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Reparations in Transitional Justice: Justice or Political Compromise?

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Title Page

Reparations in Transitional Justice: Justice or Political Compromise?

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Keywords

Reparations; transformative; transitional justice; victims.

Abstract

Reparations are often held up in transitional justice as a 'victim-centred' means of dealing with the past. Yet transitional justice has often been criticised for side-lining victims in peace negotiations or for other actors appropriating their voices for their own political ends. As a result, reparations in transitional societies can often be 'transactional', an exchange for concessions made to perpetrators, such as amnesties, or as 'blood money' for victims to forego pursuing accountability. This article explores how the political construction of reparations in transitional justice can come into conflict with more international law understandings of reparations as justice. As such this article argues that reparations in transitional justice have to be better conceptualised as in balancing competing political and legal claims, as well as engage with emerging debates on transformative justice.

Reparations in Transitional Justice: Justice or Political Compromise?

Reparations as redress to victims of serious violations seem a morally ubiquitous goal in transitional societies. Yet reparations are often sites of political, economic and legal contest in their value in dealing with the past and preventing future violence. Reparations contain important expressive messages about which individuals and harm are deemed worthy to be recognised and remedied.¹ In addition, difficulties remain in implementing international legal norms into contested transitional societies. While there may be peace in a post conflict or authoritarian society, reparations can unsettle it by unearthing controversies over who is responsible for the violence and who was victimised. These polemics can threaten wider goals of the transition of reconciliation and prevention of future violence.

This article outlines some of these criticisms and how they can be worked through. However, despite the normative expansion of reparations for gross violations of human rights and serious breaches of international humanitarian law, the engagement of domestic legal regimes to incorporate these norms in light of contentious social and political issues remains context dependent. Indeed, the success of political claims for reparations being legislated are dependent upon timing and the political will to address such issues. This is not to say that international norms have no effect, but international or regional court judgments on reparations often come into conflict with domestic visions of how the transition and reparations in particular should look like.

This article unpacks these issues by first examining the role of reparations in transitional societies in light of international norms, before exploring the political project justification for such measures. Together these two areas will hopefully shed some light on the continuing development and sites of contest that reparations face in transitional societies that can speak to wider challenges and evolution of the field. The piece contrasts this with the emerging trend for transformative reparations, and its implications for victim-centred redress. While this article does not go as far as to suggest that reparation under the guise of justice are a means of political or social reform, it does posit that reparations can be a powerful claims-making tool by different real or imagined victims that needs to be carefully crafted beyond their individual needs to be socially acceptable. This article argues that while there can be a dichotomy between international norms and domestic transitional societies' implementation, international and regional bodies should be reflexive to the domestic context while ensuring basic tenets of redress for those who suffer serious harm. Moreover, the resort to transformative reparations should be detached and discussed as guarantees of non-recurrence to distinguish between reparations for past victimisation and the need to prevent future violence.

The contested role of reparations in transitional societies

Reparations in transitional justice have arisen from both top-down and bottom-up developments. International legal norms have long established that reparations are a way of settling breaches of international law.² In post-conflict settlements, reparations are a means for the victor to claim the spoils of war, such as the Treaty of Versailles.³ With the rise of human rights law there has been a greater focus on the individual's right to a remedy for violations.⁴ In tandem victims in transitional societies have litigated and politically campaigned for reparations at national and regional courts, such as the long claim by survivors of Britain's brutal counter-insurgency against the Mau-Mau in 1950s Kenya.⁵ Although international norms have raised prospects of what reparations should look like, their implementation within states remains patchy and can conflict with prevailing narratives or overarching goals of the

¹ M. Urban Walker, Transformative Reparations? A Critical Look at a Current Trend in Thinking about Gender-Just Reparations, *International Journal of Transitional Justice*, (2016) 10(1) 108–125, p118.

² *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, para.125.

³ Article 231, 1919 Treaty of Versailles.

⁴ See A. Cançado-Trindade, *The Access of Individuals to International Justice*, (Oxford: Oxford University Press 2011).

⁵ *Mutua and Ors v The Foreign and Commonwealth Office* [2011] EWHC 1913 (QB).

transition. This is particularly apparent with the field of transitional justice, where there continues to be differing basis for the justification of reparations in dealing with the past as justice, part of the ‘political project’ or through their transformative potential in transitional societies. The rest of this section evaluates these perspectives in turn which tackle the difficulties of conceptualising the theory and practice of reparations in transitional justice, which oscillate between the top-down international perspective and more domestic pragmatic approaches.

Reparations as justice

Reparations in international law are intended to ‘promote justice’ by vindicating violations through obligating the responsible party to redress the harm they caused.⁶ This position draws from private law in domestic legal systems of *restitutio in integrum* to ensure an individual’s right to a remedy for the harm caused.⁷ Yet the scale of mass atrocities,⁸ such as the Rwandan genocide, can ‘explode the limits of the law’⁹ making it financially impossible for states to fully remedy all victims’ harm and realise their rights.¹⁰ Despite this, international judicial bodies, treaties and state practice continue to expand the normative role of reparations in redressing mass atrocities as a form of justice.¹¹

Reparations as justice has been criticised as exoticising ordinary corrective justice principles. Posner and Vermeule argue that the distinction between ordinary justice in settled democracies and transitional justice in societies emerging from conflict or authoritarianism is overstated and part of a continuum.¹² They suggest that reparations can disrupt this continuum by

compensating victims of the old regime and serve political reform by taking resources away from people who threaten the new regime, but they might also unsettle property rights and interfere with economic reform by creating new claims against existing property holders.¹³

Reparations in transitional justice are somewhat more complex than this portrayal and have not remained static from its initial extension from private law principles, but has through the engagement of human rights bodies, in particular the Inter-American Court of Human Rights, broadened the scope of appropriate remedies beyond restitution and compensation.

Reparations for gross violations of international human rights law and serious breaches of international humanitarian law include five main types: restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition. Restitution and compensation represent traditional private law property and monetary forms of redress, but have been expanded to include restoration of rights and non-pecuniary awards for moral damage. Rehabilitation is focused on the restoration, as far as possible, of the individual’s physical, mental and social integrity, through measures such as reconstructive surgery and

⁶ Principle 15, 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, A/RES/60/147 (2005).

⁷ D. Shelton, *Remedies in International Human Rights Law*, (OUP 2005, 2nd edn).

⁸ Mass atrocities refers to gross violations of human rights and international crimes, including war crimes, crimes against humanity and genocide.

⁹ L. Kohler and H. Saner (eds.), *Hannah Arendt and Karl Jaspers: Correspondence: 1926–1969*, (Harcourt Brace International 1992), p.54.

¹⁰ A. Segovia, Financing Reparations Programs Reflections from International Experience, in P. de Greiff (ed.), *Handbook of Reparations*, (OUP 2006), 650-675.

¹¹ R. Falk, Reparations, International Law, and Global Justice: A New Frontier, in de Greiff, *ibid.* 478-503. For instance Article 75, Rome Statute of the International Criminal Court; and Articles 31, 34-39, Articles on Responsibility of States for Internationally Wrongful Acts 2001. See also Rule 150, ICRC Customary Law Database.

¹² E. Posner and A. Vermeule, Transitional Justice as Ordinary Justice, *Harvard Law Review* 117(3) (2004), 761-825.

¹³ *Ibid.*, p766.

psychological counselling. Measures of satisfaction represent measures intended to officially acknowledge the wrongfulness of the victim's suffering and responsibility of those who caused it through investigations, apologies and memorials. Guarantees of non-repetition are measures to reform state institutions and to tackle the underlying causes of victimisation, such as civilian control of the military.

Proponents of reparations as justice suggest that combining material and symbolic reparative measures can overcome the insufficiency of money in remedying mass atrocities.¹⁴ Beyond the substantive outcomes of the forms of reparations, there are also procedural justice considerations to ensure victims have their interests considered in reparation programmes and that the process itself does not cause further trauma. Danieli suggests that victims' procedural role in each step of the justice process as, 'an opportunity for redress and healing'.¹⁵ Respecting victims' interests by allowing them rights to participate, be informed and help to shape reparation outcomes can improve their satisfaction.¹⁶ However as Hamber submits reparations can be a 'double edged sword' as the promise of full remedy in international standards can never be achieved, no matter how inclusive or sensitive the justice or administrative reparation process.¹⁷ That said the discourse of rights as legal entitlements has important implications in recognising victims' agency to claim redress for violations, thereby offering them a legal avenue at regional or international courts or bodies where there is a lack of domestic remedy. The Inter-American Court of Human Rights has been integral in recognising individuals' right to reparations in the face of domestic intransigence to acknowledge and remedy their harm.

In light of this legally dominated construction of remedy and reparations, implementing international legal norms on reparations remains hotly contested in many transitional societies. With scarce resources and reparations acknowledging individuals as 'deserving' of redress, it can give rise to competition between victims and public attacks on individuals' eligibility.¹⁸ Such competition even when through legal processes may not all be fair and equal. Urban elites or 'celebrity' victims who have access to the media or fit their narrative of 'innocent' or 'vulnerable' victims and likely to be more effective in leveraging political change, to have the financial resources to hire lawyers to represent their interests or can at least navigate legalese.

Victims excluded from reparation programmes emboldened with their right to remedy can also challenge it through domestic and international courts.¹⁹ This litigation can force politically agreed and legislated programmes to be subject to judicial or international scrutiny, which can upset wider social acceptance and funding of such programmes. This can be seen with the inclusion of victimised members of terrorist organisations, such as the Shinning Path in Peru, through claims at regional human rights courts for reparations where they were excluded under domestic reparation programmes.²⁰ This reflects the limitations of international law, which is state-centric in its obligations for reparations. Moreover, it demonstrates the wider

¹⁴ P. de Greiff, Justice and Reparations, in Greiff n.10, 451-477; and E. Verdeja, A Normative Theory of Reparations in Transitional Democracies, *Metaphilosophy* 37(3-4) (2006), 449-469.

¹⁵ Y. Danieli, Massive Trauma and the Healing Role of Reparative Justice, in C. Ferstman, M. Goetz, and A. Stephens (eds), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making* (Martinus Nijhoff 2009), 41-78, p47.

¹⁶ J. Wemmers, *Victims in the Criminal Justice System* (Kugler 1996), p146-147.

¹⁷ B. 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, p219.

¹⁸ L. Huyse, Victims, in D. Bloomfield, T. Barnes and L. Huyse (eds.), *Reconciliation after violent conflict: A handbook*, IDEA (2002), 54-65, p64.

¹⁹ *Gusavo Gallón y otros*, Corte Constitucional C-370/2006, 18 May 2006; and *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Preliminary Objections, Merits, Reparations and Costs. Judgment of 20 November 2013. Series C No. 270.

²⁰ See *Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. Judgment 25 November 2006, Series C No.160 (IACtHR). L. Moffett, Reparations for 'guilty victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms, *International Journal of Transitional Justice* (2016) 10(1) 146-167.

challenges of the law in effectively grappling with the reality of violence in transitional justice involving a myriad of responsible actors beyond the state.

Although these controversies are most acutely felt in reparations, they are symptomatic of wider debates on competing narratives of the conflict/past, the transition itself, or how a society is moving toward. Falk highlights that reparations in addressing mass atrocities, norms in international law are authoritative, but their implementation needs to be context-dependent and responsive to local needs.²¹ The difficulty with such an approach is that rights for victims can upset this balance of developing bespoke local approaches in transitional societies. As such the international norm justice aspect of reparations as a right and the political project vision of such redress remain within two different silos. In practice states and international bodies need to recognise the conflict between the two and how to better complement rather than compete with each other in the future.

Despite the normative growth of international standards on reparations, only 14 out of 84 countries between 1970 and 2004 implemented reparations.²² This picture has not improved over the past decade with reparations called for in Kenya, Nepal, Uganda, Northern Ireland, Cambodia and El Salvador being unheeded, neglected or shelved. It is common for subsequent governments to ignore or delay reparations in the face of more perceived pressing concerns in transitional societies.²³ Even victims in the short-term may prioritise assistance and security over more common transitional justice goals of truth, justice and reparations.²⁴ Accordingly, reparations as a construct of justice is supposed to be responsive to the disparate harms victims suffer during political violence. However, in transitional societies reparations are also tempered by moral and political claims-making around transitional goals and implementation where victimhood and responsibility are not so clear-cut and settled.

Reparations as a political project

Much of the contemporary literature on reparations in transitional societies concentrates on the construction of the legal framework of domestic reparation programmes as a 'political project'.²⁵ In such contexts reparations serve not only to remedy past violations, but also acknowledge victimisation and the wrongful acts of responsible parties. This public recognition can also be future looking by reconstituting victims and communities' identities and reaffirming their dignity and social inclusion. As Pablo de Greiff, the UN Special Rapporteur on Truth, Justice, Reparations and Non-Recurrence, argues that despite the limits of full remedy for victims of mass atrocities, justice as recognition, by building civic trust and social solidarity, should guide large administrative programmes rather than case-by-case awards.²⁶ As such, reparations as a political project reflects a more expressive function in delivering remedial measures to large numbers of victims, both in terms of the political symbolism of such measures and the social inclusion they connote.

Reparations as a political project can also address historical injustice. Victims of historical atrocities face a number of legal procedural barriers such as statutes of limitations, causation and sufficient evidence for civilian courts, which prevent them from seeking reparations. More effective avenues to redress can be through leveraging political support. This is apparent with the case of the interned Japanese-Americans interned by the US during the Second World War. Some of those interned were unsuccessful in bringing legal proceedings against the government in the years after the war. It was only in the late 1990s after years of political lobbying did the US government agreed to pay \$20,000 to each surviving internee.²⁷

²¹ Falk n.11, p491.

²² Tricia Olsen, Leigh Payne and Andrew Reiter, *Transitional Justice in the Balance: Comparing Processes, Weighing Efficacy*, USIP (2010), p53.

²³ Lars Waldorf, *Anticipating the Past: Transitional Justice and Socio-Economic Wrongs*, *Social and Legal Studies* 21(2) 171–186, p177.

²⁴ *Ibid*, p178.

²⁵ P. de Greiff, *Justice and Reparations*, in Greiff n.10, 451-477, p458.

²⁶ *Ibid*.

²⁷ See E. K. Yamamoto and L. Ebesugawa, *Report on Redress The Japanese American Internment*, in de Greiff n.10, 257-283.

However, the payment itself was a symbolic gesture, a 'token' that did not correspond to the severity of individuals' suffering.²⁸ Eligibility was for only those who survived to the passing of the law in 1988.²⁹ Peruvian-Japanese who were abducted by American forces to be interned in the US during the same period were originally excluded from the scheme, only obtaining \$5,000 each after successfully challenging the law through the courts. Thus although the legal limits of reparations can be overcome by pragmatic political negotiation, reciprocal pressure can be made through courts in broadening politically agreed reparations.

Reparations can be more political attuned in negotiations in satisfying different stakeholders. As victim-centred measures of redress, reparations can be a counterbalance to other concessions made to ex-combatants. Hazan refers to this political horse-trading as 'transactional', whereby combatants can avail of demobilisation or reduced sentences in exchange for victims obtaining reparations, keeping different stakeholders placated and maintaining the legitimacy of the transitional process.³⁰ By way of example the Colombian Peace and Justice Law 2005 allowed members of paramilitary groups to obtain reduced sentences of 5-8 years in exchange for assets obtained through illegal activities being surrendered for reparations to victims. These exchanges were part of a broader comprehensive approach to address the responsibility of the paramilitary groups by requiring their members to demobilise, contribute to finding the truth and collaborate with authorities.³¹

The distinction between reparations and accountability is not so transactional or dichotomous, but can be complementary. However, often political negotiations is that victims' interests are neglected or side-lined as priorities of more powerful political actors take centre stage. Despite the normative development of reparations in international law and state practice in transitional societies, the burden in claiming redress remains on victims to mobilise support for the creation of reparation programmes or claim remedies before domestic and international court. Time and again victims are forgotten in peace negotiations between belligerents or transitions in governments after conflict or authoritarianism. Victims do not have sufficient bargaining power to shape these new power arrangements to their own needs and are often left out of the decision making process for transitional justice mechanisms. Moreover, reparation mechanisms created by political elites can often silence and marginalise non-elites and women in particular, who are not part of the political negotiation.³²

The Colombian Peace and Justice Law itself was criticised for only benefitting victims of paramilitary violence, and neglecting victims of state atrocities.³³ This was only addressed in 2011 under the Victims and Land Restitution Law (Law 1448) that allowed claims against state forces, but mainly focused on land restitution. That said the Colombian peace talks with FARC in Havana, Cuba have involved numerous victim representatives and will hopefully provide more inclusive and sensitive victim proposals on reparations. The Colombia case represents an evolving reparations programmes dependent on political negotiations with different factions and the inclusion of previous hidden 'new' victims.

Perhaps an aspect less examined is the political agency victims project in transitional societies that leverage reparations to be implemented by states. In the aftermath of mass atrocities, reparations as redress are not handed to victims from benevolent former belligerents;

²⁸ A. Brophy, Some Conceptual and Legal Problems in Reparations for Slavery, *NYU Annual Survey of American Law*, 58(4) (2002), 497-556, p500.

²⁹ If they died after its enactment but before payment, their surviving spouse, children or parents would be eligible for their claim. Civil Liberties Act of 1988 (public law 100-383), 10th August 1988 102 stat 905, s.7. Yamamoto and Ebesugawa n.23, p272.

³⁰ P. 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.

³¹ See para.11.5, Peace and Justice Law 2005; and *Gustavo Gallón y otros*, Corte Constitucional C-370/2006, 18 May 2006.

³² B. Hamber and I. Palmary, Gender, Memorialization, and Symbolic Reparations, in R. Rubin-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies While Redressing Human Rights Violations*, (CUP 2009), 324-381, p331.

³³ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, (Cambridge: Cambridge University Press 2012), p214-215.

they have advocated for in courtrooms, legislatures and on the streets. In a way claims for reparations are resistance against continuing of the status quo and oblivion of victims' suffering. It is resistance against the legal regime that tolerated such crimes and failed to investigate and prosecute those responsible. It is resistance against society's indifference and disbelief of the victim that state actors, paragons of law and order could be involved in such dark atrocities to keep them safe in their beds at night. Or vice-versa that paramilitaries or non-state armed groups in their glorious resistance against state oppression committed barbaric acts. It is resistance against the denial of the victims' dignity and rights, in that somehow they deserved to suffer and be denied a remedy in the past. As such, claiming reparations as a redress is a social justice movement often blighted by victims being political denigrated, with individuals claiming reparations often being labelled 'bad victims' for trying to upset political and economic stability of the new regime.³⁴ Even more disconcertingly, victims can often be characterised as being opportunistic, after 'blood money' or 'beggars'.³⁵ Despite the normative framework in international law that support victims' right to reparations, political claims-making is vital in the implementation of reparation programmes.

Indeed, seeking reparations as redress is not just about compensation or rehabilitation, but also the political, moral and social restoration and vindication of the victim's experience and their status. This is apparent in Argentina where the families of those disappeared rejected compensation from the government and protected on the grounds that it meant acquiescing to the state's narrative of the conflict that those disappeared had somehow deserved their fate as part of the government's counter-insurgency policy.³⁶ However as Mendez warns, giving victims too much leeway to dictate the political process of reparations through protest can undermine the rule of law, and instead it is better for them to engage in participation through legal avenues.³⁷

The mass scale of atrocities committed by the former regime or during a conflict may make reparations that can fully remedy the harm or damage caused impossible to deliver in practice under ordinary justice mechanisms. Allocating resources to reparations can be controversial in transitional societies, raising questions on whether to focus on economic development of a recovering society over redress to those victims most seriously harmed.³⁸ Starzyk et al suggest that reparations are more likely to be publicly accepted or socially feasible where they do not compromise valuable social resources.³⁹ Restitution of property or redistribution of large amounts of money can unsettle propriety rights and economic systems.⁴⁰ More critical voices question the effectiveness, benefits and trade-offs of transitional justice mechanisms, such as reparations, in achieving their goals of remedy, 'healing', accountability and reconciliation.⁴¹ Dismissive statements about reparations being 'too costly' or society looking to 'move forward', reflect criticisms more generally of engaging with transitional justice mechanisms in many societies.

³⁴ T. Madlingozi, Good victim, bad victim: Apartheid's beneficiaries, victims and the struggle for social justice, in W. de Roux and K. van Marle (eds.), *Law, Memory and the Legacy of Apartheid: Ten years after AZAPO v President of South Africa*, Pretoria University Law Press (2007), 107-126, p112-113.

³⁵ C. Moon, 'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering, *Social and Legal Studies* 21(2) (2012) 187-199; and Madlingozi *ibid.*, p112.

³⁶ Moon *ibid.*, p194.

³⁷ J. E. Méndez, Victims as Protagonists in Transitional Justice, *International Journal of Transitional Justice*, 2016, 10(1), 1-5, p3.

³⁸ G. Manrique Rueda, Lands, wars and restoring justice for victims, in J. Wemmers (ed.), *Reparation for Victims of Crimes Against Humanity: The Healing Role of Reparations*, Routledge (2014), 190-199.

³⁹ K. Starzyk, D. Gaucher, G. Boese and K. Neufeld, Framing reparation claims for crimes against humanity: a social psychological perspective, in Wemmers *ibid.*, 113-125; and E. Nussio, A. Rettberg, and J. E. Ugarriza, Victims, Nonvictims and Their Opinions on Transitional Justice: Findings from the Colombian Case, *International Journal of Transitional Justice*, 9(2) (2015) 336-354, p343.

⁴⁰ Posner and Vermule, n.12, p784.

⁴¹ *Ibid.*; and C. Bell, Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field', *International Journal of Transitional Justice* 3(1) (2009) 5-27.

Despite these criticisms, reparations, notwithstanding their financial cost, as a political project represent invaluable political and moral significance to individual victims in reaffirming their worth in society and condemning the wrong(s) they have suffered. That while they may not prevent past sources of victimisation becoming tomorrow's justification for violence, do represent tangible measures to at least alleviate the worst harm caused by the former regime and attempt to ensure greater social inclusion. In such formulation financial cost becomes secondary, with even low-income economies such as Sierra Leone able to prioritise reparation, or even larger economies like Colombia investing \$29 billion to fund its reparation programme for 7.6 million victims.⁴² Such large administrative schemes for reparations keep an eye to preventing future conflict by aiming to transform the causes of violence.

Reparations as transformative

Given the limits around remedying the past, a more forward-looking perspective of transformative justice is increasingly being argued to prevent recurrence of mass atrocities. To some scholars transformative justice is aligned more closely to distributive justice to 'recognise unjust distributions of resources and seek to redistribute accordingly, ensuring that underlying causes of injustice are addressed.'⁴³ Gready and Robins suggest that measures in transitional justice, such as reparations, can only address the symptoms, not the causes of conflict and atrocities, instead transformative justice aims to

provide a platform for transformative change. Transformative justice is defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level.⁴⁴

Transformative reparations have been increasingly advocated in the aftermath of widespread or systematic sexual violence, where the occurrence of the crime reflects more ingrained structural discrimination and marginalisation of certain groups that precipitates such violence. More broadly transformative reparations have been engaged with to rethink the nature of reparations to examine the gendered impact of conflict on women as well as on social and economic rights.⁴⁵ 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'.⁴⁶ However, ruptures in governance and the law may not offer opportune moments to reform social and cultural perceptions and practices when more pressing needs of security, peace and redress need to be tackled.

As Walker suggests beyond the challenges of practical realism and political feasibility, transformative reparations endanger displacing victim-centred nature of reparations in remedying their harm to instrumentalising them for social justice.⁴⁷ As such transformative

⁴² From Principles to Practice Challenges of Implementing Reparations for Massive Violations in Colombia, ICTJ 2015.

⁴³ A. Saris and K. Lofts, Reparation Programmes: A Gendered Perspective, in Ferstman et al. n.14, 79-99, p93.

⁴⁴ P. Gready and S. Robins, From Transitional to Transformative Justice: A New Agenda for Practice, *International Journal of Transitional Justice*, 8, (2014), 339-361, p340.

⁴⁵ See Saris and Lofts n.43. Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007, para.4 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation.' UN Guidance Note of the Secretary-General Reparations for Conflict-Related Sexual Violence, para.4.

⁴⁶ R. Rubin-Marín, The Gender of Reparations in Transitional Societies, in Rubin-Marín n.32, 63-120, at 66. See Reparations for Conflict-Related Sexual Violence, UN Guidance Note of the Secretary-General, June 2014.

⁴⁷ Walker n.1, p110.

reparations can undermine the importance of the remedial and individual acknowledgement of victims' suffering, by placing it secondary to improving a society and preventing future victimisation. The transformative potential of reparations rests in their ability to prioritise and publicise victimisation and underlying structural inequalities that precipitated or compounded violence. Where reparations are solely used to prevent future victimisation they can be overburdened with expectations. Moreover, such guarantees of non-repetition could force those individuals who were victimised to forego their remedy for wider benefits of society for reconciliation and peace. In such circumstances victims of past violence are silenced or neglected to extend the gaze of the transition to future peace and reconciliation. As the use of reparations grows within transitional justice and debates on transformative potential increase, it is perhaps worth considering whether reparations to individuals and groups should be separated from more transformative guarantees of non-recurrence.

Ultimately reparations in transitional societies can speak to each of these perspectives as being about justice, politics and transformation. Reparations as justice reflects important standards of procedural justice for victims and best practices in remedying mass atrocities, but needs to be tempered with political realities. Victims, while key stakeholders, are not sovereign and their interests require balancing with other priorities. To ensure reparations are not overburdened with expectations, they need to be complemented with other transitional justice measures such as institutional reform as part of a comprehensive approach in dealing with the past. Overarching goals of reparations can be about justice, political posturing and preventing such crimes in the future, but such a vision needs to be practically complicated and matched with sufficient programme capacity to offer meaningful redress to large victimised populations. That said, the official narrative of reparations can be challenged by victims and others on the grounds of who is eligible and responsible for such measures.

Conclusion – Finding the middle ground?

Reparations remain a key component of dealing with the past in transitional societies that place redressing victims' suffering centre stage. There is a growing body of work displaying a richer appreciation of the complexity of mass atrocities committed during conflict and authoritarian regimes that recognises the myriad of responsible actors, victims and reasoning for engaging with reparations, as well as the difficulties in capacity and political will to meaningfully implement such measures. International law and justice approaches to reparations provide some form of certainty, but with competing political narratives and goals in transitional societies, reparations to some extent need to be contextualised. While there may be challenges in implementing international norms on reparations, it forces societies to come up with creative solutions to begin to meet or at least strive towards these standards, and to try to coalesce political will on the issue. Perhaps a more clarified understanding of reparations in transitional societies is being unearthed that reparations are a way to acknowledge the wrongs of the past as a starting point of a shared or at least broader narrative of the past. Indirectly by recognising the suffering of all sides it can perhaps contribute to more transformative goals of reconciliation and prevent of the recurrence of such violence. The future of reparations in transitional societies lies in its ability to encapsulate the basic tenets of redress for victims, while helping a society to learn from its past to prevent its repetition.