Gender-Sensitive and Transformative Reparations in Bosnia¹

By Ashley Binetti

Hillary Rodham Clinton Law Fellow

On June 24, for the first time in the history of the Bosnian War Crimes Court, judges included compensation to a wartime rape victim as part of the Court’s ruling.² Bosiljko Marković and Ostoja Marković were ordered to pay roughly $15,000 to the woman they raped during the war.³ The Court also sentenced each man to ten years in prison. On June 29, the Court sentenced former soldier Slavko Savić to eight years in prison for raping a civilian during the war, and ordered him to pay roughly $16,500 to the survivor.⁴

Such reparations orders for survivors of wartime rape are a huge step forward in the transitional justice process following the 1992-95 Bosnian war. It is estimated that 35,000 women were raped during the conflict.⁵ Until now, Bosnian courts have encouraged victims to file claims for compensation in civil proceedings—which can be prohibitively expensive⁶ and also requires survivors to reveal their identities.⁷ Now that the War Crimes Court is willing to include reparations orders as part of its ruling, it is expected that many more women will come forward.

¹ This paper focuses on individual, rather than collective, reparations. However, most recommendations and observations included herein are applicable to both “micro and macro” reparations. See Frederiek de Vlaming, Kate Clark, “War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests.” Narratives of Justice In and Out of the Courtroom. Springer Series in Transitional Justice Volume 8, 2014, pp. 163-185.
⁵ See “Bosnian court grants wartime rape victim compensation in landmark ruling,” supra note 2.
⁶ In addition to traveling to court locations and time spent away from work and family, “victims would need a lawyer to represent them either to fulfill their rights related to compensation during criminal proceedings or through civil action and, in almost all cases, they cannot afford it, while free legal aid is not granted by the State. Notably, the referral to civil proceedings takes place even when victims express their wish to obtain compensation in the context of criminal proceedings.” “Executive Summary of the Follow-Up Report to the Special Rapporteur on Violence Against Women, Its Causes and Consequences, The Situation of Women Victims of Rape or Other Forms of Sexual Violence During the War in Bosnia and Herzegovina.” TRIAL. Nov. 2014. p. 5. Available at: http://www.tribunal.org/fileadmin/user_upload/documents/CAJ/BH/SR_Violence_Women/Executive_Summary_of_the_follow-up_Report_Violence_against_Woman.pdf.
⁷ Id. (“An additional problem is related to the referral to civil proceedings for compensation concerns victims who, during criminal proceedings, enjoyed the status of protected witness. In these cases, if they decide to start civil proceedings, they have to give up the protected status and disclose their identity, thus becoming exposed to possible threats and harassment.”).
Given the anticipated spike in reparations claims, the Court should bear in mind the international community’s consensus that effective reparations should be gender-sensitive, transformative and participatory as it proceeds in its important work. This paper traces the trajectory of reparations in the context of the United Nations Security Council’s Women, Peace and Security (WPS) Agenda, examines the importance of transformative and participatory reparations under this framework, and concludes with recommendations for the Bosnian War Crimes Court as it seeks to provide redress for wartime rape survivors.

Reparations and the Women, Peace and Security Agenda

Transitional justice encompasses a myriad of judicial and non-judicial measures to redress massive human rights abuses, including criminal prosecutions, truth commissions and reparations, as well as policy reforms. Reparations specifically seek to recognize and address both the physical and dignitary harms suffered by victims of systematic human rights violations. This tool is inherently victim-focused, and “can provide acknowledgement of their rights as equal citizens, a measure of justice, crucial resources of recovery, and contribute to transforming underlying gender inequalities in post conflict societies.” The legal right to reparations is widely recognized in international law, including the recent affirmation of a woman’s right to adequate and effective reparations in the Convention on the Elimination of Discrimination against Women General Recommendation No. 30 (2013).

Reparations may take any of the following five forms, and are usually packaged as a combination, tailored to the needs of victims given the context of the conflict: 1) Restitution; 2) Compensation (for lost opportunities; money or material benefits to make the victim “whole”); 3) Rehabilitation (medical, psychological and social services); 4) Satisfaction (whatever victims need to feel satisfied—such as apologies, commemorations, acknowledgment of the truth, etc.); and 5) Guarantees of non-repetition (including legal and policy reforms, education and training).

13 See “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross
might include combinations of monetary restitution for damages incurred, education initiatives, special medical care, formal apologies and memorials.\textsuperscript{14}

Women’s experiences during conflict first received a strong wave of attention with the advent of the Women, Peace and Security (WPS) Agenda in 2000,\textsuperscript{15} through the adoption of United Nations (UN) Security Council Resolution 1325.\textsuperscript{16} Over the years, the WPS Agenda has evolved into a body of seven comprehensive UN Security Council Resolutions: 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), and 2122 (2013).\textsuperscript{17} This agenda seeks to protect women from sexual violence, increase women’s participation in peacebuilding and foster justice for women who experience conflict-related rights abuses, such as wartime rape.\textsuperscript{18}

Notably, the United Nations Security Council (UNSC) did not officially include “reparations” in the WPS Agenda until 2013, in Resolution 2122.\textsuperscript{19} Prior to this most recent

---

\textsuperscript{14} See Guidance Note, \textit{supra} note 11 at §B. “Operational Guidance on the Consideration of Different Forms of Reparation.” (Provides examples of different forms of reparations, including guidance on determining which forms are most appropriate under different factual circumstances. For example, “...only when restitution of housing, land and property is impossible, a payment of compensation should be made to address the harm suffered to the extent which could not be covered by restitution.” \textit{Id.} at p. 16.).

\textsuperscript{15} On October 24, 2000, the UN Security Council confronted the notion that “intertwining forces of conflict and gender inequality threaten international peace and security” in its first Open Debate on Women, Peace and Security. Several months before the Open Debate, Ambassador Anwarul K. Chowdhury of Bangladesh, speaking as the then President of the Security Council, stated “the equal access and full participation of women in power structures” as well as women’s “full involvement in all efforts for the prevention and resolution of conflicts are essential for the maintenance and promotion of peace and security.” He noted, however, that women remained, “under-represented in decision-making” and still had a long journey to becoming, “empowered politically and economically, and represented adequately at all levels of decision-making ...” Funmi Olonisakin, Karen Barnes, and Eka Ikpe eds., \textit{Women, Peace and Security: Translating Policy into Practice}. Routledge: London, 2011. p. 17.


\textsuperscript{17} For an overview of the aspects of these resolutions as they relate to sexual violence in wartime, see, e.g., “Background Information on Sexual Violence used as a Tool of War.” The United Nations. \textit{Available at}: http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml. (For example, UNSCR 1325 (2000) called on Member States to increase the participation of women in the “prevention and resolution of conflicts” and in the “maintenance and promotion of peace and security.”; UNSCR 1820 (2008) called for an end to the use of acts of sexual violence against women and girls as a tactic of war and an end to impunity for perpetrators, etc.; UNSCR 1888 (2009) called for the UN Secretary General to appoint a special representative on sexual violence in conflict, etc.).

\textsuperscript{18} “Conflict-related sexual violence takes multiple forms such as, inter alia, rape, forced, pregnancy, forced sterilization, forced abortion, forced prostitution, sexual exploitation, trafficking, sexual enslavement, forced circumcision, castration, forced nudity or any other form of sexual violence of comparable gravity. Depending on the circumstances, it could constitute a war crime, a crime against humanity, genocide, torture or other gross violations of human rights.” Guidance Note, \textit{supra} note 11 at 2-3.

\textsuperscript{19} This is the first time reparations were mentioned in the context of a WPS UN Security Council Resolution. They were, however, included in the 2010 WPS Global Indicators (S/2010/498): Indicator 26(a): “percentage of benefits (monetary equivalent, estimate) from reparation programs received by women and girls.” However, even this indicator lacks a nuanced understanding of reparations. The “benefit” might be non-monetary, which is not captured by this metric.
resolution on WPS, the UNSC only tangentially mentioned reparations in UNSC Resolution 1888, when discussing redress; the primary focus of the first six WPS resolutions, with regard to “justice,” was firmly placed on accountability and rejection of amnesty provisions in peace agreements.20

Reparations Should be Participatory and Transformative

While the UNSC has not given much attention to reparations in its WPS Agenda, other UN entities, including the Secretary-General and the Special Rapporteur on Violence Against Women, have produced insightful guidance on the subject.21 The international consensus affirms that reparations are most effective when they 1) involve the participation of women and girls, and 2) seek to transform the status quo.

The UN Special Rapporteur on Violence Against Women underscored the importance of these two aspects of reparations in her 2010 Report (A/HRC/14/22).22 In terms of transformation, she noted that the violence women experience during conflict usually stems from “preexisting patterns of systematic marginalization,” and that successful reparations programs must address the underlying structural violence that contributed to such violations. In 2014, at the Global Summit to End Sexual Violence in Conflict, UN Women and the Office of the High Commissioner for Human Rights released the UN Secretary-General’s Guidance Note on Reparations for Conflict-Related Sexual Violence, which reaffirmed that “Reparations should strive to be transformative, including in design, implementation and impact.”23 This charge first appeared in the Nairobi Declaration (2007), where civil society organizations from around the world concluded that “reparation[s] must go above and beyond the immediate reason and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women’s and girl’s lives.”24 The Secretary-General has echoed this sentiment, noting, “Reparations should aim to capitalize on their potential to move societies towards increased gender equality.”25

20 The protection pillar of Resolution 1325 aims to ensure that women and girls are safe from gender-based violence in conflict zones. As with the prevention pillar, this encompasses strengthening rule of law on sexual and gender-based violence, and actively prosecuting those responsible for such crimes. In particular, the resolution stresses that Member States should not include these crimes in amnesty provisions, a trend that had been all too common in peace negotiations, and a contributing factor to their frequent failure. See UNSCR 1325, supra note 16 at op. para. 11.

21 One should note, however, that while many women’s rights activists believe that reparations provide valuable recognition and redress, others are concerned with the appropriateness of issuing reparations to survivors of sexual and gender-based violence. For more on this debate, see Mayesha Alam, Women and Transitional Justice: Progress and Persistent Challenges in Retributive and Restorative Processes. Palgrave Macmillan: New York, 2014. pp. 82-84.


23 Guidance Note, supra note 11 at 9.


25 Guidance Note, supra note 11 at 16.
The Secretary-General’s Guidance Note also helped emphasize that while the conviction of perpetrators is paramount to achieving justice and fostering accountability, this action alone does not necessarily treat the underlying causes of the violence or give victims the remedy that they might find most healing. Similarly, while monetary reparations can help restore dignitary harm and compensate victims for damages, unless reparations programs are designed to be gender-sensitive and transformative, underlying inequalities will likely remain intact. These are the same inequalities that facilitated an environment of sexual violence in the first place. As the Committee on the Elimination of Discrimination against Women reminded Member States in General Recommendation No. 30, “reparation measures should seek to transform the structural inequalities which led to the violations of women’s rights, respond to women’s specific needs and prevent their re-occurrence.”

Understanding the needs of women and girls post-conflict is essential to ensuring that transitional justice mechanisms lead to increased stability. In this way, reparations do not simply contribute to the implementation of the WPS Agenda; the WPS Agenda, ideally, facilitates more meaningful reparations orders by calling for consultations with women and girls regarding their needs and wants. The Secretary-General’s Guidance Note underscored the importance of consulting with victims to foster ownership of reparations measures, and also identified that women’s participation helps ensure that reparations “have the intended impact” and do not “exclude or marginalize any group of victims.” The Special Rapporteur’s 2010 report also highlighted that women must actively participate in reparations discussions, otherwise “initiatives are more likely to reflect men’s experience of violence and their concerns, priorities and needs regarding redress.” Furthermore, without women’s participation, “an opportunity is missed for victims to gain a sense of agency that may in itself be an important form of rehabilitation, especially when victims come to perceive themselves as actors of social change.”

### Reflections on Bosnia’s Recent Reparations Orders

At present, it is difficult to properly evaluate the aforementioned Bosnian War Crimes Court orders to assess their degree of compliance with international best practices, as the final orders have not yet been released. The information that is currently available on the

---


27 “Although it is difficult and, arguably impossible, to translate psychological trauma and physical suffering into monetary terms, compensation can help alleviate poverty and associated suffering. This may not erase the pain of past human rights abuses, but it can improve livelihoods and there is value in that, too, especially when looking to the future.” Alam, supra note 21, at 83.

28 General Recommendation No. 30, supra note 12 at para. 79.

29 Guidance Note, supra note 11 at 10 (The Guidance Note states that the UN should advocate for such inclusion of victims, and also that “domestic reparations policies and mechanisms should provide for special measures to … to encourage and facilitate victims’ participation and consultation.”).

30 Special Rapporteur’s Report, supra note 22 at para. 29.

31 Id.

32 Unfortunately, the final orders are not yet available from the Court of Bosnia and Herzegovina website. See “Cases in
Court’s website provides a brief description of the charges and the awards. As mentioned above, in the first case, defendants Bosiljko Marković and Ostojić Marković were found guilty of raping a minor during the war in Bosnia and Herzegovina while members of the Army of Republika Srpska, Kotorvaroška Brigade. The survivor “S-4” was awarded non-pecuniary damages in the amount of KM 26,500: Comprised of KM 20,000 for “mental pain caused by violation of liberty or rights of personality,” and KM 6,500 for “mental pain caused by diminished quality of life.” In the second case, defendant Slavko Savić was found guilty of raping a woman twice, impregnating her on the first occasion and then abusing her violently on the second occasion—the trauma of which resulted in a miscarriage. In both instances, the victim’s 11-year-old daughter was present and witnessed her mother being taken from their home. The Court awarded the injured party KM 30,000: Comprised of KM 16,000 for “mental pains caused by a violation of liberty or personal rights,” and KM 14,000 for “mental pains due to diminished quality of life.”

Prior to these reparations orders, the Bosnian War Crimes Court had heard 76 war crimes involving sexual violence, and not a single case resulted in a reparations award. Certainly, the recent reparations orders represent an enormous advancement in Bosnia’s recognition of women’s right to redress for wartime human rights violations—combating the familiar experience where “even on the rare occasion when the law explicitly prohibits

---

33 Awards derive from the BiH “Law on Obligations,” § V, arts. 200, 202. Available at: http://ruessmann.jura.unisb.de/BiH-Project/Data/Zakon_obliga.pdf (Art. 202: “A person who was led into a punishable intercourse or punishable debauchery by fraud, force or abuse of a relationship of submission or dependence is entitled to a fair compensation due to suffered mental pain. The same right has a person to whom was committed some other act of crime against the personal dignity and morale.”; Art. 200: “The court shall allocate a just cash compensation for suffered bodily pain, to suffered mental pain. The same right has a person to whom was committed some other act of crime against the personal dignity and morale.”; Art. 200: “The court shall allocate a just cash compensation for suffered bodily pain, to suffered mental pain. The same right has a person to whom was committed some other act of crime against the personal dignity and morale.”).

34 Roughly 15,000 USD. See “Currency Converter.” Available at: http://s420422668.onlinehome.us/.


37 Roughly 16,500 USD. See Currency Converter, supra note 34.


rape crimes, enforcement of the law has been minimal or non-existent.” However, is this more than a symbolic achievement? And how can Bosnia ensure that its reparations practices align with international best practices?

**Conclusion and Recommendations**

As Bosnia’s War Crimes Court begins to think seriously about reparations, it is essential that survivors remain at the focal point of these decisions.

**Recommendations for the Bosnian Government:**

- Continue to allow wartime rape survivors to seek reparations awards in Bosnia’s War Crimes Court. Confidentiality, which is ensured at this venue, is “essential to encourage victims to come forward, to have faith and engagement in the process, and to protect them from further harm.” Confidentiality is paramount to effective participation.

- Uphold all court orders for reparations, as a failure to do so risks deepening the wounds of the war and causing further harm to survivors.

- Provide adequate psychological support and mental health services to survivors. This will help “to ensure that [the process of testifying] is a beneficial rather than a harmful experience.”

- Consider that the pool of potential victims is broader than the women who suffered the abuse first-hand. It may also include family members who witnessed the abuse of their loved ones. For example, in the Savić case, while the Court noted, “The defendant placed a gun under the throat of the witness, which caused traumas for the witness and her child,” the child did not receive direct redress.

- Inform all survivors of rape and sexual violence about their right to seek redress from individual perpetrators, and provide victims with free legal aid so that they may participate in the justice process and realize their right to reparations under

---


41 Guidance Note, supra note 11 at 11.

42 Id. at 12.

43 Basic Principles, supra note 13 at 24. (“Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”) (emphasis added).
the law.44

- Finally, while recalling that “the symbolic power [of reparations] is to recognize that the victim is a holder of rights that will be enforced,”45 also acknowledge that reparations “should be proportional to the gravity of the violations and the harm suffered.”46 Furthermore, consider reparations measures that extend beyond monetary compensation.47

Transitional justice mechanisms, including reparations, are meant to empower survivors and pave the way for a stable post-conflict society. To achieve this feat, reparations must include the voices of women and girls in their design; otherwise, they risk reinforcing, rather than subverting, preexisting structural inequality.48 The above measures will engender a climate of protected and supportive participation, encouraging survivors to actively engage in the justice process. By engaging survivors, the government, including the courts, will be able to better appraise this population’s needs and award reparations with transformative potential.49

---

46 Guidance Note, supra note 11 at 6.
47 Id. at 9. (“Designing reparations, including the appropriate combination of different forms of reparations, should be guided by their potential to be transformative.”).
48 Special Rapporteur’s Report, supra note 22 at paras. 31, 85; see also “[B]earing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State […] the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, re-establishment of the same structural context of violence and discrimination is not acceptable.” Marin, supra note 16 at 23-24. (citing Cotton Field v. Mexico, para. 450).
49 Marin, supra note 16 at 30 (“The treatment of reparations... calls not for restitution but for transformative redress, since it would be against the core foundations of human rights law to redress women...by returning them to the situation that allowed the violations to happen in the first place.”).