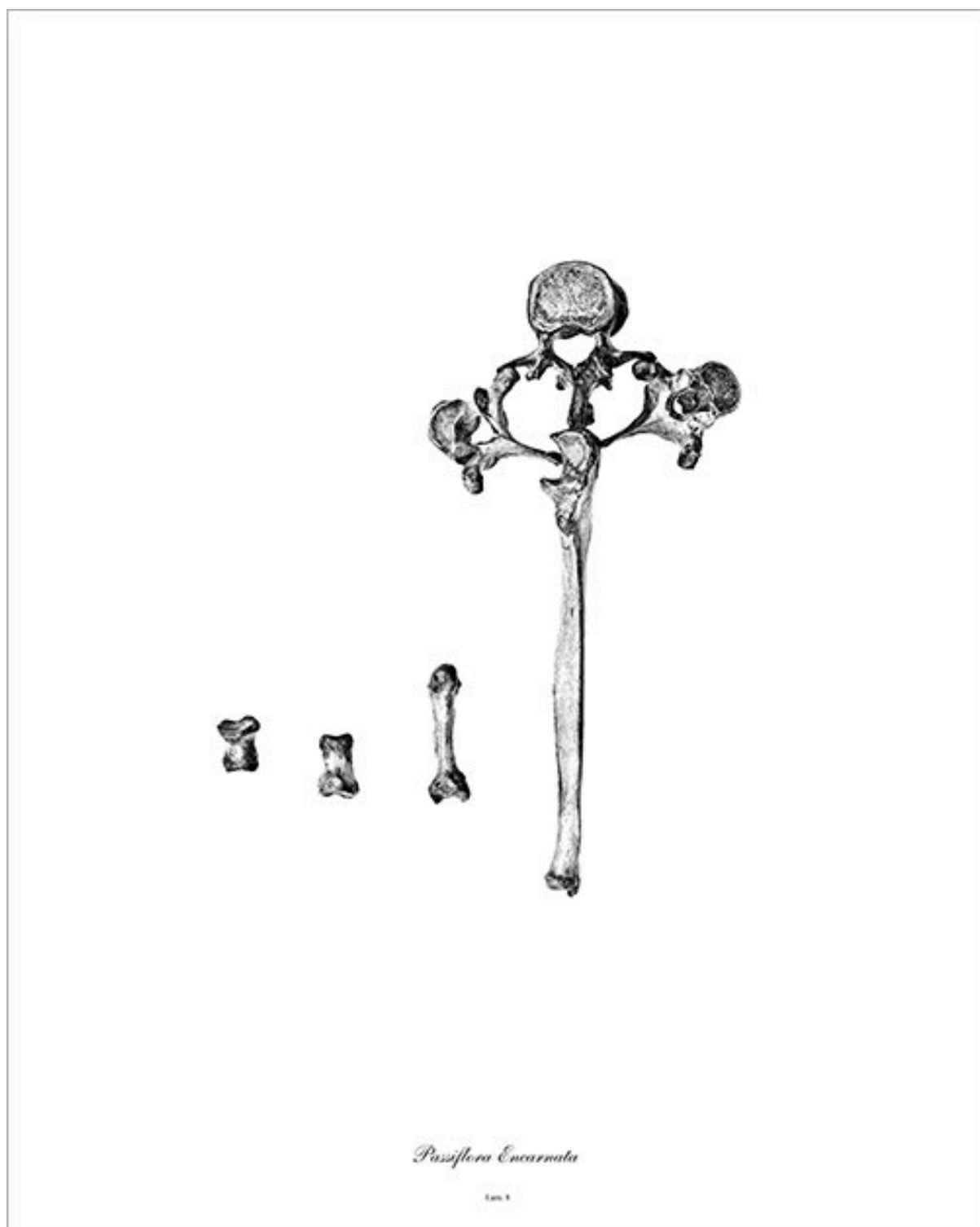


Figure 1. Corte de Florero / Flower Cut Vase, *Passiflora Encarnata*
Juan Manuel Echavarría
1997
20x16in (50x40cm) Archival Pigment Print.

Acts of testimony in the conceptualisation of reparations for conflict-related sexual and reproductive violence in Peru

Introduction

In response to conflict-related sexual violence perpetrated against women in the Peruvian armed conflict, the Truth and Reconciliation Commission of Peru (CVR, after the Spanish Comisión de la Verdad y Reconciliación del Perú) identified victims throughout the country, recorded testimonies, and mapped out measures of redress accordingly. The recording and inclusion of sexual violence, namely the use of rape as a weapon of war, by the Commission in its findings relied on the testimonies of victims and witnesses, which meant the victims were not only recognised as entitled to reparation but had a concrete platform upon which to claim it. This chapter examines how exclusion of a wider interpretation of conflict-related sexual violence to incorporate reproductive violence may have resulted in failure to recognise and represent the crime of enforced sterilisations performed on indigenous women toward the end of the conflict as constituting human rights violations, and therefore also in absence of reparation for victims of these violations.

The chapter first describes the historical context of the armed conflict, and then gives an overview of the CVR regarding its commitment to address the practice of sexual violence. The chapter uses, as a primary reference, testimonies of victims and witnesses collected by the CVR to demonstrate, from the accounts of victims and witnesses, that the method of silencing played an integral and understated role in the perpetration of all forms of CRSRV in the Peruvian armed conflict. The testimonies illustrate, further, that the framing of rape as the most pervasive form of sexual violence against women was inadequate and women experienced complex forms of violence that were also reproductive in nature. The second part of the chapter observes, by contrast, the case of Quipu, a project which gathers oral testimonies of victims of enforced sterilisation. In the late 1990s, towards the end of the conflict, indigenous, mainly Quechua speaking and illiterate women were targeted by government officials under then President Fujimori's development plan, which included a mandate to eradicate poverty among indigenous communities rife with conflict by lowering birth-rates. Victims were forcibly

sterilised in unsanitary conditions, often without anaesthesia. Their call for justice within the Quipu Project is contextualised within absence of reparations for conflict-related reproductive violence following the CVR. Victims of the enforced sterilisations have waited two decades to testify and claim reparation. The chapter concludes that a wider conceptualisation of conflict-related sexual violence to include forms of reproductive violence is required. Protection of the right to the truth through measures such as giving testimony, in response and resistance to methods of silencing, could lead to alternative recordings of CRSRV and to more adequate forms of reparation for victims.⁴⁶¹

I. Historical context of the armed conflict

The night of May 17, 1980 marked the eve of the first presidential elections to be held in a dozen years after a succession of military regimes. In resistance to the elections and what they perceived would further isolate them from their desired form of political rule, the Communist Party of Peru, *Sendero Luminoso*, or Shining Path, active since the late 1970s, burned a series of ballot boxes in Chuschi, Ayacucho.⁴⁶² The highlands of Ayacucho would become the epicentre of their *guerrilla* war.

On December 3, 1980, Shining Path consolidated its armed wing, the People's Guerrilla Army. Their leader, Abimael Guzmán was a communist professor of philosophy at the San Cristóbal of Huamanga University in Ayacucho. Local tensions between predominantly indigenous *campesinos* and their substantially wealthier Creole counterparts, landowners or inhabitants of the surrounding cities, reflected regional disparities between rural poverty and urban elite. Such tensions remain among the most persistent legacies of Spanish colonial rule throughout Latin America.

In this vein, Shining Path effectively replaced the state in rural settings. After the Agrarian Reform of 1969-1975, land ownership was circumscribed to a given community, yet owing to lack of official title it went unrecognised by judicial powers. The Agrarian Law did not confiscate land from one class for its redistribution within another, but created a different form of capitalism in which *campesinos* were ascribed a parcel of land and, with it, a debt they were obliged to pay off. One form of resolving this debt was to reconvert cash earned over a

⁴⁶¹ This chapter stems from an earlier piece on the same subject, published as an article in quite a different form. See Hala Bassel, 'Acts of truth telling and testimony in the conceptualisation of reparations in post-conflict Peru,' pp. 84-98, in *Global Society*, Vol. 34, 2020, Issue 1: The Return of Pacifism to IR.

⁴⁶² El Mundo, International, "Historia de la lucha armada de Sendero Luminoso en Perú." October 2006. Available: <http://www.elmundo.es/elmundo/2006/10/14/internacional/1160796742.html>

working year into an immediate inversion in the agrarian industry, thus establishing a kind of invitation to partake in a new land owning oligarchy,⁴⁶³ and creating new hierarchies and discords. In this informal context, Shining Path assumed an unprecedented control and administered a summary justice, initially, although not solely, in defence of landless peasants excluded from the intricacies of the Agrarian Reform. The Peruvian State was ineffective in preventing this movement, but the Fujimori administration later responded by suspending constitutional guarantees of rural areas and, in fact, the indigenous population of Ayacucho suffered disproportionate human rights violations and the highest number of deaths attributable to the internal armed conflict.⁴⁶⁴

Guzmán was inspired by José Carlos Mariátegui's *Seven Interpretive Essays on Peruvian Reality*,⁴⁶⁵ the latter a writer and founder of the Communist Party of Peru who had once proclaimed, in a statement that would later baptise Peru's armed struggle in denomination and ideology, "Marxism-Leninism is the shining path of the future."⁴⁶⁶ Further influenced by Mao Zedong, the armed movement of Shining Path expanded under the Maoist teaching that *guerrilla* war should be fought predominantly in the countryside, gradually cutting off the cities. It was thus a war waged between the armed forces, the armed wing of Shining Path, other rebel groups,⁴⁶⁷ and rebel *campesinos*, armed and calling into question the neutrality of the civil population. Citing a *campesino* whose words spoken during her years of fieldwork provided reference for the title of her book *Entre prójimos*, Kimberly Theidon writes, "Jesucristo, mira lo que hemos hecho entre prójimos".⁴⁶⁸ *El prójimo* essentially describes proximity, someone close, one's neighbour. In this sense, the statement reads, "Jesus Christ, look what we have done to one another."

Given the initial date of May 17, 1980 to which the first act of violence by Shining Path can be traced, and after which the popularly elected Fernando Belaúnde Terry assumed Presidency, the internal armed conflict effectively developed from within a transition to 'democracy'. It lasted between 1980 and 2000.

⁴⁶³ Juan Mariátegui, 'Sobre la reforma agraria peruana (1969-1975),' pp. 127-130, *Boletín Aepe Centro Virtual Cervantes*, No. 26, 2009.

⁴⁶⁴ Sergio Núñez, *Ayacucho, Rincón de los muertos: Un análisis sobre la violencia política en la sierra central del Perú entre los años 1980 y 2000*. Unpublished Thesis, Stockholms Universitet, 2010.

⁴⁶⁵ José Carlos Mariátegui, *Siete ensayos de interpretación de la realidad peruana*. Santiago, Editorial Universitaria, 1955.

⁴⁶⁶ Diario Correo, Cultura, 'Por qué se denomina Sendero Luminoso.' September 2017. Available <https://diariocorreo.pe/cultura/por-que-se-le-denomina-sendero-luminoso-773232/>

⁴⁶⁷ Another of which was the Túpac Amaru Revolutionary Movement, or MRTA el Movimiento Revolucionario Túpac Amaru, also originating from the early 1980s.

⁴⁶⁸ Kimberly Theidon, *Entre prójimos: El conflicto armado interno y la política de la reconciliación en el Perú*, p. 18. Lima, IEP Ediciones, 2004.

On August 28, 2003, the final report of the Truth and Reconciliation Commission (CVR) was presented, after two years' work and the collection of 17,000 testimonies. The Commission found Shining Path to be responsible for 54 percent of fatal victims reported to it.⁴⁶⁹ The total number of deaths attributed to the armed conflict was cited as 69,280, in contradiction to the 27,000 victims previously acknowledged by the government and human rights organisations. According to the Commission, 79 percent of victims were inhabitants of rural areas, 75 percent of whom spoke Quechua or another native language as their mother tongue.⁴⁷⁰ The armed forces played their part, too. In rural zones under government control, enforced disappearance, torture, and, among other things, rape of local, predominantly indigenous, populations were practised as methodologies of war.⁴⁷¹

There exists extensive documentation of the female body in armed conflicts regarding its use as a weapon of war, particularly in relation to sexual violence.⁴⁷² Far less has been said regarding reproductive violence against women in armed conflicts. In some instances, her ability to reproduce has been called on to repopulate a depleted population in the aftermath of massive loss of life on the battlefield. In other instances, it has been disabled in an attempt to lower numbers of, or eradicate, particular ethnic groups perceived to have contributed to the conflict, or perceived to threaten the power or privilege of certain other groups within a national space. The CVR did dedicate an important part of its work to addressing sexual and gender-based violence. Although the recording of this form of violence relied on testimonies of victims in gathering information related to the crimes, the methodology and conclusions of the CVR largely confined sexual violence to acts of rape, and did not account substantially for other related forms of violence of comparable gravity.

⁴⁶⁹ See *Comisión de la Verdad y Reconciliación*. Informe Final, Conclusiones. Lima: CVR, 2003. Available: <http://www.cverdad.org.pe/ifinal/>

⁴⁷⁰ Ibid.

⁴⁷¹ See Theidon, *Entre prójimos*, *Op. cit.*

⁴⁷² See, *inter alia*, Ruth Rubio-Marín, ed., *The gender of reparations: Unsettling sexual hierarchies while redressing human rights violations*. New York, Cambridge, 2009; Carol Cohn, *Women and wars: Contested histories, uncertain futures*. UK, Polity Press, 2013; Alejandra Ballón Gutiérrez, 'El caso peruano de esterilización forzada. Notas para una cartografía de la Resistencia,' *Aletheia*, Vol. 5, No. 9 (2014); Paul Kirby, 'How is rape a weapon of war? Feminist International Relations, modes of critical explanation and the study of wartime sexual violence,' in *European Journal of International Relations*, 10 February, 2012; Kelly Oliver, 'Women: The secret weapon of modern warfare?' in *Hypatia*, Vol. 23, No. 2, Just War, April-June 2008, pp. 1-16; Larissa Peltola, *Rape and sexual violence used as a weapon of war and genocide*, CMC Senior Thesis. Scholarship at Claremont College, 2018.

II. The recording of sexual violence against women by the Peruvian Truth and Reconciliation Commission

In its intent to elaborate a record of the atrocities committed during the armed conflict, the Commission identified sexual violence against women as a crime and, thereby, established the grounds for victims to claim reparation and the obligation of the Peruvian State to enact it.⁴⁷³ This section observes how elements of reproductive violence are acknowledged as inherent aspects of sexual violence within the work of the CVR, but are not framed as violations in their own right. The act of rape presents a subject of particular concern to the Commission in its chapter on sexual violence against women.

II.a. Framing of sexual violence against women in the internal armed conflict, particularly rape, as human rights violations

The Peruvian Truth and Reconciliation Commission (CVR) was established to:

Clarify the process, the facts and responsibilities of terrorist violence and human rights violations that occurred from May 1980 until November 2000, attributable to both terrorist organizations and to State agents, as well as to propose initiatives destined to strengthen peace and harmony among Peruvians.⁴⁷⁴

At its opening, the chapter entitled ‘Sexual violence against women’ states that the Commission “considers that sexual violence in general and, in particular, the rape of a woman, constitutes a violation of fundamental and non-derogable rights of the human being, that is, a form of torture, cruel, inhumane or degrading punishment or treatment.”⁴⁷⁵

The importance of condemnation of rape is undeniable in this or any other context. But exclusion of other related forms of violence of comparable gravity from the literature and in discourse sheds light on the limited scope of the term sexual violence. Framing the rape of women as the sole or most atrocious act committed against women further reinstates their historical position as sexual objects. The Commission continues:

⁴⁷³ Comisión de la Verdad y Reconciliación del Perú, CVR, Vol. VI, Sección cuarta: los crímenes y violaciones de los derechos humanos, Chapter 1.5, ‘Violencia sexual contra la mujer.’ Henceforth referred to as “CVR.”

⁴⁷⁴ CVR, Final Report. Supreme Decree No. 065-2001-PCM. My translation.

⁴⁷⁵ CVR, p. 263. My translation. The original reads: “La Comisión de la Verdad y Reconciliación considera que la violencia sexual en general y, en particular, la violación sexual de una mujer, constituye una violación de derechos fundamentales e inderogables de la persona humana, esto es, una forma de tortura, tratos o penas crueles, inhumanos o degradantes.”

For this reason, although this deplorable criminal act has not been expressly mentioned in its mandate, it finds itself included among the facts which, in accordance with the mandate, must be investigated by the Commission. In effect, the resolution for the creation of the Commission established that it will focus its work, *inter alia*, on “acts of torture and other grave violations” such as any other events which constitute “crimes and grave violations of human rights.”⁴⁷⁶

If the Commission acknowledges the fact that the rape of women as a practice of war constitutes a form of torture or inhumane treatment, a crime and grave violation of human rights, it should not consider it necessary to iterate the reason why it would include in its investigation material surrounding the practice. The initial acknowledgement should have sufficed, and should suffice in general observations on the matter in different contexts, to deem sexual violence an act of torture and, therefore, a violation of human rights, international humanitarian law within settings of armed conflict, and, depending on the circumstances, a crime against humanity. This, in consonance with the right of victims to reparation, should attest that the crime be punishable. This assertion should have been par for the course within the work of the Commission, as it should be common practice in other similar circumstances regarding human rights violations. There is little sense in drawing distinctions between human rights violations and the rape of women as the latter falls without exception under the category of the former. Ensuring the role of victims in testifying on their experience of violence should be considered the right of victims and part of the responsibility of States and the international community or other human rights bodies in establishing a historical record, determining the scope of such violence and protecting the right of victims to redress.

The final part of the opening section refers to the use of testimony in the methods of gathering information. It recounts:

In the course of investigation, the Commission received in many parts of the country testimonies from the victims themselves or from their families, but also from third parties, making it aware not of isolated incidents but of a practice, in relation with the armed conflict, of rape and sexual violence against women principally. This practice is attributable, given the magnitude it acquired during the anti-subversive struggle, in the first instance, to agents of the State – members of the Army, the Navy, and of the police

⁴⁷⁶ Ibid. The text in citation marks refers to Article 3 of the D.S. 065-2001-PCM. My translation. The original reads: “Por ello, aunque esta deplorable práctica delictiva no ha sido expresamente mencionada en su mandato, ella se encuentra incluida entre los hechos que, de acuerdo con el mismo, deben necesariamente ser investigados por la Comisión. En efecto, la norma de creación de la Comisión establece que enfocará su trabajo, *inter alia*, sobre las ‘torturas y otras lesiones graves’ así como sobre cualesquiera otros hechos que constituyan ‘crímenes y graves violaciones contra los derechos de las personas.’”

force. In the second instance, it is attributable, although to a lesser degree, to members of subversive groups, PCP-SL and MRTA.⁴⁷⁷

Although necessary to contextualise the scale of the rape of women within the Peruvian internal conflict, and to identify the act as a practice of war, and therefore as possessing a collective nature, the importance of recognising violations against individual victims is no less important. In this vein, protecting the right of individual victims to reparation transcends the collective nature of the violence. Reasons for this centre on the necessity, and indeed the social responsibility of states and other institutions, to shift the culpability of this particular form of violence from victim to perpetrator due to the silence and stigma attached to it, and to ensure reparation is for and received by, first and foremost, individual victims, although next of kin and others may also benefit from it.

II.b. What the Truth and Reconciliation Commission understands by the term sexual violence

The Commission understands, by the term sexual violence:

The realisation of an act of a sexual nature against one or more persons, or when that person or persons carry out an act of a sexual nature: by force or through the threat of force or through coercion, such as caused by fear of violence, intimidation, confinement, psychological oppression or abuse of power, against that person, or persons, or other person, or taking advantage of an environment of coercion or the inability of that person, or persons, to give their free consent.⁴⁷⁸

⁴⁷⁷ Ibid. My translation. In its original: “En el curso de la investigación, la Comisión recibió en muchos lugares del país testimonios de las propias víctimas y de sus familias, pero también de terceros, dando cuenta de la comisión no de hechos aislados sino de una práctica, en relación con el conflicto armado, de violaciones sexuales y violencia sexual contra mujeres principalmente. Esta práctica es imputable, dada la envergadura que adquirió en el curso de la lucha antisubversiva, en primer término, a agentes estatales –miembros del Ejército, de la Marina Guerra, de las Fuerzas Policiales. En segundo término, ella es imputable aunque en menor medida a miembros de los grupos subversivos, PCP—SL y MRTA.” The subversive groups mentioned at the paragraph’s end refer to Partido Comunista del Perú-Sendero Luminoso (PCP-SL), and Movimiento Revolucionario Túpac Amaru (MRTA).

⁴⁷⁸ Ibid., pp. 263-4. In the original: “La realización de un acto de naturaleza sexual contra una o mas personas o cuando se hace que esa(s) personas realicen un acto de naturaleza sexual: por la fuerza o mediante la amenaza de la fuerza o mediante coacción, como la causada por el temor a la violencia, la intimidación, la detención, la opresión psicológica o el abuso de poder, contra esa(s) personas u otra persona o aprovechando un entorno de coacción o la incapacidad de esa(s) personas de dar su libre consentimiento.

It elaborates on its definition of sexual violence which includes different modalities and behaviours.⁴⁷⁹

- a. Forced prostitution
- b. Forced marriage or union
- c. Sexual slavery
- d. Forced abortion
- e. Forced pregnancy
- f. Rape

The list does not include the practice of enforced sterilisation. However, a number of the forms of sexual violence outlined above also constitute forms of reproductive violence, namely d) and e), or enforced abortion and enforced pregnancy respectively, and potentially by consequence f), or rape. Acknowledgment of reproductive violence without appropriate reference to it as a practice, for instance, by explicitly naming it as such, illustrates its presence and prevalence, as well as the shadows which enshroud it. From this truth derives the difficulty victims face in articulating the need for reparation and their right to obtain it.

In accordance with International Human Rights Law, the Commission considers sexual violence against women to be a violation *per se* of human rights and, perpetrated in the context of the Peruvian armed conflict, a grave transgression of International Humanitarian Law and, furthermore, a crime against humanity.⁴⁸⁰ The Commission considers that the responsibility to redress violations of this nature lies with, not only direct perpetrators, but also their superiors, even in cases in which they could be agents of the state, civilians or members of subversive organisations.⁴⁸¹

⁴⁷⁹ CVR, p. 264.

⁴⁸⁰ Ibid., p. 265.

⁴⁸¹ Ibid.

II.c. Gender perspective within the CVR

The Commission analyses sexual violence perpetrated against women in the context of the armed conflict from within a gender perspective. Sexual violence, it observes, affected women for the simple fact of being women.⁴⁸²

In Peru, sexual violence affected women disproportionately and, above all, indigenous women. In 75 percent of cases of rape of women reported to the Commission, victims were Quechua speaking; 83 percent were of rural origin; 36 percent peasants, and 30 percent housewives.⁴⁸³ The fact of ethnicity was compounded by the fact of gender. Women are also more likely to be less educated than their male counterparts, a fact exacerbated by ethnicity. Age was another determinant with the greatest number of victims of rape falling between the ages of 10 and 29 years.⁴⁸⁴

To illustrate the gravity of the situation, a comparison of different forms of violence experienced by women and men in the conflict demonstrates how sexual violence affected women disproportionately.⁴⁸⁵

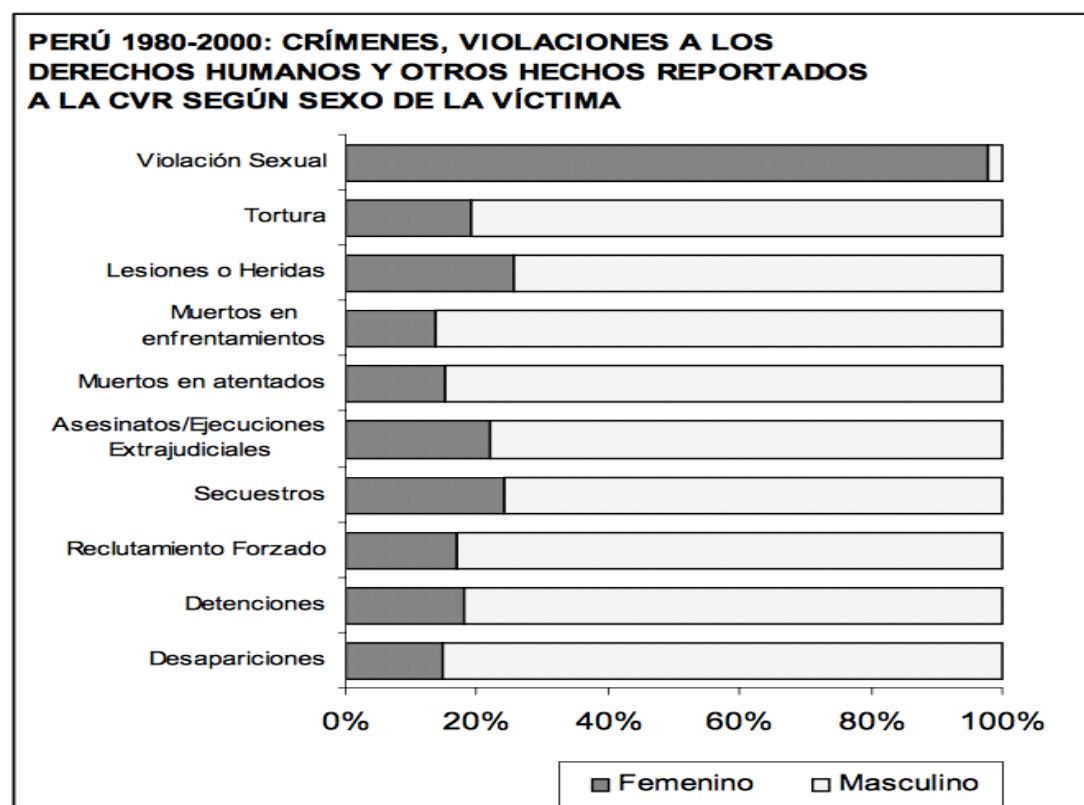
⁴⁸² Ibid., p. 273.

⁴⁸³ Ibid., p. 276.

⁴⁸⁴ Ibid.

⁴⁸⁵ The table below is taken from the CVR, see p. 273.

Figure 2. PERÚ 1980-2000: CRIMES, HUMAN RIGHTS VIOLATIONS AND OTHER EVENTS REPORTED TO THE CVR ACCORDING TO SEX OF THE VICTIM:



Translation of terms of CRSRV from Spanish to English

The Spanish fememino / masculino corresponds to female / male, and the terms are translated as follows:

Violación sexual	Rape
Tortura	Torture
Lesiones o Heridas	Injuries or Wounds
Muertos en enfrentamientos	Deaths in confrontations
Muertos en atentados	Deaths in attacks
Asesinatos / Ejecuciones Extrajudiciales	Assassinations / Extrajudicial killings
Secuestros	Kidnappings
Reclutamiento Forzado	Enforced recruitment
Detenciones	Detentions
Desapariciones	Disappearances

Yet, despite the rape of women comprising the most common form of violence and human rights violation experienced by women, and the fact that women at the time of the elaboration of the Report accounted for almost the total percentage of victims, the act of rape represents only 1.53 percent of all crimes reported to the Commission.⁴⁸⁶ In other words, poor representation of rape in the documentation is indicative not of the fact it was not practised at large, but of the shame and silence which attaches itself to victims and which dissuades narration of these events.

II.d. The use of testimony on sexual violence within the CVR

This section relays some of the testimonies related by victims or witnesses to the CVR. The testimonies collected by the Commission given by victims of human rights violations represent “the essential moments that encapsulate the ‘historical truth’ told from the viewpoint of those who suffered the horrors.”⁴⁸⁷ Despite statistical underrepresentation, the Commission collected 118 testimonies of female victims in the Establecimiento Penal de Mujeres de Chorrillos, of which 30 mention having been raped and 66 mention having experienced other forms of sexual violence. This indicates that approximately 81 percent of these testimonies were given by victims of sexual violence.⁴⁸⁸

Rape and other acts of sexual violence, perpetrated in greatest measure by the Armed Forces and to lesser extents by subversive groups, were used as systematic weapons of war to punish, shame, and alter a given ethnicity. Practices such as enforced abortion and sexual slavery were more common practice of subversive groups. The Commission notes that, in some cases, women were kidnapped from their homes and obligated to accompany rebels on their travels. One witness relayed the fate of her daughter who was kidnapped and forced to remain with the *senderistas*⁴⁸⁹ for three months. When she could escape, she was already pregnant as a result of rape.⁴⁹⁰ This testimony, as do countless others, illustrates the inextricable relationship between sexual and reproductive violence.

⁴⁸⁶ Ibid., pp. 273-4.

⁴⁸⁷ Silvia Rodríguez Maeso, translated by Michael Skinner, ‘The politics of testimony and recognition in the Guatemalan and Peruvian Truth Commissions: The figure of the “Subversive Indian”,’ in *RCCS Annual Review*, A selection from the Portuguese journal *Revista Crítica de Ciências Sociais*, Issue 3, 2011.

⁴⁸⁸ CVR, p. 275. See Base de Datos de la CVR, may 2003.

⁴⁸⁹ Refers to members of the rebel group Sendero Luminoso.

⁴⁹⁰ CVR, p. 282. Testimony 500931. Comunidad de Pucahuasi, distrito de Sañayca, provincial de Aymaraes, departamento de Apurímac. The events described took place between September 16 and December of 1986. My translation.

The relationship between sexual and reproductive violence is also compounded by other elements of violence, punishment or extreme risk, as this testimony demonstrates at the behest of “speaking out” or informing. In 1994,

Seven armed rebels entered the house of an informant, located in the annex of Antahuaycco, where they raped her daughter, to later take provisions and part of their animals. From the rape, the young girl became pregnant but the baby died at birth.⁴⁹¹

Silencing was also used in other ways as accomplice to rape as a weapon of war to facilitate coercion, to threaten and, literally, render the victim speechless and defenceless. A witness relays the rape of a blind girl, saying,

Then they aimed at her with a stick which they made her touch so that she would know it was a firearm. One of the presumed rebels took her by the arm and guided her toward one side of the entrance where there was straw piled up, he pushed her to the ground and lifted up her skirt, he sexually abused the girl while the other rebel was saying: ‘If she screams, kill her.’⁴⁹²

Another case told of a victim whose neighbour was a male affiliated with Shining Path. The neighbour came to her house to ask for shelter since he didn’t have a house after separating from his wife. Once inside the house, in front of the children who were crying, he threatened the victim with killing her and then raped her. The victim became pregnant as a result and had a child who was later recognised by the rebel. However, afterward, she heard nothing more from him.⁴⁹³ In this case, silencing by threat of death was a direct method to coerce the victim to cooperate and not speak out. Furthermore, from this single violent act a series of victims arose, being the informant herself as a direct victim of rape, among other violations, her children who, as witnesses, became indirect victims, and a final victim who was the child born as a result of the rape.

⁴⁹¹ Ibid., p. 283. Testimony 500571. Anexo de Antahuaycco, comunidad de San Juan de Juta, distrito de Lucre, provincial de Aymaraes, departamento de Apurímac. September 20, 1994.

⁴⁹² Ibid. p. 282. Testimony 303364. Anexo de Talhuis, distrito de Comas, provincial de Concepción, departamento de Junín, 1989. My translation. In the original: “Luego le apuntaron con un palo que le hicieron tocar para que supiera que era un arma de fuego. Uno de los presuntos subversivos la tomó por el brazo y la llevó hacia un lado de la puerta de entrada donde había paja amontonada, la empujó al suelo y le levantó la ‘pollera’, abusó sexualmente de la joven mientras el otro subversivo decía: ‘si grita, la matas’.” Pollera refers to the colloquial Peruvian word for the Spanish *falda*, or ‘skirt’.

⁴⁹³ Ibid., pp. 283-4. Testimony 200775. Distrito de Cayara, provincial de Víctor Fajardo, departamento de Ayacucho, 1984.

Yet another example shows how women, and their children, are perceived as property of men, a commodity to be traded, sold, or abandoned at will. This particular victim was detained in Chapi by official soldiers and taken to Chungui, to be later freed. She worked as an agricultural labourer, always under the watch of soldiers. One man from the community, around 60 years in age, asked the soldiers to give him the girl as his companion. She refused so the man accused her of being a terrorist but a teacher who knew her came to her defence, thanks to the intervention of a different older man. However, this older man who had helped her then arranged for her to be retransferred to Chapi where a captain ordered she go to live at his house. There, she was raped for fifteen days by three soldiers every night. As a consequence of the sexual torture, she gave birth to a little girl.⁴⁹⁴

Another witness relays that they “have a labourer who in that time would have been more or less eighteen years old and was raped by a member of *Sendero* and she has the child, she has the child.”⁴⁹⁵

A further commonality between sexual and reproductive violence falls under the practice of enforced abortions. Women who joined the ranks of Shining Path and who fell pregnant were obligated to abort.⁴⁹⁶ According to the *guerrilla* group, a woman in a state of pregnancy would not be able to carry out the duties required by the organisation. One victim recalled how she was electrocuted in order to produce an abortion. First, electricity was passed over her right shoulder, then over one breast and the other before she fainted; she awoke in the police station of Cajamarca where a curettage had been performed and her baby removed.⁴⁹⁷

In other instances, recruited girls were administered medicine at the end of their menstruation as contraception. In one case, at a certain point the medicine supply finished and nobody was able to go out to obtain more since the army was in pursuit of the rebels in that area. The girls who fell pregnant as a result of the lack of contraceptive medicine did in this instance manage to carry their babies to term. However, the babies were then taken from their mothers to be handed to strangers.⁴⁹⁸ This demonstrates once again the complexity of the

⁴⁹⁴ Ibid., p. 314. Testimony 202418. The Commission also notes that the informant had been forced to join a *senderista* encampment in 1983, in the mountains of Chaupimayo. The informant decided to travel to the community of Oronccoy, since she was later persecuted by the *senderistas*. Upon returning to Chapi, fleeing from the persecution, she was captured by the soldiers. See p. 314, note 200 of the CVR.

⁴⁹⁵ Ibid., p. 296. My translation. In the original: “Yo tengo una trabajadora quien en esa época tendría mas(sic) o menos 18 fue violada por sender y tiene el hijo, tiene el hijo.”

⁴⁹⁶ See CVR, ‘Los abortos forzados,’ pp. 295-6.

⁴⁹⁷ Ibid., p. 369.

⁴⁹⁸ Ibid., pp. 300-301. See CVR Testimony 303060. Anexo de Alto Yurinaki, distrito de Perené, provincial de Chanchamayo, departamento de Junín.

subject of victim and the subsequent right to reparation owed to victims. Here, the girls who fell pregnant, as well as the children they were forced to give up, can be considered victims.

Sexual violence was also perpetrated against pregnant women, despite the protection accorded to pregnant women under international law in accordance with the Vienna Convention, which Peru has ratified.⁴⁹⁹ Such violence often resulted in involuntary termination of the pregnancy.

One pregnant victim recalled how she was detained by soldiers when she was with her family and some workers in the country. At the time she was detained, she and one other detained girl were both eight months pregnant. As such, they could not easily walk and were pushed and insulted by the soldiers. Once at the military base, they were confined with two other women in a single room. At night, around 20 soldiers entered the room, tied their hands behind them and threatened them with death: “If you don’t let us, we will cut you in pieces...” Moments later, they were raped, each girl by five soldiers. This was repeated the following night three more times. At around eight o’clock, 20 soldiers entered their room; at midnight another group of 20 soldiers entered, and again at four in the morning. Over three consecutive nights after that, the rapes were repeated at the exact same times under the constant threats of the soldiers who said if they screamed, they would be shot.⁵⁰⁰

Silence as a means to prevent victims from speaking out or denouncing crimes far transcends its metaphorical contours. With regard to testimony, protection of the right to the truth for victims of sexual and reproductive violence should include a provision for redress of the acts of sexual or reproductive violence suffered and, furthermore, for redress of the attempt to silence the victim at the time of the crime or at any time prior to it, or in its aftermath.

II.e. Reparations in the context of the CVR

In Peru, as elsewhere, conflict-related sexual and reproductive violence was perpetrated in the context of other human rights violations. However, it constitutes, at all times and in any circumstance, a human rights violation in itself. Absence of the state in times of conflict, or the disintegration of human rights practice and rule of law results in cultures of violence and, frequently, impunity. During and after the armed conflict in Peru, sexual violence was

⁴⁹⁹ Ibid., 365.

⁵⁰⁰ Ibid., p. 365. See CVR Testimony 204063. Distrito de Silvia, Provincia de Huanta, Departamento de Ayacucho, 1984.

surrounded by a context of impunity, as much as at the moment in which the events transpired as when the victims decided to accuse their aggressors.⁵⁰¹

The Commission advances the Integral Plan of Reparations (PIR),⁵⁰² which recognises responsibility of the State in assuming its debt with those who directly suffered violence. The foundation of the PIR is solidarity and common effort.⁵⁰³ The right to reparation outlined by the Commission and protected within the PIR is based on the testimonies which have expressed the truth regarding the principal actors, responsibility found, and demands made by those who experienced the violence in the flesh.⁵⁰⁴ The Commission acknowledges the “irreparability” of the harm done, with respect to loss of lives and loved ones, yet affirms a commitment to apply a wide sense of reparative measures where these may contribute to restoring the life plan of victims or compensating some degree of the harm.⁵⁰⁵

The Commission cites an obligation to repair under international law, as well as under internal Peruvian law. With respect to the latter, the Political Constitution of Peru of 1993 in its first article affirms that “defense of the human person and respect for his dignity are the supreme purpose of the society and the State.”⁵⁰⁶

The PIR does not purport to resolve problems linked to poverty, exclusion and inequality, which the Commission considers to have a structural character related to the global functioning of economic and political systems, but responds to recognition of victims of human rights violations in the context of the internal armed conflict of Peru, and reparation for them.⁵⁰⁷ However, at its opening, the chapter on reparations recognises the historical injustice suffered by those minorities who have been most affected, precisely due to their historical subordination, by the internal armed conflict, citing the civil war as the last stage of a long tragedy characterised by ethnic and racial marginalisation experienced by Andean and Amazonian minorities; it recognised the contempt against those abandoned by the State of Peru

⁵⁰¹ See CVR, p. 376. “La violencia sexual estuvo rodeada de un contexto de impunidad, tanto al momento de que los hechos se produjeron como cuando las víctimas decidieron acusar a sus agresores.”

⁵⁰² Plan Integral de Reparaciones. Integral Reparations Plan. See CVR, Vol. IX, Chapter 2, Recomendaciones. See 2.2 Programa integral de reparaciones, pp. 139-197. The Plan consists of 10 different elements or “programmes”, including, Symbolic reparations, Public gestures, Acts of recognition, Memorials or sites of memory, Acts which foster reconciliation, Programme of reparations in health, Programme of reparations in education, Programme of restitution of citizen rights, Programme of economic reparations, and Programme of collective reparations.

⁵⁰³ CVR, Vol. IX, Chapter 2, PIR, see p. 139.

⁵⁰⁴ Ibid., p. 140.

⁵⁰⁵ Ibid., p. 141.

⁵⁰⁶ Congress of the Republic of Peru, Political Constitution of Peru 1993, Art. 1. English translation Juan Gotelli, Esther Velarde and Pilar Zuazo. Available

http://www.congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf

⁵⁰⁷ CVR, Vol. IX, Chapter 2, p. 148.

who fell into crescent poverty, and who became in the recent conflict, victims of grave human rights violations.⁵⁰⁸

In recollection of Chapter 1 of this thesis, reparations should seek to be transformative, in design, implementation and results.⁵⁰⁹ In this vein, where historical justice is of concern, it is not always necessary to distinguish between the obligation to repair and the objectives of development. The Commission does consider it necessary to translate various measures pertaining to the programme of public gestures as part of the PIR into Quechua, Aymara and Ashaninka languages,⁵¹⁰ thereby extending its reach to members of indigenous communities, albeit literate ones.

Under its definition of victim, the CVR recognises, among others, those who have suffered torture and rape,⁵¹¹ and affirms that the act of rape constitutes an act of torture.⁵¹² Victims of torture and rape are to be considered individual beneficiaries.⁵¹³ Similarly, children born of rape are to be considered individual beneficiaries.⁵¹⁴

A central component of the measures under the so called “Public gestures” programme of the PIR refers to human rights violations against women. It deals specifically with aggressions to the sexuality, honour, and dignity of women.⁵¹⁵ In allocating reparations in health, for example, the programme should lessen further stigmatisation of victims by avoiding terms such as “victim of rape.”⁵¹⁶ Access to health care as part of reparation is the right of victims who, among others, have suffered any physical problem which disables them, partially or totally, as a result of rape.⁵¹⁷ Despite being a necessary measure for victims of rape, the narrow reading of conflict-related sexual violence as pertaining predominantly, and at times exclusively, to the practice of rape has excluded recognition of other related forms of violence experienced by women which have also resulted in serious human rights violations, as well as

⁵⁰⁸ Ibid., p. 140.

⁵⁰⁹ See Guidance Note of the Secretary-General, Reparations for Conflict-related Sexual Violence, *Op. cit.*, p. 1. See also ICC, Trust Fund for Victims, Observations on Reparations in Response to the Scheduling Order of 14 March 2012, Prosecutor v. Thomas Lubanga Dyilo, paras. 49-66. ICC-01/04-01/06-2872, 25 April 2012.

⁵¹⁰ CVR, Vol. IX, Chapter 2, p. 162.

⁵¹¹ Ibid., p.149.

⁵¹² Ibid.

⁵¹³ CVR, Vol. IX, Chapter 2, p. 152.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid., p. 163.

⁵¹⁶ Ibid., p. 170.

⁵¹⁷ Ibid., p. 177. In the Spanish original: “Por la vulnerabilidad en salud de las víctimas que dejó el conflicto armado interno, la CVR recomienda que las personas, comprendidas dentro del universo de beneficiarios individuales, que padecen algún problema físico y prioritariamente los/as discapacitados/as permanentes, parcial o totalmente, cuya discapacidad es producto de *violaciones sexuales*, torturas, heridas o lesiones tipificadas por la CVR y ocurridas durante el periodo del conflicto, sean consideradas dentro del ámbito y la cobertura del Seguro Integral de Salud.” Emphasis added.

partial or total disability, physical and psychological harm, and should therefore merit similar forms of redress.

The Commission recognises that lack of education during the conflict has meant that those affected, who were then children and are now adults, find themselves in a situation of inequality.⁵¹⁸ Among those recognised as beneficiaries of the programme of reparations in education are children born to victims of wartime rape.⁵¹⁹ Victims of wartime rape, as well as their children born of this violation, are also considered beneficiaries of economic reparations.⁵²⁰ Specifically children, by recommendation of the Commission, should be entitled to a pension until 18 years of age.⁵²¹

In some cases, the State has rebuilt infrastructure damaged in the conflict, and re-established services, however actions oriented to redress harm done to individuals have been limited, and have benefited above all those with the means and resources to demand and initiate either judicial or administrative processes to obtain reparation.⁵²²

The reparations allocated by the Commission were to be paid for by the Reparations Fund, financed in part by extraordinary funds. These should be taken from resources acquired from repatriated “black money” acquired illicitly during the course of the conflict, and since available through the anti-corruption Special Fund of the Administration of Money Obtained Illicitly, known as FEDADOI.⁵²³ In this context, compensation by way of reparation is of particular importance to victims of conflict-related sexual violence and their children.

The Commission notes impunity especially in relation to perpetration of sexual violence by members of the Armed Forces or Police. In remote rural areas rape was used as a weapon of war and formed a routine part of interrogation of suspected rebels or their female relatives.⁵²⁴ There exist neither substantial records of this violence nor investigations into complaints laid by women who were victims of sexual abuse in this regard.⁵²⁵ There is evidence that during the 1980s, members of the armed forces would take off their uniform, appear hooded and adopt a *nom de guerre* in order to rape with anonymity.⁵²⁶ This not only constitutes

⁵¹⁸ CVR, Vol. IX, Chapter 2, p. 179.

⁵¹⁹ Ibid., p. 180.

⁵²⁰ Ibid., p. 190.

⁵²¹ Ibid., p. 192.

⁵²² Ibid., p. 189.

⁵²³ Ibid., p. 204. Fondo Especial de Administración del Dinero Obtenido Ilícitamente (FEDADOI), or in English: Special Fund of Administration of Illicitly Obtained Money. Part of the rationale for the creation of the FEDADOI was the payment of reparations for victims of human rights violations.

⁵²⁴ *New York Times*, ‘Rapists in uniform: Peru looks the other way,’ April 29, 1993. Available <https://www.nytimes.com/1993/04/29/world/lima-journal-rapists-in-uniform-peru-looks-the-other-way.html>

⁵²⁵ See Amnesty International, Report. *Peru: Human rights in a climate of terror*, p. 22. London, 1991.

⁵²⁶ CVR, p. 370.

a crime by abuse of power and a crime by virtue of the act of rape as a human rights violation on the part of direct perpetrators, but also a crime by omission where witnesses sanctioned the practice by failing to prevent or denounce it. In a statement regarding the rape of women during the conflict, then president Fujimori laments the tradition of impunity in Peru and vows prosecution of perpetrators.⁵²⁷

Existent investigation, however, carried out largely by the CVR and based on the testimonies of victims and witnesses themselves, has been centred on victims of rape. Although acknowledged repeatedly in the testimonies of victims, witnesses, and in presentation of the information collected by the Commission, there is no explicit recognition in its report of the practice of reproductive violence. The remainder of this chapter examines reproductive violence which, although largely absent from the work of the Commission and inexistent as a terminology within it, prevailed in the context of the Peruvian armed conflict, with devastating effects. It concludes that perhaps the convenience of President Fujimori's remarks on impunity regarding crimes of a strictly sexual nature rests on distraction from the very crimes of a reproductive nature which he himself sanctioned. It has been convenient, in this context, to frame the rape of women as a crime and portray other acts, such as enforced sterilisation, as a means to the ends of development policy.

III. Historical context of reproductive violence in the Peruvian armed conflict

The reproductive violence perpetrated against indigenous communities in Peru was, partly, a response to the rural origins and cartography of the Shining Path movement. Government policies, such as suspension of constitutional guarantees in Ayacucho, were legal manifestations of the suppression of rural regions and indigenous communities rife with conflict. The example of enforced sterilisations of indigenous women is illustrative.

III.a. Rationale for enforced sterilisations of indigenous women

On September 15, 1995, less than a year prior to the inception of the enforced sterilisations, Alberto Fujimori, then President of Peru, attended the United Nations International Conference on Women in Beijing. He was one of only a few males in attendance. There, he announced his

⁵²⁷ *New York Times*, *supra* note 63.

government's Reproductive Health and Family Planning Program,⁵²⁸ under which, in 1996, began the operations that would forcibly sterilise over 300,000 indigenous, mainly Quechua speaking, women, many of whom consequently died or suffered severe and lifelong morbidity.⁵²⁹ According to the Quipu Project, the number of victims was 272,000 women and 21,000 men.⁵³⁰

The operations were performed in the shadows of a discourse on feminism, women's rights, development and population concerns. Public health workers responded to orders to fill quotas, in squalid conditions, often without anaesthesia. The Program, Fujimori insisted, intended to reduce poverty and modernise rural indigenous Peru. Women were fundamental to the realisation of these objectives because, in his own words, "Poverty has a female's face."⁵³¹ In response, the Program would promote gender equality and protect reproductive rights in its provision of family planning services, such as contraception and "voluntary" legal sterilisation.⁵³²

III.b. Enforced sterilisation as reproductive violence

A 1998 investigation by human rights lawyer Giulia Tamayo later revealed that indigenous, predominantly illiterate, women in impoverished rural communities where birth rates were high had been targeted by State officials, lied to, bribed, coerced, and forced into undergoing sterilisation surgeries.⁵³³ This truth reflects a statement by the FIGO General Assembly, who resolved that "Women's health is often compromised not by lack of medical knowledge, but by infringements on women's human rights."⁵³⁴ Tamayo affirms, "the right to information gains value as a substantial and interdependent component of the right to decide in reproductive matters."⁵³⁵

⁵²⁸ El Programa Nacional de Salud Reproductiva y Planificación Familiar (PNSRPF), 1996-2000.

⁵²⁹ Giulia Tamayo, *Nada Personal: Reporte de derechos humanos sobre la aplicación de la anticoncepción quirúrgica en el Perú 1996-1998*. Lima, CLADEM, 1998.

⁵³⁰ See The Quipu Project, <https://interactive.quipu-project.com/#/en/quipu/intro>

⁵³¹ Fujimori, Alberto. Speech given at the United Nations, IV World Conference on Women, September 15, 1995, Beijing, China. Available <http://www.un.org/esa/gopher-data/conf/fwcw/conf/gov/950915131946.txt>

⁵³² Ibid.

⁵³³ See Tamayo, *Op. cit.*

⁵³⁴ International Federation of Gynecology and Obstetrics, FIGO, General Assembly, Resolution on Women's Rights Relating to Reproductive and Sexual Health. Washington DC, 2000.

⁵³⁵ Tamayo, *Op. cit.*, p. 20. My translation.

The right to reproductive health falls within the universally recognised right to health,⁵³⁶ in turn regarded as a human right, meaning that any violation of any aspect of the right to health constitutes violation of a human right. The enforced sterilisations therefore constitute human rights violations. In essence, a right represents a freedom; a violation translates as revocation of a freedom, and repair as its restoration. With regard to violation of rights and freedoms, discrimination performs the language which dictates who should be called free, who is entitled to which rights, how and when they are to be exercised. In the performance of the enforced sterilisations, discrimination was exercised on the grounds of gender, ethnic, cultural and economic difference.

In addition to the directly reproductive violence, the neo-Malthusian policies of public health under the Fujimori regime used indigenous women's bodies as instruments of economic policy;⁵³⁷ a reduction of the indigenous population would rise the Gross Domestic Product (GDP) and enhance economic development, it was thought. Yet the statistics underpinning this logic do not necessarily correspond to the aim. The total population of Peru is approximately 32.17 million,⁵³⁸ of which approximately 22.7 percent self-identify as Quechua and 2.7 percent as Aymara.⁵³⁹ However, in rural departments such as Ayacucho, the demographics of the indigenous population speaking Quechua as their mother tongue exceed 99.6 percent.⁵⁴⁰ This, compared with the 69,280 predominantly indigenous disappeared or dead as consequence of the armed conflict, is indicative of the violations which disproportionately affected indigenous communities. In this vein, the argument that the family planning program was necessary to reduce high population levels within indigenous communities is invalid,⁵⁴¹ especially toward the end of the armed conflict when the sterilisations occurred in an area that had already seen its population decimated by violence and which therefore could not have suffered from overpopulation. Contrarily, the demographic fall in indigenous areas resulting from the

⁵³⁶ As recognised by Art. 1 of the Universal Declaration on Human Rights, which states, "All human beings are born free and equal in dignity and human rights." United Nations, UDHR, 1948. Also Art. 12.1 of the International Covenant on Economic, Social and Cultural Rights which affirms "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Art. 12.2 outlines the corresponding obligations of States in the realisation of the right. See United Nations General Assembly. *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966.

⁵³⁷ See Alejandra Ballón Gutiérrez, *Op. cit.*

⁵³⁸ World Population Review, Peru Population 2017. Available: <http://worldpopulationreview.com/countries/peru-population/>

⁵³⁹ This information is according to a 2006 survey, the most recent, from the Peruvian Instituto Nacional de Estadística e Información.

⁵⁴⁰ UNICEF, Estado de la niñez indígena en el Perú, (2010), Available <https://www.unicef.org/peru/spanish/ayacuchopresenta.pdf>

⁵⁴¹ See Ballón Gutiérrez, *Op. cit.*

enforced sterilisations left an older population and economic disadvantages ensuing from morbidity and fewer people able to earn a living.⁵⁴²

III.c. Genocidal element to the enforced sterilisations

What emerges are not only systematic violations of human rights, but an act of genocide, the nature of which would also constitute crimes against humanity. The enforced sterilisations were genocidal in their intent to destroy, irrevocably, aspects of a targeted people's culture, identity, and existence. The case of the enforced sterilisations in Peru could amount to an act of genocide, in accordance with the UN Convention on the Prevention and Punishment of the Crime of Genocide, in relation to, *inter alia*, its intent to cause "serious bodily or mental harm to members of the group,"⁵⁴³ and by "imposing measures to prevent births within the group."⁵⁴⁴

Reproductive violence does not, however, comprise a reference in an extensive list of crimes for which Fujimori now serves a prison sentence of 25 years.⁵⁴⁵ He has not been found guilty of, or even tried for, violations of the right to reproductive health. It was only after the deposed President left the political scene in 2001, fleeing to Japan, that the sterilisations began to be investigated. Not long after, the case was thrown out by the Prosecutor's Office, and 2014 saw the case thrown out for a second time.⁵⁴⁶ The State attorney responsible for this decision argued that, despite being uncommon felonies and constituting serious violations to human rights, the enforced sterilisations did not constitute crimes against humanity.⁵⁴⁷ His acknowledgement that they are serious violations to human rights, however, led him to consider that the case not be completely abandoned and the door was left open for victims to refile a case against the health and justice personnel responsible for authorising or conducting the enforced sterilisations. Since he did not consider the enforced sterilisations crimes against

⁵⁴² *BBC News*, Americas, 'Mass sterilization scandal shocks Peru,' July 2002. Available <http://news.bbc.co.uk/2/hi/americas/2148793.stm>

⁵⁴³ United Nations General Assembly, *Convention on the Prevention and Punishment for the Crime of Genocide*, Res. 260 A (III), 9 December 1948. See Art. II(b).

Available <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CrimeOfGenocide.aspx>

⁵⁴⁴ *Ibid.*, Art II(d).

⁵⁴⁵ Fujimori was tried for and found guilty of crimes of corruption and crimes against humanity. Combined, his individual sentences exceed 25 years. Under Peruvian law, however, all prison terms given to an individual are served concurrently and are not to exceed 25 years in total.

⁵⁴⁶ See Amnesty International, 'Peru: Order to indict Fujimori is a milestone in search for justice for victims of forced sterilization,' 28 April 2018. Available <https://www.amnesty.org/en/latest/news/2018/04/peru-order-to-indict-fujimori-is-a-milestone-in-search-for-justice-for-victims-of-forced-sterilization/>

⁵⁴⁷ See Quipu Project, Documentary at 17:10.

humanity, the attorney general excluded Fujimori and his former ministers of health from the inquiry and any responsibility which may have arisen therefrom.

María Ysabel Cedano of the Lima-based women's rights organisation, Demus, considered the decision problematic on a number of grounds. The Attorney General stated that the sterilisations were not crimes against humanity because no organised state apparatus was used to violate human rights. However, as Cedano reflects, the Ministry of Health

is a hierarchical and vertical organization where health staff would report to the minister of health, who would then report to the president regarding how the family planning program and the reproductive and sexual health plan were being implemented.⁵⁴⁸

Demus filed an appeal. In April 2018, there was an unprecedented order to indict Fujimori and three of his former health ministers over the enforced sterilisations in formal recognition by the Prosecutor that the enforced sterilisations constituted serious violations of human rights.⁵⁴⁹ In November 2018, it emerged that the case would appear in court to determine the criminal responsibility of Fujimori, his three health ministers and former consultant also implicated in the case.⁵⁵⁰ Despite the 300,000 victims of this program, the formal charge is over the enforced sterilisation of 2,164 women, and the deaths of five women. Justice for victims, however, remains elusive and awaits a formal accusation in order for the judicial authorities to bring the case to trial.⁵⁵¹ Not only was the right to reproductive health of the victims of enforced sterilisation violated, but also their right to life; the latter not necessarily strictly in the sense of mortality, but relative to morbidity and to the genocidal intent to place under great strain the individual and collective quality of life of the victims and their community, to live in freedom, and to be informed to make decisions regarding their lives and reproductive rights.

The right to life is unprotected if the collective and individual memory of violence is repressed. In this vein, the right to the truth and acts of truth telling comprise essential elements of reparation. Where memories are repressed, impunity reigns, and there are no conditions of resistance; amnesia rises, and with it, renewed violence. Memory, in this light, comprises an essential aspect of justice.

⁵⁴⁸ Pass Blue, 'Pursuing justice for Peruvian women forcibly sterilized under Fujimori's rule,' 2015. Available <http://www.passblue.com/2015/05/05/pursuing-justice-for-peruvian-women-forcibly-sterilized-under-fujimori-rule/>

⁵⁴⁹ See Amnesty International, 'Peru: Order to indict Fujimori,' *Op. cit.*

⁵⁵⁰ See *Peru Reports*, Fujimori to go to court in forced sterilisation case, November 13 2018. Available <https://perureports.com/fujimori-court-forced-sterilisation/8675/>

⁵⁵¹ *Ibid.*

IV. A call for justice and reparation within Quipu

The Quipu Project is the name given to a phonenumber, established by Demus in 2013 which receives calls from victims from remote locations across Peru. The victims give oral testimonies of the enforced sterilisations they were subjected to under the Fujimori Family Planning Program. The testimonies collected set down an alternative historical record of the violence experienced by women in the context of the armed conflict and represent an act of resistance which articulates a demand for reparation.

IV.a. Significance of the name Quipu

In material form, a traditional *quipu* represents a horizontal line of woven string with a series of vertical strings attached to it, upon which knots are tied. The knots encode important information in a positional system, each of which represents a number which in turn stands for an object or event. Etymologically, *quipu* is the Latinised form of the Cusco Quechua “*khipu*,” meaning knot. *Quipus* provide a deep understanding of local notions of history and community.⁵⁵²

In the early years of the Conquest of Peru, Spanish officials relied on *quipus* as a source of documentation of tribute payments, production of goods, elaboration of population records and census information, or the settlement of disputes. But with the consolidation of Spanish invasion and the imposition of the written word, *quipus* became a largely historical artefact, relocated to indigenous memory. Although some believe they are unrelated to any spoken language, historians Edward Hyams and George Ordish read in the quipu a recording system similar to that of musical notation. *Quipus* hold no sound in and of themselves, but contain basic information which a performer then brings to life.⁵⁵³ Thus, although not oral but material objects, they *talk*.

Symbolically, the project of Quipu retains the method of the original *quipu* in the sense that it ‘talks’ by gathering information in the form of oral testimonies, and therefore numbers and identifies the victims of the enforced sterilisations. The women who testify are unarmed,

⁵⁵² See Susan Niles, ‘Considering Quipus: Andean knotted string records in analytical context,’ pp. 85-102, in *Reviews in Anthropology*, Vol. 36, Issue 1 (2007).

⁵⁵³ See Edward Hyams & George Ordish. *The Last of the Incas: The rise and fall of an American empire*. New York, Barnes & Noble, 1996.

their form of resistance nonviolent and pacifist; yet they expose injury, and thus truth, in a defiant stance against silence. Contrary to the popular belief, pacifism is not inaction in the face of conflict, but resistance to certain forms of action and thus comprises, by virtue of its resistance, action. Jackson inverts the language and discursive construction of pacifism and non-violence within theories of International Relations, exposing pacifism as a subjugated knowledge.⁵⁵⁴ Its subjugation, however, does not mean that it ceases to exist; rather, its existence is silenced and transformed. In line with much of the vernacular turn in security studies discussed earlier in this thesis, the Quipu project maps out not only alternative representations of history, but within these, alternative interpretations and locations of security.

IV.b. Testimony as text

The idea that testimony itself produces a kind of text is important in relation to CRSRV for it holds the potential to displace the methods of silence seen in the sections above which firmly deny the victims their right to the truth. Its importance also resonates within the Peruvian context specifically in which the vast majority of victims of enforced sterilisation were indigenous, Quechua speaking and illiterate. In the act of giving their testimonies, orally through the Quipu Project, no intermediaries were necessary, and the text, though it may be later transcribed as it has been here, lives regardless of restrictions imposed by the written word.

Martin Lienhard reads “alternative texts,” risen from the margins, in answer to the negotiations at play in the multicultural reality of Peru comprised of its indigenous, creole and mestizo heritage.⁵⁵⁵ Cultural adaptation has marked the Peruvian landscape since Spanish conquest, indeed since before it was consolidated as a single territory, yet in a post-conflict Peru, Western and indigenous world views are not reconciled, but continue on “paths of negotiation of the dual (or multiple) cultures”⁵⁵⁶ which co- or cross-exist in continual redefinitions of reality.

In contexts which deny existence of human rights violations, or the extent to which they have affected victims, the state, by omission of recognition, further violates victims’ right to

⁵⁵⁴ Richard Jackson, ‘Pacifism: the anatomy of a subjugated knowledge,’ pp. 160-175, in *Critical Studies on Security*, Vol. 6, 2018, Issue 2 – Rethinking the relevance of pacifism for security and IR.

⁵⁵⁵ See Martin Lienhard, *La voz y su huella: Escritura y conflicto étnico-social en América Latina (1492-1988)*. La Habana, Casa las Américas, 1990.

⁵⁵⁶ Anne Lambright, *Andean truths: Transitional justice, ethnicity, and cultural production in post-Shining Path Peru*, p. 3. Liverpool, Liverpool University Press, 2015.

the truth. The truth revealed by the oral testimonies of Quipu invokes the memory of historical injustice and the present implications of the violations suffered. “I am Esperanza Huayama Aguirre,” one testimony opens. And she continues that she was

*from the village of Rodeo Pampa, very far away. They gathered more than a hundred women at the clinic and they kept us imprisoned. They closed the gate. Once inside, they wouldn't let us leave. They took me in to get sterilised. They gave me the anaesthetic and as I was falling asleep, they quickly started cutting me and it hurt. I heard them saying 'the woman is pregnant'. I didn't want my little baby to die at that moment, so I said 'I don't want you to remove my baby, I would rather die next to my baby so don't you take him out.'*⁵⁵⁷

An anonymous victim of enforced sterilisation recalls how she was made to feel ashamed of her situation, told she should be thankful for not being killed as she would have been in other places, that she should be grateful to the President Fujimori without being given any information on what would happen to her or any means to prevent it:

*When I complained, they insulted me: 'You should thank Fujimori. Fujimori is sending this campaign so you can get sterilised. In Peru you are like pigs, you have children like guinea pigs. In other countries they kill that type of women' – that is how they insulted me. I was not given information. It was after, when I fell ill, that I started to know my rights. Now I know my rights. That's our situation, year after year. They filed the case over and over again. We don't find justice. We are already tired of fighting for this cause each year. For the last time, I ask for reparation and legal justice. Also at a national level, I ask for justice for all the women of Peru.'*⁵⁵⁸

This victim first relays her own experience and then acknowledges the collective suffering derived of the enforced sterilisations. The collective nature of the reproductive violence adds depth to the woman's call for justice and reparation, as in the following testimony:

This is what the government, what Fujimorism, did to us. If they so badly didn't want to see the mothers of Peru, they should have killed us, so we wouldn't be in this position of endless suffering. Damn that government for what they did. If Fujimori asks for forgiveness now, then as for me I hope he dries up in prison, the same way he left so

⁵⁵⁷ Quipu Project. Documentary. Excerpt from Testimony 001: Esperanza, Huancabamba, September 2013. Spoken Spanish with English subtitles. See The Guardian, *Quipu – Calls for Justice*, published 10 February, 2017. Available <https://www.theguardian.com/world/series/guardian-bertha-documentaries>

⁵⁵⁸ *Ibid.* Excerpt from Testimony 102: anonymous. Cusco, July 2015. Spoken Quechua with interjected Spanish and English subtitles.

*many people suffering here. Many innocent people, many illiterate people he left incapacitated.*⁵⁵⁹

Yet the collective nature of the violence should not override the need for recognition of individual victims and the individual right to reparation for the crimes of enforced sterilisation which should be considered to merit redress as acts of sexual violence have been. The testimony of Teodula Puma demonstrates some similarities with the testimonies of sexual violence gathered by the CVR.

*Hi, I am Teodula Puma. I am testing the phoneline. I am Teodula Puma Carrión. I live in the village of Ñangali. The nurses from Ñangali medical centre said to me, 'We will help you only if you get sterilised. If you don't, we won't give you any food because you all have too many children, like rabbits.' They put me on the bed and four of them held me down. Two held my arms down and two held my legs so they could inject me. I remember nothing else, since I was screaming, but they often came and held our faces, 'Lady, please shut up. Just shut up!'*⁵⁶⁰

Coercion was applied as Teodula was told she would not receive food unless she agreed to be sterilised. Force was then used in order to carry out the operation, which indicates that the methods used to carry out crimes of enforced sterilisation as a form of reproductive violence were of comparable gravity to those of sexual violence perpetrated within the context of the Peruvian armed conflict. Finally, Teodula was silenced and remained silent for almost twenty years after the sterilisation was performed. She carried the truth inside her until dialling the number of the Quipu Project in 2013 to record her testimony. These testimonies hold light to the practice of reproductive violence which went, subsumed within narratives of sexual violence, unrecorded and uncontested in the aftermath of the conflict.

IV.c. Orality and the witness in the construction of the truth

To testify is to articulate a call for reparation. The call is not necessarily for material but symbolic reparation, for recognition of a wrong committed which is evidenced in the very nature of orality as it demands reception. It is a witness who presents testimony, in the case of

⁵⁵⁹ *Ibid.* Excerpt from Testimony 121: anonymous. Huancabamba, August 2015. Spoken Spanish with English subtitles.

⁵⁶⁰ *Ibid.* Excerpt from Testimony 032: Teodula Huancabamba, December 2013. Spoken Spanish with English subtitles.

Quipu, orally. A witness is a subject who, in Spanish, shares the same root word as the verb “to testify,” or “to give testimony,” *el testigo, la testiga; testimoniar o testificar, (la testiga prestó testimonio)*. The shared roots between the witness as subject and the act of testimony assign to the victim an active role and shed light on the existence of nonviolent resistance as a force of strength. Testimony and the role of the witness, or victim, play indispensable roles in the construction of the truth. In the case of the enforced sterilisations in Peru, the witness who testifies was also the victim herself.

As discussed earlier in this thesis in relation to Elizabeth Jelin, the production of testimony depends on a number of factors somewhere between voice and silence. And it is worth recalling Jelin’s words as she considers that “the impossibility of constructing a narrative and the symbolic lapses and voids involved in trauma are relevant in this issue.”⁵⁶¹ The silences inherent in the memory of violence, and by consequence in the testimony of violence, result not solely from the victim, but also from the listener who extracts meaning.⁵⁶² This creates, whether voluntarily or involuntarily, a dialogue within a “shared space”,⁵⁶³ which to some degree displaces or decentralises the role of silence, and centralises it within the experience of the victim.

As Bassiouni considers, legislation on rights violations in international law has been largely conflict-centric, and his proposal for a shift to privilege a victim-centric perspective would, this thesis argues, assume added potency in light of acts of testimony.⁵⁶⁴ It is worth also reiterating Bassiouni’s observations that “a victim-centric perspective would require redefinition of international crimes so they become dependent on the victim’s suffering rather than on the nature of the conflict or context of violations.”⁵⁶⁵ In the methodology of a victim-centred system, the act of giving testimony and the importance of hearing victims in public audiences is essential. The right to testify would, in such settings, be considered analogous with the obligation to give evidence. Neumann acknowledges the importance and privilege of the victim in interpreting history over the role of the historian. He says: “The expert witness who reports on her research about an event in the past is no match for the eyewitness who was involved in that event. Presumed authenticity now trumps professional authority.”⁵⁶⁶ But

⁵⁶¹ Elizabeth Jelin, *State repression and the labors of memory*, *Op. cit.*, p. 61.

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*, p. 64.

⁵⁶⁴ C Bassiouni, ‘International Recognition of Victims’ Rights,’ *Op. cit.*, p. 204.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Klaus Neumann, “Historians and the yearning for historical justice”, *Rethinking History*, Vol. 18, No. 2, (2014), pp. 145-164, p. 150.

giving testimony is a question of what is contextually viable, possible and also intersects acutely with protection of victims and witnesses.

IV.d. Absence of reparation for victims of reproductive violence

Truth telling is antecedent and integral to reparation. The right to the truth represents a reparative measure in itself, and also provides a preventative measure as the recording and documentation of violations, exposure of crimes and their possible prosecution, lead to non-recurrence.

The spoken truth within testimonies furthermore transcends its orality and becomes a historical source of human rights violations within a given context. As in the case of the CVR, oral testimony was transcribed to become a written reference for the future, and in the case of the Quipu Project, the oral testimonies were recorded and have become documentation of another related form of violence; they are transcribed here on paper as further evidence contributing to the truth of the violations suffered.

The CVR acknowledged the extent of suffering experienced by victims of sexual violence and, despite recognising the impossibility of restoring lives lost, made a commitment to redress in some measure part of the loss or injury incurred from the violations. Forms of redress it laid out for victims of sexual violence consisted of pensions for victims and children born of rape. Among other measures were compensation related to restoring the wellbeing of victims, especially in terms of physical and psychological health, and education.

No form of reparation has been enacted for victims of enforced sterilisations, though it has been referred to by the daughter of Fujimori who ran, but was not elected, for President in recent years.⁵⁶⁷ Former President Fujimori proclaimed a commitment to prosecute those responsible for crimes of sexual violence against women. The enforced sterilisations were not seen by his government, or the findings of the CVR, as a form of violence. The testimonies collected by the Quipu Project attest otherwise. The enforced sterilisations comprise human rights violations of comparable gravity to the crimes of a sexual nature which were seen to merit reparation for victims. Redress equal in scope and application is therefore owed to victims of reproductive violence perpetrated within the context of the Peruvian armed conflict.

⁵⁶⁷ Both final candidates to the presidency in the elections of 2016, Keiko Fujimori (daughter of Alberto Fujimori) and Pedro Pablo Kuczynski, promised for the first time reparations for the victims of enforced sterilisations in their campaigns. The latter narrowly won; a programme of reparations is yet to be enacted.

Measures of reparation should include compensation in the form of pensions, immediate and continuing attention to the physical and psychological health of victims, and programs directed toward literacy in particular and education in general. Victims of CRSRV in Peru, and elsewhere, must begin to be seen as victims of human rights violations, in which sexual violence is inextricable but also distinct from reproductive violence, who are entitled to, and owed, the same right to reparation.

The interests in question, precisely in determining what constitutes a violation and who a victim, are fraught with a preoccupation of and for the Other. And the production of othering is incomplete without the concession of economic value because questions of value lie at the heart of determining who or what is Other and, similarly, who or what represents the self. Not to forget Fujimori's observation that poverty has a female's face. Thus seen, contemplations of the Other occur not only within a colonial lens (which operates on largely economic concerns) but also an imperial lens (driven by largely ideological concerns). Spivak considers:

If the project of Imperialism is violently to put together the episteme that will 'mean' (for others) and 'know' (for the self) the colonial subject as history's nearly-served other, the example of these deletions indicate explicitly what is always implicit: that meaning/knowledge intersects power.⁵⁶⁸

This construction of knowledge, based on a development paradigm (the family planning program) which closely, although not exactly, follows patterns of colonial thought (the Spanish conquest), renders the object (in this case, the Third World woman) powerless and disorients access to her right to reproductive health in times of armed conflict particularly, and other contexts generally, in its establishment of, among other things, prohibitive economic grounds.

As Theidon observes, in response to the aftermath of the conflict, Quecha speaking communities within Peru maintain strict theories of the aetiology of their illnesses (physical and mental) and the methods for treating them. Their therapeutic repertoire is drawn from the close relation between mental health and processes of justice as part of a micropolitics of reconciliation.⁵⁶⁹ How a culture expresses itself, how a culture remembers are furthermore fundamental elements of justice. The juridical structures which impart justice in Peru derive from a long history of colonialism, often institutionalising injustice and violence for indigenous minorities. In this vein, we are not contemplating, in a post-conflict, post-truth commission

⁵⁶⁸ Gayatri Chakravorty Spivak, 'The Rani of Sirmur: An essay in reading the archives,' pp. 247-272, in *History and Theory*, Vol. 24, No. 3, October 1985. See p. 255.

⁵⁶⁹ Kimberly Theidon, *Op. cit.*, p. 22.

Peru, simply reconciling what is the right way to repair, but rather the conciliation of difference across cultural and historical divides.

IV.e. Silence as a common thread between sexual and reproductive violence

The perpetration of CRSRV against women in the case of Peru occurred in the context of other human rights violations. This does not mean it should be subsumed by them, but responded to in relation to them. Sexual violence was prevalent in the Peruvian armed conflict. Its effects were and, in many cases, remain profound and pervasive, very often coinciding with reproductive violence. While distinctions must be drawn between sexual and reproductive violence, the testimonies of victims and witnesses cited in this chapter also illustrate their indivisibility, particularly with regard to women, the reproductive consequences of rape or enforced sterilisations, and not least in reference to the methods of silencing involved.

The CVR of Peru based a great deal of its findings regarding sexual violence against women in the internal armed conflict on the testimonies of victims and witnesses. Its final report condemned this form of violence and set out guidelines for reparation. However, the work did not include a wide range of testimonies, but limited itself to those of sexual violence, and predominantly victims of rape, despite acknowledgement of reproductive violence as a consequence or form of sexual violence in its initial descriptions of sexual violence. The testimonies also made clear links between sexual and reproductive violence, yet the human rights violations acknowledged in relation to the testimonies were framed, almost exclusively, as acts of sexual violence.

It is the duty of the state, as seen, to investigate all crimes as part of establishing the truth of violent histories, which also translates as the collective right of society and the individual right of victims and their families to know the truth regarding serious human rights violations. This chapter considered the importance of the right to the truth in relation to the right of victims to testify, actively contribute to the establishment of the truth and not merely remain passive recipients of it. A victim-centred perspective in reparations remains impossible where the experience of victims is unaccounted for as there is a very limited understanding of what exactly is in need of repair. Absence of the truth also poses a serious threat to the right to development, as an individual and collective right.

The chapter further considered the grounds for extension of the term conflict-related sexual violence to incorporate reproductive violence also in order to better reflect the reality of

violence so clearly expressed by victims, both within the CVR and the Quipu Project. The term sexual violence may have been theoretically inclusive of victims of reproductive violence in its initial broad definitions of the practice. However, in the context of Peru, practices of reproductive violence were subsumed within, as opposed to supported by, the term sexual violence. Most importantly, it was exclusive of victims who experienced violations other than of an exclusively sexual nature, and particularly rape, in regard to the absence of reparations for other victims. Perhaps prior extension of the term to include reproductive violence would have resulted in collection of a wider range of testimonies and would, therefore, have documented crimes which have remained, until recently, unaccounted for, such as the enforced sterilisations. Instead, the Quipu Project, decades later, demands redress for victims who remained silent for too long.

The methodology of silence as a means to prevent victims from speaking out, denouncing crimes or demanding redress, sheds light on an undeniable commonality between the practices of sexual and reproductive violence in the Peruvian conflict.

IV.f. Demarcations of the right to reparation

To close, this chapter makes the following suggestions in light of the preceding conditions of violations suffered to approximate demarcations of the right of victims to reparation. First and foremost, the right to reparation is initiated by recognition of violations in the context of the Peruvian armed conflict, and in the ensuing period of post-conflict. The limited nature of the testimonies gathered by the CVR meant that recognition of crimes against women were interpreted, recognised, and recorded as sexual violence. Diverse forms of sexual violence were deplored, and victims were recognised along with their right to reparation. As seen, the CVR outlined substantial guidelines for the conceptual framework and practical application of reparations.

By contrast, the testimonies gathered by the Quipu project shed light on related violations experienced by women of comparable gravity and exposed far wider interpretations of sexual violence extending to reproductive violence experienced by women in this context. First and foremost, the right of victims to reparation centres on adequate recognition of violations. Recognition can take the form of an official apology in symbolic gesture towards the suffering of victims and the responsibility of those who perpetrated, commissioned, sanctioned, or denied the crimes.

The Commission did include the Integral Plan of Reparations (PIR),⁵⁷⁰ which recognises responsibility of the State in assuming its debt with those who directly suffered violence. A central component of the measures under the “Public gestures” programme of the PIR refers to human rights violations against women and deals specifically with aggressions to the sexuality, honour, and dignity of women.⁵⁷¹ As discussed above, the reparations allocated by the Commission were to be paid for by the Reparations Fund, financed in part by extraordinary funds taken from resources from repatriated “black money” acquired illicitly during the course of the conflict, and since available through the anti-corruption Special Fund of the Administration of Money Obtained Illicitly, known as FEDADOI.⁵⁷²

The reparations set out by the CRV for victims of sexual violence should be amended to recognise and include victims of enforced sterilisation. The same forms of compensation extended to victims and next of kin should be extended to victims of the enforced sterilisations in line with the obligation cited by the Commission to repair under international law, as well as under internal Peruvian law. As seen, with respect to the latter, the Political Constitution of Peru of 1993 in its first article affirms that “defense of the human person and respect for his dignity are the supreme purpose of the society and the State.”⁵⁷³ This would better respond to the definition of victim used by the CVR, which includes, *inter alia*, those who have suffered torture and rape,⁵⁷⁴ and the affirmation that the act of rape constitutes an act of torture.⁵⁷⁵ Victims of torture and rape are to be considered individual beneficiaries.⁵⁷⁶ Similarly, children born of rape are to be considered individual beneficiaries.⁵⁷⁷ This recognition must be extended to recognise and redress victims of the crime of enforced sterilisations. Absence of this recognition reinforces the silence imposed in the perpetration of the violations and further strips victims of their right to the truth as an integral aspect of their right to reparation.

⁵⁷⁰ Plan Integral de Reparaciones. Integral Reparations Plan. See CVR, Vol. IX, Chapter 2, Recomendaciones. See 2.2 Programa integral de reparaciones, pp. 139-197. The Plan consists of 10 different elements or “programmes”, including, Symbolic reparations, Public gestures, Acts of recognition, Memorials or sites of memory, Acts which foster reconciliation, Programme of reparations in health, Programme of reparations in education, Programme of restitution of citizen rights, Programme of economic reparations, and Programme of collective reparations.

⁵⁷¹ Ibid., p. 163.

⁵⁷² Ibid., p. 204. Fondo Especial de Administración del Dinero Obtenido Ilícitamente (FEDADOI), or in English: Special Fund of Administration of Illicitly Obtained Money. Part of the rationale for the creation of the FEDADOI was the payment of reparations for victims of human rights violations.

⁵⁷³ Congress of the Republic of Peru, Political Constitution of Peru 1993, Art. 1. English translation Juan Gotelli, Esther Velarde and Pilar Zuazo. Available

http://www.congreso.gob.pe/Docs/files/CONSTITUTION_27_11_2012_ENG.pdf

⁵⁷⁴ Ibid., p.149.

⁵⁷⁵ Ibid.

⁵⁷⁶ CVR, Vol. IX, Chapter 2, p. 152.

⁵⁷⁷ Ibid.

The right to testify in this setting holds the potential to redress violations suffered and to protect further related rights. The Quipu project provided a precedent to the recording of alternative and vernacular testimonies of violence, which were communicated orally, and anonymously if desired, by telephone at the time and pace and in the language most appropriate for the victim or witness. In the first instance, the testimonies provide a source of informal evidence. This evidence serves the right to the truth by redressing the method of silence in presenting an alternative version of the violations. It complies with the right of victims to speak out against violence and demand redress where desired. It further complies with a social commitment to make this information available to society. The act of testifying provides satisfaction insofar as it recognises the perpetration of crimes, and non-recurrence by setting down a record of the violations which challenges prior interpretations and recordings of the conflict and exclusion of certain crimes. In this sense, it not only restores a sense of dignity to the victim, but also dispels impunity. The central aim of the right to the truth here is not necessarily prosecution of perpetrators but recognition of the perpetration of violations and exposure of the truth surrounding their enactment. These functions of the truth act to contest, reverse and redress the method of silencing which such violations depend upon.

Conclusion, Silence in testimonies of CRSRV

The method of silencing was integral to the perpetration of all forms of CRSRV discussed in this chapter. It occurred, customarily, prior to, at the time of, and following the violent acts themselves. Silencing, by threat, force, coercion or any other means, furthermore, represents a violation of the victim's right to the truth, in addition, and of comparable gravity, to the act of sexual or reproductive violence experienced.

Reparation for CRSRV cannot be considered without reference to the truth. The truth framed as a right implicates that the truth transcends its narrative composition and is based on the foundation of an ideal of justice so "events-based approaches to truth do not escape contestation over how narrative truth(s) can be established, by whom, and with what level of durability."⁵⁷⁸ A rights-based approach to development can be strengthened in this regard, by extension to incorporate the right to the truth where this right protects acts of testimony. The recording of vernacular truths surrounding past human rights violations similarly upholds a

⁵⁷⁸ Daniela Accatino and Cath Collins, 'Truth, evidence, truth: The deployment of testimony, archives and technical data in domestic human rights trials,' *Op. cit.*, p. 85.

victim-centred perspective in reparations by adopting a will to incorporate redress for them into any vision of development, restoration of justice, or transition to a future. The significance of the truth regarding victims who testify on CRSRV is narrative in form, but reparative and preventative in function.

In the context of post-conflict Peru, the recording of acts of sexual violence had profound influence over the interpretation of such violations, and over recognition of the existence of victims and their right to reparation. The limited reading of violations of this nature by the CVR resulted in the framing of sexual violence, and predominantly rape, as the most pervasive form of violence experienced by women. It also meant exclusion of victims from reparation. The Quipu Project, contrarily, exposed alternative forms of violence and vernacular truths shedding light on the reproductive intent and consequences of violations within the same framework. The right of victims to testify in this context should lead to the potential for reparation, the measure of which should include a provision for redress of the acts of sexual or reproductive violence suffered and, furthermore, for redress of the attempt to silence or act of silencing the victim prior to, at the time of the crime, or afterward. Both violation of sexual and reproductive rights, as well as violation of the right to the truth should be recognised as acts of war and punished accordingly to prevent recurrence. The testimonies of silencing illustrate that, though the method of silencing was effective in the perpetration of acts of CRSRV, at the time of the violent act and for prolonged periods afterward, the will to speak can resist. However, it depends on a will to listen.

El Salvador



Figure 3. Graffiti marking gang territory in an abandoned neighbourhood of San Martin, El Salvador in November 2018.

Digital Journal, 'In El Salvador, ruthless gangs draw invisible borders,' 28 November 2018.

*Absence or distortion of testimony in the criminalisation of abortion
under Article 133 of the Penal Code of El Salvador*

Introduction: With what sulphurous iron fabric?

On his recent mission to El Salvador, Zeid Ra'ad al Hussein, former UN High Commissioner for Human Rights, found, at a visit to a detention centre where women are held for the crime of “aggravated homicide” in relation to obstetric emergencies which ended their respective pregnancies, that “It only seems to be women from poor and humble backgrounds who are jailed, a telling feature of the injustice suffered.”⁵⁷⁹ He reflected, on another occasion, that the law “falls hard on the poor; never on its own privileged authors.”⁵⁸⁰ And I’m reminded of Neruda who once wrote,

*Your blood asks, how were the wealthy
and the law interwoven?
With what sulphurous iron fabric? How did the poor
keep falling into the tribunals?*⁵⁸¹

This chapter presents an analysis of CRSRV in El Salvador regarding criminalisation of abortion, and the recording of related crimes, under Article 133 of the Penal Code. It argues that the practice constitutes a form of CRSRV, forms of which traditionally “bear direct relation to the conflict itself,” but which also “occur in contexts unrelated to conflict but are

⁵⁷⁹ OHCHR, Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the end of his mission to El Salvador. 17 November 2017. Available

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22412&LangID=E>

⁵⁸⁰ Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights, ‘This is what true leaders look like,’ Parting Message. 30 August, 2018. Available

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23489&LangID=E>

⁵⁸¹ Pablo Neruda, ‘The Judges,’ in *The Poetry of Pablo Neruda*, p. 229. Edited by Ilan Stavans. New York, Straus and Giroux, 2003.

nevertheless of significant concern, for instance in contexts of political repression.”⁵⁸² It traces the relation between CRSRV, in this context, and methods of silencing, and questions, in response to the sentiments expressed in the opening citations, and in reference to the interpretation of obstetric emergencies as crimes under said law, whether the law can be considered just. To clear an all too evident negation, the chapter considers on exactly what grounds Article 133 can be called unjust, in relation to rights-based development and the right to the truth as an aspect of reparation. And so, the chapter is arranged in sequence around the following interrogative points: For whom is the law written? What is the role of silencing? How does the law, and related recording of deviations, obstruct access to justice, to sexual and reproductive rights? The methodology refers to the right to testify as a source of the truth, it considers overwhelming obstruction or absence of testimony and, where available, includes testimonies of women convicted and imprisoned, of their relatives, and those of medical practitioners extracted from secondary sources.⁵⁸³ From these testimonies, it becomes apparent that the truth surrounding obstetric emergencies is frequently distorted and recorded in such a way to meet the criteria for the crimes of induced abortion or aggravated homicide. The chapter concludes that El Salvador must not only abolish Article 133, but must recognise the violence enshrined in the recordings of what are mistakenly identified as crimes, and redress the historic injustices which have sanctioned the law, as well as those which the law has perpetuated against impoverished women and which constitute a form of CRSRV and a violation of the right to the truth.

I. Merits of Article 133 and its effects as constitutive of a form of CRSRV

For the purposes of the context discussed in this chapter and in accordance with the Guidance Note on Reparations for Conflict-Related Sexual Violence, “conflict-related sexual violence refers to incidents or patterns of sexual violence against women, men, girls or boys occurring

⁵⁸² UN, Analytical and Conceptual Framing of Conflict-related Sexual Violence, June 2011, p. 3.

⁵⁸³ The methodology of this chapter is heavily reliant on prior analyses conducted by the Center for Reproductive rights and the Agrupación Ciudadana; their respective studies lend an important theoretical framework and deliver empirical evidence of the suffering experienced by victims and the violations of human rights and human dignity that Article 133 enacts with impunity. These reports offer qualitative and quantitative analyses, including in depth examination of cases brought to trial over specific time frames. This chapter interrogates the testimonies they include and contextualises them within the framework of violations of the right to the truth.

in a conflict or post-conflict setting that have direct links with the conflict itself or that occur in other situations of concern such as in the context of political repression.”⁵⁸⁴

Given that El Salvador witnessed the close of its internal armed conflict in 1992, but acknowledging that a state of post-conflict continues with respect to political instability, high levels of gang violence, discrimination and violence against women in particular, and referring to the climate of political repression within which human rights violations relating to Article 133, among others, occur with impunity, this chapter considers that the criminalisation of abortion and its consequences merits a case, albeit untraditionally, of CRSRV.

The violence is sexual and reproductive by nature as it exploits already vulnerable women on the grounds of sex or gender, specifically regarding obstetric emergencies or attempted abortion as reproductive issues. The discrimination by which the law is enacted, and the consequences of violence derived from its application, including the use of methods of silencing, lead directly to further disintegration of women’s sexual and reproductive health by actively denying protection of their sexual and reproductive rights, among other human rights, as well as their right to the truth. The context of El Salvador therefore further argues the case for extension of the term conflict-related sexual violence to incorporate reproductive violence also. It also reiterates that absence of the right to the truth for victims, especially in the form of testimony, holds profound influence over lack of reparations, impunity, and recurrent cycles of violence.

II. Historical context

The civil war, which ended some twenty-five years ago, left an indelible mark on the country. Contemporary human rights violations in this context reflect a recurrent and undeterred legacy of the conflict in El Salvador. Present forms of violence renew historic injustices within Salvadoran society and fuel novel and hybrid forms of violence. The armed conflict, in which an estimated 75,000 lost their lives, arose in the 1980s in response to the context of a ruling elite that lacked the will to absolve political and economic problems faced by the majority of the predominantly rural population. The Catholic Church, as in many other Latin American contexts of war or political unrest, upheld an historic defence of human rights and played a significant part in the instigation and organisation of peasant movements which rose up against

⁵⁸⁴ Guidance Note of the Secretary-General, *Reparations for Conflict-related Sexual Violence*, p. 2. See also, UN Analytical and Conceptual Framing of Conflict-Related Sexual Violence, June 2011.

the land-owning elite, effectively declaring an armed conflict in resistance to the exclusive power held by the existing regime. Twelve years of armed conflict ensued.

A Peace Accord was signed in 1992, in Mexico, between the Government of El Salvador and the Frente Farabundo Martí de Liberación Nacional (FMLN), known as The Chapultepec Agreements. It has been noted that El Salvador, over the past decades, has “come a long way in institution-building and human rights protection”⁵⁸⁵ and has become a “democracy that honours freedom of expression and where the political discourse is vibrant.”⁵⁸⁶ However, an aspiration of the Accords was to “guarantee unrestricted respect for human rights and reunify Salvadorian society,”⁵⁸⁷ the implementation of which has been difficult. Although the Accords addressed the root causes of the conflict theoretically, profound social and economic inequalities remain unresolved,⁵⁸⁸ with reigning “high rates of poverty, inequality and unemployment, together with alarming levels of crime, impunity and declining trust in public institutions,”⁵⁸⁹ all of which affect women disproportionately.

III. Present political context

Today, gang violence comprises a political priority of the State,⁵⁹⁰ as well as a daily and pervasive threat to the lives of citizens. Civil society groups cite the level of killings resulting from armed confrontations between police and alleged gang members, from January 2015 to

⁵⁸⁵ UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo. Follow-up mission to El Salvador. 14 February, 2011. See para. 7, p. 5.

Available https://www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.17.26.Add.2_en.pdf

⁵⁸⁶ OHCHR, Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at the end of his mission to El Salvador. *Op. cit.*

⁵⁸⁷ ‘The Chapultepec Agreements,’ General Assembly, Security Council, 30 January 1992. See Preamble, p. 2. A/46/864 S/23501 Available

https://peacemaker.un.org/sites/peacemaker.un.org/files/SV_920116_ChapultepecAgreement.pdf

⁵⁸⁸ Alvaro de Soto and Graciana del Castillo, Implementation of Comprehensive Peace Agreements: Staying the course in El Salvador,’ pp. 189-203, in *Global Governance*, Issue 1, 1995. See pp. 189-190. Available https://peacemaker.un.org/sites/peacemaker.un.org/files/ImplementationofComprehensivePeaceAgreementsElSalvador_DeSotoDelCastillo1995.pdf

⁵⁸⁹ Rashida Manjoo Report, *Op. cit.*, para. 8, p. 5.

⁵⁹⁰ The Government’s Plan Seguro, or Safe El Salvador Plan, aims to respond to and prevent organised crime perpetrated by gang violence. It includes coordinated mechanisms for criminal investigations and a criminal justice system which the public trust. One aspect of the Plan is to prevent the influence of criminal groups within prisons, and ensure that prison sentences are served in adequate spaces and conditions with an aim to rehabilitation. Another commitment lies with victims in their right to obtain justice and reparation. OHCHR has recommended that the Plan comply with international human rights standards and adopt a focus on preventative measures in light of the recognition that “dealing with violence primarily through a security lens is insufficient.” See OHCHR, Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at the end of his mission to El Salvador. *Op. cit.*

February 2017, as over one thousand civilians and 45 police officers.⁵⁹¹ There are reports of the return of death squads, a tactic used in the civil war, and extra judicial killings.⁵⁹² This rise in violence has included enforced disappearance and has impelled enforced displacement, massive migration, and the abandonment of entire neighbourhoods.⁵⁹³ Further, El Salvador has the highest levels of gender based violence in Central America, including killings of women and girls, with femicide reaching unprecedented levels in the midst of a climate of impunity. Some steps have been taken to address violence against women.⁵⁹⁴ However, violence is not perpetrated by non-State actors alone, and it must be recognised that the harsh realities many Salvadoran women live are in some cases the result of institutional violence.

El Salvador is the smallest and most densely populated nation of Central America, and among the poorest. Mestizo represent around 90% of the population, with 5% identifying as belonging to an indigenous ethnicity.⁵⁹⁵ The primary language spoken is Spanish, while Nahuatl is spoken by a small number of indigenous people.⁵⁹⁶ Spanish colonial rule introduced strong Catholic traditions, with around 75% of the population presently practising the faith. The Catholic identity of El Salvador has strongly influenced perceptions on maternity and abortion, reinforced by a reigning patriarchy.

Women are largely excluded from social, economic, and political spheres. The case of El Salvador provides no divergence from the historical truth that men have maintained control over women's bodies, health, and freedom by legislating on issues such as abortion, contraception, and other sexual and reproductive services.⁵⁹⁷ The absolute prohibition on abortion in El Salvador violates women's reproductive rights protected by international human rights treaties signed by the country. The criminalisation of abortion rests on explicitly

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ See Digital Journal, 'In El Salvador, ruthless gangs draw invisible borders,' 28 November 2018. Available <http://www.digitaljournal.com/news/world/in-el-salvador-ruthless-gangs-draw-invisible-borders/article/537862>

⁵⁹⁴ For instance, the Special Comprehensive Law for a Violence-free Life for Women, the establishment in March 2016 of specialised courts in order to try gender-based killings of women. IDESMU, the Salvadoran Institute for the Advancement of Women. Domestic violence is regulated by two legal instruments, the Law Against Domestic Violence (LVI) (see note 88, 2nd report), passed in November 1996, and the Penal Code, effective since 1998 and which criminalised domestic violence under article 200. Further, on 27 March 2009, a law on the comprehensive protection of children and adolescents was enacted which included a ground-breaking development in the country's legal framework by recognising the obligation of the State to ensure access to sexual and reproductive health programmes and services to children and adolescents, including the incorporation of sexual and reproductive health education in the school curriculum. The years 2005-2009 also saw the adoption of the national policy on women.

⁵⁹⁵ See CIA World Factbook, Country Profiles, El Salvador. Available https://www.cia.gov/library/publications/the-world-factbook/geos/print_es.html

⁵⁹⁶ Ibid.

⁵⁹⁷ Jonathan Alvarez, 'The case of Beatriz: An outcry to amend El Salvador's abortion ban,' pp. 673-700, in *Pace International Law Review*, Vol. 27, Issue 2, 2015. See p. 673.

discriminatory foundations and has an overwhelming effect on women whose lives are already marked by poverty. Women of higher social standing also find themselves in need of abortion; yet they will remain unpunished since they will continue to have access to abortions in private clinics, “where there is less control than in state hospitals, or to travel to countries like the United States to obtain abortions.”⁵⁹⁸

There are documented cases in which women have practiced self-induced abortion in an environment where safe abortion is illegal, inaccessible, and punishable. In such cases, women, placing their health and lives in danger, have resorted to a variety of methods, including clothes hangers, iron bars, high doses of contraceptives, fertilizers, gastritis remedies, soapy water, and caustic agents such as car battery acid, or insertion of pieces of wood.⁵⁹⁹

Aside from the stark reality of the situation, an overwhelming number of women accused and prosecuted in recent years have had the events surrounding their obstetric related emergencies distorted to resemble self-induced abortions, or aggravated homicide of their infants. It is their stories that this chapter represents. The method of framing women’s need for, and right to, reproductive health as a crime derives from the historical oppression of women in the country and imperils truth, peace, stability and development within society today. In 2011, in a report on her follow-up mission to El Salvador, UN Special Rapporteur on Violence Against Women, Rashida Manjoo, referred to a previous mission in saying,

The main challenges identified to address violence against women effectively included the lack of effective implementation of legislation, obstacles such as gender discrimination in the justice system, inconsistencies in the interpretation and implementation of legislation, and lack of access to sexual and reproductive rights.⁶⁰⁰

Rashida Manjoo continues,

Deeply rooted patriarchal attitudes and the pervasiveness of a *machista* culture that reinforces stereotypes about the roles and responsibilities of women and men in the family, the workplace and society constitute serious obstacles to women’s rights, in particular their right to be free from all forms of violence. The disadvantaged situation of women is patent at all levels of society, from education and employment to political participation, contributing to the decline of their economic status and their greater vulnerability to violence and exploitation. Particularly worrying is the growing

⁵⁹⁸ Center for Reproductive Law and Policy, *Political Process and Abortion Legislation in El Salvador: A human rights analysis*. Report, September 2001. Available <https://www.reproductiverights.org/sites/default/files/documents/persecuted1.pdf>

⁵⁹⁹ Ibid., p. 8.

⁶⁰⁰ Rashida Manjoo Report, *Op. cit.* See para. 5, pp. 5-6 in reference to the previous report of the Special Rapporteur on violence against women on her mission to El Salvador, dated 2004. Available https://www2.ohchr.org/english/issues/women/rapporteur/docs/A.HRC.17.26.Add.2_en.pdf

feminization of rural poverty as a result of a major crisis in the agricultural sector and the increase in poor rural households headed by women.⁶⁰¹

In 2008, the CEDAW Committee noted of El Salvador that “vulnerable groups of women, in particular in rural areas, still have difficulties in accessing health-care services.”⁶⁰² In addition, the ESCR Committee has established that the right to health is not limited to health care alone, but extends to protection of “underlying determinants of health, such as access to health-related education and information, including on sexual and reproductive health.”⁶⁰³

So long as Article 133 remains unrevised, women in El Salvador will continue to be subjected to violence which violates their rights to, *inter alia*, health and life, and to the truth, and condemns not only their biological condition of being a woman but also their humanity. While such laws remain custom, the right of victims to reparation will remain unobtainable.

IV. Historical context of the law

The absolute prohibition on abortion under Article 133 of the Penal Code of El Salvador represents one of the most restrictive abortion laws in the world. It means that women have been, and will continue to be, punished for apparent miscarriages as well as other obstetric emergencies as they are accused of having intentionally induced termination of a pregnancy.

IV.a. Dates in the drafting of the law

On April 20, 1998, a new Penal Code was enacted in El Salvador under which situations where abortion had previously been permitted, for instance in cases where the pregnancy posed risk to a woman’s life, in cases of serious foetal deformities, cases of sex with a minor, or cases of rape, were withdrawn from Article 133.⁶⁰⁴ Further, in January of 1999, an amendment to

⁶⁰¹ Ibid., para. 11, pp. 5-6.

⁶⁰² OHCHR, Statement by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein at the end of his mission to El Salvador. *Op. cit.*

⁶⁰³ CESCR, General Comment No. 14, The right to the highest standard of health. See para. 12c. E/C.12/2000/4

⁶⁰⁴ Article 169 of the 1973 Penal Code outlined cases in which abortion did not comprise a criminal offense: (i) unintentional abortion caused by the woman or an attempt by the woman to cause an abortion due to negligence; (ii) abortion performed by a doctor in order to save the life of the pregnant woman when there is no other way to do so and when performed with the woman’s consent and after the issuing of a medical report. If the woman is a minor, incapacitated, or unable to give consent, the consent of her spouse, legal guardian, or close family

Article 1 of the Constitution recognised protection of the right to life from the moment of conception,⁶⁰⁵ extending further grounds for recognition of Article 133 of the Penal Code.⁶⁰⁶

Preceding these legislative changes, the historic position of the Catholic Church as protector of social justice and human rights in El Salvador had been threatened in the 1990s by the appointment of the new Archbishop of San Salvador, member of the right-wing Opus Dei with support of the ruling political classes. At this time, the convergence of political, social, and religious conditions led to the Catholic Church adopting increasingly severe attitudes to women's rights and effectively cemented the conditions for the criminalisation of abortion in El Salvador.

IV.b. Finalisation and wording of the law

The original draft amendment for Article 133 was to allow for abortion for therapeutic, ethical, and eugenic purposes. However, religious leaders and conservative sectors of society organised a campaign in opposition to these exceptions. The result was a total ban on abortion and its criminalisation. On April 25 1997, five days prior to the end of the legislative session, the Legislative Assembly passed Article 133, still in force today, in addition to supplementary amendments of subsequent articles which criminalise without exception consensual and self-induced abortion. The amended articles to the Penal Code establish the following:

- (1) *Consensual and self-induced abortion* – Article 133 – Whosoever induces an abortion with the woman's consent, or a woman who induces her own abortion or consents to have another person perform an abortion on her, shall be sentenced to two to eight years in prison;
- (2) *Abortion without consent* – Article 134 – Whosoever induces an abortion without the pregnant woman's consent shall be sentenced to four to ten years in prison. Whosoever performs an abortion, having obtained the woman's consent through violence or deception, shall receive the same sentence...
- (3) *Aggravated abortion* – Article 135 – Any doctor, pharmacist or person who carries out activities related to said persons who performs an abortion

member shall be required; (iii) abortion performed by a doctor when the pregnancy is presumed to be the consequence of rape or sexual intercourse with a minor and when the abortion is performed with the woman's consent; and (iv) abortion performed by a doctor when the purpose is to avoid a serious foreseeable deformity of the foetus. See Penal Code of El Salvador 1973, art. 169.

⁶⁰⁵ Political Constitution of El Salvador, 1998. See Art. 1. Available http://www.asamblea.gob.sv/asamblea-legislativa/constitucion/Constitucion_Actualizada_Republica_El_Salvador.pdf

⁶⁰⁶ The amendment to Article 1 of the Constitution was passed on April 30 1997 by the Legislative Assembly. It "recognizes as a human person every human being from the moment of conception." The amendment was ratified by the Legislative Assembly two years later on February 3 1999. Once it entered into force, amending secondary legislation in order to partially decriminalise abortion became practically impossible.

shall be sentenced to six to twelve years in prison. They shall also be suspended from practising their profession for the same period; (4) *Encouragement or assistance to obtain an abortion* – Article 136 – Whosoever encourages a woman to have an abortion or provides economic or other means for her to obtain an abortion shall be sentenced to two to five years in prison. If the person who assists or encourages a woman to obtain an abortion is the person who performs the abortion, the sentence shall be increased by one third of the maximum penalty indicated in the previous subsection... (5) *Unintentional abortion* – Article 137 – Whosoever unintentionally provokes an abortion shall be sentenced to six months to two years in prison. Neither unintentional abortion caused by the pregnant woman, nor the attempt to abortion, is punishable.⁶⁰⁷

Reproductive freedom represents a fundamental human right, and is not confined by sexual or reproductive concerns alone. As a human right, it demands that legal tools, including international human rights law, international criminal law, and international humanitarian law where applicable, obligate a state's conduct in accordance with legal norms to promote and protect it. Reproductive freedom is at the core of human dignity and self-determination, it operates in relation to the principle of non-discrimination and particular attention should be paid to it where inequalities persist, especially with respect to women. Such freedoms imply the equal participation of women in their societies, and exercise of choice without discrimination. Application of Article 133 in El Salvador has not only used discrimination to obstruct access to women's fundamental human rights in the form of reproductive rights, and to the right to the truth where victims of the Law have been unjustly imprisoned, but has also violated their right to participate as equal citizens in society and denied their right to self-determination. It has furthermore been applied in correlation with obstruction or denial of the right to the truth and, therefore, violation of the right to the truth.

IV.c. The law in a broader context of women's rights

Criminalisation of abortion in the late 1990s in El Salvador went against the global tendency toward liberalisation, recognition of women's rights and the framing of sexual and reproductive rights as human rights as seen in the context of the International Conference on Population and Development (ICPD) in 1994. In addition to El Salvador, Nicaragua and Poland have, in the

⁶⁰⁷ *Penal Code of El Salvador*, 1998. Available [http:// www.asamblea.gob.sv/eparlamento/indice-legislativo/buscadordedocumentos-legislativos/codigo-penal](http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscadordedocumentos-legislativos/codigo-penal)

aftermath of such liberalisation, taken measures to restrict conditions under which abortion may be considered legal.⁶⁰⁸ At the ICPD, upon adoption of the Programme of Action, El Salvador expressed reservation before chapters VII and VIII which refer to reproductive health and morbidity and mortality respectively. The Salvadoran delegation considered that “abortion should never be included (...) as a service, or as a method to regulate fertility.”⁶⁰⁹

In 2009, a multidisciplinary organisation was founded in El Salvador, the Agrupación Ciudadana, or Citizen’s Association for the Decriminalization of Therapeutic, Ethical, and Eugenic Abortion,⁶¹⁰ with the aim of raising public awareness so as to change existing legislation on the termination of pregnancy, and to provide legal defence for women convicted of terminating a pregnancy or related crimes in El Salvador. It also adopts a preventative focus in disseminating information on women’s sexual and reproductive rights as a means to avoid resort to unsafe abortion which could endanger their health or life.

Despite the prohibitive climate, an estimated 246,275 abortions were undertaken in El Salvador between 1995 and 2000, 11 percent of which resulted in maternal mortality.⁶¹¹ The Ministry of Health’s Maternal Death Tracking System found that suicide of pregnant women represented the third most common cause of maternal death.⁶¹² Suicide has similarly been reported to account for 57% of the deaths of pregnant females aged 10 to 19 years.⁶¹³ Between January 2005 and December 2008, another 19,290 abortions were performed, 27.6 percent on adolescent patients.⁶¹⁴ The illegality of the procedure of abortion in El Salvador means that any data remains an estimate and therefore an unreliable source on the reality Salvadoran women experience and the barriers they face.

⁶⁰⁸ Discussed in Maja Kirilova Eriksson, *Reproductive freedom: In the context of International Human Rights Law*, p. 176. The Hague, Martinus Nijhoff Publishers, 2000.

⁶⁰⁹ Ibid. Reservations of an almost identical nature were expressed by various Latin American delegates, including Guatemala, Honduras, Nicaragua, Dominican Republic, Ecuador, and Argentina.

⁶¹⁰ In the Spanish, la Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico.

⁶¹¹ See Center for Reproductive Rights and the Agrupación Ciudadana por la Despenalización del Aborto Terapéutico, Ético y Eugenésico, *Marginalized, persecuted and imprisoned. The effects of El Salvador’s criminalization of abortion*. New York, 2014.

⁶¹² Ibid.

⁶¹³ See UNFPA, El Salvador, Investigación regional para prevenir suicidios en el embarazo. April 16 2012. Available [http:// www.unfpa.org.inicia-una-investigacion-regional-para-prevenir-suicidios- en-el-embarazo](http://www.unfpa.org.inicia-una-investigacion-regional-para-prevenir-suicidios-en-el-embarazo)

⁶¹⁴ Amnesty International, *On the brink of death: Violence against women and the abortion ban in El Salvador*, p. 30. 2014.

As Fathalla affirms, “women may not want abortion, but they need it. They have always needed it.”⁶¹⁵ Criminalisation of abortion may restrict access to its safe practice and imperil women’s rights to health and life, but it will not alter the aforementioned fact.

IV.d. Consequences of application of the law

In some cases, women convicted of abortion or “aggravated homicide” in relation to obstetric emergencies have been sentenced to 30 years in prison in the Ilopango detention centre for women, on the outskirts of the capital, San Salvador. Analysis of their testimonies illustrates that it is only poor women who have been accused, silenced, tried and convicted of these “crimes”. Despite the length of prison sentences outlined in the Penal Code, actual sentences given to those women convicted have commonly been substantially longer.

Another related issue to abortion, as mentioned, is aggravated homicide for women believed to have induced abortion and then killed by consequence, intentionally or unintentionally, their newborn infant. A norm for women convicted of aggravated homicide has been sentences of 30 years, with others reaching 35 years, and, in some cases, extending to 50 years. Such sentences represent inconsistencies in the application of the law, and a systematic “violence” imparted by the administration of justice, resulting from, among other malpractices and misinterpretations, violations of prescriptions of the law itself.

V. To whom the law is ascribed

The inherent violence of the law becomes more apparent under close analysis of the cases of the women to whom the law is ascribed. In other words, the law was never intended to try or convict the majority of Salvadoran women, but primarily those whose historic subordination, before any present action or misdeed they may or may not have commissioned, had already prescribed their fate.

⁶¹⁵ Mahmoud Fathalla, FIGO, ‘A world where no woman is denied access to her right to health and life,’ The Allan Rosenfield oration. Women’s Health and Unsafe Abortion Congress. Bangkok, January 21 2010.

V.a. The grounds for conviction

Article 133 of the Penal Code of El Salvador was effectively drafted to punish the guilty, in other words women or their doctors who have undergone or performed abortions, women who have themselves attempted to abort, or others who have commissioned abortion in some way.⁶¹⁶ A provision rarely accounted for outlines that, “Whosoever unintentionally provokes an abortion shall be sentenced to six months to two years in prison.”⁶¹⁷ However, its precise intention rests on ambiguity, and even appears to contradict itself as it goes on to say, “Neither unintentional abortion caused by the pregnant woman, nor the attempt to abortion, is punishable.”⁶¹⁸ Those found guilty have invariably been poor, uneducated, and often illiterate women from humble origins who appear to have suffered what could only be considered unintentional or involuntary abortion.

But the law is also ascribed to the Catholic identity and protects the traditional values of El Salvador, in defence of the nation, its moral foundations resting on a colonial past. In the history of abortion legislation in El Salvador, patriarchal norms have trumped a commitment to human rights. The general socioeconomic status of women in El Salvador, the kinds of health services they have access to, and the level of information and resources that they have inform the context in which CRSRV occurs in El Salvador. The restrictive laws on abortion and criminalisation of related obstetric complications such as miscarriages reiterate the need for reinterpretation of this form of violence to include the definition of reproductive violence.⁶¹⁹

V.b. Deviations from the law

The Agrupación Ciudadana examined case files of women prosecuted for abortion related crimes between January 2000 and March 2011, in preliminary inquiry courts and trial courts. A total of 129 women were identified as having been prosecuted for such crimes.⁶²⁰ Of those prosecuted, 49 were convicted, 23 for abortion and 26 for varying degrees of homicide. The Agrupación Ciudadana acknowledges the inaccuracy of these figures due to the fact that many

⁶¹⁶ Penal Code of El Salvador, Arts. 133-136.

⁶¹⁷ Ibid., Art. 137.

⁶¹⁸ Ibid.

⁶¹⁹ Amnesty International, *On the brink of death*, Op. cit., p. 36.

⁶²⁰ Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned. The effects of El Salvador's criminalization of abortion*, Op. cit., p. 13.

accusations are dismissed before women are actually prosecuted. Further, the number is exclusive of minors whose files are inaccessible due to their status as minors.⁶²¹

Their analysis of these cases also revealed that an overwhelming percentage of women affected by the criminalisation of abortion comes from low socioeconomic backgrounds and is predominantly young of age. Of the 129 cases:

- 68.22% were young women aged between 18 and 25 years.
- 6.98% were illiterate, 40.31% had some primary school education, 11.63% had high school degrees, and 4.65% had completed some form of higher education, whether technical or university studies.
- 73.64% of the women were single.
- 51.16% of the women were earning an income, 31.78% of whom had very low paid jobs.
- In 56.51% of the cases, the crime was identified as homicide, which has serious repercussions in accordance with the principle of proportionality of punishment, a result of which a woman could have been convicted and sentenced to up to 50 years in prison.
- In 43.41% of the cases, provisional detention was imposed, meaning that the women were imprisoned while their proceedings were still being carried out.
- In 51.94% of the cases, the women were represented by public defenders, who were unfamiliar with both their defendant and the case prior to the defense.⁶²²

V.c. Falling into the tribunals

This data signals alarming rates of impoverishment among the women convicted, a high percentage of whom were uneducated, unemployed or low-paid, and single. Aside from any connection to abortion related crimes, these women had therefore already been excluded, not only at the time of their trials and sentencing but over their lifetimes, from social, economic, and educational rights, including access to basic health care services which would have aided in protecting some of their fundamental human rights and preventing the events which led to their conviction. Further, these women lacked the means to fully understand the legal risks presented by the situation they found themselves in and the financial means to obtain adequate legal defense. They were literally rendered defenceless and silent before the State's authority.

In many cases, women were unable to testify, or were forcibly prevented from testifying. The following section relays details of the recording of testimonies of women and

⁶²¹ The Law for the Protection of Childhood and Adolescence, El Salvador, does not permit access to this data.

⁶²² Adapted from Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned. The effects of El Salvador's criminalization of abortion*, p. 13.

girls tried or convicted, their medical practitioners, or holds absence of testimony under the light of the execution of CRSRV in the context of Law 133.

VI. She who testifies

Not all women tried for and convicted of self-induced abortion, or aggravated homicide which resulted from it, are able to testify. This section relays the stories of six Salvadoran women, extracted from secondary sources, but analysed in light of new information and alternative readings regarding the right to the truth here. The testimonies collected here were not given at the time of the women's respective hearings in response to accusations, but long afterward in reflection of criminal processes and violations already set in place. They are told sometimes in their own words, but often in the words of others. The right to the truth illustrates a form of resistance against historical injustice as it represents a form of documentation of history, contestation of historical injustice and, thus, a call for historical justice. In this same sense, it also extends the grounds for reparation, by giving evidence of violations and insight into the exact nature of these violations. Unless stated, the names of the women who testify – whether in their own words or through the words of others on their behalf – have been changed to protect their identity.

VI.a. Manuela

Manuela, a Salvadoran woman from a humble background, and a single mother of two, died of Hodgkin's lymphoma at the age of 33 while serving a 30-year prison sentence for the crime of aggravated homicide. Manuela had been imprisoned after suffering an obstetric emergency, the result of which was involuntary abortion of her fetus. The cause was the underlying condition of her cancer and the fact she had never received adequate treatment for it.

From 2006, Manuela began to seek medical care for headaches, nausea, fatigue and other pain. She was prescribed analgesics and other medication for her symptoms, although no diagnostic tests were done. On February 26, 2008, her health deteriorated. Manuela, on this date, felt intense abdominal pain and went to the latrine located outside her house where she fainted in the presence of her mother, Carmen. Her parents took her to the hospital. On the

same day, the hospital sent a report to the Public Prosecutor's Office accusing Manuela of abortion.⁶²³ She states she had not known that she was pregnant.

While in hospital, Manuela suffered numerous abuses and violations of her rights. This continued during the police and criminal investigation, during the trial, and in prison. Manuela's parents, Carmen and Juan, elderly illiterate peasants, were also subjected to serious abuse by Salvadoran authorities in relation to the circumstances their daughter found herself in. The day after Manuela had been admitted to hospital, she was interrogated by police officers despite her fragile state. Days later, the home of Carmen and Juan was searched by police, including Manuela's room and the latrine. Her mother recalls her own response to the police:

*Go on in there if you want, but not here, and since they already closed up everything, and searched everything thoroughly and didn't find anything – because they think she took pills so that it would die in her – “You know,” they told me. They looked under the bed, everywhere.*⁶²⁴

The Public Prosecutor's Office interrogated Carmen to force her to reveal the location of the fetus and that of the pills Manuela had allegedly taken. They threatened to charge Carmen and told her she could not return home until she provided information about the crime.⁶²⁵ Furthermore, the police had asked Juan to sign a document during their visit. He did not know what he signed because he was illiterate. Juan was later informed that his fingerprint was needed to formalise Manuela's arrest. Without realising, Juan had signed a criminal complaint against his daughter, later used as evidence in the trial against her in addition to the complaint filed by the physician at the hospital.⁶²⁶ Carmen was called as a witness at Manuela's trial. However, she was prevented from testifying.

*Yeah, they called me, I have the papers... And they told me that I had to be a witness for my daughter. I said to Juan, “Let's go,” and I got the kids. Look, they called me twice. Once, it was suspended and they didn't do it, and then later the police came and left me another paper – and look at that, they left me out.*⁶²⁷

⁶²³ Manuela's case is represented in Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*, see p. 36. It also appears in Amnesty International, *On the brink of death*, p. 38.

⁶²⁴ Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*, pp. 36-7.

⁶²⁵ Ibid., p. 37.

⁶²⁶ Ibid., p. 37.

⁶²⁷ Ibid.

Juan and Carmen were also accused of having hidden the fetus. They were told by the Public Prosecutor that they needed to register the fetus in the civil registry in order to be able to receive the body, and gave them a name under which to register it, thus assigning the fetus a legal identity and finalising the framing of a murder.

Why would they tell us to register the birth? And we, look, we had to go right away to get – to be able to bury the child – to get the certificate in town and call him (the public prosecutor) and make sure the child had the certificate, because if not...⁶²⁸

Manuela was arbitrarily placed in preventative detention, meaning she was imprisoned before having been tried or convicted. Authorities failed to respect minimum procedural guarantees. Manuela did not have the financial resources to pay a private lawyer. She only met her public defenders on the day of her hearing. Due to her defenders' negligence and the absence of remedies, she could not appeal the ruling after she was convicted of the crime of aggravated homicide and sentenced to 30 years in prison for aggravated homicide.⁶²⁹ The judge reportedly said that Manuela's "maternal instinct should have prevailed," meaning that "she should have protected the foetus."⁶³⁰

Due to the humiliating searches that her family was forced to undergo in order to visit her, she became isolated from her family. Carmen stopped visiting her daughter in prison in July 2008 because, with every visit, she was subjected to vaginal and anal inspection conducted in unhygienic conditions, which affected her mental health. Carmen and Juan were never informed about their daughter's procedural status or health while she was in prison.⁶³¹

Manuela died of cancer in prison, leaving her two surviving children orphans to be cared for by her parents.⁶³² It was later proven that during the judicial proceeding, Manuela's signature had been forged on appointment records by her recently sanctioned defence lawyer.⁶³³ This treatment saw violation of Manuela's rights to life, health, physical and mental integrity, freedom from cruel, inhumane and degrading treatment, due process, and truth.

⁶²⁸ Ibid.

⁶²⁹ Ibid.

⁶³⁰ Amnesty International, *On the brink of death*, p. 38.

⁶³¹ Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*, pp. 37-8.

⁶³² Ibid.

⁶³³ Ibid., p. 38.

VI.b. Rosmery

Rosmery was 22 years old and already a mother of three when she became pregnant with her fourth child. Approximately 18 weeks into pregnancy, on January 17 2002, she experienced a complication that caused serious hemorrhaging and she lost consciousness. Her baby died as a consequence.⁶³⁴

She was transported unconscious to the San Bartolo National hospital, where a curettage was performed before she regained consciousness. As she was waking from the anaesthesia, doctors began to question her as to where her fetus was. Rosemary was confused and responded with difficulty. Her attending physicians then called the police to report her for the crime of abortion.

Rosmery was arrested at the hospital at around six in the evening of that same day. Three officers were then assigned to guard her while she remained in hospital. One police officer informed her she would not return home upon being discharged from hospital, but would be transferred to the police station because she had killed her daughter. Rosmery recalls,

When I arrived at the hospital, I was unconscious, and while I was there, when I came to, the doctors began to ask me things. They asked me a bunch of things like what I had done with the child I had had. Then, around six in the evening on that same day, there were police officers around my bed. One of them told me that they were guarding me because when I got out of there I would not be going home but would be going (with them to the police station), (...) that I would not be able to go back home because I had killed my daughter... The doctors themselves had called the police. That was where they told me I was under arrest (...). They took (a statement) from me that same day in the hospital at six in the afternoon (...). When they began to take my statement, I was just coming out of the anaesthesia that they had given me.⁶³⁵

On January 24, 2002, Rosmery was taken from hospital to the Apulo prison where she remained for eight days. Recovering from the operation and still bleeding, she slept on the cold prison floor. While in custody, she had no further medical assistance. Because police had not officially registered her detention, Rosmery could not be taken to doctor's appointments.⁶³⁶

Only after she was transferred to the Ilopango women's prison definitively was she able to receive medical attention and taken to hospital appointments. Rosmery was then convicted and sentenced to 30 years in prison for aggravated homicide. Of prison, she tells,

⁶³⁴ Rosmery's story appears in Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*.

⁶³⁵ Ibid. p. 33.

⁶³⁶ Ibid.

In the cell where I was held, how many inmates were there? We were 60 (...). And now everyone definitely sleeps on the floor, people sleeping in bunks even. And in some of those caves, what they've done is put up more cots, they have raised them maybe by half, so that one fits below – I mean, what they call the third floor, first, second, and third floor – because there's so many people that it's full.⁶³⁷

Three hearings were held during Rosmery's proceeding in which she was represented by private attorneys. In the first, she was accused of the crime of abortion. In the second, of aggravated homicide. In the third, the public hearing on November 29, 2002, she was convicted and sentenced to 30 years in prison, despite the fact that the Public Prosecutor's Office had asked for a 15-year sentence for homicide aggravated by familial relationship. Further, during the hearing, Rosmery's lawyers told her she should keep quiet for if she spoke, she would make their job more difficult. She was therefore unable to testify.

The lawyers told me not to say anything. The whole time, they told me to stay quiet because if I talked I could get tripped up and make the work they were doing more complicated. I stayed (quiet) during all the hearings, I only heard what they were saying (...). I never testified (...) because they told me not to.⁶³⁸

She cried continuously during the first months of her imprisonment, remained in bed and prayed. After some time, she participated in different activities offered by the penitentiary, and completed both her primary and high school studies there. From 2007, Rosmery began to receive visits in prison from lawyers and asked for a hearing to review her sentence. It was held on July 6, 2009. In the hearing, the public prosecutors insisted she was guilty:

(T)he public prosecutors still asked that I be given another 28 years, in addition to the ones I had already served... Because for them I was always guilty. And that was the maximum punishment that they wanted (...) So, I felt like I was going to die when they said that, because they asked for more years for me.⁶³⁹

In the review, expert testimonies were crucial to the conviction. The witnesses revealed that the legal-medical report on which the conviction had been based included serious errors.

All the expert witnesses provided support. The expert witness of (El Salvador) included a lot of errors in the information that he had given. He said that I had a prostate, and, well, girls don't have those (...). And when they asked him why the report mentioned a

⁶³⁷ Ibid., p. 34.

⁶³⁸ Ibid., p. 34.

⁶³⁹ Ibid.

*prostate, he said that he hadn't written it – that his secretary had written it with his signature and seal.*⁶⁴⁰

The expert witness also revealed that the legal-medical report had not been followed which led the court to reject the theory used by the Public Prosecutor's Office to argue that Rosmery had asphyxiated the fetus. Following a three-day hearing, the judges found that a judicial error had been made in the ruling and ordered her release. The judicial error had effectively meant she served a total of eight years in prison and, despite recognition of the error by the court and the grave injustices suffered including violations of her fundamental rights and the years she had been wrongfully separated from her three live children, no reparation was granted to her by the Salvadoran State.⁶⁴¹

VI.c. Isabel Cristina Quintanilla

Isabel Cristina Quintanilla⁶⁴² was 18 years old and pregnant with her second child, excited at the prospect of becoming a mother again. In her eighth month of pregnancy, she had been feeling unwell for several days. On the night of October 25, 2004, she went to the toilet in her apartment in San Salvador upon feeling a severe pain and lost consciousness. In her own words,

*When I sat on the toilet, I felt such a terrible pain, like I was being suffocated but from here (...). When I felt the pain, I wanted to get up, but I couldn't, and I felt like I was suffocating, that I was dying, and all at once something came out of me. And then, I don't... I felt like when your breath is being cut off and you end up breathless. I know I lost consciousness because I don't remember anything from then on, until I was sitting up and I was covered in blood on the chair in the living room. Then they took me to the hospital, they checked me in to do a curettage. (...) When they took me in, they did the curettage, I wasn't unconscious (...). The only thing I remember saying to the nurse was, "And the baby?" Because I thought... it was with me, I don't know. She didn't say anything.*⁶⁴³

Afterward, in the curettage room, a nurse asked Isabel Cristina where her baby was. Following the operation, she was placed in intensive care where police officers arrived to interrogate her. Still under the effects of the anaesthesia, she was unable to respond clearly. Later, in the

⁶⁴⁰ Ibid., p. 35.

⁶⁴¹ Ibid., p. 12.

⁶⁴² Name kept as expressly requested. Her case is represented in Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*.

⁶⁴³ Ibid., p. 28.

recovery room, police continued their interrogation without the presence of a lawyer. They then informed her she was under arrest.

While still recovering in hospital, following curettage, she was guarded for three days by three police officers. Upon being released, the officers handcuffed her and took her to the Ilopango station. There, she was placed under arrest for the crime of murdering her son. The same day, she was sent to the Turicentro de Apulo station and held there for three days with eight others in a cell with the capacity for three people. Isabel Cristina was still haemorrhaging yet she received no medical attention and had to remain seated on the floor as there was not enough space to lie down.⁶⁴⁴

Though Isabel Cristina had suffered a miscarriage, in her preliminary hearing held on October 29, 2004, she was brought before the First Justice of the Peace of Ilopango and accused by the Public Prosecutor's Office of the crime of manslaughter. The judge argued she had acted with negligence in her duties as a mother by failing to take care of her child and ultimately causing his death.⁶⁴⁵

Isabel Cristina had herself questioned why it was believed that, had she wanted to end the pregnancy, she would have waited until the eighth month. *"I mean, do you think that if I had wanted to do something I would've waited until the eighth month?"*⁶⁴⁶ The Prosecutor's argument failed, furthermore, to take into consideration the fact that Isabel Cristina had been unconscious at the moment of the premature birth and had therefore been unable to care for herself, let alone an infant.⁶⁴⁷ The judge eventually released her upon failing to find evidence against her, but this did not prevent the local media from accusing her of murdering her son. Isabel Cristina recalls with some confusion,

*During the preliminary hearing, the public prosecutor comes and accuses me of the crime of aggravated homicide, but only verbally, it was something different on paper, the paper was going for manslaughter and there was a debate there with the judge, because (the prosecutor) said that I was obligated to take care of my son, that he had died because I was negligent, that I was aware of what the pains were like and that they were labor pains, that I couldn't have been ignorant.*⁶⁴⁸

She continues,

I changed lawyers... It wasn't a paid lawyer, it was an attorney that the government gives you... Then it was another lady who didn't even know my name. When the hearing

⁶⁴⁴ Ibid., p. 29.

⁶⁴⁵ Ibid.

⁶⁴⁶ Ibid., p. 28.

⁶⁴⁷ Ibid., p. 29.

⁶⁴⁸ Ibid.

*happened, she said, 'I'm representing this lady here, and what's your name?' I don't think she had even read the case history, nothing. She wasn't even interested in (the defense), like, I work for the state and the state pays me, but she is not at all interested in the person she is defending.*⁶⁴⁹

On August 15, 2005, she was convicted of aggravated homicide and sentenced to 30 years in prison. She was found guilty based on the legal-medical report, despite the fact it established the cause of death of the fetus to be undetermined.⁶⁵⁰

At the Ilopango prison, Isabel Cristina faced threats and abuse because the staff and other inmates had learned, through the media and news reports, the reason she was there. Isabel Cristina, “was not only forced to undress in public while in prison but also raped by Ilopango prison guards. These experiences are evidence of the cruel, inhuman, and degrading treatment that these women suffered.”⁶⁵¹ She was depressed for the first three months of her imprisonment, then began to resume high school studies and participate in prison activities, even helping other inmates to write requests to the prison directors. She hoped this behaviour might result in a shorter sentence. However, she was prohibited from participating in child related activities, such as taking care of the children at the prison daycare or assisting with presentations, restrictions which reflected prejudices related to her alleged crime.⁶⁵²

In May 2007, a review of her case was requested and denied. At the beginning of 2008, lawyer Dennis Muñoz brought a request for pardon before the Legislative Assembly, asking that her sentence be reduced for good behaviour. This too was rejected. The conduct report issued by the prison's directors, according to Isabel Cristina, contained lies and prejudice. On May 28, 2008, she and her lawyer sought a commutation of the sentence, which would replace the main punishment imposed by the judgment with a different one. This remedy sought to demonstrate a violation of due process during the investigation and trial. It took two years for the remedy to be ruled on when, on July 22, 2009, the Supreme Court of Justice found that for reasons of justice, equity, and morality the sentence of 30 years was excessive, disproportionate, and severe. It was thus commuted to three years. Since she had already served this amount of time, she was released on August 14, 2009, almost four years to the day after entering custody on August 16, 2005,⁶⁵³ without any form of reparation for the injustice suffered.

⁶⁴⁹ Ibid., p. 30.

⁶⁵⁰ Ibid.

⁶⁵¹ Ibid., p. 12.

⁶⁵² Ibid., pp. 31-2.

⁶⁵³ Ibid., pp. 32-3.

VI.d. Maria

Maria, from the municipality of San Delgado in San Salvador, was 18 years old and in her final year of high school when she fell pregnant. However, she never felt any of the normal symptoms of pregnancy, only experiencing some pain in her bones from which she had always suffered. On June 17, 2009, following a physical education class at school, the pains in her bones and back intensified. Over the next two days she experienced fainting spells and haemorrhaging. Finally, she felt as if she had expelled something. She was taken by her sister to a private doctor who informed her she had suffered a miscarriage and should go to a public hospital to be examined.⁶⁵⁴

She arrived at San Bartolo National Hospital on June 23, 2009. No sooner had she entered was she accused of having induced her miscarriage and threatened with arrest. The gynaecologist, before performing the curettage, took advantage of the fact that Maria was anaesthetised and barely conscious and proceeded to interrogate her about her alleged abortion.

(The doctor) who did the curettage... I remember that I was getting tired and I wanted to go to sleep and he said to me, "No, don't go to sleep... because now I'm going to ask you a series of questions... let me get a notebook to write everything down." And then after that, the hospital reported me.

After three days, the police officer arrived.

- *"So, you aborted your child?"*
- *"What child" I answered him, just like that.*
- *"You're not going to admit that there was a child here that you've thrown out? And you didn't want it? Maybe the person you are with was treating you badly? ...You're going to leave here," he told me, "but you're going straight to jail."*⁶⁵⁵

Maria left the hospital after 15 days of being treated. Upon exiting, she was arrested and placed in a jail cell at the Cuscatancino police station. There she learned she had been arrested for the crime of committing murder. In jail, Maria was exposed to rain, forced to sleep on wet ground, and to exercise for over an hour on several occasions. This persisted for over a week. The

⁶⁵⁴ Maria's case is represented in Center for Reproductive Rights and the Agrupación Ciudadana, *Marginalized, persecuted and imprisoned*. See p. 25.

⁶⁵⁵ Ibid., p. 26.

women imprisoned were also subjected to vaginal searches for drugs or other contraband goods.

*One day even, at the jail they did a vaginal search, and one woman ... she was a police officer, and she didn't even take the time to change her gloves. She just kept using the same glove for one woman, then the next one.*⁶⁵⁶

She was also denied the food brought to her by her family.

*In the jail, there was an area where there was light, but just a grate, so water always came in. so we got wet, and when we told the police to tell my family, because my family would come to see me, they would come to leave food and sometimes (the police) didn't want to pass it through to me, they said "Why? Here you're going to pay for what you did." (I slept) on the wet ground. The truth is that the treatment was really harsh, and personally I wouldn't wish it on anybody.*⁶⁵⁷

Maria was charged with aggravated homicide of a newborn at a preliminary hearing on July 13, 2009. The charge was then changed to self-induced abortion in response to a petition of the defence who argued that physical evidence had not yet been found to prove a case of homicide and, in accordance with medical records, Maria's pregnancy was not so advanced that she could have given birth.

The Public Prosecutor's Office later submitted evidence of the physical result of the crime, found in a septic tank. Its origin had not been determined, however; nor was it known beyond reasonable doubt if the evidence was in fact part of a human body.⁶⁵⁸

On September 9, 2009, Maria's defence sought a writ of nullification. They argued that the search of her property, at which time the physical evidence had been obtained, and other investigative actions performed had violated her fundamental rights. The judge denied the request; a court issued warrant had been obtained prior to the search. Maria's defence then requested that the Public Prosecutor's Office be denied a request to perform a bodily inspection of Maria in order to verify if her DNA was a match for that of the evidence found. Since it was not even known if the bone tissue found in the septic tank was of human or animal, subjecting Maria to bodily inspection would be a violation of her fundamental rights. The court agreed. Maria's trial was suspended until January 2010, and she was found innocent due to lack of evidence to prove she had induced an abortion.⁶⁵⁹

⁶⁵⁶ Ibid.

⁶⁵⁷ Ibid., p. 27

⁶⁵⁸ Ibid.

⁶⁵⁹ Ibid., pp. 27-8.

VI.e. Beatriz

Beatriz represents a landmark case in the criminalisation of abortion in El Salvador.⁶⁶⁰ She was not accused of a crime related to an obstetric emergency, but rather denied the right to abortion. She was 22-years old in late 2012, when she fell pregnant for the second time. Beatriz had a history of lupus, as well as other related medical problems, and had suffered serious complications during her first pregnancy. In early 2013, it became known that the baby Beatriz carried was anencephalic, lacking a large part of its skull and brain, a condition from which it would die hours, or at most, days after birth.⁶⁶¹

In March 2013, entering her fourth month of pregnancy, Beatriz's health began to deteriorate. She was in desperate need of an abortion. A doctor who was working on her case at the San Salvador National Specialized Maternity Hospital told Amnesty International in September 2013 that,

Given her condition, absolutely no one could say that they were against it (an abortion) from a medical point of view... continuing with the pregnancy could only result in more complications or even her death. Nevertheless, a group of doctors, despite agreeing with us told us: (...) it's illegal.⁶⁶²

Beatriz waited in hospital, fearing death, and missing her family and one-year old son. On 11 April, 2013, an appeal was made to the Constitutional Chamber of the Salvadoran Supreme Court of Justice to grant her the treatment she needed without further delay. The Court took six days to agree to hear her case, without then reaching a decision. Various international agencies campaigned on her behalf.⁶⁶³ The IACHR granted Beatriz protective rights on 29 April 2013, urging El Salvador to provide her with the medical care she needed in accordance with her wishes, within 72 hours. The government did not respond.⁶⁶⁴

⁶⁶⁰ The case of Beatriz is related in Amnesty International, *On the brink of death*, p. 24. See also, Jonathan Alvarez, 'The case of Beatriz: An outcry to amend El Salvador's abortion ban,' *Op. cit.*

⁶⁶¹ Amnesty International, *On the brink of death*, p. 24.

⁶⁶² *Ibid.*, pp. 24-25.

⁶⁶³ Including Agrupación Ciudadana, the Feminist Collective and the Centro por la Justicia y el Derecho Internacional (CEJIL), as well as the Inter-American Commission on Human Rights (IACHR).

⁶⁶⁴ Amnesty International, *On the brink of death*, p. 25.

On May 15, the Supreme Court held a hearing to examine the case of Beatriz, who, now six months pregnant, was present with her two lawyers. During the hearing, after being questioned intensely for approximately 30 minutes, Beatriz suffered an attack of hypertension and was taken to hospital. The hearing concluded on May 16, with the magistrates of the Chamber stating they would give a decision within 15 working days.⁶⁶⁵ On June 3, the State of El Salvador declared it would permit Beatriz the right to an early caesarean section. Since she had now passed her 20th week of pregnancy, the procedure would not be classed as abortion but induced labour, thus respecting the total prohibition on abortion.⁶⁶⁶ The infant died hours after birth. Beatriz survived, but she will live with the physical and psychological consequences of the delay imposed on her.

VI.f. Alba

Alba Lorena Rodriguez was one of “Las 17,” or the “group of seventeen,” comprised of seventeen women detained for abortion related crimes at Ilopango, and considered to have had their rights to due process, *inter alia*, severely violated.⁶⁶⁷ She was also one of three of these seventeen women to be released from prison in March 2019, after having been convicted and held since 2010.

Upon her release, she was greeted by her mother-in-law and daughters, aged 11 and 14, who had spent nine years without their mother. The Supreme Court commuted Alba’s 30-year prison sentence, at the insistence of her lawyers who argued she had been wrongfully imprisoned and convicted without evidence. As Morena Herrera, director of the Agrupación Ciudadana stated, the separation of mothers from their children reveals a total hypocrisy of the State of El Salvador, which imposes the identity of maternity on women, but then unjustly separates them from their children.⁶⁶⁸

Alba is free and represents an unprecedented case of a commuted sentence. But she received no form of reparation, and neither she nor her children can recover the nine years that they were unjustly separated.

⁶⁶⁵ Ibid., p. 26.

⁶⁶⁶ Ibid.

⁶⁶⁷ See Al Jazeera, ‘El Salvador frees three women convicted for suspected abortions,’ 8 March 2019. Available <https://www.aljazeera.com/news/2019/03/el-salvador-frees-women-convicted-suspected-abortions-190307192651130.html>

⁶⁶⁸ Ibid.

VII. Obstruction of justice in light of the truth

The events which preceded the conviction of the women whose stories are recorded above, the violations of procedural and fundamental rights they experienced with respect to the sexual and reproductive violence they had already been subjected to, and their testimonies, or absence of, are accounts of obstruction of justice in light of the right to the truth. Article 133 of the Penal Code of El Salvador does not impart justice, but institutionalises discrimination and violence against women and normalises their social and economic exclusion within the framework of CRSRV.

VII.a. Absence of testimony and distortion of the truth

In the cases described above, the women were repeatedly denied their right to testify during their respective hearings, effectively resulting in their imprisonment, violation of their fundamental human rights, and injustice in the form of CRSRV where their rights to sexual and reproductive health were violated.

Absence of testimony cannot translate into absence of reparation or negation of violation. Absence of testimony must mean a commitment to investigate violations, both those the women have been accused of and in the case of innocence – which invariably appears to be the case regarding this system – investigation of institutional violence at the behest of the law.

The right to the truth of the women discussed above was violated repeatedly and systematically. For example, in the case of Maria, after her curettage had been performed, the doctor continued to question her although she had not yet recovered from the anaesthesia. In numerous cases, the Court convicted women even though the autopsies could not determine the causes of death of the fetuses, which demonstrates further violation of their right to the truth. Further, in violation of their right to due process, and as an aspect of the right to the truth, the women were not given the opportunity to provide testimony or, in the case of Rosmery, were not given the chance to be present at the hearings let alone to testify. The unnecessary and totally unjust delay of the Supreme Court in granting Beatriz a hearing, and then in reaching

a decision on her case, not only put her rights to health and life at risk, but violated her right to testify.

VII.b. Social and economic exclusion

The social status of women in El Salvador and their basic fundamental human rights, in relation to Article 133, are subordinate to their imposed identity as mothers, which is often perceived to be the only appropriate role for a woman. The implication of this subordination, as seen in the testimonies transcribed above, and absence of testimony, is violation of a number of their fundamental human rights, including but not limited to the right to sexual and reproductive health, the right to life, the right to be free of discrimination, freedom from cruel, inhumane or degrading treatment, the right to due process, the right to the truth, and the right to reparation.

In the cases of Isabel Cristina and Manuela, protection of the fetus was given priority over protection of the health and life of the pregnant woman. One argument that the judges relied on in this vein, stated that the girls were already mothers and therefore should have had a maternal instinct to protect, not harm their children.

In the case of Manuela, the fact her parents were poor and illiterate not only meant that she was denied access to justice, but that her father was coerced into signing a document he could not read, which was not read to him and which he therefore did not understand, which in effect actively finalised her imprisonment. In each of the cases described above, being poor translated directly into discrimination and denial of the truth.

VII.c. Victims of an abuse of power

The women imprisoned for abortion related crimes, who in the majority of cases had in reality experienced obstetric emergencies, were also victims of an abuse of power on the part of the Salvadoran State. The authorities who informed on, accused, convicted, denied appeals, and actively denied access to fundamental human rights and to the right to the truth of the women accused, are responsible for the perpetration of CRSRV in this context and should be held accountable.

In prison, the overcrowded cells and denial of access to medical services experienced by these women seriously, sometimes irrevocably, affected their rights to health and to life. In

the case of Manuela, absence of timely and quality medical care preceding her trial, and during her imprisonment, was the direct cause of her premature death. Medical authorities not only failed her by reporting on her in the first instance,⁶⁶⁹ but prison staff also failed her by denying her right to access necessary health care, and officials of the justice system further failed her by framing her health condition as a crime and denying her right to testify, and her right to the truth.

Health professionals treating women with obstetric emergencies or abortion related complications often believe they are under the legal obligation to report their patients to police. This is in part due to the framing of the role of medical staff under Article 133 as liable for prosecution in case of aiding any abortion related procedures. Such a system violates standards of professional confidentiality, and also denies the patients their right to access timely and effective medical care, both at the time of the emergency and afterward with respect to post-abortion care or post-natal care. Each of these authorities was responsible in different ways for protecting her. Each of them abused their position of power in failing to comply with this responsibility.

VII.d. Right to reparation within rights-based development

The grounds for reparation of CRSRV in the context of the criminalisation of abortion in El Salvador under Article 133 correspond, firstly, to the failure to protect the sexual and reproductive rights of the women convicted and imprisoned of abortion related crimes, and, secondly, to the denial of their right to the truth, in relation to their right to testify, before, during or following their respective trials. Although Alba represents an unprecedented case in that she was released from prison, this freedom did not translate into recognition of injustice on the part of the law. She, as well as her two daughters, and other family members from whom she was separated during her prison sentence, are victims of an abuse of power and should be accorded reparation.

This context is characterised by the disproportionate condemnation of women. What about the men? At no time during the hearings of any of the women discussed above was

⁶⁶⁹ Authorities had previously maintained unwritten policy not to report women who sought abortion under the new presidential administration and the changes in structure of the Ministry of Health and the ISSS. In 2010, the El Salvador Medical Association reminded its members that the association's professional code of ethics considers abortion in any form to be a serious infraction and a criminal offense.

mention made of the responsibility of male counterparts with regard to abortion related crimes. Though a male may not be punished for inducing an abortion if he was absent at the time, should his absence not be punishable, or at the very least questioned and taken into consideration? Though it may be impossible to hold him accountable, or to make him assume any material, physical or practical responsibility, precisely due to his absence, recognition of his absence as a contributing factor to the circumstances in which the woman found herself should be taken into consideration. The blame placed on women is, in this context, as in countless others, excessive and unjustified. Recognition of the consequences of male absence, or violence in some cases, would at least serve to lessen the burden of responsibility placed exclusively on women and redirect punishment in consideration of wider responsibility and accountability.

In line with the general principle of reparations, absence of prosecution – in this case, absence of someone else to blame – must not result in absence of recognition of a victim, or in absence of reparation for the victim. A victim-centred perspective must be upheld by protecting the right of victims to the truth, by redressing violations of their right to the truth carried out through practices of silencing, and by establishing the necessary conditions for victims to testify.

In El Salvador, the negligence exacted within the parameters of Article 133 has consequences for the country's medical, legal, and prison systems; which undermine development, peace and stability and result in disproportionate impacts on already vulnerable women who are predominately poor, uneducated and young.

The Constitution of El Salvador protects the rights to health⁶⁷⁰ and to be presumed innocent before conviction. In addition, it recognises that all persons are equal before the law with the provision that there can be no restrictions based on gender.⁶⁷¹ The country has, furthermore, a history of strong engagement with the United Nations human rights system, having presided over the UN Human Rights Council. It has ratified eight of the nine main international human rights treaties, while there is the recommendation of OHCHR for it to ratify the Optional Protocol to the Convention Against Torture (CAT). In accordance with the CAT, as discussed earlier in this thesis, complete bans on abortion may constitute ill-treatment

⁶⁷⁰ Constitution of the Republic of El Salvador, 1983. See Art. 1.

⁶⁷¹ Ibid., Art. 3, which states that "All persons are equal before the law. For the enjoyment of civil rights, no restrictions shall be established that are based on differences of nationality, race, sex or religion. Hereditary offices and privileges are not recognized."

or torture.⁶⁷² Even in the cases where women did not seek an abortion, and where it was clear beyond reasonable doubt that a woman had suffered an obstetric emergency, the complete ban on abortion in El Salvador in line with Article 133, has led to the instability and discrimination experienced by these women under which circumstances other fundamental human rights, including the right to sexual and reproductive health and the right to the truth, were violated. Violations, in this context, and in accordance with the CESCR General Comment No. 22, are constituted by act or omission and include:

Failure to enact and enforce relevant laws, failure to ensure formal and substantive equality in the enjoyment of the right to sexual and reproductive health, State interference with an individual's freedom to control his or her own body and the ability to make free, informed and responsible decisions in this regard. Instances of violation include legal barriers to impede access to sexual and reproductive health services, criminalisation of abortion or of consensual sexual activity between adults.⁶⁷³

On these grounds, the right to reparation for victims of Article 133 is merited, can be considered the ultimate responsibility of the Salvadoran State. It should be included within a rights-based approach to development, should be transformative in nature, and include measures such as recognition of CRSRV perpetrated under Article 133, official apologies, compensation, rehabilitation, and guarantees of non-repetition. Rights-based development must also, in its protection of human rights, incorporate the right to the truth as a means to redress past injustice and to prevent future violations of a similar nature.

VII.e. Demarcations of the right to reparation

As argued in the previous chapter on Peru, reparation should redress the specific nature of the CRSRV enacted, the context and the institutional violence it occurred within. It should also respond to the method of silencing in the perpetration of violations, as well as denial of the victims' right to the truth at the time of the violation and following it. Reparation for violation of the right to the truth, and protection of this right, can take various interrelated forms coexistent with the different reparative measures outlined in this thesis. One integral aspect, in the protection of a victim-centred approach to reparations, takes the form of the right to testify.

⁶⁷² See, for example, CAT Committee, *Concluding Observations: Paraguay*, para. 22, UN Doc. CAT/C/PRY/CO/4-6 (2011); El Salvador, para. 23, UN Doc. CAT/C/SLV/CO/2 (2009); Nicaragua, para. 16, UN Doc. CAT/C/NIC/CO/1 (2009).

⁶⁷³ CESCR, General Comment No. 22 on the Right to sexual and reproductive health (2016). See Section V. Violations, paras. 54-63.

At numerous times, in the stories recorded above, acts of silencing intentionally prevented women from speaking out. During their hearing, the absence of testimony served to deprive them of a voice and to cement predetermined accusations and convictions. The right to testify is a fundamental aspect of any criminal procedure and its denial must be recognised and redressed in this context. In addition, the denial of family members as witnesses to testify further isolated and penalised the women. The voice of witnesses is essential to processes of justice. Both victims and witnesses have the right to testify during criminal proceedings, and subsequently. Where this right has been denied, it can be retaken in alternative settings as seen above by non-governmental organisations which fight to restore a sense of the victims' dignity and reverse to some degree the historical injustices suffered. Their work serves to set down an alternative record of violations. As previously acknowledged, with respect to violations of this nature, a lower standard of proof is necessary in acts of giving testimony. This could include using statements given during preliminary phases of criminal proceedings, excluding the media, and allowing the accused and defence counsel to respond remotely.⁶⁷⁴

Finally, reparations cannot be considered without reference to responsibility. In the context of El Salvador, the State must be held accountable for the intractable part it has played in the treatment of the women who have fallen victim to Article 133, which can only be described as violations of their rights to, *inter alia*, sexual and reproductive health, to life, to due process, to the truth and to reparation. The CESCR, in its General Comment No. 22, defines violations of CRSRV in the following way:

Violations, by act or omission, include failure to enact and enforce relevant laws, failure to ensure formal and substantive equality in the enjoyment of the right to sexual and reproductive health, State interference with an individual's freedom to control his or her own body and the ability to make free, informed and responsible decisions in this regard. Instances of violation include legal barriers to impede access to sexual and reproductive health services, criminalisation of abortion or of consensual sexual activity between adults. Also noted are withholding or misrepresenting information related to sexual and reproductive health, and coercive or forced medical interventions, such as enforced sterilisation, virginity or pregnancy tests.⁶⁷⁵

In light of this statement, El Salvador presents a context in which denial of the right to testify at the time of conviction must not only be recognised as playing a part in misrepresenting

⁶⁷⁴ See UNHCHR Manual, *Op. Cit.*, p.47. see also p. 156 of this thesis for a more in depth discussion on this matter as pertinent to protection of the right to the truth.

⁶⁷⁵ CESCR, General Comment No. 22 (2016), see Section V. Violations, paras. 54-63.

information but also in framing innocent women as having committed crimes. The multiple and complex forms of irreversible harm done to women can only begin to be reversed and redressed when the right to testify as an aspect of the right to the truth becomes customary in all legal, as well as para-legal, settings. Demarcations of reparation for these women and their next of kin depend on this commitment.

Origins: By way of a conclusion

The testimonies of the women tried and convicted under Article 133 of the Penal Code of El Salvador provide evidence of violation of their right to the truth prior to, at the time of, and following conviction. The testimonies, therefore, attest to the fact that the law provided a framework for the execution of CRSRV against poor women in relation to methods of silencing. The violations are both sexual and reproductive in nature, further reiterating the need for inclusion of reproductive violence in the term of, and reparation for, CRSRV to reflect the experiences of victims.

The victims of CRSRV in this context are not only the women themselves, but also their children or next of kin, such as children, and grandparents who have been left to care for their grandchildren during their daughter's imprisonment, or in the case of their death, and who were also subjected to violence by state authorities by virtue of their relation to the woman convicted. The consequences of this injustice are immediate and historic, with potentially intergenerational effects, and weigh heavily on the development of individual women and the development of the nation at large. Article 133 must, therefore, not only be abolished, but the historical injustice imparted under the law must be remedied and reparation for its victims must be enacted.

Different and complementary forms of reparation for victims will be necessary to remedy what can only amount to human rights violations perpetrated in relation to methods of silencing, specifically CRSRV, all the more punishing since they fall within the framework of the law. In this vein, Article 133 can be seen to have no function other than the institutionalisation of violence in times of "peace." The use of testimony, if carried out in reference to protection of the right to the truth, could have served to prevent the extent to which CRSRV in this context was perpetrated. It is to this space that Walter Benjamin traces a possibility that "the law's interest in a monopoly of violence vis-à-vis individuals is not

explained by the intention of preserving legal ends but, rather, by that of preserving the law itself.”⁶⁷⁶ Perhaps I should have begun with the origins, but there are some historical precedents which remain inchoate until they have run their course. So, I close with them instead and I want to refer to a word, Walter Benjamin’s, in summation: Violence. “Violence crowned by fate, is the origin of law.”⁶⁷⁷

But must this be its preordained destination?

⁶⁷⁶ Walter Benjamin, ‘Critique of Violence,’ in *Reflections*, pp. 277-300. Translated by Edmund Jephcott. Edited by Peter Demetz. New York, Harcourt Brace Jovanovich, inc., 1978. See p. 281.

⁶⁷⁷ *Ibid.*, p. 286.

Sinjar, Iraq
Northeast Syria
Islamic State of Iraq and the Levant



*Figure 4. The Guardian, ‘ “Only bones remain”: shattered Yazidis fear returning home,’
September 9, 2018.*

For as little as a pack of cigarettes

*The cost of conflict –related sexual and reproductive violence
against Yazidi women and girls by ISIL*

Introduction

The reproductive consequences of sexual violence against Yazidi women and girls in the context of the Islamic State of Iraq and the Levant (ISIL) are unprecedented. Since the fall of ISIL, Yazidi women held as sex slaves by ISIL fighters have been allowed to return home. But many fell pregnant as a result of rape during captivity, and their right to return has excluded their children, perceived, under local customary law, not to be Yazidi if born to Muslim fathers. Many thousands of women remain missing. And those who have returned have been forced to abandon their children in orphanages in northeast Syria, or at halfway houses along the way.

This chapter is comprised of two parts. The first describes the background and reviews recordings of CRSRV perpetrated in this context. It then observes the identity of victims in relation to the influences which justified forms of CRSRV (religious with regard to ISIL), or sanctioned them (economic as related to the arms trade by which war is waged with regard to the international community). The second part considers responses to CRSRV, namely the grounds for reparation in relation to the different victims identified, the women and their children, as relative to the responsibility of perpetrators (ISIL by act, or the international community by omission), held under the light of their right to the truth. It finally contextualises the perpetration of CRSRV in this context within methods of silencing. There is, to date, very little testimony given in documentation of CRSRV in this context, and certainly not in any traditional sense or within formal structures. So, this chapter takes fragments of testimony from journalistic reports available in the public domain, as well as from reports by organisations and from documentaries, told by or about victims, to provide evidence of violations and to illustrate their devastating effects on women, and children born of rape under the rule of ISIL, to question

who should be held responsible, and to delimit possible reparation from a victim-centred perspective.

Preamble: An encounter

On July 17, 2019, Nadia Murad appeared before Donald Trump in the White House to testify on behalf of her people on the horrors to which they had been subjected under the occupation of ISIL. Nadia, a Yazidi from the northern Iraqi town of Sinjar, survivor of sexual slavery under ISIL and human rights activist, was there to appeal for assistance. He, at the time president incumbent of the United States of America, remained seated while hearing her speak, and did not even turn to face her. It was almost as if, throughout her appeal which lasted a little under four minutes, she did not exist. At the heart of his disinterest lies a dangerous question. It asks, how do we extract value from that which does not exist?

Nadia's testimony of violence, in her appeal to Trump, and also on other occasions, as well as the experience of the Yazidi community and voices of the children born to rape to Yazidi women under ISIL who are not accepted as part of the community their mothers belong to, illustrate the inherent complexities of CRSRV, both the inextricability of, and the differences between, the sexual and reproductive aspects of these forms of violence. The encounter between Nadia and Trump, and the context of which she speaks, reflect the importance of protection of the right to the truth on many levels, as well as the consequences of its neglect. This reflection poses a serious question as to international responsibility and accountability. Trump should not have felt compelled to offer his condolences to Nadia if he could not bring himself to face her, nor to offer a noncommittal response to "see what we can do."⁶⁷⁸ He should be bound by humanitarian principles and by international law to act. The basis of Nadia's plea was not economic, but a plea for the (now former) President to call, by phone, the Kurdish and Iraqi governments to see what can be done to protect minorities, particularly the Yazidi community. The truth expressed in Nadia's testimony of the violence she had suffered, and the testimonies given in the words of children born of rape as victims of CRSRV, identify violations by *act* at the behest of members of ISIL, and by *omission* at the behest of international silence and in revocation of the truth concealed by act in order to preserve the profit to be made in wars. Trump should, on these grounds, be bound to enact

⁶⁷⁸ See The Washington Post, "'You had the Nobel Prize?': Trump meets Nadia Murad", 20 July 2019. Available https://www.washingtonpost.com/video/world/you-had-the-nobel-prize-trump-meets-nadia-murad/2019/07/19/87cc0e6c-1011-44d3-84e6-c7a670055f4c_video.html

reparation. This chapter finds that some of the reasons he, and countless others, are not bound to do so rest on economic concerns, are intricately tied to the profit to be made by war, are dependent on rendering the other (in this case, Yazidi women and their children) inexistent, and are indispensable to the part money plays in the methods of silencing which sanction CRSRV.

I. Contextual considerations

This section describes the context in which CRSRV has been perpetrated against Yazidi women and girls by ISIL. It first presents the historical and geographic setting and explains the rise of ISIL within, and then elaborates on who, in this context, constitutes a victim.

I.a. Historical significance of the territory

Sinjar is a town in northern Iraq, in the district of Sinjar, near to the mountain of the same name. It forms part of the Nineveh Governorate, which lies close to the border with Syria at the northeast. Its geographic location, and the composition of its Yazidi population who are not Muslim, meant its inevitable fall to the Islamic State of Iraq and the Levant (ISIL) whose primary pursuit was, as the name spells, the foundation of an Islamic State in which those who were identified as “infidels” had no place.⁶⁷⁹

The town of Sinjar, also called Shingal, forms part of the historic homeland of the Yazidi, comprising one of their primary settlement areas. The Yazidi are an ethnic minority of Iraq, speaking a dialect of Kurdish, and following a religion similar to Zoroastrianism.

As with many other territories of the region, Sinjar has been occupied by different powers over history. In the 2nd century A.D., it formed part of the Roman Empire, became a military base and part of the Roman Limes.⁶⁸⁰ In 360 A.D., the area was plundered by the Sassanids of what is present day Iran. Later, in the early 6th century A.D., a tribe known as

⁶⁷⁹ ISIL, Islamic State of Iraq and the Levant. Also sometimes referred to as Islamic State of Iraq and Syria (ISIS), and known as Daesh by its Arabic language acronym.

⁶⁸⁰ See Seton Lloyd, ‘Some ancient sites in the Sinjar district,’ pp. 123-142, in *Iraq*, Vol. 5, 1938. British Institute for the Study of Iraq.

Qadisaie made it their own until, led by Iyad ibn Ghanam, it was conquered by Muslim Arabs.⁶⁸¹

Throughout history, the Yazidi minority have resisted invaders and preserved their identity in relation to their religion and their land, which means, in the words of a young Yazidi woman named Shreen, that, “There is no Sinjar without Yazidis; and there are no Yazidis without Sinjar.”⁶⁸²

1.b. ISIL enters Yazidi territory

In 2013, the population of Sinjar was an estimated 88,023. By 2014, the town was under siege by ISIL. In this year, during the course of their second military offensive in northern Iraq, ISIL conquered great swathes of Nineveh province. Until early August, the Kurdish Peshmerga had protected the region, but they then fled ISIL leaving Yazidis defenceless.⁶⁸³ On August 3, ISIL fighters entered and seized the town of Sinjar. In the days which followed, ISIL militants perpetrated the Sinjar massacre, killing some 2,000 men. An estimated 5,000 Yazidi civilians lost their lives over the course of the August invasion by ISIL. By the end of August approximately 2,500 Yazidi, mostly women and children had been abducted, the women sold into slavery,⁶⁸⁴ and a mass exodus of the remaining population ensued.

Four months later, on the night of December 20, 2014, the Kurdish Peshmerga re-entered the city of Sinjar, in a first offensive to retake the territory from ISIL.⁶⁸⁵ However, the Peshmerga were met with fierce resistance in the southern part of the city, stalling their advance. Almost a year later, on 13 November 2015, a second offensive to retake Sinjar was launched. Kurdish forces and Yazidi militia backed by US airstrikes, entered and retook the

⁶⁸¹ See Chase F. Robinson, *Empire and elites after the Muslim conquest: The transformation of Northern Mesopotamia*. Cambridge, Cambridge University Press, 2000.

⁶⁸² See Al Jazeera, In Pictures, War and Conflict. ‘I don’t want to be considered as an ex-slave or just a survivor,’ 24 June 2019. Available <https://www.aljazeera.com/indepth/inpictures/iraq-yazidi-women-return-sinjar-190623054117003.html>

⁶⁸³ See David L. Phillips, *The great betrayal: How America abandoned the Kurds and lost the Middle East*. Bloomsbury Publishing, 2018.

⁶⁸⁴ See UN OHCHR and UNAMI (United Nations Assistance Mission for Iraq), Report on the protection of civilians in armed conflict in Iraq. 6 July-10 September 2014. Also *Washington Post*, Gil Shefler, ‘Islamic State accused of capturing Yazidi women and forcing them to convert, or else,’ 7 August 2014; *Daily Telegraph*, ‘Isil carried out massacres and mass sexual slavery of the Yazidis, UN confirms,’ 14 October 2014.

⁶⁸⁵ See *The Guardian*, ‘Kurdish Peshmerga forces launch offensive to retake Isis held areas,’ 17 December 2014. Available <https://www.theguardian.com/world/2014/dec/17/kurds-peshmerga-offensive-isis-sinjar-territory-mosul>

city. In the nearby town of Solagh, east of Sinjar city, a mass grave was found by the Kurds, containing the remains of at least 78 Yazidi women from Kocho village believed to have been killed by ISIL fighters.⁶⁸⁶ In the days which followed, some Yazidi groups sought to avenge the violence against their people by looting and burning Sunni Muslim properties, and by conducting reprisal killings.⁶⁸⁷

In August 2017, the Yazidis of Sinjar declared their government autonomous.⁶⁸⁸ The Kurdish Peshmerga withdrew on October 17, 2017, and the Iraqi Army and Popular Mobilisation Units (PMU) entered. Sinjar was then handed over to the Yazidi Lalesh Brigades, backed by the PMU. However, tensions in the region of Sinjar remain fraught, seen most vividly in fighting between the Iraqi government and Kurdish groups. As Nadia Murad lamented in her appeal to Donald Trump, “ISIL is gone, but there is still fighting.”⁶⁸⁹ The city of Sinjar lies in ruins. The memory of terror and torture perpetrated by ISIL militants does not retreat. The legacy of CRSRV will mark the lives of victims for generations.

I.c. Identity of victims of CRSRV, relation between Yazidi women and girls held by ISIL and children born of rape in this context

Victims of CRSRV are not only those who have suffered violent acts directly, but also those who, by consequence of the violence, have incurred physical, psychological, emotional, moral or economic damage. In accordance with the definition of victim given by the United Nations 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,

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also

⁶⁸⁶ See *The Guardian*, ‘Iraq: Yazidi mass grave discovered in Sinjar,’ 15 November 2015. Available <https://www.theguardian.com/world/2015/nov/15/iraq-yazidi-mass-grave-sinjar-kocho> See also, UNOHCHR and UNAMI Report, Unearthing atrocities, Mass graves in territory formerly controlled by ISIL. 6 November 2018.

⁶⁸⁷ See *The Arab Weekly*, ‘Yazidis burn Muslim homes in revenge for ISIS massacres,’ 13 November 2015. Available <https://thearabweekly.com/yazidis-burn-muslim-homes-revenge-isis-massacres>

⁶⁸⁸ The declaration was made in a press conference, and celebrated by Yazidi women. See ANF News, ‘Ezidi women: Autonomy will bring freedom,’ 22 August 2017. Available <https://anfenglish.com/women/Ezidi-women-autonomy-will-bring-freedom-21680>

⁶⁸⁹ The Washington Post, “‘You had the Nobel Prize?’: Trump meets Nadia Murad.”

includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.⁶⁹⁰

Regarding CRSRV specifically, victims, as seen, “include persons who, individually or collectively, suffered such violence but also family members, such as children or partners, and children born as a result of pregnancy from rape.”⁶⁹¹ Both the definition of victim within a general legal framework in reference to violations of international humanitarian law and international human rights law, as well as the definition relative to violations of a sexual or reproductive nature within conflict settings reflect the need for wide considerations of the effects and consequences of violence, as well as comprehensive recognition of those whose rights were in this regard violated. In reference to the sexual slavery enforced on Yazidi women and girls by members of ISIL, both the women and girls, and their children born of rape, constitute victims of CRSRV. These women and girls, and their children, therefore, also comprise subjects of the right to reparation.

Since the fall of ISIL, and the retaking of Yazidi territory, the community has allowed women sold into sexual slavery to return home. But they are not permitted to bring their children with them. Born to Muslim fathers during their enslavement, these children are not recognised by the community to be Yazidi. If the women wish to return, they are forced to do so alone; to abandon their children along the way. Before looking into the injustice derived of this injury, it is necessary to detail the context of the sexual enslavement of Yazidi women which preceded it.

II. For as little as a pack of cigarettes: Context of conflict-related sexual and reproductive violence

With the rise of ISIL in Iraq and Syria, sexual and reproductive violence became integrated weapons of war, including but not limited to the practices of abduction of girls, trade of women and girls within slave markets, enforced marriage, and sexual slavery. ISIL established slave

⁶⁹⁰ OHCHR, 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, art. 8. General Assembly Resolution 60/147, December 16 2005. This definition is given at the beginning of Chapter 5 of this thesis, and included here again with the intention of reiterating the need for wider readings of the term ‘victim’.

⁶⁹¹ Ban Ki Moon, Guidance Note of the Secretary-General, *Reparations for Conflict-related Sexual Violence*, p. 3. United Nations, June 2014.

markets in Mosul in Iraq, and in Raqqa in Syria, where girls were taken carrying price tags.⁶⁹² The UN envoy on sexual violence has said that in the slave markets of ISIL, girls have been sold for “as little as a pack of cigarettes.”⁶⁹³ In these slave markets, a girl’s worth is defined by traits of beauty, measured by distorted perceptions of ancient Islamic ideals, and sometimes her price has reached thousands of dollars,⁶⁹⁴ although her monetary value would not protect her against rape or save her life.

II.a. Scale of violations

Practices of CRSRV have been, in this context, perpetrated as part of a calculated, systematic and uncompromising weapon of war relying on diverse and devastating methods of silencing, constituting war crimes and crimes against humanity. Following abduction, the slave markets were only the beginning of the terror experienced by Yazidi women and girls. As ISIL entered Sinjar in 2014, between August 3 and 6, around 500 Yazidi women and children were taken from the village of Ba’aj, and a further 200 or more from Tal Banat.⁶⁹⁵ On August 6, 400 Yazidi women were captured to be sold as sex slaves.⁶⁹⁶ A further 100 Yazidi women were documented as being abducted on August 15 from the village of Kocho,⁶⁹⁷ though according to survivors the number is believed to be closer to 1,000 women and children.⁶⁹⁸

ISIL is reported to have contracted gynaecologists to examine the abducted women and girls to confirm virginity or to determine whether they were pregnant. Women found to be pregnant were then subjected to enforced abortions by ISIL gynaecologists. After leaving captivity, one Yazidi girl told how she witnessed another young woman, about three months pregnant, being brutally examined by ISIL doctors, and taken into another room where the doctors told her not to speak as the child was removed from her womb.⁶⁹⁹ Afterwards, she was

⁶⁹² See CNN, ‘Treated like cattle: Yazidi women sold, raped, enslaved by ISIS,’ 30 October 2014. Available <https://edition.cnn.com/2014/10/30/world/middleeast/isis-female-slaves>

⁶⁹³ *The Guardian*, Isis slave markets sell girls for ‘as little as a pack of cigarettes’, UN envoy says, 9 June 2015. Available <https://www.theguardian.com/world/2015/jun/09/isis-slave-markets-sell-girls-for-as-little-as-a-pack-of-cigarettes-un-envoy-says>

⁶⁹⁴ Ibid.

⁶⁹⁵ According to reports from survivors, see OHCHR and UNAMI, Report on the protection of civilians in armed conflict in Iraq, *Op. cit.*

⁶⁹⁶ See Al Masalah, <http://almasalah.com/ar/News/35934/داعش-يختطف-اكثر-من-400-امرأة-ايزيدي>

⁶⁹⁷ See Intelligencer, Katie Zavadski, ‘ISIS just killed 80 more Yazidis in an Iraqi village,’ August 15, 2014. Available <http://nymag.com/intelligencer/2014/08/isis-killed-80-yazidis-in-iraqi-village.html?gtm=bottom>

⁶⁹⁸ OHCHR and UNAMI, Report on the protection of civilians in armed conflict in Iraq, *Op. cit.*

⁶⁹⁹ See CNN, ‘ISIS forced pregnant Yazidi women to have abortions,’ 6 October 2015. Available <https://edition.cnn.com/2015/10/06/middleeast/pregnant-yazidis-forced-abortions-isis/>

bleeding profusely, experienced profound pain, and “she could not talk or walk.”⁷⁰⁰ Some girls attempted to commit suicide by swallowing rat poison, but were taken by their captors to a hospital to have their stomachs cleaned and were told, “We will not let you die so easily.”⁷⁰¹ A witness statement described how other girls, captured and raped by ISIL fighters, have committed suicide by jumping from Mount Sinjar.⁷⁰²

The treatment of Yazidi women and girls included not only conflict-related sexual and reproductive violence, but furthermore amounts to war crimes, crimes against humanity, a genocidal campaign, and ethnic cleansing, among other violations. The older women were routinely sold, while the younger women and girls would be sold into temporary marriages to ISIL fighters who would rape them, and then pass them on to other fighters.

In June 2017, in a story of inconceivable cruelty, reports emerged that a woman had been held in captivity as a sex slave and starved in a cellar for three days, without food or water. At the end of the three days, she finally received a meal from her captors, a plate consisting of rice and meat. When she had finished eating, the men told her, “We cooked your one-year-old son that we took from you, and this is what you just ate.”⁷⁰³ Women and girls were subject to unprecedented cruelty while held in captivity, abuses calculated to such a degree that it is unthinkable that any form of reparation could begin to redress violations in this context.

II.b. According to price

CRSRV against Yazidi women and girls was perpetrated by members of ISIL on an unprecedented scale, systematically, and in line with methods and principles which justified it according to their interpretation of the Islamic faith. Victims were not sold at random, but according to a premeditated logic, and reflecting dark economic undertones of the violence.

On 3 November 2014, the “price list” for Yazidi and Christian women elaborated by the ISIL Office of Money House was published online in Arabic. Its authenticity was verified

⁷⁰⁰ Ibid.

⁷⁰¹ Ibid.

⁷⁰² See Rudaw, Hevidar Ahmed, ‘The Yezidi exodus, girls raped by ISIS jump to their death on Mount Shingal,’ 14 August 2014. Available <https://rudaw.net/english/kurdistan/140820142>

⁷⁰³ Vian Dakhil, an Iraqi member of Parliament reported this woman’s story on television. See Aol.com, ‘Reports: Unsuspecting Yazidi sex slave was fed her own child by ISIS,’ June 27 2017. Available <https://www.aol.com/article/news/2017/06/27/reports-unsuspecting-yazidi-sex-slave-fed-her-own-child-isis/23005103/>

by Dr. Widad Akreyi,⁷⁰⁴ and was then again confirmed as authentic by a UN official. The list detailed prices for the purchase of sex slaves and included Yazidi and Christian females as young as one year of age, the youngest females fetching the highest prices.⁷⁰⁵ A day later, on November 4, Dr. Widad posted a screenshot with an English translation of the Arabic original on Twitter. The original, and the translation, includes a note, in reflection of changes in the prices of the trade of women, on the rising concern regarding decrease in the slave trade and its consequences on the funding of the Islamic State. It reads:

Islamic State in Iraq. In the name of Allah most gracious and Merciful. We have received news that the demand in Women and Cattle market has sharply decreased and that will affect Islamic state revenues as well as the funding of the mujahideen (fighters) in the battlefield, therefor [sic.] we have made some changes. Below are the prices for Yazidi and Christian women (slaves).

Price for Yazidi or Christian Women between the age of 40-50 is 43\$US

Price for Yazidi or Christian Women between the age of 30-40 is 75\$US

Price for Yazidi or Christian Women between the age of 20-30 is 86\$US

Price for Yazidi or Christian Women between the age of 10-20 is 130\$US

Price for Yazidi or Christian Women between the age 1-9 is 172\$US

Costomers (sic.) are allowed to purchase only 3three item (slaves) with the exception of costomers (sic.) from Turkey, Syria and Gulf Countries. Obey and follow rules and laws of the Islamic state or you will be killed.

Dated and sealed by IS in Iraq 21 dhu alhidjah 1435 Islamic calendar October 16 2014.

⁷⁰⁴ Also sometimes spelled 'Akrawi,' who an Iraqi doctor of Kurdish ancestry and co-founder of the humanitarian organisation Defend International.

⁷⁰⁵ See Defend International, UN Official verified is "price list" for enslaved females, August 4 2015. Available <https://defendinternational.org/is-price-list-for-yazidi-and-christian-females-verified-by-un-official/>

UPDATE

#SaveYazidis

2:11 AM - 4 Nov 2014

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Additional to the market places, women were also sold by ISIL online. They were posted in advertisements, primarily through encrypted apps, on Telegram and Facebook, and also on WhatsApp. Many of the women and girls appear in the images as:

Dressed in finery, some in heavy makeup. All look directly at the camera, standing in front of overstuffed chairs or brocade curtains in what resembles a shabby hotel ballroom. Some are barely out of elementary school. Not one looks older than 30.⁷⁰⁶

There was much enmity between the wives of ISIL fighters and the sex slaves. While women and girls sold into sexual slavery were tortured, abused and many were neglected, abandoned and sold again, it is reported that some of those sold via the online apps received lavish treatment and wives of the fighters claim that their husbands shared with each other photos of the sex slaves with the best make-up and clothes, asked \$2,000 for this one, \$3,000 for that one, \$10,000 for a virgin, and became “obsessed” with the women being held.⁷⁰⁷ One description of a girl listed on the Telegram app reads: “Virgin. Beautiful. 12 years old (...) Her price has reached \$12,500 and she will be sold soon.”⁷⁰⁸

II.c. Religious justification of CRSRV

ISIL enslavement of Yazidi women and girls was based on the religious justification for the enslavement of defeated “idolators” which has been praised as the revival of an ancient custom of using women and children as spoils of war.⁷⁰⁹ In the ISIL English language online magazine, Dabiq, used for purposes of Islamic radicalisation and recruitment, the group states that:

After capture, the Yazidi women and children were then divided according to the Shariah amongst the fighters of the Islamic State who participated in the Sinjar operations, after one fifth of the slaves were transferred to the Islamic State’s authority to be divided as khums.⁷¹⁰

⁷⁰⁶ See AP.org, Lori Hinnant, Maya Alleruzzo and Balint Szlanko, ‘Islamic State tightens grip on captives held as sex slaves,’ 5 July 2016. Available <https://www.ap.org/explore/a-savage-legacy/islamic-state-tightens-grip-on-captives-held-as-sex-slaves.html>

⁷⁰⁷ See Express, ‘Horror of ISIS sex slave app: Virgins put on sale by twisted jihadis,’ 3 July 2017. Available <https://www.express.co.uk/news/world/824163/ISIS-sex-slave-app-Virgins-sale-twisted-jihadis-Raqqa-Syria-latest-Yazidi-women-ISIS-wives>

⁷⁰⁸ See Ap.org, ‘Islamic State tightens grip on captives held as sex slaves,’ *Op. cit.*

⁷⁰⁹ Newsweek, ‘Islamic State seeks to justify enslaving Yazidi women and girls in Iraq,’ 13 October 2014. Available <https://www.newsweek.com/islamic-state-seeks-justify-enslaving-yazidi-women-and-girls-iraq-277100>

⁷¹⁰ Ibid.

Khums refers to the traditional Islamic tax on spoils of war. The group went further to say, in Dabiq, that “One should remember that enslaving the families of the kuffar – the infidels – and taking their women as concubines is a firmly established aspect of the Shariah, or Islamic law.”⁷¹¹

Further, in 2014, ISIL released a pamphlet with 27 guidelines in the form of questions and answers for fighters on taking, punishing, and raping female captives. The pamphlet, in keeping with the method of silencing relied on by CRSRV, says that any slave attempting escape is to be “reprimanded in a way that deters others like her from escaping.”⁷¹² Question 6 reads: “Is it permissible to sell a female captive?” In answer: “It is permissible to buy, sell, or give as a gift a [sic.] female captives and slaves, for they are merely property, which can be disposed of as long as that doesn’t cause [the Muslim ummah] any harm or damage.”⁷¹³

Question 9, however, asks: “If the female captive was impregnated by her owner, can he then sell her?” In response: “He can’t sell her if she becomes the mother of a child (...)”⁷¹⁴ And Question 13: “Is it permissible to have intercourse with a female slave who has not reached puberty?” The answer: “It is permissible to have intercourse with the female slave who hasn’t reached puberty if she is fit for intercourse; however if she is not fit for intercourse, then it is enough to enjoy her without intercourse.”⁷¹⁵

Question 21 considers: “What is the earthly punishment of a female slave who runs away from her master?” The answer: “She (i.e. the female slave who runs away from her master) has no punishment according to the shari’a of Allah; however, she is (to be) reprimanded (in such a way that) deters others like her from escaping.”⁷¹⁶

In 2014, Dr. Widad Akreyi said, “The plight of the Yazidis, Christians and Kobane is a humanitarian tragedy, and we want to make sure that the victims are not forgotten, protected legally, fully assisted and compensated fairly.”⁷¹⁷

⁷¹¹ See CNN, ‘ISIS states its justification for the enslavement of women,’ 13 October 2014. Available <https://edition.cnn.com/2014/10/12/world/middle-east/isis-justification-slavery/>

⁷¹² Christian Today, ‘Islamic State issues abhorrent sex slavery guidelines about how to treat women,’ 15 December 2014. Available <https://www.christiantoday.com/article/islamic-state-issues-abhorrent-sex-slavery-guidelines-about-how-to-treat-women/44435.htm>

⁷¹³ Independent, Isis releases “abhorrent” sex slaves pamphlet with 27 tips for militants on taking, punishing and raping female captives,’ 10 December 2014. Available <https://www.independent.co.uk/news/world/middle-east/isis-releases-abhorrent-sex-slaves-pamphlet-with-27-tips-for-militants-on-taking-punishing-and-9915913.html>

⁷¹⁴ Ibid.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid.

⁷¹⁷ Defend International, ‘Save the Yazidis: The world has to act now,’ September 5 2014. Available <https://defendinternational.org/save-the-yazidis-the-world-has-to-act-now/>

III. Precedents to CRSRV: Economic considerations

Countless precedents paved the way for the perpetration of CRSRV against Yazidi women and girls by ISIL, including historical and political ones. Another important element which sanctioned and maintained violations of this nature in this particular context is economic; namely, the arms trade as part of military spending, the operations and transactions of which turned a blind eye to the human rights violations of civilians, including CRSRV, and ruthlessly abandoned the international responsibility of protection of civilians in pursuit of economic interest.

III.a. The protection of civilians depends on military intervention

On August 7, 2014, then US President, Barack Obama, authorised targeted airstrikes on ISIL militants in the Sinjar region of Iraq.⁷¹⁸ The offensive began on August 8, and justified the imperative for intervention by citing the systematic destruction of the Yazidi people by ISIL as constituting genocide.⁷¹⁹ Seen under this light, there exists a clear rhetoric that protection of civilians depends on military intervention.

In a statement dated 18 September, 2014, Obama said, “I’m pleased that Congress... have now voted to support a key element of our strategy: our plan to train and equip the opposition in Syria so they can help push back these terrorists.”⁷²⁰ On his campaign trail in 2016, before becoming the succeeding President of the US, Donald Trump promised, for his part, to “bomb the shit” out of ISIL. “I would bomb the shit out of ‘em. I would just bomb those suckers,” was the phrase he used to frame his opposition.⁷²¹ Air strikes led by the US in Syria and Iraq increased under the Trump administration; as have civilian casualties. In August 2017, the US coalition dropped over 5,000 bombs on positions held by ISIL. This number

⁷¹⁸ The Guardian, ‘Obama authorises air strikes on Isis to help Iraqis besieged on mountain,’ 8 August 2014. Available <https://www.theguardian.com/world/2014/aug/08/obama-authorises-iraq-air-strikes-against-isis>

⁷¹⁹ The Washington Post, ‘When Obama talks about Iraq, his use of the word “genocide” is vital,’ 17 July 2014. Available <https://www.washingtonpost.com/news/worldviews/wp/2014/08/08/when-obama-talks-about-iraq-his-use-of-the-word-genocide-is-vital/>

⁷²⁰ The White House, Statement by the President on Congressional Authorization to Train Syrian Opposition. September 18, 2014. Available <https://obamawhitehouse.archives.gov/the-press-office/2014/09/18/statement-president-congressional-authorization-train-syrian-opposition>

⁷²¹ At a campaign rally in Fort Dodge, Iowa, Donald Trump – referring to ISIL – told supporters, “I would bomb the shit out of ‘em. I would just bomb those suckers.” See The New Yorker, ‘The recent history of bombing the shit out of ‘em,’ 20 April 2017. Available <https://www.newyorker.com/news/news-desk/the-recent-history-of-bombing-the-shit-out-of-em>

surpassed the total of the previous month, which had been 4,848 in June, and doubled the number of the previous year, which was 2,244.⁷²² These figures exclude coalition aircraft, meaning they are not representative of the total bombing raids on ISIL in Iraq and Syria. But the year of 2017, until the month of August, saw 32,801 weapons released in the campaign against ISIS. Previously, under the Obama administration, the total number of weapons released over 2016 had been 30,743, and before that 28,696 in 2015.⁷²³

The argument that terror must be defeated militarily is a costly one. It has, in recent years, been accorded weight in international relations alongside the norm of the Responsibility to Protect (R2P). Endorsed by the United Nations General Assembly in 2005, the principle was unanimously reaffirmed by Security Council in 2006, in Resolution 1674. In reference to the purpose of the responsibility to protect, in Resolution 1674, the Security Council:

Reaffirms its practice of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, and *expresses its intention* of ensuring that (i) such mandates include clear guidelines as to what missions can and should do to achieve those goals, (ii) the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (iii) that protection mandates are implemented.⁷²⁴

The concerns expressed by the Security Council as fundamental to the principle of the Responsibility to Protect cannot be seen to have comprised a vocal component of Trump's authorisation of military intervention in Iraq and Syria. The Security Council furthermore:

Condemns in the strongest terms all sexual and other forms of violence committed against civilians in armed conflict, in particular women and children, and *undertakes* to ensure that all peace support operations employ all feasible measures to prevent such violence and to address its impact where it takes place.⁷²⁵

⁷²² See News Week, 'Trump really is "bombing the shit" out of ISIS just like he promised,' 14 September 2017. Available <https://www.newsweek.com/trump-really-bombing-shit-out-isis-just-he-promised-664844>

⁷²³ Ibid.

⁷²⁴ UN Security Council, Security Council Resolution 1674 (2006), *On protection of civilians in armed conflict*. 28 April 2006. S/RES/1674 (2006). See para. 16. Original emphasis.

⁷²⁵ Ibid., para. 19. Original emphasis.

Practices of CRSRV are among the most pervasive and effective weapons of war, as well as being, as discussed in this thesis, one of, if not the, least verbalised and contested forms of violence experienced in times of war. Protection of civilians, in particular, of women and children vulnerable to forms of CRSRV, under the rule of ISIL was similarly a silent aspect of the justification of military intervention by US administration. The Responsibility to Protect justifies military intervention in humanitarian terms, or humanitarian intervention as it has been called, but only where protection of civilians remains at the core.

Nevertheless, the principle remains contested namely in reference to its promotion of humanitarian intervention and the “pervasive belief that its principle aim is to create a pathway for the legitimization of unilateral military intervention.”⁷²⁶ There is recent debate regarding the extent to which the Responsibility to Protect is becoming a norm for prevention rather than response.⁷²⁷ It has immense monetary value, both in terms of money invested in military spending and in terms of the profits to be reaped from the arms trade. It also has a human cost, in terms of irreparable physical and psychological damage, and loss of life. It furthermore allocates funding to military spending instead of investing in development, including protection and promotion of human rights, health, education, compensation or reparation.

In this vein, and in a strategical political framework of military spending and intervention, the economics of investment becomes a question of value. “The word Value,” Mill states, “when used without adjunct, always means, in political economy, value in exchange.”⁷²⁸ The same could be said of value of individuals, productivity and what can be exchanged. In determining value, states Barton Perry, the first step is to distinguish between consumption and acquisition.⁷²⁹ He proceeds:

In so far as it is legitimate to speak of a specific economic interest it will be this *dependent, acquisitive or possessive interest*, this *felt need*; and economic value in the broadest sense will be said to be possessed by anything to which this interest is directed.⁷³⁰

⁷²⁶ Alex J. Bellamy, ‘The responsibility to protect and the problem of military intervention,’ pp. 615-639, in *International Affairs*, Vol. 84, No. 4, July 2008. Oxford University Press.

⁷²⁷ For an interesting discussion on this see Aidan Gnoth, ‘Lost in translation: a comparative analysis of developing regions’ receptions of the responsibility to protect norm.’ Master’s thesis. Victoria University, 2013. Available <https://researcharchive.vuw.ac.nz/xmlui/handle/10063/2990>

⁷²⁸ See Mill, John Stuart. *Principles on Political Economy with Chapters on Socialism*. Oxford, Oxford University Press, 2008.

⁷²⁹ Ralph Barton Perry, ‘Economic value and moral value,’ pp. 443-485, in *The Quarterly Journal of Economics*, Vol. 30, No. 3 (May, 1916). Oxford University Press. See p. 451. Original emphasis.

⁷³⁰ Ibid., p. 453. Original emphasis.

Indeed, it is this felt need he identifies which informs the idea of value and concedes it economic status, that is, monetarises its existence. Perry continues, “Every felt need rests, as we have seen, on judgments as to the indispensable utility of objects.”⁷³¹ And one example he uses is, “Thus the full strength of maternal love may be directed to anything the mother thinks necessary to the saving of her child’s life.”⁷³² What he recognises here is, “I am assuming, then, that interests possess strength.”⁷³³ In this vein, if we transfer the same theoretical frame to the allocation of funding for sexual and reproductive health in conflict settings, the recipient of the funding becomes the object, practically rendered strengthless, and the subject whose action determines the fate of the object in this scenario becomes the source of the funding (governments, the international community, individual donors, policy makers, for example).

An economic perspective tends to attribute a value to each life, according to an individual’s estimated contribution to society. The individual hereby assumes value in relation to their place within a given social group and the overall economic status attributed to this group. Although there has been a recent shift to recognition of the social capital individuals contribute to economic growth and well-being,⁷³⁴ women, traditionally, are confined to childbearing roles in private spheres. There exists recognition of a deficit in the global status of women’s health and the economic benefits of investing in women’s health,⁷³⁵ but their work is often considered exogenously less productive; they are perceived to contribute less to society at large and, therefore, comparatively fewer social resources are allocated to them, a prime example being in relation to the protection of sexual and reproductive rights.

III.b. Economies of abandonment and military spending

Regardless of whether executed within the framework of the Responsibility to Protect, violations of CRSRV represent part of economies of abandonment. When military spending in the fight against ISIL is traced to the US, a number of dominant perspectives arisen from recent political debate in this context reinstate the logic and objectives which prioritise arms over the

⁷³¹ Ibid., p. 455.

⁷³² Ibid.

⁷³³ Ibid.

⁷³⁴ Organisation for Economic Co-Operation and Development (OECD), Centre for Educational Research and Innovation, *The Well-being of nations: The role of human and social capital, Education and skills*. 2001.

⁷³⁵ See Kristine Husoy Onarheim, Joanne Helene Iversen, David E. Bloom, ‘Economic benefits of investing in women’s health: A systematic review, in PLoS ONE 11(3): e0150120. Available at <https://doi.org/10.1371/journal.pone.0150120>

human rights of civilians, particularly those of women and girls. They can be seen, for example, in comments made by Republican Representative, John Shimkus, who questioned, debating the American Health Care Act, why men should have to pay for women's pre-natal care.⁷³⁶ And Trump's decision, for instance, to withhold funding from USAid for any international family planning programmes including or promoting abortion.⁷³⁷ Though not directed at the context of the conflict in Iraq and Syria, this thinking underlies decisions made by the US which influence protection or abandonment of civilians at risk in ISIL territories, and intersects with economic interests in disregard of human rights.

In his remarks at the High-Level Forum on Accelerating MDG-5, regarding improvement of maternal health, Ban Ki-moon acknowledged that achieving targets within this goal "is not expensive, especially compared to many other development commitments. But it requires far more resources than are currently available."⁷³⁸ Measures such as the withholding of funds from sexual and reproductive health by USAid, set precedents for denying the importance of, not only sexual and reproductive rights, but also the human rights of women and girls in other contexts and confirm the "unavailability" of resources to invest in their human rights generally.

Yet, Trump's administration requested for 2019, \$716 billion to invest in weapons programmes and deportation of troops,⁷³⁹ \$686 billion of which was to be allocated to the base operations of the Department of Defense.⁷⁴⁰ Resources cannot, in light of this information, be described as simply unavailable. Of the countries with the highest military spending worldwide, the USA is ranked in first place in 2018.⁷⁴¹

In 2019, the USA not only remained the country with the highest military spending, but also considerably increased its budget for military spending. All other countries remained the same, with only slight variations in spending.⁷⁴² Further, in 2018, the US arms exports to Saudi

⁷³⁶ See Vox, 'Male congressman questions why men have to pay for prenatal care. Really,' March 11, 2017.

Available at <https://www.vox.com/2017/3/11/14891034/shimkus-why-men-pay-for-prenatal-care>

⁷³⁷ See US Government, USAid, Global Health Legislative and Policy Requirements. Available at <https://www.usaid.gov/what-we-do/global-health/cross-cutting-areas/legislative-policy-requirements>

⁷³⁸ See United Nations Secretary-General, Ban Ki-moon, Remarks at High-Level Forum on Accelerating MDG-5. 23 September, 2013.

⁷³⁹ CNBC, 'Trump's 2019 defense budget request seeks more troops and firepower to deter threats,' available at <https://www.cnbc.com/2018/02/12/trumps-2019-defense-budget-request-seeks-more-troops-firepower.html>

⁷⁴⁰ See Vox, 'Trump promised to rebuild the military. His new budget does that, if you squint,' Available at <https://www.vox.com/2018/2/12/17004456/trump-2019-budget-defense-686-billion>

⁷⁴¹ See Annex 1.

⁷⁴² According to Global Firepower. See Annex 1. <https://www.globalfirepower.com/defense-spending-budget.asp>

Arabia totalled to about 3,353 million constant (1990) US dollars, while Iraq is placed 31st, corresponding to a total of 40.⁷⁴³

To return now to the context of this study, the origins of weapons obtained and used by ISIL, and responsible for the perpetration of violations of international human rights law and international humanitarian law, as well as part of the perpetration of CRSRV, are illustrative. A “huge and lethal arsenal” has been provided to members of ISIL through irresponsible arms transfers by countries including the UK, USA, Russia, China, Germany and France.⁷⁴⁴ In Iraq, for example, weapons of war have been flowing freely for decades. With poor control over Iraqi military stockpiles, and “endemic corruption by successive Iraqi governments,” these weapons, manufactured in at least 25 different countries, fell into the hands of ISIL. The weapons date from the 1970s to the 1990s and include pistols, handguns, as well as machine guns, anti-tank weapons, mortars and artillery, many of which are traceable to the USA or Russia and former Soviet states.⁷⁴⁵ These Soviet style weapons are easy to use, familiar to fighters and so common in the region that their origins are difficult to trace.

Following the US led invasion of Iraq in 2003, the country once again became inundated with weapons. Hundreds of thousands went missing and remain unaccounted for today. In relation to the Syrian civil war, weapons supplied by the US and Saudi Arabia to opposition fighters have fallen into the hands of ISIL, as well as weapons looted from Syrian and Iraqi armies.⁷⁴⁶

According to a report by Conflict Armament Research, all weapons purchased by the US and Saudi Arabia were of EU origin and, where they were passed on to ISIL and other armed groups in Syria, the US and Saudi Arabia broke contractual clauses prohibiting their transfer. Further evidence suggests that the US has repeatedly diverted EU manufactured weapons and ammunition to opposition forces in the Syrian armed conflict, after which “IS forces rapidly gained custody of significant quantities of this material.”⁷⁴⁷

Amnesty International has considered it a collective international responsibility to take urgent action to curb future arms proliferation into Iraq, Syria, and other unstable regions, and especially to stop arming Syrian government forces and armed opposition groups implicated

⁷⁴³ See Annex 2.

⁷⁴⁴ Amnesty International UK, ‘How Islamic State got its weapons,’ January 2018. Available <https://www.amnesty.org.uk/how-isis-islamic-state-isis-got-its-weapons-iraq-syria>

⁷⁴⁵ Ibid.

⁷⁴⁶ Al Jazeera, ‘ISIL weapons traced to US and Saudi Arabia,’ 15 December 2017. Available <https://www.aljazeera.com/news/2017/12/isis-weapons-traced-saudi-arabia-171214164431586.html>

⁷⁴⁷ Conflict Armament Research, Weapons of the Islamic State: A three-year investigation in Iraq and Syria. London, December 2017.

in war crimes. Similarly, states must prevent the sale of weapons to Iraq where they may end up in the hands of ISIL.⁷⁴⁸

III.c. The futility of arms

The International Peace Bureau has identified the need for an urgent shift of resources from excessive military spending to projects related to human needs, both domestically and internationally.⁷⁴⁹ On the futility of arms with regard to security, Ban Ki-moon, in an opinion on disarmament, has observed that:

Many defence establishments now recognize that security means far more than protecting borders. Grave security concerns can arise as a result of demographic trends, chronic poverty, economic inequality, environmental degradation, pandemic diseases, organized crime, repressive governance and other developments no state can control alone. Arms can address such concerns.⁷⁵⁰

Nevertheless, as seen from some of the statistics above, global military expenditure on military spending, including the arms trade, has in recent years reached unprecedented levels. While, in 2012, the estimated expenditure had reached \$1738 billions per annum, many states have neglected to increase their foreign development aid to the UN target of 0.7% of GDP.⁷⁵¹ A report from 2010 observed that military expenditure was 12.7 times higher than the Official Development Assistance at \$128 billion, and 604 times higher than regular UN budgets for Peace and Security, Development, Human Rights, Humanitarian Affairs and International Law at \$2.7 billion, as well as 2508 times higher than combined expenditures of the UN International Disarmament and Non-Proliferation Organizations at \$0.65 billion.⁷⁵² Various initiatives and the adoption of resolutions over the last decades have offered a critique of

⁷⁴⁸ Amnesty International UK, 'How Islamic State got its weapons,' *Op. cit.*

⁷⁴⁹ International Peace Bureau, *Opportunity costs: Military spending and the UN's Development Agenda. A view from the International Peace Bureau*. Geneva, November 2012. See p. 3.

⁷⁵⁰ Opinion piece by Ban Ki-moon, 2012. Available at <http://www.un.org/disarmament/up-date/20120830/>

⁷⁵¹ International Peace Bureau, *Opportunity costs: Military spending and the UN's Development Agenda. A view from the International Peace Bureau*, *Op. cit.*, p. 3.

⁷⁵² *Ibid.*, p. 8.

military spending,⁷⁵³ and its direct relation with avoidable deaths.⁷⁵⁴ The objective of disarmament, in relation to human security in this vein, purports a restructuring of economic, political, and social orders and bears explicit relation to access to, protection and enjoyment of fundamental human rights, as does the use of arms to violation of these rights. Its objective in relation to Feminist Security would imply, as seen previously in this thesis, interpretation and representation of alternative experiences of violence. The victims of violence who are most vulnerable, foremost among whom are women and children, require alternative spaces in which, and forms by which, to record their silences and their histories, and these recordings, in turn, demand vernacular readings.

IV. Subsequents to CRSRV: The fate of children born of rape

As there have been countless antecedents to practices of CRSRV, generally and in the context of violence against Yazidi women and girls, there have also been countless “subsequents”, or consequences of CRSRV. Among the most devastating is the fate of children born of rape to Yazidi sex slaves and ISIS fighters, who are abandoned if their mothers return home. This subsequent illustrates the intricate relationship between sexual and reproductive violence, and its consequences for victims, and sheds light on the complexity of the identity of victim.

IV.a. Represented by the right to return

In seemingly unprecedented support of Yazidi women and girls abducted and held by members of ISIS as sex slaves, their community leader stated that they would have the right to return home to their native villages, and to the Yazidi community, in the Northeast of Iraq. Because of the profound significance placed on women’s honour and the deep stigma attached to rape in the region in which Yazidis live, the decree to welcome Yazidi women home was

⁷⁵³ See, for example, UN General Assembly, *Reduction of Military Spending*, A/RES/44/114. 15 December 1989. Also, United Nations Office for Disarmament Affairs (UNODA), Reports of the Secretary-General on objective information on military matters, including transparency of military expenditures, available at <https://www.un.org/disarmament/convarms/milex/>

⁷⁵⁴ See The Guardian, ‘Redirect military expenditure to ensure a sustainable future,’ 17 April 2013. Available at <https://www.theguardian.com/sustainable-business/blog/redirect-military-expenditure-sustainable-future>

unprecedented.⁷⁵⁵ It was met with relief, but also trepidation by victims. As a girl named Gazal tells, “Isis lied to me. They said our families would kill us if we tried to come home so I was scared to come back. But I was so surprised at the welcome I got.”⁷⁵⁶

In the days following her return, Gazal recalls how she travelled to the holiest Yazidi temple, found within a cluster of shrines in the mountain village of Lalish. Women returned from enslavement by ISIL are showered there with water there in a ritual cleansing of the past, after which they are considered to be purified and can be accepted back into the community.⁷⁵⁷

IV.b. Unrepresented by the right to return

The right of freed Yazidi sex slaves to return home did not represent the same right for their children born of rape to ISIL fighters during captivity in Syria.⁷⁵⁸

The Yazidi Spiritual Council, the supreme body tasked with binding religious decisions, initially decided in April 2019, that children born of rape could be accepted back into the community if their mothers wished to return. However, a clarification issued a few days later explicitly warned that such children would not be welcomed.⁷⁵⁹

These paragraphs from a journal report describe the night before a group of Yazidi women freed from ISIL would cross the border between Syria and Iraq to return home:

A pale young woman with shrapnel wounds stretches out on a mattress. An older woman in a velveteen housedress leans against the wall cradling her bandaged arm – broken by an ISIS wife who accused her of taking food in the last days of the caliphate.

On the floor near a small heater warming the concrete room, a 5-year-old girl has been crying for so long that her sobs have turned to jagged coughs.

Her mother, who is 22, sits on the floor holding the girl’s head in her lap, smoothing the hair off her face as she cries. The woman’s other hand reaches out to grasp the tiny fingers of her sleeping 2-year-old son. It will likely be the last night she will spend with

⁷⁵⁵ NPR, ‘Freed from ISIS, Yazidi mothers face wrenching choice: Abandon kids or never go home,’ 9 May 2019. Available <https://www.npr.org/2019/05/09/721210631/freed-by-isis-yazidi-mothers-face-wrenching-choice-abandon-kids-or-never-go-home>

⁷⁵⁶ The Guardian, ‘Only bones remain’: shattered Yazidis fear returning home,’ 9 September 2018. Available <https://www.theguardian.com/world/2018/sep/09/yazidis-isis-only-bones-remain-fear-returning-home>

⁷⁵⁷ Ibid.

⁷⁵⁸ See The Sunday Times, ‘Freed Yazidi sex slaves forced to leave Isis children behind,’ March 17 2019. Available <https://www.thetimes.co.uk/article/freed-yazidi-sex-slaves-forced-to-leave-isis-children-behind-gf3fvhvgd>

⁷⁵⁹ Independent, ‘Yazidi rape survivors forced to abandon children of Isis to be able to return to community: “Drowning in a sea of pain”,’ 3 August 2019. Available <https://www.independent.co.uk/news/world/middle-east/yazidis-sinjar-massacre-rape-iraq-isis-fighters-children-a9037126.html>

*both her children. Her daughter is the child of her Yazidi husband, murdered by ISIS. The boy, Ibrahim, the son of a Moroccan ISIS fighter who enslaved her, won't be allowed to go home with her.*⁷⁶⁰

The boy will most likely be destined to live in an orphanage where he will be left before his mother crosses the border into Iraq.

In an orphanage in Northeast Syria, a caregiver holds a little girl in her arms. The girl is 1 and a half, wears a white dress with sequins and a pink ribbon. Around her wrist is a thread bracelet; in her ears, the gold earrings she wore when brought the orphanage, a sign that she had once been valued, prized, that “although abandoned, she was not unloved.”⁷⁶¹

IV.c. Only bones, or flesh and blood? Violations and victims

Intolerable, explicit and undeniable, the violations of CRSRV committed against women and girls who were sex slaves held by ISIL produced inevitable victims. Able to return to her country, but not her own village, 20 year-old Bafrin Shivan Amo recalled how, “They raped me every day, twice or more (...). I was just a child. I can never forget it.”⁷⁶² She went on to say, “I cannot go back to my own village,” referring to Kocho. “There is no hope there will ever be life in my village. There are only bones of the dead.”⁷⁶³

The children born to Yazidi mothers and ISIL fighters are also victims of CRSRV, subject to comparatively more implicit and quieter sorrows, stigmatised, abandoned and “forgotten”. Pari Ibrahim, founder of the free Yazidi Foundation, has said:

It is very difficult to live in the community if the child faces stigma. We know of cases where Yazidi families take the child away by force to put them up for adoption or give them to organisations that find a family or put them in orphanages. These women are left very sad. Yazidi women survivors are left out of discussions.⁷⁶⁴

⁷⁶⁰ Ibid.

⁷⁶¹ NPR, ‘In Syria, an orphanage cares for children born to Yazidi mothers enslaved by ISIS,’ 6 June 2019. Available <https://www.npr.org/2019/06/06/729972161/in-syria-an-orphanage-cares-for-children-born-to-yazidi-mothers-enslaved-by-isis>

⁷⁶² See, The Guardian, ‘Only bones remain’: shattered Yazidis fear returning home.’

⁷⁶³ Ibid.

⁷⁶⁴ See, Independent, ‘Yazidi rape survivors forced to abandon children of Isis to be able to return to community: “Drowning in a sea of pain”’.

Ibrahim continued, “When Yazidi women who escape out of captivity and flee Isis come back, it is like they are a body without a soul.”⁷⁶⁵ Not all children are adopted or reach orphanages. Some simply go missing from camps and orphanages in Syria, and risk severe human rights abuses, including being sold to organ traffickers in Turkey.⁷⁶⁶

These children are inherent heirs of the title of victim. They will have been victims of, and witness to, grave human rights abuses in the context of humanitarian crises, and, upon separation from their mothers, will be subject to further and continued physical and psychological harm. The mother of two year-old Ibrahim, from the scene described above, lamented:

It’s been three years and he wasn’t apart from me for even a minute, and I leave him in one minute? I love him just like my daughter, but my parents won’t accept him. Nothing is in my hands.⁷⁶⁷

Not even the timing of parting was on their side. Ibrahim’s mother made a first attempt to cross the border with her daughter, but found that the crossing was closed for the day. “My daughter was crying, saying, ‘Why is my brother not coming with us?’ I want to go back to Ibrahim.” She then returned to the village where she had left her son, and says, “When I came back, he saw the car, and he ran toward me and hugged me. It was very painful.”⁷⁶⁸

There are people who help abandoned children find new Kurdish families in Syria. “The family who we are giving them to must be a good family,” considered Rasho who helps in the endeavour. “Their thinking must not be radical Islam. They must be secular and open-minded.”⁷⁶⁹ It is likely that the new family found for Ibrahim will change his name. He will not know that he was born in the ISIL caliphate, and “probably won’t remember his mother. But she will remember.”⁷⁷⁰

From the reproductive consequences of CRSRV in this context, more than “only bones remain.” What is left is also felt in the flesh and blood. “All the mothers cry,” when forced to abandon their children,” because they are from the mother’s flesh and blood.”⁷⁷¹

⁷⁶⁵ Ibid.

⁷⁶⁶ The Guardian, ‘Only bones remain’: shattered Yazidis fear returning home.’

⁷⁶⁷ NPR, ‘Freed from ISIS, Yazidi mothers face wrenching choice: Abandon kids or never go home.’

⁷⁶⁸ Ibid.

⁷⁶⁹ Ibid.

⁷⁷⁰ Ibid.

⁷⁷¹ The words of Fahima Suleiman, a Yazidi woman helping to care for women and children freed from ISIL. See NPR, ‘Freed from ISIS, Yazidi mothers face wrenching choice: Abandon kids or never go home.’

V. Perpetration of CRSRV in relation to methods of silencing

The methods of silencing used by ISIL in the pre-meditation, perpetration, and aftermath of CRSRV against Yazidi women and girls included, but were not limited to, traditional means such as silencing by threat or coercion. These methods are present, explicitly or implicitly, not only in the violence itself but also in the recording of the violence. This section draws on the available recordings of CRSRV already presented regarding this context, and outlines some of the traditional means of silencing relied on by ISIL, namely use of verbal command to instil fear, coercion, and threat of death. It then discusses in further detail some of the less traditional means that were used complementary to the traditional means, and not necessarily strictly at the time of the violation, but in relation to the general context in which acts of CRSRV were perpetrated by ISIL and over a prolonged timeframe, such as total subordination of women, including, as outlined earlier, economic deprivation to the obsolescence of women's human rights and self-determination.

V.a. Silence by verbal command to instil fear

ISIL used verbal command as part of the method of silencing in the perpetration of CRSRV in order to instil fear in the victims, and prevent victims from speaking out or obstructing the course of the violent act, or destructing the continuation of violence and control. The example of enforced abortions carried out by gynaecologists employed by ISIL illustrates this as those in positions of power would isolate the pregnant woman before performing the operation and tell her not to speak.⁷⁷² As cited above in a witness testimony, one victim of enforced abortion could not, after the operation, “talk or walk.”⁷⁷³ In this case, it is evident that the method of silencing had been used during the violent act, by verbal command, and that its effects furthermore continued immediately after the violent act which had rendered the victim unable to talk, and therefore unable to express herself or give an account of what had happened to her. It is very likely that the method of silence continued in effect for a long time afterward as well.

⁷⁷² See CNN, ‘ISIS forced pregnant Yazidi women to have abortions.’

⁷⁷³ Ibid.

V.b. Silence by threat of death

The method of silence in relation to coercion in the perpetration of CRSRV by ISIL can be attributed most clearly to threat of death. There was evidence in 2015 that ISIL executed nineteen Yazidi women for refusing to have sex with them.⁷⁷⁴ These executions demonstrate with utmost clarity the brutal consequences of resisting the command of ISIL. Even where threat of death is not issued to victims directly at the time of a violent act, the fear imparted by reports such as this one serve to deter resistance and remind the victim of a fate which would otherwise await her if she did not comply.

In another example cited earlier, a Yazidi sex slave was warned by an ISIL fighter that she could not return home: “Isis lied to me. They said our families would kill us if we tried to come home so I was scared to come back. But I was so surprised at the welcome I got.”⁷⁷⁵ In this instance, silencing by threat of death was used in order to continue or prolong the circumstances under which CRSRV was being perpetrated and to keep the victim quiet.

There have also been recent reports of five freed Yazidi women and one fourteen-year old girl who, after they had reached safety in Canada, began to receive threats of death and rape from ISIL fighters by phone. Recordings of the calls have been handed over to police, including screen shots which reference ISIL with pictures of armed jihadis and beheadings. In one recording, a man laughs and says in Arabic, “I am the man who fucked you. I am your rapist.”⁷⁷⁶ Even where silencing by threat is ineffective, because in this case the women did pass on information to police, the attempt to prevent victims from obtaining justice, or successful obstruction of justice, is a reminder of the intention to render powerless and totally subordinate the victims.

⁷⁷⁴ Daily Mail, ‘ISIS executes 19 girls for refusing to have sex with fighters as UN envoy reveals how sex slaves are “peddled like barrels of petrol”’.

⁷⁷⁵ The Guardian, ‘Only bones remain’: shattered Yazidis fear returning home.’

⁷⁷⁶ See CTV News, ‘Former ISIS sex slaves sheltered in Canada threatened with phone calls, texts,’ 4 February 2019. Available <https://www.ctvnews.ca/w5/former-isis-sex-slaves-sheltered-in-canada-threatened-with-phone-calls-texts-1.4282796>

V.c. Silence by total subordination

The total subordination of women and girls held as sex slaves, as well as the fear and emotional, psychological, and physical violence inflicted on them, condones and completes their silencing, prior to, at the time of, during, and after their captivity. The subordination of women under the rule of ISIL included physical violence, especially in the form of CRSRV, but also relied on psychological and emotional violence to the effect of imparting fear sufficient to prevent resistance. The subordination of women included furthermore violation of freedom of movement, particularly for those held in captivity and was perfected in relation to the enforcement, reinforcement, and maintenance of the low economic status of women.

V.d. Silence by economic deprivation

Another terribly effective form of silencing which operated complementary to the more traditional methods of silencing described above, included the economic deprivation of women. The effects of this method meant that women were totally subordinate to the power of men, in particular their male captors, and this resulted in silencing and effectively the obsolescence of their self-determination. Economic control and deprivation were deliberated and maintained by ISIL in multiple forms, including in the form of the slave trade and the selling of Yazidi and Christian women and girls according to set prices, which funded the administration of the Islamic State, as well as the purchase of weapons. But it has also occurred under the watch of the international community, or as the international community turned a blind eye to violations and the circumstances in which violations have been occurring, and corresponds therefore not only to violations but also to omissions and is related, in this regard, to the diversion of funds from protection of human rights of women in conflict settings to the funding of war, namely investment in the arms trade.

And it has also occurred in relation to local culture which, as seen above, also silences or perpetuates the subordination of women by means of economic deprivation. For example, in cases where women held as sex slaves are given the right to return home by the Yazidi community, so long as they leave behind their children. In no way can this be seen to be a decision of the victim since, in the words of Ibrahim's mother as she explained that her family

would never accept her son born to an ISIL father, “Nothing is in my hands.”⁷⁷⁷ In this regard the significance of money (the cost of living, and the provision required for the care and survival of an individual and her children) retains a profoundly emotional function. Economically and emotionally dependent on the decisions of others, Yazidi women have been left to bear the consequences of the violations committed *against* them, as well as to bear the consequences of the decisions regarding aspects of redress made *for* them.

V.e. The truth within a rights-based approach

A victim-centred perspective, as proposed by Bassiouni, presents a fragile hope for the protection of a rights-based approach with regard to reparation for victims of CRSRV. But its promise of redress rests on the right to the truth, and within the recording of violations.

Within a rights-based approach, recognition and representation of wider economic considerations, such as the arms trade which fuels wars, the military spending and deployment of troops for the protection of civilians, and the ensuing deprivation and neglect of war’s most vulnerable, namely women and children, are important. But of comparable, and arguably more urgent, importance than the economic lack of the context, or what the victim is deprived of by the rights violation in a negative sense (notwithstanding the explicitly negative nature of the violations the discussion is centred on), becomes an analysis of what the victim is capable of, any action which might be taken in a positive sense to transform the context, to amend or redress it, which would centre the basis of her rights, or in other words cement a rights-based approach to development.

To recall the words of Fathalla, cited earlier in this thesis, “Women are not dying of diseases we can’t treat, they are dying because societies have yet to make the decision that their lives are worth saving.”⁷⁷⁸ And Sen’s conviction that the problem of “missing women” represents “what is clearly one of the more momentous, and neglected, problems facing the world today.”⁷⁷⁹ In her plea to President Trump, Nadia Murad questions, “ISIL is defeated, but

⁷⁷⁷ NPR, ‘Freed from ISIS, Yazidi mothers face wrenching choice: Abandon kids or never go home.’

⁷⁷⁸ Mahmoud Fathalla, ‘A world where no woman is denied access to her right to health and life,’ see p. 30.

⁷⁷⁹ Amartya Sen, ‘More than 100 million women are missing,’ in *The New York Review of Books*, December 20, 1990.

where are the 3,000 Yazidi women in captivity until today?”⁷⁸⁰ They are yet to be heard. Their stories, and their silences, await retelling.

V.f. Demarcations of the right to reparation

The prevalence and pervasiveness of acts of CRSRV executed in this context, and the profound stigma attached to its perpetration, elevate the idea of reparations to a near impossible task. Given the complexity of the violence at hand, notwithstanding application of the intractable methods of silencing in both traditional and non-traditional ways, the right of victims to reparation is difficult to articulate. If we look back to the previous cases studied, including the contexts of Peru and El Salvador, but also those of Rwanda and Bosnia observed earlier in the thesis, two common threads emerge in the elaboration of reparations. Firstly, that the right to reparation is owed to victims and must respond to the context from which it arises and to the gravity of the violation experienced. Secondly, that this right is dependent on breaking or reversing the silence by which these crimes are perpetrated. In this regard, the right of victims to testify as one aspect of their right to the truth, can play a potentially transformative role in informing and sustaining processes of redress.

As seen with previous contexts, no single measure of reparations will suffice to redress the harm done. A combination of measures is invariably needed in response to violations. Broad measures of redress may be applied as they exist under international law but should be tailored to respond to the specific context, and should include, *inter alia*, where and when appropriate, recognition of and apology for past wrongs, different forms of monetary compensation, and a commitment to transformative change, including the will to reverse political instability and cultures of impunity. The right to the truth serves several indispensable functions here. It sets down an alternative historical record, challenges impunity, and demands that human rights be recognised and redressed. The role of the victim in giving testimony is profoundly important in this vein, though not without issue. The experience of violence relayed in the voice of victims and witnesses puts a human face upon conflict. In a context such as violations experienced by Yazidi women and children at the hands of ISIL, the right to testify should be considered an integral element of reparation on a number of interrelated grounds.

⁷⁸⁰ The Washington Post, “‘You had the Nobel Prize?’: Trump meets Nadia Murad.’

One, it should be protected by the international community whereby its framing and practice is customary in international law. While this may appear a futile aspiration, the more recognition accorded to a right, the more likely it is to be applied in practice in a range of settings. Two, its application should take various and varied forms. That is to say, it should not be necessary for victims to testify in a court of law. Rather, testimony may be given informally by different means and in many different forms, all of which account to the highest degree possible for the protection of the victim's physical and psychological safety, but could still subsequently comprise part of formal evidence where appropriate in court settings or legal processes. This makes reference to the provision of a lower standard of proof as discussed earlier in the thesis and to the consideration for the protection of the victim or witness at all costs and above all other concerns. Finally, three, the right to testify should never be upheld without reference to its inextricable link with silence. On the one hand, it provides a necessary means to contest and reverse the methods of silencing applied in the perpetration of acts of CRSRV as discussed in detail above. But on the other hand, acts of giving testimony depend on what Elizabeth Jelin has called "the will to listen", and expose the different forms of silences at play, some complementary, some contradictory, some imposed, some intentional. These, Jelin cautions, are the "deliberate silences" of those imposed by external forces, and those chosen as a form of expression by those testifying themselves. She reminds us that "the impossibility of constructing a narrative and the symbolic lapses and voids involved in trauma are relevant in this issue."⁷⁸¹ The possibility of the interpretation of the violence is, furthermore, a result of not only what the victim tells, but also what the listener hears, how the testimony is recorded, and who extracts meaning.⁷⁸² It is at this impasse that this thesis returns to Bassiouni's proposal for a victim-centred perspective which does not simply aim to hear victims testify, but to redefine the spaces within which testimony can be given. Because legislation on rights violations in international law has been largely conflict-centric, he argues for a shift to framing the violation from the victim's experience. A "victim-centric perspective would require redefinition of international crimes so they become dependent on the victim's suffering rather than on the nature of the conflict or context of violations."⁷⁸³ In every instance, then, the word of the victim would take precedence over the nature of the conflict or its relation to a perpetrator. To delimit exactly how lies beyond the scope of this thesis, but its intimation and promise is the point at which to demarcate the right of victims to reparation.

⁷⁸¹ Elizabeth Jelin, *State repression and the labors of memory*, *Op. cit.*, p. 61.

⁷⁸² *Ibid.*

⁷⁸³ C Bassiouni, 'International Recognition of Victims' Rights,' *Op. cit.*, p. 204.

In making the call for inclusion and protection of the right to testify as a reparative measure in response to CRSRV, this thesis does not deny the importance of preserving the dignity of victims and enabling them to take the decision to speak out or to remain silent. Whether this can indeed be considered a decision in a formal sense. Speaking of violence takes immeasurable courage. Guarding silence may also be courageous for different complex reasons, and silence should never be interpreted as the absence of testimony.

Conclusion: When silence speaks to testimony

The forms of CRSRV perpetrated against Yazidi women and girls by ISIL were premeditated and unprecedented in their scope and scale. They bore consequences which were both sexual and reproductive in nature, comprised of, *inter alia*, the rape of women, and children born of rape. The grounds for reparation rest on recognition of perpetration of reproductive violence in addition to, and concomitant with, sexual violence and reiterate the call for extension of the term CRSV to CRSRV. The grounds for reparation relate, primarily, to evidence of the violations, and to evidence of two kinds of victims: the women and girls held as sex slaves, and their children born of rape in this context. The greatest price is paid by mothers and their children; when freed Yazidi sex slaves are forced to abandon their children who are not welcome in their communities of origin, further violations ensue, and will have devastating and historic effects over generations. In this vein, the prosecution of individual perpetrators, for example ISIL fighters, must not be disregarded, nor the difficulties or impossibilities inherent in this endeavour. But nor can the responsibility of the international community, which has sanctioned by act or omission, the perpetration of human rights violations of women and children in this context, namely CRSRV, and perfected methods of silencing used to this effect when it meant their own economic gain, particularly in light of the profit to be made by war and the arms trade.

The quiet, but insistently pervasive, neglect of women from social, economic, and legal spheres, including participation in them, the right to question or resist their foundation, purpose and application, and their right to seek remedy from them, represents the call for alternative versions of this history. The call must be addressed in reference to the relationship between “deprivation of individual capabilities” and the “lowness of income”,⁷⁸⁴ as put by Nussbaum and Sen, but redressed with closer regard to capabilities including the right to the truth from

⁷⁸⁴ See Amartya Sen, *Development as Freedom*, pp. 19-20. Oxford: Oxford University Press, 2001 and Martha Nussbaum, *Women and human development*, pp. 11-12. Cambridge: Cambridge University Press, 2000.

which to cull vernacular testimonies which, though they might be silent, will still somewhere exist.

In conclusion

Introduction

Redress for victims of CRSRV depends on protection of the right of the truth. The dependence represents not only evidence of the violations in question, but refers to the recording, or silencing, of the violations. Through an analysis of the recording of, and responses to, CRSRV, this thesis has shed light on the practices of silencing by which all forms of CRSRV are perpetrated. Practices of silencing have been observed as indispensable methods in the pre-meditation, perpetration and perfection of CRSRV, which persist long after the violent act itself by inflicting shame and preventing victims from speaking out. In response, the research referred to the right to the truth as a means to displace the practices of silencing involved.

In conclusion, the limitations and suggestions for further research are set out. A collection of important points presented earlier in the literature review and theoretical framework of the thesis are revisited in light of the profound challenges presented by acts of truth telling and in contrast with the empirical content of the case studies. The purpose of a victim-centred perspective in reparations is restated and held up against the two extensions proposed by this thesis, in response to the questions stated at the beginning, and in relation to interpretations of the vernacular silences underlying this piece.

I. Limitations and further research

As a pertinent first remark, further research is needed on every context in which there has occurred CRSRV. In part owing to the stigma attached to the subject and experience of CRSRV, and the silence involved in its perpetration, and notwithstanding the inherent difficulties involved in speaking of it, the recording of, and responses to, this form of violence has been limited and has also been obstructed.

Because acts of CRSRV depend on practices of silencing, in their premeditation, perpetration, and in order to later prevent victims from speaking out, the right to the truth

should comprise a reparative measure for victims. This thesis refers to pre-existing testimonies of CRSVR that were (able to be) given. Further research in this area should be conducted on the silences which remain, should involve collection of other testimonies, and should expose the common practices of silencing involved in the perpetration of CRSRV in other contexts. Furthermore, each of the contexts referred to in this research merits an in depth study in its own right.

A strength of this work lies in its commitment to a victim-centred perspective in reparations for CRSRV. This commitment is manifest, primarily, in protection of the right to the truth for victims, and in particular their right to testify. It comprised an important part of the theoretical framework, and the methodology, which draws on multiple, complex, and competing versions of the truth in order to arrive at vernacular histories, and to interpret vernacular silences as an imposition, but also as a possible expression, of the violent act itself. But the commitment can also be seen as a limitation insofar as it turns away, albeit intentionally, from dominant but important voices in the existing literature on the subject. The distancing from extant debates on CRSRV as the thesis unfolds, is based on the premise of shedding light on the vernacular, on the purpose of contesting and extending traditional interpretations and representations of violence, violations, and victims, and serves the purpose of protection of a victim-centred perspective. Further research, in this vein, is needed in relation to specific aspects of CRSRV, with stronger reference to and demands on the existing arguments on the subject, in each of the fields of, *inter alia*, international law, feminist security studies, transitional justice, and development studies. Some of the considerations presented earlier in the thesis, regarding the literature and theories underlying the subject of CRSRV, are revisited here, however, to converse with and to tie the different threads together. Some provide a stark contrast with the vernacular histories and silences uncovered in the testimonies presented within the case studies, but they also, invariably, serve to locate and relocate meanings of the truth.

II. A legal framework for the right to the truth

An overarching concern of this thesis is the articulation of the call for right to the truth within a legal framework. This call, as representative of the right to the truth, demarcates important further considerations at intersections with reparations, historical justice, transitional justice, human rights, and rights-based development. In terms of practical application, the thesis has

argued that the weaknesses and failures of the international legal architecture must be revised in light of a victim-centred perspective in reparations and that the right to the truth, here, must be extended to the right of victims to testify. Further research would also need to focus on the broad overarching concept and purpose of the right to the truth within a legal framework, and its details within legal architecture while also respecting the need to be context specific and victim-centred. What follows here are a few remarks on what it looks like in terms of the subject of this research.

For the right to the truth, framed as a reparative and preventative measure for victims of CRSRV, to hold any practical significance this thesis relies on the recognition that its purpose and viability lies in it becoming customary. With each application, however grand or small, it will assume a strengthened customary nature in practice. That said, as necessary precedent steps, the stronger its theoretical representation, the more likely its practical application – intended to be interpreted in diverse ways in diverse contexts. Acts of testimony, whether formal or informal records of violations and crimes, play an indispensable role in this regard. As discussed, testifying may not always be possible, but to increase its possibility and viability many intersecting factors must be recognised and protected, among these, the fact that testifying on the subject of CRSRV must occur under a lower standard of proof and protection of victims and witnesses must, at all times, prevail over the prosecution of perpetrators. As seen from the case studies, giving testimony does not, and should not, always have to occur in a court setting. Alternative settings are imperative for the protection of victims and the truth, which must provide emotional, psychological, physical, practical, and financial forms of support, and which may be informal, anonymous, or by distance, or any other form deemed appropriate. The ultimate objective of giving and recording testimony is to set down an alternative version of history, to protect a victim-centred perspective and the right to the truth in the vernacular. Within protection of a victim-centred perspective, it should therefore express the voice of victims and should, furthermore, as Bassiouni argues, aid in how criminal acts are categorised, for instance, whether they constitute ordinary crimes, war crimes, or crimes against humanity, and what responsibility arises from specific violations. However, testimony should provide, first and foremost, the basis of a historical record. In this vein, it also represents the means by which to displace silence, disrupt cultures of impunity, and therefore comprises an indispensable reference for reparations, as well as a preventative measure. Held up against the experience of victims, the right to the truth assumes unprecedented weight in reparative measures. As a right, it must be interpreted and framed, in the context of truth-telling, not only as a procedural right, but also as a right in itself, able to be violated, requiring protection and,

most importantly, meriting redress in case of violation. Regarding practices of CRSRV, we have seen that their imagination and very perpetration depends on methods of silencing. Reparation for these violations should, therefore, also be referent on this silence, its disruption and displacement via vernacular interpretations and applications of the right to the truth.

III. Locations of the truth

Acts of truth telling form part of a deeply complex and, at times, perilous process. This thesis makes a call for their inclusion in reparations for victims of CRSRV, in particular the right of victims to testify, as both reparative and preventative measures. This inclusion is meant to protect a victim-centred perspective in reparations, however, in what follows in this conclusion, the balance between testimony and silence, as well as the sometimes imperceptible lines dividing them, is also acknowledged.

In all contexts, CRSRV is perpetrated for numerous, complex reasons. This was the case for each of the contexts studied in this thesis. The ways in which CRSRV was practiced in the different case studies in this thesis are a far cry from representations of CRSRV in early literature on the subject, regarding the cases of the former Yugoslavia and Rwanda, for example, as seen in the literature review. The representation of diverse, and sometimes unorthodox, examples within the studies served to demonstrate the prevalence of CRSRV in wider contexts and to observe different aspects of, and perspectives on the violence, as well as to identify different kinds of victims, all of which, nevertheless, comply with and operate under common practices of silencing.

But each of the case studies also gives insight into the distinct reasons underlying the perpetration of CRSRV in different contexts. In Peru, the violence was motivated by ethnic discrimination and ethnic cleansing. It occurred under the auspices of a development plan with genocidal intent. In this context, the truth surrounding sexual and reproductive violence occurring under the enforced sterilisations went unrecognised by the Truth and Reconciliation Commission, and therefore was not redressed. The Quipu Project, decades later, presented an alternative platform for victims to give testimony on this violence. Their words countered the version of history recorded by the Commission and expressed, anonymously, orally, and in their own languages, a claim for truth and reparation.

In El Salvador, CRSRV reflected the preservation of a discriminatory law, and a system ruthlessly founded on patriarchal ideals. It perfected methods of silencing in its obstruction,

destruction, or denial of the right of victims to testify. This context was not one of a traditional ‘conflict’. Violations occurred in a time of ‘peace’ which was characterised by a climate of political instability and oppression and, therefore, met the definition of a context of conflict. It demonstrated, tragically, in such a climate the consequences of absence of testimony. The stories of violence and injustice expressed by the women imprisoned provided a record of the truth in the vernacular. This case, and their stories, demonstrated that where evidence is always a necessary element of the right to reparation, it is also always necessary to cull evidence from alternative and vernacular means. Through the readings of violations as recorded in the interviews and reports included in the case study, it became clear the degree to which violations had prevailed and that they had done so in strict dependence on violations of the right to the truth via methods of silencing.

Under ISIL, practices of CRSRV against Yazidi women and girls demonstrated economic discrimination in preservation and perpetuation of religious ideals, defined by patriarchal privilege and norms. Economic subjugation, here, served to perfect violations of sexual and reproductive rights, among other human rights, and to prevent any means of contesting their occurrence or claiming the right to the truth. This context, furthermore, like the others, shed light on the reproductive consequences of sexual violence, and the diversity of victims and devastating inter-generational effects of CRSRV which arise from this. In each of these contexts, the recording of violations, or their denial, held profound influence over the representation of CRSRV and the recognition of, and reparation for, victims.

This research centres on a reading of the recording of, and responses to, CRSRV. The process draws on existing bodies of literature and legal frameworks, but depends to a far greater extent on a reading of the testimonies of victims and witnesses in order to arrive at vernacular accounts of CRSRV, and in relation to the silences involved therein. As discussed in the methodology, it is a task which draws parallels with the role of the historian, who, in the words of White, “must ‘interpret’ his materials by filling in the gaps in his information on inferential or speculative grounds.”⁷⁸⁵ In the context of this thesis, such an endeavour signified interpretation of “the” materials (belonging neither to White’s “he”, nor to the she who so often spoke the testimonies included), but rather existing as historical evidence of violations. The interpretative lens depended, furthermore, on reading and representing not only what was said, but also what was silenced. It meant representing the methods of silence, varying by degree, scope and scale, by which all violations were perpetrated. Both what was said and unsaid, in

⁷⁸⁵ Hayden White, *Tropics of discourse*, *Op. Cit.*, p. 51.

this vein, represented the truth. The narrative view of history, described by White, can be located within a victim-centred perspective which seeks alternative sources of the past and culls vernacular versions of the truth.

These complexities find further resonance in Wibben's description of a narrative approach as she says that, "Narratives both enable and limit representation – and representation shapes our world and what is possible within it. Narratives, therefore, are profoundly political."⁷⁸⁶ However present and pervasive the political may be, though, it should be read as the influence under which, and not the substance by which, the narration unfolds. Truth telling represents a process which would undeniably be facilitated by favourable political conditions. Nevertheless, this thesis does not attest to the belief that political conditions must commence at a governmental level; there are alternative and vernacular sources of political transition, including, as seen in this thesis, individuals, civil society, and to a certain extent legal discourse. Favourable political conditions do not have to, nor can they always, precede acts of truth telling. On the contrary, these acts, given by alternative means, and however small, can critique and provide contrast to political instability and oppression, and therefore have the effect of instigating a political transition themselves. They are the understated, indispensable acts which ultimately strengthen this process. The legal frameworks referred to above should exist to provide theoretical guidance throughout the processes and protect the right of victims to reparation over and above any other concern. These frameworks recognise that absence of prosecution cannot result in absence of reparation and attest to the fact that the right to the truth exists, and has the potential to administer justice in small but profound ways. The truth expressed in such ways has the potential to inform other processes of redress, and provides a form of evidence by which to claim different forms of reparation.

This thesis has presented and framed the testimonies of victims, refraining from deconstructing or analysing these excessively, in order to protect a victim-centred perspective. As narratives serve the purpose of upholding the right to the truth of victims and providing evidence of violations, Bassionui's ideal that the violations experienced should be framed from the victim's perspective recognises the "profoundly political" nature of the narratives involved, but attests that they remain secondary to the importance of the context in which the victim experienced the harm.⁷⁸⁷ In the elaboration and implementation of reparations, Bassiouni has said that the distinctions between the different branches of law, especially in relation to the

⁷⁸⁶ Annick T R Wibben, *Feminist Security Studies: A narrative approach*, *Op. Cit.*, p. 43.

⁷⁸⁷ Cherif Bassiouni, 'International Recognition of Victims' Rights,' *Op. Cit.*, p. 204.

determination of crimes and prosecution of perpetrators, “are of little significance to victims in their quest for redress.”⁷⁸⁸ He proposes a “redefinition of crimes” whereby they become contextually dependent on the nature and extent of the victim’s suffering, not on the nature of the conflict or violations from which they derive.

The vernacular experience, over and above established fact, becomes the primary reference by which to interpret the historical event. Although it contains both adequately and inadequately explained events, it accounts for and represents versions of the truth, and is thus integral to the narrative and to history. It also provides an indispensable reference for reparations and for a future, where reparations seek to be transformative in scope and scale. In the representation of the testimonies and information included in the case studies of this thesis, Bassiouni’s victim-centred perspective remained, implicitly and explicitly, the central most point of reference. The contexts in which, and the forms by which, the violations had been recorded were read and interpreted, but not the testimonies *per se*, which were left substantively, and intentionally, to speak for themselves. Above all, the testimonies provide a different form of evidence, and show that alternative forms of evidence are required for violations of this nature. What was taken from the testimonies was not only the words spoken, but also the silences imparted.

The testimonies, in this sense, attested to the fact that the methods of silencing underlying and enabling all practices of CRSRV signified that the primary violations of sexual and reproductive rights incurred secondary violations of the right to the truth. In response, redress must reflect both sets of violations. This objective, in reference to the protection of a victim-centred perspective in reparations for victims of CRSRV, is based on what this thesis considers to be the two principal tasks involved in this endeavour, which are framed as two “extensions”. The first addresses inadequate recordings of CRSRV, and consists of extension of the term “conflict-related sexual violence” to “conflict-related sexual and reproductive violence” in order to better reflect the experiences of victims. This extension is in turn dependent on another, which addresses responses to CRSRV and is derived of the right to the truth as the basis of a victim-centred perspective in reparations; it consists of extension of the right to the truth from its conceptual origins as the right of victims to *know*, to its practical application as the right to *testify*.

⁷⁸⁸ Ibid., p. 205.

IV. Extension of the term conflict-related sexual violence to incorporate reproductive violence

Although there exists a degree of recognition of the prevalence and pervasiveness of violations of sexual *and* reproductive rights of women and girls in conflict settings, the recordings of such violence in the literature, and its interpretation in terminology, do not adequately represent this reality. By consequence, responses to CRSRV, particularly with regard to the right of victims to reparation, are also inadequate. Though intended to be represented by the term ‘conflict-related sexual violence’, these ‘other’ forms of violence, such as reproductive violence, are frequently subsumed under its umbrella. The importance of recognising forms of sexual violence and the ensuing right to reparation is undeniable, but failure to recognise or explicitly denounce other related forms of violence experienced by women and girls in conflicts, such as reproductive violence, disregards the dignity of victims and fails to frame certain acts as violations which, at best, complicates elaboration of appropriate reparation, and at worst, completely denies the grounds for reparation and truth.

From an analysis of violence experienced by women and girls in conflict settings as represented in the case studies, emerged further evidence of the undeniably intentional reproductive consequences of sexual violence. In this vein, use of testimony as part of the methodology of the right to the truth in practice would encourage reconsideration of current representations of CRSRV. It would, firstly, reconsider the term “conflict-related sexual violence”, and its possible extension, to include, in direct reflection of victims’ experiences, other related forms of violence of comparable gravity perpetrated against women and children, such as reproductive violence. It would reconsider, secondly, in protection of a victim-centred perspective within reparations the right to the truth for victims where this is extended to their right to testify, and where protection is accorded what Rubio-Marín has framed as “the *general principle* of maximum recognition of harm and an adequate correlation between harm and remedies.”⁷⁸⁹ This general principle, it is worth reiterating, is referent on two specific principles, the first constituting “minimum exposure of individual victims of SRV (*first specific principle*),” and the second, “maximum transformation of the meaning of SRV (*second specific*

⁷⁸⁹ Rubio-Marín, ‘Reparations for conflict-related sexual and reproductive violence: A Decalogue,’ *Op. Cit.*, see pp. 77-78. Original emphasis.

principle linked to the transformative aspiration of reparations).”⁷⁹⁰ Both specific principles, as operative under the general principle, are read in this context as protective of a victim-centred perspective in reparations. The proposal for extension of the term to conflict-related sexual and reproductive violence to better reflect the experiences of victims is, in turn, dependent on a second extension.

V. Extension of the right to the truth

Alternative recordings of, and responses to, CRSRV can be upheld by the right to the truth, but depend on extension of this right from its original conception as the right of relatives *to know* the truth surrounding human rights violations, to the right of victims *to testify* and thereby actively contribute to the construction of the truth.

The point of departure for extension of the right to the truth can be traced to the observations of Bassiouni who, as seen, contends that an overwhelming body of legislation on rights violations in international law has been conflict-centric. He proposes a shift to privilege a victim-centric perspective.⁷⁹¹ Continuing on from this point, this thesis draws on the right of victims to testify on violations experienced, in order to uphold a victim-centred perspective in reparations for CRSRV. The importance of testimony, and its role in the protection of a victim-centred perspective, should express the voice of victims and should aid in how criminal acts are categorised, for instance, whether they constitute ordinary crimes, war crimes, or crimes against humanity, and what responsibility arises from specific violations. However, testimony should provide, first and foremost, the basis of a historical record. In this vein, it also represents the means by which to displace silence, disrupt cultures of impunity, and therefore comprises an indispensable reference for reparations, as well as a preventative measure.

The right to testify would, in such settings, be considered analogous with the obligation to give evidence. Neumann acknowledges the importance and privilege of the victim in interpreting history over the role of the historian. He says: “The expert witness who reports on her research about an event in the past is no match for the eyewitness who was involved in that event. Presumed authenticity now trumps professional authority.”⁷⁹² The use of testimony in

⁷⁹⁰ Ibid. Original emphasis.

⁷⁹¹ Bassiouni, “International Recognition of Victims’ Rights”, *Op. cit.*, p. 204.

⁷⁹² Klaus Neumann, ‘Historians and the yearning for historical justice,’ pp. 145-164, in *Rethinking History*, Vol. 18, No. 2, 2014. See p. 150.

elaborating accounts of violations begins to acquire not only judicial weight, but also social meaning. However, it must also be accompanied by a series of practices which, by their adoption and application, assume a customary nature, the creation of space for testimony (not necessarily public, as seen in the case of Rwanda), the reading of the spaces (or silences) between testimonies, the willingness to listen (and the sense of when to remain quiet in the face of violent memories) and, ultimately, readings of both testimony and silence in the vernacular (to contrast, as Elizabeth Jelin has put it, between the “deliberate silences” of those imposed by external forces, and those chosen as a form of expression by those testifying themselves).

Recording violations from a victim-centred perspective includes wider and vernacular interpretations of violence. As one victim of the Rwandan genocide reflects, “War crimes suspects are important, they take up media space. The media focus needs to shift towards victims. There has to be more talk about them, as this is the way empathy develops.”⁷⁹³ Testimony is, however, given insufficient weight with respect to victims of CRSRV, in part because of the methods of silencing imposed, but also because of the inherent difficulties in speaking of such violence as seen above.

It is from within the victim’s perspective that the truth assumes an unprecedented weight: it must be interpreted and framed, in the context of truth-telling, not only as a procedural right, but as a right in itself, able to be violated, requiring protection and, most importantly, meriting redress in case of violation. With regards to practices of CRSRV, we have seen that their very perpetration depends on methods of silencing. Reparation for these violations should, therefore, also be referent on this silence, its disruption and displacement via the right to the truth.

Though silence surrounding practices of CRSRV is recognised in the literature on the subject, it is framed as a presence, rather than as constituting an intended role or method within the perpetration of such violence. Framing it as a method, as the method of silencing, would elevate its interpretation to an understanding of its capability to violate rights. In this vein, its presence as a method would be understood as not only an auxiliary to the violation of sexual and reproductive rights, but as a violation of the right to the truth of victims where victims are silenced prior to, at the time of, or in the aftermath of acts of CRSRV themselves. The question of redress, in this context, must undergo a shift from reparation for purely sexual and

⁷⁹³ Testimony of Stanojka Tešić, Forum žena Bratunac, interviewed by Amnesty International in March 2012. Cited in Amnesty International, *When everyone is silent. Op.Cit.*, p. 8.

reproductive rights (the primary rights), to reparation for other related rights violated in the perpetration of the primary rights, namely the right to the truth as violated by practices of silencing (the secondary rights).

VI. Extension of rights-based development to include the right to the truth

The theoretical framework of the extensions lies in a commitment to rights-based development. Because the objective of reparations is based on redress for violent histories, it is necessary to account for contexts of underdevelopment which give rise to violence and insecurity, and to consider development as a framework, alongside a legal framework, to delimit a response.

The question of security also, in this vein, becomes a question of development whereby the presence of one informs absence of the other. This means, according to the UN Development Report of 1994, that, “without peace, there may be no development. But without development, peace is threatened.”⁷⁹⁴ Seen under this light, the narration of violence also holds profound influence over meanings and representations of security. From the perspective of Feminist Security Studies (FSS), Wibben attributes this influence to the role of “counternarratives,” which “work through and beyond existing narratives and transform them by drawing on events, ideas, and actions not usually heeded when constructing security narratives.”⁷⁹⁵ Another premise of this thesis was to extend traditional understandings of conflict, since understanding what exactly constitutes contexts of insecurity is fundamental to narratives of security. The work, especially in the case studies, extends conventional perceptions of conflict, which traditionally reside within definitions of war or armed conflict, but should also address situations of clear and serious political unrest or oppression, as in the case of contemporary El Salvador. These examples shed light on the different ways in which the violence is manifest, and extend traditional interpretations and representations of ‘conflict’, and ‘sexual and reproductive violence’, and ‘victim’.

Both the presence and interpretation of narrative, as part of a victim-centred perspective and acts of testimony, contest traditional meanings, impositions, and denials of security to arrive at alternative sources of the truth. It is from these sources that the extensions proposed

⁷⁹⁴ United Nations Development Programme (UNDP), *Human Development Report 1994*. UNDP: Oxford, 1994. See p. iii.

⁷⁹⁵ Wibben, *Feminist Security Studies: A narrative approach*, *Op. Cit.*, p. 57.

by this thesis derive. The right to the truth, furthermore, provides an indispensable reference for rights-based development. This thesis advances within the framework of rights-based development, but sees it as lacking when applied to transitional settings. In its application to reparations for CRSRV, this thesis has called for extension of a rights-based approach to development and the incorporation, within it, of the right to the truth for victims. The reference of the truth would aid and strengthen a rights-based approach to development. A clear example of capability in light of CRSRV is represented by protection of the right of victims to the truth, and the necessity of their right to testify. The reference to testimony furthermore restates the call for extension of a rights-based approach to development in response to CRSRV, beyond traditional perspectives framed by the WID and GAD discourses, to include the right to the truth which would uphold a victim-centred perspective in the implementation of reparations. The truth, in this vein, provides a reparative and preventative measure, as well as an indispensable precedent to, and part of, development. The work of Sen and Nussbaum reflects this shift away from a purely economic conception of development to incorporate a human rights framework. Their proposal is based on a capabilities approach, which sees virtue in understanding the poverty of human lives and freedoms in relation to what individuals are capable of.⁷⁹⁶ The location of capabilities should comprise an essential part of reparative processes for victims.

Given that violence against women, and particularly CRSRV, remains the most persistent and pervasive force against the development of women, in terms of physical harm but also forms of silencing, the discourses of WID and GAD do not adequately address its destabilisation and destruction. Underlying this thesis has been a word of warning to development, that if it does not address the roots of conflict, there can be no prospect of the future. And I repeat, there is no development in absence of redress for victims, and no redress in disregard of the truth. This thesis has therefore called for extension of a rights-based approach to development, in response to CRSRV in transitional societies, to include the right to the truth.

⁷⁹⁶ See, for example, Amartya Sen, *Development as Freedom*, pp. 19-20. Oxford: Oxford University Press, 2001. Also, Martha Nussbaum, *Women and human development*, pp. 11-12. Cambridge: Cambridge University Press, 2000.

VII. Response to the research questions

To conclude, the final remarks offer a response to the research questions posed at the opening of this thesis.

a) What is the influence of the recording of conflict-related sexual violence on responses to, and reparations for, violations and victims?

A reading of the testimonies, and the silences they impart, in relation to readings of the wider literature on the subject and the framing of violations in law, has illustrated the profound and complex ways in which the recording of CRSRV influences responses to, and reparations for, violations and victims. Traditional recordings of violations, with a strong emphasis on rape as the most prevalent and damaging form of violence, inform and strengthen the widespread use of the term conflict-related sexual violence (CRSV). By contrast, the experiences of victims in the vernacular, as expressed in testimonies and witness statements, shed light on the reproductive consequences and intentions of such violations. This reality affirms the need for reconsideration of the term, and its extension to conflict-related sexual and reproductive violence (CRSRV).

b) Which rights, in theory and in practice, are recognised as violated in the perpetration of CRSRV?

Further, the rights recognised as being violated, in theory and in practice, not only failed to account for the reproductive aspects and intents of sexual violence, but also denied the presence of silencing in the perpetration of CRSRV. This presence must be recognised as a method on which the perpetration of CRSRV, at all times and in all forms, depends. Its absence would, theoretically and practically, disable in significant ways the perpetration of violations. The framing of the method of silencing as a violation would, also, elevate the status of the truth and victims to subjects of redress. Recognition is needed, therefore, that the perpetration of CRSRV involves the violation of sexual and reproductive rights, in addition to violations of the right to the truth. Both bodies of rights should be accounted for in reparative measures.

c) Does representation of these rights extend adequate response to and redress for victims?

Finally, since representation of the rights violated in the perpetration of CRSRV has been inadequate, so too has response and redress for victims. The reframing of violations would assist in more adequate interpretations of violence and more appropriate reparations for victims in light of the conviction that victim-centred reparation for CRSRV must respond to, and be based upon, the truth divulged from the testimonies of victims and witnesses.

Closing

On the basis of the assertions reiterated above, conclusions drawn from this thesis lead to a twin proposal. First, that the term “conflict-related sexual violence” be extended to “conflict-related sexual and reproductive violence” in reflection of the experiences of victims, and in order to effect more appropriate forms of reparation. Second, given that the grounds for extension of the term are found within testimony of victims of, and witnesses to, these forms of violence perpetrated invariably in relation to methods of silencing, the right to the truth must therefore comprise a reparative measure for victims. The scope of the right to the truth should, in this regard, also be extended from its original conception and application of the right to *know* the truth to explicitly protect the right to *testify* and to actively contribute to the construction of the truth. This would redress not only the violations of sexual and reproductive rights, but would also restore, by virtue of its reversal of the method of silencing, violation of the right to the truth.

A final clarification is necessary. The right to the truth in reparation of CRSRV cannot remedy sexual and reproductive violence *per se*. Its role, as a reparative and preventative measure, resides in a remedy of the *methods* of silencing on which CRSRV depends. With silence disrupted and displaced, sexual and reproductive violence can then be recounted (as a form of reparation). It is also less likely, as a result, to reoccur (as prevention). Silence is not only silence. It has been read as an absent presence; but also as a present absence. It represents absence of voice, imposition of fear, as something which has been taken away or violated. But it is also the expression of resistance, as a force which calls for reinterpretation of its presence, in the vernacular. The thesis now, in reference to a victim-centred perspective, closes with a proposal for reparations of CRSRV in light of the right to the truth.

A Proposal

Reparations for conflict-related sexual and reproductive violence in light of the right to the truth

Victims of conflict-related sexual and reproductive violence (CRSRV) encounter grave silences, among many other difficulties and preclusions, in their pursuit for justice. As subjects of human rights violations they are entitled to, and are owed, the right to reparation. This right, for victims of this nature, has traditionally been protected under the term “conflict-related sexual violence,” which neither excludes nor explicitly accounts for reproductive violence. This proposal centres on extension of the term to “conflict-related sexual and reproductive violence,” the wording and application of which would better reflect the pervasive nature, calculated damage and devastating consequences of the violence experienced by victims, who are disproportionately women and girls. The right to, and need for reparation, is outlined in relation to women because, although both women and men experience conflict-related sexual violence, it is women who are overwhelmingly subject to the reproductive consequences of such violence. But the proposal is dependent on protection of the right to the truth for victims, within a framework of rights-based development, and on extension of this right from its original framing as the right of victims and relatives to know the truth surrounding grave human rights abuses to its reconsideration as the right of victims to testify and actively contribute to the construction of the truth.

A. General observations

I.

For the purposes of this proposal for reparations for conflict-related sexual and reproductive violence (CRSRV), victims are considered to be women and girls who have experienced such forms of violence. The term victim refers to the individual who has experienced the violation,

irrespective of whether she has survived or not, and includes children born of rape, relatives of the victim who suffered material, moral, physical or psychological damage by consequence of the violation, and extends to witnesses or other persons who may have suffered harm as a result of attempting to protect the primary victim. Although men and boys also experience conflict-related sexual violence, this form of human rights violation is perpetrated disproportionately against females. When perpetrated against women and girls, it also has devastating reproductive consequences, hence the need for extension of the term to reflect this reality.

II.

In any form, CRSRV constitutes a human rights violation. It is a form of gender-based violence and elaboration of reparations should consider this element of its perpetration. However, any consideration of gender, culture, religion or other aspect of the victim's identity should not foreshadow recognition of the practice of CRSRV as a human rights violation, in all circumstances and in any form. In some circumstances, the practice of CRSRV may also amount to war crimes, crimes against humanity, or genocide, all of which constitute human rights violations. Further, it can be considered a human rights violation whether perpetrated by act or omission.

III.

CRSRV takes many forms, including but not limited to rape as a weapon of war, sexual slavery, other forms of sexual torture, enforced marriage, enforced nudity, enforced pregnancy, enforced sterilisation, and can even extend by definition to instances of maternal mortality and morbidity.

IV.

In times of 'peace' and in times of war, CRSRV is practiced invariably in relation to methods of silencing. The use of silence as an auxiliary to this form of violence involves use of force, or threat of force, either against the victim or relatives of the victim, and can occur prior to, during, or after the violent act itself. That CRSRV merits the right to reparation has been established. What remains to be established is that the perpetration of this form of violence in relation to the silencing of the victim is grounds for further reparation. In this vein, redress for the victim is twofold. It firstly represents a measure to restore a human rights violation, sexual or reproductive in nature; and it secondly recognises violation of the right to the truth, which has been actively distorted and violated in the perpetration of the former violation. Therefore,

the perpetration of CRSRV results in violation of both sets of rights, and reparation should be based on this recognition.

B. Merits and details of reparation

V.

The right to the truth for victims of CRSRV serves as both a reparative and a preventative measure. In response to the silences enshrouding violations of a sexual or reproductive nature perpetrated against women and girls, the right to the truth provides an indispensable remedy for victims in (a) recognition of rights and violations, (b) articulation of victims' right to reparation, and (c) prevention of the recurrence of similar forms of violence.

VI.

The violation of a human right is remedied, in part, by different forms of reparation. Therefore, merits for the right to reparation are found within the legal entity of victim. In other words, the existence of the victim invariably entails the right to reparation. The details of reparation, that is the form of redress to be applied, depend on the nature of the violation, the context in which it was perpetrated, and the past and present circumstances of the victim. In this vein, reparations for CRSRV will refer to the general principles of reparation, while also addressing the very specific nature of the violation in question, the context in which the violation occurred, and the experience of the victim.

VII.

The general principles of reparation conform to five different yet interrelated measures. These are restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. Although it may be necessary in certain contexts to privilege one measure over others, no single measure should be applied in isolation of the others. Rather, they should be considered as different parts of a whole response. At times it may be necessary to apply one measure before another is able to be applied; other times, or other circumstances, may require consideration of multiple measures simultaneously. The different measures are, therefore, not exclusive but complementary.

VIII.

Different forms of reparation may also be applied under either juridical tradition or administrative programs. Juridical reparations refer to, *inter alia*, prosecution of perpetrators, processes of obtaining legal redress for victims, and establishing a historical record of the crime within a legal framework. They generally apply to relatively isolated cases which seek to resolve disputes between individuals, however, similar principles are applied in international criminal law in reference to large scale human rights abuses. By contrast, reparations under administrative programs are generally more inclusive of victims and present easier ways and alternative means to access to justice. Administrative reparations usually refer to human rights violations which have occurred on a large scale, and administer justice for greater numbers of victims. They may, for instance, include a mandate to investigate past atrocities within a Truth and Reconciliation Commission, one purpose of which, based on the collection and dissemination of evidence of violations, is to establish grounds for, and propose a concrete plan for, reparations for victims.

IX.

Reparations may also be symbolic or material. Symbolic reparations may refer to an official acknowledgement of violations and an apology. This will usually be considered a necessary preliminary step but insufficient if unmet with some form of material reparation also. Material reparations most commonly refer to compensation as a form of economic redress to remedy harm suffered. This can be sought as a remedy for moral or material damages suffered. In the case of CRSRV regarding women and girls, it should at the least extend to, *inter alia*, legal aid, medical treatment, provision of housing and other basic necessities for the victim and her children, or recovery of lost earnings.

X.

There exist many contentions between individual and collective reparations. More often than not, it will be necessary to recognise individual victims, but doing so must not place the individual at further risk or expose her identity, particularly in the case of CRSRV, to further violence or acts of reprisal. There may be cases where it is desirable to enact collective reparations which are of benefit to whole communities. Such cases should not disregard the complexities of distinguishing between victim and perpetrator who may belong to the same community, or the instances in which it may not be beneficial to make distinctions. It is of utmost concern, in all cases of CRSRV, that the victim herself does not lose significance within

the collective. Given the nature of the violence and the blame placed on women and girls who experience any form of CRSRV, wherever possible and desirable, the victim herself should remain the most important subject of reparation.

VIII.

Similarly, concerns of gender, culture and religion must comprise indispensable references in the elaboration and implementation of reparations for CRSRV. They should not, however, take precedence over recognition of these crimes as violations of human rights. They should be thought of as concerns as to how reparations can be enacted, not as to why reparations must be enacted, the latter being a response to violation of human rights regardless of the nature of the violation.

IX.

CRSRV comprises a human rights violation and a health problem. Women and girls, as well as men and boys, can as a result of sexual and reproductive violence experience serious and irreparable physical harm, including, *inter alia*, genital, vaginal, and or anal injury, serious sexual mutilations, fistulas or uterine prolapse, among other damage, that would affect not only their reproductive systems but also their urinary and digestive systems, and their quality of life. This can result in further shame, and lead to abandonment and exclusion from their communities. Access to immediate and urgent medical treatment as well as other health related services, including psychological ones, and other interim reparative measures are required in order to prevent or reduce further irreparable harm.

X.

Urgent interim reparations may include a truth-seeking mechanism, establishment of a truth commission, immediate assistance such as health care, including maternal, sexual, reproductive, or psychological services; and also extend to protection of victims, including housing, other basic provisions such as medicine or food, or other necessary legal funding. An administrative reparations programme may aid in this endeavour, and could include where necessary such measures as fistula surgery, or access to anti-retroviral drugs where the victim may be at risk of contracting HIV. Also important are the immediate needs of women or girls who have fallen pregnant as a result of rape, in which case access to safe abortion services may be required, but should also comprehend, wherever necessary, access to ante-natal care, delivery, post-natal and newborn care. Children born as a result of rape are, furthermore,

entitled to specific and often lifelong forms of reparation, including housing, sanitation, food provisions, and access to education. There are no urgent interim reparation programmes to date which provide redress to victims of serious violations of international human rights law or of humanitarian law, including to victims of CRSRV. This must be seen as a responsibility of the international community and, similarly, mechanisms to test accountability of individual states must be framed within international law and become part of the right to reparation under customary law.

C. Responsibility and accountability of individual perpetrators, states, and the international community

XI.

The right to reparations for victims of CRSRV is protected under international law. Enactment of the right and the processes by which victims are able to obtain justice are complicated, among other reasons, by different interpretations or evasions of responsibility and accountability.

XII.

Absence of prosecution cannot mean absence of reparation. The victim's right to reparation must take precedence over and above the responsibility of perpetrators. At times identification of perpetrators may be impossible, or where identified, the possibility of the individual providing redress to the victim may be limited or inexistent, or inappropriate. This merits a collective response.

XIII.

A state can be responsible for failing to prevent, investigate or punish extreme violence – even if it did not commit or order this violence. Therefore, where unobtainable by any other means, the state must protect and enact the victim's right to reparation. It is similarly the role of the international community, in agreement with international law and in correlation with international human rights bodies such as the United Nations, to hold states accountable to this responsibility.

XIV.

Different forms of accountability apply to crimes of sexual or reproductive violence perpetrated in times of conflict. An important reference will be reparations that not only provide redress by seeking to restore the harm suffered, but which are also transformative in nature. They must seek to ensure measures of non-recurrence and uphold a victim-centred perspective.

D. A victim-centred perspective in light of the right to the truth

XV.

Protection of a victim-centred perspective in reparations for CRSRV can be enacted in light of the right to the right to the truth. The right to the truth has traditionally been framed as the right of victims and relatives to know the truth surrounding serious human rights abuses. Its importance should be given weight within reparations for CRSRV, in the framework of a rights-based approach to development, but its original conception, current status and application require reconsideration. The right to the truth for victims in this context requires extension to protect the victim's right to testify and to actively contribute to processes of exposing the truth and constructing the truth as a reference for historical justice and development.

XVI.

Victims should be involved not only in testifying and other forms of truth telling, but at all stages from the mapping, design, and implementation of reparations. Such inclusive processes hold the potential to disrupt patriarchal and cultural hierarchies and customs which need to be addressed in reparations. Many women and girls, for example, are unaccustomed to speaking in public in certain cultural contexts. This must be accounted for in giving testimony and in the participation of victims. Victims and witnesses need adequate spaces and support to do so, in full confidentiality if required. Participation of victims must also take into consideration child care obligations and other responsibilities that women have, for instance in the home, and also such difficulties including transport and the associated costs. A lower standard of proof will be necessary in testifying on violations of CRSRV, as well as utmost concern placed on protection of victims and witnesses. Testimony should not always be given in a court setting; alternative settings as well as considerations of giving testimony orally, anonymously, and by distance must also be taken into account.

XVII.

Girls are among those victims most adversely affected by war and other forms of conflict, and are at greatest risk of CRSRV. They face discrimination on multiple levels compounded by their age, and special care must be taken to ensure protection of their rights. The particular needs and experiences of children should be granted special consideration in protection of their right to the truth, as should the additional rights they carry as children. Participation of child victims needs to be carefully managed, taking into account their vulnerability regarding age, ability, intellectual maturity, and experiences of trauma in a way which prevents or limits further harm.

XVIII.

Testimony as an aspect of the right to the truth protects the right to reparation for CRSRV in numerous ways. Two are of particular importance here. First, it extends a way to illustrate with absolute clarity the realities of violence experienced by women and girls in times of conflict, namely its reproductive consequences. In this vein, testimony of victims or witnesses can establish grounds for criminal responsibility and a clear platform on which to demand and claim reparation. It also provides clear links and denotes the inextricability between forms of sexual and reproductive violence, therefore reiterating the need for extension of the term to reflect this. In its exposure of the truth, it provides a form of evidence. As noted, a lower standard of proof is necessary in providing evidence of CRSRV, given the inherent difficulties in speaking of, contesting, and proving such forms of violence.

XIX.

Secondly, the right to the truth responds to and contests the methodology of silence by which CRSRV is perpetrated. The right of victims to testify in this context should lead to the potential for reparation, the measure of which should include a provision for redress of the acts of sexual or reproductive violence suffered and, furthermore, for redress of the attempt to silence, or act of silencing, the victim antecedent to, at the time of, or after the crime. Both should be recognised as acts of war, and as human rights violations, and punished accordingly to prevent recurrence.

XX.

The right to the truth for CRSRV also clearly illustrates the experiences and consequences of violence experienced by victims, thus giving way to more appropriate responses to the

violence, and to more adequate forms of reparation. The right to the truth, in this vein, must be protected as an integral part of processes of reparation, in a rights-based framework, which protects the principle of non-discrimination, in line with the anticipation, condemnation, and elimination of discrimination, without which the victim's access to other fundamental human rights is precluded, the preclusion of which similarly disintegrates her right to development, as it disintegrates the development of society at large. The right to the truth holds, furthermore, the potential to displace silence as a method of CRSRV, provide evidence of violations, lead to prosecution of perpetrators, warn against perpetration of similar crimes in future – because where the truth is known and accepted, violations will not go unpunished –, and therefore draw a concrete platform upon which to claim and enact reparation. It will only be clear that these forms of violence have become unacceptable when there are not only measures set in place to punish them, but also, at every foreseeable instance, measures to prevent them. The right to the truth represents, therefore, an indispensable response to CRSRV, which is both reparative and preventative in its intent to protect.

Final remarks

Testimonies of CRSRV, as an aspect of the right to the truth and in protection of a victim-centred perspective, offer alternative versions and sources of history, which must be responded to in alternative ways and redressed by alternative measures. Both the voices in which they are given, and the silences which determine how or whether they are given, must also be recorded and responded to.

And though testimonies of CRSRV all share a common silence, the silences they harbour are diverse and distinct; each silence will speak to testimony in its own words and impart a history in the vernacular.

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Annex 1.

Military spending by country 2018-2019 (Spending equivalent to US dollars in billions)

Military spending by country	2018
USA	649
China	250
Saudi Arabia	67.6
India	66.5
France	63.8
Russia	61.4
United Kingdom	50
Germany	49.5
Japan	46.6
South Korea	43.1

Statistics for 2018 available from <https://www.statista.com/statistics/262742/countries-with-the-highest-military-spending/>

Military spending by country	2019
USA	716,000,000,000
China	224,000,000,000
Saudi Arabia	70,000,000,000
India	55,200,000,000
Germany	49,100,000,000
United Kingdom	47,500,000,000
Japan	47,000,000,000
Russia	44,000,000,000
France	40,500,000,000
South Korea	38,300,000,000

Statistics for 2019 available from Global Firepower available
<https://www.globalfirepower.com/defense-spending-budget.asp>

Annex 2.

Weapons exports by USA to countries in 2018

Exports to country	Export value in TIV million constant (1990) US dollars
Saudi Arabia	3,353
Australia	918
United Arab Emirates	799
Japan	675
South Korea	612
Israel	480
Qatar	423
Norway	346
Morocco	333
Turkey	293
Italy	241
Afghanistan	206
Egypt	197

Information available from Statista, Arms exports by country. Available <https://www.statista.com/statistics/248552/us-arms-exports-by-country/>

The US total arms exports by country in 2018 are expressed in TIV. The TIV refers to the known unit production costs of a core set of weapons, intended to represent the transfer of military resources rather than the financial value of the transfer. The TIV is expressed here in

million constant US dollars as of 1990, meaning that, in 2018, the US arms exports to Saudi Arabia totalled to about 3,353 million constant (1990) US dollars, while Iraq is placed 31st, corresponding to a total of 40.