

Gender and Dealing with the Past

Essential

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There are various reasons why gender dimensions are of key importance when it comes to Dealing with the Past after a violent conflict, an authoritarian regime or an occupation. Women and men, due to their gender, have divergent roles and thus differently experience violence and human rights violations. Women and men are also differently affected by the violations and touched by the various types of crimes. Since women are often not active combatants, they might be more affected by violations of their socio-economic rights and the consequences of a violent conflict. Violence against women might be rampant during conflict and they might experience certain types of crimes more often than men, such as sexual violence, rape, sexual slavery, forced marriage or enforced pregnancy. Pre-existing gender inequalities and injustices often render women particularly vulnerable in situations of conflict. While the majority of persons sentenced for international crimes are men, women can clearly also play the role of perpetrator in addition to the many other roles.

Regardless the roles men and women have played during periods of violence, it is a fact that peace negotiations, mediation and processes of transition are largely male dominated. In contexts where women have played a significant role in bringing peace or change, they have usually done so informally, while being excluded from the formal peace negotiations. Exclusion prevails in sidelining gender aspects when it comes to the design of post conflict reconstruction programs¹. In many post conflict contexts, a backlash in women's participation and women's rights has been observed. Even in contexts where women were fighting in rebel forces or have played important political roles as peace activists they were often marginalized within the new political settlement and pushed back into traditional roles in the aftermath of the conflict². However, while violent conflicts challenge the existing social and political order, transitional and post-conflict contexts also present particular opportunities to define and construct

a new society and to transform and reorder existing power relations, including gender relations.

By combining two areas of swisspeace's expertise, namely on gender and Dealing with the Past, this Essential speaks to both Dealing with the Past practitioners and gender experts. Based on existing academic literature, studies of current Dealing with the Past processes and experiences from practice³, it aims at providing insights on, and enhancing the understanding of, gender and Dealing with the Past for these two communities. In the following this Essential firstly presents swisspeace's conceptual framework of a holistic Dealing with the Past approach from a gender perspective. Secondly, the Essential highlights gender issues which need to be taken into consideration throughout Dealing with the Past processes. Finally, it emphasizes the potential of Dealing with the Past in transforming unequal gender relations and structures through the right to truth, justice, reparations and the guarantee of non-recurrence. This explicit focus on the transformative aspect of the Dealing with the Past concept highlights its potential to achieve gender justice in a broad sense, thus creating more equal relations between men and women, and to enhance women's participation and women's rights. However, we are aware that Dealing with the Past can also result in the maintenance or reproduction of power relations and stereotypical roles of men and women if gender aspects are not proactively introduced.

* We thank Barbara Brank and Rahel Fischer and other swisspeace staff for sharing their insights and providing valuable feedback for this Essential.

1 Reimann, Cordula (2012) Gender and Peace Mediation. Berne: Mediation Support Program, CSS/swisspeace. UN Women (2012) Women's Participation in Peace Negotiations: Connections between Presence and Influence. 2nd edition. Farr, Vanessa (2002) Gendering Demilitarization as a Peacebuilding Tool. Bonn: Bonn International Center for Conversion (BICC).

2 Clare Castillejo (2011) Building a state that works for women: Integrating gender into post-conflict state building. Fridt Working Paper Nr 107.

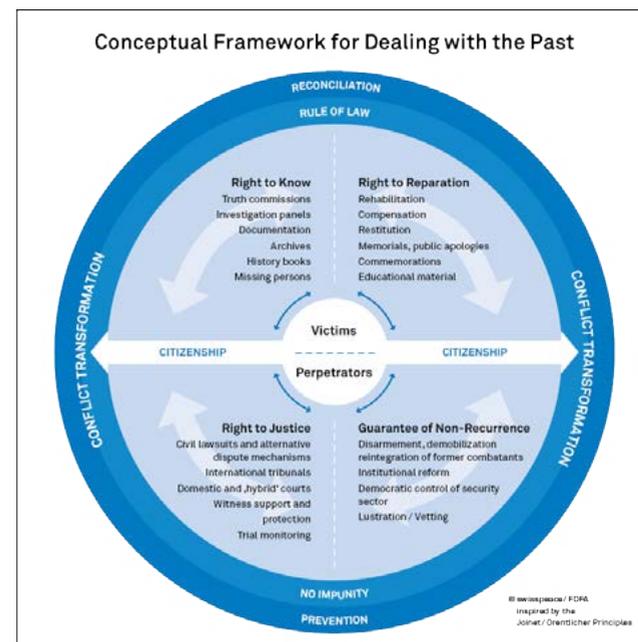
3 In this Essential we cannot provide a comprehensive overview of the existing literature and an in-depth analysis of the variety of gender aspects in Dealing with the Past. For further references see Gender and Peacebuilding, KOFF Factsheet Series on Gender and Peacebuilding (Forthcoming www.koff.ch)

2 Gender and a holistic approach to Dealing with the Past

By addressing legacies of human rights violations Dealing with the Past (DwP) aims at transforming the root causes of violence and at establishing guarantees that violent history does not repeat itself. DwP includes various measures and mechanisms. For example, international, hybrid or domestic courts hold those responsible who have planned, ordered, and committed such violations. Or, reparation programs rehabilitate and compensate victims and truth commissions shed light on past crimes, responsibilities and underlying root causes. Reforms of institutions seek to establish the ethical and institutional framework which ensures the prevention and non-recurrence of human rights violations in the future. The concept of DwP has also become known as transitional justice, which appears to have a stronger semantic focus on justice aspects.

Based on the principles against impunity that were recommended by Louis Joinet the UN Special Rapporteur on Prevention of Discrimination and Protection of Minorities in 1997 and up-dated by Diane Orentlicher, swisspeace and the Swiss Federal Department of Foreign Affairs developed the Conceptual Framework on Dealing with the Past⁴. The Framework emphasizes four pillars - truth, justice, reparation and the guarantee of non-recurrence – which form a holistic approach. Formulated as rights and duties, these four pillars are interdependent and mutually reinforcing. Its central focus is on victims and perpetrators and their transformation into citizens with equal rights.

⁴ swisspeace (2013) A Conceptual Framework for Dealing with the Past. Essential 03/2013. See also Joinet, Louis (1997) Revised Final Report. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) (E/CN.4/Sub.2/1997/20. E/CN.4/Sub.2/1997/20/Rev.1.) and Orentlicher, Diane (2004) Independent Study on best Practices, including Recommendations, to assist States in Strengthening their Domestic Capacity to combat all Aspects of Impunity (E/CN.4/2004/88).



Gender defines the socially constructed processes of the relations between and among women and men. A gender approach emphasizes the particular manner in which women and men experience violent conflict and human rights violations since the roles, experiences, needs and interests of women, girls, men and boys tend to be different. Both women and men are social, economic and political actors in armed conflict or involved in fighting and in peacebuilding. As a shift in prevailing roles, women tend to enter male-dominated economic and political sectors, including becoming heads of households, and consequently face a double burden during conflict. Both women and men are exposed to armed and gender-based (including sexual) violence. While men are more likely to be the prime targets of armed violence, women tend to be disproportionately affected by sexual and domestic violence, displacement and social discrimination.

A gender perspective would thus allow us to consider the different needs and interests stemming from these gendered experiences of violent conflict; the reasons why women and men were targeted for particular violations; how notions of masculinity and femininity shaped the different roles and behaviors of men and women during the conflict; and how gender as well as other intersecting relations of power in society influence and shape the justice and reconciliation outcomes⁵.

5 Reimann, Cordula (2002) All You Need Is Love ... and What About Gender? Bradford University, Working Paper 10. Pillay, Anu (2009) Views from the field. Truth seeking and gender: The Liberian experience. In: ACCORD, 9(2). Meintjes, Sheila (2009) 'Gendered Truth'? Legacies of the South African Truth and Reconciliation Commission. In: ACCORD, 9(2), p. 101.

6 As a part of the UN human rights framework, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979, A/RES/48/104) is the first and most comprehensive instrument dealing with women's rights among the UN mechanisms. It was complemented by specific resolutions reinforcing women's rights in conflict related contexts, namely the UN Security Council Resolution 1325 on women, peace and security adopted in 2000. The recent CEDAW General Recommendations on Women in Conflict Prevention, Conflict and Post-conflict Situations (CEDAW/C/GC/30) links the CEDAW and the UN Resolution 1325.

7 Hamber, Brandon (2007) Masculinity and Transitional Justice: An Exploratory Essay. In: International Journal of Transitional Justice, 1, pp. 375-390.

Gender is of key importance when it comes to dealing with past human rights and women's rights violations⁶ that have occurred in relation to violent conflict, authoritarianism or occupation. Although the Dealing with the Past Framework does not explicitly mention women and men or gender, its central focus on victims, perpetrators and citizenship allows the inclusion of crucial gender issues.

In most cases, men are considered to be perpetrators and women are cast as victims in an oversimplistic manner. However, in reality also some women are responsible for human rights violations and men are among the victims. While such a simplification of men as perpetrators and women as victims not only ignores reality, from a gender perspective it can also obfuscate gender inequalities as causes of violence. Thus, a gender-responsive understanding of DwP needs to account for such differentiations and the different roles that men and women played during a conflict which are not limited to victims and perpetrators, but include witnesses, bystanders, silent supporters, opponents, heads of household, food suppliers or bearers.

The different, continuously changing, roles of women and men do not simply emanate from and in relation to the conflict, but are also, to a large extent, shaped by the cultural, historical, material, economic as well as geopolitical context of a society⁷. While the

In many cases, both women and men have taken up arms, although the percentages of female combatants vary from context to context. For example, in the Colombian Farc an estimate of 30 to 40 percent of the combatants are female and the Sri Lankan LTTE was formed by at least 20 percent of women. In Liberia, where around 30-40 percent of the fighting forces have been female combatants, the truth commission emphasized the plight of women as victims while crimes committed by women remained unrecognized.

gender of victims, survivors and perpetrators matter, these positions and identities intersect with other identities, such as ethnicity, religion or sexual orientation, and more structural positions including socio-economic classes, levels of education, disabilities or political exclusion. These different roles and experiences before, during and after a conflict certainly form the basis from which transformation of victims and perpetrators must start.

These differences and injustices between men and women need to be addressed in order to have a society with active citizens with equal rights. In a holistic and transformative understanding, DwP is well suited to address gender issues particularly by challenging and questioning past power relations, structural injustices, discriminatory systems and both social and individual experiences of violence. Being oriented at the same time towards the past, present and the future, DwP interventions also address past, present and future of gender-relations. However, when they are gender blind, these interventions can contribute to the trend towards exclusion. A gender-responsive DwP process needs to consider these different needs and present measures and mechanisms which address them adequately. With these issues in mind, we realize that a holistic approach to Dealing with the Past can never be a gender blind approach.

3 Taking Gender issues into consideration throughout DwP processes

In transitional justice or Dealing with the Past practice and scholarship the term gender has often been used almost exclusively as synonymous with the social category of women and the gendered dimensions of its concept remained largely unrecognized. The gender dimensions were limited to the focus on sexualized violence against women and girls, and women were primarily brought into view as victims of these rather narrowly understood forms of sexual violence⁸. This tended in itself to reinforce stereotypes of women's fragility, fixing their social positions and political identities in the newly emerging society as passive, inferior, vulnerable and in need of protection. Against this background, women were considered more as objects of DwP processes and less as negotiators, political actors and change agents in their own right.

Within DwP practice, gender has often been connoted with "attempts of identifying and addressing the exclusion, or insufficient inclusion, of women" within transitional justice mechanisms⁹. It has been assumed that de facto all women implicitly prioritize certain DwP issues, such as truth seeking, justice, memorial practices and reparations¹⁰. This might have downplayed other issues such as social and economic equality, reproductive health and choices, cultural identity and other intersectional identity aspects. In recent years, considerable developments and efforts have been undertaken with regard to procedural as well as substantive levels to ensure the gender-responsiveness of DwP measures and mechanisms.

Regardless of the specific DwP mechanism, some general gender issues¹¹ must be taken into consideration in all phases of a DwP process, from the design, to implementation and to outreach. Gender advisors or special gender units within DwP mechanisms can help to ensure gender-responsive mechanisms and gender mainstreaming on the procedural as well as substantive level.

Despite having a gender-neutral mandate, the Truth and Reconciliation Commission in Peru put a particular focus on gender. It established a special gender unit which was responsible for the gender related work, including trainings, capacity development for commission officers and background research on gendered patterns of violence. The final report then also included two chapters focused on gender, one of which was written by the gender unit itself¹².

When planning and designing DwP mechanisms, including their mandates, staffing and rules of procedure, special attention has to be paid to gender issues and inclusion of gender expertise from the very beginning.

On the process level, it is important that both men and women are equally included in the decisions, planning and design of a DwP mechanism. For instance, women's participation must already be ensured when DwP programs and mechanisms are designed and their mandates defined. Regarding the implementation and staffing of DwP mechanisms, women are often under-represented. While women are still outnumbered by their male colleagues as commissioners in many cases, truth commissions should be gender balanced. Certainly this is also true for the staff of international and national tribunals, including women as prosecutors, judges, legal officers or defence lawyers. With regard to domestic judicial mechanisms, one should take into consideration that existing formal and informal traditional justice is often gender-biased and male-dominated¹³. The integration of a gender perspective into SSR often includes measures to ensure the representation of both men and women (if not equal participation) in security sector institutions and consequently to increase the recruitment and promotion of female personnel.

8 Buckley-Zistel, Susanne and Zolkos, Magdalena (2011) Introduction: Gender in Transitional Justice, in: Buckley-Zistel, Susanne and Stanley, Ruth (eds.) Gender in Transitional Justice. London: Palgrave Macmillan, p. 11. As for women, the concern with masculinity within transitional justice should not solely focus on men's issues or asking where are the men in transitional justice. Hamber 2007 op. cit. However, the legal definition of sexual and gender-based violence has also quite developed. See de Brouwer, Anne-Marie et al. (eds.) (2013) Sexual Violence as an International Crime: Interdisciplinary Approaches. Cambridge, Antwerp, Portland: Intersentia.

9 Buckley-Zistel and Zolkos 2011 op. cit. p. 5.

10 Ní Aoláin, Fionnuala (2012) Advancing Feminist Positioning in the Field of Transitional Justice. In: International Journal of Transitional Justice, vol. 6, p. 208.

11 See UN Women Sourcebook on Women, Peace and Security (2012) A Window of Opportunity: Making Transitional Justice Work for Women. Available at: <http://www.unwomen.org/co/digital-library/publications/2012/10/un-women-sourcebook-on-women-peace-and-security>.

12 Report of the Peruvian Truth and Reconciliation Commission, Volume VI, Chapter 1.5 (La violencia sexual contra la mujer) and Volume VIII, Chapter 2.1. (Violencia y desigualdad de género). Nesiha, Vasuki et al. (2006) Truth Commissions and Gender: Principles, Policies, and Procedures. International Center for Transitional Justice. Valji, Nahla (2012) Gender and Transitional Justice Programming: A Review of Peru, Sierra Leone and Rwanda. UNIFEM. However, historically, many truth commission processes were gender blind and have failed to include and account for gender issues, and until today only few truth commissions have fully addressed gender.

13 Huyse, Luc and Mark Salter (eds.) (2008) Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences, Stockholm: International IDEA.

In security sector reform programs in Burundi, Kosovo and Sierra Leone there have been attempts to increase the number of women police officers and to improve police response to gender based crimes. Although in Sierra Leone and in Burundi women still face serious barriers in terms of accessing police services this endeavor has proven to be an important first step to creating a more inclusive security apparatus.

However, while DwP measures might be more likely to be gender-responsive with the inclusion of women in the decision, design and implementation of DwP processes, simply increasing the number of women in decision committees or female staff, such as women commissioners, judges, prosecutors and lawyers alone does not necessarily result in gender-responsive procedures and decisions¹⁴. In addition, on a substantive level, DwP measures must be planned and designed in a way which ensures that they do address patterns of exclusion, discrimination and gender imbalance that existed before and during the armed conflict or the authoritarian regime. This particularly includes the choice of the actual mechanisms itself, such as a commission of inquiry, truth commission, mixed or domestic tribunal, reparation program or vetting board, and their mandates including time frames, crimes to be included or rights or needs based approaches.

Once DwP mechanisms are set up, attention must be paid to gender responsive procedures and methodologies regarding preliminary investigation, giving testimonies or benefitting from reparation programs. Formal and informal barriers which may affect the participation of women in a disproportional manner, including cost, language, the need to travel, lack of education, cultural or religious rules or a limited awareness of rights must be addressed.

14 UN Women Sourcebook 2012 op. cit. p. 6.

Equal participation of both women and men as sources of information, testimonies and witnesses must be guaranteed; the design of hearings, sessions and witness and victim protection programs must take into consideration gender specific needs and prevailing gender relations in local societies. Such procedural measures include balanced staff, specialists on sexual violence, the possibility of in camera hearings, the exclusion of the public, possibilities of individual statements, exclusive male or female group hearings on gender relevant topics, specific and adapted psycho-social support, translation services, or the choice of female or male staff for statement-taking. In particular in cases of sexual and gender based violence, international criminal law has still a long way to go before it becomes truly gender responsive, starting from procedural strategies which ignore widespread gender violence¹⁵, to gender sensitive investigation methods, and procedural issues linked to the adversarial nature of international tribunals including cross-examinations which make it difficult for victims to talk about gendered crimes. Therefore, for victims of sexual violence of both sexes special incentives and measures, such as longer investigation periods, special outreach programs which include psycho-social services or access to hospitals, are often necessary in order to provide a conducive environment for voluntary testimony.

15 SáCouto, Susana and Cleary, Katherine (2009) The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court. In: American University Journal of Gender, Social Policy and the Law, 17, p. 337. Pritchett, Suzan M. (2008) Entrenched Hegemony, Efficient Procedure, or Selected Justice: An Inquiry into Charges for Gender-Based Violence at the International Criminal Court. In: Transnational Law and Contemporary Problems, 17, p. 265.

The Special Court for Sierra Leone paid for and arranged access to health facilities for women who testified. This included procedures to repair fistula which were often caused by violent sex, rape or sexual torture¹⁶.

The process of statement taking, including the venues for rendering testimonies, should be designed in a particularly respectful manner which does not entail the risk of re-traumatization, for example in situations where victims must retell their entire story of suffering again and again. Such consideration also concerns standards of proofs and assessment of testimonies for reparation programs or trials by taking into consideration pre-existing inequalities with regard to access to documentation, state services, and justice institutions. Such standards should be conceptualized in a gender-responsive way, for instance by using lower standards where certain patterns of abuses are proven or using other evidence in cases where women are systematically deprived of official identification documents.

In contrast to criminal processes, in which due process rights of alleged perpetrators must be respected, reparation programs can more easily use creative evidentiary procedures of proof. Regarding sexual violence this could go as far as assuming the veracity of the testimonies of victims or rely on a system of presumptions based on patterns of criminal conduct, as the Commission on Illegal Detention and Torture in Chile has done in the case of torture. Or in Rwanda, a local NGO assisted victims in getting the necessary documents from the authorities which the latter had to provide for free.

On a substantive level, gender issues need to be taken into account in all DwP initiatives, activities and measures, including the representation of men and women's voices and their different experiences. For example, practice has shown that women's testimonies of violence in truth commission hearings often focus on family members or their spouses rather than their own experiences¹⁷ or are silent around issues considered to be stigmatizing. These include sexual violence against both men and women or experiences of women as bush wives or combatants. Primarily focusing on young men and stopping them from using their arms, DDR programs often tend to forget groups of people who have never been arms bearers, but who directly supported or were associated with armed groups. These groups, primarily women and girls, support combatants (voluntarily or forced) while not directly engaging in combat: carrying supplies, cooking food, washing clothes and providing sexual services. However, DDR programs increasingly address the different experiences and needs of female and male ex-combatants, in particular in regards to children, sexually transmitted diseases including HIV- AIDS, and difficulties of obtaining skills to earn a living as well as security issues and economic dependence.

When accounting for the different experiences one needs to be cautious that women's and men's voices are not represented in simply stereotypical ways. For instance, symbolic reparations, such as public admissions of guilt, apologies or memorials, should not portray women as victims and men as perpetrators or war heroes.

¹⁶ Scanlon, Helen and Muddell, Kelli (2009) Gender and Transitional Justice in Africa: Progress and Prospects. In: African Journal on Conflict Resolution, 9(2), pp. 9–28.

¹⁷ UN Women Sourcebook 2012 op. cit. p. 11.

After the end of Apartheid in South Africa the government established a number of new memorials commemorating new heroes and previously neglected perspectives on the past, but virtually none of them were erected in honor of women. As a reaction a private-sector initiative erected seven public memorials in honor of women. While this initiative filled an important gap in terms of gender representation (by creating memorials honoring women), they may not have challenged gender stereotypes and the historically male-dominated public monument genre as they could have. However, in more subtle ways, these memorials will probably shift notions of gender identity and legitimate alternative role models.¹⁸

As regards the output of DwP mechanisms, be it truth commission reports, judgments, reparation decisions, memorials or history books, gender aspects need not only to be included formally but in a genuine and broad manner. For instance, final reports of truth commissions can focus particularly on gendered causes of violence as well as elaborate specific recommendations on gender. While some reports remain completely silent on gender issues, others have mainstreamed a gender analysis, including gendered causes of violence, or have dedicated chapters exclusively to women's experiences. Or, going beyond just adding sexual violence as a crime to the list of compensated violations, gender-responsive responses and remedies (e.g. reparations) should be based on a mapping of men's and women's position in society, their roles and experiences before and during a conflict or an authoritarian regime. In order to do so, consultations can reveal different views of men and women of what measures are needed for redress and reparation¹⁹. Hence, in order to take into account particular experiences and needs of women and men in DwP and to address structural causes for gender inequalities, discrimination and exclusion the underlying causes of gendered crimes, outputs and

18 Marschall, Sabine (2010) How to honour a women: gendered memorialization in post-apartheid South Africa. In: Critical Arts, vol. 24, issue 2, pp. 260-283.

19 On popular consultations on transitional justice see Office of the High Commissioner of Human Rights (2009) Rule-of-Law Tools for Post-Conflict States: National consultations on transitional justice. New York and Geneva: United Nations.

recommendations of DwP mechanisms should address gender issues in a genuine and transformative manner.

Finally, outreach efforts, for example the dissemination the findings of a truth commission, need also to be gender-responsive. Regarding the process level, it is important that both men and women are reached and have access to the final report of a truth commission, a judgment or archives. Barriers that might affect women in a disproportional manner, such as high levels of illiteracy, travel costs or spare time resources, must be considered when planning, deciding and implementing outreach programs.

The final report of the Truth and Reconciliation Commission of Sierra Leone was published both in the full text version and in a shorter, comic-style version, which was distributed in rural areas, particularly aiming at illiterate and young people.

4 Key Gender aspects regarding Truth, Justice, Reparations and Non-Recurrence

The gender dimension of a holistic DwP approach goes beyond the recognition and mainstreaming of gender on the procedural and substantive level of specific measures and mechanisms. Transitional contexts and the aftermath of conflicts present particular opportunities to define and construct a new society and to transform and reorder existing power relations. Feminist approaches and critical transitional justice literature have increasingly emphasized the potential of transitional justice and DwP to (re-)order gender and other relations of power so as to address and reconstitute structural exclusion, discrimination, but also stereotypical identities. When addressing root causes of violence, unequal power and gender relations and injustices, the four pillars of DwP contain a transformative potential to create a more inclusive society with citizens enjoying equal rights. Going beyond the conceptualization of gender of 'women as a category' in transitional justice processes, the following part of the Essential outlines the opportunities and challenges within the Right to Truth, Justice, Reparations and the Guarantee of Non-Recurrence in regard to this transformative aspect.

4.1. The right to know

The right to know refers to the importance of individual and collective knowledge regarding the causes, experiences and legacies of human rights violations and entails the responsibility of states to investigate past violations in order to prevent the recurrence of human rights abuse in the future. These truths and knowledge provides the basis for formulating lessons for the future and for imagining the post-conflict society, including the elimination of past injustices.

Truth commissions, as the most popular institutions for fostering the right to know, provide an extraordinary window of opportunity to highlight prior abuses and previous unequal gender relations and assess

opportunity: to construct knowledge and truths about the past which account for the stories experiences of both men and women in order to serve as a basis for lessons to create an inclusive society and gender justice.
challenge: to design gender-responsive truth seeking mechanisms which exhibit unequal power structures, gender inequalities and root causes for gendered violence.

enabling conditions of gendered violations. They serve as a platform for a symbolic break with the past, denouncing past human rights violations and constructing an inclusive history. By collecting testimonies through individual statement taking and sometimes public hearings, they provide official acknowledgement for crimes and experiences of both female and male victims. While certainly procedural and substantive aspects influence whose voices are included, it is important to be aware that truth commissions, as well as other truth-seeking mechanisms, have the capacity to frame individual statements, public hearings and testimonies to 'fit' a particular meta-narrative of justice and reconciliation.

On the one hand, this allows for a particular emphasis on gender issues and gendered causes of violence. Structural gender inequalities, power relations and patriarchal patterns perpetuated during conflict or authoritarian regimes can be challenged by formulating a new meta-narrative. Likewise, traditional narratives or history books often recount the legends of brave men and warriors on the battlefields or the story of those who perpetuated violence. Such narratives can be challenged and the perspective of those who suffered the brutality of war and the scarcity of resources as civilians can be put forward.

The final report of the Truth and Reconciliation Commission in Sierra Leone addressed gender in a broad way, for example by issuing recommendations to address structural inequality or discriminatory laws, including the establishment of educational programmes to counter attitudes and norms which lead to the oppression of women and special efforts to accept the survivors of rape and sexual violence and integrate them into society. Another example constitutes the report of the Peruvian Truth and Reconciliation Commission. It specifically dedicated chapters to sexual violence against women and to violence and gender inequalities as root causes.

On the other hand, attention must be paid to the exclusion of experiences which do not fit with the intended meta-narrative, thereby denying their legitimacy and authenticity, and reinforce prevailing unjust constructions of masculinity and femininity. Some feminist scholars have even warned that women's stories, memories and experiences might be appropriated by and instrumentalized in the service of an essentially patriarchal, albeit new democratic state²⁰.

4.2. The right to justice

The right to justice entails the duty of the state to hold accountable those who are responsible for human rights. For many victims justice is an important remedy for their suffering. The right to justice is primarily fulfilled by domestic, international, and so-called "hybrid" courts and tribunals. Gender is thereby constitutive in defining what constitutes a crime in need of rectification through transitional justice. For example, the gender responsive view in defining what constitutes an international crime can play a crucial role for post-conflict societies when it comes to re-drafting domestic legislation. Gender is largely present in the application of norms and understandings about adequate practices

20 Cf. Buckley-Zistel and Zolkos 2011 op. cit. p.8. This statement reflects a thread in feminist thinking which criticizes liberal democratic approaches to peace-building as well as transitional justice.

of doing justice for past crimes²¹. Thus, a gender perspective on justice requires a critical analysis of the very violations for which redress is sought.

opportunity: to fight against impunity of gender-based violence and change the understanding of what kind of violence against women and men redress is sought in societies emerging from violent conflict.

challenge: to recognize, acknowledge and provide accountability for gender-based violence and other crimes affecting gender.

Over the years, the categories of crimes accounting for gender specificities as well as the legal framework to prosecute gender based violence have been continuously developed. Until the 1990s sexual violence and gendered crimes were largely absent in norm setting, such as the Geneva Conventions and their additional protocols or the Genocide Convention, and in accountability processes, for instance the military tribunals of Nuremberg and Tokyo. Due to sustained advocacy of human rights and women's NGOs as well as scholars in the context of the creation of the international criminal tribunals for the former Yugoslavia and Rwanda and the International Criminal Court (ICC), gender-based violence has become enshrined and mainstreamed in criminal law both at the international and domestic level, and equally at the procedural and substantial level. Today, sexual and gender-based violence has become acknowledged in different forms as crimes against humanity, as genocidal acts and war crimes and the Statute of the International Criminal Court is exemplary in codifying it as part of its core crimes²².

21 Chappell, Louise (2011) The Role of the ICC in Transitional Gender Justice: Capacity and Limitations. In: Buckley-Zistel, Susanne and Stanley, Ruth (eds.) Gender in Transitional Justice. London: Palgrave Macmillan.

Campbell, Kirsten (2007) The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia. In: International Journal of Transitional Justice, vol. 1, no. 3, pp. 411-432.

22 The Rome Statute of the International Criminal Court, ICC, which can be seen as the largely accepted codification of international criminal law, defines gender crimes, such as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity both as crimes against humanity and as war crimes (Art. 7 para. 1 g and Art. 8 para. 2 b (xxii) and e (vi) Rome Statute). Copelon, Rhonda (2000) Gender Crimes as War Crimes: Integrating crimes against women into international criminal law. In: McGill Law Journal, vol. 217.

The first case where an international tribunal defined rape as genocide was the Jean-Paul Akayesu case before the ICTR. It states that “in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group.”²³ Moreover, the definition of rape by the UN-ad hoc tribunals – the ICTY and the ICTR does not require that the victim physically or verbally communicated their non-consent to the perpetrator. This allowed an adaptation to the usual evidentiary standards in order to account for the gendered impacts of the conflict.

23 Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (TC), 2 September 1998, paras. 507.

24 E.g. Völkerstrafrechtsgesetzbuch in Germany and new norms introduced in Swiss legislation on 1.1.2011 in the Swiss Criminal Code and the Swiss Military Criminal Code. (see Baumgartner, Elisabeth (2014) Die Verfolgung von Völkerstraftaten in der Schweiz, in: Christoph Safferling and Stefan Kirsch (eds.) Völkerstrafrechtspolitik. Praxis des Völkerstrafrechts, Heidelberg: Springer, pp. 399-431.)

These developments in international and domestic jurisprudence and internationally recognized legal frameworks certainly reinforce the signaling and acknowledgement of sexual violence being a punishable crime. This is particularly important, since international justice heavily influences recent and on-going legislation at the domestic level²⁴. Applying these rules and norms within DwP mechanisms both at the international and domestic level further shows that perpetrators are held accountable for having committed these kinds of crimes. Thus, DwP provides an opportunity to transform contexts where state sponsored or sanctioned impunity for sexual and gender based violence is widespread.

While justice processes provide accountability for gender-based crimes, the (observed) strong focus on sexual violence and female victims might reduce women and their multiple and complex experiences of the conflict to victims of sexual violence deprived of their agency. Further, this tends to exclude instances of sexual violence against men from the gendered analysis.

Moreover, the definition of gender based crimes as international crimes, such as rape as a form of genocide, thus linking gendered violence to ethnicity or other identity markers, might obfuscate or ignore other power relations and patriarchal structures which informed gender violence. The use of relatively rigid legal categories of crimes risks excluding violations and harm which do not fit the definitions and makes them invisible or does not recognize them as illegal²⁵. All these aspects might be challenges which limit or hamper the potential of prosecutions to address context-specific structural causes of gender based violence and create a society which guarantees and applies equal rights for women and men. This might be accentuated by the often neat separation between past and present and public and private inherent in DwP which leaves unaddressed gender based crimes before or after the conflict as well as violence in the domestic sphere under its framework²⁶.

The Special Court in Sierra Leone was mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed since 1996 in the context of the civil war. While domestic violence was widespread, the court did not address instances of domestic violence since they were outside of the court’s jurisdiction. Nevertheless its jurisprudence on gender crimes influenced to a great extent the new Sierra Leonean legislation which includes domestic violence.

4.3. The right to reparations

The right to reparations refers to restitution, compensation or rehabilitation provided for violations of humanitarian law and human rights collectively or individually to victims and their families. Reparations aim at acknowledging the harm suffered, promoting

25 Ní Aoláin, op.cit., p. 209.

26 Buckley-Zistel and Zolkos 2011 op. cit. p. 6. The concept of DwP focuses on severe human rights violations and only rarely considers violence in the private sphere such as domestic violence.

dignity and empowering victims. Addressing the immediate reasons and consequences of the violations, reparations might be most directly linked to, and resonate with the fact that men and women experienced and were affected in a different manner by the violations due to their gender, including reproductive violence and forced pregnancy and socio-economic violations. Therefore, on a substantive level, it is particularly important that the form of reparations and the violations to be repaired correspond to the perceptions and experiences of the beneficiaries.

opportunity: to address structural economic and social gender injustices and power relations and create a society where women and men enjoy equal possibilities and opportunities.

challenge: to alleviate the system of existing gendered inequalities, discriminations and dispossessions by addressing the specific needs, experiences and victimization of women and men through reparations.

Reparations which are gender-responsive go beyond addressing the immediate consequences of violence. They have the potential to challenge and transform structural and socio-economic gender inequalities, such as distribution of land and property or access to education, in particular when they are linked to development initiatives. For example, individual financial reparations can economically empower the beneficiaries and particularly women who often do have less economic resources at their disposal than men.

According to a study, women in northern Uganda prioritized individual over community reparations more than the men in the survey. These preferences might reflect mistrust women have towards their communities, a recognition of existing power relations, and the likelihood that they will be marginalized from any decision-making regarding the form reparations would take²⁷.

Further, complex programs, for instance programs that envision a variety of benefits (e.g. educational, medical and psycho-social support, symbolic measures) together with material compensation are well suited to address specific gender needs²⁸. Thus, the way in which financial compensations, restitution of land or goods and other reparations are distributed can have important gender impacts. Symbolic reparations, such as memorials and museums, present an opportunity to challenge dominant images of masculinity and femininity, which existed before or have been produced during an armed conflict or authoritarian regime.

27 Pijnenburg, Annick (2013) Transforming conflict-affected countries: a gender-sensitive approach. Background Paper, Impunity Watch.

28 Rubio-Marin, Ruth and de Greiff, Pablo (2007) Women and Reparations. In: International Journal of Transitional Justice, vol. 1, pp. 318-337.

The Moroccan Equity and Reconciliation Commission (IER) conditioned access to compensation by the family on the direct victim being deceased. This non-inclusion of family members of surviving victims, who were mostly women, might have discriminated against women. However, regarding the distribution of compensation the IER accorded equal treatment to men and women. Thereby it ignored the Sharia-based concept of heirs as it is defined in the Moroccan law of succession. Instead it adopted the concept of successor; the spouses (whether man or women) as well as the descendants (of both sexes) received 40 percent and the parents of both sexes received 10 percent of the compensation²⁹.

²⁹ Guillerot, Julie et al. (2011) Morocco: Gender and the Transitional Justice Process. International Center for Transitional Justice.

In Colombia, the 2011 Law on Victims and Land Restitution (Law 1448) contains special provision regarding land restitution and gender justice, in particular for internally displaced people. Some special measures aim at creating equal opportunities and protect women's rights, for instance by prioritizing women—particularly female heads of households—in administrative procedure for land restitution in newly established special land-restitution jurisdictions. Further, specific security conditions for women and their land are foreseen, and women have priority in obtaining benefits in land restitution processes (e.g. productive credit or technical assistance)³⁰.

³⁰ Meertens, Donny (2012) Forced Displacement and Gender Justice in Colombia. Between Disproportional Effects of Violence and Historical Injustice. International Center for Transitional Justice.

However, in order to avoid reparations perpetuating pre-existing gender inequalities they must be carefully designed in line with an analysis of family and community power relations and broader contextual factors, such as unequal access to bank accounts or necessary documentation. This might be particularly true for restitution which seeks to restore the original situation of the victims. While many women often took over traditionally the role of men and were in control of land, sometimes we observe a backlash in women's participation in the economic and political sphere after a violent conflict; through restitution processes they might lose the control of the land again. Hence, restitution and other reparation programs may leave unaddressed previously existing gender injustices and insecurity. Moreover, compensation efforts, for example for sexual violence, should not further stigmatize women or men who suffered from these crimes. Thus, reparation programs may even reproduce gender inequalities or unjust practices.

4.4. The guarantee of non-recurrence

The guarantee of non-recurrence aims at transforming underlying, structural causes for armed conflict and authoritarian regimes. Presuppositions of the non-recurrence of systematic human rights violations are democratic structures, civil oversight of security forces, and a functioning judicial system based on the rule of law. Therefore the guarantee of non-recurrence includes measures such as the demobilization, disarmament and reintegration (DDR) of former combatants, vetting and lustration, as well as institutional reforms consisting among others of structural reorganization, the creation of new legal frameworks and systems of democratic control as well as educational measures for the staff.

opportunity: to transform and reform the institutional and social context, which enabled gross human rights violations to take place, and to ensure gender justice and equal rights for women and men.

challenge: to address gendered root causes, power relations and structural gender inequalities in a way that they guarantee the non-recurrence of gender-based violations to take place.

In addition to addressing different needs of female and male ex-combatants on a substantive level, gender-responsive DDR programs require the taking into account of broader socio-economic situations of the society, including the families of the former combatants or the villages in which they wish to reintegrate³¹. As such, DDR programs can address and transform gendered injustices and unequal power relations. But

DDR might also be seen as a sort of reward for having taken up arms, or can reinforce existing inequalities and even lead to new tensions, in particular when the wider population does not benefit from reconstruction efforts. Considering the fact that in some contexts the majority of victims are women and the majority of combatants are men, DDR activities without or with insufficient reparations run the risk of widening existing gender inequalities.

31 UN Department for Disarmament Affairs in collaboration with the Office of the Special Adviser on Gender Issues and the Advancement of Women (2001) Gender Perspectives on Disarmament, Demobilization and Reintegration. Briefing Note 4.

Women sometimes fill strong leadership positions or enjoy respect as fighters, such as in the LTTE in Sri Lanka. Female ex-combatants have voiced concerns over the return to potentially subservient roles when the conflict ends, in particular when DDR programs only offer training and capacity building in traditional women's activities such as sewing or secretarial work. Women might also go through a parallel process that is not labelled as DDR. DDR might develop a cultural stigma, such as in the Democratic Republic of Congo, where only a few women have enrolled in DDR³².

Efforts to guarantee non-recurrence present an opportunity to rebuild the state and to reform its institutions in a way that it works for, and is trusted by both women and men. This is of key importance, especially when public institutions such as the police, the military and the judiciary have been instruments of repression or were involved in systematic human rights violations. As public institutions generally contribute to the social construction and maintenance of masculinity and femininity and gender differences are deeply entrenched within public and private institutions, security sector and judicial institutions might have also served to create and maintain unequal gender relations. The reform of these public institutions in the course of DwP present therefore an opportunity to redress more general gender injustices, for example by advancing previously neglected women's rights or to address law-, policy- and context-related barriers which existed for men or women vis-à-vis state services.

32 Anderlini, Sanam Naraghi and Conaway, Camille Pampell (2004) Disarmament, Demobilisation and Reintegration. Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action. London: Print. Hanson, Stephanie (2007) Disarmament, Demobilization, and Reintegration (DDR) in Africa. Council on Foreign Relations. Available at: <http://www.cfr.org/world/disarmament-demobilization-reintegration-ddr-africa/p12650> (last accessed January 2014).

A holistic DwP approach cannot be gender blind; gender issues must be taken into consideration when designing, planning and implementing mechanisms and measures dealing with the legacy of a violent conflict, an authoritarian regime or occupation. To ensure a fully gender-responsive DwP process, gender must be mainstreamed and issues must be addressed both on a procedural and substantive level. Gender advisors and special gender units within DwP mechanisms can help to identify, address and mainstream gender issues in all DwP activities.

By focusing on different roles and experiences of men and women, a gender perspective on DwP allows us to identify different perceptions, positions and identities and understand how they are entrenched and embedded in broader power relations. Awareness for and systematic considerations of these gendered differences help to design DwP measures, such as truth commissions, judicial prosecution, reparation programs, DDR activities or institutional reforms, that are responsive to the specific needs of those who suffered and experienced conflict or an authoritarian regime. However, it is important to keep in mind that there are various identity markers, such as age, religion or ethnicity, which intersect with gender. All these aspects and how they intersect with each other need to be part of a gender analysis³³ which forms the basis of designing, planning and implementing gender-responsive DwP mechanisms.

While in many cases the consideration of gender dimensions means that women's needs and experiences must not be forgotten, a conceptual confusion around gender and the conflation of gender with women should be avoided. Such an equalization of gender with women can ultimately result in perpetuation of stereotypical notions of women³⁴ and reproducing existing gender inequalities and power relations. Instead, the opportunity that DwP presents to challenge unequal gender relations and to achieve gender justice needs to be explored and

translated into all activities dealing with the legacy of a violent conflict or an authoritarian regime. Adopting a gender perspective on DwP leads us to re-ask some of the most basic questions of the transitional justice field: Whose justice – and for whom? Transition – where to?³⁵

33 See Gender Analysis of Violent Conflict, in Gender and Peacebuilding, KOFF Factsheet Series on Gender and Peacebuilding (Forthcoming www.koff.ch).

34 Pillay 2009 op. cit. p.96.

35 Buckley-Zistel and Zolkos 2011 op. cit. These questions are increasingly addressed by critical scholars on transitional justice mainly in relation to institutions or former conflict parties and powerful actor groups. However, they certainly apply on gender relations, too, and can be formulated as follows: Are both women and men included in defining justice? Are the specific gender needs taken into account? Does the envisaged transition lead to more equal gender relations?

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About swisspeace

swisspeace is an action-oriented peace research institute with headquarters in Bern, Switzerland. It aims to prevent the outbreak of violent conflicts and to enable sustainable conflict transformation.

swisspeace sees itself as a center of excellence and an information platform in the areas of conflict analysis and peacebuilding. We conduct research on the causes of war and violent conflict, develop tools for early recognition of tensions, and formulate conflict mitigation and peacebuilding strategies. swisspeace contributes to information exchange and networking on current issues of peace and security policy through its analyses and reports as well as meetings and conferences.

swisspeace was founded in 1988 as the "Swiss Peace Foundation" with the goal of promoting independent peace research in Switzerland. Today swisspeace engages about 40 staff members. Its most important clients include the Swiss Federal Department of Foreign Affairs (FDFA) and the Swiss National Science Foundation. Its activities are further assisted by contributions from its Support Association. The supreme swisspeace body is the Foundation Council, which is comprised of representatives from politics, science, and the government.

swisspeace is an associated Institute of the University of Basel and member of the Swiss Academy of Humanities and Social Sciences (SAHS).