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Repairing the Irreparable: Current and Future Approaches to Reparations

by Chanté Lasco*

In his bestselling book entitled, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda*, Philip Gourevitch describes the physical destruction and emotional wreckage left in the wake of the Rwandan genocide. One survivor describes Kigali, the capital of Rwanda, as a necropolis. “The place smelled of death,” he recounts, “[t]here were very few people whom you knew from before, and no water or electricity, but the problem for most people was that their houses were destroyed.” Survival was made even more difficult by the widespread depression experienced by Rwandans, leaving them without “a reason to survive again, a reason to look to tomorrow.”

The physical and emotional devastation survivors face in Rwanda and around the world highlight the fact that justice for victims of violations of international human rights and humanitarian law must include not only accountability for the perpetrators, but also reparations for the victims struggling to put their lives back together. All too often, justice is defined very narrowly, encompassing only what consequences perpetrators of crime will face without addressing the needs of the victims.

Black's Law Dictionary defines “reparation” as “Compensation for an injury or wrong, especially for wartime damages or breach of an international obligation.” “Compensation” is defined as “Payment of damages, or any other act that a court orders to be done by a person who has caused injury to another and must therefore make the other whole.” It is difficult to imagine what would compensate victims of atrocities such as genocide and what it would take to make victims whole again. It is even more difficult, however, to ignore the pressing need for such assistance. This article will explore current reparations mechanisms for victims of violations of international human rights and humanitarian law as well as promising trends offering new hope for more comprehensive reparations.

Current Reparations Mechanisms for Violations of Human Rights Law

Several international human rights instruments address the need for reparations in general terms. Article 8 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, and Article 39 of the Convention on the Rights of the Child employ similar language incorporating a right to a remedy for violations of its provisions.

Regional human rights conventions also provide for a right of remedy. The American Convention on Human Rights (Article 25) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 13) provide for a right of remedy for victims of violations of these conventions, although “remedy” is not specifically defined.

Additionally, the UN General Assembly adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985 (Declaration), which includes more specific and far-reaching rights for victims, including a right to restitution and compensation. The language of the Declaration, for example, reflects a very progressive recognition of victims’ rights to participate in criminal proceedings, but

it lacks potency. It states that “[g]overnments *should* review their practices, regulations and laws to consider restitution as an available sentencing option in criminal cases,” and that they “*should* endeavour to provide financial compensation” to victims (emphasis added). To this end, the Declaration states that “[t]he establishment, strengthening and expansion of national funds for compensation to victims should be encouraged.”

Limitations to Current Approaches

Although these instruments contain promising provisions regarding reparations, there are several reasons why they cannot always ensure victims actually have access to reparations. To begin with, some of these instruments are binding treaties (i.e., the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)) and others are non-binding declarations (like the General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power), which are binding only to the degree that they reflect principles of customary international law.

Even binding treaties can be limited by the states’ willingness or ability to comply. For example, while many of the CAT’s provisions have attained the status of customary international law, state parties to the CAT bear the burden of determining the amount of compensation and providing the compensation to victims of torture. It is especially problematic to depend on state parties to enforce the provisions of a treaty when that treaty addresses abuses usually committed by governments.

Given the fact that Article I of the CAT defines torture as “severe pain or suffering . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,” governments themselves are the only potential perpetrators of torture from which compensation could be sought. Many human rights instruments lack effective enforcement measures. The CAT gives individuals the right to lodge a complaint with the Committee against Torture (Committee), yet in order for the Committee to admit and examine individual communications against a state party, that state party must first expressly recognize the Committee’s competence to do so. Other states can put diplomatic pressure on non-compliant states or use economic sanctions against them, but the problem with enforcing the law with political pressure is that politics dictate whom the laws are enforced against.

Lack of Resources

In addition to the problem of some states’ unwillingness to comply with compensation requirements, many states are unable to provide reparations due to a lack of resources. The UN has established a Voluntary Fund for Victims of Torture (Voluntary Fund) that is supported by voluntary donations from governments, organizations, and individuals. Although the Voluntary Fund could address the state compliance problem by pooling the resources of wealthier countries, it does not provide direct financial compensation to victims of torture. Rather, it provides funding to non-governmental organizations (NGOs) that provide “direct medical, psychological, social, economic, legal, humanitarian or other forms of assistance to torture victims and members

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of their family.” For victims to receive these services, they must reside in a region where a Voluntary Fund-supported NGO operates, be aware of the NGO and its services, have the means to request assistance, and meet the guidelines the particular NGO established. Furthermore, the Voluntary Fund, like individual states, lacks resources. According to a statement by the International Rehabilitation Council for Torture Victims (IRCT), in the year 2000, the gap between the Voluntary Fund’s resources and the requests for funding received was more than \$3 million. According to the IRCT, this gap shows that “only a small fraction of torture victims worldwide have the possibility to obtain rehabilitation treatment, counseling or support services.”

In short, while many international human rights instruments require states to offer remedies for victims of specific human rights abuses, some are not legally binding, and others often provide rights in vague terms that allow each state to interpret “remedy” as it sees fit. Where states do not meet treaty obligations, enforcement mechanisms are at times seriously lacking. Even where states are willing to offer remedies to victims, they may lack the necessary resources to do so, and the way international funds to support such remedies are set up can present significant obstacles for individual victims seeking adequate redress.

Current Reparations Mechanisms for Violations of International Humanitarian and Criminal Law

In 1993, the UN Security Council passed a resolution to create the International Criminal Tribunal for the Former Yugoslavia (ICTY) in response to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTY’s mission is fourfold: to bring to justice persons allegedly responsible for violations of international humanitarian law; to render justice to the victims; to deter further crimes; and to contribute to the restoration of peace by promoting reconciliation in the Former Yugoslavia. In 1994 in response to the murder of approximately 800,000 Rwandans, the Security Council passed a resolution to create the International Criminal Tribunal for Rwanda (ICTR) with a mission to “contribute to the process of national reconciliation in Rwanda and to the maintenance of peace in the region.”

Although the ad hoc tribunals for Rwanda and the Former Yugoslavia have created important precedents by holding individuals accountable for violations of international law, they have failed to demonstrate great progress where reparations are concerned. The statutes and rules of procedure and evidence for both tribunals use the same language regarding reparations, providing for “the return of any property and proceeds acquired by criminal conduct . . . to their rightful owners.” In other words, these provisions limit reparations to the return of stolen property and do not provide for mandatory redress for personal injuries of a physical or mental nature. Rule 105 of both the ICTR’s and ICTY’s Rules of Procedure and Evidence elaborate on the procedure for carrying out the restitution provision. This rule provides for the Trial Chamber to order the return of property or its proceeds if it can determine the rightful owner.

In the tribunals, compensation, as described in the Rules of Procedure and Evidence, could entail awards of a broader scope than those discussed above. Rule 106 in both the ICTR’s and ICTY’s Rules of Procedure and Evidence stipulates that “[p]ursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.” This leaves victims who have often lost their homes and all of their belongings to seek their own repre-



Credit: Internews Network

Defendants and counsel in proceedings before the International Criminal Tribunal for Rwanda. Seated in the front are Giacomo Calderera, counsel for Jean Bosco Barayagwiza, as well as John Floyd and Rene Martel, counsel for Hassan Ngeze. Diana Ellis, deputy counsel for Ferdinand Nahimana, and assistants are seated in the second row. Defendants Ferdinand Nahimana and Hassan Ngeze are in the back of the courtroom.

sentation and file suit with domestic justice systems left in shambles and overburdened by the prosecution of war criminals. Once again, the decision of whether to provide compensation is ultimately left to the discretion of national jurisdictions. The tribunals only assist victims to get compensation by declaring that ICTR and ICTY judgments “shall be final and binding as to the criminal responsibility of the convicted person for such injury [to the victim].”

Recent Developments: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law

New developments in providing adequate reparations to victims face many of the same limitations as existing mechanisms. Increasing momentum in this area, however, could signal growing support for victims’ rights to reparations. In 1989, the Commission on Human Rights commissioned a study on the “right to restitution, compensation and rehabilitation for victims of human rights [abuses] and fundamental freedoms.” In 1998, the chairman of the Commission appointed an independent expert, M. Cherif Bassiouni, who prepared a revised version of the basic principles and guidelines in a document entitled, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law” (Principles). The Principles were analyzed in the context of other United Nations norms and standards concerning victim redress, including the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Rome Statute for the International Criminal Court. Various countries participated in consultative meetings to help shape the Principles, as well as several United Nations bodies, intergovernmental organizations (IGOs) and NGOs. The latest consultative meeting on the Principles was held in late September and early October of 2002 and was attended by 52 States and twelve organizations.

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The most recent draft of the Principles embraces existing international law, taking into account “all relevant international norms arising from treaties, customary international law and resolutions of the General Assembly” and other UN organs, yet also leaves room for future developments in international law. In this regard, the Principles differentiate between existing international obligations and emerging norms by using the word “shall” for existing international obligations and the word “should” for emerging norms. The precise nature of the instrument that the Principles will become is not yet clear, but at this stage it appears it might only get enough support from states as a declaration rather than a binding treaty.

Scope of the Definition of Victims

In any instrument addressing victims’ rights, a paramount issue is how “victim” is defined. If an instrument provides for reparations to victims, those reparations will go only to the class of people defined by the instrument as victims. For example, the CAT addresses only reparations for victims of torture. The Principles embody a wide definition of victims, perhaps reflecting an increasing desire to address the needs of victims of human rights abuses more generally. Article V of the Principles provides that

[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 person’s status as “a victim” should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

Scope of Reparations

Under Article VII(11) of the Principles, “[r]emedies for violations of international human rights and humanitarian law include the victim’s right to: access justice; reparation for harm suffered; and access the factual information concerning the violations.” The Principles define reparations broadly to include remedies such as “restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition.” Whenever possible, restitution is meant to “restore the victim to the original situation before the violations of international human rights or humanitarian law occurred.” It includes restoring a victim’s liberty and legal rights, returning victims to their place of residence, or returning their property. Compensation is defined as providing a financial remedy for “economically assessable damage,” such as physical or mental harm, lost opportunities (including education), loss of employment opportunity, and even damage to one’s reputation or dignity. Rehabilitation refers to medical, psychological, legal, and social services. Finally, the Principles state that part of reparations is a guarantee of non-repetition, demonstrated by “cessation of continuing violations,” “full public disclosure,” and where disappearances have occurred, locating and reburial of bodies “in accordance with the cultural

practices of the families and communities.” The concept of non-repetition incorporates, among other things “[a]n official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim” and an “[a]pology, including public acknowledgement of the facts and acceptance of responsibility.”

The Principles also include more systemic efforts to address the deeper societal issues that lead to violations of international human rights and humanitarian law, such as “[p]rotecting persons in the legal, media and other related professions and human rights defenders; conducting and strengthening, on a priority and continued basis, human rights training to all sectors of society . . . and [c]reating mechanisms for monitoring conflict resolution and preventive intervention.” Finally, and very importantly, the Principles request that states publicize victims’ rights to reparations.

Purposes of the Principles

The Human Rights Commission’s intentions in drafting the Principles are best expressed in the preamble to the Principles:

Recognizing that, in honouring the victims’ right to benefit from remedies and reparation, the international community keeps faith and solidarity with victims, survivors, and future human generations, and reaffirms the international legal principles of accountability, justice and rule of law,

Convinced that, in adopting a victim-oriented point of departure, the community, at local, national and international levels, affirms its human solidarity and compassion with victims of violations of international

human rights and humanitarian law as well as with humanity at large, [the Commission on Human Rights] decides to adopt the [Principles].

NGOs involved in consultative meetings concerning the Principles identify several major purposes that the Principles will serve. These groups point out that even in its draft form the Principles are becoming a point of reference for international jurisprudence and national practice, and cite several rulings of the Inter-American Court of Human Rights in which the judges have referred to the Principles. NGOs look to the Principles as a universal document that will help standardize victims’ rights to reparation, overcoming the fragmented nature of the current legal framework for reparations reflected in instruments discussed earlier in this article. Several fundamental questions relating to the scope of the Principles were still being discussed at the most recent consultative meeting. Also, meeting participants noted that further clarification is needed to differentiate between state responsibility for violations of human rights and humanitarian law and individual criminal and civil liability arising from these violations.

Like the other instruments discussed earlier in this article, the Principles depend on state action and have no enforcement mechanism. But also like the other instruments, the Principles have the potential to impact domestic and international norms and become a part of customary international law. The Principles may someday be the benchmark by which

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states' treatment of victims are measured. At the very least, to the degree that governments are willing to implement the Principles domestically, they can be an important tool to strengthen victims' rights to reparation.

The International Criminal Court's Victims' Trust Fund

Another very promising reparations mechanism is the Victims' Trust Fund provided for by Article 79 of the Rome Statute, the treaty that created the International Criminal Court (ICC). For the purposes of the Victims' Trust Fund, victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." Crimes within the jurisdiction of the ICC currently include genocide, crimes against humanity, and war crimes only if they are either committed on the territory of a state party, on the territory of a state who accepts the ICC's jurisdiction, or by a national of a state party. The nationality of the victim is not relevant to whether or not he or she can benefit from the ICC's Victims' Trust Fund. The Victims' Trust Fund is a unique mechanism because it is being established under the auspices of the ICC, yet unlike support provided by the Victims and Witnesses Unit, victims can receive support from the Victims' Trust Fund even if they do not appear before the ICC. The ICC can award reparations to victims against their perpetrators' property, or victims can receive reparations from the Victims' Trust Fund. The ICC may award reparations on an individualized basis, on a collective basis, or both.

The Rome Statute and the ICC's Rules of Procedure and Evidence leave most of the details regarding the Victims' Trust Fund for consideration by the Assembly of States Parties (ASP), the governing body of the ICC. The ASP met for the first time in September 2002 and accepted the "draft resolution of the Assembly of States Parties relating to the procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims" drafted by the ICC Preparatory Commission in its Tenth Session in July. This resolution establishes a board of directors to manage the Victims' Trust Fund and addresses such issues as funding sources (voluntary contributions and court-ordered fines, forfeitures, and reparations) and the relationship between the board of directors, the registry of the ICC, and the ASP. The Preparatory Commission also drafted a resolution outlining the process for electing the board of directors, which will be comprised of five individuals selected from five different geographical regions. The mandate of the board of directors will be to establish and manage the Trust Fund, and as the resolution states, they "shall consult, as far as possible, victims and their families or their legal representatives and may consult any competent expert or organization."

The board of directors will confront a number of issues and play a crucial role in the effectiveness of the Victims' Trust Fund. They will determine whether the Fund is proactive—engaged in soliciting, collecting, and allocating contributions from governments, international organizations, corporations, and individuals—or reactive, restricting its income to court-ordered forfeitures and reparations. This decision will determine the amount of resources that the Victims' Trust Fund is able to harness and what kind of assistance it can provide. Court-ordered reparations will probably not yield a significant sum of money given the experiences of the ICTR and ICTY: almost all of the defendants before the tribunals have been declared indigent. Voluntary contributions have the potential to provide more revenue than court-ordered reparations alone, but a balance must be struck between depending on donations from individuals and organizations, which tend to be vulnerable due to changing priorities, and from government pledges, which tend to be more stable. Initially, it will be unlikely that the Trust Fund will contain enough

resources to meet all victims' needs. Therefore, the board of directors will have to prioritize its assistance. They will have to decide whether to apply the funds for interim relief in the form of medical or psychological support, legal assistance in pursuing reparations claims, or other types of humanitarian aid. The board of directors must also determine whether to award support on an individual or collective basis.

Unlike the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which explicitly applies to victims regardless of whether the perpetrator is identified, apprehended, prosecuted, or convicted, it is unclear under what circumstances the Victims' Trust Fund will offer support to individuals. The board of directors will have to determine at what point assistance is provided (when an investigation into a situation commences, when the prosecutor indicts an individual, or when the perpetrator is convicted), and this decision will impact how soon victims will receive the help they need. Victims' rights groups have urged that assistance be provided when the Pre-trial Chamber has issued a warrant of arrest or has concluded there is not sufficient basis for prosecution yet is satisfied that crimes under the ICC's jurisdiction occurred. Rights groups also urge that assistance be provided in cases in which national authorities have investigated or prosecuted a crime that would fall within the ICC's jurisdiction under the complementary regime if those national authorities did not investigate.

The Rome Statute not only provides for the Victims' Trust Fund, it also incorporates unprecedented participation rights for victims. Pursuant to the Rome Statute and Rule 90 of the Rules of Procedure and Evidence, victims can have their own legal representatives, and if a victim or group of victims lack the necessary means to pay for representation, the registry may provide financial assistance. Article 68(3) provides that these legal representatives may present victims' news and concerns when their personal interests are affected by trial. Having legal representation and a right to participate could greatly enhance the ability of victims to exercise their rights to reparation. Indeed, this restriction on victim participation is a major stumbling block for victims in most domestic and international courts. The parties to a criminal case consist of the prosecutor and the defense counsel, leaving the victim to play little, if any, role in the proceedings. The increased participation rights for victims in ICC proceedings should afford victims the opportunity to have their voices heard on a wide range of matters, not least of which is their right to reparation.

Conclusion

In the face of widespread atrocities happening throughout the world, the international community must struggle to provide the resources necessary to help victims rebuild their lives. This need has been increasingly reflected in the provisions of many human rights instruments and most recently in the creation of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law and the International Criminal Court's Victims' Trust Fund. While implementation of both of these mechanisms will face obstacles, the creation of these instruments represents a renewed commitment by governments, organizations, and individuals around the world to offer reparations and support to the victims who need it most. As Philip Gourevitch laments in his book, "It was impossible to give survivors what they really wanted—their lost world as it was in the time they called 'Before.' But did it have to be that those who were most damaged by the genocide remained the most neglected in the aftermath?" 🌐

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