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Heidy Robouts
University of Antwerp

Stef Vandeginste
University of Antwerp

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REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS: THE NOTION OF VICTIM*

Heidy Rombouts** and Stef Vandeginste***

I. INTRODUCTION

Through a combined legal and social science analysis, this paper reflects on one of the root concepts of reparation. As reparation occurs in response to victimization, this paper concentrates on the notion of victim.¹ The notion of victim will be explored from a socio-political perspective and from an international legal perspective. By way of conclusion, these two approaches will be interwoven in order to consider a more comprehensive definition of victim.

A. The Notion of Victim

1. In search of a definition: social science perspectives

"Victim" is often used in every-day life but also in science. As E. Fattah states, the word victim is used in almost every possible context to designate anyone who suffers a negative outcome or any kind of loss, harm, or injury, whether the harm is material, physical or psychological.² Accordingly there are victims of crime, war, accident, diseases, poverty, injustice, oppression, discrimination, natural disasters, etc. According to Fattah this understanding of "victim" is of little use for research purposes as it might cover about anything and anyone.³ We will explore different disciplines, as "victims" have been the object of study for a long time. We wish to explore whether a

* This is a shorter version of the paper which was presented at the Cape Town Conference. The full version is available at simple request from rombouts@ruca.ua.ac.be or stef.vandeginste@uia.ua.ac.be. For comments on the section on the social science perspective contact Heidy Rombouts, for comments on the section on international legal perspectives contact Stef Vandeginste.

** Heidy Rombouts is a Researcher at the University of Antwerp in Belgium.

*** Stef Vandeginste is a Researcher at the University of Antwerp in Belgium.

¹ This paper is part of a series of four papers of an inter-disciplinary research project on the international right to reparation for victims of gross and systematic human rights violations, done at the Universities of Antwerp and Leuven (Belgium). Each of the four basic papers explores a basic notion. In addition to "victim," the papers study the notions of "reparation," "gross and systematic violations of human rights" and "political transition."

² E. FATTAH, CRIMINOLOGY. PAST, PRESENT AND FUTURE. A CRITICAL OVERVIEW 147 (1997).

³ *Id.*

more satisfying definition can be found or whether this definition can be clarified.

a) 1.1. Existing definitions

1.1.1. Victimology

F. Wertham defines the term victimology as the sociology of the victim.⁴ As "victim" is its object of study, victimology seems to be a promising starting point in the search for a definition of "victim". Victimology is a relatively new discipline resulting from a perceived lack of attention for the victim in criminology. For that reason it has been regarded by many as part of criminology. But controversy has arisen about the subject-matter of victimology. The ultimate question in this controversy is whether victimology should or is concerned exclusively with victims of crime, or also with other categories of victims or victimisation. In terms of defining victim, the core question is whether the source of victimisation (that is, crime) is essential in order to define victim. Elias is a strong proponent of a global victimology. According to Elias victimology has rarely considered anything but crime victims and he considers this as an unnecessarily constraint within traditional criminological boundaries, adopting its same conservative mentality.⁵ Elias calls for a new victimology embracing a broader definition of victimisation that brings all victims, or at least many more, within its purview.⁶ Advocates of a global victimology do not want this discipline to confine itself to the study of criminal behaviour but want it to extend its scope to social deviance in general. According to E. Fattah this option is attractive but defective. "Global victimisation has no clear precise identifiable or delimitable boundaries."⁷ He further states that the theoretical and practical advantages of limiting the study to criminal victimisation outweigh whatever drawbacks this limitation might have. The limitation is even more "essential". But, whether essential or not, this delimitation does not define "victim" as such, it only refers to a source of victimization.

⁴ F. WERTHAM, *THE SHOW OF VIOLENCE* (1949) 259. See also E. FATTAH, *CRIMINOLOGY. OR "victimology is the science studying 'victims,'" R. ELIAS, THE POLITICS OF VICTIMISATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS* (1986) 17.

⁵ R. ELIAS, *THE POLITICS OF VICTIMISATION*, *Ibid.* at 22. See also E. FATTAH, *CRIMINOLOGY*, *supra* note 3 at 183.

⁶ R. ELIAS, *THE POLITICS OF VICTIMISATION*, *Ibid.* at 23-26.

⁷ E. FATTAH, *CRIMINOLOGY*, *supra* note 3 at 184.

Victimology is a growing (sub)-discipline but so far there is no agreement on what a victim actually is and even little effort has been done to reach such an agreement. This gap has been recognised by the World Society of Victimology (WSV). The WSV has placed defining "victims" and defining "victimology" on its research agenda.⁸

1.1.2. Sociology

Abstract sociological concepts are also not satisfactory. According to Quinney

the victim is only a social construct. We all deal in a conventional wisdom ... and it is that wisdom that defines for us just who the victim is in any situation, which also means that alternative victims can be construed.⁹

Labelling theorists consider victim as a social "label". This theoretical relativism does not offer workable concepts which make it possible to designate victims and non-victims. The relativism they express should not be neglected though. A similar relativism can be found in the cultural victim described by Elias. According to him our reaction to female victimisation suggests that women represent "culturally legitimate" victims. As victimisations fulfil certain functions we should not expect that victims will be universally pitied or even recognised as victims. He concludes that the "cultural victim" reveals an American political theory, that is, the ideology of liberal capitalism.¹⁰ A conceptualisation of victim should try to take cultural and societal relativism into account, without overemphasising it. Overemphasis of relativism makes true conceptualisation impossible.

1.1.3. Psychology

Y. Danieli studies victims from a psychological viewpoint. Some are survivors of the Nazi-Holocaust, others come from Argentina and Chile, and some are Japanese Americans, In conceptualising the experience¹¹ she offers

⁸ INTERNATIONAL VICTIMOLOGY WEBSITE, WSV RESEARCH AGENDA, <http://www.victimology.nl/ivwdb/resagenda.html>.

⁹ R. Quinney, *Who is the Victim*, CRIMINOLOGY (1972) 321.

¹⁰ R. ELIAS, THE POLITICS OF VICTIMISATION, *supra* note 5 at 13-17.

¹¹ Y. Danieli, *Preliminary Reflections From a Psychological Perspective* in SEMINAR ON THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS

some useful perspectives for a workable concept of "victim." According to Danieli, an individual's identity consists of many spheres or systems, for example, physical, intra-psychic, inter-personal, familial, social, communal, religious, ethnic, cultural, spiritual, material, economic, political, national and international.¹² Ideally the individual should simultaneously have free psychological access and be able to move freely within all these identity dimensions. Once the individual is described in this way, she continues by stating that "victimisation¹³ causes a rupture, a possible regression, and a state of being stuck or frozen in this free flow" and this she calls "fixity". From this follows that an individual whose balance between the different identity dimensions is disturbed or broken (rupture, possible regression or fixity) could be called a victim. An important aspect of Danieli's approach is to look at the individual as an integrated system of many different dimensions. In her conceptualisation rupture, possible regression and fixity remain unclear to a certain extent.

1.1.4. A political perspective¹⁴: the 1985 UN Declaration and the Bassiouni Principles

(a) *The 1985 UN Declaration*

Within the scope of crime prevention and criminal justice, the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) gives two definitions of victim.¹⁵

OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (T. Van Boven, C Flinterman, F. Grunfeld and I. Westendorp eds. 1992) 199-200.

¹² Becker and others recognise, when describing psychological therapy, the dialectical relationship between therapy and macro-social processes. D. Becker et al., *Therapy With Victims of Political Repression in Chile: the Challenge of Social Reparation*, JOURNAL OF SOCIAL ISSUES (1990) 134. See also e.g. B. Lykes and R. Liem, *Human Rights and Mental Health in the United States: Lessons from Latin America*, JOURNAL OF SOCIAL ISSUES (1990) 151-165.

¹³ Emphasis added.

¹⁴ We use the term "political" because of the nature of UN institutions.

¹⁵ UNITED NATIONS GENERAL ASSEMBLY, UN DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER, UNGA Res.40/34 of 29 November 1985. The World Society of Victimology (WSV) has been instrumental in the development and subsequent adoption of the Declaration. J. VAN DIJK, INTRODUCING VICTIMOLOGY, <http://www.victimology.nl>, (ninth symposium of the WSV, 25-29/08/1997).

First definition: in the case of crime

Section 1. "victim' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power."

Section 2. "A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation."

Second definition: in the case of abuse of power

Section 18. "victim' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights."

The first part of both definitions is the same, the last part differs.¹⁶ The first difference is the source of victimisation. The victim of crime and the description of crime fall within the boundaries of classical "penal" victimology. The recognition of victims of abuse of power might be regarded as an extension. Elias welcomes this political move towards broadening the field of victimology, as the declaration stresses the victimological effects of international crimes, defined by human rights standards beyond narrow, national crime definitions.¹⁷ In regard to the definition of "victim" it is

¹⁶ The Guide for Policymakers is silent about the necessity of the two stage definition as well as on the difference between the two parts. X, *Guide for Policymakers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, New York, United Nations Office for Drug Control and Crime Prevention (1999) 15. Hereinafter *Guide for Policymakers*.

¹⁷ R. ELIAS, THE POLITICS OF VICTIMISATION, *supra* note 5 at 25. Elias, refers to the draft, meanwhile the draft has been adopted. See also Yacoubin who stresses the lack of attention given to international crimes within criminology. G. Yacoubin, *Underestimating the Magnitude of International Crime: Implications of Genocidal Behavior for the Discipline of Criminology*, INJUSTICE STUDIES, (1997) N.1, 1-10.

important to note though that only victims of crime and abuse of power are defined in a formal way. Again it has to be questioned whether the source of victimisation (crime, abuse of power, etc.) should be part of the definition of "victim" as such.

The second difference between the two definitions is that in relation to abuse of power, the second part has been left out and one has to conclude that in the case of abuse of power, this section with respect to indirect victims does not apply.¹⁸ This is a negative consequence of adopting two different definitions of victim only because the source of victimisation differs. The UN Declaration further makes a distinction between direct victims and indirect victims.¹⁹ Although we believe it to be a useful distinction, we doubt it to be inherent notions to the basic definition of a victim as the distinction between direct and indirect is only related to the degree of proximity of the source of victimisation.

The three main merits of this definition are: first, the political agreement by the countries that adopted this declaration of Basic Principles. Definitions given by academics (for example, in victimology, sociology, psychology) can be beautifully constructed, but are of little relevance to victims when there is no political support given to it. Second, attention has been given not only to persons in their individual capacity but also to persons collectively. The Guide for Policymakers does not explain the term "collective victim" any further; it only makes reference to large groups of victims²⁰ Bassiouni describes collective victims as groups or groupings of individuals linked by special bonds, considerations, factors or circumstances which, for these very reasons, make them the target or object of victimization.²¹

¹⁸ Another reason for non-application of the second section in relation to abuse of power is that section 1, in case of crime, explicitly states that when national laws incorporate abuse of power, section 1 will apply: "including those laws proscribing criminal abuse of power". The Guide for Policymakers states in the same way: "where these jurisdictions have enacted legislation criminalizing conduct covered by the above Conventions or instruments (i.e. in relation to abuse of power), Part A of the Victim Declaration would apply", *Guide for Policymakers*, 30.

¹⁹ According to the declaration immediate family and dependents (where appropriate) are indirect victims. One must realise though that the interpretation of immediate family and dependents might differ in each of the UN nations.

²⁰ *Guide for Policymakers*, *supra* note 19 at 14.

²¹ C. Bassiouni, *The Protection of "Collective Victims" in International Law*, in INTERNATIONAL PROTECTION OF VICTIMS (C. Bassiouni ed. 1988) 183.

Accordingly a "group" needs to exist before the occurrence of the violations. On the other hand, international criminal law protects categories of victims. Examples given by Bassiouni range from apartheid, to the taking of civilian hostages. In the case of apartheid the "group" clearly exists prior to the offence, but this is not necessarily the case with civilian hostage taking. In the latter case the group emerges only after the offence has been committed.²² We believe that both kinds of collectivities must be recognised as victims as language, culture, colour and crime are possible bonding factors. A third merit of the definition is the room given to other forms or aspects of harm. Taking into account Y. Danieli's description is definitely a positive element. It is regrettable though that a distinction has been made between the definition of the victim of a crime and the victim of abuse of power. The different source of victimisation might entail different needs for the victims and therefore a difference in the subsequent sections could be justified. But two basic definitions that differ (especially the second part) do not further add coherence to the conceptualisation. The main difficulty in the definition is the meaning of "harm".²³ The enumeration only indicates that it might comprise a physical, mental, emotional and economic component. It is not clear though to what extent injury, suffering and loss substantially add anything.

(b) The Bassiouni Principles

On the international political level the issue of reparation for victims of gross and systematic violations of human rights has been considered by the UN Commission on Human Rights and its Sub-Commission on the Promotion and the Protection of Human Rights. Only the final version, that is, the version of Bassiouni, of the Basic Principles and Guidelines on the right to reparation for victims of gross violations of human rights and international humanitarian law contains a definition of victim of gross and systematic violations of human rights.²⁴ The Bassiouni Principles clearly take

²² Bassiouni recognizes though that the degree of collectivisation in each of the given international crimes will differ as will the reasons for victimization. C. Bassiouni, *The Protection of "Collective Victims"* *Ibid.* at 187.

²³ This is the main shortcoming, even when one accepts that only the very first part is the true definition of a victim: "victim" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights...".

²⁴ Van Boven does refer to the 1985 UN Declaration in his 1993 Report, paragraph 33. UNITED NATIONS COMMISSION ON HUMAN RIGHTS, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF

the 1985 UN Declaration as the basis for the definition of a victim in Principle 8.²⁵

By formulating "victim" within one definition, no problems similar to the ones arising from two separate definitions arise. Consequently the section dealing with 'indirect' victims applies to all situations of international human rights or humanitarian law. We believe it is positive that a definition of victim has been made part of the Principles, as victims are the basis and the "raison d'être" of the Principles. The main difficulty in the definition remains the meaning of "harm".

b) 1.2. Proposed definition

1.2.1. A way out: defining "harm"

It is quite striking that many definitions of victim use terms that are at least as clear or unclear as the notion of victim in itself. It may be useful to clarify these concepts in order to define "victim" properly. These notions are: suffering, rupture, possible regression, fixity harm, injury, loss, substantial impairment. It is clear though that all these notions are not very different. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power indicates "harm" as an umbrella term. Offering a true conceptualisation of harm could therefore be a step forward in defining "victim".

The notion of harm has been studied by social policy academics.²⁶ First, "harm" is an independent notion and has a meaning as such. It should not be

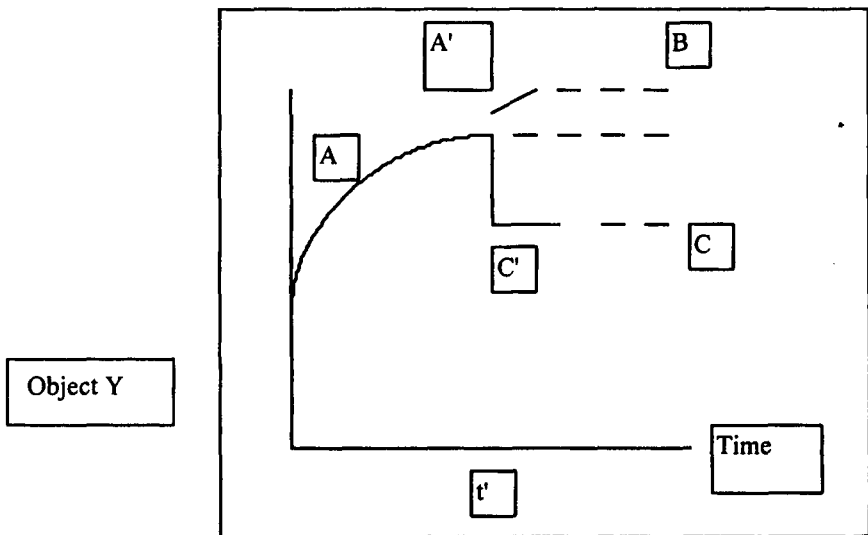
HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. Final report submitted by Mr. Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8. It has been left out though in the revised versions. UNITED NATIONS COMMISSION ON HUMAN RIGHTS, THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS. Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33 E/CN.4/2000/62. Hereinafter the *Bassiouni Principles*.

²⁵ Principle 8, *Bassiouni Principles*: "A person is a victim where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A victim may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental or economic harm." See also Principle 9.

²⁶ They stress however, that the notion of harm explored by them is "universal" in the sense that it is applicable to any kind of harm. Furthermore the understanding of harm does not

confused with "indemnification" or "reparation". The term "damages" for example, tends to confuse those two different aspects as it might refer to both.²⁷ Secondly "harm" always indicates a diminution. Harm can consequently be described as: the negative outcome resulting of the comparison of two conditions - distinguished²⁸ as a result of the causing event - of one object.

The diagram may clarify:



In this diagram a person (Y) is leading his / her life according to his / her personal capacities at a level A. At a moment 't', he or she is tortured and as a result, his / her "level" decreases from A to C. From the moment that such a decrease occurs, one can talk about *harm* and the event causing this decrease will be a "harming" event. The causal link between harm and the

differ that much throughout the world; the differences occur at the level of indemnification. J. VAN STEENBERGE, J. VIAENE AND D. LAHAYE, *SCHADE AAN DE MENS*, volume III (1975-1976) 226 and 244.

²⁷ J. Dabin, "A l'origine de tout système de réparation, quel qu'en soit le fondement ou le principe, se place l'idée de dommage, dont il convient de souligner le caractère à la fois autonome et de pur fait", cited in J. VAN STEENBERGE, J. VIAENE AND D. LAHAYE, *SCHADE AAN DE MENS*, *Ibid* at 232.

²⁸ The first condition being immediately prior to the causing event, the second condition by being caused and immediately after the causing event.

harming event is evidently important. This does not mean though that the *extent* of the harm is the difference between A and C.²⁹

In regard to the *extent* of harm, approaches might differ. A static approach might not take the further evolution of a person into account and therefore consider the distance between A and C as the basis for calculating harm.³⁰ A more dynamic approach does take the further evolution of a person into consideration in defining the extent of harm. This further evolution is represented by the "hypothetical" B curve in the diagram. According to Vansteenbergh and others, this B curve has the *shape* of the "normal course". This "normal course" is determined by the social reality which determines the life course of people that can be compared with the victim. The *level* on which this "hypothetical" evolution starts, is determined by the individual A level. The extent of harm according to this approach is represented in the diagram by the surface between B and C.³¹ We call this approach of Vansteenbergh and others,³² the objective dynamic approach, as opposed to the subjective dynamic approach. The evolution taken into account by the subjective dynamic approach, is the "subjective" evolution. The latter refers to what the person him or herself believes he would have achieved if the harming event would not have occurred. This subjective evolution might have a different shape from the shape of the B curve (this might result in a lower or a higher level than the B curve).³³ In the latter case, the extent of harm would be the surface between this "subjective" curve and the C curve.

This structure of harm is not just a theoretical scientific conceptualisation, it is reflected in much of jurisprudence. We explored this notion in order to define victim more clearly. The most important element

²⁹ R. Dalq, "La certitude au sujet de l'existence du dommage ne doit toutefois pas être confondue avec la certitude au sujet de son montant", cited in J. VAN STEENBERGE, J. VIAENE AND D. LAHAYE, *SCHADE AAN DE MENS*, *supra* note 27 at 355.

³⁰ This approach might though take "time" as such into consideration.

³¹ It must be clear that the C curve might have another form (shape + level). The C curve in the diagram is only an example. The authors propose to reduce the difficulties in measuring the extent of harm. These difficulties are inherent to the measurement of harm as they are inherent to the hypothetical situation. The level of uncertainty can be reduced by determining the extent of harm for only short periods in the future in stead off at once for the whole future (repeated evaluation). Harm of the past can be measured at once.

³² J. VAN STEENBERGE, J. VIAENE AND D. LAHAYE, *SCHADE AAN DE MENS* *supra* note 27 at 257 - 390.

³³ These personal beliefs may be very important from a psychological point of view.

for the definition of victim is the difference between A and C, as this is the "moment" that "harm" arises and one becomes a victim. Although favouring the dynamic approach to determine the "extent" of harm, a conclusive decision on what the extent of harm is, is not necessary for the understanding of victim.

1.2.2. Our proposed definition

The above offers some insight and leads to the construction of a conceptualisation of "victim".

Persons,³⁴ individually or collectively, can be considered as an integrated system of several dimensions, such as the physical, intra-psychic, inter-personal, familial, social, communal, religious, ethnic, cultural, spiritual, material, economic, political, national and international dimensions. When harm is done to this integrated system of several dimensions, the individual or group of individuals becomes a *victim*. Harm occurs when there is a negative outcome resulting of the comparison of two conditions³⁵ of the integrated system of several dimensions of the individual or the group of individuals.

It is clear that this definition relies to a large extent on the conceptualisation of an individual by Y. Danieli, but this conceptualisation, on the contrary, is not restrained to individuals. One of the basic principles of interactionism is that a group of individuals (persons collectively) is more than the sum of individuals, therefore groups of individuals should be considered in their own capacity. Groups have their own characteristics that differ from the characteristics of the individuals composing the group, nevertheless groups can be described in the same way i.e. as an integrated system of several dimensions. The groups of individuals that we talk about can be small groups but can also be large communities or even societies. Societies are systems composed of the same dimensions: physical, intra-psychic, inter-personal, familial, social, communal, religious, ethnic, cultural, spiritual, material, economic, political, national and international. The proportions of each dimension will differ between an individual and a society, but this is also the case between individuals and groups of individuals.

³⁴ "Persons" refers to both natural persons and legal persons, including corporations and non-governmental organizations.

³⁵ Being the A and C condition as described above. Harm in this definition is to be understood as described above.

1.2.3. Merits and demerits

The advantage of describing individuals and groups of individuals by the same principle of an integrated system of several dimensions is that it is easy to see that societies and groups of individuals can be victims in a similar way.³⁶ This is important, certainly in the context of gross and systematic violations of human rights. As D. Becker and others dealing with victims of political repression say:

Political repression creates problems for its direct victims in private and subjective ways, but is also affects a whole society socially and politically.³⁷

Another advantage of this definition is that it does not preclude certain victims. The dimensions mentioned are by no means exhaustive and the definition does not specify *through what* victims should be victimised.³⁸ It could therefore apply to victims of gross and systematic human rights violations, as well as, victims of natural disasters. Further this definition does not include *by whom* the victimisation must be caused. Some definitions state that victimization has to be caused by "another person", and it is not always clear to what extent governments or armed groups can be included. Choosing a particular actor can again limit the field of study although rendering it more manageable, but it is not inherent to the definition of victim.

In making this conceptualisation operational one can see two main problems. First, this definition does not enjoy political support as does the 1985 UN Declaration. As political support is important, we opted to use as far as possible the terminology of the Declaration: "persons, individually or collectively" and especially "harm" as it is used in the Declaration. The proposed definition therefore suggests the uniform use of harm, instead of similar terms, for example, suffering, pain, loss, anguish, injury, and impairment. The use of only one notion, that is, harm and offering an understanding of this notion is the largest difference between the 1985 UN

³⁶ See also M. Woolcock, *Social Capital and Economic Development: Toward a Theoretical Synthesis and Policy Framework*, THEORY AND SOCIETY (1998) 151-208.

³⁷ D. Becker, E. Lira, M. Castillo, E. Gomez and J. Kovalskys, *Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation*, JOURNAL OF SOCIAL ISSUES 1990 3, 133-149.

³⁸ Fattah would consider this to be a problem as it makes the field of study too broad. But it is not a true problem as this conceptualisation does delineate victims and non-victims and the question of what they are victimised by is different from the one of conceptualising victim.

Declaration, the definition in the Bassiouni Principles and our proposed conceptualisation.³⁹

Second, critics will point at the impossibility of objectively determining "harm" as defined in the proposed definition. When one considers the psychological dimension of a person it is indeed difficult to measure the harm done, because this is such a subjective question. Apart from the possibility of measuring with objective indicators,⁴⁰ one has to conclude that it is actually a pseudo problem as it leaves the core of the proposed conceptualisation untouched. According to the latter each person whose psychological situation has deteriorated can be considered to be a victim. Whether it is socio-politically desirable and feasible to provide reparation for, or to pay attention to each and every victim, is a whole different question from the one of conceptualising "victim" and they should therefore not be confused.

2. International legal perspectives

International (human rights) treaties rarely define the notion of victim or injured party. This section will therefore, where appropriate, study the jurisprudence of the treaty monitoring bodies.⁴¹

a) 2.1. Under general public international law

In its draft Articles on State Responsibility, provisionally adopted in 1996, the International Law Commission (ILC) lays down the legal consequences of an international wrongful act for the State that has committed this wrongful act and for the injured State. In 2000, an amended

³⁹ Another difference is of course that we propose a "general" definition of victim. The two documents mentioned never envisaged such a general definition and therefore limited victim mainly by indicating the source of victimization.

⁴⁰ This could be done within the static and dynamic objective approach briefly referred to above.

⁴¹ Methodologically, some caution is warranted. It is important to recognize that the definition of victim may not be identical to the definition of the person who has access to a certain treaty body. In others words, a person may in view of certain treaty provisions be considered as a victim and nevertheless, for other (often procedural) reasons, not be granted access to the international mechanism established to monitor compliance with the same treaty. Standing may indeed be limited for reasons related to an agreed prioritisation of fora to be used when submitting claims following alleged violations of treaty provisions.

version of the draft Articles was adopted by the ILC Drafting Committee.⁴² In this context, we are particularly interested by the notion of injured State.

(a) In the 1996 draft Articles:

For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State. (article 40, para.1).

The notion was further specified in paragraphs 2 and 3 of article 40. If the right infringed arises from a bilateral treaty, the other State Party to the treaty is an injured State. If the right infringed arises from a multilateral treaty which has been established for the protection of human rights and fundamental freedoms, every other State Party to the treaty is an injured State. If the right infringed arises from a rule of customary international law which has been established for the protection of human rights, a fortiori in the case of an international crime, any other State is an injured State and is entitled to obtain reparation. On the one hand, the language of the ILC was "admirable in its generosity"⁴³ as far as State responsibility in case of human rights violations is concerned. However, in practice, "the system for the reparation as conceived of by the ILC is hardly workable".⁴⁴ It will be illustrated below how little use indeed has been made of the interstate complaints mechanisms before the various human rights bodies.

(b) In the 2000 version of the draft Articles, the range of States that are considered as injured States has been scaled down, but more attention is paid to the possibilities for other States to invoke the responsibility of the author State.

⁴² INTERNATIONAL LAW COMMISSION, REPORT ON THE WORK OF ITS FIFTY-SECOND SESSION (1 May - 9 June and 10 July - 18 August 2000), A/55/10, para.47.

⁴³ C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in STATE RESPONSIBILITY AND THE INDIVIDUAL REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (A. Randelzhofer and C. Tomuschat ed.1999) 4.

⁴⁴ *Ibid.*, 6.

2.2. Analysis under human rights texts and mechanisms

2.2.1. European Convention on Human Rights

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violations by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. (article 34 ECHR).

If the Court finds that there has been a violation of the Convention, (...) the Court shall, if necessary, afford just satisfaction to the injured party. (article 41 ECHR)

Standing under Article 34 is awarded to individuals, organizations or groups of persons on the condition that they are victims of a violation of one of the Articles. In other words, in the context of the ECHR, in order to determine who has standing and whether an application is admissible, the Court (previously also the Commission) has to apply its own definition of the notion of victim. Moreover, in order to determine who can receive just satisfaction under Article 41, the Court has indicated in several cases, that it considers the term injured party as synonymous with the term victim in article 34.⁴⁵ The same acts or omissions may give rise to different claims⁴⁶ by different applicants for one or more violations.

1. Direct victims

Most obvious is the situation in which a direct victim claims just satisfaction for the injury suffered as a result of the violation. Indeed, unlike in the general public international law, the duty to provide reparation on behalf of the State who is responsible for the breach of the international obligation is not owed primarily to other contracting parties, but to the individual victim or injured party. The Court has ruled that the notion of victim, as referred to in Article 34, does not presuppose any prejudice. In *Brumarescu v. Romania*, the Court stated that,

it is the settled case-law of the Court that the word "victim" in the context of Article 34 of the Convention denotes the person directly affected by the act or omission in issue, the existence of a violation of the Convention being

⁴⁵ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999) 183.

⁴⁶ It should be noted that just satisfaction needs to be claimed, and will not be awarded by the Court of its own motion.

conceivable even in the absence of prejudice; prejudice is relevant only in the context of Article 41.⁴⁷

Consequently, any measures taken to alleviate or compensate the prejudice suffered as a result of the alleged violation, pending the proceedings, does not in itself deprive the applicant of the status of victim. The relevance of prejudice under article 41 is related to “just satisfaction”, not to “injured party”. The Court has recognized that not only natural persons, but also corporations and non-profit organizations can have the status of victim and injured party under the ECHR.

2. *Indirect victims*

The Commission defined the term victim as including:

not only the direct victim or victims of the alleged violation, but also any person who would indirectly suffer prejudice as a result of such violations or who should have a valid personal interest in securing cessation of the violation.⁴⁸

Indirect victims (for instance, the direct victim's widow⁴⁹), are therefore entitled to just satisfaction for their own suffering as a result of the violation. In a recent case, *Velikova v. Bulgaria*, the Court awarded both non-pecuniary damages to compensate the “pain and suffering” of the partner of the direct victim who died in police custody, as well as pecuniary damages for the loss of income resulting from the death of her partner and father of her three children.⁵⁰

In addition, the lack of information and investigation on behalf of the authorities into an alleged violation may amount to a (distinct) violation of the European Convention, the indirect victim of the initial violation becoming a direct victim of the second.

⁴⁷ BRUMARESCU V. ROMANIA, Judgment of 28 October 1999, para.50.

⁴⁸ X V. FEDERAL REPUBLIC OF GERMANY, Application 4185/69, EUROPEAN COMMISSION ON HUMAN RIGHTS DECISIONS AND REPORTS, Vol.35 (1970)142.

⁴⁹ COLOZZA AND RUBINAT V. ITALY, Judgment of 12 February 1985.

⁵⁰ VELIKOVA V. BULGARIA, Judgment of 18 May 2000.

3. *Survivability of claims*

Heirs and successors can recover an award of pecuniary damages to the direct victim if the applicant dies during the proceedings. Initially, non-pecuniary or moral damages did not survive unless the Court deems it necessary to advance the cause of justice.⁵¹ The European Court has gradually recognized the survivability of claims for moral damages. The rights of an injured party can also be exercised by a heir even if the proceedings were not initiated by the victim prior to his death.

4. *Inter-state applications*

M. Kamminga⁵² analysed the capacity of the ECHR mechanism to cope with gross and systematic violations. Given the inadmissibility of individual complaints as *actio popularis*, Kamminga focused on the inter-state procedure as provided for under Article 33. He found that the past record of the supervisory system of the ECHR in dealing with situations of gross and systematic human rights violations had been unimpressive. The more serious and widespread the violations, the less adequate the response.

In addition to the changes introduced by Protocol No. 11, entered into force on 1 November 1998, Kamminga proposes a further reform which would allow the Court to act *proprio motu*. This competence would enable the Court to investigate alleged gross and systematic violations at its own initiative (for instance, on the basis of information submitted by non-governmental organizations). Logically, it would also enable the Court to impose reparation measures on the offending State⁵³.

2.2.2. American Convention on Human Rights

The American Convention on Human Rights provides that:

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge

⁵¹ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW *supra* note 46 at 184.

⁵² M. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?* 12 NETHERLANDS QUARTERLY OF HUMAN RIGHTS (1994) 153-164.

⁵³ For a response and an analysis of the contribution of the individual application procedure to address situations of gross and systematic violations, see A. Reidy, F. Hampson and K. Boyle, *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETHERLANDS QUARTERLY OF HUMAN RIGHTS (1997) 161-173.

petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party. (Article 44)

If a violation is found, the Court may, under Article 63,, rule that fair compensation be paid to the injured party.

1. Before the Inter-American Commission on Human Rights

Standing before the Inter-American Commission on Human Rights is not subject to any major limitation. Any person or group of persons, or an NGO may lodge a petition without necessarily being the victim of the alleged violation. The Commission can also act *proprio motu*. The Commission will place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in the Convention. These friendly settlements may include wide-ranging remedies and large compensatory damages.⁵⁴

If no friendly settlement can be obtained, the Commission may recommend that the offending State take measures to remedy the situation examined.⁵⁵ In practice the Commission has confined itself to a general recommendation that the defendant State needs to pay compensation. It is only when the Commission brings a case to the Court that it specifies the theory and measure of damages it is urging.⁵⁶ As far as reparation measures other than financial compensation for the individual victims are concerned, the Commission has, for example, issued recommendations for the reform of the military court system, the investigation, prosecution and punishment of perpetrators, the adoption or modification of legislation. This comports with the general power of the Commission to recommend reparation measures that address structural human rights violations, rather than necessarily confining its recommendations to individual reparation needs.

It is therefore clear that a combination of the possibility of the Commission to act *proprio motu* and to initiate a friendly settlement procedure, allows for a greater structural approach to remedies and reparation measures. This may benefit a wider range of victims and may also render considerations of standing of minor importance.

⁵⁴ AMERICAN CONVENTION ON HUMAN RIGHTS, Article 48, paragraph 1 f.

⁵⁵ *Ibid* Article 51, paragraph 2.

⁵⁶ W. Reisman, *Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas* in STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS (A. Randelzhofer and C. Tomuschat eds. 1999) 71.

2. *Before the Inter-American Court of Human Rights*

Cases before the Inter-American Court of Human Rights are submitted by the Commission. Individual victims or organizations (including those with standing before the Commission under Article 44) do not have standing before the Court. Generally, the issue of reparations (Article 63) is reserved for a second phase, after the judgment on the merits of the case. Regarding the notion of injured party (as in Article 63), the Court has laid down a general definition of the notion in *Aloeboetoe v. Suriname*.⁵⁷ The Court required the State to remedy the harm caused to those who suffer immediate effects of the breach of a human rights guarantee, when those effects are sufficiently direct and proximate.

The Court has held that both pecuniary and non-pecuniary claims survive and automatically pass to the victim's heirs or successors. To determine who can rightfully claim to be a heir or successor, the Court does not apply national legislation, but has tended to develop its own law. In *Velasquez Rodriguez v. Honduras* and *Godinez Cruz v. Honduras*, the Court rejected the argument developed by Honduras and the Commission that indirect beneficiaries needed to fulfil the requirements under Honduran law in order to be recognized as heirs of the victims.⁵⁸

In several cases, the Court has clearly indicated that not only direct victims may be entitled to a remedy under article 63 for their own suffering. In *Loayza Tamayo v. Peru*⁵⁹, the Court held that the term "injured party" in Article 63 also includes the victim's family members, and that the term family members should be understood in a broad sense to include all those persons linked by a close relationship, including the children, the parents and the siblings. In *Aloeboetoe v. Suriname*, the Court found inspiration in local, tribal law (and not in Surinamese state law) to determine who could rightfully claim to be an injured party. Since tribal customary law accepts polygamy, the Court recognized the multiple wives (and their children) of the victims. In addition, the Commission argued that in traditional Maroon

⁵⁷ ALOEBOETOE V. SURINAME, REPARATIONS, Judgment of 10 September 1993

⁵⁸ VELASQUES RODRIGUEZ V. HONDURAS, COMPENSATORY DAMAGES, Judgement of 21 July 1989.

⁵⁹ LAOYZA TAMAYO V. PERU, REPARATIONS, 27 November 1998.

society, a village community constitutes a family in the broad sense of the term.⁶⁰

2.2.3. African Charter on Human and Peoples' Rights

Communications alleging a violation of the Charter by one of the States Parties may be submitted to the African Commission on Human and Peoples' Rights by another State Party (Article 47-54). To date, there have been no formal submissions to the African Commission in accordance with this inter-State communication mechanism.⁶¹

The Charter is relatively unclear with regard to "other communications" it can receive under Article 55. According to Article 56, individual and non-governmental organization communications shall be considered by the Commission if a simple majority of its members so decides. The latter stipulates that a communication shall be considered if the author is mentioned, if all local remedies have been exhausted, and the like. It appears therefore that the admissibility criteria do not seem to limit the range of persons or NGO's who have standing before the Commission under Article 55. In practice, a large number of communications have been brought by non-governmental organizations. The decisions of the Commission do not shed any light on the notion of victim under the African system.⁶²

Article 58 of the Charter refers to a specific procedure with regard to communications that relate to a series of serious or massive violations. In practice, this procedure has on no occasion been taken up by the Assembly of Heads of State and Government. Murray notes that although these situations are in practice dealt with in the same manner as individual communications (that is, under articles 55 and 56, rather than under article 58), the Commission has nevertheless adapted its individual communication procedure to deal with serious or massive violations. In several cases, the

⁶⁰ As a consequence, according to the Commission, villagers suffering emotional damages as a result of the beating and killing of their fellow members of the group were entitled to compensation. The Court rejected this part of the claim, although it is not fully clear which arguments motivated this decision. D.SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW*, *supra* note 46 at 187.

⁶¹ R. Murray, *Serious or Massive Violations under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms*, *NETHERLANDS QUARTERLY OF HUMAN RIGHTS* (1999) 127.

⁶² See INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT, *COMPILATION OF DECISIONS AND COMMUNICATIONS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS EXTRACTED FROM THE COMMISSION'S ACTIVITY REPORTS 1994-1999*, Banjul (1999) 275.

African Commission held that local remedies need not be exhausted if there is *prima facie* evidence of serious or massive violations of the Charter. The reasoning behind this is that in such situations the Government has necessarily had ample notice of the violation before the international body is called upon.⁶³

It is obviously too soon to tell what role the African Court on Human and Peoples' Rights will play in awarding reparation to victims. In accordance with the Protocol, the African Court will have the possibility to award financial reparation and to rule on other measures to remedy the situation.⁶⁴ Some observers have already rightly expressed caution against the idea that the Court might be used as the preferential forum to obtain reparation in each and every individual case.⁶⁵

2.2.4. The United Nations Convention against Torture and Other, Cruel, Inhuman and Degrading Treatment.(UN CAT)

Article 14 of UN CAT provides that:

Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

A victim under the Convention can logically be understood as a person upon whom "severe pain or suffering, whether physical or mental is intentionally inflicted" in accordance with the definition of torture under Article 1 of the Convention. As far as standing is concerned, under the individual complaint procedure, cases can be brought before the Committee

⁶³ Murray nevertheless rightly notes that "Until the African Commission adopts a separate procedure for dealing with serious or massive violations it is debatable whether minor alterations to the individual communication system can be sufficient for dealing with serious or massive violations. (...) Such a waiver of conditions arguably implies a recognition by the international organs that at least some aspects of individual mechanisms are not suited to cases of serious or massive violations".

⁶⁴ H. Boukrif, *La Cour Africaine des Droits de l'Homme et des Peuples: un organe judiciaire au service des droits de l'homme et des peuples en Afrique*, 10 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (1998) 85.

⁶⁵ M. Mutua, *The African Human Rights Court: A Two-Legged Stool?*, 21 HUMAN RIGHTS QUARTERLY (1999) 359-375.

against Torture (CAT) by direct victims of an act of torture, or a designated representative, the victim's relatives or, where the victim is unable to make the submission in person, others who can justify taking action on the victim's behalf.

Unlike the ICCPR and the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention provides for an innovative implementation procedure under article 20, which allows the Committee to act *proprio motu* in case of an alleged systematic practice of torture.⁶⁶ The only requirement for the CAT to set in motion this procedure *ex officio* is the reliability of the information containing well-founded indications of systematic practices of torture. Private individuals, national and international governmental or non-governmental organizations may submit information to the CAT. The proceedings under article 20 are confidential, but the CAT may, after consultations with the State Party concerned, decide to include a summary account in its annual report. The report on Egypt⁶⁷ is indicative of the type of reparation measures which the CAT requires the State Party to take. They are of a structural rather than of an individual victim-oriented nature.

b) 2.3. Cross-section summary

On the basis of the above-mentioned overview, some conclusions can be drawn with regard to the notion of victim (who is entitled to receive reparation) and *locus standi* (who can claim reparation). Generally, no limitative definition of the notion of victim is used and the various human rights mechanisms all recognize that the direct victims, and also indirect victims are entitled to reparation for their own suffering. The range of indirect victims is rightly not limited to some close family members. In fact, and despite the importance of the (proximity of) family ties, not all family members are automatically indirect victims. Conversely, not all indirect victims are relatives. For non-relatives to be recognized as victims entitled to receive reparation, both their emotional link with the direct victim and the cultural setting are important. We noted that in the Aloeboetoe case before the Inter-American Court on Human Rights, customary law related to polygamy and village community ties were fully taken into account when

⁶⁶ The compulsory nature of this procedure is somewhat reduced by the possibility for States to make a reservation under Article 28, allowing to opt out of the procedure under Article 20.

⁶⁷ REPORT OF THE COMMITTEE AGAINST TORTURE, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, 51ST SESSION, SUPPLEMENT NO. 44 (1996) para. 220-222.

defining the range of victims to whom the author State should award reparation. Victims were rightly defined as those persons who suffer immediate effects of the breach of a human rights guarantee, on condition that those effects are sufficiently direct and proximate.

It is also generally recognized that indirect victims of a human rights violation can become direct victims of a violation of another human rights norm, especially in cases where there is a lack of action taken by the author State in response to the initial violation. A broad notion of direct and indirect victim, which we advocate, may also have an impact on the exercise of universal jurisdiction for certain international crimes by States other than the State where the violations have been committed. In a 2000 case before the International Court of Justice, the Democratic Republic of the Congo (DRC) rejected the possibility of Belgium exercising its universal jurisdiction through criminal prosecution of a Congolese national for acts committed on Congolese territory against Congolese nationals. Among other arguments, the DRC referred to the lack of territorial (or other) link with Belgium. In the reply by Belgium, reference was made to the fact that such link follows from the nationality of the victims who constituted themselves *partie civile* (civil claimants) before the Belgian judiciary.⁶⁸ In the case concerned, these persons are indirect victims, relatives of persons who were actually killed in the DRC, possibly as a result of the acts committed by the accused.⁶⁹

Is harm an essential component of the status of victim? The European Court has ruled that, to invoke the responsibility of the author State, a victim does not necessarily have to demonstrate any prejudice: the finding of a violation does not depend on the proof of prejudice. What it means in essence, however, is that *material* prejudice is no precondition for victim status or locus standi under article 34. It does obviously play a role in relation to the granting of reparation (ECHR, Article 41). This ruling does not appear to contradict our definition, since any person directly affected by the act or omission which constitutes the violation can be said to suffer at least from some moral harm. This argument is made by Shelton who refers to Anzilott, noting that,

⁶⁸ See the VERBATIM RECORD OF THE PUBLIC SITTING HELD ON TUESDAY 21 NOVEMBER 2000 IN THE CASE CONCERNING THE ARREST WARRANT OF DRC v. BELGIUM, 11 April 2000 www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm

⁶⁹ At the time of writing, the International Court of Justice has not yet rendered its judgment on the case, so it remains unclear whether the recognition of indirect victims and their nationality is indeed a relevant aspect in the exercise of universal jurisdiction.

harm is implicitly contained in the illegal character of the act” and that “the violation of a norm always disturbs the interest it protects as well as the right(s) of the person(s) having the interest.⁷⁰

Similarly, the International Law Commission, in both the 1996 and the 2000 versions of the Draft Articles on State Responsibility, does not require any harm other than the breach of an obligation to recognize the status of injured party.

In most cases, the notion of victim is not limited to natural persons, and legal persons are also recognized as potentially having personal standing. In the context of gross and systematic human rights violations it might be interesting for human rights protection and reparation mechanisms to be set in motion through procedures other than individual complaints by victims. The mere fact that in most cases organizations are allowed to set in motion the mechanism concerned does not necessarily mean that the said mechanism also allows for an *actio popularis*. In fact, standing is in most cases reserved for those who have been actually affected by a violation or those explicitly speaking on their behalf. Before the African Commission and the Inter-American Commission (not before the Inter-American Court), an *actio popularis* is admissible. Of the mechanism studied above, only the Committee against Torture and the Inter-American Commission may set in motion an investigation procedure *proprio motu*. Finally, although under most mechanisms, inter-state complaints are theoretically possible, they remain without major practical significance.

II. CONCLUSION: THE SOCIAL SCIENCE AND THE LEGAL PERSPECTIVE INTERTWINED

The above-mentioned legal and social science analysis indicates, in our view, that under any human rights mechanism, the notion of victim should be defined as broadly as possible. Anyone who has been sufficiently directly affected by a human rights violation should be considered a victim. This recognition of victim status may in itself already constitute some sort of reparation.

The broad and flexible approach to the notion should apply to both direct and indirect victims. A narrower legal definition which excludes certain individuals and categories from potential (indirect) victimhood is

⁷⁰ D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 46 at 102.

hardly feasible and it does not allow for an incorporation of socio-political concerns. For instance, irrespective of whether proximate family ties link direct and alleged indirect victims, culturally determined visions of community ties should be allowed to have an impact on the legal recognition of who is a victim. The legal approach should therefore be sufficiently flexible. Cases such as Aloeboetoe and Loayza Tamayo are indicative of such flexibility.

This does not necessarily mean that all victims should automatically be allowed to enforce a subjective right to reparation before the human rights mechanism in question. In this situation, concerns of both a socio-political and a legal nature should be given due consideration and may result in limitations of a victim's actual reparation.

At the socio-political level, particularly in situations of gross and systematic human rights violations, it may be practically and financially impossible for a State to consider the possibly daunting reparation and reconstruction issue. This is so particularly where there is a large number of individual reparation claims by a large group of victims as defined above. Indeed, society as a whole, or groups in society may experience reparation needs that go beyond individual reparation claims. These claims may sometimes be conflicting, but will in most cases require the appropriate priority setting by the responsible State. Appropriate reparation could therefore be made up of a combination of individual and collective oriented measures of a financial, symbolic, moral and political nature. In addition, the socio-economic and political setting may require a certain de-prioritisation of reparations.

Will the legal approach to the reparations issue be able to incorporate these socio-political considerations? If reparation is conceived of as a subjective right for every individual victim, irrespective of whether the violation results from an isolated act of ill-treatment in a police cell in a democratic State, or from gang-rape in the context of genocide, then it is hardly conceivable that some victims would be deprived of the exercise of their individual right to reparations as a result of 'contextual' socio-political considerations. One possible way-out is to conceive of reparations as an obligation on behalf of the responsible State rather than as a subjective right of the victims. The responsible State can then meet its obligation through a combination of individual and collective reparation measures. The best illustration is the sanctioning of individual perpetrators: will the legal setting consider this as an individual subjective right of the victim (which the Bassiouni principles seem to indicate) or as an obligation on behalf of the

responsible State? Looking at reparation as an obligation of the author State automatically means allowing this State to exercise some discretion, within a reasonable margin of appreciation, and to weigh individual (financial and other) reparation needs against collective reparation measures and socio-political considerations. The recent change in the conception of reparation in the draft Articles on State Responsibility by the International Law Commission which suggest an approach of a right of the injured State to an obligation of the author state sets an interesting framework.

A second socio-political factor which might have an impact on who among the larger group of victims will receive reparation - and which the legal setting should give due consideration to - is related to what we call "public recognition selection processes". These are the mechanisms according to which some victims have the "power" to enforce recognition (socially and legally) and others do not. Are victims organized in civil society groups? Do they receive (financial or other) donor support? Are they in competition with other groups of victims? These socio-political mechanisms will influence the access to court (or other official reparation mechanisms). In addition, the public recognition selection process might also lead to certain forms of reparation other than "legally enforced" reparation. This type of reparation might be offered by, for instance, civil society groups or services and not through a court order. When victims feel satisfied by this kind of reparation, this may reduce the necessity of establishing a legal forum.

A third limitation is of a more strict legal, procedural nature. It seems very legitimate to force victims to address themselves, in first instance, to national courts or funds or other reparation mechanisms. The preferential reparation forum may indeed be situated at the level of the responsible State, the international level operating as a back-stop, dealing with precedent cases and, only if the national forum is reasonably excluded for the victims concerned, acting as the immediately available level. These considerations should, however, be translated in the notion of *locus standi* rather than in the notion of victim before the mechanism concerned.