



## Transitional Justice and Reparations: Remediating the Past?

Moffett, L. (2016). Transitional Justice and Reparations: Remediating the Past? In C. Lawther, L. Moffett, & D. Jacobs (Eds.), *Research Handbook on Transitional Justice*. Edward Elgar Publishing.

### Published in:

Research Handbook on Transitional Justice

### Document Version:

Peer reviewed version

### Queen's University Belfast - Research Portal:

[Link to publication record in Queen's University Belfast Research Portal](#)

### Publisher rights

Copyright 2017 Elgar Publishing

This is a draft chapter / article that has been accepted for publication by Edward Elgar Publishing Ltd in the forthcoming book 'Research Handbook on Transitional Justice' edited by Lawther, Moffet and Jacobs and is due to be published in 2017.

### General rights

Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

### Take down policy

The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact [openaccess@qub.ac.uk](mailto:openaccess@qub.ac.uk).

# Transitional Justice and Reparations: Remediating the Past?

By Luke Moffett

*in Research Handbook on Transitional Justice (Dov Jacobs ed., Edward Elgar, forthcoming 2015)*

## Abstract

*Reparations are often considered victim-centred transitional justice measures. While they have their basis in private law notions of corrective justice and the human rights principle of remedy, politics and economic resources often shape reparations in times of transition. Reparations in transitional justice often take time and require revisiting as society becomes conscious of previously hidden or marginalised victims. Added to this is the challenge of delimiting those who are eligible, contested victimhood, and determining when the transition ends. This raises questions of whether reparations are appropriate for historical violations caused by colonial governments or slavery. The chapter examines individual and collective reparations, apportionment amongst family members, reparation processes and mechanisms, as well as evidential and financial concerns. Although public resources may be limited in providing full compensatory awards to all victims, small sums or pensions along with public acknowledgement of victims' suffering, wrongfulness of the perpetrators and institutions' acts, along with guarantees of non-repetition can be 'good enough'. This chapter argues that despite the political wrangling of reparations during transition, the right to reparations in international law reflects the necessity of states to deliver reparations to victims of serious violations.*

Reparations are increasingly resorted to both symbolise healing and to remedy the consequences of collective violence in times of transition. In contrast to demobilisation programmes or prosecutions, reparations represent more victim-centred transitional justice measures. At their most basic level reparations are intended to redress harm caused to victims. The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNBPG) states that reparations are intended to 'promote justice by redress'.<sup>1</sup> However reparations in transition justice are complex legal constructions, often shaped and entangled with political, social and moral contentions.

Although there is clear moral impetus to do justice for victims and to alleviate their plight, reparations are often not implemented by states. Even when they are adopted, the law is limited in its ability to do justice, in that it cannot undo the egregious harm caused by disappearances, torture or sexual violence. Added to this is that victims may number in their millions and post-conflict countries can be ravaged, leaving little resources to provide

---

<sup>1</sup> Principle 15, A/RES/60/147. Hereafter referred to as the UN Basic Principles of Reparation.

reparations to each victim. Moreover identities of victimhood and narratives of the conflict or the past can intensify contention around reparations. In all despite the prospect of reparations to provide a more tangible form of justice to victims, the reality is that most states emerging from collective violence fail to deliver such measures.<sup>2</sup>

This chapter explores these issues of reparations in transitional justice beginning with their historical and international use, before moving to examine the theoretical basis and practical bounds of reparation. The subsequent section examines eligibility for reparations, taking in to account contested identities of victim and perpetrator, the temporal limits on the remedial nature of transitions, and individual and collective needs. We then move on to consider who is responsible for making reparations, noting the traditional state-centric model is imperfect for the growing nature of internal armed conflicts and atrocities committed by non-state actors. The final section explores the process and mechanisms in delivering reparations.

## **I. Reparations in historical and international perspective**

Reparations are rooted in private law remedies, such as tort and delicts, reflecting more ancient principles of corrective justice. Aristotle theorised that corrective or rectificatory justice should correct the harm suffered by the injured party by trying to return to the position they were in before the harm.<sup>3</sup> Corrective justice is concerned with re-establishing equality between the injured party and perpetrator, a mathematical formula, rather than about ensuring fairness.<sup>4</sup> Accordingly, remedy under private law is based on the premise of seeking to return the victim to the *status quo ante* (original position) through *restitutio in integrum* (returning to the victim all they have lost).<sup>5</sup> These private law principles have informed international law

---

<sup>2</sup> Pablo de Greiff, Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 8 October 2014; and Olsen et al. note that out of 84 transitional countries only 14 have implemented reparation programmes. Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice In Balance Comparing Processes, Weighing Efficacy*, (USIP 2010), at 53.

<sup>3</sup> Aristotle, *Nicomachean Ethics*, Book V.

<sup>4</sup> D.D. Raphael, *Concepts of Justice*, (Oxford University Press 2003), at 43.

<sup>5</sup> Dinah Shelton, *Remedies in International Human Rights Law*, (OUP 2005, 2<sup>nd</sup> edn), at 9 and 65.

where a breach by a state of a primary obligation requires reparation to be made to an injured party. As stated in the seminal *Chorzow Factory* case reparations should,

as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed...It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.<sup>6</sup>

In times of transition reparations have moved beyond the individual-centricity of private law and the state-centric nature of international law, to acknowledge that individuals have standing to claim reparations from states. Perhaps one of the most successful reparation programmes has been compensation paid by Germany and other countries to victims of the Holocaust and the state of Israel.<sup>7</sup> As discussed below, such success is based on the moral indignation, public attention to the justification of reparations, and available resources that make such large awards possible.

The advent of human rights has cemented the individual's right to reparation to recognise the protection of the individual in international law against excesses of power of the state.<sup>8</sup> There is growing customary practice of individuals' right to reparation against the state and non-state actors in armed conflict and gross violations of human rights.<sup>9</sup> More recently, the international personality of the individual has been expanded to include individual responsibility for reparations under the Rome Statute of the International Criminal Court.<sup>10</sup> This international attention to reparations has also seen general and discrete international

---

<sup>6</sup> *Germany v Poland, The Factory at Chorzów* (Claim for Indemnity) (The Merits), Permanent Court of International Justice, File E. c. XIII. Docket XIV:I Judgment No. 13, 13 September 1928 ('*Chorzów Factory*' case), §125.

<sup>7</sup> See Gideon Taylor, Greg Schneider and Saul Kagan, The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution, in C. Ferstman, M. Goetz, and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (Martinus Nijhoff 2009), 103-113.

<sup>8</sup> Antonio Augusto Cançado-Trindade, *The Access of Individuals to International Justice*, (Oxford University Press 2011). Recognised in international law in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136 §§151-153.

<sup>9</sup> UN Basic Principles of Reparations; Article 75, Rome Statute of the International Criminal Court; Christine Evans, *The Right to Reparations in International Law for Victims of Armed Conflict*, (Cambridge University Press 2012), p43; ICRC Customary International Humanitarian Law Database Rule 150; and Declaration of International Law Principles on Reparation for Victims of Armed Conflict, Resolution No.2 (2010), International Law Association (ILA) Committee on Reparation for Victims of Armed Conflict.

<sup>10</sup> See Mariana Goetz, Reporative Justice at the International Criminal Court: Best practice or tokenism? in J. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity: The healing role of reparation*, (Routledge 2014) 55-70, p64.

declarations and conventions emerge.<sup>11</sup> While reparations originate in private law corrective justice notions, there is growing recognition and legal guidelines affirming their normative and customary nature in the face of mass atrocities.

Regional human rights courts have been at the forefront of developing reparation jurisprudence. Yet they recognise the limits of the law, in that returning victims who have been killed or tortured to the original position as ‘impossible, insufficient, and inadequate’.<sup>12</sup> Judge Cançado Trindade suggests, ‘reparation cannot “efface” [a violation], but it can rather avoid the negative consequences of the wrongful act.’<sup>13</sup> Human rights courts have firmly established the principle of full and effective remedy for gross violations of human rights. The human rights remedial approach has three components: acknowledgement; responsibility; and remedy. As such reparations intend to publicly acknowledge the suffering and dignity of the victim, as well as to affirm the wrongful nature of the perpetrator’s action. Reparations are made by the responsible party, and are delivered through measures intended to alleviate the victims’ suffering. Thus reparations in human rights law is much about remedying victims’ harm as it is about reaffirming the legal order and awakening public consciousness about such victimisation to prevent its reoccurrence.

The remedial human rights approach is effected through five types of reparation to redress the harm of victims of gross violations of human rights: restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition. While developed from the jurisprudence of the Inter-American Court of Human Rights and practice in Latin American in the 1980s-1990s, they are now widely accepted and part of the 2005 UN Basic Principles on Reparations (UNBPG).<sup>14</sup> Restitution includes restoration of property or rights. Compensation involves both pecuniary and non-pecuniary awards to cover the cost and moral

---

<sup>11</sup> In particular the 2005 UNBPG, 2006 International Convention for the Protection of All Persons from Enforced Disappearance, the 2007 Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, International Law Association Resolution No.2 on Reparation for Victims of Armed Conflict (2010); and Reparations for Conflict-Related Sexual Violence, UN Guidance Note of the Secretary-General, June 2014.

<sup>12</sup> *Blake v Guatemala*, Reparations, Series C No. 48 (IACtHR, 22 January 1999).

<sup>13</sup> Separate Opinion of Judge Cançado Trindade, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation Judgment, ICJ Reports (2012) 324, para.26.

<sup>14</sup> From the initial case of *Velásquez Rodríguez v Honduras*, Reparations and Costs, Series C No. 7 (IACtHR, 21 July 1989); and Principles 19-23, UNBPG.

harm suffered by victims, whether through a lump sum or a pension. Rehabilitation entails physical and mental care, as well as social services to heal a victim's personal integrity and social functioning. Measures of satisfaction are public acknowledgements of victims' harm and symbolic redress to reaffirm their dignity, such as memorials, apologies, recovery of those disappeared, and investigations. Guarantees of non-repetition are public commitments and reforms by the state to prevent violations recurring in the future, such as human rights training of the armed forces and civilian oversight. These five types of reparations complement each other in holistically remedying victims' suffering from gross violations of human rights.

This remedial approach can also better protect minorities or discriminated groups, as returning them to their original position before the harm may reinforced inequalities or structural victimisation that gave rise to their suffering.<sup>15</sup> It can be sensitive to gender, indigenous and children's rights, reflecting that the experience of harm to such groups is different, due to discrimination, communal rights, or impact of violence on their development. While this may cause perception of creating a hierarchy of victims and not treating them all equally,<sup>16</sup> an important and meaningful aspect of reparations is to tailor, as far as possible, appropriate remedies that can alleviate the suffering and causes of victimisation.

For instance, the Inter-American Court in *Serrano Cruz Sisters v El Salvador* as part of a reparations package established parameters for a national commission to trace children who had disappeared during the armed conflict, ordered the creation of website to support the search, as well as a DNA database and a national day of commemoration for children disappeared during the conflict.<sup>17</sup> Similarly in the *Plan de Sánchez Massacre* case involving the massacre of 268 civilians the Inter-American Court ordered rehabilitation including a housing and development programme, a healthcare centre, Mayan education, and

---

<sup>15</sup> Heidi Rombouts and Stephan Parmentier, The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims, *International Review of Victimology* 16 (2009) 149–182.

<sup>16</sup> Mijke de Waardt, Are Peruvian Victims Being Mocked?: Politicization of Victimhood and Victims' Motivations for Reparations, *Human Rights Quarterly* 35 (2013) 830–849, p840.

<sup>17</sup> Judgment of 1 March 2005, (Merits, Reparations and Costs), paras.183-193 and 196.

infrastructure (a road, sewage, and potage water system) for the remaining 317 survivors, along with compensation awards for each.<sup>18</sup> Such full reparation sits uneasily with practical considerations and wider objectives in times of transition.

## **II. The theoretical and practical bounds of reparations in times of transition**

Despite the growing international acceptance of reparations, in times of transition it can be unworkable to provide full redress to all victims of mass atrocities. Human rights courts are generally responding to individual cases, redressing only a fraction of the total victimised population in a country who can number in their hundreds of thousands of victims. The effect of this case-by-case approach is two-fold according to de Greiff, whereby it both disaggregates victims and disaggregates reparations.<sup>19</sup> With disaggregating victims, there is generally unequal access to courts, which are more likely to be used by urban elites, and it distinguishes individuals from each other based on their own harm. In disaggregating reparations, case-by-case awards cause discrepancies by individualising reparations, rather than providing comprehensive redress. This section explores reparations in times of transition in terms of its theoretical and practical bounds, by discussing it as a political project, its transformational potential and as part of comprehensively dealing with the past.

### **A. Reparations as a political project**

Reparations in transitional justice represent more of a political project, promoting wider goals than justice to encompass other aims, such as reconciliation, peace or economic development.<sup>20</sup> In such circumstances the intention of reparations for victims is to serve to ‘contribute to the reconstitution or the constitution of a new political community’ by remedying the violations of the past and preventing future victimisation.<sup>21</sup> Reparations have a symbolic component, in that they ‘symbolically acknowledge and recognise the individual’s

---

<sup>18</sup> *Plan de Sánchez Massacre v Guatemala*, Merits, Reparations and Costs, Series C No. 116 (IACtHR, 19 November 2004).

<sup>19</sup> Pablo de Greiff, Justice and Reparations, in P. de Greiff (ed.), *Handbook of Reparations*, (OUP 2006) 451-477, p458.

<sup>20</sup> Ibid. p454; Lisa Magarrell, Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice, *Windsor Yearbook of Access to Justice* 22 (2003) 85–98, p94.

<sup>21</sup> De Greiff *supra* note 19, p454.

suffering ... can help concretise a traumatic event, aid an individual to come to terms with it and help label responsibility.’<sup>22</sup> It can also reflect the ‘social, moral, psychological and religious meanings’ attached to official efforts to redress the past, such as public apologies and acknowledgement of responsibility, memorials and commemorations.<sup>23</sup> Such public recognition and physical space can help victims in their grieving process by offering focal points that maintain the memory of their loved one.<sup>24</sup>

Reparations in transitional societies can also serve a political function in rebuilding the victim’s ‘civic trust’ with other citizens and in the state, and reaffirming their dignity by prioritising their suffering as deserving redress.<sup>25</sup> This sits in stark contrast to the past where they were vilified, dehumanised and targeted. In building this new political community, social solidarity and inclusion is extended to victims as citizens entitled to a remedy. While of course there are not enough resources to fully or completely remedy victims’ harm, Hamber suggests the notion of ‘good enough’, whereby sufficient effort and recognition is made to victims leaves them psychologically satisfied, in turn rebuilding community and societal bonds.<sup>26</sup>

Reparations in transitional justice processes also have to contend with responding to large victim populations and balancing resource concerns, rather than the more juridical, individual, isolated cases before regional human rights courts.<sup>27</sup> Attention to reparations can be inhibited by priorities of reconstruction, increased public space for marginalised groups to have access to resources, more public proceedings of criminal trials or truth commissions, and obligations to international financial institutions can all inhibit the attention to reparations.<sup>28</sup>

---

<sup>22</sup> Brandon Hamber, Repairing the irreparable: Dealing with the double-binds of making reparations for crimes of the past, *Ethnicity and Health* 5(3/4) (2000) 215-226, p218.

<sup>23</sup> Geneviève Painter, Towards Feminist Theoretical Approaches to Reparations (Conference Paper, September 2006) p4, quoted by Anne Saris and Katherine Lofts, Reparation Programmes: A Gendered Perspective, in Ferstman et al. *supra* note 7, 79-99, at 86.

<sup>24</sup> Brandon Hamber, The dilemmas of reparations: In search of a process-driven approach, in K. De Feyter, S. Parmnetier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 135-149, p137.

<sup>25</sup> Magarrell *supra* note 20, p91.

<sup>26</sup> Hamber *supra* note 24, p137.

<sup>27</sup> De Greiff *supra* note 19, p451.

<sup>28</sup> Alexander Segovia, Financing Reparations Programs Reflections from International Experience, in de Greiff *supra* note 19, 650-675, p653-654.



If a reparation programme is adopted, further resources and expertise is needed to administer awards, adding to the cost, before any money reaches victims. It is impossible to generalise about reparations and transitional justice with certainty, as each country has to be taken its own political and socioeconomic circumstances.<sup>29</sup> While a country may suffer from endemic poverty, it does not mean that the government will not prioritise reparations. Countries such as Argentina and Sierra Leone have successfully implemented reparation programmes despite their limited fiscal capacity.<sup>30</sup>

The political nature and resources constraints of reparations in times of transition can dilute the components of acknowledgement, responsibility and remedy. Acknowledgement of victims' suffering can be framed around the government's narrative of the past. For instance in Argentina the victim group Madres de Plaza de Mayo rejected reparations as 'blood money', as it involved accepting the 'two devils' discourse of state and guerrilla violence, legitimising the state's use of torture and disappearances of their children and grandchildren.<sup>31</sup> In terms of responsibility, transitional justice reparation mechanisms tend to be state-centric reflects its traditional roots in inter-state conflicts and post-authoritarianism in international law and transitional justice, capturing little of the lived reality of contemporary collective violence, which can be committed by private individuals or corporations.<sup>32</sup> Responsibility for reparations and their remedial effects can be further diminished by being subsumed within developmental programmes to affected communities, rather than to victims. Accordingly, such programmes can represent more distributive justice, than corrective or remedial justice. These issues are explored further in subsequent sections.

## **B. Reparations as transformational**

Reparations in times of transition can be both backward and forward looking, in the sense that they attempt to redress past violations as well as to prevent future occurrence. This future-

---

<sup>29</sup> See Richard Falk, Reparations, International Law and Global Justice: A New Frontier, in de Greiff *supra* note 19, 478-503.

<sup>30</sup> Segovia *supra* note 28, at 669.

<sup>31</sup> Claire Moon, 'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering, *Social and Legal Studies* 21(2) (2012) 187-199, p194.

<sup>32</sup> Discussed further in section IV.

looking perspective is intended to tackle the causes of victimisation, such as resource allocation, civilian oversight of armed forces, or minorities in government. According to Rubin-Marín, reparations can also have a transformational potential ‘to subvert, instead of reinforce, pre-existing structural ... inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes’.<sup>33</sup> Yet reparation mechanisms can often silence and marginalise non-elites, and women in particular.<sup>34</sup>

With women and girls, a gender perspective has been advocated to be included in reparation mechanisms to reflect the wider social inequalities that compound their suffering, such as being subjected to sexual and domestic violence, forced to abandon their education or career to care for their family after parents or a spouse is killed or seriously injured, suffer a loss of income, left to search for the remains of loved ones and to demand justice.<sup>35</sup> As such to prevent the replication of the class, political, ethnic and gender hierarchies and the causes of victimisation, reparations should be developed not only as forward-looking, but include backward-looking measures to deliver fair non-discriminatory redress that respond to victims’ experience, as far as possible.<sup>36</sup> Ladling reparations with such systematic reform is to doom it to failure. Instead it requires reparations to be complemented by other measures and mechanisms, such as educational and employment law reform.<sup>37</sup> The Peruvian Comprehensive Reparations (PIR) noted that in developing a reparations programme,

...the PIR cannot and should not be considered as one more instrument of social policy. The PIR does not seek to resolve problems of poverty, exclusion and inequality, which are structural in nature and respond to the overall operation of the political and economic system. While some of its programs can and should contribute to improving the quality of life of victims and their family members, its central objective is the repair and recognition of victims as human beings, whose fundamental rights have been violated. This does not mean that the State should not also undertake a policy of social development aimed at attacking poverty and inequality at the root - and [in fact] the TRC formulates concrete proposals elsewhere

---

<sup>33</sup> Ruth Rubin-Marín, *The Gender of Reparations in Transitional Societies*, in R. Rubin-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (CUP 2009), 63-120, at 66. See *Reparations for Conflict-Related Sexual Violence*, UN Guidance Note of the Secretary-General, June 2014.

<sup>34</sup> Brandon Hamber and Ingrid Palmay, *Gender, Memorialization, and Symbolic Reparations*, in Rubin-Marín *supra* note 33, 324-381, at 331.

<sup>35</sup> Ruth Rubin-Marín, *A Gender and Reparations Taxonomy*, in Rubin-Marín *supra* note 33, 1-17, at 2.

<sup>36</sup> Rubin-Marín *supra* note 33, at 101.

<sup>37</sup> Magarrell *supra* note 20, at 94.

in this report on necessary institutional reforms - but the PIR responds to other goals.<sup>38</sup> As such, the transformative potential of reparations rests in their ability to prioritise and publicise victimisation and underlying structural inequalities that precipitated or compounded violence.

### **C. Reparations as part of comprehensively dealing with the past**

Transitional justice since the Second World War has been dominated by retributive responses through the Nuremberg and Tokyo tribunals, as well as numerous other domestic trials. Only in the late 1980s and 1990s was there greater resort to truth commissions and the recommendations of reparations.<sup>39</sup> The inclusion of reparations with the 1998 Rome Statute of the International Criminal Court reflects that criminal trials and reparations complement each other, despite the narrow and individual focus of responsibility in such trials.<sup>40</sup> Reparations represent an alternative form of accountability from criminal trials, by acknowledging the suffering of victims and the wrongfulness of their harm. This is important as in times of transition the authoritarian government or peace process may have entailed an amnesty to ease the transfer of power to a democratically elected one. There may also be evidential difficulties in prosecuting perpetrators in the aftermath of collective violence, as witnesses may have died, the passage of time can diminish memory, and material evidence can be damaged or destroyed, which together reduce the prospects of criminal sanctions.

In terms of comprehensively dealing with the past and reconciliation between different groups, reparations can also serve to balance concessions and demobilisation packages made to combatants.<sup>41</sup> As Hazan suggests, reparations can be transactional, such as

---

<sup>38</sup> CVR Final Report, Vol. LX, section 2.2.2.1, p.148, cited and translated by Magarrell *supra* note 20, at 95.

<sup>39</sup> See Arturo J. Carrillo, Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past, in de Greiff *supra* note 19, at 505-506. Not all truth commissions have the power to make reparation recommendations, such as Argentina's National Commission on the Disappeared (CONADEP), Decree No. 187/83, 15 December 1983.

<sup>40</sup> Article 75. See Luke Moffett, Reporative Complementarity: Ensuring an effective remedy for victims in the reparation regime of the International Criminal Court, *The International Journal of Human Rights* 17(3) (2013), 368-390.

<sup>41</sup> See Pablo de Greiff, DDR and Reparations: Establishing Links Between Peace and Justice Instruments, in K. Ambos, J. Large, and M. Weirda (eds.), *Building a Future on Peace and Justice*, (Springer 2009), 321-355; Heidy Rombouts, *Victim Organisations and the Politics of Reparation: A*

the case with South Africa where ‘the perpetrators obtained amnesty, and the victims received reparations in exchange.’<sup>42</sup> However victims may lack the political clout, at least initially, in political negotiations to ensure effective bargaining power to guarantee that their interests in reparations and accountability measures are prioritised.<sup>43</sup> This can contrast with members of armed forces or non-state armed groups, who have political weight in peace negotiations and are often placated to maintain peace and security. Really for reparations to be effective it requires political will, compromise, and consultation of victims in their design. But as discussed more in the final section, such political willingness and public sensitivity to reparations for victims takes time.

As de Greiff, now UN Special Rapporteur on Truth, Justice, Reparation and Guarantees of Non-Repetition, posits ‘what should victims in fairness receive?’ From victims’ perspective the human rights law principle of full and effective remedy offer the most substantial redress. However, the notion of fairness or justice in transition is not just an adjudication between the injured party and the perpetrator, but has to take into account the diverse public interests. In times of transition, victims’ right to remedy should remain a priority, but their amount of reparation has to be limited, given resource constraints, requiring victims’ expectations to managed on what reparations can deliver in times of transition.<sup>44</sup>

Although transitional contexts have been informed by private law principles and guided to an extent by international law, they generally taken on a political character, responding to their own unique circumstances and creating bespoke reparation programmes. Reparations are more likely to be implemented and complied with where there is a strong coalition amongst political parties in government and as part of their political mandate.<sup>45</sup> However, such political willingness to support regimes may take time, or even generations, in particular if a comprehensive approach including other measures is to be included. This can

---

*Case-Study on Rwanda* (Intersentia 2004), at 22; and the Final Report of Sierra Leone Truth Commission, Vol.II, Chapter 4, §§34-39, and 69.

<sup>42</sup> Pierre Hazan, Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice, *International Review of the Red Cross*, 88(861) 19-47 (2006), p44.

<sup>43</sup> Lisa Magarrell, *Reparations in Theory and Practice*, ICTJ (2007), 2.

<sup>44</sup> De Greiff *supra* note 19, at 457. This is discussed more in the final section on process.

<sup>45</sup> Segovia *supra* note 28, at 666-667.

undermine the remedial effect of reparations, if those victims directly harmed are dead and requires developing complicated beneficiary rules for heirs.<sup>46</sup> As a starting point for examining the practice of reparations in times of transition, it is perhaps worth discuss who is eligible for such measures.

### **III. Who is eligible for reparations?**

Victim populations in the aftermath of collective violence or armed conflict can number in the hundreds of thousands to even millions.<sup>47</sup> Determining which individuals and groups are eligible for reparations is beset with logistical, moral and political challenges.<sup>48</sup> The UN Basic Principles on Reparations stipulates that victims are those who have,

individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes 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 victimization.

This broad definition of victims and notion of harm as a criterion for eligibility is ‘potentially limitless’ as during times of conflict or under an authoritarian regime everyone suffers in some way.<sup>49</sup> However, the scarcity of resources for countries emerging from collective violence or conflict means only certain victims will be entitled to reparations.

To make reparation programmes and international declarations more feasible, they generally concentrate on the most harmful violations of individuals and groups’ civil and political rights, such as extra-judicial killings, disappearances, torture and sexual violence. The UNBPG itself is limited to victims of serious violations of international humanitarian law and gross violations of human rights. Yet this leaves little attention or scope to widen reparations to those who have suffered violations of their economic, social or cultural rights.<sup>50</sup>

---

<sup>46</sup> Ruti Teitel, *Transitional Justice*, (OUP 2002) at 141-143.

<sup>47</sup> The UN Claims Commission for violations committed by Iraqi forces in Kuwait in 1991 had 2.7 million claimants, with 1.5 million successful obtaining \$52.4 billion. See Linda A. Taylor, The United Nations Compensation Commission, in Ferstman et al *supra* note 7, 197-215. See UNCC website: <http://www.uncc.ch/>

<sup>48</sup> This chapter does not address more discrete concerns about different types of harm or damage.

<sup>49</sup> Teitel *supra* note 46, at 134.

<sup>50</sup> See Lars Waldorf, Anticipating the Past: Transitional Justice and Socio-Economic Wrongs, *Social and Legal Studies* 21(2) 171–186.

Although developmental or humanitarian programmes could better redress these violations, they are more likely to benefit the general population than specific remedy the harm suffered by victims. Nonetheless it is possible to some extent to steer a middle course, as countries like Morocco and Peru have developed community reparation programmes to redress those who have been economically marginalised in the past by the state, discussed further below.<sup>51</sup>

The truth commissions in Sierra Leone and Timor Leste recommended that reparations should concentrate on those who suffered the most and as a result were made vulnerable, such as amputees, orphans, widows, victims of sexual violence, and victims of torture.<sup>52</sup> As the Timor Leste report states, '[w]e are all victims but not all victims are equal. We must acknowledge this reality and lend a hand to those who are most vulnerable.'<sup>53</sup> Accordingly while violence touched everybody in some way, some individuals suffered more than others. Similarly in Peru individual reparations have been prioritised for elderly victims, so they are paid first, given their greater vulnerability and limited time to avail of such measures.<sup>54</sup> As Magarrell notes in the initial work of the Peruvian Comprehensive Reparation Program (PIR)

while motivated by a desire to address the very real consequences of the violence, proved unworkable. First, the universe of harm it intended to redress was enormous and the victim population particularly difficult to define. By looking at consequences of violations, the increasing size of the population affected was unavoidable. (In fact, in that early plan, they expected to be providing reparations for close to two million people, about 7 percent of the population.) Individual idiosyncrasies of how people were affected by violence increased exponentially as well, making it more and more difficult to adequately respond to the long-term situation of each. ... Causation issues became mixed with other underlying social problems that exacerbated or coincided with harms caused directly by the abuses experienced. By using this approach, without tying the analysis to the original violations in a more specific way, reparations can become repair for exclusion and lack of social attention to broad sectors of the population. Thus, in one fell swoop one can lose the specific recognition of human rights victims as such, and frustrate those who suffer the same problems but are not included in the program.<sup>55</sup>

---

<sup>51</sup> Root Rebecca K. Root, *Transitional Justice in Peru*, Palgrave MacMillan (2012), p134; and Waldorf *supra* note 50, p172. See Section III.D.

<sup>52</sup> TRC Report Vol.II, Chapter 4, paras.69-70.

<sup>53</sup> Chega! Commission for Reception, Truth and Reconciliation in East Timor (CAVR), (2005), §12.1.

<sup>54</sup> Cristián Correa, Reparations in Peru: From Recommendations to Implementation, ICTJ, June 2013, p16.

<sup>55</sup> Magarrell *supra* note 20, p93.

In the South African Truth and Reconciliation Commission (TRC) the scope of eligible victims was connected to those who testified before it. The promotion of reconciliation as part of the TRC's mandate defined victims broadly to include those who suffered harm from gross violations of human rights or an act associated with a political objective for which an amnesty was granted.<sup>56</sup> Despite this inclusive definition of victimisation, numerous victims were excluded from reparations, in particular those who were victimised by other violations not falling within the defined gross violations of human rights, harm suffered by acts committed by perpetrators not given an amnesty, or did not amount to a 'political objective'.<sup>57</sup>

Narrowing the scope of eligible victims to ensure feasibility and beneficial awards is a difficult task. The Kenyan Truth, Justice and Reconciliation Commission (TJRC) recommended reparations to include all victims of extra-judicial killings, sexual violence, torture, forcible transfer, land injustice and historical marginalisation from 1963-2008.<sup>58</sup> To make this feasible the Commission recommended all should benefit from collective reparations, with those most vulnerable to receive individual reparations, such as sexual violence and disappearances. Thus through collective measures everyone who suffered harm is acknowledged, with other those who suffered the most receiving individual awards. Despite this innovative approach, the Kenyan government has yet to implement such a comprehensive reparation programme.

#### **A. The scope of the 'transition'**

A more general challenge in transitional justice is delimiting its temporal scope, i.e. 'what exactly transitional justice is transiting "from" and "to"'.<sup>59</sup> In terms of eligibility for reparations, how far back should a truth commission or reparation programme go? In the United States the debate on reparations for African-American slavery has been raging for

---

<sup>56</sup> Section 1, Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>57</sup> Mahmood Mamdani, Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC), *Diacritics* 32(3-4) (2002) 33-59.

<sup>58</sup> TRJC Report Volume IV, p.63-68

<sup>59</sup> Christine Bell and Catherine O'Rourke, Does feminism need a theory of transitional justice? An introductory essay, *International Journal of Transitional Justice* 1(1) (2007) 23-44, p35.

decades.<sup>60</sup> In the Caribbean, heads of states have established a National Commission for Reparations to pursue reparations against European states involved in the slave trade and indigenous genocide over 400 years ago. Their claim includes harm caused by structural inequalities to individuals of African descent in the Caribbean, including illiteracy, chronic disease, cultural deprivation, psychological trauma, and scientific and technological backwardness.<sup>61</sup>

There have been some successes in holding former colonial masters responsible for violations in the past. For instance the litigation brought against the British government for atrocities committed during the Mau-Mau campaign in Kenya in the 1960s.<sup>62</sup> In addition attention to the plight of indigenous people has seen some of their land returned and apologies made by governments.<sup>63</sup> Perhaps a distinction is that in the Mau-Mau case the claimants were directly victimised, not their ancestors, whereas claimants for slavery are many generations removed from those who enslaved. As such with each generation the harm caused by the wrongful act become less discernable and reparations based on more symbolic redress and institutional reform, than material need. With indigenous people, international attention to their collective spiritual connection to their ancestral land and the legal basis of treaties has been a source of redress, as such the harm remains discernable and ongoing despite the passage of time. With slavery, not every descendant of a slave will identify himself or herself as a victim, as they have agency to shape their own life. Yet there are clear structurally inequalities, collective harm and issues of transgenerational trauma caused by the slave trade.

---

<sup>60</sup> See Ta-Nehisi Coates, The Case for Reparations, *The Atlantic*, June 2014.

<sup>61</sup> CARICOM seek a public apology; repatriation to Africa; indigenous peoples development program; investment in cultural institution, public health and education; African knowledge program; psychological rehabilitation; technology transfer; and debt cancellation. See CARICOM nations unanimously approve 10 point plan for slavery reparations, Leigh Day, 11 March 2014 - <http://www.leighday.co.uk/News/2014/March-2014/CARICOM-nations-unanimously-approve-10-point-plan->

<sup>62</sup> The British government settled the case for £19.9 million to 5,228 claimants, with foreign secretary William Hague MP apologizing on behalf of the state and pledging to support the construction of a memorial in Nairobi. Many of the remaining claimants were in their 70s and 80s. See UK Parliament Hansard, 6 Jun 2013: Col 1692-94.

<sup>63</sup> See *Reparations for Indigenous Peoples International and Comparative Perspectives*, F. Lenzerini (ed.), (OUP 2008).



It is likely that if any form of reparations is agreed it will be symbolic or transformational, rather than compensation, given the distance in time and degree of suffering.

### **B. Apportionment amongst family members**

Related to this is the challenge for the law in determining apportionment of reparation amongst family members. In cases of mass atrocities, the direct victims may have been killed leaving a number of indirect victims as next-of-kin or dependants. Such apportionment of reparations does not have to follow domestic inheritance law. The Moroccan Equity and Reconciliation Commission (IER) departed from sharia-based inheritance law to give a larger percentage to widows (40% rather than 12.5%) instead of the eldest son.<sup>64</sup> In Chile the amount of pension for a person disappeared or killed was apportioned amongst family members as 40% surviving spouse; 30% for mother or father in her absence; 15% for the mother, or the father, as the case may be, of the victim's biological children; and 15% for each one of the children of the person. If there is more than one child, each received 15% even if exceed the total amount.<sup>65</sup> There is an issue of maximising resources for those most seriously harmed. As stated by the Inter-American Court of Human Rights in determining the scope of a state's obligation to those it harmed,

Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causæ est causa causati*. Imagine the effect of a stone cast into a lake; it will cause concentric circles to ripple over the water, moving further and further away and becoming ever more imperceptible. Thus it is that all human actions cause remote and distant effects. To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible, since that action caused effects that multiplied to a degree that cannot be measured.<sup>66</sup>

Thus logically speaking it is impossible to oblige a perpetrator or responsible party to redress all harm of their actions.

Nevertheless, there is increasing psychological research supporting the transgenerational impact of collective violence that remains unaddressed, whether in terms of economic hardship to psychological impact and even carer responsibilities for children and

---

<sup>64</sup> Rubin-Marín *supra* note 33, p17.

<sup>65</sup> Article 20, Law 19.123, Establishes the National Corporation for Reparation and Reconciliation and Grants other Benefits to Persons as Indicated, Official Gazette No.34 (188), 8 February 1992.

<sup>66</sup> *Aloeboetoe and others v Suriname*, Judgment of September 10, 1993 (Reparations and Costs), para.48.

grandchildren of direct victims.<sup>67</sup> In the Swiss Bank Holocaust settlement it was recognised that given the limited nature of the funds, not all heirs for the purpose of personal injury claims should be eligible for compensation, as it would otherwise dilute the amount of money available to those directly harmed.<sup>68</sup> The eligibility of Japanese-American internees is limited to heirs of direct victims who died after the legislation was passed, but before payment of the \$20,000 compensation.<sup>69</sup> Reparations are generally limited to surviving spouses, children, and parents (if they had no children). Recognition of eligible victims can be sensitive to such surviving heirs' needs. For children of those disappeared the Chilean National Corporation of Reparation and Reconciliation provided a pension as well as military service waivers and education support, including university fees and expenses.<sup>70</sup> Such reparations, while not fully remedying the past, do allow victims and their families new opportunities. The challenge is to delineate those who have been sufficiently harmed and continue to need redress, without undermining the amount of resources for reparations.

### C. Contested identities

With scarce resources and reparations acknowledging individuals as 'deserving' redress, it can give rise to competition between victims and public attacks on individuals' eligibility.<sup>71</sup> Different communities and actors can present themselves as victimised to cast the 'other side' as perpetrators.<sup>72</sup> This is apparent in Palestine/Israel and Northern Ireland, where

---

<sup>67</sup> Marie Breen-Smyth, *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*, Wave (2012); Yael Danieli, Massive Trauma and the Healing Role of Reparative Justice, in Ferstman et al. *supra* note 7, 41-78.

<sup>68</sup> Judah Gribetz and Shari C. Reig, The Swiss Banks Holocaust Settlement, in Ferstman et al. *supra* note 7, 115-142.

<sup>69</sup> Civil Liberties Act of 1988 (public law 100-383), 10th August 1988 102 stat 905, s.7. See Eric K. Yamamoto and Liann Ebesugawa, Report on Redress The Japanese American Internment, in P. de Greiff, *The Handbook of Reparations*, (OUP 2006), 257-283, p272.

<sup>70</sup> Law 19.123, 8 February 1992; educational scholarships were made transferrable to grandchildren under Law 20.405, 10 December 2009. Ernesto Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3/4) (2006), 449-469, at 459.

<sup>71</sup> Luc Huyse, Victims, in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation after violent conflict: A handbook*, IDEA (2002), 54-65, p64.

<sup>72</sup> Mike Morrissey and Marie Smith, *Northern Ireland after the Good Friday Agreement: Victims, Grievance and Blame*, Pluto Press (2002), p4.

contested identities of victimhood are used to justify violence.<sup>73</sup> This is further complicated by victims not all being ‘innocent’, as those victimised by serious violations or crimes can also be responsible for causing similar harm to others.<sup>74</sup> These complex victims are often excluded, as they are considered as not ‘deserving’ of redress. Of course complex victims only account for a small number of perpetrators who were victimised. However, it is these contentious few who can delay or prevent reparations for other victims. For instance in Northern Ireland the inclusion of such individuals in a £12,000 ‘recognition payment’ for all those killed during the Troubles/conflict caused protests and media uproar, resulting in a comprehensive package on dealing with the past being rejected and negotiations on the past being put back years.<sup>75</sup> This reflects the moral capital of victimhood, which can be used by politicians to advance their own political agenda or for perpetrators to legitimise their struggle.<sup>76</sup>

Generally speaking it is the dominant political narrative that emerges at the end of the conflict or transitional justice process, which can shape the inclusion or exclusion of complex victims. In countries, such as Chile, complex victims are eligible for reparations as it is set against the dominant political narrative of the wrongfulness of the state’s actions, rather than private actors’ responsibility.<sup>77</sup> A political narrative of reconciliation can promote that no distinction is made between victims, such as in Sierra Leone Truth and Reconciliation Commission where reparations were recommended to those who suffered the most no matter their responsibility.<sup>78</sup> In contrast, in Colombia and Peru members of non-state armed groups who were victimised, are ineligible for reparations due to their responsibility in victimising

---

<sup>73</sup> See Daniel Bar-Tal, Lily Chernyak-Hai, Noa Schori, and Ayelet Gundar, A Sense of Self-Perceived Collective Victimhood in Intractable Conflicts, 91(874) *International Review of the Red Cross*, June 2009, 229-258; and Morrissey and Smyth *supra* note 70, at 7.

<sup>74</sup> See Luke Moffett, Reparations for ‘guilty victims’: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* (forthcoming 2016).

<sup>75</sup> See Cheryl Lawther, *Truth, Denial and Transition: Northern Ireland and the Contested Past*, (Routledge 2014).

<sup>76</sup> Morrissey and Smyth, *supra* note 70, at 4; and Heidy Rombouts, Pierto Sardaro, and Stef Vandeginste, The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights, in Feyter et al. *supra* note 24, 345-503, at 475.

<sup>77</sup> See Elizabeth Lira, The Reparations Policy for Human Rights Violations in Chile, in de Greiff *supra* note 19, 55-101.

<sup>78</sup> TRC Report Vol.II, Chapter 4, paras.69-70.

others.<sup>79</sup> Such exclusion is to deny the legitimacy of their struggle, in that they took up arms against the democratic government and were subjected to legitimate force by the state, therefore they do not deserve reparations.<sup>80</sup> In such cases we can see the moral and political discourses prevailing over more legal concerns in ensuring redress for serious harm.

In South Africa there was a strong distinction between perpetrators and victims, with the former to be dealt through amnesties and the latter with reparations. Borer and others have highlighted that this dichotomy did not capture the composite grey zone of identities, nor 'perpetrators [who] are simultaneously victims'.<sup>81</sup> Nevertheless, the South African TRC recommended reparations for a number of complex victims. By way of example, in the case of the three AWB<sup>82</sup> members who were murdered by a police officer (who received an amnesty) in Mafikeng in March 1994, the family members of the deceased were recognised as victims and referred to the Reparations and Rehabilitation Committee for consideration.<sup>83</sup> The picture of victimisation is further clouded by the exclusion of innocent individuals who were wrongly convicted under the apartheid legal system, but were ineligible for amnesty or reparations.<sup>84</sup>

On surveying a number of transitional justice contexts it is also apparent that state security forces continue to receive generous pension or demobilisation packages, as well as possibly being eligible for reparations if they were victimised, without excluding those who committed atrocities.<sup>85</sup> In South Africa a Special Pension Fund was set up to benefit members of the state and liberation groups, on the basis of the sacrifices such forces made in the

---

<sup>79</sup> In Colombia - Article 3(5), Ley de Víctimas y Restitución de Tierras, Ley (2011). In Colombia children in non-state armed groups at the time of demobilisation are eligible for reparations (Article 3(2)). In Peru - Article 4, Ley que crea el Plan Integral de Reparaciones (PIR), Ley No.28592 (2006); Truth and Reconciliation Commission (CVR) Vol. IX, at 149 and 153

<sup>80</sup> Root *supra* note 51, at 131.

<sup>81</sup> Tshepo Madlingozi, Good victim, bad victim: Apartheid's beneficiaries, victims and the struggle for social justice, in W. Le Roux (ed.), *Law, Memory and the Legacy of Apartheid: Ten years after AZAPO v President of South Africa*, 107-126, at 114.

<sup>82</sup> Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement) a far right paramilitary Afrikaner group.

<sup>83</sup> Application in Terms of Section 18 of the Promotion of National Unity and Reconciliation Act, No.34 of 1995. Ontlametse Bernstein Menyatsoe Applicant (AM 7498/97), 5 August 1999, involving the deaths of Jacobus Stephanus Uys, Alwyn Wolfaardt and Nicolaas Cornelius Fourie.

<sup>84</sup> Louise Mallinder, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa* (2009), at 97-98.

<sup>85</sup> Moffett *supra* note 74.

establishment of democracy.<sup>86</sup> However, members of non-state armed groups are generally excluded from reparation programmes, given their responsibility for victimising others. While this may suit the official narrative of the conflict and reestablishment of the state's monopoly on law and order, it fails to ensure a basic tenant of the rule of law that where an individual suffers a serious violation they should have equal access to a remedy. This exclusion of complex victims has come into conflict with human rights courts, which recognise individuals' right to remedy for gross violation of human rights.<sup>87</sup> A compromise position, and perhaps one that better reflects reality, would be to take into account complex victims' responsibility in reparation orders, such as a symbolic 10% reduction in compensation awards, measures contingent on them apologising to those they victimised, or a review panel to assess their harm and responsibility.<sup>88</sup> This distinction between victims and complex victims is only further complicated with individual and collective victims.

#### **D. Individual and collective victims**

Suffering can reflect both individual and collective dimensions. In contrast to domestic crimes or private wrongs, international crimes and gross violations of human rights are generally perpetrated by ideologically driven armed organisations against groups or civilian populations.<sup>89</sup> Recognition of the collective harm suffered by groups who were targeted by violence can direct public attention to the organised and ideologically driven nature of atrocities.<sup>90</sup> Collective violence can have a wider social impact, by destroying relationships,

---

<sup>86</sup> Including the South African Defence Forces, Umkhonoto we Sizwe and the Azanian People's Liberation Army, recognising that members did not join liberation movements for financial compensation, but that they were prevented from accumulating a work pension. Some members of MK believed that victims who 'did not fight' did not deserve compensation. Lovell Fernandez, Reparations policy in South Africa for the victims of apartheid, *Law, Democracy and Development* 3(2) (1999), 209-222, at 214. Section 189(1) of the Interim South African Constitution (No.200 of 1993), s.1, Government Employees Pension Law 1996 (No.21 of 1996), and Special Pensions Act 1996 (No. 69 of 1996). The pension board in determining awards could take into account the individual's role and motive in a political offence, and its nature and gravity on state and non-state actors under s.1(2), Special Pensions Act 1996.

<sup>87</sup> See *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160 (IACtHR).

<sup>88</sup> See Moffett *supra* note 74.

<sup>89</sup> Luke Moffett, *Justice for Victims before the International Criminal Court*, (Routledge 2014), at 10-12.

<sup>90</sup> Verdeja *supra* note 68, p455.

‘community bonds, capacities and knowledge’.<sup>91</sup> While individuals are targeted during conflict or under authoritarian regimes, due to their identification with a group or even simply being a civilian, it does not negate their unique individual experience of victimisation. Collectivising victims’ suffering runs the risk of reducing them into ‘an amorphous group of passive, voiceless survivors.’<sup>92</sup> Suffering is personal, owing to the different circumstances in which the violation occurred and the physical, psychological, and social impact on the victim.<sup>93</sup>

Reparations, to an extent, try to remedy individual and/or collective harm. Individual awards of compensation can allow victims to have agency and choice by supplying ‘the means for whatever part of the former life and projects remain possible and may allow for new ones’.<sup>94</sup> As Verdeja asserts ‘individual symbolic recognition emphasizes the importance of remembering that victims are not merely a statistic but actual people who often suffered intolerable cruelties.’<sup>95</sup> In Argentina \$224,000 was initially awarded to families of those disappeared based on the highest earning of public employees, rather than the industrial accidents scheme, so as to distinguish their individual harm as intentional, wrongful acts.<sup>96</sup>

Collective reparations encompass more symbolic measures aimed at repairing the group harm, awakening public understanding and remembrance of victims’ suffering, such as apologies, memorials, and guarantees of non-repetition.<sup>97</sup> Collective reparations can be more economically feasible to implement than individual compensation awards, and can avoid hierarchies amongst individuals, as they apply equally to those in the group.<sup>98</sup> In Morocco the Equity and Reconciliation Commission recommended collective reparations with a development and symbolic components, the former to redevelop the economic and social ability of communities affected by repression, such as income-generating cooperatives and

---

<sup>91</sup> Hugo van der Merwe, Reparations through different lenses: The culture, rights and politics of healing and empowerment after mass atrocities, in Wemmers *supra* note 10, 200-218, p202.

<sup>92</sup> Verdeja *supra* note 68, p456.

<sup>93</sup> Viktor E. Frankl, *Man’s Search for Meaning*, Washington Square Press (1985), p99.

<sup>94</sup> Shelton *supra* note 5, p291

<sup>95</sup> Verdeja *supra* note 68, p456.

<sup>96</sup> José María Guemba, Economic Reparations for Grave Human Rights Violations The Argentinean Experience, in de Greiff *supra* note 19, 21-47.

<sup>97</sup> *19 Tradesmen v Colombia*, paras.272–273; and *Myrna Mack-Chang v Peru*, para.286.

<sup>98</sup> Moffett *supra* note 87, p179 .

human rights and gender mainstreaming, with symbolic measures to maintain memory of the violence through converting former detention sites into sites of public memory.<sup>99</sup>

Collective measures can also better respond to the common interests or suffering of victims. By way of example, in *Awes Tingi community v Nicaragua* the Inter-American Court of Human Rights awarded compensation collectively to an indigenous group, as their land had not been officially recognised or titled to them, reflecting that the group understood land as communal ownership.<sup>100</sup> Similar collective reparations were recommended in the Timor Leste's truth commission (CAVR) for rehabilitation for widows, recognising that recovery occurs in the community, but it has yet to be implemented.<sup>101</sup> Accordingly, collective reparations can better fulfil victims' shared needs.

Despite the benefits of both individual and collective reparations, there are challenges with each. Individual monetary awards to each victim may be economically unviable, particularly in terms of a full remedy. Moreover, an administrative scheme will need to be established to verify and assess applications for reparation, which can take time, money and expertise.<sup>102</sup> Given the collective nature of the violence, victims may group together to advance their interests. Yet, individual reparations can cause divisions within such groups and communities, as some may be awarded more than others, or not at all.<sup>103</sup> Collective reparations are not without their own shortcomings. Collective measures to groups can marginalise vulnerable individuals, such as women, children, elderly or other vulnerable individuals who have differing needs from the majority.<sup>104</sup> Symbolic measures, such as apologies or building memorials, without material compensation or rehabilitation to victims

---

<sup>99</sup> Rabat Report: The Concept and Challenges of Collective Reparations, ICTJ (2009), at 26-28.

<sup>100</sup> *Mayagna (Sumo) Awes Tingi Community v. Nicaragua*, Judgment of 31 August 2001 (Merits, Reparations and Costs), §§149 and 167.

<sup>101</sup> Para.12.7, *Chega! CAVR 2005*. See *Unfulfilled Expectations: Victims' perceptions of justice and reparations in Timor-Leste*, ICTJ (2010). See also Per Memoriam Ad Spem: Final Report of Commission of Truth and Friendship (CTF), Indonesia-Timor-Leste (2009) §§288-304, which only recommended collective reparations for the recovery of those disappeared, document collection center, and survivor rehabilitation programs, alongside institutional reform and acknowledgments of responsibility.

<sup>102</sup> Frédéric Mégret, The case for collective reparations before the International Criminal Court, in Wemmers *supra* note 10, 171-189, p175.

<sup>103</sup> De Greiff *supra* note 19, p458.

<sup>104</sup> Para.7, 2007 Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation.

can appear as insincere and empty gestures in redress the past.<sup>105</sup> If individual compensation awards are not accompanied with acknowledgement of responsibility and tackle the collective nature of the violence, they can appear as simply ‘blood money’ to buy victims’ silence.<sup>106</sup>

A further difficulty with collective reparations is that individuals may not belong or have sufficient connection to or identification with a group. This was apparent in the first reparation decision before the ICC in the *Lubanga* case, where Thomas Lubanga was convicted of enlisting and conscripting children to be used in armed hostilities. As Mr Lubanga was indigent, the court ruled that reparations were to be collectively made to the community to benefit victims of sexual violence and other child soldier. The Court based this on the grounds that community reparations would be ‘more beneficial and have greater utility than individual awards, given the limited funds available’.<sup>107</sup> Nevertheless the court dismissed the participating victims’ representations, who wanted individual and collective reparations to alleviate their suffering, rather than the community awards, as it was community who supported and facilitated such crimes.<sup>108</sup> Subsequently, some victims in the Kenyan case of *Ruto and Sang* have ended their participation before the Court over distress that perpetrators could collectively benefit from reparations.<sup>109</sup> In the *Katanga* case before the ICC, there is strong sentiment amongst victims for individual financial awards, as collective reparations will not address their needs.<sup>110</sup>

---

<sup>105</sup> Mark Osiel, “Transitional Justice” in Israel/Palestine? Symbolism and Materialism in Reparations for Mass Violence, *Ethics and International Affairs* (2015 forthcoming).

<sup>106</sup> Moon *supra* note.

<sup>107</sup> Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, §274.

<sup>108</sup> Ibid. para.220. Observations on the Sentence and Reparations by Victims a/0001/06, a/0003/06, a/0007/06, a/00049/06, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0149/08, a/0404/08, a/0405/08, a/0406/08, a/0407/08, a/0409/08, a/0523/08, a/0610/08, a/0611/08, a/0053/09, a/0249/09, a/0292/09, a/0398/09, and a/1622/10, *Lubanga* (ICC-01/04-01/06-2864-tENG), 18 April 2012; Observations du groupe de victimes VO2 concernant la fixation de la peine et des réparations, *Lubanga* (ICC-01/04-01/06-2869), 18 April 2012.

<sup>109</sup> Though the VLR did cite concerns that some victims may have been intimidated, which could be discouraging them from participating. Common Legal Representative for Victims’ Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013, *Ruto and Sang* (ICC-01/09-01/11-896-Corr-Red), 5 September 2013, para.12.

<sup>110</sup> *Prosecutor v Katanga*, Registry Report on Applications for Reparations in accordance with Trial Chamber II’s Order of 27 August 2014 ICC-01/04-01/07-3512-Anx-Red2, 21 January 2015; and Observations des victimes sur les reparations, ICC-01/04-01/07-3514, 27 January 2015.



Collective reparations can be further complicated by being included with developmental aid or services to communities. In the Peruvian case, the truth commission (CVR) included communities (indigenous, peasants and town) affected by the conflict and internally displaced people as eligible for collective reparations.<sup>111</sup> Collective reparations were intended to contribute to the reconstructing and strengthening communities by providing them with technical and capital resources to do so.<sup>112</sup> Key to doing this would be to tailor collective reparations through consulting communities on their needs so that measures would respond to their experience. Collective reparation measures included human rights and conflict resolution training, peace education, support for return and resettlement of those displaced, and rebuilding and improving basic services infrastructure.<sup>113</sup>

As Segovia points out, with insufficient resources and limited fiscal flexibility, governments generally favour funding social programmes than reparations.<sup>114</sup> There are clear benefits to implementing such social programmes. Development assistance or service provision sends a message to victims about ‘belonging and self-esteem’, recognising they are citizens and affirming social solidarity with their plight.<sup>115</sup> The government is more likely to gain political support, as they are investing services and assistance to a wider group of voters, than more discrete reparations for victims. Social or development programmes can also be delivered without too much additional cost, by being provided through existing government services.<sup>116</sup> Whereas reparation programmes require a costly set up through the creation of new mechanisms, training of staff and developing regulations. In addition development or humanitarian assistance is available to all human beings, unlike reparations, which are restricted to specific victims.<sup>117</sup>

---

<sup>111</sup> Peruvian Truth and Reconciliation Commission, Vol.IX, Programa Integral de Reparaciones, para.2.2.2.2.2.2.

<sup>112</sup> Para.2.2.3.6.4.

<sup>113</sup> See Correa *supra* note 54. Correa (12) notes that 1,946 communities at the end of 2013 benefited from collective reparations program, but is far below than the 5,697 communities eligible.

<sup>114</sup> Segovia *supra* note 28, p654

<sup>115</sup> Van der Merwe *supra* note 89, p203.

<sup>116</sup> Segovia *supra* note 28, p655.

<sup>117</sup> See Article 1, UN Declaration on the Right to Development (1986), A/RES/41/128. Jo-Anne Wemmers, The Healing Role of Reparation, in Wemmers *supra* note 10, 221-233, p228.

The conflation of development or services with collective reparations undermines their remedial or corrective effect. States are obliged to provide basic service to those within their jurisdiction.<sup>118</sup> However, simply extending services to communities affected by conflict does not satisfy obligations to remedy violations. This is due to development aid and services being devoid of any acknowledgement of responsibility or recognition of victims' suffering. Moreover they are an imprecise way of remedying victims' specific needs in that they are aimed at assisting the general community. More critically, services do not empower or enable victims to exercise their agency in developing new prospects for the future, such as a compensation award; instead they create dependency on state provision, which does not directly alleviate their continuing suffering. This abdication of reparations in preference for development or services can reflect contention over who is responsible for reparations.

#### **IV. Who is responsible for reparations?**

Reparations have traditionally been connected to deontological notions of remedy, in that an injured party or victim, who has suffered from a wrongful act, violation or crime, has a right to seek redress from the perpetrator, who is obliged to follow the law. Responsibility helps to distinguish reparations as a form of accountability by evincing the corrective justice requirement of the wrongful party remedying the harm they have caused. Responsibility can serve a symbolic function in acknowledging and vindicating the wrongfulness of a victim's suffering by directing blame away from them and towards the actor responsible.<sup>119</sup>

As with determining eligibility for reparations, responsibility can also frame the narrative of the conflict or violence. This is apparent at the inter-state level in the 1919 Treaty of Versailles, where Article 231 affirms Germany's responsibility for the war, the loss and damage caused to Allied forces and nationals, and the obligation to make reparations under Article 232.<sup>120</sup> Similarly in Colombia the 2005 Peace and Justice Law was framed around

---

<sup>118</sup> Correa *supra* note 54, at 13.

<sup>119</sup> Hamber *supra* note 22, at 218.

<sup>120</sup> Teitel *supra* note 46, at 122.

crimes committed by paramilitary groups and their duty to make reparations, excluding the state's responsibility for harm it had caused to civilians and members of such groups.<sup>121</sup>

The difficulty with most of the literature on transitional justice and reparations is that it is framed around the traditional state-centric notion of responsibility. There are good reasons for this beyond the international law influence,<sup>122</sup> due to the fact that most of the violence in the past century, such as in focal points in Latin American, Europe and South Africa, have been dominated by systematic atrocities committed by state forces and democracies emerging from post-authoritarianism or apartheid. Moreover the international legal order offers a reciprocal obligation system amongst states, which has reinforced reparations as a legal consequence of their wrongful acts.<sup>123</sup> However with the growth of internal armed conflicts and globalisation, non-state actors are increasingly committing atrocities. For instance in Peru, the Truth and Reconciliation Commission (CVR) found that the non-state armed group the Shining Path was responsible for 46% of violations, including extra-judicial executions and disappearances, with state forces responsible for 30%.<sup>124</sup> Similarly in Northern Ireland 90% of the 3,600 conflict-related deaths were committed by Republican and Loyalist paramilitary groups.<sup>125</sup> Accordingly the messy reality of conflicts means that a simply state-centric framework is inadequate to capture the complex web of responsibility for atrocities by different actors and institutions.

The 2005 UN Basic Principles on Reparations and the 2007 Nairobi Declaration suggest that any other legal entity or person found responsible for gross violations should

---

<sup>121</sup> Article 42, La Ley de Justicia y Paz, Ley 975 de 2005. This was changed under the Ley de Víctimas y Restitución de Tierras, Ley 1448 de 2011. See Arturo Carrillo, Truth, Justice, and Reparations in Colombia, in V.M. Bouvier (ed.), *Colombia: Building Peace in a Time of War*, 133-156, p154; and Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012), p214-215.

<sup>122</sup> Conflict in the international legal order was historically between states, and rules of reparations for breaches of the laws of war reflect this - Article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), and Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977.

<sup>123</sup> See the International Law Commission, Responsibility of States for Internationally Wrongful Acts 2001.

<sup>124</sup> See CVR Report, Vol. VIII.

<sup>125</sup> See Malcolm Sutton, *Bear in mind these dead ... An Index of Deaths from the Conflict in Ireland 1969-1993*, (Beyond the Pale Publications 2001).

make reparations for victims, as tackling impunity should include all responsible actors.<sup>126</sup> Unlike the state-centric nature of international law, reparations in transitional contexts can be constructed to reflect the responsibility of different actors. In Colombia under Laws 975 (2005) and 1148 (2011) reparations can be ordered against paramilitary and state forces responsible for violations or crimes. In Guatemala while state forces and local defence forces were responsible for the vast majority of massacres, other actors, such as the World Bank, were found complicit in certain massacres and have made reparations to victims, such as the Rio Negro massacres in the construction of the Chixoy dam.<sup>127</sup> In the DRC, the mobile military courts have found government soldiers, the state and local militias jointly responsible for massacres and other atrocities also liable for reparations to the victims.<sup>128</sup>

Of course transitional justice is not just about accountability, but also trying to achieve reconciliation, peace and stability. Instead what emerges is that the state provides reparations including victims of non-state actors' atrocities, on the basis of social solidarity or to ensure victims receive some redress. The 2005 UN Basic Principles on Reparations also support the principle of subsidiarity, in that states should establish national reparation programmes and other assistance to victims in the event that 'the parties liable for the harm suffered are unable or unwilling to meet *their obligation*.'<sup>129</sup> This principle of subsidiarity means that where an armed group has obligations to provide reparations and can be held responsible to fulfil such duties to victims for international crimes, the state can facilitate this through creating independent reparation mechanisms. Alternatively if the armed group is unable to meet its commitment, the state acts in a subsidiary role to provide reparations directly to victims of non-state actors' violations, as a sort of remedial guarantor. Thereby subsidiarity ensures that victims have access to a remedy either way.

---

<sup>126</sup> Paras.15 and 16 UNBPG; paras.5 and 6, 2007 Nairobi Declaration.

<sup>127</sup> *Río Negro Massacres v Guatemala*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 4 September 2012, (IACtHR) Series C No. 250; and April 2010 Reparation Plan for Damages Suffered by the Communities Affected by the Construction of the Chixoy Hydroelectric Dam in Guatemala.

<sup>128</sup> See *Avocats Sans Frontières, Case Study: The Application of the Rome Statute of the International Criminal Court by the Courts of the Democratic Republic of Congo* (2009).

<sup>129</sup> Principle 16. See also Principle 17 on the enforcement of domestic and foreign reparations decisions against individuals or entities liable for harm suffered; and Principle 3, *Chicago Principles of Post-Conflict Justice* (2008), The International Human Rights Law Institute, p46.

The principles of subsidiarity and social solidarity with victims is apparent in a number of contexts. In the aftermath of Timor Leste's succession from Indonesia, the Timorese Truth and Reconciliation Commission (CAVR) found that despite the Indonesian state being responsible for the majority of atrocities, it might take years to seek redress from them. Instead the CAVR recommended that the Timor Leste government take responsibility to provide reparations, as seeking redress from Indonesia would be too long for victims to wait.<sup>130</sup> In South Africa, the provision of amnesties to a number of individuals who testified before the Truth and Reconciliation Commission prevented victims from seeking civil redress. Some of the victims appealed to the South African Constitutional Court, which ruled that the state was entitled to extinguish individual criminal and civil liability.<sup>131</sup> This was based on the grounds that responsibility for reparations would instead be shouldered by the state, thus reflecting a more transactional arrangement in managing different interests in navigating the transition.<sup>132</sup> This approach reflects human rights standards on state obligations to ensure respect for human rights, including effective investigations and access to redress, in that while the state may not be directly responsible for the victims' suffering, it is should ensure victims have access to a remedy.<sup>133</sup>

Correspondingly, actions of non-state actors can be attributed to the state if it had knowledge of violations or control over such actors. The Inter-American Court of Human Rights in the *Ituango Massacre v Colombia* case civilians were murdered by non-state paramilitary forces, who also looted, detained, tortured, and displaced the remaining civilian population. The court ordered the Colombian government to provide reparations to the victims, as it was responsible for failing to protect its citizens and to properly investigate, prosecute, and punish those responsible.<sup>134</sup> Accordingly, human rights law establishes a

---

<sup>130</sup> CAVR Part 11, p38.

<sup>131</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, (CCT17/96) [1996] ZACC 16.

<sup>132</sup> Pierre Hazan, Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice, *International Review of the Red Cross*, 88(861) 19-47 (2006), p44.

<sup>133</sup> See UNBPG para.15-16; paras.5-6, Naoribi Declarations 2007.

<sup>134</sup> *Ituango Massacres v Colombia*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 148 (IACtHR, 1 July 2006).

minimum, where even the state has fulfilled its obligations in redressing violations it is responsible for, it may extend reparations to victims committed by other non-state actors on more moral grounds of social solidarity with their suffering.<sup>135</sup>

In practice very few countries have implemented reparations programmes in times of transitional justice, meaning that victims have often turned to human rights courts as the main avenue of redress. However, human rights courts have struggled to grapple with a more pluralistic understanding of responsibility of different actors and their liability for reparations. Human rights obligations have been framed to protect individuals against the state, but limited in their ability to guide states in implementing reparation programmes are problematic. This can be seen in cases involving members of non-state armed groups who are responsible for committing violence, but been victimised by the state in Peru, Northern Ireland and Spain. In such cases human rights courts, tied to the state's obligation under relevant conventions, have upheld the right of the individual to reparation, despite that many of the victims of such non-state armed groups remain without reparations domestically.<sup>136</sup> Yet human rights courts remain a last resort where domestic remedies have been exhausted. States should be attune to the deleterious and asymmetrical effect of a reparation order before a regional human rights court and should pre-empt such eventualities by creating reparation programmes for all victims.

## **V. The process and mechanisms of reparations**

While most of our discussion so far has focused on the substantive and political dimensions of reparations, in this final section it is worth examining the process and mechanisms that have been developed in transitional countries to deliver remedial measures. In legal terms reparations as remedial measures can be conceptualised in procedural and substantive terms.<sup>137</sup> We have discussed the substantive content of reparations, such as compensation. The procedural aspect of remedy reflects procedural justice concerns, in that those who have

---

<sup>135</sup> Rombouts *supra* note 41, at 21.

<sup>136</sup> See Moffett *supra* note 74.

<sup>137</sup> Shelton *supra* note 5, at 7.

their interests affected, i.e. victims, should have access to and be able to participate in proceedings. By enabling victims to have their views and concerns heard in reparation proceedings it can impact on decision-making, thereby shaping substantive outcomes.<sup>138</sup> This also requires judges and courts to be impartial and sensitive in facilitating victims' input.<sup>139</sup> The 2005 UN Basic Principles on Reparations (UNBPG) teases out such concerns by suggesting that states should ensure equal and effective access to justice; access to information; provide assistance and legal advice to facilitate their access and participation; treat victims fairly; and protect their integrity, privacy and well-being.

### **A. Reparations as a process**

In psychological terms, reparation processes can be important to victims, as it helps to convey the public acknowledgement of their suffering and the symbolism attached to reparations.<sup>140</sup> Victim definitions can be sensitive to victims' psychological needs, such as in Argentina the creation of the legal category of 'missing as a result of enforced disappearance'.<sup>141</sup> In addition, consulting victims and allowing them to participating in the decision-making process can affirm their status as citizens in the new political order, in that their voices and interests have value. Hamber suggests that this fosters 'social belonging...[and] helps counter...the consequences of 'extreme' political trauma'.<sup>142</sup> There is also a need to provide 'ongoing spaces' for victims to 'express their feelings of sadness and rage as they struggle to come to terms with the psychological and emotional impact of their loss.'<sup>143</sup> Such spaces should be private (such as counselling and group story-telling) and public (e.g. media, theatre, etc.), as well as official and facilitated through civil society.<sup>144</sup> These spaces can be achieved through formal state processes, and informal community gatherings or within victim groups. Participation in the design and process of reparation mechanisms can also offer recognition to

---

<sup>138</sup> See Edgar A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (Springer 1988); Jo-Anne Wemmers, *Victims in the Criminal Justice System* (Kugler 1996); and Moffett *supra* note 87, at 31-34.

<sup>139</sup> Wemmers *ibid*.

<sup>140</sup> Hamber *supra* note 24, at 141.

<sup>141</sup> Law No. 24,321, 8 June 1994.

<sup>142</sup> Hamber *supra* note 24, at 141.

<sup>143</sup> *Ibid* at 142.

<sup>144</sup> *Ibid*.

victims as ‘valuable agents of political and social transformation’, in particular for those groups previously marginalised, such as women and minorities.<sup>145</sup>

Process is not just psychological or procedural, but it also entails a temporal dimension. In the aftermath of collective violence victims may seek to normalise their position in the community by assimilating, rather than wanting to publicly distinguish themselves as victims.<sup>146</sup> It can take time for victims to organise and claim reparations. Society also needs time to engender shared public acceptance and understanding of the need for reparations to become a political priority. In the US, reparations to those Japanese-American interned during the Second World War, were only provided an apology letter and a cheque for \$20,000 in 1988, after over four decades of victims campaigning and litigating.<sup>147</sup> Starzyk and others suggest that it depends on society viewing reparations as feasible, in that it does not compromise valuable social resources.<sup>148</sup> Moreover, Osiel argues that communities or societies are unlikely to sacrifice sacred values and issues of concern, such as recognising complex victims as eligible for reparations, unless the opposing side is willing to do the same.<sup>149</sup> Thus gaining traction on the reparations debate is more than just political or economic wrangling, but a more nuanced social and moral steering that inevitably takes time to be normalised or accepted.

Time can also have the effect of diminishing reparations as a public priority where they are no longer perceived as feasible. For instances in South Africa, reparations were a key part of the Truth and Reconciliation Commission’s mandate, which in the end recommended \$2,700 for six years to each victim who testified before the TRC, some 22,000 individuals.<sup>150</sup>

---

<sup>145</sup> Rubin-Marín *supra* note 33, at 17.

<sup>146</sup> Rombouts *supra* note 41, at 66.

<sup>147</sup> Civil Liberties Act of 1988. See Eric K. Yamamoto and Liann Ebesugawa, Report on Redress The Japanese American Internment, in de Greiff *supra* note 19, 257-283.

<sup>148</sup> Katherine B. Starzyk, Danielle Gaucher, Gregory D.B. Boese and Katelin H. Neufeld, Framing reparation claims for crimes against humanity, in Wemmers *supra* note 10, 113-125, at 118.

<sup>149</sup> Osiel *supra* note 103.

<sup>150</sup> See Promotion of National Unity and Reconciliation Act, No. 34 of 1995. TRC Vol.5, Chapter 5, at 184-6. The TRC also recommended symbolic reparations to victims including: issuing death certificates; exhumations, reburials and ceremonies; headstones; expunging criminal records; and expedite outstanding legal matters, such as inheritance. It also recommended community interventions such as renaming streets and facilities in honour of individual or events in particular communities; memorial or monuments; culturally appropriate ceremonies; as well as similar national measures and a



However, the South African government took nearly seven years from the initiation of the TRC until it paid reparations to those victims, even then it reduced the sum to a single \$4,900 payment.<sup>151</sup> In the interim victims had been vilified by the government that their pursuit of reparations was for financial gain or greed, than for the economic development of the country.<sup>152</sup> The sad fact is that time works against victims, many of whom will die before seeing an award. The passage of time means that reparations may only benefit the direct victims' descendants or next of kin, lessening its remedial effect and making such measures appear more like distributive justice than corrective redress.<sup>153</sup>

States often do not get reparations right the first time, involving amendments or a series of reparation laws and mechanisms, as the scope of beneficiaries is expanded to include those previously invisible to the public consciousness. In Chile there have been some 19 programmes or amendments to existing ones from 1990-2013.<sup>154</sup> In Morocco the Independent Arbitration Panel was established in 1999 awarding compensation to victims of enforced disappearances and illegal detention. The Equity and Reconciliation Commission (IER) followed in 2004, which recommended more inclusive reparations to those subjected to other violations such as torture, extrajudicial executions and sexual violence, amongst others. The IER widened the provisions of compensation to these victims, as well as recommending rehabilitation, restoration of civil rights and personal property.<sup>155</sup>

It can also take time to mobilise public resource or consolidating public debts to facilitate reparations. In Argentina compensation was first paid out to those illegally detained amounting to some \$1.17 billion, then a further \$1.9 billion to families of those disappeared, based on the issue of public bonds. However, the economic crisis in 2003 caused Argentina to

---

day of remembrance; in addition to community rehabilitation and education initiatives for the whole of society.

<sup>151</sup> Hamber *supra* note 24, at 143-145.

<sup>152</sup> *Ibid* at 144, quoting President Thabo Mbeki.

<sup>153</sup> Teitel *supra* note 46, at 141.

<sup>154</sup> Cath Collins and Boris Hau, Chile: Late justice, late truth? In C. Collins, J. Garcia Godos and E. Skaar (eds.), *Reconceptualising Transitional Justice: The Latin American Experience*, Routledge (forthcoming).

<sup>155</sup> Rabat Report, ICTJ.

rethink the amount of reparations with further wards in Argentine pesos than US dollars.<sup>156</sup> Yet, issues of public debt and feasibility of funding reparations should not inhibit a state from making reparations, even if this means adopting pensions over lump sums. Current talks between the Colombian government and FARC have outlined an ambitious \$37 billion reparation package for the victims of the conflict, using in part oil revenue.<sup>157</sup>

In terms of guiding principles for reparation processes there are five general principles: (1) completeness and comprehensive; (2) complex and coherent; (3) appropriate and proportionate; (4) acknowledgement; and (5) transformative. First, completeness and comprehensiveness involve as far as possible including all atrocities and victims who have suffered serious harm, as discussed this can be impossible.<sup>158</sup> However, governments should be attuned to enabling redress for all victims who suffer serious harm, otherwise it may be a further source of victimisation and political marginalisation. Special attention should be made to ensure inclusion of politically marginalised groups, such as women, children, and minorities in reparation programmes.<sup>159</sup> As Rombouts notes in Rwanda the exclusion of victims of Rwandan state forces from reparations has hindered wider goals of reconciliation.<sup>160</sup>

Second reparation mechanisms should be complex by including different types of reparations, individual and collective measures. Such measures should be internally and externally coherent with both the reparations order and complement other transitional justice approach such as trial and truth commissions.<sup>161</sup> Third in terms of being proportionate, human rights reparation principles support that awards should not enrich or impoverish victims, but be equal to their harm.<sup>162</sup> Reparations are intended to restore victims' dignity and autonomy,

---

<sup>156</sup> See Guembe *supra* note 94.

<sup>157</sup> Helen Murphy and Luis Jaime Acosta, Colombia's reparation to war victims sacred, government says, *Reuters*, 19 February 2015.

<sup>158</sup> Pablo de Greiff, Introduction Repairing the Past: Compensation for Victims of Human Rights Violations, in de Greiff *supra* note 19, 1-16.

<sup>159</sup> Rubio-Marín *supra* note 33, at 16. This is a more proactive non-discriminatory approach. Principle 25, UNBPG.

<sup>160</sup> Rombouts *supra* note 41, at 496.

<sup>161</sup> De Greiff, *supra* note 155, 10-11.

<sup>162</sup> *Garrido and Baigorria v Argentina*, Judgment, Series C No. 39 (IACtHR, 27 August 1998), §43.

not to undermine their self-respect or be condescending.<sup>163</sup> Thus appropriate reparations should be responsive to victims' needs and interests to be effective. Fourth, reparations should publicly acknowledge victims' suffering and dignity, as well as the responsibility of those who committed, facilitated or were complicit in their harm. Such acknowledgement should be directly made to the individual, as well as publicised to society to create public awareness and understanding of the past. Finally, Rubio-Marín suggests that reparations should also have a transformative potential, in that programmes tackle underlying structural inequalities, such as in gender.<sup>164</sup>

It is perhaps helpful to think of reparations as both a process and an outcome, whereby victims' input into reparation mechanisms can better inform the decision making process in determining eligibility, apportionment and appropriate measures. As such, victim participation can facilitate completeness and comprehensive for reparation programmes, minimising years of litigation or further mechanisms.<sup>165</sup> Yet, Waterhouse notes that most programmes fail in providing a meaningful role for victims in negotiating and processes, undermining the effectiveness of their outcomes.<sup>166</sup> Making legal provisions for victims to participate or be consulted is not enough. Access to reparations also requires effective outreach and information to victims and affected communities, as well as capacity building and support for victim groups and civil society. In the case of Peru, where collective reparations were created in consultation with victimised communities, Correa notes that some found it difficult to access technical support to make informed decisions in implementing projects. As a result, some local government officials manipulated the funding for the projects, which did not primarily focus on the victimised communities' interests.<sup>167</sup>

---

<sup>163</sup> Verdeja *supra* note 68, at 451.

<sup>164</sup> Rubio-Marín *supra* note 33, at 17. 2007 Nairobi Declaration, §§3 and 7; and 2014 UN Guidance Note of the Secretary-General Reparations for Conflict-Related Sexual Violence, §4.

<sup>165</sup> See UN Special Rapporteur Report, *supra* note 2, §§74-80.

<sup>166</sup> Carlton Waterhouse, The Good, The Bad, And The Ugly: Moral Agency And The Role of Victims in Reparations Programs, *University of Pennsylvania Journal of International Law* 31 (2009) 257-294, at 258.

<sup>167</sup> Correa *supra* note 54, at 13.

While legal and psychological understandings of procedural justice and victims' needs provide an outline of what states should devise, in reality the negotiating of reparations involve more crude political dealings.<sup>168</sup> Nevertheless, neglecting certain victims, adopting a top-down approach to process, or failing to provide effective remedies will cause protracted litigation. The Inter-American and European Human Rights Courts have noted that the failure to deliver redress for serious violations of human rights aggravates the harm and can amount to inhuman and degrading treatment.<sup>169</sup> States should provide prompt redress and engage in a public information campaign about victims' access to reparation programmes and participation in its development. Wider society also needs to be sensitised on victims' suffering and the significance of reparations in redressing the past and ensuring future reconciliation. Without this sensitising information campaign victims can often be resented for receiving 'benefits' or belittled as being seen as 'useless'.<sup>170</sup> Accordingly reparation processes go beyond the legal construction of procedure. It is necessary that reparation programmes and mechanisms are inclusive to victims and remain a public priority, a difficult balance of procedural justice and public engagement.

## **B. Reparation mechanisms**

Reparations can be ordered, recommended or delivered through a number of mechanisms. This section discusses the four main types: courts; truth commissions; reparation programmes; and inter-state procedures. In the absence of a reparation programme, victims often turn to the courts for redress, both during violence and in the aftermath. Of course recourse to the courts is very much limited to finding sufficient resources to fund such cases and evidence of victims' harm and the perpetrators' responsibility. In times of collective violence the administration of justice is often unable to operate or unwilling to do so, whether

---

<sup>168</sup> Van der Merwe *supra* note 89, at 208.

<sup>169</sup> This is particularly the case for disappearances, see *Varnava and Others v Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90) (ECtHR, 18 September 2009) Grand Chamber, §§200–202; and *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Merits, Reparations and Costs, Series C No.219, (IACtHR, 24 November 2010), §240.

<sup>170</sup> Edward Conteh and Maria Berghs, 'Mi At Don Poil': A Report on Reparations in Sierra Leone for Amputee and War-Wounded People, Amputee and War-Wounded Association (2014), at 23.

through authoritarian state or threat to security from non-state actors. Court settlements can achieve an outcome for victims, but those responsible can limit or absolve their liability. As with the Mau-Mau claim against the British government, the government apologised and paid out nearly £20 million in compensation, but it denied its liability for violations committed by the colonial administration. Ultimately with mass atrocities recourse to the courts is for the fortunate few, who do not represent or speak for all victims.

Civil litigation can provide an avenue for seeking justice and maintain public awareness of victims' plight. This is apparent in the case brought by some of the families of the Omagh bombing in Northern Ireland, where 29 civilians were killed by a bomb planted by the Real IRA, were awarded £1.6million compensation award against four senior members of the organisation, after no one was convicted for the bombing.<sup>171</sup> As noted above, litigation and court-based awards for reparations are individualistic and unworkable for mass atrocities. Nevertheless, civil litigation plays an important part in instigating, sustaining and re-examining a wider discussion on reparation claims. Collective claims by victim groups can help to develop solidarity amongst members and their technical skills, such as administration, advocacy and fundraising, in a sense self-empowering.<sup>172</sup> Larger administrative reparation schemes do not always run smoothly, and are often subjected to judicial scrutiny, which can improve or clarify the scope of reparations.<sup>173</sup>

Truth commissions can be apposite forum for recommending mass reparation programmes, as they collect information on victimisation, the number of victims, impact on groups, and those organisations responsible, making them well placed to make recommendations on appropriate reparations.<sup>174</sup> However, not all truth commissions' recommendations on reparations are implemented, such as in Kenya and South Africa. The

---

<sup>171</sup> *Breslin & Ors v Seamus McKenna & Ors* [2009] NIQB 50. Legal costs in the Omagh bomb case amounted to over £2 million for the victims.

<sup>172</sup> Hamber *supra* note 24, at 148.

<sup>173</sup> See *AZAPO* case; and in Colombia *Gusavo Gallón y otros*, Corte Constitucional C-370/2006, 18 May 2006.

<sup>174</sup> Reparations Programmes, Rule-of-Law Tools for Post-Conflict State, Office of the UN High Commissioner for Human Rights, (2008) HR/PUB/08/1, at 11.

short-term nature of truth commissions means that they lack the mandate to ensure their recommendations on reparations are implemented once their term is complete.<sup>175</sup>

Generally in times of transition, reparations are delivered through a separate mechanism, which assesses eligibility and administers awards. In contrast to court-based reparations, these more political negotiated national reparation programmes reflect the collective responsibility of the state, rather than individuals, and aim to deliver redress to large numbers of individuals, making them more comprehensive.<sup>176</sup> Rules of court procedure and evidence for ordinary crimes and private wrongs can be insufficient to deal with exceptional nature of mass atrocities.<sup>177</sup> Instead reparation programmes provide large administrative schemes, which can cope with thousands of victims in a generalised way by stratifying them based on harm and apportionment. While we segregate different mechanisms and processes for the purpose of analysis, in practice reparations can be recommended in a peace agreement or a truth commission, litigated in courts, advocated on the streets, and delivered through reparation programmes, such as in Colombia and South Africa. Accordingly reparations can be a contested process that takes time to refine. Consultation with victims and community sensitisation can reduce such contention, emphasising the importance of an effective process.<sup>178</sup>

For inter-state conflicts international arbitration bodies can adjudicate and administrate reparations, such as the Permanent Court of Arbitration with the Eritrea-Ethiopia Claims Commission, or specialised bodies, such as the UN Compensation Commission on Iraq-Kuwait<sup>179</sup> Alternatively peace agreements can facilitate reparations amongst states.<sup>180</sup> Of course states can make recourse to the International Court of Justice (ICJ) for redress for injury suffered by the state and its citizens, but such adversarial contests can take time, and

---

<sup>175</sup> Ibid. at 12, citing the examples in El Salvador and Guatemala.

<sup>176</sup> In Colombia under Law 975 (2005) paramilitary groups were also responsible for making reparations. Rombouts *supra* note 41, at 57; and Teitel *supra* note 46, at 292.

<sup>177</sup> Rombouts *ibid* at 58.

<sup>178</sup> Ibid.

<sup>179</sup> Edda Kristjánsdóttir, International Mass Claims Processes and the ICC Trust Fund for Victims, in Ferstman et al. *supra* note 7, 167-195.

<sup>180</sup> See Comprehensive Peace Agreement 2005 between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Army, Chapter II, Part V, Schedule B, provision 18.

there is weak enforcement powers. This is apparent in the *DRC v Uganda* case, where the ICJ found Ugandan state forces responsible for violations of international human rights law and international humanitarian law and ordered it to make reparations, which were claimed at \$10-15 billion, but this has not been made over a decade later, with renewed proceedings beginning in 2016.<sup>181</sup> As a result there can be a myriad of reparation processes at domestic, regional and international level, with reparations in the DRC reappearing at the ICC and domestic military courts.<sup>182</sup> This indicates a lack of comprehensive redress at the domestic level, forcing victims to seek justice beyond the state.

### **C. Evidential and financial challenges**

Two of the biggest practical challenges in designing and operating a reparation programme are finding sufficient evidence to support claims and financial resources. With the first of these, there can be a number of problems with evidence verification: incomplete evidence; vast amount of information received; time-period for submissions; different languages; illiteracy amongst claimants; and fraudulent claims.<sup>183</sup> Some of these issues can be resolved by relaxing evidential standards.<sup>184</sup> As noted by the Iraq-Kuwait UN Claims Commission the general situation of emergency and breakdown of civil order, resulted in a scarcity of evidence meaning many victims would be unable to provide sufficient evidence to support their claims. Thus taking a flexible approach the UNCC required claimants to provide 'simply' documentation on the proof of the fact and the date of injury or death.<sup>185</sup>

Not all claimants will have the same access to evidence. Women, elderly and disabled can be marginalised from completing applications and reparation processes by their physical immobility, illiteracy, or stigma.<sup>186</sup> Thus there is an acute need for outreach to inform

---

<sup>181</sup> The ICJ believed there was sufficient evidence to believe that the UPDF was responsible for massacres, torture, looting and training child soldiers, amongst other crimes. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, 168-283.

<sup>182</sup> Moffett, *supra* note 87, p242-243.

<sup>183</sup> Heike Niebergall, Overcoming Evidentiary Weaknesses in Reparation Claims Programmes, in Ferstman et al. *supra* note 7, 145-166, at 148-150; and Kristjánssdóttir *supra* note 176, p185.

<sup>184</sup> Niebergall *ibid.* p151.

<sup>185</sup> Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), S/AC.26/1994/1 26 May 1994, p34-5.

<sup>186</sup> Rubin-Marín *supra* note 33, p12.

claimants of the reparation scheme, application forms and deadlines.<sup>187</sup> In Timor-Leste the commission kept its application deadline open for two years after closing of its mandate to ensure most victims could access redress.<sup>188</sup> However, extending deadlines and lowering evidential burdens brings the risk of fraudulent claims, such as members of a neo-Nazi group claiming compensation from a Holocaust claims process to deplete funds available for victims.<sup>189</sup> There remains a need to scrutinise applications.

A significant challenge eluded throughout this chapter has been the financing of such reparation programmes. Often states lack the political will to finance reparation programmes. UN Special Rapporteur Pablo de Greiff argues that the

state cannot simply ignore the claims of victims with the argument that there are no resources to cover the corresponding costs, or alleging that there is simply no way to overcome the problems described. This would be tantamount to acknowledging that it is in no position to sustain a fair regime.<sup>190</sup>

Yet he notes that states often do not initiate reparation programmes as they are ‘unaffordable’ or compete with resources for reconstruction and economic development.<sup>191</sup> Two of the main ways to fund reparation programmes in many transitional contexts is through funds or a dedicated budget line.<sup>192</sup> De Greiff suggests that dedicated budget lines are more successful than funds, as dedicated budget lines represent clear political commitment to redressing victims’ suffering.<sup>193</sup>

There are financial alternatives, such as micro-financing schemes for victims,<sup>194</sup> special taxes,<sup>195</sup> or seizing assets (in the Philippines with former President Marcos<sup>196</sup> and

---

<sup>187</sup> Kristjánsdóttir *supra* note 176, p184-5.

<sup>188</sup> Rubin-Marín *supra* note 33, p13.

<sup>189</sup> Kristjánsdóttir *supra* note 176, p185.

<sup>190</sup> De Greiff, *supra* note 19, p459.

<sup>191</sup> Para.51, Report by the Special Rapporteur *supra* note 2.

<sup>192</sup> Para.56, *ibid.*

<sup>193</sup> Para.56, *ibid.*

<sup>194</sup> Hans Dieter Seibel and Andrea Armstrong, Reparations and Microfinance Scheme in de Greiff *supra* note 19, 676-698; and Waldorf *supra* note 50, p181-2.

<sup>195</sup> Such as the wealth tax suggested by the South African TRC, which was unsuccessful. TRC Vol.5, Chapter 8, at 308; and Hamber *supra* note 24, p144.

<sup>196</sup> Some \$225 million of former President Marcos assets seized in Swiss banks accounts is the source for reparations to victims under s.7 of the Act Providing for Reparation and Recognition of Victims of Human Rights Violations during the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes, Republic Act No. 10368, 25 February 2013.



paramilitaries in Colombia<sup>197</sup>), but these can be unpopular and raise separate implementation issues. Correa suggests that states can prioritise reparations over defence budgets.<sup>198</sup> The modalities of awarding individual reparations can also be creative and staggered over time to avoid large initial lump sum payments, such as pensions, university scholarships, or medical coupons for rehabilitation, as suggested by the Kenyan TJRC. Such measures also need to be complemented with wider provision of collective reparation, such as memorials, and basic social provision such as education, housing and healthcare. Otherwise compensation awards will be quickly exhausted paying for these basic service, rather than allowing the victim to use it to alleviate their daily suffering and provide new opportunities.<sup>199</sup> Such support should be used in conjunction with development programs and NGO assistance so as to ensure communal and societal reconstruction.<sup>200</sup>

As reparation processes can take years, interim reparations are vital to ensure some measures of provisional relief of victims' suffering. In Sierra Leone to kick-start the reparation programme the UN provided \$3 million, of which victims who made applications received \$100 each before receiving reparations later on.<sup>201</sup> However, there is a danger that interim reparation awards may appear as more humanitarian assistance if used in the long term. This is the case in Nepal where awards and services have been provided to victims, without acknowledging the state's responsibility and treating victims as beneficiaries, rather

---

<sup>197</sup> In Colombia between 2005-2008, 4,619 items of property donated by combatants to victims for the purpose of reparations, ranging from TVs and cars to apartments in Belize. National Report Submitted in Accordance with Paragraph 15(A) of the Annex to the Human Rights Council Resolution 5/1 - Colombia, A/HRC/WG.6/3/COL/1, 19 September 2008, para.52. Restitution of law is provided through the Ley de Víctimas y Restitución de Tierras, Law 1448. In 2012 reparations were provided to 153,013 victims. National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 - Colombia, A/HRC/WG.6/16/COL/1, 7 February 2013, para.91.

<sup>198</sup> Cristian Correa, Reparations for Victims of Massive Crimes: Making Concrete a Message of Inclusion, in in R. Letschert, R. Haveman, A.M. de Brouwer, and A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, (Intersentia 2011), 185-234.

<sup>199</sup> This was a common concern in Sierra Leone where the war-wounded and amputees were awarded \$1,400. See Conteh and Berghs *supra* note 166.

<sup>200</sup> *Ibid.* p20-21.

<sup>201</sup> This payment was for amputees, war wounded victims that have 50% or more incapacity, and victims of sexual violence, it generally only last 6-12 months, but also included health and educational support. See Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, ICTJ (2009).

than right-holders.<sup>202</sup> Accordingly while there are serious evidential and financial challenges with reparation programmes for mass atrocities, creative ways can be fashioned if there is sufficient political will.

## **VI. Conclusion**

Reparations in transitional societies abound with practical and financial concerns, human rights law requires victims of gross violations of human rights to have access to an effective remedy. Using reparations and victim eligibility as a political bargaining chip or a ‘gesture of solidarity’ in promoting reconciliation trivialises reparations as a justice and accountability measure in times of transition.<sup>203</sup> Politicising identities in determining who can and cannot receive reparations based on their background, rather than their victimisation, only serves to entrench the official narrative of the conflict into legal measures, giving rise to possible sources of victimisation in the future. Such tactics undermine the rule of law, in that everyone who suffers serious harm should have access to a remedy. While the law can be shaped to fit the bespoke political interests of each transitional context, international declarations, such as the 2005 UN Basic Principles of Reparations, should serve as guidance in delivering effective redress.

A major challenge to reparations in times of transition is not getting them on the political agenda or recommended by a truth commission, but having them implemented. Gaining social acceptance as to the need and feasibility of reparations is a delicate balance, which takes time. Victims are often at the forefront in litigating, advocating and negotiating their right to reparations. In terms of sensitising society on the necessity of reparations perhaps snowballing a compensation program for a small group of victims into subsequently larger and more comprehensive process, as in Chile, can normalise the need for reparations. What is apparent from this survey of reparations in transitional contexts is that there exists a

---

<sup>202</sup> There have also been criticisms of the interim payment excluding torture survivors and victims of sexual violence, as well as the complexity, lack of transparency, and inaccessibility of its procedure. See “To Walk Freely with a Wide Heart” A Study of the Needs and Aspirations for Reparative Justice of Victims of Conflict-Related Abuses in Nepal, CREPHA and ICTJ, (2014).

<sup>203</sup> Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2012), p229.

myriad of approaches in redressing mass atrocities. While there are significant practical, financial and political challenges to provide reparations, creative solutions can be engineered to overcome these concerns. If not, victims and their descendants will continue their pursuit of justice through reparations for many years to come.