



# **A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence**

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# A. EXECUTIVE SUMMARY

## TERMS OF REFERENCE

1. Oxford Pro Bono Publico (OPBP) a programme within the Law Faculty at the University of Oxford was invited by REDRESS, a London-based human rights organisation, to conduct comparative research on the forms of reparations and remedies for victims that can be granted by a court in cases of Sexual and Gender-Based Violence (SGBV). The factual context of the research is summarized below.
2. Following the announcement of election results in the Republic of Kenya on 30 December 2007, widespread violence erupted in the entire country until March 2008. Women were allegedly<sup>1</sup> subjected to rape, attempted rape, defilement, attempted defilement, gang rape, forced pregnancy, and other forms of SGBV. Men were allegedly sodomised, forcibly circumcised, and had their penises amputated as specific forms of SGBV. Perpetrators of SGBV included members of the Kenya Police Service, Administrative Police and other State security agents as well as non-State actors. To date, none of the conflict-related SGBV crimes have been investigated and prosecuted by Kenyan authorities and SGBV victims are yet to have access to any form of redress.<sup>2</sup>
3. On 20 February 2014, four Kenyan civil society organisations together with eight SGBV survivors filed a constitutional petition at the Constitutional and Human Rights Division of the High Court of Kenya in Nairobi against a number of national authorities, including the Attorney General of Kenya, the Director of Public Prosecution of Kenya, the Independent Police Oversight Authority, the Inspector-General of National Police Service of Kenya, the Minister for Medical Services of Kenya, and the Minister for Public Health and Sanitation of Kenya.
4. The petitioners claim that Kenyan authorities failed to protect civilians during the post-election violence in 2007/2008 when numerous forms of SGBV were

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<sup>1</sup> Many of the alleged crimes that form part of the litigation have not been established in a competent court of law. Therefore, these remain allegations.

<sup>2</sup> OPBP recognises that the alleged crimes are either the subject of pending litigation or that there are non charges that have been brought against the alleged perpetrators. OPBP also acknowledges that the presumption of innocence, as is entrenched in Article 50(2)(a) of the Kenyan Constitution and as recognised in various international human rights instruments, operates in favour of those accused of the crimes that are the subject matter of this research. Therefore, the term 'victim' is employed herein with reservation and in full awareness of the problematic connotations that the term implies for the presumption of innocence. The reason OPBP chooses to employ this terminology in spite of this is to maintain consistency across the national, regional and international jurisdictions.

committed. They also claim that authorities did not fulfill their obligation to investigate and prosecute SGBV crimes afterwards and to provide reparations to the victims.

5. The court hearings, which started on 23 March 2014, are pending. On 27 August 2014, REDRESS was granted leave to file an amicus brief on the international legal framework as well as international and regional jurisprudence on the State obligation towards SGBV victims, with a focus on reparation and remedial measures.
6. Therefore, REDRESS approached OPBP to assist in conducting comparative research on reparations and remedies for SGBV, the outcome of which is contained in this report. This research will provide background information for the amicus brief on reparation and remedies measures granted by international and national human rights bodies or courts in cases of SGBV. The aim of the amicus brief to be prepared by REDRESS is to offer ideas to the Kenyan High Court on what types of reparations and remedies it can order.
7. As the title to the Report suggests, the research focuses on both reparations and remedies, which are collectively considered as forms of redress.<sup>3</sup> There are material distinctions between the two: reparations seek to - as far as possible – remove the consequences of the illegal conduct and to re-establish the situation which would, in all probability, have existed if such conduct had not ensued.<sup>4</sup> Reparations are more specific to the individual or individuals harmed or wronged. On the other hand, a remedy is seen a crucial component of a right to redress, as it provides victims with the procedure by which they can assert their rights and seek reparation for the violation. Explicitly or implicitly, all human rights treaties and instruments analysed in this Report require States parties to provide remedies under national law.<sup>5</sup>
8. This Report adopts this conceptual understanding and therefore refers to and investigates both reparations and remedies under the relevant jurisdictions.

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<sup>3</sup> The United Nations Committee Against Torture (2007) ‘General Comments No. 2 of the Committee Against Torture’, para. 2.

<sup>4</sup> REDRESS. *What is Reparations?* Available from <http://www.redress.org/what-is-reparation/what-is-reparation> Last accessed 26 December 2015.

<sup>5</sup> REDRESS. 2013. *Reaching for Justice: The Right to Reparation in the African Human Rights System*, p. 8. Available from: <http://www.redress.org/downloads/publications/1310Reaching%20For%20JusticeFinal.pdf> Last accessed 26 December 2015.

## JURISDICTIONS INVESTIGATED

9. OPBP has prepared comparative research on eleven jurisdictions: three international jurisdictions, two regional jurisdictions, and four common law national jurisdictions. They are as follows:

**Table 1: Jurisdictions researched**

INTERNATIONAL JURISDICTIONS	REGIONAL JURISDICTIONS	NATIONAL JURISDICTIONS
The United Nations Committee Against Torture	The African Human Rights jurisdiction [consisting of (a) the African Commission on Human and Peoples' Rights, and (b) the African Court on Human and Peoples' Rights]	The Republic of India
The United Nations Committee for the Elimination of all forms of Discrimination Against Women	The Inter-American Human Rights jurisdiction [consisting of (a) the Inter-American Commission of Human Rights and (b) the Inter-American Court on Human Rights]	The Republic of Ireland
The United Nations Committee for Human Rights		The Republic of South Africa
		The United Kingdom of Great Britain and Northern Ireland

10. Each jurisdiction has been separately researched and analysed. Like Kenya, the four national jurisdictions are all common law based legal systems, which exist within a democratic political context. As for the two regional bodies, Kenya is a participant in the African human rights system through its ratification of the African Charter on Human and Peoples' Rights and other related legal instruments. Although Kenya has also ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998, it is not a State party to the Court as it has not yet submitted the requisite declaration to trigger the jurisdiction of the Court.<sup>6</sup> Nonetheless, the jurisprudence of both the African Court and African Commission remains relevant and is researched.

<sup>6</sup> Article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights provides that:

11. Similarly, the Inter-American Commission on Human Rights, together with its sister organization, the Inter-American Court on Human Rights, operates in a similar manner as the African human rights system, and is researched for comparative purposes.
12. With respect to the international jurisdictions, namely the Committee Against Torture, the UN Human Rights Committee, and the UN Committee For the Elimination of All Forms of Discrimination, these are referenced for comparative purposes as they have produced a wealth of jurisprudence on issues related to SGBV.

## **RESEARCH QUESTIONS**

13. The following three primary research questions were formulated in order to examine the reparations and remedies in each jurisdiction for the purposes of this study:<sup>7</sup>
  - I. What forms of reparations and remedies have been awarded by a judicial or quasi-judicial body for SGBV?
  - II. Please give examples of how such reparations and remedies were formulated by the respective court or human right body.
  - III. How did these courts or human right bodies address the implementation of the awarded reparations or remedies?

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At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.

<sup>7</sup> The question may be framed differently depending on the relevant jurisdiction and institutions being discussed.

## SUMMARY OF FINDINGS

### I. WHAT FORMS OF REPARATIONS OR REMEDIES HAVE BEEN AWARDED BY A JUDICIAL OR QUASI-JUDICIAL BODY FOR SGBV?

14. Across all of the nine jurisdictions surveyed, various forms of reparations and remedies have been awarded<sup>8</sup> to victims of SGBV. The jurisprudence of the Committee Against Torture is most extensive and helpful as it regards certain forms of SGBV as acts of torture and/or inhumane treatment. The Committee Against Torture has stated that there is an obligation upon States to prevent such acts. Frequently awarded forms can broadly be categorised as restitutive (reinstatement); compensatory (whether provided in the form of money, goods or services); or rehabilitative (medical and psychological care and other social services). Reparations in the form of compensation are the most common. However, numerous jurisdictions highlight that compensation as a form of redress must be combined with a non-monetary reparation mechanism: compensation alone is not sufficient to repair the damage suffered by victims. Moreover, the above forms of reparations or remedies are not mutually exclusive. Depending on the particular circumstances of the case, they have been awarded cumulatively. Examples of awarded reparations and remedies include:

- Providing and ensuring equal access to courts
- Providing impartial, effective and thorough investigation, prosecution and punishment of those responsible
- Providing appropriate compensation
- Providing free, specialised medical assistance
- Providing information about investigation results
- Releasing those detained
- Providing appropriate satisfaction.

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<sup>8</sup> It is necessary to distinguish between binding and non-binding reparations awards. Judicial bodies such as national and regional courts, as well as some quasi-judicial bodies have the power to make binding reparation awards. However, other quasi-judicial bodies, for example the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights may award reparations, decision of which are non-binding.

15. Uniquely, some bodies<sup>9</sup> have expressly sought to commit States to ensure that similar violations are not perpetrated or repeated in the future through gaurentees of non-repetition using the mechanism known as a transformative declaratory order. Others have sought to achieve a similar objective more implicitly by recommending or in some cases ordering<sup>10</sup> that States implement measures to train and raise awareness of official staff, adopting public policies, educational curriculums, and institutional programs to train official staff and police units on women’s rights and SGBV.
16. The below table summarises the four main forms of reparations and remedies indicating whether they are awarded within the jurisdiction in question:

**Table 2: Forms of remedies and reparations awarded<sup>11</sup>**

	Compensation	Restitution	Rehabilitation	Satisfaction
The United Nations Committee Against Torture	✓	✓	✓	✓
Committee for the Elimination of all forms of Discrimination Against Women	✓	✓	✓	✓
The United Nations Committee for Human Rights	✓	✓	✓	✓
African Commission/ Court on Human and Peoples’ Rights	✓			
Inter-American Commission/Court of Human Rights	✓	✓	✓	✓
The Republic of India	✓			
The Republic of Ireland	✓		✓	✓
The Republic of South Africa	✓		✓	
The United Kingdom of Great Britian and Nothern Ireland	✓			

<sup>9</sup> Such as the United Nations Human Rights Committee and the United Nations Committee Against Torture.

<sup>10</sup> In the case of the Inter-American Commission on Human Rights.

<sup>11</sup> This is only a summary of the four main forms of reparations and remedies. The jurisdictional sections elaborate on how these are applied and provide further forms of reparations and remedies that apply.

## II. EXAMPLES OF HOW SUCH REPARATIONS AND REMEDIES WERE FORMULATED BY THE RESPECTIVE COURTS OR HUMAN RIGHT BODIES

17. Courts and human rights bodies formulate reparations and remedies in different ways depending on the nature of the remedy being granted and the jurisdictional competence of the institution. In the face of courts with powers to hand down binding decisions, reparations in the form of compensation are the most common, with the court or body usually determining the quantum of compensation to be paid. However, compensation is not always momentary. Formulations can be positive or negative such that the State in question is ordered to either act or refrain from acting in a prescribed manner. Reparations and remedies ordered may be individual or collective.
18. Courts or bodies with the power to make recommendations (such as supra-national institutions including commissions and committees) frequently formulate their reparations or remedies in broad and vague terms, leaving it on the State to decide on the specific actions it would take in implementing the recommendations. This unfortunately often gives leeway for non-compliance and the implementation of vague measures that do not provide sufficient redress to victims.
19. More prescriptive, transformatory orders have also been formulated, thereby specifying the exact actions that the State is expected to carry out in order to repair the harm to victims (for example the provision of medical care) or to ensure that incidents of SGBV are not repeated. The following example from the United Nations Human Rights Committee highlights this difference:

Under article 2, paragraph 3(a), of the Covenant [on Civil and Political Rights], the State party is under an obligation to provide the author with an effective remedy in the form, inter alia, of an impartial investigation in the circumstances of his wife's death, prosecution of those responsible, and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.<sup>12</sup>
20. It is noteworthy that national institutions, as opposed to supra-national, would formulate their reparations or remedies in a more prescriptive manner.

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<sup>12</sup> *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 13.

### **III. HOW DID THESE COURTS OR HUMAN RIGHTS BODIES ADDRESS THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES?**

21. As is the case with the formulation of reparations and remedies, the implementation mechanisms used by different courts or bodies depends on their nature and competence. Courts generally invoke their binding powers to ensure that an awarded remedy is implemented. In jurisdictions such as South Africa, courts can go further than conventional court orders as they can issue structural interdicts that may require the State to take mandatory steps to fulfil its obligations, and may invoke the courts' supervisory jurisdiction in order to monitor compliance with these orders.
22. Most quasi-judicial organs or bodies can only make recommendations, thereby adversely affecting their ability to ensure effective implementation of their orders. However, there are other mechanisms that are invoked when monitoring the implementation of recommendations such as requiring the State to report back to the relevant institution on the measures taken. Recommendations such as those to enact national legislation and ensure the availability of judicial review can allow for their implementation. Institutions such as the Committee Against Torture have enacted a follow-up process through a rapporteur to ensure State parties are adhering to Article 14<sup>13</sup> and are implementing the reparation measures ordered by the Committee. The Human Rights Committee requires written explanations or statements clarifying the remedies implemented by the State party, in addition to the traditional periodic reporting and review processes.

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<sup>13</sup> Article 14 provides that:

1. 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. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.
2. Nothing in this article shall affect any right of the victim or other persons to compensation, which may exist under national law.

## B. INTERNATIONAL JURISDICTIONS

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### THE UNITED NATIONS COMMITTEE AGAINST TORTURE

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#### I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE UNITED NATIONS COMMITTEE AGAINST TORTURE

23. As reiterated by the United Nation Committee Against Torture's General Comment 2, a State party to the Convention Against Torture has a non-derogable obligation to prevent torture (as per Article 2 of the Convention) and ill-treatment (as per Article 14). This includes, according to the Committee, making torture a criminal offence, and implementing effective investigative, prosecutorial and reparative measures in order to prevent further acts.<sup>14</sup>
24. In its General Comment 2, the Committee refers specifically to gender-based acts, which are included as a form of torture and/or inhumane or degrading treatment. It refers specifically to violence against women by private actors in communities and homes, as well as violence against men (such as rape or sexual violence and abuse). State parties have an obligation to report to the Committee the measure being taken to prevent gender-specific violence:
- The Committee emphasizes that gender is a key factor, which intersects with other identifying characteristics... States Parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.<sup>15</sup>
25. Essentially, General Comment 2 recognises sexual violence as a form of torture, specifically identifying gender as a factor engaged in its perpetration, and imposes an obligation on State parties to prevent such acts.<sup>16</sup> Since this communication, the Committee has drastically increased its references to rape in country reports and

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<sup>14</sup> Committee Against Torture (2007) 'General Comments No. 2 of the Committee Against Torture'.

<sup>15</sup> *ibid.* para 22.

<sup>16</sup> See Gaer, F (2012) 'Rape as a Form of Torture: The Experience of the Committee Against Torture' *Camy Law Review* 15:293.

addressed issues of sexual violence more frequently.<sup>17</sup> For example, in *V.L. v Switzerland* (2005)<sup>18</sup>, the Committee considered the communication of a Belarusian woman who had experienced sexual violence by police officers in Belarus. The Committee decided that she faced a risk of torture if she were sent back to Belarus and ordered Switzerland to keep her in the country. The Committee also found a risk of return to torture – involving rape by both non-State as well as State actors – in the cases of *Bakatu v Sweden* (2009)<sup>19</sup> and *Njamba and Balikosa v Sweden* (2007)<sup>20</sup>.

26. States are also obligated to provide disaggregated data to the Committee, for gender as well as other factors such as age. This allows the Committee to continuously evaluate implementation of the Convention by State parties.<sup>21</sup>

27. The Committee orders reparation to be implemented by State Parties who demonstrate a failure to adhere to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. In terms of General Comment 3:

[W]here State authorities or others acting in their official capacity committed, knew or have reasonable grounds to believe that acts of torture or ill-treatment had been committed by non-state officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention.<sup>22</sup>

28. The Committee has worked endlessly to encourage State parties to adhere to Article 14 of the Convention Against Torture. This includes methods such as the dissemination of its General Comments 3, individual complaints procedure, periodic reviews and jurisprudence delivered by the Committee. In adopting its General Comments 3 on Article 14, the Committee has described its recommended reparation measures to include the following:

a) ***Restitution***

29. Restitution refers to restoring the victim to their pre-violation situation; however, this should be done in such a way that repetitive victimization is avoided. Sometimes the nature of the violation means that restitution may not be possible, in which case the Committee reiterates that full access to redress must be provided. The State

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<sup>17</sup> *Ibid.* p 304.

<sup>18</sup> Comm. Against Torture, *V.L. v Switzerland*, Communication 262/2005, U.N. Doc. CAT/C/37/D/262/2005 (Nov. 20, 2006)

<sup>19</sup> Comm. Against Torture, *Bakatu-Bia v Sweden*, Communication 379/2009 U.N. Doc. CAT/C/46/D/379/2009 (Jun. 3, 2011)

<sup>20</sup> Comm. Against Torture, *Njamba and Balikosa v Sweden*, Communication 322/2007, U.N. Doc. CAT/C/44/D/322/2007 (May 14, 2010)

<sup>21</sup> Committee Against Torture (2007) ‘General Comments No. 3 of the Committee Against Torture’ para 23.

<sup>22</sup> Committee Against Torture (2012) ‘General Comments No. 3 of the Committee Against Torture’ para 7.

should consider structural causes that led to the violation, such as discrimination based on gender and/or ethnicity.

b) *Compensation*

30. The Committee has stressed the importance of financial redress to assist victims in re-building their lives post-torture, and meeting both, their material and moral needs (such as dealing with pain and suffering). However, it is emphasized that this form of redress must be combined with a non-monetary reparation mechanism, as money alone is not sufficient to repair the damage suffered by victims. For example, it may be considered offensive by victims for compensation to be provided without investigating the case, enacting criminal prosecution processes, and/or punishing those responsible.<sup>23</sup>

c) *Rehabilitation*

31. The Committee encourages a long-term, collaborative approach to ensure all aspects of the victim's life have a chance for rehabilitation. This includes, for example, the provision of psychological and health services as well as legal and social assistance and any other reintegration support. As the Committee notes in its General Comments 3, "rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society".<sup>24</sup>

d) *Satisfaction and the right to truth*

32. The principle behind this is the restoration of the victim's dignity. This includes a number of measures such as: ensuring cessation of the violations, full public disclosure of the violations so long as sensitivity towards the victims is not compromised, taking steps to locate any missing people, identification of bodies recovered, and allowing criminal prosecution and/or civil proceedings against those responsible. It is important that these measures are implemented in the context of the victim's situation and with their needs and suffering in mind; ignoring the specific needs of the victims can produce counterproductive – and sometimes offensive – results.<sup>25</sup>

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<sup>23</sup> Grossman, Claudio, and Octavio Amezcua. "Panel II: The Role of the Committee against Torture in Providing Full and Adequate Reparation to Victims." *Human Rights Brief* 20, No. 4 (2013): 22.

<sup>24</sup> Committee Against Torture (2012) 'General Comments No. 3 of the Committee Against Torture' para 11.

<sup>25</sup> A potent example is in relation to State killings in Mexico, to which the State was pressed in negotiations to provide redress in the form of a victims' memorial, to honour those who had fallen victim to State crime. Negotiations suddenly ceased without providing the Government with full guidance and as a result it built the memorial next to the main military base in Mexico. As the military played a large part in the tragedy, this act was no

e) *Ensuring the violation is not repeated*

33. It is important that remedies ensure long-term cessation of the offence and not just a short-term partial fix. This includes domestic legislation to be amended and/or enacted to ensure the violation is strictly prohibited and punished in the future. It may also require institutional reform, such as the re-structuring of government agencies so that those responsible are no longer in charge or to implement checks and balances to protect against future violations.<sup>26</sup> The Committee's periodic review follow up procedure can be used to ensure State parties continue to avoid breaching Article 14 as ordered.
34. The distinction of these remedies principles were based on the Committee's decision in *Gerasimov v Kazakhstan* (2012),<sup>27</sup> which acknowledged the need for holistic, integrated remedies to ensure that all aspects of the victim's situation are addressed. In this decision the Committee also noted the importance of avoiding undue delay of implementing reparation (such as compensation or civil proceedings) until the conclusion of a criminal proceeding. A victim should not have to wait for criminal proceedings to conclude before receiving what is entitled to them regardless of the outcome of responsibility. The Committee emphasized that if the State party's domestic legislation precluded the victim from rehabilitation, compensation and/or other redress mechanisms until the completion of criminal trials, this would constitute a violation of the Convention.

## **II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY UNITED NATIONS COMMITTEE AGAINST TORTURE**

35. Whilst the Committee defines its interpretation of reparation for victims of torture in its General Comments 3, what is ordered in practice in responses concerning periodic reviews from State parties is often vague and undefined, leaving the specific award of redress to State discretion. For example, in its Conclusions and Recommendations of

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longer one of reparation but a counterproductive, offensive move that only heightened the situation. It is important therefore that the Committee is specific about victims' needs when negotiating reparation measures with Governments and that it provides strict guidance to ensure these needs are met effectively. See Grossman, Claudio, and Octavio Amezcua. "Panel II: The Role of the Committee against Torture in Providing Full and Adequate Reparation to Victims." *Human Rights Brief* 20(4) (2013): 22.

<sup>26</sup> Grossman, Claudio, and Octavio Amezcua. "Panel II: The Role of the Committee against Torture in Providing Full and Adequate Reparation to Victims." *Human Rights Brief* 20, no. 4 (2013): 22.

<sup>27</sup> Communication No. 433/2010.

the Republic of Korea's second periodic report – with regards to failure to prosecute incidents of domestic violence and other gender-based violence such as marital rape – the Committee requested that:

The State party should ensure that victims of marital rape and gender-based violence have access to immediate means of redress and protection, that measures aimed at seeking settlements and agreements in investigation processes are not detrimental to women who are victims of abuse, and that perpetrators are prosecuted and punished. The Committee urges the State party to continue to undertake awareness-raising and training activities on the issue for the public at large and particularly for legislators, the judiciary, law-enforcement personnel and health-service providers. The Committee also urges the State party to take all necessary measures to ensure that marital rape constitutes a criminal offence.<sup>28</sup>

36. In response to the combined third and fifth periodic reports of Latvia, the Committee noted its concern surrounding human trafficking for the purposes of sexual (and labour) exploitation. The Committee ordered that the State party to take further measures in an effort to prevent trafficking and investigate existing cases with an aim to prosecute those responsible. The Committee also ordered the State provide remedies for its victims in the following form:

Increase the protection of and provide redress to victims of trafficking, including legal, medical and psychological aid and rehabilitation, including the introduction of specific rehabilitation services for victims of trafficking, adequate shelters and assistance in reporting incidents of trafficking to the police.<sup>29</sup>

37. Additionally, in relation to domestic violence:

Ensure that victims of domestic, including sexual, violence benefit from protection, including restraining orders for the perpetrators, and have access to medical and legal services, including psychosocial counselling, to reparation, including rehabilitation, and to safe and adequately funded shelters specifically for abused women, which the State directly runs and supports.<sup>30</sup>

38. In response to the fourth periodic report of Cyprus, the Committee made specific reference to its guidance in General Comments 3 but remains open in its wording:

The Committee draws the attention of the State party to general comment No. 3 (2012), in which the Committee explains the content and scope of the obligation of States parties to provide full redress to victims of torture. The State party should:

- (a) Review the existing procedures for seeking reparation in order to ensure that they are accessible to all victims of torture and ill-treatment;
- (b) Ensure full compliance with article 14 of the Convention, as interpreted in general comment No. 3 (2012), and provide the Committee with information on redress and compensation ordered by courts and ongoing rehabilitation, including resources

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<sup>28</sup> United Nations (2006) 'Report of the Committee Against Torture, thirty-fifth session, thirty-sixth session' A/61/44' p.61

<sup>29</sup> United Nations (2014) 'Report of the Committee Against Torture, fifty-first session, fifty-second session' 69/44 p.49.

<sup>30</sup> *ibid.*

allocated for that purpose.<sup>31</sup>

39. In some ways this approach may be the Committee's downfall. Octavio Amezcua has noted that the more specific the order, the better the chance that the State party will fulfil its obligations. Simply giving vague instructions to provide redress without specifying exactly what the party should do – with regards to its specific situation and the victims involved – gives them ample leeway not to comply, or to implement vague measures themselves that do not sufficiently address the victims' needs. The right to State sovereignty can, in cases of human rights violations, often be to the detriment of victims and it is surely well within the Committee's jurisdiction to order specific measures of reparation. Rule 117 allows the Committee to conduct closed meetings with the State party for "further clarification" and it should be so that this involves specificity and direction. Applying guidance such as the Istanbul Protocol<sup>32</sup> when ordering reparation (particularly in the form of investigation), which provides instruction on an international scale on how to effectively investigate incidents of torture and report them to a judicial body.<sup>33</sup>

### **III. THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES BY THE UNITED NATIONS COMMITTEE AGAINST TORTURE**

40. The Committee Against Torture requires States to enact legislation to specifically provide victims with the required form of redress "*including compensation and as full rehabilitation as possible*"<sup>34</sup> and to ensure judicial review is available.

41. It is an inevitable obstacle of the Committee Against Torture that, as implementation of remedies only involve a recommendation and ultimately require State action to implement, the State Party may not take the recommendation on board and fail to carry out the reparative measure or – in the event its domestic court takes it on board and delivers a judgment requiring reparation to be provided - fail to comply with that judgement. In their General Comments 3, the Committee notes a number of obstacles in implementation, which include:

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<sup>31</sup> *ibid.* p. 99.

<sup>32</sup> Istanbul Protocol. 2004. *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

<sup>33</sup> UNHR (2010) 'Committee Against Torture discusses Istanbul Protocol' <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10498&LangID=E>.

<sup>34</sup> CAT (2012) 'General Comments No. 3 of the Committee Against Torture' para 20.

inadequate national legislation, discrimination in accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures to secure the custody of alleged perpetrators, state secrecy laws, evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations, amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well associated stigma, and the physical, psychological and other related effects of torture and ill-treatment.<sup>35</sup>

42. It is also important that a State party ensures there are mechanisms in place for judgements handed down by other States to be valid and upheld in their jurisdiction, so as to ensure the widest possible access to reparation for victims.<sup>36</sup>
43. In attempt to overcome these implementation difficulties, Rule 120 of the Committee's Rules of Procedure enacted a follow-up process through a rapporteur to ensure State parties are adhering to Article 14 and implementing the reparation measures ordered by the Committee. As per Article 19 of the Convention, State Parties must submit periodic reports every four years outlining how they are implementing the requirements of the Convention. The Committee makes 'Conclusions and Recommendations' commenting on each periodic report, which may develop into an investigation and subsequent order for reparation, if the Committee is not satisfied the State party has sufficiently executed the Convention.<sup>37</sup>
44. For example, as a result of the fourth periodic report of Belarus, the Committee revealed its concern over the State's failure to afford detainees legal safeguards including protection against torture, inhumane or degrading treatment. It ordered the State government to award reparation to the victims of torture and also required a detailed report on what was awarded by the courts, which was to be provided through its subsequent periodic review:

...the State party should provide information on redress and compensation measures ordered by the courts and provided to victims of torture or their families. This information should include the number of requests made and those granted, and the amounts ordered and actually provided in each case. In addition, the State party should provide the Committee with relevant statistical data and examples of cases in which individuals have received such compensation in its next periodic report.<sup>38</sup>

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<sup>35</sup> CAT (2012) 'General Comments No. 3 of the Committee Against Torture' para 38.

<sup>36</sup> *ibid.*

<sup>37</sup> Fortin, K 'Rape as torture An evaluation of the Committee against Torture's attitude to sexual violence' *Utrecht Law Review* p.157.

<sup>38</sup> CAT (2011) *Concluding Observations of the Commission Against Torture: Belarus*, p.11 [www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BLR.CO.4\\_en.doc](http://www2.ohchr.org/english/bodies/cat/docs/co/CAT.C.BLR.CO.4_en.doc).

45. It was emphasised that this information should not simply contain replication of legal judgment transcripts but rather provide detailed reporting of exactly how the awards were implemented and worked in practice.
46. The Committee has an advantage through its periodic report procedure to exercise continuous dialogue with State parties, which in turn allows continuous review into their implementation of reparation measures as per Article 14 of the Convention. Requiring States to be as detailed as possible in their reporting, and include statistical data as well as focusing on how the measures have played out in practice rather than simply providing legal or contractual documentation, further ensures that implementation can be monitored as closely as possible to avoid repetition of the violation.

# THE UNITED NATIONS COMMITTEE AGAINST THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

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## I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE UNITED NATIONS COMMITTEE FOR THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

47. Before considering the range of remedies granted in individual complaints and the consequent recommendations made by the United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), this Report will consider the remedies highlighted in its General Recommendations.
48. General Recommendation No. 33 deals specifically with access to justice and in paragraph 19(b) requires that States:

Ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement); compensation (whether provided in the form of money, goods or services); and rehabilitation (medical and psychological care and other social services). Remedies for civil damages and criminal sanctions should not be mutually exclusive [emphasis added].<sup>39</sup>

49. Meanwhile, General Recommendation No. 28 goes somewhat further on the reparations a State could make to effectively implement CEDAW and meet its international obligations under Article 2 of the Convention by stating that:

Such remedies should include different forms of reparation, such as monetary compensation, restitution, rehabilitation and reinstatement; measures of satisfaction, such as public apologies, public memorials and guarantees of non-repetition; changes in relevant laws and practices; and bringing to justice the perpetrators of violations of human rights of women.<sup>40</sup>

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<sup>39</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation on Women's Access To Justice* 2015, CEDAW/C/GC/33.

<sup>40</sup> Committee of the Elimination of Discrimination against Women, *General Recommendation No. 28 Of The Core Obligations Of State Parties Under Article 2 Of The Convention On The Elimination Of All Forms Of Discrimination Against Women* 2010, CEDAW/C/GC/28, para.32.

50. In cases concerning SGBV, the CEDAW has recommended that States:

- Provide monetary compensation<sup>41</sup>
- Provide counselling and therapy free-of-charge for the victims and their families<sup>42</sup>
- Review legislation that is a barrier to eliminating the gender discrimination, including repeal of aspects<sup>43</sup>
- Effectively investigate and prosecute<sup>44</sup>
- Better implement the laws enacted<sup>45</sup>
- Cooperate with NGOs to protect and support victims<sup>46</sup>
- Provide training and education programmes to prevent recurrences and change attitudes<sup>47</sup>
- Provide State-funded shelters for victims [note that this was in the context of domestic violence]<sup>48</sup>
- Ease the burden of proof<sup>49</sup>
- Provide rehabilitation<sup>50</sup>
- Provide gender-specific health care<sup>51</sup>
- Safeguards in place.<sup>52</sup>

51. CEDAW is the quasi-judicial body of independent experts that monitors implementation of the Convention for the Elimination of All Forms of Discrimination Against Women.<sup>53</sup> CEDAW itself only makes recommendations to

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<sup>41</sup> *SVP v Bulgaria* 2012, CEDAW/C/53/D/31/2011, para.10(1); *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 9.1; *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.9.1; *RPB v the Philippines* 2014, CEDAW/C/57/D/34/2011, para 9(a)(i); *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.16(a).

<sup>42</sup> *RPB v the Philippines* 2014, CEDAW/C/57/D/34/2011, para 9(a)(ii).

<sup>43</sup> *SVP v Bulgaria* 2012, CEDAW/C/53/D/31/2011, para.10(2)(a); *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 9.2(a) and 9.2(c); *RPB v the Philippines* 2014, CEDAW/C/57/D/34/2011, para 9(b)(i); *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.16(b)(i).

<sup>44</sup> *Vienna Intervention Centre v Austria* 2007, CEDAW/C/39/D/6/2005, para 12.3(b); *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.9.2(c); *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.3(b).

<sup>45</sup> *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.3(a).

<sup>46</sup> *Vienna Intervention Centre v Austria* 2007, CEDAW/C/39/D/6/2005, para 12.3(c); *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.3(c).

<sup>47</sup> *Vienna Intervention Centre v Austria* 2007, CEDAW/C/39/D/6/2005, para 12.3(d); *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.9.2(e); *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 9.2(b); *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.3(d).

<sup>48</sup> *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.16(b)(iii).

<sup>49</sup> *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.16(b)(ii).

<sup>50</sup> *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 9.1.

<sup>51</sup> *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.9.2(b); *SVP v Bulgaria* 2012, CEDAW/C/53/D/31/2011, para.10(1)(e).

<sup>52</sup> *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.9.2(d).

<sup>53</sup> See Office of the United Nations High Commissioner for Human Rights, 'Human Rights Treaty Bodies – Individual Communications' <<http://www2.ohchr.org/english/bodies/petitions/individual.htm>> accessed 6 October 2015.

States as an international body and thus the actual reparations are made by the State if it follows recommendations in the Communication decisions. Recommendations are therefore of a declaratory nature,<sup>54</sup> as opposed to providing specific reparations, explaining Girma's extreme conclusion that CEDAW is a "toothless instrument when it comes to the protection of women".<sup>55</sup>

## II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY UNITED NATIONS COMMITTEE FOR THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

52. Typically, CEDAW formulates broad and declaratory remedies. These then serve as a catalyst for State reparation and initiate dialogue when combined with the reporting requirement (similar to a reporting order or structural interdict). This section will provide examples of cases and the formulation of pertinent recommendations within the decisions.

### *SVP v Bulgaria 2012*

53. In this communication, the author claimed that her daughter had been diagnosed as mentally retarded and with an affective disorder, mania without psychotic disorder, as a result of an act of severe sexual violence. The CEDAW, in formulating the remedies, distinguished them as follows: those concerning the author and those that were general. This is reflective of the retrospective and transformative aims to prevent SGBV in future. This is a common feature of CEDAW recommendations. This shows that redress under CEDAW strives to have a transformative potential and to remedy the framework that played a part in enabling such violence. In other words, it aims to draw out the root of the problem and not just the manifestation.

54. As often formulated in CEDAW cases, the recommendation for the victim is for "reparation, including appropriate monetary compensation".<sup>56</sup> This makes it clear that reparations are not to be limited to monetary compensation, but also to include other measures. This leaves discretion to the State to decide what the appropriate compensatory mechanisms should be.

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<sup>54</sup> See Heather Monasky, "What's Law Got to Do With It?: An Overview of CEDAW's Treatment of Violence Against Women and Girls Through Case Studies" (2014) *Michigan State Law Review* 327, 334.

<sup>55</sup> Meiraf Girma, "Violence Against Women: Inadequate Remedies under the CEDAW" (2009) 3(2) *Mizan Law Review* 351, 352.

<sup>56</sup> *SVP v Bulgaria* 2012, CEDAW/C/53/D/31/2011, para.10(1).

55. It is, however, vastly more precise as it recommended the repeal of a specific section of the Criminal Code so as to ensure that rape was to be legally defined in line with international standards. This can be compared with a declaration of invalidity, which a domestic court would be able to order, and sets the overall goal of the new legislation defining the parameters for the State.

### *Goeke v Austria 2007*

56. Here, the remedies were broadly formulated by the CEDAW leaving space for the State to create the specific methods. For example, it recommended that the State:

Strengthen implementation and monitoring of the Federal Act [...], by acting with due diligence to prevent and respond such violence against women and adequately providing for sanctions for the failure to do so.<sup>57</sup>

57. This was again combined with some more precise recommendations regarding prosecution:

Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence....<sup>58</sup>

58. Prosecution, and the message it sends, would likely be of even higher significance when the State itself has not only allowed the violence, but *directly* inflicted it. Furthermore, it recommended cooperation with NGOs to protect and support the victims. This reflects the overall aim of a more deliberative approach, but does not provide the more intricate details.<sup>59</sup>

### *TPF v Peru 2011*

59. TPF goes further than the individual recommendation in SVP. Not only does it state that recommendations should include adequate compensation for material and moral damages (emotional and physical), but “measures of rehabilitation” are also required of the State to comply with its obligations under CEDAW. The aim is “to ensure that she [the victim] enjoys the best possible quality of life”.<sup>60</sup> What allowances would be permitted for available resources and other practical considerations are not clear.

60. Other aspects of the recommendations address how the State should deal with the aftermath of gender violence perpetrated by others. Measures were to include “education and training programmes to encourage health providers to change their

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<sup>57</sup> *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.3(a).

<sup>58</sup> *ibid.*, para 12.3(b).

<sup>59</sup> *ibid.*, para 12.3(c).

<sup>60</sup> *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 9.1.

attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence”. Although this is in the context of refusal of therapeutic abortion following sexual abuse of a minor, it was found that the State had added to her pain and suffering in that she then became paralysed. This reflects the need for greater understanding of the harm done as a result of SGBV. For effective reparation the State needs to be able to both understand the harm and provide services to deal with this.

#### *RPB v the Philippines 2014*

61. Again the Committee stated that reparation should “include monetary compensation” making clear what is expected is that compensation si necessary, but is not of itself sufficient).<sup>61</sup> It was precise in its recommendation for counselling, which thus is comparable to a mandatory order in domestic courts (aside from the legal force of CEDAW decisions). It recommended that the State party “[p]rovide free-of-charge psychological counselling and therapy for the author and her affected family members”.<sup>62</sup> This level of precision in relation to positive provision marks a significant development in CEDAW recommendations for reparation due to the cost implications.
62. It was also precise in explaining how it wants the legislation to be reformulated by the Philippines. The requirement “that sexual assault be committed by force or violence” was to be removed and lack of consent was to be at the core of the offence of sexual assault.<sup>63</sup>

#### *VK v Bulgaria 2011*

63. Here, CEDAW recommended that the State party:

Ensure that a sufficient number of State-funded shelters are available to victims of domestic violence and their children and provide support to non-governmental organisations offering shelter and other forms of support to victims of domestic violence.<sup>64</sup>

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<sup>61</sup> *RPB v the Philippines* 2014, CEDAW/C/57/D/34/2011, para 9(a)(i).

<sup>62</sup> *ibid.*, para 9(a)(ii).

<sup>63</sup> *ibid.*, para 9(b)(i).

<sup>64</sup> *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.16(b)(iii).

### III. IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES BY THE UNITED NATIONS COMMITTEE AGAINST THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

64. CEDAW uses the same reporting requirement in each case where the State party has ratified the Optional Protocol. Article 7, paragraph 4 of the Optional Protocol states that:

The State Party shall give due consideration to the views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee.<sup>65</sup>

65. Consequently, this is the method used to address the implementation of the recommendations. Although it may not be considered particularly strong, due to reliance on “publicly shaming noncompliant States [*sic*] parties”.<sup>66</sup> However, the CEDAW also goes further than this in its recommendations, requesting that States publish and have judgments translated to “reach all relevant sectors of society”.<sup>67</sup> It therefore tries to ensure maximum declaratory effect.

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<sup>65</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999, A/RES/54/4.

<sup>66</sup> Heather Monasky, “What’s Law Got to Do With It?: An Overview of CEDAW’s Treatment of Violence Against Women and Girls Through Case Studies” (2014) Michigan State Law Review 327, 334.

<sup>67</sup> *SVP v Bulgaria* 2012, CEDAW/C/53/D/31/2011, para.11. See also *Goeke v Austria* 2007, CEDAW/C/39/D/5/2005, para 12.4; *TPF v Peru* 2011, CEDAW/C/50/D/22/2009, para 10; *Abramova v Belarus* 2011, CEDAW/C/49/D/23/2009, para 7.10; *RPB v the Philippines* 2014, CEDAW/C/57/D/34/2011, para 10; *Vienna Intervention Centre v Austria* 2007, CEDAW/C/39/D/6/2005, para 12.4; *VK v Bulgaria* 2011, CEDAW/C/49/D/20/2008, para 9.17.

# THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

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## I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE

66. The United Nations Human Rights Committee is a quasi-judicial body consisting of independent experts and monitors implementation of the International Covenant on Civil and Political Rights.<sup>68</sup> Reparations and remedies are ultimately awarded by the State in the following decisions of the Committee and not by the Committee itself as it is an international body, as opposed to a domestic court. The Committee has no power to hand down binding decisions, and there are no further enforcement mechanisms or sanctions.<sup>69</sup>

67. Before considering the range of remedies granted in individual complaints and the decisions of the United Nations Human Rights Committee, this report will briefly consider what forms of remedies may be included in the International Covenant on Civil and Political Rights<sup>70</sup>. Article 2(3)(a) of the International Covenant on Civil and Political Rights provides for access to the courts and “judicial remedy”, stating that parties undertake:

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.<sup>71</sup>

68. In cases concerning SGBV, the Human Rights Committee has recommended that States:

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<sup>68</sup> See Office of the United Nations High Commissioner for Human Rights, ‘Human Rights Treaty Bodies – Individual Communications’ <<http://www2.ohchr.org/english/bodies/petitions/individual.htm>> accessed 6 October 2015.

<sup>69</sup> Selected Decisions of the Human Rights Committee under the Optional Protocol, Volume 3, Thirty-third to thirty-ninth sessions (July 1988 – July 1990), United Nations 2002, CCPR/C/OP/3, 8 <<http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf>> accessed 5 October 2015.

<sup>70</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

<sup>71</sup> International Covenant on Civil and Political Rights, Article 2(3)(a).

- Fully implement compensatory measures agreed between the author of the communication and the State party<sup>72</sup>, as well as to the family<sup>73</sup>
- Have an obligation to ensure that similar violations are not perpetrated in the future<sup>74</sup> (attempt at a transformative declaratory order, but it is very weak)
- Provide and ensure equal access to courts<sup>75</sup>
- Provide impartial, effective and thorough investigation, prosecution and punishment of those responsible<sup>76</sup>
- Provide appropriate compensation<sup>77</sup>
- Free, specialised medical assistance<sup>78</sup>
- Providing information about investigation results<sup>79</sup>
- Releasing those detained<sup>80</sup>
- Provide appropriate satisfaction<sup>81</sup>

69. The next section further elaborates on the possible remedies that would fulfil State obligations under the International Covenant on Civil and Political Rights, but in most cases only to a limited extent.

## II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY UNITED NATIONS HUMAN RIGHTS COMMITTEE

70. Typically, the Human Rights Committee provides limited elaboration of the remedy that should be made but tends to go as far as highlighting the State's obligation to ensure that violations do not occur again or that perpetrators should be prosecuted,

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<sup>72</sup> *LNP v Argentine Republic* 2011, CCPR/C/102/D/1610/2007, para 14.

<sup>73</sup> *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, para 9(f).

<sup>74</sup> *LNP v Argentine Republic* 2011, CCPR/C/102/D/1610/2007, para 14; *María Cruz Achabal Puertas v Spain* 2013, CCPR/C/107/D/1945/2010, para 10(c); *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, para 9; *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 13; *VDA v Argentina* 2011, CCPR/C/101/D/1608/2007, para 11.

<sup>75</sup> *LNP v Argentine Republic* 2011, CCPR/C/102/D/1610/2007, para 14.

<sup>76</sup> *María Cruz Achabal Puertas v Spain* 2013, CCPR/C/107/D/1945/2010, para 10(a); *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, para 9(a) and (e); *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 13.

<sup>77</sup> *María Cruz Achabal Puertas v Spain* 2013, CCPR/C/107/D/1945/2010, para 10(b); *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 13; *VDA v Argentina* 2011, CCPR/C/101/D/1608/2007, para 11.

<sup>78</sup> *María Cruz Achabal Puertas v Spain* 2013, CCPR/C/107/D/1945/2010, para 10(c).

<sup>79</sup> *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, para 9(b).

<sup>80</sup> *ibid.*, para 9(c).

<sup>81</sup> *Kedar Chaulagain v Nepal* 2014, CCPR/C/112/D/2018/2010, para 13.

following a thorough investigation. It also frequently highlights the obligation to provide an effective remedy, without providing a thorough breakdown. Significantly, however, some recent cases have provided greater detail of reparations expected of the State, as well as joint opinions which have critiqued the non-transformative approach of the majority opinion. This section will provide examples of pertinent reparations or remedies provided within decisions.

### *Amirov v Russian Federation 2009*

71. In this case, the wife of the author of the communication, a Russian national of Chechen origin, was found dead following her disappearance. Her death was not investigated, but the author claims that the situation she was found in suggests she was raped and murdered. The decision provides a non-exhaustive list (evident by use of “*inter alia*”) of what is required, stating that:

Under article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy in the form, *inter alia*, of an impartial investigation in the circumstances of his wife’s death, prosecution of those responsible, and adequate compensation. The State party is also under an obligation to prevent similar violations in the future.<sup>82</sup>

72. Beyond compensation, it is not clear what exactly was required of the State both in terms of providing reparation to the author or to prevent similar violations.

### *LNP v Argentine Republic 2011*

73. The case concerned discrimination against an indigenous girl who was a victim of rape. The Committee merely requested “full implementation of the agreed commitment”<sup>83</sup> (which were compensatory measures agreed between the parties) and thus had a very limited role in formulating reparations. It just provides greater force to the agreed commitments regarding compensation. It further stated that:

The Committee further recalls that the State party has the obligation to ensure that similar violations are not perpetrated in the future, in particular by guaranteeing access for victims, including victims of sexual assault, to the courts in conditions of equality.<sup>84</sup>

74. Whilst the overall aim is clearly transformative, the declaration in itself did not elaborate on *how* to reach this aim and thus was not a truly transformative remedy for the victim.

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<sup>82</sup> *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 13.

<sup>83</sup> *LNP v Argentine Republic* 2011, CCPR/C/102/D/1610/2007, para 14.

<sup>84</sup> *ibid.*

### *VDA v Argentina 2011*

75. Here, the daughter of the communications' author had mental disabilities and was raped. She was prevented from terminating her pregnancy until the Supreme Court overturned the various orders. This caused the daughter physical and mental suffering. The obligations were broadly formulated, similar to the above communication, holding that:

the State party is under an obligation to provide L.M.R. [the victim] with avenues of redress that include adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.<sup>85</sup>

76. The 'avenues of redress' were thus left to the State to formulate.

### *María Cruz Achabal Puertas v Spain 2013*

77. The author of the communication was arrested on suspicion of belonging to an armed group and threatened with sexual abuse personally and of her daughter as part of the interrogation. She suffered post-traumatic stress disorder and severe depression as a result.

78. The Committee sought not only "an impartial, effective and thorough investigation of the facts and the prosecution and punishment of those responsible", but also "full reparation, including appropriate compensation".<sup>86</sup> Full reparation is not limited to just compensation. However, the Committee did not dictate to the State other expected methods of reparation, save for the below.

79. The Committee gave detailed guidance on effective remedy in requiring the "provision of free, specialised medical assistance".<sup>87</sup> This is comparable to a mandatory order that a domestic court could make. This level of precision marks a significant development in the Committee remedy decisions and in regard to the transformative potential of the decisions.

80. To some extent the Committee developed a form of safeguard in deciding that the State:

[S]hould take the necessary measures, including legislative ones, to definitively put an end to the practice of incommunicado detention and to guarantee that all detainees have the right to freely choose a lawyer who can be consulted in complete confidentiality and who can be present at interrogations.<sup>88</sup>

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<sup>85</sup> *VDA v Argentina* 2011, CCPR/C/101/D/1608/2007, para 11.

<sup>86</sup> *María Cruz Achabal Puertas v Spain* 2013, CCPR/C/107/D/1945/2010, para 10(b).

<sup>87</sup> *ibid.*, para 10(c).

<sup>88</sup> *ibid.*, para 10.

81. Although the above safeguards apply largely to criminal procedure generally, it is of relevance when considering remedies and reparations for SGBV.

### *Fatima Mehalli v Algeria 2014*

82. Here, sexual violence and torture were committed by the police. This comparably recent decision contains far greater detail of reparations expected from the State party than previous Human Rights Committee decisions. It was formulated as a detailed list. To provide an effective remedy the State party was expected to conduct:

a prompt and effective investigation into the allegations of torture of the author, her sisters and her brothers, [...] prosecuting and punishing the perpetrators, and providing the victims with adequate compensation, including for their illegal detention in this context.<sup>89</sup>

83. It was left up to the State to formulate the measures that would be “adequate” and “prompt and effective”. Yet, it is implicit that more is expected of the State to meet its obligations. Algeria was also required to provide “the author with detailed information about the results of its investigation”.<sup>90</sup> Detailed sets a threshold of information that must be provided and thus makes clear the level of obligation.

84. Meanwhile, the joint opinion of Mr. Fabián Omar Salvioli and Mr. Víctor Rodríguez Rescia is more informative regarding the reparation that would be needed to have a transformative effect on the situation. They wrote that:

It should have led to the establishment of adequate redress in the form of education and training for law enforcement officials on gender issues and women’s rights in order to ensure the non-recurrence of such events.<sup>91</sup>

85. This goes much further than the typical statement of the obligation to prevent recurrence and gave the State party directions.

### *Finland - Concluding Observations 2013*

86. The Committee was concerned by reports of gender-based violence, which were often not reported and, therefore, not investigated. The Committee recommended that:

The State party should intensify its efforts and take all necessary measures, including legislative reforms, to effectively prevent and combat all forms of violence against women, particularly sexual violence. The State party should ensure that services, including a sufficient number of shelters, are made available to protect women victims of violence and provide them with adequate financial resources. The State party should also educate society on the prevalence of gender-based violence, including domestic violence, and improve coordination among the bodies responsible for preventing and punishing domestic violence, so as to ensure that such acts are

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<sup>89</sup> *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, para 9(g).

<sup>90</sup> *ibid.*, para 9(b).

<sup>91</sup> *Fatima Mehalli v Algeria* 2014, CCPR/C/110/D/1900/2009, Appendix, Joint opinion of Mr. Fabián Omar Salvioli and Mr. Víctor Rodríguez Rescia, para 7.

investigated, and perpetrators prosecuted and, if convicted, punished with appropriate sanctions.<sup>92</sup>

### **III. IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES BY THE UNITED NATIONS HUMAN RIGHTS COMMITTEE**

87. Under Article 4(2) of the Optional Protocol to the International Covenant on Civil and Political Rights “[w]ithin six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.”<sup>93</sup> As a consequence the Human Rights Committee uses the same formulation of reporting requirement in each decision on an individual complaint. The Committee usually holds that it: “wishes to receive from the State party, within 180 days, information about the measures adopted to give effect to the Committee’s Views. The State party is also requested to publish the Committee’s Views.”<sup>94</sup>

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<sup>92</sup> *Report of the Human Rights Committee*, Volume I, 108<sup>th</sup> session, 109<sup>th</sup> session and 110<sup>th</sup> session, A/69/40 (Vol. I) 52.

<sup>93</sup> Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976).

<sup>94</sup> *Amirov v Russian Federation* 2009, CCPR/C/95/D/1447/2006, para 14.

# C. REGIONAL JURISDICTIONS

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## THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, AND THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

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### I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, AND THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

88. Where there exists a finding that there has been a violation of human and/or peoples' rights, the African Court on Human and Peoples' Rights (the African Court) has the power to issue appropriate orders to remedy the violation including the payment of fair and adequate compensation or reparation.<sup>95</sup> Judgments of the African Court are binding. On the other hand, decisions of the African Commission on Human and Peoples' Rights (the African Commission) are only recommendatory. Therefore, any decisions by the Commission as to reparations are not binding upon the Party. As the procedure fees are at the parties' expense,<sup>96</sup> the reparation can also take the form of covering the Claimant's costs.
89. Article 45 of the Statute of the Single Court further provides that the Court can, when it finds there has been a violation of human or peoples' rights, order all appropriate measures to remedy the situation, including the granting of a fair indemnity.<sup>97</sup>

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<sup>95</sup> Article 27 of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

<sup>96</sup> Article 30 of the Interim Rules of Court.

<sup>97</sup> Protocol on the Statute of the African Court of Justice and Human Rights. This Protocol is yet to come into force, as it has not obtained the required number of ratifications, however.

90. Owing to the African systems recognition of human and peoples' rights, reparation may be either individual or collective. Collective reparation has the benefit of being able to reach a wider group of beneficiaries, prevent stigma by avoiding the identification of individual victims and recognising the harm imposed on families and communities intended and caused by such violence<sup>98</sup>. The African Commission has considered that for a collective of individuals to be recognised as peoples', there must be 'linkages between peoples, their land and a culture that such a group expresses its desire to be identified as a people, or have the consciousness that they are a people'<sup>99</sup>.
91. Reparation may also be awarded in the form of either pecuniary damages (consisting of damages and interest) or non-pecuniary reparation which serves to acknowledge that gender and/or sexual based violence has been inflicted on the victim and to affirm the position of the victim as a citizen and rights holder. For example, it has been held that the handing down of a civil or criminal judgment itself can constitute a sufficient form of reparation for moral or symbolic damages<sup>100</sup>.
92. Article 4(2)(f) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides for the establishment of mechanisms and accessible services for amongst others, the effective reparation for victims of violence against women.
93. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of 2003 further provide that everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the Constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity and that the right to an effective remedy includes restitution and reparation for the harm suffered.<sup>101</sup>
94. Numerous resolutions have also been passed whereby the African Commission has called on Members States to guarantee that victims of sexual and gender based

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<sup>98</sup> Report of the Office of the United Nations High Commissioner for Human Rights: Analytical study focusing on gender-based and sexual violence in relation to transitional justice (30 June 2014).

<sup>99</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya African Commission*, Communication 276/03, paras 150-151.

<sup>100</sup> *Tanganyika Law Society and The Legal and Human Rights Centre v The United Republic of Tanzania* and *011 of 2011 Reverend Christopher R. Mtikila v The United Republic of Tanzania* Judgment of the Court in Consolidated Applications No. 9 of 2011, African Court on Human and Peoples' Rights.

<sup>101</sup> Part C(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa of 2003 <http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/> <last accessed 29 October 2015>.

violence have the right to just and equitable reparation in all forms including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. These include the following:

- Resolution on the Situation of Women and Children in Armed Conflict<sup>102</sup>;
- Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence<sup>103</sup>; and
- Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt<sup>104</sup>.

95. Paragraph 34 of the General Comments on the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa further provides that States Parties should ensure implementation of laws and policies through for example the provision of timely and effective redress mechanisms where women's sexual rights have been violated.

96. However, despite the affirmations of the Constitutive Act of the African Union, the African Charter on Democracy, Elections and Governance, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and various other instruments to eliminate all forms of discrimination and of gender-based violence against women including all forms of gender intolerance and despite the repeated urge of the Commission on States Parties to adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of all women from all forms of violence, the African Court has generally been slow to award reparations to victims.

## **II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY THE JUDICIAL AND NON-JUDICIAL BODIES**

97. The first reparations ruling to be sought (and denied) by the Court was in the case of *Reverend Christopher Mtikila v United Republic of Tanzania*<sup>105</sup>. The case did not involve

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<sup>102</sup> The African Commission on Human and Peoples' Rights, meeting at its 55th Ordinary Session held in Luanda, Republic of Angola, from 28 April to 12 May 2014.

<sup>103</sup> The African Commission on Human and Peoples' Rights, meeting at its 42nd Ordinary Session held in Brazzaville, Republic of Congo, from 15 - 28 November 2007.

<sup>104</sup> The African Commission on Human and Peoples' Rights (the Commission), meeting at its 16th Extraordinary Session held from 20 to 29 July 2014 in Kigali, Rwanda.

<sup>105</sup> Applications No. 11 of 2011, African Court on Human and Peoples' Rights (13 June 2014).

allegations of sexual and gender based violence but rather, the enactment by Tanzania of a Constitutional amendment requiring election candidates to be a member of a political party. This was held to breach Articles 2 (freedom from discrimination), 3 (equal protection), 10 (freedom of association), and 13(1) (right to participate in government) of the African Charter on Human and Peoples' Rights. However, in holding that the Claimant was not entitled to reparations, the Court decided that he had "failed to produce any evidence" to support his claim that both pecuniary and moral damage had been caused to him by the facts of the case.

98. The recent case of *Zongo and others v Burkina Faso*<sup>106</sup> is the first case in which the Court has awarded reparations to successful applicants. It should be noted that the case similarly did not involve allegations of sexual and gender based violence but rather, violations of Article 1, Article 7 and Article 9 of the African Charter on Human and Peoples' Rights as well as Article 66(2)(c) of the ECOWAS Treaty concerning the protection of journalists in relation to the murder of an investigative journalist and his three work companions. Both the possibility of moral and material reparations were recognised in the case and it was decided that 'victims' of human rights violations can go as far as to include members of the victim's family including his or her spouse, children and parents. Substantial reparation payments were made consisting of approximately \$41,500 per spouse, approximately \$25,000 per child and approximately \$16,500 per mother or father. The Court also awarded a symbolic payment to the Burkina Faso NGO Burkinabé Human and Peoples' Rights Movement and ordered costs for lawyer's fees, travel and accommodation.
99. It is to be seen whether the African Court on Human and Peoples' Rights will follow this decision to award reparation damages to victims of sexual and gender based violence.

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<sup>106</sup> The African Court on Human and Peoples' Rights Application No. 013/2011.

### III. THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES

100. As stated above, the African Court on Human and Peoples' Rights has yet to award remedies or reparations damages to victims of sexual and gender based violence. However, the national courts of various African States have made provision for the award of reparations in their respective jurisdictions. These examples are given in addition to the extensive discussion of other national jurisdictions later in this Report.

#### *Democratic Republic of Congo*

101. The right to reparation is recognised by the following provisions of Congolese law:

Civil Code, Article 258: Any act whatsoever that causes harm to another obliges the person by whose offence the harm was caused to make amends for this harm.

Civil Code, Article 259: A person is responsible not only for the harm caused by his/her own action, but also the harm caused by acts committed by persons answerable to him/her, or matters that are within his/her responsibility.

102. The Government of the Democratic Republic of Congo has established a national strategy to combat gender-based violence including a reparations fund for sexual violence victims whose perpetrators are unknown or are not arrested.

#### *Niger*

103. On 16 December 2010, the Government of Niger adopted Ordinance No. 2010-086 which is intended to prevent and combat human trafficking (defined as including 'an operation or action intended to recruit, transport, accommodate or receive persons through threat of the use or use of force or other forms of coercion...') in particular that of women and children. The ordinance provides for correctional and criminal penalties including a civil reparation scheme.

#### *Uganda*

104. Section 197 of the Magistrates Courts Act 1971 (Chapter 16) provides inter alia that when an accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted

person to pay to that other person such compensation as the court deems fair and reasonable. Section 126 of the Trial on Indictments' Act 1971 (Chapter 23) contains a similar provision.

105. At present, survivors of sexual and gender based violence can pursue compensation through civil suits in the Magistrates' Court or the High Court. Under the criminal law, the Penal Code provides that a person convicted for defilement or rape may be asked to pay compensation in addition to receiving any sentence.
106. However, the discretion to determine the amount of compensation is left entirely to the judge, taking into consideration the extent of the harm suffered by the survivor, the degree of force used by the convict as well as the medical and other expenses incurred by the survivor as a result of the offence.
107. It has been noted in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights.
108. However, even where damages have been awarded, court judgments are rarely enforced with the result that damages awarded by the courts are never paid to the victims<sup>107</sup>. According to ACORD's Judicial Audit of 2010, none of the survivors interviewed were able to access any form of court awarded compensation or reparation<sup>108</sup>.
109. This has led to the emergence of increasing numbers of 'amicable agreements', which take the form of out-of-court settlements<sup>109</sup>. However, although such customary arrangements may benefit the father or community leaders of the victims, they are often not beneficial to the victims themselves<sup>110</sup>.

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<sup>107</sup> Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights (March 2011).

<sup>108</sup> Protection and Restitution for Survivors of Sexual and Gender Based Violence in Uganda: The legal peculiarities, the possibilities and the options (ACORD Uganda, September 2010).

<sup>109</sup> Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights (March 2011).

<sup>110</sup> *ibid.*

# **THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, AND INTER- AMERICAN COURT ON HUMAN RIGHTS**

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## **I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE INTER-AMERICAN COURT ON HUMAN RIGHTS**

110. This section outlines the forms of reparations and remedies awarded to victims of sexual and gender-based violence (SGBV) by the Inter-American Commission on Human Rights (IACHR) and Inter-American Court on Human Rights (IACtHR). In this regard, it should be noted that the IACHR only has the authority to make recommendations to the defending State as to which reparations it should make, whereas the IACtHR has the authority to order the defending State to make the appropriate reparations. It should also be noted that recommendations from the IACHR and orders from the IACtHR are generally substantially similar although additional types of reparations (especially more detailed ones) tend to be awarded by the Court as compared to the Commission.

### **a) The Inter-American Commission on Human Rights**

111. There are certain forms of reparations that are recommended by the IACHR in nearly every case relating to SGBV. While these reparations are sometimes formulated with slightly different wording, they include: conducting an efficient, thorough and impartial investigation into the facts of the case and prosecution of those responsible, adopting some form of legislative or institutional reforms to bring domestic laws into conformity with international human rights standards, and/or to make the national system more effective in preventing SGBV and assisting the

- victims, and providing adequate compensation to the victims based on pecuniary and non-pecuniary damages.<sup>111</sup>
112. Additionally, there are a number of case-specific reparations recommended by the IACHR. In *Martín de Mejía v Peru*, it was recommended that the State drop current criminal proceedings against the victim for the alleged crime of terrorism as such proceedings had failed to guarantee her right to a fair trial.<sup>112</sup> In *Da Penha v Brazil* and in *González v US*, it was recommended that the States pursue a more expanded reform process of the national system in order to put an end to the institutional failure to protect women from domestic violence. These recommendations included: implementing measures to train and raise the awareness of official staff<sup>113</sup> and adopting public policies, educational curricula, and institutional programs to train official staff and police units on women’s rights and SGBV.<sup>114</sup>
113. In *Da Penha v Brazil*, it was also recommended that the State simplify judicial proceedings for victims,<sup>115</sup> implement alternative mechanisms (non-judicial) to resolve issues in a prompt and efficient manner and to raise further awareness,<sup>116</sup> and increase the amount of special police stations dealing specifically with the rights of women and assisting them with special measures in cases of domestic violence.<sup>117</sup> In *González v US*, it was specifically recommended that the State design standardized protocols for the proper investigation by law enforcement units into SGBV crimes.<sup>118</sup>
114. Finally, in *X and Y v Argentina* and in *Martín de Mejía v Peru*, the IACHR included specific recommendations regarding the publication of a report in the Annual Report of the General Assembly of the Organization of American States as a form of reparation to the victims.<sup>119</sup>

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<sup>111</sup> *Raquel Martín de Mejía v. Peru*, Case 10.970, Report No 5/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.91 (1996) (hereinafter “*Martín de Mejía v Peru*”), part VII; *Ana, Beatriz and Celia González Pérez v. Mexico*, Case 11.565, Report No 53/01, Inter-Am.C.H.R., OEA/Ser.L/V/II.111 (2000) (hereinafter “*González Pérez v Mexico*”), para. 96(1) and (2); *Maria Da Penha Maia Fernandes v. Brazil*, Case 12.051, Report No 54/01, Inter-Am.C.H.R., OEA/Ser.L/V/II.111 (2000) (hereinafter “*Da Penha v Brazil*”), paras. 61(1) *et seq.*; *Jessica Lenaban (Gonzales) et al. v. United States of America*, Case 12.626, Report No 80/11, Inter-Am.C.H.R., OEA/Ser.L/V/II.142 (2011) (hereinafter “*Gonzales v US*”), paras. 201 *et seq.*; *X and Y v. Argentina*, Case 10.506, Report No 38/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 (1996) (hereinafter “*X and Y v Argentina*”), paras. 117 *et seq.*

<sup>112</sup> *Martín de Mejía v Peru*, part VII, para. 5.

<sup>113</sup> *Da Penha v Brazil*, paras. 61(4); *Gonzales v US*, paras. 201(4)-(7).

<sup>114</sup> *ibid.*

<sup>115</sup> *Da Penha v Brazil*, para. 61(4)(b).

<sup>116</sup> *ibid.*, para. 61(4)(c).

<sup>117</sup> *ibid.*, para. 61(4)(d).

<sup>118</sup> *Gonzales v US*, para. 201(4).

<sup>119</sup> *X and Y v Argentina*, para. 121; *Martín de Mejía v Peru*, part VII, para. 6.

115. It should be noted that certain cases were settled before the IACHR under a friendly settlement procedure.<sup>120</sup> In these cases, the settlement reached included similar reparations by the State to the victim as in the other cases before the Commission. In *Valdes v Diaz*, for instance, the State agreed to improve the regulatory standards on domestic violence and sexual harassment by the police, implement educational studies in its official institutions on these subjects, implement training workshops for police units on the protection of women, publish an official summary of the agreement, continue to provide health care to the victim, and pay the victim a compensatory sum of \$50,000.<sup>121</sup>

### **b) The Inter-American Court on Human Rights**

116. The reparations and remedies awarded by the IACtHR are similar to those recommended by the IACHR, albeit more detailed and greater in amount. The most frequent forms of reparations and remedies granted by this Court are listed below whereby the State is ordered to do the following:<sup>122</sup>

- Conduct an efficient criminal investigation into the facts of the case and apply the appropriate punishments within a reasonable period of time
- Adapt domestic legislation to international standards relating to the protection of women's rights and other applicable human rights
- Perform a public act of acknowledgment of responsibility, often including a radio broadcast
- Publish the judgment in national gazettes
- Implement a standardized protocol for investigations into SGBV crimes
- Provide free and immediate medical and psychological care to the victim(s)
- Implement human rights training programs for State officials
- Award full scholarships (up to and including university level) to victim(s)

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<sup>120</sup> See e.g. *Marcela Andrea Valdes Diaz v. Chile*, Case 12.337, Report No. 57/03, Inter-Am. C.H.R., OEA/Ser.L/V/II.118 (2003) (hereinafter "*Valdes Diaz v Chile*").

<sup>121</sup> *Valdes Diaz v Chile*, para. 25(1) *et seq.*

<sup>122</sup> See, in general *Rosendo Cantú et al. v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 216 (31 August 2010) (hereinafter "*Cantu v Mexico*"), paras. 2013 *et seq.*; *Case of Fernández Ortega et al. v. Mexico* (Preliminary Objection, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 215 (30 August 2010) (hereinafter "*Ortega v Mexico*"), paras. 220 *et seq.*; *Case of the Miguel Castro Castro Prison v. Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 160 (25 November 2006) (hereinafter "*Miguel Castro Castro Prison v Peru*"), paras. 414 *et seq.*

- Award pecuniary and non-pecuniary damages to victim(s) in accordance with calculations by the Court.

117. The international standards to which the State's domestic legislative/institutional reforms were ordered to conform with included the American Convention on Human Rights, the Istanbul Protocol, and the guidelines of the World Health Organization.<sup>123</sup>

118. The pecuniary damages ranged from \$5,500-10,000 based on the income/assets lost as a result of the State violation.<sup>124</sup> The non-pecuniary damages ranged from \$4,000-\$60,000 for the primary victim(s) (i.e. those who were the main victims of the SGBV) and from \$1,000-\$10,000 for the secondary victims (either those who were also subjected to violence as a result of the violence done to the primary victim, or the next-of-kin of the primary victims).<sup>125</sup>

119. In addition to these standard forms of reparation, the Court has also ordered certain case-specific remedies. In *Ortega v Mexico*, the State was ordered to set up a permanent educational program on human rights for its officials, as well as a women's community centre in the community of the victim, and construct a high school in the area or provide proper housing and food for high school students studying at a high school situated in another area, where such housing and proper diet were lacking.<sup>126</sup>

120. The *Miguel Castro-Castro Prison v Peru* case concerned not only victims of SGBV, but also victims of violence and murder occurring at the Miguel Castro-Castro Prison. The State was ordered to inscribe the names of all of the prison victims in a national monument previously set up to honour the victims of the conflict in the region.<sup>127</sup> In the same case, the Court also ordered certain case-specific non-pecuniary damages to be paid to victims who had suffered SGBV. This included additional compensation to victims who had been pregnant at the time the violence had occurred and who had endured rape, or were victims of other forms of SGBV.<sup>128</sup>

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<sup>123</sup> *Cantu v Mexico*, paras. 218, 242, 245; *Ortega v Mexico*, paras. 237-239, 256.

<sup>124</sup> *Cantu v Mexico*, para. 274; *Ortega v Mexico*, para. 286; *Miguel Castro Castro Prison v Peru*, paras. 421 *et seq.*

<sup>125</sup> *Cantu v Mexico*, para. 279; *Ortega v Mexico*, para. 293; *Miguel Castro Castro Prison v Peru*, paras. 421 *et seq.*

<sup>126</sup> *Ortega v Mexico*, paras. 262, 267, 270.

<sup>127</sup> *Miguel Castro Castro Prison v Peru*, para. 454.

<sup>128</sup> *ibid*, para. 433(c)(viii)-(x).

## II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY JUDICIAL AND NON-JUDICIAL BODIES

### a) The Inter-American Commission on Human Rights

121. In *Da Penha v Brazil*, the Commission made a detailed recommendation to the State with regards to adopting measures to provide adequate compensation to victims. This recommendation was formulated as follows:

Adopt, without prejudice to possible civil proceedings against the perpetrator, the measures necessary for the State to grant the victim appropriate symbolic and actual compensation for the violence established herein, in particular for its failure to provide rapid and effective remedies, for the impunity that has surrounded the case for more than 15 years, and for making it impossible, as a result of that delay, to institute timely proceedings for redress and compensation in the civil sphere.”<sup>129</sup>

122. In this regard, the appropriate compensation, in the IACHR’s view, would have to take into consideration the abovementioned issues, including the State’s failure to provide the victim with a remedy and the resulting long-term impunity the victim had to experience.

123. In *Martín de Mejía v Peru*, the Commission combined the recommendation to conduct a thorough investigation with the provision of compensation:

...conduct a **thorough, rapid and impartial** investigation of the sexual abuse of which Raquel Mejía was the victim, in order to **identify the perpetrators so that they may be punished** in accordance with the law, and that it **pay the injured party a fair compensation**.<sup>130</sup> (Emphasis added)

124. In this regard, the Commission argued that the amount of the compensation should be determined only after a thorough, rapid and impartial investigation into the crime has taken place. In other words, that the compensation be proportionate to the results of the investigation.

125. In *González v US*, the Commission made a detailed recommendation to the State to adopt new legislation or reform existing legislation in connection with the enforcement of protective measures of women and children against domestic violence. To this end, the Commission recommended that the State:

create **effective implementation mechanisms**. These measures should be **accompanied by adequate resources** destined to foster their implementation; **regulations to ensure their enforcement; training programs** for the law enforcement and justice system officials who will

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<sup>129</sup> *Da Penha v Brazil*, para. 61(3).

<sup>130</sup> *Martín de Mejía v Peru*, part VII.

participate in their execution; and **the design of model protocols and directives** that can be followed by police departments throughout the country.<sup>131</sup> (Emphasis added)

126. In that case, the IACHR also recommended that the State:

Continue **adopting public policies and institutional programs aimed at restructuring the stereotypes of domestic violence victims**, and to promote the **eradication of discriminatory socio-cultural patterns that impede women and children’s full protection** from domestic violence acts, including programs to train public officials in all branches of the administration of justice and police, and comprehensive prevention programs.<sup>132</sup> (Emphasis added)

127. Thus, it appears that the gravity of this case, where the State’s failure to protect the victim against domestic violence eventually led to the death of her three children, prompted the Commission to recommend more detailed and specific measures of reparations and remedies to the victim, proportionate to the violation of her rights.

#### **b) The Inter-American Court on Human Rights**

128. In each of the Court cases outlined under the first subheading, the Court took certain facts of the case into special consideration when awarding the reparations. In *Cantu v Mexico*, the IACtHR stated that the victim was:

a girl at the time when the violations occurred, whose situation of particular vulnerability will be taken into account in the reparations awarded in this Judgment.<sup>133</sup>

129. This was reiterated in *Ortega v Mexico*, where the Court stated that the victim was in a particularly vulnerable situation due to the fact that she was a woman and a member of the indigenous community.<sup>134</sup> These aspects would be taken into account in respect of the reparations awarded.<sup>135</sup>

130. Similarly, in regards to the remedies to conduct an efficient investigation into the facts, the Court in *Cantu v Mexico* stated that the State must ensure that the victim has full access and capacity at all stages during the investigation into the case, and that, due to the particular vulnerability of the victim, the State must ensure that she can “rely on assistance with a gender-based perspective.”<sup>136</sup> This was again reiterated in *Ortega v Mexico*, where the Court stated that the State must continue to:

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<sup>131</sup> *Gonzales v US*, paras. 215(4) and (5).

<sup>132</sup> *Gonzales v US*, paras. 215(6).

<sup>133</sup> *Cantu v Mexico*, para. 206.

<sup>134</sup> *Ortega v Mexico*, paras. 79, 223.

<sup>135</sup> *ibid.*

<sup>136</sup> *Cantu v Mexico*, para. 213.

offer the means by which the victim may fully access and participate in all the proceedings of the case and, to this end, it must ensure that an interpreter is provided, all support with a gender perspective [sic], based on her circumstance of special vulnerability.<sup>137</sup>

131. In respect of the public acknowledgment of the violation, the Court in *Cantu v Mexico* and *Ortega v Mexico* placed particular emphasis on conducting the public ceremony in both the national language of the State, and in the language of the particular minority group of which the victim was a member. In this regard, the Court declared (with varying formulations) that:

reference should be made to the human rights violations declared in this judgment. It should be conducted through a public ceremony, held in the Spanish and Me'paa languages, in the presence of high-ranking national authorities and authorities of the state of Guerrero, the victims and authorities and members of the victims' community.<sup>138</sup>

132. In respect of the training programs for officials, the Court stated in both *Cantu v Mexico* and *Ortega v Mexico* that these should "pay special attention to assisting alleged victims of rape, particularly those belonging to vulnerable groups, such as indigenous women and children."<sup>139</sup> In respect of the trainings, the Court in *Ortega* further stated that:

the services addressing women victims [sic] of violence must be provided by the institutions indicated by the State, among others, the Public Prosecutor's Office of Ayutla de los Libres, by means of the provision of material and personal resources, whose activities must be strengthened by the trainings ordered in the present Judgment.<sup>140</sup>

133. As regards mental and physical health care, this should have regard to the victims' "gender and ethnicity".<sup>141</sup> In *Ortega*, the Court made an additional note that the care should be provided nearest to the victims' place of residency.<sup>142</sup> In *Miguel Castro-Castro Prison v Peru*, the Court made an additional order, that in case any of the victims or their next-of-kin currently reside in a foreign country, the State should provide them with \$5,000 to undergo mental and physical treatment in their country of residence.<sup>143</sup>

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<sup>137</sup> *Ortega v Mexico*, para. 230.

<sup>138</sup> *Cantu v Mexico*, para. 226; *Ortega v Mexico*, paras. 241-247.

<sup>139</sup> *Cantu v Mexico*, para. 245; *Ortega v Mexico*, para. 259.

<sup>140</sup> *Ortega v Mexico*, para. 277.

<sup>141</sup> *Cantu v Mexico*, para. 252; *Ortega v Mexico*, para. 251.

<sup>142</sup> *Ortega v Mexico*, para. 251.

<sup>143</sup> *Miguel Castro Castro Prison v Peru*, para. 450.

134. Finally, the scholarships to be awarded to the victims in *Cantu v Mexico* were justified on the basis that the only way to further help the victims of these violations would be through education.<sup>144</sup> In *Ortega v Mexico*, the award of scholarships was based on the fact that:

this harm continues and has resulted in significant alterations to their lives and also to their domestic relations and their relations with the community, which have affected their personal development.<sup>145</sup>

135. In *Ortega*, the specific measure ordered by the Court to set up a women's community center in the indigenous community of the victim held that the State should provide the necessary resources to the indigenous community:

to be able to **establish a community center**, which is **set up as a women's center** and in which **educational activities are held on human rights and women's rights, under the responsibility and management of the women of the community**, including [the victim] if she so desires. The State must **assist State institutions and civil society organizations working in the area of human rights and gender to provide assistance for the community training activities**, which must be **adapted to the indigenous community's view of the world**.<sup>146</sup> (Emphasis added)

### III. THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES

#### a) The Inter-American Commission on Human Rights

136. The Commission generally grants the State concerned a certain number of days to report to the IACHR on the measures taken and to begin implementing the recommendations in the report. For the SGBV cases mentioned above, this has typically ranged from fifteen to sixty days, depending on the specific reparatory measures recommended.<sup>147</sup>

137. In order to determine whether the report has been complied with, the Commission concludes each case by stating (with varying formulations) that:

Pursuant to the provisions contained in the instruments governing its mandate, the IACHR will continue to evaluate the measures taken by the... State with respect to those recommendations, until the State has fully complied with them.<sup>148</sup>

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<sup>144</sup> *Cantu v Mexico*, para. 257.

<sup>145</sup> *Ortega v Mexico*, para. 264.

<sup>146</sup> *ibid.*, para. 267.

<sup>147</sup> See e.g. *González Pérez v Mexico*, para. 97; *Da Penha v Brazil*, paras. 61(4)(f) and 62; *Gonzales v US*, para. 214.

<sup>148</sup> See *González Pérez v Mexico*, para. 99; *Da Penha v Brazil*, para. 63; *Gonzales v US*, para. 216.

138. If the number of days accorded to the State for implementation has passed with no report on the process, the IACHR is required to reiterate the measures recommended and continue to monitor compliance in accordance with its rules.<sup>149</sup> In this regard, Article 51(2) and (3) of the American Convention on Human Rights contains the following procedural rules:

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.<sup>150</sup>

139. Similarly, Articles 47 and 48 on the Rules of Procedure of the IACHR contain more detailed rules. Article 47(3) states:

The Commission shall evaluate compliance with its recommendations based on the information available, and shall decide on the publication of the final report by the vote of an absolute majority of its members. The Commission shall also make a determination as to whether to include it in the Annual Report to the OAS General Assembly, and/or to publish it in any other manner deemed appropriate.<sup>151</sup>

140. Whereas Article 48 states:

1. Once the Commission has published a report on a friendly settlement or on the merits in which it has made recommendations, it may adopt the follow-up measures it deems appropriate, such as requesting information from the parties and holding hearings in order to verify compliance with friendly settlement agreements and its recommendations.

2. The Commission shall report on progress in complying with those agreements and recommendations as it deems appropriate.<sup>152</sup>

141. Article 51(2) and (3), as well as Articles 47 and/or 48 are applied together in *Da Penha v Brazil* and in *Gonzalez v US*, where the Commission stated the following (with varying formulations):

Pursuant to the foregoing considerations, and in conformity with Article 51(3) of the American Convention and Article 48 [Article 47 in *Gonzalez v US*] of its Regulations, the Commission decides to reiterate the conclusions and recommendations of

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<sup>149</sup> See e.g. *Gonzales v US*, para. 207, 215; *Da Penha v Brazil*, para. 53.

<sup>150</sup> American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art. 51(2) and (3).

<sup>151</sup> Inter-American Commission on Human Rights, 'Rules of Procedure' (1 August 2013), available at: <<http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>> accessed 24 October 2015, para. 47.

<sup>152</sup> *ibid.*, para. 48.

paragraphs 1 and 2, to make this Report public, and to include it in its Annual Report to the General Assembly of the OAS.<sup>153</sup>

142. Indeed, it appears that publication of the report and its inclusion in the Annual Report is a form of punishment to the State for failing to comply with the recommendations within the allocated time.

#### **b) The Inter-American Court on Human Rights**

143. In general, the IACtHR grants States a time period between one year and eighteen months within which it must fulfill the remedies awarded to the victims.<sup>154</sup> In *Ortega v Mexico*, the Court further ordered the State to provide a report on the process of the implementation, within a period of six months.<sup>155</sup> In *Miguel Castro-Castro Prison v Peru*, the State was specifically ordered to broadcast and publish the judgment within a period of six months,<sup>156</sup> and inscribe the names of the victims in the national monument within one year.<sup>157</sup> In *Cantu* and *Ortega*, the Court concluded the cases by stating:

The Court will **monitor full compliance** with this Judgment, in exercise of its **powers** and in accordance with its **obligations under the American Convention**, and will conclude this case when the State complied [sic] fully with its provisions. **Within one year** of notification of this Judgment, **the State must provide the Court with a report** on the measures taken to comply with it.<sup>158</sup>

144. In this regard, the powers and obligations of the Court under the American Convention that it is referring to is Article 63(1):

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.<sup>159</sup>

145. Article 65 further provides that:

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<sup>153</sup> *Da Penha v Brazil*, para. 63; *Gonzales v US*, para. 216.

<sup>154</sup> *Cantu v Mexico*, para. 287; *Ortega v Mexico*, para. 300; *Miguel Castro Castro Prison v Peru*, paras. 457-458, 469, operative para. 24.

<sup>155</sup> *Ortega v Mexico*, operative para. 26.

<sup>156</sup> *Miguel Castro Castro Prison v Peru*, para. 459.

<sup>157</sup> *ibid.*, para. 463.

<sup>158</sup> *Cantu v Mexico*, operative para. 25; *Ortega v Mexico*, operative para. 26.

<sup>159</sup> American Convention on Human Rights, art. 63(1).

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

146. Article 68(1) proceeds to also provide that:

The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.<sup>160</sup>

147. Indeed, the Court has also confirmed that its powers and obligations derive from its consistent practice, as it did in *Miguel Castro-Castro Prison v Peru*:

**In accordance with its consistent practice**, the Court reserves **the power, inherent to its attributions and derived, at the same time, from Article 65 of the Convention** to monitor compliance of the present Judgment in all its aspects. The case will be closed once the State has fully implemented [sic] all of the provisions of this Judgment...<sup>161</sup>

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<sup>160</sup> *ibid.*, art. 68(1).

<sup>161</sup> *Miguel Castro Castro Prison v Peru*, para. 469.

# D. NATIONAL JURISDICTIONS

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## THE REPUBLIC OF INDIA

### I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY JUDICIAL AND NON-JUDICIAL BODIES IN INDIA

148. Indian law responds to SGBV crimes through a patchwork of reparations and remedies based upon statutes, executive schemes and judicial orders. In any particular instance, each source provides options to the victim and informs the State's response. As an introductory remark, it would be useful to note that there is no singular source – in legislation, judicial policy or executive order – that governs this area. Rather, each possible remedy supports the other.

149. In *Gudalure M.J. Cherian v Union of India*,<sup>162</sup> the State was ordered to pay compensation of 250 000 Indian rupees to nuns raped by perpetrators who had entered a convent. The case was investigated in a perfunctory manner resulting in the loss of vital evidence. The Supreme Court ordered the government to suspend the police officers and initiate disciplinary action against them, and also directed it to pay compensation to the victims. The quantum of compensation was enhanced due to the harassment caused by the public servants (police officials) and the delay in procurement of justice.

150. In *Domestic Working Women's Forum v Union of India*,<sup>163</sup> the Indian Supreme Court laid down guidelines for the determination of the quantum of compensation in cases involving sexual violence. This is one of the key judgments that signified a turning point for the rehabilitation of rape survivors. The Court stated that the Criminal Injuries Compensation Board should take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape. Hence, the amount of compensation is to be calculated based on circumstances, and varies as per the rehabilitative needs of both

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<sup>162</sup> 1992 (1) Crimes 2 SC.

<sup>163</sup> (1995) 1 SCC 14.

the primary and secondary victims of crime. Further, the Court also held that the victim has a right to compensation awarded by the Court upon conviction of the offender, provided that it is subject to a Central Government scheme. Furthermore, that there is no reason for the denial of interim compensation, which must necessarily be provided for in the said scheme as well. It was pursuant to these guidelines that the National Commission for Women drafted the Scheme for the Rehabilitation for the Victims of Rape, 2005.

151. In the *Suo Moto Criminal Writ Petition, In Re: Indian woman says gang raped on orders of village court published in Business & Financial News of 23/01/2014*,<sup>164</sup> Chief Justice Sathasivam outlined the need for long term rehabilitation of survivors of rape. He also stated that the compensation for survivors of rape should be half of the property of the perpetrators (rapists).
152. In *Ankush Shivaji Gaikwad v. State of Maharashtra*,<sup>165</sup> the Supreme Court reiterated a shift in the focus on the victim, and reaffirmed that Section 357 of the Code of Criminal Procedure imposes a mandatory duty upon the Court to actively consider the award of compensation in each case.
153. Another instance is in *Suo Motu v State of Rajasthan*,<sup>166</sup> where the fast-track court for rape trials convicted two auto rickshaw drivers within a period of two weeks from the commission of the offence. In addition to compensation of 300 000 rupees, the victim was provided board and lodging by the State Government and all expenses during the days of trial were borne by the State.
154. Furthermore, the above judgement uses the term ‘fast-track court’ as descriptive of the nature of the court which pronounced it. In India by the order of the Central Government<sup>167</sup>, every rape trial is conducted (mostly in-camera) at a fast-track court, where evidence is taken on daily basis. The goal is to finish the trial as soon as possible which is beneficial both to the accused and the victim while maintaining the principles of natural justice and the rule of law. Considering that there are a number of barriers to access to the judicial system – including but not limited to geographical location, access to a lawyer, ability to afford the cost of litigation, time delays and multiple appearances – the introduction of fast track courts seeks to counterbalance some of the access barriers, and allow for increased access to justice. This can be

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<sup>164</sup> Available at: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41349>

<sup>165</sup> (2013) 6 SCC 770.

<sup>166</sup> RLW 2005 (2) Raj. 1385.

<sup>167</sup> Incorporated under Section 327 of the Code of Criminal Procedure, 1973.

regarded as a remedy, considering that the shortened timeframe for trials, resources saved as a consequence, and limited psychological burden that accompanies a pending trial. Absent robust and speedy trials, the issue of reparation – even if theoretically strong – becomes moot. Accordingly, Indian courts have treated the former as a necessary prerequisite of any adequate reparatory mechanism.

### **b) Non-Judicial reparations and remedies**

155. The 154<sup>th</sup> Law Commission Report on Criminal Procedure laid down recommendations for a comprehensive victim compensation scheme to be established under the Legal Services Authorities Act, 1987.<sup>168</sup> This was done to take into account special cases whilst compensating victims of rape, sexual assault, victims with physical and mental disabilities etc.
156. This was also reiterated by the Justice Malimath Committee on Criminal Justice Reforms in 2003,<sup>169</sup> and that the scale of compensation for different offences is to be decided through the guidance of the Court. Furthermore, the committee recommended that in terms of interim remedies, apart from compensation, psychiatric and medical help as well as protection against “secondary victimization” must be guaranteed. The Committee also recognized that victim compensation is an obligation of the State, irrespective of the acquittal or conviction of a perpetrator. Thus the provision of compensation to the victim, need not necessarily establish the guilt or innocence of the perpetrator.
157. The National Commission for Women, in its report ‘Revised Scheme for Relief and Rehabilitation of Victims of Rape’,<sup>170</sup> recommended that after a rape survivor files an application for compensation under these guidelines,<sup>171</sup> she should be awarded compensation of 2,00,000 rupees which may be increased to 3,00,000 in special cases. This takes place in instalments of 20,000 rupees each, subject to the approval by the District Relief and Rehabilitation Board. Moreover, it must be accompanied by a copy of the First Information Report that alleges rape as well as the medical report

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<sup>168</sup>Available at: <http://lawcommissionofindia.nic.in/101-169/Report154Vol1.pdf> [Last accessed 30 December 2015].

<sup>169</sup>Available at: [https://indialawyers.files.wordpress.com/2009/12/criminal\\_justice\\_system.pdf](https://indialawyers.files.wordpress.com/2009/12/criminal_justice_system.pdf) [Last accessed: 30 December 2015].

<sup>170</sup> National Commission for Women, ‘Revised Scheme for Relief and Rehabilitation of Victims of Rape’ (15 April 2010) <[http://ncw.nic.in/PDFFiles/Scheme\\_Rape\\_Victim.pdf](http://ncw.nic.in/PDFFiles/Scheme_Rape_Victim.pdf)> accessed 25 September 2015.

<sup>171</sup> First Information Report (defined under section 154 of the Code of Criminal Procedure CrPC).

that confirms it. The remaining amount has to be disbursed within one month of the victim's evidence in court or one year of the receipt of application.

158. The National Commission for Women has also recommended that the State Government set up criminal injuries compensation boards at district, State and national levels, to oversee the implementation of this scheme and to attend any complaints.

159. Furthermore, criminal injuries compensation boards have received the approval of the Ministry of Women and Child Development and been entrusted with a wide range of activities, not only relating to financial assistance but also including medical, psychological and counselling services and affording holistic protection and support to the victim.

160. As of October 2015, the government has sanctioned the Central Victim Compensation Fund scheme (CVCF) which aims to reduce the disparity that exists across states in the quantum of compensation that each State exchequer is able to provide victims of such sexual crimes. It also allows for the implementation of the Victim Compensation Scheme notified by each State under Section 357A of the Code for Criminal Procedure.

## **II. EXAMPLES OF THE REPARATIONS AND REMEDIES FORMULATED BY THE JUDICIAL AND NON-JUDICIAL BODIES IN INDIA**

161. Apart from pro-active judicial discourse on reparation, the Indian legislature has time and again enacted and amended both the substantive and procedural law, in order to satisfy the judgements of the Courts and to formulate remedies, particularly for victims of sexual and gender based crimes. Examples are included below.

### **a) Section 190 of the Code of Criminal Procedure, 1973 (CrPC)**

162. Perpetrators of SGBV violence often include members of police and other administrative services. Similarly, in India, if police refuse to record the information, the victim/informant is allowed to directly approach the magistrate with his/her complaint, who can then take cognisance of the offence. The availability and use of this alternate route by the victim/complainant acts as a complaint mechanism against

those officials who are not discharging their duty according to the prescribed police rules and procedures, and acts as a check on the police system.

**b) Section 357 of the Code of Criminal Procedure,1973 (CrPC)**

163. This provision enables a sentencing court to order a payment of compensation out of the fine recovered from the accused, to a person for any loss or injury caused to him by the offence. However, the quantum of compensation within this provision is limited to the fine levied. It is not available in addition to or in excess of the fine imposed. Furthermore, compensation to victims can be awarded only when a substantive sentence is imposed and not in cases of acquittal.

**c) Section 357A of the Code of Criminal Procedure, 1973 (CrPC)**

164. This provision incorporates the ‘victim compensation scheme’, and was adopted with the 2009 amendment. This provision mandates States to prepare a scheme for providing funds for the purpose of compensation to the victims or their kin who have suffered loss or injury as a result of a crime and require rehabilitation.

165. Disbursement of compensation is to be made on orders of the court, when it is of the opinion that the compensation awarded under section 357 is not adequate or, in cases of discharge or acquittal of the accused, where the victim has to be rehabilitated. A victim is also entitled under the provision to maintain an application in cases where the offender is not traceable or identifiable etc.

166. The district and State legal service authority shall thereupon award adequate compensation to the victim. The section has widened the scope of the authority to do further acts in order to alleviate the suffering of the victim which includes proper medical services.<sup>172</sup>

**d) Section 357C of the Code of Criminal Procedure, 1973 (CrPC)**

167. Section 357C of the Code of Criminal Procedure was changed for the better by the Amendment Act 2013. The section states that “all hospitals, public or private, whether run by the central government, the State government, local bodies or any other person shall, immediately provide the first-aid or medical treatment, free of cost, to the victims” of particular offences [under the Indian Penal Code 1860], and

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<sup>172</sup> Dipa Dube & Bhagwan R Gawali, ‘Reparative Justice for Rape Victims in India’ (2012) *International Journal of Advanced Research in Management and Social Sciences*, 257.

must “immediately report and inform the police of such incident”. The offences referred to are covered under s 326A (punishment for acid throwing); s 376 IPC (punishment for rape); s 376A IPC (punishment for causing death or resulting in persistent vegetative state of the victim); s 376B IPC (sexual intercourse by husband upon his wife during separation); s 376C IPC (sexual intercourse by person in authority); s 376D (gang rape); and s 376E (punishment for repeat offenders).

168. This provision is an attempt to expedite the availability of first aid services to such victims, which is otherwise a costly affair, especially in the cases involving acid attacks/vitriolage.

### **III. IMPLEMENTATION OF THE AWARDED REPARATIONS OR REMEDIES IN INDIA**

169. For the implementation of court orders, the Contempt of Courts Act 1971 applies. An application can be moved before the same court in case of non-compliance. This act is a penal statute and attracts both imprisonment and a fine.

170. With an offence such as rape, there is a clear constitutional violation of Articles 14, 19 and 21 (the right to equality before law and equal protection before laws; the right to freedom and the right to life and personal liberty respectively), and thus this would also entitle the victim to claim compensation from the State for being unable to provide a safe space for women. The Justice Verma Committee Report on Amendments to Criminal Law<sup>173</sup> also provides certain recommendations as to the inclusion of acid attacks, gang rape and other such offences within the ambit of compensation.

171. In terms of implementation of judicial remedies, there was a public interest litigation presented to the Rajasthan High Court re the rape of 392 minor girls.<sup>174</sup> Out of that number, 377 girls were not provided relief or assistance from the State relief fund. According to the petition, all the girls who were similarly treated must be entitled to the same amount of compensation. It is a clear case of arbitrariness and discrimination in the implementation of the remedy since two of the girls received disproportionate media attention and were hence provided with more compensation.

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<sup>173</sup>Available at:

<http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> [Last accessed 30 December 2015].

<sup>174</sup>State of Rajasthan and others v. Sanyam Lodha, 2011 Indlaw SC 677.

The Court held that the individual needs of each of the victims must be looked at individually, however stated that equality of proportion of compensation cannot be claimed as a matter of right. This is problematic as it would necessarily negate the effect of the right to compensation if it is not effective or adequate.

# THE REPUBLIC OF IRELAND

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## I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY THE REPUBLIC OF IRELAND

172. By way of overview, reparations have been awarded to the survivors of institutional abuse in Ireland in recent years. Attention was brought to the State's collusion in the systematic abuse of women and children in religious institutions in Ireland in the 19<sup>th</sup> and 20<sup>th</sup> centuries. There have been several highly publicised policy documents produced in Ireland in recent years criticising the support of government and law officials in the running of institutions like the Magdalene laundries and industrial schools. These policy reports detailing endemic abuse and violence in the institutions generated a public outcry, and subsequently lead to several forms of reparation being awarded to survivors by the Irish government. The reports, and the reparations arising from them are summarised below.

173. The McAleese Report<sup>175</sup> documented facts of living conditions in Magdalene laundries. Physical abuse of women working in the laundries was noted in the Report. Women were placed in the Magdalen Laundries following a formal conviction by the criminal justice system of minor or petty crimes, including failure to purchase a train ticket, larceny, vagrancy, assault.<sup>176</sup> The Report also notes the *informal* placement of women in laundries by members of the Garda Síochána (the Irish police force). The Committee found cases of informal placements of girls and women by the Gardaí, which occurred without a court process. These were typically cases of temporary homelessness, or where a young girl was being introduced to prostitution.<sup>177</sup>

174. The Ryan Report<sup>178</sup> investigated child abuse in Irish institutional schools, noting the endemic nature of physical and sexual abuse, noting that “Acute and chronic contact and non-contact sexual abuse was reported, including vaginal and anal rape,

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<sup>175</sup> Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries <<http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013>> accessed 22 November 2015

<sup>176</sup> *ibid* ch 9 204.

<sup>177</sup> *ibid* 206.

<sup>178</sup> Commission to Inquire into Child Abuse <<http://www.childabusecommission.com/rpt/01-01.php>> accessed 2 March 2015.

molestation and voyeurism in both isolated assaults and on a regular basis over long periods of time [...]”.<sup>179</sup>

## II. THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES

175. Survivors of institutional abuse in Ireland can apply for remedies under two mutually exclusive schemes. These were the Residential Institutions Redress Board (RIRB) established under the Residential Institutions Redress Act, 2002,<sup>180</sup> and an Ad-Hoc Restorative Justice scheme.
176. The RIRB is an independent board chaired by Sean O’Leary, a retired Circuit Court Judge. All applications for redress are treated in confidence and all hearings by the Board are conducted in private.
177. The Ad-Hoc Restorative Justice scheme was established in the following manner. Following the official State apology issued on the 19<sup>th</sup> of February 2013, the government asked Justice John Quirke to undertake a three month review and make recommendations to the Government about the criteria for applying to the Magdalene funding schemes for payment and other forms of support. This scheme was then organised, on the basis of Justice Quirke’s recommendations, through the Restorative Justice Implementation Team in the Department of Justice and Equality.
178. The terms of reference covered by the RIRB included the survivors of industrial schools, but do not specifically address survivors of the Magdalene laundries. For example, in the Residential Institutions Redress Act, 2002, the Act is stated to provide financial awards to assist persons ‘who as children were resident in certain institutions’.<sup>181</sup> The terms of reference of the Quirke Report specifically address ‘women who were admitted to and worked in a Magdalene Laundry’.<sup>182</sup>
179. Problems that have arisen in practice with these schemes overlapping. First, it is unclear from both Reports who is entitled to apply to which scheme, or if survivors ought apply to both schemes. The RIRB advises that those who should apply for redress under the scheme include residents of industrial schools, reformatory

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<sup>179</sup> *ibid.*

<sup>180</sup> Section 2 of the Residential Institutions Redress Act, 2002.

<sup>181</sup> *ibid.*, preamble..

<sup>182</sup> The Magdalen Commission Report

<<http://www.justice.ie/en/JELR/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf/Files/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf>> accessed 10 October 2015, 1.

schools, children's homes, special hospitals or similar institutions at any time whilst under the age of 18.<sup>183</sup> The Quirke Report specifically addresses survivors of laundries or training units. The RIRB states that if you accept the award made by the Board, you must agree in writing to give up any right you may have to bring a claim for damages in the courts in respect of the abuse and injuries covered by the award. However, a guide to redress under the Restorative Justice Scheme states that survivors are eligible to apply under this scheme, even if they have received a payment from the RIRB.<sup>184</sup> This conflicts with the terms of the Residential Institutions Redress Act, 2002.

180. In addition, certain institutions changed from being classified as industrial schools, to training centres or community schools, at different intervals in time. Several residential institutions were in operation that had laundries attached to them, including St Mary's, Stanhope Street, Bethany Home, Summerhill in Wexford and Newtownforbes Industrial School. The representative group 'Magdalene Survivors Together' argued that these institutions ought be classified as laundries (therefore qualifying survivors to apply under the Ad-Hoc scheme), as no education was provided to the girls who worked there, the appearance of the laundry and uniforms the girls had to wear were similar to the specified Magdalene laundries, and the experience of the girls in these institutions was equivalent to that of the women in the laundries.<sup>185</sup>

181. There is lack of clarity surrounding the terms of reference of the exclusive schemes, namely: the RIRB and Survivor's guide containing conflicting information about the waiver of legal rights to pursue additional remedies if a claimant has already received some form of redress; the individuals entitled to apply, that is 'children', 'women', 'survivors of the Magdalene laundries'; and the titles of 'industrial school', 'laundry', 'training centre' not reflecting the overlapping nature of the institutions. This has resulted in considerable confusion over who should apply for funding under which schemes, how much survivors are entitled to, and if survivors are eligible to apply under both schemes.

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<sup>183</sup> Residential Institutions Redress Board 'Application Procedure' <<http://www.rirb.ie/application.asp>> accessed 10 October 2015.

<sup>184</sup> JFM Research 'Survivor Guide to the Magdalene Restorative Justice Scheme' <<http://magdalenelaundries.com/Survivor%20Guide%20to%20Magdalene%20Restorative%20Justice%20Scheme.pdf>> accessed 10 October 2015, 8.

<sup>185</sup> Inter-Departmental Committee Report (n 175) 19.

182. Survivors have also found problematic that, when the Restorative Justice Scheme following the Quirke Report is applied, heavy reliance is placed on official records of attendance kept by the nuns governing the laundries. Survivors often felt that the records did not accurately reflect the time spent in the laundries, and in some cases, the Order told survivors that no records had been kept, as proof of the time spent in the institution.<sup>186</sup>
183. Furthermore, relatives of deceased women do not fall within the ambit of the Restorative Justice Scheme's application.<sup>187</sup> Contrarily, under the RIRB Scheme, applications may be made on behalf of a deceased person by his/her spouse or children.<sup>188</sup>
184. The two schemes also differ in terms of the remedy awarded. This is discussed below, listed as examples of remedies offered by the RIRB and the Restorative Justice Scheme, following the recommendations of Justice Quirke.

### **III. EXAMPLES ON THE REPARATIONS AND REMEDIES FORMULATED BY THE JUDICIAL AND NON-JUDICIAL BODIES**

#### ***RIRB***

185. The RIRB states that redress will be assessed and awarded as follows: An interim award will be awarded of not more than €10,000 when the Board has made a preliminary decision that applicants are entitled to an award. This interim award will then be deducted from the final award.
186. The final award made by the Board is assessed under the following headings. First, the Board will have regard to the *severity of the abuse and injury*, with reference to the severity of the abuse suffered, physical and mental injuries, emotional and social effects of injuries, loss of employment and other opportunities (however, no redress is payable for loss of earnings as such, noting that the Board will not take account of any actuarial material presented on the applicant's behalf). Second, the Board may decide to award *additional redress*, not exceeding 20% of the original redress. Thirdly, the Board may make an award for *medical expenses* (past, present or future medical or psychiatric treatment for the effects of the injuries suffered as a result of the abuse).

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<sup>186</sup> JFM Research (n 184) 8.

<sup>187</sup> *ibid* 9.

<sup>188</sup> Application Form for Redress on Behalf of Injured Person who has Died Since 11 May 1999 <<http://www.rirb.ie/documents/RIRB-Application-Form-Deceased.pdf>> accessed 10 October 2015.

Lastly, the Board may make an award for *any other costs and expenses* reasonably incurred in any application for redress (including legal representation).

187. Redress awards are normally paid in one lump sum, by means of a cheque or by payment into a bank account. The application process for redress under the scheme takes the following format:

If the Board is satisfied you are entitled to redress, it may make an offer in settlement of your application, which you are free to accept or reject. If applicants accept the settlement offer, no further proceedings are necessary. If applicants choose to reject the settlement offer, the application proceeds to a hearing by the Board. This hearing is conducted by a panel consisting of two or three members of the Board. The hearing enables the applicant or the Board to call witnesses to give oral evidence and to question other witnesses. Notably, any person named in the application as responsible for the abuse suffered, and the representative of the institutions in which the abuse took place, may also take part in the hearing. All hearings are held in private and are not open to the public or the media. In exceptional circumstances, the Board may allow, at the applicant's request, a close relative or another appropriate person to be present at the hearing of your application.<sup>189</sup>

188. The remedies for applicants eligible under the Restorative Justice scheme differ to the remedies awarded under the Residential Institutions Redress Act, 2002. Before noting the specific remedies available under the Restorative Justice scheme following Justice Quirke's recommendations, and administered by the Department of Justice, it is worth noting the sequence of events prior to the Quirke Report, in terms of remedies.

### *State Apology*

189. Following Senator Martin McAleese's Report (McAleese Report) which found that the State was directly and fundamentally involved in the Magdalene laundry institutions, a *State apology* was made to the survivors of such institutions by the Taoiseach (Head of State) in the Dáil (Parliament).<sup>190</sup> This was welcomed by 'Justice for Magdalenes' (JFM), a survivor advocacy group who had lobbied a ten-year campaign to bring about (i) an official apology from the Irish State and Catholic Church; and (ii) the establishment of a distinct compensation scheme for all

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<sup>189</sup> Residential Institutions Redress Board 'Application Procedure' (n 183).

<sup>190</sup> Taoiseach of Ireland 'Full speech of Taoiseach's apology to survivors of the Magdalene laundries (*RTE News*, 19 February 2013) <<http://www.rte.ie/news/player/2013/0219/3489751-full-speech-of-taoiseachs-apology-to-survivors-of-the-magdalene-laundries/>> accessed 2 March 2015.

Magdalene survivors.<sup>191</sup> JFM arranged for a group of surviving women, their children and family members to sit in the public gallery of the Dáil to hear the State apology.

190. Following the official State apology, the government asked Justice John Quirke to undertake a three month review to make recommendations to the government about the criteria for applying to the Magdalen fund for payments and other supports.

### *Restorative Justice Scheme*

191. The specific remedies made available to applicants under the Quirke Report (administered by the Restorative Justice Scheme, Department of Justice) include the following:

#### *An enhanced medical card (“HAA card”)*

192. The services available under the HAA card, listed in detail under Appendix G of Justice Quirke’s Report, include:

GP services, Prescriptions, Dental Services, Ophthalmic services (e.g. eye glasses), Aural services (e.g. hearing aids), Aids and appliances (e.g. walking sticks, wheel chairs, shower rails/seats), Home support (e.g. for household chores, cooking and cleaning), Home nursing, Counselling, Chiropody/podiatry, Physiotherapy, Complementary therapies (e.g. massage, reflexology, acupuncture, aromatherapy, hydrotherapy)

#### *State pension*

193. Under the scheme, applicants are entitled to a State pension (contributory), in recognition of the fact that applicants have worked within, and arguably for, the State for a period of time. Applicants will receive €230 a week. It will not be affected by other payments, and it is tax free. If applicants are already receiving another pension (e.g. the Widow’s Pension), it will be topped up to the maximum level of €230 a week.

194. If you are not old enough to receive the pension (age 66), applicants will receive €100 per week until reaching pension age, when they will receive the full State pension. This payment is also tax free.

#### *Ex gratia payment*

195. The scheme provides an ex gratia payment to survivors, in order to express the State’s reconciliatory intent, and to recognise the work undertaken for no pay in the laundries. The amount will vary, dependent on the time spent in the laundries. Applicants who were in laundries for 3 months or less will receive a lump sum of

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<sup>191</sup> JFM Research ‘Press Releases’ <[http://www.magdalenelaundries.com/press\\_releases.htm](http://www.magdalenelaundries.com/press_releases.htm)> accessed 2 March 2015.

€11,500. Applicants who were in laundries for more than three months may receive payments of up to €100,000. The following is a rough guide to how much applicants ought to be compensated relative to the time spent in the laundry:

<b>Time in laundry</b>	<b>Approximate payment (€)</b>
6 months	14,500
1 year	20,500
1 year, 6 months	26,500
2 years	32,500
2 years, 6 months	38,500
3 years	44,500
3 years, 6 months	50,500
4 years	56,500
4 years, 6 months	62,500
5 years	68,500
5 years, 6 months	73,000
6 years	79,000
6 years, 6 months	79,000
7 years	82,000
7 years, 6 months	85,000
8 years	88,000
8 years, 6 months	91,000
9 years	94,000
9 years, 6 months	97,000
10 years	100,000

196. This ex gratia payment is tax free. The maximum amount that can be awarded to applicants is €100,000. Payments of up to €50,000 are paid in a lump sum and the remaining money is repaid on a weekly basis as ‘weekly life income’. To date, decisions have been made on 86% of applications out of 776 received so far. €18 million has been paid out to date.

*Advocate*

197. Survivors living in an institutionalised setting (eg a nursing home run by a religious order or by the State health service, the HSE) are entitled to an advocate under this scheme, to advise applicants in making decisions. If applicants are not in nursing homes but wish to have an advocate, applicants can contact the Scheme Administrator.

*Advice via the government-established Dedicated Unit*

198. This was set up to provide help and advice to survivors. This Dedicated Unit includes the following services:

- A helpline
- Assistance with housing needs
- Assistance with educational needs
- Assistance to meet with the religious orders if applicants so wish
- Assistance in meeting with other survivors
- The unit will work to set up a memorial or museum

*Free legal advice*

199. If applicants decide to avail of the Scheme, they are requested to sign a waiver that they will not pursue legal action against the State in respect of time in the laundries. Applicants are entitled to free legal advice on this matter before signing the waiver. Furthermore, complying with the waiver does not mean that applicants cannot take legal action against the religious orders.

200. In order to apply for the scheme, applicants must fill out an application form, and include the following: proof of residence, proof of identity, photocopies of records from the laundries.

201. Those eligible to apply include women who were in any of the ten Magdalene laundries, and in addition the following institutions are now recognised under the scheme: St. Mary's Training Centre, Stanhope Street, and House of Mercy Training School, Summerhill, Wexford.

202. The scheme is operated on a non-adversarial basis, therefore applicants will not be required to give evidence, and no 'hearings' will take place. No oral evidence is required in order to receive a payment, ie survivors will not have to discuss their time spent in the laundries in order to receive a payment. The only requirement is to prove that the applicant was in a laundry. Applicants in order to access records or proof of their time in the laundries must contact the religious orders to ask for their

records. If applicants do not feel that these records accurately reflect the time spent, or if the religious orders cannot provide records to applicants, applicants ought forward the letters to the Restorative Justice Implementation Team with the Department of Justice, who will further advise on how to confirm applicants worked in the laundries.

203. There is no time limit to apply for the scheme, but as noted above, relatives of deceased women are not eligible to apply to the scheme. Women who spent time in ‘mother and baby homes’ are not eligible to apply.

204. If applicants live outside of Ireland, the scheme proposes that other agreements should be made with other countries to ensure that payments under the Scheme are tax free, however it remains unclear if these agreements have been established.<sup>192</sup>

205. Notably, the Irish government has also made a payment of €250,000 to the UK based Irish Women Survivors Support Network (IWSSN) to enable them to continue to provide support, advice and assistance to women survivors of Irish institutions including women who were in Magdalen laundries.

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<sup>192</sup> JFM Research (n 184).

# THE REPUBLIC OF SOUTH AFRICA

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## I. FORMS OF REPARATIONS AND REMEDIES AWARDED BY SOUTH AFRICAN JUDICIAL AND QUASI-JUDICIAL BODIES

### a) Relevant South African constitutional norms

206. The South African Constitution, in section 12(1)(c), sets out the right ‘to be free from all forms of violence from either public or private sources’. Every person thus has the right to legal protection against interference by the State but also against violence perpetrated by other individuals.<sup>193</sup> This right has been interpreted by the Constitutional Court of South Africa to impose a positive obligation: the State is directly obliged to appropriately protect everyone from violence, including sexual violence, through laws and structures.<sup>194</sup>
207. Currently, South Africa does not have any broad State-funded reparation schemes for victims of crime, including SGBV.<sup>195</sup> This is despite the fact that the South Africa is amongs the countries with the highest incidences of sexual violence globally. The South African Law Reform Commission (a body responsible for considering legal reforms) explored the possibility of establishing a compensation fund for victims of crimes, including sexual violence. It concluded that a compensation fund is not viable, as it is unaffordable and difficult to effectively manage.<sup>196</sup> Instead, the Commission emphasised the development of victim empowerment programmes<sup>197</sup> as an alternative way of vindicating justice for victims.<sup>198</sup> The Commission did, however,

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<sup>193</sup> JS von Bonde ‘Victims of crime in international law and constitutional law: Is the state responsible for establishing restitution and state-funded compensation schemes?’ (2010) *SACJ* 198.

<sup>194</sup> *S v Baloyi and Others* [1999] ZACC 19; 2000 (2) SA 425 (CC), para 11; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC), para 44.

<sup>195</sup> Von Bonde (n 193) 192, who criticises this failure at 210: ‘By not implementing an effective system of restitution and a State-funded victim compensation scheme, South Africa frustrates the expectations of the international community and thereby its acceptance as an equal member’.

<sup>196</sup> South African Law Reform Commission (2011) *Media statement by the South African Law Reform Commission Concerning Its Investigation into Sentencing – A compensation fund for victims* <<http://www.justice.gov.za/salrc/media/2011-prj82-victim-compensation.pdf>> accessed 24 October 2015.

<sup>197</sup> South African Law Reform Commission (2004) *Project 82: Sentencing (A compensation fund for victims of crime)* <[http://www.justice.gov.za/salrc/reports/r\\_prj82-2011-victim-compensation.pdf](http://www.justice.gov.za/salrc/reports/r_prj82-2011-victim-compensation.pdf)> accessed 25 October 2015, 9.99.

<sup>198</sup> Von Bonde (n 193) 183; and South African Law Reform Commission (*ibid*) 9.114.

recommend that targeted compensatory assistance schemes be piloted, including for rape survivors.<sup>199</sup> To date, it seems that these schemes have not been piloted.

#### **b) Forums for remedies and reparations in South Africa**

208. Although victims of sexual violence generally have somewhat limited avenues for remedies and reparations, four possible routes are as follows:

- First, the Truth and Reconciliation Commission process which provided reparations to identified victims of gross human rights violations, including sexual violence.
- Second, a victim of sexual violence can claim for compensation directly from the wrongdoer, under either the criminal or civil law.
- Third, the South African law of delict has been developed by the courts to recognise claims against the State for its failure to protect individuals from sexual violence, including by its systematic failures as well as when the violence is perpetrated by State officials.
- Fourth, compensatory orders made by the International Criminal Court can be enforced in South Africa.

209. These are discussed below:

##### *a) Reparations under the Truth and Reconciliation Commission process*

210. The Truth and Reconciliation Commission (“TRC”) was established to investigate gross violations of human rights during and under apartheid, and grant amnesty to those who made full disclosure of acts associated with political objectives. Although the Promotion of National Unity and Reconciliation Act<sup>200</sup> insulated persons granted amnesty from criminal and civil liability – thereby barring direct (and vicarious) claims for compensation from wrongdoers<sup>201</sup> – it did provide for the possibility of victims claiming reparation, defined as ‘any form of compensation, *ex gratia* payment, restitution, rehabilitation or recognition’.<sup>202</sup>

211. A Committee on Reparation and Rehabilitation was tasked with making recommendations regarding reparations, with the South African Parliament and the President then mandated to make regulations for grants to victims. In the interim period before this reparation system was in place, the TRC instituted urgent

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<sup>199</sup> *ibid.* 9.2.1.

<sup>200</sup> 34 of 1995 (‘The TRC Act’).

<sup>201</sup> *ibid.*, s 20.

<sup>202</sup> *ibid.*, s 1(1)(xix).

reparations (for sums between R2500 – R7500), and some victims of sexual violence applied for urgent medical treatment as a form of an interim measure.<sup>203</sup>

212. Almost 10 years after the end of apartheid, and five years after the TRC's report was filed, the Reparation to Victims Regulations<sup>204</sup> were passed as regulations under the TRC Act. They provide that an identified victim of a gross violation of human rights is entitled to a once-off grant of R30 000 as final reparation (a sum which was below what the Committee on Reparations had recommended).<sup>205</sup> While the Regulations themselves govern monetary compensation only, the Reparation and Rehabilitation Committee recommended other forms of reparation, including symbolic forms, and community rehabilitation programmes. Although sexual violence was not specifically listed as a gross violation of human rights, a gender lobby group argued that SGBV violence can constitute torture and severe ill-treatment (and so fall within the ambit of a gross human-rights violation or an associated act). In principle, then, the Regulations allowed for women who had been victims of sexual violence, undertaken as part of a political objective, to seek reparations.

213. In reality, however, there was dire absence of testimony to the TRC from SGBV victims in part, commentators argue, because of the TRC's central requirement of truth telling, which was onerous for victims who may not have felt ready to discuss their experiences of sexual violence.<sup>206</sup> As a result, only 140 incidences of rape were reported (in total, the TRC heard over 21 000 statements concerning nearly 38 000 allegations of human-rights violations).<sup>207</sup> This absence was notwithstanding the establishment of special women's hearings,<sup>208</sup> and the TRC's conclusion that women had 'suffered direct gross violations of human rights, many of which were gender specific in their exploitative and humiliating nature'.<sup>209</sup> The TRC, therefore, had

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<sup>203</sup> K Braig 'The individual right to reparation for victims of sexual violence during armed conflict in international law – theory and practice' (LLM thesis, University of Cape Town) <[www.publiclaw.uct.ac.za/usr/public\\_law/LLMPapers/braig.pdf](http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/braig.pdf)> accessed 24 October 2015, 84.

<sup>204</sup> GN R1660 in *Government Gazette* 25695 of 12 November 2003.

<sup>205</sup> H Scanlon and K Muddell 'Gender and transitional justice in Africa: Progress and prospects' (2009) 9 (20) *African Journal on Conflict Resolution*, 20.

<sup>206</sup> B Goldblatt 'Evaluating the Gender Content of Reparations: Lessons from South Africa' in R Rubio-Marín (ed) *What Happened to the Women?* (Social Science Research Council 2006), 80.

<sup>207</sup> B Goldblatt and S Meintjies 'Dealing with the Aftermath: Sexual Violence and the Truth and Reconciliation Commission' (1997) *Agenda* 36; A Kusafuka 'Truth commissions and gender: A South African case study' (2009) *Accord* 47.

<sup>208</sup> Goldblatt and Meintjies (*ibid*) 8.

<sup>209</sup> South African Truth and Reconciliation Commission *Final Report* (1998) 5 (6) 256.

serious shortcomings as a scheme for providing reparations for victims of sexual violence.<sup>210</sup>

*b) Compensation from the wrongdoer*

214. SGBV victims can seek compensation from the offender, either within criminal or civil law. The Criminal Procedure Act provides that, once the accused has been convicted, the complainant can request that the prosecutor apply for a compensation order against the accused to vindicate restorative justice aims.<sup>211</sup> These provisions are used only sparingly, however, and the court's discretion to award compensation is contingent on the sentence being postponed or suspended, and not susceptible to minimum punishment provisions.<sup>212</sup> Further, this form of compensation is not in any way a State-funded reparation scheme – only a mechanism for the victim of sexual violence to claim compensation. Additionally, a victim may also sue the wrongdoer in the civil law of delict for compensation.

*c) Claims against the State in the law of delict*

215. Although South Africa does not have express and specific legislation that provides for reparations for SGBV victims in particular, the courts have recognised that the State has a general duty to protect everyone from these crimes, and can be held liable in the law of delict (i.e. the law of tort) if it fails to do so. A delict is conduct (either an act or an omission) which culpably and wrongfully causes harm to another. Although delicts are private-law actions, actions have been developed to hold both individual wrongdoers and the State liable for sexual violence. SGBV victims can, therefore, receive compensation within this area of law.

216. The critical South African case that established the principle that the State can be liable for its part in protecting women from sexual violence is *Carmichele*.<sup>213</sup> After being attacked by a man who had recently been released from prison on bail, the complainant, Ms Carmichele, sued the State for failing to protect her from sexual violence. Her assailant had been imprisoned on accusations of rape and murder and

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<sup>210</sup> Given criticism of the South African TRC for failing to be sufficiently gender sensitive in its processes, the Sierra Leonean Truth and Reconciliation Commission (supported by the United Nations Development Fund for Women) set up its processes to pay particular attention to women's and children's experiences during the conflict – see Scanlon and Muddell (n 205) 12.

<sup>211</sup> Criminal Procedure Act 51 of 1977, s 297; *Seedat v S* [2015] 3 All SA 93 (GP).

<sup>212</sup> B Greenbaum 'Compensation for victims of sexual violence in South Africa' (PhD Thesis, University of Cape Town 2013) <[http://uctscholar.uct.ac.za/PDF/166039\\_Greenbaum\\_Braynt.pdf](http://uctscholar.uct.ac.za/PDF/166039_Greenbaum_Braynt.pdf)> accessed on 24 October 2015, 3.

<sup>213</sup> *Carmichele* (n 194).

had a history of violence against women, but the investigating officer and prosecutor failed to oppose his bail on this basis. Ms Carmichele argued that the State officials were thus liable to her for breach of its duty to protect her.

217. The Constitutional Court agreed, and developed the common law by finding that the State is obliged to protect individuals not only from acts taken by the State's own agents, but also from other individuals. Where there are systematic failures to fulfil this duty, liability can be imposed:

Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women. . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. The police is one of the primary agencies of the State responsible for the protection of the public in general and women and children in particular against the invasion of their fundamental rights by perpetrators of violent crime.<sup>214</sup>

218. The State has also been held vicariously liable for sexual violence perpetrated by its employees. In *K v Minister of Security and Security*,<sup>215</sup> a woman had been raped by three police officers who were on-duty at the time, and had offered her a lift home. The Constitutional Court held that the police officers not only committed a crime themselves, but also failed to fulfil their constitutional duty to protect Ms K. These wrongs, the Court held, grounded the State's vicarious liability. And in *F v Minister of Safety and Security and Another*, the Constitutional Court upheld this principle, finding that the State was liable to compensate a victim of a rape by a police officer, even though the police officer was not on duty at the time. It was enough, the Court found, that the police service, the State's most important agent against crime, is clothed with authority; if the wrongdoer's position of employment as a police officer secured the trust of the vulnerable victim, the State can be held vicariously liable for the conduct.<sup>216</sup>

219. The law of delict, then, provides one way to seek compensation for sexual violence (although, given the nature of the area of the law and the way that the claim was framed, no other form of 'reparations', including possible disciplinary measures, are typically ordered). However, delictual claims have a number of potential drawbacks. First, claims in delict generally prescribe three years after the wrongful conduct was

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<sup>214</sup> *ibid*, para 62 (footnotes omitted).

<sup>215</sup> *K v Minister of Safety and Security* [2005] ZACC 8; 2005 BCLR 835 (CC).

<sup>216</sup> *F v Minister of Safety and Security and Another* [2011] ZACC 37; 2012 (1) SA 536 (CC) para 66.

committed.<sup>217</sup> Second, such claims are typically individualised rather than systemic, and so fall short when it comes to addressing broad-scale claims for reparations. This need not be absolute, however; in South Africa, progressive rules governing class action suits could in principle be used for a class of victims to claim from the government for its failure to protect them from sexual violence.<sup>218</sup>

*d) Obligations stemming from international law*

220. Finally, reparations awarded internationally can be enforced domestically. The Implementation of the Rome Statute of the International Criminal Court Act<sup>219</sup> provides, in section 25, that compensatory orders of the International Criminal Court can be registered with the appropriate court in South Africa, and has the effect of a civil judgment.

## II. EXAMPLES OF REPARATIONS AND REMEDIES FORMULATED BY SOUTH AFRICAN JUDICIAL AND NON-JUDICIAL BODIES

221. Courts have broad remedial powers under section 172 of the South African Constitution to make any order that is just and equitable. In principle and exceptionally, direct constitutional damages could be claimed.<sup>220</sup> However, typically courts use existing common law mechanisms to order compensation. In the delictual cases discussed above, for example, courts have used the remedial processes within the common law to award compensation to SGBV victims.

222. Finally, courts could in theory issue structural interdicts, requiring the State to take obligatory steps to fulfil its obligations, and relying on the courts' own supervisory jurisdiction to monitor compliance with these orders.<sup>221</sup> In areas unrelated to SGBV, the Constitutional Court has, for example, ordered State departments to report back to it so that it can ensure that they comply with their obligations to, for example,

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<sup>217</sup> Prescription Act 68 of 1969.

<sup>218</sup> On South Africa's permissive rules regarding standing and class actions, see *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC).

<sup>219</sup> Act 27 of 2002.

<sup>220</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786.

<sup>221</sup> *C Mbazira Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (PULP 2009) 173; *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC) is one Constitutional Court example.

enable prisoners to register to vote; pay successful parties to court proceedings; and report back on tender processes.

### III. THE IMPLEMENTATION OF THE AWARDED REPARATIONS AND REMEDIES

223. It is difficult to comment on implementation of remedies as a whole, in the absence of a broad State-funded scheme for reparation. The delictual remedies ordered by courts in the cases discussed earlier would have been enforced by the individual claimants.

224. Reparations under the TRC process have been vexed. Reparations under the TRC was a voluntary process; victims had to choose to come forward. Although most of those who were listed as victims by the TRC did apply for reparations, implementation has been a serious concern. This is because, as Borer points out, although the reparation scheme was gender neutral in theory, in outcomes it had an adverse impact on women.<sup>222</sup> To receive reparations, victims were required to have access to a bank account. This requirement disproportionately affected women, barring their receipt of reparations. Finally, other non-financial forms of reparations were not seriously pursued by the South African government as part of the process of transitional justice.<sup>223</sup>

### CONCLUSION

225. In sum, South Africa only has a limited systematic scheme for State-funded reparations for victims of sexual violence. The Truth and Reconciliation Commission established reparations for gross human-rights violations, which included sexual violence. Because the process was insufficiently sensitive to the gender dimensions, however, very few SGBV victims claimed for reparations. There is no legislation governing broad scale compensatory schemes, and the South African Law Reform Commission has recommended against such schemes (although it did suggest a pilot scheme to provide compensation to victims of sexual violence). Victims can pursue compensation directly from the offender. Finally, developments in the South African law of delict have sustained claims against the State when it has failed to protect

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<sup>222</sup> TA Borer 'Gendered War and Gendered Peace: Truth Commissions and Postconflict Gender Violence: Lessons from South Africa' (2009) 20 (10) *Violence against Women* 16.

<sup>223</sup> Goldblatt (n 206) 74.

individuals from violence, including when State officials themselves perpetrate SGBV.

# THE UNITED KINGDOM OF GREAT BRITIAN AND NORTHERN IRELAND

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## I. FORMS OF REPARATIONS AND REMEDIES AWARDED IN THE UNITED KINGDOM

226. The primary form of reparation awarded to victims of SGBV is compensation, whether through the State-funded compensation scheme, the law of tort, or theoretically as part of the sentencing of the individual convicted. Alternative forms of reparation may occur through referral order panels with regards to young offenders; yet the frequency of this process occurring in the case of SGBV would depend on the particular circumstances of the case.

### a) Compensation

227. A State-funded compensation framework was established in England, Wales and Scotland<sup>224</sup> by virtue of the Criminal Injuries Compensation Scheme 2012 pursuant to the Criminal Injuries Compensation Act 1995, the third revision of the scheme under the 1995 Act (previously in 2001 and 2008). Under the 2012 Scheme, a person is eligible for compensation if ‘they sustain a criminal injury which is directly attributable to their being a direct victim of a crime of violence’.<sup>225</sup> Alternatively, a person is eligible for compensation if ‘they sustain a criminal injury...which is directly attributable to being present at and witnessing an incident, or the immediate aftermath of an incident, as a result of which a loved one sustained a criminal injury’.<sup>226</sup>

228. The types of payments include the following: injury payments, loss of earnings payments, special expenses payments, bereavement payments, child’s payments, dependency payments, funeral payments, and certain other payments in fatal cases.<sup>227</sup> In order to prove loss of earnings, the 2012 Scheme sets out two conditions. First, “as a direct result of the injury for which the applicant is eligible for an injury

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<sup>224</sup> Criminal Injuries Compensation Act 1995, s 13(2).

<sup>225</sup> Criminal Injuries Compensation Scheme 2012, s 4; see J Miers, ‘Compensating deserving victims of violent crime: the Criminal Injuries Compensation Scheme 2012’ (2014) 34(2) *Legal Studies* 242.

<sup>226</sup> Criminal Injuries Compensation Scheme 2012, s 6.

<sup>227</sup> *ibid.* s 30.

payment they have no or very limited capacity for paid work.”<sup>228</sup> Second, that the applicant “was in paid work on the date of the incident giving rise to the injury, or, in the case of a series of incidents, at any time during the series”, “had been in regular paid work for a period of at least three years immediately before the date of the incident giving rise to the injury”, *or* “had a good reason for not having been in regular paid work for the period” of at least three years immediately prior to the incident.<sup>229</sup> Of particular concern in relation to SGBV is that an individual who suffers from mental injury resulting from sexual assault is entitled to the highest injury payment under the tariff which follows from either the sexual assault *or* the mental injury.<sup>230</sup> To prove mental injury, it must be demonstrated that the mental injury was either a disabling mental injury or a permanent mental injury; “temporary mental anxiety and similar temporary conditions” are not covered. To prove a disabling mental injury, the injury must have “a substantial adverse effect on a person’s ability to carry out normal day-to-day activities” for different time specifications, the shortest lasting six weeks or more up to twenty-eight weeks and the longest lasting five years or more but not permanent. This must be confirmed by “diagnosis or prognosis of [a] psychiatrist or clinical psychologist.” A permanent mental injury must prove that the injury is permanent and must also be “confirmed by diagnosis or prognosis of [a] psychiatrist or clinical psychologist.”<sup>231</sup> The 2012 Scheme is administered by the Criminal Injuries Compensation Authority<sup>232</sup>; appeals against decisions taken on reviews under the Scheme are taken to the First-tier Tribunal.<sup>233</sup>

229. In Northern Ireland, there also exists a State-funded tariff based compensation scheme. The Criminal Injuries Compensation (Northern Ireland) Order 2002 came into force on 1 May 2002, and established the Northern Ireland Injuries Compensation Scheme 2002 to award compensation for criminal injuries suffered between 1 May 2009 and 31 March 2009. The Northern Ireland Criminal Injuries Compensation Scheme 2009 awards compensation for criminal injuries suffered on or after 1 April 2009. The types of compensation under the 2009 Scheme include compensation according to the nature of injury, loss of earnings, special expenses, or

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<sup>228</sup> *ibid.* s 43(1).

<sup>229</sup> *ibid.* s 43(2).

<sup>230</sup> *ibid.* s 34.

<sup>231</sup> *ibid.* Table of Injuries Part A.

<sup>232</sup> *ibid.* s 135.

<sup>233</sup> Criminal Injuries Compensation Act 1995 (n 1), s 5.

bereavement support payments.<sup>234</sup> In order to prove loss of earnings, the applicant must have “lost earnings or earning capacity for longer than twenty-eight weeks as a direct consequence of the injury”.<sup>235</sup> However, “no compensation in respect of loss of earnings or earning capacity will be payable for the first twenty-eight weeks of loss.”<sup>236</sup> ‘Earnings’ will include “any profit or gain payable in respect of an office or employment (including salary, benefits in kind, pensions benefits (whether or not paid as a lump sum), redundancy payments and other severance payments) and will be calculated net of tax, national insurance and pension contributions.”<sup>237</sup> Significantly, injuries from sexual offences between 11 June 1968 and 30 April 2002 where the victim was under 18 at the time of the offence, may be considered under the 2009 Scheme if they would have failed due to the stated time limit in previous legislation.<sup>238</sup> Under the Scheme, mental injury constitutes a disabling mental illness and must be confirmed by psychiatric diagnosis.<sup>239</sup>

230. Alternatively, a victim may sue in tort law for a breach of a duty of care, assault or battery. By extension, greater compensation may be available through vicarious liability if there is an employee-employer relationship or one akin to such, and the existence of a close connection between the tort and the employee’s duties.<sup>240</sup> This may apply if the employer is the State; for instance, the chief constable of the police may be vicariously liable for the crimes committed by a police officer, however this will depend on how closely connected the employment duties are with the crimes committed, and thus whether it is fair and just to hold the State vicariously liable.<sup>241</sup>

231. In England and Wales, by virtue of section 130 of the Powers of Criminal Courts (Sentencing) Act 2000, the court can also issue a ‘compensation order’ in determining the sentence of the convicted person, ordering them ‘to pay compensation for any personal injury, loss or damage resulting from that offence’<sup>242</sup> or ‘to make payments for funeral expenses or bereavement’ with exceptions.<sup>243</sup> In doing so, the court must have regard to the means of the convicted person.<sup>244</sup> However, it does not seem that

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<sup>234</sup> Northern Ireland Criminal Injuries Compensation Scheme 2009, s 24.

<sup>235</sup> *ibid.* s 24(b).

<sup>236</sup> *ibid.* s 31(1).

<sup>237</sup> *ibid.* s 31(3).

<sup>238</sup> *ibid.* s 86.

<sup>239</sup> *ibid.* s 10.

<sup>240</sup> *Lister v Hesley Hall Ltd* [2001] UKHL 22; [2002] 1 A.C. 215.

<sup>241</sup> *N v Chief Constable of Merseyside* [2006] EWHC 3041 (QB).

<sup>242</sup> Powers of Criminal Courts (Sentencing) Act 2000, s 130(1)(a).

<sup>243</sup> *ibid.* s 130(1)(b).

<sup>244</sup> *ibid.* s 130(11).

there has been a case where the court has issued a compensation order in relation to SGBV.

**b) Other forms of reparations: restorative justice and young offenders (under 18)**

232. Although compensation is the primary means of reparation, in some circumstances restorative justice may be used with young offenders in England and Wales (under the age of 18 at the time of the offence) through ‘referral orders’ pursuant to section 16 of the Powers of Criminal Courts (Sentencing) Act 2000. Importantly, this will only apply if ‘neither the offence nor any connected offence is one for which the sentence is fixed by law’.<sup>245</sup> Thus, in relation to SGBV, the use of referral orders will depend on the particular offence and the existence or lack of a fixed sentence for *young* offenders. If the young offender is given a referral order, they will have to attend a meeting with a panel at which time they will agree on a contract which will be signed at this meeting.<sup>246</sup> This contract may include a meeting with the victim, a letter of apology to the victim, or/and community service which may or may not have direct applicability to the victim depending on the circumstances, wishes of the victim, and safety considerations.

233. However, this method of reparation may be inappropriate in many circumstances pertaining to SGBV and the implications of such a process need to be considered<sup>247</sup> despite views that restorative justice will offer a form of meaningful reparation lacking in the criminal justice system.<sup>248</sup> Victims of SGBV, through the process of restorative justice, may risk re-victimisation, and thus their level of fear of the offender may be affected by the process in a possibly negative manner.<sup>249</sup> In this regard, Strang has recognised that for some victims “restorative justice was a negative experience that did not improve their situation and may have made it worse”.<sup>250</sup> Additionally, it is worth considering the gendered nature of processes surrounding restorative justice, such as the likelihood of acceptance of apologies and thus

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<sup>245</sup> *ibid.* s 16(1)(a).

<sup>246</sup> *ibid.* s 23.

<sup>247</sup> A Cossins, ‘Restorative Justice and Child Sex Offences’ (2008) 48(3) *British Journal of Criminology* 359, 363.

<sup>248</sup> *ibid.* 359.

<sup>249</sup> *ibid.* 363.

<sup>250</sup> H Strang et al, ‘Victim evaluations of face-to-face restorative justice conferences: A quasi-experimental analysis’ (2006) 62(2) *Journal of Social Issues* 281, 303.

whether these alternative processes provide meaningful alternative reparation to compensation.<sup>251</sup>

## II. EXAMPLES OF HOW REPARATIONS AND REMEDIES WERE FORMULATED BY UNITED KINGDOM JUDICIAL AND QUASI-JUDICIAL BODIES

### a) Judicial bodies

234. In *AT v Dulghieru*, the four claimants claimed compensation to the Criminal Injuries Compensation Authority for their injuries as a result of their unlawful imprisonment and sexual exploitation over a period of one or two months.<sup>252</sup> The Court accorded damages for the loss of amenity, pain, suffering, and aggravated damages due to the injury of their feelings of dignity and pride. It was held that in awarding compensation, some differentiation should be made according to the time period for which each claimant had been exposed to the exploitation, but importantly the time difference was *not* to be treated mathematically.

235. *A v N* regarded a case concerning a claim in tort for a course of sexual abuse spanning from when the claimant was seven to when she was thirty.<sup>253</sup> The Court in this case held that it was necessary to draw a line within the continuity of the sexual abuse as the nature of the tortious act changed after the claimant became a legal adult (after the age of 18). The division of the act of sexual abuse thus had an effect on the compensation awarded. *E v English Province of our Lady of Charity* concerned the sexual abuse and rape of a child by a Roman Catholic parish priest and whether there was sufficiently close relationship between the priest and the bishop/Roman Catholic Church to make it one akin to employment and thus fair and just to hold the diocese vicariously liable for the acts of the priest, requiring payment of compensation to the victim.<sup>254</sup> Although the relationship between the priest and the church was not exactly one of employee-employer, it was held that the priest was more like an employee than an independent contractor due to the control that the church had over priest and the integrated nature of the priest's duties in the affairs of the church. Thus vicarious

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<sup>251</sup> Cossins, (n 24) 371; see J Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice' (2007) 7 *Criminology and Criminal Justice* 169.

<sup>252</sup> *AT v Dulghieru* [2009] EWHC 225 (QB).

<sup>253</sup> *A v N* [2015] CSIH 26; 2015 S.L.T. 289.

<sup>254</sup> *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938.

liability extends beyond a purely employee-employer relationship, giving victims of SGBV possibly greater possibilities for greater compensation.

236. With regards to limitation periods, in *A v Hoare*, the then House of Lords held that even if the three year limitation period has passed, a victim of historic abuse/assault is able to make a claim for abuse compensation in civil law. This was achieved by using section 14 of the Limitation Act 1980 regarding the definition of the date of knowledge of the ability to bring a claim to construe section 33 regarding judicial discretion and limitation so as to allow for consideration of the influence of sexual abuse, and SGBV more generally, on a victim's ability to bring a claim.<sup>255</sup> This was and is essential for ensuring victims of SGBV are able to effectively claim reparations in the form of compensation.

#### **b) Quasi-judicial**

237. As stated above, the Criminal Injuries Compensation Authority is the 'quasi-judicial' body that administers the Criminal Injuries Compensation Scheme 2012. The Criminal Injuries Compensation Authority have, in exceptional circumstances related to SGBV, been willing to disregard requirements to obtain compensation if the reason of non-fulfilment is related to the harm suffered. In *Re L (CICB: Quantum: 1999)*, the claimant was a victim of rape but had not reported the incident to the police until she was approached by the police two years later who were investigating other offences similar to that of the claimant. Although failing to report to the police was a condition of compensation, due to the extremely violent behaviour of the assailant and the fact that his threats had contributed to her failure to report, the Authority did not reduce the amount of compensation granted and awarded her 7 500 GBP.<sup>256</sup> It should be noted that this decision was under the Criminal Injuries Compensation Act 1995, but prior to the current secondary legislation in force, the 2012 Scheme. However, the willingness of the Criminal Injuries Compensation Authority to award compensation in such circumstances remains relevant to the ability of victims of SGBV to obtain compensation when they have not perfectly fulfilled all the requirements provided for in the Scheme due to the injury faced.

238. The Criminal Injuries Compensation Authority has also awarded compensation for psychiatric harm. For example, in the case of *Re P*, compensation of 17 500 GBP was awarded not only for the personal injuries but also for the post-traumatic stress,

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<sup>255</sup> *A v Hoare* [2008] UKHL 6; [2008] 1 A.C. 844; [2008] 2 W.L.R. 311.

<sup>256</sup> *Re L (CICB: Quantum: 1999)* [2000] C.L.Y. 1527.

including alcohol abuse, nightmares, and depressive mood swings, that resulted from sexual abuse by the claimant's stepfather for six years (from age 12 to 18).<sup>257</sup> Moreover, the Authority has awarded compensation for crimes of violence without any physical contact or injury in addition to the psychological so long as it put her in 'reasonable apprehension of immediate fear for her own safety'.<sup>258</sup> In *D v Criminal Injuries Compensation Authority* the claimant was awarded 1000 GBP; this was determined according to the harm suffered and the time for which she suffered from this harm as set out in the scheme.

### **III. IMPLEMENTATION OF AWARDED REPARATIONS AND REMEDIES**

239. It is difficult to comment on the implementation of the Criminal Justice Compensation Scheme 2012 as it is a government-funded scheme and thus is not dependent upon the payment of the offender in the particular case. With regards to young offenders and referral orders, the referral order panel may refer the young offender back to the court for various reasons such as lack of attendance at meetings or failure to fulfill the terms of the contract.<sup>259</sup> Although the court may not directly implement the remedy in the referral order contract to the victim (such as a conference or apology letter), failure of the young offender to comply with the specific terms of the contract will result in referral back to court and appropriate consequences, thus a kind of court supervision of the order.

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<sup>257</sup> *P, Re* [1997] C.L.Y. 1852.

<sup>258</sup> *D v Criminal Injuries Compensation Authority* [2010] C.L.Y. 2399.

<sup>259</sup> Powers of Criminal Courts Act 2000 Schedule 1 para 2.

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