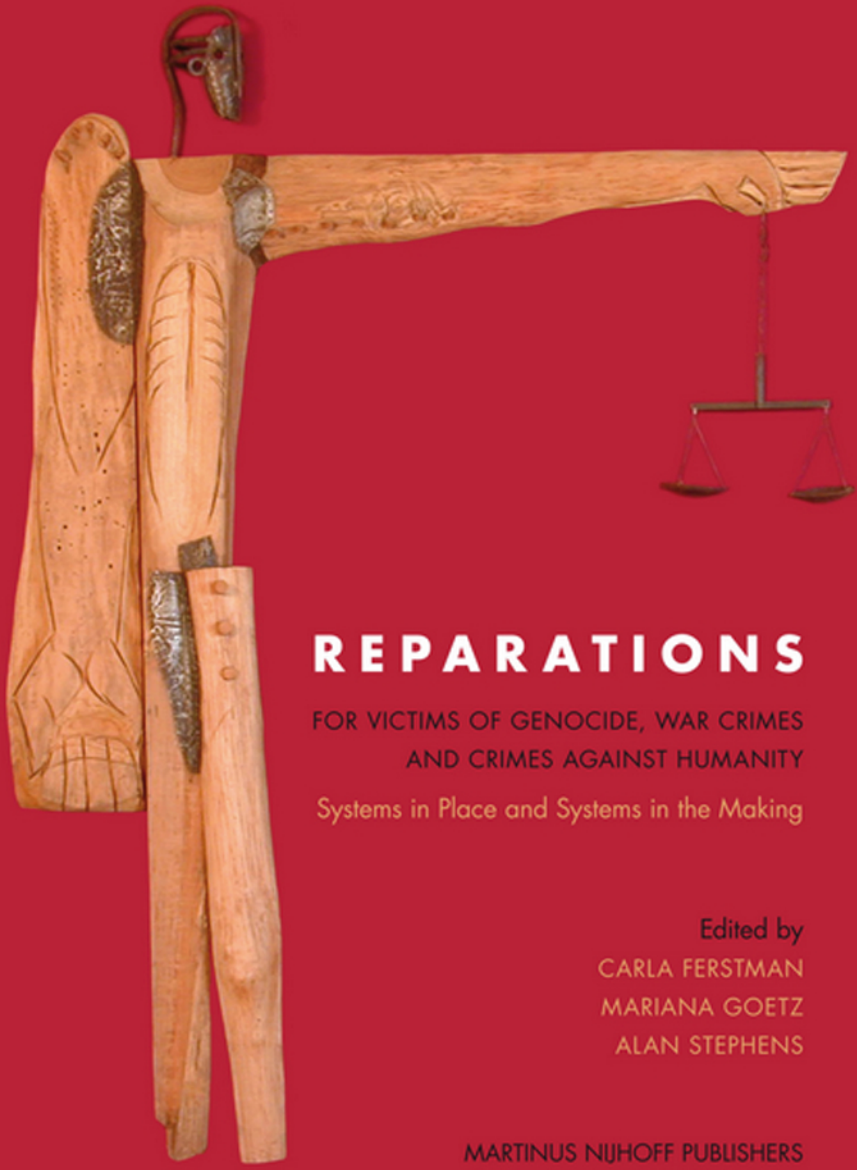

REPARATIONS

FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

Systems in Place and Systems in the Making

Edited by
CARLA FERSTMAN
MARIANA GOETZ
ALAN STEPHENS

MARTINUS NIJHOFF PUBLISHERS

Reparations for Victims of Genocide, War Crimes and Crimes against Humanity

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Foreword

*By Judge Elizabeth Odio-Benito**

Wars and armed conflicts are deeply embedded in the history of humankind. This has been particularly true during the 20th century and today, where national and international armed conflicts have terrorised and killed millions, mostly civilians, and among them mainly women and children.

However, the victims of international crimes had neither a voice beyond that of a witness nor the right to demand reparations for what happened to them or to their loved ones. The only exception was in the case of some survivors of the Holocaust that received some reparations from the German government and other sources.

The ad-hoc tribunals for the Former Yugoslavia and Rwanda had already been operating for several years when the Rome Statute, and later the Rules of Procedure and Evidence, were adopted in 1998. Their international criminal procedures were limited to the prosecution of perpetrators, having no mandate to deal with victims beyond their role as witnesses. This was debated in the year 2000 as there was the possibility to grant reparations to victims but no formal agreement was reached and no reparations ever given. Work conducted by academics and non-governmental organizations based on personal interviews with those who survived the war in the Former Yugoslavia, have demonstrated that for many the economic situation, especially for women who were raped, enslaved or trafficked, is worse than it was before the war. For women who were raped it was not until many years later that some of them received recognition as war victims which entitled them to a small pension from the State.

Our notions of judicial justice are incomprehensible for those who are unable to survive without a permanent place to live in, without enough money to take care of their families' basic needs and without full recognition of the atrocities committed against them.

This was recognised by the drafters of the Rome Statute who established a Court that is significantly different from any previous international criminal

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* Judge assigned to the Trial Division, International Criminal Court. The views included in this Foreword are those of the author and in no way reflect those of the International Criminal Court.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 1–4.

tribunal. It included in its provisions the rights of victims to receive protection and reparations and to participate in the proceedings. The ICC attempted to become a victim-focused International Criminal Court where victims had not only interests but also rights. The ICC system is not only comprised of the organs of the Court, but it is complemented by an independent Trust Fund for Victims and it requires the full cooperation and assistance of the international community, States and non-State Parties, international organizations and non-governmental organizations.

Our biggest challenge today will be to make this innovative criminal legal system a reality for the thousands of victims of crimes under its jurisdiction.

For example, Article 75 creates a mandate for judges to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. It remains to be seen what these principles will encompass. Guidelines may be provided by the universal principles of non-discrimination, and of proportionality (between harm suffered and reparation granted and between rights of victims and rights of the accused) and always maintaining a clear gender perspective.

It is also important to clarify that before issuing a reparations order under this article, judges may invite and take into account the points of view of the convicted person(s), the victims, and any other interested persons or States. Since State cooperation is indispensable for the effective enforcement of reparations orders, their participation in the reparations proceedings is not only advisable, but essential. The Statute also clearly states that no decision of the Court shall be interpreted as prejudicing the rights of victims under national or international law.

The ICC system of reparations contains substantive and procedural provisions in the Rome Statute, the Rules of Procedure and Evidence, and the Regulations of the Trust Fund for Victims (the latter specifies the role of this important autonomous organ and its relation with the Court). However, in light of Article 21, the Court can go beyond its Statute, Elements of Crime and its Rules of Procedure and Evidence and apply, where appropriate, treaty and the principles of international law, including the established principles of the international law of armed conflict and failing that the principles of law derived from national laws of the legal systems of the world.

Documents such as the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[1] *and the Basic Principles* and the *Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*[2] have proven to be useful for the Court's determinations.

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[1] GA Res. 40/34, 1985.
[2] GA Res. 60/174, 2005.

In fact ICC Trial Chamber 1 has already referred to the Basic Principles in its Decision on victims' participation in order to determine the concept of "harm" under Rule 85 of the Rules of Procedure and Evidence. This, in addition, has been confirmed by the Appeals Chamber in a judgement thereof.

The extensive case law of the Inter-American Court of Human Rights, which has defined crucial concepts such as moral damage, damage to a life plan, and has interpreted the right to receive reparations taking into account the particularities of groups or communities (such as indigenous groups), could certainly serve as an exemplary model for our future judicial work.

Bearing in mind that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity", the Rome Statute and its Rules of Procedure and Evidence create a new international criminal justice system which is complex and ambitious. It is a system that, in light of the principle of complementarity, includes as essential the judicial domestic legal structure of State Parties (and also non-State Parties), which should implement the provisions of the Rome Statute. As such, their national laws must incorporate the international crimes specified in the ICC Statute, all the cooperation mechanisms foreseen in its Statute, and most significantly, all provisions related to the rights of victims to receive protection, to participate and to obtain reparations.

The States, apart from their obligations comprised in the Statute, have the duty, following international customary law, to cooperate with international organizations such as the ICC. Common Article 3, the Third Geneva Convention, the Optional Protocols, and all human rights covenants and treaties must also serve as guidance to fulfil the Court's mission regarding victims' protection, and to an extent, reparations. Most importantly, victims will not receive reparations if they do not come forward before the Court. This will not be achieved if victims are not aware of their rights under the Statute and they do not perceive the Court as also representing their newly acquired rights.

But the Court alone, specifically as regards reparations, will not be able to face all the expectations that have arisen since its creation. It will require a Trust Fund that is economically and politically strong, that States cooperate with the Court and, above all, it will need the support of the international community, international and regional organizations and non-governmental organizations. Justice, in addition to respecting the rights of the accused, means hearing the voices of women and men in a courtroom where they express their right to determine what happened to them, what they need to rebuild their lives and reparations which will help them achieve what they had before their downfall.

Introductory Remarks

*By Clemens N. Nathan**

The late René Cassin inspired me to use our experience of The Holocaust for the benefit of mankind in general. It was his motivation in which he believed passionately, having lived through the nightmare of both the First World War and the neglect of pensions for war widows, and the even more horrific elimination of the majority of European Jews and many others during the Second World War, that made him determined to help create the Universal Declaration of Human Rights, despite the enormous opposition from certain States on the grounds that it was a gross interference in their internal, national sovereignty.

It is very important to remember that any form of reparation cannot overcome the suffering of the individual – no amount of material reparation can heal the psychological scars which remain indelible on those who have been abused and traumatised. These can never be restored except in a damaged state.

The lack of human dignity and worth for those who have suffered should shame those who commit atrocities. The challenge to help survivors is extremely important. The major contribution of many criminal prosecutions over the last few years has not only seen the indictment of the accused but also the very important documentation which has taken place of what actually happened. I recollect with the Eichmann case how hundreds of researchers had immense difficulty in collating the information from all over Europe of what had actually happened. This was the beginning of the realisation of the nightmares, far worse than anyone could have imagined, which had finally been revealed to the public in all its horror. It was from this foundation that much of the work on the Holocaust, including compensation, was able to evolve. The Nuremberg Trials similarly opened the door to what had happened previously.

To me this is one of the important facets of the International Criminal Court. There are several major questions.

1. Can compensation really be effective? What are the practicalities of compensation versus the idealism which we all have for it?

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 5–6.

2. To what extent is compensation in the real sense illusory? Is it extremely dangerous to raise the emotional high hopes of victims which can never be fulfilled?
3. How far should we consider compensation for second and third generations?
4. Where do we draw the line between relief, welfare, and compensation? If one looks at the major concentration camps which were liberated after the Second World War, thousands of people died in the first few days in each one because of inappropriate food, or no food at all. How should this be dealt with and can it be dealt with before compensation can be paid out from a central fund?
5. What political priority should be given nationally and internationally to fund compensation and how does one promote this concept to different countries? It is a low priority compared, for example, to climate change or armaments, for most countries. Is it possible to change the attitude of people and therefore ultimately governments in democratic states to help with this on a large scale?
6. What is the effect of invasion for liberalising a genocidal regime? How can an invasion force become accountable and responsible, if at all, for dealing with compensation? What are the duties of invaders in such cases towards the victims? Is this type of duty something which can only be done on an international basis with the support of individual states?
7. To what extent should an organisation be responsible for transferring victims to new countries where they can settle peacefully with the support of other people who are already there, perhaps of the same ethnic or religious background?

I believe that all these matters are within the expertise of the various contributors in this book. The unique experience of the Claims Conference for me is that they have had 60 years of experience since the Second World War in looking at, negotiating and settling countless claims, together with the World Restitution Organisation, for Jewish victims of gross violation of human rights when over 6 million Jews were exterminated, including 1.5 million children. Even so, their achievements are nowhere near sufficient to alleviate the suffering of those still alive. Every year when some of us attend the Board Meetings we come back shattered by the new tragedies which confront us and make us realise how the pattern of suffering has continued for many of these people, who at least were not killed, over this whole span of time.

Suffering just does not go away. Today, some of these victims have blossomed out to be leaders of their own communities and have overcome their problems. In most cases, when one sees the children and grandchildren of these victims, usually proud and confident where they have had every opportunity of education and development, one marvels at the human spirit to overcome adversity.

With news of new genocides confronting us every day we really need to run before we can walk. Let us hope that this publication will bring us one miniscule step forward to accelerating help for those in desperate need.

Introduction

*By Carla Ferstman, Mariana Goetz and Alan Stephens**

This book is intended to provide a detailed analysis of systems that have been established to provide reparations to victims of genocide, crimes against humanity and war crimes. It draws upon a Conference organised by the Clemens Nathan Research Centre (CNRC) and REDRESS, which took place at the Peace Palace in The Hague, The Netherlands on 1–2 March 2007. The idea for the Conference arose out of discussions between CNRC and REDRESS on the considerable difficulties for victims of the most serious international crimes to access effective and enforceable remedies and reparation for the harm they suffered. It was understood that the many initiatives of governments and regional and international institutions to afford reparations to victims of genocide, crimes against humanity and war crimes should take account of the wide and varied practice that had been built up in the past decades. In particular, the Conference sought to consider the long practice of the Conference on Material Claims against Germany (the Claims Conference) in respect of the Holocaust restitution programmes, as well as the practice of truth commissions, arbitral proceedings and a variety of national processes to identify common trends, best practices and lessons learned.

The emphasis of the Conference and indeed this book is not on 'whether' there is a right to reparation and if so 'what' this right entails. It is recognised that there is already a sound legal basis for the right to reparation as well as detailed expositions of the different forms that reparation may take. Instead, the focus here is on the effective implementation of the right to reparation.

This book explores the practice of governments, national and international courts and commissions in applying, processing, implementing and enforcing a variety of reparations awards. It also considers the practice from the perspective of the beneficiaries – survivors and their communities, and from the perspective of the policy makers and implementers who are tasked with resolving the

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity,* pp. 7–16.

range of technical and procedural challenges in bringing to fruition adequate, effective and meaningful reparations in the context of mass victimisation.

Holding of the Conference in The Hague, The Netherlands was by no means accidental. Indeed, one of the key aims of the Conference was to lend support to the International Criminal Court (ICC), as it embarks on the implementation of its reparations mandate. One of the most important and innovative aspects of the ICC is its ability to afford reparations to victims. Its Statute and Rules enable the competent chambers to award reparations to victims after a conviction, and a separate Trust Fund for Victims exists to complement the work of the Court in these endeavours.

Genocide, crimes against humanity and war crimes are recognised worldwide as the most abhorrent of crimes; and the perpetrators understood as enemies of all mankind (*hostis humani*). It has long been recognised that those responsible for such crimes must be held to account and that the institutions, organisations and governments that enabled the abuses to occur should not escape liability. International law recognises the obligation to provide reparations for international wrongful acts.[1] This has been repeatedly reaffirmed in the jurisprudence of national and international courts. It is also reflected in a range of international treaty texts and has recently been confirmed by the United Nations with the adoption by the General Assembly of the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law* in December 2005.

Reparation for genocide, crimes against humanity and war crimes and other serious violations of international human rights and international humanitarian law has been traditionally conceived in the context of State responsibility for injurious international wrongs, particularly at the end of a conflict. The progressive recognition of the status of individuals under international law, owed in large part to the developments in international human rights law since the Second World War, has impacted on the concept and progressive application of the principle of reparation in a number of fundamental ways.

1. *Reparation is Understood as a Right of Victims, not only as an Inter-State Prerogative or an Act of Compassion or Charity*

Reparation is a moral imperative seeking to mend what has been broken. It can contribute to the individual and societal aims of rehabilitation, reconciliation,

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[1] See Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (Sept. 13); Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001" (ILC draft Articles on State Responsibility).

consolidation of democracy and restoration of law. It can also help to overcome traditional prejudices that have served to marginalise certain sectors of society and contribute to the crimes perpetrated against them. It is also a legal right owed to the survivors.

2. *The Positive Implementation of the Right to Reparation Entails Both a Procedural Right of Access to the Remedy as well as the Substantive Form of the Relief*

The procedural implementation of the right to reparation can prove challenging in a number of ways. For example, insufficient outreach to and consultation with targeted beneficiaries about reparations measures may reduce the impact of such measures with local communities, and lessen the likelihood that the special needs of particularly vulnerable or marginalised sectors of society (including women, children and minority groups) are adequately considered. The effectiveness of reparations measures can also be judged with respect to their accessibility to victims, considering whether the adopted measures adequately address evidentiary, logistical or other hurdles. For example, beneficiaries that were forced to flee their homes may not have access to the same level of documentation; low literacy and education levels may mitigate against complicated forms or procedures.

It is important that the form(s) of reparations (e.g., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) as well as the quantum and quality of the adopted measures, adequately respond to the injurious acts and to the rights, needs and priorities of beneficiaries and survivor communities. Yet the nature of the crimes of genocide, crimes against humanity and war crimes, is such that it is impossible to put survivors back to their previous position prior to the violation or to 'repair' the violation. Necessarily, reparation measures for such crimes will be symbolic.

A holistic appreciation of the adequacy and appropriateness of reparation measures (both access to reparations and the reparation measures themselves) requires consideration of survivors' perspectives, including their initial experience of victimisation as well as the impact this has had subsequently. Survivors' expectations of and satisfaction with reparations will reflect this, and will impact on how they relate to procedures for claiming reparations and the measures themselves.[2]

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[2] Y. Danieli, "Preliminary reflections from a psychological perspective", in T. van Boven, C. Flinterman, F. Grunfeld & I. Westendorp (Eds.) *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Netherlands Institute of Human Rights [Studieen Informatiecentrum Mensenrechten], Special issue No. 12, 1992 (196–213). Also published in N.J. Kritz (Ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 1 1995 (572–582). Washington, D.C.: United States Institute of Peace.

Reparation measures should reflect the particularities of the victimisation and its impact on vulnerable groups and whole communities. In many instances of mass victimisation, women represent a disproportionately large number of the survivors and the violations they face are distinct and have differential impact on them and their communities. Equally, the use and abuse of children in conflicts will impact on them, their families and successive generations. As is noted in the preamble of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, "contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively." For instance, the crime of genocide, which by its nature targets national, ethnical, racial or religious groups, impacts not only the individual victims but the collective identity of the group.

The horror of the Holocaust led to major shifts in international law. The many restitution measures that resulted can be seen as important precursors for future national and international reparations processes. Some of the key markers from the Holocaust restitution measures that may have particular relevance for current and future reparations processes include:

- Rallying, unifying and building consensus within survivors' communities to strengthen political leverage and support for reparations and to aid with distributions;
- Contributing to the procedural evolution of mass claims processes, by identifying special beneficiary categories with both individualised and collective awards schemes;
- Utilising streamlined claims processes with flexible evidentiary standards, innovative engagement of civil society groups, governments, specialised administrative tribunals and courts;
- Experience in the recovery of public and private assets and property.

The post-Holocaust experience must also be seen in a broader context, considering the range of mass claims processes that have developed alongside. Various mechanisms have been employed to address the multitude of situations and objectives. Some of these mechanisms have served more political than judicial objectives, performing fact-finding functions and assessing payments, as opposed to evaluating liability that has been predetermined by settlement or agreement.

Certain processes have developed on a purely adversarial basis whereas others have sought to incorporate dispute resolution or settlement facilities into their activities, including conciliation and mediation. Some tribunals have adjudicated claims against States, brought by States either on their own behalf or representing claims of nationals of States that have been espoused and presented on their behalf by their national governments.

Claims mechanisms have also been established to resolve the claims of individual victims against their own State or a third-State, as well as to resolve claims of victims against various corporate entities or organisations. Some tribunals have dealt only with the restitution of victim assets, whereas others have sought to compensate a broad range of harms caused. Some mechanisms have focused exclusively on monetary awards for verifiable real losses whereas others have sought to restore property or other assets.

Many claims mechanisms have successfully used categorisation schemes to determine distinct processes for different types of claims or claimants, with differing applicable rules and procedures. In determining the most appropriate approach, there has often been a tension between competing principles. On the one hand, the adoption of measures aimed at maximising procedural efficiency and cost effectiveness. On the other hand, the need to maintain a minimum of procedural fairness and the overall legitimacy of the mechanism as a legally sound institution, capable of accurate decision-making and compatible with generally accepted principles of international law.

Also relevant are the important steps taken by regional human rights courts, in particular the Inter-American Court of Human Rights, and the work of certain national post-conflict truth and reconciliation commissions, which have sought to address reparation in the context of mass victimisation. To note is the frequent resort to health and education programmes to strengthen victims' capacity for personal and social development and to rebuild lives and communities.

In the examples cited, liability for the injurious act(s) rests with the State. This has, in some instances, aided the funding and implementation of both individual and collective reparations programmes. States that have recognised their responsibilities to repair past abuses have set aside lump sums for distribution to victims, identified portions of annual State budgets, and introduced special taxes to collect funds. However, in some other cases, the will of governments to contribute to reparations programmes has waned quickly, with reparations falling below other demands on States' budgets, such as general societal development.

The examples also stand in contrast to reparations processes before national criminal courts, and indeed the International Criminal Court, whose mandate is limited to individual (as opposed to State) responsibility. Funding reparations for mass victimisation from the resources collected from individual convicted perpetrators will be necessarily a challenge. Also, placing the burden of reparations on the few who are convicted before a criminal court is difficult conceptually, given the nature of the crimes which require the extensive organisation and planning of governments or other entities.

Certain crucial reparation measures will be difficult to implement using the sole lens of individual responsibility. For example, most measures of satisfaction and guarantees of non-repetition would require State involvement. This is also

the case for other symbolic measures such as public acts and civic rituals designed to restore social ties between citizens. The reparations regime of the ICC can therefore not operate in a vacuum nor can its measures ever hope to fully satisfy victims' rights to reparation.

The International Criminal Court's Trust Fund for Victims should remedy some of the resource gaps created by indigent defendants unable to pay the reparations awards ordered against them. The Trust Fund is an important counterbalance to the Court's reparations process that can pool resources from a variety of sources, including voluntary contributions, for the benefit of victims and their communities. Whilst the mandate of the Trust Fund is in many ways broader than that of the Court, it will remain difficult for it to adequately address the context of mass victimisation within which the Court's work is situated.

The UN *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recognise that "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim," and the Court will need to consider how this principle relates to its procedures.

In determining methods, priorities and approaches to reparation there are a range of factors to consider which include:

- *How to ensure that the forms of reparation best address the needs of survivors and their communities*. There is no magic formula for reparation; identifying the most suitable remedies requires careful analysis of and consultation with beneficiary groups, taking into account variances of perspectives within beneficiary groups, and other divergences such as time, age, and experience during and post victimisation. Given the impossibility to fully repair the harm that was caused, most reparations measures (however concrete) will be symbolic.
- *How to ensure that procedures for claiming and receiving reparation do not constitute or contribute to a secondary victimisation of beneficiaries*. The reparation process should be designed to restore the dignity of survivors, not to further alienate or traumatise them.
- *How to secure assets*. This will depend on the nature of the assets (victim assets or property, assets belonging to a judgment/debtor or a criminal defendant in respect of proceeds of crime) as well as the purpose for the asset recovery – to restitute stolen assets, to compensate beneficiaries for their losses, or to ensure that perpetrators do not benefit illegally from their crimes. The key to improving enforcement efforts is to ensure courts have adequate information about the financial circumstances of defendants.

Part I: Reparations for Victims – Key Themes and Concepts

Part I of this book provides the theoretical framework and key themes and concepts relevant to all reparations programmes are analysed. Professor Theo van Boven analyses the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law*, which were adopted by the UN General Assembly in 2005. This is followed by Professor Anne Saris and Katherine Lofts' gendered perspective of reparations, in which they explain the recently adopted *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*.[3] Dr. Yael Danieli follows with an analysis of psychological perspectives on reparative justice, exposing how and why reparations are so significant for victims.

Part II: Reparations and the Holocaust

Part II of this book considers the extensive six decade experience of post-Holocaust restitution. Gideon Taylor, Greg Schneider and Saul Kagan explain the work of the Conference on Material Claims Against Germany, an organisation dedicated to securing reparations for Jewish victims of Nazi persecution, and consider its work in negotiations, disbursing funds to individuals and organizations, and seeking the return of Jewish property lost during the Holocaust. Judah Gribetz and Shari Reig follow with an analysis of the litigation in United States federal courts against certain Swiss banks and other Swiss entities, which led to a 1.2 billion dollar settlement with complex processing and disbursement processes. Both chapters consider the use of various mass claims processing techniques intended to simplify and speed up the claims, decision-making and disbursement procedures.

Part III: The Internationalised Context of 'Mass Claims'

Part III of this book continues with the theme of mass claims processing, looking at other claims processes also relevant to reparations for victims of genocide, crimes against humanity and war crimes. Heike Niebergall considers the use by mass claims processes of special techniques to resolve problems with evidence.

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[3] Adopted at the *International Meeting on Women's and Girls' Right to a Remedy and Reparation*, held in Nairobi from 19 to 21 March 2007.

There are a variety of reasons why victims of the worst crimes are unable to provide the necessary proof to evidence their losses, and these are explored as well as some of the solutions employed including relaxing the evidentiary requirements in favour of claimants, and applying certain mass claims processing techniques in order to fill the evidentiary gaps in individual claims. Edda Kristjánsdóttir analyses the potential for applying the tools of mass claims processes to the International Criminal Court's Trust Fund for Victims and Linda Taylor reviews the experiences of the United Nations Compensation Commission in processing claims and paying compensation for loss, damage or injury caused by Iraq as a result of its unlawful invasion and occupation of Kuwait.

Part IV: Reparations and International and Regional Courts

Part IV considers the various and widely divergent approaches of international and regional courts. Lutz Oette begins with a review of the responses by regional and international human rights courts and treaty bodies to reparations for mass violations. He considers the procedural frameworks and the jurisprudence of such bodies from a comparative perspective and identifies best practice. Clara Sandoval-Villalba considers the jurisprudence of the Inter-American Court of Human Rights, looking in particular at the concepts of 'injured party' and 'victim' as interpreted by the Court and the implications for reparations awards. Conor McCarthy considers the jurisprudence of the International Court of Justice and Carla Ferstman and Mariana Goetz consider the prospects for reparations before the International Criminal Court.

Part V: Pursuing Extraterritorial Reparations Claims – Lawyers' Perspectives

Part V considers lawyers' experiences with reparations claims. Two very different examples are provided. Luc Walleyn explains some of the challenges faced by lawyers representing groups of victims in universal jurisdiction cases in Belgium and before the International Criminal Court. Liesbeth Zegveld explains the challenges faced when representing victims in Dutch courts. These authors include the difficulties to obtain instructions from clients far away and the challenges for courts in Europe to assess crimes and reparations that relate to distant contexts.

Part VI: Reparations in National (Territorial) Contexts

Part VI considers a variety of examples of reparations programmes in transitional contexts. Cristián Correa, Julie Guillerot and Lisa Magarrell begin with a review of the truth commission experience, considering in particular the ways in which such bodies have enabled victims to participate in the process. Andrea Gualde and Natalia Luterstein analyse the Argentinean reparations programme, which is a followed by a review by Julián Guerrero Orozco and Mariana Goetz of the Colombian Law on Justice and Peace. Peter Van der Auweraert considers the recent efforts in Iraq to institute a property restitution programme. This is followed by Carla Ferstman and Sheri Rosenberg's review of reparation measures in Bosnia and Herzegovina, in which they consider the work of two bodies set up by the Dayton Peace Agreement – the Human Rights Chamber and the Commission for Real Property Claims of Refugees and Displaced Persons. Lars Waldorf then considers the experience of Rwanda's Gacaca courts as a mechanism to provide restitution in post-genocide Rwanda and Oupa Makhalemele looks at ongoing challenges in implementing reparations in South Africa.

Part I
Reparations for Victims – Key Themes and Concepts

Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines

*By Theo van Boven**

A. *Introduction*

1. *The Victims' Perspective*

In this essay the perspective of the victim is a central point of orientation. It is obvious that in the human rights discourse the victims' perspective cannot be seen in isolation from the perspective of various organs of society. Thus, governments may be guided by claims of sovereignty; peoples pursue their aspirations in terms of self-determination and development; religions entertain value systems; political and social institutions look for a normative basis in order to attain their objectives. The perspectives of these various actors may be human rights related but often differ depending on status and power positions. They have to a greater or lesser extent the means at their disposal to promote and defend their interests. However, victims often find themselves in vulnerable situations of neglect and abandonment and are in need of the care, the interest and active recognition of the human rights promotion and protection systems. The position of victims, at least the most destitute among them, was aptly characterised by a former Director-General of UNESCO in a publication marking the 20th anniversary of the Universal Declaration of Human Rights:

> The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Whenever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been – there still are – multitudes of men, women and children

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 19–40.

> who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one.[1]

If victims are at all in a position to speak, they often express themselves in similar terms. Consequently, one may learn more about the essence and the universality of human rights from the voices of victims than from the views of secular or religious leaders. Concepts of human rights are better translated from the perspective of victims than from demands of the powerful.

Without defining in this introductory paragraph the notion of victim and the right of victims to a remedy – these issues will be dealt with later – it is apparent that victims of systematic breaches of the law and of flagrant deprivation of rights find themselves in many different settings and situations, armed conflicts: situations of violence including domestic violence, as objects of crime and terror, or stricken by the misery of poverty and deprivation. As human beings entitled to enjoy the basic human rights and freedoms enshrined in the Universal Declaration of Human Rights and other international human rights instruments, victims are, more often than not, experiencing the gap between entitlements and realities. Domestic legal and social orders disclose *legal* shortcomings such as inadequate laws, restrictions in legal scope and content, impediments in getting access to justice and restrictive attitudes of courts; *political* obstacles in the sense of unwillingness of the authorities and the society to recognise that wrongs were committed; *economic* setbacks as a result of shortage or unjust distribution of resources; and *under-empowerment* of victims themselves because of lack of knowledge and capacity to present and pursue their claims.[2] All these factors are compounded by the vulnerability of categories or groups of victimised persons, notably women, children, members of specific racial, ethnic or religious groups, the mentally and physically disabled and many others.

2. *Evolutions in International Law*

In traditional international law, States were the major subjects and insofar as wrongful acts were committed and remedies instituted, this was a matter of inter-State relations and inter-State responsibility. The leading opinion in this regard was set out in the often-cited judgment of the Permanent Court of International

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[1] René Maheu, in: Preface to *Birthright of Man*, an anthology of texts or human rights prepared under the direction of Jeanne Hersch, UNESCO, 1968.

[2] See further, Theo van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (final report), UN Doc. E/CN.4/Sub.2/1993/8, chapter VI (National Law and Practice).

Justice in the *Chorzow Factory* case: "It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form".[3] For long, when internationally protected human rights were not yet proclaimed, wrongs committed by a State against its own nationals were regarded as essentially a domestic matter and wrongs committed by a State against nationals of another State may only give rise to claims by the other State as asserting its own rights and not the rights of individual persons or groups of persons. It was only since World War II with the recognition that human rights were no more a matter of exclusive domestic jurisdiction and that victims of human rights violations had a right to pursue their claims for redress and reparation before national justice mechanisms and, eventually, before international fora, that remedies in international human rights law progressively developed as a requirement to obtain justice. As the result of an international normative process the legal basis for a right to a remedy and reparation became firmly anchored in the elaborate corpus of international human rights instruments, now widely ratified by States. Further, in a fair amount of case law developed by international (quasi-) judicial bodies, including the European and Inter-American Courts of Human Rights, the meaning and significance of access to effective remedies at national and international levels was given concrete shape.

This chapter will deal with developments towards the recognition of the right to an effective remedy as laid down in international instruments, with emphasis on the normative content of this right. Special attention will be given to the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in their final form by the UN General Assembly in 2005[4] and marking a milestone in the lengthy process towards the framing of victim-orientated policies and practices. While the gap between entitlements and realities still persists in the light of the requirements of remedial justice, the Basic Principles and Guidelines coincide with an increasing awareness of the prevalence of victims' rights. This tendency is illustrated by the granting of standing to victims to participate in their own right in proceedings before the International Criminal Court and by the prominent attention given to victims of past and contemporary practices of racism and racial discrimination in the documents adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, September 2001).

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[3] Permanent Court of International Justice, Ser. A, No. 9 at 21 (1927).
[4] United Nations General Assembly resolution 60/147, 16 December 2005.

B. *The Right to a Remedy and Reparation in International Instruments*

1. *Effective Remedies; Various Dimensions*

The basic right to effective remedies has a dual meaning.[5] It has a *procedural* and a *substantive* dimension. The *procedural* dimension is subsumed in the duty to provide "effective domestic remedies" by means of unhindered and equal access to justice. The right to an effective remedy is laid down in numerous international instruments widely accepted by States; the Universal Declaration of Human Rights (article 8), the International Covenant on Civil and Political Rights (article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14), the Convention on the Rights of the Child (article 39), the International Convention for the Protection of All Persons from Enforced Disappearance (article 24), as well as in regional human rights treaties: the African Charter on Human and Peoples' Rights (article 7), the American Convention on Human Rights (article 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 13). Also relevant are instruments of international humanitarian law: the Hague Convention of 1907 concerning the Laws and Customs of War on Land (article 3), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I, article 91) and the Rome Statute of the International Criminal Court (article 68 and 75).

The notion of "effective remedies" is not spelled out in detail in these international instruments. However, international adjudicators, in particular when faced with complaints about gross violations of core rights such as the right to life and the prohibition of torture, increasingly and insistently underlined the obligation of States Parties to give concrete content to the notion of effective remedies, with emphasis on the requirement that remedies must be effective. Thus, while the European Court of Human Rights was for quite some time not very forthcoming in its interpretation of the effective remedy provision in article 13 of the European Convention, the Court evolved its position when dealing with complaints about gross violations of human rights relating to article 2 (the right to life) and article 3 (prohibition of torture or cruel, inhuman or degrading treatment or punishment). For instance, in a landmark case involving serious ill-treatment against a member of the Kurdish minority in South East Turkey while in police custody, the European Court gave particular weight to the prohibition of torture and the vulnerable position of torture victims and the

[5] See in particular Dinah Shelton, *Remedies in International Human Rights Law* (2nd edition), Oxford, 2005, 7 ff.

implications for article 13. Consequently the notion of an "effective remedy" entails, according to the European Court, an obligation to carry out a thorough and effective investigation of incidents of torture and, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including access for the complainant to the investigatory procedure.[6] The European Court followed the same reasoning in a case of alleged rape and ill-treatment of a female detainee and the failure of the authorities to conduct an effective investigation into the complaint of torture.[7]

The Inter-American Court of Human Rights adjudicated many cases involving *gross* violations of human rights, notably killings and disappearances. In this context the Court ruled that article 25 of the American Convention on the right to judicial protection and effective domestic recourse is "one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in terms of the Convention".[8]

The trend to give concrete content and to emphasise the crucial importance of "effective remedies" in any human rights protection system is not only apparent in the jurisprudence of regional human rights adjudicators, it is equally manifest in the case law developed by global human rights adjudicators, notably the Human Rights Committee. Analysis of case law pertaining to the right to life and the prohibition of torture (article 6 and 7 of the International Covenant on Civil and Political Rights) bears out that the Human Rights Committee expressed in numerous cases the view that States Parties are under an obligation to take such measures under article 2(3) of the Covenant as to investigate the facts, to take actions thereon as appropriate, to bring to justice persons found responsible and to extend to the victim(s) treatment in accordance with the provisions of the Covenant.[9] The essence of the procedural dimension of the right to an effective remedy and the corresponding duties of States to respect and to guarantee this right is also reflected in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity,[10] endorsed by UN Commission on Human Rights resolution 2005/81. Principle 1 containing the General Principles of States to take Effective Action to Combat Impunity reads as follows:

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[6] *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para. 98.

[7] *Aydin v. Turkey*, ECtHR, Judgment of 25 September 1997, Reports of Judgments and Decisions of the ECtHR, 1997-VI, para. 103.

[8] *Castillo Paez v. Peru*, IACtHR, Judgment of 3 November 1997, 19 Human Rights Law Journal (1998), 219–229.

[9] See also in the study referred to in n. 2 above, para. 56 and Dinah Shelton, *supra*. n. 5, 184–186.

[10] See *Report of the independent expert to update the set of principles to combat impunity*, Diane Orentlicher, UN doc. E/CN.4/2005/102 and Add.1.

> Impunity arises from a failure by States to meet their obligations to *investigate* violations; to take appropriate measures in respect of *perpetrator*, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide *victims* with *effective remedies* and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to *know the truth* about violations; and to take other necessary steps to *prevent the recurrence* of violations (italics added).

In fact, in many situations where impunity is sanctioned by the law or where de facto impunity prevails, victims are effectively barred from seeking justice by having recourse to effective remedies. Where State authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate redress and reparation.

2. *Substantive Dimension*

The substantive dimension of the right to an effective remedy is essentially reflected in the general principle of law of wiping out the consequences of the wrong committed. In this respect, having regard to the obligation of States, it is appropriate to rely on the doctrine of State Responsibility elaborated by the International Law Commission in a set of articles which were commended in 2001 to the attention of Governments by the United Nations General Assembly.[11] The ILC Articles indicate that there is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State (article 2). For present purposes, in connection with the substantive dimension of the right to an effective remedy, the ILC Articles provide useful guidance, in particular in the description of the obligation to cease the wrongful act and offer appropriate assurances of non-repetition (article 30) and the obligation to make full reparation for the injury caused by the internationally wrongful act (article 31). Further, the Articles spell out the different forms of reparation to be afforded either singly or in combination as restitution, compensation and satisfaction (articles 34–37). Later in this paper, when more detailed attention will be paid to the *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*, the various forms of reparation will be further discussed. At this stage it should be noted that, while the Basic Principles and Guidelines list guarantees of non-repetition

[11] UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

under the forms of reparation for harm suffered, the ILC Articles consider the obligation of cessation and assuring non-repetition as a separate and distinct legal consequence of the internationally wrongful act.[12] Equally, the updated principles to combat impunity[13] treat separately guarantees of non-recurrence of violations which may include reform of State institutions, the repeal of laws that contribute to or authorise violations of human rights and civilian control of military and security forces and intelligence services, from the right to reparation (principles 35–38, and 31–34).

The obligation of States to afford reparation is also stressed by the Human Rights Committee in its General Comment 31 interpreting the meaning and significance of article 2 of the International Covenant on Civil and Political Rights.[14] Marking the importance of the effective remedy provision in article 2(3) of the Covenant, the Committee stated that "without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy, which is central to the efficacy of article 2(3), is not discharged." The Committee further noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

C. *The Law of State Responsibility as a Legal Basis for the Right to Remedy and Reparation*

In the foregoing section of this chapter the ILC Articles on State Responsibility were referred to as setting out legal consequences in terms of obligations of a State to stop wrongs attributable to that State and to repair the harm done to injured parties. It is true that, as argued by those who are critical of relying on the Law of State Responsibility as a basis for the right to a remedy and reparation in cases of human rights violations,[15] that the ILC Articles were drawn up with inter-State relations in mind. Does this mean that in so far as States violate the human rights of individual persons or groups, causing serious harm to their life, integrity and dignity, the Law of State Responsibility would not apply? It is

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[12] See also, Dinah Shelton, *supra*. n. 5 at 149, who correctly states that cessation is not part of reparation but part of the general obligation to conform to the norms of international law.

[13] See n. 10 above.

[14] Human Rights Committee, General Comment 31 adopted 29 March 2004; (UN doc. HRI/GEN/1/Rev, 8 233–238). See in particular paras. 15–17.

[15] See statement by Germany at the 61st session of the UN Commission on Human Rights in an explanation of vote concerning the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 19 April 2005.

submitted here that construction of the concept of State Responsibility to the inter-State context only, ignores the historic evolution since World War II of human rights becoming an integral and dynamic part of international law as evidenced by numerous widely ratified international instruments for the promotion and protection of human rights. It also ignores that the duty of affording remedies for governmental misconduct is so widely acknowledged that the right to an effective remedy of violations of human rights may be regarded as forming part of customary international law.[16]

The evolution in the traditional State Responsibility concept in the light of the emergence of human rights as a matter of international concern and the proclamation of human rights at universal, regional and national levels since the adoption of the United Nations Charter in 1945, was aptly set out in the Report of the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, to the UN Secretary-General pursuant to Security Council Resolution 1564.[17] In suggesting the establishment of a Compensation Commission on behalf of the victims of war crimes and crimes against humanity, in particular the victims of rape, the Commission of Inquiry argued that the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on State Responsibility. The Commission stated that these provisions may now be construed as obligations assumed by States not only towards other States but also vis-à-vis the victims who suffered from war crimes and crimes against humanity.[18] In this context the Commission of Inquiry also quoted a former President of the International Criminal Tribunal for the Former Yugoslavia who stated in a letter of 12 October 2000 to the UN Secretary-General:

> The emergence of human rights under international law has altered the traditional State Responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State Responsibility has removed the procedural limitation that victims of war could seek compensation only through their own governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State Responsibility. Moreover, there is a clear trend in international law to recognise a right to compensation in the victim to recover from the individual who caused his or her injury.[19]

In all fairness, the authorities referred to above speak in terms of trends and tendencies as regards the duty of States to provide effective remedy and reparation to

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[16] See Dinah Shelton, *supra*. n. 5, 28–29.
[17] UN doc. S/2005/60, 11 February 2005.
[18] *Id*, para. 597.
[19] UN doc. S/2000/1063, at p. 11, Annex para. 20.

victims as a legal consequence of the concept of state Responsibility. This is not yet a firm *acquis* but an emerging duty that finds a consistent basis in human rights instruments cited in the preceding section of this chapter. This emerging duty is also confirmed, as the Inter-national Commission of Inquiry acknowledged, in the UN *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) and in the (draft and since then adopted) *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* (2005). It should be recognised, however, that as transpired from the German position referred to above, there appears not to be general consensus as to existence of a customary international law governing individual reparation claims.[20] It should also be noted that the Security Council, when acting upon the recommendations of the Darfur Inquiry Commission, did refer the situation of Darfur to the International Criminal Court for criminal investigation and action pursuant to article 13(b) of the ICC Statute but the Security Council did not act upon the recommendation to establish a Compensation Commission. This leaves, however, unaffected the right of victims in the Darfur situation to claim in appropriate cases reparations, including restitution, compensation and rehabilitation pursuant to article 75 of the ICC Statute.

D. *The Process Towards a Comprehensive International Instrument*[21]

1. *Background*

The years marking the end of the Cold War (late eighties and early nineties) opened up new potentials and new perspectives. Democratic structures were introduced or reintroduced in various continents, notably in Central and Eastern Europe and in Latin-America. In many countries institutions and mechanisms were established with the purpose to set out a process of truth and reconciliation, prominently also in South Africa. It was in the same period that the struggle against impunity and the call for reparative justice took shape. It was also in this climate that claims for criminal and reparative justice, having their origin in

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[20] Note in particular Christian Tomuschat, "Darfur - Compensation for the Victims," 3 *Journal of International Criminal Justice* (2005), 579–589, where the author criticised the underlying arguments of the proposition of the Darfur Inquiry Commission to establish a Compensation Commission.

[21] This section is largely based on the text of a paper the present author wrote in preparation of a report published by the International Council on Human Rights Policy together with the International Commission of Jurists and the International Service for Human Rights, *Human Rights Standards: Learning from Experience*, Versoix, Geneva, 2006.

World War II, became more visible and vocal. The victim's perspective, often overlooked and ignored, was lifted up from the stalemate of the Cold War. Thus, civil society groups in East Asia, Australia and Europe demanded reparations for the comfort women (sex slaves of the Japanese Imperial Army) and for the victims of Japanese forced labour schemes. Their demands had for long received hardly any resonance. In the same climate the right to reparation for victims of brutal repression by Latin American dictatorships became a persistent claim.

It was against this background, stressing the importance of criminal and reparative justice as a condition for reconciliation and democracy, that the then UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989 the present author, as one of its members, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – with a view to exploring the possibility of developing some basic principles and guidelines in this respect.[22] The study had to take into account relevant existing international human rights norms on compensation and relevant decisions of international human rights bodies. The study and the draft principles and guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political and that a new instrument was not supposed to entail new international or domestic legal obligations but rather to identify mechanisms, modalities, procedures and methods for making existing legal obligations operational.

2. *Description of the Process and its Form and Nature*

The Special Rapporteur of the Sub-Commission included in his 1993 final report a set of proposed basic principles and guidelines which he drew up with the assistance of non-governmental experts from various continents, notably from countries that had been facing and living through gross violations of human rights.[23] On the basis of comments received and as a result of deliberations in a workshop, co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights, the Special Rapporteur made the draft basic principles subject to several revisions. The revised text reached the Commission on Human Rights in 1997.[24] From thereon the process moved from the expert and non-governmental sphere to the inter-governmental arena, with considerable involvement, though, of non-governmental and independent expertise but also with input of the views of governments. At the Commission level

[22] Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1989/13.
[23] UN doc. E/CN.4/Sub.2/1993/8, chapter IX.
[24] UN doc. E/CN.4/1997, Annex.

the process stretched over a considerable number of years, with repeated requests for comments but with little substantive discussion in the Commission itself. The process received, however, new impetus with the appointment of an Independent Expert of the Commission Mr. M. Cherif Bassiouni who, after consultations with governmental and non-Governmental experts, added new dimensions to the draft principles and guidelines in particular with reference to international humanitarian law.[25] The process was also advanced by the organization, on the basis of Commission resolutions, of a series of open-ended consultations under the leadership of the delegation of Chile (Chile being an early proponent of the draft principles and guidelines), with the assistance of the former Special Rapporteur of the UN Sub-Commission and the former Independent Expert of the Commission, and with the participation of governmental representatives and non-governmental experts. As a result, the draft principles underwent a series of revisions and clarifications with the aim of reaching consensus without reducing the text to the lowest common denominator level. This process under the Commission's authority and stretching over quite a number of years was important for political and psychological reasons. It signified the indispensable element of inter-governmental ownership and interest in the process, without however losing close links with essential quarters of civil society. The process was not following a pre-conceived plan. It was made up of an evolving pattern, entailing non-governmental expertise and, progressively, intergovernmental participation and input.

3. *Actors of the Process*

The initial actors were expert members of the Sub-Commission, joined by a number of active human rights NGOs, such as the International Commission of Jurists, Amnesty International, Redress Trust, and a good number of governmental representatives and experts. The political backing in the process came largely from a number of Latin American countries, with Chile in a leadership role, and to a lesser extent from West European countries. In the consultative process organised under the authority of the Commission on Human Rights, delegates acted not so much as members of regional groups but rather individually. As a result, the discussions had an open character and were not fixed in advance. They reflected by and large the willingness to reach acceptable solutions.

4. *Other Influencing Factors*

The process – and this is a common feature of many projects on the UN human rights agenda – was in competition with many other items and sub-items of an

[25] UN doc. E/CN.4/2000/62.

overloaded agenda. As a result the Commission on Human Rights and even its Sub-Commission provided little substantive guidance and feedback. The human rights policy bodies were mainly involved in taking procedural decisions so as to advance the process (with moderate speed). In this connection it must be noted that the subject matter of redress and reparation enjoyed broad sympathy – the procedural resolutions of the Commission received wide sponsorship – but by and large the political interest was not strong among the membership of the United Nations. This limited political interest may also reflect the reticence of many States to accept and implement domestically the consequences of victim-oriented policies of reparative justice.

In the course of the proceedings relating to the substance, a number of politico-legal issues came up that complicated the process and that were difficult to solve by way of consensus. One such issue was whether the document under preparation should only deal with *gross* violations of international human rights law or with *all* violations of human rights. Further, disagreement arose as to whether the basic principles and guidelines should only focus on violations of human rights law or, in addition, deal with serious violations of international humanitarian law. Another issue was whether the basic principles and guidelines should extend, in addition to violations committed by States, to violations committed by non-state actors and further deal with the duty of the latter to provide compensation. An issue giving rise to much debate was the question whether the notion of victims applies to individual human beings or also to collectivities.

During the process, in the years 2000 and 2001, there was glimmering at the background, in the political process leading to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa (31 August – 8 September 2001), a highly politicised issue that deeply divided States and that was relevant to the substance of the basic principles and guidelines. It related to the duty to repair historical wrongs connected with practices of slavery and colonialism.[26] If this issue would have been introduced in the standard-setting process, it could have substantially complicated the process. This did not happen. Apparently no delegation wished to pursue such a hazardous course. At the same time, and understandably so, the process lingered in those years with minimal speed in order to avoid disruptive influences. In later years the road towards the adoption of the basic principles

[26] See on this issue paras. 98–106 of the Declaration adopted by the Durban Conference, in particular para. 100 which reads: "We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies. We further note that some States have taken the initiative to apologise and have paid reparation, where appropriate, for grave and massive violations committed." UN doc. A/CONF. 189/12.

and guidelines was paved by a series of open-ended consultations held under the authority of the UN Commission of Human Rights, which culminated in their endorsement by consensus of the UN General Assembly.[27]

5. *Implementation*

It is worth noting that the draft basic principles and guidelines as they were emerging over the years had already a certain influence on national law and practice, on international jurisprudence and on other standard-setting activities. One could consider these developments as implementation "*avant la lettre*." Thus, several Latin American countries, in drawing up legislation on reparation for victims, have taken the draft principles and guidelines into account. The Inter-American Court on Human Rights referred in its jurisprudence several times to the draft principles and guidelines. Last but not least, the Statute of the International Criminal Court, notably article 75 dealing with reparation to victims, bears in its intent and wording, the imprint of the basic principles and guidelines. Since the Basic Principles and Guidelines are adopted by the UN General Assembly, their implementation is crucial for the advancement of reparative justice. Therefore, the General Assembly recommended that States take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general.[28]

E. *The Nature, Scope and Content of the Basic Principles and Guidelines*[29]

For the purpose of the present chapter it is not envisaged to review in detail all the provisions of the Basic Principles and Guidelines. The focus will be on a number of general issues relating to the nature and the scope of the document as well as to its structure and substantive content.

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[27] UN General Assembly resolution 60/147, 16 December 2005.

[28] *Id*, oper. para. 2.

[29] The 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 have been extensively commented upon by: REDRESS, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, London, 2006, 1–42; Dinah Shelton, "The United Nations Principles and Guidelines on Reparations: Context and Contents," in *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations* (eds. K. De Feyter, S. Parmentier, M. Bossuyt and

1. *Normative value*

When the Basic Principles and Guidelines were adopted by the UN General Assembly a number of speakers pointed out that the document was not a legally binding document. Reference was made in this context to the seventh preambular paragraph to the effect that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law. While the Basic Principles and Guidelines are therefore not intended to create new or additional obligations, they are meant to serve as a tool, a guiding instrument for States in devising and implementing victim-oriented policies and programmes. They also serve as guidance to victims themselves, collectively and individually, in support of claims to remedy and reparation. They may further be referred to or invoked by domestic and international adjudicators when faced with issues of victims' rights and reparations. In fact, the Inter-American Court of Human Rights and the International Criminal Court were already mindful of the Basic Principles and Guidelines as a source of reference before they received final approval by the UN General Assembly. It is worth recalling that the Basic Principles and Guidelines are the outcome of a lengthy process of consideration and review by non-governmental and governmental experts and that the significance of the document was considerably enhanced by its adoption by the UN General Assembly without a dissenting vote. Thus, good reasons can be advanced to consider the text as declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation.[30]

2. *Gross and Serious Violations*

A second aspect relating to the nature and scope of the Basic Principles and Guidelines is intrinsic in the terms *gross* violations and *serious* violations. These qualifying words have a restrictive effect on the scope of the Basic Principles and Guidelines and were the subject of much discussion as it was argued that all violations entail a duty to afford remedies and reparations. The initial study carried out under the mandate of the Sub-Commission on Prevention of Discrimination and Protection of Minorities referred to victims of "gross violations of human

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P. Lemmens), Antwerpen-Oxford, 2005, 11–33; Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal," 24 Netherlands Quarterly of Human Rights, 2006, 641–686; International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide*, Geneva, December 2006 and Bogotá, Colombia, June 2007 (authors Cordula Droege and Frederico Andreu-Guzmán).

[30] See in this regard Marc Groenhuijsen and Rianne Letschert, "Reflections on the Development and Legal Status of Victims' Rights Instruments," in *Compilation of International Victims' Rights Instruments*, Tilburg/Nijmegen, 2006, 1–18.

rights and fundamental freedoms" and the Special Rapporteur who, in the absence of an agreed definition of the term "gross violations", was called upon to give further guidance on this issue relied on a number of relevant sources. In this connection he mentioned the draft Code of Crimes Against the Peace and Security of Mankind drawn up by the International Law Commission, common Article 3 of the Geneva Conventions of 12 August 1949 and the Third Statement of the Foreign Relations Law of the United States (section 702). He also noted that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the term "gross" is also related to the type of human rights that is being violated.[31] Against this background the Special Rapporteur in his first set of proposed basic principles and guidelines included the following text as general principle 1:

> Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture or cruel, inhuman or degrading treatment or punishment; enforced disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.[32]

While over the years diverging views persisted whether or not the Basic Principles and Guidelines should be restricted to "gross violations", with the evolving opinion that the document should also explicitly cover serious violations of international humanitarian law, the view prevailed that the focus of the Basic Principles and Guidelines should be on the worst violations. The authors had in mind the violations of international humanitarian law constituting international crimes under the Rome Statute of the International Criminal Court. On this premise a number of provisions were included in the Basic Principles and Guidelines spelling out legal consequences that are contingent, according to the present state of international law, to international crimes. Such provisions affirm the duty of States to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish (article 4). They also include the duty to make appropriate provisions for universal jurisdiction (article 5) as well as references to the non-applicability of statutes of limitation (articles 6–7).

It remains true, however, that the terms "gross violations" and "serious violations" are not formally defined in international law. It must nonetheless be understood that in customary international law "gross violations" include the types of violations that affect in qualitative and quantitative terms the core rights

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[31] Final report of the Special Rapporteur, *supra* note 2, UN doc. E/CN.4/Sub.2/1993/8, paras. 8–13.

[32] *Id*, para. 137.

of human beings, notably the right to life and the right to physical and moral integrity of the human person. It may generally be assumed that the non-exhaustive list of gross violations cited in the above mentioned General Principle 1 of the first version of the Basic Principles and Guidelines falls in this category. But also deliberate, systematic and large-scale violations of economic and social rights may amount to gross violations of human rights and serious violations of international humanitarian law.[33] It should further be noted that the concept of "serious violations" is to be distinguished from "grave breaches" in international humanitarian law. The latter term refers to atrocious acts defined in international humanitarian law but only in relation to international armed conflicts (Third and Fourth Geneva Conventions of August 12, 1949, and the 1977 Protocol I additional to the Geneva Conventions). The term "serious violations" stands for severe violations that constitute crimes under international law, irrespective of the national or international context in which these violations are committed.[34] The acts and elements of these crimes are reflected in the Rome Statute of the International Criminal Court under the headings of genocide, crimes against humanity and war crimes (ICC Statute, articles 6, 7 and 8).

As pointed out, in various stages of the development of the Basic Principles and Guidelines reservations were expressed regarding the limitation to "gross violations" and "serious violations" with the argument that as a general rule all violations of human rights and international humanitarian law entail State Responsibility and corresponding legal consequences. This was generally acknowledged but did not preclude opting for a narrower approach: "gross" and "serious" violations. However, in order to rule out any misunderstanding on the matter, the following phrase was included in article 26 on non-derogation: "– it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law" (italics added).

3. *The Notion of Victims*

In situations which are characterised by systematic and gross human rights violations large numbers of human beings are affected. They are all entitled to reparative justice. Problems do arise, however, because of the tension between

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[33] See in particular the statement by the UN High Commissioner on Human Rights, Louise Arbour, at the New York University School of Law on *Economic and Social Justice for Societies in Transition*, 25 October 2006. Note her following words: "In crises like the one we now witness in Darfur, the systematic burning of houses and villages, the forced displacement of the population and the starvation caused by the restrictions on the delivery of humanitarian assistance and destruction of food crops are deliberately used along other gross human rights violations – such as murder or rape – as instruments of war."

[34] See also REDRESS, Handbook, *supra*. n. 29, at 14.

the huge number of persons involved and the limited capacity to afford reparations. A firm principle is that of non-discrimination, emphasised in article 25 of the Basic Principles and Guidelines. But in order to devise and apply fair and just criteria for the rendering of reparative justice in terms of personal and material entitlements, it is crucial to define the notion of "victim." A great variety of views were expressed in the consultations and deliberations on this issue. Objections were raised to include collectivities in the definition. Reservations were also expressed against mentioning legal persons as possible victims. At the end of the day it was proposed and decided to base the notion of victims, as reflected in articles 8 and 9, on the terms used in the generally accepted Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power earlier adopted by the UN General Assembly.[35] Thus, for the purposes of the interpretation and application of the Basic Principles and Guidelines the following elements can be distinguished:[36]

- a person is a victim if he/she suffered physical or mental harm or economic oss as well as impairment of fundamental rights, regardless of whether a perpetrator is identified[37] or whether he/she has a particular relationship with the perpetrator;
- there are different types of harm or loss which can be inflicted through acts or omissions;
- there can be both direct victims as well as indirect victims such as immediate family members or dependents of the direct victim;
- persons can suffer harm individually or collectively.

It is noteworthy that the above description only mentions natural persons and not legal persons. This does not mean that legal persons cannot qualify as victims. In fact, in the context of international criminal law, notably the International Criminal Court, victims are defined in the Rules of Procedure and Evidence for the purpose of the Statute as (a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, and (b) including organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or

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[35] UN General Assembly resolution 40/34, 29 November 1985.

[36] These elements were aptly summarised in REDRESS, Handbook, *supra*. n. 29 at 15–16.

[37] There are situations where individual perpetrators are identified and such perpetrators can be held liable to provide reparations to victims. Note article 15 of the Basic Principles and Guidelines: "In cases where a person, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparations to the victim." In other situations perpetrators may not be identified. Whichever is the case, there remains an obligation on the part of the State to provide reparation to victims for acts or omissions which can be attributed to it, irrespective of whether a natural or legal person has been found liable.

charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[38]

A huge problem faced by national authorities and, as the case may be an institution like the International Criminal Court, is the large number of people victimised by systematic and widespread violations of human rights and humanitarian law. The types of situations referred to the International Criminal Court – Uganda, the Democratic Republic of Congo and Darfur (Sudan) – all involve systematic and widespread attacks against civilian populations, affecting many thousands, if not hundreds of thousands of women, men and children. The reparative capacities of the Court and its Trust Fund for Victims will be complex as regards the demarcation of beneficiaries and the entitlements to and modalities of reparation. As a matter of fact such a complex issue was the subject matter of an early significant decision relating to the Situation in the Democratic Republic of Congo in a ruling by Pre-Trial Chamber I of the ICC on the applications from six victims asking the right to participate in the proceedings. The Prosecutor considered such participation premature before defendants had been identified and arrest warrants had been issued. In the opinion of the Prosecutor the admission of the applications from six victims could instigate many thousands of persons, in view of the massive scale of alleged criminality in the DRC and finding themselves in a similar situation as the six applicants, to claim the same right. In his view a distinction had to be made between a class of "situation victims" and a victim who had been personally affected by a "case" and the accused in such a case. In its decision the Pre-Trial Chamber analysed in detail the relevant provisions of the ICC Statute and Rules of Procedure and Evidence. It took also into account the UN *Basic Principles of Justice for Victims of Crime and Abuse of Power* and the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law* and decided, after assessing the specific circumstances of each victim, to grant the applications.[39] Consequently, in determining the category and the scope of victim's participation in ICC proceedings and victim's entitlement to reparation, the 1985 UN Basic Principles and the 2005 UN Basic Principles and Guidelines may provide useful guidance. Both instruments determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

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[38] Rule 85 of the ICC Rules of Procedure and Evidence. See also Article 8(2)(b)(ix) and article 8(2)(e)(iv) of the ICC Statute on the war crime of attacking protected objects.

[39] *Situation in the Democratic Republic of Congo*, Decision of the Pre-Trial Chamber I on the Application of Participation in the Proceedings, No: ICC-01/04, 17 January 2006.

4. *Link with Impunity*

For many years work on combating impunity for perpetrators of human rights violations and reparation for victims followed parallel tracks in the UN Sub-Commission and Commission on Human Rights. As Special Rapporteur the present author concluded in his final report submitted in 1993:

> – that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.[40]

The process leading to a completion of two comprehensive instruments on reparation and on impunity ended in 2005 with the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation by the UN General Assembly and the endorsement of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity by the UN Commission on Human Rights.[41] The Impunity Principles and the Remedy and Reparation Principles and Guidelines are largely complementary in setting out the principles and prescriptions of punitive and reparative justice. Principle 1 of the Impunity Principles succinctly describes the general obligations of States to take effective action to combat impunity with emphasis on the duty (i) to investigate violations, (ii) to meet out justice to perpetrators, (iii) to provide effective remedies and reparations to victims, (iv) to ensure the inalienable right to know the truth about violations, (v) to take steps to prevent recurrence of violations. The comprehensive document, consisting of a preamble, definitional explanations and 38 principles, is structured along the lines of three principal elements: the right to know, the right to justice and the right to reparation/guarantees of non-recurrence.

The Impunity Principles provide, from the perspective of the right to an effective remedy and reparation, additional insights and policy directives in conjunction with other justice measures, particularly in societies in transition. In dealing with reparation procedures (principle 32), they do not only highlight the right of all victims to have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings, but they also draw attention to setting up reparation programmes, based upon

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[40] Final report of the Special Rapporteur, *supra*. n. 2, UN doc. E/CN.4/sub.2/1993/8, at para. 130.

[41] Commission on Human Rights resolution 2005/81; See Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, UN doc. E/CN.4/2005/102 and Add. 1.

legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. The latter element implying that reparation should not only be secured through litigation and adjudication but first and foremost through the design and implementation of reparation programmes, is a valuable and realistic complement which remained somewhat under-exposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation. In two other aspects the Impunity Principles differ from, albeit do not contradict, the Basic Principles and Guidelines. They are not limited to "gross violations" ("any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries –" (principle 31)) and, as noted above, guarantees of non-recurrence of violations (principles 35–38) are not listed as a form of reparation but as a connected and separate category.

5. *Forms of Reparation in a Concluding Perspective*

Already in the early version of the Basic Principles and Guidelines proposed by the Special Rapporteur of the Sub-Commission, the following forms of reparation were identified and spelled out: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[42] It should be recalled that they were formulated with the (then draft) Articles on State Responsibility of the International Law Commission in mind, subject to the difference, however, that the ILC Articles list the obligation of cessation and non-repetition under "general principles" and forms of reparation under "reparation for injury".[43] In the process of the further elaboration and adoption of the Basic Principles and Guidelines the various forms of reparation were retained and refined and they now appear in section IX of the document (Reparation for harm suffered). The Basic Principles and Guidelines underline that victims are entitled to adequate, effective and prompt reparation which should be proportional to the gravity of the violations and the harm suffered.

The various forms of reparation and their scope and content may be summarised as follows:

- *Restitution* refers to measures which "restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred" (Basic Principles and Guidelines, article 19). Examples of restitution include: restoration of liberty,

[42] Final Report of the Special Rapporteur, *supra*. n. 2, UN doc. E/CN.4/Sub.2/1993/8, at para. 137.

[43] See General Assembly resolution 56/83, Annex, Responsibility of States for internationally wrongful acts, articles 28–39.

enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

- *Compensation* "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case" (Basic Principles and Guidelines, article 20). The damage giving rise to compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation* includes medical and psychological care, as well as legal and social services (Basic Principles and Guidelines, article 21).
- *Satisfaction* includes a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, human rights training (Basic Principles and Guidelines, article 22).
- *Guarantees of non-repetition* comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry, and psychological and social services (Basic Principles and Guidelines, article 23).

Some concluding observations are called for in affording various forms of reparation. *First*, these forms and modalities are not mutually exclusive. In certain instances and with respect to certain individual victims or groups of victims more than one form of reparation may commend themselves in order to render justice. The Basic Principles and Guidelines are designed with a fair degree of flexibility in this regard. *Second*, while the legal and judicial approach to reparation characterises the Basic Principles and Guidelines, in reality non-judicial schemes and programmes offering redress and reparation do also contribute to reparative justice for the benefit of large numbers of victims. Such schemes and programmes should operate in coordination with other justice measures.[44] Both the judicial and the non-judicial approach should interrelate and interact in a complementary fashion. *Third*, though perceptions, notions and forms of reparation are mostly discussed and understood in monetary terms, the

[44] See in particular Pablo de Greiff, "Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice," in *Repairing the Irreparable: Reparations and Reconstruction in South Africa*, Charles Villa-Vicencio and Erik Doxtader (eds.), Cape Town, 2004.

importance of non-monetary and symbolic forms of reparation, with the aim to render satisfaction to victims, must not be neglected. *Fourth*, in situations of gross violations of human rights law and serious violations of international humanitarian law, the numbers of victimised women, children and men tend to reach appalling proportions. For this reason, reparative policies are very complex in terms of demarcation of beneficiaries and entitlements to and modalities of reparation. Nevertheless, also in these circumstances and in order to meet the requirements of justice, policies and programmes of reparation must aim to be complete and inclusive in affording material and moral benefits to all who have suffered abuses.

Massive Trauma and the Healing Role of Reparative Justice

By Yael Danieli *

Emphasising the need for a multi-dimensional, multi-disciplinary, integrative framework for understanding massive trauma and its aftermath, this chapter examines victims/survivors' experiences from the psychological perspective. It describes how victims are affected by mass atrocities, their reactions, concerns and needs. Delineating necessary elements in the recovery processes from the victims' point of view, the chapter will focus in particular on those elements of healing that are related to justice processes and victims' experiences of such processes. Although not sufficient in itself, reparative justice is nonetheless an important, if not necessary, component among the healing processes. Missed opportunities and negative experiences will be examined as a means to better understand the critical junctures of the trial and victims' role within the process that can, if conducted optimally, lead to opportunities for healing.

A. *Conspiracy of Silence*

It was in the context of studying the phenomenology of hope in the late 1960s that I interviewed survivors of the Nazi Holocaust. To my profound anguish and outrage, *all* of those interviewed asserted that no one, including mental health professionals, listened to them or believed them when they attempted to share their Holocaust experiences and their continuing suffering. They, and later their children, concluded that people who had not gone through the same experiences could not understand and/or did not care. With bitterness, many thus opted for silence about the Holocaust and its aftermath in their interctions with non-survivors. The resulting *conspiracy of silence* between

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 41–78.

Holocaust survivors and society,[1] including mental health, justice and other professionals,[2] has proven detrimental to the survivors' familial and socio-cultural reintegration by intensifying their already profound sense of isolation, loneliness, and mistrust of society. This has further impeded the possibility of their intrapsychic integration and healing, and made mourning their massive losses impossible.

This imposed silence proved particularly painful to those who had survived the war determined to bear witness. Keilson[3] similarly demonstrated that a poor post-war environment ("*third traumatic sequence*") could intensify the preceding traumatic events and, conversely, a good environment might mitigate some of the traumatic effects.[4]

Because the conspiracy of silence most often follows the trauma, it is the most prevalent and effective mechanism for the transmission of trauma on all dimensions. Both intrapsychically and interpersonally protective, silence is profoundly destructive, for it attests to the person's, family's, society's, community's, and nation's inability to integrate (and constructively respond to) the trauma. They can find no words to narrate the trauma story and create a meaningful dialogue around it. This prevalence of a conspiracy of silence stands in sharp contrast to the widespread research finding that social support is the most important factor in coping with traumatic stress. This applies as well to justice processes. When done optimally, these processes can lead whole societies to begin to dissipate the detrimental effects of the conspiracy of silence.

Nagata[5] reported that more than twice as many Sansei (children of Japanese-Americans interned by the U.S. Government) whose fathers were in camps, died before the age of 60 compared to Sansei whose fathers were not interned.[6] Nagata

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[1] Y. Danieli, "On the Achievement of Integration in Aging Survivors of the Nazi Holocaust," *Journal of Geriatric Psychiatry*, 14(2), (1981), at 191–210. See also, Y. Danieli, "Therapists' Difficulties in Treating Survivors of the Nazi Holocaust and their Children," *Dissertation Abstracts International*, 42(12-B, Pt 1), 4927 (1982). (UMI No. 949–904).

[2] Y. Danieli, "Therapists' Difficulties…," *supra*. n. 1. See also, Y. Danieli, "Psychotherapists' Participation in the Conspiracy of Silence about the Holocaust," *Psychoanalytic Psychology*, (1984) 1(1), 23–42.

[3] H. Keilson, *Sequential Traumatization in Children*. Jerusalem: The Hebrew University. The Magnes Press (1992).

[4] W. Op den Velde, "Children of Dutch War Sailors and Civilian Resistance Veterans," in Y. Danieli (ed.) *International Handbook of Multigenerational Legacies of Trauma*, New York: Kluwer Academic/ Plenum Publishing Corporation (1998), 147–162.

[5] D.K. Nagata, "Intergenerational Effects of the Japanese American Internment," in Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma, id*. at 125–140.

[6] See, also, on the survivors of the Nazi Holocaust, L. Eitinger, "The Concentration Camp Syndrome and its Late Sequelae," in J. E. Dimsdale (ed.), *Survivors, victims, and perpetrators: Essays on the Nazi Holocaust*. New York: Hemisphere (1980). On the fathers of the disappeared in Argentina, see, L. Edelman, D. Kordon. & D Lagos, "Argentina: Physical Disease and Bereavement in a Social Context of Human Rights Violations and Impunity," in L.H.M. van Willigen (Chair), *The limitations of current concepts of post traumatic stress disorders regarding the consequences of organized violence*. Session presented at the World Conference of the International Society for Traumatic Stress Studies, Amsterdam, The Netherlands (1992).

speculated that there may be a link between their early deaths and their general reluctance to discuss the internment. Pennebaker and others'[7] research suggests that avoidance of discussing one's traumatic experience may negatively affect physical health, and Nagata in the present study reported that the Sansei's fathers were much less likely to bring up the topic of internment than were their mothers.

The conspiracy of silence is also used *as a defence* for trying to prevent total collapse and breakout of intrusive traumatic memories and emotions. Like paper, it is a very thin and flimsy protection that rips easily. Children of survivors' conflicting attempts both to know and to defend against such knowledge[8] is ubiquitous as well. Aarts[9] concluded that the conspiracy of silence often is at the core of dynamics that may lead to symptomatology in the second generation. Op den Velde[10] demonstrated that when offspring of Dutch WWII sailors and resistance fighters observed the "family secret," separation and identification problems arose. Bernstein[11] chronicled the isolation and emotional distance created when U.S. WWII POWs avoided close emotional relationships with their spouse and children. In studies of Israel, West Germany and the former GDR, Rosenthal and Volter[12] found that collective silence had endured, despite the recent emergence of a more open social dialogue about the Holocaust. Their case analyses clearly showed that silence, family secrets, and myths are effective mechanisms that ensure the traumata's continued impact on subsequent generations. As Hannaham[13] states, "What's left in posterity [is] what Parks,[14] in her drama *The America Play* (1992, 1994) on African American experience calls 'the Great Hole of History'." As Bettelheim[15] observed, "What cannot be talked about can also not be put to rest; and if it is not, the wounds continue to fester from generation to generation."

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[7] J.W. Pennebaker, S.D. Barger & J. Tiebout, "Disclosure of Trauma and Health among Holocaust Survivors," in *Psychosomatic Medicine*, 51, (1989) 577–589.

[8] N.C. Auerhahn & D. Laub, "Intergenerational Memory of the Holocaust," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 21–42.

[9] P.G.H. Aarts, "Intergenerational Effects in Families of World War II Survivors from the Dutch East Indies: Aftermath of another Dutch war," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 175–190.

[10] W. Op den Velde, *supra*. n. 4.

[11] M.M. Bernstein, "Conflicts in Adjustment: World War II Prisoners of War and their Families," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 119–124.

[12] G. Rosenthal & B. Volter, "Three Generations within Jewish and non-Jewish German families after the Unification of Germany," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 297–314.

[13] J. Hannaham, "Holding History," in *Public Access: the Program of The Joseph Papp Public Theater/ New York Shakespeare Festival*, 3(2) (1996) 22–26, at 24.

[14] S-L. Parks. "The America Play (1992, 1994)," in S-L Parks *The America Play and other works*. New York: Theatre Communications Group (1995), at 157–199.

[15] B. Bettelheim, Afterward to C. Vegh, *I didn't say goodbye* (R. Schwartz, Trans.). New York: E. P. Dutton (1984), at 166.

Though descriptions of what is now understood as post-traumatic stress have appeared throughout recorded history, the development of the field of traumatic stress, or traumatology, has been episodic, marked by interest and denial, and plagued with errors in diagnostic and treatment practices.[16] Indeed, one of the most prevalent and consistent themes during the 20th century has been the denial of psychic trauma and its consequences,[17] particularly in the myriad deadly conflicts that find their multigenerational origins in history, the non-resolution of which ensures their perpetuation. One can only marvel at the international dimensions of the conspiracy of silence, as shown by the slowness of the world community to acknowledge and act on the terrible events in the Former Yugoslavia, Rwanda, Burundi and the Sudan.

1. *Impunity as [a societal instance of] the Conspiracy of Silence*

In an interview in 1995, Judge Richard Goldstone[18] stated: "I have no doubt that you cannot get peace without justice .... If there is not justice, there is no hope of reconciliation or forgiveness because these people do not know who to forgive [and they] end up taking the law into their own hands, and that is the beginning of the next cycle of violence .... I don't think that justice depends on peace, but I think peace depends on justice."

Multigenerational findings uniformly suggest that the process of redress and the attainment of justice are critical to the healing for individual victims, as well as their families, societies and nations. Klain[19] underscores its importance for succeeding generations, "to break the chain of intergenerational transmission of hatred, rage, revenge and guilt."

Justice is understood here both in terms of the administration of a formal and fair judicial process and the implementation of judgments of courts, and in terms of the complete reparation to victims by governments and by society as a whole. This process must include the investigation of crime, identification and bringing to trial of those responsible, the trial itself, punishment of those convicted, and appropriate restitution.

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[16] See, for example, J. Herman, *Trauma and Recovery*. New York: Basic Books; Mangelsdorf, A.D (1992); J. Herman, "Lessons Learned and Forgotten: the Need for Prevention and Mental Health Interventions in Disaster Preparedness," *Journal of Community Psychology*, 13 (198), 239–257; and Z. Solomon, "Oscillating Between Denial and Recognition of PTSD: Why are Lessons Learned and Forgotten?," *Journal of Traumatic Stress*, 8(2) (1995), 271–282.

[17] R.J. Lifton, *The Broken Connection*, New York: Simon & Schuster (1979).

[18] R. Goldstone, Interview with Judge Richard Goldstone. *Transnational Law & Contemporary Problems*, 5 (1995), (374–385), at 376.

[19] E. Klain, "Intergenerational Aspects of the Conflict in the Former Yugoslavia," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 279–296.

Victims and their offspring who have been wronged by a government or society, for example, find it considerably more difficult to begin the healing process if the responsible individuals cannot be identified and punished for their crimes.[20]

The attempted genocide of the Armenians stands as one of the most grievous instances of injustice in this century, one in which none of the necessary steps for resolution of the trauma have been taken by the perpetrators, the Turks.[21] Not only does the current generation of Turks refuse to acknowledge, apologise and compensate for the genocide, its ongoing campaign of denial, de-legitimisation, and disinformation affects the Armenians as a psychological continuation of persecution.

Impunity, by definition, is the opposite of justice.[22] Why, then, would it be embraced? One reason – in parts of Latin America and South Africa – is that it was required by military dictatorships or the racial minority government for relinquishing power or negotiating a peace settlement.[23] A second reason for accepting impunity is the belief that "forgive and forget" is the route to follow in order to heal societies torn apart by conflict. This was the route chosen, for example, by Spain following its civil war. However, the critical question remains: what does it do for a society if individuals' and groups' claims to justice are set aside in the name of what is purported to be the greater good?

The creation of "truth commissions" would seem to be an integral tool of justice. In many cases, however, such commissions have not identified those responsible and have been accompanied by amnesty laws or pardons that enshrine impunity (see the Guatemalan Commission on Clarification of the Past). In South Africa's Truth and Reconciliation Commission, pardons are granted for any actions taken during the *Apartheid* years if they were for political reasons and there is full disclosure. Simpson[24] scathingly criticises it, calling this "flight into reconciliation" an imposed conspiracy of silence that fails to deal with the

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[20] See, B. Raphael, P. Swan & N. Martinek, "Intergenerational Aspects of Trauma for Australian Aboriginal People," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 327–340. See also, in the same edition, E. Duran, B. Duran, M. Yellow Horse Brave Heart & M. Yellow Horse-Davis, "Healing the American Indian Soul Wound," at 341–354; M-A Gagne, "The Role of Dependency and Colonialism in Generating Trauma in First Nations Citizens: The James Bay Cree," at 355–372; W.G. Cross, Jr., "Black Psychological Functioning and the Legacy of Slavery: Myths and Realities," at 387–402.

[21] D. Kupelian, A.S. Kalayjian & A. Kassabian, in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 191–210.

[22] N. Roht-Arriaza (Ed.), *Impunity and Human Rights in International law and Practice*. New York: Oxford University Press (1995).

[23] D.W. Shriver Jr., *An Ethic for Enemies: Forgiveness in Politics*. New York: Oxford University Press (1995).

[24] M.A. Simpson, "The Second Bullet: Transgenerational Impacts of the Trauma of Conflict within a South African and World Context," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 487–512.

multigenerational effects of trauma, and states that this process is a poor substitute for justice for individual or groups of victims. He tells of a South African mother who, seeking punishment for her son's killers of a year ago was told not to rake up the past! For the victims, according to Edelman and others,[25] impunity has become "a new traumatic factor" so detrimental that it renders closure impossible. For their societies, moreover, impunity may contribute to a loss of respect for law and government, and to a subsequent increase in crime.

Emboldened by the world's indifference to the Armenian genocide, Hitler proceeded with the systematic attempt to annihilate the Jewish people. Much preventable pain is likely to occur in the future if atrocities are not stopped, and justice done in the present. The struggle for victims and the generations that follow them is to defy the dominance of evil and find a way to restore a sense of justice and compassion to the world. Victim/survivors of trauma feel a need to bear witness to their own and their people's losses, to speak the truth, to urge the world to ensure that such injustices never happen again. But some cannot say "never again" because it has happened again – in Cambodia, Rwanda, Bosnia, Sudan, and elsewhere.

International justice has acknowledged this. One significant trend countering such amnesties and pardons is found in the creation by the United Nations of several *ad hoc* international criminal tribunals and of the permanent International Criminal Court.

B. *Some Aspects of Survivor's Guilt*

One of the most powerful functions of "survivor's guilt" is to serve as a defence against existential helplessness. Being totally passive and helpless in the face of mass atrocities is perhaps the most devastating experience for victim survivors, one that was existentially intolerable and necessitated psychological defence. Elsewhere[26] I have speculated that much of what has been termed "survivor's guilt"[27] may be an unconscious attempt to deny or undo this helplessness. Guilt

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[25] L. Edelman, D. Kordon & D. Lagos, "Transmission of Trauma: The Argentine case," in Y. Danieli (ed.), *International Handbook of Multigenerational Legacies of Trauma*, *supra*. n. 4 at 447–464.

[26] Y. Danieli, "On the Achievement of Integration in Aging Survivors of the Nazi Holocaust," *supra*. n. 1. See also, Y. Danieli, "Exploring the Factors in Jewish Identity Formation (in children of survivors)," in *Consultation on the Psycho-dynamics of Jewish Identity: Summary of Proceedings*, American Jewish Committee and the Central Conference of American Rabbis, March 15–16, 1981, at 22–25.

[27] W. G. Niederland, "Psychiatric Disorders among Persecution Victims: A Contribution to the Understanding of Concentration Camp Pathology and its Aftereffects," *Journal of Nervous and Mental Diseases*, 1964, 139, 458–474.

presupposes the presence of choice and the power, the ability, and the possibility to exercise it. It states, "I chose wrong. I *could* have done something (to prevent what happened) and I didn't;" or, "There is something I *can* do, and if I only tried hard enough I will find what it is." Guilt as a defence against utter helplessness links both the survivors and their children's generations to the trauma: The children, in their turn, are helpless in their mission to undo the Holocaust both for their parents and for themselves. This sense of failure often generalises to "No matter what I do or how far I go, nothing will be good enough".[28] Guilt was one of the most potent means of control in these victim families, keeping many adult children from questioning parents about their war experience, expressing anger toward them, or "burdening" them with their own pain.

The bystander guilt of therapists and other professionals also appears as a defence when they experience their helplessness to undo the long-term consequences of the trauma for their patients (clients), and stopped them too, for example, from asking questions. When victims experience themselves during trials as rights bearers whose views are treated with respect and dignity, this sense of helplessness might be replaced by a sense of efficacy and control.[29]

Klein[30] states that while "it is obvious that survival guilt is … a way of working through late mourning and bereavement for loss of beloved people … It also seems to serve as means of survival in a chaotic world where all objects of love have been lost and where there are no people with whom to cry and to share one's grief." In a memorial for a survivor friend,[31] Elie Wiesel said that the hearts of the survivors have served as the graveyards for the known and the nameless dead of the Holocaust who were turned into ashes, and for whom no graves exist. Many children of survivors also share this sentiment. Elsewhere, I[32] stated my belief that much of the unhedonia (constant suffering) and the holding on to the guilt, shame, and pain of the past had to do with these internally carried graveyards. Survivors fear that successful mourning may lead to letting go and thereby to forgetting the dead and committing them to oblivion – which for many of them amounts to perpetuating Nazi crimes. Thus, guilt also serves a commemorative function and as a vehicle of loyalty to the dead, keeping survivors

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[28] Y. Danieli, "Psychotherapists' Participation in the Conspiracy of Silence about the Holocaust," *supra*. n. 2.

[29] See also, E. Stover. *The Witnesses. War Crimes and the Promise of Justice in The Hague* (Berkeley 2003).

[30] H. Klein, "Problems in the Psychotherapeutic Treatment of Israeli Survivors of the Holocaust," in H. Krystal (Ed.), *Massive Psychic Trauma*. New York: International Universities Press (1968), at 234–35.

[31] E. Wiesel, "Listen to the Wind," *in* I. Abrahamson (ed.) *Against Silence: The Voice and Vision of Elie Wiesel*, 1, 166–168. New York: Holocaust Library (1985).

[32] Y. Danieli, "On the Achievement of Integration in Aging Survivors of the Nazi Holocaust," *supra*. n. 1.

and succeeding generations engaged in relationships with those who perished, and maintaining a semblance of familial and communal continuity.[33] It also leads to what some call chronic collective mourning or "depression" in communities, groups and nations.

Counteracting psychological aloneness and re-establishing and maintaining a sense of belongingness and (familial/social and cultural) continuity are two additional crucially important functions of survivor's guilt. One survivor stated, "I keep thinking over and over again what I could have done to save my mother and brother. Inside me they are not dead. They are all with me all the time … It is the hardest on holidays and happy family occasions: If they could only be here to see it! … How can I be happy when all I can think about it that they are not here to celebrate it with us like we used to?" And another survivor commented, "If we accept the ashes then we have no past." When survivors experience the records established by the courts as documenting their collective truthful history that counteracts this dread of oblivion, this particular aspect of their survivor's guilt might become less crippling.

Reaffirmation of morality and of the world as a just and compassionate place has served as one of the most adaptive functions of survivor's guilt. Klein[34] views it as "restitution of lost human values, as well as restoration of one's own human image" and states that "both guilt and aggression serve to restore a feeling of justice and security in relation to the world" which is "in complete contrast to the denial and rejection of any kind of guilt by the mass murderers … " and the silently acquiescent world. The need and determination of many survivors and survivors' offspring to bear witness expresses both their commitment to make the world a better place where atrocities such as Holocaust and genocide will never happen again, and their belief in the moral compassion and responsive participation of their listeners. Many survivors speak of the "unanswerable puzzlement" of their survival and of their survivor's guilt as "automatically triggered precisely because so many good people died. How come so many good ones died? Am I not a good one?"

The pervasiveness and the misuse in application of the concept of "survivor guilt" in the treatment of survivors led Carmelly[35] to divide it into two categories, passive and active. *Passive guilt*, the one actually meant by Niederland[36] when he coined the term *survivor guilt*, is experienced by those who survived

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[33] For additional functions of guilt, see Y. Danieli, Psychotherapists' Participation in the Conspiracy of Silence about the Holocaust," *supra*. n. 2.

[34] H. Klein, "Problems in the Psychotherapeutic Treatment of Israeli Survivors of the Holocaust," *supra*. n. 30.

[35] F. Carmelly, "Guilt Feelings in Concentration Camp Survivors: Comments of a 'Survivor'," in *Journal of Jewish Communal Service*, (1975) *2* 139–144 at 234–35.

[36] W.G. Niederland, "Psychiatric Disorders among Persecution Victims," *supra*. n. 27.

"merely because they happened to be alive at the time of liberation"[37] as "I was spared the fate of those who were murdered." *Active* guilt stems from having committed immoral acts and/or knowingly having chosen not to help when one could possibly have done so. Asserting that "the greatest majority of concentration camp survivors are 'passive guilt carriers,'" Carmelly[38] notes that persons working with survivors

> have interpreted hostile, aggressive and depressive symptoms [of survivors] as a direct result of unrelieved active guilt feelings … [out of their] mistaken belief that any survivor must have committed immoral acts …. As a result of the focus on the relief of active guilt feelings (which do not exist in reality), these patients have not been helped to relate constructively to their present life. Instead … they developed distorted guilt feelings. [And their] already painful life might become more drastically painful.

Therapists working with war veterans who report having committed atrocities may be caught in the opposite attribution of passive guilt when their patients need to resolve their active guilt feelings.

Justice as well as transitional justice mechanisms, including truth and reconciliation commissions, can help victims feel vindicated of some portion of this often crippling guilt.

C. *The Need for a Multidimensional, Multidisciplinary Integrative Framework*

Massive trauma causes such diverse and complex destruction that only a multidimensional, multi-disciplinary integrative framework is adequate to describe it.[39] An individual's identity involves a complex interplay of multiple spheres or systems. Among these are the biological and intrapsychic; the interpersonal – familial, social, communal; the ethnic, cultural, ethical, religious, spiritual, natural; the educational/professional/occupational; the material/economic, legal, environmental, political, national and international. Each dimension may be in the domain of one or more disciplines, which may overlap and interact, such as biology, psychology, sociology, economics, law, anthropology, religious studies, and philosophy. Each discipline has its own views of human nature and it is those that inform what the professional thinks and does. These systems dynamically coexist along the time dimension to create a continuous conception of life

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[37] Carmelly, *supra*. n. 35 at 140.
[38] Carmelly, *id*. at 143–145.
[39] Y. Danieli, (Ed.) (1998). *International Handbook of Multigenerational Legacies of Trauma, supra*. n. 4.

from past through present to the future. Ideally, the individual should simultaneously have free psychological access to and movement within all these identity dimensions.

Exposure to trauma causes a *rupture*, a possible regression, and a state of being "stuck" in this free flow, which I have called *fixity*. The time, duration, extent and meaning of the trauma for the individual, the survival mechanisms/strategies utilised to adapt to it,[40] as well as post-victimisation traumata, especially the *conspiracy of silence* elaborated upon above, will determine the elements and degree of rupture, the disruption, disorganisation and disorientation, and the severity of the fixity. The fixity may render the individual vulnerable, particularly to further trauma/ruptures, throughout the life cycle. It also may render immediate reactions to trauma (e.g., acute stress disorder) *chronic*, and, in the extreme, become life-long *post-trauma/victimisation adaptational styles*,[41] when survival strategies generalise to a way of life and become an integral part of one's personality, repertoire of defence, or character armour.

These effects may also become intergenerational in that they affect families and succeeding generations.[42] In addition, they may affect groups, communities, societies and nations. Thus, it is not only what the victim has experienced and suffered during the trauma, be it genocide, crimes against humanity, or war crimes. It is what happens *after* the trauma that crucially affects the long-term, including multigenerational, legacies of the trauma.[43]

This framework allows evaluation of each system's degree of rupture or resilience, and thus informs the choice and development of optimal multilevel intervention. Repairing the rupture and thereby freeing the flow rarely means, "going back to normal." Clinging to the possibility of "returning to normal" may indicate denial of the survivors' experiences and thereby fixity. The same holds true for expecting testifying in court or any other single measure in the posttraumatic period, to "make it all OK." Justice processes, when done optimally, might contribute to lessening the feeling of being stuck for both the survivors and their societies. When they are not, they may exacerbate the fixity by participating in the conspiracy of silence.

In response to some trends in the literature to pathologise, overgeneralise and/or stigmatise survivors' and children of survivors' Holocaust-related phenomena,

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[40] For example, see Y. Danieli, "The Treatment and Prevention of Long-term Effects and Intergenerational Transmission of Victimization: A Lesson from Holocaust Survivors and their Children," in C.R. Figley (ed.), *Trauma and its Wake*, New York: Brunner/Mazel (1985) at 295–313.

[41] Y. Danieli, *id.*

[42] Y. Danieli, *id.* and Y. Danieli, *supra.* n. 4.

[43] See generally H. Keilson, *supra.* n. 3.

as well as differences emerging between the clinical and the research literature, I[44] have emphasised the *heterogeneity* of adaptation among survivors' families. Studies by Rich,[45] Klein[46] and Sigal and Weinfeld[47] have empirically validated my descriptions of at least four differing post-war *"adaptational styles"* of survivors' families: the *Victim* families, *Fighter* families, *Numb* families, and families of "*Those who made it*." This family typology illustrates life-long and intergenerational transmission of Holocaust traumata, the conspiracy of silence, and their effects. Findings by Klein-Parker,[48] Kahana, Harel and Kahana,[49] Kaminer and Lavie[50] and Helmreich[51] confirm an *heterogeneity* of *adaptation* and *quality of adjustment* to the Holocaust and post-Holocaust life experiences. This heterogeneity is noted by numerous experts working with other massively traumatised populations.

These adaptational styles shape the way survivors view the world and interact with it, including the justice system.

Common sense dictates that it is inevitable for the massive traumata experienced by victims of mass atrocities to have had immediate and possibly long-term effects on them and even on their offspring. Nevertheless, the vast literature on these consequences reveals an arduous struggle in law,[52] but even more so in psychiatry,[53] to prove the existence of these effects. Only in 1980 did the evolving descriptions and definitions of the "survivor syndrome" in the psychiatric literature win their way into the "Diagnostic and Statistical Manual of Mental

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[44] Y. Danieli, "On the Achievement of Integration in Aging Survivors of the Nazi Holocaust," *supra*. n. 1.

[45] M.S. Rich, "Children of Holocaust Survivors: A Concurrent Validity Study of a Survivor Family Typology," Unpublished doctoral dissertation (1982). California School of Professional Psychology, Berkeley.

[46] M.E. Klein, "Transmission of Trauma: the Defensive Styles of Children of Holocaust Survivors," (Doctoral dissertation, California School of Professional Psychology 1987). University Microfilms International, #8802441.

[47] J.J. Sigal & M. Weinfeld, *Trauma and Rebirth: Intergenerational Effects of the Holocaust*. New York: Praeger (1989).

[48] F. Klein-Parker, "Dominant Attitudes of Adult Children of Holocaust Survivors Toward their Parents," in J. P. Wilson, Z. Harel, & B. Kahana (eds.), *Human Adaptation to Extreme Stress* (1988) (193–218).

[49] B. Kahana, Z. Harel & E. Kahana, "Clinical and Gerontological Issues Facing Survivors of the Nazi Holocaust," in P. Marcus, and A. Rosenberg (eds.), *Healing their Wounds: Psychotherapy with Holocaust Survivors and their Families*, New York: Praeger (1989), at 197–211.

[50] H. Kaminer and P. Lavie, "Sleep and Dreaming in Holocaust Survivors: Dramatic Decrease in Dream Recall in Well-adjusted Survivors," in *Journal of Nervous and Mental Disease*, (1991) *179*(11), 664–669.

[51] W.B. Helmreich, *Against all Odds: Holocaust Survivors and the Successful Lives they Made in America*. New York: Simon & Schuster (1992).

[52] M. Kestenberg, "Discriminatory Aspects of the German Indemnification Policy: A Continuation of Persecution," *in, Generations of the Holocaust*, New York: Basic Books, (M. S. Bergman & M. Jucovy eds., 1982).

[53] L. Eitinger & R. Krell (eds.), *The Psychological and Medical Effects of Concentration Camps and Related Persecutions of Survivors of the Holocaust: A Research Bibliography* (1985).

Disorders" as a separate, valid category of "mental disorder" – 309.81 Post-traumatic Stress Disorder.[54]

Post-Traumatic Stress Disorder (PTSD) and other diagnostic conditions

Victims respond to trauma in rather predictable ways. They suffer shock and helplessness, and experience difficulty concentrating, sleeping and bodily tensions of all kinds; guilt and shame, anger and profound grief. They re-experience the events of the victimisation that many of them dedicate their whole lives to avoiding. They also exhibit sometimes striking resilience.

The psychological effects in the most seriously affected individuals are defined narrowly in both of the world's primary nosologies (reference sources), ICD-10[55] and DSM-IV.[56] The most directly relevant syndromes include acute stress disorder (ASD) in the short, and posttraumatic stress disorder (PTSD) in the longer term. PTSD is characterised by intrusive recollections, avoidance reactions, and symptoms of increased arousal. PTSD has been found to be associated with stable neurobiological alterations in both the central and autonomic nervous systems.[57]

Table A, taken from Fabri[58] provides comparative examples of the frequency of PTSD diagnoses across several massive trauma situations:

Frequency of PTSD diagnoses

Study Population	PTSD Dx	Comments
Cambodian Refugees, 2005	62%	Composite International Diagnostic Interview
Bosnian Refugees, 1999	26.2%	HTQ Diagnostic Algorithm
Post-Conflict, Settings, 2001	Algeria – 37.4% Cambodia – 28.4% Ethiopia – 17.8% Gaza – 17.8%	Composite International Diagnostic Interview

[54] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (1980).
[55] World Health Organization (WHO), *International Classification of Diseases* (10th revision 1992).
[56] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., 1994).
[57] Neuropharmacologic and neuroendocrine abnormalities have been detected in the noradrenergic, hypothalamic-pituitary-adrenocortical, and endogenous opioid systems. These data are reviewed extensively elsewhere. M.J. Friedman, D.S. Charney & A.Y. Deutch, *Neurobiological and Clinical Consequences of Stress: From Normal Adaptation to PTSD* (1995).
[58] M. Fabri, "Responding to Trauma and HIV in Rwanda," in M. Fabri (Chair) *Symposium conducted at the meeting of the International Society for Traumatic Stress Studies*. Baltimore, MD, USA (2007).

Frequency of PTSD diagnoses

Study Population	PTSD Dx	Comments
South Africa, HIV+, 2005	14.8%	MINI International Neuropsychiatric Interview
USA, HIV+ Women, 2002	42%	PTSD Checklist – Civilian Version
Rwanda Communities, 2004	24.8%	PTSD Checklist Civilian Version

Additional disorders that frequently occur after exposure to trauma include depression, other anxiety disorders, and substance abuse. Conversion and somatisation disorders (expressing emotional reactions via the body) may also occur, and may be more likely to be observed in non-Western cultures.[59] Complicated bereavement[60] and traumatic grief[61] have been noted as additional potential effects. Shear and colleagues[62] define "traumatic grief" as a constellation of symptoms, including preoccupation with the deceased, longing, yearning, disbelief and inability to accept the death, bitterness or anger about the death, and avoidance of reminders of the loss. Research shows that traumatic events that are man-made and intentional, unexpected, sudden and violent have a greater adverse impact than natural disasters.[63]

Indeed, perhaps the most important challenge confronting victims, especially of the massive crimes we are deliberating, is the impossibility of mourning the loss and destruction rendered by such crimes. Isabella Leitner, a Holocaust survivor, expressed it thus:

> The sun made a desperate effort to shine on the last day of May in 1944. The sun is warm in May. It heals. But even the heavens were helpless on that day. A force so evil ruled heaven and earth that it altered the natural order of the universe, and the heart of my mother was floating in the smoke-filled sky of Auschwitz. I have tried to rub the smoke out of my vision for forty years now, but my eyes are still burning, Mother.[64]

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[59] B. Engdahl, J. Jaranson, M. Kastrup & Y. Danieli, "*Traumatic Human Rights Violations*: *Their Psychological Impact and Treatment*," in Y. Danieli, E.C. Stamatapoulou & C. Dias (eds.) *The Universal Declaration of Human Rights Fifty Years and Beyond* (1999) 337.

[60] M.J. Horowitz, *Stress Response Syndrome* (1976).

[61] H. Prigerson & S.C. Jacobs, "Traumatic Grief as a Distinct Disorder: A Rationale, Consensus Criteria, and a Preliminary Empirical Test," *in* M.S. Stroebe, R.O. Hanson, W. Stroebe & H.A.W. Schut (eds.) *Handbook of Bereavement Research: Consequences, Coping, and Care* (2001) 613.

[62] K.M. Shear, E. Frank, E. Foa, C. Cherry, C. F. Reynolds, J. Vader Bilt & S. Masters, "Traumatic Grief Treatment: A Pilot Study," 158 Am. J. of Psych. 1506 (2001).

[63] F. H. Norris, "Psychological Consequences of Disasters," 13(2) *PTSD Research Quarterly* 1 (2002).

[64] I. Leitner, *Saving the Fragments* vii (1985).

Later, writing in America, she adds,

> I search the sky … in desperate sorrow but can discern no human form … There is not a trace. No grave. Nothing. Absolutely nothing. My mother lived for just a while – Potyo for less than fourteen years. In a way they did not really die. They simply became smoke. How does one bury smoke? How does one place headstones in the sky? How does one bring flowers to the clouds? Mother, Potyo … I am *trying* to say good-bye to you. I am *trying* to say good-bye.[65]

I have read her words in many presentations across the world – in South Africa, Rwanda, Bosnia, Australia, Israel, the Americas – and have been uniformly told by listeners that they have experienced her words as comforting and transforming. For example, my reading them to Dr. Neil Cohen, then Commissioner of Health and Mental Health of the City of New York on 11 September 2001 to ensure that the families of victims of 9/11 received some remnant of Ground Zero, led to Mayor Rudy Giulianni's decision to give each family an urn containing ashes from the World Trade Center site.

Exposure to trauma may also prompt review and re-evaluation of one's self-perception, beliefs about the world, and values. Although changes in self perception, beliefs, and values can be negative, varying percentages of trauma-exposed people report positive changes as a result of coping with the aftermath of trauma.[66] Survivors have described an increased appreciation for life, a reorganisation of their priorities, and a realisation that they are stronger than they thought. This is related to my[67] recognition of competence vs. helplessness in coping with the aftermath of trauma. Competence (through one's own strength and/or the support of others), coupled with an awareness of options, can provide the basis of hope in recovery from traumatisation.

Of course, the symptoms described above would affect the victims' behaviour as witnesses in courts. Not less importantly, they would affect the listeners. All will need psychosocial protection before, during and after their involvement in the process of justice so the victims are not retraumatised (which the criminal justice system has done for years) and the listeners are not vicariously traumatised. Studies of psychotherapists working with victims of massive trauma have shown how, while attempting to protect themselves against their own vicarious victimisation, they too participate in the *conspiracy of silence*.[68] Justice professionals

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[65] Leitner, *id*. (*emphasis added*).

[66] R.G. Tedeschi & L.G. Calhoun, *The Post-traumatic Growth Inventory: Measuring the Positive Legacy of Trauma*, 9 J. Traum. Stress 455 (1996).

[67] Y. Danieli, "Resilience and Hope," in G. Lejeune (ed.) *Children Worldwide* (1994) 47.

[68] Y. Danieli, "Therapists' Difficulties in Treating Survivors of the Nazi Holocaust and Their Children," *in* Dissertation Abstracts International, 42(12-B, Pt 1), 4927 (UMI No. 949-904) (1982); "Compassion Fatigue: Coping with Secondary Traumatic Stress Disorder in Those who Treat the Traumatized," (C.R. Figley ed., 1995).

have responded similarly. Indeed, the field of traumatology has recognised the necessity for specialised training to protect all involved in these horrific experiences and in bearing witness to them.

D. *The Healing Process*

Cognitive recovery involves the ability to develop a realistic perspective of what happened, by whom, to whom, and accepting the reality that it had happened the way it did. For example, what was and was not under the victim's control, what could not be, and why. Accepting the impersonality of the events also removes the need to attribute personal causality and consequently guilt and false responsibility. An educated and contained image of the events of victimisation is potentially freeing from constructing one's view of oneself and of humanity solely on the basis of those events. For example, having been helpless does not mean that one is a helpless person; having witnessed or experienced evil does not mean that the world as a whole is evil; having been betrayed does not mean that betrayal is an overriding human behaviour; having been victimised does not necessarily mean that one has to live one's life in constant readiness for its re-enactment; having been treated as dispensable vermin does not mean that one is worthless; and, taking the painful risk of bearing witness does not mean that the world will listen, learn, change, and become a better place.[69]

The Latin American Institute of Mental Health and Human Rights in Santiago, Chile stated that "The victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what has happened to them … Truth means the end of denial and silence … Truth will be achieved only when literally everyone knows and acknowledges what happened during the military regime. … [They concluded:] Social reparation is thus … simultaneously a sociopolitical and a psychological process. It aims to establish the truth of political repression and demands justice for the victims … both through the judicial process and through the availability of health and mental health services … The new democracy that now offers the possibility of reparation will deteriorate into a frail bureaucratic system if the process of social mourning is not realized fully".[70]

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[69] Y. Danieli, "Treating survivors and children of survivors of the Nazi Holocaust," in F. M. Ochberg (ed.), *Post-traumatic therapy and victims of violence* (278–294). New York: Brunner/Mazel (1988).

[70] D. Becker, E. Lira, M.I. Castillo, E. Gomez & Kovalskys, "Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation," *Journal of Social Issues,* 40(3) (1990), 133–149 at 147. (For related programmes see R.K. Kordon, L.I. Edelman, D.M. Lagos,

Thus, you need to heal the sociopolitical context for the full healing of the individuals and their families, as you need to heal the individuals to heal the sociopolitical context. This is a mutually reinforcing context of shared mourning, shared memory, a sense that the memory is preserved, that the nation transformed it into a part of its global consciousness. The nation shares the horrible pain. The survivors are not lonely in their pain. Reparative justice is fundamental to this dimension of healing.

Integration of the trauma must take place in *all* of life's relevant dimensions or systems and cannot be accomplished by the individual alone. Systems can change and recover independently of other systems. Rupture repair may be needed in all systems of the survivor, in his or her community and nation, and in their place in the international community.[71] Reparative justice is a necessary but not sufficient part of this process. To fulfil the reparative and preventive goals of trauma recovery, perspective, and integration through awareness and containment must be established so that one's sense of continuity and belongingness is restored. To be healing and even self-actualising, the integration of traumatic experiences must be examined from the perspective of the *totality* of the trauma survivor's family and community members' lives.

E. *What Victims Tell us about Reparation*

In order to understand more fully the experience of receiving reparation, compensation, and how it can be helpful to individuals and to their society, as well as to gain a long-term perspective, I interviewed victims/survivors of the Nazi Holocaust survivors and then newer populations, such as Japanese-Americans, Argentineans and Chileans, and professionals working with them, both in and outside their countries. Following a description of the process of claiming redress, are some quotations of statements, discussions and conclusions from these interviews.

1. *Claiming Redress*

The process of applying for German "*Wiedergutmachung*"[72] [literally means to make something good again, to make amends for their suffering during the Nazi

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E. Nicoletti & R.C. Bozzolo, *Psychological Effects of Political Repression*, Buenos Aires: Sudamericana/Planeta (1988 English Edition by Diana R. Kordon and others, Hipolito Yrigoyen 1442 – Buenos Aires – R. Argentina) and I. Genefke, "The most effective weapon against democracy: torture – it concerns us all", Testimony to the subcommittee on foreign operations, export financing and related expenses for the *Rehabilitation Centre for Torture Victims*, Copenhagen, Denmark. 1 May 1992.)

[71] Y. Danieli, *International handbook of multigenerational legacies of trauma. supra*. n. 4.

[72] *Facts and figures on restitution in Germany*. New York: German Information Center, November 1977. (Available from German Information Center, 410 Park Avenue, New York, N.Y. 10022).

regime] was experienced by survivors as yet an additional series of hardships. The Allied Powers after World War II issued laws restricted to restoring to the original owners property confiscated by the Nazis. The laws did not take into account personal damage to victims of Nazi persecution – those who had suffered in mind and body, or had been deprived unjustly of their freedom, or whose professional or economic prospects had been summarily cut short. Nor did these laws consider assistance to the widows and orphans of those who had died as a result of Hitler's policies. The Western Allies placed the responsibility for the reparation of such damages in the hands of the newly constituted German Federal States. Following a few stages, the Federal Republic of Germany enacted the "Final Federal Compensation Law" on 14 September 1965. Thus, indemnification for persecution of persons was differentiated from restitution for lost property. The implementation of the compensation law was traumatic in itself.

Kestenberg,[73] a reparation lawyer, states:

> Even when most German officials showed concern and willingness to compensate Jews for the wrong done to them, their so-called "Wiedergutmachung" … was only concerned with monetary matters. A moral "Wiedergutmachung" was not planned and did not exist. No one bothered to restore the survivor's dignity. On the contrary, the procedures inherent in some of the paragraphs of the Restitution Laws, inflict indignities upon the claimants while at the same time German authorities are elevated to the status of superior beings who adjudge the claimants' veracity and honesty and classify them in accordance with the degree of their damage. … [Even if] the applicant had indeed been confined in a concentration camp … they behaved as if he were trying to extort money from the German government under false pretenses.
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> The survivors had to prove that they had been damaged. Their attempts at self-cure were destroyed once they had to admit that their damage was permanent, sealed and signed by the authorities. To receive payments, often sorely needed, the applicants had to subject themselves to the most humiliating and degrading, seemingly very correct legal type of investigation.[74]
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> Bureaucratic deadlines are used for the unfair and prejudicial practice of rejecting claims … The German treasury enriches itself when a claimant dies before his case is concluded. At this time 50% of claims are denied, 25% are still pending and only 25% have been resolved in favor of the claimants. A case in the highest court alone takes eight years for determination, while many of the elderly claimants are not only humiliated, but suffer from lack of economic necessities and moneys for treatment of ailments which exacerbate in old age. (p. 9) [T]he victimization of the once persecuted continues.[75]

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[73] M. Kestenberg, "Discriminatory aspects of the German restitution law and practice," in Y. Danieli (Chair), *Nazi Holocaust Effects*. Session presented at the meeting of the First World Congress of Victimology, Washington, D.C., August, 1980, at 2–3, 4.

[74] *Id.*, at 5.

[75] *Id.*, at 12.

Crucial to having a claim processed was undergoing a psychiatric examination. To be an examiner, the only requirement was that the psychiatrist be able to speak and write German, not Yiddish or Polish, which were the languages spoken by many survivors. The psychiatric examiner had to determine, and try to express in numbers, how much, or what fraction of the patient's emotional illness is, in his opinion, due to the persecution he suffered. The law required a minimum of 25% damage in order for the applicant to receive pension.

Examiners had intense emotional and moral reactions to this process. These reactions motivated much of their writings and were poignantly expressed in most of them.[76] Eissler[77] speculates that one major reason for the experts' (and the courts') "open or concealed hostility against those who have had to bear great sufferings" has to do with the "universal," archaic, pagan "contempt that man still tends to feel for the [weak and] humiliated, for those who have had to submit to physical punishment, suffering, and torture." He concludes:

> The minimum one may demand, under such circumstances, is that the responsible authorities recognise those who cannot control this archaic feeling and exclude them from the position of experts in matters of compensation for suffering. When a physician refers to concentration camp experiences as "disagreeable" he has given away his secret contempt.... He has thrown away the right to be called an "expert"; if he continues to avail himself of that privilege, he must share the blame with those who continue to use his services.[78]

Krystal and Niederland[79] (1968) add, "Even the hearing of the tales of the concentration camp survivors is so disturbing and traumatic, so abusive to the examiner that some are compelled to avoid obtaining the details of the traumatisation.[80] They then arrive at a meaninglessly brief summary of the experiences," and Hocking[81] reports cases "where patients have been told not to describe their experiences, only their symptoms."

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[76] Y. Danieli, "Therapists' Difficulties in Treating Survivors of the Nazi Holocaust and their Children," *supra*. n. 68.

[77] K.R. Eissler, "Perverted Psychiatry?," *American Journal of Psychiatry*, (1967) *123*, 1352–1358, at 1357.

[78] *Id.*, at 1358.

[79] H. Krystal & W.G. Niederland, "Clinical Observations on the Survivor Syndrome," in H. Krystal (ed), *Massive Psychic Trauma, supra*. n. 30, at 341.

[80] See the section "In search for justice" describing the toll paid by human rights and justice defenders in their work, particularly with victims, in Y. Danieli (ed.) *Sharing the Front Line and the Back Hills: International Protectors and Providers, Peacekeepers, Humanitarian Aid Workers and the Media in the Midst of Crisis*. Amityville, New York: Baywood Publishing Company, Inc (2002).

[81] F. Hocking, "Human Reactions to Extreme Environmental Stress," *Medical Journal of Australia*, (1965) 2(12), 477–483 at 481.

FT, a Czech Jew of Viennese origins and the sole survivor of a well-to-do family, whose total possessions in Prague were taken over by the Germans, and then by the Communists … left, via France to the United States … and began pursuing compensation in the 50s. He describes his ordeal as follows,

> The fact that I was three and a half years in concentration camps didn't count. At that time unless you were literally disabled – such as missing a hand – they recognized nothing. I always found it distasteful to spend days fighting a bureaucracy that tried to tell me that I am not entitled to that money, providing documents, writing letters, having to prove that I was indeed worthy of compensation. When I tried to get payment for some medical bills they wanted copies of the bills from 1946 to 1956. I had no way of finding them so they figured out an "average" and offered me $200 if I waive claims against medical bills and I said that that is an insult and told them to keep the money and leave me alone. Fighting for these things absorbs so much emotional energy … It is bad enough that I have to live with memories, but to have to stir them up and to also face one's persecutors. I don't have to face Nazis anymore, but I still have to deal with German bureaucracy. I got disgusted and wanted to quit. But I knew that if I didn't claim it, the money will remain in Germany. They won't give more to someone else.[82]

2. *Restitution and Compensation*

Of course everybody says that money is not enough. There is a disagreement whether we should take money or not. Some people don't need it at all financially yet insist on getting reparations; for others the check is practically necessary, especially the elderly. Compensation is a symbolic act because you can never be compensated. It is minor in amount but major in significance. Many people are desperate and need the support; they are living on a pension and $200 a month is critical. For a family in Bhopal even $15 a month may make a difference even though it's a pittance.

How does one compensate for three and a half years in concentration camps? For the loss of a child? It is impossible. How do you pay for a dead person? For a Korean woman sexually abused by the Japanese in WWII? It's not the money but what the money signifies – vindication. It signifies the governments' own admission of guilt, and an apology. The actual value, especially in cases of loss of life, is, of course, merely symbolic, and should be acknowledged as such.

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[82] Y. Danieli, "Preliminary reflections from a psychological perspective," *in* T.C. van Boven, C. Flinterman, F. Grunfeld & I. Westendorp (eds.), *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Netherlands Institute of Human Rights [*Studie- en Informatiecentrum Mensenrechten*], Special issue No. 12 (196–213). Also published in N.J. Kritz (ed.) (1995). *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. 1 (572–582). Washington, D.C.: United States Institute of Peace.

The money *concretises* for the victim the confirmation of responsibility, wrongfulness, he is not guilty, and somebody cares about it. It is at least a token. It does have a meaning. Just a letter of apology doesn't have the same meaning and even if it is a token it adds. In our system of justice, of government, when damage occurred, money is paid.

We have demonstrated that people can be damaged. There must be an acknowledgment that wrong was done. Then those who were damaged are entitled to compensation for their damages and a programme of rehabilitation. The acknowledgment is necessary because without an admission of guilt people are still angry. Rehabilitation programmes must be available on a long-term basis.

In Israel idealists fought against [taking money]: "I refused. Today I am sorry, because I concluded that I did not succeed to change anything by refusing and the truth is that here and in Israel there are aging survivors who don't have an extended family. The steady sum enables them to go on. The fact that I gave up only left the money in the hands of the Germans. We were wrong".[83]

Should there be one payment? No. The monthly check in some ways weakens the trauma. When it becomes routine, it transforms into something permanent that somehow enables overcoming survivor guilt. The routine swallows the guilt.

For the Argentinean and Chilean parents who lost their children, it was crucial that the State would admit that a horrible crime was done to them and that it was done without any justification or reason and was purely an expression of political harm and abuse of power and violation of their freedoms and human lives. Not only was there a crime of taking lives – suddenly they are without their children. They were also robbed of the chance of their children helping and supporting them and standing by them in their old age. Thus at least they should have compensation for the rest of their lives, not a single lump sum. There is no place for a single payment. A house is a house, but when it is human life you compensate for something that could have accompanied them throughout their lives. Therefore there is logic in receiving regular compensation. This should be legalised.

In Argentina, responses of different victim groups seemed to vary. The Madres de Plaza de Mayo organization officially refused economic reparations which they saw as the Argentine Government's attempt to buy their silence, particularly in the absence of social and historical recognition that their children had been political or social opponents and not criminals. Conversely, the former political prisoners, especially if they had been in prison for a long time, considered economic compensation as their rightful reparation. Mostly young people, their imprisonment deprived them of finishing their studies, progressing in a job, or

[83] *Id.*

establishing their own home and families. For the families of those who were married, the long period in jail caused great economic difficulties. Many of them felt that this is a partial moral recognition of the damage they had suffered and that, albeit in a small way, they can at least win something from the State. For people who are ambivalent, their ambivalence increases when compensation is experienced as an offence, yet is very necessary economically.

Perhaps the most crucial aspect is that of "*impunidad*": that traitors, collaborators, torturers are not punished. As long as persons who have violated human rights or exerted torture can go free, there can never be a true democracy in a society. A democratic constitution is no guarantee against torture. Impunity under a democratic constitution is a continuous repression. Impunity stops democratic processes. Torturers for example should have absolute maximum punishment. To practice torture is equal to committing murder.

Most Japanese-Americans felt finally vindicated after 50 years, having spent 10 years fighting the system, not as a Japanese-American issue, but as an American constitutional one. "So many of our people could now talk about it and express deep-seated feelings for the first time in 50 years. That was the positive, therapeutic side. It was only a token compensation. $20,000 won't cover what was lost: jobs, names, all properties, horrible living conditions, dignity or citizenship. It's not the money but what the money signifies. Psychologically it lifted a big burden off the Japanese-Americans who always felt that the system couldn't trust us but viewed us as potential enemies, as second-class citizens. At least we now feel not accepted but vindicated for what happened 50 years ago. The apology was more important than the amount of money. After 50 years of maintaining that they were right, the government did acknowledge that they were constitutionally wrong".[84]

Economic compensation given to torture victims should be very substantial. The torturers should compensate for their crime by having confiscated all of their property in order to pay back to those they have tortured. Whether members of governments, police officers, and doctors who have participated in torture – *all* property should be confiscated from them – this is the most important aspect of restitution – and used for compensation to the victim. Furthermore, there should be general awareness in the whole population about this aspect and the situation as such. It might be very effective preventively if this principle was generally known.

Before anything else the victim wants an acknowledgement of a debt that somehow, sometime a government writes laws and one of them is "Mr. – deserves

[84] For intergenerational effects, see D.K. Nagata, "Intergenerational Effects of the Japanese American Internment," *supra*. n. 5.

the praise of the country." The first step of a government such as Argentina is "the state of Argentina has woefully wronged those people who were persecuted by the military and we feel contrite and wish to apologize." The full sense of it is that it *should* be a *law*, nothing else. And put it on the books. We have done wrong, we acknowledge it. It is *very* important. As a *political* matter I would absolutely have the books open … open the files and let the facts speak for themselves.

Let us find a way and make a general statement. Clearly victims of governmental wrong should be compensated and this is the way we should go about it. As we had established norms of international minimal behaviours, crimes against humanity, we need parallel legislation for compensation for the victims.

Legal procedures against the victimisers and financial arrangements compensating the victims are necessary steps in the aftermath of man-made calamities. However, they are not sufficient steps for societies to recover. In societies which moved out of totalitarian regimes, into quasi-democratic ones (Argentina, Chile, Eastern Europe), victims and victimisers of the former regime go on living in the same society. As they do not have any social and psychological mechanisms to repair these past relations, these may just penetrate deeper inside, and thereby be transmitted to the next generations. Therefore, along legal and financial steps, in each of these countries, a socio-psychological institute should be established to work on the after-effects of the traumata with both children of victims and victimisers. The end result of this process should be to try to bring them together, to think about the overall social responsibility: What can they do together so that detrimental tensions will not burst out again and again within those societies.

I am still concerned that it makes it easier to just assign monetary value, and not address the profound emotional and moral breach.[85]

Because of the long-term and/or intergenerational transmission of victimisation there should be no statute of limitation. If the victim, for moral reasons, refuses the meaning of the reparation payment, the money should, nonetheless, not remain in the hands of the perpetrators or the silently acquiescing proceeding socio/political system, but it or its equivalent sum should be put in a special long-term fund whose purpose should be future-oriented, both in terms of

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[85] See also the study carried out by the Chilean human rights organization CODEPU under the auspices of the Association for the Prevention of Torture, that interviewed about 100 individuals and groups of family members of disappeared and summarily executed victims in Chile, Argentina, El Salvador, and Guatemala. The findings emphasised that, for the victims, "moral and legal measures of reparation are fundamental, while monetary compensation is controversial and problematic" (Naomi Roht-Arriaza, "Reparations in the aftermath of repression and mass violence," *in My Neighbor, My Enemy: Justice and community in the aftermath of mass atrocity* (E. Stover & H.M. Weinstein (eds.) (2004), *supra*. n. 29 at 127). Of note is the emphasis survivors placed on education for the children of those killed.

education, prevention, and later care as provisions for the future – for themselves and/or their offspring's care, if needed and necessary.

In the genocide case brought by Bosnia and Herzegovina against Serbia and Montenegro,[86] The International Court of Justice declined to hold Serbia responsible for what it conceded was the genocide in Srebrenica and refused to make an order for compensation. In reaction to the Court's failure, the Bosnian participant in the conference *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* held at The Hague a few days after the decision, felt she could not attend. Dr. Irfanka Pasagic, wrote:

> Survivors, rushing these days into my office having lost even the ultimate hope that the world will confess the horrible crime committed upon them and clearly name the responsible ones, have definitely made me decide not to come to the Hague. I think it is here where I am needed more. Already for two days, throughout the scaffold of Bosnia and Herzegovina, the criminals celebrate. The victims have lost, even this time. Only emptiness fills me out; I feel it so painfully. I wish you successful work.[87]

3. *Commemoration and Education*

The need for commemoration is for the victims and for society. Rituals are very important; there is no organised society, religion or culture that does not have rituals of memory. Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their society.

It is a shared context, shared mourning, shared memory. The memory is preserved; the nation has transformed it into part of its consciousness. The nation shares the horrible pain. What may be an obligatory one-day-a-year ritual to others the victims experience as a gesture of support, of sharing the pain. They are not lonely in their pain.

There should be general awareness on a high level; information and education about the situation, how it arose, what are the consequences, statues of heroes/martyrs, paintings. Streets should be named after them, as could rooms in colleges and museums. There should be memorial services, scholarship funds, concerts and theatre performances, and educational books.

Commemoration should be done with great dignity, and with a feeling that while it honours those who suffered, those who have died, it is also done for preventive purposes, in the spirit of the knowledge that compensation for loss of

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[86] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)* 26 February 2007.

[87] The Report of the Conference Proceedings is available online, at: www.redress.org/reports/ReparationsVictimsGenocideSept07.pdf, at 21.

lives, health and hopes can never be fully fulfilled. Yet, one must maintain the commitment to 'NEVER AGAIN!,' and to the possibility for intergenerational dialogue, which may include dialogues between children of survivors and of perpetrators.

In Elie Wiesel's words, "they have no cemetery; we are their cemetery".[88] Building monuments serves some important functions in the re-establishment of a sense of continuity for the survivors, and for the world. Much of the chronic grief, the holding on to the guilt, shame, and pain of the past have to do with these internally carried graveyards. Survivors fear that successful mourning may lead to letting go, thereby to forgetting the dead and committing them to oblivion. The attempt to make these graveyards external creates the need for building monuments so that the survivors might have a place to go to remember and mourn in a somewhat traditional way. Visiting Yad Vashem seems to provide such an opportunity for some survivors.

Building monuments also has the significant functions of commemoration, documentation and education – an extension of bearing witness – and of leaving a legacy so that the victims, the survivors, and the Holocaust will not be forgotten. The latter are comforting to some of the essential components of the aging survivor's preoccupation: "Who cares if I live?" "Who loves me?" "Who will remember me?" "Will the memory of my people and of the Holocaust perish?" and, "Did/Will the world learn anything from it?"

F. *Necessary Elements of Healing (Summary)*

The following summarises what the victims/survivors themselves stated in the aforementioned interviews[89] as the *necessary components for healing* in the wake of massive trauma. Presented as goals and recommendations, they are organised from the (1) individual, (2) societal, (3) national, and (4) international, perspectives, as follows:

1. Reestablishment of the victims' equality of value, power, esteem (dignity), the basis of reparation in the society or nation. This is accomplished by, a. compensation, both real and symbolic; b. restitution; c. rehabilitation; d. commemoration.
2. Relieving the victims' stigmatisation and separation from society. This is accomplished by, a. commemoration; b. memorials to heroism; c. empowerment; d. education.

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[88] E. Wiesel, "Listen to the Wind," *supra*., n. 31.
[89] Y. Danieli, "Preliminary reflections from a psychological perspective," *supra*. n. 82.

3. Repairing the nation's ability to provide and maintain equal value under law and the provisions of justice. This is accomplished by, a. prosecution; b. apology; c. securing public records; d. education; e. creating national mechanisms for monitoring, conflict resolution and preventive interventions.
4. Asserting the commitment of the international community to combat impunity and provide and maintain equal value under law and the provisions of justice and redress. This is accomplished by, a. creating ad hoc and permanent mechanisms for prosecution (e.g., ad hoc Tribunals and an International Criminal Court); b. securing public records; c. education; d. creating international mechanisms for monitoring, conflict resolution and preventive interventions.

It is important to emphasise that this comprehensive framework, rather than presenting *alternative* means of reparation, sets out necessary *complementary* elements, *all* of which are needed to be applied in different weights, in different situations, cultures and context, and at different points in time. It is also crucial that victims/survivors participate in the choice of the reparation measures adopted for them.[90] While justice is crucially one of the healing agents, it does not replace the other psychological and social elements necessary for recovery. It is thus a necessary, but not a sufficient condition for healing.

Some of these elements had already been recognised among the measures recommended in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[91] the Magna Carta for victims. These elements include, at the international and regional levels, improving access to justice and fair treatment, restitution, compensation and necessary material, medical, psychological, and social assistance and support for such victims. Adopted in 1985 by the UN General Assembly, although it was conceived and drafted in what was then the UN Crime Branch, the Declaration was listed as well by the UN Commission on Human Rights as a human rights instrument – one of very few such documents.

The above framework partly informed the 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[92] which were adopted on 16 December 2005.[93] Earlier in

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[90] "A constant under all these approaches is the need to involve the victims and their organizations in discussions about what reparations, like other post-conflict strategies, should look like." Naomi Roht-Arriaza, "Reparations in the aftermath of repression and mass violence," *supra*. n. 85.
[91] G. A. res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, at 213, U.N. Doc. A/40/53 (1986).
[92] Commission on Human Rights Res. E/CN.4/2005/L.48 (2005).
[93] G.A. res. 60/147.

that year, the United Nations Human Rights Commission also took note, with appreciation, of the recently revised Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, updated by Professor Diane Orentlicher.[94] This set of principles includes the right to know, the right to justice, and the right to reparation/guarantees of non-recurrence.[95]

G. *The Reparative Aspects of Victims' Participation in the Justice Process*

Although the above study focused on the meanings of reparation to victims and not on reparative justice generally, it clearly hints at some aspects of what victims consider healing or reparative in the justice process as a whole. Indeed, many of the aforementioned healing elements that victims identified can, and optimally *should*, be fulfilled through the justice processes. As acknowledged by Supreme Court Justice Albie Sachs of South Africa, "Justice is also in the process, not only in the outcome".[96] I refer here in particular to *reparative justice* processes, in which reparation *per se* is neither the sole component nor the only ultimate goal for the victims. Every step throughout the justice experience as a whole – from the first moment of encounter of the Court with a potential witness through the follow-up of witnesses after their return home to the aftermath of the completion of the case – presents an opportunity for redress and healing. Conversely, every step throughout the justice experience might exacerbate the conspiracy of silence by missing or neglecting the opportunity for healing victims and reintegrating them into their communities and societies, or worse, by (re)victimising and (re)traumatising victims, or compounding their victimisation. Thus, what follows addresses what it is about both courts' processes and outcomes that might miss opportunities but, when done optimally, might help victims. An overarching psychological concern must be to remain sensitive to who the survivor is and where she or he is along the posttraumatic healing time-line: At what point in time do you meet him or her? Is it when the victim/survivor is still in shock and fully symptomatic? When the survivor is in a DP camp? Already somewhat settled? At home? Years later? And to tailor your approach accordingly.

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[94] U.N. Doc. E/CN.4/2005/102/Add.1 (2005).

[95] *See also* The Administration of Justice and The Human Rights of Detainees, Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997).

[96] Justice Albie Sachs, the Raul Wallenberg Memorial Lecture at the International Human Rights Symposium to educate leaders of tomorrow. Osgoode Hall Law School, York University, Toronto, Canada (17 January 2005).

1. *(Missed) Opportunities and Further Victimisation*

Tragically, as with all-too-many other legacies mentioned above, the continuing attempted denial of both the Armenian genocide and the Nazi Holocaust, and the legacy of the Nuremberg trials with regard to Holocaust victims, foreshadow ongoing problems. Consider also, the distance in time from the genocide in Cambodia in the mid 1970s to the creation of the Extraordinary Chambers in the Courts of Cambodia to prosecute its perpetrators.

2. *Remote and Exclusionary Justice: Justice for the World vs. Justice for Victims*

At Nuremberg, the decision to rely primarily on documentary evidence minimised the role of victims/survivors in the trials. Moreover, by focusing mostly on war crimes, the trials failed to comprehend the full scope of the Jewish tragedy of the Holocaust. While aiming at the best judicial methodology, the Nuremberg trials have thus, either by design or unwittingly, nonetheless participated in the conspiracy of silence, particularly about the *nature* and *meaning* of the survivors' Holocaust experiences. In that, the trials did not differ from the ubiquitous behaviour of the post-Holocaust world. As a result, the trials not only missed a healing opportunity of welcoming demoralised survivors to a world with justice, but they added little meaning to the survivors and their re-emerging communities. Not until the end of the 1990s did various European countries officially begin observing Holocaust Memorial Day. Not until 27 January 2006 did the United Nations observe the first International Day of Commemoration in Memory of the Victims of the Holocaust.

Frederick Terna, a survivor of various concentration camps, among them Ghetto Theresienstadt, Auschwitz, and Kaufering (a sub-camp of Dachau), remembers:

> I was hospitalized in Bavaria and then in Prague when the trials started in 1945–46. Recovering from the physical effects of the camps after liberation absorbed a good deal of attention. Then followed the need to get the basic necessities: food, shelter, clothing, in an environment that was less than supportive. Attempts to recover property or possessions were rebuffed at every turn, which could be summed up by an official's comment to me, "You must have been some scoundrel to have survived concentration camps." There were but few survivors of the Prague Jewish community. Communication was minimal and focused on day-to-day problems.[97]

His comments presage the immediate aftermath of so many other massive traumata. For example, consider the lives of victims in Northern Uganda right now. They too are just trying to survive. Abducted and sexually enslaved girls, now

[97] Interview with Frederick Terna (31 October 2005).

back in their communities, are rejected from their families, begging in the streets, becoming prostitutes and, in some cases, forced to marry their perpetrators so that they have a livelihood and can support their babies.

Terna continues:

> We wanted to know whether the commanders and troops of the SS of the camps where we had been inmates were captured and brought to trial. What we knew did not raise our hopes for justice. Even collaborators among the Czech officials who during the war helped rounding up Jews were often employed in their former positions. We were told again and again how lucky we were to survive, that we should keep quiet, and, above all, should not try to get back any of our family's possessions.
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> Generally, I was aware that the trials were going on, who the accused were, and I followed it as closely as the newspapers allowed me, but I do not remember details. There and later, in Paris, I most likely read the local papers, the New York Herald Tribune and Stars and Stripes. Of course, I remember that Goebels committed suicide. We were far removed from the action. They were important not on an immediate personal levels other than it is time those guys are indicted for what they did. For example, questions raised by survivors even after stating "Good. About time," included, "What is it going to do?" "Can it bring one person back to life"? But these were not ongoing conversations.
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> The Nuremberg trials were seen as a necessary action. War crimes needed to be defined and punished, but the trials did not have an impact on us as survivors. There was only a vague understanding about the extent of the destruction of Jewish communities throughout Europe. The few who returned knew about the loss of their own family and that of friends. We grieved about the loss of those we knew about.
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> Justice was a far-away concept. It certainly was not available on a personal or local level. The Nuremberg trials were a distant happening, important for the abstract concept of international law, but did not touch us personally then.
> The general amnesia about the Shoah lasted for decades. It is only now, nearly three generations later, that we seem more ready face that past and to appreciate the importance of the Nuremberg trials.[98]

Yisrael Gutman, a Holocaust survivor, Director, Holocaust Research Centre, Yad Vashem and Professor, Institute of Contemporary Jewry, Hebrew University of Jerusalem, Israel, adds his point of view:

> I was an activist at that time and walked on foot from country to country the trials did not even come to mind. We did not read newspapers. No one sought us as a community that had anything to do with the trial. No one tried to approach us and say: Do you have anyone who will be there? Do you have witnesses? They did not seek any of it. If I showed up there they would not have let me in. It was as though

[98] Interview with Frederick Terna, *id.*

> unrelated. The only interest was among the warring powers. It was not about people or anything to do with racism. They dealt only with the war: Who gave the order? Who was responsible for the outbreak of the war? How were prisoners treated?
>
> The survivors, especially the Jewish survivors, did not count at all. No prosecutor at the trial said: "I choose to deal with the Jewish matter. The trials were about the military, about concentration camps – but not about Jews. At most, witnesses said "those poor people" and put them aside".[99]

A recent example of a missed opportunity by deliberate exclusion is the Civil Defence Force (CDF) case in the Special Court for Sierra Leone.[100] The case considered wide-spread killing and offences against the person, but excluded charges of sexual violence. As women called to testify invariably spoke of the sexual violence and systematic rape they suffered, the Prosecution decided to stop calling female witnesses. The judges refused to have the indictment amended even though the trial had not yet begun. This is in stark contrast to the Akayesu case before the International Criminal Tribunal for Rwanda (ICTR). There, the trial was temporarily suspended to allow the prosecutor to investigate. Subsequently, the indictment was amended 5 months into trial to include cases of sexual violence.[101]

In the Thomas Lubanga case before the International Criminal Court (ICC), the prosecution is focusing on the undoubtedly important use of child soldiers but is not pursuing the equally important issues of sexual violence. Some observers wonder whether this is another case of exclusion, and an unduly narrow focus for the Court's first case.[102]

Victims/survivors have also chosen exclusion as a statement of protest (refusing to testify in response to the ICTR case of the laughing judges below) or refusal of reparation as "blood" or "dirty" money, such as some of the Holocaust and Argentine survivors quoted above.

The remote justice of the International Criminal Tribunal for the former Yugoslavia (ICTY), ICTR and ICC, has faced the similar consequent challenges to Nuremberg of (potential) irrelevance to and neglect of the realities and concerns of millions of victims and the societal and cultural contexts in which they live.[103] Research[104] conducted in the former Yugoslav federation and in Rwanda

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[99] Interview with Yisrael Gutman (8 December 2005).

[100] Sara Kendall and Michelle Staggs, "Silencing Sexual Violence: recent Developments in the CDF case at the Special Court for Sierra Leone," (June 2005), available at: http://socrates.berkeley.edu/~warcrime/Papers/Silencing_Sexual_Violence.pdf.

[101] See Edward M. Wise, Ellen S. Podgor and Roger S. Clark, *International Criminal Law: Cases and Materials* 682 (2nd ed. 2004).

[102] On the CDF Trial see, Sara Kendall and Michelle Staggs, *supra*. n. 100.

[103] See also E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague, supra*. n. 29: "This is regrettable, as it has deprived the people of the former Yugoslavia of an independent focal point for analyzing the past war devoid of nationalist distortions," at 144.

[104] Stover & Weinstein (eds.) *My Neighbor, My Enemy, supra*. n. 29.

between 1999 and 2002 suggests that while informants generally supported trials as a means of punishing the guilty, they viewed the ad hoc international tribunals as distant institutions that had little to do with their lives. Eighty-seven percent of 2,091 Rwandans surveyed in 2002 were either "not well informed" or "not informed at all" about the work of the international tribunal in Arusha. Similarly, in their survey of 1,624 residents of Croatia and Bosnia, a significant number of Serbs and Croats expressed strong resentment toward the Hague tribunal largely – biased against their national group.

Each of the tribunals and the ICC has undertaken progressively outreach activities to attempt to avert these dangers and meet the challenges. The ICC strategies for informative outreach[105] and access should be regularly monitored and evaluated to ensure that they realise the spirit of the Rome Statute for victims' participation and reparation. Data should be regularly and systematically collected from the outset on victims' attitudes and feelings about every aspect of testifying, and of their satisfaction with the justice process.[106] When these strategies are successful, the victims' traumatogenic sense of having been forgotten in a world where the *conspiracy of silence* rules without solidarity and compassion, might lessen, and their sense of empowerment, efficacy and control, and of belongingness to their own community and the community of humanity would augment their healing and hope for a future free of atrocities.

Pursuing justice and truth nationally as well as internationally should reduce both the sense of irrelevance of remote justice alone, and the witnesses' estrangement and possibly threat from their communities after testifying.

a. *Being Treated with Dignity and Respect*

In one particularly egregious example of judicial insensitivity, at the ICTR Butare trial, the judges guffawed during the testimony of a rape victim. They suddenly burst out laughing while witness TA, a victim of multiple rapes during the genocide, was being cross-examined by a defence lawyer.

> As lawyer Mwanyumba ineptly and insensitively questioned the witness at length about the rape, the judges burst out laughing twice at the lawyer while witness TA described in detail the lead-up to the rape. Witness TA had undergone a day and a half of questioning by the prosecutor, before being put through a week of cross-examination by the counsel of the six defendants. One of the more offensive questions put by defence lawyer Mwanyumba included reference to the fact that the witness had not taken a bath, and the implication that she could not have been

[105] Available at: www.icc-cpi.int/outreach/o_strategicplan.html. See also, "The ICC organises open discussions in Bunia (Ituri) and Béni (North Kivu)", ICC press release, 10 March 2008, available at: www.icc-cpi.int/press/pressreleases/345.html.

[106] These should be collected regularly and systematically as well for the Extraordinary Chambers in the Courts of Cambodia.

> raped because she smelled. Other questions asked were, "Did you touch the accused's penis?", "How was it introduced into your vagina?" and "Were you injured in the process of being raped by nine men?" To which witness TA responded, "If you were raped by nine people, you would not be intact.[107]

The three judges – William Sekule (Tanzania), Winston Maqutu (Lesotho) and Arlette Ramaroson (Madagascar) – never apologised to the rape victim on the stand, nor were they reprimanded in any way for their behaviour.

> She said that originally she had agreed to testify when she was asked because she thought that if she refused the strangers (the ICTR investigators), they would "think I had lied and nothing would happen to those in jail". Witness TA lost her whole family during the genocide. She said: My parents, my brother and my sister were killed. I'm all alone. My relatives were killed in a horrible fashion. But I survived – to answer the strange questions that were asked by the ICTR. If you say you were raped, that is something understandable. How many times do you need to say it? When the judges laughed, they laughed like they could not stop laughing. I was angry and nervous. When I returned, everyone knew I had testified. My fiancé refused to marry me once he knew I had been raped. He said, you went to Arusha and told everyone that you were raped. Today I would not accept to testify, to be traumatized for a second time. No one apologized to me.
>
> Only Gregory Townsend [the ICTR prosecuting lawyer] congratulated me after the testimony for my courage. When you return you get threatened. My house was attacked. My fiancé has left me. In any case, I'm already dead.[108]

In a society such as Rwanda, where women are valued highly for their roles as wives and mothers, witness TA's reintegration into society was very much predicated on her 'marriageability.' The exposure of TA's status as a rape victim following the publicity that surrounded the incident resulted in her fiancé breaking off their relationship. A split second of careless laughter by the ICTR judges destroyed this woman's best chance to rebuild her life".[109]

Stover adds,

> On leaving the courtroom, witnesses are generally anxious to receive some form of appreciation from their prosecutors, but often the lawyers, for some reason or another, are not available to debrief or even thank them. Witnesses may also feel that the court did not "respect" them, especially if they had to endure an intense cross-examination or were not given extra time to say what they wanted at the end of their testimony. And, in a few cases, witnesses may even travel to The Hague but end up not testifying for trial-related reasons.

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[107] See, "UN Judges Laugh at Rape Victim," available at: www.globalpolicy.org/intljustice/tribunals/2001/0512rwa.htm. See also, B. Nowrojee (2005) " 'Your Justice is Too Slow' Will the ICTR Fail Rwanda's Rape Victims?", UNRISD Occasional Paper 10, at 24.

[108] Nowrojee, *id*.

[109] See also (then President) Judge Pillay's cautious statement about the incident, ICTR/INFO-9-3-07.EN Arusha, 14 December 2001 available at: http://69.94.11.53/ENGLISH/PRESSREL/2001/9-3-07.htm.

> The key here is to ensure that victim-witnesses, especially those who have suffered rape or torture or witnessed the death of family members, testify in an environment that is, to the greatest extent possible, *predictable and controlled*. Judges must be proactive in the courtroom and intervene if a prosecutor or defense counsel begins to insult, badger, or manipulate a witness.[110]

ICTY Witnesses were embittered by what they viewed as extremely short prison sentences. Still others said that their "work as a witness" would only be complete once they had testified against *local* war criminals whom they held directly responsible for the deaths of family members and neighbours.

Both Dembour and Haslam's[111] and Stover's[112] analyses of ICTY trial transcripts present ample evidence of insensitivity and inappropriate, un-empathic behaviour by judges toward victim-witnesses. Dembour and Haslam go as far as to recommend creating "a space for the victims to tell their stories in non-legal arenas [that] would be at least as, if not more, beneficial to them than their participation in the ICTY".[113] Mollica goes as far as to suggest that the human rights and humanitarian fields must shift their focus away from strict legal definitions, link their work to the healing process and extend a commitment to providing universal medical and mental health care to all victims of violence [It] must ask: "How are my projects and policies affecting the health and well-being of survivors? Are these projects promoting the self-healing of the communities and persons being served?[114]

Even under optimal conditions, in a society mindful of victims' rights, individual rape victim/survivors have mixed reactions to participation in legal processes. A 1999 Canadian study of rape victims who had pursued compensation though civil suits and quasi-judicial remedies[115] found testifying "completely anti-therapeutic" and reported some negative emotional consequences" from their participation in the judicial process (not just from testifying), including depression, suicidal tendencies, frustration, and anger. Despite these stresses, a plurality (48 percent) reported that the overall effect of the experience had been positive, giving them a "sense of closure, validation, empowerment, or relief.

Indeed, my own ongoing psychosocial project in Bosnia and Herzegovina which I had, in uninspired prose, named "Promoting a Dialogue," was renamed by its participants, "Democracy Cannot be Built with the Hands of Broken Souls."

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[110] E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague, supra*. n. 29, at 129–30.

[111] M-B. Dembour & E. Haslam, "Silencing hearings? Victim-witnesses at war crimes trials," *EJIL* (2004) 1, at 151–177.

[112] Stover, *supra*. n. 29.

[113] *Supra*. n. 111 at 117.

[114] R.F. Mollica *Healing Invisible Wounds*. New York: Harcourt, Inc. 2006, at 231.

[115] Bruce Feldthusen "Therapeutic Consequences of Civil Actions of Damages and Compensation Claims by Victims of Sexual Abuse," in *Canadian Journal of Women and the Law* 12(200) 83.

b. *Being Afforded Support, Assistance and Protection*

Justice loses its meaning for the victims when it does not provide full – both physical and psychosocial – protection, support and assistance while using the victims as witnesses. There are ample example from both the ICTY and ICTR of the negative impact of the absence of these crucial measures.[116] These problems were prevalent particularly in the early stages. Later, mechanisms were put in place.

In 2002, the Coalition for Women's Human Rights in Conflict Situations prepared a comprehensive set of recommendations for policies and procedures for respecting the needs and effectively involving women in the ICTR process.[117] The recommendations deal with procedures before, during and after the trial designed to protect the witnesses' right to life and identity and their psychological integrity.

Goetz[118] elaborates:

> The issue of medical care for victims testifying before the Tribunal has been seriously criticised by victim groups in Rwanda (AVEGA and IBUKA being the leading critics). Overwhelmingly, victims testifying for rape offences are HIV positive and need medical assistance. The ICTR was committed to providing medical assistance to all witnesses under the Tribunal's Witness and Victims Support Section (WVSS), however this did not extend to long-term needs when witnesses returned to Rwanda after testifying. Women's rights groups in Rwanda were appalled and launched an international petition against the Tribunal and the UN advocating against cooperation with the process (resulting in diminishing numbers of testimonies for gender violence). They claimed that the Tribunal operated a double standard: the male perpetrators in the custody were provided with anti-retroviral treatment, while they, the female victims were denied the vital treatment. The UN held that the Tribunal was not a humanitarian agency, and other UN agencies located in Rwanda, such as UNDP and UNICEF were better placed to ensure the long-term provision of medical care to all victims of the genocide.

However, the ICTY and ICTR as well as the Special Court for Sierra leone, none of which have a mandate to award compensation to victims, could not provide for their long-term needs as a form of reparation within the framework of reparative justice. Compensation was to be claimed through national courts under Rules 105 and 106 of the Composite International Diagnostic Interview Rules of Procedure and Evidence.[119]

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[116] Available at www.womensrightscoalition.org/advocacyDossiers/rwanda/witnessProtection/report_en.php and www.womensrightscoalition.org/advocacyDossiers/rwanda/witnessProtection/protectionofwitnesses_en.php.

[117] *The Protection of Women as Witnesses and the ICTR* (prepared by Eva Gazurek and Anne Saris) found at www.womensrightscoalition.org/advocacyDossiers/rwanda/witnesses.

[118] M. Goetz. *From Victims to Rights Holders: Women and Girls' Demands from Transitional Justice*, Actionaid 2006.

[119] See also Nowrojee, *supra*. n. 103.

Victim and Witness Units should therefore make periodic assessments of the most vulnerable witnesses and monitor their situation. They should also, in consultation with the prosecutor's offices, conduct pre-trial assessments in communities where it is likely that cases will increase inter-group tensions and animosities, and try to devise appropriate protective and conflict resolution mechanisms.

In an her article *Trauma and isolation await many witnesses of UN court at home*,[120] Isabelle Wesselingh reports that "Many war crimes victims who testify at the UN court for the former Yugoslavia return home traumatized after a psychologically demanding court appearance and often feel isolated."

Wesselingh elaborates:

> In stark contrast to their crucial role in the legal process, the victims that testify in The Hague find themselves alone upon their return home.[121] There is no follow-up counseling or material help for the witnesses who often come back to a country facing economic hardship. "They are proud to have testified but post-traumatic stress is heavier after they leave The Hague because they had to recount very difficult events," said Dubranka Dizdarevic, a Sarajevo psychologist who has worked with torture victims that testified in The Hague.
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> Some witnesses are shunned by their community because they gave evidence about crimes committed by fellow villagers. "One of my colleagues at the hospital, a Bosnian Serb nurse, fell into a depression for almost a year after she went to The Hague. For lots of people around her, the people who work with the tribunal are traitors," Miodrag Milanovic, a psychiatrist from Prijedor in northwestern Bosnia, said.
>
> The dire economic situation and the sense of insecurity, especially for victims living in areas where nationalists still hold power, take a heavy toll on those who testify. "Witnesses are telling us they need material goods. Sometimes the witnesses feel used, they have expectations that the court cannot fulfill," said Wendy Lobwein, Deputy Head, Victims and Witnesses section of the ICTY and a trauma counselor.
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> To soften the blow for returning witnesses, the victims and witnesses section of the tribunal [decided to] set up a health and welfare network in Bosnia-Hercegovina where 59 percent of the tribunal's 2,330 witnesses who testified since 1998 reside.
>
> In December 2003, in a conference paid for by the European Union, 24 psychologists, psychiatrists and social workers from Bosnia – Bosnian Serbs, Bosnian Croats and Bosnian Muslims – met at the tribunal. The goal of the conference was to exchange experiences and discuss a protocol for follow-up services when witnesses return home, especially in regard to issues of confidentiality.
>
> "The professionals who work with victims feel very isolated in Bosnia. It is very positive to be able to meet each other here in The Hague and see that all the victims are equal and have the same problems," Tuzla psychiatrist Alija Sutovic, who works with survivors of the Srebrenica massacre, told AFP.

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[120] Agence France-Presse, 16 January 2004.

[121] Stover also reports that the few ICTY witnesses he interviewed who experienced cathartic feelings immediately or soon after testifying in The Hague found that" the glow quickly faded once they returned to their shattered villages and towns." (*supra*. n. 29 at 131).

According to Lobwein,[122] this conference was followed by others convening health care specialists from Serbia and Montenegro, Croatia and Kosovo. Support group members were brought to The Hague to learn in vivo the workings of the Court to enable them to provide meaningful support to victim/witnesses before, during and after testifying. This led to the establishment of a support network in place in every state.

A final conference brought 60 select members of these groups to Sarajevo, together with 20 judges and prosecutors from each state or province, to apply the knowledge they had accumulated in The Hague and from their own experiences to future collaboration and exchange of witnesses.

Lobwein concluded, "It worked, because 18 months later three states signed a collaborative agreement. It was a dream come true."

It behoves the ICC to learn from the earlier tribunals' flaws and create such networks at the very outset of the investigation stage to support victims prior to, during and following giving testimony.

H. *Conclusion*

Emphasising the need for a multi-dimensional, multi-disciplinary, integrative framework for understanding massive trauma and its aftermath, particularly the *conspiracy of silence*, this chapter has examined victims/survivors' experiences from the psychological perspective. It has delineated victim/survivors' needs and concerns as they apply to reparative justice, in which reparation *per se* is neither the sole component nor the only ultimate goal for the victims. Rather, reparative justice insists that every step throughout the justice experience as a whole – from the first moment of encounter of the Court with a potential witness through the follow-up of witnesses after their return home to the aftermath of the completion of the case – presents an opportunity for redress and healing. Conversely, every step throughout the justice experience might exacerbate the conspiracy of silence by missing or neglecting the opportunity for healing victims and reintegrating them into their communities and societies, or worse, by (re)victimising and (re)traumatising them, or compounding their victimisation. While restitution, rehabilitation or compensation may only come after the process has concluded, the process may nonetheless provide numerous forms of satisfaction along the way, particularly if all professionals interfacing with victims act in an empathic, dignified and respectful manner, mindfully protecting victims from further trauma and from unnecessary bureaucracies, and facilitating opportunities

[122] Interview with Wendy Lobwein (7 March 2008).

to contribute to a collective record and shared memory. If potential witnesses come to regard their treatment as demeaning, unfair, too remote, or unconcerned with their rights and interests, this neglect may hinder the future cooperation of the very people we are trying to serve.

This requires ongoing training of all professionals, be it judges, prosecutors, lawyers, interpreters, on all aspects of the courts' mandates related to victims, including self-care to counteract vicarious victimisation.[123] Much of the substance of this chapter should be also taken as an invitation for sorely needed systematic empirical research and curricula development. The task may be immense, but in the long run the results will be an invaluable building block in the edifice of international law.

Regarding funds, which all-too-often are insufficient, I concur with Stover that in the final analysis it seems hypocritical to create an international court with a wide array of witness protections and support services on paper, and fail to provide its staff with adequate resources to fulfil their duties and obligations as set forth in courts' Statute and Rules.

Witnesses in Stover's ICTY study gave the highest marks to prosecutors and investigators, who treated them with respect, informed them of their entitlements, apprised them of development in their case, prepared them to testify, and debriefed them after they left the stand. According to them, good pre-trial preparation included informing witnesses of their trial date well in advance; apprising them of available protective measures; maintaining contact during the pre-trial phase, especially concerning delays in trial dates; orienting them to the physical layout of the court; and briefing them on the adversarial nature of the trial proceedings. Above all, he suggests, prosecutors and investigators should be required during their first encounter with all potential witnesses to inform them of their rights and entitlements. The prosecutor's office should also develop a procedure, in consultation with the witness section, for following up with prosecution witnesses should an appellate chamber overturn a guilty verdict in cases in which they testified.[124] I agree wholeheartedly with these recommendations.

Judges can play an extremely important role in ensuring that witnesses are treated with dignity. In particular, they should be vigilant of and more quickly to end any abusive or disrespectful behaviour on the part of both defence counsel and prosecutors during cross-examination; provide witnesses with an opportunity

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[123] Danieli, Y. (ed.) (2002). *Sharing the Front Line and the Back Hills, supra*. n. 82. See also, Danieli, Y. (1994). "Countertransference, Trauma and Training," in J.P. Wilson and J. Lindy (eds.), *Countertransference in the Treatment of Post-Traumatic Stress Disorder*, New York: Guilford Press at 368–388.

[124] E. Stover. *The Witnesses: War Crimes and the Promise of Justice in The Hague, supra*. n. 29, at 152.

to make a statement at the conclusion of their testimony; conduct periodic assessments of the effectiveness of the court's protection measures and issue recommendations for improving these procedures.[125]

One of the obstacles to mourning experienced by survivors is *survivors' guilt*. The act of public witnessing and giving testimony, and the judgment by the Court, give the victims vindication for their survivor's guilt. Also, every victim has only his or her own story of rupture. By generating records, courts help the victims not only to create a coherent narrative of what they themselves have gone through, and a sense of what relatives whose fate they have no knowledge of have suffered, but also to comprehend the global context for their suffering.

[125] *Id*. at 153.

Reparation Programmes: A Gendered Perspective

By Anne Saris and Katherine Lofts***

A. *Introduction: Gendered Violence and International Justice*

International law is beginning to recognise that men and women do not experience political violence and other gross violations of human rights in the same way.[1] In addition to the spectrum of violations experienced by men, women are subjected to sexual violence much more systematically than men, as well as to other violations more specific to their gender, including reproductive violence and forms of domestic enslavement.[2] In many cases, violence directed toward women because they are women is part of a larger strategy of political domination, and gendered violence is used as a weapon of conflict.

While some of the consequences of violence against women are specific to the country or region in which the conflict has taken place, a number of general consequences can be noted. These may include:

(1) harm to women's reproductive and sexual organs;
(2) a subsequent inability to have a normal sex life;
(3) a high risk of HIV infection and, because of lack of adequate medication, the associated risk of developing full-blown AIDS;
(4) a sense of shame or loss of honour;
(5) a sense of guilt for: (a) having been unable to protect family members and/or themselves; (b) not committing suicide before the rape and abuse could occur; (c) having survived when other family members were killed;
(6) an inability to face society, knowing that a pregnancy is the result of rape; and

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[1] Colleen Duggan & Adila M. Abusharaf. "Reparation for Sexual Violence in Democratic Transitions: The Search for Gender Justice," in Pablo de Greiff (ed.) *The Handbook of Reparations* (Oxford: Oxford University Press, 2006) 623 at 624.

[2] Sexual violence is also committed against males, but not to the same extent, nor as systematically, as it is committed against women and girls.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 79–100.

(7) for girls who have been raped or sexually assaulted, fewer prospects for marriage and a normal life in the future;
(8) a woman's inability to face her children because she was not able to protect them from sexual abuse or, perhaps, because they witnessed her rape and sexual abuse; and
(9) long-term feelings of insecurity and vulnerability.[3]

Over the last fifteen years, the international legal response to gendered violence has changed dramatically.[4] Judgments rendered by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been groundbreaking for their recognition of sexual violence as among the most serious crimes under international law.[5] These developments have increased the visibility of gendered violence, leading to the explicit inclusion of rape, sexual slavery, enforced prostitution, forced pregnancy, gender-based persecution, sexual enslavement, enforced sterilisation, and sexual violence as war crimes and crimes against humanity in the Rome Statute of the International Criminal Court.

Furthermore, jurists and policy-makers have slowly begun to turn their attention to the issue of gender and reparation, largely due to a tremendous push from grassroots feminist and victims' groups in both developing and developed nations. More recent processes of truth-telling and reparation show movement toward greater gender sensitivity in transitional justice mechanisms. For example, sexual violence was not even included among those principle acts to be documented by the truth commission in El Salvador in 1993. By contrast, a decade later in Peru, incidents of sexual violence "figure[d] prominently" in the Commission's report, and will be an explicit head of compensation under the proposed reparation programme. Such changes suggest that gender-based violence is increasingly being

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[3] Rights & Democracy. Women's Right to Reparation," Working Paper for Pparticipants of the International Meeting on Women's Right to Reparation, 19–21 March 2007, Nairobi, Kenya, (unpublished) at 12.

[4] Katherine Franke, "Gendered Subjects of Transitional Justice" (2006) 15 Colum. J. Gender & L. 813 at 816. As Duggan and Abusharaf note, "[a]dvancements in international law reflect the evolution of the treatment of sexual violence in international humanitarian and human rights law as well as international criminal law from a crime 'against family honor and rights' or as 'outrages against personal dignity' (Fourth Geneva Convention) to the recognition of rape and other forms of sexual violence as a crime against humanity (Statutes of the International Criminal Court, International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda)" (Duggan and Abusharaf, *supra* n. 1 at 624).

[5] These judgments include *Furundzija* [Furundzija,"Lasva River Valley" (10 November 1995), *amended*, No. IT-95-17/1-PT (Mar.3, 1998)], the *Celebici* case [Delalic and others, "Celebici," No. IT-96-21 (21 March 1996)], and *Akayesu* [Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)].

viewed as a fundamental issue "which appears more centrally on the agenda of transitional governments".[6]

Nevertheless, much work in this area remains, and much of the discourse and practice surrounding reparation continues to be insensitive to the specificities of gender. This gender-blindness is clearly evident in national reparations programmes that have failed to specifically address the needs of women and girls who have experienced sexual violence.[7] It is also evident in cases where women's views have been incorporated in the design and execution of reparations programmes only nominally.[8] As Duggan and Abusharaf note, however:

> The public debate which often accompanies the creation of reparations programs provides a historic opportunity not only to discuss why sexual violence figures so prominently as a tool for political repression but also to lay the groundwork for the social transformation of gender-discriminatory attitudes.[9]

In order to seize such opportunities for meaningful change, a gendered approach to reparation must expose the way in which rigid, conceptual distinctions between development and reparation lose coherence in the aftermath of gross and systematic human rights violations. Such an approach must also highlight the ways in which classic models of reparation emphasising restitution and compensation fail to address the pre-existing inequalities and injustices that enabled violations to occur in the first place. While governments "cannot […] do development and call it reparation",[10] the concept of reparation must be expanded, giving greater scope to questions of distributional justice usually thought to be the domain of development. One possible solution is to re-conceptualise reparation as a process – a participatory mode of reparation that will recognise victims as valued members of the community, acknowledge the harms they have suffered, and engage them in addressing the deeper, more systemic roots of violence and injustice.

This chapter will examine reparation through the lens of gender, emphasising the critical importance of gender-sensitive reparation programmes for societies in transition. Part II of this chapter will examine reparation as an obligation under international law, Part III will explore different conceptual frameworks for understanding reparation, and Part IV will address the specific experiences of women and girls during and after conflict. Finally, Part V will examine the ways in which the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation*

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[6] Duggan and Abusharaf, *supra* n. 1 at 636.

[7] *Id.* at 634. For example, programmes such as those in Chile, Brazil and Argentina.

[8] Beth Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa" in Ruth Rubio-Marin (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006) 48 at 55.

[9] Duggan and Abusharaf, *supra* n. 1 at 637.

[10] Rights & Democracy, "Women's Right to Reparation," *supra*., n. 3 at 32.

addresses the specific needs of women and girls by re-conceptualising reparation in a gender-just way.

1. *A Word about Key Terms*

Gender: In this paper, we adopt the definition of gender as a social category that is "cross-cut by other axes of difference, including age/life-cycle position, marital status, ethnicity, race, religion, class, and caste," as well as being "shaped by political, economic, social, and cultural relations and contexts".[11]

Reparation: According to *the 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*,[12] the notion of reparation can encompass a vast array of measures: restitution, as those measures to restore the victim to his/her original situation before the violation including restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property; compensation for any economically assessable damage as appropriate and proportional to the gravity of the violation including physical or mental harm, lost opportunities including employment, education and social benefits, and material and moral damages; measures of rehabilitation including medical and psychological care as well as legal and social services; measures of satisfaction including, among others, the verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, public apologies, judicial and administrative sanctions against persons liable for the violations, commemorations and tributes to the victims; and guarantees of non-repetition including measures to contribute to prevention, such as ensuring effective civilian control of military and security forces, protecting human rights defenders, providing human rights education and reviewing and reforming laws contributing to or allowing gross violations of international human rights law.

Transitional justice: The term "transitional justice" is commonly defined as a "conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes".[13] Nevertheless, this term itself is "a bit slippery".[14] However, emphasis

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[11] Ruth Rubio-Marin, Foreword, in *What Happened to the Women? Gender and Reparations for Human Rights Violations, supra*. n. 8 at 18.

[12] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*, UN Human Rights Committee, *56*th *meeting*, chap. XI, E/CN.4/2005/L.10/Add.11.

[13] Ruti Teitel, "Transitional Justice Genealogy" (2003) *Harvard Human Rights Journal* 16 at 69.

[14] Naomi Roht-Arriaza, "The New Landscape of Transitional Justice" in Naomi Roht-Arriaza & Javier Mariezcurrena, (eds)., *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: Cambridge University Press, 2006) 1 at 1.

on the transient nature of transitional justice suggests that it will be possible to delineate a clear post-transitional state, without defining exactly of what this post-transitional state will consist.[15] In reality, such a definition is misleading, underestimating the extent to which "[t]ransitional justice will always be both incomplete and messy".[16]

The challenges facing governments and societies in transition are complex and intractable. Transitional justice has two inter-related goals.[17] The first of these is to respond to past abuses; the second is to prevent similar abuses from occurring in the future.[18] Transitional justice must thus be both backward and forward-looking. The challenge is:

> how to address the legitimate claims for justice of victims and survivors of horrific abuses in a way that treads the delicate balance between averting a relapse into conflict or crisis on the one hand, and on the other hand consolidating long-term peace based on equity, respect and inclusion.[19]

These goals can be difficult to reconcile. Countries emerging from conflict are typically impoverished.[20] Struggling to meet the basic needs of the population, transitional governments are faced with difficult choices in the allocation of scarce resources.

B. *Reparation as an Obligation under International Law*

The term "reparation" is commonly used in two different contexts. Firstly, it is used in international law to designate measures adopted for the redress of various harms suffered as a consequence of certain crimes or breaches of state responsibility.[21] In the second sense of the term, "reparation" refers more narrowly to reparations programmes – that is, to the direct provision of benefits to

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[15] *Id*.

[16] Franke, *supra* n. 4 at 813.

[17] Ellen Lutz, "Transitional Justice: Lessons Learned and the Road Ahead," in Naomi Roht-Arriaza & Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice, supra*., n. 14 at 325.

[18] *Id*.

[19] Rama Mani, "Reparation as a Component of Transitional Justice: Pursuing Reparative Justice in the Aftermath of Violent Conflict" in Stephan Parmentier and Koen De Feyter (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systemic Human Rights Violations* (Antwerpen: Intersentia, 2006), at 55.

[20] Rights & Democracy, "Women's Right to Reparation," *supra* n. 3 at 31.

[21] Pablo de Greiff, "Justice and Reparations" in Pablo de Greiff (ed.), *The Handbook of* Reparations (New York: Oxford University Press, 2006) 451 at 452. See, also, J.-Maurice Arbour and Geneviève Parent, *Droit international public*, 5ieme ed. at 593.

the victims of different types of violation, usually in the wake of a conflict or a period of political upheaval.[22] Understood in this way, the term has come to signify a "panoply of different responses to atrocities and wrongdoing".[23] It is this second sense of the term that will be the focus here.

Most human rights and humanitarian law treaties provide for a right to a remedy, often including both procedural rights to a fair hearing as well as the substantive right to a remedy.[24] In general, reparations aim at 'full restitution,' which means restoration of the victim to the condition s/he was in before the violation occurred.[25] In cases where this is not possible, such as cases in which the victim has been killed, compensation is required.[26] Reparation is thus formulated as an individual entitlement, flowing from an individualised conception of harm, and the obligation to repair individuals under international law resides with the State.

In the context of gross and systematic violations of human rights, the *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*, adopted and proclaimed by the UN General Assembly in December 2005,[27] also start with the premise that "the State is

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[22] de Grieff, *id*. at 452.

[23] John Torpey, "Victims and Citizens: The Discourse of Reparation(s) at the Dawn of the New Millennium" in Stephan Parmentier and Koen De Feyter (eds.), *Out of the Ashes: Reparation for Victims of Gross and Systemic Human Rights Violations* (Antwerpen: Intersentia, 2006) at 38.

[24] Dinah Shelton, *Remedies in International Human Rights Law*, 2nd ed. (Oxford: Oxford University Press, 2005) at 114. As Shelton states: "[t]he international guarantee of a remedy implies that a wrongdoing state has the primary duty to afford redress to the victim of a violation. The role of international tribunals is subsidiary and only becomes necessary and possible when the state has failed to afford the required relief". The nature of the obligations undertaken in human rights treaties also differs significantly from those undertaken in other types of treaties. Whereas non-human rights treaties are generally contractual in nature, the obligations encompassed by human rights treaties are owed to individual human beings, and are therefore not based on reciprocity between states. This difference produces a number of important consequences. Firstly, due to the fact that the obligations undertaken in human rights treaties are owed to individuals within the jurisdiction of a State party, and not to other states as such, loss is assessed in terms of injury to individuals, rather than in terms of injury suffered by the state of nationality (*id*. at 50). Another consequence of the special character of human rights treaties concerns the nature of the remedy owed upon breach. As Shelton notes, "the primary role of restitution in international law generally has not been mirrored in human rights law specifically because […] many of the violations are irreparable" (*id*. at 103). Nevertheless, restitution (for example, in the form of the release of detainees, or restitution of property) remains a possible remedy for human rights violations.

[25] de Greiff, *supra* n. 21 at 455.

[26] *Id*. For example, the Inter-American Court of Human Rights will order both material and moral damages in cases where *restitutio in integrum* is impossible.

[27] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, supra*. n. 12.

responsible for ensuring that victims of gross human rights violations enjoy an individual right to reparation".[28] In practice, however, cases of individual human rights violations and those that are gross and systematic differ in important ways. In the latter case, a purely individualistic notion of reparation may be both conceptually incoherent and materially impossible, given the extent and the interconnected nature of the victimisation and suffering. These differences thus have the potential to limit or render impossible conventional modes of reparation, highlighting constraints in the notion of reparation as a right inhering in individual victims of human rights violations.

C. *The Problem of Gross and Systematic Violations: Conceptual Considerations*

Shelton notes three salient differences between cases of relatively discrete human rights violations and those violations that are gross and systematic.[29] The first difference is that gross and systematic violations frequently involve numerous perpetrators and victims, and thus "may overwhelm the best efforts to provide redress".[30] Shelton cites Rwanda and Cambodia as two illustrations of situations where the sheer numbers of those involved are staggering.

A second difference is the serious lack of resources that generally follows situations of conflict. In such cases, the resources that do remain are usually already earmarked for the purposes of rebuilding, leaving little for reparation and redress.[31]

Finally, the overall social context in which the remedies for gross and systemic violations are to be provided differs in the case of gross and systematic violations.[32] In such cases, it is often the entire population that has suffered, rather than an easily identifiable subset of individuals.[33] Under these circumstances, the prospect of addressing each individual's suffering in a comprehensive way becomes an impossible task; conventional remedies may thus need to be "adjusted to achieve other goals," such as the "cessation of conflict, prevention of future conflict, deterrence of individual wrongdoing, rehabilitation of society and victims, and reconciliation of individuals and groups".[34]

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[28] Duggan and Abusharaf, *supra* n. 1 at 630.
[29] Shelton, *supra* n. 24 at 389–390.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*

In this context, development and reparation – as strategies for the building of a just and equitable society – begin to merge in important ways. Examining such strategies through the lens of gender exposes to an even greater extent the necessity of this merging, highlighting the way in which reparation must be re-conceptualised when applied concretely to the needs of women after periods of gross and systemic violations.

1. *Three Characterisations of Reparation Programmes*

In describing the nature of reparation programmes, we might think broadly of three possible conceptual frameworks. These are reparation-as-right, reparation-as-symbol, and reparation-as-process.[35] The reparation-as-right formulation has received the most currency in international practice.[36] Indeed, the majority of reparations programmes instituted to date have encapsulated this view of reparation.[37] It is premised on the principle that the violation of an individual's rights creates a corresponding individual right to a remedy, and is thus consistent with the classic juridical understanding of the consequences proceeding from a breach of international law.[38] This model emphasises individualised compensation, the goal of which is to repair harm, or at the very least to "mak[e] an effort in that direction".[39]

The second characterisation of reparation-as-symbol emphasises the role of reparation as a symbolic act. This model acknowledges that "social, moral, psychological and religious meanings are at the heart of reparation, as opposed to the economic transfers which could never achieve anything close to compensation".[40] Emphasising the symbolic nature of reparation does not imply rejecting monetary compensation, and indeed there may be a compensatory element. However, this formulation concedes the inadequacy of compensation, such that "any material transfers become symbolic objects around which wrongs are acknowledged," rather than sufficient remedies of harm in and of themselves.[41]

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[35] Geneviève Painter, "Towards Feminist Theoretical Approaches to Reparations" (Conference Paper, September 2006) [unpublished] at 3.

[36] *Id*. at 11. As Painter notes: "The Reparations-as-Rights model seems to dominate most contemporary practice and discourse on reparations. […] Among activists and commentators, there is also evidence of the predominance of the "reparations as right" model". See also, Ruth Rubio-Marín, "The Gender of Reparations: Setting the Agenda" in Ruth Rubio-Marín (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations, supra* n. 8 at 24.

[37] For example, reparations programmes in Argentina, Peru, and South Africa have taken a predominantly rights-based approach.

[38] Painter, *supra* n. 35 at 3.

[39] *Id*. Reparation through rights may also occur via the non-material, through restitution of citizenship rights or legal personality. See Painter, *supra* n. 35 at 3.

[40] *Id*. at 4.

[41] *Id*.

The aim of understanding reparations as symbolic is thus related to "meaning-construction in the public sphere".[42] Such meaning construction can convey the important message that individuals are valued members of the community, helping to restore dignity and aiding in the process of reconciliation.

Finally, reparation may be conceptualised as a process. In this view, "emphasis is placed on the role that reparations play in the complex transition out of a period of human rights violations, for individuals and for society".[43] In facilitating this process, reparations are envisaged as participatory and empowering. They seek to repair past rights violations, while at the same time looking toward the future, aiming to promote peace and the protection of rights through the linked goals of reconciliation, redistribution, and development.[44]

D. *Women and Girls' Specific Needs Regarding Reparations*

The specific issues faced by women and girls in the aftermath of conflict have not been fully taken into account in the design and execution of reparation programmes to date. Women and girls' particular vulnerability in the wake of conflict, as well as the enormous potential for societal transformation nascent in such periods, means that paying close attention to these issues is particularly pressing.

The challenges faced by women and girls in the post-conflict period are especially acute for several reasons. First of all, women must frequently shoulder heavy economic burdens in cases where a man, as the former head of the household, has been killed, disabled, or disappeared during the conflict. In cases where women are already marginalised and economically disadvantaged, this greater burden increases their vulnerability.

Secondly, the effects of sexual violence on women and girls' lives are acute and ongoing, plaguing them both emotionally and physically. These effects are compounded by negative stereotypes that continue to harm victims, often leading women to blame themselves for the crimes they have experienced.[45] For example, Gardam and Jarvis note that women who were raped during the Rwandan genocide "have been subsequently treated with suspicion," and "are accused of using the 'sex card' to avoid being massacred alongside the 'defenseless' men and children".[46] Negative stereotypes also impact on access to justice and reparation by

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Judith G. Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law* (The Hague: Kluwer Law International, 2001) at 180.
[46] *Id.*

women, who may be reluctant to come forth due to feelings of shame or fear of social ostracisation.[47]

Finally, sexual violence against women tends to continue in the aftermath of conflict, often in the form of elevated levels of domestic violence.[48] This continuation occurs in part because, as noted by UNIFEM, "women's suffering cannot be attributed solely to the conditions of political violence or regime change".[49] Rather, sexual violence is linked to pervasive underlying structural inequalities that do not end simply because peace is restored.

1. *Problems with the Reparation-as-Right Model*

If reparation is to be gender-sensitive, it must address these structural inequalities and take into account the particular ways in which women and girls experience harm. However, there are a number of ways in which current conceptions of reparation fail in this respect. As noted above, the reparation-as-right model has received the most currency in international practice. This model construes reparation primarily as an individualised legal entitlement; recognition by the State involves a process of individualisation, "first of the harmful act and later of the individual herself".[50] Such recognition may express belonging to the political community, which is important in cases where women have historically been excluded and denied the full entitlements of citizenship.[51] But as Duggan and Abusharaf caution, any programme of reparation

> will need to take into account that in many contexts, in both law and practice, women's legal autonomy, and by extension the system of individual entitlements available to them, continue to face serious obstacles.[52]

Policymakers, therefore, cannot presume that "citizenship" exists as a neutral right allowing women and men to access reparation on equal terms. Rather, pre-existing socio-cultural inequalities based on gender may create serious obstacles to women's access to reparation and the other entitlements of full citizenship.[53] These obstacles include religious and customary norms that may operate concurrently with formal law at the national level.[54] For example, as Duggan and Abusharaf note,

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[47] As Gardam and Jarvis note: "Generally speaking, the limited resources and poor legal literacy of women present significant practical obstacles to their ability to access legal or administrative remedies" (*Id.* at 181).

[48] Duggan and Abusharaf, *supra* n. 1 at 627.

[49] *Id.*

[50] *Id.* at 631.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 632.

the strict interpretation of Alwilaia ("guardianship") in some Islamic communities may supersede and circumscribe women's choices, hindering their ability to exercise their rights.[55] Thus, women's ability to access reparation must always be understood contextually, based on "a full understanding of how gender identities interact with race, class, age, religion, and other social divisions".[56]

Even if problems linked to unequal citizenship are addressed, however, other difficulties with the reparation-as-right model arise. By individualising the notion of the harm experienced into discrete and quantifiable incidences, reparations programmes risk ignoring or downplaying the systemic nature of these violations. Failing to account for such violence as a socially constructed, structural phenomenon within a broader conception of justice may mean missing an important opportunity to address pressing distributional issues that go to the heart of more trenchant inequalities. Moreover, even in cases where reparations

> do consider public and societal acknowledgement and respect for victims, the resulting remedies, such as compensation or restitution, repair the individual's 'private sphere' interests – their patrimony. This privatization process is a weakness of individual reparations measures, because it prevents a comprehensive picture of the nature and extent of the period of human rights violations.[57]

Finally, the notions of restitution and compensation underpinning most reparations programmes are highly problematic, particularly in the context of gender-based violence. This is not to suggest that monetary assistance is not of critical importance for women's well-being in many respects. Women generally have "less opportunity for economic recovery than men"[58] in the wake of conflict, and monetary assistance can help them re-establish their lives. Nevertheless, mere compensation will inevitably be grossly disproportionate to the harm suffered and the damage caused. For this reason, it may risk trivialising suffering, or simply be viewed as blood money.[59]

Furthermore, as "the central principle underlying legal reparation," restitution is an extremely difficult principle to apply after gross and systematic human rights violations.[60] Obviously, it is impossible for any remedy to succeed in wiping out all the consequences of systematic sexual violence, genocide or other gross violations of human rights.[61] But perhaps even more importantly, "[i]t is impossible to talk about 'repair' and 'restitution' to the pre-conflict situation when that situation

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[55] *Id.*
[56] *Id.* at 634.
[57] Painter, *supra* n. 35 at 13.
[58] Gardam, *supra* note 45 at 180.
[59] Mani, *supra* n. 19 at 77.
[60] *Id.*
[61] *Id.*

was marked by inequality based on gender and other aspects of identity".[62] In such cases, restoring a victim to her position before the conflict began would be tantamount to returning her to a state of marginalisation and inequality that to some extent facilitated the harms experienced in the first place.[63]

2. *Toward a Gender-Just Conception of Reparation*

Any narrow view of reparation, grounded solely on the principles of restitution and compensation, will thus be an inadequate response to gendered human rights violations. However, in beginning to look at the ways in which certain structural exclusions have perpetuated injustice and discrimination, and by examining more fundamental distributional injustices, we leave the realm of reparation as it is conventionally defined and begin to venture into the territory of development.

Some commentators strenuously disagree with this approach. For example, de Greiff is sceptical of efforts "to turn a program of reparations into the means of solving structural problems of poverty and inequality".[64] He argues that development programmes "have a very low reparative capacity, for they do not target victims specifically".[65] Indeed, many activists and victims' groups have expressed serious concern over governments undertaking development projects in the name of reparation, and at the expense of particular remedial aims. As Erika Bocanegra Torres, the Peruvian National Coordinator of Human Rights, states:

> There is a thin line between reparation and development. We have been struggling for the last three years with the TRC commission to make the case that reparation is different and development is different. And we are not against development because there is a right to development. But at the same time we need to make the case that it is one thing to be poor and another to be poor and be violated or raped.[66]

Merging development and reparation risks negating the conciliatory effects of reparation by failing to acknowledge violations as such. It is therefore crucial to differentiate between kinds of harm – for example, to distinguish between being poor, and being poor *and* violated or raped – if reparation is to fully serve its transitional purpose. Moreover, States are already under an obligation to provide social and economic development policies following conflict. This obligation co-exists with the obligation to provide reparation, and one may not be fulfilled simply through the execution of the other.[67]

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[62] Painter, *supra* n. 35 at 17.
[63] Rights & Democracy, *supra*. n. 10 at 30.
[64] de Greiff, *supra* n. 21 at 470.
[65] *Id*.
[66] Rights & Democracy, *supra*. n. 10 at 31 (from an interview with Erika Bocanegra Torres, *Area de Communicaciones, Coordinadora Nacional de Derechos Humanos*, Peru, November 2005).
[67] Duggan and Abusharaf, *supra*. n. 1 at 640.

Recognition must therefore remain central to any project of reparation, if such a programme is to have any real reparatory or corrective effect. For example, in the case of Japanese "comfort women" in the Second World War, the Asian Women's Fund for financial compensation failed to provide sufficient recognition of the violations that occurred, and was thus criticised for being "a welfare-oriented system based on gender and development needs rather than an acceptance of responsibility and an obligation to provide reparation".[68]

Nevertheless, acknowledging the necessity of retaining the particular remedial aims of reparation is neither an excuse for being unambitious, nor for accepting superficial "Band-Aid" solutions to deep-running injustices. The challenge is to keep the project of reparation distinct enough that it retains its remedial purpose, while simultaneously acknowledging to the fullest extent possible the ways in which development and reparation are fundamentally linked and interdependent. Just as harm and victimhood must be understood contextually, so must remedy and reparation be conceived of in a holistic manner, if real transformation is to occur.

Furthermore, it is crucial to examine the basic assumptions underlying the dominant reparation-as-right model, and the attempts to divorce reparation more wholly from development. Painter is astute in noting that resistance to using reparations "to promote economic redistribution or development"[69] springs from

> an underlying liberal conception of the state-citizen relationship built around a rights-bearing individual. The individual at the center of the reparatory effort is thought of in abstract and neutral terms, which means that the structural inequalities which position individuals in communities are obscured.[70]

Indeed, as this paper has attempted to elucidate, the abstract beneficiary envisaged by this liberal conception is never neutral; rather, it is always inflected by numerous factors including gender, class, ethnicity, and religion. The individual cannot be abstracted from her fundamental enmeshment within society; she cannot be extracted from the complex set of social relations in which she is implicated, nor from the socially-constructed hierarchies or power-relations that operate at the national, communal, or familial level.

In light of these observations, one possible way forward is the reparations-as-process model articulated above. Conceiving of reparations as process would allow for a kind of *rapprochement* between the concepts of reparation and development. Gendered violence is intimately linked to the production of meaning within a

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[68] *Id*. at 637.

[69] Painter, *supra*. n. 35 at 13.

[70] *Id*.

larger societal discourse; it "is part of a socio-political economy," premised on inequality and "on the desire to control women's sexuality, especially their productive and reproductive capacity". For this reason, "collective understanding of, and responsibility for, this type of violence as a socially constructed phenomenon is key to changing the status quo".[71] Conceiving of reparation as a process would allow victims to participate in the production of meaning in more inclusive and radical ways. It would place the reparative focus on the ways in which injustice is produced, rather than simply on harms already sustained.[72]

In practice, exactly how programmes premised on the reparation-as-process model are carried out will vary from context to context. Key to this approach is the engagement of victims "in processes which are genuinely democratic" and which promote meaningful participation and representation.[73] Victims must be meaningfully engaged in all stages of the design, implementation, and assessment of reparations programmes, and will thus determine what the overall contours of such programmes will be. Nevertheless, some general comments may be made.

Firstly, the symbolic aspect of reparation should be emphasised. Particularly in contexts where resources are scarce and generous monetary compensation schemes unfeasible, symbolic reparations may have powerful remedial consequences. The Inter-American Court of Human Rights has been particularly innovative in ordering a wide range of remedies for human rights violations, including the construction of public monuments, the location and reburial of victims, and the provision of grave markers.[74] Acts such as these become symbols of acknowledgement, and focal points for the process of healing. Many victims, especially women, have also emphasised the importance rehabilitation, asking for access to healthcare, psychological care, and other social services. While these measures are very much akin to developmental projects, the way in which they are framed, and the extent to which they are demanded by victims in relation to particular harms suffered, will determine their reparative value.

Finally, criminal prosecutions must remain an integral component of transitional justice strategies, and are of vital importance in the fight against impunity. However, while seeing one's tormentors brought to justice can help a victim in the healing process, an overemphasis on criminal justice provides an incomplete solution to the intractable problems facing societies in transition. A focus on criminal

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[71] Duggan and Abusharaf, *supra* n. 1 at 637.

[72] Painter, *supra* n. 35 at 10.

[73] *Id*.

[74] See, for example: Trujillo Oroza Case, Judgment of 27 February 2002, Inter-Am. Ct. H.R., (Ser. C) No. 92 (2002); Moiwana Village V. Suriname, Judgment of 15 June 2005, Inter-Am Ct. H.R., (Ser. C) No. 124 (2005); Myrna Mack Chang Case, Judgment of 25 November 2003, Inter-Am. Ct. H.R., (Ser. C) No. 101 (2003).

prosecutions must not be allowed to take away from other, less juridical aspects of transitional justice.

E. *The Nairobi Declaration: Guidelines for Implementing Gender-Just Reparation Programmes*

In 2006 and 2007, the Coalition for Women's Human Rights in Conflict Situations decided to sponsor a series of discussions on the subject of reparation, with the aim of guiding State and non-State actors toward the effective implementation of gender-just reparation programmes. The Coalition also sought to better understand what constitutes reparation from the perspective of survivors of gender crimes and their communities. The Coalition's ultimate goal was to inform the international justice process, and, in particular, the International Criminal Court and its Trust Fund. As a result of these discussions, an international Working Meeting on Women's Right to Reparation was convened in Nairobi, Kenya, from March 19–21, 2007. During this meeting, activists, jurists and survivors worked together to draft the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation.

The Declaration espouses a gender-just concept of reparation; it promotes an understanding of reparation-as-process, asserting that reparation must be seen as a transformative process that is both participatory and empowering. In order to facilitate such transformation, "[r]eparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives".[75] Therefore, according to the drafters of the Declaration, reparation programmes should not only assign blame to the perpetrator of wrongs, but such programmes should also recognise unjust distributions of resources and seek to redistribute accordingly, ensuring that underlying causes of injustice are addressed.

The Declaration also outlines the features that reparation programmes should be holistic, using specialised, integrated, and multidisciplinary approaches that take into consideration "the multi-dimensional and long-term consequences of these crimes to women and girls, their families and their communities".[76] In that order, reparations programmes should encompass, including: (i) mental and physical health services; (ii) provisions for compensation, rehabilitation and restitution; (iii) justice initiatives including guarantees of non recurrence;

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[75] Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, March 2007, available at: http://www.womensrightscoalition.org/site/reparation/signature_en.php.

[76] *Id.*

(iv) programmes aimed at restoring victims' dignity, through public apologies or other symbolic forms of reparation; (v) truth telling, together with the recognition and acknowledgement of women's suffering; (vi) educational programmes, including education on women's rights and gender sensitivity; (vii) the reform of discriminatory laws and customs against women.[77]

The way in which victims are identified and defined within the context of reparation programmes is also important. Victims must be recognised as individuals embedded within a network of relationships with other persons; in other words, both the individual and collective aspects of harm must be acknowledged. Furthermore, victims should be allowed to define their families on their own terms. A woman's family may include children, both biological and adoptive, a spouse, parents, siblings, in-laws or various other extended family members.

1. *Principles underlying the Nairobi Declaration*

a. *The State must take Primary Responsibility for Implementing Reparation Programmes, which Includes Fighting Impunity for Crimes Committed against Women and Girls, Instituting Truth Commissions Regarding such Crimes and Complying with Human Rights Instruments*

While acknowledging the role and responsibility of both State actors (such as foreign governments and inter-governmental bodies) and non-state actors (such as multinational companies and armed militias) in the reparative process, the onus of the responsibility to repair must lie primarily on the State. Amongst other things, the State is responsible to put an end to the culture of impunity and guarantee the non recurrence of crimes against women and girls.

Nevertheless, the Declaration also emphasises the need for the State to work in partnership with civil society and put the emphasis on the fact that "Measures are necessary to guarantee civil society autonomy and space for the representation of women's and girls' voices in all their diversity".[78] The Declaration also emphasises the crucial role of women's self-help organizations in periods of transition. The exchange of information and a sense of solidarity helps facilitate the development of social and politico-legal skills, allowing women to lobby for their interests. Self-help groups like widows' associations in Rwanda create for their members a supportive social fabric, allowing survivors to make the transition from passive disengagement to active engagement in reparation efforts.

b. *Compliance with Human Rights Standards*

As already stated, successful reparation measures must address the underlying factors leading to the commission of human rights violations. Often,

[77] *Id.*

[78] Nairobi Declaration, Principle E.

re-establishing the conditions that existed prior to such violations would mean restoring an unjust status quo, compromising women's rights and perpetuating discriminatory practices. In light of this observation, reparation policies that are relevant and meaningful for women must challenge and change the gender status quo.

Indeed, in post-conflict societies, there is often a push by the international community to secure ratification of, or accession to, major international human rights treaties and legal instruments. At the same time, a great deal of effort is put into processes aimed at elaborating a new constitution or revising an existing one, as well as reform of civil and criminal legislation. Finally, reparations policies, programmes, forms and procedures, including those ones of the ICC trust fund, must comply with standards set out in international human rights treaties. These treaties include the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention Against Torture and the Convention on the Elimination of Racial Discrimination.

c. *The Distinction between Development and Reparation*

The Nairobi Declaration, while acknowledging that reparation programmes are an integral part of reconstruction and development, also stresses that development should not be undertaken instead of reparation. The collective dimensions of reparation should not be confused with development projects that also benefit the community as a whole. For instance, the rebuilding of a school burnt down during the war may benefit the community as a whole, while serving as an important form of reparation at the same time, provided that the symbolic element of reparative intent is present.

d. *Affirmative Action and Non-discrimination on the Basis of Sex or Gender*

The Nairobi Declaration states that all policies and measures relating to reparation must explicitly be based on the principle of non-discrimination on the basis of sex or gender, as well as on affirmative measures to redress inequalities. Indeed, differences in rights and entitlements have been of great importance in determining how conflicts impact on men and women's lives. For instance, women are not always registered as individual citizens, nor are they always recognised as legal owners of land and other assets.[79] In situations of conflict and social

[79] Vahida Nainar, "Picking Pieces … Making Whole, Gender, Reparation and International Law," Working Paper drafted for the Coalition of Women's Rights in Conflict Situations, [unpublished], 2007 at 86.

upheaval, therefore, women may have difficulty protecting their resources and might find it almost impossible to claim compensation and other kinds of assistance in the aftermath.

Under such circumstances, affirmative action may also be needed so that equality can be achieved in real terms. Reservations or quotas are a popular form of affirmative action applied in the areas where the marginalisation has been the severe, and these measures can relate to the allocation of agricultural land, enrolment in educational institutions, and access to administrative and political positions.

e. *Full Participation*

Reparation schemes and programmes must be conceptualised and prepared in consultation with victims and survivors, as well as with the active involvement of those connected to rural, tribal and indigenous ways of living. Full participation of women and girl survivors in all their diversity should be guaranteed in all the stages of the reparation process, including in the design, execution, and evaluation of reparation programmes.[80] Too often, women's participation is restricted to the implementation, rather than design, of reparation programmes.[81]

Reparation programmes must also seek to enhance women's agency, first and foremost by ensuring their participation in deciding on adequate forms of reparation. Finally, governments and other actors must adequately inform women and girls of their rights with respect to participation, as a lack of information pertaining to reparation mechanisms at the grass roots level has often been a major obstacle in the implementation of reparation programmes.

f. *Available and Accessible Justice*

Full access to reparation programmes for women and girls requires a broad definition of "victim," as well as the specific inclusion of gendered violence and harm. Indeed, Truth and Justice Commissions in the past have been mandated to investigate only certain listed crimes, overlooking victims of crimes not listed or not committed within the parameters specified in the Commission's mandate.[82] Importantly, in the past, sexual violence often fell outside this mandate, resulting in the need to read such violations into those crimes that were mandated.

> When people went to the commission to tell their story, there was a line of questioning and there was no question about sexual violence. The information they have about sexual violence is what women spontaneously offered. When they finally

[80] This includes specific communities of women: disable communities, rural and indigenous communities.

[81] For instance, in Guatemala.

[82] Nainar, *supra*. n. 79 at 85.

> closed the period of taking testimony, they got to realise the enormous numbers of women who were alleging sexual violence. So much that they could not ignore it. And they had to put in a couple of paragraphs in the final report. In the report they say that there were 70% men and 30% women testified and we questioned as to how this could be a trustworthy figure when many women did not go to testify. And women themselves do not identify sexual violence as torture. (Interview – Patricia Palacios, Researcher, Human Rights Centre, University of Chile, Chile).[83]

Reparation measures must also allow for women and girls to come forward to claim reparation when they are ready and in a way that respects their right to safety, dignity and privacy.[84] Women and girls should not be excluded from reparation schemes for failing to apply within a prescribed time period. Furthermore, support structures are needed to assist women and girls in the process of speaking out and claiming reparations.

Other administrative obstacles that should to be eliminated include requirements of birth certificates or death certificates of a disappeared relative in order to access compensation, the non-recognition of women as the heads of households, and the refusal to open bank accounts in a woman's name without permission of a male family member.[85] These and similar obstacles must be removed in order for women to access reparations and other crucial social services in the aftermath of conflict. Specific obstacles targeting girls (because the double discrimination resulting of their age and gender as well as because of their specific experience of human rights violations[86]), rural, disable and indigenous women should be also taken into consideration.[87]

g. *Women's and Girls' Autonomy and Empowerment*

Supporting the empowerment of women and girls through their active participation in decision-making is crucial to successful reparation programmes. The Declaration stipulates to that effect that "in order to accurately reflect and incorporate the perspectives of victims and their advocates, the notion of "victim" must be broadly defined within the context of women's and girls' experiences".[88]

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[83] *Id*. at 88.

[84] Nairobi Declaration, *supra*. n. 75.

[85] Nainar, *supra*. n. 79 at 92.

[86] See, the Nairobi Declaration, *supra*. n. 75, Preamble: "TAKING INTO CONSIDERATION that girls specifically suffer both from physical and sexual violence directed at them and from human rights violations against their parents, siblings and caregivers; BEARING IN MIND that girls respond differently than women to grave rights violations because of less developed physical, mental and emotional responses to these experiences. Noting also that girls are victims of double discrimination based on their gender and age".

[87] Nairobi Declaration, *id*.

[88] Nairobi Declaration.

Furthermore, reparation processes must empower women and girls to determine for themselves the means of reparation best suited to their situation, and must seek to "remov[e] those aspects of customary and religious law and practice that prevent women from being in a position to make decisions about their lives".[89] Reparation programmes must therefore recognise "social, economic and political constraints" acting upon women, and must attempt "to maximize women's power within those realities".[90]

F. *Conclusion*

When looking at international justice mechanisms and how they impact on national systems, the following challenges must be taken into consideration: (i) the absence of a normative framework on reparations and the existence of laws that militate against reparations, such as amnesty laws; (ii) the lack of coherence in the application of existing laws and policies; and (iii) the lack of resources available for reparations. In light of these challenges, it is hoped that the principles espoused by the Nairobi Declaration will serve as guidelines for the implementation of gender just reparation policies at the national and international level.

At the ICC, the Trust Fund for Victims is the main tool for the implementation of victims' rights to redress and reparation. The Trust Fund targets the victims of crimes within the jurisdiction of the ICC as well as their families.[91] Reparations are ordered when the Court finds them appropriate.[92] Apart from the reparations ordered by the Court, the Trust Fund also supports projects directed to groups of survivors, based on similarities in their claims or situations. These groups must be identified by "demographic data, targeted outreach, and consultations with those with relevant knowledge".[93] Nevertheless, many questions remain with respect to contributions to the Trust Fund, as well as to its purpose and implementation.

Firstly, the Trust Fund's current arbitrariness of the choice of victims is problematic. While the Trust Fund's regulations stipulate that the selection of project

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[89] Radhika Coomaraswamy. "Cultural Relativism and Minority Rights," in Indira Jaising. (Ed.) *Men's Laws Women's Lives, Women Unlimited*, New Delhi, 2005, at 48.

[90] *Id.*

[91] Art 79(1) of the Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998), U.N. Doc. A/CONF.183/9.

[92] Article 75(1) Rome Statute.

[93] See ICC-ASP/4/32 Annex – Regulations of the Trust Fund for Victims Part III. CHAPTER IV collective awards to victims pursuant to rule 98(3) http://www.icc-cpi.int/library/asp/PartIII_-_Resolutions.pdf

beneficiaries and the implementation of reparation projects must not result in discrimination based on a social status, special attention should also be paid to the fact that project implementation should also not result in discrimination based on gender. In light of this concern, it might be important to complement project implementation with the quashing of discriminatory laws or customary norms. Furthermore, while the regulations state that victims and survivors should be active participants in the implementation of reparatory projects, it is also crucial that women and girls' participation be present at the design level.[94] Finally, while the regulations state that projects funded by the Trust Fund should directly address harm (whether physical, psychological, economic or social) caused by the conflict, and must target the most vulnerable and marginalised of survivors, it is vital to link the harm caused by the conflict to its root causes, including discrimination against women and girls.

While progress has been made in the last decades, much work remains. By incorporating the principles espoused in the Nairobi Declaration in the implementation of the guidelines of the Trust Fund for Victims, the international community will move one step closer to remedying gross and systematic violations of human rights in a way that is gender-just and responsive to the needs of women and girls.

[94] Chap IV. 70. The Board of Directors may consult victims as defined in rule 85 of the Rules of Procedure and Evidence and, where natural persons are concerned, their families, as well as their legal representatives, and may consult any competent expert or expert organization on the nature of the collective award(s) and the methods for its/their implementation.

Part II
Reparations and the Holocaust

The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution

*By Gideon Taylor, Greg Schneider and Saul Kagan**

A. *Introduction*

When the Conference on Jewish Material Claims Against Germany was founded by 23 international Jewish organizations in 1951, the name was chosen very deliberately. The founders wanted to make clear to Germany and the rest of the world that while they expected compensation and restitution from the perpetrators of the Holocaust and those who abetted the Nazis, the moral issues arising from the Holocaust could not be resolved through negotiations.

The mission of the Claims Conference has always been to secure what it considers a small measure of justice for Jewish victims of Nazi persecution. It has pursued this goal through a combination of negotiations, disbursing funds to individuals and organizations, and seeking the return of Jewish property lost during the Holocaust. Over the past five decades, the Claims Conference has:

- Negotiated for compensation for injuries inflicted upon individual Jewish victims of Nazi persecution;
- Negotiated for the return of and restitution for Jewish-owned properties and assets confiscated or destroyed by the Nazis;
- Obtained funds for the relief, rehabilitation and resettlement of Jewish victims of Nazi persecution, and aided in rebuilding Jewish communities and institutions devastated by the Nazis;
- Administered individual compensation programmes for Shoah survivors;
- Recovered unclaimed East German Jewish property and allocated the proceeds from their sale to institutions that provide social services to elderly,

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity,* pp. 103–114.

needy Nazi victims and that engage in Holocaust research, education, and documentation.[1]

In 1952, after the Claims Conference and the State of Israel attained the first compensation agreements with West Germany, Israeli Prime Minister David Ben-Gurion said in a letter to the founder and first president, Dr. Nahum Goldmann, "For the first time in the history of the Jewish people, oppressed and plundered for hundreds of years … the oppressor and plunderer has had to hand back some of the spoil and pay collective compensation for part of the material losses."

At the time, likely no one involved in this historic process could have foreseen that the Jewish drive for Holocaust-related compensation and restitution would still be active 55 years later, and that governments and industry from all over Europe would be held to account for profiting from the murder of millions and the persecution and plunder of millions more.

There have been different types of Holocaust compensation and restitution agreements over the decades:

– International bilateral agreements between the Claims Conference and Germany and Austria, such as the Luxembourg Agreement in 1952; subsequent German-funded programmes such as the Hardship Fund, the Article 2 Fund, and various pacts with the Austrian Government;
– Multilateral agreements between governments and industry, and various parties representing victims and heirs such as the establishment of the German Foundation in 2000, primarily to compensate former slave and forced labourers;
– Agreements arising out of class-action lawsuits, such as the 1998 Swiss Banks Settlement; and
– Agreements between parties, such as that establishing the International Commission on Holocaust Era Insurance Claims, in which companies, insurance regulators, and the Claims Conference participated.

From the first negotiations, the Germans have referred to their payments to Holocaust survivors as "Wiedergutmachung," meaning "to make whole." The Claims Conference has never used this term, as it has always maintained that the payments, no matter the amount, can never be more than symbolic in their attempt to compensate victims. The Claims Conference is the place where morality meets money, two elements that are impossible to reconcile.

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[1] See Marilyn Henry, Confronting the Perpetrators: History of the Claims Conference, Vallentine Mitchell–London, Portland, OR, 2007; Zweig, Ronald, German Reparations and the Jewish World: A History of the Claims Conference, 2nd ed.–London; Frank Cass, 2001; www.claimscon.org – Extensive Claims Conference website: Covering major aspects of Claims Conference activities and related compensation programmes; periodically updated.

B. *Negotiations and Agreements*

On 10 September 1952, after six months of negotiations, the Claims Conference and the West German Federal Government signed an agreement embodied in two protocols. Protocol No. 1 called for the enactment of laws that would compensate Nazi victims directly for indemnification and restitution claims arising from Nazi persecution. Under Protocol No. 2, the West German Government provided the Claims Conference with DM 450 million for the relief, rehabilitation and resettlement of Jewish victims of Nazi persecution, according to the urgency of their need as determined by the Conference. Agreements were also signed with the State of Israel.[2]

Subsequent to the agreements, the Claims Conference continued to negotiate with the German Government for amendments to the various legislative commitments contained in Protocol No. 1, and monitored the implementation of the various compensation and restitution laws.

The German Government has expended more than $60 billion in satisfaction of claims under the law negotiated by the Claims Conference. In all, more than 278,000 survivors received lifetime pensions under the German Federal Indemnification Laws (Bundesentschädigungsgesetz – BEG), with tens of thousands of these survivors continuing to receive pensions. Hundreds of thousands more received one-time payments under German compensation laws.

Since then, the Claims Conference has negotiated numerous compensation programmes that it has also administered. The Claims Conference is continually negotiating with the German Government to expand and liberalise the eligibility criteria for these programmes in order to include additional survivors in them. It is crucial that any compensation agreement arrived at through negotiations includes a clause providing for annual review of eligibility criteria, as this will open the way for inclusion of additional recipients.

- *Hardship Fund, 1980*: One-time payment of €2,556 to certain Jewish victims of Nazism from former Soviet bloc countries who emigrated to the West after 1965, which was the application deadline for the West German Indemnification Laws (BEG).
- *Article 2 Fund, 1992*: Monthly pensions of €270 to certain Jewish victims of Nazi persecution who had received little or no indemnification under the BEG. Originally intended to benefit 25,000 survivors, it has paid more than 74,000 people due to Claims Conference negotiations to expand criteria.

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[2] See Sagi, Nana, *German Reparations: A History of the Negotiations*, Jerusalem. Hebrew University Press, 1980.

- *Central and Eastern European Fund, 1998*: Monthly pensions of €200 (EU countries) or €165 (non-EU countries) to certain Jewish victims of Nazi persecution living in former Eastern bloc countries, who meet the same eligibility criteria as the Article 2 Fund. The payment amount has been increased over the years due to Claims Conference negotiations, and we are still pressing to make payments equal to Article 2.
- *Programme for Former Slave and Forced Laborers, 2000*: One-time payments of €7,556 (slave labor) or €2,556 (forced labor) from the German Foundation, a joint fund of German Government and industry established through multiparty negotiations. For survivors who had performed slave or forced labour under the Nazis, including for German industry.
- *Fund for Victims of Medical Experiments and Other Injuries, 2000*: Payments totalling €6,690 to victims of Nazi medical experiments, from the German Foundation.

C. *From Negotiating Principles to Administering Programmes*

One challenge faced by the Claims Conference is that it is a place where morality meets money. It is not an easy place to be. We are advocates for the victims, a group we honour and respect, but also have to reconcile the principles of negotiations with the reality of implementing payments.

For example, the Article 2 Fund, a pension programme negotiated with the German Government, includes as one eligibility factor a length of time of persecution, such as incarceration in a concentration camp for six months. That means the person who was there for five or five and a half months is not eligible. So even if a person is a victim, he or she may not be eligible for payment.

Fighting and struggling for the money, however difficult, is far easier and more morally clear than when it comes to distribution, which becomes much messier, harder, and uglier. In the discussions for the programme for the victims of slave labour, the Claims Conference was grouped together with Eastern European governments that were representing non-Jewish victims with very different historical experiences than Jewish survivors. A settlement was achieved that covered people who were forced to work under different circumstances, encompassing experiences from the person who was taken to a concentration camp and subject to the programme of being worked to death, to a non-Jewish Pole taken to Germany to forcibly work on a farm but went back to his country after a few years. They all came under the same umbrella in this agreement.

In the negotiation, the Claims Conference was arguing with Germany over the settlement and at the same time sitting at the table with people who were representing very different groupings with very different persecution experiences.

Ultimately, two categories of persecution were created, slave labor and forced labor. "Slave laborers" were defined as survivors of concentration camps and ghettos, who were forced to work. "Forced laborers" covered other people who were forced to work but were not in camps or ghettos. The slave labor payment was DM15,000 and the forced labor payment was DM5,000 (later converted to Euros).

D. *Key Elements of an Effective Process*

Being able to issue payments to survivors requires translating the high-minded principles of negotiations for rough justice into an application process that must account for eligibility, public knowledge of the programmes, and complex processing issues. Survivors have to reach through the decades to be able to describe events that occurred six and seven decades ago, in a time of chaos and uncertainty.

During this process of asking survivors to relive the trauma again, it is incumbent upon us to be cognisant of all the emotional triggers along the way. For example as an administrator one could ask a question that seems perfectly coherent but which turns out to be an emotional issue for the person completing the form. Throughout the process, we strive to enable survivors to retain dignity and avoid unnecessary traumatisation.

Survivors must participate in the process. It helps considerably in implementing a programme if the people negotiating the criteria confer with those who will be administering it and processing claims and payments. Issues often arise in processing applications that were not foreseen during negotiations, and usually no one is willing to re-open an agreement for administrative reasons.

Key elements of an effective, fair, and transparent process include:

- *Outreach*: Doing everything possible to find and inform eligible survivors, including direct mail, advertisements, media stories, working with local organizations, and updating our website. Informing people of the programme is as important as any other element of the process, and requires some creativity. For example, at the beginning of the Program for Former Slave and Forced Laborers, applications were made available in every post office in Israel in an effort to reach as many elderly survivors as possible in the country.
- *Communication*: Keeping applicants and their families constantly apprised of the status of their applications and claims. Eligibility criteria should be made clear and accessible to victims. Call centres are established to receive and direct inquiries, with operators speaking numerous languages staffing them.
- *Victim Participation*: Survivors should be integral to the process from negotiations through administration of the programme.

- *Expectations*: Emphasising that payments are symbolic. An independent appeals process should be in place.
- *Fairness*: Under the slave labor programme, it was decided that as the payment was symbolic, a flat amount for all eligible applicants was more justifiable than trying to determine compensation based on the length of a person's experiences, especially as many applications did not include exact dates of incarceration.
- *Technology*: Designing custom-made systems and utilising the latest technology can significantly speed up processing of the claims and provide a more effective process.
- *Moral Basis*: Every programme that the Claims Conference administers also inherently includes an acknowledgment that is passed on to each individual. For many this is just as important as the money.

E. *Processing Claims: Slave Labor Programme*

The Claims Conference Programme for Former Slave and Forced Laborers began in 2000, after German Government and industry agreed to a DM 10 billion fund to compensate surviving former laborers under the Nazis. The Claims Conference was a major party in the protracted negotiations that led to the agreement and the establishment of the German Foundation, "Remembrance, Responsibility, and the Future." The Claims Conference also administers slave labour compensation payments from the Swiss Banks Settlement.[3]

On 31 December 2006, the Claims Conference concluded all payments from the German Foundation, as mandated by German law. In five years of payments, the Claims Conference distributed $1.2 billion on 157,738 claims. Payments were made to 146,136 Holocaust survivors and to 19,952 eligible heirs of survivors. Payments were made in two instalments. (For 8,350 claims, the first payment was made to a survivor while the second payment was issued to eligible heirs.)

These payments are the result of intensive efforts at negotiations, processing claims, outreach to survivors and their families, and research to validate applications and include more survivors in the programme. They are the culmination of years of effort to compel German government and business, as well as Swiss industry, to acknowledge their use of slave and forced labor during World War II, and the benefits they derived from the victims' labor.

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[3] See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II*, New York, Public Affairs, 2003.

This programme is the most complex ever administered by the Claims Conference, entailing levels of technology, staffing, and international coordination unprecedented in the organization's previous half-century. The large amount of money distributed, the relatively short application period, and the advanced age of Holocaust survivors all converged to imbue the program with great urgency.

In order to make these payments, the Claims Conference:

- Processed 283,600 claims in eight languages;
- Engaged in intensive and continuing negotiations, even after the programme's establishment, in order to obtain additional funds and include more survivors in the programme;
- Received and responded to an average of 8,400 telephone calls, 1,200 letters, and 1,000 emails every week from survivors and families;
- Pro-actively researched 150 Holocaust-related archives scattered in 29 countries around the world to document claims.

In order to prepare for the large logistical undertaking of processing applications from around the world, the Claims Conference took a series of actions including:

– Identifying survivors most likely to be eligible;
– Mailing applications to survivors who had received previous compensation and were most likely to be eligible for slave labour compensation;
– Launching an international media and advertising campaign to announce the claims process;
– Engaging a network of 350 local survivor and Jewish organizations around the world that could provide assistance in the application process;
– Contacting 500 homes for the elderly in Israel, asking them to inform residents of the programme, and opening nine help centres for survivors throughout the country.

The Claims Conference created an advanced system of computerised processing where every application form was digitally scanned. The computer system provided global linkage between regional processing offices in New York, Tel Aviv, Frankfurt, and Budapest. The database permitted unlimited information input, storage and retrieval while allowing staff to trace the progress and the status of every application in the system. Hundreds of thousands of claims were further electronically sorted and analysed to identify and group them for streamlined procedures.

This sophisticated computerisation system was key in the most pressing imperative and most challenging task facing the Claims Conference: reducing the time needed to process claims.

F. *Documenting Applications and Restituting History*

The campaign for Holocaust restitution has given us much more than dollars and payments. It has revealed persecutions previously unknown. The restitution of money has led to the restitution of history.

The clearest example of this is the new evidence of Holocaust events that came to light through applications to the Fund for Victims of Medical Experiments. From the application process, combined with extensive research, the Claims Conference painstakingly identified 195 procedures in 32 different camps. Dozens of these experiments were identified solely through elderly survivors' individual testimonies submitted with their applications. No book, no document, no list told of these torments that test the limits of human imagination. Without the compensation process that elicited first-hand accounts from the last remaining survivors, the existence of those horrific experiments would have slipped from the grasp of history.

Under the Program for Former Slave and Forced Laborers, the Claims Conference had to consider many factors when evaluating applications including exact dates of persecution, whether a person received prior compensation from a German company, verifying the place of persecution, and checking the identity of the individual.

For survivors who had already received indemnification payments from the German Government, Israeli Government, or Claims Conference, no further persecution documentation was necessary. These survivors received abridged versions of the application, designed by the Claims Conference and designated specifically for survivors who would not need to again document their persecution.

However, thousands of applicants who had never before applied for compensation payments lacked any sort of corroboration that they had performed slave or forced labour under the Nazis. The German Foundation, which audited claims approved by the Claims Conference, required such documentation.

Place names had been forgotten, dates were uncertain, and survivors did not have written evidence placing them in camps, ghettos, or labor battalions.

One of the main challenges that the Claims Conference faced in processing claims was sorting through the more than 700,000 separate places of persecution named by survivors in their applications. The forms included misspellings and different languages that had to be administered in a database to provide accurate places and dates of persecution, important both for the processing of claims and for history. For the camp of Auschwitz-Birkenau alone, there were 1,600 spellings of the camp submitted on applications, all of which had to be identified and verified by Claims Conference staff.

The Claims Conference undertook to pro-actively research 150 Holocaust-related archives scattered in 29 countries around the world in order to find

documentation that would satisfy the claim verification requirements of the German Foundation. Claims Conference researchers scoured paper and microfilmed lists – often handwritten and not alphabetised – in order to match the names of claimants to any documentation that would meet the guidelines established by the German Foundation.

Sources of information at both places included concentration camp lists, ghetto registers, transport lists, labour battalion rosters, lists of slave laborers in factories and plants, lists of inmates on work gangs, lists of prisoners released or liberated from concentration camps by Allied forces or humanitarian groups, lists of recipients of packages sent by friends and relatives through the Red Cross, and testimonials of survivors produced in the immediate aftermath of the Nazi occupation, among others.

Sometimes, survivors would remember details about a camp but not its name, describing the work they performed or the towns where they were, compelling researchers to search for sources that might provide the missing information. Other survivors could name specific dates upon which they entered a camp, enabling the Claims Conference to verify their persecution by consulting a transport list.

Finally, where no documentation could be found, applicants were invited to describe their persecution experiences and these statements could constitute part of the proof that the claimant was eligible for a payment.

This research helped re-write established myths of Holocaust history, such as the experiences of Bulgarian Jews. Their experiences had been previously shrouded in the perception of complete Bulgarian beneficence to Jews during World War II, but in reality, this programme helped uncover the truth that they toiled in 112 labor camps. Archival documents combined with personal stories, letters and photos from survivors applying for payment led finally to Germany's recognition that Bulgarian Jews were entitled to compensation for their suffering. Sixty years later, these survivors' experiences were finally acknowledged, and their history is now told the way it happened.

G. *Property Restitution*

This Chapter has advisedly focused on the Claims Conference's effort to secure a measure of compensation for serious personal suffering experienced by Holocaust survivors. The Claims Conference also intensively seeks the return and restitution of Jewish-owned property and assets confiscated or destroyed under the Nazis. The Claims Conference distinguishes between compensation, symbolic payments to acknowledge persecution and suffering, and restitution, the return of assets or payment for them.

When dealing with restitution, it is essential to develop as much data and information as possible as a basis for seeking and locating assets that have been taken unlawfully and confiscated. Legislation for the return of or payment for assets is a primary instrument if it can be achieved, on the basis of which claims can be filed and through the process of which property and assets can be recovered.

As restitution in full is usually impossible, the degree and extent of it becomes the focus of legislation. The effectiveness of such legislation must be fought for as intensively as possible and will also depend on the thoroughness of the research and documentation of claims.

Since 1990, the Claims Conference has served as the Successor Organization for unclaimed Jewish property in the former East Germany. In fulfilment of this objective, the Claims Conference organized massive research on Jewish-owned assets in that area, and documented tens of thousands of claims before German restitution agencies and courts. It utilises the proceeds primarily for programmes benefiting Holocaust survivors.

In 1990, the new Government of a reunified Germany passed legislation to restitute property that had been nationalised by the former East German Communist regime. The Claims Conference negotiated intensely to include in this legislation the restitution of Jewish property that was either sold after 1933 under duress or confiscated by the Nazis.

As a result, original Jewish owners and heirs gained the right to file claims for property in the former East Germany. The German Government imposed an application deadline, which, under pressure from the Claims Conference, was extended to 31 December 1992 for real estate claims, and 30 June 1993 for claims for movable property. This deadline was widely publicised by both the German Government and the Claims Conference. Before the deadline, the Claims Conference also conducted a massive research effort to identify all possible Jewish properties.

The Claims Conference also negotiated to become the legal successor to individual Jewish property and property of dissolved Jewish communities and organizations that went unclaimed after 31 December 1992. Had the Claims Conference not taken this step, Jewish assets that remained unclaimed after the filing deadline would have remained with the owners at the time or reverted to the German Government.

The Claims Conference filed more than 100,000 claims for formerly Jewish-owned properties, believing it better to cast as wide a net as possible within the possible universe of formerly Jewish-owned properties. Since then, the German restitution authorities have awarded only a small fraction of those to the Claims Conference, as many were claimed by original owners or heirs, deemed not to be Jewish properties, or turned out to be duplicate claims due to changes in street addresses, for example.

Of those claims awarded to the Claims Conference, the vast majority have been in the form of compensation payments from the German Government rather than outright restitution of the properties.

The Claims Conference also has a Goodwill Fund to compensate property owners and heirs who came forward after the German filing deadline of 1992 and whose assets have been recovered by the Claims Conference.

H. *Conclusion*

The historic international Jewish efforts at negotiating symbolic compensation and restitution for Jewish victims of Nazism have attempted the impossible task of reconciling the greatest moral challenge of our times with the base element of money. Yet throughout, the Claims Conference has always insisted that the process is about more than money. It is about recognition, acknowledgement, and preserving victims' stories for history.

During negotiations, the Claims Conference has been a staunch advocate for survivors and heirs. In translating the high-minded principles of negotiations into payment programs, the Claims Conference has been an equally staunch advocate for victims, implementing procedures and processes to inform and include as many survivors as possible. From exhaustively researching claims to establishing call centres to designing user-friendly application forms and instructions, the Claims Conference has always been mindful of its urgent task to issue as many payments as possible within survivors' lifetimes. The Claims Conference has also been intent on preserving the memory of the six million Jewish victims of Nazism and disseminating the broad lessons of the Holocaust.[4]

[4] Updated information on Claims Conference programmes is always available on the organization's website, www.claimscon.org.

The Swiss Banks Holocaust Settlement

By Judah Gribetz and Shari C. Reig[1]

A. *Introduction*

In late 1996 and early 1997, a series of class action lawsuits were filed in several United States federal courts against certain Swiss banks and other Swiss entities. The lawsuits alleged that Swiss financial institutions collaborated with and aided and abetted the Nazi Regime by knowingly retaining and concealing assets of Holocaust victims, and by accepting and laundering illegally obtained Nazi loot and profits of slave labour. In August, 1998, the parties reached an agreement in principle to settle the lawsuits for $1.25 billion. Following several months of continued negotiation, a formal Settlement Agreement was signed on 26 January 1999. In exchange for the settlement amount paid by the Swiss banks ("Settlement Fund"), the plaintiffs and class members agreed to release and forever discharge Swiss banks, the Swiss Government and other Swiss entities from, among other things, any and all claims relating to the Holocaust, World War II, and its prelude and aftermath. Significantly, although the Swiss Government was released, it refrained from participating in the litigation and later the settlement negotiations.

It is worth noting that the settlement addresses crimes and injuries that occurred more than sixty years ago, involving documents and evidence located largely in Europe. Yet the effort to compensate some of these injuries is being addressed today under United States law and in a United States federal courthouse.

As of December 2008, over $1 billion has been distributed or allocated on behalf of over 449,000 claimants, nearly all of whom are Holocaust

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[1] Judah Gribetz is Special Master and Shari C. Reig is Deputy Special Master. Portions of this article originally were presented by Shari C. Reig at the Conference on Reparations for victims of genocide, crimes against humanity and war crimes: systems in place and systems in the making, The Peace Palace, The Hague, The Netherlands, 1–2 March 2007. The Swiss Banks Holocaust Settlement (In re Holocaust Victim Assets Litigation) is pending in the United States District Court, Eastern District of New York, before the Honorable Edward R. Korman (Presiding Judge).

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 115–142.

survivors (and in some instances, their heirs). The distributions have ranged from repayment of a Swiss bank account in the amount of approximately $22 million to the heirs of what was once of Austria's largest sugar refineries – the company and nearly all of the family's assets were appropriated by the Nazis – to a monthly food package delivered to an elderly survivor living alone in a village in the Ukraine, a package consisting of pasta, flour, beans, canned fish, rice, sugar and oil.

In accordance with the themes of the conference at which portions of this chapter originally were presented, we describe in this chapter some elements of our distribution process which may be germane to compensation programmes arising from more recent human rights atrocities. Some aspects of the Swiss Banks Settlement are unique because the case is governed by United States law and subject to particular United States legal requirements pertaining to class actions. On the other hand, many of the issues that we confronted in devising a plan for distributing and allocating the $1.25 billion Settlement Fund, and in overseeing its implementation, may have broader relevance.

For example, the Victims Trust Fund of the International Criminal Court authorises a variety of reparations options, including compensation to individual victims and family members, restitution of property, and community programmes. Some of the same considerations had to be confronted in allocating the Swiss Banks settlement fund. Should compensation be made to individuals? To groups? To victims' family members? Should compensation take the form of cash payments? A return of property? Is it appropriate to make compensation "in kind", i.e., to provide food, medicine and the like? Additional issues common to other programmes would include whether to compensate heirs; how to account for the lack of documents (which in many instances may have been deliberately destroyed); and how to simplify the claims process.

There is a tragedy of unimaginable dimensions behind every payment that is made to a Holocaust victim or that person's heirs. In many cases, we have learned a great deal about how these victims were abandoned, step by step, by the people and institutions that should have lived up to the trust that was placed in them. An important goal of the Swiss Banks Settlement distribution process is to make sure that these stories are told, especially in the face of continuing Holocaust denial and, specifically in the Swiss Banks case, a persistent effort to belittle the settlement as "blackmail".[2]

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[2] *See, e.g.*, Mariatte Denman, "If Auschwitz were in Switzerland … German Swiss Intellectuals Respond to the Nazi Gold Affair," New German Critique, No. 85, Special Issue on Intellectuals (Winter 2002), at 170 (observing that "the *Neue Zürcher Zeitung (NZZ)*, a highly respected but politically conservative newspaper, compared the settlement to national blackmail").

In recounting some of our own experiences in assisting the Court in administering the Swiss Banks settlement, in view of the legal constraints and historical antecedents that underlie the claims process, we emphasise three themes that may be useful to organisers of other compensation programmes, particularly as they move beyond the theoretical concept of restitution and enter the implementation stage. First, given the limits of victim compensation funds and the desire to avoid *de minimus* payments, which people should be eligible for distributions? Second, which claims should receive priority? Third, in light of the age of the claimants, the passage of time and typically the lack of documents, how can the claims process be simplified while ensuring that only plausible claims are paid?

B. *Background: The Swiss Banks Class Action Litigation, the Settlement Agreement, Notice and Approval of the Settlement*

The Swiss Banks Settlement Fund of $1.25 billion was the result of class action litigation initiated in the United States Courts.[3] In the United States, a class action lawsuit provides a vehicle by which individual plaintiffs join together to bring common claims against a common defendant or defendants, thereby enabling lawsuits to proceed that otherwise might never be brought due to an individual plaintiff's financial or time constraints. The first of the class action lawsuits was filed in October 1996. Several additional suits followed, and on 26 March 1997, the complaints were consolidated as one action, *In re Holocaust Victim Assets Litigation*, before the Hon. Edward R. Korman, United States District Judge (Eastern District of New York).

In their complaints, the plaintiffs alleged that:

> [B]efore and during World War II, they were subjected to persecution by the Nazi regime, including genocide, wholesale and systematic looting of personal and business property and slave labor. Plaintiffs alleged that, in knowingly retaining and concealing the assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot and transacting in the profits of slave labor, Swiss institutions and entities, including the named defendants [the Swiss banks Credit Suisse and UBS], collaborated with and aided the Nazi regime in furtherance of war crimes, crimes against humanity, crimes against peace, slave labor and genocide.
>
> Plaintiffs also alleged that defendants breached fiduciary and other duties; breached contracts; converted plaintiffs' property; enriched themselves unjustly; were negligent; violated customary international law, Swiss banking law and the Swiss commercial code of obligations; engaged in fraud and conspiracy; and concealed relevant

[3] All significant court opinions, reports and other documents are available online at: www.swissbankclaims.com.

> facts from the named plaintiffs and the plaintiff class members in an effort to frustrate plaintiffs' ability to pursue their claims. Plaintiffs sought an accounting, disgorgement, compensatory and punitive damages, and declaratory and other appropriate relief.[4]

In response to the complaints, the defendants filed voluminous motions to dismiss the claims, arguing that plaintiffs "failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing. Defendants also argued that [the Court] should abstain from adjudicating plaintiffs' claims in favour of ongoing non-judicial initiatives to redress all of plaintiffs' claims, and argued that Switzerland, not the United States, was the proper forum for plaintiffs to pursue the relief to which they believed they were entitled".[5]

Judge Korman did not rule on the motions to dismiss the claims. Instead, he encouraged and actively participated in settlement negotiations, thereby facilitating the historic agreement that resolved the lawsuits and created the $1.25 billion Settlement Fund.[6]

On 12 August 1998, the parties reached an agreement in principle to settle the litigation and negotiated its terms for several months. On 26 January 1999, the parties signed the agreement, and on 30 March 1999, the agreement became effective upon the execution of "organizational endorsements" by seventeen major worldwide Jewish organizations.[7] Although the complaints had named as defendants a variety of Swiss governmental and private entities, the Settlement Agreement specified as defendants only two entities, the largest Swiss banks: Credit Suisse and UBS (as successor to the Union Bank of Switzerland and the Swiss Bank Corporation). Nevertheless, the Settlement Agreement released virtually all Swiss financial and governmental institutions from further claims arising from Holocaust-related events.

The Settlement Agreement created five specific categories of claims – the "classes" – that could be compensated, and also designated five specific categories of victims. The five classes are the Deposited Assets Class (those who deposited money and other assets in Swiss Banks prior to or during the Holocaust and whose accounts have not been returned); Slave Labor Class I (those who performed slave labor for German corporations whose profits from such labor were

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[4] *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 141–42 (E.D.N.Y. 2000).
[5] *Id.*, 105 F.Supp.2d at 142.
[6] *Id.*
[7] By executing an "organizational endorsement," each organization agreed, among other things, to affirm that the Settlement "brings about complete closure and an end to confrontation with respect to the issues dealt with in the settlement," and also agreed "not to make any public statement" inconsistent with the endorsement. *See* Settlement Agreement, Exhibit 1, available at www.swissbankclaims.com. The organisational endorsements were required by defendants as a prerequisite to settlement.

deposited with or transacted through Swiss banks and other financial institutions); Slave Labor Class II (those who performed slave labor for Swiss corporations); the Refugee Class (those who were denied entry into, expelled from, or mistreated while in Switzerland during the Holocaust era); and the Looted Assets Class (those whose property was looted by Nazis and then disposed of through Swiss banks and other institutions).

With the exception of Slave Labor Class II, a class member must be a "Victim or Target of Nazi Persecution." That term is defined under the Settlement Agreement as "any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, physically or mentally disabled or handicapped".[8]

The Settlement Agreement did not provide for a specific method of allocating the $1.25 billion Settlement Fund among these diverse classes and victim groups. Rather, the agreement provided for the Court to appoint a Special Master to employ "open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution".[9] On 15 December 1998, while the terms of the agreement still were under negotiation, the Plaintiffs' Executive Committee, which included leading members of the United States class action plaintiffs' bar, unanimously endorsed Judge Korman's proposal to appoint Judah Gribetz as Special Master. On 31 March 1999, Judge Korman issued an order formalising the recommendation and appointing Judah Gribetz as Special Master. Shari C. Reig subsequently was appointed by the Court as Deputy Special Master.

Under United States law, one of the more unique aspects of the class action lawsuit is the requirement of ongoing judicial supervision of the settlement notwithstanding the parties' private agreement to terminate the litigation.[10] The Court may approve a class action settlement agreement only after determining whether it is "fair, reasonable and adequate"; whether the class members have been given appropriate notice of the settlement and its terms; and whether the settlement has satisfied due process under the laws of the United States.[11]

Thus, beginning in June, 1999, Judge Korman authorised plaintiffs' attorneys to undertake an extensive campaign of international notice, including an advertising campaign and direct mail notices to potential class members in dozens of countries, and in multiple languages, press conferences, meetings with victims'

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[8] Settlement Agreement, Section 1.
[9] Settlement Agreement, Section 7.1.
[10] *See* Federal Rule of Civil Procedure 23.
[11] *Id.*, Fed. R. Civ. P. 23; *see also In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d at 145, citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

groups, and creation of an Internet site available in over 20 languages. As part of this notice programme, plaintiffs' attorneys designed an "Initial Questionnaire" to solicit comments from potential class members and to obtain preliminary claim-related information. Eventually nearly 600,000 Initial Questionnaires were returned from around the world, probably the largest survey of Nazi victims and their heirs ever conducted.[12]

Judge Korman presided over two hearings at which participants were able to advise the Court of their concerns and to opine on the fairness of the settlement. On 29 November 1999, Judge Korman held a "fairness" hearing in New York, at which he heard a full day of testimony from survivors, attorneys, representatives of the United States Government and international non-governmental organizations, and other interested parties. Two weeks later, on 14 December 1999, Judge Korman conducted a telephonic fairness hearing in Tel Aviv. Partly on the basis of comments made at or in connection with the hearings, Judge Korman refrained from approving the Settlement Agreement until the parties had renegotiated certain provisions of the agreement, including elements relating to bank accounts, insurance and art.

Following several months of additional negotiations, during which time two crucial reports were released relating to Switzerland's Holocaust-era activities – the so-called "Volcker Report" and the "Bergier Report" (each discussed in more detail below) – Judge Korman granted final approved to the Settlement Agreement on 26 July 2000. The Court's approval, however, was conditioned upon the banks' good faith cooperation with the distribution process. On 11 September 2000, the Special Master filed a Proposed Plan of Allocation and Distribution of Settlement Proceeds ("Distribution Plan"), a two-volume, approximately 900-page document intended to provide all parties and interested observers, including reviewing courts, with a detailed rationale for each allocation recommendation. After a period of notice and public comment, and following a hearing on 20 November 2000, the Court adopted the Special Master's recommendations in their entirety by order dated 22 November 2000. Six appeals were filed from the Court's order approving the Distribution Plan; five were withdrawn. On 26 July 2001, the United States Court of Appeals for the Second Circuit upheld the District Court's adoption of the Distribution Plan.[13]

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[12] *See* Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, 11 September 2000 ("Distribution Plan"), Vol. I, at 86–87 (available at www .swissbankclaims.com).

[13] *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001) (reissued as a published opinion, 1 July 2005).

C. *The Distribution Recommendations – a Brief Synopsis*

The Settlement Agreement directed the Special Master, as representative of the Court, to employ "open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution".[14] To that end, the Special Master met or spoke with hundreds of individuals and benefited from many written proposals submitted from around the world. The Distribution Plan was intended to allocate and distribute "an historic, yet limited, settlement fund" in a manner that was "fair, equitable and consistent with governing legal principles".[15] In drafting our recommendations, however, we were "ever mindful" that "no amount of money could begin to compensate the millions of victims of Nazi persecution for the horrors they suffered during the Holocaust, that no amount of money could restore the generations that were lost, and that no amount of money could right the injustice perpetrated by Nazi Germany that has been termed 'one of the greatest thefts by a government in history' ".[16]

At the same time, the distribution recommendations also were premised upon a number of more pragmatic concerns: the recognition that the $1.25 billion Settlement Fund arose "out of the settlement of a consolidated, class action lawsuit, that the plaintiffs in the lawsuit do not include all those who suffered at the hands of the Nazis, and that the defendants (and other Releasees) are not the Nazis who inflicted" the atrocities of the Holocaust.[17] "Rather, this lawsuit was brought and settled on behalf of a circumscribed group of class members who have or may have claims against Swiss banks and other Swiss governmental and business entities for specific wrongs allegedly committed by those banks and other entities in connection with events surrounding World War II. It also must be recognised that this suit primarily concerns assets – assets which actually or allegedly were deposited into Swiss banks by victims of Nazi persecution and never returned to their rightful owners, and assets which either were looted by the Nazis or derived from the slave and forced labor to which they subjected their victims and which actually or allegedly were deposited into or transacted through Swiss banks and other entities".[18]

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[14] Settlement Agreement, Section 7.1.
[15] Distribution Plan, at 2.
[16] *Id.*, at 2–3, citing *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II – Preliminary S*tudy (May 1997), a report coordinated by U.S. President Clinton's then-Under Secretary of Commerce for International Trade Stuart E. Eizenstat and prepared by William Z. Slaney, at iii. Mr. Eizenstat subsequently served as Deputy Secretary of the Treasury and Special Representative of the President and Secretary of State for Holocaust Issues.
[17] Distribution Plan, at 3.
[18] *Id.*, at 3.

The Distribution Plan allocated up to $800 million of the $1.25 billion Settlement Fund to the Deposited Assets Class in recognition of the estimated value of the unreturned Holocaust-era accounts still held in Swiss banks, the priority placed upon the bank deposits under the Settlement Agreement, and the legal and historical strength of the bank account claims (as more fully described below). The remaining $425 million was earmarked for distribution to members of Slave Labor Class I and Slave Labor Class II, who received payments of $1,450 each, and to members of the Refugee Class, who received payments of $3,625 if they were expelled from or denied entry into Switzerland, or $725 if they were admitted but mistreated as refugees. In addition, the sum of $100 million, subsequently increased to $205 million due to unanticipated tax benefits and other earnings on the Settlement Fund, was designated for humanitarian assistance programmes benefiting the neediest survivors, as members of the Looted Assets Class.[19]

D. *Implementing the Settlement: Three Key Issues*

In developing the proposal for distributing the $1.25 billion settlement fund, we were required to operate within the constraints of the framework imposed by the terms of the Settlement Agreement as well as the requirements of United States class action law. Nevertheless, there was room within that framework for what we hope have proven to be creative solutions to three key problems that may be faced by those implementing other human rights compensation programmes. First, which people should be paid? Second, which claims should receive priority? Third, how may the claims process be simplified in favour of claimants, while ensuring payment of plausible claims?

1. *Which People Should be Paid?*

Under the terms of the Settlement Agreement, not only Nazi victims but also their "heirs" were eligible for compensation. The term "heirs," however, was not defined in the Agreement, although the Agreement is governed by New York law. When we studied the law of New York, as well as that of many other jurisdictions, we learned that the definition of "heirs" is extremely broad. It "extends well beyond even great-grandchildren of grandparents – and, moreover,

[19] The Court also has set aside $10 million (0.8% of the $1.25 billion Settlement Fund) for a Victim List Project to benefit all class members, including heirs. The programme's objective is to compile and make widely accessible, for research and remembrance, the names of all Victims or Targets of Nazi Persecution.

must be determined at the time of the decedent's death".[20] Given that there were approximately one million surviving victims of the Holocaust at the time we were considering these issues, the number of heirs clearly could reach several million.

Moreover, the potential reach of the settlement was additionally complicated by the Settlement Agreement's mandate that "Victims or Targets of Nazi Persecution" were eligible for compensation. While that provision narrowed the scope of potentially eligible claimants, it also broadened it because the term "Victim or Target" applied not only to individual victims and their heirs, but also to corporations, partnerships, sole proprietorships, unincorporated associations, communities, congregations, groups, organizations, and other entities.[21]

These broad categories of potential beneficiaries do not appear to be unique to the Swiss Banks Settlement. The Statute of the International Criminal Court authorises the Court to "establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation," and reparations may be assessed on an individualised or collective basis.[22] The Victims Trust Fund also provides for compensation not only to an actual victim, but to his or her family members as well.

In the Swiss Banks case, it seems evident that the purpose of broadly defining the term "Victim or Target" was to obtain a release from liability from the widest possible spectrum of potential claimants. As noted above, although there were only two defendants involved in the litigation – the two largest Swiss banks, Credit Suisse and UBS – virtually all Swiss business and governmental entities were included as "releasees" when the case settled.[23] The releasees' intent was to ensure that virtually all Holocaust-era claims that could be asserted against them would be barred by this Settlement Agreement. Thus, an effort was made to anticipate and foreclose all possible claims and all possible claimants.

Faced with these broad definitions of "Victim or Target of Nazi Persecution," the first issue confronting the Special Master was how to distribute a relatively limited sum among millions of possibly eligible claimants, while trying to ensure that payments did not become meaningless, an outcome morally repugnant and

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[20] Distribution Plan, at 9; see also Distribution Plan, Annex D ("Heirs").

[21] Settlement Agreement, Section 1.

[22] ICC Statute, Article 75(1); *see also* Sam Garkawe, "Victims and the International Criminal Court: Three major issues," 3 Int'l Crim. L. Rev. 345 (2003), at 346 and 363, citing the ICC Rules of Procedure and Evidence definition of "victims": "(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes (Rule 85)."

[23] *See* Settlement Agreement, Sec. 1 (defining "Releasees").

legally indefensible under United States class action law. The Distribution Plan described this special responsibility to preserve the Settlement Fund on behalf of the claimants:

> [I]t has been over fifty years since many of the victim class members in this action have died. Undoubtedly, there are millions of heirs who could potentially claim class member status. The Notice Plan of the class action, for example, in what it terms a "mid-range estimate," concludes that there are over 2 million heirs qualifying as class members for a total of 2,863,000 class members – *using a definition of heirs limited to children of deceased Nazi victims*. [Citation omitted.] Based on current estimates of the worldwide Jewish population as between 12.9 and 13.5 million people, the Special Master estimates that, using a legal definition of heirs which potentially extends to second cousins or beyond, there are likely to be several million heirs of Jewish Holocaust survivors alone.
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> …. [T]he Special Master is presented with a limited Settlement Fund and a seemingly limitless number of deserving claimants. A primary task, in accordance with his obligations under United States class action law, is to structure a distribution program that minimizes administrative costs and affords meaningful compensation that tangibly benefits at least some class members. The Special Master has sought to avoid a plan which makes millions of symbolic *de minimus* payments to all those who could potentially claim membership in the classes. … Not only would direct payments to a broadly defined class of heirs require such costly eligibility determinations as to substantially deplete the fund, but the number of eligible claimants would reach such large proportions as to make it virtually impossible to meaningfully impact the lives of any individual class member. The Special Master does not deem equitable a plan which would, as a practical matter, award a token payment of "$1.98" each to millions of potential claimants.[24]

In view of these concerns, it was helpful to examine how other compensation programmes had treated claims by heirs, especially those programmes that had distributed funds among victims of torture or personal injury.

These earlier programmes included the so-called "Princz Agreement" between Germany and the United States in 1995, which compensated 11 United States survivors of Nazi concentration camps; the United States Civil Liberties Act of 1988, which compensated certain Japanese American citizens and others who were interned by the United States Government during World War II; and various German Holocaust compensation programmes negotiated and in some cases administered by the Conference on Jewish Material Claims Against Germany ("Claims Conference").[25] Most of these programmes had limited payments so

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[24] Distribution Plan, Annex D ("Heirs"), at D-4–D-5 (emphasis in original).

[25] Distribution Plan, at D-6–D-16. The Claims Conference is one of four administrative agencies recommended by the Special Master and selected by the Court to assist in distribution of the Swiss Banks Settlement Fund. The United States Court of Appeals observed of the Claims Conference's role in this case that it has had "lengthy experience with similar programs"; the Court of Appeals also observed that it was appropriate for the Claims Conference to assist

that they could be made only to the original victim or, if deceased, to a very narrow class of relatives, generally spouses and children.

By contrast, programmes aimed at returning property (or an equivalent monetary payment) typically extend to a broad category of heirs as eligible claimants. These programmes included the United States' post-War amendment of the Trading with the Enemy Act, which released property belonging to Nazi victims that the United States had seized in its effort to impede the Nazi and Axis war effort. Under the Trading with the Enemy Act, the property was to be returned to the original owner, "legal representative," or "successor in interest by inheritance" or other operation of law. German restitution programmes for property stolen from Holocaust victims similarly contemplated a broad definition of heirs, including a property owner's "successors in right".[26]

Upon studying these various programmes, it became clear that whereas "property"-related compensation historically has covered broad categories of heirs, including distant relatives, compensation for "personal injury" generally has been limited to actual victims and their most immediate family members. We incorporated these principles in the Distribution Plan. Thus, for Deposited Assets Class claims alone (which seek the return of specific, identifiable property – Swiss bank accounts), payments are made to "heirs," using a broad legal definition. In accordance with precedent, payments for the other claims, which are premised upon damage to the person – Slave Labor Classes I and II and the Refugee Class – are limited to survivors, except where the victim died on or after 15 February 1999.[27] As to the Looted Assets Class, while "looting" ostensibly involved "property" claims, the class presented other unique problems and required a different approach to compensation, as more fully discussed below.

The Distribution Plan limits the scope of potentially eligible claimants in another significant manner. Notwithstanding that the Settlement Agreement applies not only to individuals but to organizations, communities, and other

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the Court in the Swiss Banks Settlement because it had been chosen "to process claims and distribute funds [by the German Foundation], which shares many class members with the present litigation. The efficacy of having one organization process the claims of individuals entitled to recover from both programs cannot be gainsaid." *In re Holocaust Victim Assets Litig.*, 413 F.3d 183.

[26] Distribution Plan, Annex D, at D-17–D-19.

[27] The German Foundation "Remembrance, Responsibility and the Future" (the German Slave Labor Foundation), which was negotiated at approximately the same time that we were formulating our own distribution recommendations in the Swiss Banks case, provided compensation to heirs of former slave laborers who had died on or after 15 February 1999. To minimise confusion among survivors and for administrative efficiency, we attempted to adhere as closely as possible to the German Foundation procedures, including the 15 February 1999 date for claims by heirs.

entities, the Distribution Plan does not provide for compensation to these institutions, "whether memorial, educational, religious, or cultural, whether for the recognition of the 'heirless' who did not survive the Holocaust or for any other laudable purpose".[28] As we observed in the Distribution Plan, this "is not to suggest that heirs of Nazi victims, particularly surviving members of the immediate family, have not themselves suffered. Nor does the Special Master overlook the immeasurable losses sustained by educational, religious and other communal institutions at the hands of the Nazis".[29] However, given the limits of the Fund and the broad definitions of the Settlement Agreement, it was necessary "to recommend essentially a 'triage' method of allocation and distribution. At the very head of the long line of individuals and groups who continue to suffer from the devastation inflicted upon their families and communities, stand the elderly survivors …".[30]

The Court's decision to adopt these more restrictive interpretations of the Settlement Agreement was of great significance in limiting the potentially eligible pool of class members to a manageable size. Fortunately, survivors, victim groups, organizations and other interested parties appear to recognise that for the Settlement Fund to have any real meaning, its benefits should be conserved to assist the hundreds of thousands of elderly Holocaust survivors who suffered most directly at the hands of the Nazis.

2. *Which Claims Should be Prioritised?*

The Settlement Agreement created five classes of compensable claims: Deposited Assets, Slave Labor Class I, Slave Labor Class II, the Refugee Class, and the Looted Assets Class. Nevertheless, under United States law, not all class action claims are to be treated equally. Indeed, as the United States Court of Appeals for the Second Circuit held in this very case: "Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims".[31]

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[28] Distribution Plan, at 19. There is a limited exception to this restriction. The $10 million Victim List Program benefits all class members by allocating funds to projects intended to locate and compile definitive lists of Holocaust victims, those who perished and those who survived.

[29] *Id.*, at 19.

[30] *Id.*

[31] *In re Holocaust Victim Assets Litig.,* 413 F.3d at 186, citing *In re "Agent Orange" Prod. Litig., 818 F.2d 179, 183–84 (2d Cir. 1978)* ("approving equitable distribution of settlement funds based on 'weigh[ing] of the relative deservedness of the claims"); *Curtiss-Wright Corp. v. Helfand,* 687 F.2d 171, 174 (7th Cir. 1982) (holding that limited settlement fund requires allocation based on equitable principles such as the strength of competing claims).

In devising the allocation and distribution recommendations, it was crucial to recognise that the Deposited Assets Class claims were unique, historically and legally. They were the foundation of the lawsuits, the focus of public pressure, and had the greatest substantive merit under United States law.

To place the Deposited Assets Class claims in context, some historic background is necessary. The first efforts to recover bank accounts deposited in Switzerland by individuals who ultimately would become Holocaust victims began just after the War, and continued unsuccessfully over the decades. Periodically, the Swiss banks would conduct internal "surveys" to find "dormant" Holocaust victim accounts. These surveys produced just a few hundred accounts. In 1996, due to mounting pressure from Holocaust victims and heirs and renewed media attention, a new investigation of Swiss accounts took place following Switzerland's agreement to relax its bank secrecy rules, this time led by Paul Volcker, former Chairman of the Board of Governors of the United States Federal Reserve System. The commission, also known as the Independent Committee of Eminent Persons or "ICEP," had two main objectives as stated in its final report: to "identify accounts in Swiss banks of victims of Nazi persecution that have lain dormant since World War II or have otherwise not been made available to those victims or their heirs" and "to assess the treatment of the accounts of victims of Nazi persecution by Swiss banks".[32]

On 6 December 1999, the Volcker Committee released its final report. Its research showed that some 6.8 million Swiss bank accounts were open or opened during the relevant period of 1933–1945. Of these, the banks had destroyed documents relating to approximately 2.7 million accounts. Despite this massive document destruction, records still remained for approximately 4.1 million Holocaust-era Swiss accounts. The auditors conducted research on approximately 300,000 of these 4.1 million accounts. The Volcker Committee determined that of the 300,000 accounts investigated, a total of 53,886 had a "probable" or "possible" relationship to victims of Nazi persecution.[33] These 53,886 accounts were to constitute the Accounts History Database ("AHD"). The Volcker Committee further recommended that approximately 25,000 of these AHD accounts should be published. The Volcker Committee concluded that the value of the accounts in the AHD was approximately $643 million to $1.36 billion, including interest. The Volcker Committee recommended that all of the 4.1 million Holocaust-era

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[32] Distribution Plan, at 52–53, citing Independent Committee of Eminent Persons, *Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks* (Berne: Staempfli) ("Volcker Report"), at ¶ 3.

[33] Distribution Plan, at 57, citing Volcker Report, at ¶ 30.

accounts for which records continued to exist should be consolidated into a "Total Accounts Database" (TAD) for use in a claims process.[34]

On the same date that the Volcker Committee released its report, 6 December 1999, the Swiss Federal Banking Commission ("SFBC") announced that it alone was solely responsible for decisions on publishing further lists of accounts, and that it would conduct additional analysis before reaching a decision on the Volcker Committee recommendations. Several months later, on 30 March 2000, the SFBC announced that it had authorised the Swiss Banks to "publish [25,000] accounts that are deemed by the Volcker Committee to have a probability of being related to victims of the Holocaust" and to create a central database containing [54,000] accounts which "the Volcker Committee considers to be probably or possibly related to Holocaust victims." The number of accounts recommended for publication subsequently was reduced to 21,000, while the number of accounts recommended for inclusion in the "central database" was reduced to 36,000. The SFBC declined to adopt the Volcker Committee's recommendation to create a Total Accounts Database for all of the 4.1 million accounts that existed in Swiss Banks in the relevant 1933–1945 period.[35]

In addition to the Volcker Committee investigation, a second major inquiry was under way at approximately the same time: that of the Bergier Commission, which had been established by the Swiss Parliament on 13 December 1996 to "examine the period prior to, during and immediately after the Second World War".[36] On 22 March 2002, the Bergier Commission issued its final report as well as a number of detailed studies concerning the behaviour of the Swiss banks and other Swiss institutions during the Holocaust period. The Bergier Commission concluded, among other things, that Swiss banks had permitted account owners to transfer their accounts to Nazi entities although the banks should have suspected that the owners were acting under Nazi duress; these were considered "forced transfers." The Commission also condemned the banks' post-War failure to adequately survey dormant accounts or to make a serious attempt to locate heirs of unclaimed accounts.

Despite the Bergier Commission's criticism of the banks' treatment of Holocaust-era accounts, the banks continued to object to elements of the distribution process, although under the terms of the Settlement Agreement they had no standing to do so. The Court did not tolerate this behaviour for long. Thus, in March 2004, Judge Korman wrote a remarkably direct and forceful opinion which summarised the entire history of the Swiss banks' activities in connection with Holocaust-era accounts. He began by observing:

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[34] Distribution Plan, at 58–59, 98–99, citing Volcker Report., at ¶ 65–67.
[35] Distribution Plan, at 57.
[36] *Id.*, at 64 (citation omitted).

> What compels me to write is that over the past year-and-a-half, the bank defendants have filed a series of frivolous and offensive objections to the distribution process …. These objections bring to mind the theory that, "if you tell a lie big enough and keep repeating it, people will eventually come to believe it." The "Big Lie" for the Swiss banks is that during the Nazi era and in its wake, the banks never engaged in substantial wrongdoing.[37]

Drawing upon the Bergier Commission's findings, Judge Korman explained how the banks had cooperated with one another to avoid customer inquiries after the War. He described the banks' history of document destruction and their determination to advise customers that they were not obligated to maintain records for more than ten years, even when the documents at issue still existed, and even when they knew that Holocaust victims were asking for them:

> After the war, many surviving account holders or their heirs approached the banks seeking information about accounts, often with valid legal claims. The banks, which had improperly transferred the funds in the accounts to the Nazis, were afraid that they would be called to account for the breach of their fiduciary duties. *See*, *e.g., Albers v. Credit Suisse*, 188 Misc. 229, 234, 67 N.Y.S.2d 239, 244 (N.Y.City. Ct. 1946) (holding Credit Suisse liable for transferring a client's assets to a German bank pursuant to the client's orders because "above all it knew that the plaintiff was not likely of his free will to transfer property of his located in Switzerland to a bank in German territory controlled by the German government"). Equally important, the problem was not disappearing. "Although assets transferred to the Third Reich were left out of the inventory of unclaimed assets of Nazi victims in Swiss banks, they were nevertheless part of the restitution claims" that had been filed against the banks [citing Bergier Report, at 443]. In sum, former account holders and their heirs were complaining, and access to records could have shown their claims to be legitimate.[38]

The Court explained that "the banks received a direct economic benefit from their silence," because in contrast to the law of the United States and other nations, "in Switzerland dormant assets remain indefinitely with the banks".[39] With this profit motive, in response to questions from account owners or their heirs, the "Swiss banks stonewalled as a matter of course. Because claimants typically lacked information as to the exact location or nature of the items deposited, the banks could routinely 'entrench themselves behind banking secrecy' and cite the claimant's inability to sufficiently document a legal entitlement as a reason to

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[37] *In re Holocaust Victim Assets Litig.*, 319 F.Supp.2d 301, 303 (E.D.N.Y. 2004). Judge Korman expanded further upon these themes in a later essay; *see* Edward R. Korman, "Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal," in *Holocaust Restitution: Perspectives on the Litigation and its Legacy*, Michael Bazyler and Roger P. Alford (eds.) New York University Press (2006).

[38] *In re Holocaust Victim Assets Litig.*, 319 F.Supp.2d at 308.

[39] *Id.*, citing Volcker Report, at ¶ 45.

deny payment".[40] If "claimants had precise information, the banks turned to still more deceitful tactics. 'A situation was reached where even death certificates were being demanded for people who had been killed in the [concentration] camps,'" when of course "no such documents were issued".[41]

The banks' refusal to provide information to their former customers continued for almost a decade after the Holocaust, and at some point the banks decided to act together to deflect further inquiry. "'In May 1954, the legal representatives of the big banks co-ordinated their response to heirs so that the banks would have at their disposal a concerted mechanism for deflecting any kind of enquiry. They agreed not to provide further information on transactions dating back more than ten years under any circumstances, and to refer to the statutory obligation to keep files for only ten years, even if their records would have allowed them to provide the information' ".[42] Nor did the Swiss banks stonewall "only in response to individual claimants." Rather, they "also employed this strategy in the face of broad-based efforts to uncover assets of Nazi victims. '[T]he banks and their Association lobbied against legislation that would have required publication of the names of such so called 'heirless assets accounts,' legislation that if enacted and implemented, would have obviated … the controversy of the last 30 years' ".[43]

This, then, was the factual background to the Deposited Assets Class. The claims plaintiffs had asserted against the banks in the late 1990s, and had settled by this lawsuit, were but the most recent attempt to recover Holocaust-era accounts from the Swiss banks. The lawsuits had been preceded by decades of bank misconduct and obfuscation.

As to the legal backdrop, the Volcker Committee investigation had revealed that even with the massive document destruction that had been undertaken by the banks, millions of Holocaust-era records did continue to exist. It was still possible to locate and pay specific accounts to specific Holocaust victims and heirs. Further, the underlying causes of action were quite straightforward and did not require application of novel or untested legal theories. Plaintiffs merely were asserting claims for simple breach of contract and unjust enrichment.

Our distribution recommendations therefore placed greatest priority upon establishing an individualised claims process for Deposited Assets Class claims, a recommendation that Judge Korman adopted and the Court of Appeals upheld in 2001, when it confirmed that it was appropriate to accord priority to the Deposited Assets claims:

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[40] *Id.*, 319 F.Supp.2d at 309, citing Bergier Report, at 449.
[41] *Id.*, 319 F.Supp.2d at 309.
[42] *Id.*, 319 F.Supp.2d at 311, citing Bergier Report, at 446.
[43] *Id.*, 319 F.Supp.2d at 312, citing Volcker Report, at ¶ 48.

> The existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting …. [T]hese claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate.[44]

Based on the estimates of account values set forth in the Volcker Report, at the exchange rates prevailing in September 2000 when the Distribution Plan recommendations were issued, the total value of the accounts that the auditors concluded "probably" or "possibly" belonged to Nazi victims was in the range of between $643 million to $1.36 billion, including interest and at present-day values. The Deposited Assets Class claims alone thus potentially were worth more than the $1.25 billion Settlement Fund.[45] Yet it was unlikely that all of the victims or heirs would be located, or that sufficient records existed to ensure that all victim accounts would be successfully claimed. Therefore, the Distribution Plan recommended that the amount available to the Deposited Assets Class be capped at $800 million. The remaining $425 million would be available for distribution to surviving members of the other four classes: Slave Labor Class I, Slave Labor Class II, the Refugee Class and the Looted Assets Class.

Payments of Deposited Assets Class claims would be based upon individualised review of the existing bank records as well as examination of claim forms, archival records, and a wide variety of other sources. Every effort would be made to determine and return to claimants the actual value of their deposits (multiplied by interest). If the actual account value was unavailable due to document destruction, then the auditors' estimates of average account values for similar types of accounts would be used.

The question that we still confronted, however, was how to minimise the administrative burdens and compensate for the lack of records, while still

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[44] *In re Holocaust Victim Assets Litig.*, 413 F.3d 183, 186. Judge Korman likewise has reaffirmed the strength of the Deposited Assets Class claims on numerous occasions since the adoption of the Distribution Plan. "The heart of this case" and indeed "the only cause of action capable of surviving a motion to dismiss turned on the failure of Swiss banks to honor their contractual and fiduciary duties to their depositors." *In re Holocaust Victim Assets Litig.*, 2002 WL 31526754 (E.D.N.Y. Nov. 4, 2002), at *7; *see also In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 93 (E.D.N.Y. 2004) ("[O]f all the claims asserted against the Swiss Banks, only the claims of the Deposited Assets Class have any legal merit. The other claims could not have withstood a motion to dismiss"). It should be noted that Judge Korman also has emphasised that the issue is not whether the other claims had moral validity, but rather that the deficiencies of these claims under United States law must serve "as a reality check for those … who believe that strong moral claims are easily converted into successful legal causes of action." *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 148–49 (E.D.N.Y. 2000).

[45] Distribution Plan, at 96–97; Volcker Report, at ¶ 32–34; ¶ 42 and n.23.

ensuring that only plausible bank account claims were paid. That concern is addressed below.

3. *How to Simplify the Claims Process while Paying only Plausible Claims?*

Given the passage of more than sixty years since the Holocaust, the fading of memories, and the destruction of documents, it was imperative to find a way to simplify the claims processes while still establishing limits so that only those with plausible claims would be compensated. In the absence of that element of plausibility, the Settlement Fund would be depleted and those whose property was taken as a result of the Holocaust would have lost whatever small satisfaction they might have obtained from finally seeing their specific injuries recognised in some tangible form. Yet if the evidentiary bar was raised too high, virtually no one could prove a claim. Thus, it was important to strike a balance by favouring the claimant while requiring that certain minimum levels of proof be met, depending upon the class and the nature of the claim.

Moreover, monetary compensation was only part of what so many claimants, especially the survivors, were seeking from the settlement. They, and the Court, also wanted the facts to be on record: how people were turned away from Switzerland at the border; how they were imprisoned and enslaved by companies that deposited the profits of this labour in Switzerland; how the Swiss banks the victims had entrusted had turned over their savings to the Nazis or had withheld them for decades under the guise of "banking secrecy."

We provide below some examples of how we tried to assist in easing the administrative burdens for claimants, and telling their stories.

a. *The Deposited Assets Class and the "Adverse Inference"*

As noted above, there had been massive and often deliberate destruction of bank records relating to Holocaust-era accounts. There are no records for 2.7 million accounts – over one-third of the deposits – and the account records that do remain sometimes are sparse. Nevertheless, millions of records continue to exist. In many cases, these records are sufficient to show that an account had been open or opened during the Holocaust era; who owned the account; and how much it had been worth. What often is missing is the record that would show whether the account had been closed, and if so, by whom. As the Volcker Committee and the Bergier Commission had indicated, it was not surprising that this kind of information often was unavailable, since presumably it would have confirmed in many instances that the banks had permitted Holocaust victims to turn over their accounts to Nazi Germany under duress, or that the banks had taken the accounts into their own profits after the War.

The solution to this dilemma actually was quite straightforward. It required only that the Court apply a fundamental evidentiary principle under United

States law and presumably available under other legal systems as well, that of "spoliation." The theory of spoliation posits that a party who has caused the destruction of documents, and who knew or should have known that the documents would be relevant to litigation, should be held responsible for this destruction. An "adverse inference" may be taken against that party. It may be presumed that the evidence destroyed would have been unfavourable to the person causing its destruction.

In his 2004 opinion criticising the banks' behaviour during and after the Holocaust, Judge Korman explained in considerable detail the basis for relying upon the adverse inference in reviewing claims to Swiss bank accounts:

> In light of [the] history [of ongoing and routine document destruction by Swiss banks], it is not surprising that individuals seeking to make claims as members of the Deposited Assets Class have had trouble establishing legal entitlement to accounts once held in Swiss banks. Despite decades of requests by claimants, records were denied to people under the auspices of private property law. Now that the records are ostensibly open [as a result of the settlement], they often do not exist. As a way to account in some measure for this void, the [Court-approved] rules governing the [claims resolution] process codify "Presumptions Relating to Claims to Certain Closed Accounts" that include the following:
>
> In order to make an Award … for claims to Accounts that were categorized by ICEP [the Volcker Committee] as "closed unknown by whom," a determination shall be made as to whether the Account Owners or their heirs received the proceeds of the Account prior to the time when the claim was submitted to the CRT. In the absence of evidence to the contrary, the CRT [an administrative body located in Zurich which administers the bank account claims process under the Court's supervision] presumes that neither the Account Owners, the Beneficial Owners, nor their heirs received the proceeds of a claimed Account in cases involving one or more of the following circumstances: ….
>
> h) the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks' practice of [destroying records or] withholding or misstating account information in their responses to inquiries by Account Owners and heirs because of the banks' concerns regarding double liability; … and/or
>
> j) there is no indication in the bank records that the Account Owners, Beneficial Owners, or their heirs received the proceeds of the Account.[46]

Judge Korman explained that the presumptions he had authorised the CRT to apply to the claims resolution process

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[46] *In re Holocaust Victim Assets Litig.*, 319 F.Supp.2d at 316–17, citing CRT Rules, Article 28 (footnotes omitted). The CRT Rules are available at www.crt-ii.org and www.swissbankclaims.com.

> are based on the principle of spoliation. 'It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). '[A]n adverse inference should serve the function, insofar as possible, of restoring the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.' *Id.* While these presumptions can of course never return account holders to the position they would have been in were it not for decades of bank stonewalling and document destruction, they can help to balance the equities.[47]

Thus, in the absence of bank records or other evidence to the contrary, where there is no information showing what happened to a Holocaust-era Swiss bank account, the CRT presumes that the account was closed improperly. It is assumed that the account owner did not receive the proceeds, but, rather, that the bank took the account into its own profits, permitted the account owner to withdraw the funds and turn them over to the Nazis under duress, or that the bank otherwise closed the account improperly. Based on these presumptions, the claimant – the Holocaust victim and/or his heir – receives an award. In many other instances, the adverse inference is not needed, because the surviving documentation is more than sufficient to show bank misconduct. The effect of the presumption is not insignificant. The average Deposited Assets Class award as of December 2008 is more than $147,000. Every one of these awards is described in detail on the case website, www.swissbankclaims.com.

The spoliation/adverse inference principle also has been utilised in another way in administering the Deposited Assets Class claims process: it underlies the Court's decision to accept our recommendation to authorise payments to claimants on the basis of their "Plausible Undocumented" claims. Given that the Swiss banks destroyed the records for over one-third of Holocaust-era accounts, and also in view of limitations on access even to the still-existing accounts,[48] it would be unfair to penalise claimants for whom bank records cannot be located. Thus, each of the approximately 105,000 Deposited Assets Class claims has been carefully reviewed by claims administrators.[49] Those claims determined to be plausible in accordance with fixed criteria, including the nature of the relationship between the claimant and the account owner, the account owner's connection

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[47] *Id.*, 319 F.Supp.2d at 317.

[48] These limitations on access include restrictions on viewing certain account data; a requirement that a "Data Librarian" appointed by Swiss banking authorities redact various data before claims administrators can review particular bank records; and, as noted previously, lack of full access to the "Total Accounts Database" (the 4.1 million accounts that still exist). *See* Judah Gribetz and Shari C. Reig, *Special Master's Interim Report on Distribution and Recommendations for Allocation of Excess and Possible Residual Funds*, at 32–35.

[49] These 105,000 claims include approximately 35,000 claim forms as well as "Initial Questionnaires" solicited after the settlement agreement was reached to obtain background

to Switzerland, the claimant's (or owner's) prior attempt(s) to retrieve his accounts from Switzerland, and other factors, receive compensation in the amount of $5,000. As of December 2008, over 12,000 claimants have received such payments.

b. *The Looted Assets Class and the "Cy Pres" Remedy*

As we explored various options for compensating members of the Looted Assets Class, we were confronted with several issues. On the one hand, the class was potentially vast, because all Nazi victims were looted, whether by German officials, local authorities, or neighbours. Looting took place whether the victim had fled to safety or had been murdered in a concentration camp. Indeed, as the Distribution Plan observed, there is "scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale".[50] On the other hand, there is no legitimate or responsible way to determine what property was lost, to whom, in what amount, and where it ended up. The link between a particular looted item and a Swiss entity or institution is far from clear.[51]

Yet the Settlement Agreement required that the loss have some connection to Switzerland. Thus, if we had recommended an individualised claims process for the Looted Assets Class similar to that recommended for the Deposited Assets Class (where millions of bank records did still exist), few if any Looted Assets claimants would have had sufficient proof to demonstrate what they had lost, what it had been worth, and most significantly, whether it had been transacted through Switzerland. Further, the administrative costs of such a process would have overburdened the Settlement Fund. Alternatively, if we had disregarded the "Swiss connection" and simply divided payments *pro rata* among all eligible claimants, individual compensation would have been minimal.

Under these circumstances, we concluded that neither a case-by-case adjudication of individual claims nor a *pro rata* distribution was acceptable. We explained in the Distribution Plan that it was:

> neither justifiable nor appropriate to select which looting victims may be entitled to recompense from this $1.25 billion Settlement Fund based entirely upon the happenstance of where the Nazi Regime chose to direct which loot, which records of the plunder happen to survive, and which items one may hazard a guess may have found their way to or through Switzerland. …
>
> Were the Special Master to recommend that each claim be assessed individually – as in the case of the bank accounts, which still exist in Switzerland in an identifiable

information in developing a plan of allocation and distribution. However, to ensure that all possible claims had been reviewed, the Court determined that Initial Questionnaires containing information about possible Swiss bank accounts – approximately 70,000 in total – could be treated as claim forms.

[50] *See* Distribution Plan, at 111.

[51] *Id.*, at 22–24, 111–116, and Annex G (The Looted Assets Class).

> form accompanied by documentation – the result would be an unwieldy and enormously expensive apparatus to adjudicate hundreds of thousands of claims, for losses which can barely be measured and hardly be documented, and whose connection to Switzerland, or a Swiss entity, if ever it existed, probably no longer can be proven. Further, the administrative expense of such a process would unjustifiably deplete the Settlement Fund.
>
> Conversely, were the Special Master to recommend a *pro rata* distribution, with each of the approximately 424,000 individuals who have indicated that they are Looted Assets Class claimants (to date) [based upon the analysis of the Initial Questionnaires received as of September 2000] receiving an identical distribution on the presumption that their plundered assets are traceable to Switzerland, or Swiss entities, each "award" would total little more than a few dollars. This is obviously untenable.[52]

Instead, we proposed and the Court adopted a third option: the distribution of Looted Assets Class compensation under a *cy pres* remedy. Under United States class action law, the *cy pres* doctrine (meaning "the next best thing" or "as near as possible") permits the Court to authorise to class members compensation of a type other than direct cash payments. The United States Court of Appeals for the Second Circuit – the jurisdiction with appellate responsibility for the district court in which this matter is pending – has held in the context of the Vietnam-era *Agent Orange* product liability class action that where a settlement fund cannot "satisfy the claimed losses of every class member," it is "equitable to limit payments to those with the most severe injuries" and to "give as much help as possible to individuals who, in general, are most in need of assistance".[53]

For the Looted Assets Class, the Distribution Plan provided for targeted humanitarian assistance to the very neediest class members, elderly Holocaust survivors who "perhaps would be less in need today had their assets not been looted and their lives nearly destroyed" during the Nazi era.[54] The Distribution Plan provided for a multi-year assistance programme to be operated by service agencies with many years of experience in administering similar programmes and who therefore were familiar with the claimants as well as the country-specific distribution mechanisms. The Court designated the American Jewish Joint Distribution Committee and the Claims Conference to assist with the administration of the Looted Assets Class programme within the Jewish survivor community. For decades, each organization has operated its own humanitarian aid

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[52] Distribution Plan, at 113–115.

[53] *In re Agent Orange Product Liability Litig.*, 818 F.2d 145, 158 (2d Cir. 1987); *see also In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 96–97 (E.D.N.Y. 2004).

[54] *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 96 (E.D.N.Y. 2004), citing Distribution Plan, at 117.

programmes on behalf of Jewish Nazi victims, and thus was well positioned to begin almost immediately the work on behalf of the Court. As to Roma, Jehovah's Witness, homosexual and disabled survivors, the Court took advantage of a similar assistance programme targeting Roma victims that was beginning under the auspices of the German Foundation, and that had designated the International Organization for Migration (IOM) to serve as administrator. The Court has allocated $205 million for multi-year humanitarian assistance programmes around the world, with particular emphasis upon the very neediest victims in the former Soviet Union and Central and Eastern Europe.

Unlike the programmes established for the other four settlement classes, the Looted Assets Class distribution process does not require a class member individually to show that his or her claim is "plausible." Rather, a class member must show only that he or she was a Nazi victim, and that he or she is in financial need. The assessment of need was and continues to be based upon analysis of demographic, mortality and social welfare data from a wide variety of sources. All available data has indicated a striking conclusion: that of the many services required by Nazi victims, such as medical treatments, prescription drugs, home health care, transportation, support groups and the like, the most urgent requirement in many cases is food. The needs are particularly severe for Jewish and non-Jewish victims in the former Soviet Union and Central and Eastern Europe. As of December 2008, over 228,000 of the neediest Nazi victims worldwide had benefited from services funded by the Court. Among that group are approximately 73,000 Roma survivors who, before this settlement, had received little or no Holocaust compensation. The Court's assistance to these victims often has meant the difference between subsistence and hunger.[55]

c. *Slave Labor Class I: Presumption of a Swiss Connection to the Proceeds of Slave Labor*

The third and final example of our attempt to simplify the claims process is the Court's approach to the claims process for members of Slave Labor Class I. Once again, the starting point was the language of the Settlement Agreement, which apparently required former slave laborers to show that the proceeds of their labor

[55] The allocation method adopted for the Looted Assets Class generated further litigation which was ended only by the United States Supreme Court. Certain United States survivors and their spokesperson repeatedly challenged the Court's decision to adopt the Special Master's recommendation to allocate the greatest percentage of Looted Assets Class funds to survivors living in the former Soviet Union, who upon study of demography, social services, prior Holocaust compensation programmes and a variety of other subjects, were determined to be the very neediest of the unfortunately large pool of needy survivors around the world. The allocation method has been upheld by the appellate courts, and in June 2006, the United States Supreme Court denied certiorari. *See In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89 (E.D.N.Y. 2004), *aff'd*, 424 F.23d 132 (2d Cir. 2005); *cert. denied*, 126 S.Ct. 2891 (2006).

were transacted through Swiss banks or other Swiss entities. We observed in the Distribution Plan that "[h]aving performed slave labor in itself does not make one a member of Slave Labor Class I. Under the Settlement Agreement (at Section 8.2 (c)), members of Slave Labor Class I must have labored 'for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through, Releasees' ".[56]

The slave labor class definitions "contain[] elements difficult to satisfy, in large part because, as many scholars agree, the economic history of the Holocaust remains incomplete".[57] We were "aware of no scholarly research that has yet traced 'the revenues or proceeds' of slave labor from a specific slave labor-using entity to its ultimate destination. While there are hundreds of thousands of surviving former slave laborers, many do not even know the name of the company they worked for, much less where the profits of their labor ended up".[58]

Nevertheless, "even while the actual proceeds of slave labor have not yet been traced – nor can they be without expending an inordinate amount of the Settlement Fund – certain indisputable [evidence] demonstrate[d] … the pervasiveness of slave labor across all of conquered Europe" and "the close financial relationships between German public and private slave labor-using entities and Swiss entities, including Swiss banks".[59]

As to Nazi Germany's use of slave labor, leading scholars confirmed "that the Nazi Regime exploited the slave labor of hundreds of thousands of 'Victims or Targets of Nazi Persecution' in every corner of its realm, and that slave labor not only was integral to Nazi policy goals but also critical to the Nazi war effort, particularly in its later years." Jewish and other Nazi victims performed slave labor "in a variety of settings: in labor details (clearing rubble, building roads and bridges), in concentration and forced labor camps (constructing and maintaining the camps, working in SSA-and privately-owned entities), and in ghettos (working in municipal workshops and private enterprises), among others. As the War progressed, the Nazis increasingly turned to concentration camp inmates to fill their labor needs in the armaments and other industries, and 'external camps' were constructed near factories themselves".[60] Based upon our analysis of other Holocaust compensation programmes, especially those administered on behalf of Germany, it appeared that a "conservative measure of the number of slave laborers from across Nazi Europe who survive today [i.e. the year 2000]" was approximately 170,000 individuals, who were receiving monthly pensions

[56] Distribution Plan, at 143.
[57] *Id.*, at 143.
[58] *Id.*, at 147–48.
[59] *Id.*, at 143.
[60] *Id.*, at 144.

under one of four separate German-funded Holocaust compensation programmes.[61] Because of the rigorous eligibility requirements under these programmes, which required extensive documentary proof concerning the claimant's whereabouts during the Nazi era, it was clear that a very large number of these individuals had performed slave labor.

As to the financial dealings between German slave labor enterprises and Swiss banks and other institutions, we learned that at least three distinct relationships had existed. First, "most significant German slave labor users had Swiss bank accounts".[62] There were extensive ties among German slave labor-using companies, the Nazi government, and Swiss financial institutions, as became clear from documentation we received after months of negotiations with the defendant banks and with the assistance of the Volcker Committee and the Swiss Federal Archives. We obtained a copy of the 1945 "Frozen Assets List," a document relating to a freeze of German assets instituted by Swiss authorities at the behest of the Allies, finally undertaken by the Swiss when the inevitability of an Allied victory became clear. The list demonstrates that hundreds of German companies known to have used slave labor, as well as the German government itself, held Swiss bank accounts as of 1945.[63]

Second, "many German entities, including a large number of the German corporations that exploited slave labor, established Swiss subsidiaries, and it is not unfair to presume that a Swiss entity would have maintained a domestic bank account or other asset in Switzerland." Third, the Nazi Regime itself also employed slave laborers, and "governmental reports analysing movements of Nazi gold, as well as other scholarship, confirm that the Nazi Regime and Nazi-controlled entities banked in Switzerland, which served as a vital conduit for needed hard currency exchange" during the Second World War.[64]

All of this information permitted us to recommend and the Court to adopt a legal presumption: that all former slaves for German entities should be considered to be members of Slave Labor Class I. This presumption would "simplify the 'administration of Slave Labor Class I by making it unnecessary for each claimant to prove a link between the German company for which slave labor was performed and a Swiss bank' ".[65] Accordingly, the "elderly members of this class" were "relieved of the burden of demonstrating precisely which company enslaved them and whether and how that company channeled revenues or proceeds of their slave labor through a Swiss entity. The fortuity that the apparent Swiss

[61] *Id.*, at 145.
[62] *Id.*
[63] *Id.*, at 146.
[64] *Id.*, at 146; see also Distribution Plan, Annex H and exhibits.
[65] Distribution Plan, at 147.

banking relationships of many slave labor-using entities has been documented should not prejudice those class members who performed slave labor for enterprises whose financial ties to Swiss entities may not yet have been demonstrated with the present state of research and scholarship".[66] We noted that many former slaves "cannot even identify the name of the corporation for which they labored; they know only what they did, where they did it, and the generally sub-human conditions in which they were forced" to work.[67]

As a result of the presumption that all former slave laborers worked for companies which transacted the proceeds of their slave labor through Switzerland, the compensation and payment process could be significantly simplified. Every former slave laborer would receive payment from the Swiss Banks Settlement Fund. We were able to recommend a Slave Labor Class I process that would essentially mirror the larger $5 billion German Foundation slave labor program, which had been finalised by German legislation shortly before the Special Master filed his distribution recommendations in the Swiss Banks case. Thus, each Jewish, Roma, Jehovah's Witness, homosexual and disabled former slave laborer who was to be compensated under the German Foundation legislation also would receive an additional payment from the Swiss Banks Settlement. The German Foundation had selected a number of claims administrators, among them the Claims Conference (for Jewish claimants) and the IOM (for non-Jewish claimants). For administrative efficiency and to minimise complications for class members, the Court adopted the Special Master's recommendation to use the same organizations and claims processes for Slave Labor Class I.

In addition to using many of the same application forms and claims processing rules, the Distribution Plan also recommended that the Court use the same fundamental compensation principle: payments to all former slave laborers would be in identical amounts regardless of the length of time spent in slave labor or the nature of the work performed. At this stage of their lives, the Court agreed that it would have been unseemly to encourage survivors to engage in a competition to demonstrate who had suffered "more." As Judge Korman has observed, "comparisons among survivors are odious".[68]

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[66] *Id.*, at 147.

[67] *Id.*, at 147–48, citing the seminal work *Less Than Slaves* (Cambridge, Massachusetts: Harvard University Press 1979). The author of *Less Than Slaves*, Benjamin B. Ferencz, was the Chief Prosecutor in the Nuremberg trial against the Nazi *Einsatzgruppen* units, later became a key advocate on behalf of compensation for Holocaust victims, and more recently has been a leading supporter of the International Criminal Court. *See*, *e.g.*, Benjamin B. Ferencz, "Misguided Fears About the International Criminal Court," 15 Pace Int'l L. Rev. 223 (2003); "The International Criminal Court: The First Year and Future Prospects – Remarks by Benjamin B. Ferencz," 97 Am Soc'y Int'l L. Proc. 259 (2003).

[68] *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d at 97.

As true for the Looted Assets Class humanitarian programmes, the Slave Labor Class I compensation programme has been a great success, resulting in payments as of December 2008 of over $287 million to nearly 198,000 former slave laborers. The application process takes advantage of the Claims Conference's long years of experience in administering other Holocaust-related compensation programmes. Thus, claimants not only were located through outreach and the submission of claim forms, but through an existing database of Holocaust survivors already available to the Claims Conference through its administration of other compensation programmes. Although the IOM's work was considerably more complicated because the German Foundation and Swiss Banks settlement programmes essentially have been the first major efforts to compensate Roma and other victim groups, the IOM's research under the supervision of the Court and Special Masters – and the claims documents themselves – have resulted in important new scholarship in collaboration with renowned Holocaust research institutions such as the United States Holocaust Memorial Museum.[69]

E. *Conclusion*

One element of our compensation programme is perhaps incapable of replication: the fortuity that the case is pending before a judge as compassionate and courageous as the Hon. Edward R. Korman, who was willing to tackle and overcome what others might have viewed as insoluble dilemmas to bring some measure of justice to survivors of the Holocaust. Other courts have declined to take on this responsibility. For example, slave laborers tried to sue German companies in the 1960s. A case against the major slave labor-using enterprise IG Farben was rejected in 1966. The United States District Court in that case held that the

> span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought – adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power – is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.[70]

We have had the great privilege over these years to have learned something of the personal histories of thousands of individual survivors of the Holocaust. We became acquainted with one of the more poignant and ironic of these stories

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[69] *Special Master's Interim Report, October 2, 2003*, at 63–64 and n. 103.
[70] *Kelberine v. Societe Internationale,* 363 F.2d 989, 995 (D.C. Cir. 1966).

while reviewing proposed awards for claimants with plausible undocumented bank account claims. In the fall of 2006, the Court authorised an award of $5,000 to a Holocaust survivor who plausibly had demonstrated that her family had had a Swiss bank account that was never returned. Because she also had been a former slave laborer, she had received a separate payment under Slave Labor Class I. Her daughter is a professor and she sent us her research concerning resistance efforts in the concentration camps. Her mother (the claimant) and aunt had been saved by this "resistance" – by the concentration camp inmates who, at great personal risk, had warned them to lie about their ages, and about whether they were twins, to avoid "selection" for immediate death in the gas chambers.

The professor's mother – who was paid under the Swiss Banks settlement because of the complex claims processes Judge Korman was willing to undertake – happens to have been one of the plaintiffs in the IG Farben case: the very case that was dismissed in 1966 because the claims seemingly presented so many obstacles. Now, forty years later, this Holocaust survivor finally has received some measure of compensation for what happened to her in Europe in the 1940s, because a United States federal judge concluded in the 1990s that justice was long overdue.

Part III
The Internationalised Context of 'Mass Claims'

Overcoming Evidentiary Weaknesses in Reparation Claims Programmes

*By Heike Niebergall**

A. *Introduction*

1. *The Right to Reparation*

It is a long established principle of international law that the breach of an international obligation entails the duty of States to make reparations,[1] a duty that also applies to human rights law. Reparations for victims of gross violations of human rights or international crimes are called for in many international treaties[2] as well as more recently in declarative instruments, most notably the *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* adopted by the UN Commission on Human Rights in 2005[3] and the *Principles on Housing and Property Restitution for Refugees and Displaced Persons* adopted by the Sub-Commission on the Promotion and Protection of Human Rights in 2005.[4]

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[1] Factory at Chorzow, Judgment No. 8, 1927, P.C.I.J., Series A, no. 17, at 29.

[2] See specifically, Art. 8 of the Universal Declaration of Human Rights; Arts. 2(3), 9(5) and 14(6) of the International Covenant on Civil and Political Rights; Art. 39 of the Convention on the Rights of the Child; Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Arts. 5(5), 13 and 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Arts. 25, 68 and 63(1) of the Inter-American Convention on Human Rights as well as Art. 21(2) of the African Charter on Human and Peoples' Rights.

[3] The so-called van Boven/Bassiouni Principles, Adopted by the Commission on Human Rights in its resolution 2005/35 of 19 April 2005, by the Economic and Social Council in its resolution 2005/30 of 25 July 2005, and adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, UN Doc A/RES/60/147.

[4] The so-called Pinheiro Principles, UN ECOSOC Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 56th Session, Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, *Principles on Housing and Property Restitution for Refugees and Displaced Persons* UN Doc E/CN.4/Sub.2/2005/17 (28 June 2005).

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 145–166.

While the obligation to provide reparations for victims of gross human rights violations and international crimes continues to be neglected in the majority of cases, the past two decades have seen a steady increase in the number of institutions and mechanisms that are established to provide redress directly to individuals for their losses and/or suffering.[5]

Reparation claims programmes have begun to play a prominent role in national and international rehabilitation and reconciliation efforts following an armed conflict or other crisis that involved large-scale human rights violations, as they are being increasingly recognised as an integral part of transitional justice, complementing other transitional justice measures such as the establishment of criminal tribunals and truth and reconciliation commissions. Following this recognition, reparation claims programmes have been explicitly provided for in peace agreements[6] or have been called for in the reports and recommendations of truth and reconciliation commissions.[7]

2. *The Setting of Reparation Claims Programmes*

Given the different violations that victims suffer during a conflict or crisis and the variety of circumstances that victims might find themselves in afterwards, reparation claims programmes typically address one or more of the following issues:

They may provide for the restitution of a right, a piece of property or an asset that was lost during the conflict, or if restitution is not possible, they may provide compensation in lieu of restitution. In particular, the restitution of land and other property rights has been called for in the aftermath of recent conflicts, as restitution is seen as a major requirement for a sustainable and successful return of refugees and internally displaced persons (IDPs).[8] Unresolved property disputes constitute a major threat to peace and a country's stability and their

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[5] See K. Oellers-Frahm and A. Zimmermann (eds.), *Dispute Settlement in Public International Law – Texts and Materials*, 2nd revised and updated edn, 2001; P. Sands, R. Mackenzie, and Y. Shany (eds.), *Manual on International Courts and Tribunals*, 1999.

[6] The Dayton Peace Agreement signed in November 1995 that ended the four year conflict in the former Yugoslavia recognised the right of all refugees and displaced persons in Bosnia and Herzegovina to freely return to their homes of origin and granted "the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them". This recognition was the basis for the establishment of the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina ("CRPC") in 2000 which received over 240,000 claims to over 319,220 properties. See Annex 7 of Article 1 of the General Framework Agreement for Peace in Bosnia and Herzegovina, 1995, available at www.nato.int/ifor/gfa/gfa-home.htm.

[7] The Final Report of the Truth and Reconciliation Commission of Sierra Leone dedicated a whole chapter to the establishment of a Reparations Programme for victims of the conflict, see Volume 2, Chapter 4 of the Report at www.trcsierraleone.org/dnwebsite/publish/index.shtml.

[8] For a list of the situations and countries for which the establishment of reparation programmes have been discussed or called for in addition to existing property restitution programmes, see

resolution is thus considered to be a key aspect of peace-building and economic development within post-conflict societies.[9]

Reparation claims programmes might also aim at rehabilitating victims through the provision of in-kind benefits, for example free medical services or education, or the payment of a mostly symbolic and often standardised sum of compensation. In addition, reparation claims programmes might provide certain measures of satisfaction through the issuance of (quasi) judicial decisions of claims[10] that contain an account of the violations that occurred, restore the rights of victims or, at least, officially acknowledge the violation of these rights.

3. *Main Characteristics of Reparation Claims Programmes*

Reparation claims programmes set up in the aftermath of an atrocity need to take into account the historic and factual circumstances that led to the atrocity and need to be targeted to the specific situations that victims find themselves in. As a result, each programme has its unique features and challenges that impact upon the legal framework and operational structures.

At the same time, there are a number of similar features that can be found in practically all reparation claims programmes:[11]

First, reparation claims programmes invariably deal with very large numbers of cases. In past reparation claims programmes, the numbers ranged from 10,000 claims to 2.6 million claims.[12] Such numbers effectively exclude the possibility of resolving the claims within the domestic court systems. Furthermore, the financial and human resources available to administer reparation programmes and/or to fund the awards are usually extremely limited and almost always fall short of the actual funding needs. At the same time these programmes are faced with high expectations on the side of victims as well as political pressure to provide redress in a short period of time.

Even though these features are not equally prominent in all programmes, in practice they have forced claims administrators to balance individual justice concerns and aspirations of individual victims with the necessity to bring a just

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N. Wühler, "Claims for Restitution and Compensation," in: R. Cholewinski, R. Perruchoud and E. MacDonald (eds.): *International Migration Law*, 2007, 203 at 215.

[9] Scott Leckie, *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons*, (New York, Transnational Publishers 2003).

[10] Sometimes also called "Award" or "Notification".

[11] On the general characteristics of mass claims processes, see, Hans Das, "The Concept of Mass Claims and the Specificity of Mass Claims Resolution," in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes*, at 3; N. Wühler and H. Niebergall, *Property Restitution and Compensation: Practices and Experiences of Claims Programmes*, International Organization for Migration, Geneva, 2008.

[12] The 10,000 claims received and decided by the First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland and the 2.6 Million claims processed by the United Nations Compensation Commission (UNCC) represent the two ends of the spectrum.

solution to all victims within an acceptable timeframe. Reparation claims programmes are faced with the difficult task to streamline the reparation process and, at the same time, be mindful of the individual claimant's due process rights when deciding about her or his entitlement to benefits. In dealing with this challenge, reparation programmes have developed novel approaches and techniques, which are not known in the case-by-case approach of traditional domestic courts.[13] These so-called mass claims processing techniques rely heavily on the support of a substantial secretariat and the use of modern information technology.[14]

An area where mass claims processing techniques have played a particularly important role is the administration of evidence, i.e. the information that is considered when deciding about the victim's entitlement to restitution or compensation under the programme. This chapter seeks to provide an overview and give concrete examples of how large-scale reparation programmes have administered the evidence in their decision-making processes, in particular the new techniques and approaches applied in order to overcome the lack of evidence in individual cases.[15]

B. *Challenges in the Administration of Evidence*

There are two main challenges that large-scale reparation claims programmes face in the administration of evidence. These are the incomplete evidence submitted by individual claimants in support of their claim on the one hand, and the vast amount of information that the programmes have to administer in total on the other.

1. *Incomplete Evidence Submitted by Claimants*

The information and evidentiary documents required from those claiming a benefit in a reparation claims programme usually concern the distinction between

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[13] For the development of these techniques, programmes have drawn on certain national experiences, notably the rules and procedures developed in the United States for class action lawsuits, see F.E. McGovern, "The Intellectual Heritage of Claims Processing at the UNCC," in R. Lillich (ed.), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (New York Transnational Publishers 1995), at 191.

[14] V. Heiskanen, "Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology," in: Permanent Court of Arbitration, ed., *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges, supra*. n. 11, at 25.

[15] For an overview of the special provisions with respect to evidence and standards of proof in the major international mass claims processes of the past three decades, see Howard M. Holtzmann and Edda Kristjansdottir (eds.), *International Mass Claims Processes: Legal and Practical Perspective*s, Oxford 2007, Chapter 5.02, at 210.

the victims of conflict and crisis in general and the beneficiaries of the programme. While reparation claims programmes are established to redress the individual suffering of victims during conflict or crisis, not all victims are necessarily entitled to receive benefits under a particular programme. Rather, these benefits will be limited to those victims who fall under the legal definitions set out in the programme's legal framework. For an individual claiming a benefit, it is thus not sufficient to show that she or he is a victim of the conflict, but rather that she or he meets the eligibility criteria to receive benefits, i.e. that she or he suffered a particular type of violation or loss during a certain period of time and due to certain circumstances. Depending on the type of the programme, a victim might also be required to substantiate a particular loss by submitting information that will allow a valuation of the loss and the fixation of the compensation sum to be paid.

Various factors make it difficult, and sometimes impossible, for victims to provide the necessary information to prove their eligibility or to substantiate their claim:

The first difficulty results from the circumstances under which the violation or loss occurred. Those fleeing from a war zone seldom have the foresight or are able to take with them the evidence that will later be required to prove their eligibility and/or to substantiate a claim in a reparations programme. The same is true for those who are expelled from their home by hostile forces or whose homes and personal belongings are destroyed.

Another factor is time, i.e. the period that lies between the occurrence of the loss or violation and the establishment of a reparation programme. The more time that has passed, the harder it is for victims or their relatives to gather information necessary to substantiate a claim. Family members who might have witnessed the events might have passed away and memories about the fate of relatives or the family's history may have faded.

The poor quality, complete destruction or loss of public records that occur during a prolonged or violent conflict add to the difficulty most claimants face in providing evidence in support of their claims. If ownership deeds and cadastral records or birth, marriage and death certificates cannot be obtained or replaced in the aftermath of a conflict, it is difficult for claimants to proof their right of ownership or inheritance.

But even if public records exist in the country, victims wishing to claim benefits might not have access to these records, because they have fled the country or region of origin and cannot or dare not return to their homes.

Last but not least, the difficulty might lie in the nature of the violation itself that will make it difficult to proof a certain loss or violation. This is particularly true for some of the gross human rights violations that the more recent reparation programmes try to address. The Reparation Programme recommended by

the Truth and Reconciliation Commission of Sierra Leone, for example, is to provide benefits to victims of sexual violence.[16] What type of evidence is a victim of sexual violence to provide as proof of the sufferings she or he endured, if, according to the programme's legal framework, the violation has to have occurred during a particular period of time?

2. *Vast Amount of Information Received in Total*

While the individual claim might lack supporting evidence, the reparation programme that is dealing with the entirety of claims is faced with the difficult task of collecting, storing and administering a vast amount of information in a way that allows repeated and easy access to and cross-referencing of the information. In most reparation programmes, this does not only include the information provided by individual claimants, but also information gathered from archives and public records or from international organizations and NGOs.

The sheer volume of information that programmes are being faced with has created the need for robust databases and state of the art information management systems.[17] As will be shown below, these systems have also allowed for the development of new processing techniques that help to overcome or compensate for the lack of evidence available in individual claims.

C. *Addressing Evidentiary Weaknesses*

In reparation claims programmes that address gross violations of human rights following a conflict or crisis, the lack of evidence in individual claims is very much linked with the circumstances leading to the losses and violations that were sustained and that are to be redressed through the programme.[18] As a result, past reparation claims programmes had to be sensitive to the evidentiary difficulties victims faced and needed to take an innovative approach to the administration and assessment of evidence, in order to ensure that those victims who the programme was meant for were indeed reached and benefiting from the programme.

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[16] See Report of the Truth and Reconciliation Commission of Sierra Leone, Volume 2, Chapter 4, para. 134, at www.trcsierraleone.org/dnwebsite/publish/index.shtml.

[17] For a general overview of the use of information technology in mass claims processing, see V. Heiskanen, "Virtue Out of Necessity …", *supra*. n. 14 at 25.

[18] Jacomijn J. van Haersolte-van Hof, "Innovations to Speed Mass Claims: New Standards of Proof," in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, supra*. n. 11, at 13.

They have done so, mainly on two levels. First, by relaxing the evidentiary requirements in favour of claimants, and second, by applying certain mass claims processing techniques in order to fill the evidentiary gaps in individual claims.

1. *Relaxing Evidentiary Requirements in Favour of Claimants*

a. *Distributing the Burden of Proof*

While the burden of proof[19] in principle rests with a person claiming a benefit, mass claims processes have eased this burden for claimants by stipulating an obligation for other parties directly or indirectly involved in the claims resolution process to cooperate in the gathering of evidence.

An example is the regulation in the rules of procedure for the First Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland ("CRT I"). The establishment of the CRT I in 1997 resulted from the international controversy regarding the destiny of dormant assets deposited with Swiss banks prior to or during World War II. Following an agreement between the World Jewish Restitution Organization and the World Jewish Congress on the one side and the Swiss Bankers Association on the other, the CRT I was tasked with the resolution of claims filed following the publication of a list of accounts that had been dormant since 9 May 1945. The design of the CRT I process was based on the principles of international arbitration.[20]

Article 22 of the CRT I Rules[21] states that "the claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account" and thus in principle places the burden of proof on the claimants. At the same time, however, the banks had to provide all available bank documentation on the dormant accounts in their possession, including bank records that might contain biographical information about the original owners.[22] The extent of information that still existed in the bank records differed

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[19] Generally speaking burden of proof refers to "the obligation to prove or the necessity of affirmatively proving a fact or facts in dispute". The exact scope and legal connotations of the term "burden of proof", in French referred to as "*la charge de la preuve*," differs between the common and civil law and international law.

[20] For a more detailed description of the CRT I's structures and processes, see S. Wade, *Mass Claims Arbitration: The Experience of the Claims Resolution Tribunal for Dormant Accounts in Switzerland*, Mealey's International Arbitration Report, vol. 14, No.11.

[21] The Claims Resolution Tribunal for Dormant Accounts in Switzerland – Rules of Procedure for the Claims Resolution Process, 15 October 1997, in, *World Trade and Arbitration Material*, vol.11, 1999, at 165 or available at: www.crt-ii.org/_crt-i/frame.html.

[22] According to Article 10 paragraph 3 of the CRT I Rules, the disclosure of bank records could be withheld only in those cases, where the claim had not passed the so-called initial screening test, which preceded the actual arbitration process. For this test, the threshold was lowered considerably. A claim only failed the test, if the claimant had not submitted any information on his or her entitlement to the dormant account, or if it was apparent that the claimant was not entitled to the dormant account.

widely from account to account. However, Bank records often included information such as the account owner's address, her or his profession or academic title, information about next of kin and maiden names, the name of a power of attorney as well as information on dates of deposits or meetings with the account owner at the bank. In many cases the duty to disclose this information helped claimants, who lacked documentation directly proving their family's connection to an account, to show that the family member they had identified and the account owner were in fact the same person. For example, some claimants were able to provide a letter received from their relative that showed that the relative had lived in a certain town that matched the place of residence of the account owner recorded by the bank, or a post card that showed that the relative was in Switzerland during the period when the bank account was opened or deposits were made. Others provided family photographs taken in front of the family business that showed that their relative had the same profession that was recorded for the account owner in the bank records.

The burden of proof was also attenuated in the German Forced Labour Compensation Programme. This programme was established and implemented by the International Organization for Migration ("IOM") on behalf of the German Foundation "Remembrance, Responsibility and Future" that had been set up by the German Government in August 2000 to provide compensation to former slave and forced labourers under the National Socialist regime.[23]

While claimants had to demonstrate through the submission of documents that they were eligible for compensation, the German Foundation Act[24] that governed parts of the claims resolution process also directed German enterprises and German state entities (e.g. social security and other archives) to assist claimants in the production of evidence. As a result of this duty to cooperate, German enterprises provided company records, mostly on previous compensation payments to former forced and slave labourers made by the company that could be used to supplement and/or validate individual claims submissions.[25]

The duty to cooperate could also be found in the rules guiding the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). ICHEIC was established in 1998 following negotiations among European insurance companies and US insurance regulators, as well as representatives of Jewish and survivor

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[23] For information on the establishment of the Foundation "Remembrance, Responsibility and Future" see R. Bank, "The New Programs for Payments to Victims of National Socialist Injustice," 44 German Yearbook of International Law (2001), at 307.

[24] The complete text of the German Foundation Act is available at www.stiftung-evz.de/die_stiftung_erinnerung_verantwortung_und_zukunft/stiftungsgesetz/.

[25] While these lists helped claimants to proof that they had worked as slave or forced labourers for certain companies, these lists also resulted in a reduction of the compensation award as compensation payments previously received by claimants had to be deducted.

organizations and the State of Israel. By the end of its operations in December 2006, ICHEIC had resolved more than 90,000 claims relating to unpaid insurance policies from the Holocaust era.[26] While claimants had to submit all relevant documentary and non-documentary evidence in their possession or under their control that could reasonably be expected to be submitted in view of the circumstances and the years that elapsed, the responding insurance companies were required to cooperate in the search of evidence.[27] Once a claim was made, insurance companies searched within their company archives for any records and information on whether a policy had been issued under a certain name and on what terms.

b. *Fact Finding Role of the Programme*

The secretariats of most claims processes have themselves actively participated in the gathering of evidence. The CRT I Rules of Procedure granted broad powers to the arbitrators and arbitrator panels to "conduct on their own such factual and legal inquiries as may appear necessary to assess as comprehensively as possible all submitted claims".[28] As a result, the lawyers and paralegals working at the secretariat conducted legal and factual inquiries as well as historical research on the circumstances surrounding a case. In most cases, further factual inquiries were conducted by sending a written request for (additional) information to the Bank or the Claimant to inquire about information on the account and the account owner contained in the bank records or to inquire about and clarify specific aspects of a claim. In some cases, the secretariat staff also contacted claimants or answered requests from claimants by phone to clarify aspects of a claim and to encourage the submission of informal information and documents that helped to establish plausibility.

In this regard, it is important to mention that claimants were advised that they did not require legal representation during the CRT I process.[29] While this facilitated access to the claims process for claimants, it also lead to a certain imbalance between the claimants and the Swiss Banks who in contrast to claimants were represented by their internal legal departments or by external law firms and who had been closely involved in the setting up of the CRT and in drafting its rules. As a result of this and in view of a largely elderly claimant community, the Secretariat, while remaining impartial and independent at all time, took an active

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[26] For further information on ICHEIC, see the Commission's website at www.icheic.org.

[27] Holocaust Era Insurance Claims Processing Guide, 1st edition – 22 June 2003, at www.icheic .org /pdf/ICHEIC_CPG.pdf.

[28] Article 17 CRT I Rules of Procedure.

[29] This advice was included both in the literature sent to potential claimants with the Claim Form and in the CRT information booklet. The majority of claimants took this advice and had no legal representation.

role in advising claimants on the CRT's arbitration procedures and the type of information that they could submit and ensured that each party's arguments and documents were fairly presented to the arbitrators.[30]

The much larger number of claims received by the German Forced Labour Compensation Programme made it impossible to contact claimants on an individual basis for further information.[31] Nevertheless, the German Foundation Act established a general fact-finding role for the implementing partner organizations that processed the claims. As part of the gathering of evidence, the International Organization for Migration ("IOM"), for instance, cooperated closely with external archives, such as the Red Cross International Tracing Service (ITC) in Bad Arolsen as well as archives in Poland and the former Yugoslavia, in order to supplement and match the information available in individual claims with records and information contained in these archives. In addition, both the German Foundation itself and the programme's Secretariat at IOM conducted historical research about slave and forced labour to verify claimant allegations and to assist claimants in their fact finding efforts.

The United Nations Compensation Commission ("UNCC") that was established as a subsidiary organ of the United Nations Security Council to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait in August 1991,[32] also spent considerable resources on gathering information and documentation to help establish the facts underlying the claims. Again, in light of the large number of claims received for each category, this was not done on an individual claims basis, but rather in bulk, by matching lists of claimant names against external records. Examples for the Secretariat's fact finding are the collection and computerisation of the Kuwaiti and Iraqi residence databases so that they could be compared with information contained in claims. Also, flight manifests from airlines operating in the aftermath of the occupation, border control records as well as lists of evacuees kept by

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[30] S. Wade, *Mass Claims Arbitration, supra*., n. 20 at 4.

[31] In contrast to the 9,918 claims received and resolved by the CRT I within three and a half years (January 1998 to September 2001), the German Forced Labour Compensation Programme at IOM processed over 400,000 compensation claims during its operations from August 2000 to December 2006.

[32] Report of the United Nations Secretary-General of 2 May 1991 pursuant to paragraph 19 of Security Council Resolution 687, UN Doc. S/22559, available at: www2.unog.ch/uncc/resolutio/res2559; for general information about the UNCC, see Veijo Heiskanen, *The United Nations Compensation Commission*, Requeil des Cours, Vol. 296, 2002, at 259; Mojtaba Kazazi, "An Overview of Evidence before the United Nations Compensation Commission," in: *International Law Forum du droit international 1999*, at 219; N. Wühler, "The United Nations Compensation Commission," in: *Albrecht Randelzhofer, Christian Tomuschat* (eds.), State responsibility and the individual: reparation in instances of grave violations of human rights, The Hague et. al. 1999, at 213.

international organizations were used to verify the so-called small departure claims (Category "A" claims).

Finally, an active fact-finding role was also a common feature of property restitution programmes. The Commission for Real Property Claims for Displaced Persons and Refugees in Bosnia and Herzegovina ("CRPC"),[33] which was created under Annex VII of the "General Framework Agreement for Peace in Bosnia and Herzegovina" to decide claims for real property following the war in the former Yugoslavia, initiated evidence collection or evidence verification procedures, if no evidence was available to the claimant or if the credibility of the evidence presented was doubtful.[34] Consequently, the Commission's Executive Office set up a Verification and Cadastre Section that was tasked with individual claims verification. The staff of this Section consulted cadastral and other public records in the 148 municipalities in Bosnia and Herzegovina whenever the required evidence was missing in a claim.

c. *Relaxed Standards of Evidence*

While not true for all programmes,[35] the majority of recent mass claims programmes have developed and applied relaxed standards of proof, in order to facilitate the claimants' task of proving their claims.

i. Holocaust-Related Programmes

Due to the devastation caused by the Second World War and the long time that had passed since then, it was clear at the outset of the Holocaust-related programmes that evidence would be particularly scarce. In fact, one of the reasons why victims had not received insurance benefits or accessed bank accounts in the past was the inability of victims to meet the ordinary evidentiary standards applied by banks, insurance companies or the domestic courts, should they have pursued their claims on an individual basis.[36] In recognition

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[33] During its operations from 1996 to 2003, the Commission in Bosnia processed approximately 320,000 claims filed with it. For general information on the CRPC, see Hans Van Houtte, "Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina," 48 Int'l & Comp. L.Q., at 625 (1999); Hans Van Houtte, "Evidence before the Commission for Real Property Claims in Bosnia and Herzegovina," in: *International Law Forum du droit international*, vol.1, 1999, at 225.

[34] See Article 33 of the Book or Regulations on Confirmation of Occupancy Rights of Displaced Persons and Refugees, on file with the author.

[35] Neither the Commission for Real Property Claims of Refugees and Displaced Persons in Bosnia and Herzegovina nor the Housing and Property Claims Commission in Kosovo included in their legal rules a relaxation of evidentiary standards.

[36] Another reason, of course, was the costs involved in pursuing a claim on an individual basis and through the domestic court systems. In contrast to this, all reparation claims programmes were free of charge for the claimants and did not require legal representation during the proceedings.

of this fact, all Holocaust-related claims programmes applied a relaxed standard of proof for all claims.

Standard of Plausibility. Article 22 of the CRT I Rules provides that a claimant must show that it is plausible in light of all the circumstances that he or she is entitled to the claimed account. Article 22 further states that the Sole Arbitrator or the Claims Panel "shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts".

The claims process before the Second Claims Resolution Tribunal ("CRT II"),[37] which was established following the completion of the CRT I process and used the existing CRT I infrastructure in Zurich, Switzerland, also uses the "standard of plausibility". Article 17 (1) of the CRT II Rules provides that each claimant shall "demonstrate that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the claimed Account".[38]

While the Rules for CRT I or for CRT II do not contain a definition as to what constitutes a finding of plausibility, Article 22 of the CRT I Rules lists three requirements for a finding of plausibility:

- *Production of all documents and information by the Claimant that can be reasonably expected to be produced in view of the particular circumstances, including, without limitation, the history of the claimant's family and whether or not the published account holder was a victim of Nazi persecution.*

As stated above, claimants were encouraged to provide any information that, even though not directly connected to the Swiss bank account, might help to show that it was plausible that the relative they identified and the account owner were the same person and that they were entitled to the relative's account. The type of information that was accepted as proof of evidence about personal circumstances and family relations was broadened to assist claimants: in lieu of official documents, a self-drawn family tree that showed how the claimant was related to the original owner of the account was accepted even if it was unsupported by official documents such as birth certificates. Similarly, family photographs, letters and postcards or even newspaper clippings were regarded as

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[37] The CRT II claims process was established in February 2001. It followed the publication of lists of names of owners of approximately 23,700 accounts who were probably or possibly victims of Nazi persecution as well as 400 Power of Attorney holders. The claims process is part of the settlement of the Holocaust Victim Assets litigation in the US District Court for the Eastern District of New York, Chief Judge Edward R. Korman presiding. For further information on the CRT II claims process, see www.crt-ii.org/index_ex.phtm.

[38] CRT II, Rules Governing the Claims Resolution Process, as amended, Art. 17 (1), available at www.crt.ii.org/_pdf/governing_rules_en.pdf.

sufficient to show a connection to a certain place or to prove the existence of a family member with a certain name, if this information matched or at least did not contradict information contained in the bank records.

- *No reasonable basis to conclude that fraud or forgery affects the claim.*

The second requirement addressed the obvious concerns connected with the application of a low standard of proof.[39] While the CRT did not detect any deliberate attempts to assume a false identity or falsify a family relationship, there were a few cases where individuals – apparently acting in bad faith – had filed a large number of claims to different accounts even though they evidently knew that they were not related to the account holders. The Tribunal adopted special procedures to deal with these cases of apparent abuse of process in an expedited manner.[40]

- *No reasonable basis to conclude that other persons may have an identical or better claim*.

A finding of plausibility also depended on the quality of the evidence and information submitted in competing claims. What sufficed in one case to make a plausible showing that in light of all the circumstances a claimant was entitled to the claimed account might have been insufficient in another case where there were better-substantiated claims. As a result of this, the standard of evidence required to show entitlement to an account under a common name that had been claimed by many people could be higher than for accounts that had been claimed by one or only a few claimants.

In summary, the plausibility standard of evidence as used in the CRT I programme did not have a fixed or minimum threshold for a finding of plausibility. Rather, such a finding depended on the type and extent of information contained in the bank records and on the quality of information submitted by competing claimants. If, for example, a claimant identified an account owner as his mother's sister who owned a bakery in Berlin and if he could show that his mother had the same maiden name as the account owner, then this might have been sufficient to make his entitlement plausible – at least in a case where the bank records contained no contradictory information about the account owner's profession, marital status or next of kin and where no competing claimant provided documentary evidence. If, however, the bank records noted a different profession or indicated that the family name was the married name of the account owner, then the claimant's submission would no longer be plausible.

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[39] S. Wade, *Mass Claims Arbitration, supra* n. 20 at 20.

[40] Final Report on the Work of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), on file with the author.

The plausibility standard was also applied in the ICHEIC proceedings. According to the ICHEIC rules a claimant had to show that "it is plausible, in the light of all the special circumstances involved, including but not limited to the destruction caused by World War II, the Holocaust, and the lengthy period of time that has passed since the insurance policy in question was obtained, that the claimant is entitled, either in whole or in part, to the benefits of the insurance policy under consideration."[41] The decisions of the ICHEIC Appeals Panel, however, indicate that a higher threshold was applied for a finding of plausibility even though claimant could also submit corroborative evidence such as letters or statements from third parties that supported certain aspects of the claim submission not necessarily directly related to the insurance policy. The Appeals Panel stated that "where the Appellant is not able to submit any documentary evidence in support of the claim, the Appellant's assertion must have the necessary degree of particularity and authenticity to make it credible in the circumstances of this case that a policy was issued by the company."[42]

Standard of Credibility. For the German Forced Labour Compensation Programme, the Foundation Act first of all provided that "eligibility shall be demonstrated by the applicant by submission of documents." However, the Foundation Act supplemented this requirement by further stating that "if no relevant evidence is available, the claimant's eligibility can be made credible in some other way".[43]

In the course of the programme, the Foundation's Board of Directors, which served as one of the programme's prime policy-making bodies, specified that a flexible approach should be taken allowing virtually any kind of formal or informal evidence to demonstrate that the claim was true. As in the claims processes before the CRT and ICHEIC, photographs, private correspondence from the period, written narrative such as excerpts of diaries etc. were accepted as proof.

The credibility standard was met if in light of the available information it seemed more probable than not that the underlying facts were true.[44] The credibility standard proved to be critical for the majority of claimants to show their eligibility to receive compensation under the programme.

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[41] ICHEIC, Relaxed Standard of Proof Guide, Rule A 1, available at www.icheic.org/docs-documents.html.

[42] See for example: Appeals Panel, Redacted Decision No. 20, available at www.icheic .org/docs-appealspanel.htm.

[43] Art. 11 (2) of the German Foundation Act, available at www.stiftung-evz.de.

[44] P. Van der Auweraert, "The Practicalities of Forced Labor Compensation. The Work of the International Organization form Migration as one of the Partner Organizations under the German Foundation Law," in: *NS-Forced Labour: Remembrance and Responsibility*, Wiesbaden 2002, 301, at 313.

ii. UNCC

The United Nations Compensation Commission ("UNCC") applied not one, but a system of evidentiary standards, which varied according to the different categories of claims dealt with before the Commission.[45]

The starting point for this was Article 35 of the UNCC Rules that provided that each claimant is responsible for submitting documents and other evidence that "demonstrates satisfactorily" that the claim is eligible for compensation.[46] While this already suggested the application of a relaxed standard of proof, as claimants were obliged to "demonstrate satisfactorily" rather than prove facts,[47] the Commission developed specific standards for the different types of claims, applying more relaxed standards for small claims from individuals and more stringent standards for larger claims from individuals, corporations or governments.

Simple Documentation. The so-called category "A" claims, which dealt with claims for compensation from individuals for the fact that they had to leave Iraq or Kuwait as a result of the occupation required only "simple documentation" of the fact and date of departure. Compensation in these cases consisted of a fixed and standardised sum, without the need to substantiate the amount of loss.

For category "C" claims, which dealt with compensation for individual losses up to US$100,000, the required evidence was "the reasonable minimum that is appropriate under the particular circumstances of the case".[48]

Balance of Probability Test. In contrast to this, claims from individuals for losses over US$100,000 had to be "supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss".[49] Despite this more stringent standard provided by the UNCC Rules, the Panel deciding these so-called category "D" claims, recognised that in light of the difficult circumstances of the invasion and occupation of Kuwait, "many claimants cannot, and cannot be expected to, document all aspects of a claim." The Panel went on to establish a "test of balance of probability" as the required level of proof which had to be applied having regard to the circumstances existing at the time of the invasion and loss.[50]

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[45] For an overview of the category of individual claims dealt with before the Commission, see: N. Wühler, "The United Nations Compensation Commission," *supra*. n. 32 at 220.

[46] UNCC Governing Council, Decision No.10: Article 35 (1) UNCC Provisional Rules for Claims Procedure, U.N. Doc. S/AC.26/1991/10 (26 June 1992), available at www2.unog.ch/uncc.

[47] Jacomijn J. van Haersolte-van Hof, "Innovations to Speed Mass Claims: New Standards of Proof,"*supra*. n. 18 at 15.

[48] Article 35, para. 2 (2) UNCC Rules.

[49] Article 35, para. 3 UNCC Rules.

[50] UNCC, Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Individual Claims for Damages Above US$ 100,000 (Category "D" Claims), 3 February 1998, U Doc. S/AC.26/1998/1, at para. 72.

d. *The Use of Presumptions*

The use of presumptions is one of the most important means of assisting claimants in proving and substantiating a claim. Reparation claims processes have developed and applied presumptions in order to fill gaps in the evidence provided by claimants by compiling together different pieces of information received from individual claims and the historical research conducted by the secretariat.

The use of presumptions has proven to be of particular importance in the area of causality, concretely in cases where claimants had to establish a causal link between their loss and certain events or actions.

An illustrative example for this can be found in the Property Loss Programme of the German Forced Labour Compensation Programme. One of the eligibility requirements for compensation under this programme was a causal link between the property loss suffered and the involvement of German companies, causation that was extremely difficult to show for claimants. Based on its historical research and the claims review conducted, the Property Claims Commission developed a presumption regarding this causality in the form of a grid of geographical extension and timeframe: If the loss happened during a certain period in a certain territory occupied by the Reich, then it was presumed that the loss happened due to the involvement of German companies.

In contrast to this, a number of presumptions have been laid out in the Rules Governing the Claims Resolution Process for CRT II, in order to ease the claimants' burden of proof: According to Art. 25 (1) of the CRT II Rules, it is presumed that owners of a joint account have equal shares, and for bank accounts where the bank records do not contain any information as to their value, Art. 35 of the CRT II Rules presumes a certain standard value that is based on the average values of accounts of that type during that time.

The most important presumptions that can be found in the CRT II Rules refer to accounts that have been closed, but for which it is not clear by whom and to whom proceeds were paid. Mindful of the fact that it would be close to impossible for claimants to prove that the proceeds of the account were not paid to the original owner or one of her or his heirs, Article 28 of the CRT II Rules lists a number of situations in which it is to be presumed that the proceeds did not go to the original account holder or her or his legitimate heirs. This presumption has been instrumental in awarding accounts that are "closed unknown by whom" to victims of the Holocaust or their heirs.

Causality presumptions also played a role for the small departure claims before the UNCC. Claimants only had to provide simple documentation of the fact and date of their departure from either Iraq or Kuwait during a certain period of time and then the causal link for this departure to the occupation of Kuwait was presumed.

2. *Mass Claims Processing Techniques*

The need to decide several thousands of claims within a reasonable period of time has forced reparation claims programmes to develop new claims processing techniques. These techniques that rely extensively on the use of information technology, have been developed and applied to rationalise the claims processing and to speed up claims verification and decision-making, thus, generally, to make the claims resolution process more efficient.[51] In the area of administration of evidence, it is mainly the grouping of claims, the computerised data matching and the use of standardised valuation methodologies that have been applied in order to overcome the evidential weaknesses of individual claims.

a. *Grouping Claims*

The grouping of claims means that claims with the same fact patterns or otherwise similar profile are identified in the database and "grouped" together. Grouping requires that key data of every single claim is "computerised", i.e. data is entered and stored in a structured way in the programme's database system. The definition of key claims data depends on the legal requirements for entitlement under the programme, but usually includes identifying information about the claimant, the types of violations or losses claimed and the circumstances in which the violations or losses occurred, including the time and place.

Once groups of claims have been created, it is possible to supplement one claim with necessary information that is lacking in the claim but that is provided in another – information that is likely to be unavailable if claims are reviewed individually on their own. Furthermore, it allows claims administrators to process "easy" or "straightforward" claims expeditiously and possibly in bulk, and thus to focus resources on more difficult claims. Most importantly for compensation programmes, the grouping allows the decision-making body to concentrate on deciding the principal legal and factual issues present in all claims in a particular group in a precedent-setting decision. All claims in the group can then expeditiously be decided according to the precedent.[52]

For the German Forced Labour Compensation Programme, IOM applied a three-step approach for the claims review, which relied heavily on the ability to group claims: First, all claims were resolved that were within the programme's jurisdiction and that were supported with documentary evidence. Secondly,

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[51] V. Heiskanen, "New Uses of Information Technology," in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes*, *supra*., n. 11 at 27; H. Das, "The Concept of Mass Claims and the Specificity of Mass Claims Resolution," in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes*, *supra*., n. 11 at 6.

[52] V. Heiskanen, "New Uses of Information Technology," *id*. at 32.

those claims where no evidence had been submitted were matched against external data repositories for verification purposes. If there was a positive match, i.e. the victim's name could be found in external archive lists of slave and forced labourers, this match was considered as sufficient evidence to support the claim. Only if there was no match, the programme Secretariat carried out an individual claims review and applied the credibility test.

This three-step approach was only possible, because a substantial amount of data about the claimant's identity and his or her story as well as the type of documentation submitted with the claims had been entered into a database system that then allowed the grouping of claims according to these criteria. While a lot of resources had to be spent at the beginning of the programme, a lot of time and resources were saved later on by deciding all claims in a group at once and by limiting the individual review of a claim to the negative matches.

b. *Computerised Data Matching*

Computerised data matching is mainly a verification tool. Information provided in a claim is compared with information from external records. While data matching can be complex because it involves bringing together data from different sources, stored on different technical platforms and in different formats, it is a powerful tool for the gathering and verification of claim information.

As pointed out above, data matching was used extensively in the German Forced Labour Compensation Programme. By comparing the names of victims who had claimed compensation under the programme with lists of forced and slave labourers contained in external archives, eligibility could be established and compensation could be paid even in those cases where little or no evidentiary documentation was found in the individual claim.

Data-matching plays a significant role at the CRT II, where the matching takes place at the very beginning of the claims resolution process.[53] All names contained in a claim, i.e. the name of the victim and her or his family members, are matched against databases containing the names found in the records of approximately 36,000 accounts that have been classified as "probably or possibly belonging to victims" of the Holocaust. In case of a match, the claim and bank records are further reviewed to determine whether the claimant is likely to be entitled to the account.[54]

The technique is of similar importance in the context of property restitution programmes where claims data is matched against cadastral and other public

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[53] Article 19 (1) of the Rules Governing the Claims Resolution Process, as amended, available at www.crt.ii.org/_pdf/governing_rules_en.pdf.

[54] Article 22 of the Rules Governing the Claims Resolution Process, as amended, available at www.crt.ii.org/_pdf/governing_rules_en.pdf.

records to verify ownership rights to a certain piece of lands. As pointed out above, the Verification and Cadastre Section in the Executive Office of the Commission for Real Property Claims in Bosnia and Herzegovina undertook individual claim verification across the 148 municipalities in Bosnia and Herzegovina. However, the Section also collected cadastral data from municipalities and with it created the programme's own cadastre land survey database. This in-house-developed database maximised efficiency of the decision-making process as it enabled the computerised matching of claims data against cadastral records to verify claims.

Without such a custom-built database, the computerised data matching with cadastral and other public records is technically difficult, as most of this information usually is not available on suitable technical platforms. Despite these difficulties, the technique of computerised data-matching is likely to play an important role in the resolution of property disputes through property restitution and/or compensation claims programmes.

c. *Standardised Valuation Methodologies*

The individual valuation of losses is time-consuming and costly. It also requires a certain amount of information to substantiate the losses, information that is often lacking in reparation claims programmes. Faced with several thousands of claims, mass claims reparation programmes have developed standard valuation methodologies, i.e. customised programmes developed by accountants, loss adjusters and other technical experts for the purpose of the standardised verification of claims and quantification of compensation awards.[55]

The UNCC was faced with the largest number of claims dealt with by any reparation programme so far. It relied heavily on standard valuation methodologies for the different loss types and claim categories in order to process and decide all claims before it in a consistent manner and in a reasonable period of time. An example is the sampling and statistical modelling that was developed for the compensation awards of eligible Category A claims, i.e. claims for the departure from Iraq or Kuwait during the time period of the invasion and occupation of Kuwait by Iraq.[56] For this category, claims with the same loss type were grouped and a statistically relevant number of claims were examined. The amounts established for the statistical group were then extrapolated to the entire group.

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[55] V. Heiskanen, "New Uses of Information Technology," *supra*. n. 51 at 34.

[56] Another example is the methodology applied for Kuwaiti corporate claims which is discussed in Ramanand Mundkur, Michael J. Mucchetti & D. Craig Christensen, "The Intersection of international Accounting Practices and International Law: The Review of Kuwaiti Corporate Claims at the United Nations Compensation Commission," 16 Am. U. Unt.'l L. Rev., at 628 (2001).

The Property Programme at the German Forced Labour Compensation Programme developed grids of standardised values to compensate for lost properties. The compensation award was based on a complex but standardised calculation which took into account certain parameters about the property, such as the type of property lost (residential building, factory etc.), the property's age at the time of the loss, its size and location.

The most extreme example of standardised compensation is compensation in the form of so-called lump sum payments. In lump-sum compensation programmes, claimants do not need to substantiate the loss and there is no need on the side of the programme to gather, review and evaluate information about individual losses, as every claimant eligible for compensation receives the same amount of money. The German Forced Labour Compensation Programme had fixed sums for the compensation of the different victim groups. There was no valuation of the individual losses or suffering within the different groups, all victims belonging to a certain group received the same standardised amount. A person who had worked for a number of years as a forced labourer in the German industry received the same amount as somebody who did so for a few weeks "only".

While fixed compensation awards might be perceived as unfair by claimants in light of the different degree and length of suffering they endured, lump sum payments are seen as the most transparent and workable approach in programmes where it would be extremely difficult (time consuming and costly) to devise and administer a set of criteria which assesses individual amounts of reparation to be paid to victims according to their degree of suffering without producing unfair or arbitrary results.[57] The difficulty in assessing individual compensation amounts might stem from the large number of claims received or from the limited evidence available in individual cases for the valuation of losses. In reparation programmes dealing with gross violations of human rights such as torture or sexual violence, it might also lie in the nature of the suffering itself which being perceived differently by each individual is not open to objective and standardised measurement.[58]

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[57] The Reparation and Rehabilitation Committee in South Africa which was responsible for formulating the reparation policies of the Truth and Reconciliation Commission stated that such a set of criteria was impossible to devise with regard to the victims' suffering under the Apartheid regime. See, Lovell Fernandez, "Reparation for Human Rights Violations Committed by the Apartheid Regime in South Africa," in: Albrecht Randelzhofer, Christian Tomuschat (eds.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, The Hague et. al. 1999, at 179.

[58] In this regard, the Reparation and Rehabilitation Committee in South Africa noted that "certain individuals can withstand horrendous long term torture and remain relatively healthy and functional, while other individuals may be permanently debilitated as a result of a single act of violence". *Id.*

As such, the payments made under the German Forced Labour Compensation Programme to former slave and forced labourers or their heirs were of a symbolic nature and were made *in recognition of the victims' suffering* rather than in an attempt to *compensate* the individual losses and suffering of each forced or slave labourer.[59]

D. *Conclusion*

The extraordinary circumstances from which reparation claims programmes arise greatly affect the claimants' ability to prove and substantiate their claims for compensation or restitution. The practice of recent large-scale reparation claims programmes has shown that a number of questions should be considered at the outset of a programme, so that the programme's legal framework and procedural rules can be tailored to the circumstances on the ground and specific victims' needs:

- What types of evidence are available to victims and can be reasonably expected from them?
- What types of external records are available to the programme to supplement or verify data?
- How many claims – counting both eligible and non-eligible claims – are to be expected?

All of these questions will be crucial to determine whether a streamlined process that relies on mass claims processing techniques is necessary.

The nature of the evidentiary rules of a programme inevitably impacts upon the accuracy of the decisions taken. Strict evidentiary rules help to ensure that only those who are truly entitled will receive the programme's benefits, but they also result in the exclusion of worthy claimants who are unable to document their claims. "Claimant-friendly" rules facilitate the process for victims wishing to claim a benefit, but they also increase the risk that benefits are awarded to persons who are not entitled and that fraudulent claimants successfully abuse the process.

The amount of information that is needed for the decision-maker to decide the claims fairly and consistently and the extent of evidence needed to ensure the integrity of the process ultimately depends on the circumstances the reparations programme is set in – the history of the conflict, the prevailing distrust within

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[59] See, Preamble of the German Foundation Act, available at www.stiftung-evz.de/die_stiftung_erinnerung_verantwortung_und_zukunft/stiftungsgesetz/.

the society or between different ethnic groups, but also the question of who bears the costs of erroneous decisions. Particularly, in programmes with a fixed compensation fund where claimants "compete" for and share the limited funds available, the costs of error are borne by the worthy victims. In deciding about the evidentiary standards of a reparations programme, a balance will have to be struck between the interest of the individual victim and the interest in a fair and effective reparations programme as a whole.

International Mass Claims Processes and the ICC Trust Fund for Victims

*By Edda Kristjánsdóttir**

A. *Introduction*

"International law is not victim oriented".[1] Those who expect redress through international judicial settlements have consistently been cautioned against "over-optimism as regards the results".[2] Even after victims issues began to take a more central stage following the "internationalization of human rights and humanization of international law",[3] the remedies available – such as *restitutio in integrum* or compensation equivalent in value to that which was lost[4] – have seemed woefully inadequate in mass atrocity situations; where that which was lost can never be restored, and no amount of money is equal to its value.[5] In practical terms, the law has had "no uniform rules governing reparations" and only "a chaos of conflicting decisions" to guide it.[6] The work undertaken in recent years to codify victims' rights and access to reparations,[7] and the creation of a Trust Fund for

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[1] M. Cherif Bassiouni, "International Recognition of Victims' Rights", 6 Hum. Rts. L. Rev. 203, at 279 (2006).

[2] Christine Grey, *Judicial Remedies In International Law* 1 (Clarendon Press, Oxford 1987).

[3] Thomas Buergenthal, "International Law and the Holocaust", in *Holocaust Restitution: Perspectives on the Litigation and its Legacy*, 17 at 21 (Michael Bazyler and Roger P. Alford eds, New York University Press 2006).

[4] *See e.g.* Dinah L. Shelton, "Reparations to Victims at the International Criminal Court", in Shelton and Ingadóttir, *The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Article 79)*, available at www.pict-pcti.org.

[5] As a family member of a victim told the 9/11 special master: "Go away, Mr. Feinberg. Thank you for coming but no amount of money can replace him". Kenneth R. Feinberg, "What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11" 162 (Public Affairs, New York 2005).

[6] Grey, *supra* n. 2, at 10.

[7] *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* (E/CN.4/2005/L.48 (2005), available at www2.ohchr.org/english/law/remedy.htm.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 167–196.

Victims at the International Criminal Court (ICC), have only confirmed that "[t]he law alone cannot repair the scars of war".[8] The Trust Fund has taken the form of an assistance programme with a "justice component"[9] – and it is important to keep these two concepts distinct.[10] Thus, although it is already actively assisting victims through its autonomous procedure, the Trust Fund's 'justice component' has not yet been triggered as the Court has yet to order any reparations.

The Regulations of the ICC Trust Fund[11] contain many features commonly found in the practice of "mass claims processes" (MCPs), which are ad hoc tribunals, commissions, or administrative programmes established to resolve claims for reparation "when a large number of parties have suffered damages arising from the same diplomatic, historic or other event … sometimes borrowing concepts and procedures from each other, but often inventing unique solutions in light of particular legal and practical perspectives".[12]

Section I of this article highlights the work of the Permanent Court of Arbitration in the field of mass claims, as secretariat to international mass claims processes, documentation and research center,[13] and as convener of a special study on this

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[8] Archbishop Desmond Tutu, member of the Board of Directors of the Trust Fund for Victims, speaking at its inaugural ceremony, April 2004, available at www.icc-cpi.int.

[9] André Laperrière, Executive Director of the Trust Fund for Victims, quoted in Ananga Dalal, "New Head of Trust For Victims Has Sights Set on the Future," *in The Monitor* No. 35 / Nov. 2007 – April 2008, available at www.iccnow.org.

[10] *Cf* Bassiouni, *supra* n. 1, at 206 ("an important distinction must be made between criminal and civil legal proceedings that are driven by the concept of responsibility as opposed to human and social solidarity reflected in social assistance and support programs that are driven by other considerations.") *Cf* Elazar Barkan, "A Moral and Political Dilemma," in *Reparations: Interdisciplinary Inquiries* 1, at 6 (Jon Miller and Rahul Kumar eds, Oxford University Press 2007) ("The question of whether reparation is a social justice movement or a moral justice claim is never clear, and the movement often trips over its own lack of clarity").

[11] Resolution ICC-ASP/4/Res.3, *Regulations of the Trust Fund for Victims* (3 December 2005) (hereinafter Trust Fund Regulations).

[12] Howard M. Holtzmann, "Mass Claims," para. 1, in Max-Planck Encyclopedia of Public International Law online edition (R. Wolfrum gen. ed., Oxford University Press, forthcoming 2008). Two MPCs described elsewhere in the present volume are the Claims Resolution Tribunal (CRT) for dormant bank accounts in Switzerland, and the work of the Conference on Jewish Material Claims Against Germany (Claims Conference), both of which have made significant contributions to the practice of MCPs. See Judah Gribetz and Shari C. Reig, "The Swiss Banks Holocaust Settlement" in this volume; Gideon Taylor, Greg Schneider and Saul Kagan, "The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution" in this volume.

[13] During their period of active operations, most MCPs maintain websites with information for claimants, relevant legal documents and rules, claims statistics, and texts of awards, etc. These websites may be taken off line once the mandate ends without most of their information being published in paper form. The PCA has made such dismantled websites publicly available, alongside links to active processes, via its own website, thereby becoming an important documentation center and source of information about past and present MCPs. *See* www.pca-cpa.org > PCA Services > Mass Claims Processes.

under-explored subject.[14] In order to facilitate comparisons between MCPs and the ICC Trust Fund, Section II outlines the Trust Fund's regulatory framework. Section III surveys some of the findings of the PCA special study concerning MCP practices and procedures and points out parallels in the Trust Fund Regulations. Section IV concludes that, although the ICC stepped onto a field with few rules governing reparations to victims, the practice of MCPs has provided it with some concrete examples of practical approaches. If nothing else, they show that where there is political will and some source of funds to pay compensation or property to restitute, the challenge of processing hundreds of thousands, or even millions, of claims in a relatively short amount of time is not insurmountably difficult.

B. *Permanent Court of Arbitration*

A century before the creation of the first permanent international criminal court, the Permanent Court of Arbitration (PCA) at The Hague was created as the first permanent court for international disputes. It now has over one hundred member states, but its original simple structure has enabled it to remain available to disputing parties despite fundamental changes in the world around it. Unlike other international courts (but like the ICC Trust Fund for Victims) the PCA is not a sitting court but rather a secretariat competent to handle a range of different dispute settlement procedures.[15] Parties before it can be states, international organizations, natural persons, or corporations. This flexibility renders it a useful

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[14] *Cf* Andrea Gattini, "The UN Compensation Commission: Old Rules, New Procedures on War Reparations" 13(1) Eur. J. Int'l L. 161, 161–62 (2002) (calling it "striking how little scholarship has been devoted to the question of post-conflict settlement"); J. Romesh Weeramantry, "Prisoners of War (Eritrea v. Ethiopia), Eritrea's Claim 17/Ethiopia's Claim 4, Partial Awards." EECC 28 April 2004; "Central Front (Eritrea v. Ethiopia), Eritrea's Claims 2,4,6,7,8 & 22/ Ethiopia's Claim 2. Partial Awards." EECC 28 April 2004, in International Decisions, 99(2) Am. J. Int'l L. 465, at 471 (2005) (EECC's work "has not received the publicity it deserves"); John R. Crook, "The UN Compensation Commission: What Now?" in 5 Int'l L Forum du droit international 276 (2003) (UNCC's contributions to international claims law is "perhaps not yet fully understood"). Reparations to victims have received considerable attention from the field of Transitional Justice, *see e.g. The Handbook of Reparations* (Pablo de Greiff ed., The International Center for Transitional Justice, Oxford University Press 2006).

[15] It is interesting to recall here that the PCA has a role under the Rome Statute's provisions on the nomination of ICC judges. Rome Statute of the International Criminal Court, signed July 1998, entered into force 1 July 2002, U.N. Doc. A/CONF.183/9th (available at www.icc-cpi .int), Article 36(4)(ii) provides that judges may be nominated to the court "[b]y the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court." The ICJ Statute, Article 4, provides that ICJ judges are to be elected "from a list of persons nominated by the national groups in the Permanent Court of Arbitration." "Members of the Court" of the PCA are potential arbitrators appointed by PCA member states. Each member state is entitled to nominate up to four such persons, who then constitute a 'national group' of such state. *See* www.pca-cpa.org > about us > structure > Members of the Court.

framework for assisting certain aspects of MCPs.[16] The following subsections describe how the PCA has already contributed to the practice of, and scholarship about international mass claims.

1. *PCA Role in Administering Mass Claims Processes*

The PCA's founding instruments, the 1899 and 1907 Hague Conventions, authorise it to make its offices and staff available "for the use of any Special Board of Arbitrators".[17] On the basis of this provision, the PCA has made its offices and staff available to assist two public international law MCPs: the Iran-United States Claims Tribunal (Iran-US CT), during the start-up phase of that tribunal's operations, and the Eritrea-Ethiopia Claims Commission (EECC) for all its work to date. The Iran-US CT used the PCA's premises in the Peace Palace for receiving and registering claims as they were filed, and PCA staff assisted the Tribunal on a part-time basis until it moved into a separate building in The Hague and hired its own staff. The EECC is a five-member arbitral commission established in 2000 to resolve Eritrea and Ethiopia's claims against one another arising out of the 1998 armed conflict between them.[18] The PCA provides registry services and administrative support to the Commission on a reimbursable basis, including archival and hearing facilities, so the Commission has not needed to hire its own staff or space. The Commission based its rules of procedure on the 1992 PCA Optional Rules for Arbitrating Disputes Between Two States.[19] At the time of

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[16] This has most recently been recommended by Jacomijn J. van Haersolte-van Hof, "Het Permanente Hof van Arbitrage – Gemengde en Commerciële Arbitrage," in 135 *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* 41, at 67 (T.M.C. Asser Press, November 2007). Another well-suited organ for MCP work on a larger scale has been the International Organisation for Migration (IOM), *see* www.swissbankclaims.iom.int; www.claims-for-forced-labour.org; and the www.iom-iraq.net.

[17] 1899 Convention for the Pacific Settlement of International Disputes, reprinted in *Permanent Court of Arbitration, Basic Documents* 1, Article 27 (Secretary-General and International Bureau of the Permanent Court of Arbitration eds); and 1907 Convention for the Pacific Settlement of International Disputes, reprinted in *id*., at 17, Article 47, both also available at www.pca-cpa.org.

[18] *See* Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2999, 40 ILM 260 (2001), available at www.pca-cpa.org > cases > pending cases.

[19] Text of EECC Rules of Procedure, and PCA Optional Rules available at www.pca-cpa.org. The PCA Rules are modeled on the UNCITRAL Arbitration Rules (United Nations Commission on International Trade Law Arbitration Rules, 1976, available at www.uncitral.org), which the Iran-US CT uses for its work, with certain amendments, *see* Iran-United States Claims Tribunal, Final Tribunal Rules of Procedure, adopted 3 May 1983, 2 Iran-U.S. C.T.R. 405, available at www.iusct.org. On the work of the EECC, *see e.g.* George H. Aldrich, "The Work of the Eritrea-Ethiopia Claims Commission", 6 Yb Int'l Humanitarian L. 435 (2005); Judith I.A. Lichtenberg, "Case Law: Eritrea Ethiopia Claims Commission", 12(2) Tilburg For. L. Rev. (2004); Weeramantry, *supra* note 14, at 472; Weeramantry, *Civilians Claims (Eritrea v. Ethiopia), Eritrea's Claims 15, 16, 23 & 27–32/ Ethiopia's Claim 5, Partial Awards. Eritrea Ethiopia Claims Commission, December 17, 2004*, 100 Am. J. Int'l L. 201 (2006).

writing, it has completed the first phase of its work – on liability of the two states for breaches of international law – and has begun its second phase on damages.

2. *PCA Steering Committee on Mass Claims*

From 1999 to 2006, the PCA hosted a Steering Committee on International Mass Claims Processes – a study group composed of persons who had participated in two or more of such processes as administrator, counsel for parties, decision-maker, consultant, or other. The Steering Committee compiled information on the practice and procedures of eleven MCPs, culminating in the publication of a book which began as an annotated "checklist of matters that designers of international mass claims processes might wish to consider".[20] The requirement that each member of the Steering Committee have had experience with the inner workings of two or more MCPs was an acknowledgment of the fact that there is no single "blueprint" for a claims or compensation commission, due to the vastly different situations to which they must respond.[21] Particularly instructive were instances in which original procedural rules or constituting instruments of a claims process contained methods that were, in practice, expanded, modified, or never put to use, as the anticipated circumstances never arose, or the claims, once reviewed, required something else. Also, with each new process, rapid advances in information technology have changed what is possible to achieve and how. The first lesson for future MCPs is therefore that, although some similar issues are likely to arise in each one, no past MCP should be seen as the perfect model for how to solve them. In practical terms, this means that it may be advisable to keep the constituting instruments of a claims process general, framing the broad terms and referring to a known set of procedures as a starting point, but leaving some detailed provisions for later determination, in light of the actual circumstances and in consultation with the parties.[22] The ICC Assembly of States Parties (ASP) appears to have followed this approach with respect to the Regulations it adopted for the Trust Fund for Victims.

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[20] *International Mass Claims Processes: Legal and Practical Perspectives* (Howard M. Holtzmann and Edda Kristjánsdóttir eds, Oxford University Press 2007). The PCA International Bureau has also edited two collections of scholarly articles on mass claims: *Institutional and Procedural Aspects of Mass Claims Settlement Systems* (Peace Palace Papers 1) (Kluwer Law International 2000); and *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press 2006).

[21] Norbert Wühler, "The UNCC and Future International Claims Practice", Proceedings of the Ninety-Ninth Annual Meeting of the American Society of International Law, 30 March–2 April 2005, 99 Am. Soc'y Int'l L. Proc. 338 at 339 (2005).

[22] *International Mass Claims Processes, supra* n. 20, section 1.02.

MCPs are not a new phenomenon,[23] but their use grew markedly over the past few decades, with an especially high concentration of processes operating during the late 1990s and early 2000s. A corollary of this – and because ad hoc programmes are dismantled after their mandates expire – has been the migration of staff between MCPs, with certain individuals accumulating experience from several processes. As the Director of Claims Programmes at the International Organisation for Migration (IOM) observed in 2005, "[m]igration of experienced UNCC staff to other claims institutions has occurred and is likely to continue with respect to other mechanisms that are on the horizon or that may be created in the future, for example in Cyprus, Palestine, and the system currently being set up by the International Criminal Court and its trust fund for the compensation of victims".[24] Recent processes indeed show clear signs of having borrowed methods from earlier ones, as is evident from the 2001 EECC Rules of Procedure, and the 2006 ICC Trust Fund Regulations. Some of the findings of the PCA Steering Committee are surveyed in Part III below, but before considering their parallels in the Trust Fund Regulations, Part II will briefly outline the ICC Trust Fund mechanism.

C. *ICC Trust Fund for Victims and their Families*

The Rome Statute of the ICC provided that the Court's legislative body, the Assembly of States Parties (ASP) should create a Trust Fund for the benefit of victims of crimes within the jurisdiction of the Court,[25] and of the families of such victims. The ASP established the Trust Fund in September 2002 and a five-member Board of Directors to oversee its activities.[26] In 2004, a Trust Fund Secretariat was created as part of the Court's Registry – funded by the Court's regular budget and not out of the funds it holds for the benefit of victims.[27] On 3 December 2005, the ASP adopted the Trust Fund Regulations, and the Fund began its operations in February 2007.

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[23] *See e.g.* Holtzmann, *supra* n. 12, part B; John R. Crook, "Mass Claims Processes: Lessons Learned Over Twenty-Five Years", in *Redressing Injustices, supra* n. 20, at 41 and sources cited therein.

[24] Wühler, *supra* n. 21, at 338.

[25] The ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, committed after the Rome Statute's entry into force (1 July 2002) within states having ratified the Statute or attributed to nationals of such states, in cases where those states are unwilling or unable to act. *See* Rome Statute, *supra* n. 15, Part II.

[26] Resolution ICC-ASP/1/Res.6 (9 September 2002), and Annex to same, para. 7.

[27] Resolution ICC-ASP/3/Res.7, *Establishment of the Secretariat of the Trust Fund for Victims*, paras 2 and 4 (10 September 2004). *But see* Resolution ICC-ASP/1/Res.6, para. 6 (9 September 2002) (ASP may, as and when the workload of the Trust Fund increases, create an expanded capacity,

The ICC can order money and other property collected through fines or forfeiture or orders of reparations against a convicted perpetrator to be transferred into and distributed by the Trust Fund.[28] As a court of law with powers to deprive persons of their freedom and property, the Court must base its reparations orders on a solid legal basis. But trials can take years. While the accused persons receive worldwide attention, medical care, and a fair trial, their victims, if ignored, may be "literally left to die".[29] This is not an acceptable outcome to supporters of the Court, which was created with the promise of redress to victims. Hence, the Trust Fund's Regulations authorise it to receive 'other resources' from voluntary donations and use such resources without the same restrictions as apply to property obtained from convicted persons. The source of funding determines *when* the Trust Fund can act, as well as for *whose* benefit. As for the temporal scope, firstly, if its Board of Directors decides there is a compelling need to act, the Fund may use 'other resources' for the benefit of victims before or in the absence of a prosecution; secondly, during a prosecution, where victims have critical needs, the Trust Fund may provide immediate assistance; and thirdly, once the Court has ordered reparations to be implemented through the Trust Fund, the latter can implement such orders, and it can at that point also use its 'other funds' to complement Court-ordered reparations. The way in which the funding source determines whom the Trust Fund can benefit is discussed in the sub-sections below.

1. *Use of 'Other Resources' to Benefit Victims*

Rather than sit idly while waiting for a conviction and a possible reparations order issued by the Court, the Trust Fund may utilise its 'other resources' for the

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including the appointment of an Executive Director, and "as part of such consideration … consider the payment of expenses of the Trust Fund from the voluntary contributions accruing to it.") An Executive Director was appointed in 2006. When administrative costs are covered out of the same funds as awards to victims, a claims process may risk review costs completely depleting funds available for awards. *See e.g.* Edda Kristjánsdóttir and Barbora Simerova, "Processing Claims for "Other Personal Injury" Under the German Forced Labour Compensation Programme," in *Redressing Injustices, supra* n. 20, at 109.

[28] Rome Statute, *supra* n. 15, Article 79. If the accused is acquitted, the Court does not have power to order reparations. *See* Gilbert Bitti and Gabriela González Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court," in *Redressing Injustices, supra* n. 20, at 314.

[29] Anne-Marie de Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families," 20 Leiden J Int'l L 207, at 208–09 and 214 (2007). *See also* presentation of Dr Ester Mujawayo, survivor of the 1994 Rwandan genocide, *Report of Proceedings of the Conference 'Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making*, The Peace Palace, The Hague, 1–2 March 2007, available at www.redress.org (the perpetrators of mass rape "were given medication from the UN so that they could stay alive and be processed. … but the victims continued to die.")

benefit of victims of crimes within the jurisdiction of the Court. It can act in this manner when its "Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families"; as long as it has formally notified the relevant Chamber of the Court of its planned activities and the Chamber has not, within specified time limits, informed the Board in writing that the activity or project would "predetermine any issue to be determined by the Court, including the determination of jurisdiction, admissibility, or violate the presumption of innocence".[30] Thus, while 'other resources' must be used for "victims of crimes within the jurisdiction of the Court", they need not be used *only* for victims "affected directly or indirectly by the crimes committed by the convicted person".[31] The assistance takes the form of projects selected by the Trust Fund from among proposals it receives, and it seeks to actively involve victims, complement, not duplicate, existing projects, and select partners with a proven expertise and competency to implement them.[32]

The Trust Fund's projects can thus assist 'other victims' as well as victims whose injury can be causally linked to the responsibility of the convicted person – assuming such clear distinctions can be made in all cases.[33] Because assistance projects in the form of e.g. "services and infrastructure cannot feasibly be reserved to the 'victim' group", and can even benefit the perpetrators,[34] some have expressed concern that "international funding of reparations might erode part of the purpose of reparations: the (material) recognition of responsibility for wrongs committed".[35] As was mentioned above, however, one should avoid conflating

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[30] Trust Fund Regulations, *supra* n. 11, para. 50(a). *Cf* Carla Ferstman, "The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities", 6 Yb. Int'l Humanitarian L. 424, at 434 (2004); Brouwer, *supra* n. 29, at 229.

[31] *Contrast* Trust Fund Regulations, *supra* n. 11, para. 48 ("Other resources of the Trust Fund shall be used to benefit victims of crimes …, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm *as a result of these crimes*") *with* para. 46 ("Resources collected through awards for reparations may *only* benefit victims …, and where natural persons are concerned, their families, affected directly or indirectly by the crimes committed by the *convicted* person.") (emphases added).

[32] *See* Dalal, *supra* n. 9 (the projects which the Fund had already launched as of November 2007 were, in the DRC, a rehabilitation programme for victims of rape, and an interactive radio programme to help long-silenced victims speak out and overcome stigma and marginalisation; and, in Northern Uganda, a reconstructive surgery programme for those disfigured in the conflict with the Lord's Resistance Army).

[33] *See* section III.6 below.

[34] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas," 27 Hastings Int'l & Comp L. Rev 157, at 188 (2004).

[35] Adrian Di Giovanni, "The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?," 2 J. Int'l L. & Int'l Rel. 25, at 60 (2006). *See also* Barkan, *supra* note 10, at 8 ("Is reparation a useful policy toward achieving economic and social justice?").

legal reparations and humanitarian assistance, and not view one as a substitute for the other. In other words, accepting life-saving food and medicine in the midst of a humanitarian crisis should not be construed as somehow waiving a right to 'legal' recourse or as a set-off against the recipient's ability to participate in a reparations process. Such later process can offer something resembling a 'day in court' and a chance to be heard – something which the law and the legal profession can handle rather well.[36] Some MCPs administer both, but they maintain a clear distinction between, on one hand, awards which are based on a legal entitlement and, on the other hand, awards of humanitarian aid, which are not.[37] The Trust Fund's bifurcated mandate preserves this distinction, even in situations where it can use voluntary donations to complement Court-ordered reparations.

2. *Complementing Awards*

As resources collected through a reparations order from the Court against a convicted person are sometimes likely to be insufficient to benefit all the affected victims, the Regulations of the Trust Fund allow it to use its 'other resources' to complement the resources collected through awards for reparations. The Regulations leave it to the Fund's Board of Directors to determine whether to complement; and it shall advise the Court accordingly of its determination.[38] This procedure could presumably be used either to increase benefits to victims identified or described in the Court's order, or, since 'other resources' do not carry the same restrictions, to cover other similarly affected victims, or both.

3. *Court-Ordered Reparations*

The 'justice component' of the Trust Fund's work consists of implementing specific awards for reparations ordered by the Court against convicted persons for the benefit of affected victims, through the Trust Fund and according to criteria specified by the Court.[39] It is in the context of such awards being made through the Trust Fund that the latter may be called upon to identify, locate, and distribute reparations to a specific group of victims – individually, collectively, or both.

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[36] *Consider* David D. Caron and Brian Morris, "The UN Compensation Commission: Practical Justice, not Retribution," 13(1) Eur J Int'l L 183 at 189 (2002)("the determination of the merits of claims, regardless of eventual satisfaction, is itself a form of satisfaction").

[37] *E.g.*, ICHEIC 8A1 humanitarian claims process, described in *International Mass Claims Processes, supra* note 20 (one-time payment to claimants who could not prove legal entitlement to Holocaust era insurance accounts but whose stories were plausible); *and* humanitarian and social programs implemented as part of the German Foundation 'Remembrance, Responsibility and Future', *see* www.compensation-for-forced-labour.org.

[38] Trust Fund Regulations, *supra* n. 11, para. 56.

[39] Rome Statute, *supra* n. 15, Article 75.2; Trust Fund Regulations, *supra* n. 11, paras 43–46.

Mass Claims Process	Years	Number of claims/ awards decided	Staff at height of the process*
Iran-United States Claims Tribunal (Iran-US CT), claims relating to the 1979 Islamic revolution in Iran	27+	3,936	100
United Nations Compensation Commission (UNCC), claims relating to the 1990–1991 Gulf War resulting from Iraq's invasion and occupation of Kuwait	17+	2.6 million	300
Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), claims relating to the 1992–1995 war in Bosnia and Herzegovina	7	311,757	320
Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), claims for assets deposited in Swiss banks	3	9,918	55
Claims Resolution Tribunal (CRT-II), claims to assets deposited in Swiss banks by victims of Nazi persecution	7+	2,597	35 in Zurich; 50 in New York
Housing and Property Claims Commission (HPCC), claims relating to the 1999 conflict in Kosovo	6**	29,160	250
German Forced Labour Compensation Programme (GFLCP), claims against Germany and German industry for Nazi injustice (at IOM)	6	372,000 +35,200 property claims	100 Geneva; 150 in field offices
Holocaust Victim Assets Programme (HVAP), claims pursuant to 1999 Swiss banks class action settlement (at IOM)	7	Over 41,000	40

Continued

Mass Claims Process	Years	Number of claims/ awards decided	Staff at height of the process*
Eritrea-Ethiopia Claims Commission (EECC), claims relating to the 1998–2000 war between Eritrea and Ethiopia (at PCA)	8+	Damages phase ongoing	5–10
International Commission on Holocaust Era Insurance Claims (ICHEIC), claims relating to insurance accounts *** (at Claims Conference)	2	78,000	35
American Arbitration Association claims process relating to insurance policy class action settlement	4	60,000	60

* In various combinations of decision makers, attorneys, claims processors, administrative staff, interpreters, translators, IT personnel.
** Operations have been handed over to local authorities.
*** ICHEIC wais a much larger claims process carried out by many more participants; the PCA study only focused on one sub-programme, distributing humanitarian payments to claimants who could not prove legal entitlement to a Holocaust insurance account.

In short, as the Court's docket progresses, the Trust Fund could find itself simultaneously supervising several mass claims processes, given that the crimes within the jurisdiction of the Court almost by definition involve large groups of victims.[40] A rough indication of what that could entail can be gleaned from considering the approximate size, scope, and duration of some past MCPs.

The ICC Trust Fund has a stated policy of working through partnerships wherever possible. According to André Laperrière, its Executive Director, "we

[40] The Court, throughout its planning stages, was appraised of this possibility, *cf* Paper on some policy issues before the Office of the Prosecutor, September 2003, Doc. ICC-OTP 2003, 6–7 www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf, noting that some or all of such cases might involve an 'untold number of victims', cited in Ferstman, *supra* n. 30, at 425, n 5. During the negotiations leading to its establishment, the ASP had the benefit of studies such as: REDRESS Discussion Document, *The International Criminal Court's Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims* (December 2003), available at www.redress.org (citing numerous examples from relevant practices of MCPs). *See also* Bassiouni, *supra* note 1, at 241, n 199 (noting that the example of collective mechanisms such as the Iran-US CT could serve the overall goal of the 2006 Basic Principles and Guidelines and "can be seen as a potential model with respect to future processes established to process the claims of victims who have experienced serious violations of fundamental rights").

mobilise others to address the needs of victims, instead of doing everything ourselves".[41] This approach will probably not only apply to assistance projects based on voluntary donations, but also to instances when the Trust Fund is seized to implement a reparations order by the Court. Section III describes some relevant lessons from MCP practice that were identified in the PCA Steering Committee's study.

D. *The Practice of Mass Claims Processes*

All MCPs face certain fundamental dilemmas, summed up most succinctly as having "(1) to be fast but fair and (2) to collect and divide a clearly inadequate pie".[42] On the one hand, justice delayed is justice denied, but on the other hand, expediency comes at the cost of accuracy. Speedy processing may reduce administrative costs and thereby maximise funds available to victims and deliver relief sooner, but there are many pitfalls to be avoided as rapid claims review starts to seem more automated and impersonal. There is a constant balancing of concerns, often referred to as 'managing expectations' of claimants.[43] For example, extensive publicity is needed in order to reach all potentially eligible beneficiaries, but high-visibility publicity campaigns might give the impression that a process is more far-reaching than it actually is. Transparency is essential, but candid disclosure of eligibility criteria, coupled with low evidentiary thresholds, may open a process up to fraudulent claims which deplete reparations to deserving victims. 'Approximate justice' raises due process concerns, and 'imperfect justice' or 'attempts at justice' – phrases often used to connote the best that could be achieved in the circumstances – often seem inadequate to the victims.[44] Whether based on legal liability or moral duty to provide reparations, a claims process is an exercise in futility for all parties involved if it does not deliver a sense of 'justice' to its intended beneficiaries. Last but not least, the importance of strengthening the rule of law in a post-conflict situation needs to be taken into account. As EECC Commissioner John Crook has observed, although some losses may go uncompensated, there is value in having decisions regarding allocation of loss "consciously made by authorized decision makers through a law-based process of negotiation and mutual accommodation".[45]

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[41] Dalal, *supra* n. 9.

[42] David Caron, "The Gulf War, the United Nations Compensation Commission and the Search for Practical Justice," 24 *The Transcript* 26 (Fall 1991).

[43] Although the terms 'victim' and 'claimant' are sometimes interchangeable, in some MCPs it is more appropriate to speak of claimants or beneficiaries than victims.

[44] *See e.g.* Bazyler and Alford, Introduction, *in Holocaust Restitution, supra* n. 3, at 6.

[45] John Crook, *supra* n. 14, at 282 (writing in the context of the UNCC, about whether obligations stemming from actions of the previous odious regime should be repudiated).

All the pressures inherent in "processing and deciding very large numbers of claims, coupled with the desire to speed payments of compensation and the difficulties that victims often face in finding documentary evidence, have led to major innovations in the procedures of some of the more recent [MCPs]".[46] Many such innovations happened once a process was underway, and a second lesson of MCPs could indeed be said to be to expect the unexpected. In order to be able to adapt to unanticipated circumstances, most MCPs have designated a body authorised to modify the rules of procedure.[47] This may be more difficult to achieve at a permanent organization. Amendments to the ICC Trust Fund Regulations may be proposed by a State Party, by the Court, or by the Board of Directors and they must be approved by the ASP.[48] The Board does not expressly have the power to override proposals by others before they are submitted to the ASP. It is, however, authorised to adopt additional administrative procedures necessary to implement its regulations, and it plays a central role in drafting implementation plans for awards of reparation.[49] These two functions are key to the Trust Fund's becoming an innovator for justice as well as assistance.

As mentioned above, the eleven different claims mechanisms that were compared in the PCA Steering Committee study were 'related' in the sense that some of the same persons worked on them. They were also related through their formal rules of procedure.[50] Methods borrowed and evolved between these ad hoc programmes, and by the permanent organizations that administered more than one such programme (e.g., IOM and the Claims Conference), seem to have been taken into account in the drafting of the Regulations of the ICC Trust Fund, which will likely have to respond to similar pressures. The subsections below describe some of the MCP approaches for resolving issues – such as scope of jurisdiction, choice of remedies, practical considerations in claims collection and evaluation, evidentiary issues, staffing, and funding – and compares those with the Trust Fund Regulations.

1. *Beneficiaries*

The central question of any claims process concerns who is eligible to receive reparation. However, '[d]etermining who is a victim is perhaps the most difficult task of a compensation program'.[51] The underlying determination of liability or

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[46] Holtzmann, *supra* n. 12, para. 16. Some of these methods are known in domestic mass tort or bankruptcy litigation.
[47] *See International Mass Claims Processes, supra* n. 20, section 1.03.
[48] Trust Fund Regulations, *supra* n. 11, para. 78.
[49] Trust Fund Regulations, *supra* n. 11, paras 15 and 54.
[50] *See International Mass Claims Processes, supra* note 20, section 5.02 on the provenance of the rules of procedure of various MCPs.
[51] Roht-Arriaza, *supra* n. 34, at 177.

responsibility may have already clarified what harm will be redressed, and the time and place in which claims need to have arisen in order to be eligible for redress, but it also needs to be clear whether only natural persons or also legal persons can recover, whether only the victims or also their heirs are eligible, and so on. The criteria must be neither too narrow nor too broad if the programme is to accomplish its purpose. Hence, within a single claims process, the solution is often to designate different classes and subclasses of claimants depending on the type of harm, urgency of need, availability of proof, etc. The UNCC adopted an elaborate scheme of claims categories (A through F and subclasses), where Categories A, B, and C were designated the most urgent claims of individuals and given priority in processing.[52] This is expressly allowed in the ICC Trust Fund Regulations.[53] The UNCC and other MCPs also altered traditional rules of diplomatic protection in order to be able to include deserving claimants who otherwise would fall outside their jurisdiction.[54] In a further twist, the EECC deals with claims that were filed simultaneously by the two sides to the same conflict, with some persons of one side's nationality living in the territory of the other, and vice versa.[55]

At first glance, the definition of who is entitled to reparation under the ICC regime appears straight-forward. The Rules of Procedure and Evidence define 'victims' as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court" and victims may also include "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and

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[52] *See* www.uncc.ch > 'the Claims'. This privileged position of the individual claimant in the UNCC system has been called 'possibly the most significant contribution of the UNCC to the development of international law in the field of claims settlement', Gattini, *supra* n. 14, at 170.

[53] Trust Fund Regulations, *supra* n. 11, para. 65.

[54] *See* UNCC Governing Council Decision 5 of 18 October 1991, *Guidelines Relating to Paragraph 19 of the Criteria for Expedited Processing of Urgent Claims*, U.N. Doc. S/AC26/1991/5 (23 October 1991) authorising certain intergovernmental organizations to file claims on behalf of stateless persons and refugees. *See also* Veijo Heiskanen, "The United Nations Compensation Commission," 296 *Recueil des Cours* 255 (Martinus Nijhoff Publishers 2003).

[55] The EECC considered that, "under customary international humanitarian law, damage unlawfully caused by one Party to an international armed conflict to persons or property within territory that was peacefully administered by the other Party to that conflict prior to the outbreak of the conflict is damage for which the Party causing the damage should be responsible, and that such responsibility is not affected by where the boundary between them may subsequently be determined to be. [28.] The alternative could deny vulnerable persons in disputed areas the important protections provided by international humanitarian law. These protections should not be cast into doubt because the belligerents dispute the status of territory." *EECC Partial Award – Central Front – Ethipia's Claim 2*, paras 27 and 28. *See also* Aldrich, *supra* n. 19, at 440.

objects for humanitarian purposes".[56] This broad definition allows the Court to adjust the definition of 'victim' in the light of the facts of each case.[57] Where both legal and natural persons stand to recover, conflicts of interest may appear. In an ICC case, if non-natural 'victims' are owned or controlled, in whole or in part, by the very government that is unwilling to prosecute, or even may have backed the perpetrators, reparations awarded to organizations or institutions might end up in government coffers. But even deciding to focus only on natural persons may raise complex issues. For example in Uganda, where the ICC has indicted members of the Lord's Resistance Army (LRA), kidnapped children have been forced to kill their own family members, blurring the boundaries between perpetrator and victim.[58]

Due to the high number of alleged perpetrators in most cases within its jurisdiction, the ICC is focusing on prosecuting key perpetrators.[59] Such key figures are likely to have been responsible for the harm to the highest number of victims. Similarly, the EECC, albeit in the context of state responsibility and not individual criminal liability, resolved "to determine responsibility only in respect of *serious* violations of the law – 'usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims' ".[60] While understandable in the circumstances of the EECC, this has been criticised for sending out the 'wrong message' and not doing "more when there was credible evidence of isolated incidents of serious violations of the law, such as the rape of civilians or the unlawful killing of [prisoners of war]".[61]

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[56] ICC Rules of Procedure and Evidence, Rule 85, available at www.icc-cpi.int. *See also* Shelton, *supra* n. 4, section 3) *who may claim reparations. But see* Bassiouni, *supra* n. 1, at 255 ("important that a victim be considered a person and not a moral or abstract entity. That person, however, could be part of a collectivity or group" 2006 Basic Principles and Guidelines, define 'victims' as persons); Barkan, *supra* n. 10, at 9 ("reparative responses have to attend to real people").

[57] Di Giovanni, *supra* n. 35, at 45–46.

[58] Di Giovanni, *supra* n. 35, at 60–61 ("the Ugandan government might welcome a reparations fund"); Roht-Arriaza *supra* n. 34, at 181–82 (on the "tactic of making local civilians complicit in atrocities").

[59] 'Paper on some policy issues before the Office of the Prosecutor' September 2003, Doc. ICC-OTP 203, pp 6–7, www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf. *Cf* Christian Tomuschat, "Darfur – Compensation for the Victims," in *Symposium: The Commission of Inquiry on Darfur and Its Follow-Up: A Critical View*, 3 J. Int'l Crim. Just. 579, at 581 (July 2005) ("[I] t will never be possible to put a whole people on trial [but] the key figures … should never be spared punishment").

[60] *EECC Partial Award – Prisoners of War – Ethiopia's Claim 4*, para. 56; *Partial Award – Prisoners of War – Eritrea's Claim 17*, para 54. *See also* Weeramantry, *supra* n. 14, at 467; *See* Aldrich, *supra* n. 19, at 437 (2003).

[61] Weeramantry, *supra* n. 14, at 472. *See also* Roht-Arriaza, *supra* n. 34, at 177–78 ("While justified as a way to spend limited funds on the "worst" violations, the effect was to infuriate survivors, who read this as a lack of recognition for the severity of their own suffering and an attempt to paper over the extent of the crimes").

With respect to heirs, a decision to apply the distribution laws of the victims' home culture, or the law of the place where the harm arose, will honour legitimate expectations and benefit some victims, but it may also have the effect of excluding heirs whom the designers of the claims process wished to include.[62] Some MCPs, faced with complex issues of claimants from many different legal cultures, chose rather to create a formula to cover all equally.[63] Others combined both approaches, changing the application of national laws when they seemed contrary to the aims of the process.[64]

ICC reparations and resources of the Trust Fund are intended for the families of victims as well as of the victims themselves.[65] This inclusion of 'family' in the definition of beneficiaries gets around thorny issues such as certain domestic legal systems not allowing widows to inherit their husbands' property.[66] The definition of 'family' differs from culture to culture and the term as such has not been defined in the ICC constituting instruments, allowing the Trust Fund to respond appropriately 'in a variety of situations involving different family structures.' In some post-conflict situations, the traditional concepts of 'family' and 'household', have been completely torn apart as a result the conflict. Failure to meet the definition of a traditional 'household' or 'family' should not bar recovery.[67] In areas where rape is perceived more as an injury to the family members than the direct victim, tensions may arise between the Trust Fund's goal of 'local ownership' of solutions and the wishes of its donors. It may be advisable to decide the exact scope of eligible family members in the implementation plan for each individual case, while observing as an underlying principle that awards should not

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[62] *Consider e.g.* federal relief such as the 9/11 fund leaving to each state of the Union how to apply distribution rules. This will result in same-sex domestic partners being included in some states and excluded in others.

[63] *See e.g.* Claims Resolution Tribunal (CRT) Governing Rules, Articles 23–27, available at www.crt-ii.org.

[64] Feinberg, *supra* n. 5, at 69–70 ("For example, there was simply no way I would agree to comply with foreign laws that prohibited women from receiving any portion of the victim's estate. Nor would I as a matter of public policy recognize foreign laws that endorsed the legality of multiple wives. In such cases, I would exercise my discretion to modify the law of a foreign nation when it came to the distribution of 9/11 awards.") *But see* Dinah Shelton, *Remedies in International Human Rights Law* at 251 (2d ed, Oxford University Press 2005) (criticising the Inter-American Court of Human Rights for dividing awards among survivors according to its own view of appropriate succession. "This unsettles the legitimate expectations of individuals living within a specific legal system that establishes who are their heirs and successors. It also divests spouses of a portion of their marital property.")

[65] Regulations of the Trust Fund, *supra* n. 11, para. 42.

[66] *See e.g.* Brouwer, *supra* n. 29, at 211–12; Cherie Blair, "The Mourning After," *International Herald Tribune*, 18 December 2007, available via www.iht.com; www.theloombatrust.org.

[67] *See* Brouwer, *supra* n. 29, at 229, n 121. *See also* EECC's use of 'household unit' in light of the custom of the victims' country for purposes of awarding fixed amounts to each household. *International Mass Claims Processes, supra* n. 20, at 70–71, *and* Mujawayo, *supra* n. 29, on children heads-of-households in Rwanda.

leave the victims worse off than they would be under domestic law, as long as doing so does not inequitably reduce resources for other eligible victims.[68]

2. *Remedies*

The types of remedies in a MCP depend on the needs of the victims and must be capable of implementation in light of their circumstances. "The primary function of corrective or remedial justice is to rectify the wrong done to a victim".[69] In other words, legal remedies do not address problems that predate the infliction of the harm. Fashioning appropriate remedies presents many difficult issues in situations where restoring people to the position they were in before the harm – even assuming that it would be possible to somehow undo the effects of the violence – would in effect 'restore' victims to abject poverty and marginalisation. Monetary compensation may moreover be of limited use in places where there is nothing money can buy.

Among the MCPs in the PCA study, remedies tended to be either monetary compensation (for breach of contract or expropriation or for forced labour or personal injury); or restitution (of assets in bank accounts or real property losses).[70] The EECC, for example, although not precluding that other remedies could be provided in appropriate cases, decided early on that monetary compensation was, in principle, the appropriate remedy for valid claims.[71] On the basis of this decision, it has denied requests for remedies such as reinstatement of nationality, restoration of property, release of detained persons, and nullification of economic transactions.[72] Compensation schemes either divide a finite amount (e.g. pursuant to settlement or legislation) among eligible claimants, or are open-ended as to the total aggregate amount.[73] In the former scenario, the claims process may pay out partial awards in an initial phase and the remainder in a later installment that can be reduced pro rata and divided equally among the claimants if funds do not last to pay the awards in full. Restitution schemes either return assets in full to claimants who can quantify their loss, or pay out a fixed

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[68] *See* rule with respect to appeals at the IOM, below, section III(5).
[69] Shelton, *supra* n. 4.
[70] *See generally, International Mass Claims Processes, supra* n. 20, section 1.05.
[71] EECC Decision Number 3: Remedies. Available at www.pca-cpa.org.
[72] *See* Weeramantry, 100 Am. J. Int'l L. *supra* n. 19, at 205–206; Natalie Klein, "State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far," 47 Germ. Yb Int'l L. 214, at 262–64 (2004).
[73] Pierre A. Karrer, "Mass Claims Proceedings in Practice: A Few Lessons Learned," 23(2) Berkeley J. Int'l L. 463, at 466, n. 13 (warns that "where there is an open budget, as must be expected, the mentality of "no stone unturned" will take over, with grotesque results. The process will … bring enormous profits to those who carry it out (accounting firms and law firms). It will necessarily take a long time. This cannot be in the interest of the claimants").

assessed amount, or a *cy pres* remedy,[74] to eligible claimants who cannot prove their precise loss. Finally, some MCPs have distributed humanitarian payments or aid, but they have done so not in recognition of any *legal* entitlement.[75]

The ICC is competent to award restitution, compensation, and rehabilitation, directly to victims, or through collective awards.[76] According to some studies, victims who feel there is no hope to mend their own broken lives tend to prefer and request only aid for their children.[77] The Trust Fund's aim is to give victims a voice in the process and honour their wishes, but there are often no clear lines between who is a victim and who are a victim's family, nor is it possible always to give voice to all affected groups. A newborn should be given access to health care and education, whether born to a victim or a non-victim, but even if something can be done fairly to honour the victim's wish that the help be directed towards her child, it needs to be considered that the loss of hope may stem from post-traumatic stress or cultural stigma against victims, both of which ought to be addressed. It may be that a child's best hope of a secure future is to restore his or her victimised parent to physical and mental health. Add to this that in many communities, people's children are their only source of social security later in life, so focusing reparations on children by extension helps their parents.[78] The choice of remedies after mass atrocities must seek to restore the complex balance that was society.

3. *Starting the Process/Outreach*

It is important to reach out to all potential claimants if a claims process is to be fair and effective, and all MCPs engage in extensive publicity campaigns to

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[74] Meaning an amount as close as possible; *see* Judah Gribetz and Sheri Reig, "The Swiss Banks Holocaust Settlement," in this volume.

[75] *See e.g.* ICHEIC 8A1 humanitarian claims process and GFLCP humanitarian programmes, in *International Mass Claims Processes, supra* n. 20, section 1.05.

[76] Rome Statute, *supra* n. 15, Article 75(2). As the Court cannot make orders against a state, "official recognition or apology or other forms of state action are beyond its powers, although collective awards may approximate such forms." *See* Linda M. Keller, "Seeking Justice at the International Criminal Court: Victims' Reparations," 29 T. Jefferson L. Rev. 189, at 195 (2007).

[77] *See e.g.* Roht-Arriaza, *supra* n. 34, at 180–81 (reporting a Chilean human rights organization study concluded that for many victims moral and legal reparation is fundamental, while monetary compensation is controversial and problematic. The study found a striking emphasis by survivors on education for the children of the victims, a possible explanation being that "even victims who do not expect compensation to make much of a difference in their own damaged lives want resources that could improve the lives of their children"). *See also* Brouwer *supra* n. 29, at 213 (one of the primary concerns of rape victims of the Rwandan genocide is what will happen to their children when their mothers die of AIDS); Shelton, *supra* n. 4, section 4) *Kinds of Remedies*.

[78] *See* Ester Mujawayo, *supra* n. 29.

inform as many as possible of the opportunity to receive reparation.[79] Most often, specially designed claim forms are used to collect the claims and reliably identify each claimant.[80] Before such forms can be distributed, though, it needs to be clear who will collect the data, and what data are required, which means knowing more or less within which dates and geographic locations valid claims arose, whether nationality or membership in a targeted group is a material fact, and any other facts that trigger legal elements and hence need to be captured on the form. The victims may speak a variety of languages, be scattered as refugees in many countries, and be hesitant to identify themselves due to trauma and fear. It is quite possible, therefore, that certain fact patterns will only become clear once the claims are received and screened. Add to this that 'claims collection will often be a one-shot process; it is extremely difficult and costly to go back to tens of thousands of claimants a second time for additional information if the claims questionnaire was not properly designed the first time'[81] – and it becomes clear why implementation plans need to be drafted with some degree of flexibility. The extent to which evaluation criteria should be made public up front is also tied to the lowered evidentiary burdens and the likelihood of exposing the process to fraud. For example, in one of the Holocaust claims processes, claims were received from what turned out to be members of neo-Nazi organizations seeking to deplete the funds available to pay survivors.[82]

Other issues include whether the forms are capable of computer processing; what documentary evidence is required from the victims themselves (as opposed to data available in central records); in what format evidence can be submitted (electronically, photocopies, original); and how the claimants can remain informed of the status of their claim. Deadlines for filing claims are essential in order to be able to evaluate the process as a whole before deciding any claims, estimate how far funds are going to last, set overall time targets, and determine how many staff members are required, and with what skills, to carry out the claims review.[83] Claimants need to be made aware of relevant deadlines well in advance, and it also needs to be clear who has the power to extend deadlines or

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[79] *See generally International Mass Claims Processes, supra* n. 20, chapter 3.

[80] *See International Mass Claims Processes, supra* n. 20, section 2.02 on exclusivity of the process: in order to limit multiple recovery for the same claim, some MCPs require a waiver or release before payment can be received. The ICC claim form does not contain such a waiver. Nor is anything in Article 75 if the Rome Statute to be interpreted as prejudicing the rights of victims under national or international law; thus these claims can be pursued in other fora. Bassiouni, *supra* n. 1, at 244–45.

[81] Crook, in *Redressing Injustices, supra* n. 20, at 59.

[82] *See also* email Hoaxes that plague the CRT process, at www.crt-ii.org.

[83] EECC was for example given an ambitious deadline of three years within which to conclude all its work. This was extended and the Commission is now in its 7th year of operations. The original mandate of CRPC was also extended.

allow exceptions, and in what circumstances. For instance, in the Swiss bank claims process, some elderly claimants believed they were filing claim forms when they were merely responding to initial questionnaires about their intent to participate. This was discovered after the filing deadline, when the number of claimants was far lower than anticipated. Thus, an exception was made to treat a large number of the initial questionnaires as timely filed claims.[84]

Application procedures must be user-friendly, and the victims must be able to understand the relevant claim forms and instructions. At a minimum, the form and key documents must be available in a language that the victims understand.[85] Although many questions can be answered by ticking a 'yes' or 'no' box, it is inescapable that forms will include some narrative. Given scarce resources and shortness of time, translating filled-in forms back into the working language of the claims process is not ideal and further risks introducing errors and inconsistencies and losing narrative nuances that might suffice in some cases to establish plausibility absent other available evidence. If the claim forms can be filled in and submitted online, the processing software needs to be able to support data in the victims' language(s). An issue arose at the UNCC, for example, where the software used required all data to be in English.[86] The victims should not be expected to bear the expense of having their statements or evidence translated. (MCPs generally do not reimburse any costs incurred by claimants in submitting their claims but rather emphasise that the process is free of charge and that the claimants do not need to be assisted by a lawyer or other representative.) The MCPs run by IOM and the Claims Conference developed highly efficient methods of scanning claim forms that had been hand-written in various languages into digital images and sending them electronically to their claims processing centres for review by staff members who could read the originals and answer evidentiary questions about the claims directly into an English-language database.

Literacy rates among the claimant population are an obvious factor relevant for planning, for if the victims are not able to fill in their own forms, they will need the help of local teams of claims collectors whom they can trust with intimate personal information.[87] Although MCPs are not truth commissions, claims collectors should take care to write down exactly what the victims say rather than try to improve their chances of redress by writing down the statements in ways

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[84] *See* www.crt-ii.org.

[85] The GFLCP was made available in 20 languages; the HVAP form in 11. *See generally International Mass Claims Processes, supra* n. 20, section 5.03.

[86] *See* UNCC Governing Council Decision 10 of 26 June 1992, *Provisional Rules for Claims Procedure*, Article 6(3), U.N. Doc. S/AC.26/1992/10 (26 June 1002), available at www.uncc.ch.

[87] *International Mass Claims Processes, supra* n. 20, section 5.10; Brouwer, *supra* n. 29, at 225 *ff*, discussing unequal gender distribution on ICC lists of legal counsel; *see* www.icc-cpi.int/library/defence/ Defense_Counsel_List_English for the most up-to-date list.

which the collectors know will clear some evidentiary threshold. Those who review and process large numbers of such statements quickly become attuned to patterns and may have to judge whether each story is plausible based on its genuineness. Thus, recurring 'catch-phrases' may actually have the effect of casting into doubt otherwise believable claims.

The ICC website contains a standard claim form prepared by the Victims' Participation and Reparation Section, responsible for giving all appropriate publicity to reparation proceedings in order to enable victims to apply.[88] As the ICC jurisdiction over crimes will remain constant, it is likely that the same form can indeed be used in many different cases, translated each time into the relevant languages, and perhaps with questions added or deleted in each instance if, for example, evidentiary presumptions are being used which can 'pass' a claim without further information.[89] But even if the basic form remains the same, different staff may be needed to review that form depending on the languages and circumstances of each case.

4. *Who Decides the Claims*

In some MCPs, a body of decision-makers such as arbitrators or judges, decides the merits of individual claims or groups of claims; in others, claims reviewers make recommendations on whether to accept or reject a claim subject to approval by a central oversight body. Many MCPs delegate certain review functions to secretariat staff, such as accepting uncontested claims, or screening out ones that are clearly outside the jurisdiction of the process. It is clear that it must be possible for the ICC Trust Fund Board of Directors – which serves pro bono and is only required to meet once a year – to delegate functions to its Secretariat staff.[90] Not to mention the fact that the Trust Fund might be required to coordinate a number of claims programmes simultaneously, each with its own claims processing team, either in-house or outsourced, or in a combination of the two. IOM and the Claims Conference are good examples of arrangements where a core secretariat supports different teams reviewing claims under different programmes. As a permanent mechanism, the ICC Trust Fund's decisions over time will be scrutinised for consistency and equal treatment – both within one case and as among

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[88] *See* www.icc-cpi.int/victimsissues/victimsreparation/victimsreparationForm.html&l=en.The form is also available in French.

[89] *See* ICHEIC 8A1 claims process and practice where claims 'passed' once they scored above a certain evidentiary threshold, which meant not having to evaluate each and every entry in full, saved time, and accelerated relief to the claimants.

[90] Ferstman, *supra* n. 30, at 427. *Cf* Bitti and González Rivas, in *Redressing Injustices, supra* n. 20, at 315 ("it seems indeed impracticable for a single trial chamber of three judges, with the assistance of only three associate legal advisers, to analyze in-depth thousands of requests for reparations. This would require an entirely different setting from the one the Court has currently").

different cases. MCPs have used various methods to achieve consistency of decisions. Ensuring that similar victims are compensated similarly for similar harms has even been referred to as "internal goals of reparations".[91] Generally speaking "[u]ncertainty and arbitrariness in awards undermines respect for the law. … Accurate assessment is also necessary because inadequate or excessive awards frustrate the compensatory, retributive and deterrent functions of the law".[92] This may appear at odds with what was said above with respect to the need for flexibility. However, consistency here means applying the same amount of due diligence and effort when gathering and reviewing claims in different cases and putting in place sufficient safeguards for preventing unjustified irregularities.

If and when the Trust Fund is faced with an actual MCP, the issue will arise as to whether its Board of Directors needs to approve all claims decisions in order for them to become final, or whether final approval from the Court is needed as well. As time is of the essence, MCPs generally strive to minimise the number of procedural steps leading to a final decision. The advantage of having decisions approved by a supervisory body (which promotes overall consistency) needs to be weighed against the expediency of single-step decision-making. The Trust Fund Regulations provide that once the ICC issues an order for reparations, the Fund's Secretariat is to draft an implementation plan based upon stipulations in the Court's order. The draft plan is to be approved by the Board of Directors, but it requires final approval of the relevant Chamber of the Court, and the Trust Fund '*shall* consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award'.[93] The Trust Fund is further obligated to update the Chamber of its progress in implementing awards, and submit to it a 'final narrative and financial report',[94] but the Regulations stop short of saying that the Chamber needs to approve each decision on claims.[95] The part of the Regulations that refers to stages taking place after the approval of the draft implementation plan, leaves it to the Trust Fund to verify victims' eligibility, determine the standard of proof, approve the final list of beneficiaries, prioritise certain categories, disburse the reparations awards, and verify their receipt by the intended beneficiaries.[96]

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[91] Di Giovanni, *supra* n. 35, at 27. *See International Mass Claims Processes, supra* n. 20, sections 2.04 on effect of decisions, and 5.07 on coordinating decisions.

[92] Shelton, *supra* n. 4, section 2) *who may claim reparations*.

[93] Trust Fund Regulations, *supra* n. 11, paras 54 and 57.

[94] Trust Fund Regulations, *supra* n. 11, para. 58.

[95] While the Board of Directors is mandated to decide the use of resources collected through fines and forfeiture or awards for reparation 'in accordance with' stipulations or instructions from the Court, Trust Fund Regulations, *supra* n. 11, para. 43, "[w]here no further stipulations or instructions accompany the orders, the Board of Directors *may* determine the uses of such resources [and] *may* seek further instructions from the relevant Chamber on the implementation of its orders", paras 44 and 45 (emphases added).

[96] *See* Trust Fund Regulations, *supra* n. 11, paras 62–68.

The Regulations are silent as to whether a decision by the Trust Fund to use voluntary contributions to complement a Court order needs to be included in the draft implementation plan.[97] Nor is there any requirement that the Trust Fund wait for the Court's response before deciding to complement as there is in paragraph 50(a)(ii) concerning assistance projects funded by voluntary contributions. The Board of Directors need only 'advise the Court accordingly' if it determines to complement reparations awards with its 'other resources', and it is encouraged by the ASP to do so,[98] perhaps to limit the number of victims rejected from the ICC reparations process for having suffered the "wrong crimes", committed by the "wrong perpetrators".[99]

5. *Standard of Proof and Mass Claims Techniques*

Whether conducted as arbitrations, mediations, administrative schemes, or court-supervised class action settlements, the procedural rules of MCPs tend to include provisions on the minimum evidence needed to substantiate a claim; the standard of proof applicable to each category of claims; and whether to allow the use of evidentiary presumptions. "The extraordinary circumstances from which many [MCPs] arise, such as wars, revolutions, and massive population movements, more often than not result in a dearth of available documentary evidence of each claimant's loss. Problems in obtaining evidence are almost to be expected, and the quality of what little evidence the claimants can provide may be poor".[100] Victims who have fled without their identification documents or whose papers have been stolen or destroyed should not be barred from recovery, and it has to be accepted that justice in such circumstances is sometimes only achievable if the process is allowed to be imprecise. Most MCPs have therefore applied lowered or 'relaxed' standards of proof – a development which has been called the "most innovative legal contribution of mass claims processes".[101]

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[97] Trust Fund Regulations, *supra* n. 11, para. 54 merely states that there shall be "a draft plan to implement the *order* of the Court."

[98] Trust Fund Regulations, *supra* n. 11, para. 56 ("Without prejudice to its activities under paragraph [50(a) on assistance projects], the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards … and taking particular account of ongoing legal proceedings that may give rise to such awards").

[99] Di Giovanni, *supra* n. 35, at 27, adding also "at the wrong time" – but reparations pursuant to the Rome Statute strictly speaking will always exclude injuries suffered from acts predating its effective date, as the Trust Fund is only created for the benefit of victims within the jurisdiction of the Court.

[100] *International Mass Claims Processes, supra* n. 20, at 210–11.

[101] *See* Holtzmann, *supra* n. 12, para. 16 ("relaxed standards of proof for finding facts based on a test of what is "plausible," instead of applying traditional legal standards of proof such as those requiring facts to be established by a preponderance of the evidence"). *See also International Mass Claims Processes, supra* n. 20, at 211.

It is clear that this innovation has been noted at the ICC. Thus, the Trust Fund, "[s]ubject to the order of the Court, … shall take into account the following factors in determining the nature and/or size of awards, *inter alia*: the nature of the crimes, the particular injuries to the victims and the nature of the evidence to support such injuries, as well as the size and location of the beneficiary group".[102] The Regulations also expressly leave it to the Board of Directors to determine the standard of proof for the verification exercise, in the light of "the prevailing circumstances of the beneficiary group and the available evidence".[103] Whereas the Court, in order to convict an accused, "must be convinced of the guilt of the accused beyond reasonable doubt",[104] a related claim for redress is, in essence, "a civil claim heard in the criminal jurisdiction" at a lower standard of proof.[105] What that standard will be may vary from case to case, and even between different categories of claims, as for instance within the UNCC framework.[106]

Any post-conflict adjudication will be "called upon to piece together the truth out of a conflicting patchwork of evidence presented by each side".[107] MCPs are not truth commissions (although they might be run in conjunction with a truth commission), but rather are meant to give a measure of satisfaction to the victims, acknowledge wrongs done to them, and achieve finality for all sides. Some MCPs determine eligibility only on the basis of documentary evidence. In fact, the practice of holding hearings has been reduced or even abandoned in many of them.[108] Instead, a growing use has been made of such methods as grouping and categorisation of claims, evidentiary presumptions, statistical sampling and modeling, computerised matching of data against public or other records, standardised verification and valuation, and awarding fixed amounts in certain categories. Even if such methods are not expressly authorised in the constituting instruments or rules, MCPs "have based their authority

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[102] Trust Fund Regulations, *supra* n. 11, para. 55.
[103] Trust Fund Regulations, *supra* n. 11, para. 63.
[104] Rome Statute, supra n. 15, Article 66(3).
[105] *See* Shelton, *supra* n. 4, section 6) *Recommendations for the Processing of Claims under the Rome Statute* ("While the requisite standard for conviction is proof beyond a reasonable doubt, this is not an appropriate standard for claims of reparation after the conviction has been obtained. In essence, the claim of redress is a civil claim heard in the criminal jurisdiction."). *But see* Göran Sluiter and Alexander Zahar, *International Criminal Law – a Critical Introduction* at 76–78 (Oxford University Press 2008) (noting that the role of victims as beneficiaries of reparations raises the fundamental question of demarcation between criminal and civil proceedings).
[106] *See* www.uncc.ch > The claims. *See also* Jacomijn van Haersolte-van Hof, "Innovations to Speed Mass Claims: New Standards of Proof," *in Redressing Injustices, supra* n. 20, at 13 *ff.*
[107] Weeramantry, *supra* n. 14, at 471.
[108] *See* Holtzmann, *supra* n. 12, para. 17; *International Mass Claims Processes, supra* n. 20, section 5.03. *See also* Roht-Arriaza, *supra* n. 34, at 179–80 (the more individualized review, "the more delay, the more evidence required and the longer the process will take").

to adopt such methodologies on their inherent power to determine how their proceedings can best be conducted".[109]

An ICC order for reparations will either have identified individual beneficiaries or described the class or classes of beneficiaries who are to receive awards.[110] "Where the names and/or locations of the victims are not known, or where the number of victims is such that it is impossible or impracticable for the Secretariat to determine these with precision, the Secretariat shall set out all relevant demographic/statistical data about the group of victims, as defined in the order of the Court, and shall list options for determining any missing details for approval by the Board of Directors".[111] Effectively, this means that even when reparations are awarded after trial and conviction, the precise identification of victims will not always be possible, and there will be eligible victims who cannot prove that their injury was in reality caused by the convicted person. It is thus a legal fiction that the victims who may receive reparations pursuant to an order of the Court are only those whose injury was in reality caused by the convicted person. The only way to achieve such absolute certainty would be to apply the same standard of proof as in the criminal trial. Every effort will of course be made to define the group of victims correctly and to verify each applicant's membership in such group. The Trust Fund Regulations provide that once the criteria of eligibility have been defined, the "Secretariat shall verify that any persons who identify themselves to the Trust Fund are *in fact* members of the beneficiary group in accordance with any principles set out in the order of the Court".[112] The implementation plan, as approved by the Court, could authorise that the verification exercise establish such group membership on the basis of a relaxed standard of proof. The Regulations also expressly allow the MCP technique of using "demographic data to determine the members of the beneficiary group".[113]

MCPs may decide 'false negatives' as well as 'false positives' through such approximation methods, and it is therefore important that victims who feel that an error has been made in the handling of their claim have an opportunity to appeal the decision. Although MCPs generally issue binding and immediately effective awards, most have included internal appeals mechanisms. The German Forced Labor Compensation Programme designed its appeals procedure in such a way that it could only alter a decision in the claimants' favour, in recognition of the overall purpose of compensating victims and that they should not be made

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[109] *International Mass Claims Processes, supra* n. 20, at 247 and section 5.06. *See generally* Veijo Heiskanen, "Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology," *in Redressing Injustices, supra* n. 20, at 25 *ff.*

[110] Trust Fund Regulations, *supra* n. 11, paras 59 and 60.

[111] Trust Fund Regulations, *supra* n. 11, para. 60.

[112] Trust Fund Regulations, *supra* n. 11, para. 62 (emphasis added).

[113] Trust Fund Regulations, *supra* n. 11, para. 61(a).

worse off by lodging an appeal. Also, while not wishing to turn the Trust Fund into an adversarial process, it would be consistent with the quest to benefit the true victims if the defense were given an opportunity to refute claims with evidence in its possession. At the UNCC, for example, Iraq, as the liable party, was given an opportunity to submit information through the so-called 'Article 16 Report' procedure.[114]

6. *Infrastructure*

In order to decide the maximum number of claims as quickly and inexpensively as possible, many MCPs have relied on existing institutions or outsourcing work in whole or in part, adjusting staff levels upwards or downwards depending on the workload in each phase, using temporary employment contracts and even teams working alternate day and night shifts to save space and time, and avoiding translation expenses by hiring multi-lingual claims reviewers.[115]

The ICC Trust Fund Secretariat will need to allocate staff and resources to its assistance projects in such a way as to be available to mobilise quickly once the Court issues a reparations order. The Fund's policy of liaising with other organizations presumably applies also to cases where it is called on to implement Court orders. The Trust Fund, like the ICC itself, is a magnet for highly educated persons eager to devote their careers to helping the work of such a novel organization. The Fund will, however, need to balance the need for hiring experienced staff to meet the high demands placed upon it, against the need to keep its overhead costs low and its administration flexible enough to respond rapidly and meaningfully to each situation. ICC cases are likely to require different language skills and expertise, and much of the work – such as claims collection and implementation of awards – will best be carried out locally among the affected communities by persons who speak the local languages and whom the victim population trusts.[116] This suggests creating (temporary) field offices and hiring locally rather than spending scarce funds on relocation expenses or travel costs for permanent staff. Likewise, should the Court award restitution of real property, as it is authorised to do under the Rome Statute, the experience of past property commissions is that the review of such claims is best conducted at the place where the decision makers can make on-site inspections, access title

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[114] *See* UNCC Provisional Rules, *supra* n. 86, Article 16(1).

[115] At the UNCC, expert consultants played a vital role under the oversight of a division of the Secretariat.

[116] *See* Brouwer, *supra* n. 29, at 223, n 87. Although the Registry or Office of the Prosecutor (OTP) will already have done much work, the work needed for the criminal case may be of a different nature than what is needed for the claims process, so efforts need to be carefully coordinated.

registries, and interact with the relevant municipal agencies. Conducting such processes from afar is generally not considered efficient.[117]

Although the ICC cannot issue reparation orders against states, its cases will nevertheless involve interaction and cooperation with states and intergovernmental organizations. Its decisions are without prejudice to the right to pursue a remedy elsewhere, and there may be other initiatives actively redressing wrongs arising out of the same situation – on behalf of other liable parties, or parties willing to match funds or cover victims outside the scope of the ICC's jurisdiction. (There may be governments willing to pledge or match funds for the benefit the victims but, for political or other reasons, unable to do so through the ICC mechanism.) It would be most efficient – and hence in the best interest of the victims – if information and some operational units could be shared. For example, GFLCP (pursuant to the German Foundation Remembrance, Responsibility and Future) and HVAP (pursuant to the Swiss banks settlement) partly shared a secretariat at IOM, and access to the same databases, and their decisions in some claims categories could be appealed to a common appeals body. Also, as one of the seven national and international partner organizations implementing the German Foundation process, IOM, in addition to processing large numbers of claims in administrative proceedings, served as secretariat to a Property Claims Commission which decided all claims for real property across all seven partner organizations.[118]

The Permanent Court of Arbitration could conceivably serve as registry to special committees formed as part of a larger administrative claims process, similar to the IOM Property Claims Commission. While the fact that the PCA has accumulated experience and know-how in the field of MCPs is no guarantee that it will be seized of other such cases in the future, it might make sense now that it has become "especially qualified for such cases" to employ it for MCPs that involve both inter-state and mixed attributes.[119] The PCA could perhaps even be used to supplement the work of the ICC Trust Fund Secretariat on an ad hoc basis at certain stages – as 'good offices' for negotiations or panels resolving preliminary issues among external stake-holders; as host to a common appeals procedure among the Trust Fund and factually related processes, etc. – so long as moneys in the Trust Fund itself are used for the benefit of victims of crimes within the jurisdiction of the ICC.

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[117] *See International Mass Claims Processes, supra* n. 20, sections 1.06 on the location of claims process, and 6.05 on satellite offices. *See especially* work of CRPC, HPCC, and the IOM Iraq Property Claims Commission (www.iom-iraq.int).

[118] On the work of the IOM Property Claims Commission, *see* Karrer, *supra* n. 73.

[119] Van Haersolte-van Hof, *supra* n. 16, at 67 and 69.

7. *Sources of Funding*

The issue of funding is a topic which deserves a study unto itself,[120] but it is worth noting here briefly that, in the ICC Trust Fund Regulations as adopted in 2006, governments could not earmark their contributions to the Fund, and other donors could earmark only up to one third of their contributions.[121] In November 2007, however, the Trust Fund requested amendments to its Regulations to exempt private funds from the earmarking cap and allow state earmarking of funds raised by the Board or the Executive Director.[122]

The Trust Fund Regulations do not mention any requirement of keeping a minimum amount in reserve. They state only that, without prejudice to its special assistance projects, "the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards … taking particular account of ongoing legal proceedings that may give rise to such awards".[123] As discussed above, the Fund will be expected to apply consistency across cases, so prudent planning may in practice mean keeping emergency reserves or securing regular pledges. Given the many and conflicting demands it will face, and the expanded license to earmark donations, it may be of interest in this regard to study the work of institutions such as the 'office of the Defender of the Fund' at the Marshall Islands Nuclear Claims Tribunal claims process.[124]

E. *Conclusions*

This article has surveyed how some of the methods and practices developed for resolving international mass claims, whether in public, private, administrative, or arbitral settings, have been taken into account in designing the reparations procedures of the International Criminal Court. The article has highlighted the quiet but significant contribution of the Permanent Court of Arbitration, which shares with the Trust Fund for Victims the rare ability to assist a wide variety of dispute settlement mechanisms. The PCA Steering Committee on Mass Claims found that claims processes often are constituted by open and flexible provisions, as no previous process can be used as a blueprint for the next one, leaving detailed

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[120] *See e.g.* Claus Kress and Göran Sluiter, "Fines and Forfeiture Orders," *in 2 The Rome Statute of the International Criminal Court, A Commentary*, 1823, at 1826–27; Keller, *supra* n. 76, at 197.

[121] Trust Fund Regulations, *supra* n. 11, para. 27.

[122] *See* www.iccnow.org.

[123] Trust Fund Regulations, *supra* n. 11, para. 56.

[124] *See* www.nuclearclaimstribunal.com.

procedural rules to be developed and modified to meet unforeseen circumstances. The Regulations of the Trust Fund for Victims similarly leave many criteria to be determined on a case-by-case basis in light of each individual situation.

There is a danger when establishing a permanent international organization in a constantly changing world, that its methods may begin to lose relevance, its focus turn inwards, and that bureaucratic delays take over. The PCA's flexible framework has enabled it to focus on its core functions, at low costs and lightly staffed, and to adjust itself to new demands rather than impose out-dated procedures on new problems. Given its experience with mass claims processes, the PCA could again lend its premises and staff to assist with such endeavours.

Mass claims mechanisms, beyond merely providing financial remedies, have provided "at least some recognition of wrongs".[125] Through methods devised to arrive at truth in the absence of precise evidence, they have also – even if incidentally – recognized some rights. Their practice has set the standard for what is 'possible' very high – and to do less for victims in future reparations programs might therefore lead to fresh resentments, further litigations, and in extreme cases, history repeating.[126] Even if many a claims process is motivated by a desire to quiet claims and achieve 'legal peace' for the liable parties, it will serve the best interests and reputations of those who fund and administer such processes to ensure that the beneficiaries can live with the results.

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[125] Wühler, *supra* n. 19, at 339.

[126] *See e.g.* Richard M. Buxbaum, "*A Legal History of International Reparations*," 23(2) Berkeley J. Int'l L. 314, at 323.

The United Nations Compensation Commission

*By Linda A. Taylor**

A. *Introduction*

The United Nations Compensation Commission ("Commission" or "UNCC") is an example of the successful implementation of a large-scale victims' compensation programme. Nearly 2.7 million claims were submitted to the Commission, the vast majority on behalf of individuals. Those claims designated as urgent humanitarian claims, which comprised more than 99 per cent of the claims filed, were processed within eight years of their submission to the Commission. All of the claims submitted to the Commission were processed by mid-2005.

The institutional framework of the Commission, and the guidelines and procedures established to process claims and to pay compensation, were driven by the large numbers of claims that it was anticipated would be filed, and were eventually filed, with the Commission. The objective was to settle compensation claims in a fair and efficient manner within a reasonable period of time.

The purpose of this chapter is to provide a brief overview of the guidelines and procedures adopted by the Commission to process the claims, having particular regard to their impact on individual victims.

B. *Establishment and Mandate*

The Commission was established in 1991 as a subsidiary organ of the United Nations Security Council, pursuant to Security Council resolutions 687 (1991) and 692 (1991). Security Council resolution 687 provided that Iraq was "liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of its unlawful invasion and occupation of

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 197–214.

Kuwait". The Commission's mandate is to process claims and to pay compensation for such direct loss, damage or injury.

Compensation is payable to successful claimants from the Compensation Fund contemplated in resolution 687 and established under resolution 692. The Fund receives a percentage of the proceeds from the sale of Iraqi oil. Initially, the Fund received 30 per cent of such proceeds; however, the percentage was subsequently reduced and at the time of writing was 5 percent.[1]

C. *Institutional Framework*

The Commission's institutional framework was elaborated in the Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687, dated 2 May 1991 (S/22559). The Secretary-General recommended that the Commission have a tri-partite structure consisting of a Governing Council, panels of Commissioners and a secretariat.

The Governing Council is the principal organ of the Commission. It is composed of the representatives of the current members of the Security Council at any given time. The Governing Council establishes policy (including guidelines relating to the administration and financing of the Compensation Fund, the organization of the Commission's work, the procedures to be applied to the processing of claims and to the settlement of disputed claims, and to the payments to be made from the Fund) and approved awards of compensation.

The Governing Council's guidelines provide for its decisions to be taken by a majority of at least nine of its members, as in the Security Council. The right of veto is expressly excluded. To date, the Governing Council has adopted all of its decisions by consensus.

Commissioners, who were internationally-recognised experts in fields such as law, finance, accountancy, insurance, engineering and environmental damage assessment, and who acted in their personal capacity, assisted the Governing Council. The Commissioners were nominated by the Secretary-General and appointed by the Governing Council for specific tasks and terms. They sat on three-member panels, which were established to review specific categories or sub-categories of claims. The panels verified and valued the claims and made recommendations with respect to awards of compensation to the Governing Council.[2] There were a total of 19 panels of Commissioners, made up of 54 Commissioners representing some 40 nationalities.

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[1] See Security Council resolution 1483 (2003).

[2] Some panels of Commissioners described their task as three-fold: to determine whether the alleged losses fell within the jurisdiction of the Commission; to verify whether those alleged losses that were compensable in principle had in fact been incurred; and to value those losses that were

The Governing Council and the panels of Commissioners were supported by a secretariat, headed by an Executive Secretary, whose primary responsibility was the technical administration of the Compensation Fund and the servicing of the Governing Council and panels of Commissioners. At the height of claims processing, the secretariat comprised approximately 350 staff members, the majority of whom were lawyers, accountants and loss adjusters in the claims processing division.

The Secretary-General, in his Report, indicated that the Commission was not a court or an arbitral tribunal before which the parties appear, but rather a political organ performing an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. He further indicated that it was important to build into the procedure some element of due process, and stated that it would fall to the Commissioners to provide such element.

In practice, several aspects of the work of the Commissioners were quasi-judicial in nature, namely their organization of the work, their determinations concerning the applicable law and their assessment of the sufficiency of the evidence supporting the claims.[3]

D. *Categories of Claims*

The prospective claims population and the types of losses that likely had been sustained as a result of Iraq's invasion and occupation of Kuwait was one of the first issues addressed by the Governing Council. Following its consideration of the events that had taken place in Kuwait and Iraq during the invasion and occupation period, and mindful of the fact that over one million nationals of other countries had been forced to flee Kuwait and Iraq, the Council, in its first decision (S/AC.26/1991/1), dated 2 August 1991, established three categories of individual claims, as follows.

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compensable and had been incurred. See, for example, the Report and Recommendations of the "F2" panel of Commissioners concerning the first instalment of "F2" claims (S/AC.26/1999/23), dated 23 September 1999, para. 15.

[3] Under article 29 of the Commission's Provisional Rules for Claims Procedure (S/AC.26/1992/10), dated 26 June 1992, the chairmen of the panels of Commissioners were responsible for organising the work of their respective panels so as to ensure the expeditious processing of the claims and the consistent application of the relevant criteria and the Rules. Under article 31, in considering the claims, the panels were to apply Security Council resolution 687 and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, panels were to apply other relevant rules of international law. Under article 35(1), each panel was to determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.

Category "A" claims were for departure from Kuwait or Iraq as a result of Iraq's invasion and occupation of Kuwait during the period 2 August 1990 to 2 March 1991. The Governing Council fixed the amount of compensation for successful claimants in this category at US$2500 for individuals and US$5000 for families. Where a claimant agreed not to file claims in any of the other individual claims categories, a higher award of US$4000 for individuals or US$8000 for families could be claimed. The Commission received over 920,000 category "A" claims, submitted by 77 governments and three international organizations, seeking a total of approximately US$3.6 billion in compensation.

Category "B" claims were for serious personal injury or for those whose spouse, child or parent had been injured or died as a result of Iraq's invasion and occupation of Kuwait. The Governing Council fixed the amount of compensation for successful claimants in this category at US$2500 for each injury or death and up to US$10000 for families. The Commission received approximately 6,000 category "B" claims, submitted by 47 governments and three international organizations, seeking a total of approximately US$21 million in compensation.

Category "C" claims were for damages up to US$100,000. These claims encompassed some 21 different loss elements, grouped under nine loss types including departure from Kuwait or Iraq, personal injury, mental pain and anguish, loss of personal property, loss of bank accounts, stocks and other securities, loss of income or support, loss of real property and business losses. In the regular claims programme, the Commission received approximately 420,000 category "C" claims submitted by 85 governments and two international organizations, seeking a total of approximately US$9 billion in compensation. Additionally, pursuant to an agreement between the Government of Egypt and the Commission, a consolidated claim was submitted on behalf of over 800,000 workers in Iraq for the non-transfer of remittances by Iraqi banks to beneficiaries in Egypt. This consolidated claim comprised 1,240,000 individual claims with an asserted value of approximately US$491 million.

In decision 1, the Governing Council designated claims in categories "A", "B" and "C" as urgent humanitarian claims that were to be processed on an expedited basis, using mass claims techniques. This decision reflected the Council's view that it was important to acknowledge, as quickly as possible, the harm that had been suffered by large numbers of individuals and to provide meaningful relief, either as full compensation or as substantial interim relief. Category "A" claims were given both processing and payment priority.

Subsequently, in its seventh decision (S/AC.26/1992/7/Rev.1), dated 17 March 1992, the Governing Council established three more claims categories for larger claims, as follows. Claims in these latter three categories were not processed using mass claims techniques, but rather were reviewed individually.

Category "D" claims were for damages above US$100,000. The types of losses claimed by individuals in this category were similar to those claimed in

category "C". In the regular claims programme, the Commission received approximately 10,500 claims submitted by 50 governments and three international organizations.

Category "E" claims were for direct loss, damage or injury to corporate or other private legal entities and public sector enterprises. These claims included claims for loss or damage to real property, loss relating to the non-payment for goods or services, loss arising from the destruction or seizure of business assets, loss of profits, construction or other contract losses, and other business-related loss including payment or relief to employees. The Commission received approximately 5,800 category "E" claims, submitted by 70 governments, seeking a total of about US$80 billion in compensation.

For processing purposes, category "E" was divided into four sub-categories: oil sector claims ("E1" claims); non-Kuwaiti corporate claims excluding oil sector claims, construction and engineering claims, and export guarantee claims ("E2" claims); non-Kuwaiti construction and engineering claims ("E3" claims), and Kuwaiti private sector claims excluding oil sector claims ("E4" claims).

Category "F" claims were for direct loss, damage or injury to governments and international organizations. These claims included claims for loss or expense incurred in evacuating nationals or in providing relief to nationals, damage to diplomatic premises, loss of and damage to government property, and damage to the environment and public health. The Commission received approximately 300 category "F" claims, submitted by 43 governments and six international organizations, seeking compensation totaling approximately US$210 billion.

For processing purposes, category "F" claims were divided into four sub-categories: government claims for losses related to departure and evacuation costs or damage to physical property and claims filed by international organizations ("F1" claims); claims filed by the Governments of Jordan and Saudi Arabia excluding environmental claims ("F2" claims); claims filed by the Government of Kuwait excluding environmental claims ("F3" claims); and claims for damage to the environment and public health ("F4" claims).

Further, sub-category "E/F" claims were export guarantee and insurance claims submitted under both categories "E" and "F". Some 137 "E/F" claims were filed with the Commission, with a total asserted value of approximately US$6 billion.

E. *"Late Claims"*

The Governing Council established deadlines for the filing of claims in each of the six claims categories. These deadlines were extended several times when it became apparent that compliance with the original dates was not feasible because of the volume of claims. The Council also elaborated criteria pursuant

to which it would consider requests made by submitting entities for the filing of "late claims" after the expiration of the deadlines. The Council considered such requests from time to time, and approved a number of them, including requests for the establishment of two large-scale "late claims" programmes, as follows.

In December 2001, the Council approved the establishment of a "late claims" programme for those Palestinians who could demonstrate that they did not have a full and effective opportunity to file claims with the Commission during the regular filing period for individuals. Pursuant thereto, the Palestinian Authority submitted nearly 44,000 category "C" and 2,400 category "D" claims to the Commission.

In July 2004, towards the end of the Commission's work programme, the Governing Council approved the creation of a special accelerated programme for "bedoun", stateless individuals who lived in Kuwait. Thereunder, individuals who satisfied the eligibility criteria elaborated by the Council were awarded the fixed amount of US$2500. The Government of Kuwait submitted nearly 32,000 claims to the Commission under this programme.

F. *Who Could Submit Claims?*

Individuals could not file claims directly with the Commission. The Report of the Secretary-General dated 2 May 1991 recommended that the Commission should entertain, as a general rule, only consolidated claims filed by individual governments on their own behalf or on behalf of their nationals and corporations. The stated rationale was that "The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants." The Commission's Provisional Rules for Claims Procedure[4] ("Rules"), approved by the Governing Council in decision 10, provided that governments and international organizations were entitled to submit claims to the Commission. A government was permitted to submit claims on behalf of its nationals and, at its discretion, on behalf of other persons resident in its territory. A government was also permitted to submit claims on behalf of corporations or other entities that, on the date on which the claim arose, were incorporated or organised under the law of that state.

The Rules also contemplated that all communications with respect to the submitted claims would take place between the Commission's secretariat and the

[4] See *supra* n. 3.

governments (through their permanent missions in Geneva) and international organizations.

The Governing Council anticipated that some individuals would not be in a position to have their claims submitted by a government. The Rules provided that the Council could appoint an appropriate person, authority or body to file claims on their behalf. Pursuant thereto, several United Nations organizations, including the United Nations Development Programme, the United Nations Office of the High Commissioner for Refugees and the United Nations Relief and Works Agency for Palestine Refugees in the Near East, were appointed to submit claims on behalf of Palestinians.

In total, 100 governments and international organizations submitted claims to the Commission.

As anticipated by the Secretary-General in his Report, the rationale for the restriction on who could submit claims to the Commission was a practical one. Given the large numbers of claims, the Commission would have been unable to cope with receiving claims on an individual basis or communicating directly with individual claimants.

Submitting entities were responsible for distributing the claim forms and for filing claims, and later for distributing awards of compensation to successful claimants. It was expected that they would disseminate information about the UNCC compensation programme in order to assist claimants in the preparation of claims for submission to the Commission. Under the Rules, governments were required to submit with each consolidated claim an affirmation stating that, to the best of the information available to it, the claimants were its nationals or residents, and that it had no reason to believe that the information stated in the claims was incorrect.

The Commission's experience was that there were substantial variations in the type and level of assistance provided to claimants by governments.[5] Some governments established their own large-scale national programmes to advise and assist claimants in preparing their claims and in responding to requests for information from the Commission. Other governments limited their role to forwarding communications from the Commission to claimants and returning responses to the Commission.

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[5] For example, in its first report, Recommendations made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims) (S/AC.26/1994/1), dated 14 April 1994, the category "B" panel observed at pages 34–35 that there were considerable disparities with respect to the degree of evidence provided among claims submitted by different governments and within them, among individual claims. The panel stated that this was mainly attributable to the differences among the claims programmes instituted within various countries.

G. *Outreach*

The Commission focused its outreach activities on prospective claimant governments and international organizations. Outreach activities conducted by the secretariat included the preparation and provision of written materials about the UNCC compensation programme and claim forms to governments and international organizations, meetings with representatives of permanent missions in Geneva to provide information and to answer questions, missions to claimant countries to meet with government officials, and publication of information concerning the UNCC compensation programme in newspapers. Subsequently, as the secretariat reviewed claim forms submitted to the Commission, additional information was disseminated to submitting entities concerning common errors or omissions made by claimants on the claim forms, and questions from claimants were answered by means of official communications through the submitting entities. Still later, as some panels of Commissioners developed methodologies for the review of certain types of losses, workshops were conducted to explain the methodologies. A database was also developed for submitting entities that enabled them to access detailed information concerning the claims that they had submitted to the Commission.

The Commission's experience was that outreach was essential to the success of the UNCC compensation programme, especially in managing the expectations of claimants. It was particularly important to disseminate information concerning the jurisdictional limitations on the programme.

H. *Participation of Claimants*

The participation of claimants in the claims review process was necessarily limited as a result of the large numbers of claims filed and the need to process them within a reasonable period of time.

Claimants were required to complete and sign a claim form, and provide a personal statement (categories "A", "B", "C" and "D") or statement of claim (categories "E" and "F") together with documentary support for their claims. The claim forms, which were designed by the Commission, were intended to elicit essential information concerning the claimant and the claim. The forms were designed to capture data essential to the resolution of each type of loss and element of loss in a manner that facilitated electronic analysis and manipulation, the grouping and tracking of claims and the processing of claims. The Commission tried to balance several competing concerns – to avoid making the forms too long and complex for claimants to understand and complete, but ensure that the data the panels of Commissioners required in order to verify and value the claims

was captured and limit, to the greatest extent possible, the need to go back to claimants for additional information.

Pursuant to article 19 of the Rules, the secretariat made a preliminary assessment of the claims upon receipt in order to determine whether they met certain formal requirements established by the Governing Council. Where it was found that a claim did not meet those formal requirements, the secretariat notified the claimant, through the relevant submitting entity, and the claimant was given an opportunity to remedy the deficiency. If the deficiency was not remedied, the claim was processed "as is".

Thereafter, a claimant's participation in the review process depended upon whether the claim was filed in category "A", "B" or "C" or in category "D", "E" or "F".

As stated above, claims in categories "A", "B" and "C" were processed on an expedited basis using mass claim techniques. The procedures developed did not require extensive participation by claimants and, accordingly, their role in these three claims categories essentially consisted of remedying formal deficiencies in their claims.

With respect to claims in categories "D", "E" and "F", the Commission's Rules contemplated that additional information could be obtained from claimants and others at the request of and for the benefit of the panels of Commissioners. Under the direction of panels, the secretariat prepared and issued notifications under article 34 of the Rules requesting further information or documentary evidence. The secretariat, together with external expert consultants engaged to assist the panels of Commissioners, undertook technical missions to claimant countries to interview claimants and others, inspect documents, inspect damage and facilities, and gather additional information for the panels. Panels also were empowered under article 38 of the Rules, in unusually large or complex cases, to request written submissions and invite claimants to present their views in oral proceedings.

It is worth noting that under article 16 of the Rules, governments and international organizations that had submitted claims (together with the Government of Iraq) received regular written reports from the Executive Secretary reporting on the progress of claims and indicating significant legal and factual issues raised by the claims. The recipients could present their views and additional information on such issues to the Executive Secretary for transmission to the panels of Commissioners. Although this mechanism did not afford claimants direct access to the panels, their views and concerns on such issues could be reflected in the comments their submitting entities provided to the Commission. The responses of submitting entities and the Government of Iraq to the article 16 reports were given due regard by the panels of Commissioners in the conduct of their work.

I. *Role of Counsel*

As noted earlier, the Commission is not a court or arbitral tribunal and the claims review process was not adversarial in nature. The procedures established by the Commission did not contemplate a formal role for counsel, apart from article 38(d) of the Rules, which provided that a claimant could be assisted by an attorney or other representative of choice at an oral proceeding (if a panel of Commissioners, in its discretion, decided to hold such a proceeding[6]). While claimants were at liberty to retain legal counsel or others to assist them in the preparation of their claims, the Commission did not deal with them except as set out in article 38. The vast majority of claimants, especially in categories "A", "B", "C" and "D", did not have counsel. A few claimants engaged counsel to attempt to appeal the Governing Council's decisions with respect to awards of compensation; however, pursuant to article 40(4) of the Rules, decisions of the Council are final and are not subject to appeal or review on procedural, substantive or other grounds.[7]

J. *Evidence*

The burden of proof was on the claimant to establish his or her claim. Under article 35 of the Rules, each claimant was responsible for submitting documents and other evidence that demonstrated satisfactorily that a particular claim or group of claims was eligible for compensation pursuant to Security Council resolution 687. However, the evidentiary standards established by the Governing Council differed depending upon the category of claim. Generally speaking, the evidence required of a claimant was commensurate with the asserted quantum of the loss. Claimants in categories "A", "B" and "C" were not held to the same evidentiary requirements as claimants in categories "D", "E" and "F", since claims in the first three categories were generally for lower amounts and awards

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[6] In decision 114 (S/AC.26/Dec.114 (2002)) the Governing Council confirmed that the discretion to convene oral proceedings remained with the panels of Commissioners and noted the panels' practice to schedule oral proceedings where a claim had an asserted value of US$1 billion or more, with the exception of claims falling outside the Commission's jurisdiction or claims that were otherwise not compensable. The Council encouraged panels to also schedule oral proceedings where the panels determined that it would be useful to hear the views of the claimants and Iraq or where the claims contained significant technical, legal or factual issues or where the claims were substantive "F4" claims.

[7] Article 41 of the Rules provides, however, that computational, clerical, typographical or other technical errors brought to the attention of the Executive Secretary within a specified time frame would be reported to the Governing Council for a decision as to remedial action. Where the Council determined that an error within the scope of article 41 had been made, an appropriate correction was made to the award of compensation.

of compensation were fixed or capped under the guidelines approved by the Governing Council. Under the Rules, the panels of Commissioners determined the admissibility, relevance, materiality and weight of any documents and other evidence submitted.

Category "A" claimants were required to provide simple documentation of the fact and date of departure from Iraq or Kuwait. Documentation of the actual amount of loss was not required.

Category "B" claimants were required, in the case of serious personal injury, to provide simple documentation of the fact and date of the injury and, in the case of death, to provide simple documentation of the death and family relationship. Documentation of the actual amount of loss was not required.

Category "C" claimants were required to provide appropriate evidence of the circumstances and amount of the claimed loss. Documents and other evidence required was the reasonable minimum that was appropriate under the particular circumstances of the case. A lesser degree of documentary evidence ordinarily would suffice for smaller claims such as those below US$20,000.

Claims in categories "D", "E" and "F" had to be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. In its decision 46 (S/AC.26/Dec.46 (1998)), the Governing Council decided that, with respect to claims in these three categories, no loss could be compensated solely on the basis of an explanatory statement provided by the claimant. Claim files were also transmitted to the Government of Iraq for its views and information, in accordance with criteria established by panels of Commissioners, and the panels took such views and information into account in their verification and valuation of the claims.[8]

The Governing Council in elaborating the evidentiary standards, and the panels of Commissioners in applying them to claims, recognised the challenges faced by claimants in providing evidence in support of their claims. The loss of official records and documentation as a result of Iraq's invasion and occupation of Kuwait had been noted in the Report to the Secretary-General by a United Nations Mission, led by Mr. Abdulrahim A. Farah, Former Under-Secretary General, assessing the scope and nature of damage inflicted on Kuwait's infrastructure during the Iraqi occupation of the country from 2 August 1990 to 27 February 1991 (S/22535), dated 29 April 1991. This report together with other United Nations reports[9] were part of the background information before the Governing

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[8] See also Governing Council decision 114, *supra* n. 6.

[9] Such as the Report to the Secretary-General on Humanitarian Needs in Kuwait in the Immediate Post-Crisis Environment by a Mission to the Area, led by Mr. Ahtisaari, Under-Secretary-General for Administration and Management (S/22409), dated 28 March 1991; and Report on the Situation of Human Rights in Kuwait Under Iraqi Occupation, prepared by Mr. Walter Kälin, Special Rapporteur of the Commission on Human Rights, in accordance with Commission Resolution 1991/67, E/CN.4/1992/26 (16 January 1992).

Council as it elaborated its criteria and guidelines for processing claims and before the panels of Commissioners as they applied the evidentiary standards.

For example, in its first report the category "B" panel cited these and other reports and noted that:

> … Under the general emergency conditions prevailing in the two countries, thousands of individuals were forced to flee or hide, or were held captive, without retaining documents that later could be used to substantiate their losses. In addition, many claimants chose not to or could not return to Iraq or Kuwait, and therefore had difficulty producing primary evidence of their losses, damages or injuries.

and further that:

> The scarcity of evidentiary support where massive numbers of claims are involved is not a phenomenon without precedent in international claims programs, in particular if the events generating responsibility have taken place in abnormal circumstances such as those prevailing in Kuwait and Iraq during the conflict. An analysis of the practice of international tribunals regarding issues of evidence shows that tribunals often had to decide claims on the basis of meagre or incomplete evidence. It has been observed that the lowering of the levels of the evidence required occurs especially 'in the case of claims commissions, which have to deal with complex questions of fact relating to the claims of hundreds or even thousands of individuals'.[10]

The category "B" panel indicated that it took all of these circumstances into account in assessing the evidence submitted in each claim, but required in all cases a minimum level of evidence to recommend an award of compensation.

Similarly, in its first report the category "D" panel indicated that it had commenced its work by reviewing these United Nations reports and found the factual information contained in them to be of critical importance in defining the criteria and evidentiary standards for category "D" claims. The panel stated that, in considering whether a claim had met the applicable evidentiary burden, it kept in mind the circumstances in Kuwait and Iraq during the invasion and occupation and their impact on the claimants' ability to provide evidence in support of their claims. The panel further stated that in carrying out its work, the panel balanced the interests of claimants who fled a war zone often in difficult circumstances and who therefore in many cases were unable to submit extensive evidence to document legitimate claims with the interests of Iraq, which was only liable for damage and loss caused as a direct result of its invasion and occupation of Kuwait.[11]

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[10] *Supra* n. 5, at pp. 33–34.

[11] Report and Recommendations made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages over US$100,000 (Category "D" Claims) (S/AC.26/1998/1), dated 6 October 1997, at paras. 21, 70 and 76.

Presumptions were also used. For example, in decisions 1 and 7, the Governing Council enumerated five circumstances in which the loss, injury or damage was deemed to be direct. Pursuant thereto, departure from Kuwait or Iraq during the period from 2 August 1990 to 2 March 1991 (or a decision not to return) was presumed to be a direct result of Iraq's invasion and occupation of Kuwait, thus relieving claimants of the burden of proving directness.[12]

In some instances, panels of Commissioners used mass claims processing techniques and third party data to verify the information and evidence provided by claimants. For example, in order to process category "A" claims for departure, the Commission obtained independent information on the movement of people out of Kuwait and Iraq during the invasion and occupation period. Information such as refugee camp rosters, census data, border crossing records, departure and arrival records, evacuation records, diplomatic records, and flight, ship and bus manifests were obtained from governments and international organizations. This information, comprising millions of documents, was used to develop an arrivals/departures database. A computer application was developed to match the information in the database against the information provided by claimants, in order to verify claimants' presence in Kuwait or Iraq as at 2 August 1990 and their departure during the period from 2 August 1990 to 2 March 1991.

In another example, both the category "C" and category "D" panels of Commissioners relied upon data provided by the Government of Kuwait to value the loss of motor vehicles in Kuwait. The data consisted of a report and motor vehicle valuation table setting out the depreciated value as of 2 August 1990 of a wide variety of makes and models of motor vehicles.[13]

Third party data also was used by the "F2" panel of Commissioners to fill in the gaps in the evidence provided by the Government of the Hashemite Kingdom of Jordan in respect of its claims for the reimbursement of costs it alleged were sustained in providing emergency humanitarian relief to hundreds of thousands of individuals fleeing Kuwait and Iraq during the invasion and occupation period. The Government demonstrated that, due to the sheer number of individuals who entered Jordan, and the urgent nature of the assistance given to them, expenditure relating to emergency humanitarian relief could not be documented in the usual manner. The panel was satisfied that the Government had

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[12] The enumerated circumstances were not intended to be exhaustive; the Governing Council noted in decision 15 (S/AC.26/1992/15) that there would be other situations where evidence could be produced showing claims to be for direct loss, damage or injury.

[13] See the Report and Recommendations made by the Panel of Commissioners Concerning the First Instalment of Claims for Damages up to US$100,000 (S/AC.26/1994/3) at 156; and the Report and Recommendations made by the Panel of Commissioners Concerning Part One of the First Instalment of Individual Claims for Damages above US$100,000, *supra* n. 11, at paras. 251 and 267–272.

sustained significant losses in its emergency humanitarian relief effort and accepted its explanation for the lack of complete documentation of those losses. However, the panel was unable to quantify the losses solely on the evidence provided by the Government. It therefore assumed an investigative role of its own, and relied on article 36 of the Rules to obtain additional information including reports, budgets, cost estimates and correspondence from United Nations and other international organizations involved in the provision of emergency humanitarian aid in Jordan during the period of Iraq's invasion and occupation of Kuwait. The panel used that additional information, together with the evidence submitted by the Government, to quantify the net cost to Jordan of its emergency humanitarian relief effort and recommend an award of compensation.[14]

K. *Claims Processing*

Under article 17 of the Rules, in order to facilitate the work of the Commissioners and to ensure uniformity in the treatment of similar claims, the secretariat categorised the claims according to factors such as the type or size of the claims and the similarity of legal and factual issues. Insofar as possible, claims with significant common legal and factual issues were processed together. Claims in each claims category were submitted in instalments to the same panel of Commissioners or to a limited number of panels that met together from time to time to ensure consistency.

As was stated earlier, based on humanitarian concerns, the Governing Council in decision 1 designated claims in categories "A", "B" and "C" as urgent claims to be processed on an expedited basis. Anticipating the submission of large numbers of claims in these three categories, the Council directed that these claims be resolved using expedited procedures "such as checking individual claims on a sample basis, with further verification only if circumstances warranted."

The expedited procedures were further outlined in article 37 of the Rules, which provided that the secretariat would check individual claims by matching them, insofar as possible, against the information in the UNCC database, and provide the results of the database analysis to the panels of Commissioners for cross-checking. With respect to claims that could not be completely verified through the database, if the volume of claims was large, the panels could check individual claims on the basis of a sampling, with further verification only as circumstances warranted. In sum, three methods of verification of claims were

[14] See the report and recommendations of the "F2" panel of Commissioners concerning the first instalment of "F2" claims, *supra* n. 2.

contemplated under the expedited procedures: matching, sampling and additional verification as circumstances warranted.

For example, all of these methods were utilised by the category "A" panel of Commissioners in its review of claims for departure. Submitting entities were required to enter data on the claim forms and file category "A" claims electronically. The panel began its review of these claims by matching the information provided by claimants on the claim forms with the information contained in the arrivals/departures database to confirm whether claimants in fact departed from Kuwait or Iraq during the period 2 August 1990 to 2 March 1991. In that way, the panel verified nearly 350,000 claims. The remaining claims were checked and verified using sampling. Representative samples of the overall claims population of each country or international organization were identified, the sample claims were reviewed to determine whether the claimants had provided evidence to show they departed Kuwait or Iraq within the jurisdictional period, and the results of the sampling were applied or extrapolated to the population of claims from which the samples were drawn. Some claims were set aside for individual review of the paper claim files (which were requested from the relevant governments and international organizations) where circumstances warranted such review.

The category "A" panel noted that:

> The conceptual framework and the elements of the sampling methodology employed by the Panel derive from evolving principles and practice both under international and national jurisdictions. Faced with situations of mass claims and other situations where a large number of cases involving common issues of law and fact arise, courts, tribunals and commissions have adopted methodologies, including that of sampling, recognising that the traditional method of individualised adjudication if applied would result in unacceptable delays and substantially increase the burden of costs for such claimants and more so for the respondents. The legal principle involved may be stated as follows: in situations involving mass claims or analogous situations raising common factual and legal issues, it is permissible in the interest of effective justice to apply methodologies and procedures which provide for an examination and determination of a representative sample of these claims. Statistical methods may be used to determine the size and composition of the sample claims and to apply the results of the review of the sample to the remaining claims.[15]

Similarly, during the course of its review of the first instalment of category "C" claims, the category "C" panel of Commissioners concluded that it was neither appropriate nor feasible, and would not be in future instalments of claims, to review individually each element of loss for each claim. The panel indicated that

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[15] Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Instalment of claims for Departure from Iraq or Kuwait (Category "A" Claims) (S/AC.26/1995/4), dated 1 September 1995, at 5–6.

while it would use an individualised approach for certain loss elements, most claims would necessarily be processed pursuant to methodologies designed to resolve massive numbers of claims "in a fair and expeditious manner".[16] The panel used grouping and sampling to develop claim evaluation and compensation criteria that were then applied to the remaining claims populations.

For example, the category "C" panel developed a methodology for the review of claims for the loss of clothing, personal effects, household furnishings and other personal property that involved: a) the grouping of claims presenting similar legal and factual issues; b) the individual review of sample claims from relevant groupings; c) the analysis of statistical data with respect to the claims, and specifically the evidentiary patterns and amounts claimed; d) the extrapolation of its findings in respect of sample claims to the remaining claims; and e) additional verification of individual claims only when necessary. In developing the methodology, the panel built a statistical regression model to estimate amounts that claimants might reasonably have been expected to claim, since the panel was unable to value the losses solely on the basis of the supporting evidence, although the panel was satisfied that the claimants had suffered significant losses. The model was built using the amounts claimed by similarly situated claimants within the population and certain individual characteristics of claimants relevant to predicting an individual claimant's property accumulation behaviour and thus property losses. Using the model, amounts claimed by individual claimants were compared to amounts claimed by other claimants, taking into account their respective personal characteristics and property accumulation indicators. By using the model, the panel was able to conclude that compensation awarded on the basis of the comparison of amounts claimed with those estimated by the statistical model was reasonable, since it reflected the patterns in the amounts claimed by all claimants, was equitable, since no claimant was awarded an amount higher than that to which the panel had established that he or she was entitled, and reflected, to the extent possible within the framework of mass claims processing, the individual circumstances and characteristics of the claimants.

The Commission also used experts to assist with the resolution of certain types of losses. For example, in decision 1 the Governing Council indicated that it would consider, after receiving expert advice, the circumstances in which claims for mental pain and anguish might be admitted, the amounts to be awarded and the limits to be imposed thereon. In decision 3 (S/AC.26/1991/3) the Governing Council decided that compensation would be provided for pecuniary losses

[16] *Supra* n. 13, at 39.

resulting from mental pain and anguish and for non-pecuniary injuries resulting from such mental pain and anguish in certain enumerated circumstances, and in decision 8 (S/AC.26/1992/8) established ceilings on the amount of compensation for mental pain and anguish. The circumstances that qualified for compensation were defined following statistically representative sampling of claims to identify situations that gave rise to claims for mental pain and anguish and common features. Experts in fields such as psychiatry, psychology, general medicine, and war and disaster medicine provided assistance in the development of criteria that were applied by panels of Commissioners to claims for mental pain and anguish.[17]

As stated above, claims in categories "D", "E" and "F" were individually reviewed. Those panels with large numbers of claims to be reviewed, most notably the two category "D" and the two sub-category "E4" panels of Commissioners, developed specific methodologies or claim review procedures for the verification and valuation of most loss types and loss elements. These methodologies were applied to the claims, with the panels reserving the right to depart from the methodologies in appropriate cases. Other panels, with smaller numbers of claims to be reviewed, applied the criteria elaborated by the Governing Council with respect to the verification and valuation of claims directly to each claim without the need for specific review methodologies.

L. *Conclusion*

One of the most significant challenges faced by the Commission was how to resolve the tension between "… the search for individual justice and fairness and the requirement of an expedient process that resolves the whole claims population within a reasonable time period".[18] The guidelines and procedures utilised by the Commission to process the large numbers of claims filed reflected the balance struck between these competing considerations. The vast majority of claims were resolved using the mass claims techniques described above. The remaining claims, which were for losses of a greater magnitude, were reviewed individually. Using these criteria and procedures, nearly 2.7 million claims were processed in less than 15 years, and the goal of settling the claims in a fair and efficient manner within a reasonable period of time was achieved.

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[17] See Annex VI to the first report of the category "C" panel of Commissioners, *supra* n. 13.

[18] Wühler, Norbert, "The United Nations Compensation Commission: A new contribution to the process of international claims resolution", *Reflections on the UN Compensation Commission, The United Nations Compensation Commission*, Thirteenth Sokol Colloquium, (R. Lillich ed. 1995) at 265–266.

In the words of the Commission's first Executive Secretary, Ambassador Carlos Alzamora, the Commission is an "… original system, which is neither traditional arbitration, nor a tribunal or court, but a special procedure suited to the circumstances and to the need to bring effective and swift justice to the millions of victims of Iraq's invasion of Kuwait".[19] Despite doubts by some at the outset and in the early years of the Commission's operations as to whether claimants would ever receive compensation, awards of compensation totaling approximately US$11.7 billion were made to individual claimants, all of which have been paid in full.[20]

[19] *Supra* n. 18, at 349–350.

[20] The Governing Council has approved awards of compensation to successful claimants in all claims categories totaling approximately US$52.4 billion, of which approximately US$23.4 billion had been paid by the end of 2007.

Part IV
Reparations and International and Regional Courts

Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations

*By Lutz Oette**

A. *Introduction*

It is a depressing reality that mass violations of human rights,[1] including in particular international crimes, continue to take place with an alarming frequency, leaving in their wake a large number of individuals and communities who have suffered harm and losses. Responses aimed at providing justice and reparation to the victims of such violations have consisted predominantly of reparation programmes at the domestic level, mainly in the context of political transition, and of compensation commissions or other mass claims programmes at the international level.[2] These mechanisms and programmes have often succeeded in awarding compensation and/or other forms of reparation to a considerable number of victims. However, many victims of mass violations have not benefited from such

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[1] The term 'mass violations' is used throughout this chapter to encompass systematic or large-scale violations, which are characterised by the large number of victims suffering thereof. It is not a term commonly used in human rights parlance but appears best suited to designate violations that may give rise to mass claims. The term 'mass violations' partly overlaps with the related concept of 'gross violations,' which has been defined as "unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law." (See Second Consultative Meeting on 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and Humanitarian Law,' 20–23 October (IMADR), quoted in M. Cherif Bassiouni, "International Recognition of Victims' Rights," in *Human Rights Law Review* 6:2 (2006), 203–279, at 251, Fn. 253.)

[2] See on national responses in particular Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, 2006, and on international responses, Howard M. Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Processes*, Oxford University Press, 2007.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 217–242.

programmes, either because no adequate programme has been set up at the national level or because the violations did not trigger the establishment of an international mechanism. In a recent development, the International Criminal Court has been vested with the power, in particular through the Court's direct procedures on reparations and through the Court's Victims' Trust Fund, to award reparation to a potentially large number of victims of international crimes. The potential of this mechanism has yet to be tested but it is already clear that there will be limitations to the number of victims and the scope of reparation that the Court can possibly provide.[3]

In light of these piecemeal responses, it is pertinent to ask what role regional and international human rights courts and treaty bodies have played and may play in responding to mass violations.

The focus of this chapter is on mass violations in cases of serious violations of human rights, including violations that may amount to international crimes. The chapter examines the practice of human rights treaty bodies and regional human rights courts, in adjudicating claims concerning mass violations in relation to large-scale violations, such as massacres, systemic or recurring patterns of violations and violations of community-based rights. It focuses on cases that actually or potentially involve a considerable or large number of claimants, i.e. several dozens or even hundreds or more claimants, and seeks to identify and analyse key issues that have arisen in such contexts. These include: (i) the accessibility of human rights treaty bodies to the victims of mass violations; (ii) the adequacy of the reparation awards afforded by such bodies; and (iii) the challenges relating to the enforcement of reparations awards. In so doing, the chapter seeks to identify the best practice of human rights bodies in responding to mass violations.

B. *Human Rights Courts and Treaty Bodies and Mass Violations: Some General Considerations*

There are several factors that may limit the capacity of human rights treaty bodies and courts to respond adequately to mass violations. The individualised nature of most human rights complaints systems that follow judicial models of fairly rigid standing and evidentiary rules is characteristic of a supervisory system seeking to determine state responsibility. Individual complaints procedures entail that in many instances a series of cases would have to be brought in relation to systemic or large-scale violations.[4]

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[3] See Carla Ferstman, "The International Criminal Court's Trust Fund for Victims: Challenges and Opportunities," in *Yearbook of International Humanitarian Law*, (2006), Vol. 6, 424–434.

[4] See for example *Broniowski v. Poland*, [GC], no.31443/96, ECHR 2004-V (22 June 2004).

Human rights treaty bodies and regional human rights courts often suffer from limited institutional capacity and grapple with their caseloads, frequently resulting in lengthy delays.[5] Against this background, they appear ill-equipped to deal with a large number of claims in the most efficient manner, a task that requires considerable resources and efforts even for bodies set up for this very purpose.

Even where the outcome is favourable to the complainants, the decisions of human rights treaty bodies are often declaratory or of a general nature. UN human rights treaty bodies and the African Commission on Human and Peoples' Rights tend to refrain from making specific recommendations or awards, respectively, for compensation and/or other forms of reparation, simply setting out that it is the responsibility of the state party to afford adequate or just reparation and thus leaving broad discretion to states parties as to how to implement decisions. This is often coupled with limited compliance, particularly of non-monetary forms of reparation linked to satisfaction and guarantees of non-repetition, and the absence of efficient enforcement mechanisms that hamper the effectiveness of many human rights bodies.[6]

These are genuine challenges that have contributed to the piecemeal record of human rights treaty bodies in responding to mass violations and need to be recognised when examining relevant practice. This should not, however, lead to the impression or even conclusion that human rights treaty bodies and courts are ill-suited to deal with mass violations and/or have completely failed to respond to such situations. Some of these bodies, notably the Inter-American Court of Human Rights, have sought to develop adequate responses. Indeed, there is an increasing awareness, at least amongst regional human rights bodies, that a failure to deal satisfactorily with mass violations may undermine the integrity and efficiency of the system itself. Inevitably, mass violations will by their very nature continue to pose a challenge to human rights bodies as to how best to use existing powers and procedures so as to do justice to a large number of victims.

C. *Key Issues in the Adjudication of Mass Violation Claims*

1. *Number of Victims and Individualised Nature of Procedures*

Victims of mass violations frequently face a series of challenges in bringing claims before human rights treaty bodies or courts. At the initial stage of proceedings,

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[5] See for example on the efforts of the European Court of Human Rights to address these issues, *Foreword by Jean Paul Costa, President of the European Court of Human Rights*, in European Court of Human Rights, 'Annual Report, 2006,' at 5 et seq.

[6] See REDRESS, *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006.

victims have to make the decision on whether they are to bring their case individually or take joint action (though it may be possible for cases to be joined at later stages). Where victims experience violations as individualised acts and have no direct relationship to any or most of the other victims, such as in instances of unlawful mass expropriations, they may be less likely to consider taking joint action and may instead pursue their case individually. An example is the Bug river cases before the European Court of Human Rights that affected almost 80,000 persons and led to hundreds of applications.[7]

Complaints procedures before human rights treaty bodies and regional human rights courts are geared towards individual claims so that it is potentially easier for anyone to pursue his or her own case individually. This very fact may, however, create a genuine problem for the human rights treaty system concerned where it is being inundated with individual claims that are essentially identical so that the body in question may have to adjudicate repeatedly on what is effectively the same subject matter. The European Court of Human Rights emphasised the undesirable effects of such a situation on the efficiency of the system in *Broniowski v. Poland*:

> The Court has already noted that the violation which it has found in the present case has as its cause a situation concerning large numbers of people. The failure to implement in a manner compatible with Article 1 of Protocol No. 1 the chosen mechanism for settling the Bug River claims has affected nearly 80,000 people … There are moreover already 167 applications pending before the Court brought by Bug River claimants … This is not only an aggravating factor as regards the State's responsibility under the Convention for an existing or past state of affairs, but also represents a threat to the future effectiveness of the Convention machinery.[8]

In cases of collective attacks[9] or communities whose group rights have been violated,[10] there is a much greater likelihood that victims who have suffered violations directly and collectively and know (of) each other would want to bring a claim jointly, either on their own initiative or through intermediaries, such as NGOs.

A key procedural question for any group of victims is whether they have standing to bring a case as a collective entity or only individually. The starting point of

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[7] *Broniowski v. Poland*, *supra* n. 4, para. 193.

[8] *Id*.

[9] See for example before the Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 11 May 2007, Series C No.163, and *Case of the Pueblo Bello Massacre v. Colombia*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 31 January 2006, Series C No.140.

[10] See for example, *Case of the Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs), Int-Am Ct HR, 28 November 2007, Series C No.172; *Sawhoyamaxa Indigenous Community v. Paraguay* (Merits, Reparations, and Costs), Int-Am Ct HR, 29 March 2006, Series C No.146; *Yakye Axa Indigenous Community v. Paraguay* (Merits, Reparations, and Costs), Int-Am Ct HR, 17 June 2005, Series C No.125.

individual human rights complaints procedures is that only a victim, i.e. anyone who has suffered harm as a result of a violation, may submit a complaint. This comprises direct victims as well as, depending on the nature of the violation, relatives and, in limited circumstances, others affected by the violation. The status of a victim may expressly extend to NGOs or groups of individuals.[11] However, whether it is the victim or anyone authorised to act on his/her or their behalf, standing in these cases is inextricably linked to proving that the complainant(s) him/herself or themselves suffered from a violation.[12]

A consequence of the individualised nature of complaints procedures is that victims need to be named individually and that evidence must be brought to prove the alleged violation in respect of the individual concerned. These requirements have caused difficulties where the applicants had not been able to identify all victims beforehand. In a judicial response to this difficulty in the case of the *Castro Castro Prison v. Peru*, the Inter-American Court of Human Rights recognised the inclusion of a person as victim who had not been mentioned in the application, basing its decision on the fact that the State had been guaranteed its right to defence and had not objected to the inclusion.[13]

Different rules apply in instances where victims lodge a petition as a group claiming a violation of their collective rights; this does not require individual victims to be identified. This has been affirmed by the Inter-American Court of Human Rights in the case of *Samaraka People v. Suriname* which concerned the standing of the applicants to bring a case on their own behalf and on behalf of the tribal community of the Samaraka people who alleged a violation of their collective right to property and judicial protection. The Court based its decision on the fact that the "broad authority to file a petition is a characteristic feature of the Inter-American system for the protection of human rights. Moreover, a person or group of persons other than the alleged victims may file the petition".[14]

The alternative to a procedure that links standing to victim status is public interest litigation taking the form of an *actio popularis*, according to which anyone may lodge a petition claiming a violation of the respective human rights

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[11] See in particular Article 34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and Article 44 of the American Convention on Human Rights.

[12] This is the rule laid down in Article 22 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (CAT), Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), Article 14 (1) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the European Convention on Human Rights.

[13] *Case of the Miguel Castro-Castro Prison v. Peru*, (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 25 November 2006, Series C No.160, paras. 172, 173.

[14] *Case of the Saramaka People v. Suriname, supra* n. 10, para. 22.

treaty without being a victim him or herself, or themselves. By its nature, such an action shifts the focus from the identity of the applicant to the nature of the violation. A genuine *actio popularis* is possible under the African Charter on Human and Peoples' Rights where the practice of bringing petitions to the African Commission on Human and Peoples' Rights on behalf of victims and in response to mass violations plays an important role.[15] The African Commission, in the case of *Article 19 v. Eritrea*, expressly affirmed that the African Charter "adopted the *actio popularis* approach where the author of a communication need not know or have any relationship with a victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality".[16]

The practice of the African Commission testifies to the importance of broad rules of standing. Dozens of cases have been brought to the Commission by NGOs and others in response to mass violations, such as large-scale discrimination, persecution characterised by detention, torture and unfair trials and expulsion of foreign nationals,[17] campaigns of arrests, detentions, torture, unfair trials and restrictions on freedom of association, freedom of the press and freedom of conscience,[18] and violations of collective rights[19] where the victims would in all likelihood not have been in a position to take such action themselves. Another recent case – *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea* – before the African Commission, concerned attacks on a large number of the 300,000 refugees from Sierra Leone in Guinea, including 5,000 detentions, mob violence by security forces and widespread looting.[20]

The inherent advantage of this practice is readily apparent. It eases the difficulties that victims may face in satisfying strict rules of standing and allows NGOs and others to seize human rights treaty bodies where the public interest is at stake, in particular in instances of mass violations. Such cases have enabled the African Commission to rule on gross and systematic violations of human rights

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[15] Article 55 of the African Charter on Human and Peoples' Rights.

[16] *Article 19 v. Eritrea*, African Commission on Human and Peoples' Rights, Communication 275/2003 (2007), para. 65.

[17] *Malawi African Association and others v. Mauritania*, African Commission on Human and Peoples' Rights, Communication Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

[18] *Free Legal Assistance Group and others v. Zaire*, African Commission on Human and Peoples' Rights, Communications Nos. 25/89, 47/90, 56/91 and 100/93 (1995).

[19] *Social and Economic Rights Action Center, Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001).

[20] *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea v. Republic of Guinea*, African Commission on Human and Peoples' Rights, Communication 249/2002 (2004).

and to exhort states to end violations, to provide a remedy and reparation to victims and to take steps to prevent recurrence.[21] Public interest litigation also allows a greater focus on collective violations as is evident, for example, in the case concerning human rights violations perpetrated against the Ogoni community in Nigeria brought by the Social and Economic Rights Action Center and the Centre for Economic and Social Rights.[22]

The *actio popularis* procedure is bound to result in greater fairness as it allows claims on behalf of all victims so that the outcome will impact on, and frequently benefit a great number of victims. However, this assessment needs to be qualified in so far as the focus on violations rather than victim status means that reparation measures will not be individualised (as (all) individual victims are not necessarily identified in the application process or otherwise during the proceedings). In such cases, reparation measures tend to be of a general (and collective) nature, which requires specification and implementation through follow-up procedures that are often, where available, not very effective.[23]

2. *Representation*

A key issue in relation to mass claims is legal representation. Individuals and groups of victims often do not have the same viewpoints, either on case strategy or on the choice of legal representatives, and may as a result choose different representatives to represent their legal interests. As cases of mass violations can often only proceed with external assistance, a number of human rights lawyers or NGOs may wish to represent some or all of the victims and may either compete with each other and/or end up representing some but not all victims. For example, in a case of a group of villagers in Chechnya who allege to have been subjected to a series of violations by Russian soldiers, which is currently pending before the European Court of Human Rights, one NGO initially took up the case of some villagers in relation to specific violations and it was then left to another NGO to represent victims in relation to other violations. Such an approach may result in diverging outcomes and has the potential of causing friction within a group of victims represented by different NGO lawyers. A human rights treaty body confronted with such a situation may decide to join the cases[24] and may encourage parties to coordinate their efforts but in principle it is the

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[21] See Rachel Murray, *Serious or massive violations under the African Charter on Human and Peoples' Rights*, in Netherlands Quarterly of Human Rights, 17 (1999) 2, 109–133, at 117 et seq.

[22] *Social and Economic Rights Action Center, Centre for Economic and Social Rights v. Nigeria*, *supra* n. 19.

[23] See on this point, Section E *infra* on enforcement of awards.

[24] See Rule 42 of the Rules of the Court, European Court of Human Rights, 2007.

decision and responsibility of victims and their legal representatives as to how they wish to pursue their cases.

Where applicants choose several representatives in the same case difficulties may arise as to who is authorised to act on behalf of victims and who represents particular victims. The Inter-American Court of Human Rights has taken a pragmatic stance in responding to such situations. In the case of *Castro-Castro Prison v. Peru*, following a dispute over legal representation, the Court ruled that one of the representatives should be the common intervener that would represent all the alleged victims, largely because she represented the greater number of victims and had, as an alleged victim, "a great part of the representation during the proceedings before the Commission".[25] The Court informed the representatives of the victims and their next of kin "that this should not imply a limitation to the right of the alleged victims or their next of kin to present before the Court their pleadings and arguments, as well as to offer the corresponding evidence, and that the common intervener 'would be [the] only one authorized to present pleadings, arguments, and evidence during the proceedings, [and that] they should channel the different claims and arguments of the various representatives of the alleged victims and their next of kin in the brief, oral arguments and offerings of evidence' ".[26] Victims left without any representation are to be represented by the Inter-American Commission "as guarantor of public interest under the American Convention, in order to avoid their defenselessness".[27] The Court has also followed this practice in other cases.[28]

This is a flexible solution that seeks to combine efficiency with safeguarding the rights of victims to be represented and to effectively participate in proceedings. However, cases involving a large number of victims are prone to pose genuine problems of representation at the various stages of proceedings, such as in cases of disagreements on whether or not to accept a friendly settlement, which may confront the human rights treaty body with contesting claims as to who has the right to speak on behalf of victims. Responding to such situations in a way that does not compound existing disagreements and enables all victims to benefit from adequate representation remains a constant challenge for human rights courts and treaty bodies.

3. *Exhausting Domestic Remedies*

The exhaustion of domestic remedies rule, designed to provide the state concerned with the opportunity to remedy the violation at the domestic level, often

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[25] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13, para. 40.
[26] *Id.*
[27] *Id.*
[28] *Case of Acevedo-Jaramillo et al. v. Peru*, (Preliminary Objections, Merits, Reparations and Costs), Int-Am Ct HR, 7 February, 2006, Series C No. 144, paras. 142 et seq.

poses a considerable hurdle for complainants. At times, it may not be readily apparent how to remedy mass violations at the domestic level. Where remedies have been pursued locally, it may be unclear whether and to what extent, if any, violations can be, and have actually been remedied.

The requirement to exhaust domestic remedies is subject to several qualifications, which are highly relevant in cases of mass violations. If a state party considers that domestic remedies have been exhausted, it will have to show that domestic remedies were available and effective.[29] In cases concerning the violation of collective rights, the domestic legal system itself often does not provide a remedy for a collective entity seeking to assert its rights. A case in point is *Samaraka People v. Suriname* where the Inter-American Court of Human Rights found that the national legal system did not provide tribal groups with juridical personality and failed to provide judicial protection.[30]

There is no need to exhaust remedies where there is already an established jurisprudence that no effective remedies are available. Human rights treaty bodies and courts have developed a consistent jurisprudence that ongoing mass violations or recurring patterns of violations are indicative of ineffective domestic remedies, thereby relieving the complainant(s) from having to exhaust such remedies. This applies in particular where the administration of justice is affected, such as where there is a lack of legal recourse,[31] trials are said to be unfair,[32] or there are inordinate delays in responding to violations.[33]

As stated by the African Commission on Human and Peoples' Rights in the case of *Article 19 v. Eritrea*:

> As regards the argument that the communication reveals serious and massive violations of human rights, the African Commission would like to reiterate its earlier decisions in communication Nos. 16/88, 25/89, 47/90, 56/91, 100/93, 27/89, 46/91, 49/91, 99/93 [footnotes omitted] that it […] cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the Complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of victims.

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[29] *Dogan and others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02 (Sect.3) (bil.), ECHR 2004-VI (29 June 2004), para. 102.

[30] Case of the *Saramaka People v. Suriname*, *supra* n. 10, paras. 168, 169. In that case, the preliminary objection of the state concerning the failure to exhaust domestic remedies was dismissed because the state party had failed to raise it initially. However, it is most likely that the objection would have also been dismissed on the grounds that there were no remedies for tribal groups in Suriname's legal system.

[31] *Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 151/96 (1999), para. 14, and *Amnesty International and others v. Sudan*, Communication No.48/90, 50/91, 52/91, 89/93 (1999), paras. 34 et seq.

[32] *Las Palmeras v. Colombia*, (Merits), Inter-Am. Ct HR, 6 December 2001, Ser. C, No.90, para. 58.

[33] *Aksoy v. Turkey*, (1997) 23 EHRR 553, para. 56.

> Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable …[34]

The African Commission has also developed jurisprudence in cases of sustained and large-scale violations attributable to the state to the effect that the lack of remedial action over several years shows that the state concerned had failed to take the opportunity to remedy violations domestically and that existing remedies are unlikely to be effective.[35] Where complainants can make out a *prima facie* case of mass violations, states will find it difficult to show that existing remedies are effective. However, human rights treaty bodies have not always been consistent in their jurisprudence; for example, the African Commission dismissed a case for failure to exhaust domestic remedies even though there were serious concerns over the effectiveness of domestic remedies.[36] The Commission distinguished the case from other cases of massive violations whose pervasiveness "dispenses with the requirement of exhaustion of local remedies" on the grounds that it involved "one single incident that took place for a short period of time" and that the "State has indicated the measures it took to deal with the situation and the legal proceedings being undertaken by those alleged to have committed human rights violations during the incident".[37]

4. *Evidence: Substantiating and Proving a Claim*

Mass violations are often characterised by the fact that victims have limited evidence to show that they suffered a violation. This appears counter intuitive given the scale of the violations. However, often victims will have lost everything, including documents that may prove ownership or identity; the domestic judicial system may have broken down or may be malfunctioning; there may be few survivors of particular incidents; considerable time may have lapsed since the events and both victims and witnesses may be threatened and/or severely

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[34] *Article 19 v. Eritrea*, *supra* n. 16, para. 71, See also *Malawi African Association and others v. Mauritania*, African Commission on Human and Peoples' Rights, *supra* n. 17, para. 80; *Free Legal Assistance Group and others v. Zaire*, *supra* n. 18, para. 37; *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Republic of Guinea*, *supra* n. 20, para. 34.

[35] *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, Commission Internationale des Juristes, Union Interafricaine des Droits de l'Homme (OMCT, AIJD, CIJ, UIDH) v. Rwanda*, Communication Nos. 27/89, 46/91, 49/91, 99/93 (1996), paras. 16, 17.

[36] *Anuak Justice Council v. Ethiopia*, African Commission on Human and Peoples' Rights, Communication No.299/2005, (2006), para. 61.

[37] *Id.*, paras. 60, 61.

traumatised by events.[38] Many victims will have fled the country where the violation(s) took place and will have found it difficult to access the requisite evidence, in particular where there are no official investigations into the violations as is often the case.[39]

As a general rule, the individual(s) or group of persons alleging a violation need to substantiate any claim as the human rights body may otherwise reject the complaint as manifestly ill-founded.[40] They have to meet the applicable standard of proof to show that the alleged violations took place and that the state is responsible in order to be successful on the merits.

The adjudicative nature of proceedings before human rights bodies can be a significant hurdle for victims of mass violations. Cases before the European Court of Human Rights and the Inter-American Court of Human Rights, in particular, are characterised by the considerable quantity and close scrutiny of evidence submitted. This applies to cases of mass violations where complainants have to furnish an enormous amount of evidence to demonstrate that the claimant(s) actually have been victim(s) of the violation(s) complained about.[41]

The circumstances of mass violations and the large number of victims frequently make it difficult to compile the required evidence which is, incidentally, the very reason why mass claims procedures tend to accept lower standards of plausibility as proof.[42] In cases before human rights treaty bodies where the burden of proof is principally on the complainant and the standard of proof is beyond reasonable doubt or somewhat akin to balance of probabilities,[43] victims and their legal representatives have to go to considerable lengths to prove their case. Compiling dozens or hundreds of victims' statements, coordinating the compilation of evidence with victims who may not be easily accessible, obtaining

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[38] See Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, "The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights," in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (Eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, 2005, 345–503, at 488, 489.

[39] See for example in relation to the Darfur conflict, Concluding observations of the UN Human Rights Committee, UN Doc. CCPR/C/SDN/CO/3/CRP.1, 26 July 2007, para. 9.

[40] See for example Article 4 (2) of the Optional Protocol to CEDAW and Rule 96 (b) of the Rules of Procedure of the UN Human Rights Committee.

[41] See e.g. *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13, paras. 182 et seq.

[42] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes*, *supra*, n. 2, 210 et seq.

[43] The European Court of Human Rights applies the standard of proof 'beyond reasonable doubt,' which has an autonomous meaning under the Convention, see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, para. 147, ECHR 2005-VII. Other courts and bodies do not necessarily specify the standard of proof applied but make an assessment based on all circumstances. See for the standard applied by the Inter-American Court of Human Rights, *Case of Fairén-Garbi and Solís-Corrales v. Honduras* (Merits), Inter-Am. Ct HR, 15 March 1989, Ser. C, No.6, para. 130.

expert evidence, and undertaking travelling and the actual work itself is time-consuming and requires the legal and technical capacity of the representatives and the availability of sufficient resources. The latter often necessitates the involvement of NGOs or pro bono lawyers as the costs awarded by human rights treaty bodies normally do not reflect the amount of work involved.

Human rights treaty bodies and courts have eased the burden for applicants in a number of ways. At the admissibility stage, complainants only need to make out a *prima facie* case where the state party fails to contest the substance of the complaint. This rule has been important in cases of mass violations where the state parties concerned did not contest the complaints,[44] though the lack of responsiveness at the initial phase of a case often foreshadows the lack of compliance to come.[45]

Where the claimant(s) can show that there is a pattern of violations, it may be sufficient to demonstrate that claimant(s) have been affected by it. The Inter-American Court of Human Rights has developed this rule in cases of gross violations, such as in the *Case of Fairén-Garbi and Solis-Corrales v. Honduras*:

> The testimony and documentary evidence, corroborated by press clippings, presented by the Commission, tend to show:
> a. That there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances, carried out with the assistance or tolerance of the government;
> b. That Francisco Fairén Garbi and Yolanda Solís Corrales were presumably victims of that practice …[46]

The rule is highly significant in cases of mass violations, in particular where there is already jurisprudence of the human rights body on similar cases. Such jurisprudence effectively lowers the threshold for prospective complainants who can draw on other cases when substantiating their claims. However, as the recent case of *Aksakal v. Turkey* before the European Court of Human Rights demonstrates, the establishment of such a pattern ("… the Court has also found in numerous similar cases that security forces deliberately destroyed the homes and property of certain applicants, depriving them of their livelihood and forcing them to leave their villages in the state-of-emergency region of Turkey")[47] may not be

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[44] *Lawyers Committee For Human Rights v. Zaire*, African Commission on Human and Peoples' Rights, Comm. No. 47/90 (1994) and *Free Legal Assistance Group and others v. Zaire*, Communications Nos. 25/89, 47/90, 56/91 and 100/93 (1995), para. 40.

[45] Frans Viljoen and Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights*, 1994–2004, in AJIL, January 2007, Vol. 101, Number 1, 1–34, at 15.

[46] *Case of Fairén-Garbi and Solis-Corrales v. Honduras* (Merits), *supra* n. 43, para. 121.

[47] *Aksakal v. Turkey*, Application No.37850/97, Judgment of the European Court of Human Rights, 15 February 2007, para. 33.

sufficient where the applicants do not submit sufficient evidence to corroborate their allegations. The Court stated that even a fact-finding mission would not have brought about clarification of the facts "given that the passage of a substantial period of time, almost eleven years in the instant case, makes it more difficult to find witnesses to give testimony and takes a toll on a witness' capacity to recall events in detail and with accuracy".[48] This judgment is a potential setback for individual victims of systemic violations who are unable to meet the high standard of proof beyond a reasonable doubt applied by the Court where the events date back a considerable time.

Other courts such as the Inter-American Court of Human Rights have adopted a more flexible standard of proof that takes the nature of the violations into account. This Court indicated that it may adopt a contextual approach to the standard of proof in cases of serious and/or mass violations:

> The Court cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner.[49]

This flexibility may ease the burden of proof on applicants, in particular where combined with other rules that place the burden on the state. For instance, when the applicant provides *prima facie* evidence, the burden shifts to the state to demonstrate that it is not responsible for violations that are alleged to have taken place in its sphere of power or control.[50] However, much will depend on how the judges interpret the context in a given case, in particular with regards to taking the specific characteristics of mass violations into account when assessing the evidence.

5. *Judicial responses to mass violations*

a. *Use of Precedents*

Human right treaty bodies have used precedent setting in their jurisprudence on systematic violations. This approach is highly significant, particularly for cases of violations based on a common underlying cause, such as violations of property rights or discrimination. In the case of *Broniowski v. Poland*, the European Court of Human Rights found that Poland had violated the property rights of the applicant (who was one of around 80,000 affected by post World War II

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[48] *Id.*, para. 35.
[49] *Case of Fairén-Garbi and Solís-Corrales v. Honduras, supra* n. 43, para. 132.
[50] See for example *Aksoy v. Turkey*, *supra* n. 33, para. 61 and *Bousroual v. Algeria*, Communication No.992/2001, UN Doc. CCPR/C/86/992/2001, 24 April 2001, para. 9.4.

expropriations) and required the Respondent party to provide compensation, the determination of which was left open pending reforms in the domestic system. As long as Poland had not put in place effective domestic remedies, Bug river complainants in post-Broniowski cases before the European Court of Human Rights would have only needed to show that they owned a property beyond the Bug river to invoke the reasoning in the precedent case of *Broniowski v. Poland* and to validate their claim. In light of this, Poland eventually changed its domestic legal system to provide effective remedies for all affected claimants.[51] Similarly, Turkey established claims mechanisms for property violations in South-East Turkey, not least to pre-empt adverse rulings by the European Court of Human Rights. The latter, in assessing the compensation commissions that had been established, held that they constituted effective remedies and declared a case brought against Turkey inadmissible for its failure to exhaust the said remedy.[52]

The European Court of Human Rights developed this "pilot-judgment procedure" in response to systemic or structural problems in the national legal order of the state party concerned.[53] Effectively, these types of judgments require the states parties concerned to take general measures such as legislative reforms to address the problems identified in the judgments in addition to any particular measures of reparation ordered in respect of the individual claimants. They also act as precedents on the basis of which the Court may admit and decide future cases speedily once the 14th Protocol comes into force.[54] The Protocol envisages that a committee of judges may declare "admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case law of the Court".[55] The notion of a "well-founded" case has been introduced both to increase the efficiency of the system and to make the system more "victim-friendly".[56] It is of major importance

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[51] Subsequent to the *Broniowski* judgment, *supra* n. 4, the Polish Government put in place remedies for the Bug river applicants that constituted effective remedies according to the European Court of Human Rights. As a result, the Court found several later applications from Bug river claimants inadmissible. See in particular cases *Wolkenberg and others v Poland*, European Court of Human Rights, Application No.50003/99, Decision of 4 December 2007, in particular paras. 34–36 and paras. 60 et seq. and *Witkowska-Tobola v. Poland*, European Court of Human Rights, Application No. 11208/02, Decision of 4 December 2007, in particular paras. 38–40 and paras. 62 et seq.

[52] See *Içyer v. Turkey*, Application no. 18888/02, Decision by the European Court of Human Rights of 12 January 2006, in particular para. 77.

[53] *Broniowski v. Poland* [friendly settlement] [GC] no.31443/96, ECHR 2005-IX (28 September 2005), para. 34.

[54] Only the ratification of the Russian Federation was outstanding at the time of writing.

[55] Proposed article 28 (1) (b) pursuant to article 8 of the 14th Protocol.

[56] See for a critical evaluation of the 14th Protocol in this regard, Pietro Sardaro, "Individual Complaints," in Paul Lemmens and Wouter Vandenhole (eds.), *Protocol No.14 and the Reform of the European Court of Human Rights*, Intersentia, 2005, 45–68, in particular 54 et seq. and 66, 67.

in cases of mass violations: where precedents exist that recognise certain factual circumstances resulting in particular violations against a certain category of persons, the Court may find a complaint to be merited on the basis of *prima facie* claims, which considerably eases the burden of proof. This is a procedural technique recognised and used by bodies having to deal with a high volume of cases that may relate to similar or large-scale violations. While the "pilot-judgment procedure" has been developed in response to deficiencies in the legal order of states parties (such as inordinate delays and the lack of adequate remedies for the taking of property), its underlying rationale may be utilised in cases where there are clear patterns of violations and the applicant(s) establishes that they fall within the category of persons affected.

b. *Encouraging Acceptance of Responsibility and Friendly Settlements*

In recognition of this jurisprudence and/or the strength of the evidence in the particular case, states parties have increasingly admitted responsibility for violations, particularly in the Inter-American system.[57] This is a significant development in response to mass violations, as it has enabled the Inter-American Court of Human Rights to better focus on fashioning appropriate measures of reparation for the violations concerned. In a similar development in the European system, states parties such as Turkey have more frequently sought friendly settlements in relation to cases where a settled jurisprudence exists.[58] This has resulted in a "fast-track procedure" in those instances in which victims are inclined to accept the offer of friendly settlement.

In some ways, the impact of this development resembles the system of precedents. Effectively, the state party concerned knows that it will be held responsible and seeks a settlement instead of contesting the case. Human rights treaty bodies and courts play an important role in facilitating such outcomes. This puts victims in a better bargaining position as a state is more likely to accept claims relating to patterns of violations that had already formed part of prior rulings.

c. *Use of Special Procedures in Cases of Mass Violations*

Human rights treaty bodies can be proactive by undertaking fact-finding missions. This practice has been followed in some cases, such as in South-East

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[57] See e.g. *Barrios Altos (Chumbipuma Aguirre et al. v. Peru*, (Merits), Inter-Am. Ct HR, judgment of 14 March 2001, Ser. C, No.75, para. 31 and *Las Palmeras v Colombia*, *supra* n. 32, para. 19.

[58] In 2007, the Committee of Ministers was supervising the execution of 67 friendly settlements concerning serious violations by the Turkish security forces, see Council of Europe, *Committee of Ministers' to supervise the execution of the European Court of Human Rights' judgments*, 15–17 October 2007.

Turkey[59] and in Suriname.[60] A procedure specifically geared towards mass violations is contained in article 58 of the African Charter on Human and Peoples' Rights:

> (1) When it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious and massive violations of human and peoples' rights, the Commission shall draw the attention of the Assembly of the Heads of State and Government to these special cases.
> (2) The Assembly of Heads of State and Government may then request the Commission to undertake an in-depth study of these cases and make a factual report, accompanied by its findings and recommendations.

This is a potentially far-reaching provision. However, the OAU Assembly has failed to act upon referrals by the African Commission on Human and Peoples' Rights under article 58 of the African Charter, which in turn has resulted in few referrals by the Commission altogether.[61] This has frustrated the use of a potentially important mechanism to advance the practice of the African human rights system in dealing with mass violations. Effective recourse to the mechanism and response by the Assembly of Heads of State and Government would raise awareness about the seriousness of the case at hand. It would also help to galvanise support for responses in the particular case and best practice in dealing with mass violations in general. It would therefore seem important that the use of article 58 of the African Charter is revisited in any endeavours to strengthen the effectiveness of the African human rights system as a whole.

D. *Reparation Awards*

Human rights treaty bodies and regional human rights courts have the express or implied power to award or recommend compensation or other types of reparation upon finding the respondent state(s) responsible for a violation.[62] Applicants

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[59] See *Aksakal v. Turkey*, *supra* n. 47, para. 34: "… it is to be pointed out that both the European Commission of Human Rights and the Court have previously embarked on fact finding missions in similar cases in Turkey where the State security forces were allegedly the perpetrators of the unlawful destruction of property (see, among many others, the above cited judgments of Akdivar and Others and Yöyler; and Ipek v. Turkey, no. 25760/94, ECHR 2004-…). In those cases, the main reason which prompted the Convention institutions to have recourse to such an exercise was their inability to establish the facts in the absence of an effective domestic investigation."

[60] See *Aloeboetoe et al. v Suriname*, (Reparations and Costs), Judgment of 10 September 1993, Inter-Am. Ct HR, Series C, No. 15, para. 40.

[61] Viljoen and Louw, *State Compliance, supra* n. 45, 21.

[62] See in particular Article 63 (1) of the American Convention on Human Rights, Article 41 of the European Convention on Human Rights and Article 27 (1) of the Protocol to the African Charter on Human and Peoples' Rights.

carry the burden of proof to show that they have suffered damages and many of the evidentiary difficulties already outlined apply in equal measure to proving damages.

Compensation remains the most common form of reparation awarded by human rights treaty bodies and courts in cases of mass violations. The salient features of their jurisprudence in this regard are the scope of victims who are beneficiaries, which has, at least in the jurisprudence of the Inter-American Court of Human Rights, come to include not only direct individual victims but also indirect victims and collective victims, and the methods used to determine the appropriate forms of reparation, and the specific content of awards.

The Inter-American Court of Human Rights arguably has developed the most significant jurisprudence, awarding compensation for violations involving dozens or even hundreds of victims in a series of cases. These cases consist in particular of massacres or similar violations that affected a large number of individual claimants, including family members, and collective violations that affected indigenous or tribal communities, which are effectively treated as collective victims.[63]

The jurisprudence of the Inter-American Court of Human Rights in cases concerning a large number of individual victims is characterised by the following features:

1. *Scope of Victims*

The Court recognises both direct and indirect victims, such as the next-of-kin.[64]

2. *Proof of Victim Status*

Complainants and those acting on their behalf need to identify victims of violations so as to establish eligibility for reparations. The Court has shown some flexibility on how victims can prove identity, even after an award has been made.[65] In the case of *Castro-Castro Prison v. Peru*, for example, it ruled that victims should be given compensation if they "present themselves before the competent State

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[63] *Case of the Pueblo Bello Massacre v. Colombia*, *supra* n. 9; *Rochela Massacre v. Colombia*, *supra* n. 9; *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela* (Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 31 January 2006, Series C No.150; Case of *Las Palmeras v. Colombia, supra* n. 32; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13; *Case of the Saramaka People v. Suriname*, *supra* n. 10; *Sawhoyamaxa Indigenous Community v. Paraguay, supra* n. 11; *Yakye Axa Indigenous Community v. Paraguay*, *supra* n. 10.

[64] See for example *Case of the "Mapiripán Massacre" v. Colombia*, (Merits, Reparations and Costs), Judgment of 15 September 2005, Series C No. 134, paras. 256, 257. See, for further information on this point, the chapter by Clara Sandoval in this volume.

[65] *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, *supra* n. 63, para. 212 and *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13, para. 420.

authorities within the 8 months following the notification of this Judgment, and they prove, through a sufficient means of identification, [footnote omitted] their relationship or kinship with the victim and that they were alive at the time of the facts".[66] Whilst this approach allows for the inclusion of victims following a judgment, it places victims at the mercy of the competent state authorities and state compliance would therefore need to be subject to close supervision by the Court. The Court has not considered individuals as injured parties where they failed to submit timely proof of the nature of their relationship with the victim.[67] However, in the case of *Mapiripán Massacre v. Colombia*, the Court ruled that victims who have not been identified could claim reparations subsequent to the judgment of the Court if they applied within 24 months to the competent national mechanisms following notification of judgment and proved their kinship with the deceased victims.[68] This jurisprudence suggests that the Court will be more accommodating in cases where applicants face genuine problems of identification as compared to cases where such problems could have been avoided by the parties.

3. *Categories of Victims*

The Court has in several cases identified categories of victims who have suffered the same or similar violations, which has resulted in a certain standardisation of amounts of compensation. The principal approach is to award the same amount of compensation to all victims falling within the category, in particular for non-pecuniary damages but also for pecuniary damages if based on equitable considerations. For example, the next-of-kin of deceased victims were entitled to the same amount, amounting to non-pecuniary damages of $100,000 in *Rochela Massacre v. Colombia*, $75,000 in *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela* and $50,000 in *Castro-Castro Prison v. Peru* to be distributed according to the specifications of the Court (commonly 50% to the victims' children and 50% to the victims' spouse or permanent companion, and in the absence of either, 50% to the victims' parents and 50% to victims' siblings or similar arrangements).[69] The Court has also established sub-categories entitled to higher or lower amounts of compensation depending on the circumstances, for example in *Castro-Castro Prison v Peru*, surviving victims of violations were awarded different amounts depending on whether they had suffered a complete permanent handicap ($20,000), a permanent partial handicap ($12,000),

[66] *Ibid*. See also *Moiwana v. Suriname*, (Preliminary Objections, Merits, Reparations and Costs), Int-Am Ct HR, Judgment of 15 June 2005, Series C, No. 124, para. 178.
[67] *Rochela Massacre v. Colombia*, *supra* n. 9, para. 236.
[68] *Case of the "Mapiripán Massacre" v. Colombia*, *supra* n. 64, para. 257.
[69] See for example *Rochela Massacre v. Colombia*, *supra* n. 9, para. 237.

a permanent injury ($8,000) or suffered a violation without falling into any of the other categories ($4,000). It has also awarded differing amounts to individual victims falling within any of these categories where additional factors so warranted, such as victims suffering rape and sexual violence ($30,000 and £10,000 respectively in the case of *Castro-Castro Prison v. Peru*).[70]

4. *Loss Suffered*

Pecuniary compensation is based on proof of actual losses. The Court has recognised the difficulty of victims to provide proof for the losses suffered. It has therefore applied equitable considerations in determining the amount of compensation.[71] It has also employed a series of presumptions in favour of victims, such as "the presumption according to which every person, from the time he or she attains majority, carries out productive activities and perceives, at least, an income equivalent to minimum legal wage in the country involved".[72] With regard to non-pecuniary damages, the Court has applied "the presumption according to which violations of human rights and a situation of impunity regarding those violations cause grief, anguish and sadness, both to the victims and to their next of kin".[73]

5. *Method of Payment*

The Court has identified methods of payment other than direct monetary transfer to individuals. To this end, it has ordered the opening of accounts and the setting up of trust funds for the benefit of victims, in particular minors, with the proviso that they should continue to operate until the victims reach maturity or marry.[74]

As indicated above, the Inter-American Court of Human Rights has developed several methods to fashion adequate responses to different kinds of violations

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[70] *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13, paras. 421, 424, 425, 432, 433. See also *Rochela Massacre v. Colombia*, *supra* n. 109, in particular paras. 237, 248, 272, 273; *Case of Montero Aranguren et al (Detention Center of Catia) v. Venezuela, supra* n. 63, paras. 122, 127, 132, 133, 134; *Case of the Pueblo Bello Massacre v. Colombia*, *supra* n. 9, paras. 240, 249, 258.

[71] See for example *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* n. 13, paras. 425 et seq.

[72] *Case of the Caracazo v. Venezuela*, (Reparations and Costs), Int-Am Ct HR, Judgment of 29 August 2002, Series C No.95, para. 50 d.

[73] *Id*, para. 50 e.

[74] *Aloeboetoe v. Suriname, supra* n. 60, paras. 101, 102. See also *Case of the Caracazo v. Venezuela, supra* n. 72, para. 137; *Case of Suárez-Rosero v Ecuador*, (Reparations and Costs), Int-Am Ct HR, Judgment of 20 January 1999, Series C No.44, para. 107; *Case of the 'White Van' (Paniagua Morales et al.) v. Guatemala*, (Reparations and Costs), Int-Am Ct HR, Judgment of 25 May 2001, Series C No.76, para. 223; *Case of Godinez Cruz v. Honduras*, (Interpretation of the Judgment of Reparations and Costs), Int-Am Ct HR, Judgment of 17 August 1990, Series C No.10, para. 32.

and in awarding compensation to the large number of victims. It has shown flexibility with regards to the scope and identity of victims, has sought to develop categories that are sufficiently broad to reflect different types of violations and has used methods of payments that are best suited to benefit particular groups of victims. However, in spite of the often collective nature of violations, such as in massacre cases, the compensation itself remains largely focused on the individual victim(s), rather than on groups of victims who are commonly only the beneficiaries of symbolic reparation.

The jurisprudence differs with regard to groups of victims in cases of violations of collective rights, in particular the rights of tribal or indigenous communities. Here, in contrast to awards in individual cases, the Court has recognised that:

- The group/indigenous community itself is entitled to compensation,[75] with the members of the community being the "injured party" and being the "beneficiaries of the collective forms of reparations".[76]
- Amounts awarded are for the benefit of the group as a whole and may be used to provide services to the community,[77] such as funds to provide "educational, housing, agricultural, and health projects, as well as provide electricity and drinking water" for the benefit of the community.[78]
- Awards are made in the form of trust funds. A unique feature of this mechanism is the setting up of tripartite structures of "a representative appointed by the victims, a representative appointed by the State, and another representative jointly appointed by the victims and the State" to decide about the use of the fund.[79] The rationale for this approach appears to encourage agreement between the parties that may facilitate implementation.

The jurisprudence on collective awards for indigenous and tribal people has a number of noteworthy features that takes the collective nature of violations into account. It is to date largely confined to the violation of collective rights but collective awards and the establishment of trust funds may be equally appropriate where groups of persons were targeted and, though suffering violations of their individual rights, suffered harm both individually and collectively. In those

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[75] Case of the *Saramaka People v. Suriname, supra* n. 10, para. 188; *Sawhoyamaxa Indigenous Community v. Paraguay, supra* n. 10, paras. 204 et seq; *Yakye Axa Indigenous Community v. Paraguay, supra* n. 10, para. 189.

[76] Case of the *Saramaka People v. Suriname, supra* n. 10, para. 189.

[77] *Id.*, para. 201; *Sawhoyamaxa Indigenous Community v. Paraguay supra* n. 10, para. 224; *Yakye Axa Indigenous Community v. Paraguay, supra* n. 10, para. 205.

[78] Case of the *Saramaka People v. Suriname, supra* n. 10, para. 201.

[79] *Id.*, para. 202; *Sawhoyamaxa Indigenous Community v. Paraguay, supra* n. 10, para. 225; *Yakye Axa Indigenous Community v. Paraguay, supra* n. 10, para. 206.

instances, it may be more appropriate to develop mechanisms that reflect the collective nature of suffering, such as in cases of massacres targeting particular communities, in particular where the victims themselves express a preference for such measures.

The Inter-American Court of Human Rights has generated what is arguably the most important jurisprudence on forms of reparations other than, or in addition to, compensation. In cases of mass violations, the Court has ordered states to conduct investigations and has recognised the public right to know the truth about violations and the corresponding obligation of the state to provide the requested information where possible. It has also ordered states to take a range of measures to acknowledge the violations, such as to provide public apologies or symbolic memorials – types of reparations that are often of particular importance to the victims of mass violations.[80] The Court has also specified a series of measures, including legislative and institutional reforms, as well as training, which are designed to address the causes of violations in order to prevent recurrence. Such measures have played an important role in responding to systematic mass violations, such as in cases of massacres.[81]

The European Court of Human Rights has considered a series of cases that have taken place in the context of mass violations, in particular in South-East Turkey and Chechnya. Unlike the practice of the Inter-American Court of Human Rights, the judgments of the European Court of Human Rights have been confined largely to awarding compensation to the limited number of applicants in the cases concerned. In *Broniowski v Poland*, which concerned property claims affecting nearly 80,000 people,[82] the Court developed important principles for reparation mechanisms such as the "pilot judgment procedure" mentioned above and the need for the state party to put in place effective domestic remedies to deal with the large number of claims. A similar approach was taken in response to property violations in South-East Turkey.[83] For this kind of violation, the jurisprudence of the Court shows a preference of encouraging states parties to institute domestic reforms that provide adequate remedies and compensation, rather than for the Court to decide on these matters itself.

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[80] See Douglas Cassel, "The Expanding Scope and Impact of Reparations awarded by the Inter-American Court of Human Rights," in Feyter, Parmentier, Bossuyt and Lemmens, *Out of the Ashes, supra* n. 38, pp. 191–223. See also *Case of the Miguel Castro-Castro Prison v. Peru, supra* n. 13.

[81] See for example the *Case of the Pueblo Bello Massacre v. Colombia, supra* n. 9, paras. 277 et seq.

[82] *Broniowski v. Poland, supra* n. 4, para. 193.

[83] See *supra* at (3.V). See also *Dogan and others v. Turkey, supra* n. 29, in particular paras. 153 et seq.

Other human rights treaty bodies, such as the United Nations Committee against Torture[84] and the African Commission on Human and Peoples' Rights have largely confined themselves to making general recommendations to states to pay compensation to the victims in cases of mass violations,[85] which have often not been enforced subsequently. In an important recent case of mass violence against refugees from Sierra Leone in Guinea, the African Commission recommended that a "Joint Commission of the Sierra Leonean and the Guinea Governments be established to assess the losses by various victims with a view to compensate the victims," thus encouraging the parties to consider appropriate methods of reparation and potentially paving the way for an agreement on a mass claims procedure.[86] It made a similar recommendation in *Social and Economic Rights Action Center, Centre for Economic and Social Rights vs. Nigeria* and, in the case of *Zimbabwe Human Rights Forum v Zimbabwe*, the African Commission called on Zimbabwe to "identify victims of the violence in order to provide them with just and adequate compensation".[87] The inter-state case of *DRC v. Burundi, Rwanda and Uganda* is also noteworthy as it recommends the payment of reparation to the victims of mass violations to the Government of the Democratic Republic of the Congo, raising he question of how best to effectuate reparation in such circumstances.[88] All of these decisions contain a plea to the states parties concerned to develop adequate mechanisms for the provision of compensation to the victims of mass violations. However, the African Commission has not gone beyond making general recommendations to establish commissions to assess or provide compensation and it is not clear what steps states have taken in response, if any. Given the number of cases concerning mass

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[84] The Committee against Torture has had few opportunities to consider mass claims or gross violations. It has urged, for example in the case of *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, in which 65 individuals of Romani origin complained about violations resulting from an attack on their settlement by a mob: "the State party to conduct a proper investigation into the facts that occurred on 15 April 1995, prosecute and punish the persons responsible for those acts and provide the complainants with redress, including fair and adequate compensation." *Hajrizi Dzemajl et al. v. Serbia and Montenegro*, Communication No.161, UN Doc. CAT/C/29/D/161/2000, 21 November 2002, para. 11.

[85] See e.g. *Article 19 v. Eritrea, supra* n. 16, and *Amnesty International and others v. Sudan, supra* n. 31.

[86] *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea, supra* n. 20, para. 74.

[87] *Zimbabwe Human Rights Forum v. Zimbabwe*, Communication No.245/2002 (2006). See also recommendations in cases *Social and Economic Rights Action Center, Centre for Economic and Social Rights v. Nigeria, supra* n. 19, and *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Republic of Guinea, supra* n. 20.

[88] *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, Communication 227/ 1999 (2004): "Recommends that adequate reparations be paid, according to the appropriate ways to the Complainant State for and on behalf of the victims of the human rights by the armed forces of the Respondent States while the armed forces of the Respondent States were in effective control of the provinces of the Complainant State, which suffered these violations."

violations and the limited compliance with its decisions, a more detailed response may be appropriate. If Commission decisions specified the scope of beneficiaries, the factors to be taken into account when determining compensation or even the amount of compensation, as well as the mechanisms and procedures for implementation, this might raise the profile of, and enhance compliance with Commission decisions. The effectiveness of the recently established African Court on Human and Peoples' Rights, will be judged in no small measure by its capacity to use its enhanced powers to award adequate reparation to victims of mass violations.[89]

E. *Enforcement of Awards*

The limited compliance with the judgments and decisions of human rights treaty bodies is prone to undermine the value of existing complaints procedures for the victims of mass violations and poses a significant challenge to the effectiveness of the system itself.

There is no specific procedure under any human rights treaty or rules of procedures on how to seek compliance and enforce decisions involving a large number of claims. Instead, the various general procedures apply, which may include specific enforcement procedures, such as the supervisory function of the Committee of Ministers in the European Human Rights system, the follow-up procedure developed by the Inter-American Court of Human Rights, or the procedures followed by other regional and international bodies.[90]

In practice, problems of compliance arise in particular where the determination of compensation is referred back to the state party, such as in the African system or the procedures of UN human rights treaty bodies, as this frequently makes it more difficult for victims to insist on payment of a specified sum, unlike in the European and Inter-American systems. However, in the Inter-American system aspects such as the subsequent identification of victim status and the operation of tripartite trust funds depend on a number of steps to be taken by the state authorities and their active and sustained cooperation. Initial experience with the implementation of such funds demonstrates several problems, such as the failure to establish the fund or to provide for an operational budget in the absence of which funds remain largely inoperative.[91]

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[89] See in particular article 27 (1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

[90] See REDRESS, *Enforcement of Awards, supra* n. 6.

[91] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment. Order of the Inter-American Court of Human Rights of 2 February 2007, para. 22 b

The European Court of Human Rights has taken a different approach. As mentioned above, it has, by means of the "pilot judgment" procedure effectively and successfully ordered states, such as Poland and Turkey, to develop effective remedies to respond to mass violations domestically or face a series of adverse awards.[92] The Court scrutinises the effectiveness of any measures taken in any subsequent decisions whereas the effective implementation of the general measures is supervised by the Committee of Ministers.[93] This approach has the dual advantage of giving the states parties the opportunity to remedy mass claims themselves and of absolving the Court from the difficult task of developing systems that would do justice to the large number of claimants.

The response of the European Court of Human Rights to systematic violations is also important for mass claims in so far as the Court has specified appropriate domestic judicial and non-judicial remedies for violations that potentially affect a large number of persons.[94] It signifies the proactive role that a human rights treaty body may play in prompting states parties to put in place effective domestic remedies or face repeated adverse decisions, particular if combined with the accompanying political pressure exerted by the Committee of Ministers.

Ensuring compliance with other forms of reparation in cases of mass violations has encountered the same problems faced by human rights treaty bodies. This applies in particular to the continuous failure of states to investigate violations and put in place other forms of satisfaction and guarantees of non-repetition.[95]

F. *Outlook: Prospects for the Future Adjudication of Cases of Mass Violations*

The mixed record of human rights treaty bodies' and courts' responses to the challenge of doing justice to a large number of victims of mass violations shows that the legal framework and practice of most bodies is characterised by a case-specific adjudicative approach that appears ill-equipped in the context. This framework largely shapes the mindset of the actors involved in the process, which has served to limit genuine mass claims from being brought. However, the

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and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 8 February 2008, paras. 14 et seq. as well as *Case of the Yakye Axa Indigenous Community v. Paraguay*, Monitoring Compliance with Judgment, Order of the Inter-American Court of Human Rights of 8 February 2008, paras. 27 et seq.

[92] See in particular *Broniowski v. Poland, supra* n. 4, and *Dogan and others v. Turkey, supra* n. 29.

[93] See on the work of the Committee of Ministers, http://www.coe.int/T/E/Human_rights/execution/

[94] *Broniowski v. Poland, supra* n. 4, as well as *Dogan and others v. Turkey, supra* n. 29.

[95] REDRESS, *Enforcement of Awards, supra* n. 6, pp. 17 et seq.

increasing use of strategic litigation by domestic and international human rights organisations, in particular in the Inter-American and African human rights systems, inevitably raises the challenge of how to do justice in cases of mass violations before human rights treaty bodies. It is mainly regional human rights courts that have been conscious of the need to develop adequate responses in such cases, not least in the interest of self-preservation given the potentially large number of claims and the strain on the system that this would entail.

There is scope and arguably even the need for human rights treaty bodies to further develop their legal frameworks and jurisprudence, in order to better respond to mass violations.

Possible changes in the governing treaties or rules of procedures of human rights bodies would ideally facilitate mass claims at the various stages of proceedings. At the admissibility stage, this may encompass allowing an *actio popularis* and applying a context-conscious threshold for substantiating claims that takes into account the nature of mass violations, such as demonstrating patterns of violations and victimisation.

With regard to the merits, the key challenge is to devise mechanisms capable of proving mass violations, which do not overburden the complainants as well as the court system with volumes of evidence relating to each and every individual violation. To this end, methods such as drawing on patterns of violations and making greater use of fact finding missions would be useful. This should be complemented by a greater use of presumptions that would make it easier for individuals or groups to prove that they were victims, such as drawing on patterns of violations and identities of victims. Human rights bodies may even employ mass claims techniques where appropriate, and may draw on the expertise of mass claims specialists to decide on the most appropriate method in the circumstances of the case at hand.

Devising a system of adequate reparation is a litmus test for human rights bodies' and courts' ability to respond adequately and effectively to mass violations. All human rights treaty bodies and courts should explore further the use of compensation schemes, including trust funds, that are relatively easy to administer and that have the potential to provide a measure of justice to all victims of mass violations, instead of solely focusing on the individual case before it.

Enforcement mechanisms need to be strengthened in order to complement the development of reparation regimes in cases of mass violations. The experiences of human rights bodies and courts in enforcing mass claims awards are rather limited to date. It is important however, that any schemes, such as long-term trust funds, operate under the supervision of the human rights body concerned and that the parties, and particularly victims, are able to revert to the body where implementation is inadequate or fails altogether. However, such recourse can only be expected to have impact where the body concerned is

sufficiently strong to induce state compliance. While regional human rights bodies, in particular the Inter-American and European courts are largely able to exert their authority, the UN human rights treaty bodies have been less successful in securing compliance with their recommendations.

There is no immediate prospect of a transformation of the present system of human rights bodies dealing with cases of mass violations, but a gradual change of practice can be expected in light of the increasing number of such cases being brought. What should be considered by all actors concerned is whether changes in governing procedures and in the working methods of human rights bodies can be made, responding specifically to cases of mass violations. This would be a welcome development that would recognise the importance of a system having the capacity to provide satisfactory answers to one of the most serious challenges faced by the international human rights order today.

The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations

*By Clara Sandoval-Villalba**

In the Americas region "there is an enormous unfinished business of justice for past crimes".[1] As a result of this unfinished business, also applicable to other regions in the world, victims continue to challenge domestic legal systems calling upon them to investigate, prosecute and punish the perpetrators of gross human rights violations and award them reparations for the harms suffered. This has been done to no avail: domestic systems have for the most part been unable or unwilling to respond to such situations as international law requires them to do. This deficit in domestic legal systems has forced regional human rights systems like the Inter-American Commission on Human Rights (IACommHR or Commission), the Inter-American Court of Human Rights (IACtHR or Court) and the European Court of Human Rights (ECtHR) to deal with increasing numbers of complaints of alleged gross human rights violations.

Of these regional systems, the Inter-American one has played a crucial role in dealing with these types of violations at several levels. For instance, the Commission has been instrumental in documenting systematic practices and patterns of gross human rights violations taking place within the Organisation of American States (OAS) region through reporting, *in situ* visits and individual complaints.[2] It has also helped establish regional standards to be able to respond more adequately to such violations, as is evidenced by the drafting and negotiation

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[1] J. Mendez. "Lessons Learned" in Due Process of Law Foundation, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, Due Process of Law Foundation, 2007), 191–202, at 191.

[2] See, e.g., *The Status of Human Rights in Chile*, 25 October 1974; *The Situation of Human Rights in Argentina*, 11 April 1980; the III Report on *The Situation of Human Rights in Guatemala*, 3 October 1985; the II Report on *The Situation of Human Rights in Perú*, 2 June 2000 and

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 243–282.

of the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons.[3] Equally, the Court has contributed to the development of international law with ground-breaking jurisprudence on the legal treatment of disappearances, arbitrary killings, torture, arbitrary detention and internal displacement. The Court has also developed what is considered to be the most coherent and solid approach to reparations for gross, widespread and systematic human rights violations in international law today.[4]

The IACtHR is mandated to receive and study alleged violations of rights incorporated within the American Convention on Human Rights (ACHR) or any other relevant regional treaties, if applicable.[5] The ECtHR is similarly mandated regarding violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its protocols where applicable.[6] As courts, they carry out this function by applying predetermined, general procedural and substantive rules for the purpose of facilitating the fair, independent and impartial administration of justice. However, when the issue of reparations arises, the regional legal frameworks do not envisage special procedures to repair gross, widespread and systematic human rights violations; they only provide for general provisions regulating this subject. Therefore, these courts face the difficult job of interpreting such provisions in a way that responds in an independent and impartial manner to the nature and consequences of gross human rights violations.

As the IACtHR has developed the most coherent and consistent approach to reparations for gross human rights violations, it is worth looking at some of its achievements. Due to the vastness and complexity of the subject matter, the author focuses on the concepts of 'victim' and 'injured party' as these two concepts are essential in analysing the reparations awards afforded for gross human rights violations. The meaning and interplay of both concepts have been established through years of the Court's jurisprudence that has not been the object of detailed analysis. Therefore, an analytical overview of the Court's understanding

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the III Report on *The Human Rights Situation in Colombia*, 26 February 1999. See, also C. Medina. "The Role of Country Reports in the Inter-American System of Human Rights", in D. Harris and S. Livingstone. *The Inter-American System of Human Rights* (Oxford, Clarendon Press, 1998).

[3] OAS General Assembly, Inter-American Convention to Prevent and Punish Torture, 9 December 1985, and OAS General Assembly, Inter-American Convention on Forced Disappearance of Persons, 9 June 1994. See also, N, Rodley. *The Treatment of Prisoners under International Law* (Oxford University Press, 2nd edition).

[4] D. Shelton. *Remedies in International Human Rights Law* (Oxford University Press, 2005) 299.

[5] This function is established in art. 33 of the ACHR and art. 1 of the 1979 Statute of the Inter-American Court of Human Rights.

[6] Articles 19 and 34 of the ECHR.

of these concepts is long overdue and is required to make sense of its current approach and of the challenges ahead. The analysis takes into account critical moments that determined the transformation of these two concepts.

The chapter begins with an analysis of the scope of article 63.1 of the ACHR, as it establishes the regulating principles applicable to reparations under this treaty, and indicates that an 'injured party' is entitled to reparations. The following sections concentrate on the concept of 'injured party' while mapping this notion against the concept of 'victim' in four different periods. The consequences of the different approaches of the IACtHR to these concepts and to their relationship will be highlighted accordingly.

A. *The Legal Framework: Article 63.1 of the American Convention*

The ACHR created the IACtHR and established general principles to be applied to reparations for violations of its provisions. Article 63.1 states:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.[7]

Article 63.1 provides the IACtHR with less restrictive rules regarding reparations than those found within the ECHR. Indeed, it gives the IACtHR a primary and not a subsidiary role in the award of reparations and recognises different types of reparations measures. In contrast, the content of article 41 of the ECHR provides that:

> If the Court finds that there has been a violation of the Convention or the protocols thereto, *and if* the internal law of the High Contracting Party concerned allows *only* partial reparation to be made, the Court shall, *if necessary*, afford just satisfaction to the injured party. (emphasis added)

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[7] The initial draft of article 63.1 followed former article 50, now article 41, of the ECHR that is, as just seen, more restrictive in nature. In response to the draft, Guatemala presented a new proposal that was wider as it included that the injured party should receive reparations for the consequences produced resulting from violations of the ACHR and should also be guaranteed the enjoyment of any impaired rights and freedoms. This final view was adopted and the minutes of the Drafting Committee considered the 'text [to be] broader and more categorically in defence of the injured party than was the Draft'. OAS, *Report of the II Committee: Organs of Protection and General Provisions*, OEA/Ser.K/XVI/1.1.doc.71, 30 January 1970. See also, D. Shelton, *supra*, n. 4, 217; J. Pasqualucci. *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2003) 234.

The IACtHR established the legal foundations for the interpretation of article 63.1 in *Velásquez Rodríguez v. Honduras*.[8] Based mainly on case law and advisory opinions of the International Court of Justice, the Court indicated that 'just compensation' is a general principle of international law[9] that applies to human rights, as reflected in the work of the ECtHR and the United Nations Human Rights Committee (HRC), adding that:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.[10]

This decision clarified the applicable law under Article 63.1, establishing that reparations for human rights violations by the IACtHR are regulated by the ACHR and international law and not by domestic law, contrary to Honduras' claim at the time.[11] Since the landmark decision in 1989, the nature of awards under article 63.1 have been interpreted as compensatory and not punitive.[12] Equally, the article has been taken to consider, without distinction as to the kind of violations, that *any* human rights violation requires *restitutio in integrum* which includes different elements such as restoration of the *status quo ante* if possible, material damages, moral damages and non-satisfaction measures.[13]

In light of this interpretation, the IACtHR has consistently dismissed the wording of article 63.1 requiring that reparations should only be granted 'if appropriate'. Further, the Court did not see the need to address a major component of the provision, namely – the meaning of 'injured party.' Indeed, in *Velásquez Rodríguez* the Court identified the injured parties but did not lay down the principles that should be followed for their identification. Nevertheless, and as will be seen in the coming pages, it can be inferred from the treatment given by the Court to reparations in this case that any victim of violations of the ACHR is also an injured party. The topic, however, was not exhausted.

The IACtHR has maintained this interpretation of article 63.1 across its case law, but its application in specific cases has become more holistic as will be seen.[14] Additionally, as the complexity of the cases increased, the Court has been forced to address the meaning of the concepts of 'injured party' and 'victim' either by identifying them or by defining them. The following sections review these transformations.

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[8] IACtHR, *Velásquez Rodríguez v. Honduras*, judgment on reparations, 21 July 1989.
[9] *Id*, para. 25.
[10] *Id*, para. 26.
[11] *Id*, paras. 28–31.
[12] *Id*, paras. 8, 9 and 38.
[13] *Id*, para. 26.
[14] See, for instance, the judgment of the IACtHR in the case of *Saramaka People v. Suriname*, judgment on preliminary objections, merits and reparations, 28 November, 2007, paras. 186–187.

B. *The Concept of 'Injured Party'*

Addressing the meaning of 'injured party' necessitates a precise conceptualisation of 'victim' as the latter is usually referred to as the person who has suffered damage resulting from a human rights violation and who is entitled to reparation as a result of a decision by a relevant court. These two terms are clearly interrelated; however, what is not entirely clear is whether the two concepts are equivalent. Understanding these concepts is especially problematic when the terms are raised in relation to gross human rights violations. This is due in part to the fact that while only a few individuals or a single person is initially a party to the proceedings, and considered to be a 'victim' by a relevant court, the universe of people affected by these violations could be infinite. Therefore, there is a growing need to properly identify those affected in order to give effect to their right to be repaired for the harm they have suffered, and/or to recognise their standing before a domestic or international body. Therefore, defining and distinguishing these concepts is essential to ensuring effective protection.

1. *The Concept of 'Victim' and 'Injured Party' under International Law*

International law lacks an adequate and consistent working definition of 'victim' of gross human rights violations. Its contribution to the clarification of this concept has been very slow although in recent years this has started to change. UN human rights treaties rarely refer to the word 'victim', never to the term 'injured party' and do not otherwise define who could be a victim.[15] For instance, the International Covenant on Civil and Political Rights only mentions the word victim once in article 9 (right to liberty and security of the person) but does not define it.[16] Yet, some steps have been taken to define this concept. *The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) contains one of the few available definitions of 'victim' but the Declaration is considered to be 'soft law', simply of declaratory value. It defines 'victims' as:

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[15] To define who is a victim, it is necessary, for example, to be familiar with the understanding of the word by the Human Rights Committee and similar treaty monitoring bodies and by the regional courts. See, for instance, S, Davidson, "Procedure under the Optional Protocol" in A, Conte, S, Davidson, and R, Burschill. *Defining Civil and Political Rights* (UK, Ashgate, 2004) 17–32.

[16] United Nations General Assembly, International Covenant on Civil and Political Rights, resolution 2200A (XXI), 16 December 1966. Equally, the International Convention on the Elimination of all Forms of Racial Discrimination mentions the word victim only in article 14, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child do not mention the word at all while the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment enacted in 1984 and dealing with a gross human rights violation, mentions the word in articles 5, 14, 21 and 22.

> 1. …. persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
> 2. … The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[17]

More recently, in December 2005, the United Nations' General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Basic Principles). These principles contain several references to victims and define them as:

> [the] persons who 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 definition follows the definition of the Declaration of Basic Principles of Justice of 1985 recognising that individuals other than the 'direct victim' of a violation can also be understood as victims. However, the definition contains two conditions to extend the status of 'victim' to others such as members of the immediate family and dependents. Indeed, the Basic Principles establish that 'where appropriate' and 'in accordance with domestic law' persons other than direct victims could be afforded the same treatment. These phrases imply that States are given the possibility to consider in which situations the extension of the concept of victim can take place, and confirms that in all situations, such a decision to extend the concept of victim would have to conform with domestic law. So, as a result, for instance, the domestic reparations programme of South Africa cannot be considered to be acting against the Basic Principles, when it only awarded reparations to relatives and dependents if the direct victim of a gross human rights violation had died.[18] South Africa did not consider it appropriate to give such status to the next of kin of direct victims who were alive.

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[17] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, res 40/34, 29 November 1985.

[18] B. Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa" in R, Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York, Social Science Research Council, 2006), 48–91.

Nevertheless, the problem is not limited to the human rights violations where the extension of the status of 'victim' to others, is permissible. The problem is also how domestic law defines 'immediate family' and 'dependents' for the purposes of reparations. A narrow definition of these terms would go against the basic idea that gross human rights violations produce a domino effect that goes beyond the nuclear family of a person.

The latest important development is the UN *Convention for the Protection of All Persons from Enforced Disappearance* (UNCPPED or the Convention) that was adopted in 2006 but at the time of writing had not yet come into force. This Convention mentions the word 'victim' several times and, more importantly, defines victim as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance".[19] This is a very broad definition of 'victim' as the only requisite condition for being treated as a 'victim,' other than for the disappeared person, is to have suffered harm 'as the direct result' of the disappearance.[20] The meaning of "direct result" is yet to be interpreted but could provide a ground breaking contribution to international law. For example, on a broad reading, 'victim' could be taken to include members of the extended family, of a community or an eye-witness of gross human rights violations.

Despite these developments, the meaning of the word 'victim' continues to be disputed terrain, but nonetheless one where the IACtHR is able to contribute by virtue of its solid approach to the topic. The steps taken by the IACtHR to define 'victim' and injured party' should be read in connection with existing gaps and developments present in international law, and its achievements should be measured by its ability to close these gaps.

2. *Preliminary Comments on the IACtHR's Interpretation of the Terms 'Injured Party' and 'Victim'*

As outlined above, article 63.1 of the ACHR refers to 'injured party' but it does not define the term. In principle, the article should apply once the Court has established that there has been a violation of the ACHR, or other applicable treaty. As such, this would imply that the term 'injured party' is synonymous with 'victim', as is the case under the ECHR.[21] Therefore, those who are recognised as victims in a judgment of the Court would be treated as injured parties for the purposes of reparations. This is, however, a very restrictive reading

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[19] Art. 24 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[20] S. McCrory, "The International Convention for the Protection of All Persons from Enforced Disappearance 7(3) *Human Rights Law Review* 545 (2007), at 557–228.

[21] As seen already, article 41 of the ECHR uses the words 'injured party' when dealing with just satisfaction. The practice of the Court since *De Wilde, Ooms and Versyp v. Belgium*, 18 June

that the IACtHR rejected since its reparation decision in *Velásquez Rodríguez* where it recognised the wife and children of the disappeared man as injured parties.[22] For the Court, the term 'injured party' would not only apply to victims but also to other persons considered to have suffered the effects of the violations even if they are not treated as victims by the Court on the merits of the case. Therefore, as Judge Cançado Trindade held, the concept of 'injured party' is a more ample concept than that of 'victim'.[23]

The Court's arrival at such an understanding of the term 'injured party' has not been easy as it has had to deal with both the legal gaps in relevant instruments, (such as the ACHR and its Rules of Procedure) and with factual challenges in difficult cases that will be discussed in the following sections. Despite these challenges, the concepts of 'injured party' and 'victim' have evolved holistically to try and cover all those persons who suffer harm as a result of gross human rights violations. The two concepts taken together go beyond the understanding of the term 'victim' within the Basic Principles. These two concepts offer a more complex understanding of those who suffer harm when gross human rights violations take place even if it is not as encompassing as the definition of victim within the UNCPPED. As previously noted, UNCPPED does not restrict the treatment of a person as a victim to only 'direct victims' or next of kin since any other person could claim 'victim' status so far as the person has suffered harm as a direct result of the disappearance. Nevertheless, recent developments in the jurisprudence of the Court suggest that it has been revisiting this intrinsic relationship and, what is worrying, is that by doing so it might be undoing what it has previously achieved.

a. *The Court and the Concepts of 'Injured Party' and 'Victim' (1980–1991)*

Besides the ACHR, the work of the IACtHR is regulated by its Statutes and Rules of Procedure (RP). The latter have been the object of fundamental reforms and to date contain the most important changes the IACtHR has made to strengthen the protection of human rights in the Americas.[24] This, however, has been the result of more than 25 years of experience and transformations.

1971, has been to consider that only the persons who are considered as victims in a particular case can receive reparations unless a person is awarded reparations but not as victim but as a heir or successor.

[22] *Velásquez Rodríguez*, *supra* n. 8, at paras. 50–52.

[23] Concurring opinion of Judge Cançado Trindade, *Interpretation of the judgment in the case of la Cantuta v. Perú*, 20 November 2007, para. 61.

[24] The RP of the Commission and the Court have been amended on different occasions. For the purposes of this article, only 4 of the amendments to the RP of the Court are addressed since they have been the most substantial amendments and have also contributed in one way or another to the topic of this article. Therefore, other smaller amendments are not analysed.

The ACHR does not mention the word 'victim' and does not define the words 'injured party'. This gap in the ACHR had to be resolved by the Court. The first Rules of Procedure (RPI) of the IACtHR were developed by the Court during its second session in 1980.[25] These rules were inspired by the regulations of the ECtHR and the International Court of Justice and did not define the term 'victim' or 'injured party'.[26] Equally, between the Court's 1989 decision in *Velásquez Rodríguez* and the coming into force of the New Rules of Procedure of the Court (RPII) in 1991, the IACtHR did not explicitly define the terms 'victim' or 'injured party', even though it had to determine who was to receive reparations for disappearances, the first gross and systematic human rights violation it had to deal with.

In the first cases decided by the Court, it used the term 'victim' to refer to those persons who suffered a direct violation of rights under the ACHR as happened to Manfredo Velásquez Rodríguez, the victim of a disappearance in the case against Honduras. The Court, however, did not give the same status to his next of kin even if they were awarded reparations.[27] Indeed, in the reparations decision, the Court awarded monetary reparations for loss of earnings caused to Manfredo, to his wife and 4 children as heirs.[28] The Court, nevertheless, awarded moral damages directly to all members of the family as it was proven that "they had symptoms of fright, anguish, depression and withdrawal, all because of the disappearance of the head of the family"[29] but not because the Court recognised them as victims. On the contrary, they were only treated as injured parties. Manfredo was not awarded moral damages and the judgment was considered by the Court as a satisfaction measure.[30] Other cases in this period were treated similarly.[31] In this first period, the Court distinguished between 'victim' and 'injured party'. However, the Court was of the view that for the purposes of reparations the concept of 'injured party' had two separate meanings: 1) as a genre to be applied to all those persons who receive reparations awarded by the IACtHR

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[25] Article 60 of the ACHR mandates the IACtHR to draw up its own Statutes and Rules of Procedure.

[26] IACtHR, *Annual Report to the General Assembly*, 1980, 27.

[27] IACtHR, *Velásquez Rodríguez v. Honduras*, judgment on the merits, 29 July 1988, paras. 2, 119. The dissenting opinion of Judge Piza Escalante in this judgment appears to include the next of kin of Manfredo in the concept of 'injured party'.

[28] Nevertheless, it should be recalled that in the judgment on the Merits, the Court clearly indicated to Honduras that under the ACHR it had and has the obligation to investigate, prosecute and punish the perpetrators of disappearances and to disclose all available information to the next of kin of the disappeared person. In the judgment on reparations, the Court referred to the judgment on the merits to stress that Honduras had and has such an obligation. *Velásquez Rodríguez, supra* n. 8, paras. 45–49 and 32–34.

[29] *Id*, para. 51.

[30] *Id*, paras. 6–9.

[31] IACtHR, *Godínez Cruz v. Honduras*, judgment on reparations, 20 January 1989.

(Manfredo, the disappeared person, and his family); and 2) those persons who, even if not considered to be victims by the Court in the judgment on the merits, are still awarded reparations (the family of Manfredo as heirs and for moral damages).[32]

b. *The Court and the Concepts of 'Injured Party' and 'Victim' (1991–1997)*

The IACtHR began to use its contentious jurisdiction in 1983 when the IACommHR submitted to it the case of *Velásquez Rodríguez*. This case and subsequent ones made clear to the Court that it had to adapt its RP to the nature of the cases it was facing because a prompt response from the Court was needed. As a result, the RPI were amended in 1990 and entered into force in 1991 (RPII). They incorporated, for the first time, in article "2.0" the term 'victim', meaning the person whose rights under the ACHR have allegedly been violated. These rules made another important amendment. They included a new paragraph 2 to article 22 related to the representation of the Commission before the IACtHR, which indicated that if within the delegates of the Commission are some of the lawyers of the alleged victim or the next of kin, the Court should be informed. This article makes sense if its content is read in connection with article 44 of the RPII that, for the first time, recognised some *standi* before the Court to the persons mentioned in article 22.2. This article stated that the Court could invite the persons mentioned in article 22.2 of the Rules to present pleadings in relation to the application of article 63.1 of the ACHR (reparations).[33]

These changes were important for reparations for gross human rights violations as confirmed by the case-law of the years 1991 to 1996. Indeed, in *Aloeboetoe v. Suriname*, the fourth case known by the Court concerning the arbitrary killing of 7 Maroons by military personnel in December 1987, the Court faced complex questions related to reparations and evidence. Indeed, the IACommHR requested the payment of moral damages to the Saramaka tribe[34]-collective reparations-, the application of Saramaka's traditional concept of family for the award of reparations and the award of reparations to dependents.

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[32] The IACtHR awards reparations for moral and material damages of a deceased person to his or her heirs. It could be discussed whether such awards are made because the Court considers the heirs as injured parties or just because inheritance law should apply. For the purposes of this chapter, it is maintained that the Court awards such reparations to the heirs as it considers that they are injured parties. Indeed, they have lost a close member of the nuclear family who, in many cases, was the breadwinner, so such harm has detrimental consequences for them, an issue that inheritance law recognises.

[33] IACtHR, *Annual Report to the General Assembly*, 1991, 17.

[34] IACtHR, *Aloeboetoe v. Suriname*, judgment on reparations, 10 September 1993, para. 81. See, also, C. Martin and F. Roth, "Suriname Faces Past Human Rights Violations" in 1(1) *Human Rights Brief* 1994.

For the award of reparations, the Court distinguished between the victims of the case -the 7 persons who died- and injured parties which are the heirs of the deceased and/or persons who not being victims of violations of the ACHR can claim reparations as they suffered damages. In this latter concept, the Court identified two possible claims for reparations: a) the one made by the next of kin of the victim, not as successors, for moral and pecuniary damages and b) dependents. The Court awarded reparations to a) but not to b) as in relation to the latter there was insufficient evidence to prove that the conditions established by the Court were met. For a dependent to be awarded reparations the Court required:

> First, the payment sought must be based on payments actually made by the victim to the claimant, regardless of whether or not they constituted a legal obligation to pay support. Such payments cannot be simply a series of sporadic contributions; they must be regular, periodic payments either in cash, in kind, or in services. What is important here is the effectiveness and regularity of the contributions.
>
> Second, the nature of the relationship between the victim and the claimant should be such that it provides some basis for the assumption that the payments would have continued had the victim not been killed.
>
> Lastly, the claimant must have experienced a financial need that was periodically met by the contributions made by the victim. This does not necessarily mean that the person should be indigent, but only that it be somebody for whom the payment represented a benefit that, had it not been for the victim's attitude, it would not have been able to obtain on his or her own.[35]

Although the Court rejected the request to award reparations to dependents, the same Court made use of an important presumption to identify some of them as injured parties. The issue concerned the status of five of the parents of the deceased who were not successors and whom the Commission claimed to be dependents for the award of moral damages. Indeed, the Court indicated that "it can be presumed that the parents have suffered morally as a result of the cruel death of their offspring, for it is essentially human for all persons to feel pain at the torment of their child".[36] Therefore, the Court's use of this presumption *juris tantum* evolved as a mechanism for the identification of injured parties even if only to award them moral damages. This means that besides any working definition of the concepts of 'victim' and 'injured party', issues of evidence might be of transcendental importance for their identification.

The Commission equally requested the Court to consider the Saramaka tribe as an injured party and to award it moral damages as it considered that the killings were racially motivated, that the community was a family and as such it

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[35] *Id*, paras. 67–73.
[36] *Id*, para. 76.

suffered harm and that they had autonomy over their territory. The Court rejected all three claims. In relation to the second and most important claim, the Court considered that people always belong to 'intermediate' communities, therefore, reparations were not justified on this basis. Further, the Court considered that in this case there was no direct damage.[37]

The Commission also requested the Court to identify the successors of the victims taking into account the concept of family for the Saramaka's. Their system is matrilineal and accepts polygamy. The Court accepted the request but emphasised that respect for a particular culture can only take place if it does not violate the ACHR or important principles such as non-discrimination of women in which case the latter would prevail.[38] The acceptance of such a concept had clear consequences for the identification of the next of kin of the deceased and their heirs.

Further, this is the first decision taken by the Court where it awarded an additional measure of satisfaction to the judgment itself. The Court ordered Suriname to re-open the school of Gujaba making it, as well as the medical dispensary of the school, fully operational.[39] This last measure should be noted because while the Court did not consider the 'community' as an injured party, (therefore it was not entitled to reparations on that basis), the order to Suriname to re-open the school and make the medical dispensary operational in-and-of-itself constituted a form of reparations for the community. The Court's order not only can be considered to be reparations to the children of the deceased, but also to the children of the community as a whole. Therefore, the Court implicitly awarded reparations to the community, an approach to be defined in later cases as will be seen in the coming pages.[40]

Finally, it is important to highlight a procedural landmark that contributed to a better treatment of reparations in this case. The Court carried out a fact-finding visit to Suriname, which allowed it to be proactive in the identification of the injured parties and the quantification of the damages. The Court sent Ana Maria Reina, Deputy Secretary of the Court, to the country to gather information about the economic situation of the State and to visit the village of Gujaba in order to gather more data that would enable the Court to award reparations. The Court used the information gathered to award reparations in the case.[41] This important fact-finding tool appears not to have been used by the Court in other cases. It is clearly time-consuming and expensive but certainly is

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[37] *Id*, para. 83.
[38] *Id*, paras. 59–62.
[39] *Id*, paras. 96.
[40] Shelton, *Remedies in International Human Rights Law*, *supra* n. 4, 286.
[41] *Aloeboetoe*, *supra* n. 34, para. 40.

an option that the Court should consider for cases where features such as the following ones are present:[42]

a) there are multiple victims, next of kin or duly accredited representatives and the Court requires that a common intervener be appointed to represent them before all proceedings before the Court according to article 23 of the RPIV of the IACtHR;[43]
b) the Commission was unable to present a complete list of victims before the Court and there are clear indications from the facts of the case that there are other potential victims to be determined;
c) the victims in the case were in such a vulnerable situation that they did not have access to registration systems or to State institutions so as to be able to register their identity or their property; and
d) the victims in the case belong to a community with different cultural traditions.

During this period another important case was decided by the Court: *El Amparo v. Venezuela*.[44] In this case, members of the Venezuelan military and the police opened fire against 16 fishermen who were about to leave their boat in the Arauca river. Fourteen of the fishermen were killed and two were left with permanent injuries.

The Commission appointed two of the lawyers of the victims as assistants, (Ligia Bolivar and Walter Márquez), before the IACtHR during the reparations stage as was envisaged in the 1996 RPII. During the proceedings on reparations, the Court faced many problems as the Commission and its assistants (the lawyers or the victims) were presenting different evidence and arguments. This forced the Court to ask questions directly to the assistants/legal representatives of the next of kin and not to the Commission or the State.[45] This was not however

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[42] Article 45 of the RPIV of the Court could be used to justify such action. The article states that "The Court may, at any stage of the proceedings: "1. Obtain, on is own motion, any evidence it considers helpful. In particular, it may hear as a witness, expert witness, or in any other capacity, any person whose evidence, statement or opinion it deems to be relevant. 2. Request the parties to provide any evidence within their reach or any explanation or statement that, in its opinion, may be useful. 3. Request any entity, office, organ or authority of its choice to obtain information, express an opinion, or deliver a report or pronouncement on any given point. The documents may not be published without the authorisation of the Court. 4. Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence".

[43] Article 23 establishes that: "…When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorised to present pleadings, motions and evidence during the proceedings, including the public hearings…"

[44] IACtHR, *El Amparo v. Venezuela*, judgment on reparations, 14 September 1996.

[45] IACtHR, *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI* (Costa Rica, BID, USAID, OEA and IACtHR, 2001, Vol. II), 23.

the only situation where victims, their next of kin or their legal representatives were involved with the reparations stage of the proceedings, but certainly it made patent to the Court that victims' participation was essential to deal with reparations adequately:[46] victims, their next of kin and/or their duly accredited representative are in a better position to both explain and if necessary, to prove the harm they have suffered to the Court.

Although some preliminary concepts were in the making, the Court continued to experience in this period a lack of a regulating principle to identify the injured parties of the case. At the same time, the lack of such a principle was also beneficial as it gave the Court a certain flexibility to deal with each case on its own merits. At the end of this period it was clear that the proper administration of justice in cases of gross human rights violations required the direct participation of victims, their next of kin or their duly accredited representatives, an area where the Inter-American system needed multiple changes as individuals do not have *standi* before the IACtHR, and where according to article 61 of the ACHR only the Commission or States parties to the Convention may submit cases to the Court.[47]

c. *The Court and the Concepts of 'Injured Party' and 'Victim' (1997–2001)*

In 1996, it became apparent that there was a need to give better access to justice to victims, their next of kin or their duly accredited representatives before the Court after the reparations decision in *El Amparo* coupled with important changes in the European System. Then, Protocol 11 to the ECHR was opened for signature. It restructured the enforcement machinery of the ECHR to give better access to justice for victims and to deal in a more efficient way with the caseload. The combination of these two events led the IACtHR to once again reform its RPII.

The most important change of the new RPIII, which entered into force in 1997, was the incorporation in article 23 of the autonomous right of victims, their next of kin or their legal representative to present pleadings, motions and evidence before the Court at the reparations stage.[48] Although article 23 intended to resolve the difficulties of the RPII by granting full *standi* to the victims, their next of kin or their duly accredited representative before the Court at the reparations stage, the concept of victim remained the same as that of the RPII.[49] This amendment of the RP cannot be underestimated as it led to better reparations

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[46] J. Mendez and J. Vivanco. "Disappearances and the Inter-American Court: Reflections on a Litigation Experience" 13 *Hamline Law Review* 1990, 566.

[47] Article 61 reads: "1. Only the States Parties and the Commission shall have the right to submit a case to the Court. 2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed".

[48] IACtHR, *Annual Report to the General Assembly*, 1996, 202.

[49] *Id*.

pleadings before the Court. However, it introduced new challenges for the Court as is evidenced by the case law of the period 1997–2001.

During this period, the Court began to understand that violation(s) of the ACHR could encompass other victims beyond the direct victim of the violation. The Court's understanding of this important issue developed first in cases related to disappearances and then later in cases regarding arbitrary killings, resulting in part from the assistance provided by the Commission and by the participation of victims and their next of kin at the reparations stage. This extension of the concept of 'victim' to others, usually next of kin, had an impact in reparations awards as now some members of the family of a victim of gross human rights violations would receive reparation as victims and not only as injured parties.

The Court first recognised such a situation in disappearance cases.[50] In *Blake v. Guatemala*,[51] two American journalists were disappeared in 1985. The Court considered that the disappearance of Blake "generate(d) suffering and anguish (to his parents), in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate". The Court added that "such suffering was increased by the fact that the mortal remains of Mr. Blake were burned in order to destroy any traces of the crime". All of these constituted a violation of article 5 of the ACHR (right to human treatment).[52] The relatives of Mr. Blake were also considered as autonomous victims of violations of article 8 of the ACHR (right to fair trial) as there was undue delay in the administration of justice in the case of their son and it is a right of the next of kin of victims of disappearance to be able to get an effective investigation, prosecution and punishment of the material and intellectual perpetrators of the crime, together with compensation for the harm suffered.[53]

In relation to arbitrary killings, the first time the Court considered persons other than the persons deprived of their life as victims of rights under the ACHR was in the case of the *Street Children v. Guatemala*.[54] In this case five street children (three of them below 18 years of age) were killed and subjected to

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[50] The first case where the Court found that the next of kin of a disappeared person could also be autonomous victims of the ACHR was *Castillo Páez v. Perú*, where the Court considered the next of kin to be victims of violations of their right to judicial guarantees (article 25 of the ACHR). See, judgment, 3 November 1997, paras. 80–84. Nevertheless, the first case where the Court made a more holistic reading of the ACHR in relation to other victims than the direct victim is the case of *Blake* as it found the next of kin to be victims of the right to human treatment (article 5 of the ACHR).

[51] IACtHR, *Blake v. Guatemala*, judgment on the merits, 24 January 1998.

[52] *Id*, paras. 114–116.

[53] *Id*, para. 97.

[54] IACtHR, *Street Children v. Guatemala*, judgment on the merits, 19 November 1999. See, also, I. Zarifis. "Guatemala: Children's Rights Case Wins Judgment at Inter-American Court of Human Rights", in 9(1) *Human Rights Brief* (2001).

inhuman treatment by State authorities. The mothers of all the children and one grandmother were considered to be autonomous victims of violations of article 5 (right to humane treatment). First, the authorities never took the necessary measures to identify the victims or to inform their next of kin of their deaths; consequently, they were unable to bury them according to their traditions. Second, the authorities mistreated the bodies of the children and third, they failed to properly investigate the crimes and to punish those responsible.[55] They and the siblings of the children were also found to be victims of violations of article 8 and 25 (right to fair trial and judicial guarantees) as Guatemala did not carry out an effective investigation, and the children, as well as their next of kin, were prevented from using effective remedies to resolve the situation.[56]

The recognition as victims of rights under the ACHR of persons that were previously treated as injured parties by the Court for the purposes of reparations meant that they had access to better monetary reparations for both pecuniary and non-pecuniary damages but especially for the latter. The following examples illustrate this: In the case of *El Amparo*, the following were the awards in 1996 to the direct victims and to the injured parties:

El Amparo v. Venezuela (1996)

	Pecuniary damages[57] (loss of income)	Moral damages[58]
To each of the families of the deceased[59]	Average USD 23,843 (as successors)	USD 20,000 (on their own right)
To each of the two victims who survived	USD 4,566 (for the two years they were unfit to work)	USD 20,000 to each one of the survivors

In the *Street Children* case, where the mothers and one grandmother of the children were considered to be victims in their own right in 2001, the following awards were granted:[60]

[55] *Id*, paras. 173–177.
[56] *Id*, paras. 199–238.
[57] *El Amparo*, *supra* n. 44, paras. 29–30.
[58] *Id*, para. 37.
[59] Each family received the award and the Court indicated the manner in which it should be distributed. The Court ordered that one third of the pecuniary damage be given to the wife or companion of the deceased and two thirds to the children. In relation to moral damages, the Court ordered that one half be given to the children, one quarter to the wife/companion and one quarter to the parents. *Ibid*, paras. 41–42.
[60] This table only illustrates the awards given to the mothers and grand mother of the children as victims of violations of the right to human treatment, fair trial and juridical guarantees but not the awards given to the siblings who were only considered as victims of the right to fair trial and juridical guarantees.

Street Children v. Guatemala (2001)

	Pecuniary damage[61]		Moral damages[62]	
Direct victims	Expenses (for mothers in their own right)	Loss of income (as successors)	For the direct victims as successors	For the mothers and grandmother as victims
Anstraun Aman Villagrán Morales	USD 150.00 USD 4,000.00	USD 28,136.00	USD 23,000.00	USD 26,000.00
Henry Giovanni Contreras	USD 400.00 USD 2,500.00	USD 28,095.00	USD 27,000.00	USD 26,000.00
Julio Roberto Caal Sandoval	USD 400.00 USD 2.500.00	USD 28,348.00	USD 30,000.00	USD 26,000.00 for the Mother US$ 26,000.00 for the Grand Mother
Federico Clemente Figueroa Túnchez	USD 2,500.00	USD 28,004.00	USD 27,000.00	USD 26,000.00
Jovito Josué Juárez Cifuentes		USD 28,181.00	USD 30,000.00	USD 26,000.00

A comparison of the awards in these two cases allows one to conclude that there is a drastic difference in the amount of financial and other reparations measures awarded between someone that is recognised as a 'victim' by the Court and someone that is only recognised as an 'injured party'. One can also compare the award of moral damages to the families of the deceased in the case of *El Amparo* with the mothers and grandmother of the youngsters in the *Street Children* case. In the latter case each one of them received USD 26,000 while in *El Amparo* all family members collectively received USD 20,000.[63]

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[61] *Street Children*, *supra* n. 54, paras. 78–82.
[62] *Id*, paras. 88–93.
[63] Certainly, the Court takes into account other variables than the one under discussion here when awarding reparations. It is argued, however, that the consideration of a person as victim (as opposed to injured party) is a determinant factor to award greater monetary reparations.

It should be noted that the cases determined during this period maintained the distinction between 'victim' and 'injured party'. However, the scope of 'victim' was expanded to include 'indirect victims' in cases of disappearances and arbitrary killings. The broadened scope of who may be classified as a 'victim' is justified since these violations in-and-of themselves produce severe pain in the next of kin and others. Additionally, subsequent events following such violations may also adversely affect the next of kin. For example, a lack of adequate response by the State in relation to the investigation, prosecution and punishment of the perpetrators can cause further pain and suffering to the next of kin. Nevertheless, the Court continued to award reparations to persons as injured parties even if they were not victims as decided by the Court in the merits of the cases. The case of *Loayza Tamayo v. Perú* illustrates this approach. In this case, Maria Helena Loayza was arbitrarily detained and subjected to inhuman treatment for more than four years in Perú. The Court considered that she was the only victim in the case but awarded reparations to her children, parents and siblings as injured parties as shown in the table below.

Therefore, during this period the Court applied two different approaches in relation to reparations for gross human rights violations. First, in relation to disappearances and arbitrary killings, where the Court considered as victims some

Loayza Tamayo v. Perú (1998)

Victim and injured parties	Reparations for pecuniary damages[64]	Reparations for non-pecuniary damages[65]
Maria Helena Loayza (direct victim)	USD 48,690	USD 50,000
Gissele (daugther)	USD 5,000 (medical expenses)	USD 10,000
Paul Abelardo (son)	USD 5,000 (medical expenses)	USD 10,000
Julio Loayza and Adelina Tamayo (father and mother)	USD 500 (transport expenses)	USD 10,000 (to each parent)
Siblings of Maria Helena		USD 3,000 (to each sibling)

Nevertheless, this factor should be read in conjunction with other factors that the Court takes into account such as the equity principle and the particular circumstances of each case. The Court has not always been consistent when awarding reparations. Nevertheless, it is possible to say that the recognition of a person as victim provides her with better chances to be awarded more and better reparations. On the inconsistencies of the Court when awarding reparations, see R. Uprimny and M. P. Saffon "*Las Masacres de Ituango Colombia: Una Sentencia de Desarrollo Incremental*", 3 *CEJIL* (2007) 46–56, at 54–56.

[64] IACtHR, *Loayza Tamayo v. Perú*, judgment on reparations, 27 November 1998, paras, 129–133.

[65] *Id*, paras. 138–143.

of the next of kin of the direct victim as a result of violations of the right to humane treatment, to a fair trial and/or to judicial guarantees.[66] In such cases it did not recognise other injured parties for the purposes of reparations. The second approach was in relation to violations where the direct victim was subjected to arbitrary detention and to inhuman treatment. Under the second approach, the Court only considered those persons subjected to arbitrary arrest and detention and/or inhuman treatment as victims. Nonetheless, it recognised their next of kin as injured parties for the purposes of reparations as in *Loayza Tamayo*.[67]

However, the Court used presumptions to grant the status of 'injured party' to some of the next of kin of direct victims of gross human rights violations prior to the Court's extension of the concept of 'victim'. For instance, it continued to apply the presumption established in *Garrido and Baigorria v. Argentina*, according to which the torment of a child produces intense suffering in the parents of the deceased or disappeared person. More importantly, the Court also extended the presumption to others such as children and siblings of direct victims of gross human rights violations who were arbitrarily detained and subjected to inhuman treatment. In *Loayza Tamayo*, the Court considered that it had " … established that grievous violations were committed against the victim and must presume that they had an impact on her children, who were kept apart from her and were aware of and shared her suffering".[68] It added that "the same considerations apply to the victim's siblings, who as members of a close family could not have been indifferent to Ms. Loayza-Tamayo's terrible suffering, a presumption not disproved by the State".[69] It is important to note that the Court first extended the presumption to children and siblings in cases not related to disappearances and arbitrary killings. Indeed, up until the case of *Paniagua Morales v. Guatemala* was decided in May 2001, the Court was ready to award moral damages to the siblings of the deceased or disappeared person if "credible or convincing evidence demonstrating an affective relationship with the disappeared person that goes beyond simple consanguinity"[70] was presented to the Court. This applied in cases like *Castillo Páez v. Perú*, where the Court presumed the moral damages of the parents but not those of the sister of Mr. Castillo. Nevertheless, the moral damage of the latter was duly proved and she was awarded reparations.[71]

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[66] See for instance, IACtHR, *Garrido and Baigorria v. Argentina*, judgment on the merits, 2 February 1996 and judgment on reparations, 27 August 1998; *Durand and Ugarte v. Perú*, judgment on the merits, 16 August 2000 and judgment on reparations, 3 December 2001.

[67] See also IACtHR, *Suarez Rosero v. Ecuador*, judgment on the merits and reparations, 20 January 1999. The only exception to this approach is *Castillo Petruzzi v. Perú*, where only those detained were awarded reparations. See, judgment on the merits and reparations, 30 May 1999.

[68] *Loayza Tamayo*, *supra* n. 64, para. 140.

[69] *Id*, para. 143.

[70] *Garrido and Baigorria*, reparations, *supra* n. 66, para. 64.

[71] IACtHR, *Castillo Páez v. Perú*, judgment on reparations, 27 November 1998, paras. 88–90.

When the Court extended the concept of victim to include some of the next of kin, the use of the presumptions mentioned above lost importance at the reparations stage. However, they continued to be relevant for those cases of arbitrary detention and inhuman treatment, such as *Loayza Tamayo*, where the Court only recognised the existence of direct victims.

d. *The Court and the Concepts of 'Injured Party' and 'Victim' (2001–2007)*

Another substantial reform of the Rules of Procedure took place in 2000 (RPIV). This reform produced one of the most important changes in the life of the Inter-American system as for the first time, it recognised *locus standi in judicio* to the victim, the next of kin or their duly accredited representative.[72] Prior to RPIV, the parties before the Court were limited to the Commission and the State while the victim; his/her next of kin; or the duly accredited representative played only a minor role in the proceedings. Subsequently to the reforms entering into force in June 2001, the latter became real parties in the litigation before the Court as established by article 23 of the RPIV.[73]

Importantly, article 2 of the RPIV was also amended extending the definition of 'next of kin' to include 'the immediate family, that is, the direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable.' Such a concept was required not only for the purposes of article 23 of the RPIV – who could have standing before the Court – once the Commission submits a case, but also for reparations as the Court faced disputes in relation to who could be considered member of the family and as injured party.[74] The new Rules also included a new definition of 'victim' but kept the old concept to define an 'alleged victim.' As such, article 2.30 defines an alleged victim as "the person whose rights under the Convention are alleged to

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[72] A good article on these procedural changes is the one by V. Gómez. "The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: New Rules and Recent Cases" 1 *Human Rights Law Review* 3 (2001).

[73] Article 23 states: "Participation of the Alleged Victims: 1. When the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their pleadings, motions and evidence, autonomously, throughout the proceedings. 2. When there are several alleged victims, next of kin or duly accredited representatives, they shall designate a common intervener who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings. 3. In case of disagreement, the Court shall make the appropriate ruling". See also article 2.23 of the RPIV. This is not the same as full *standi* before the Court as the Commission has still the power to decide whether or not to send a case to the Court and only when the case has been sent to the Court, the victims gain *standi*. See also article 44 of the Rules of Procedure of the Inter-American Commission on Human Rights.

[74] This took place, for instance, in the case of *Loayza Tamayo*, where the latter rejected any claim to pay compensation to the next of kin of Maria Helena, the direct victim of the case. Reparations decision, *supra* n. 64, paras. 88–92.

have been violated" and article 2.31 defines a victim as "the person whose rights have been violated, according to a judgment pronounced by the Court." Note, however, that the Court continued without defining the term "injured party".

The newly introduced concept of 'next of kin' is broad in nature as it allows the Court to consider persons other than the traditional members of the nuclear family; an approach that the Court was already applying as was highlighted when the case of *Aloeboetoe* was analysed.[75] This flexible concept applies to both the identification of victims and of injured parties that are not considered victims in the judgment of the Court.[76] Therefore, the Court does not interpret the concept in a restrictive manner when identifying the victims of violations of rights under the ACHR. Indeed, in the *Street Children* case, as seen earlier, one of the grandmothers of the children was treated as a mother due to her close relationship with one of the children and, therefore considered as a victim.[77] Equally, in the case of *Myrna Mack v. Guatemala*, Ronald Chang, a cousin of the deceased, was considered as a victim by the Court as he was raised from his childhood by the Mack family and developed very close ties with Myrna.[78] Further, the concept is especially meaningful when the Court has to deal with claims of victims that belong to different cultures or traditions as the Court can be sensitive to their understanding of family.[79] Finally, the concept equates the spouse of a victim with the permanent companion avoiding in this manner any discriminatory treatment in relation to the latter.[80]

The major developments which took place between 1997–2001, coupled with the subsequent jurisprudence during 2001–2007, have been particularly important in solidifying the meaning of 'victim' and 'injured party.' During this period the Court continued to widen its understanding of victims of gross human rights violations by extending the concept to the next of kin of a direct victim who is still alive after a period of arbitrary detention and inhuman treatment. In *Tibi v. Ecuador*, the Court considered that the arbitrary detention and torture of Mr. Tibi also breached

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[75] *Supra* n. 34 p. 14.

[76] The Court has considered as injured party for the purposes of reparations other persons not part of the nuclear family such as step children (*Mapiripán v. Colombia*, para 259a), sisters in law (*Paniagua Morales v. Guatemala*, para. 109), cousins (*19 Merchants v. Colombia*, paras. 244–264g) and nieces (*Las Palmeras v. Colombia*, para. 61).

[77] *Street Children*, *supra* n. 54, paras 80–85.

[78] IACtHR, *Myrna Mack v. Guatemala*, judgment on the merits and reparations, 25 November 2003, paras. 242–244.

[79] The Court has always shown sensitivity towards other conceptions of family in its case law as already mentioned in the case of *Aloeboetoe*.

[80] The equal treatment of spouses and companions by the Court has also been present across its case law. See, e.g., *Juan Humberto Sánchez v. Honduras*, para. 164 and *La Rochela v. Colombia*, para, 268. See also *Pueblo Bello v. Colombia*, judgment on the merits and reparations, 31 January 2006 and *Gómez Palomino v. Perú*, judgment on the merits and reparations, *22* November 2005.

the right to human treatment of his wife and children, treating his next of kin, for the first time, as victims of violations of the ACHR.[81] This approach has also been applied in more recent cases such as *De la Cruz Flores v. Perú* where inhuman treatment – not torture – was found to have taken place.[82] As shown before, such a treatment gives the next of kin, as victims, access to greater reparations. One may compare, for example, the cases of *Loayza Tamayo*[83] and *De la Cruz Flores*. In the latter case, the awards for moral damages were more substantial than the former.

The expansion of the concept of victim in cases of gross human rights violations should be seen as a step forward in the acknowledgment of the effects of these violations on other persons than the direct victims. As a consequence, the Court will now treat most people as victims and not only as injured parties even if the latter concept continues to exist in the jurisprudence of the Court. In fact, in *Bámaca Velásquez v. Guatemala*, the Court awarded reparations to the direct and indirect victims of the case: the disappeared man, his wife, his father and two

Loayza Tamayo v. Perú (1998)

Victim and injured parties	Reparations for pecuniary damages	Reparations for non-pecuniary damages
Maria Helena Loayza (direct victim)	USD 48,690	USD 50,000
Gissele (daugther)	USD 5,000 (medical expenses)	USD 10,000
Paul Abelardo (son)	USD 5,000 (medical expenses)	USD 10,000
Julio Loayza and Adelina Tamayo (father and mother)	USD 500 (transport expenses)	USD 10,000 (to each parent)
Siblings		USD 3,000 (to each sibling)

[81] IACtHR, *Tibi v. Ecuador*, judgment on the merits and reparations, 7 September 2004, paras. 139–163. Although the violations that took place in this case, such as arbitrary detention and torture, could be considered gross, they did not take place as part of a general practice of arbitrary detention and torture in Ecuador. Nevertheless, it is possible to infer that if the Court treated as victims the next of kin of Mr. Tibi despite the absence of a general practice, such treatment is to be also expected in cases where there is a general practice in the country of arbitrary detention and inhuman treatment.

[82] IACtHR, *De la Cruz Flores v. Perú*, judgment on the merits and reparations, 18 November 2004, para. 162.

[83] Maria Helena Loayza was subjected to arbitrary detention and inhuman treatment in Peru during Fujimori's fight against the Shining Path.

De La Cruz Flores v. Perú (2004)

Victims	Next of kin Reparations for pecuniary damages[84]	Reparations for non-pecuniary damages[85]
Mrs. De La Cruz Flores (direct victim)	Loss of income USD 39,050	USD 80,000
Widow of de la Cruz (mother)	USD 5,000 for expenses	USD 40,000
Ana Teresa (daughter)		USD 30,000
Danilo (son)		USD 30,000
Alcira Isabel de la Cruz (sister)	USD 5,000 for expenses	USD 30,000
Other siblings		USD 15,000 each

of his siblings,[86] and to Alberta Velásquez, another sister, as an injured party (but not a victim in the case). Alberta had a very close relationship with Mr. Bámaca during his childhood and her existence was unknown to the Commission until very late in the proceedings of the case.[87] This case shows that the Court maintains the concepts of victim and injured party despite the recent expansion of the former concept.[88]

So far, it has been shown that in the past the Court treated those who suffered the consequences of gross human rights violations as 'injured parties' and 'victims' but that the latter category was mostly applied to few persons in each case. This tendency by the Court has been reversed. The Court now treats the majority of persons who suffer the consequences of gross human rights violations as victims using the category of 'injured party' in exceptional cases as in *Bámaca*. Despite the importance that such a shift represents, the Court keeps the concept of injured party as distinct from that of victim as it provides the

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[84] Loayza Tamayo, *supra* n. 64, paras. 151–154.

[85] *Id*, paras. 159–163.

[86] *Bámaca Velásquez v. Guatemala*, judgment on the merits, 25 November 2000, paras. 145g, 159–166; judgment on reparations, paras. 30–36.

[87] *Id*, judgment on reparations, para. 36. The Court considered Alberta as an injured party taking into account that the direct victim of the case and his next of kin belong to the Mam community, that they are not very good at communicating their feelings and that Alberta lived in a different place than her brother.

[88] See also the case of *Palamara Iribarne v. Chile*, judgment on the merits and reparations, 22 November 2005, para. 237, where the Court also recognised the wife of Mr. Palamara, the victim in the case, as an injured party (but not as a victim). Although this case is not related to gross human rights violations, it is important to note the treatment given by the Court to the next of kin of victims in other cases. Such treatment also reiterates the point made in relation to *Bámaca*.

Court with a legal tool to protect persons who experience suffering as a result of gross human rights violations but who are not considered by the Court as victims. This is particularly important as the standard and burden of proof applied by the Court in relation to who can claim to be a victim of gross human rights violations under the ACHR are very rigid as later case law suggests, and in light of current reforms of the system sought by OAS member States.[89]

The second development of this period that deserves attention is the recognition the Court gives to potentially unknown/unidentified victims. In cases of gross human rights violations such as massacres or massive disappearances, where it is difficult to individually establish each of the possible victims, the Court has adopted a flexible approach that allows it to provide unknown victims with reparations and also to repair the harm produced to communities.

In *Massacre of Plan de Sánchez v. Guatemala*, the Court knew of a case where approximately 268 members of the indigenous community Achi were killed by military personnel in 1982. Although the surviving victims were under permanent threat, the State never carried out effective investigations, prosecutions and punishment of the perpetrators, instigators and accessories of the crimes. Several reasons explain the difficulties of establishing the victims in the case. For instance, more than fourteen years passed between the time the facts of the case began to take place and the time when the petition was filed with the Commission. Additionally, most of the surviving victims had fled from the area of the massacre out of fear for their personal safety and intimidation while others were only visiting the area from neighbouring towns on the day of the massacre because it was market day.

The Court considered in its decision on the merits that the victims of the violations of the right to humane treatment, right to fair trial, right to privacy, freedom of conscience and religion, freedom of expression, freedom of association, right to property, right to equality and right to judicial protection of the ACHR are the persons listed by the Commission in its application "and those that may subsequently be identified, since the complexities and difficulties faced in identifying them lead to the presumption that there may be victims yet to be identified".[90]

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[89] See for example the remarks by the Delegation of Colombia in the last Permanent Council Special Meeting, 4 April 2008. Colombia presented a preliminary study made by Brazil, Panama, El Salvador, Chile, Perú and Mexico with diverse proposals, including 1) The need to individualise the victims in both the proceedings before the Commission and the Court as lack of such identification breaches the right to defence of the State; 2) Reparations by the Court should take into account 3 key issues: the subsidiary nature of reparations, the aspirations of the victim to obtain fair reparation and the amount of monetary compensation that should be awarded. If such proposals were to materialise, the Court would not have other choice than to go back to its concept of 'injured party' as that would be the only open door to recognise the harm suffered by all those who were not individualised in due time before the Court. See: www.oas.org/OASpage/videosondemand/home_eng/videos_query.asp?sCodigo=08-0129#. See also the references of this chapter to the case of *la Cantuta* and the treatment of siblings by the Court.

[90] IACtHR, *Plan De Sánchez v. Guatemala*, judgment on the merits, 29 April 2004, paras. 47–48.

Nevertheless, as the Commission or the next of kin of the victims were unable to identify other people, the Court considered, at the reparations stage, that although it was unable to establish compensation for victims who had not been duly identified it reserved the right to determine other forms of reparation in favour of all the members of the communities affected by the facts of the case, among other reasons due to the gravity of the facts.[91] A total of 317 victims were duly identified before the Court. The reparations awarded by the Court are given in the table below.

The Court dealt with the case of *Moiwana v. Suriname* in a similar manner. It required those persons of the Moiwana community who had not proven their identity to the satisfaction of the Court (using identity cards or similar documents) to do so to receive their award within 24 months of the decision by the

Case of Massacre of Plan de Sánchez v. Guatemala (2004)

Victims	Pecuniary damages	Non-pecuniary damages	Satisfaction measures (apply to all victims and to the members of the community)[92]
To each of the surviving victims[93] To the members of the Community	USD 5,000	USD 20,000	Obligation to investigate, prosecute and punish those responsible (right of the victims to know the truth). Public act acknowledging State responsibility in the village of Plan de Sanchez, with the presence of high State authorities and with the members of the different communities affected, in Spanish and in Maya-Achi. Translation of the judgment of the Court to Maya-Achi. Publication in a national newspaper of national circulation of the proven facts of the case and other parts of the judgment.

[91] IACtHR, *id*, judgment on reparations, 19 November 2004, paras. 62 and 86.
[92] *Id*, paras. 90–116.
[93] The Court also distinguished between victims whose identity has been duly proven (because an identity card or similar document was presented to the Court) and those other victims who had not adequately proven their identity but who were named by the Commission or other victims. The Court also awarded reparations to them but conditioned such awards. Each of those victims would have to prove their identity somehow to the State when claiming the reparation awarded. *Id*, para. 67.

Continued

Victims	Pecuniary damages	Non-pecuniary damages	Satisfaction measures (apply to all victims and to the members of the community)
			USD 25,000 for the members of the community as guarantee of non-repetition and to honour the collective memory of the victims. Housing programme for the surviving victims of the massacre who lost their houses as a result of the State's actions. Medical and Psychological treatment to victims including medicines. Development programmes for the members of the community (dissemination of Maya-Achi culture, maintenance and improvement of roads in the area, sewage system and potable water supply, supply of teaching personnel with intercultural skills and the establishment of a health centre).

Court. Nevertheless, the Court recognised that Suriname did not have in place a good and accessible system to register persons in the country or to provide them with identity cards, therefore it was not possible to require the victims to prove the impossible.[94] As a result, the Court established alternative methods to prove their identity such as "a statement before a competent state official by a recognised leader of the Moiwana community members, as well as the declarations of two

[94] In *Aloeboetoe*, the Court had already considered that Suriname was not providing means of identification to people living in the area of the Saramakas. Therefore, the Court concluded that "Suriname cannot, therefore, demand proof of the relationship and identity of persons through means that are not available to all of its inhabitants in that region. In addition, Suriname has not here offered to make up for its inaction by providing additional proof as to the identity and relationship of the victims and their successors", *supra* n. 34, paras. 64–65.

additional persons, all of which clearly attest to the individual's identity".[95] And again, the Court awarded reparations – satisfaction measures – to the N'djuka community and not only to individual persons in view of the gravity of the facts and their existence as a collective unit.[96]

The case of *Mapiripán v. Colombia*[97] further refined this approach by awarding reparations to potentially identifiable victims after the decision of the Court. The AUC, a paramilitary group in Colombia, with the help and acquiescence of the military in Meta, took over the town of Mapiripán for some days and massacred approximately 49 persons who were then thrown into the Guaviare River. As a result of the massacre and subsequent threats and intimidation, several persons were displaced from Mapiripán, making it impossible to fully identify the victims of the case.[98] This was acknowledged by the Court, which considered that it will not be able to award material damages to unidentified victims.[99] Nevertheless, the Court was of the view that as Colombia recognised its international responsibility in the case, any unidentified victim could claim reparations as ordered by the Court. Unidentified victims could claim reparations if they:

1) Appeared within 24 months of the notification of the identification of the remains of their next of kin before the national mechanism set up for reparations in the case; and
2) Proved their relationship with the deceased using an identity card, a birth certificate or with the declaration of two attesting witnesses.[100] As a result, and in contrast with *Moiwana* or *Plan de Sanchez*, the Court awarded moral damages to persons other than the identified victims as potentially identifiable ones.[101]

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[95] IACtHR, *Moiwana v. Suriname*, judgment on the merits and reparations, 15 June 2005, para. 178.

[96] It is important to note that although the N'djuka community was not considered by the Court in the section titled "beneficiaries of reparations" as such, the Court stated the following some paragraphs later: "Given that the victims of the present case are members of the N'djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole in subsection D". This permits to conclude that the community was acknowledged by the Court as a recipient of reparations. *Id*, para. 194.

[97] IACtHR, *Mapiripán v. Colombia*, judgment on the merits, 15 September 2005.

[98] *Id*, paras. 96.29–96.67.

[99] *Id*, para. 247.

[100] *Id*, para. 257.

[101] Something similar took place in *Castro Castro Prison v. Perú*, judgment, 25 November 2006, para. 420.

Indeed, it ordered the following:

Mapiripán v. Colombia (2005)

Victim[102]	Moral damage	
For the approximately 49 persons who were executed o disappeared (whether identified or not)	USD 80,000	USD 10,000 In addition for the two minors that were executed
Mother, father, wife, companion, and children of the executed/ disappeared	USD 50,000 (for each of them)	
Sister or brother of the executed/ disappeared	USD 8,500 (for each of them)	
To the persons who were boys and girls when the facts of the case took place	USD 5,000 (for each of them)	

In this case, the Court did not award reparations measures to the members of the community or to the community as 'victim' or 'injured party' as in the cases of *Massacre of Plan de Sánchez* and *Moiwana*. However, the Court did award satisfaction measures such as the construction of a monument in Mapiripán to remember the massacre, which is deemed as a non-repetition measure benefiting future generations. The following table provides an overview of the satisfaction measures that were awarded in the *Massacres of Plan de Sanchez* and *Mapiripán*.

Comparative table – massacres of Plan de Sanchez and Mapiripán

Satisfaction measures	Massacre of Plan de Sanchez	Mapiripán[103]
Obligation to investigate, prosecute and punish those responsible (right of the victims and their next of kin to know the truth)	X-C[104]	X-C
Identification of the Victims and their next of kin		X
Establishment of a mechanism to monitor reparations in the case in relation to the victims and next of kin		X
Public act acknowledging State responsibility/apology	X-C[105]	X-C

[102] *Mapiripán*, *supra* n. 97, paras. 288–290.
[103] *Id*, paras. 294–318.
[104] X refers to measures awarded by the Court in the case.
[105] X-C refers to measures awarded to the members of the community or the community as injured party and/or to others beyond such intermediate community. The Court usually refers to "society as a whole" to mean those others who benefit from reparations measures.

Continued

Satisfaction measures	Massacre of Plan de Sanchez	Mapiripán
Building a Monument		X-C
Translation of the judgment of the Court to Maya-Achi	X-C	
Publication in a national newspaper of national circulation of the proven facts of the case and other parts of the judgment	X-C	X-C
25,000 USD for the community as guarantee of non-repetition and to honour the collective memory of the victims. The money should be used to main-tain the Chapel where the victims pay homage to those who were executed during the massacre.	X-C	
Housing programme for the surviving victims of the massacre who lost their houses as a result of the State's actions.	X	
Medical and Psychological treatment to victims including medicines.	X	X
Development programme for the community (dissemination of Maya-Achi culture, maintainance of roads in the area, sewage system and potable water supply, supply of teaching personnel with intercultural skills, establishment of a health centre	X-C	
The State should guarantee the safety of the displaced persons who decide to return to Mapiripan		X
Human Rights Training and education		X-C

This table facilitates the consideration of the third development of this period: the recognition of members of a community as 'victims' and 'injured party.' Indeed, the Court recognises that reparations have an important collective dimension.[106] Such recognition is reflected in the awards of the Court in two different but interrelated areas. Firstly, some of the reparations awards included in the table have as a recipient the members of a particular community or the community as is the case

[106] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, judgment on the merits and reparations, 17 June 2005, para. 188.

in *Massacre of Plan de Sanchez* with the money given to maintain the Chapel where the community pays homage to those executed in the massacre. In the case of *Massacre of Plan de Sanchez* the Court did not consider the members of the community as a whole to be victims of violations under the ACHR.[107] However, it treated them as injured parties even though it did not name them as such in the section entitled "beneficiaries" of reparations.[108] Nevertheless, in this section of the judgment the Court stated that "… [it] reserves the possibility to determine … other forms of reparation in favour of all the members of the communities affected by the facts of the case".[109] On the contrary, in the case of *Moiwana* an interesting development took place. The Court considered the members of this community as victims of multiple violations of rights under the ACHR. Therefore, the reparations awards in this case were to the victims as such and not to them qua injured parties. Such a view by the Court also implies that it has extended the concept of victim to also include members of certain communities.

The most explicit recognition of members of a particular community as victims and injured parties is provided in *Saramaka v. Suriname*. It is not a gross human rights violations case but nevertheless establishes an important precedent for the future jurisprudence of the Court. In the instant case the Court expressly indicated that

> The Tribunal has previously held that in a contentious case before the Court, the Commission must individually name the beneficiaries of possible reparations. However, given the size and geographic diversity of the Saramaka people, and particularly the collective nature of reparations to be ordered in the present case, the Court does not find it necessary in the instant case to individually name the members of the Saramaka people in order to recognize them as the injured party. Nevertheless, the Court observes that the members of the Saramaka people are identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal lös in which the community is organized.
>
> Thus, in accordance with the Court's jurisprudence regarding indigenous and tribal peoples, the Court considers the members of the Saramaka people as the "injured party" in the present case who, due to their status as victims of the violations established in the present Judgment (…), are the beneficiaries of the collective forms of reparations ordered by the Court.[110]

Such awards to the members of the community or to the community as a whole are common in cases where the Court considers that the rights of members of

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[107] *Massacre of Plan de Sanchez*, judgment on the merits, *supra* n. 90, paras. 47–48.

[108] Since the *Loayza Tamayo* case the Court includes a section in every judgment on reparations entitled "beneficiaries" where it identifies those persons that will be the recipients of the awards. In those sections the Court deals with direct and indirect victims and injured parties.

[109] *Massacre of Plan de Sanchez*, *supra* n. 90, para. 62. See also fn 98 of this chapter.

[110] *Saramaka v. Suriname*, *supra* n. 14, paras, 188–189. See also *Sawhoyamaxa Indigenous Community v. Paraguay*, judgment on the merits and reparations, 29 March 2006, paras. 204–209.

such groups have been breached. The Court understands by members of the community or to the community as a whole, those peoples, indigenous or not,[111] who are connected by a strong and unique bond with their ancestral land that determines their culture, way of life, beliefs and survival.[112]

Secondly, the table also illustrates other reparations measures such as human rights training and education of armed forces and security agencies that benefit both individual members of the community, (such as the people of the town of Mapiripán), and more importantly, the 'society as a whole'.[113] The Court has not clearly defined the meaning of those terms. Nevertheless, the Court tends to use these terms in the context of State parties' general obligations under the ACHR, namely to: 1) Take all necessary measures to respect the rights under the Convention; 2) Ensure their free and full exercise; 3) Adopt all necessary measures, (beyond that of a legislative character), that are necessary to make domestic law, national institutions and practices compatible with articles 1 and 2 of the Convention;[114] and 4) In the context of the obligation States have to fulfil the right to know the truth that belongs to victims of gross human rights violations and their next of kin.[115]

Indeed, when the Court considered Colombia's obligations to investigate, prosecute, and punish the perpetrators of disappearances of the direct victims in *19 Tradesmen v. Colombia*, it recalled that these obligations 'benefit […] not only the next of kin of the victims, but also *society as a whole*, because, by knowing the truth about such crimes, it can prevent them in the future' [116] (emphasis added). This case underscores how the Court can infer 'society as a whole' to be synonymous with the State in question. For example, in more recent cases it is common to find references to the benefit that such reparation measures would bring to 'Peruvian Society,'[117] 'Colombian Society'[118] and 'Paraguayan Society'.[119]

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[111] *Moiwana*, *supra* n. 95 and Saramaka v. Suriname, *id*.

[112] *Awas Tingni v. Nicaragua*, judgment on the merits, 31 August 2001, para. 149, and *Moiwana*, *id*, paras. 86.6, 101, 129–135.

[113] See as illustrations the following cases where the Court refers to "society as a whole": IACtHR, *Trujillo Oroza v. Bolivia*, judgment on reparations, 27 February 2002, para. 110; *La Cantuta v. Perú*, 29 November 2006, judgment on the merits and reparations, para. 162; *Almonacid Arellano v. Chile*, judgment on the merits and reparations, 26 September 2006, para. 157. See also, J. Schönsteiner. "Dissuasive Measures and the "Society as a Whole": A Working Theory of Reparations in the Inter-American Court of Human Rights" in 23(1) *American University International Law Review* (2008), 127–164.

[114] IACtHR, *Trujillo Oroza v. Bolivia*, judgment on reparations, 27 February 2002, para. 110.

[115] *La Cantuta* and *Almonacid Arellano*, *supra* n. 113.

[116] IACtHR, *19 Tradesmen v. Colombia*, judgment on the merits and reparations, 5 July 2004, para. 259.

[117] IACtHR, *Gómez Palomino v. Perú*, *supra* n. 80, para. 78 and 139.

[118] IACtHR, *Ituango Massacres v. Colombia*, judgment on the merits and reparations, 1 July 2006, para. 399.

[119] IACtHR, *Goiburú v. Paraguay*, judgment on the merits and reparations, 22 September 2006, para. 165.

The measures that benefit society as a whole are satisfaction and/or non-repetition.[120] As such they do not aim to provide reparations to 'society as a whole' as an injured party in the terms of article 63.1 of the ACHR. On the contrary, the collective dimension of such measures is their result as they serve to restore the legal order, they work to prevent future violations and as a form of dissuasion.[121] Therefore, while these measures aim to produce structural changes that could allow the State in question to fulfil its human rights obligations, they also have the potential to benefit both the communities who have suffered violations and future generations as such measures would prevent repetition of breaches. This means that beyond the intrinsic relationship that exists between the concepts of 'victims' and 'injured parties,' the reparations awards of the Court also benefit others that could be called beneficiaries. Nevertheless, such persons are not necessarily 'injured parties' and cannot necessarily claim to have been harmed.

During this period, the use of presumptions for the establishment of injured parties experienced drastic and not always consistent change. In 2001, the Court extended to siblings the presumption that they suffer moral damages similar to those of parents of a disappeared or arbitrarily killed person, who suffer as a result of their child's torment. Indeed, in *Paniagua Morales v. Guatemala*, the Court held that the moral damages suffered by the brother of the dead victim was duly proven as there was clear evidence of the strong emotional ties between the two brothers by virtue of their having lived under the same roof. Nevertheless, the situation of this brother was not the same as the rest of the siblings of the deceased, as they could not prove the same emotional ties. Despite this, the Court presumed the existence of moral damage and awarded them reparations arguing that "with regard to the victim's other siblings, it is evident that they form part of the family and even when they do not appear to have participated directly in the measures taken in the situation by the mother and by the sister-in-law, this does not mean that they were indifferent to the suffering caused by the loss of their sister, particularly when the circumstances of death were so singularly traumatic".[122]

The Court has continued to apply this presumption to the siblings of disappeared or arbitrarily killed persons[123] as seen in cases like *Pueblo Bello v.*

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[120] The obligation to train security personnel is a non-repetition measure while the obligation of the state to investigate, prosecute and punish the perpetrators of gross human rights violations is a satisfaction measure, a non-repetition measure as well as a primary human rights obligation of the State.

[121] International Law Commission, *Draft Articles on State Responsibility*, A/56/10, 2001, commentary to article 30, 89–90.

[122] IACtHR, *Paniagua Morales v. Guatemala*, judgment on reparations, 25 May 2001, para. 110.

[123] The Court, however, has not always been consistent with this rule. In *Gómez Palomino v. Perú*, the State did not recognise its international responsibility for the inhuman treatment that the siblings of the main victim claimed to have suffered as a result of a violation of Art. 5 of the

Colombia[124] or *Goiburú et al v. Paraguay*.[125] It should be noted, however, that the Court seems to be revising the application of this presumption to siblings. For example, in *la Cantuta v. Perú*, ten persons were subjected to disappearance as part of a systematic practice of disappearances within the country.[126] In this case, the Court only deemed some siblings of the direct victims as 'victims' and 'injured parties' based on the fact that there was evidence that they had suffered inhuman treatment and moral damages and not as a result of the Court applying the presumption under discussion.[127] As a result, the Court did not treat other siblings as victims or award them reparations as injured parties because the Court considered that it lacked sufficient evidence to prove damages even though the Commission and the legal representatives of the next of kin found otherwise.[128]

As a result of the decision of the Court in this case, the representatives of the victims requested that the Court interpret different parts of the judgment. In particular, they asked the Court to explain why it did not consider some siblings as victims under article 5.1 of the ACHR and/or as injured parties. The Court reaffirmed its view that in the case of siblings evidence was required to prove damages under article 5.[129] Judge Cançado Trindade clearly states in his concurring opinion that this constitutes a setback in the practice of the Court, especially when the facts of the case were so serious:

> How can an international human rights tribunal such as this Court put upon the [siblings] or their next of kin the *onus probandi* not only of the facts, but of feelings as well? How can it demand from the alleged victims or their next of kin the evidence of a damage that can be considered a non-pecuniary damage? And, even when, with a great effort of the imagination, this was possible, what purpose would

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ACHR. The Court, to look at whether they were victims of a violation or Article 5, analysed in detail their relationship with the victim. The distinction between this case and those where the Court applied the presumption for moral damages can be explained because here the Court was dealing with a claim of a violation of a Convention right and not with reparations. If this argument is acceptable, then the IACtHR is not contradicting its jurisprudence with this case. Nevertheless, it should be noted that the Court is not entirely clear when distinguishing the grounds to claim, as the next of kin of a direct victim; that X person has suffered a violation of art. 5 of the ACHR and/or has suffered moral damages. The reasoning of the court in relation to both points tends to overlap.

[124] *Pueblo Bello*, *supra* n. 80, para. 257.

[125] *Goiburú*, *supra* n. 119, para. 159.

[126] IACtHR, *la Cantuta v. Perú*, *supra* n. 113, paras. 216–220.

[127] *Id*.

[128] *Id*, para. 128.

[129] Since the Court is now ready to find that some of the next of kin of the direct victim could also be considered victims, for instance, of inhuman treatment, the prior approach of the court of applying the presumption of suffering to the next of kin (or some of them) when awarding moral damages at the reparations' stage has shifted and is now applied when the Court considers whether such next of kin could be considered as a victim of article 5 of the ACHR (the right to human treatment). Therefore, there seems to be an intrinsic link between moral damages and violations of article 5 of the ACHR.

> it serve, if the determination of the non-pecuniary damage is normally done through a judgment of equity?
>
> …
>
> It is possible to imagine, as a general rule, that in our Latin American societies, where family ties are maintained tight (or at least tighter than in other post-industrial social environments), a brother or sister of a person massacred or disappeared will not undergo a personal suffering? Is it possible to imagine, as a general rule, that they will not continue to suffer in the case of a violent death of a brother or sister? Is it possible to imagine, as a general rule, that they will not continue to suffer in the event of a forced disappearance of a brother or sister? For me, this is unimaginable, as a general rule. Even so, this Court stated, in the present case of *la Cantuta*, that it requires additional evidence of the damage to the brothers or sisters of the people illegally detained, executed, and disappeared…[130]

This position clearly constitutes a setback for the Court. Whenever a sibling of a deceased victim wants to be considered as a 'victim' under article 5 of the ACHR, the onus is on the sibling, his/her legal representative or the Commission to prove that the sibling and the deceased had a very strong emotional bond. A mere consanguinity link will not suffice for this purpose.

This period reflects the IACtHRs' understanding of the terms 'injured party' and 'victim' allowing several conclusions to be drawn. First, the Court accepts the existence of both direct and other (indirect) victims of gross human rights violations regarding disappearances, arbitrary killings, arbitrary detention and inhuman treatment. Thus, the term 'victim' should be understood to mean the person(s) or other members of a community, whose rights under the ACHR or other relevant treaties, have been violated according with decisions or judgments of the Court resulting from:

1) The first and direct infringement of rights of the person (direct victim); and/or
2) New violations resulting from a primary violation (indirect victim).

The second category refers to those persons who suffer inhuman treatment as a result of the arbitrary killing, disappearance of inhuman treatment/arbitrary detention of a beloved one or whom, as a result of subsequent facts to the primary violation, suffer a new violation of their rights as when there is a lack of effective investigation, prosecution and punishment of the perpetrators. The important point is that both direct and indirect victims are 'victims' and not only 'injured parties' for the Court. This has important implications at the reparations stage, as already noted, as they are entitled to more substantial reparations awards

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[130] IACtHR, concurring opinion in the interpretation of the judgement in *la Cantuta*, *supra* n. 24, paras. 44, 46.

at least for moral damages. Equally, as we have already seen, the concept of victim extends to members of the community.

Further, the Court recognises the possible existence of potentially identifiable unknown victims that were not duly identified before the Court during the proceedings. The Court also awards them reparations for moral damages as seen in the case of *Mapiripán*. They can have access to such reparations if they prove their identity before domestic institutions in the way required by the Court in the relevant judgment.

Additionally, the analysis above suggests that the Court has deliberately avoided defining the term 'injured party' because the term's vagueness provides the Court with the flexibility to deal with the possible universe of affected persons by gross human rights violations in a better way. Therefore, the term 'injured party' should be read as an umbrella term that covers all those who have been affected by the violations of the ACHR or other applicable treaties as determined by the Court. The concept includes:

i. victims as determined by the Court in the judgment (nowadays the majority of those who receive reparations awards);
ii. the next of kin of victims of gross human rights violations if they have not been considered also as victims (as in the case of *Bámaca Velásquez*);
iii. some of the next of kin as successors/heirs of a deceased person;
iv. dependents (as recognised in the case of *Aloeboetoe*); and
v. members of a community.

Also, the evolution of the case-law within the Inter-American system suggests that the IACtHR has a tendency to treat as 'victims' of violations of rights under the ACHR those formerly treated only as 'injured parties'. However, this does not mean that the term 'injured party' is no longer applicable in the Court's jurisprudence. The term 'injured party' continues to be relevant in cases such as *Bámaca Velásquez* and when dealing with community harm. This is true regardless of recent cases such as *Moiwana* and *Saramaka* that suggest that the Court has moved towards considering members of such communities as 'victims' of violations under the ACHR and not merely as 'injured parties.' It should be noted that the concept is important to grant reparations to members of the extended family, to possible dependents and to others such as eyewitnesses or members of intermediate communities who cannot claim to be indigenous or tribal.

Finally, the IACtHR's recent interpretation in *la Cantuta v. Perú*, represents a serious threat to the achievements mentioned above. The threat comes by virtue of the Court's consideration that two of the siblings of the disappeared did not prove the harm they suffered in order to be treated as victims of violations under article 5 of the ACHR (right to human treatment). In relation to reparations, the Court added the following statement:

> …the injured party is made up by those people that have been declared victims in the Judgment and in favour of who the Tribunal "[w]ill order[…] that the consequences of the measure or situation that have made up the violation of those rights be repaired.[131] (sic)

If this statement leads to the conclusion that the siblings are not entitled to be deemed as 'injured parties' for reparations because the Court did not consider them as victims, then the Court is contradicting its own case law.[132] The Court has previously recognised persons and even communities, who were not treated as 'victims' as 'injured parties,' in its judgments.[133] If this similarly means the Court has begun to limit the concept of 'injured party' to include only the victims of human rights violations under the ACHR, this should be deemed a monumental step backwards regarding the treatment owed to those subjected to gross and systematic human rights violations, particularly if the Court applies such a rigid burden and standard of proof as seen in the case of *la Cantuta*. The recent case of *Kimel v. Argentina*[134] also uses the same narrow concept of injured party as *la Cantuta*, and confirms the existence of a massive and regrettable change in the jurisprudence of the Court. An expansive concept of 'injured party' vis-à-vis that of 'victim' seems to be important to compensate, as far as possible, the suffering that has been borne by people, beyond those of 'direct victims' and their next of kin, to include other persons and their communities. Such a reading is possible under article 63.1 of the ACHR and as previously noted, has been sustained by the Court in its judgments since it decided its first case.

C. *Conclusions*

This chapter has analysed the terms 'victim' and 'injured party' used by the IACtHR when determining reparations under article 63.1 of the ACHR. Most of the chapter was focused on clarifying the understanding of the Court of these legal concepts as they are the filters that could allow a person to claim and receive reparations by

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[131] IACtHR, interpretation of the judgment in *la Cantuta*, *supra* n. 24, para. 31.

[132] The interpretation of the judgment by the Court is confusing as the Court first indicates that they are not victims of article 5 and therefore cannot be treated as injured parties but some paragraphs later it indicates that it considered in the judgment that "all the next of kin", including the two siblings, were victims of violations of articles 8(1) and 25 of the ACHR (right to fair trial and judicial guarantees respectively), and a that as a result they were entitled to reparations as injured parties. Nevertheless, the Court did not award any reparations to them but it recommended in the interpretation of the judgment that they go to the domestic system and claim reparations for such violations. Paras. 33–35.

[133] See e.g., *Bámaca Velásquez, supra* n. 86; *Cantoral Benavides v. Perú*, judgment on the merits, 18 August 2000.

[134] IACtHR, *Kimel v. Argentina*, judgment on the merits and reparations, 2 May 2008, para. 102.

the Court. Understanding both concepts is, therefore, of outmost importance for those who suffer the consequences of gross human rights violations.

The practice of the Court contains important elements that should be carefully studied by other international and domestic courts and bodies dealing with similar situations. At the very least, regional human rights courts and domestic bodies in charge of implementing domestic reparations programmes, should broaden the concepts of 'victim' and use the concept of 'injured party' as distinct but related to the former. Indeed, it is clear that when gross violations take place a universe of persons experience suffering and other types of damages. International law has responded in some way or another to the suffering and damages experienced by direct victims and some of the next of kin either as injured parties or as indirect victims. Consequently, others such as members of the extended family such as siblings, members of the community, or eyewitnesses who have suffered (even if to a lesser degree) as a result of gross human rights violations, do not receive reparations. The concept of 'injured party' opens a new opportunity for redress in relation to all those other persons, an option that follows from article 63.1 of the ACHR that refers to 'injured party' and not to 'victim.' Such an approach could become important if combined with a creative approach to possible reparations measures. Here, however, it should be remembered that although the Court has used in its jurisprudence both terms: 'victim' and 'injured party', the latter concept is only used in exceptional cases nowadays and has been used mainly to grant reparations to the next of kin of a direct victim. Therefore, the concept has not been used by the Court in a revolutionary way. On the contrary, the approach of the Court has been timid even if important. Therefore, a more creative use of the latter concept could help to compensate the suffering of people other than victims and their close next of kin. This is a challenge that the IACtHR has to face in the future.

Clarifying the complex relationship and differences between the terms 'injured party' and 'victim' during different moments in the jurisprudence of the Court has made clear that although the two concepts are not equivalent, there is a relationship of dependence between the two of them that should continue to exist. Indeed, the achievements of the Court in terms of reparations for gross human rights violations are not merely the result of the different types of reparations measures it awards but of its understanding of the terms 'victim' and 'injured party' and more importantly, of the combination of the two concepts. Such a conclusion follows from the practice of the Court even if it considers that each case has to be looked at on its own merits at the reparations stage and that the previous treatment of other cases cannot be seen as a precedent for future ones.[135]

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[135] *El Amparo*, *supra* n. 44, para. 3; *Neira Alegria v. Perú*, judgment on reparations, 19 September 1996, para. 52.

Despite this caveat, according to the Court the term injured party is an umbrella term that covers: victims (direct and indirect); potential victims; the next of kin of the victims who are not recognised as victims in the judgment; the next of kin of the victims as successors/heirs; dependents; and members of communities. The cases of *la Cantuta* and *Kimel* challenge such a structure, as they consider that 'injured parties' are only the victims of violations of the ACHR as decided by the Court, and no one else.[136]

This recent change jeopardises one of the most valuable contributions the Court has made to reparations for gross human rights violations under international law. Indeed, the combination of the concepts 'victim' and 'injured party' for the purposes of reparations places the work of the Court ahead of the content of the Basic Principles and closer to the understanding of the UN Convention on Disappearances. Indeed, as already noted, the Basic Principles consider as victims any individual and/or collective persons who suffer different types of harm as a result of gross human rights violations or of serious violations of humanitarian law but conditions the treatment of others such as next of kin or dependents to domestic law and to the appropriateness of such treatment. The dichotomy of 'injured party' and 'victim' goes beyond the Basic Principles as it considers that the next of kin of direct victims of gross human rights violations are also victims (at least those members of the nuclear family), that dependents could exist if duly proven and that other members of the extended family could also be victims and exceptionally injured parties. The IACtHR does not condition its understanding of the next of kin to what a state party to the ACHR considers them to be under domestic law. Equally, the Court has extended the concept of victim to 'indirect victims' of arbitrary killings, disappearances and inhuman treatment/arbitrary detention without distinctions based on whether the direct victim of a gross human rights violation is still alive.

The UNCPPED, contains the most generous concept of victims of enforced disappearances. It does not restrict the treatment of a person as a victim to the direct victim or to the next of kin. It provides that "… any individual who has suffered harm as the direct result of an enforced disappearance" could claim to be a victim. Certainly, the Convention appears to go even beyond the IACtHR jurisprudence, at least in what refers to disappearances. However it is still too early to anticipate the understanding that the UNCPPED will have once the Convention enters into force and the Committee on Enforced Disappearances produces an authoritative interpretation of article 24.1 of the Convention. Nevertheless, even if the Committee will interpret the words "direct result" in flexible terms, the Committee is not a Court. The views of the Committee, even

[136] *La Cantuta*, interpretation of the judgment, *supra* n. 25 and 116.

if welcomed, will not be binding on States as are those of the IACtHR in relation to countries that have ratified the ACHR and accepted the jurisdiction of the Court. From this point of view, the current approach of the IACtHR is more significant. It is one of the few regional human rights courts that exist in the world and certainly the only one that has taken very seriously the obligation to afford fair and adequate reparations to those who have suffered gross human rights violations. This is all the more remarkable if it is remembered that the Court is doing so despite the permanent challenges and complaints of States over which the Court has jurisdiction.

This chapter has also drawn attention to the intrinsic relationship that exists between concepts such as 'victim' and 'injured party' and the use of presumptions *juris tantum*. It has been noted that while the Court lacked an enlarged concept of victim (covering direct and indirect victims), the Court used presumptions to consider as injured parties some members of the next of kin of a direct victim of gross human rights violations. This reiterates that more complex elements than the mere definition of victim or injured party are at stake when the identification of victims is taking place. The IACtHR has contributed greatly to international law by establishing a very creative approach and a flexible understanding of evidentiary matters in relation to State liability when gross human rights violations are at stake. The very nature of such violations demands this approach or impunity and lack of reparations for harm suffered would be the rule at the international level in addition to that of the domestic systems. Therefore, it should be regretted that the Court, despite such a well known approach, has decided to move to a more rigid system of standards and burdens of proof as seen in the case of *la Cantuta*.

In connection to this, the Court and its users should bear in mind that although the Court should guarantee equality of arms and fair procedures for both parties in any case, the parties before each case do not have the same *standi* in practical terms as the situation of an alleged victim is notoriously different from that of the State.[137] Such imbalance has to be corrected with the adoption

[137] This is a notorious fact. Most persons who suffer the consequences of gross human rights violations in the hemisphere are persons without economic means to engage in a legal case domestically and even less at the international level. Further, States do not have in place good legal aid systems for such persons and, in many cases, such affected persons do not even know that they can turn to the OAS system for the protection of their rights when domestic remedies are inadequate and/or ineffective. These are just some of the issues that should be borne in mind when the argument that the right of defence of the State might be breached because the Court adopts a victim oriented approach. See, for instance, IACommHR, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II/doc.68, 20 January 2007, available at: www.cidh.org/women/Access07/tocaccess.htm and the Report on *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights*, OEA/Ser.L/V/II.129.Doc.4, 7 September 2007, available at: www.cidh.org/pdf%20files/ACCESS%20TO%20JUSTICE%20DESC.pdf.

of a flexible approach, for instance, to issues such as the identification of victims and, more importantly, to the award of reparations not only to victims (direct and indirect) but of possible injured parties that have not been treated as victims in cases of gross human rights violations.

The chapter has also indicated that the IACtHR uses the concept of 'potentially identifiable' or 'unknown victim' to refer to those persons (direct or indirect victims) whose identity was not established before the Court due to circumstances beyond its control. For example, as when massive displacement occurs resulting from a massacre. Cases like *Plan de Sánchez*, *Moiwana* and *Mapiripán* illustrate the way in which the Court has continued to refine its approach to the issue. In the latter case, the Court acknowledged that such potential victims exist and also awarded them moral damages.

Finally, it is important to note that the achievements of the Court in defining the terms victim/injured party has not been an easy job as the Court has had to face different challenges: from normative to political ones. In relation to the normative ones, the author has shown how the Rules of Procedure of the Court were amended over time with the view to increase the level of participation of victims and their next of kin in the proceedings before the Court. Such reforms have, at the very least, improved the handling of reparations claims. Indeed, it is possible to establish a clear correlation between the standing of victims, their next of kin or their legal representatives at the reparations' stage and the expansion of the concept of 'victim' as their increased participation opened the Court's eyes to the damage they suffered.

Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice

*By Conor McCarthy**

A. *Introduction*

The issue of reparation for gross violations of human rights law and international humanitarian law has been placed firmly under the scrutiny of the International Court of Justice (ICJ) in recent years. Three cases in particular have brought questions regarding reparation to increased prominence in the jurisprudence of the Court. These include *Democratic Republic of the Congo v. Uganda*, the *Bosnia-Genocide* case and the *Wall* advisory opinion.[1] In particular, the findings by the Court in the first of these cases indicate some of the many difficult issues which arise in respect of reparation for gross violations of human rights law and humanitarian law. In that case the ICJ found in paragraph four of the judgment's *dispositif* that:

> …Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, trained child soldiers, incited ethnic conflict and failed to take measures to put an end to such conflict as well as by its failure, as an occupying Power, to take measures to respect and ensure respect for human rights and international humanitarian law in Ituri district, violated its obligations under international human rights law and international humanitarian law.[2]

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[1] *Armed Activities in the Democratic Republic of the Congo (Democratic Republic of the Congo v. Uganda) (Merits)*, I.C.J. Reports (2005), 168 [*D.R.C. v. Uganda*]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits)* 26 February 2007 ["*Bosnia-Genocide*" case]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (Advisory Opinion)* I.C.J. Reports (2004) 136 [the "Wall" advisory opinion].

[2] *D.R.C. v. Uganda (Merits), id.*

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 283–312.

The Court also found that Uganda had violated obligations owed under international law to the Democratic Republic of the Congo (DRC) through "acts of looting, plundering and exploitation of Congolese natural resources" committed by members of the Ugandan Armed Forces and "by its failure to comply with its obligations as an occupying power in the Ituri district to prevent acts of looting, plundering and exploitation of Congolese natural resources".[3]

These findings represent the Court's most wide-ranging determinations to date in a contentious case regarding a state's responsibility for violations of both human rights and humanitarian law and as such raise many important questions regarding reparation in respect of such conduct. Of course, the Court's determination on the merits that the obligation to make reparation has arisen is only the first stage in seeking compliance with and enforcement of that obligation. First, it is necessary to determine what the obligation to make reparation entails in concrete terms. This may be the subject of negotiation or a subsequent procedure before the Court. Once the substance of what the obligation to make reparation entails is determined, the issue is then one of post-adjudicative enforcement. This study will explore several key issues raised by the recent jurisprudence of the ICJ. The analysis will have three parts.

The first part examines three important issues that arise from the Court's recent jurisprudence, in particular its judgment in the *Bosnia-Genocide* case that largely determine the form and extent of reparation required. How is wrongful conduct involving a composite act defined, what forms of harm are recoverable and what principles of causation should be applied? Many human rights and humanitarian law obligations are violated by a course of conduct rather than by a single act. How such conduct is defined has a significant impact in determining the extent of the injury. The relevant principles of causation and how these are applied to acts or *omissions* are also key factors determining the scope of a state's obligation to make reparation, as are the forms of injury treated as recoverable. Recent cases have given the ICJ the opportunity to develop its jurisprudence on these issues, and this chapter appraises these recent developments and their impact on awards for reparation. The second and third parts examine questions of negotiated settlement and post-adjudicative enforcement, considering in particular the key issues raised by gross violations of human rights and humanitarian law that are highlighted by judgment on the merits in *D.R.C. v. Uganda*.[4]

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[3] *Id*. Paragraph (4) of the *dispositif*.

[4] In *DRC v. Uganda* the Court reserved a reparation procedure, in the event that the parties failed to reach agreement on the issue, in paragraphs (6) and (14) of the judgment's *dispositif*. *D.R.C. v. Uganda (Merits), supra* n. 1.

B. *Determining the Extent of Reparation Owed*

The essence of what is entailed by the obligation to make reparation for an internationally wrongful act can be stated quite simply. It was famously laid down by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzów* case where the PCIJ stated that:

> The essential principle contained in the actual notion of an illegal act … is that reparation must, so far as possible, wipe out all the consequences of the illegal act, and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award if need be of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[5]

The definition of reparation contained in the first sentence of this quotation, often referred to as the principle of full reparation,[6] has served as the basis for reparation awards in numerous arbitral decisions,[7] and has been relied upon in many subsequent cases by the ICJ.[8] It is also well-established that this principle is equally applicable to violations of human rights and humanitarian law as it is to other breaches of international law.[9] However, in the context of reparation for gross violations of human rights and international humanitarian law the application of this principle raises several issues. The first of these concerns how the wrongful conduct which gives rise to the obligation to make reparation is defined. In order to determine what full reparation will entail in a concrete case, it is first necessary to establish the precise conduct in respect of which reparation is required. This can be a difficult issue in the context of violations of human rights and humanitarian law.

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[5] *Factory at Chorzów, (Merits)*, 1928, PCIJ Series A, No. 17, at 47.

[6] The Articles on Responsibility of States for Internationally Wrongful Acts [Articles on State Responsibility] drafted by the International Law Commission [ILC] provide that "[t]he responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act". *See* Article 31, Articles on State Responsibility, annexed to General Assembly Resolution 56/83, 22 January 2002, A/Res/56/83. *See also* ILC Commentary to the Articles on State Responsibility [ILC Commentary] to Article 31 in *Yearbook of the International Law Commission 2001* Vol. II Part II, 91, A/CN.4/SER.A/2001/Add.1.

[7] *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al.*, Award No. 141-7-2, 6 Iran-U.S. C. T. R 222.

[8] *Bosnia-Genocide (Merits)*, para. 460, *supra* n. 1; *D.R.C. v. Uganda (Merits)*, para. 259, *supra* n. 1; *Wall (Advisory Opinion)*, para. 152 *supra* n. 1.

[9] *D.R.C. v. Uganda, (Merits)*, para. 259, *supra* n. 1. *See further Velásquez Rodríguez v Honduras*, Judgment, 21 July 1989, Reparations and Costs, Inter-Am Ct. H. R. Series C No. 7. para. 26; *Papamichalopoulos and Others v. Greece*, Just Satisfaction, Grand Chamber, 31 October 1995, para. 34, 21 E.H.R.R. 439.

1. *Breach of an Obligation by a Composite Wrongful Act*

Although reparation entails an obligation so far as possible "to wipe out all the consequences of the illegal act",[10] gross violations of human rights law and humanitarian law may often encompass a complex course of conduct involving a series of acts (or omissions) which may not be unlawful when taken in isolation but which are unlawful when taken as a whole. There are numerous examples of this kind of violation in the Court's findings in *D.R.C. v. Uganda*. In that case the Court found, for example, that Uganda had violated obligations incumbent upon it as an occupying power including Article 43 of the Hague Regulations which provides in the authentic French text that:

> *L'autorité du pouvoir légal ayant passé de fait entre les mains de l'occupant, celui-ci prendra toutes les mesures qui dépendent de lui en vue de rétablir et d'assurer, autant qu'il est possible, l'ordre et la vie public en respectant, sauf empêchement absolu, les lois en vigueur dans le pays*.[11]

The *Bosnia-Genocide* case is a further notable example of a situation where the ICJ was faced with a series of acts and omissions, which were alleged cumulatively to have resulted in various breaches of the Genocide Convention.[12] Indeed, the prohibition against genocide, inherent in Article I of the Genocide Convention, is an obligation that by definition is violated by the commission of a cumulative series of acts.[13] Indeed, depending on the relationship between a state and those carrying out a genocidal atrocity, the same may also be true of the obligation to prevent genocide. Thus, in assessing what the principle of full reparation entails in respect of violations of this kind, a clear definition of the injurious conduct is required.

The ILC's Articles of State Responsibility directly address the question of obligations that are breached by a composite act. Article 15(1) provides that "[t]he breach of an international obligation by a state through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to

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[10] *Factory at Chorzów, (Merits)*, *supra* n. 5.

[11] Article 43 Hague Regulations annexed to Hague Convention IV (1907) Respecting the Laws and Customs of War on Land [Hague Regulations] published in 2 AJIL (1908) Supplement 90–117 (Eng: Fr.). The English translation of Article 43 employed by many states diverges from the authentic French. The following translation by the United States Department of State is typical: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" reprinted in J.B. Scott (ed.) *The Hague Conventions and Declarations of 1899 and 1907* (3rd ed.) [New York: OUP, 1918].

[12] Convention on the Prevention and Punishment of the Crime of Genocide 78 U.N.T.S. 227.

[13] *Bosnia-Genocide (Merits) supra* n. 1, para. 166. *See further* ILC Commentary *supra* n. 6, 62.

constitute the wrongful act".[14] The ILC's Commentary on Article 15 provides further elaboration of the definition of a composite act. It states that "[c]omposite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words their focus is a series of acts or omissions defined in aggregate as wrongful".[15] The commentary gives as indicative examples of such acts international obligations concerning genocide and *apartheid*.[16] There is also considerable jurisprudence in international human rights law recognising the concept of a composite obligation.[17]

So how is reparation to be assessed in respect of obligations that are violated by composite acts? Is it to be judged by reference to harm caused by each of the acts that comprise the composite conduct, or is it to be judged against the harm caused by the wrongful conduct taken as a whole? The approach adopted by the ICJ in the *Bosnia-Genocide* case regarding reparation for Serbia's failure to prevent genocide indicates that, at least in respect of positive obligations, reparation is to be assessed against the injury caused by the conduct taken as a whole.

In its judgment, the Court noted that the Federal Republic of Yugoslavia (FRY), which today has shrunk to Serbia, was in a position of particular influence over the *Republika Srpska* and its army (the VRS) "owing to the strength of their political, military and financial links" which "remained very close" at the time of the Srebrenica massacres.[18] However, in assessing reparation for the injury caused by the FRY's failure to prevent genocide, the Court did not, for example, assess the injury caused by the various acts of military or logistic support which the FRY should have withheld from the *Republika Srpska* were it to have acted in conformity with the obligation to prevent genocide. Instead the Court assessed reparation by reference to the injury caused by the conduct that, in aggregate, comprised the failure to prevent genocide. The question asked by the Court was therefore "…whether there is a sufficiently direct and certain causal nexus between the wrongful act, the Respondent's breach of the obligation to prevent

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[14] Article 15, Articles on State Responsibility, *supra* n. 6.

[15] ILC Commentary *supra* n. 6, p. 62 para. 2 (internal quotation marks omitted).

[16] *Id*.

[17] For example, in respect of the right to life a state is not simply under an obligation to refrain from the act of arbitrarily taking life but is also required to take a range of investigative, procedural and possibly prosecutorial measures where it appears that life may have been taken unlawfully Although the absence of one of these measures does not necessarily imply a violation of the right to life, alongside a failure to take other measures, it may amount to such a violation. *See Herrera Rubio v. Colombia*, Human Rights Committee Communication No. 161/83; "*Mapiripán Massacre" v. Colombia*, Inter-Am. Ct. H. R Ser. C. No. 134 para. 232; *Ergi v. Turkey*, Merits, [GC], 32 E.H.R.R. 18.

[18] *Bosnia-Genocide (Merits), supra* n. 1, para. 434.

genocide, and the injury suffered by the Applicant, consisting of all damage of any type, material or moral, caused by the acts of genocide".[19]

The fact that reparation in respect of a composite act is to be assessed in this way and not by reference to the individual acts which collectively comprise the composite act is, of course, a matter of some significance. As later became apparent in the Court's judgment concerning reparation in the *Bosnia-Genocide* case, it is much more difficult to establish a causal relationship between a form of injury and an abstract course of conduct than it is to establish such a relationship between injury and a single act or omission forming part of a wider course of conduct. This is particularly so in respect of complex positive obligations often found in human rights and international humanitarian law such as those placed on an occupying power concerning its interaction with the civilian population.[20]

2. *Forms of Injury Requiring Reparation*

A further important issue arising from the Court's judgment in *Bosnia-Genocide* and which potentially has important implications for the assessment of reparation in other cases concerning gross human rights violations, concerns the identification and definition of the injury in respect of which reparation is to be assessed. In setting out its approach to this issue the Court considered that a sufficient causal nexus could be established "… only if it were able to conclude … that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations".[21]

In fact, this is something of an oversimplification of the enquiry concerning the injury in respect of which reparation is required and may have led the Court to underestimate the extent of injury caused by the FRY's failure to prevent genocide for which it was obliged to make reparation. In customary international law the principle of full reparation originally set out by the PCIJ in *Factory at Chorzów* requires the responsible state to make reparation in respect of all forms of injury caused by the internationally wrongful act, which in the words of the ILC's Articles on State Responsibility includes "… any damage, whether material or moral, caused by the internationally wrongful act of a state".[22] Thus the causal link between a wrongful act and any particular form of injury assessed individually, and not simply as a part of the totality of injury alleged to have been inflicted

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[19] *Id* para. 462.
[20] *See generally* Section III, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 U.N.T.S. 973 and Section III, Hague Regulations *supra* n. 11.
[21] *Bosnia-Genocide (Merits), supra* n. 1, para. 462.
[22] Article 31, Articles on State Responsibility, *supra* n. 6.

by a wrongful act. As a consequence, even if it was not established that FRY's wrongful conduct was sufficiently causally linked to the genocide at Srebrenica and the material harm sustained by the victims of that atrocity, this does not necessarily lead to the conclusion that there were not other forms of damage, in particular moral injury, which were clearly causally linked to the conduct of the FRY.

Now it is true that the Court did find that the failure to prevent genocide required reparation in the form of satisfaction. However, it is important to be clear about the injury in respect of which the Court provided this reparation. On its face, the Court's findings regarding satisfaction and compensation seem quite incongruous since there cannot be a sufficient causal nexus between a wrongful act and an injury for the purposes of satisfaction but none for compensation. The causal relationship clearly does not vary according to the modality of reparation employed. The only explanation for these seemingly incongruous findings is that they, in fact, relate to separate forms of injury. What was the injury in respect of which the Court provided satisfaction? Was the Court indicating that it considered a declaration of wrongfulness sufficient to provide adequate reparation for the moral harm suffered by the victims of Srebrenica? If so, this is a conclusion which could have much wider implications for reparation in respect of gross violations of human rights and international humanitarian law.[23]

The answer to this question appears to be negative. In holding that its declaration that the FRY had failed to comply with its obligation to prevent genocide was sufficient to provide satisfaction for the injury suffered, the Court cited as authority its earlier decision in *Corfu Channel*. This reference is significant in that it indicates the very narrow form of injury that the Court viewed as attributable to the wrongful conduct of the FRY thereby requiring reparation. In *Corfu Channel* the United Kingdom had conducted a minesweeping operation in Albanian territorial waters after the destruction of several of its ships. The Court acknowledged that there were "extenuating circumstances" for the conduct of the British Navy,[24] however, it went on to recognise that, notwithstanding this, the British operation had violated Albanian territorial sovereignty. As a result the Court provided a declaration to this effect, as a form of satisfaction, in acknowledgment that the very fact of a breach of sovereignty had caused injury to the state. The Articles on State Responsibility also adopt this approach. Article 36 concerns the obligation to pay compensation and limits compensable harm to

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[23] Some writers have read the Court's judgment to this effect and criticised the Court for its narrow approach. Christian Tomuschat, "Reparation in Cases of Genocide", 5 JICJ 905 (2007) 908.

[24] *Corfu Channel, (Merits)*, I.C.J. Reports (1949) 4, 35.

"financially assessable damage".[25] The ILC Commentary to Article 36 points out that this is meant to exclude injury to the states which involves "… the affront or injury caused by a violation of rights not associated with actual damage to property or persons: this is the subject matter of satisfaction, dealt with in Article 37".[26] Thus in *Bosnia-Genocide* the reparation which the Court did provide had a very limited role – it was not meant to redress the moral harm suffered by the victims of Srebrenica but instead represented a narrowly focused acknowledgment of the fact of the breach as, in itself, causing injury to the applicant state.

However, had the Court applied an orthodox approach to determining the injury in respect of which reparation was required, there were several other forms of injury in respect of which it may have concluded Serbia had an obligation to provide reparation. For the victims of the Srebrenica genocide the very fact that a state, which maintained close relations with the *Republika Srpska* and its army and which had serious obligations incumbent upon it under international law, could have taken action to seek to prevent the massacres but did not do so must in itself have added considerably to the moral harm suffered by the victims and their families. This is so irrespective of whether the action, which could have been taken by the FRY, would *certainly* have worked. The fact that it *may* have prevented the massacre or reduced its scale must in itself have caused grave moral harm to the families and loved ones of those who lost their lives.

In international human rights law there is a rich and well-established jurisprudence allowing reparation for forms of moral injury arising from precisely these kinds of circumstances. Where a state fails in its positive obligations, human rights jurisprudence has long recognised distinct forms of moral injury including distress, anxiety, frustration[27] and the sense of helplessness or injustice that may be felt by victims and their families in such a situation.[28] Thus in the case of *Shanaghan v. United Kingdom* the ECtHR said that while it was not in a position to make findings as to whether the security forces had played a role in the killing of the victim, as a result of the state's failure to carry out the positive obligations incumbent upon it with regard to the right to life, "… the applicant must thereby have suffered feelings of frustration, distress and anxiety"[29] and it awarded

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[25] Article 36, Articles on State Responsibility, *supra* n. 6.

[26] ILC Commentary, 98, *supra* n. 6.

[27] *McShane v. United Kingdom*, Merits, para. 156, 28 May 2002, 35 E.H.R.R. 593. *Jordan v. United Kingdom*, Merits, para. 170, 4 May 2001, 37 E.H.R.R. 52; *Edwards v. United Kingdom*, Merits, para. 106, 14 March 2002, 35 E.H.R.R. 487.

[28] *Devenney v. United Kingdom*, 19 March 2002, 35 E.H.R.R. 24 (2002); *Loizidou v. Turkey*, Just Satisfaction, 28 July 1998, para. 39, 20 E.H.R.R. 99; *Las Palmeras v. Colombia*, Reparations and Costs, 26 November 2002, paras. 53–54, Inter-Am Ct. H. R., Series C., No. 96.

[29] *Shanaghan v. United Kingdom*, Merits, 4 May 2001, para. 144., Unreported Application No. 37715/97.

reparation to the victim's family on the basis of these forms of injury. This approach has been applied by the ECtHR on numerous other occasions in circumstances where a state has violated positive obligations concerning the right to life.[30] The Inter-American Court of Human Rights (IACHR) also adopts a similar position where the state has failed to uphold positive obligations incumbent upon it.[31]

In light of this it appears that there were forms of injury, which are well recognised in international jurisprudence, which could quite properly have formed the basis for a wider reparation award. In particular, insufficient consideration was given to the possibility that various discrete forms of moral harm were caused by the FRY's failure to prevent genocide including the frustration, sense of injustice, helplessness and anguish which may have been caused by the fact that a state which was in a position to help prevent genocide in Srebrenica failed to use its best efforts to prevent it and instead continued to provide military, political and financial support to those who were responsible for committing the genocide.

3. *The Role of Causation in Determining the Injury Requiring Reparation*

Defining the scope of the wrongful act and the forms of harm in respect of which reparation is required are only two of the three elements that are important to analysis of the obligation to make reparation. The standard for determining whether a sufficient nexus exists between a wrongful act and a recoverable form of injury is a further, crucial issue in determining what full reparation entails. The complexity of this question is amplified by the many different approaches that various international tribunals have adopted.

In applying the exclusion of remote harm, international adjudicative bodies have adopted various formulae to describe the relationship that must be established for injury to be attributed to a responsible party. The ILC Commentary on the Articles on State Responsibility makes the point that "… the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation".[32] Thus, the existence of different approaches for analysing causation is not simply the result of inconsistency as between various adjudicative bodies;[33] the precise requirements of causation also vary according to the

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[30] *Supra* n. 27.

[31] *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, 31 January 2006, paras. 111 and 256, Inter-Am. Ct. H. R., Series C. No. 140.

[32] ILC Commentary *supra* n. 6, 93, para. 10.

[33] Although there is undoubtedly some inconsistency as to the standard applied in decisions addressing substantially the same question. *See Administrative Decision No. II*, United States-Germany Claims Commission, 7 R.I.A.A. 23 (1923) at 29; *Cf Naulilaa Case* (*Responsibility of*

factual subject matter being regulated and the body of legal principles being applied. Among the range of possibilities, perhaps the most commonly applied criteria are those of "proximity",[34] "foreseeability",[35] and "directness".[36] The *Bosnia-Genocide* case provided the Court with the opportunity to address the question of causation in the context of reparation for genocide.

In its submissions Bosnia asked the Court to declare that "… the Federal Republic of Yugoslavia (Serbia and Montenegro) is required to pay, and the Republic of Bosnia and Herzegovina is entitled to receive, in its own right and as *parens patriae* for its citizens, full compensation for the damages and losses caused …".[37] In dealing with this issue the Court held that a sufficiently direct and certain causal nexus between the FRY's internationally wrongful conduct and the injury suffered by the applicant "… could be considered established only if the Court were able to conclude from the case as a whole and with a sufficient degree of certainty that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations".[38] The Court went on to say that it "… clearly cannot do so".[39] The judgment noted that while the FRY "… did have significant means of influencing the Bosnian Serb military and political authorities which it could, and therefore should, have employed in an attempt to prevent the atrocities,"[40] it said that it had not been demonstrated that "… in the specific context of these events, those means would have sufficed to achieve the result which the Respondent should have sought".[41] As a result the Court concluded that financial compensation was not the appropriate form of reparation for breach of the obligation to prevent genocide. It will be recalled that it did, however, determine that Bosnia was entitled to reparation in the form of

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Germany for damage caused in the Portuguese colonies in the south of Africa (*Portugal v. Germany*), 2 R.I.A.A. 1011 (1928).

[34] *Administrative Decision No. II*, United States-Germany Claims Commission, *ibid*; *Dix*, American-Venezuela Commission, 9 R.I.A.A. 119 (1902) at 121; *War-Risk Insurance Premium Claims*, 7 R.I.A.A. 44 (1923) at 55.

[35] *Naulilaa Case supra* n. 33.

[36] Acting under Chapter VII of the Charter the Security Council affirmed that Iraq "… is liable under international law for any direct loss, damage … or injury … as a result of its unlawful invasion and occupation of Kuwait". Security Council Resolution 687 (1991) para. 16. *See further Recommendations Made by the Panel of Commissioners Concerning Claims Made for Serious Personal Injury or Death* (Category B Claims), 26 May 1994, S/AC.26/1994/1 and *Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US$ 100,000* (Category "C" Claims) 19–22, 21 December 1994 S/AC.26/199S/AC.26/1994/3.

[37] *Bosnia-Genocide, (Merits)*, Memorial of the Government of the Republic of Bosnia and Herzegovina, Submission 7, 294.

[38] *Bosnia-Genocide (Merits), supra* n. 1, para. 462.

[39] *Id*.

[40] *Id*.

[41] *Id*.

satisfaction and that the declaration by the Court that the FRY had violated its obligation to prevent genocide was sufficient relief in this regard.[42]

The Court's approach to determining the reparation owed by Serbia as a result of its failure to prevent genocide is problematic on several grounds. Firstly the standard of factual causation applied by the court *viz.*, that the FRY's failure to prevent genocide needs to have been the condition *sine qua non* of the genocide which in fact occurred, places a burden on the applicant which in many situations will be unattainable and stands in contrast to a significant body of practice in international human rights law dealing with reparation arising from a breach of a positive obligation relating to the conduct of third parties. Secondly, the Court's starting proposition – that a sufficiently direct and certain causal nexus could be considered established " … only if the Court were to conclude from the case as a whole … that the genocide at Srebrenica would in fact have been averted if the Respondent had acted in compliance with its legal obligations"[43] – oversimplifies the nature of the enquiry concerning reparation leading the Court to significantly underestimate the extent of injury which, even applying the stipulated test, could be considered "caused" by the FRY's failure to prevent genocide.

As to the first of these issues, the approach of the Court in requiring that the failure to prevent be the condition *sine qua non* of the genocide, means that even if the failure of a state to act made a substantial and important contribution to enabling a genocidal atrocity, or to augmenting the scale of that atrocity, this would not be sufficient to give rise to a duty to provide reparation in respect of the atrocity where it could have occurred without the conduct of that state. This approach is fundamentally problematic because the very nature of the acts of which genocide is comprised imply that it will rarely be possible to discharge this burden of proof. Very often the combined effect of many factors is required to bring about a genocidal atrocity. These factors may include the actions of non-state actors or the wrongful conduct of several states. As a result it will rarely be possible to conclude that genocide would not in fact have occurred but for the failure of any one state to act. Thus the effect of the Court's approach in setting out the *sine qua non* standard is to allow one party which has wrongfully failed to act to point to the actions or omissions of others to argue that, irrespective of its own wrongful conduct, the genocide may have occurred in any event. In this way a responsible state could avoid providing reparation for the injury caused by a genocide to which it may have made a substantial, though not indispensable, contribution.

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[42] *Id*. para. 463.
[43] *Id*. para. 462.

Moreover, the reasoning of the Court may have wider implications. While it may be that the principles which the Court sets out concerning causation are confined simply to the obligation to prevent genocide, the Court itself does not hinge its reasoning on the fact that the obligation in question relates to an omission rather than an act, nor does it suggest that a different standard of causation may apply in respect of the commission of genocide than applies to the failure to prevent genocide. Moreover, a distinction between the principles applicable to causation for omission and causation through a positive act has not been recognised in the decisions of international adjudicative tribunals including human rights courts and arbitral commissions.[44] For its part, the ILC Commentary on the Articles of State Responsibility does not suggest a distinction in the causative principles applicable to acts and omissions.[45] So although the decision of the ICJ in the *Bosnia-Genocide* case only decides issues relating to reparation for failure to prevent genocide[46] the approach to causation enunciated by the Court may also be relevant to other egregious violations of human rights law or serious violations of international humanitarian law.

If this is the case the problem of concurrent responsibility could be even more acute in relation to responsibility arising from the commission of a wrongful act than it is for causation through omission. Where several states or a state and various non-state actors are involved in the commission of an atrocity entailing the responsibility of the state, the court's analysis of causation leaves open the argument that as a result of the important role which these other parties played in an atrocity it is possible that the relevant injury would have occurred even if the responsible state had complied with its own obligations and that it is therefore not required to make reparation in respect of the atrocities. An even starker example is where several states collectively cooperate in the commission of egregious violations of fundamental international obligations. While all states may be responsible for the commission of the relevant violation it may well be that the contribution of no single state was indispensable and that the relevant atrocity would have occurred even if any single state had not been involved. This would create the very peculiar situation where, although all such states had an obligation to make reparation, the only reparation which the

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[44] For example in *Z v. United Kingdom* the Grand Chamber of the European Court of Human Rights (ECtHR) found the United Kingdom responsible for failing to protect several children from serious and sustained abuse and neglect in violation of the Article 3 prohibition on inhuman and degrading treatment. The Court explicitly applied its standard principles of causation in determining the reparation owed to the victims. *Z v. United Kingdom*, Merits, [GC], 10 May 2001, para. 119, 34 E.H.R.R. 3. *See also Alabama Claims* arbitration in Vol. I Moore's History and Digest of Int'l Arb. 623.

[45] ILC Commentary *supra* n. 6, p. 34 para. 8 and p. 92.

[46] *See Bosnia-Genocide (Merits) supra* n. 1, para. 429.

Court would be in a position to provide is a declaration of wrongfulness as a form of satisfaction.

This seems a remarkable position and one that is also out of keeping with the general approach in international law to questions of causation in two important ways. First, the Court fails to cite any authority or supporting jurisprudence in setting out the "but-for" standard for causation through omission. In fact, as will be seen there is important jurisprudence to the contrary particularly in international human rights law. Secondly, the approach of the Court to causation tends to undermine the established position in general international law that a state which is responsible for an internationally wrongful act, is required to make full reparation for all the injury which its conduct has caused irrespective of other concurrent causative factors, in particular, the concurrent responsibility of other states.

As to the first of these points there is a good deal of jurisprudence, particularly in international human rights law, which does not prevent an applicant from receiving reparation where it is possible that injury would still have been sustained had a state acted in accordance with its obligations. In the case of *Z. v. United Kingdom* the Grand Chamber of the European Court of Human Rights (ECtHR) found that the United Kingdom had violated the prohibition on torture and inhuman and degrading treatment found in Article 3 of the European Convention on Human Rights[47] (ECHR) by failing to take reasonable steps to prevent sustained abuse and neglect of several children. In its submissions on the question of reparation the United Kingdom specifically made the argument that the children "… might have suffered damage even if effective steps had been taken at an earlier stage".[48] The Grand Chamber expressly accepted that this proposition was correct. However, the Court denied that this was a sufficient basis to refuse reparation to the victims in respect of the injury that they suffered.[49] In numerous other cases where the injury suffered by a victim was inflicted by a private actor, but where the responsibility of the state was engaged for failing to take reasonable steps to prevent that injury, "but-for" causation has also not been required to establish a state's obligation to make reparation.[50]

The second reason why the approach of the Court sits ill at ease with existing jurisprudence in international law concerns the well established position in customary international law concerning concurrent causation. In circumstances

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[47] European Convention for the Protection of Human Rights and Fundamental Freedoms 213 U.N.T.S. 221.

[48] *Z. v. United Kingdom supra* n. 44, para. 121.

[49] *Id.*

[50] *Mahmut Kaya v. Turkey*, Merits, 28 March 2000, 28 E.H.R.R. 1; *Ilaşcu v. Moldova and Russia*, [GC] Merits, 8 July 2004, 41 E.H.R.R. 567; *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, *supra* n. 31.

where several states or a state and one or more private groups are responsible for conduct, which entails the international responsibility of the state, it is well established that any single responsible state is liable to provide full reparation for the damage caused by the wrongful act. The argument that the injury may have occurred in any event because of the conduct of others has not been regarded as sufficient to lessen, much less absolve, a responsible state from an obligation to provide reparation in respect of that injury. This is a position that has been recognised by longstanding jurisprudence of the ICJ itself. For example, in the *United States Diplomatic and Consular Staff* case Iran was required to provide full reparation for the detention of hostages by the students[51] because of its failure to take "all appropriate steps to protect the premises of the mission" for the purposes of the Vienna Convention on Diplomatic Relations.[52] The Court did not consider the possibility that the injury, which was caused in the incident, may have occurred even if Iran had not failed to take appropriate steps to protect the United States personnel and premises. In the *Corfu Channel* case, the ICJ found Albania responsible for damage done to British warships, by mines which had been unlawfully planted by a third state, because of Albania's failure to warn of the presence of mines. The Court found Albania liable to make full reparation for the injury inflicted by the mines and did not reflect on whether the harm to the British vessels may have occurred even if Albania had not acted in contravention of its international obligations.[53] The position regarding concurrent causation is also addressed by the ILC commentary on the Articles of State Responsibility which maintains that where "… injury is caused by a combination of factors, only one of which is to be ascribed to the responsible state, international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes …".[54]

Thus by setting a very high threshold of factual causation, the Court, in effect, permits the introduction of an otherwise unacceptable argument based on concurrent causation under the guise of a factual submission going to causation. As a result a party seeking to avoid providing reparation for an atrocity to which it made a substantial contribution alongside several other states or private groups could argue that as a matter of fact its contribution was not indispensable to the occurrence of the atrocity and that therefore, irrespective of its responsibility, it is not required to provide reparation beyond perhaps any declaration of wrongfulness which the Court may deem appropriate.

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[51] *United States Diplomatic and Consular Staff in Tehran, (Merits)*, I.CJ. Reports (1980) 3, para. 90.
[52] Vienna Convention on Diplomatic Relations, 1961, 500 U.N.T.S. 95.
[53] *Corfu Channel, Assessment of Compensation*, I.C.J. Reports (1949) 244, at 250.
[54] ILC Commentary *supra* n. 6, at 93 para. 12.

It may be that underlying the Court's adoption of this highly restrictive approach to causation for the purposes of reparation was a concern that a state not be held liable to make reparation for the full extent of a genocide which it had failed to take reasonable steps to prevent but had not actually committed. This is perhaps understandable given that in general international law a state's liability for reparation is not attenuated according to the extent of its responsibility for the injury caused by the wrongful act.[55] However, a bifurcated approach to causation – separating the issue of factual causation from that of legal causation (the exclusion of remote harm) – would have provided a much more effective means of keeping the extent of the reparation owed by a state for failure to prevent genocide within acceptable limits.

In many national legal systems a wrongdoer is liable for harm where its conduct is a substantial, even if not indispensable, factor in causing that harm.[56] The adoption of a similar standard by the Court would have prevented an insufficiently tenuous factual relationship from forming the basis of reparation for failure to prevent genocide. In terms of legal causation the Court had already acknowledged that failure to prevent genocide requires a degree of foresight of harm noting that "a State's obligation to prevent, and the corresponding duty to act, arise the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[57] Adopting a foreseeability standard of causation alongside a more realistic test of factual causation would have ensured that a responsible state is required to make reparation in respect of injury caused by its failure to prevent genocide where its omission was a substantial factor in the occurrence of the atrocity but only to the extent that the scale of the injury caused in the genocidal atrocity was foreseeable. This approach would have been more consonant with, and better supported by, existing practice than the approach that was ultimately adopted by the Court.[58]

Analysis of recent ICJ jurisprudence on reparation, in particular the Court's judgment on the merits in *Bosnia-Genocide*, provides wider lessons for future litigation before the ICJ. Firstly, since human rights and international humanitarian

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[55] *See* ILC Commentary to Article 31 of Articles on State Responsibility, *supra* n. 6, at 93, para. 12.

[56] For discussion of approaches to the question of "cause in fact" in the main legal systems of the world and, in particular, the *conditio sine qua non* rule and its rivals see Anthony Honoré, "Causation and Remoteness in Damage", in Andre Tunc. (ed) *International Encyclopaedia of Comparative Law: Vol. XI*, Part 1, Chapter VII [Tübingen: Mohr, 1983] 67.

[57] *Bosnia-Genocide (Merits), supra* n. 1, para. 431.

[58] "Foreseeability" is a causative test which is frequently employed by various international tribunals. *See Naulilaa Case supra* 33; *Irene Roberts*, American-Venezuela Commission, 9 R.I.A.A. 204 (1903–05) at 208. Recently the Ethiopia-Eritrea Claims Commission (EECC) has set out a standard of foreseeable causation in relation to assessing reparation required in respect of *jus ad bellum* violations. EECC Decision Number 7, Guidance Regarding *Jus ad Bellum* Liability, para. 13.

law often involve composite obligations or obligations which are violated by a composite act, it is crucial to carefully define the scope of the wrongful act in respect of which reparation is claimed. Failure to do so may make establishing the necessary causal nexus significantly more difficult. Furthermore, given the diffuse kinds of harm that human rights and humanitarian law violations can inflict, applicants are well advised to be careful to specify the precise forms of injury in respect of which reparation is sought and how there is a causal nexus between those forms of injury and each internationally wrongful act alleged.

In *Bosnia-Genocide* the applicant predicated its submission on reparation on the basis that the Court would have upheld the claims relating, not just to the prevention and punishment of genocide, but also "… the claim that the Respondent has violated its substantive obligation not to commit genocide, as well as the ancillary obligations under the Convention concerning complicity, conspiracy and incitement and the claim that the Respondent has aided and abetted genocide".[59] The result of this was that the Court was not satisfied from the evidence and argumentation placed before it that there was a sufficient causal nexus between recoverable forms of injury and the internationally wrongful conduct substantiated against Serbia. Thus, providing evidence as to the totality of harm without adequately distinguishing between different types of injury and, crucially, how they relate to the various violations alleged, may well be insufficient to establish the necessary causal nexus for reparation in respect of those forms of injury.

C. *Settlement through Negotiation or Subsequent Reparation Proceedings*

Determining the form and extent of reparation can occur in two different contexts, one judicial the other diplomatic. In most cases, what is entailed by the obligation to make reparation is sufficiently straightforward to allow the Court to make relevant findings on the merits. However, in cases that raise complex issues of reparation, the Court will first give the parties the opportunity to negotiate a settlement and will only make findings on reparation in a subsequent procedure if these negotiations fail to reach agreement.[60] Thus in cases like that of *D.R.C. v. Uganda*, involving reparation claims in relation to widespread and egregious violations of human rights law and international humanitarian law, diplomatic negotiations will provide the first context in which the extent of a responsible state's liability is determined.

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[59] *Bosnia-Genocide (Merits), supra* n. 1, para. 459.

[60] *D.R.C. v. Uganda (Merits), supra* 1 paragraphs (6) and (14) of the *dispositif* of the judgment; *Military Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)* I.C.J. Reports (1986) 14, paragraph 15 of the *dispositif*.

From the perspective of the Court, once it has decided the merits of the claim, its role vis-à-vis subsequent negotiations on reparation are subsidiary. In *Free Zones of Upper Savoy and the District of Gex* the PCIJ stated that:

> … the judicial settlement of international disputes with a view to which the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties; as consequently it is for the Court to facilitate, so far as is compatible with its Statute, such direct and friendly settlement.[61]

In *Military Activities in and against Nicaragua* the applicant requested that the Court make an interim reparation order against the United States for compensation totalling over three hundred and seventy million dollars as a minimum valuation of the reparation it said it was owed.[62] In denying this request the Court cited with approval the above passage from the jurisprudence of the PCIJ. It noted that while there was nothing in its Statute that prevented or empowered it to provide such relief, it "… should refrain from any unnecessary act which might prove an obstacle to a negotiated settlement".[63] In recognition of its role in facilitating the direct and friendly settlement of disputes the Court is therefore extremely reluctant to make a determination during the merits phase of proceedings which could prejudice the eventual settlement of issues relating to reparation by subsequent negotiation between the parties in cases where this is required. Moreover, the Court does not purport to exercise any supervisory role regarding how the parties go about settling the matter of reparation. If the parties do reach an agreement, unlike international adjudicative bodies in the field of human rights law such as the ECtHR or the IACHR, the ICJ does not have power to review or approve the agreement at which the parties may arrive.[64] Indeed, under Articles 88 and 89 of the ICJ's Rules of Court, the parties in a contentious case can, acting jointly, discontinue proceedings at any stage by providing valid notification to that effect.[65] The role of the Court in this process is simply to record the discontinuance and to remove the case from its list.[66]

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[61] *Free Zones of Upper Savoy and the District of Gex*, (1929) P.C.I.J. Series A. No 22, at 13.

[62] *Military Activities in and against Nicaragua (Nicaragua v. United States of America) Memorial of Nicaragua*, ICJ Pleadings, Oral Arguments, Documents Vol. IV, at 132.

[63] *Military Activities in and against Nicaragua*, *(Merits)*, *supra* n. 60, para. 285.

[64] *See* Article 38(1) (b) European Convention on Human Rights, *supra* 47, and Rules 43(2) and 62(3) of the ECtHR Rules of Court; Article 48(f) American Convention on Human Rights and Article 53–55 of the Inter-American Court of Human Rights Rules of Court. *See also* Articles 41(4) and (5) of the Inter-American Commission of Human Rights Rules of Procedure.

[65] International Court of Justice: The Rules of Court (1978) adopted on 14 April 1978 and entered into force on 1 July 1978 and as subsequently amended.

[66] *See Barcelona Traction Light and Power Company Limited (Spain v. Belgium) (New Application) (Preliminary Objections)* I.C.J. Reports (1964) 6, at 20.

Inevitably this gives negotiations concerning reparation a political and not just a legal character. In fact, there are few limitations on the kind of agreement that the parties may reach in settlement of reparation claims. While the judgment of the Court as to the respective obligations of the parties provides the broad terms of reference for negotiations, it is quite possible that during these negotiations the parties may consider reparation as part of a wider political bargain, which addresses aspects of the relations between the two states more generally. As part of such a wider process the obligation of full reparation and principles that determine what is entailed by this obligation may provide a benchmark against which full reparation is assessed. However, an injured state is entitled to settle for less than full reparation if it so decides[67] or, as with other claims in international law, it may waive its claim to receive reparation altogether as part of a wider deal.[68]

The culmination of the lengthy legal proceedings between the United States and Nicaragua concerning the military and covert intelligence operations of the former in the territory of the latter provide an example of this. A change of government in Nicaragua triggered a thawing of relations between the two countries. In April 1991, during an official visit of the new president of Nicaragua to the United States, President Bush announced a five hundred million dollar aid package to Nicaragua, support for Nicaragua in international financial institutions and enhanced opportunities for trade and investment. On 12 September 1991 Nicaragua informed the ICJ that it would not be continuing with the proceedings and that it renounced any further right of action in the matter. Nicaragua's letter to the Registrar of the Court indicates the significance of the wider political context in its decision to discontinue the case. In the letter Nicaragua's agent said that the decision to terminate proceedings had been arrived at "… taking into consideration that the Government of Nicaragua and the Government of the United States of America have reached agreements aimed at enhancing Nicaragua's economic, commercial and technical development to the maximum extent possible".[69] Thus where negotiations on reparation occur

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[67] In final settlement of the compensation claim arising from the 1946 Corfu Channel incident the United Kingdom agreed that Albania make payment of $2 million USD in 1996. This was only a marginal increase on the £843, 947 STG the ICJ had ordered Albania to pay in 1949 and, allowing for inflation, represented less than full monetary reparation for the applicant. The Joint Statement Albania and the United Kingdom as well as the memorandum of understanding are reprinted in 63 BYIL 781 (1992).

[68] On the principles relevant to the valid waiver of a claim generally in international law see *Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections)* I.C.J. Reports (1992) 240. *See further* Article 45, Articles on State Responsibility *supra* 6 and ILC Commentary on Article 45, *supra* n. 6, at 121.

[69] Letter of the Agent of Nicaragua to the Registrar, 12 September 1991, ICJ Pleadings, Oral Arguments, Documents, Vol. V, at 485.

they should be seen fundamentally as a diplomatic process with a legal dimension but occurring in a much wider political context.

On the other hand, if the parties to a contentious case inform the Court that they are unable to reach an agreement on reparation, the Court will then determine the question of reparation in a subsequent procedure of the case. Since the establishment of the PCIJ, the payment of a liquidated sum of compensation has only been ordered on two occasions. These were *SS Wimbledon* and *Corfu Channel* cases, only the latter of which required a subsequent procedure for determining the issue of reparation.[70] In two other cases, *Military Activities in and against Nicaragua* and *United States Diplomatic and Consular Staff*, although the Court set aside a subsequent procedure for determining the form and extent of reparation required, both cases were settled out of court. Thus, unlike other international courts, a specialised reparation procedure is rarely utilised by parties in cases before the ICJ. This may be partly a function of the Court's role as an alternative to the direct and friendly settlement of disputes in that states may regard direct settlement as preferable once a judgment has clarified the legal relations between the parties. It may also be because contentious cases which raise complex issues as to the form and scope of reparation tend not form the factual subject matter of disputes coming before the Court. While the reparation which is required may be relatively clear where a dispute concerns a maritime boundary or sovereignty over a certain portion of territory, as the frequent use of specific reparation proceedings in the ECtHR and IACHR illustrates, this is often not the case in respect of gross violations of human rights or international humanitarian law. Equally, in the case of *D.R.C. v. Uganda*, where gross violations of human rights and humanitarian law form the subject matter of a contentious case, it is likely that a subsequent reparation procedure will be necessary if the on-going negotiations settlement fails.

The Court's procedure for the determination of reparation issues will naturally have a legal focus. During these proceedings neither party may call into question such findings of the Court as have become *res judicata* in the dispute between them.[71] The task of the Court during such proceedings is simply to apply the relevant principles of international law to determine the form and extent of reparation that arises out of the internationally wrongful acts of one or both parties. As with judgment on the merits, the Court's judgment on the reparation due is "final" within the meaning of Article 60 of the Statute of the Court, creating its own *res judicata*.

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[70] *S.S. "Wimbledon" (Merits)* 1923 PCIJ Series A No. 1; *Corfu Channel, (Assessment of Compensation*) *supra* n. 53.

[71] *Military Activities in and against Nicaragua*, *(Merits) supra* n. 60, para. 284.

Thus, either by negotiated settlement or by decision emanating from a subsequent procedure in the case the Court's role in resolving a dispute, including the question of reparation, is brought to an end.[72] The Court has indicated in its jurisprudence that issues of compliance and enforcement are not matters for it to address.[73] Instead they are matters to be addressed, in particular, by the political organs of the United Nations.

D. *Post-Adjudicative Compliance and Enforcement*

The number and gravity of violations for which Uganda was found to be responsible in the case concerning *Armed Activities in the Democratic Republic of the Congo* has rendered Uganda liable to make reparation on a very substantial scale. At least by some estimates compensation alone may run to several billion pounds.[74] If the parties cannot reach agreement on these issues, and a subsequent determination by the Court on reparation becomes necessary, obligations concerning post-adjudicative compliance and methods to secure enforcement of the decision of the Court will become crucial.

1. *The Role of the Security Council*

The findings that the Court may make in a subsequent reparation procedure bind the parties to a case under Article 59 of the Court's Statute in the same manner as a judgment of the Court on the merits of the dispute and entail an obligation of compliance, in particular, under Article 94 (1) of the Charter of the United Nations. Given the strong political character of ensuring compliance with a decision of the Court, it is the Security Council and not the ICJ which has the primary role in this regard. The key provision is Article 94 contained in Chapter XIV of the Charter. It provides that:

> 1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
> 2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the

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[72] Parties to a case may ask the Court to construe the meaning and scope of a judgment under Article 60 of the Statute of the Court. However, the Court will not choose between methods of compliance as this is outside the legal function of the Court. *See Haya de la Torre (Colombia v. Peru) (Merits)* I.C.J. Reports (1951) 71. Where a new fact is discovered a party may also make an application for revision under Article 61 of the Court's Statute.

[73] *Asylum Case (Colombia v. Peru) (Merits)* ICJ Reports (1950) 266; *Asylum Case (Colombia v. Peru) (Request for Interpretation)* I.C.J. Reports (1950) 395; *Haya de la Torre (Colombia v. Peru) (Merits) id*.

[74] "Court Orders Uganda to Pay Congo Damages", *The Guardian*, 20 December 2005.

> Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

It is clear from the wording of Article 94 that where a party had brought the issue of compliance to the attention of the Security Council under Article 94(2), the Council has discretion to take action but is not obliged to do so. An important question in relation to the scope and effect of Article 94 is whether it provides the Security Council with an autonomous power to make recommendations or take measures. Alternatively, may such measures only be taken pursuant to Chapter VI or VII of the Charter once the relevant conditions are satisfied, in particular concerning the endangerment or threat to international peace and security? There is a substantial literature on this question, of which the significant preponderance supports the former position.[75] In particular, it is pointed out that the latter interpretation would render Article 94(2) entirely superfluous. Article 94 is placed in Chapter XIV of the Charter, which is not a subsidiary provision, in particular since it concerns the role and function of the principle judicial organ of the United Nations. Moreover, the text of Article 94(2) provides that if "any party to a case" fails to perform its obligation the other party may have recourse to the Council. The provision is not therefore limited to parties to a judgment in respect of which a failure of one party to perform its obligations would pose a threat to international peace and security.

Thus, it appears from the text of Article 94, and from its surrounding context, that irrespective of whether the alleged failure of a party to implement the judgment of the ICJ creates a situation amounting to a threat to the maintenance of international peace and security, the other party to the dispute may still request the Security Council to make recommendations or decide upon binding measures to ensure compliance with the Court's judgment. On the other hand, where a dispute between the parties to a case does amount to a threat to international peace and security, in accordance with the broad discretion granted to the Security Council by Article 39 of the Charter, the Council may, under its own initiative, invoke its extensive powers under Chapter VII of the Charter to seek to address the matter.

Where the Security Council is seized with jurisdiction under Article 94 there are a considerable range of recommendations and measures that the Security Council could pursue if it is minded to do so. This could include recommending

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[75] Constanze Schulte, *Compliance with the Decisions of the International Court of Justice*, 39, [Oxford: Oxford University Press, 2004]; Shabtai Rosenne, *The Law and Practice of the International Court of Justice, Vol. I* p. 245 [Leiden: Martinus Nijhoff, 2005]; Michael Reisman, *Nullity and Revision: Review and Enforcement of International Judgments and Awards*, [New Haven: Yale University Press, 1971]; Oscar Schachter, "The Enforcement of International Judicial and Arbitral Decisions", 54 AJIL 1 (1960).

modalities for implementation or for third-party assistance. In cases concerning gross violations of human rights and international humanitarian law, a decision reiterating the judgment of the Court and ordering compliance could be particularly significant. Under Article 59 of the Statute of the Court "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". Similarly the obligation under 94(1) is only incumbent upon parties to a case. In the context of gross violations of human rights or international humanitarian law a decision by the Security Council affirming the judgment of the Court and ordering compliance may be particularly appropriate in respect of these kinds of *erga omnes* obligations in that it could extend the legal effect of the operative part of the Court's decision, in particular concerning the form and extent of reparation, beyond the *inter partes* scope of Article 59. In a case where failure to pay compensation was at issue, the Security Council could also decide that measures should be taken to freeze or seize assets of the judgment debtor or to impose some form of economic sanctions.

Undoubtedly Article 94 is potentially a powerful means of securing compliance with a judgment of the Court. Despite this potential, it should be born in mind that Article 94(2) has been specifically invoked by a judgment creditor on only two occasions and never successfully.[76] Previous experience indicates that judgment creditors are reluctant to pursue this as a means of enforcement and that even if they are, depending on the wider political context, this may not be a particularly fruitful avenue to ensure compliance with a decision of the Court.

2. *The Role of the General Assembly*

A further UN body which has competence to address the issue of compliance with a decision of the ICJ is the General Assembly. Under Article 10 of the Charter of the United Nations, the General Assembly has power to "… discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and … may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters". Thus, the General Assembly has power to make non-binding recommendations regarding the implementation of an ICJ decision. This is subject to the temporary

[76] The United Kingdom invoked Article 94(2) after an order indicating provisional measures in *Anglo Iranian Oil Co (Provisional Measures)* I.C.J. Reports (1951) 89. *See* letter dated 28 September 1951 to the President of the Security Council and the Secretary General from the UK Deputy Permanent Representative to the UN, S/2357. Nicaragua also invoked the provision in seeking compliance by the United States with the Court's controversial 1986 judgment. *See* letter of 22 July 1986 from representative of Nicaragua to the President of the Security Council. S/18230.

prohibition in Article 12 on the adoption of Assembly recommendations where the Security Council "… is exercising in respect of any dispute or situation the functions assigned to it in the present Charter".

In practice the General Assembly has interpreted this provision relatively narrowly leaving itself a good deal of room to act. It has treated the exercise of a veto by a Permanent Member of the Security Council as bringing the question of compliance within its competence. In the follow-up to the case concerning *Military Activities in and against Nicaragua* the United States twice used its veto to prevent the Security Council from adopting a resolution recalling the obligation of compliance contained in Article 94 of the Charter and recommending full compliance with the judgment of the Court.[77] As a result Nicaragua took the matter to the General Assembly, which accepted Nicaragua's proposal and adopted Resolution 41/31 on 3 November 1986 by 94 Affirmative votes, 3 negative votes and 47 abstentions.[78] This resolution, and several subsequent resolutions, called for full and immediate compliance with the judgment of the ICJ.[79]

The General Assembly has also been quite active in seeking compliance with the advisory opinions of the ICJ to ensure that the legal principles enunciated by the Court are respected. In response to the ICJ's advisory opinion on the *International Status of South West Africa*[80] the General Assembly promulgated a series of resolutions which, *inter alia*, "accepted" the findings of the Court, recommended that South Africa take the necessary measures to implement the advisory opinion and created a committee to liaise with the Union of South Africa on the procedural measures for the implementation of the opinion.[81] Most recently the ICJ's advisory opinion in the *Wall* case dealt in some detail with human rights and international humanitarian law obligations pertaining to the facts of that situation. Of course, an advisory opinion is not, in itself, binding on any state; however, the legal principles that it seeks to elucidate are binding. Thus in response to the Court's advisory opinion the General Assembly has taken a series of steps concerned with the implementation of the legal principles enunciated by the Court, in particular, concerning Israel's obligation to make reparation

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[77] See Security Council Draft Resolution, 31 July 1986, S/18250 and Draft Resolution.

[78] A/41/PV.53.

[79] In three subsequent sessions the General Assembly adopted similar resolutions. General Assembly Resolutions 42/18, 12 November 1987, 43/11, 25 October 1988 and 44/43, 7 December 1989.

[80] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* I.C.J. Reports (1971) 16.

[81] General Assembly Resolutions 449 (V), 13 December 1950, 449 B (V), 13 December 1950, 570 A (VI) 19 January 1952, 749 (VIII), 28 November 1953, 852 (IX), 23 November 1954 as modified in Resolution 940 (X), 3 December 1955.

arising from the violations of human rights and humanitarian law for which the Court found it responsible.

On 20 July 2004, the General Assembly adopted resolution ES-10/15 by 150 affirmative votes, 6 negative votes and 10 abstentions. In the resolution, the General Assembly "acknowledged" the advisory opinion of the ICJ and recalled the various human rights and international humanitarian law obligations that the Court had found relevant to the facts of the case.[82] It went on to "[d]emand that Israel, the occupying power, comply with its legal obligations as mentioned in the advisory opinion".[83] It also called upon "… all States Members of the United Nations to comply with their legal obligations as mentioned in the advisory opinion" and, interestingly, requested the "Secretary-General to establish a register of damage caused to all natural or legal persons concerned in connection with paragraphs 152 and 153 of the advisory opinion".[84]

On 15 December 2006, the General Assembly adopted a further resolution establishing the United Nations Register of Damage by 162 affirmative votes, 7 negative votes and 7 abstentions.[85] In this resolution the Assembly recalled the finding of the Court, namely that Israel had an obligation to make reparation to all natural and legal persons who have suffered damage as a result of the construction of a wall in the Occupied Palestinian Territory and 'decided to set up an Office of the Register of Damage which will be … responsible for the establishment and comprehensive maintenance of the Register of Damage".[86] The budget of the Office is approximately two and a half million US dollars for its first year of operation.[87] The Office has a three person board, which "shall determine the eligibility criteria … for the inclusion of damages and losses caused in the Register of Damage with an established causal link to the construction of the wall". It also has a Secretariat including logistical support staff. In its task of determining "the criteria of damage and the procedure for the collection and registration of damage claims", the Board is to be "guided by the relevant findings of the advisory opinion, general principles of international law and principles of due process of law …".[88] The role of the Office is simply to record rather than evaluate the damage caused by the construction of the wall. In its resolution

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[82] A/Res/ES-10/15, 20 July 2004.
[83] *Id*, operative paragraph 2.
[84] *Ibid.* operative paragraphs 3 and 4. Paragraphs 152 and 153 of the *Wall* advisory opinion concerned the form and extent of reparation which Israel was required to make to various natural and legal persons. *See Wall, (Advisory Opinion), supra* n. 1.
[85] A/Res/ES-10/17, 15 December 2006.
[86] *Id*, para. 4.
[87] Report of 5th Committee: Programme Budget for the Biennium 2006–2007. A/61/625/Rev.1.
[88] *Supra* n. 85 paras. 5 (c) and (d).

the General Assembly made clear that "… the act of registration of damage does not entail, at this stage, an evaluation or assessment of loss or damage caused by the construction of the wall." The resolution calls upon Israel and the Palestinian Authority to cooperate with the work of the Register of Damage. It also asks the Secretary-General to instruct the United Nations agencies present on the ground in the Occupied Palestinian Territories to lend their support and expertise to the Office of the Register of Damage to facilitate its work.

In a way, the follow-up to the *Wall* advisory opinion illustrates both the potential strength and limitations of the General Assembly's powers to enhance compliance with pronouncements of the ICJ, in particular regarding the obligation to make reparation. On the one hand the absence of the risk of veto avoids the kinds of difficulties into which the Security Council's consideration of Nicaragua's claims for compliance ran. Perhaps partly as result of this, the Assembly has generally been more active than the Security Council in discussing and instigating practical steps to enhance the prospect of compliance. Moreover, as demonstrated by its follow-up to the *Wall* advisory opinion, like the Security Council, the General Assembly can mobilise UN resources as part of any plan to seek compliance which it devises. Depending on the circumstances of a situation, this kind of logistical support can be of some benefit, particularly in compiling information for the purpose of reparation before such evidence is lost.

However, a central, and perhaps crucial, limitation on the effectiveness of the General Assembly in seeking compliance with a decision or advisory opinion is the non-binding character of the recommendations that the Assembly may make. Even the compilation of the record of damage falling within the ambit of the *Wall* advisory opinion relies on the good will of the relevant governing authorities, in particular Israel, which is under no obligation to facilitate the work of the Register.

3. *Unilateral Enforcement Measures*

Aside from pursuing compliance through international institutions, a judgment creditor in a contentious case may also take certain unilateral measures in accordance with general principles of international law to bring about compliance with an ICJ decision.

It should be noted at the outset that non-compliance, even with a decision in respect of egregious violations of human rights or international humanitarian law, does not, in itself, entitle a judgment creditor to resort to force. The Charter of the United Nations contains no special provision exempting a judgment creditor from the general prohibition on the threat or use of force contained in Article 2(4). Moreover, suggestions during the drafting of the Charter that failure to comply with a judgment of the Court be treated automatically as a form of

aggression were also rejected.[89] In the *Corfu Channel* case although the ICJ recognised the existence of a doctrine of self-help it also indicated its limitations. In this case the United Kingdom argued that its minesweeping operation in Albanian territorial waters was a lawful act of self-help aimed at gathering evidence that could be submitted to an international tribunal to facilitate its task of determining liability.[90] The Court rejected this as an impermissible use of force and a violation of Albanian sovereignty.[91]

So what kind of measures is it permissible for a judgment creditor to take to seek compliance? The two main avenues of self-help open to an injured state are retorsion and countermeasures. As to the first of these an injured state may apply various means of political and diplomatic pressure on the responsible state. The injured state may also make direct representations to the debtor state, including its various legislative, executive or judicial organs, to seek compliance with the judgment. Indeed, failure by the courts of a state that is party to a case before the ICJ to carry out or comply with the final judgment of the Court could engage the responsibility of the state no less than the acts of any of its other organs. In the words of the PCIJ in *Factory at Chorzów* it is impossible to attribute "… to a judgment of a municipal court power indirectly to invalidate a judgment of an international court".[92] Of course, whether domestic courts do in fact assist the injured state may have more to do with the municipal law of that state than the requirements of international law.

Failing this a further avenue open to the injured state is that of countermeasures. Article 49 (2) of the Articles on State Responsibility defines countermeasures as the "… non-performance for the time being of one or more international obligations owed to the responsible state." Permissible countermeasures therefore involve action by an injured state which would otherwise be internationally wrongful but which is justified by the initial wrongful conduct of the responsible state. It is a well-established principle of international law that countermeasures must be commensurate to the gravity of the violation which gave rise to them, which in the present context relates to the failure to comply with the judgment rather than the violations on which the judgment was based.

In the *Naulilaa* case the Portugo-German Arbitral Tribunal held that "… one should certainly consider as excessive and therefore unlawful reprisals out of all proportion to the act motivating them".[93] The ILC Commentary to Article 49

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[89] Proposal of Bolivia, 3 UNICO 579.
[90] *Corfu Channel (Merits)*, *supra* n. 24, p. 35.
[91] *Ibid. See also United States Diplomatic and Consular Staff in Tehran*, *supra* n. 51, para. 93.
[92] *Factory at Chorzów, (Merits)*, at 33, *supra* n. 5.
[93] *Naulilaa Case supra* 33, at 1028; *Gabcikovo-Nagymaros Project (Merits)(Hungary v. Slovakia)* I.C.J. Reports (1997) 7 at at 56, para. 85. *See further* Article 51, Articles of State Responsibility, *supra* n. 6.

notes that where the injured state invokes countermeasures such as "freezing the assets of a State"[94] this may involve non-performance of several obligations in respect of that state; this, however, is not necessarily impermissible, "the test is always that of proportionality".[95] However, the attachment or confiscation of the responsible state's property is not a permissible countermeasure, since international law requires that countermeasures are reversible once the responsible state's conduct comes into conformity with its international obligations.[96]

Since attachment is not a permissible countermeasure an important question which this gives rise to is whether international law permits a judgment creditor to attach property within its jurisdiction belonging to a debtor state in execution of a judgment of the International Court? This is a difficult question which runs into complicated issues of state immunity which it is not possible to fully address here. However, in general terms immunity from execution is treated in international law as a separate issue from immunity from suit; rules in respect of the former generally being more restrictive than the latter.[97] In broad terms post-judgment execution is only permissible in two situations: Either where the judgment debtor has consented to the use of the property for this purpose, or in respect of property which is in use by the debtor state for other than public purposes and is connected to the entity against which the proceeding was directed. This is the position which is adopted by the United Nations Convention on Jurisdictional Immunities of States and Their Property.[98] It also appears to be broadly consistent with the position in general international law concerning permissible limitations on sovereign immunity and supported by state practice.[99] One interesting example of the latter concerns the case of *Socobelge v. The Hellenic State*[100] which related to an arbitral award which the PCIJ had confirmed against Greece in the case

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[94] ILC Commentary, *supra* n. 6, at 130.

[95] *Id*.

[96] *Gabcikovo-Nagymaros Project (Merits)*, para. 87, *supra* n. 93. *See also* Article 49 (3), Articles on State Responsibility, *supra* n. 6.

[97] James Crawford, "Execution of Judgments and Foreign Sovereign Immunity", 75 AJIL 820 (1981).

[98] See Article 19, United Nations Convention on the Jurisdictional Immunities of States and Their Property (2004), [UN Convention on Jurisdictional Immunities] not yet in force, adopted by the UN General Assembly in Resolution A/Res/59/38. The term "entity is defined in the series of "understandings" annexed to the Convention as "… the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality".

[99] Hazel Fox, *The Law of State Immunity*, [Oxford: OUP, 2002] p. 399. *See also* Constanze Schulte, *supra* n. 75 at. 73; Oscar Schachter, *supra* 75 at 7; Mary Ellen O'Connell, "The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States", 30 VJIL (1989) 892.

[100] Tribunal Civil de Bruxelles, 15 ILR 3 (1951).

Société Commerciale de Belgique.[101] In *Socobelge* the Belgian civil court declared that the attachment of funds deposited by Greece in a bank in Belgium was valid in satisfaction of the judgment affirmed by the Permanent Court.

Some writers also support the view that third states may, if they wish, assist a judgment creditor in recovering the judgment debt citing the circumstances surrounding the *Corfu Channel* and *Monetary Gold* cases in support.[102] In the *Corfu Channel* case, once it became apparent that Albania had no intention of paying the compensation awarded by the Court, the United Kingdom looked for means of enforcing the Court's judgment. An opportunity presented itself in the form of the Tripartite Commission for the Restitution of Monetary Gold established pursuant to Part III of the Final Act of the Paris Conference on Reparations of 14 January 1946.[103] Under this arrangement the United Kingdom, France and the United States had been jointly entrusted with restoring gold to states that had a claim to it under the Paris Act. Albania was found to be one such state. However, there were various other possible claims to the gold and the three governments – the United Kingdom, France and the United States agreed to submit the issues to arbitration under the Washington Agreement of 25 April 1951.[104] Significantly, for present purposes, a joint statement[105] was attached to that treaty whereby the three governments stated that if the arbitrator decided that the gold was Albania's then they would transfer this share to the United Kingdom in partial satisfaction of Albania's judgment debt, unless within 90 days Albania or Italy contested the transfer at the ICJ seeking to establish a better claim. Albania did not make such a claim before the Court while Italy sought to contest the transfer on the ground that it had a better claim.[106] Several writers have viewed this practice as strong evidence supporting the proposition that states are "entitled under international law to assist in the execution of a decision of the International Court, if that decision has not been complied with and the successful party requests such assistance".[107]

However, on its own this provides insufficient evidence of state practice to indicate that such intervention is permissible. In addition, the failure of the negotiations surrounding the UN Convention on Jurisdictional Immunities to reach agreement on enforcement measures in third states indicates the absence of

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[101] *Commerciale de Belgique, (Merits)*, 1939, P.C.I.J. Series A/B No. 78. at 160.
[102] *Monetary Gold Removed from Rome (Preliminary Question) (Italy v. France, United Kingdom and the United States)* I.C.J. Reports (1954) at 19.
[103] 555 U.N.T.S. 69.
[104] 91 U.N.T.S. 21.
[105] I.C.J. Pleadings, Oral Arguments, Documents, (1954) 127.
[106] This formed the subject matter of a further case *Monetary Gold Removed from Rome (Preliminary Question) (Italy v. France, United Kingdom and the United States) supra* n. 102.
[107] Oscar Schachter, *supra* 75, p. 11. *See also* Shabtai Rosenne, *supra* n. 75, at 237.

settled *opinio juris* on this question.[108] Irrespective of the position regarding whether it is permissible for a third state to assist in execution of a judgment of the International Court, it is evident that there is no *erga omnes* obligation upon third party states to do so.[109] Both Article 94 of the Charter and Article 59 of the Statute of the ICJ make clear that a decision of the Court is binding only as between the parties to a case. Moreover, there is no significant state practice in support of the existence of an obligation to assist with compliance with the execution of a judgment *per se*.

E. *Conclusion*

Some twenty years ago it was said that the World Court's "treatment of remedies seems somewhat perfunctory in contrast to its approach to substantive issues. For it, as for most writers, remedies are an afterthought. The conception of an international law of remedies seems weak".[110] While much has changed in the twenty years since this analysis was written its overall tenor still rings true in respect of reparation. The Court's treatment of this issue was perhaps the most unsatisfactory aspect of its *Bosnia-Genocide* judgment. At best the Court's analysis of the issues was cursory, leaving divergences from established practice largely unexplained, at worst the injury caused by the conduct of the FRY was substantially underestimated. Should the parties fail to reach agreement in the case concerning *Armed Activities in the Democratic Republic of the Congo*, the resultant reparation phase of proceedings will provide the Court with a major opportunity but also a substantial test concerning its jurisprudence on reparation. Issues of compliance will also then become crucial. However, whatever powers of enforcement may exist at the level of legal theory, in practice the best opportunity for an outcome satisfactory to both parties is in a negotiated settlement. After all, the best and most reliable method of ensuring compliance with a decision of the Court is the voluntary agreement of both parties as to how a dispute should best be resolved.

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[108] A/C.6/48/L.4
[109] *Cf.* Mary Ellen O'Connell, *supra* n. 99, at 939.
[110] Christine Gray, *Judicial Remedies in International Law*, [Oxford: OUP, 1987] 108.

Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings

By Carla Ferstman and Mariana Goetz***

A. *Introduction*

The Statute of the International Criminal Court (ICC) has gone further than those of other international tribunals in incorporating processes that positively affirm victims' dignity, including their right to be kept informed about legal proceedings, special measures of protection and support, the ability of victims to participate in legal proceedings independent from any role they may have as prosecution witnesses, and their right to claim reparations before the ICC for the harm they suffered. Equally, a specialised trust fund has been established to both complement the ICC's reparative mandate and assist with its implementation.

These elements are an integral part of the Court's mandate to mete out justice for the worst crimes. The public nature of criminal proceedings, the formal identification of the perpetrator and the assignation of responsibility can help meet victims' requirements of justice. Bringing perpetrators to justice might also contribute to the immediate security of victims and help to prevent future crimes; it can also help clarify the events surrounding the commission of crimes and make clear that a wrong was done. Providing additional forms of relief to victims, such as restitution, compensation and rehabilitation will also help to address victims' immediate and long term physical and psychological needs, and assist them to re-integrate into society.[1] Many victims will have been displaced by conflict, have

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[1] Y. Danieli, "Preliminary Reflections from a Psychological Perspective" in Kritz, N.J. (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Vol. 1 General Considerations*, 1995, United States Institute of Peace Press, Washington.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 313–350.

lost their homes and livelihoods, and will literally need to start from scratch to rebuild their lives and financial compensation can help address some of the harm or impairment caused by the crime,[2] though it will rarely, if ever, succeed in fully repairing what was shattered or restore the person to their former position.[3]

Since the ICC came into force in 2002, the Prosecutor has investigated a number of situations giving rise to crimes under the Statute and a number of cases are underway. At the time of writing, investigations have commenced in relation to crimes allegedly committed in the Democratic Republic of Congo, Uganda, Sudan and Central African Republic. Arrest warrants have been issued against Thomas Lubanga Dyilo, Bosco Ntaganda, Germain Katanga and Mathieu Ngudjolo Chui in the Democratic Republic of Congo; Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen in Uganda; Jean-Pierre Bemba Gombo in relation to crimes said to have been committed in Central African Republic and Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman and Omar Hassan Ahmad Al Bashir in relation to Darfur, Sudan. Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui and Jean-Pierre Bemba Gombo are in custody in The Hague with their cases underway.

Victims are already involved in a variety of ways in ICC proceedings. They are in touch with the Office of the Prosecutor and other organs of the Court; their needs for protection and support have been considered and in a number of cases special measures have been afforded. They are participating in legal proceedings as independent participants and some have lawyers representing their interests in this capacity. The Court's Trust Fund for Victims has also started to function, with its first assistance projects identified for affected areas.

The Court has not yet begun to implement its reparations mandate. Article 75 of the Statute provides that the Court may order reparations following conviction,[4] and it will be some time still before any of the cases currently before the ICC result in conviction. Nonetheless, there are a number of preparatory steps the ICC can take to make certain that it can determine reparations at the appropriate time. These steps include establishing the procedures by which victims are informed of the reparations process and invited to apply. They also include developing the wherewithal to effectively search for, freeze and seize property and assets for the ultimate benefit of victims, determining the principles to guide the

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[2] R. J. Daly, "Compensation and Rehabilitation for Victims of Torture" *Danish Medical Bulletin*, 27(3): 1980, 245–248.

[3] Danieli, *supra* n. 1.

[4] Paragraph 2 of Article 75 provides that: "The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."

reparations process, and clarifying the relationship and modalities of cooperation between the Court and the Trust Fund for Victims.

To a great extent, the ICC remains at the very early stages in its conceptualisation of the reparations phase of proceedings and relatively few preparatory steps have been taken to ensure that reparations becomes a practical reality at the Court. Indeed, the implementation of the system of reparations at the ICC is a daunting prospect, owing to the seriousness and scale of the crimes coming before the Court, the penurious situation of the victims and the wider communities affected. Doing veritable justice to victims without subscribing to tokenism is a difficult prospect, as is described more fully below.

Whilst the Court's consideration of reparations is still at the very beginning, its early jurisprudence on other matters pertaining to victims, in particular on victims' eligibility to participate in proceedings and the modalities of their participation is relevant and provides some insight into how the Court may determine some of the extant questions regarding the principles to guide the reparations process.

This chapter considers the issues and challenges relating to the operationalisation of the Court's reparations mandate. It assesses the provisions in the Statute governing reparations and analyses the early jurisprudence of the Court with a view to considering the impact this may have on giving practical effect to the reparations mandate. Further, the chapter considers additional matters the Court ought to address to prepare for the task of affording adequate and effective reparations, and provides certain perspectives on how these matters might be addressed.

B. *Overview of the System of Reparations before the ICC*

Article 75 of the Statute enables the Court to order reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The ability for victims to claim reparation against the convicted person was not featured in the statutes of the *ad hoc* tribunals for the former Yugoslavia or Rwanda, nor other internationalised or internationally supported criminal courts[5] and it was not obvious that it would be included in the ICC Statute either. The International

[5] An exception is the Extraordinary Chambers in the Courts of Cambodia, in which the Chambers may award collective and moral reparations to civil parties, and which may take the following forms: "a) An order to publish the judgment in any appropriate news or other media at the convicted person's expense; b) An order to fund any non-profit activity or service that is intended for the benefit of Victims; or c) Other appropriate and comparable forms of reparation." See, Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev.1), as Revised on 1 February 2008, rr. 10, 11.

Law Commission decided to delete from its 1994 draft statute an article on reparations (introduced in the 1993 draft) on the basis of the argument that a criminal court was not an appropriate forum in which to order reparations. It was not recognised that where national systems have, by definition, been unwilling or unable to administer criminal justice, it is unlikely that those systems will be able or willing to give effect to the victims' right to reparations.[6]

Paragraph 1 of Article 75 provides that the Court shall establish principles relating to reparations. The provision does not specify whether such principles should be determined within the context of a particular situation or case before the Court or independently from same. To date, neither the judges nor other organs of the Court have issued any general principles or operational guidelines on reparations aside from standard application forms for victims seeking reparations,[7] and it is not clear whether there is an intention to do so outside of a particular situation or case. Whilst adopting a case-by-case approach may preserve the Court's flexibility to address what may be vastly different factual circumstances, certain decisions or orientations could usefully be taken now, particularly in relation to evidentiary standards and procedures. This may assist the Registry to take the necessary steps to effectively plan for the reparations phase. It might also provide some clarity to victims and communities who have little knowledge and high expectations of the process.

As with the overall mandate of the Court, which is limited to determining the responsibility of individuals charged with crimes within its jurisdiction, reparations orders may be made "against a convicted person".[8] For reparations this may prove to be limiting, as it will often be collectives or other groupings (e.g., governments, rebel movements, criminal enterprises, companies) that have benefited financially from the commission of certain crimes carried out by the defendants. The Court is only mandated to enforce reparations orders against individual defendants, who will often not have the requisite financial resources to make good on the awards. It is perhaps for this reason that the ICC Statute refers to the possibility for the Court to "order that the award for reparations be made through the Trust Fund".[9]

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[6] D. Donat-Cattin, "The Role of Victims in the ICC Proceedings", in Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute*, University of Teramo, Italy, 1998 at 269–70.

[7] The Standard Application Forms for victims seeking to apply to the Court for reparations were prepared by the Victim Participation and Reparation Section of the Registry. The first form is for individual victims and persons acting on their behalf, and it is available on the Court's website at: www.icc-cpi.int/library/victims/Form-Reparation-1_en.pdf. The second form is for victims which are organizations or institutions: www.icc-cpi.int/library/victims/Form-Reparation-2_en.pdf.

[8] Article 75(2) of the ICC Statute.

[9] *Id*.

The Court has the possibility to award both individual and collective forms of reparations. In essence, individual awards would address the actual losses of individuals or possibly provide for some form of standardised payment to individuals, as has been used in other large compensation programmes such as the United Nations Compensation Commission,[10] whereas collective awards are likely to be made up of *cy pres* remedies or assistance programmes benefiting communities of victims.[11]

C. *The Scope of Beneficiaries*

Given the nature of crimes within the jurisdiction of the ICC, there is potentially a very wide scope of beneficiaries who may be eligible to receive reparations. The Court's approach to the issue of 'scope' therefore has a profound impact on the realisation of reparations and in this respect is highly sensitive to and critical for, victims. Some of the determinations on the size and scale of the beneficiary class will be influenced by the approach taken by the Prosecutor in deciding the charges to be brought. Other considerations are for the judges, and to a lesser extent, the Trust Fund for Victims, in determining how closely connected the beneficiary class must be to the criminal acts that are properly before the Court.

1. *The Breadth of the Charges and the Impact on the Scope of Beneficiaries*

The Office of the Prosecutor does not have the resources to prosecute all the individuals involved in the perpetration of massive crimes, nor is it capable of simultaneously investigating each and every crime falling within the ICC's jurisdiction. To optimise efficiency and impact the Prosecutor will need to find a way to focus on the responsibility of key individuals, but without being perceived as detracting from the complexities of any given situation. As stated in a prosecution policy paper:

> The global character of the ICC, its statutory provisions and logical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.[12]

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[10] See, L. Taylor, "The United Nations Compensation Commission", at Ch. 8 in this book.
[11] Rules of Procedure and Evidence, adopted by the 1st session of the Assembly of States Parties, New York, 3–10 September 2002, Official Records ICC-ASP/1/3, at rr. 97–98.
[12] ICC-OTP September 2003 at 6–7.

The Prosecutor will also need to consider the seriousness of the information it receives in order to assess whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being, committed and address issues regarding the practicality and feasibility of the investigation and prosecution, including the ability to have access to sufficient evidence to prove the elements of the enumerated offences, and the ability to secure custody over the accused.

As a result, it is clear that not all victims of crimes within the jurisdiction of the Court will fall within the potential class of beneficiaries of the Court's reparations awards, for the simple reason that no charges have been brought and/or proven which relate to their victimisation. As indicated, the Court's mandate to afford reparations stems from its jurisdiction to consider and decide charges brought by the Prosecutor; there is no independent possibility for the Court to determine reparations without a prior finding of guilt in respect of a particular accused person.

The Prosecutor has sole responsibility for determining which situations and cases to investigate and bring forward to the Court.[13] Whilst victims and others have the possibility to inform the Prosecutor about the commission of crimes and tender evidence,[14] they have no standing before the Court to oblige the Prosecutor to pursue certain leads or to develop certain lines of prosecutorial enquiry, nor an ability to appeal a decision not to pursue certain lines of enquiry, though they have the right to be informed of such developments,[15] and in principle, are entitled to submit their views and concerns.[16] All they can advocate for is that the Prosecutor responsibly implements its policy statement of pursuing those who bear the greatest responsibility, and further encourage the Office to pursue lines of enquiry that relate to the most significant patterns of victimisation, which reflect both the magnitude of victimisation as well as their central characteristics, including the impact on particular categories of victims, including women, children and other vulnerable groups.[17]

Thomas Lubanga Dyilo – the first accused before the ICC, is charged with enlisting, conscripting and using children under the age of fifteen to participate

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[13] Whilst in addition to his *proprio motu* powers, the Prosecutor may receive referrals from States Parties and the UN Security Council, it is ultimately his decision on the review of the evidence, as to which situations, cases and charges to pursue. See, Arts. 13(b), 14(1) and 15(3) of the Statute.

[14] Article 15 (1) and (2) of the Statute.

[15] R. 49(1) of the Rules of Procedure and Evidence.

[16] Article 68(3) of the Statute.

[17] See, for example, REDRESS, *Public Statement issued at the Second Public Hearing of the Office of the Prosecutor*, 26 September 2006, available at: www.vrwg.org/Publications/02/RedressStatementOnICCProsecutor'sStrategy.pdf.

actively in hostilities.[18] Several organisations raised concerns about the narrowness of the indictment, given the broader reports of his involvement in murder, torture and sexual violence.[19] The Prosecutor had indicated at the time that it was continuing to investigate other potential crimes, and that "it will, if and when the collection of evidence meets the threshold of Article 58(1)(a) of the Rome Statute (Statute) in relation to the further allegations of crimes currently under investigation, seek to amend the REDACTED in order to add substantial new charges to the ones already charged".[20] However, at the end of June 2006, the Prosecutor informed the Pre-Trial Chamber that it had temporarily suspended its investigation into other crimes potentially committed by Mr. Lubanga, citing security concerns.[21] No new charges have subsequently been brought. Efforts by the Women's Initiatives for Gender Justice to make submissions on the narrow scope of charges at Mr. Lubanga's confirmation hearing[22] were unsuccessful, denied on the basis of the somewhat circular reasoning that the proposed submission had no link with the charges.[23] The later indictments for Messrs. Katanga and Ngudjolo Chui encompassed a broader range of crimes though the incidents to which they related took place in a single village.[24]

Given that the Prosecutor becomes engaged in a particular situation or case because of the inability or unwillingness of local authorities to undertake investigations and prosecutions in the territorial state, it stands to reason that the proceedings before the ICC will be a key opportunity for justice, if not the only opportunity. This underscores the need for the Prosecutor to investigate a broad spectrum of crimes which gives due weight to the patterns of victimisation in the country concerned. Not to do so would, conversely, contribute to a double silencing of

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[18] Case of *The Prosecutor* v. *Thomas Lubanga Dyilo*, Warrant of Arrest dated 10 February 2006, ICC-01/04-01/06.

[19] See, *Joint Letter to the ICC Prosecutor on the narrow scope of the charges brought against Mr. Lubanga*, issued by Avocats Sans Frontières, Centre for Justice & Reconciliation, DRC Coalition for the ICC, International Federation of Human Rights, Human Rights Watch, REDRESS and the Women's Initiative for Gender Justice, 31 July 2006, available at: www.vrwg.org/Publications/02/DRC%20joint%20letter%20english%201-8-2006.pdf.

[20] *Prosecutor's Information on Further Investigation*, 28 June 2006, ICC-01/04-01/06, at para. 2.

[21] *Id.*, at paras. 7, 9.

[22] *Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for Leave to Participate as Amicus Curiae in the Article 61 Confirmation Proceedings* (With Confidential Annex 2), submitted 7 September 2006, ICC-01/04-01/06.

[23] *Decision on Request pursuant to Rule 103(1) of the Statute*, 26 September 2006, ICC-01/04-01/06.

[24] These related to murder, wilful killing, inhumane acts, inhuman treatment, sexual slavery, intentionally directing attacks against the civilian population, pillaging in the village of Bogoro. See, the Warrant of arrest for Germain Katanga, ICC-01/04-01/07-1 and ICC-01/04-01/07-Anx1 and the Warrant of arrest for Mathieu Ngudjolo Chui, ICC-01/04-01/07-260 and ICC-01/04-01/07-260-Anx, both dated 2 July 2007.

victims,[25] given that their crimes have not been acknowledged locally. Not to do so would also deprive a representative class of victims from seeking reparations before the Court.

a. *The Relationship between the Crimes for which an Accused is Convicted and Victims' Eligibility to Seek Reparations*

Rule 85(1) of the ICC Rules of Procedure and Evidence provides that

> For the purposes of the Statute and the Rules of Procedure and Evidence:
>
> (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
> (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

This Rule has already been subject to much judicial interpretation in relation to the participation of victims in the situation phase,[26] pre-trial[27] and trial phases.[28] Whilst the Court has not yet had occasion to consider the provision in relation to the reparation phase of proceedings, its jurisprudence regarding earlier phases may provide some insight into several of the considerations the judges may be faced with during the reparations phase.

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[25] See, in relation to the International Criminal Tribunal for Rwanda's poor experience of prosecuting sexual violence crimes, B. Nowrojee, "'Your Justice is Too Slow': Will the ICTR Fail Rwanda's Rape Victims?", United Nations Research Institute for Social Development (UNRISD) Occasional Paper Ten, November, 2005. For an analysis of the Special Court for Sierra Leone's failings in prosecuting sexual violence, see S. Kendell and M. Staggs, "Silencing Sexual Violence: Recent Developments in the CDF case at the Special Court for Sierra Leone", UC Berkeley War Crimes Studies Centre (2005).

[26] "Situations" exist prior to and/or independent of any arrest warrants issued in relation to particular accused persons have been described by the Court "in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such." See, e.g., *Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6*, ICC-Ol/04-lOl-tEN-Corr,17 January 2006 at para. 65.

[27] See, e.g., *Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-601, 20 October 2006; *Decision on the Applications for Participation in the Proceedings of Applicants a/0327/07 to a/0337/07 and a/0001/08 ICC-01/04-01/07-357*, 2 April 2008; *Decision on victim's application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06 (Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen)* ICC-02/04-01/05-282, 14 March 2008.

[28] See, e.g., *Decision on victim's participation* (Case of the Prosecutor v. Thomas Lubanga Dyilo*)* ICC-01/04-01/06-1119, 18 January 2008.

In assessing whether the conditions set out in Rule 85(1) have been met, the different chambers have considered (i) whether the identity of the applicant as either a natural person or an organisation or institution can be established; (ii) whether the events described by the applicants in their application forms constitute a crime within the jurisdiction of the Court; (iii) whether the applicants claim to have suffered harm; and (iv) whether such harm appears to have arisen "as a result" of the event constituting a crime within the jurisdiction of the Court. This four part test was first set out in January 2006 by Pre-Trial Chamber I in relation to victims' applications to participate in proceedings in the situation in the Democratic Republic of Congo,[29] and has since been adopted in numerous subsequent decisions.

2. *Proving Identity – Whether the Identity of the Applicant as Either a Natural Person or an Organisation or Institution Can be Established*

Given the exigencies in the countries where victims are located, proving identity has been a complex, arduous and time-consuming process for victims. As was noted by Pre-Trial Chamber I in relation to the DRC situation, "in regions which are or have been ravaged by conflict, not all civil status records may be available, and if available, may be difficult or too expensive to obtain".[30] Similarly, in considering the context in Uganda, the Single Judge evaluating applications from victims noted, that

> [i]n in a country such as Uganda, where many areas have been (and, to some extent, still are) ravaged by an ongoing conflict and communication and travelling between different areas may be difficult, it would be inappropriate to expect applicants to be able to provide a proof of identity of the same type as would be required of individuals living in areas not experiencing the same kind of difficulties. On the other hand, given the profound impact that the right to participate may have on the parties and, ultimately, on the overall fairness of the proceedings, it would be equally inappropriate not to require that some kind of proof meeting a few basic requirements be submitted.[31]

As a result of these challenges, certain allowances have been made by judges to ease the burden on victims to prove identity. In the Uganda situation, the Single Judge took the view that, in principle, the identity of an applicant should be confirmed

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[29] *Decision on the applications for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, ICC-Ol/04-lOl-tEN-Corr*, 17 January 2006 at para. 79.

[30] *Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation* (DRC Situation), ICC-01/04-374, of 17 August 2007 at para. 14.

[31] *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* (Uganda Situation), ICC-02/04-101 10 August 2007, at para. 16.

by a document (i) issued by a recognised public authority; (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the holder.[32] However, following the receipt of a Registry report on the identity documents available in Uganda which showed that the majority of actual and potential applicants in Northern Uganda were unable to meet those requirements, the Single Judge noted in a later decision that "these requirements must be lowered and adapted to the factual circumstances in the region",[33] and significantly extended the list of documents that would be accepted as proof of identity. The following documents were listed: (i) passport, (ii) voter card, (iii) certificate of registration issued by the Electoral Commission, (iv) driving permits, (v) graduated tax ticket, (vi) "short" birth certificate or "long" birth certificate, (vii) birth notification card, (viii) certificate of amnesty, (ix) resident permit or card issued by a Local Council, (x) identification letter issued by a Local Council, (xi) letter issued by a leader of an IDP Camp, (xii) "Reunion letter" issued by the Resident District Commissioner, (xiii) identity card issued by a workplace or an educational establishment, (xiv) camp registration card and card issued by humanitarian relief agencies, such as the United Nations High Commissioner for Refugees and the World Food Programme, (xv) baptism card, (xvi) letter issued by a Rehabilitation Centre.

In the DRC situation, the Chamber decided to allow any of the following documents to prove identity, kinship, guardianship or legal guardianship:

(i) national identity card, passport, birth certificate, death certificate, marriage certificate, family registration booklet, will, driving licence, card from a humanitarian agency;
(ii) voting card, student identity card, pupil identity card, letter from local authority, camp registration card, documents pertaining to medical treatment, employee identity card, baptism card;
(iii) certificate/attestation of loss of documents (loss of official documents), school documents, church membership card, association and political party membership card, documents issued in rehabilitation centres for children associated with armed groups, certificates of nationality, pension booklet; or
(iv) a statement signed by two witnesses attesting to the identity of the applicant or the relationship between the victim and the person acting on his or her behalf, providing that there is consistency between the statement and the application. The statement should be accompanied by proof of identity of the two witnesses.[34]

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[32] *Ibid*., para. 16.
[33] Decision *on victim's application for participation a/0010/06, a/0064/06 to a/0/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06* (Uganda Situation) ICC-02/04-125, 14 March 2008.
[34] ICC-01/04-374, *supra* n. 30, at para. 15.

A similar position on identity documents was taken by the Trial Chamber in the Lubanga case.[35]

Despite the allowances made by the judges as illustrated above, challenges remain for victims to obtain the necessary documents. In particular, many child applicants do not possess national identity documents, are not eligible for voting cards and student identity cards are not regularly available and/or are too costly to procure. Also, given the haphazard recording of births in many of the areas in which victims are located, the dates of birth registered on official documents can differ from victims' recollections of these dates and consequently discrepancies will regularly exist between the dates victims cite in their application forms and those listed in official documents, leading to confusion in the review and consideration of victims' applications by the Court.[36] Local intermediaries assisting victims with their applications to obtain the necessary identity documents have sought minimal reimbursements for making copies of application forms and other documents and for travel. However the Registry's position has been that it cannot assist the applicants in this way. It has stated that it can provide information, training and copies of the forms, but as it is a neutral body such assistance could amount to a bias incompatible with fair trial.[37] On the ground affected communities and local human rights groups are frustrated by the lack of support. It is often local activists who bear the costs of the application process in addition to being unpaid volunteers. The result has been that large numbers of application forms are not filled out correctly or evidentiary materials supplied to prove identity are incomplete, adding to delays.

Whilst all of the ICC jurisprudence on proving identity concerns victims' applications to participate in proceedings, it is expected that the Court will adopt a similar if not identical approach when considering the types of identity documents that victims may supply when applying for reparations. However, it is expected that given the material consequences of the reparations phase, a higher standard of proof will be adopted to prove identity as well as the substance of the claims. It is unlikely that *prima facie* evidence[38] of identity will be considered sufficient in the reparations phase. There may be further challenges by the defence and other parties on issues relating to identity, and it would consequently be advisable for the Court to adopt clear and streamlined procedures to apprise victims well in advance of what is required and to avoid lengthy Court challenges.

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[35] Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06-1119 ((Case of the Prosecutor v. Thomas Lubanga Dyilo)), *supra* n. 28, at paras. 87–89.

[36] Discussions held by the authors with legal representatives for victims in the DRC situation.

[37] Discussions, *id*.

[38] See the part entitled 'Causation and standard of proof in reparations proceedings' at Section 3(b)(iv) of this Chapter.

3. *Whether the Events Described by the Applicants in their Application Forms Constitute a Crime within the Jurisdiction of the Court*

To fall within the Court's jurisdiction, a crime must be one of the crimes mentioned in Article 5 of the Statute, e.g., genocide, crimes against humanity and war crimes; it must have been committed within the time period set out in Article 11 of the Statute, e.g., after the entry into force of this Statute on 1 July 2002,[39] and must relate to an alleged crime that either took place on the territory of a State Party to the Statute, concerns an accused person who is a national of a State Party, or is otherwise referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.

This criterion should be relatively straight-forward to satisfy in the context of the eventual reparations proceedings before the Court, for the simple reason that orders for reparations may be made "against a convicted person".[40] Consequently, the Court's jurisdiction will have already been ascertained in relation to the individuals and the crimes concerned. However, it is possible for victims to apply for reparations prior to the conclusion of the criminal case,[41] and in this respect this criterion will need to be positively satisfied by applicants. The requirement that reparations is linked to the "convicted person" underscores the need for the Prosecutor to investigate a broad spectrum of crimes which gives due weight to the patterns of victimisation in the country concerned.[42]

a. *Whether the Applicants Claim to Have Suffered Harm*

The term "harm" is not defined in either the Statute or Rules of Procedure and Evidence. In the jurisprudence of the Court, "harm" has been taken to refer to the notions of hurt, injury and damage,[43] and has been considered on a case-by-case basis. Rule 85(b) which relates to organisations or institutions, provides that legal persons must have "sustained direct harm" while Rule 85(a) does not make that specification with regards to natural persons. In the Appeals Chamber decision in the Lubanga case, it was determined that in light of Rule

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[39] If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under Article 12(3).

[40] Article 75(2) of the Statute; Rule 97(2) of the Rules of Procedure and Evidence.

[41] The Standard Application Forms for victims seeking to apply to the Court for reparations are already available on the ICC website, *supra* n. 7.

[42] See, Section III(a) in this Chapter: 'The Breadth of the Charges and the Impact on the Scope of Beneficiaries,' above.

[43] *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06 OA 9 OA 10 (Case of Thomas Lubanga Dyilo), 11 July 2008 at para. 31.

85(a), "harm" does not necessarily need to be direct, though it must be personal to the victim:[44]

> [T]he harm suffered by a natural person is harm to that person, i.e. personal harm. Material, physical, and psychological harm are all forms of harm that fall within the rule if they are suffered personally by the victim. Harm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims. This is evident for instance, when there is a close personal relationship between the victims such as the relationship between a child soldier and the parents of that child. The recruitment of a child soldier may result in personal suffering of both the child concerned and the parents of that child. … The issue for determination is whether the harm suffered is personal to the individual. If it is, it can attach to both direct and indirect victims. Whether or not a person has suffered harm as the result of a crime within the jurisdiction of the Court and is therefore a victim before the Court would have to be determined in light of the particular circumstances.[45]

As with several other determinations of the Court that relate to victims' procedural rights, a low threshold to satisfy the requirements of "harm" was set out in proceedings relating to the investigation of "a situation", also known as the "situation phase", but the threshold has been interpreted as higher in the pre-trial and trial phases of a case. Indeed, a minimal showing of harm was required in the 17 January 2006 decision of Pre-Trial Chamber I, which considered whether the applicants could be recognised as victim participants in proceedings relating to the investigation of "the situation. The Pre-Trial Chamber held that:

> [w]ith regard to the more specific question of determining the harm suffered by the victims, Pre-Trial Chamber I notes that the purpose of this decision is not to make a definitive determination of the harm suffered by the victims, as this will be determined subsequently, where appropriate, by the Trial Chamber in the context of a case. Pre-Trial Chamber I considers, moreover, that the determination of a single instance of harm suffered is sufficient, at this stage, to establish the status of victim.[46]

The Court has drawn on the standards set out in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*,[47] and the *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*

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[44] *Id.*, para. 38.
[45] *Id.*, para. 32.
[46] *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, of 17 January 2006, ICC-01/04-101 (Situation in the Democratic Republic of Congo) at para. 82.
[47] Adopted by General Assembly resolution 40/34, 29 November 1985, fortieth session, United Nations document A/RES/40/34.

law,[48] as well as the jurisprudence of regional human rights courts to frame it's analysis of the concept of harm. It has determined a wide array of situations and circumstances as falling within this concept, including both physical and emotional harm, pecuniary and non-pecuniary losses.

In its early decisions on the admission of victims as participants in proceedings, the different chambers have indicated that the following non-exhaustive types of damage satisfy the requirement of "harm" under the Statute: emotional suffering related to the loss of family members;[49] forced recruitment into rebel movements and participation in hostilities resulting in continuous psychological problems;[50] emotional and physical suffering related to enslavement and detention,[51] beatings and torture,[52] including incommunicado detention, the denial of medical treatment and limited access to food;[53] displacement of families;[54] injury by gunshots,[55] and economic loss due, in particular, to looting, destruction and burning of houses.[56]

The types of harm listed above vary in gravity. So far, the Court has not established whether a certain threshold of harm is required in the context of victims' applications to participate in proceedings, though this may be a consideration for the reparations phase.[57]

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[48] Adopted by General Assembly resolution 60/147 of 16 December 2005. See, Ch. 1 by Professor T. van Boven in this book. On the use by the ICC of these principles and guidelines, see for example, Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06-1119 ((Case of the Prosecutor v. Thomas Lubanga Dyilo)), *supra* n. 28, at para. 91; *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, of 17 January 2006, ICC-01/04-101 (Situation in the Democratic Republic of Congo), *supra* n. 46 at paras. 115–16; See also *Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008*, ICC-01/04-01/06 OA 9 OA 10 (Case of Thomas Lubanga Dyilo), 11 July 2008, *supra* n. 43 at para. 33.

[49] *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, of 17 January 2006, ICC-01/04-101 (Situation in the Democratic Republic of Congo), *supra* n. 46 at paras. 117, 132; *Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, ICO-01/04-01/07 (Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui), at paras. 69, 70.

[50] *Decision on Victim Participation* dated 2 April 2008, ICC-01-04-01-07-357, (Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui), 11.

[51] *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n. 46 at para. 147.

[52] *Id.*, para. 173.

[53] *Decision on Victim Participation* of 14 December 2007, ICC-02/05 (Situation of Darfur) at para. 40.

[54] *Id.*

[55] *Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, *supra* n. 49 at paras. 71, 115.

[56] *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n. 46 at paras. 132, 162; *Decision on Victim Participation* of 14 December 2007, ICC-02/05 (Situation of Darfur) *supra* n. 53 at para. 40.

[57] See, M. Henzelin, V. Hesikanen and G. Mettraux, "Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes," Criminal Law Forum (2006) 17:317–344 at 325–26.

b. *Whether the Harm Appears to Have Arisen "as a Result" of the Event Constituting a Crime within the Jurisdiction of the Court*

In relation to the fourth criterion, the ICC Statute does not specify the precise relationship required between the harm caused to individuals seeking to be recognised as victims and the degree to which this harm results from a crime within the jurisdiction of the Court.

The Court's approach to the particular issue has largely depended on the phase of the proceedings before the Court. In a general sense, the Court has interpreted the connection between the applicant and the actual proceedings before the Court, to become progressively precise as proceedings move forward.

In proceedings relating to an investigation, namely at the "situation phase", which exists prior to or independent of any arrest warrant against a particular accused person, the first decision of the Court to canvass Rule 85(1) indicated that "it is not necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes",[58] and when analysing the applications of the alleged victims to participate in such proceedings, it merely stated that "[t]he Chamber also considers that there are grounds to believe that the [individual applicant] suffered harm as a result of the commission of those crimes".[59] In later decisions of the Pre-Trial Chambers in the situation phase, the criterion has been more specifically considered. For example, in the 10 August 2007 decision of Pre-Trial Chamber II regarding the Uganda situation, the Single Judge adopted a "pragmatic, strictly factual approach, whereby the alleged harm will be held as "resulting from" the alleged incident when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent".[60]

At the pre-trial phase of a case, a closer link between the harm suffered and the crime within the jurisdiction of the Court has been required when determining applications by victims to participate in the proceedings against the accused. In the Lubanga case, the Pre-Trial Chamber indicated that there must be "a sufficient causal link between the harm they suffered and the crimes for which there are reasonable grounds to believe that Thomas Lubanga Dyilo is criminally responsible and for whose commission the Chamber issued an arrest warrant";[61]

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[58] *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n. 46 at para. 94.

[59] *Id.*, at paras. 124, 135, 153, 167, 176, 186.

[60] *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* of 10 August 2007, ICC-02/04-101 (Uganda Situation) at para. 14.

[61] *Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo*, 29 June 2006, ICC-01/04-01/06-172-tEN, at 6.

and that the causal link is demonstrated once sufficient evidence is provided to establish that that person has suffered harm directly linked to the crimes set out in the arrest warrant or that that person has suffered harm by intervening to assist the direct victims in the case or to prevent these victims from becoming victims as a result of these crimes being committed.[62] The same approach of requiring a direct link between the harm suffered and the crimes set out in the arrest warrant was taken in the case against Germain Katanga and Mathieu Ngudjolo Chui.[63]

At the time of writing, only the Lubanga case had reached trial.[64] The Trial Chamber issued a seminal decision on victim participation on 18 January 2008, in which it held, unlike the Pre-Trial Chamber before it, that a *direct* link between the harm and the crimes before the Court was not required for victims seeking to participate in the trial. The Presiding Judge, His Honour, Judge Fulford, for the majority, held that

> Rule 85 of the Rules does not have the effect of restricting the participation of victims to the crimes contained in the charges confirmed by Pre-Trial Chamber I, and this restriction is not provided for in the Rome Statute framework. Rule 85(a) of the Rules simply refers to the harm having resulted from the commission of a "crime within the jurisdiction of the Court" and to add the proposed additional element – that they must be the crimes alleged against the accused – therefore would be to introduce a limitation not found anywhere in the regulatory framework of the Court.[65]

Further, it was held that in principle, "a victim of any crime falling within the jurisdiction of the Court can potentially participate".[66] However, considering Article 68(3) of the Statute which provides that "where the interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate […]", there should either be a "real evidential link" between the victim and the evidence which the Court will be considering at trial leading to the conclusion that the victim's personal interests are affected or the victim is affected by an issue arising during

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[62] *Decision on the Application for Participation m the Proceedings of VPRS1 to VPRS6 in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/-06-228-tEN, 8–9.

[63] *Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, *supra* n. 49 at para. 66.

[64] The Trial Chamber had issued a stay of proceedings in relation to the Lubanga case as a result of problems stemming from the lack of disclosure of evidence to the accused, and the Trial Chamber had ordered Mr. Lubanga's release from custody. The Office of the Prosecutor had appealed this decision and the matter was pending at the time of writing.

[65] Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06-1119 (Case of the Prosecutor v. Thomas Lubanga Dyilo), *supra*. n. 28 at para. 93.

[66] *Id*., at para. 95.

the trial because his or her personal interests are in a real sense engaged by it.[67] Judge Blattmann, in his separate and dissenting opinion, disagreed with the majority approach and noted that a causal link was required, holding that "[t]he Trial Chamber has the competency to determine whether a person is a victim only when linked to the facts and circumstances found within the charges presented by the prosecution and confirmed by the Pre-Trial Chamber, and must stay within this framework in its consideration of victims".[68]

This and several other findings of the Trial Chamber decision were appealed.[69] The Appeals Chamber has determined that while the ordinary meaning of rule 85 does not *per se* limit the notion of victims to those directly affected by the crimes charged, article 68(3) of the Statute which specifically regulates the participation of victims in the proceedings, does have the effect of limiting participation in the trial phase to those victims who are linked to the charges.[70]

i. *Causality of "Harm" in Relation to Reparations Proceedings*

Article 75 of the Statute is silent on the extent to which, during the reparations phase, the "harm" suffered by victims must be causally connected to the crimes for which the individual was convicted. It merely states that "the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims." The Court's Rules of Procedure and Evidence are also silent on this point. Rule 94 sets out the particulars that applicants must provide to substantiate their reparations claims,[71] however, the precise relationship between the applicants and the crimes before the Court is not evident.

As has been indicated, the Court, in most cases relating to the participation of victims in proceedings, has determined that there must be a personal link between

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[67] *Id.*

[68] *Id.*, para. 16 of the separate and dissenting opinion.

[69] The Trial Chamber granted leave to appeal its decision of 18 January 2008 on a number of grounds, including *inter alia*, whether the notion of victim necessarily implies the existence of personal and direct harm and whether the harm alleged by a victim and the concept of "personal interests" under Article 68 of the Statute must be linked with the charges against the accused. See, *Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008* (Case of Thomas Lubanga Dyilo) ICC-01/04-01/06-1191 of 26 February 2008 at paras. 54(a) and (b).

[70] See, Judgment of the Appeals Chamber of 18 July 2008, *supra* n. 43 at para. 58.

[71] Rule 94(1) provides: "1. A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars: (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) Claims for rehabilitation and other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses."

the harm and the crimes before the Court, though this link need not be direct. This has now been confirmed by the Appeals Chamber in the Lubanga case.[72] The Court has interpreted this, in the context of victims seeking to participate in proceedings as entailing a requirement of connection with the charges before the Court. Consequently, taking the example of Thomas Lubanga Dyilo who is charged with offences relating to the enlisting, conscripting and using children under the age of fifteen to participate actively in hostilities, if convicted of this crime, and assuming that the Court adopts the same approach at the reparations phase of the case as with victim participation, the class of potential beneficiaries would presumably be limited to:

– those individuals who were personally affected by the crime (e.g.: children under the age of fifteen who were enlisted, conscripted and used to participate actively in hostilities, family members of such victims who suffered moral or economic harm as a result);
– those individuals that have suffered harm by intervening to assist the direct victims or to prevent these victims from becoming victims as a result of these crimes being committed (e.g., the school masters that were injured whilst trying to prevent forced recruitment in schools); and
– those organizations or institutions that sustained direct harm to their property (e.g. schools that were destroyed in the course of the enlisting, conscripting or use of children under the age of fifteen to participate actively in hostilities).

The decision of the Appeals Chamber was largely circumscribed by the wording of Article 68(3) of the Statute, which explains the nature and extent to which victims may participate in proceedings. It provides that participation is limited to those victims whose "personal interests" are affected:

> 3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Article 68(3), may, in a general sense, apply to reparations to the extent that the reparations phase of proceedings can be considered to be one of the "stages of the proceedings" referred to in that paragraph. This notwithstanding, Article 75 of the Statute does not specify who may apply for reparations, other than indicating

[72] See, Judgment of the Appeals Chamber of 18 July 2008, *supra* n. 43.

that reparations may be awarded "to, or in respect of, victims".[73] While there is a reference to "victims" and in this sense, the analysis in relation to the meaning and scope of Rule 85(1) detailed in the preceding paragraphs is pertinent, there is no reference to "personal interests" as a factor limiting the scope of victims who might potentially be eligible for reparations. From this perspective, it is possible that the majority decision of the Trial Chamber in the Lubanga case might still be relevant, given the Appeals Chamber's finding that the ordinary meaning of rule 85 does not *per se* limit the notion of victims to those directly affected by the crimes charged.[74] The question remains, therefore, whether and to what extent Article 68(3) of the Statute applies to the reparations phase of the case, and if so, whether the "personal interests" of victims are confined to the specific criminal acts for which the offender was found guilty. In other words, the "personal interests" of a much wider group of victims may be engendered by the reparations phase, insofar as the criminal acts can be said to have resulted in other acts impacting directly or indirectly on victims. In this respect, the class of potential beneficiaries of reparations in the Lubanga case could extend to any victim in the situation country for which the harm they suffered resulted directly or indirectly from the criminal acts for which the offender was convicted. Whilst this issue has not been canvassed by the Trial Chamber, it could potentially include victims who suffered harm as a result of the actions of child soldiers (e.g., the many women and girls who were raped as a result of the forced initiation rites of new recruits).

ii. *Causation and Standard of Proof in Reparations Proceedings*

As a separate but additional matter related to scope and causation, the question remains as to the standards the Court will use to *prove* the relationship between the harm suffered and the crimes no matter how the latter are framed, and indeed to prove all other requirements for the definition of "victim" under Rule 85(1). As has been indicated, in the situation phase the Court has determined there to be quite a low threshold, referring in some cases to the standard of "grounds to believe",[75]

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[73] Art 75(2).

[74] Judgment of the Appeals Chamber of 18 July 2008, *supra* n. 43 at para. 58.

[75] *Decision on the Applications for Participation in the Proceedings* of 17 January 2006, *supra* n. 46, at paras. 94, 98–101. Though beyond the issues before it, the Pre-Trial Chamber stated in its 17 January 2006 decision that there would be a gradated approach to causation: "Thus, the Chamber finds that the criterion used at the situation stage to accord procedural rights in the context of an investigation, i.e. article 55 (2) of the Statute, is that of "grounds to believe". Moreover, the Chamber notes that as soon as a warrant of arrest is issued, the examination criterion is more restrictive. Thus, according to article 58 (1)(a) of the Statute, the Chamber shall issue a warrant of arrest if it is satisfied that "[t]here are reasonable grounds to believe" that the person concerned has committed a crime. Similarly, at the stage of confirmation of the charges,

and that there should be broad discretion to consider evidence.[76] There should be an overlap between the alleged incident and the spatial and temporal circumstances surrounding the appearance of the harm, which would at least be compatible and not clearly inconsistent.[77] In Pre-Trial proceedings relating to cases before the Court, there should be "reasonable grounds to believe;" also, "a sufficient causal link" has been seen to be required, demonstrated once "sufficient evidence" is provided. These standards require that applicants demonstrate that the elements established by rule 85 of the Rules are met *prima facie*.[78] As has been stated:

> [T]he Chamber has emphasized that its analysis of the Applications "will not consist in assessing the credibility of the [applicants'] statements or engaging in a process of corroboration *stricto sensu*." This has been further explained by Pre-Trial Chamber II in the following terms: "similarly to the method followed by Pre-Trial Chamber I, the Single Judge will therefore assess each statement by applicant victims first and foremost on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber." [Footnotes omitted][79]

A similar approach has been taken by the Trial Chamber, which indicated that it will "merely ensure that there are, *prima facie*, credible grounds for suggesting that the applicant has suffered harm as a result of a crime committed within the jurisdiction of the Court".[80]

It is likely that the Court will adopt a stricter approach to standard of proof in the reparations phase, both in the consideration of which individuals qualify as

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the criterion used by article 61(7) of the Statute to determine whether the charges should be confirmed is even more restrictive. The Chamber determines whether there is sufficient evidence "to establish substantial grounds to believe" that the person committed a crime." [at para. 98].

[76] In relation to the standard of proof, Pre-Trial Chamber II stated that due to the lack of provisions in this regard, it has "broad discretion in assessing the soundness of a given statement or other piece of evidence". *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*, of 10 August 2007, ICC-02/04-101, paras. 12–14.

[77] *Decision on victims' application for participation* dated 14 March 08, ICC-02/04-125 (Uganda Situation). As regards the method of examination and the required standard of proof, all the factors identified as relevant for the definition of victim provided by rule 85 of the Rules are to be proved to a level which might be considered satisfactory for the limited purposes of that rule. Each statement by applicant victims will therefore first and foremost be assessed on the merits of its intrinsic coherence, as well as on the basis of information otherwise available to the Chamber.

[78] See, *Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case* of 10 June 2008, *supra* n. 49 at para. 67.

[79] *Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2) (e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor* of 7 December 2007, ICC-01/04-417 (Situation in the DRC) at para. 8.

[80] Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06-1119 (Case of the Prosecutor v. Thomas Lubanga Dyilo), *supra* n. 28 at para. 99.

"victims" and also, for the evaluation of "harm" for an award of reparations. Indeed, various chambers have already hinted that the standard of proof will be more onerous. For instance, this was indicated by Pre-Trial Chamber II in the Uganda Situation:

> Whilst the determination of a causal link between a purported crime and the ensuing harm is one of the most complex theoretical issues in criminal law, the Single Judge shares Pre-Trial Chamber I's view that a determination of the specific nature of such a link goes beyond the purposes of a determination made under rule 89 of the Rules, whether in the context of a situation or of a case. In particular, *whereas such an analysis may be required for the purposes of a reparation order*, it does not seem required when the determination to permit an applicant to present "views and concerns" within the meaning of article 68, paragraph 3 of the Statute is at stake. [Emphasis added][81]

D. *Reparations Proceedings before the Court*

Under the Statute, reparations to victims may be considered by the Court on its own initiative following applications by victims. These possibilities are referred to in Article 75(1) which provides that "… [o]n this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting."

The ability for the Court to determine reparations *proprio motu* is important. This possibility recognises, *inter alia*, that not all individuals who may be deserving of reparations will be in a position to apply to the Court, and that this should not prevent the Court from determining reparations in a general or specific way. It is made clear that these powers should be exercised on an exceptional basis[82] only, though the criteria for determining what may constitute such an exceptional situation are not spelt out and are likely to be considered on a case-by-case basis by the Court. Under Rule 95 of the Rules of Procedure and Evidence, should the Court decide to utilise these *proprio motu* powers, it shall request the Registrar to notify this intention to the defendant(s) [the person(s) against whom the Court is considering making a determination], and to the extent possible, to victims and other interested persons or interested States. Other interested persons might include judgment creditors who might be impacted by any decision

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[81] *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06* of 10 August 2007, ICC-02/04-101 (Uganda Situation) at para. 14.

[82] Article 75(1) refers to "on its own motion *in exceptional circumstances*" (emphasis added).

of the Court to order reparations, and interested States might include the State in which the harm is said to have occurred and/or any other States potentially impacted by that harm, that may have an interest in an eventual reparations award.[83]

1. *The Application Process*

Typically, the Court will consider reparations as a result of applications submitted by victims pursuant to Rule 94 of the Rules of Procedure and Evidence. Indeed, even if the Court utilises its *proprio motu* powers, if the notification of its intention to do so leads to applications by victims to be included in the reparations process, these will be considered as if they had been brought under Rule 94.[84]

Applications for reparations must be made in writing and filed with the Registrar. The requirements for the contents of the application are specified in Rule 94:

(a) The identity and address of the claimant;
(b) A description of the injury, loss or harm;
(c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm;
(d) Where restitution of assets, property or other tangible items is sought, a description of them;
(e) Claims for compensation;
(f) Claims for rehabilitation and other forms of remedy;
(g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.

The Registry has developed standard reparations forms for both natural and legal persons that reflect the contents above.[85] The forms invite applicants to specify their physical injuries resulting from the alleged crime(s), mental pain or anguish, loss of, or damage to property, and also include a place for applicants to list any other damage. The forms are similar to those prepared for victims seeking to

[83] As has been indicated, the Court is limited by the Statute to afforded reparation "to, or in respect of, victims" which may, according to Rule 85(1) of the Rules of Procedure and Evidence be natural persons or legal persons, the latter being restricted to "organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes." Consequently, it is not possible for the Court to award reparations to States though they may have an interest in the proceedings which may be taken into account by the Court.

[84] Rule 95(2)(a).

[85] These standard application forms for reparations are available on the website of the Court at: www.icc-cpi.int/victimsissues/victimsreparation/victimsreparationForm.html.

participate in proceedings.[86] Indeed, all Parts of the forms are identical with the exception of Part C on stages of participation and Part F on reparations that only appear in the participation or reparations application forms respectively. Consequently, it would appear that victims who have been granted procedural status at the pre-trial or trial phase of a case would not be required to complete afresh a new application for reparations given that the information will have been supplied already to the Court.[87] Both forms request applicants to specify whether they have made previous applications to the Court, and if so, to specify the registration number,[88] suggesting that any information provided in previous applications would be taken into account.

The Court does not specify when applications may be received or when they will be considered. The forms are already on the Court's website, suggesting that it is already possible for victims to apply. However, given that the offences for which any particular accused will be found guilty, if any, are not yet known, and victims will need to show some connection with these crimes to benefit from reparations, it would seem premature for victims to submit a full application for reparations, though appropriate for them to register their intention to seek reparations. Indeed, the reparations forms specify that "criminal proceedings take time and it may be some time before the Court makes decisions on reparations".

The application process for reparations is individualised, e.g., each individual who suffered harm who wishes to apply for reparations must complete an application form. This is despite the fact that many victims may have suffered harm collectively (e.g., the incidents which gave rise to the harm may have affected communities or large groups of persons in a similar if not identical way – burning of villages, displacement). This is also despite the fact that some of the forms of harm may, in their nature be collective. The *Basic Principles and Guidelines on the Right to a Remedy and Reparation*[89] notes that "contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively." As has been seen with the Court's proceedings to date relating to victim participation, in which victims must apply individually only to be accorded collective rights of participation, the

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[86] The standard application forms for victims seeking to participate in proceedings are available on the website of the Court at: www.icc-cpi.int/victimsissues/victimsparticipation/victimsparticipationForm.html.

[87] At the time of writing, this issue had not been canvassed by the Court.

[88] The beginning of Part A of both forms.

[89] *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*, Adopted by the UN General Assembly at the *64th plenary meeting, 16 December 2005*, A/RES/60/147, preamble.

failure to develop procedures which align with the rights to be eventually accorded may lead to unnecessary delays, uncertainties and frustrations.[90] The Court does have the potential to afford collective reparations where this is seen to be most appropriate, though this has not been factored into the application process. As was indicated by the Appeals Chamber in the Lubanga case,

> 34. … in accordance with Principle 8 of the Basic Principles of 2005 "a victim may suffer either individually or collectively from harm in a variety of different ways such as physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights." The Defence contends that the Trial Chamber erred in adopting the wording of Principle 8 to conclude that a victim may suffer either individually or collectively.
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> 35. The Appeals Chamber considers that there may clearly be harm that could be both personal and collective in nature. The fact that harm is collective does not mandate either its inclusion or exclusion in the establishment of whether a person is a victim before the Court. The issue for determination is whether the harm is personal to the individual victim. The notion of harm suffered by a collective is not, as such, relevant or determinative.[91]

2. *Judicial Proceedings*

Judicial proceedings relating to reparations may have relevance before, during and after the trial. Prior to and also during the trial phase, proceedings will involve the location, freezing and seizure of assets for a future reparations order.[92] In addition, victims participating in proceedings might also seek to express views and concerns about elements of the criminal procedure that may impact on their reparations claims.

Article 75(2) provides that "[a]t commencement of the trial and subject to any protective measures, the Court shall ask the Registrar to provide notification of

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[90] Victims must apply individually to participate in proceedings despite the fact that their participation, if successful will invariably be collective, through common legal representatives representing groups of similarly situated victims. There is little opportunity for their individual unfiltered voices to be heard.

[91] Judgment of the Appeals Chamber of 18 July 2008, *supra* n. 43.

[92] Once a warrant of arrest or a summons has been issued, the Pre-Trial Chamber may make an order for protective measures to ensure that any assets which might be the subject of a future reparations order are maintained. Art. 57(3)(e) provides that the Pre-Trial Chamber may "seek the cooperation of States pursuant to Article 93, paragraph 1(k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims." This provision may well be of critical importance to the realization of reparations awards, in those instances where there are assets and they are traceable. Rule 99(1) of the Rules of Procedure and Evidence specifies that: "the Pre-Trial Chamber, pursuant to Article 57, paragraph 3(e), or the Trial Chamber, pursuant to Article 75, paragraph 4, may, on its own motion or on the application of the Prosecutor or at the request of the victims or their legal representatives who have made a request for reparations or who have given a written undertaking to do so, determine whether measures should be adopted."

the request to the person or persons named in the request or identified in the charges and, to the extent possible, to any interested persons or any interested States." Notwithstanding this provision, it is unclear how the Court will hear claims relating to reparations once notified by the Registrar,[93] e.g., when during the procedure such matters will be considered and whether and to what extent hearings will be held to substantiate the information providing in application forms. As has been indicated, Article 75(1) provides that "[t]he Court shall establish principles relating to reparations to, or in respect of, victims…," though these have thus far not been established.

The "reparations phase" could form part of the trial or as a separate post-trial procedure.[94] Reparations may only be ordered post-trial, however, it may be possible for the Court to hear evidence on reparation prior to the end of the trial. Regulation 56 of the Regulations of the Court provides that "[t]he Trial Chamber may hear the witnesses and examine the evidence for the purposes of a decision on reparations in accordance with article 75, paragraph 2, at the same time as for the purposes of trial."[95]

The extent to which evidence for the purposes of reparations may be heard during trial was recently the subject of debate in the Lubanga case. The defence submitted that reparations should be dealt with post-trial and argued that Regulation 56 is to be read as an exceptional procedure that should not become general practice. The prosecution called for a "blended approach", according to which victims should be permitted to question witnesses called by the parties during the trial for the purposes of reparations if trial issues and reparations issues could reasonably be dealt with at the same time. It submitted that the victims should also have the opportunity to introduce evidence that related solely to the issue of reparations prior to the delivery of a verdict.[96] According to the Office of Public Counsel for Victims, it would be preferable for the Chamber to consider reparations at trial as it would further the objective of expediting the proceedings and limiting unnecessary further trauma to the victims.[97]

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[93] Regulation 88(2) of the Regulations of the Court provides that: "The Registrar shall seek all necessary additional information from a victim in order to complete his or her request in accordance with rule 94, sub-rule 1, and shall assist victims in completing such a request. The request shall then be registered and stored electronically in order to be notified by the unit described in regulation 86, subregulation 9, in accordance with rule 94, sub-rule 2." There is no mention of what procedures the Court will adopt subsequent to notification.

[94] However, given that the Court "may make an order directly against a convicted person [Art 75(2) Statute], a separate post-trial procedure may be preferable.

[95] Regulations of the Court, as amended on 14 June and 14 November 2007, Official documents of the International Criminal Court, ICC-BD/01-02-07.

[96] Summarised at para. 61 of the Decision of the Trial Chamber of 18 January 2008, ICC-01/04-01/06-1119 ((Case of the Prosecutor v. Thomas Lubanga Dyilo)), *supra* n. 28.

[97] *Id.*, at para. 76.

The Trial Chamber determined that:

> There will be some areas of evidence concerning reparations which it would be inappropriate, unfair or inefficient to consider as part of the trial process. The extent to which reparations issues are considered during the trial will follow fact-sensitive decisions involving careful scrutiny of the proposed areas of evidence and the implications of introducing this material at any particular stage. The Trial Chamber may allow such evidence to be given during the trial if it is in the interests of individual witnesses or victims, or if it will assist with the efficient disposal of issues that may arise for determination. However, the Chamber emphasises that at all times it will ensure that this course does not involve any element of prejudgment on the issue of the defendant's guilt or innocence, and generally that it does not undermine the defendant's right to a fair trial.[98]

This particular determination was not subject to appeal, though the related question of whether it is possible for victims participating at trial to lead evidence pertaining to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence was subject to appeal, and was affirmed by the Appeals Chamber, the Honourable Judge Pikis dissenting.[99] While the participation of a victim at the trial is not a prerequisite for claiming reparations, the finding that reparations issues may possibly be considered during the trial underscores the need for victims' interests to be protected during this phase.

3. *Assessing Reparations*

As has been indicated earlier in this chapter, whilst the standard of proof is not precisely identified in the Statute, there is concern that the Court might adopt a stricter standard of proof in the reparations phase than what was used in the pre-trial, trial or appeals phases, both in the consideration of which individuals qualify as "victims" and also, for the substantive evaluation of the "harm".[100] This could limit the numbers of persons who may be eligible for reparations before the Court, irrespective of the harm they may have suffered. The use of a rigorous standard of proof, either a 'balance of probabilities' or other strict foreseeability standard was specifically rejected by several other reparations bodies discussed in other chapters in this Book,[101] particularly *for cy pres* collective awards or lump sum payments where the amount of the award does not correspond to the precise

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[98] Id., at para. 122.

[99] Judgment of the Appeals Chamber of 18 July 2008, *supra* n. 43, at para. 109.

[100] *Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06*, of 10 August 2007, ICC-02/04-101 (Uganda Situation) at para. 14.

[101] See, Heike Niebergall, "Overcoming Evidentiary Weaknesses in Reparation Claims Programmes", Ch. 6; Linda A. Taylor, "The United Nations Compensation Commission", Ch, 8; Judah Gribetz and Shari C. Reig, "The Swiss Banks Holocaust Settlement", Ch. 5 in this Book.

harms suffered by individual victims. Such bodies have recognised the challenges for claimants to provide evidence of their identity and document harm suffered and have favoured relaxed standards of proof.[102]

In addition to relaxing the standard of proof, the secretariats of some claims bodies have taken on some of the work of gathering evidence to substantiate or corroborate the evidence supplied by applicants. For instance, the Moroccan Equity and Reconciliation Commission established an in-house medical unit, which provided a comprehensive study of the medical conditions of victims participating in the programme and contributed to the identification of appropriate remedies.[103] The Legal Unit of the Commission for Real Property Claims of Refugees and Displaced Persons amassed cadastre and property book records to verify the claims of applicants, in recognition of the difficulties that would be posed should they be required to collect this data from local municipalities directly.[104] Similarly, the lawyers and paralegals working at the secretariat of the first Claims Resolution Tribunal for Dormant Accounts in Zurich, Switzerland conducted legal and factual inquiries as well as historical research on the circumstances surrounding a case, and often sent requests for (additional) information to the bank or the claimant to inquire about information on the account and the account owner contained in the bank records or to inquire about and clarify specific aspects of a claim.[105]

At the ICC, the Victim Participation and Reparations Section (VPRS) of the Registry serves as the secretariat for reparations claims, receiving and processing claims from applicants and transmitting them to the competent chambers for decision. The Regulations of the Registry provide that the Registry can seek additional information from applicants,[106] however, there is no provision to enable the Registry to collect information from other sources to assist victims to substantiate their claims. As has been indicated, the VPRS prides itself on its neutrality,[107] though this may be at the expense of applicants who individually may face too high a burden to substantiate their reparations claims, and may contribute to delays when incomplete applications are submitted.

Article 75(1) of the Statute provides that the Court may award restitution, compensation and rehabilitation. Restitution "should, whenever possible, restore the victim to the original situation before the … violations … occurred. Restitution

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[102] *Id*.

[103] See, The Moroccan Equity and Reconciliation Commission, *Summary of the Findings of the Final Report*, available at: http://ictj.org/static/MENA/Morocco/IERreport.summary.eng.pdf.

[104] See, C. Ferstman and S. Rosenberg, "Reparations in Dayton's Bosnia and Herzegovina", at Ch. 19 in this Book.

[105] Niebergall, *supra* n. 101.

[106] See, Regulation 106(2), 107(3) and (4).

[107] See, *supra* n. 37 and accompanying text.

includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property".[108] In the context of the crimes within the jurisdiction of the Court, it is unlikely that victims can be restored to their original situation before the violations occurred – for example, pain and suffering cannot be 'undone' – though certain specific aspects of restitution are possible, including the restoration of citizenship and land and property rights.[109] Compensation "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case…, such as: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services, psychological and social services".[110] As was held by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, "it is appropriate to fix the payment of 'fair compensation' in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered".[111] Rehabilitation "should include medical and psychological care as well as legal and social services".[112] The Basic Principles and Guidelines refer, in addition to restitution, compensation and rehabilitation, to measures of satisfaction and guarantees of non-repetition,[113] though given the limits of the Court's mandate to make an order against the convicted person – there is no possibility for the Court to assess the responsibility of states or other actors – the latter two measures may have been perceived as inappropriate or ill-advised.

Rule 97(1) of the Rules of Procedure and Evidence provides that "[t]aking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both". Individualised reparations are likely to take the form of financial payments based on a true assessment of the harm or on a lump sum basis or restitution of property or other assets. Where the number of victims is high, the Court may be inclined to award collective reparations,[114] which may be

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[108] Principle 19 of the *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*, adopted by General Assembly resolution 60/147 of 16 December 2005.

[109] See, C. Ferstman and S. Rosenberg, *supra* n. 104; See, also P. Van der Auweraert, "Policy Challenges for Property Restitution in Transition: The Example of Iraq", at Ch. 18 in this Book.

[110] Principle 20 of the *Basic principles and guidelines*.

[111] *Velásquez Rodríguez Case*, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, para. 27.

[112] Principle 21 of the *Basic principles and guidelines*.

[113] Principle 22 and 23, respectively of the *Basic principles and guidelines*.

[114] Rule 98(3) of the Rules of Procedure and Evidence.

awarded to address the victimisation of a large number of individuals, or to address group victimisation, if harm was inflicted on a specific group. Collective reparations could take the form of symbolic measures such as monuments or other commemorative acts, practical measures of support such as education or income generation programmes, or rehabilitative measures such as building treatment and counselling centres. While collective reparations may be extremely beneficial for victims, particularly if victims are involved in the conceptualisation of the reparations package, though there are also dangers that such forms of reparation lose their reparative objective, becoming humanitarian or developmental in nature given the parallel needs of rebuilding societies torn apart by war or widespread criminality. By the same measure, individualised payments can be costly to administer, and when faced with limited funds and mass victimisation could result in *de minimus* awards that can lose all practical meaning for beneficiaries.

Regardless of the form(s) of reparations afforded, the measures will inevitably be symbolic, and therefore the process can be as important as the result. The procedural handling of the reparations process plays an important role in ensuring that the process is well received, accepted, indeed that the process is *owned* by victims and that it *empowers* them as survivors, eventually reinstating dignity, respect and their rightful place in society. Consequently, in determining reparations, the process should, as far as possible, be nourished by the requirements of victims themselves. It should be victim-led.

Also, the quality of the substantive result, in terms of its ability to afford an adequate and effective remedy to victims, and to pay due attention to the different types of harm suffered, will depend to a large extent on the thought and energy put into ensuring an inclusive and effective process. Where reparations address large classes of individual victims, the specific harm suffered by particular individuals should not get ignored in the group settlement, e.g., survivors of sexual violence who have contracted HIV, amputees who are crippled, or children who were forcibly recruited as child soldiers may require specific recognition over and above the fact that they were forcibly displaced and dispossessed, though specific recognition should avoid stigmatising such groups. Due care must also be taken to consider how the reparations awards will be perceived within the community, which may also have suffered generally as opposed to specifically.

The issue of appropriate *quantity* of consultation should not be overlooked. The nature of crimes within the jurisdiction of the Court implies that the harm to be addressed is not sporadic or isolated. Undoubtedly, there will be a wide beneficiary group to be redressed, even if the Court adopted the narrowest of approaches in relation to questions of scope and causation, and with multiple layers of harm suffered by most victims. Furthermore, the very context of mass

criminality and violence often implies a humanitarian crisis with vast populations either displaced or refugees in neighbouring states. Thus, there are great challenges to access potential beneficiaries. Diversity of local languages and regional dialects, poor access routes and extensive security issues are further obstacles that may only be overcome with creativity, reliance on local knowledge and the building of partnerships on the ground.

In order to ensure *qualitatively* satisfying consultations, one must recognise that in most cases, victims in conflict situations in Africa are disenfranchised, dispossessed and difficult to reach. In addition they may have been subject to manipulation by a variety of actors and may have negative associations or mistrust for outsiders (or foreigners) or scepticism towards courts and "justice" processes in general. There will be multiple cultural, ethnic socio-economic, gender and language barriers in ensuring the quality of consultations. Victims might be put off wanting to apply to participate in a programme because of the requirement of completing a form within a short time frame, which they may be psychologically unprepared to do. Thus, the availability of trained staff able to assist victims in completing such forms may play a significant role in promoting wider access to reparations programmes. Thus, special attention needs to be given to the methods and means of communicating with and supporting affected populations, particularly in order to reach the most vulnerable of victims, who may be women, children, elderly and/or illiterate. Consultation and outreach are two-way processes – they involve *engaging with people*. In addition to simply providing information, there will be a need to build trust and confidence, ensure inclusive and participatory fora for veritable exchange, and the need to support their empowerment.

Rule 97(2) of the Rules of Procedure and Evidence allows for the appointment of: "appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts". The appointment of experts specifically concerned with the collection, collation and analysis of information relevant to the reparations process will be extremely important. The Court is currently not set up to implement a reparations programme; its experience of outreach has been limited and piecemeal,[115] and it does not have the structures in place to determine reparations or ensure that any reparations award it makes is duly implemented. It

[115] See, for example, ICTJ, *Sensibilisaton à la CPI en RDC: Sortir du « Profil Bas », March 2007*, available at: www.ictj.org/images/content/6/3/638.pdf.

is unclear whether sufficient will exists within the Court to put such structures in place. Yet, it is vital that the Court develops the wherewithal to conduct relevant and sufficient outreach to potential beneficiaries and to implement future reparations awards, either by marshalling personnel resources internally or by developing a structured system of work with outside experts and partners. There is experience in domestic courts of outsourcing some of the quasi- or non-judicial functions relating to outreach and awards implementation. For example, the Swiss banks litigation before US courts utilised a Special Master as an outside expert to consult with potential beneficiaries and interested parties and to develop a reparations plan that was agreeable to the parties, and used outside institutions to implement the award. It still retained judicial oversight over the process, though it was understood that some of the administrative processes required to process and implement claims were best handled externally.[116] A generous interpretation of Rule 97(2) could allow the ICC to adopt such an approach.[117]

4. *Implementing Reparations and the Role of the Trust Fund for Victims*

The way in which reparations awards will be implemented will depend on the nature of the award and the intended beneficiaries. The Statute and Rules of Procedure and Evidence are silent on what will happen in the rare case in which the Court makes an award of reparations for the benefit of a single individual victim or a small number of individuals, though it is possible to infer from Rule 98 that the in such cases, the Court would transfer the award "directly" to beneficiaries.

Where the number of intended beneficiaries is high (which will be the typical case), or the scope, forms and modalities of reparations makes a collective award more appropriate, the Court may make the award "through" the Trust Fund for Victims.[118] In such cases, and in particular when the Court transfers resources to the Trust Fund collected through fines or forfeiture or awards for reparations, the Board of Directors of the Trust Fund would be obligated to comply with any directions specified by the Court in its reparations order, and in this respect would

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[116] See, Judah Gribetz and Shari C. Reig, "The Swiss Banks Holocaust Settlement", Ch. 5 in this Book.

[117] See, Henzelin et al., *supra* n. 57 at p. 333.

[118] Rule 98(3) and (4). The Trust Fund for Victims is a body established by the Assembly of States Parties of the ICC, which a dual mandate to provide physical or psychological rehabilitation or material support for the benefit of victims and their families, and to implement orders for reparations against a convicted person where the Court has ordered that the award be deposited with or made through the Trust Fund. See, Regulations of the Trust Fund for Victims, *adopted at the 4th plenary meeting of the Assembly of States Parties on 3 December 2005, by consensus*, ICC-ASP/4/Res.3.

be acting as the Court's implementing body.[119] Indeed, the Regulations of the Trust Fund specify that:

> The Trust Fund shall take receipt of resources collected through awards for reparations and shall separate such resources from the remaining resources of the Trust Fund in accordance with rule 98 of the Rules of Procedure and Evidence. It shall note the sources and amounts received, together with any stipulations contained in the order of the Court as to the use of the funds.[120]
>
> When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2–4, of the Rules of Procedure and Evidence, the Board of Directors shall determine the uses of such resources in accordance with any stipulations or instructions contained in such orders, in particular on the scope of beneficiaries and the nature and amount of the award(s).[121]

This role of the Trust Fund to implement the Court's reparations orders is akin to what has been referred to elsewhere in this Book regarding the delegation by a Court of some of its non-judicial functions.[122] As has been indicated, given the nature of the Court's orders, it is appropriate for the Court to retain judicial oversight over the implementation of the awards, and to deal with any problems that arise. This principle of judicial oversight has been incorporated into the Trust Fund Regulations, which provide that the Trust Fund "shall submit to the relevant Chamber, via the Registrar, the draft implementation plan for approval and shall consult the relevant Chamber, as appropriate, on any questions that arise in connection with the implementation of the award",[123] and the it "shall provide updates to the relevant Chamber on progress in the implementation of the award, in accordance with the Chamber's order. At the end of the implementation period, the Trust Fund shall submit a final narrative and financial report to the relevant Chamber".[124]

In those cases where the Court has not specified the beneficiaries or the precise forms or modalities of reparations, the Trust Fund for Victims can determine the uses of resources distributed to it by the Court for the benefit of victims.[125]

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[119] See, C. Ferstman, "The International Criminal Court's Trust Fund for Victims", Yearbook of International Humanitarian Law, Vol. 6 (2003), 424–434 at 432.
[120] Reg. 34, Regulations of the Trust Fund for Victims, Adopted at the 4th plenary meeting on 3 December 2005, by consensus, Resolution ICC-ASP/4/Res.3.
[121] Reg. 43, *id*.
[122] Judah Gribetz and Shari C. Reig, "The Swiss Banks Holocaust Settlement", Ch. 5 in this Book.
[123] Reg. 57, *supra* n. 120.
[124] Reg 58. *id*.
[125] Reg 44. *id*.

The Trust Fund has already begun to implement the first of its functions – to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.[126] This first function mandates the Trust Fund to use its voluntary resources as necessary to provide support to victims and their families, and as it is not specifically connected to the reparations orders of the Court, has been interpreted to enable the Trust Fund to provide support at any point in time (e.g., also prior to any determination of guilt).[127] In accordance with the Regulations of the Trust Fund for Victims, if and when the Board of Directors considers that it is necessary to provide such assistance, it must notify the Court of its intentions and provide opportunity to the parties to indicate that a specific activity or project of the Trust Fund "would pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." The Trust Fund presented its first filings in respect of the Situation in the Democratic Republic of Congo,[128] and the Situation in Uganda[129] in which it listed a series of planned projects and activities. In both instances, the relevant Chamber indicated that the proposed projects and activities did not appear to "pre-determine any issue to be determined by the Court, including the determination of jurisdiction, admissibility, or to violate the presumption of innocence, and do not appear to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[130]

Pre-Trial Chamber I, in relation to the Trust Fund's filing in the Situation in the Democratic Republic of Congo, made mention of the usages of the Trust Funds' voluntary contributions. According to the Regulations of the Trust Fund, these voluntary contributions are to be used as the Board of Directors deems appropriate; the Court has no control over the Trust Fund's decisions on how these resources

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[126] See, reg 50(a), *id*.

[127] Both of the filings of the Trust Fund related to the "situation phase" of proceedings.

[128] *Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex*, of 24 January 2008, ICC-01/04-439 (Situation in the Democratic Republic of Congo).

[129] *Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex*, of 24 January 2008, ICC-02/04-114 (Situation in Uganda).

[130] *Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund* of 11 April 2008, ICC-01/04 (Situation in the Democratic Republic of Congo); *Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification* of 19 March 2008 ICC-02/04 (Situation in Uganda).

are used (e.g., to which situation or beneficiary group they are applied); all the Court must ensure is that the activities and projects of the Trust Fund do not adversely impact on Court proceedings.[131] Pre-Trial Chamber I noted as follows:

> CONSIDERING that the Trust Fund has a further mandate, which relates to "other resources" to be used for the benefit of victims under rule 98(5) of the Rules and chapter II of the Regulations of the Trust Fund; and that the implementation of activities and projects in execution of this further mandate, including those referred to in the Notification of the Trust Fund, is, on the one hand, unrelated to Court ordered reparations, and on the other hand, subject to the responsibility of the Trust Fund to ensure that there are sufficient funds to comply with any reparation order that the Court may make under article 75 of the Statute;
>
> CONSIDERING that, in light of the above, and given the fact that no property or assets have been seized to date from the accused and/or suspects in the cases pending before the Court, *the Chamber strongly recommends that, in compliance with regulation 56 of the Regulations of the Trust Fund, before resorting to other activities or projects, the Trust Fund undertake a study evaluating and anticipating the resources which would be needed to execute an eventual reparation order pursuant to article 75 of the Statute in the cases pending before this Court*.[132] [Emphasis added]

Regulation 56 does refer to the possibility for the Board of Directors to assign a portion of its voluntary contributions to the execution of reparations orders, and notes that the Board shall make reasonable endeavors to do so.[133] However, as the matter is within the discretion of the Board of Directors, the Pre-Trial Chamber's *strong recommendation* appears ill-placed, given that it does not have an oversight function regarding this aspect of the Trust Fund's mandate.

5. *Financial Enforcement of Reparations Orders*[134]

The Statute allows the Pre-Trial Chamber or the Trial Chamber to order "protective measures" upon the issuance of an arrest warrant or summons or

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[131] Regulation 50(a)(ii) and (iii).

[132] *Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund*, (Situation in the Democratic Republic of Congo) *supra* n. 130, at 7.

[133] Regulation 56 provides: "The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, sub-paragraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards."

[134] This Section is based in large part on the report written by the authors for REDRESS, *State Cooperation & the Rights of Victims before the International Criminal Court*, Paper presented by REDRESS at the 5th Session of the Assembly of States Parties, The Hague, Netherlands, 23 November – 1 December 2006, available at: www.redress.org/publications/StateCooperation&RightsofVictims.pdf.

thereafter,[135] to ensure that any assets which might be the subject of a future reparations order are maintained. Furthermore, after a conviction, the Statute refers to measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, and for the purpose of enforcing the reparations orders of the Court.

If reparations orders are to have any meaning to victims at all, the Court will need the full co-operation of states parties in the execution of searches and seizures and the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes.[136] Assets could be located in any number of national jurisdictions. States Parties would have the obligation to give effect to fines and forfeitures ordered by the Court, as well as reparations orders,[137] though if the Court's reparations regime is to be effective, it will require significant interaction and coordination with national jurisdictions of States Parties and non-States Parties alike.[138] The Statute provides that in those cases when it is not possible for a State Party to give effect to an order for forfeiture, it "shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of *bona fide* third parties".[139] This will require national courts to undertake a variety of steps associated with defaulting debtors such as garnishee orders, liens and enforced sales of property.

In addition, the success of asset tracing, freezing and seizure for the ultimate benefit of victims will depend on the strength of the evidence underpinning requests for cooperation as well as the discretion exercised in the issuance of the request. The primary responsibility for investigating the assets of accused persons for the purpose of protective measures lies with the Prosecutor, though the relevant Chamber has powers to request cooperation of States of its own motion.[140] Rule 218(3) of the Rules of Procedure and Evidence provides that

> in order to enable States to give effect to an order for reparations, the order shall specify:
>
> (a) The identity of the person against whom the order has been issued;
> (b) In respect of reparations of a financial nature, the identity of the victims to whom individual reparations have been granted, and, where the award for

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[135] See Article 57(3)(e) of the Statute and Rule 99(1) of the Rules of Procedure and Evidence.
[136] See Article 75(5) of the Statute.
[137] Article 75(5) specifically refers to the applicability of Article 109 (dealing with the requirements of States Parties to enforce fines and forfeitures, and/or to take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited), to the reparations orders of the Court.
[138] Non-States parties have no obligation to cooperate with the Court though in accordance with Article 87(5)(a) of the Statute, they may do so, "on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis".
[139] Article 109(2) of the Statute.
[140] Art. 57(3)(e) of the Statute.

reparations shall be deposited with the Trust Fund, the particulars of the Trust Fund for the deposit of the award; and

(c) The scope and nature of the reparations ordered by the Court, including, where applicable, the property and assets for which restitution has been ordered.

In the Lubanga case, Pre-Trial Chamber I requested cooperation from the Democratic Republic of Congo both in execution of the Arrest Warrant and in tracing, identifying and seizing Mr. Lubanga's assets.[141] This was done simultaneously with its request for cooperation on the Arrest Warrant, initially under seal, and later made public after Mr. Lubanga's apprehension and transfer to The Hague. Furthermore, on 31 March 2006, the Pre-Trial Chamber *publicly* requested all States Parties to identify, trace and freeze or seize property and assets of Mr. Lubanga.[142]

The process would have been enhanced by a more precise request, ideally made by the Prosecutor on an *ex parte* basis. States parties may have difficulty responding to broad requests for assistance, where the location and nature of the assets is not specified. This is conditioned upon detailed investigations by the Prosecutor in collaboration with States Parties, to uncover the nature and whereabouts of assets prior to the issuance of a request for cooperation. The extent of the duty to search for assets, in order to give effect to requests for protective measures, is unclear and few jurisdictions countenance "fishing expeditions". This underscores the need for specificity in the request. In the Marcos litigation, the States in which assets were said to be located were reluctant to disclose comprehensive bank documentation, particularly without safeguarding the privacy of non-participating third parties.[143]

Equally, the ability of the Court to ensure that the beneficiaries receive the reparations ordered would be greatly enhanced by stronger mechanisms within the Registry and other organs of the Court to monitor and oversee the enforcement process. The generality of the obligations to "cooperate" and/or to "enforce" may, in the absence of a clear follow-up mechanism, hinder enforcement in practice. The experience of other human rights courts and treaty mechanisms shows the utility and merits of developing internal enforcement procedures, order to ensure enforcement in practice.[144] While a system of support for victims

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[141] *Demande adressée à la République Démocratique du Congo en vue d'obtenir l'indentification, la localisation, le gel ou la saisie des biens et avoirs de M Thomas Lubanga Dyilo* of 9 March 2006, ICC-01/04-01/06-62 (The Prosecutor v Thomas Lubanga Dyilo).

[142] *Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr Thomas Lubanga Dyilo* of 31 March 2006, ICC-01/04-01/06-62 (Prosecutor v Thomas Lubanga Dyilo).

[143] D. Chaikin (2000), "Tracking the Proceeds of Organised Crime – The Marcos Case", Transnational Crime Conference, Canberra 9–10 March 2000, at 16.

[144] For a review of follow-up mechanisms of other international bodies, see REDRESS, *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006, available at: www.redress.org/publications/master_enforcement%2030%20May%202006.pdf.

currently exists for the duration of the 'proceedings' through the Victims Participation and Reparations Section of the Registry, and while responsibility for collecting and allotting fines and forfeitures is accorded to the Presidency, with the possible assistance of the Registry, neither the Statute nor the Rules of Procedure and Evidence clearly specify a body that will be responsible for following up on reparations claims once awards are made by the Court.

A continuing role in monitoring the enforcement of reparations awards is merited, in light of the particularities of the ICC system and the fact that it will be difficult/impossible for victims within the jurisdiction of the Court (the judgment creditors) to follow up with States where assets are located. Also, the lack of implementing legislation in many States parties may impede the easy recognition of ICC judgments by foreign courts. An arm of the Registry should be tasked with monitoring cooperation and enforcement requests and following up with the bureau of the Assembly of States Parties to ensure compliance. While this lack of follow-up responsibility may be common in domestic legal systems, it seems that in light of the possible difficulties relating to obtaining the cooperation of States as described above, a stronger and more visible Court-level enforcement mechanism that can engage directly with States and track compliance is appropriate for an international court such as the ICC.

The Chamber that issues the reparations order should remain seized until enforcement is ensured. Following from this, the person(s) affected should be entitled to seek the assistance of the Court in ensuring compliance. This would require recipients of reparations awards to have standing before the Court as well as continued access to legal representation in the enforcement phase.

E. *Conclusion*

The reparations mandate raises a range of complex questions for the Court and its stakeholders that require careful consideration. These questions relate to very practical or technical matters about how the system will be set up and how to ensure its smooth functioning. These questions might be relatively straightforward to solve, had the broader legal and policy framework been in place. Unfortunately, the Statute and Rules of Procedure and Evidence leave a lot of open questions; reparations to victims was one of the most complicated issues in the negotiations at Rome and many of the details were left out in order to secure agreement. The reference in Article 75(1) of the Statute to the development of principles relating to reparations is therefore not accidental. It is important for the Court to develop these principles – so that the framework is clear and coherent across chambers. However, the vastly different factual circumstances and contexts of victimisation in the different cases and situations before the Court

mean that it would be detrimental to have a one-size-fits-all approach. Flexibility is certainly required.

Certainly, it would be appropriate for the substantive consideration of what may constitute appropriate reparations to be left for the judges at the end of the trial, including decisions on whether individual and/or collective forms of reparations are most relevant in the circumstances. And, some of the fundamental procedural considerations should really flow from the judges' determination of the forms and modalities of reparations.

If these very basic considerations about the nature and forms of reparations will only be considered after the trial, the application forms for reparations which are currently available for victims to complete and submit to the Court, are like a "shot in the dark" – victims have no idea what they are aiming at, nor is it clear whether the detailed information they provide would serve any utility whatsoever in the determination of the award. It would be important for the Court to find a way to avoid requiring applicants to provide a full accounting of their harm and losses if the Court considers that a collective award is most appropriate, or if an individualised lump sum payment approach is taken which does not align with the particular losses suffered by victims. In order to do this, the relevant Chamber would need to be capable of thinking ahead to the end of the process and have a good idea about the type of beneficiary class, the types of remedies to be afforded and whether these might be individualised or collective. This is an impossible task, and if one attempts it at the beginning of the process one risks marginalising views and voices of key stakeholders who deserve to be heard on these vital questions. There is also the risk of being too rigid and inflexible to the evolving evidence coming out at trial. Perhaps the easiest solution would be to invite applications for reparations only after the beneficiary classes are determined and the criteria for inclusion in these are clear. Victims seeking to present their views and concerns in respect of the particular harm they suffered or the modalities of reparations, more generally, could be invited to apply to participate during the trial phase as is provided for in the Regulations of the Court.[145]

[145] See, Regulation 56 of the Regulations of the Court and n. 98 and accompanying text.

Part V

Pursuing Extraterritorial Reparations Claims – Lawyers' Perspectives

The Prosecution of International Crimes and the Role of Victims' Lawyers

*By Luc Walleyn**

Victims are playing an increasingly important role in international criminal procedures. They are generally not supported by any prosecutor's office but by non governmental organisations and independent private counsel. The role of victims' counsel can often be more decisive than that of their colleagues from the public prosecutor's office in bringing the suspects of international crimes to justice. During the different stages of the procedure: the investigation phase, the prosecution phase and, of course, procedures for compensation, the role of victims' lawyers can be challenging but also extremely exciting and rewarding.

A. *Victims as Independent Actors in the Criminal Justice System*

For centuries, reparation for victims of international crimes was either non-existent, or left to the sole initiative of states (for example, the German reparation programmes for crimes during the Second World War). For the most part, individual victims were usually only rather passive beneficiaries of such programmes. Sometimes, compensation paid to states was simply used by states for other purposes than for reparation to victims, while such compensation prevented victims from initiating legal procedures in the responsible state.[1]

The development of human rights law and the case law of international human rights courts[2] changed this situation, particularly in the last decades of the 20th

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* Belgian human rights lawyer.

[1] On 27 August 2002, a court of Tokyo rejected the claims of 180 Chinese victims of massacres during the Second World War. Although admitting the facts, the court argued that all reparation issues had been settled by the Peace Treaty. See I. Bottigliero. *Redress for Victims of Crimes Under International Law*, Martinus Njihoff: The Hague (2004), at 85.

[2] Mainly the European Court of Human Rights and the Inter-American Court of Human Rights, but also the UN Human Rights Committee established pursuant to the UN International Covenant on Civil and Political Rights, the Committee established pursuant to the Convention on the elimination of racial discrimination, and the African Commission on Human and Peoples' Rights.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 353–368.

century. In different countries, individual victims or victims' groups lodged legal actions with the purpose of obtaining compensation for gross violations of human rights and humanitarian law. Before US courts, some civil actions based on the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA)[3] succeeded, but very little compensation was eventually paid by the defendants, as a result of the difficulties for successful claimants to enforce the judgments, though the number of enforced decisions has somewhat improved with time.[4] A notorious exception was the settlement between victims of slave labour in Burma and the UNOCAL corporation, in which it was alleged that the oil company was complicit in human rights abuses against Burmese villagers while building a gas pipeline during the 1990s. The case, which was the first time any case has been brought against a U.S. company under the Alien Tort Claims Act was settled for an undisclosed amount.

In countries with a civil law tradition, victims have mainly used the process of initiating criminal complaints as a lever to obtain reparation. Holocaust survivors paved the way, initiating criminal complaints in France against war criminals like Klaus Barbie and Maurice Papon. Victims played a decisive role in ensuring that these and other suspects faced justice; the victims accused them in front of the court, and transformed public opinion. Some of these trials, such as the Barbie trial which took place in Lyon in 1987, were entirely dominated by the voice of the victims, who testified for weeks, while the accused stayed silent or was even absent from the court.

Following such examples, victims of several of the Latin-American dictatorial regimes used provisions in the Spanish law to compel the arrest of former Chilean President Augusto Pinochet and Argentine torturers such as Miguel Cavallo who was arrested in Mexico on the basis of a Spanish arrest warrant. Suspected perpetrators of the 1994 genocide in Rwanda were not only prosecuted abroad before the International Criminal Tribunal for Rwanda, but also on the initiative of victims before local courts in Belgium, Switzerland, Canada and France.

At the international ad hoc tribunals created in the nineties by the United Nations Security Council, victims are still reduced to the limited role of witnesses of the prosecutor, similar to the practice in many common law countries. This has changed with the Rome Statute of the International Criminal Court, adopted in 1998, which provides the possibility for victims to participate in the criminal procedure and to request reparation before the Court.

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[3] The Alien Tort Claims Act is an act of the U.S. Congress from 1789 (28U.S.C. §1350 (1994)). The Torture Victim Protection Act dates from 1991 (28 U.S.C. § 1350 (1994)).

[4] The efforts to enforce ACTA cases are discussed in REDRESS. *Enforcement of Awards for Victims of Torture and Other International Crimes*, May 2006, at 60–63.

In the ICC system, legal representatives of victims can present, in the language of the Rome Statute, *"the views and concerns"* of their clients, when their *"personal interests"* are affected.[5] It is possible for victims to participate in the procedure before any accused is convicted, and even before anyone is formally charged. Some tried to reduce the notion of "personal interest" to strict individual issues affecting victims such as victim and witness protection, but in a decision dated 17 January 2007,[6] the Pre-trial Chamber of the ICC authorised the participation of victims at the investigation stage, stating that *"the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered"*.[7]

By this decision, the Pre-trial Chamber determined that the personal interests of victims are engaged by the establishment of the facts, and also in a general way by the punishment of the perpetrators. Punishment is indeed closely linked to the issue of reparations. The declaration of the General Assembly of the United Nations establishing principles and guidelines on victims' rights reminds that satisfaction, as essential element of reparation, includes "*Judicial and administrative sanctions against persons liable for the violations*".[8]

The same Pre-trial Chamber of the ICC accepted the intervention of the first group of victims in the case against Thomas Lubanga[9] and considered that the personal interests of the victims were affected by the procedure leading up to the confirmation of the charges against the acc-used, given that there were sufficient grounds to believe that their personal interests were affected by the crimes allegedly committed.[10] Unfortunately, the Pre-trial Chamber, as well as the Trial Chamber, postponed the decision on all other applications by victims to participate in the proceedings in the case against Thomas Lubanga since October 2006. On 24 December 2007, participation of a large number of victims was accepted in the DRC situation, but some of the applicants had waited for a decision for more than a year.[11] At the time of writing, no decisions affording victims with

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[5] ICC Statute, art. 68(3).

[6] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-101 of 17 January 2006. All decisions of the ICC are available on the website www.icc-cpi.int.

[7] *Id*. This view was not shared by the Appeals Chamber in its decision of 19 December 2007 (ICC-01/04-566).

[8] *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*. Resolution 60/147 of the S.C. U.N. Principle 22(f).

[9] Decision of 28 July 2006 in the case of the Prosecutor v. Thomas Lubanga Dyilo (situation in the Democratic Republic of Congo).

[10] Decision of 22 September 2006.

[11] *Décision sur les demandes de participation à la procédure déposées dans le cadre de l'enquête en République démocratique du Congo par a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 à a/0105/06 à a/0110/06, a/0188/06, a/0128/06 à a/0162/06,*

the right to participate in the Lubanga case have been issued since October 2006. In the Uganda situation, participation of 8 victims was accepted in the Kony case,[12] and some victims were accepted for participation in the Darfur situation (not in the case).[13]

On 18 January 2008, the Trial Chamber I issued a framework decision on victim participation in which it set out in some detail the criteria it would apply to requests by victims to participate in the proceedings in the Lubanga case, though a number of aspects of this decision were under appeal at the time of writing.[14] This decision is confirmed by the Appeals Chamber decision of 11 July 2008. Victims' legal representatives will have the opportunity to make statements, to question some witnesses, to present evidence, and to have access to all documents of the prosecution if they can show a personal interest.

B. *Counsel Initiating Cases*

Civil compensation cases, as is demonstrated by the spectacular alien tort claims act cases in the United States, are always initiated by private counsel. In civil law countries, cases have also been lodged in the context of criminal prosecutions of persons accused of war crimes, crimes against humanity and other serious violations of human rights. Victims' counsel, often acting on a pro bono basis, continue to play an important role in exploring new avenues to justice. Sometimes, victims' counsel were supported by motivated prosecutors and judges, but often they had to first overcome the opposition from prosecutors with a conservative reflex. Victims' counsel are often personally engaged and committed to the cause of justice for their clients, and the trial can at times represent the ultimate result of the personal struggle of lawyers. The French lawyer Serge Klarsfeld was hunting Nazi criminals all over the world, before representing some of their victims in court when Barbie, Touvier and others were brought to justice. The trial against Maurice Papon in Bordeaux, which led in 1998 to his conviction for complicity in war crimes, could only take place after a long judicial struggle and the perseverance of victims' counsel, Me Gérard Boulanger, who was even suited for defamation by Papon (and acquitted). In Belgium, Eric Gillet and Michèle Hirsh were the first counsel of survivors of the genocide of the Rwandese Tutsi using the Belgian universal jurisdiction legislation.

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a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 à a/0222/06, a/0224/06, a/0227/06 à a/0230/06, a/0234/06 à a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 à a/0233/06, a/0237/06 à a/0239/06 à a/0241/06 à a/0250/06, ICC-01/04-423 dated 24 December 2007.

[12] Pre-trial Chamber decision of 14 March 2008, ICC-02/04-125.

[13] Pre-trial Chamber decision of 14 December 2007.

[14] Decision on victim's participation, ICC-01/04-01/06-1119 of 18 January 2008.

C. *Presenting the Views and Concerns of a Group of Victims*

Presenting the view and concerns of a group of victims is a challenge for their legal representative, as it necessitates an analysis of the common views and concerns of a sometimes quite large and divergent group.

All victims' groups are composed of individuals. The personal history and present situation of each individual within the group will influence their analysis and unique understanding of the case. All want justice, but for some justice can mean revenge, for others it means essentially knowing the truth, for yet others still, punishment of the accused or obtaining reparation can be most important. Sometimes victims can even support the defence. In one of the Belgian trials against Rwandans accused of war crimes during the 1994 genocide, a Tutsi survivor who had her life saved by one of the accused, gave not only exculpatory testimony, but was rejected by the other victims and joined the group of supporters of the accused in the court room. Ambiguous situations can also occur when a victim belongs to the ethnic group or community of the accused, as can be the case for former child soldiers and their families.

For counsel, meeting the clients he/she represents and discussing the case with them is essential. Unfortunately communication between counsel and clients is very complicated when victims are poor, without access to basic communication tools, and when gaining access to victims is made more complicated in a country still highly insecure. The larger the group, the more difficult is the task and the risk for the victims. It is essential for counsel to have individual contact in safe conditions with, if not all, then at least some of the members of the group, as well as any intermediaries or representatives of the group. In this respect, it is essential for counsel to know what the expectations of his or her clients are, to inform them about the legal possibilities and to share with them the strategic choices to be made.

The legal representation of victims is often organised by victim organisations, NGO's or more informal victims' groups who decided to lodge a complaint or to participate in a procedure. Organisations of Holocaust victims played an essential role in bringing to justice criminals like Barbie and Papon; survivors of the genocide in Rwanda organised themselves in organisations such as IBUKA (meaning 'remember' in Kinyarwanda) and AVEGA (association of widows of the genocide) for mutual support and assistance, but also for obtaining justice. For victims' counsel, organisations of victims can be an important support, but can also became a factor that can make things more difficult, as organisations and their spokesmen can have political or personal agendas, not necessarily shared by all members of a victims' group and/or by their counsel. Organisations can be in competition to be recognised as representing the victims, and often have different views on the legal case. Politics are never far away. For counsel it is

important to be in line, at least on speaking terms, with the leaders of the group the victims he/she represents belong to. When discussions on legal strategy or political influence provoke conflicts or split groups, a counsel can play a role of conciliator, stressing the common interest of the group, without becoming involved in political or other conflicts.

I learnt from my limited experience with Rwandese, Congolese and Palestinian victims of crimes against humanity and war crimes that their first objective is generally not compensation, but justice. Ultimately, they would like to see the perpetrator himself admit responsibility, express sincere remorse and ask for forgiveness. In their view, compensation should only be the result of a process of accountability. Victims know that the outcome of a legal action is uncertain. Thirsty for justice, they accept the risk of a defeat by challenging the persons they consider to be responsible for their suffering, hoping the action will at least give publicity to their view, enforce the chances for punishment or accountability, and stress their views on the situation. Sometimes victims are reluctant to request financial compensation, seeing this as weakening their search for justice, believing that they will never obtain it, or afraid they will be seen as motivated by money only. Not only the public, but also the victims and their counsel must understand reparation as a fundamental right of victims. In 2005, two Rwandese businessmen were convicted for international crimes by a Belgian court. Although they still had important assets in Rwanda, only a small number of the counsel representing victims who acted as "partie civile" prepared a well documented case for reparation. Yet it would take three more years of procedure in Rwanda before an "exequatur" decision could be obtained and the first building in Kigali could be put for public sale.[15]

In countries where it is possible for victims to use universal jurisdiction provisions or other forms of extraterritorial jurisdiction, counsel can be confronted with victims who mainly want to use the justice system as a political forum. When in the years 1999–2003, the Belgian law made it possible to lodge a complaint for international crimes against almost anyone, even heads of state and government, a small number of Belgian lawyers were then confronted with many victims' groups asking them to lodge cases sometimes without any legal or factual grounding and generally without any chance of success. Of course, a legal complaint can strengthen the demand of victims and give them access to the media, but lodging a complaint on such a basis often does a disservice to victims, as it creates illusions and disappointment.

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[15] At the date of writing, the public sale of a building with shops and offices was announced for 23 April 2008.

Even when an investigation is possible and there are serious prospects for a prosecution, counsel are obligated to inform the victims of the real prospects for success, and avoid raising illusions about compensation. Outreach programmes for victims in the framework of the ICC should equally serve this purpose as well.

D. *Elaborating a Judicial Strategy*

1. *Forum Choice*

Today, there are a number of legal forums which can exercise jurisdiction over international crimes: local courts, international courts and even national courts of other countries based on the principle of extraterritorial jurisdiction. The forum choice is not only a legal issue. Perpetrators, but also victims can have an interest to privilege a particular forum. Victims want to have the opportunity to speak out, in front of a court, but also to engage public opinion. The country where the crimes occurred, or the country of the accused, are natural fora. International or extraterritorial jurisdictions are the last resort when real justice is not possible before national territorial courts.

Access to local courts can be easier for victims, but such courts can be corrupt, or the perpetrators can still have influence on the judicial actors. International courts, except perhaps for the ICC, are not victim friendly. But also in national systems abroad, victims can face particular legal and practical obstacles. Only in very limited circumstances will the victims be in the position to influence the forum where a perpetrator will be prosecuted by lodging a complaint or initiating an investigation as a civil party. A wrong choice can result in the application of the *non bis in idem* principle and the end of any process for the victims.

In the Democratic Republic of the Congo, a militia leader allegedly bearing responsibility for many crimes, was recently acquitted in obscure conditions by a local military judge. Such a decision makes any prosecution before other forums exceedingly difficult. Fortunately, article 17 of the Rome Statute establishes the principle of priority for local courts, but accepts that the ICC can prosecute, if the proceedings were undertaken for the purpose of shielding the person concerned from criminal responsibility, if there has been an unjustified delay in the proceedings, or when proceedings were not conducted independently or impartially.

The International Criminal Tribunal for Rwanda asked Belgium to transfer to it a number of cases against Rwandese suspects found in Belgium, but in some of these cases, the ICTR decided the drop the charges. The Belgian Supreme Court accepted that the *non bis in idem* principle should not be applied in such a situation, and two Rwandans were eventually convicted by the Belgian *cour d'assises* after they were released from prosecution in Arusha.

2. *Choice of Facts and Qualification*

When prosecuting mass crimes, the prosecution makes choices and can decide not to prosecute certain crimes, considering whether the investigation of certain incidents would be too difficult, taking into account the length of the trial or the evidence that is available. In the Milosevic case before the International Criminal Tribunal for the former Yugoslavia, the Prosecution opted to include a broad scope of facts in its prosecution strategy. This led to a trial that took many years, and did not in the end reach a conclusion as a result of the death of the accused. This influenced the prosecutors in Iraq to take an opposite approach in the prosecution of Saddam Hussein. Here, the trial was limited to one single out of hundreds of potential criminal incidents. Also the ICC prosecutor seems to be in favour of such an approach. At the International Criminal Court, victims and NGO's are very frustrated about the fact that Thomas Lubanga is only being prosecuted for the crime of enlisting children under the age of 15 into the UPC militia, and not for other war crimes committed by the same group. In the second ICC case against Germain Katanga, the arrest warrant that was issued contained a broader range of crimes, but was territorially limited to one single village. It is understandable that prosecutors wish to avoid a repeat of the problems faced in the Milosevic case, but for victims, an overly narrow approach can be extremely frustrating, as it fails to acknowledge the nature and scale of the crimes. Prosecutorial strategies which are overly narrow have the risk of alienating the ICC from the affected communities to whom it was established to afford justice. When possible, victims' counsel can try to bring to the attention of the court the additional crimes in which their clients directly suffered.

But even the qualification of facts is not a neutral matter for victims. Survivors of the genocide against Tutsis in Rwanda consider it to be extremely important that crimes committed in that context are labelled as such. Women victims of mass sexual assault or forced pregnancy consider it important that such crimes are recognised as crimes against humanity. In three of the Belgian cases against Rwandese war criminals, the prosecution systematically refused to retain the accusation of genocide and crimes against humanity. In a case that is scheduled to start next year, for the very first time the prosecution is countenancing the crime of genocide.

3. *Compensation and Accountability*

For most of the victims, compensation is not the main issue, although prosecutors and judges continue to understand victims' participation too often as a compensation claim only. In the ICC system, applications for participation and for reparation are clearly distinct phases in the procedure. This means that a victim

can request to participate in the proceedings, even if he or she has no intention of submitting a claim for reparation, for example because of the fact that the accused is indigent, or because reparation is being sought through other channels.

Reparation alone can never be a substitute for accountability. All the families of Belgian peacekeepers killed on the first day of the Rwandese genocide received financial compensation from the Belgian state. Still it was essential for them to see the persons responsible for these killings brought before a court of law.[16]

In the Lubanga case, former child soldiers and their families are mainly participating because they want to be recognised as victims, not as perpetrators, and because they feel betrayed by those who pretended to be their leaders and representatives.

Of course, civil reparation is important as well, as a matter of principle, but also because most of the victims of war crimes and crimes against humanity are living in very difficult personal circumstances and harsh living conditions. The approach of victims regarding financial compensation will largely depend on the circumstances. When relatives of Belgians who disappeared or were killed during the Guatemalan dictatorship lodged a complaint in Belgium on the basis of the universal jurisdiction law, the Guatemalan embassy invited the relatives to discuss a potential compensation agreement. The immediate reaction of the relatives was to consider this as an attempt to cover up the case by "buying" the plaintiffs. They wanted to know what happened exactly to their family members and who decided that they had to disappear. They also wanted to find their remains. The relatives wanted the individuals responsible for their suffering to be prosecuted and punished. They wanted justice, not money.

In 2001, two Rwandese nuns were convicted in Belgium for their role in the killing of hundreds of Tutsi who believed they would find a safe heaven in the buildings of their convent. For the relatives of these people and the genocide survivors in general, this was an important victory. As counsel of a group of widows which sought to find these nuns responsible for the deaths of their husbands, I discovered that the possibility of negotiating compensation with the convent became a political issue. Any negotiation was seen as an attempt by the nuns to obtain from the victims some benefit which could assist them to be liberated. Within the group of victims, the tension was visible between those looking to the past who wanted justice, and those looking not only for improvement of their present poor conditions, but also for a better relationship with their neighbours.

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[16] On 5 July 2007, former Rwandese army major Bernard Ntuyahaga was convicted by the Brussels court to 20 years of imprisonment for the killing of the Belgian soldiers and other war crimes. The families participated in the procedure and some members obtained decisions on additional compensation.

In contrast, a Belgian victim of torture in Saudi Arabia was initially willing to negotiate a financial settlement, and lodged a criminal complaint against the alleged perpetrators only when his settlement request was rejected by the Saudi Government.

When the payment of compensation is the result of an acceptance of responsibility or the application of the restitution principle, it will generally be seen as a valuable act of justice by the victims. This is certainly the case when it results from a process of negotiation with their representatives. This was the case when the Belgian state and financial institutions accepted recently a compensation programme for the restitution of goods and assets belonging to Holocaust victims.[17]

But how will the ICC trust fund be perceived by victims? Financial intervention by international funds is certainly justified when the international community bears a part of the responsibility for its failure to prevent the crimes from being committed. It is more problematic if there is no link between the persons responsible and the reparations to be afforded. When reparation is a unilateral decision of a national or international institution, compensation can be seen as just a lucky incident, if not as purely an act of charity.

For the victims, the origin of compensation is important. The group of Rwandese widows I referred to above received help from a Protestant NGO to repair their houses. This was welcomed by the group, but seen as charity, not as compensation. If the Catholic Church had done the same, it would have been seen as compensation and some form of accountability.

The origin of compensation funds is thus not neutral, and this could become an important aspect of the discussion on the ICC victims' trust fund and other compensation programmes. Recuperation of assets of perpetrators is as important if not more so than the contributions of donors unconnected with the crimes.

4. *Individual and Collective Reparation*

War crimes and crimes against humanity have a profound impact on people even more so than other serious crimes, because they affect not only the individual, but also the group or community it belongs to. Individual trauma is to be taken into account by anyone representing or assisting victims, but when legal action is also a collective action, problems of a community or a collective of victims as a whole need to be dealt with by counsel.

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[17] A more then 50 million euro agreement between the Belgian State, banks and insurance companies and Jewish organisations, was confirmed by the law of 20 December 2001 installing a compensation mechanism.

Collective forms of reparation are often a logical approach to offer redress to traumatised communities. In most occidental legal systems however, reparation is an individual affair, certainly this is the case in civil law systems where even the concept of "class action" is unknown. The counsel representing a group of victims will then be forced to translate the demand of a group of clients, even if they are collectively organised, into individual applications for compensation. The translation of the collective claim into a series of individualised claims also risks breaking the solidarity of the group. When the convicted perpetrators have some assets, only those victims who were represented in court will be able to obtain compensation. In general these will be the most assertive ones, those with the highest education and sometimes the most wealthy, whereas others in the same situation will remain without any relief.

Discrimination within the group of victims is often inherent in reparation and restitution programmes that are premised on individual claims. Another disadvantage is that no compensation is to be paid to families who were totally exterminated. This is why the Belgian compensation programme for Holocaust victims provides that part of the compensation will be collective, through a commission with representatives of the Jewish community legally recognised as such. Unfortunately, no solution could be found for the less organised Roma community.

In addition, collective reparation poses a further danger that must be taken into account. In Rwanda, Tutsi survivors of the genocide are sharing their neighbourhoods with Hutu families. Compensation for victims can raise jealousy, jeopardise reconciliation efforts between communities, revive the conflict between groups that was at the origin of the crimes committed, and eventually put the beneficiaries at risk. Even the few advantages accorded to families of genocide victims by the Rwandese Government, like free school inscription for children, were criticised as forms of ethnic discrimination. So collective reparation also needs to be fully explained and if possible, it should be accepted by all communities concerned.

E. *Victims and the Prosecution*

Prosecutors do not represent victims' interests. When victims lodge complaints for international crimes committed on the territory of other states (on the basis of the principle of universal or extraterritorial jurisdiction), the reaction of prosecutors is generally negative. The investigations into such crimes are time-consuming, and require extensive energy and resources. They can also present political challenges, and are not part of the usual priorities of governments. Consequently, the spontaneous reaction of public prosecutors is to oppose such

investigations and prosecutions. Rwandese genocide victims in Belgium initially faced harsh opposition from the prosecutor's office before eventually obtaining the arrest, prosecution and judgment of several perpetrators who found asylum in the country.

Even when the prosecution eventually accepts to proceed with a complaint, victims can still face opposition from the side of the prosecutor. In France, the prosecution did not accept that the torture of resistance fighters during the Second World War should be considered as a crime against humanity, though victims managed to obtain a review of this position by appealing to the Supreme Court.[18] In Belgium, the Pros-ecutor refused until recently, after three jury trials for war crimes committed during the 1994 genocide in Rwanda, to prosecute suspects also on the basis of the crime of genocide, notwithstanding a legal reform of the law in 1999.[19]

The ICC Prosecutor opposed victim participation at the stage of the investigation. In the Lubanga case, during the debates on the modalities of victim participation, the prosecution systematically put forward the narrowest interpretation of the legal texts, and has tried to reduce victims' participation to the most minimal rights afforded by the Rome Statute and the Rules of Procedure and Evidence. Together with the Defence, he lodged an appeal against the decision of 18 January 2008, trying to reduce the possibilities of participation. The ICC Prosecutor even opposed the protection of the identity of the victims, although stressing that all witnesses of the prosecution are at risk if their identity would be known by the defence. At different occasions the Court rejected the position of the prosecution on victims' participation.[20] The fundamental position of the ICC Prosecutor is that victims shouldn't influence the investigation or prosecution, and that their role should be limited to requesting compensation, once the Court decides on the guilt of the accused, ignoring thus the very specific provisions on victim participation that the Rome Statute affords.

F. *Avoiding New Victimisation*

For victims, the decision to participate in a legal action is not an easy step. It reopens old wounds, entails yet a further confrontation with a difficult past. Especially for victims of sexual violence, participation in a legal action can

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[18] Cour de Cassation, 20.12.85, arrêt Klaus Barbie.

[19] The statute of 16 June 1994 providing for universal jurisdiction for war crimes was amended to include provisions on genocide and crimes against humanity on 10 February 1999.

[20] Decision of 17 January 2006 in the DRC situation.

provoke a need for psychological help. Victims' legal counsel must take this into account when questioning his or her clients and when asking them to testify.

Even in ordinary cases, victims' counsel are often confronted with traumatised individuals. When in daily life, their clients can put aside the trauma they suffered, it is difficult to do so in the course of a legal action focusing on the very causes of their suffering. Legal action against perpetrators or accomplices can be part of a healing process, but at the same time such a process may reopen a painful past. Also, personal confrontations with suspects at the court hearings can also create new trauma and victimisation.

In the 2005 Rwanda trial in Brussels, a group of women survivors appeared at the court on request of the prosecution. During the investigation, they had supplied information about the accused, but all of them had agreed that they would not reveal the fact that during a period of two weeks, they were used as sex slaves by a group of interahamwe. Some of them spoke for the very first time about this to their counsel, after hiding their sufferings for years. Finally they all decided to speak out, in a public session, in a very impressive way. This was however, a very traumatic situation, and some women needed psychological assistance after the trial.

Other victims want to speak out and to testify. Challenging and confronting the presumed perpetrators can restore their dignity and self confidence. Unfortunately, it can also put them at risk. In a region that remains in conflict, such as is the case today in Ituri in the Democratic Republic of Congo, any contact with a foreigner can create a security risk. It is a duty for lawyers as for investigators to protect the safety of victims and witnesses through a professional approach, sometimes by asking the Court to protect their clients' anonymity.

Even when the conflict is officially ended, the hatred is still very much present. Victims who are seeking justice are often seen as the enemies searching for revenge. One of my clients who is a genocide survivor was heard as a witness in the second Brussels Rwanda trial. Because of her cooperation with the Belgian investigators and probably following the publication of her name in the case record, she has been sexually assaulted again, just before the start of the trial. Although a system for witness protection exists under Belgian law, the Federal Prosecutor refused to recognise the victim as a person at risk and to organise a framework for protection, and he refused to consider the modalities for protection of the witness in Rwanda in cooperation with the local authorities, considering that this was the sole responsibility of Rwanda to afford protection. Eventually the person was forced to lodge an asylum claim and was recognised as a refugee in Belgium.

In the Lubanga case, the Court accepted to treat participating victims as anonymous, although after the hearing on the confirmation of charges, one of the participating victims was nevertheless discovered and threatened. The ICC system provides for the protection of victims "appearing before the Court", to be

organised by the Victims and Witness Unit.[21] The need for protection of victims who lodged an application to participate in proceedings but that is still pending before the Court, in other words, when the Court has not yet decided whether the victim fulfils the criteria to participate in proceedings, became a live issue before Trial Chamber I, as is the possibility for participating victims to maintain their anonymity as the best form of protection.[22] The ICC Prosecutor has advocated for a narrow interpretation of the duty of the Court to protect victims and the role of the Victims and Witnesses Unit, and has argued that protection should only be available for victims once their application for participation is accepted, not when they are at risk as a result of such application.

G. *Counsel as Independent Spokesman*

Last but not least, presenting the views and concerns of victims is also a way to encourage understanding for them. When Palestinian survivors of the Sabra & Shatila massacre used the Belgian law as their last hope for an independent investigation of one of the most egregious crimes committed in the Middle East, it was a difficult challenge for them and for their lawyers to convince the Israeli and even international public opinion that legal action was not revenge, but indeed an alternative for revenge. It was equally difficult to convince the Lebanese and Arab public opinion that an international investigation should entail accountability, not only of Israeli officials, but also of Lebanese individuals, notwithstanding the local amnesty law. When radical political groups tried to obtain control over the action, the legal team was heavily criticised in the Lebanese press for cooperating with Jewish-Israeli lawyers and suspicion was created against the Lebanese member of the team because of his Christian origin.

Crimes against humanity are often committed in a political context. In cases of international crimes, a legal case can become a political or diplomatic struggle, or will at least be influences by political factors. Lawyers, who do not necessarily share the political analyses of their clients on the situation in their country, must find a difficult balance between the need for presenting their clients' views and concerns, and the risk of getting involved in an ongoing conflict. Certainly in less developed regions, the identification of a lawyer with his clients' causes occurs easily.

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[21] Art. 43(6) of the Rome Statute.

[22] The prosecution opposes this and stresses, alongside the defense, that "anonymous accusations" are not acceptable, notwithstanding the fact that certain national jurisdictions accept claims by anonymous victims (in the US generally indicated by the nickname John or Jane Doe).

H. *Conclusion*

Reparation is a form of justice; it must also be seen as justice by the victims. National and international judicial systems provide victims with the opportunity to have a voice, not only on reparation issues, but also on issues of jurisdiction, criminal responsibility, and even provisional or conditional liberty of the accused or convicted person. Being heard is essential for victims, to restore their dignity and to transform reparation into an issue of justice. Lawyers must therefore ensure that they are avid listeners of their clients' before simply speaking on their behalf.

Compensation for the Victims of Chemical Warfare in Iraq and Iran

*By Liesbeth Zegveld**

A. *The Case against Van Anraat*

It has been two decades since the end of the Iran-Iraq War. Yet, Iranian and Kurdish victims of Iraq's chemical warfare are still seeking judicial redress.[1] Recently they filed claims for compensation in the criminal case against Frans Van Anraat. Iraq's chemical warfare programme relied heavily on foreign suppliers. The Dutch businessman Frans Van Anraat sold huge quantities of the chemical thiodiglycol (TDG) to the regime of Saddam Hussein. The material was crucial for the production of mustard gas. This gas was used by the Ba'athists in the war against Iran and in their attacks on Kurds in 1987 and 1988, which included the Anfal campaign. Van Anraat sought refuge in Iraq. From there he managed to return to his home country, the Netherlands. Van Anraat was arrested in the Netherlands in December 2004, on criminal charges of complicity in war crimes and genocide.[2]

On 9 May 2007, Van Anraat was convicted for complicity in war crimes.[3] He was convicted of violating the 1925 Geneva Gas Protocol,[4] as well as international customary law prohibiting the use of chemical weapons in an international

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[1] At the same time, the Iraqi Special Tribunal has sentenced three key perpetrators to death.

[2] *See* on the criminal law aspects of this case H. van der Wilt, "Genocide, Complicity in Genocide and International v. Domestic Jurisdiction. Reflections on the van Anraat Case", Journal of International Criminal Justice 4 (2006), 239–57.

[3] Court of Appeal The Hague, 9 May 2007, LJN: BA4676 and District Court, 23 December 2005, LJN: AU8685. English versions of the judgments are available at www.rechtspraak.nl.

[4] 'Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare' (The Hague Convention of 17 June 1925). Text of the Protocol is available at www.opcw.org/html/db/cwc/more/geneva_protocol.html. Both Iran and Iraq were party to the Gas Protocol.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 369–382.

armed conflict and indiscriminatory attacks.[5] During the war, Iraq also used chemical weapons against its Kurdish minority population, in particular in an attack on the town of Halabja in northern Iraq in March 1988. The 1925 Geneva Protocol does not cover the use of chemical weapons against its own population. For this reason the indictment also included common article 3.[6]

These violations constituted not only a war crime committed by Van Anraat, they also constituted a tort under Dutch law against those who had suffered damage as a result of these crimes. Fifteen victims of the Iraq chemical attacks, both from Iran and Iraq, joined in the criminal case against Van Anraat. These victims submitted to the Dutch Court a claim for compensation for the damages and injuries they had suffered.

In this article I will discuss a few matters that are outstanding in this compensation case of the victims.[7] But let me first address the following question.

1. *Compensation for Violation of the Law on Conduct of Hostilities*

Among cases of civilians, combatants, prisoners of war and civilian detainees, cases of civilians and combatants seem to be the most difficult. One of the reasons for this is that they seem to allow for less clear establishment of conduct in violation of international humanitarian law.[8] This being the case, the question arises whether there is any reason to assume that compensation for violation of the law on conduct of hostilities (Hague Law)[9] would be different from compensation for violation of the rules protecting persons in the power of a party to the conflict (Geneva Law)[10] or international humanitarian law in general. The answer

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[5] The Dutch War Crimes Act (1952) penalises violations of the laws and customs of war (article 8). This Act has been replaced by the International Crimes Act in October 2003.

[6] Article 3 common to the four Geneva Conventions of 1949, available at www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions.

[7] The author acted as a lawyer representing the victims who joined as a civil party in the criminal proceedings against Van Anraat.

[8] H. Fujita, I. Suzuki and K. Nagano (eds), *War and the Right of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., LTD. Publishers, Tokyo 1999, 13.

[9] The Law of The Hague are those provisions that affect the conduct of hostilities. It consists of, among others, the 1907 Hague Convention Respecting the Laws and Customs of War on Land (Hague IV), the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), the 1907 Hague Convention Relative to the Laying of Automatic Submarine Contact Mines (Hague VIII) and the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare. Also Additional Protocol I and II to the 1949 Geneva Conventions contain rules on the conduct of hostilities.

[10] The Law of Geneva is a body of rules which protect victims of war who find themselves in the power of a party to the conflict. It is laid down in, among others, the 1949 Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, the 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and

seems to be no. Remedies are not affected by the origin of the obligation, Hague or Geneva law.

Indeed, Article 3 of the fourth Hague Convention of 1907 on respecting the laws and customs of war on land was the first article to lay down the principle of compensation, be it not for individuals but for states.[11] This rule applies to all the regulations in the 1907 Hague Convention IV: both the rules on the conduct of hostilities and the rules on the protection of persons in the power of a party to the conflict. As a matter of principle, there is no reason why compensation should be different for violations of the law on conduct of hostilities as compared to other international humanitarian law rules. The principle is simple: a person or entity who by an act contrary to law damages the right of another, is obliged to provide redress for the resulting damage. This principle is equally applicable to the Hague and Geneva law. On the level of the principle of compensation, this conclusion is true. However, while remedies as such are not affected by the origin of the obligation, Hague or Geneva law, the content of a particular substantive rule may affect the regime of the remedy. Concepts of the law on the conduct of hostilities such as military necessity, proportionality, distinction between civilians and combatants are likely to influence questions of evidence, burden of proof, and reparations. In general it can be said, I believe, that the law on conduct of hostilities is more complex than the Geneva law and that this will have an impact on the matter of compensation.

There is little practice to prove this assumption however, at least inso-far as when the focus is on legal cases brought by individual victims.[12] Victims are generally denied the right to claim compensation and states are not considered liable to pay compensation to them. Factual findings as to the wrongdoings and illegality of conduct of hostilities are consequently also rare.[13]

Future perspectives for compensation for violations of the law on the conduct of hostilities are more promising however. There has been a tremendous

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Shipwrecked Members of Armed Forces at Sea, the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, the 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, the 1977 Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) and the 1977 Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II).

[11] Article 3 of the 1907 Hague Convention IV states: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This article has been reaffirmed in article 91 of Additional Protocol I.

[12] In the past, treaties have been concluded between states that have settled damages from the war.

[13] There are many reasons why individual victims are denied the right to compensation for violations of international humanitarian law. *See supra* n. 8. I will not deal with these reasons here.

development in the context of international criminal law opening the door for victims' claims. The International Criminal Court may award reparations to the benefit of victims. It may do so directly against a convicted person.[14] The Statute of the ICC is the first embodiment of the right of victims to reparations. The drafting of this provision was influenced by Professor Theo van Boven's reports to the UN Commission on Human Rights leading to the Commission's adoption of the *Basic Principles and Guidelines on the Right to Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[15] While the procedure under the ICC may not be described as a tort action but rather as an action *sui generis*, the principle of reparations laid down in the ICC Statute has been derived from national criminal law systems. In civil jurisdictions, such as in France, Germany and also in the Netherlands, victims can join in the criminal proceedings and raise a compensation claim based on tort under domestic law. The case in the Netherlands against Van Anraat is such an example.

The victims' claims filed against Van Anraat were awarded in the first instance, but dismissed on appeal. Still this case offers interesting reflections about compensation cases for violations of the law on conduct of hostilities. I will discuss the following aspects of this case: the mass nature of the victims' claims, establishment of the facts and determination of the damages.

2. *Mass Claim*

The total number of victims of Iraq's chemical warfare is high: 20,000 in Iraq and 100,000 in Iran.[16] In general, the number of victims of violations of the law on conduct of hostilities is likely to be large, when compared to the number of victims of violations of Geneva law. The available data on civilian casualties rarely distinguish between victims from violations of The Hague law and victims caused by violations of Geneva law. However, clearly, also in the present armed conflicts,

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[14] The 1998 Rome Statute of the ICC includes in its list of war crimes the use of asphyxiating, poisonous or other gases: art. 8(2) (b) (xviii), but only in international armed conflicts. Yet, the attacks in internal conflicts can be brought under intentional attacks against the civilian population (art. 8(2)(e) (i)).

[15] Violation of these rules will in principle entitle the victims thereof to a claim for reparations (ICC Statute, Article 75 para. 2). For an analysis of the provisions on reparations to victims, *see* Peter Lewis & Håkan Friman, "Reparations to Victims," in Roy Lee (Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*) Ardsley (NY): Transnational Publishers, 2001, at 474 and Gilbert Bitti and Gabriela Gonzáles Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes. Innovative Responses to Unique Challenges*, 299–322 at 309.

[16] A. Foroutan, *Medical Experiences of Iraq's Chemical Warfare*, Baqiyatallah University of Medical Sciences, Tehran, 2003.

the victims from torture and other illegal treatment are far fewer in number than the victims from indiscriminatory and direct attacks on civilians.[17]

How does the mass nature of the violations of the law on conduct of hostilities affect the prospect of compensation claims by these victims in national or international criminal courts? As a matter of fact, the mass nature of the violations is one of the reasons why legal avenues for victims to claim compensation are often opposed. It is feared that thousands or millions of individuals will file lawsuits.[18] In the same line, it is claimed that the traditional method of individualised adjudication, when applied to mass claims, is undesirable. It would result in unacceptable delays and substantially increased costs for both claimants and respondents. The sheer numbers of victims are prohibitive and would leave no choice but to adopt a more collective approach.[19] This claim is critical in the evaluation of compensation claims to be dealt with by domestic courts, or by the ICC for that matter.

Also in the Van Anraat case, the Dutch Court feared that large numbers of victims would put their claims to the court. The Court's fear was understandable. The Dutch legal system is not equipped to deal with mass claims. Under Dutch law, there is no class action. Article 51 of Code of Criminal Procedure stipulates that a person who has suffered harm can for the purpose of claiming civil damages join as a party to the criminal proceedings. Thus each and every individual has to start his or her own case, representing only him- or herself. In the case against Van Anraat, only 15 victims presented their claim in court. The number of victims was limited for practical reasons and so as to not put off the Court.[20] This decision meant that the other victims were left empty-handed.[21]

How does the ICC handle the mass nature of the crimes coming before it? No victim has yet requested reparations since at the time of writing, no trial had yet started. Most cases are still before the Pre-Trial Chamber, and the Lubanga case, currently before Trial Chamber 1, is due to start imminently. But, since the start

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[17] For example, according to various reports, over 800 civilians have died in fighting in Afghanistan in the past few months. It raised strong criticism over NATO and US aerial bombardments. See, http://afghandevnews.wordpress.com/2007/07/31.

[18] *See* for example *Leo Handel* et al. *v. Andrija Artucovic* on behalf of himself and as representative of the Independent Government of the State of Croatia, US District Court for the Central District of California US 601 f. Supp. 1421 judgment of 31 January 1985, reproduced in M. Sassoli and A. Bouvier (eds), *How Does Law Protect in War*, ICRC, Geneva, 1999, 713–9.

[19] This is argued in particular by mass claims procedures. *See* for example with respect to the UNCC, report and recommendations made by the panel of commissioners concerning the fourth instalment of claims for departure from Iraq or Kuwait (category A claims) (UN doc S/AC.26/1995/4, 12 October 1995, §9 available at http://www2.unog.ch/uncc/).

[20] The civil party participation was limited to one or at most 2 victims per place figuring in the indictment (in total 4 villages in Iraq and 6 in Iran).

[21] They have the possibility though to pursue the case in civil court.

of the proceedings, victims have systematically filed applications for participation. A few hundred victims are already involved in proceedings before the Court. Potentially, the group of victims the ICC will be facing will be even larger. Indeed, it is an outspoken aim of the ICC to reach as many victims as possible. Under rule 96, the Registrar has an obligation to give publicity "as widely as possible and by all possible means" to the reparation proceedings before the Court "to other victims, interested persons and interested states".[22]

The ICC's approach towards the mass nature of victims' claims is mixed. In principle, the ICC takes an individualistic approach. Rule 85 of the Rules of Procedure and Evidence states that a victim is a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the Court.[23] The Rules thus address victims as individuals, rather than as groups or members of groups. The Statute does not provide for class actions.

At the same time, the Statute also offers mechanisms meant to assist the ICC in handling large numbers of victims. Indeed during the drafting of the Statute, many delegations were concerned that the potential numbers of victims might make their participation practically impossible.[24] One of such mechanisms is collective reparations.[25] Another mechanism to deal with mass claims is that the Rules are drafted so as to leave a wide margin of appreciation to the ICC. So it is left in the hands of the ICC to determine the modalities for victims to exercise their rights to participate and to claim reparations.[26]

However, so far I can see little awareness of the judges of the ICC of the potential challenge of great numbers of victims wishing to participate. One example is its decision on the situation of Democratic Republic of Congo, of 17 January 2006. In this decision the ICC decided that already during the investigation stage of a situation, victims are permitted to present their views to the Court. Under the Rome Statute victims are entitled to present their views and concerns

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[22] The aim is to inform victims about their rights and how to participate in the proceedings. To this end, the Registrar may seek the cooperation of relevant states parties and the assistance of NGO's.

[23] Doc. ICC-ASP/1/3 (2002).

[24] G. Bitti and H. Friman, "Participation of victims in the proceedings," in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, NY: Transnational Publishers, 2001, at 456.

[25] *See below*. Another mechanism is collective representation. Rule 90 stipulates that the Court may require a common legal representative for a group of victims as a prerequisite for participation: "Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives." The purpose of this provision is effectiveness of the proceedings (*see supra* n. 24, 461.).

[26] *See supra* n. 24, 456.

"where their *personal* interests are affected".[27] This means that the judges must not only decide whether victims' personal interests are involved, but also at what stages the victims may present their views and concerns and in what manner they may do so.[28] In its decision of 17 January 2006, the Court found that the victims' personal interests may in principle be affected already during this preliminary stage. In the words of the Chamber: "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered".[29] In other words, victims are considered to assist in the prosecution and trial of the crimes. Without an accused having been identified at the stage of a situation, victims may even assist in the selection of an accused. Clearly, where many victims are involved, this will increase the burden on the Court and delay the proceedings.

In its decision of 13 February 2007 in the case against Lubanga, the Appeals Chamber determined that for victims to participate in an appeal, they have to file an application again.[30] While the Trial Chamber in this case had already authorised these victims to participate in the proceedings, each victim had to refile their request to participate, stating again how their personal interests are affected by this appeal and why they should present their views to the Appeals Chamber. The Appeals Chamber found that it could not automatically be bound by a previous determination of the Pre-Trial Chamber on this matter.[31] When examining this and other decisions both of trial and appeal chambers dealing with victims, the conclusion can only be that, so far, the judges have not interpreted the articles in a way so as to narrow down the participation of victims.

What if – in the case against Van Anraat – many more victims would have made it to the Dutch court? For sure, the Court could not have refused them.

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[27] The Rome Statute affords victims of crimes explicit rights to make representations (Art. 15, para. 3), to submit observations (Art. 19, para. 3) and to have their views and concerns presented and considered where the personal interests of the victims are affected (Art. 65, para. 3). Also each individual victim may be allowed by the Court, through his representative, to question witnesses, experts or even the accused (Rule 91 of the Rules on Procedure and Evidence).

[28] This is an outstanding example of the individualised approach of the ICC towards the victims. Victims enjoy a right to take part in the proceedings in their personal capacity.

[29] Pre-Trial Chamber I, Situation in the DRC, "*Decision on the applications for participation in the proceedings of VPRS 1,VPRS 2, VPRS 3, VPRS 5 and VPRS 6*", 1CC-01704-01/06-101, 17 January 2006, para. 63.

[30] *Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo"*, ICC-01/04-01/06-824, 13 February 2007, para. 43, which considers Regulation 86 (8). According to the Appeals Chamber, Regulation 86 (8) was subordinate to Article 68 (3) Statute. It was the first time that the Appeals Chamber considered the manner in which victims can participate in interlocutory appeals.

[31] *Idem*.

But there would have been the potential of blowing up the system, each of them being entitled to make a statement to clarify his or her claim, each of them being entitled to question witnesses in Court. There exists little precedent for how large numbers of victims should be dealt with by a single court. Easy answers are therefore not available. Perhaps it is not the principle of large numbers of victims participating that is the problem, but rather the modalities of their participation that need to be resolved. That may be. Time will tell.

3. *Fact Finding*

As said, compensation cases brought by civilians and combatants are the most difficult. The reason is that the circumstances on the battlefield involving civilians and combatants are hazy. Accurate and reliable information is often difficult to obtain. A tremendous advantage of compensation cases that are linked to criminal proceedings is that the facts proving the crimes are to be provided through the criminal proceedings. So it is up to the prosecutor to find the facts. Of course the prosecutor, both at the national courts and the ICC, faces his own problems in establishing the facts. This will in turn affect victims' claims because, if the prosecution is not successful, the victims will lose the opportunity to have their requests for reparations dealt with by the Court.[32]

In the case against Van Anraat, the prosecutor, and thereby the victims, benefited from a UN investigation team that was set up to investigate allegations by Iran of chemical weapons use in the Iran-Iraq War.[33] The UN team issued seven reports between 1984 and 1988. It conducted interviews with government officials; it visited the war-zones in order to examine evidence of alleged chemical attacks and to collect samples for chemical analysis in specialised laboratories. The team also carried out clinical examinations: it conducted interviews with medical doctors and patients who were allegedly exposed to an attack of chemical warfare agents.

One of the findings of the investigation team was that the chemical weapons were "without any doubt" used against Iranian forces by Iraqi forces, also causing

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[32] Unlike some national systems the Trial Chamber does not have the power to decide on reparations if the accused is acquitted. (*See*, *e.g.*, C. Pr. Pén., art. 372 (Fr.). Gilbert Bitti and Gabriela Gonzáles Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", *supra* n. 15, at 314.

[33] In a letter Iran requested the UN Secretary-General to dispatch a team of experts to the affected sites "so as to document the criminal behaviour of the Iraqi regime and to take immediate steps to hold such inhuman methods of warfare", Letter Dated 26 January 1987 From the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General (S/18635, 27 January 1987). *See also* the Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq (S/20060, 20 July 1988).

injuries to civilians in Iran.[34] It also established that various kinds of agents had been used, predominantly mustard gas. It has been on the basis of these UN reports (among other evidence) that Van Anraat has been convicted for selling materials that served for the production of mustard gas.

A practical problem regarding fact finding is lapse of time. In some instances the UN team went to the spot almost immediately after the attacks. In other instances, there was a delay of about two weeks between the dates of the alleged attacks and the arrival of the mission. The investigation team pointed out that "the intervals between the alleged attacks and our actual arrival in the areas to collect samples for chemical analy-sis resulted in the degradation and evaporation of chemical agents".[35] It stressed that "in order to facilitate such analysis it is important that sampling be done as quickly as possible".[36]

In sum, the Van Anraat case was concerned with a conflict that has been one of the rare cases where fact finding was done. In the majority of armed conflicts, the parties cannot agree on such missions. Legal actions brought – or considered to be brought – will then suffer from a lack of written records.[37] Otherwise, the victims in this case greatly benefited from the criminal proceedings against Van Anraat. Their case was built on the indictment and it was for the prosecutor to prove the allegations in the indictment.

4. *Damage*

While the facts proving the criminal behaviour are for the prosecutor to deliver, this is different for the damage suffered by the victims. In principle, it is for the victims to prove the scope of their injuries and losses.[38] However, in this particular

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[34] Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq (S/18852, 8 May 1987), para. 5.

[35] Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict Between the Islamic Republic of Iran and Iraq (S/20060, 20 July 1988), 9.

[36] In the Letter Dated 26 January 1987 From the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, it was stated: "We hope that Your Excellencies and Your and Excellency's team will reach the region before the disappearance of the evidence of crime" (S/18635, 27 January 1987).

[37] The fact finding commission envisaged by Additional Protocol I has never come into action. There have been, however, some *ad hoc* inquiry commissions, for example the Commission of Experts for the former Yugoslavia and the Commission of Inquiry for Darfur. Both commissions reported to criminal tribunals, the Yugoslavia Tribunal and the ICC respectively.

[38] The indictment did state that civilians had suffered damage from Van Anraat's acts, both material and immaterial, as a consequence of Van Anraat's criminal acts. So the nature of the damage as well as the causal link between Van Anraat's acts and the damage was for the prosecutor to prove. The indictment did not state, however, the scope of the damage.

case this burden of proof resting on the victims turned out to be not that heavy, for several reasons.

In the first place, in this kind of compensation proceedings in Dutch law that are linked to a criminal case, the victims' claims are awarded on the basis of fairness.[39] Victims are thus not required to provide definite proof of their injuries.

Also the ICC applies a relaxed standard of proof for reparations claims. It requires victims to provide "relevant supporting documentation" for their reparation claim only "to the extent possible".[40] In case of lack of sufficient evidence, the ICC shall have to adopt measures to fill the evidence gap. It may follow the road taken by Dutch domestic courts and award the claims on the basis of equity. Another option for the ICC is for it to collect itself the necessary evidence. This could involve requesting the cooperation of states or international organizations.[41]

A second reason why proving the scope of their damage was not such a heavy burden for the chemical war victims, was because their injuries were not disputed. To a large extent, they were still clearly visible. The victims of mustard gas still had scars of the blisters that resulted from second degree burns. In some instances, victims displayed symptoms of respiratory problems. Some suffered from sight deterioration over the years, a few ending up blind.[42] Many of the

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[39] Supreme Court (W7919, 27 April 1903): "*De toegebrachte schade wordt naar billijkheid vastgesteld; daarbij kan ook worden gelet op de getuigenis van de beledigde partij; de omvang van de schadevergoeding wordt aan het oordeel van de rechter overgelaten en de wetgever vereist niet dat de beledigde partij in bijzonderheden van de geleden schade doet blijken*." ["The afflicted damage will be determined on the basis of equity; in this regard particular attention can be given to the offended party's testimony; the legislator does not require the offended party to give evidence of the details aspects of the damages suffered and the determination of the extent of the compensation is left to the Court."] In a similar line the Court of Appeal of Amsterdam reasoned (W6091, P.v.J. 29 September 1891, nr. 93): "*Waar degenen die zich als beledigde partij in het strafgeding heeft gevoegd, de rechter geen enkel gegeven heeft verstrekt (…) van het door haar gevorderde bedrag voor schadevergoeding en evenmin enige maatstaf om die schade zelfstandig te begroten, moet de vordering niet worden ontzegd. Doch de toegebrachte schade moet door de rechter ex bono et aequo worden geschat en bepaald*". ["In those cases in which a person joining the criminal proceedings as civil plaintiff has failed to provide the Court with details of the compensation claimed or with any substantive criterion that can be used to determine the extent of damages suffered, the civil party should not be denied standing. Instead, the extent of the damage suffered is to be assessed by the Court ex bono et aequo."]

[40] Rule 94 of the Rules of Procedure and Evidence.

[41] In accordance with Part 9 "International Cooperation and Judicial Assistance" of the Rome Statute. Gilbert Bitti and Gabriela Gonzáles Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", *supra* n. 15, at 313.

[42] Medical prognoses are gloomy. Some need lung transplantation and all have severe psychological problems, suffering from instability and nervousness. Besides immaterial damage, the victims also suffered material damage, their houses were destroyed by the chemical bombardments, their houses became unfit for habitation or they were forced to flee their houses. Added to this they have considerable medical costs of hospitalisation and medicines up until today.

victims had been examined by medical doctors in Iran and Europe over the years. These doctors confirmed in this case that they displayed typical symptoms of exposure to mustard gas. The UN investigation team appeared useful in this respect too. It had investigated the injuries and recorded the evidence of the damage.

A third – and perhaps the most important reason – why the victims did not have a heavy burden proving the scope of their injuries, is that under the Dutch criminal code of the eighties, when the chemical attacks occurred, the victims could be granted not more that € 670 per person. Of course this is a symbolic amount in view of their injuries.[43]

It should be noted that Dutch law does not provide for collective compensation. This is likely to raise problems in case of mass claims. When large groups of victims are involved, it may be difficult to quantify their harms exactly. It may be even more difficult to redress their harms individually. Collective awards may therefore be more suitable. Another reason to grant a collective award is that there are likely to be few resources available. Even the small amounts of € 670, when put together, mount up.

The ICC does provide for the possibility of collective reparations. Rule 97 provides: "the Court may award reparations on an individualized basis or, when it deems it appropriate, on a collective basis or both".[44] So, the beneficiaries of reparations orders may be either individual victims, groups of victims, or entire communities. To assist in determining the scope of damage, the Court may appoint experts.[45] This may become a general practice for the Court. It seems infeasible for a trial chamber to analyse numerous requests for reparations. As pointed out by some authors: "this would require an entirely different setting from the one the Court has currently".[46]

B. *Conclusion*

The tort claims of the chemical warfare victims in the Van Anraat case are not directly based on international humanitarian law, or the law on conduct of hostilities for that matter. They are based on Dutch civil law. But the 1925 Gas Protocol, and the customary prohibition on the use of chemical weapons did

[43] In the nineties, the law has changed. The amount of compensation that can be claimed by victims is no longer restricted.
[44] Collective awards can be ordered by the Court through the Trust Fund.
[45] Rule 97(2). Rules of Procedure and Evidence, Doc. ICC-ASP/1/3 (2002).
[46] Gilbert Bitti and Gabriela Gonzáles Rivas, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court", *supra* n. 15, at 314–15.

constitute the substantive tort. So the law on conduct of hostilities was – indirectly – a source of rights enforceable by individual victims in a domestic court. This case thus shows that individuals are no longer only victims of violations of the law on conduct of hostilities. They can also present their claim to a tribunal.[47] This development – of compensation claims linked to criminal proceedings – is part of the growing emphasis on the role of victims by the international human rights and humanitarian law.

At the same time, on the basis of this single case, and in the near absence of similar practice, it is impossible to extract general rules. We are still far from a coherent theory on different aspects of this kind of compensation cases. Clearly international humanitarian law does not provide any principles for determining how reparation is to be made for the injury caused by the wrongful acts. Nor does it give any methods for assessing the damage. In part, the relevant rules are therefore to be derived from domestic law. An important question will be to what extent these domestic courts work in isolation or whether they will draw from other national or international sources such as human rights treaties. Also the ICC Statute does not contain provisions on how to establish the damage, burden of proof, etcetera. It is up to the ICC to establish – on a case-by-case basis – these procedural criteria in relation to reparation cases.[48] Ultimately what we need is a practical guide that can be used by both tribunals and victims. Such a guide on compensation is important as a decision of national authorities to prosecute an international war crimes case may be guided by the legal possibilities offered by the municipal system to victims of such crimes. Also the victims should know where their claims have the biggest chance to succeed.

Having stressed this important development for victims' compensation in international criminal law, it should be recalled that the victims of the chemical warfare in Iraq lost their case in the Dutch court of appeal. The case is currently pending before the Supreme Court in the Netherlands. If the claims are not granted in the criminal case, they will be brought to a civil court. The reason the Appeals Court rejected the compensation claims was that it considered them to be too complex to be decided by a criminal court. Complex aspects were deemed not so much the facts or the damages. Difficult issues according to the Court

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[47] The recognition of this private remedy shows that the traditional theory that only a state is entitled to claim compensation is no longer valid. This development is in line with the criminal accountability of individuals that is directly based on international humanitarian law.

[48] It will do so in accordance with Article 21 of the Statute on applicable law by resorting to applicable treaties and the principles and rules of international law, and to internationally recognised human rights. In its decision related to victims, the ICC has already referred to jurisprudence of human rights courts such as the European Court for Human Rights and the Inter-American Court of Human Rights.

were the applicable law and statute of limitations.[49] The victims' claims have an accessory nature. The court to which these claims were presented, is in the first place a court to try the accused rather than a court to provide reparations. It is therefore not equipped to deal with complex questions of civil law.

Consequently, criminal proceedings do offer a way out to some difficulties victims are likely to face when bringing compensation cases for violations of law of the conduct of hostilities, but serious obstacles remain. Future success of these types of claims is therefore uncertain.

[49] As for the applicable law the Court had to apply the *lex loci delicti*, the law applicable in the state where the tort was committed, i.e. Iraqi and Iranian law. The Court, being in the first place a criminal court to interpret difficult rules of Iraqi and Iranian law, did not feel competent. A second reason why the cases were dismissed in appeal was that the facts occurred some 20 years ago. While for the war crimes committed by Van Anraat no limitation applied, ordinary tort actions are barred under Dutch law by limitation after a lapse of 5 years. A question that deserves attention is whether this narrow statute of limitations should also apply to civil claims that are fundamentally linked with war crimes.

Part VI
Reparations in National (Territorial) Contexts

Reparations and Victim Participation: A Look at the Truth Commission Experience

By Cristián Correa, Julie Guillerot and Lisa Magarrell *

A. *Introduction*

The design and implementation of reparations for victims in the aftermath of large-scale and serious human rights violations is an area rife with challenges. These processes generally unfold in contexts of transition, in which state institutions mandated to guarantee the rule of law are weak, corrupted, or nonexistent, and victims are often focused on meeting their most basic daily needs. Investing in victims' rights – whether in terms of political capital, meaningful and ethical messages of acknowledgment, or budgetary allocation – is often low on the list of priorities of both national and international actors in these contexts. Yet reparations are about more than just responding to victims' basic needs; reparations must respond to the real impact of violations in victims' lives and at the same time be received as sincere efforts on the part of the larger society to acknowledge what happened and to provide some real measure of justice to those harmed. The design and implementation of reparations must consider both material as well as symbolic dimensions of such recognition and acknowledgment in order to ensure that reparations are both legitimate and just.

The participation of victims in this process is a complex undertaking, fraught with difficulties. It can provoke unrealistic expectations, but it can also be a crucial element in devising and delivering meaningful reparations. Moreover, it may help reparations play an important role in the broader agenda of achieving justice and modeling respect for human rights and democracy.

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 385–414.

This paper reflects on the advantages and difficulties of victim participation in the design and implementation of reparations policy. We draw on the experience from a number of countries, highlighting Peru's ongoing experience as well as Chile's extensive history in this regard.[1] Peru's Truth and Reconciliation Commission (CVR for its acronym in Spanish) recommended a reparations plan in 2003 to address two decades of abuses on the part of both government and insurgent forces that affected many thousands of victims, their families and communities. This plan was, in large part, passed into law two years later and is currently in the process of implementation on several fronts. In Chile, reparations were implemented first for family members of victims who were disappeared or executed, and followed several years later by the extensive documentation of victims of political detention and torture, again leading to reparations. These two cases help us to examine some of the issues we raise here in greater depth, but we must recognise that the scope of the topic is much broader than can be dealt with in this brief article. While we have limited ourselves to reflections based on cases in which reparations have followed truth-seeking mechanisms and only a small set of examples at that, we hope that the lessons taken from these may be relevant more broadly. Certainly this is an issue ripe for additional research and analysis.

Within this modest frame of reference we look first at the underlying challenge: how to honour the right to reparation and ensure that the State carries out its obligation in this regard. We then consider the nature of victim participation, its value to both reparations and transitional processes more generally, and some of the threshold challenges of expectations, representation, and types of participation. Through case examples, we then take a more detailed look at how the issue plays out in three key phases of a reparations process: defining the debate, determining reparations policy, and delivering reparations to victims. Throughout, and in conclusion, we offer some suggested lessons which we hope will be useful not only in the context of reparations processes in relation to truth-seeking, but more generally as well.

B. *The Underlying Challenge: Reparations in the Face of Massive Abuses*

The obligation of states to provide reparations is set out in the United Nation's *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International*

[1] For more detail on the Peruvian process through 2005, see Julie Guillerot and Lisa Magarrell, *Memorias de un Proceso Inacabado: Reparaciones en la transición peruana*, ICTJ, OXFAM and Asociación Pro Derechos Humanos (APRODEH), Lima (2006), www.ictj.org/static/Peru.Reparations/Memorias.Peru.esp.pdf.

Humanitarian Law.[2] While it is now fairly established that this duty includes some combination of restitution, compensation, and rehabilitation, bolstered by steps to prevent recurrence and to provide other measures of satisfaction for victims, the exact content of any reparations programme for massive violations is not prescribed by law.[3] In the aftermath of massive or systematic violations or more generalised conflict, providing reparations in a meaningful way is particularly difficult. The number of victims may be massive; harm may be devastating and irreversible and felt individually and collectively in the short and long term. When these abuses have become the norm rather than the exception, institutional guarantors such as courts or other arbiters of redress can be overwhelmed by the scale of the challenge, destroyed in the conflict, or corrupted by political interference.

The adoption of an administrative reparations programme may allow the state to provide adequate reparations to a greater number of victims than that which might have access to a judicial forum for their claim and the proof to go with it.[4] This is particularly important if one considers that the victims who are most economically or geographically marginalised – often the great majority – have the least possibilities to effectively demand their rights in a judicial forum. Additionally, an administrative reparations programme can consider the larger context and both individual and collective dimensions of harm, in ways that may be more comprehensive and holistic than remedies that a court could devise.

In designing an administrative reparations programme one must know to at least a reasonable degree of certainty the size of the victim population, the kinds of violations suffered and their immediate consequences. Truth commissions help to uncover this information, but not always all that is needed for determining reparations programmes, including demographic information about

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[2] Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005. Accessible at: http://www.ohchr.org/english/law/remedy.htm.

[3] It is worth noting that recent truth commissions are making a contribution to the development of law in the area of reparations. Timor-Leste's Commission for Reception, Truth and Reconciliation (CAVR), the Ghanaian National Reconciliation Commission (NRC), the Moroccan Equity and Reconciliation Commission (IER), the Peruvian CVR, the Chilean National Commission on Political Prison and Torture, and the Sierra Leone Truth and Reconciliation Commission (TRC) all refer to the UN basic principles and guidelines on reparations or to draft versions before they were officially adopted. By doing so, they continue to reinforce the status of these principles in international law, while gradually helping to define the contents of the duty to make reparations in circumstances of massive and systematic violations of human rights and humanitarian law.

[4] On reparations generally, see Lisa Magarrell, "Reparations in Theory and Practice," ICTJ (2007) at www.ictj.org/static/Reparations/0710.Reparations.pdf; Ruth Rubio Marin, Ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Social Science Research Council, New York (2006), available for on-line access or purchase at http://press.ssrc.org/RubioMarin/; and Pablo de Greiff, Ed. *The Handbook of Reparations*, Oxford University Press, New York (2006).

victims, their families and communities. And while they do a good job of bringing victims' narratives to the fore, not all victims engage with truth-seeking processes, so that additional efforts are required to identify the full range of victims and harms involved. When no prior truth-seeking efforts have been undertaken, some form of documenting these aspects of what happened will be required.

Reparations programmes deal with a number of other variables that must be considered and weighed in terms of how best to respond to the crimes and the harm, to the satisfaction of victims. These include, what types of measures should be designed for which victims, whether individual or collective or both, and in what priority and form these should be delivered, along a continuum from purely symbolic gestures to ones that still send a message but are predominantly defined by their material nature. Decisions must be taken about how to address disparities in the experience of violence across gender, ethnic and class-based lines, as well as pragmatic issues of how to fund the process and who is responsible for it. Plans must take into consideration what is feasible, and how reparations complement and can be complemented by other measures, such as judicial processes, institutional reforms, documentation and commemoration of the truth about what happened and who was responsible, as well as larger national agendas of rebuilding and development.

The perception of this type of policy as legitimate should be shared well beyond the victims and their natural allies, to their neighbours and acquaintances, the media, and public opinion in general. Essentially, reparations measures constitute a message to victims from the rest of society, recognising that victims belong and expressing solidarity in the face of unjust suffering. In order for this message to be perceived by victims as honest, it must be coherent with the other messages that are directed to victims, through actions such as criminal justice, but also in other contexts of daily discourse. This is why it is so important that reparations processes be transparent to the society as a whole. Information and outreach needs to educate the broader public about the violations committed, the harms and suffering inflicted on victims, and processes of truth-seeking, justice and reparation need to be mutually reinforced in the public consciousness. This is also why it is important that efforts at recognition not only stem from the conclusions of a truth commission or the statements of individual officials who are especially sensitive to the issue, but also from across all government entities and society in general.

One aspect among all of these that must be considered, is who takes these decisions and by what process. In the following section, we examine some of the reasons why victims should be included, in what ways, and the challenges of making victim participation an important part of the reparations process from conception to delivery.

C. *The Nature of Participation*

While participation is generally considered to be a virtue in principle, it is important to remember that it can be staged, manipulated for political ends, and frustrated by unrealistic mechanisms, a lack of follow-through or by eliciting engagement without sharing information. Here, we refer to participation as ideally encompassing three essential component parts: 1) effective representation that recognises complexity and builds capacity; 2) information, knowledge and capacity that flow in two directions; and 3) meaningful and transparent impact.

Choices about participation of victims in addressing the issue of reparations, designing reparations measures and seeing these implemented can contribute powerfully to a policy's success or to its downfall. There are important risks that should not be underestimated. These include the imposition of time frames for policy development that may not accommodate first creating the ideal conditions for participation; in fact, this is often the case. Victim groups are often under-resourced, may have limited skills in crafting and negotiating government policy, and may not be structured in a way (if organised at all) that makes it easy for there to be effective and communicative representation of them through selective participation. Participation that does not first facilitate the existence of these conditions may frustrate the purpose of it, and even create a dynamic that leaves victim groups feeling inadequate and ignorant (or treated as such) in their interventions with government officials. An assessment of enabling conditions for participation and steps taken to facilitate those conditions may need to be undertaken, while participation is adjusted to evolving capacity over time.

At the same time, a real or presumed lack of technical skill should not be an excuse for failing to find appropriate channels for participation of some kind. Participation that is respectful, knowledgeable, and transparent, and achieved through effective forms of representation, allows victims to feel that they are valued and recognised as rights-holders under the law and as relevant actors in their society. This is particularly important for groups of persons who were victims of violence due to their political stance and who demand recognition as political actors, but it is also true for those who were victims because they belonged to populations that were marginalised, discriminated against or made effectively invisible by society. In this way, participation serves not only to add value to measures of restitution, rehabilitation, or compensation, but also as a good in itself by opening the space for debate about how to ensure greater inclusion for victims both socially and politically. Participation can itself become a guarantee of non-repetition and play a role in institutional changes that allow society to learn from what happened and ensure respect for human rights in the future.

In practical terms, consulting with victims can be an important factor to consider along with others in responding to the real impact of the violations in their

lives. Victims, their families and the representatives of their organizations are a direct source of information on some of the key points needed in designing a reparations programme, for example, the kind of violations suffered, the consequences of these, victims' current needs and condition. Reparations will be most effective if they make sense to victims and if the priorities respond to the real impacts in the lives of victims and honour their realistic expectations. To the extent that reparations are not perceived as such by the victims, they fail in their purpose.

Viewed more broadly, victim participation can contribute to strengthening victim organizations,[5] to promoting their active presence in the country's political life, and provide new foundations for generating public trust. This is especially important if one considers that political repression usually is accompanied by the destruction of social organizations and the generation of distrust and fragmentation of the population. In this sense, a participatory process in the realm of reparations can have an important reparative effect itself, by countering the fragmentation through stimulating and strengthening victim organizations.[6]

Participation is a malleable term that can and often should vary substantially in its purpose, form, degree, and timing. Those variations need to respond not only to the enabling conditions for participation already noted, but also to the broader context and stages of the reparations process. As we explore in more detail in section IV of this paper, in the earlier stages of defining the debate and documenting the underlying facts that give rise to reparations, participation may be more about avenues for accessing information about victims' experience, situation and needs; later, as policy on reparations is developed, participation may be more focused on transparency, input and feedback on policy decisions. When it comes time to implement reparations, participation may range from continuing to provide information about victims to participating in bodies that direct reparations or oversee their implementation in some way. The forms that participation takes can be more or less expansive in terms of the interaction with victim groups: a few representatives on a consultative body, or a consultative conference that brings together a wide array of groups and individuals. Victim groups may

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[5] There is often some legitimate concern about "institutionalising victimhood" but that does not have to be a consequence of strengthening these organizations.

[6] This can be done expressly by taking steps to create or strengthen victim agency through organizations. An example of this is the Aboriginal Healing Foundation in Canada, established as a non-profit organization in 1998 with a $350 million grant from the Canadian Government, following that country's Royal Commission on Aboriginal Peoples. Its "mission is to encourage and support Aboriginal people in building and reinforcing sustainable healing that address the legacy of physical abuse and sexual abuse in the residential school system, including intergenerational impacts." Its work has been very successful, earning the respect of Aboriginal and non-Aboriginal Canadians. See, www.ahf.ca/about-us/mission.

develop their own proposals or conduct research that can influence policy-makers, or they may work to create regular channels of communication, just to mention a few alternatives.

While it is easy to point out the virtues of participation it is not particularly easy, or even attractive, for governments to establish mechanisms for participation in reparation design or implementation. Giving voice to victims who have enormous needs and who have suffered unimaginable harms opens up an endless horizon of expectations that no state has yet been able to fully redress.[7] The difficulties in finding legitimate representatives of victims as well as concerns within government over how much meaningful space to provide and what degree of expectations to open up for victim groups, are obstacles that either must be overcome or will become justifications for not including victims in these processes. We explore these and other challenges below.

1. *Participation and Expectations*

There are at least two areas of expectations on the part of victims that need to be addressed in considering the best way to ensure effective participation. First, expectations about the scope of participation and degree of influence: understanding that while victims' voices are an important factor, this is not the only basis for policy decisions, or even appropriately a voice at all on certain aspects of policy definition and implementation. And second, expectations about reparations and the relation of this agenda with other national issues of importance to victims: there are excellent reasons why victims may want to take a maximalist position on reparations issues, but any position should have a realistic understanding of what reparations programmes can and cannot accomplish. At the same time, victims groups need to be strategic about their expectations on multiple agendas, so they must take on participation with an eye to how expectations about reparations fits into a larger picture of needs and priorities.

A lack of adequate information and grounding on the subject, or an undue emphasis on victims' situation in the current moment, can also unnecessarily limit expectations and, consequently limit reparations. Victims who have just emerged from conflict and are displaced may be more focused on returning to their lands and ensuring access to security, housing, and employment or the tools to carry out their livelihood. In one context in Colombia, despite explanations about what reparations might include, people at a meeting insisted that the only reparation needed was simply a cessation of the killings. While they may not be

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[7] Pablo de Greiff describes some of the limitations of reparations policy, even when it is at its most efficient and expansive, in "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Reparations Handbook, supra* n. 4 at 2–18.

thinking at the moment of initial consultation about including in reparations policy elements of psychological attention for rape victims or memorials commemorating lives lost or meeting other less immediate demands for rehabilitation and services, these may well be important aspects for a reparations programme to contemplate at some point.

Participation, and the necessary accompaniment of information about victims' rights, should not be avoided because of the risk of unfettered expectations, but rather precisely as a way to inform, shape and challenge those expectations. In Peru, the exercise of carrying out a joint research project, undertaken by the ICTJ and an outspoken Peruvian human rights NGO was a first step toward giving concrete expression to what reparations might be, and a first exposure to the challenges of seeking to satisfy demands with feasible policies.

2. *Identifying the Victims and their Representatives*

One of the difficult challenges of opening up space for participation is finding adequate representation and channels of communication for making it effective. Victims' organizations are numerous, heterogeneous, fragmented, often marginalised politically, under-funded and frequently lacking in the kind of formal structure that provides for clear representation. At the same time, many victims do not belong to an organization. In the Peruvian case, a study following the publication of the CVR's report[8] identified 118 existing victims' organizations of diverse geographic coverage and focus, in 11 of 24 departments (political subdivisions). According to the study, there were significant difficulties in transmitting information to, and in consulting with, their constituents, both within groups and across groups when they worked together. These factors had an enormous impact, complicating efforts to identify or create consistent, manageable and effective lines of representation and communication.

Even when representatives are identified, there is not always a clear incentive or capacity to establish ongoing joint action. The Peruvian human rights movement made efforts to link up the victim organizations to heighten their direct agency and strengthen their unity as one of the crucial social actors involved in the struggle for the design and later implementation of the Comprehensive Reparations Plan (PIR for its Spanish acronym). Through national meetings of representatives of victim organizations, on several occasions, a "national coalition of people affected by political violence" was pulled together. These coalitions quickly fell apart, evidencing the real difficulties inherent in ensuring legitimate representation and leadership within the victim movement at a national level.

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[8] Oxfam-Great Britain, "*Mapeo de las organizaciones de afectados por la violencia política en el Perú*," Lima, April 2004.

The short-term work of the coalitions for the purposes of one-off events was nonetheless important. And, despite the tensions it may generate from time to time, since human rights NGOs often cannot claim to represent the victims themselves, NGOs can still serve as an important channel for approaching victims and creating avenues of participation.

There are any number of other factors that complicate the identification of victim organizations and their participation through effective representation within what may optimistically be described by policymakers or advocates as "the victim community." These may include, for example, tensions between claims of national representation and the role of those more locally circumscribed; between organizations formed around a specific shared experience (disappearances or displacement, for example) whose interests may diverge or who may have more or less political pull; or tensions that fall along political lines or relations to parties of the conflict (including "perpetrator groups," though this terminology oversimplifies what can be a gray area between victims and perpetrators); along with factors such as cultural differences, varying degrees of political experience, or styles of negotiation.

In some cases there may be no existing victim-identified organizations at all, as tends to be the case in Liberia. That means that when seeking input from victims one has to look for other expressions of joint action – such as women's organizations, or social development groups – or develop new civil society groups for channels of communication with victims.

It is not easy for victims' organizations themselves to resolve their differences harmoniously and create internal channels of participation that ensure representativity of their leaders and, in turn communication by leaders with their constituents. Neither is it easy for truth commissions or government bodies charged with designing and implementing reparations policy to respond adequately to the need to consult victims and establish legitimate mechanisms for participation at the various stages of the process. A frequent temptation faced by these bodies is to create links primarily with groups closest to themselves politically, giving the process the appearance of participation and legitimacy without being adequately inclusive. Or they may relate primarily to those who have the louder voice and greater presence in the media, in order to protect themselves from public criticism. Both responses reinforce the marginalisation of other groups with less political weight or victims who are not affiliated with any organization.

Another difficulty that may be faced by truth commissions and government bodies is the need for a constant flow of information from the victim groups, making sporadic meetings or the publication of a periodic bulletin inadequate. Given the experience of distrust and the need to fill the vacuum of information on fundamental aspects of the lives of victims or the situation of policy development or implementation, for example, the tendency for rumours to take hold is frequent.

Informed policy decisions about victim participation need to consider all of these factors and dynamics. A mixed strategy of smaller and larger representative channels, forms of direct communication to the larger constituencies, and different avenues of formal and informal participation that are transparent and evaluated periodically to adapt to evolving conditions, may be the best practice in the face of significant obstacles. Imperfection is likely, but is not a reason to discount the importance of finding a way to implement participatory policies. Governments need to be aware of the advantages that participation offers and not see only the obstacles they must confront to establish this type of channel.[9]

The reality varies from one context to another. But some other general lessons about representation and victim groups may be summarised as follows:

- Victim heterogeneity should not be ignored, even while space for communication across groups should be encouraged where possible;
- Support should be offered to strengthen victim groups' organizational capacity and to facilitate communication;
- Victim groups need information that is accessible and trustworthy;
- Channels of communication and participation need to be both local and national;
- Human rights organizations and other NGOs play an important role as advocates for victim rights and should be involved, with the understanding that they may well have similar challenges in ensuring that their communication to and from victim groups is effective;
- Participation that is flexible in terms of representation and that takes place over time will have a better chance of reflecting growing capacity of victim groups.

3. *The Benefits of a Common Conceptual Framework*

The design and implementation of reparations policy is an exercise in bringing diverse interests into agreement, even when all the parties involved share the principles at the heart of reparations and are all talking about the same thing. But it would be wrong to assume that there is a conceptual framework common

[9] At the time of writing, the debate on the creation of a National Institute of Human Rights in Chile proved to be an interesting situation to watch with respect to institutionalising forms of participation. Of the 9 members of the Board of Directors of the body defined in the proposed legislation, 2 were to be designated by civil society organizations working in the defense and protection of human rights, which includes the victim organizations. In addition, a National Consultative Council was to be created, in which social and academic bodies dedicated to the promotion and defense of human rights were to be represented. Among the victims' organizations the proposal generated debate about whether it would be appropriate and beneficial for them to participate in these bodies or whether it would be preferable to maintain their autonomy.

to all. Many victim organizations and human rights organizations have some experience with development projects or litigation of cases, but most have not been involved in the design of comprehensive reparations programmes or the execution of public policy on a large scale.

Likewise, governments are usually more familiar with massive responses to natural disasters and humanitarian needs, planning development projects, or responding to court judgments, than with structuring a rights-based reparations programme. Governments tend to lack the sensitivity required in order to incorporate important symbolic and subjective elements into the design and implementation of these policies, an omission that can seriously affect the victims' perception of the measures as effectively reparative. Governments also tend to want concrete and quantitative measures of social profitability of projects, while indicators of victim satisfaction may be much more ephemeral and diverse.

Further, in situations of transition, the priorities of victims are almost always a mix of reparations and other demands for social justice, including the satisfaction of basic social and economic rights. Governments in post-conflict contexts may be focused instead on reconstruction and development issues rather than recognition of human rights violations. Identifying what agenda is on the table at any one time can be difficult. Sorting out which strategies correspond to which agenda and channeling an appropriate response to each can help enormously to make the participatory process productive.

The process of building a conceptual consensus in Peru was fundamental to moving the reparations process forward in the earliest stages. We referred earlier to a research project undertaken by the ICTJ and the Association for Human Rights (APRODEH), as an aid to *knowledgeable* participation. The paper that emerged from that research,[10] later taken up in large part by both the CVR and an assembly of victim groups and NGOs, helped to establish *common ground for the debate* on reparations more generally. It allowed the debate to focus on substantive matters and not become sidetracked. It also helped, to some degree, to clarify expectations and the challenges that implementation of a reparations plan would entail.

In South Africa, despite eventual agreement early on in the process of truth-seeking as to what reparations meant, there was an enormous gap between the vision of victim groups and government on this issue. While there was some consultation by government after intense pressure from the principal victims' organization, the Khulumani Support Group, the consultation was criticised

[10] International Center for Transitional Justice (ICTJ) and Asociación Pro Derechos Humanos (APRODEH), "Parameters for the Design of a Reparations Program in Peru." Lima, 2002. The impact of this paper was furthered by the role the ICTJ played in providing technical assistance to both sectors, which allowed it to help foster debate on this topic, and by a concerted advocacy effort of both human rights NGOs and victim groups.

by the Center for the Study of Violence and Reconciliation (CSVR) as not broad enough, and government failed to follow through on promises to provide Khulumani with a government policy document.[11] According to a CSVR researcher, "… many survivors felt that government was reluctant to implement a clear reparations policy. In the public debate on the issue of reparations survivors and civil society on the one hand and government on the other assumed increasingly adversarial positions. Government started construing demands for reparations as opportunistic and as debasing the noble nature of the anti-apartheid struggle by demanding financial recompense for it. …This variance of views concerning the meaning of reparations precipitated an often-acrimonious relationship between government and survivors".[12]

Clearly, a number of dynamics were involved in this situation, but the difference in conception of reparations – and its role in the transition – between government and the survivor group are a stark reminder of how this issue can frustrate the trust that reparations should build between victims and government. It is difficult to know what the impact of a better dialogue between these groups could have produced, but it seems likely that greater openness by government to victim participation on this issue would have been helpful.

In brief, having a clear conceptual framework for debate on reparations that is shared by the various actors in the process – no matter how divergent their agendas on the topic may be – is crucial to moving forward on this issue in a positive way. Besides having a shared view of what reparations means, including its objective of recognising wrongs, harms, responsibility, and victims as rights-holders, it is important for all actors to have a clear picture of how this issue fits into a broader agenda of transition, including larger questions of nation-building, development and reconstruction.

4. *Effective Impact of the Participation*

Participation should not only be seen as a means of understanding victims' situations and needs, nor as simply an opportunity to explain to victims the good intentions behind reparations efforts. It should be something that contributes, in a definitive way, to ensuring that the persons receive real benefits that are a help to them in their lives; that is, victims should derive a substantive benefit from participation. They should be able to see their experience reflected there,

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[11] Oupa Makhalemele, "Still not talking: Government's exclusive reparations policy and the impact of the R30,000 financial reparations on survivors," Centre for the Study of Violence and Reconciliation (CSVR), Braamfontein, South Africa (2004), 6–7; see also, Makhalamele, in this volume; and Christopher J. Colvin, "Overview of the Reparations Program in South Africa," in The Handbook of Reparations, *supra* n. 4 at 177.

[12] Makhalemele, *id*. at 5.

at least in some way. The intervention of victims should contribute as well to linking their experiences with the rest of society, as a way to help (re)build trust among victims, and with the rest of society, including government. Dialogue, consultation, devolution of information in both directions makes it easier for victims to feel recognised not only as actors and allies but also as full rights-holders with capacity to make proposals and contribute.

The CSVR's report on reparations in South Africa provides some insight: "… by failing to consult with survivor groups before deciding on the final amount for reparations, government wasted an opportunity to learn about the different survivor needs, which would have helped in designing a more comprehensive reparation policy with potential to optimise its effectiveness. The report also characterises that failure as a lost opportunity for government to mend a difficult relationship between itself and survivor groups, including NGOs and other stakeholders lobbying for reparations".[13] This report also concludes that participation must be planned strategically in order to ensure results. Campaigns to demand a reparations policy were overly focused on monetary compensation, relegating to a secondary level the importance of responding to other impacts of violations on the lives of survivors.

Reparations frequently constitute a long-term commitment that necessarily extends beyond one period of government. To the extent that truth commissions have a temporary mandate, the construction of a reparations proposal in which a truth commission consults and communicates effectively with NGOs and victim organizations allows these other actors to own it and, once the truth commission's mandate expires, to defend it and demand its implementation. This requires forging strong alliances that cut across the political spectrum and establishing stable measures, through legislation, to guarantee the sustainability of the policies. It is often a slow and difficult process for society as a whole to understand the importance and need for these policies, the reasons why they are the State's responsibility and why they are owed to victims as of right. All of this means, effectively, that even the best openings for victim participation will not be adequate if the process does not engage the broader society as well.

D. *Three Key Moments for Participation*

We turn here to a more in-depth look at victim participation in the context of truth commissions at three key moments: when the scope of truth-seeking and crimes that would give rise to reparations are defined; when reparations are on the table and must be tailored into a policy; and when recommended

[13] Makhalemele, *id.*

reparations measures must make the leap from a statement of intended policy to a practical reality.

1. *Setting the Terms of the Debate*

When a truth commission is created victim organizations and human rights groups often play an important role by exercising pressure and influence. Likewise, it is these actors (or the courts, in response to litigation by these groups) who put reparations on the agenda in other contexts and press the authorities to deal with human rights abuses. The initial framework for any process of truth-seeking and reparation for victims is the mandate of the truth commission or, in other cases, the scope of the debate about human rights violations more generally. These commissions are created by an act of authority in which their scope of action is defined, particularly the type of violations to be covered, the period in which these occurred, the investigative powers, expected products (reports, recommendations on reparations, etc.), the weight to be given to any recommendations, the period for the execution of the mandate and the commission's composition.

One of the important aspects in defining the crimes that will be considered by a commission, and in turn by a reparations programme, is the inclusion of violations that tend to primarily affect women. Given the silence and denial that often surrounds them, for various reasons, the forms in which women are affected by violence are often omitted in a truth commission mandate, reiterating this negation. The participation of feminist organizations or organizations that defend the rights of women, as well as women victims, in the definition of the mandate and the operations of a truth commission can help ensure an appropriate framework and establish from the beginning the methodology and criteria that can ensure inclusion of the forms of victimisation suffered by women.

In South Africa, for example, women's organizations did not prioritise working with the TRC of that county in its initial stages, but rather focused their energies on other areas of work. As a consequence, they did not have sufficient influence in the definition of legislation that established the Commission, which ended up being "neutral" on gender. This translated into a lack of recognition of the specifics of gender in the way in which individuals and groups suffered during Apartheid and in the determination of the differentiated needs of the victims depending on their sex. Women's organizations began to advocate around this issue only once the Commission had started work.[14] Timor-Leste offers a more positive example. There, the mandate of the Commission for Reception, Truth

[14] Beth Goldblatt, "Evaluating the Gender Content of Reparations: Lessons from South Africa," in Ruth Rubio-Marin, (ed.), *What Happened to the Women? Gender and Reparations for Human Rights Violations*, *supra* n. 4 at 53.

and Reconciliation (CAVR) provided explicitly that a gender perspective be incorporated throughout its work and this was accomplished through female commissioners, staff and engagement with women's groups during the process. Two women's NGOs were involved in helping the Commission design its collective reparations program.[15]

Two additional examples of the importance of mobilising civil society at the moment of creating truth commissions can be found in the case of Ghana and in Chile with regard to the National Commission on Political Prison and Torture (also known as the Valech Commission). In Ghana, some 20 organizations joined together to form the Civil Society Coalition, playing an important role in ensuring the effectiveness of the National Reconciliation Commission (NRC). Even before the legislation creating the NRC was passed, this group met with the Attorney General to discuss the framework for the Commission. According to one Coalition leader, the group was consulted extensively and in the end the process of drafting the framework legislation was "open, consultative and participatory".[16] As a result, the NRC's mandate covered a wide range of victim experiences, including such crimes as wrongful dismissals and mock executions.[17]

In Chile, the Valech Commission was created 13 years after the recovery of democracy and 12 after the conclusion of the work of the initial Truth and Reconciliation Commission, which was limited only to cases of enforced disappearances and murder. It was established largely as a consequence of a growing political and social mobilisation. As the 30th anniversary of the coup of 1973 approached and the torture survivors' sense of abandonment by government increased, organizations of former political prisoners and other human rights groups began to put an enormous pressure on government. This was reinforced by the use made by one opposition party, strongly identified with the dictatorship and its legacy, of the discontent on the part of some family members of the disappeared who were from outlying areas and who were barely surviving on the reparations provided for them a decade before.

As a result of these pressures, President Lagos convened a broad process of collecting input from human rights organizations and political parties, culminating in his proposal, "There is no tomorrow without yesterday".[18] This proposal

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[15] Galuh Wandita, Karen Campbell-Nelson, and Manuela Leong Pereira, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims," in Ruth Rubio Marin, *supra* n. 4 at 294–96.

[16] Nahla Valji, "Ghana's National Reconciliation Commission: a Comparative Assessment," ICTJ Sept. 2006, at 42, citing E. Gyimah-Boadi, *National Reconciliation in Ghana: Prospects and Challenges*, Accra: CDD-Ghana, 2002.

[17] *Id*. at 17.

[18] www.ddhh.gov.cl/filesapp/propuesta_DDHH.pdf for full text. Other measures proposed included: the increase by 50% of reparation pensions for family members of the disappeared, the

included, among other measures, the creation of a commission that would investigate cases of torture, identify victims and propose reparative measures for these victims. In three months that commission was established and started its work.

Institutions charged with revealing the truth about human rights violations may uncover truths that later stimulate participation, so even if there is a lack of foresight or participation early on, these shortcomings may stimulate further efforts to ensure that reparative justice is achieved. In this regard, the case of the inclusion of girls and boys as victims of political imprisonment and torture by the Valech Commission of Chile is instructive. That commission, like South Africa's, had a neutral definition of victim in terms of gender and age, referring only to persons who had been deprived of their liberty or tortured for political reasons.

The outreach performed by the Commission to explain its mandate also referred only generally to "all persons" without specifying categories of victims who might feel invisible. Of the 27,255 victims who were recognised individually as victims by the Commission in its first report, 1,080 were under 18 years of age at the moment of their detention and 88 of these were younger than 13. The Commission dedicated a special section to describe their profile and the consequences they suffered. When the Commission's report was made public, complaints arose from others who, having suffered similar situations claimed not to have been asked to speak to the Commission. During a reconsideration phase that followed the report, the Commission realised that it received testimonies about minors who were detained with their parents and were mentioned in their parents' testimonies, but that the Commission had failed to adequately explain that the children themselves could also come in to give a statement. It was through this review that another 164 cases were added, making a total of 1,244 minors who suffered deprivation of liberty or torture, out of the total of 28,459 victims recognised as such by the Commission.[19] Nevertheless, despite this effort, many individuals who were boys or girls at the time of their detention could not present their statements to the Commission and felt they had been discriminated against.[20]

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allocation of a fund for memorials, and the establishment of procedural benefits for lower ranking perpetrators whose collaboration effectively led to the location of remains of the disappeared (an element of the proposal that was opposed by human rights organizations and ultimately rejected by the Congress).

[19] *Informe Complementario de la Comisión Nacional sobre Prisión Política y Tortura*, at www.comisiontortura.cl.

[20] As a result of the pressure from victims' organizations, an amendment to the bill (being debated at the time of this writing) which creates the Chilean National Institute of Human Rights establishes, in its transitional articles, the reopening of the Valech Commission. If approved, this would open up the possibility that excluded victims could be recognised. The Peruvian experience also reinforces the notion that while neutral definitions may seek inclusivity, they can lead to feelings of exclusion because victims need to feel recognised. In order to achieve inclusive participation it may be important to be as explicit as possible in communications on the subject.

Defining the debate in terms of who are considered victims sets the stage for later debate on reparations. As these examples demonstrate, participation is not always a given, but when it does not occur, there will likely be a need later – in the short or long term – to rethink the question of who are victims and survivors for the purposes of eventual reparations. Even in cases of reparations defined outside of a truth commission context, the lessons mentioned above can be applied. Victims' organizations might exercise pressure directly to the institutions in charge of defining the scope of the reparations programme and to those implementing it, to guarantee that the crimes and resulting harms they suffered are not overlooked.

2. *Defining Reparations Policy*

During the operation of a truth commission whose tasks include recommending reparations, the participation of victims and their organizations is crucial, especially to ensure that proposed reparations respond to the interests of victims and are perceived by them as adequate. It is precisely in this stage when greater possibilities for participation exist and thus there can be greater impacts from participation, though it is also a time with increased risks of generating unrealistic expectations.

A first step is to know the experience, situation and needs of victims. It is very important to gather this information directly from the victims, without prejudice to additionally organising consultations with the victims' organizations. The direct testimonies from the victims about their condition are a fundamental input for designing a reparations programme. This is information that victims are well-placed to give, whereas they may be less able to offer concrete policy suggestions about how to define specific measures or policy directives.

Participation does not mean simply responding to what victims say when they speak before a truth commission; it also demands later consultation, so as to ensure the utility and reparative meaning of measures that are recommended.[21] In Ghana, the recommendations on reparations made by the NRC apparently coincided with the violations raised by victims in their statements. Nevertheless, in some cases the reference was almost too literal. For example, victims testified that soldiers had burned down a market installation and the Commission recommended that it be rebuilt, years after the events and when its reconstruction might not have the same relevance for the victims in terms of reparations.

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[21] When we speak about consultation and participation during the life of a truth commission, this does not mean that the commission process should be necessarily linked to reparations or that statement-givers should be asked what their expectations are in this regard, since this can skew the dynamics of truth-seeking. Each commission will find the best way to balance the competing interests of getting insights on what victims need and how to ensure that testimonies are not just seen as stepping stones to reparations.

During the first year of operations of the Peruvian CVR (2002), the Commission made essentially no progress on reparations recommendations. The CVR's silence on the issue inevitably led to tensions with victims' organizations and human rights NGOs who were demanding information and a participatory process in reaching recommendations on this issue. The NGOs and victim organizations' strategy was key: on the one hand, they never stopped pressuring the technical teams of the CVR to open up the debate on the reparations proposal and, on the other, they worked to build agreement on the conceptual basis of reparations, allowing expectations to take concrete form rather than remain idealised demands.

Effectively, once the dialogue on reparations was established, first between the NGOs and the CVR, it became obvious that there was a need to develop and maintain direct relations with victim groups, since they not only were to be the ultimate recipients of any reparative measures but would also be the CVR's principal allies in demanding and ensuring implementation of reparations policies once the CVR's work was done. As a result, a framework for including the victims in the process was developed.

Workshops were organised with victims in various parts of the country, under the joint leadership of the CVR and a group of human rights NGOs, with the aim of learning about the harms suffered by victims, collecting information about their expectations of reparations, drafting joint proposals for reparations and committing to work toward their implementation by the State.[22] This process of local workshops culminated in a national meeting at whichs 25 institutions made up of NGOs and victim groups approved a document of "Basic criteria for the design of a reparations programme in Peru".[23] These would serve as a basis for the CVR's design of a reparations programme that could satisfy its proposed beneficiaries, that is, the victims and their family members.

Later, and under pressure from the NGOs who believed it was essential that the beneficiaries themselves could learn about the progress toward a reparations plan, the CVR agreed to convene a consultative workshop on their draft proposal, bringing together some one hundred people from victim organizations and NGOs. The confrontation of the CVR's proposals and the victims' expectations was not an easy process. A number of times tensions erupted between, on the one hand, the responsibility of the CVR team to draft a document that

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[22] Between September and October 2002, 19 workshops were organised in 6 different departments of the country, with the participation of 846 victims, family members of victims and representatives of victim organizations. Julie Guillerot, Humberto Ortiz and Rolando Pérez, *"Hacia la reparación integral de las víctimas. Memoria del II Encuentro Internacional «Sociedad Civil y Comisiones de la Verdad»*," Lima: Asociación Paz y Esperanza, 2002, 9.

[23] Guillerot, Ortiz and Pérez, *id.* 17–23. This document is also reproduced in the annexes of Guillerot and Magarrell, *Memorias de un Proceso Inacabado, supra* n. 1 at 329–33.

responded to criteria of political, legal and financial viability and, on the other, the frustrations, immediate needs, hopes and also differences among those who loosely represented thousands of victims. Nevertheless, the debates produced positive effects both in sensitising the Commission to the priorities of the victims (adding a new programme on access to education), as well as sensitising victims to the Commission's own difficulties in defining the appropriate measures to recommend.

In this way, the Comprehensive Reparations Plan (PIR) finally approved by the Commission is the expression of a political process of negotiation and consensus-building that to date enjoys the support of both the NGOs and the victim groups because they felt that their opinions were not only heard but reflected in the final recommendation. The Peruvian experience likewise demonstrates that, to the extent that victims' organizations are often spread out and unarticulated or facing problems with leadership and representation issues, the role of NGOs can be crucial, given their privileged relationship with victims' organizations.

The Chilean Commission on Political Prison and Torture accorded victims less space for participation in the drafting of reparations proposals, limiting itself to hearing suggestions. The Commission met with all the political prisoner groups and all of the human rights organizations at the beginning of its operations. Later, in its travels to the provinces, the Commission met with representatives of all the regional groups. In these meetings Commissioners heard the proposals of the organizations on how to conduct the process, their complaints and concerns about how it was being carried out or on the limitations of the mandate, and their demands with regard to reparations. Likewise, the Commission arrived at agreements with these groups on forms of collaboration, such as the dissemination of information about the work of the Commission and gathering background data that would help provide the evidence needed to make determinations about reported cases. The Commission also maintained constant communication with the leaders of groups both for the purpose of verifying and analysing testimonies and for receiving demands and proposals on the issue of reparations.[24] Nevertheless, the Commission abstained from organising mass meetings on the issue of reparations or presenting transparently its preliminary conclusions. This would have allowed for greater – and reciprocal – sensitisation

[24] This was a massive process, but the statement form itself did not prompt the interviewer to ask specifically about reparations. This would have made it easier to process opinions, though questions about reparations can also skew the truth-seeking process, as we noted earlier. Instead, the Valech Commission's recommendations drew on demands or proposals offered spontaneously by people giving their statements; given the large universe of testimonies – 35,000 – there were a fair number of such spontaneous suggestions despite the failure to systematically inquire about this issue.

for victims and Commissioners, as was the case in Peru. It might also have prepared the victims' groups to present a united and realistic front when reparations were discussed in Congress. However, the possibilities for such a discussion were limited by a number of factors: the maximalist posture of the organizations; the perception of the Commissioners that these organizations were not representative of the thousands of victims who had given their statements to the Commission; and the conviction that the Commission's proposal to the President should leave in his hands the final terms of a reparations bill and the task of ensuring it would be amply debated in Congress. The Commission knew that its recommendations did not reach the high level of compensation demanded by victim groups, though as it turned out, these groups did not publicly express opposition to the Commission on that point.

In Morocco, a National Forum on Reparations was held in October 2005. The initiative was part of the work of the Equity and Reconciliation Commission[25] and allowed for broad participation, particularly on the debate about issues of gender, health, memory and development of the regions affected by the violence.[26] One of the results of the forum was the announcement of the priority that the Commission would give to the gender component in its reparations measures. Thus, in its recommendations, the Commission was able to avoid applying Moroccan laws of inheritance, conceding to widows a greater share of compensation than they would have received under the law as a consequence of the death or disappearance of their spouse.

The culmination of the work of a truth commission and its ensuing dissolution creates a change of scene which, in turn, leads necessarily to a redefinition of the roles and functions of the civil society actors involved in the reparations process. One of the characteristics of this new context is that suddenly the range of topics and agencies with which one must engage to achieve advances on the reparations front expands enormously: it no longer is a matter of simply influencing a truth commission so its recommendations on reparations come out of a participatory process or so it adopts a particular conceptual approach, but rather a question of how recommendations become official policy.[27]

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[25] "In a bid to include the national general public, the Commission took note of the opinions put forward by national non-governmental organizations, working at a national level or abroad, and this, by holding direct meetings with some of these organizations or through the memorandums and suggestions presented to the Commission." Instance Equité et Réconciliation, *Summary of the Final Report*, Edition spéciale Conseil Consultatif des Droits de l'Homme, Rabat, 2007, English section, 21. In considering the question of communal reparations, the IER held seminars in a number of cities and regions. Its national forum on reparations had the participation of over 200 organizations and 50 national and international experts. *Id*., at 28.

[26] See http://www.ier.ma/article.php3?id_article=1312.

[27] On the Peruvian experience in this regard, see Julie Guillerot and Lisa Magarrell, *Memorias de un proceso inacabado, supra* n. 1 at 108.

Another aspect of this new context is that once again the natural allies of the reparations process – the human rights NGOs and victims' organizations – have to work on building consensus so they can present clear and united messages to the various State actors involved and, in so doing, increase the effectiveness of their lobby. In these initial processes of building consensus among natural allies, prior to carrying a message to policy-making and implementing bodies of the State, the Peruvian experience shows that relations can wear thin and one can lose sight of common interests, especially because the final work and final decision are not taken in spaces occupied by civil society.

In this stage, the capacity and will to engage directly on the topic on the part of victims' organizations also tends to increase. This is explained in the Peruvian context by the positive impact of the experience of participating with the CVR on the development, visibility, and agency of the victim organizations. Notably, the work of the CVR revitalised existing organizations and in many cases motivated the creation of new ones.[28] This led to victims' organizations developing awareness of their rights and how these were violated, of the State's direct responsibility or failure to protect its citizens and, overall, their status as rights-holders in society.[29]

The increase in the will to participate and the direct engagement of victims at this stage is also explained by the expectation that material benefits are on the way. Relying on interlocutors (whether a regional or national organization of victims, a coalition of victims' organizations or a human rights NGO) can be seen by some groups as a risk, as each starts to focus on its share of whatever is coming. Along with new or rising expectations, there is often a legitimate suspicion that reparations measures will not be applied equally to all. The dynamic becomes much more infused with all the doubts, distrust, and needs that come when things like money, health, education, or infrastructure hang in the balance.[30] As a result, what may have been a unified front in relation to what reparations should be recommended, can become splintered and fraught with tensions when it comes to turning this into explicit policy. This lessens the lobbying force of victims and opens the process up to interest-driven manipulation.

Although truth commissions are frequently charged with making recommendations, the definition of reparations measures does not ultimately fall on them, but rather requires the will of government and, in many cases, of legislative bodies.

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[28] Between 1980 and 1990 three victims' organizations were created, while between 2000 and 2004 some 120 were identified. (The CVR operated from mid-2001 to the end of August, 2003.) See, Oxfam-GB (ed), *Mapeo de las organizaciones de afectados por la violencia política en el Perú*, Lima, April 2004.

[29] See Guillerot and Magarrell, *supra* n. 1 at 112.

[30] In Peru, tensions between NGOs and victim groups have been accentuated in this phase.

While this may provide a guarantee of transparency and public debate about reparations, sometimes it can have an impact contrary to the goals outlined by a commission and even result in a step backwards in terms of recognition of victims and their right to reparations. This is something that victims' groups and human rights defenders need to have clear from the beginning, so that their planning (as well as actions the Commission might take) contemplate the later need to develop a political consensus around reparations legislation or administrative action.

An example of this is what happened with the passage of a law on reparations for victims of political imprisonment and torture in Chile, in which the Government drafted a bill much more restrictive than what the Valech Commission had recommended, and then submitted it to debate in Congress, utilising its prerogative to establish a two-day time limit for approval. The limitation imposed kept the groups of former political prisoners from creating a united front to defend the Commission's recommendations. The pressure by government to get the bill approved and its insistence that it was impossible to commit more resources to financing the reparations package led to approval of legislation that later, both victims and members of Congress said were unsatisfactory. The measures approved not only involved a significantly inferior amount of compensation as compared to that recommended by the Commission, but effectively ignored the Commission's findings on the impact suffered by family members of victims.[31] The Commission itself was excluded from the debate and understood that because of its role as an advisory body to the President, it was not appropriate to publicly criticise the law as approved.

Despite the negative aspects of this experience, the legislative passage of reparations measures can offer an opportunity to broaden the debate, incorporating other actors such as the legislators and the broader political class and giving more visibility to the violations committed and the situation of victims. An example of this is also found in the Chilean context some years earlier, where the legislative debate on the law for reparations for family members of the victims of forced disappearance and killings incorporated positive aspects of the recommendations made by the Truth and Reconciliation Commission in that country. In this case, the bill was not subject to pressures by Government to be approved within an unreasonably short time frame, and study of the law in Congressional commissions included victims' organizations, human rights organizations and members of the TRC.[32]

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[31] The reparations approved by Congress applied only to direct victims and rejected pensions for widows and widowers of victims and educational grants for the victims' children, which the Commission had recommended.

[32] See Law 19.123 and the record of debate on it in the Nacional Congreso at http://sil.congreso.cl/pags/index.html in Bulletin No. 316-06.

3. *Making Reparations Real*

Victory on the legislative front does not mean that the struggle to see reparations delivered to victims is over. In general, the implementation of reparations represents a serious challenge in its own right. It is often here that even the most participatory of processes can fail if victims' reasonable expectations are frustrated by inaction and inefficiency. Reparations programmes often are made up of various measures that need to be delivered individually to victims recognised as having that right. In addition to institutional challenges of capacity to provide services or distribute benefits to individuals, one must consider the complicating factor of needing to incorporate symbolic elements of reparation to the delivery of goods and services. Implementation serves as an excellent test of the degree of realism built into the design of the measures and the extent to which victims were heard as to how to best reach them and produce a real impact in their lives.

Even collective reparations measures, which may be thought to be easier to implement because identification of individual victims may not be required, can be quite complex undertakings. Participation may still be crucial for verifying decisions about which collectives are to be served, in what order of priority, and by what projects appropriate to the group. When collective reparations projects are to be defined by the communities entitled to receive them, the demands of participation must take into consideration group dynamics which may still be influenced by the conflict and may make some victim groups invisible.

Two clear avenues of victim participation at this stage include consultation as implementation begins to take shape, and provision of information about victims and their needs.[33] In the execution of individual reparations, the participation of victims can lend a fundamental contribution to disseminating information so that those who live in isolated areas can access reparations. On many occasions and especially in rural or marginalised areas, information obtained early on about the domicile and location of victims may turn out to be insufficient or to have changed.[34]

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[33] Of course it should be clear that it is the State's responsibility to identify victims and gather the information required to implement reparations; victim participation is an aid to this process.

[34] This was definitely the case in Peru, where the CVR's database and interview form were the first technical tools that were designed for collecting testimonies, shortly after the Commission was installed. They were designed well before the creation of the CVR's internal Working Group on the Comprehensive Reparations Plan and before this group could identify its information needs with regard to victims and family members. As a result, the database did not systematically include information on the family members of victims, number and ages of widow/widower/s and orphans, number of victims left disabled as a result of the violation of their human rights, socio-economic data about victims, or other data that would help to define the "profile" of the beneficiaries. All of this meant difficulties later in designing a reparations plan that was in tune with the realities of the violations and the victims, but combined with a decision that reparations would not be limited to victims identified by the CVR, it also meant that a lot of work needed to be done to implement the reparations law.

Consultations with communities for the implementation of community-based collective reparations should include in some special way (perhaps in separate meetings in addition to full community consultation meetings) groups of persons who because of their condition were exposed as a group to special forms of victimisation, such as women, ethnic groups or members of other minorities. The projects that the community finally selects and executes should reflect not only the majority's vision, but also these other realities.

Truth commissions often fail to identify all the victims – whether collective or individual – who might have a right to reparations measures. When the commitment on reparations extends beyond that already-documented universe, new efforts must be carried out to identify and certify the status of victims so that reparations can be made and delivered.[35] That task gives some indications of what would be required in cases of proceeding to identify victims for the purpose of reparations without a prior truth-seeking process.[36] Organizations and individuals can play an important role in this process. In Peru, the Reparations Council (CR, for its Spanish acronym)[37] is charged with registering and certifying both collectives and individuals to establish their eligibility for reparations. At the time of this writing, the CR is in the process of verifying the status of pre-existing lists of victims and filling in gaps so that it can identify both groups and individuals entitled to reparations under the law. Its pilot experience in the province of Satipo (an eastern jungle area in the Department of Junin with a number of indigenous communities who were displaced and extensively affected by violence) illustrates the role of consultation. According to the CR, it "has visited the area and held meetings with leaders and representatives of the principal native organizations and federations and with civil society organizations, seeking to generate participatory mechanisms to ensure the appropriate collection of information in a context characterised by poverty, low levels of education and difficulties with transport and communications".[38] Through meetings in 8 local districts of the province, the CR conducted interviews of leaders and other representatives,

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[35] South Africa is an example of a case where reparation was deemed to be restricted to those victims who had been identified by the TRC, despite indications that many more victims had never provided their testimony to that body, for a number of legitimate reasons. A "closed list" such as this makes reparations easier to implement but may well be more unfair to victims across the board.

[36] Reparations without revealing the truth about victims, the violations and harms suffered, and about who was responsible are likely to be seen as a ploy to "buy" victims' silence. Sufficient information about what happened should already be public or revealed through the reparation process itself in order to turn to reparations in a positive way, though the truth need not come out through a truth commission.

[37] Some information about this process and the methodology for registering collective and individual victims can be found on the Council's website (in Spanish): www.registrodevictimas.gob.pe/.

[38] www.registrodevictimas.gob.pe/ruv_registro_satipo.html (authors' translation).

identifying a total of 163 communities as "collective beneficiaries" and using individual or focalised consultations in communities to identify individual victims.[39]

Victims and their organizations can also be a valuable source of information for the implementation of reparations programmes, providing important feedback about the effectiveness of distribution and the quality of service provided by the agents in charge of reparations. The legacy of human rights abuse, as lived experience of victims and their families implies an additional effort in terms of delivery style and, for certain services, such as health care, it may require special measures to provide appropriate service and convey a reparative message to victims. The constant demand of victims' organizations that these services be provided through persons sensitised on the subject reinforces this conviction.

Depending on the characteristics of the victims' organizations and their leaders, these should help to satisfy the often difficult bureaucratic steps required in order to receive reparations, such as filling out claims forms, presentation of documentations and other steps that may be especially difficult when victims are illiterate or must travel to local population centers to carry them out. The contribution of victims' organizations can be a big help to those in charge of reparations in not only spreading information but lending advice to claimants. This can be a valuable contribution as well to victims who live in exile, and with whom communication is difficult. Nevertheless, this is also a terrain ripe for abuse, and cases have often been reported of "facilitators" springing up and charging for their services; safeguards need to be in place to ensure that victims' access to reparations is free of charge and that local political entities and their own organizations do not usurp the victims' right to reparations.

Perhaps the most difficult question about the role of victim organizations during the implementation phase is whether their representatives should shoulder some of the responsibility for implementation by participating directly in decision-making bodies and implementing agencies. Experience is mixed.

In Peru, the CVR had proposed the creation of a National Council of Reconciliation to follow up on the CVR recommendations, and this plan included creating a "consultative committee of victims of the violence" whose seven members were to be designated by the President based on proposals of the victim organizations. Nevertheless, the idea did not gain traction and was discarded. In February 2004, the government created a high-level follow-up commission, CMAN (for its acronym in Spanish),[40] which ultimately was also tasked

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[39] *Id*. Whether over time this methodology will prove itself is still a question, since it relies extensively on community leaders rather than more objective sources.

[40] Its full name is High Level Multi-Sectoral Commission in Charge of the Follow-up of State Actions and Policies in the Fields of Peace, Collective Reparation and National Reconciliation.

with overseeing implementation of the reparations law. While civil society obtained 4 seats out of 14 members (the other 10 are representative of various ministries and government agencies),[41] none of the four directly represents victims' organizations and only the representatives of human rights organizations and a civil society development network see themselves as representing victim interests.

During the first years of CMAN's operation, during the Toledo government, a group of NGOs that had been working on the reparations issue since early in the CVR process took on the task of facilitating communication between CMAN and victim groups by means of a monthly meeting space for dialogue, with progress reports and reactions. The ideal would have been for CMAN itself to convene this type of informational meeting and to collect opinions, or at least to take the initiative to establish a direct dialogue with victims' organizations. While a few victims' organizations did relate directly to CMAN, this has not been the case generally. Later, under the government of President García (in office as of the time of this writing), forms of communication between CMAN and civil society organizations in general and victims in particular have been limited to private dialogue with some organizations, without an institutional framework.

The most effective arenas of participation for victims in Peru has occurred at the regional and district level. A number of factors led the human rights movement fairly early on to adopt organizing strategies focused on participation at this level: the difficulty of identifying national leaders recognised by the universe of victims; problems in putting in place a functional channel for direct dialogue between CMAN and the victim groups; and national government's apparent lack of political will to fully implement the reparations as recommended by the CVR. Peru was in the process of regionalising government structures, so this was a new opportunity for participatory activism.

In fact, the process of follow up and implementation of reparations has had a special status at the regional level thanks to these strategies. Municipal governments have primarily adopted measures of symbolic reparations. Regional commissions have been set up that generally include regional authorities and representatives of relevant sectors of government, as well as members of civil society, including NGOs and victim groups. The main objective of these groups has been to craft regional reparations plans. One assumes that one of the reasons that local and regional governments are more susceptible to the demand for victim participation is precisely their proximity and a resulting empathy for victims'

[41] CMAN is composed of a representative of the President, who presides; representatives from each of the Ministries of Interior, Economy & Finance, Justice, Defense, Women & Social Development, Education, Health, and Labor; and a representative of the National Council on Decentralization, in addition to the 4 civil society representatives.

situation.[42] The regional and local activity allows the particularities of the experience of violence and local priorities to come to the fore. These forms of participation also offer an important opportunity to ensure that the voices of the victims are heard nationally. Unfortunately CMAN's current collective reparations programme fails to integrate these prior regional efforts, though community-level input is required.

In Guatemala, victims' organizations had played a crucial role in producing public policy on reparations.[43] The Executive Decree that established the National Redress Commission (Comisión Nacional de Resarcimiento) provided that it would be made up of five representatives of different government bodies and five delegates from human rights, women's, victims' and Mayan organizations. Later, civil society representation was raised to seven members, and government six. This structure put a premium on civil society capacity to develop government policy on technical matters that were also outside of the control of these delegates. Exacerbated by divisions and disagreement among the civil society delegates, which extended respectively to the various fragmented groups they represented, and by ambivalence on the part of government representatives, the process stalled.

According to Gustavo Porras Castejón, the government wanted to start with "reparations packages" of social investment projects for affected communities that would bear the names of victims, cases or important dates. But, "… the proposal was rejected by the victim organizations," he reports, "under the argument that the construction of infrastructure was already a Government task, and so should not be absorbed as redress".[44] Porras argues that it was an error to delegate to the Program not only the design of the reparations measures but also their execution, when only the State was capable of discharging this latter function. Government then unilaterally restructured the programme, eliminating the civil society representation and failing to establish any new channels for formal consultation with these sectors.[45] PNR staff member Rodrigo Carrillo writes, "Constituting the CNR with only representatives of Government made it possible to reduce the

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[42] Also in play, of course, are many other factors, including the interest in attracting additional resources and attention to these traditionally marginalised areas of the country.

[43] Executive Decree (Acuerdo Gubernativo) Number 258–2003, which created the Commission and National Redress Program. For more information on how victim and human rights organizations participated in this process, see Programa Nacional de Resarcimiento, *La vida no tiene precio: Acciones y omisiones de resarcimiento en Guatemala*, Magna Terra Editores, S.A., Guatemala (2007), 31.

[44] Gustavo Porras Castejón, "Introducción," *La Vida no Tiene Precio, ibid*. 33. (Authors' translation.)

[45] *Id*. An advisory council that was to be composed of victims' representatives had not been set up as of November 2007.

time required to take decisions and it sped up the process, but it also lost dialogue as a general feature, and this led to criticisms that are still heard".[46]

Notwithstanding these problems, some implementation of reparations occurred in 2007, and a newly elected government installed in January 2008 is expected to be supportive of the ongoing process.

At least two lessons can be derived from this example: first, the government responsibility of making reparations work should not be off-loaded onto victim and civil society organizations, especially where these groups are ill prepared to craft and implement public policy; and second, without effective channels for participation and consultation, the implementation process is likely to suffer. These lessons do not suggest that participation of victim representatives in implementing bodies is always inadvisable or impossible; but it is a question that should be considered very carefully, both from a strategic standpoint and from a practical one, in light of the specific context. It may be that, in general, victim groups will best be served by being advocates and pressing for effective channels of communication and bi-directional consultation with implementing bodies rather than taking on a responsibility that should rest solidly on government. Yet each case will depend on the specific dynamics that make each actor effective vis-à-vis the others.

E. *Lessons and Conclusions*

The objective need for participation is often not matched by an easy parallel of capacity, resources, and forms of participation in the diverse universe of victims. However, by revealing the various challenges inherent in the process of designing and implementing reparations and the different stages involved, it is possible to see how effective policies for participation can generate a positive impact for the process overall.

In particular, the work of a commission or other truth-seeking body can serve to build capacity of victim groups, allowing them to participate effectively not only in relation to the truth commission but also at later stages. A truth commission process is an important time for building the capacity of victim groups to participate effectively and to sensitise policy-makers to the needs and situation of victims. This can help a commission's recommendations to be implemented and thus serve as guarantees of its legacy following its dissolution.

Some conclusions were offered before in regards to the challenges created by positing a participatory role for victims. The heterogeneity of victims and their

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[46] Rodrigo Carrillo, "Programa Nacional de Resarcimiento: Cuatro años hacienda camino al andar," *La Vida no Tiene Precio, id*. at 60. (Authors' translation.)

organizations makes it difficult or impossible to work with one single organization or just a few delegates tasked to represent all victims with a unified discourse. However, establishing different channels of communication and providing support for victims' groups might lead to a positive engagement of these organizations later in the process. Human rights NGOs can help to facilitate victim participation, as in the case of Peru, but they do not themselves take the place of victims and they too have to take care to build victims' space for engagement rather than supplant it.

Establishing a common framework for reparations can help to clarify expectations and the scope of the reparations debate, making it possible for all parties to understand the possibilities and the limitations of a reparations programme. That may lead also to a higher level of satisfaction, as expectations are met and policy is made more realistic. It will also allow victims' groups to build strong and realistic arguments to defend and support the recommendations for reparations as their own.

There is increasing awareness of the importance of ensuring that victims have a voice during the phase of developing a reparations plan. Participation is often weaker or lacking earlier, when the scope of the debate is defined. However, the greatest challenge to participation is probably in the transition from policy to reality: the implementation of reparations. Unless victims have strengthened their voice and political clout, and gained public sympathy through earlier and knowledgeable participation, this will be a significantly difficult period.

Following a truth commission the political space tends to be filled up with other priorities and the policy-makers who must be swayed to support reparations have not been subject to the same level of sensitisation as those involved in a truth commission process would be. At the same time, some opinion leaders can become tired of what they see as "over-exposure" on this issue. In this way, victims tend to lose influence at the implementation stage and often become divided as they seek scarce resources in the face of variable political will. Tensions also arise among those victims groups who enjoy greater political sympathy and those who feel more marginalised, in a new (or continuing) political context. Where governments have not embraced truth commission findings or actively acknowledged the truth about victims, violations, harms and responsibility in some way, this uphill struggle becomes even more fraught. International assistance and support seem to drift away during this post-truth commission phase, when victim groups and human rights NGOs may need more attention and resources than ever. International actors need to be reminded of this lesson and urged to continue to pay attention as implementation gets underway.

Participation at the local level, where local authorities and victim groups have greater access to each other and where there may be greater political sensitivity to victims' situation, can be the most robust. However, without input at a national

level, this strength can end up being limited to only those localities where victim groups are strong and there is political affinity with their interests. In some cases, local authorities may have important ties to powerful actors from the period of violence and constitute a greater threat than a support to victims. Participation on a local level may be very relevant, but it is insufficient by itself. Attention to building effective national arenas for participation and two-way communication is critical. Victims' organizations and human rights groups alike will have to consider carefully whether to have their delegates take on a direct role in seeing that reparations are realised.

While more and more information is being made available on reparations policy, we need to pay more attention to this issue and share lessons across experiences. Little has been written with specific attention to the role of victims in these processes. Like policy-makers in contexts where truth and reparations are needed, we who work in this field must be prepared to listen to, and learn from, the voices of victims and survivors, and the experience on the ground.

The Argentinean Reparations Programme for Grave Violations of Human Rights Perpetrated during the Last Military Dictatorship (1976–1983)

*By Andrea Gualde and Natalia Luterstein**

A. *Introduction*

The military dictatorship that ruled the country from 24 March 1976 to 10 December 1983 carried out a policy of repression characterised by detention at the behest of the National Executive Power, torture, abduction, forced disappearance and the use of clandestine detention centres among other appalling measures. The state became a "terrorist state", which can be understood as a state occupied by the military, where coercion replaced democratic decisions, and where there was an abrogation of the rights and freedoms of citizens. However, fundamentally it also entailed a qualitative and profound change in the conception of the state; it was a new form of a state of exception. It acquired clandestine structures and permanently institutionalised the most abhorrent forms of illegal and repressive activities. Terror became a permanent method and practice in order to achieve the physical annihilation of the opposition and the destruction of all traces of democratic organization.[1]

When democracy was restored, the issue of reparations was brought to the forefront and the following questions arose: what kind of damages should be repaired? What forms should reparations take? What should be the significance of the reparations? What were we seeking to accomplish with a reparations programme? Who should be included among the beneficiaries of reparations?

The Argentinean process is a good example of a post-dictatorial, historical and wide-ranging reparations scheme, which includes both pecuniary and

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[1] Eduardo Luis Duhalde, *El Estado Terrorista Argentino. Quince años después, una mirada crítica*, Eudeba, Buenos Aires 1999, 217–219.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 415–434.

non-pecuniary measures. The process also demonstrates the obstacles that can arise in newly democratic societies regarding the implementation of such schemes. The reparations programme includes measures addressed to the individual injured party, in the form of pecuniary compensation, and measures addressed to the community as a whole, such as the so-called "spaces of memory." In this sense, the programme offers different kinds of reparations foreseen by the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*[2] (hereinafter "Basic Principles and Guidelines"), such as restitution (whenever possible), rehabilitation, compensation, satisfaction and guarantees of non-repetition. These Basic Principles and Guidelines will be applied as a theoretical framework throughout this chapter to examine the Argentinean case.

On the basis of these Basic Principles and Guidelines, it is possible to consider one of the first actions taken by President Raúl Alfonsín[3] as reparations in the form of satisfaction. Indeed, the establishment of the National Commission on the Disappearance of Persons (CONADEP, according to its name in Spanish) in December of 1983 aimed at the "verification of the facts and full and public disclosure of the truth".[4] CONADEP was mandated to investigate the fate of the thousands who were disappeared during the rule of the Juntas. The commission was to receive depositions and evidence concerning these events, and pass the information to the courts in those cases where crimes were alleged to have been committed. The commission's report, which was published under the title "Never Again", did not extend, however, to determining criminal responsibility, only to delivering an unbiased chronicle of the events. Thus, CONADEP could be labelled as a truth commission, which formed the basis for future judicial cases.

Indeed, following the work of CONADEP, a trial against the Military Juntas was put in motion. The top leaders of the dictatorship were accused of numerous murders, abductions and cases of torture. Most of the accused were convicted; however, in December 1990,[5] then President Carlos Saúl Menem granted them a presidential pardon and thus, they were released.

High-ranking and middle-ranking officials benefited from two laws, entitled "The Final Stop Law" and the "Law of Due Obedience",[6] which came into force

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[2] Adopted by the United Nations General Assembly, Resolution 60/147.

[3] Alfonsín was elected President in 1983, in the first democratic elections after the dictatorship, and stayed in office until 1989.

[4] Basic Principles and Guidelines, paragraph 22(b).

[5] Decree 1002/89.

[6] Law N° 23.492 (*Ley de Punto Final*) and Law N° 23.521 (*Ley de Obediencia Debida*) respectively. The former set a 60-day deadline for terminating all criminal proceedings involving crimes committed during the Dictatorship and the latter established the irrefutable presumption that military

on 24 December 1986 and 8 June 1987 respectively, preventing these officials from being tried. The trials that had been opened remained stayed until 2003, when Law N° 25.779 was adopted, declaring "The Final Stop Law" and the "Law of Due Obedience" null and void, thus reopening the possibility of bringing to trial those responsible for gross violations of human rights. As will be explained, the National Supreme Court of Justice confirmed this possibility in a leading case known as the "Simon" case.[7] Up until then, the national courts had looked for ways around these laws in order to keep investigating the events, even if they were barred from holding criminal trials. The result was the so-called "Truth Trials", which sought to gather information about what happened to the victims of the military dictatorship.

B. *The Argentinean Reparations Programme*

Reparations for human rights violations have "the purpose of relieving the suffering and affording justice to victims by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations".[8] In this respect, the Argentinean reparations programme is historic and wide-ranging, and can be broadly divided into two general categories: 1) pecuniary reparations; and 2) non-pecuniary reparations, which include, *inter alia*, truth commission and accountability measures.

1. *Pecuniary Reparations*

According to the Basic Principles and Guidelines, "compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case".[9] At the national level, an array of laws were adopted in the context of a reparations policy carried out since 1991 aimed at offering economic reparations to the victims of state terrorism. These laws can be summarised as follows:

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personnel who committed crimes during the Dictatorship were acting in the line of duty, thereby acquitting them of any criminal liability. The law even extended the protection to high-ranking officers who did not have decision-making authority or any role in drawing up orders.

[7] National Supreme Court of Justice, *"Recurso de Hecho Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. Causa N° 17.768C"*, 14 June 2005.

[8] Theo Van Boven, Special Rapporteur, *Basic Principles and Guidelines*. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Doc. E/CN.4/1997/104), 56.

[9] Basic Principles and Guidelines, paragraph 20.

a) *Law N° 24.043* (modified by Law N° 24.096)[10] provided a specific benefit to the people who were placed in the hands of the Executive Power during the state of siege from 6 November 1974 to 10 December 1983, when democratic government was re-established, or for those who, being civilians, were detained by virtue of acts emanating from military tribunals, regardless of whether they had brought an action for damages before the ordinary tribunals. The terms of this law have been exceptionally broadened through Decree N° 1313/94.
b) *Law N° 24.411*[11] foresees an extraordinary benefit for the heirs of those who remained forcibly disappeared at the behest of the armed forces, security forces or paramilitary groups prior to 10 December 1983. The heirs of any person who passed away as a result of the actions of any of the above-mentioned forces prior to 10 December 1983 equally enjoy the same benefits. Decree N° 403/95 contains the regulations for this law.
c) *Law N° 25.192*[12] establishes a one-off extraordinary benefit for the heirs of those who passed away as a result of the repressive actions of the civil-military uprising which took place between 9–12 June 1956. This Law has been complemented by Decree N° 716/2004.
d) *Law N° 25.914*[13] determined an extraordinary benefit for those who were born during the deprivation of liberty of their mothers, or who, being under age, were in detention in connection with their parents, who were detained and/or disappeared for political reasons, either by the National Executive Power and/or military tribunals. This benefit increases if the children's identity was forcibly changed, or when serious or very serious injuries were inflicted. The benefit covers both the individuals who were born inside or outside the prisons or places of detention.

The following table details the reparations established by the above-mentioned laws:[14]

a. *Application Procedure*
Applications must be brought before the National Secretariat of Human Rights, which is within the National Ministry of Justice and Human Rights. In such procedures, the principle of *in dubio pro beneficiary* is applicable, thus whenever in doubt, the application should be resolved in favour of the applicant.

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[10] Law N° 24.043 entered into force on 23 December 1991.
[11] Law N° 24.411 entered into force on 28 December 1994.
[12] Law N° 24.192 entered into force on 24 November 1999.
[13] Law N° 24.914 entered into force on 25 August 2004.
[14] According to the values up to February 2007.

Administrative decisions issued by the Ministry of Justice and Human Rights, which totally or partially deny an application, can be directly appealed to the Federal Judiciary. The appeals are decided by the National Contentious-Administrative Chamber of Appeals, whose decisions are in turn susceptible of being appealed before the National Supreme Court of Justice. Such a pronouncement exhausts all available internal remedies, opening the possibility of bringing a claim before the Inter-American Commission on Human Rights, and eventually before the Inter-American Court of Human Rights.[15]

The courts have interpreted the reparations policy and have broadened the seemingly narrow universe of beneficiaries. Firstly, in response to actions brought by the former Sub-Secretariat of Human Rights (currently the Secretariat of Human Rights), the Solicitor's General Office (which is the superior organ of legal services of the National Executive Power and whose resolutions are binding on the Public Administration), the courts have held that the benefits established by Law N° 24.411 are not limited to cases stemming from repressive action between 24 March 1976 and 10 December 1983, but they also cover cases from earlier in the 1970s, when another military national security regime ruled the country.

b. *Some Statistics*[16]

Of the 22,234 applications filed under Law N° 24.043, 9,776 received a favourable decision. A number of claims warranted the intervention of the National Supreme Court of Justice on appeal, which favourably considered the claims to be covered by the benefits of this law. These include the cases of those who sought refuge in foreign embassies (even thought they were not technically considered as having received asylum), or those who were illegally detained and were forced by their captors to leave the country, or left because they were able to escape from the clandestine detention centres. Thus, these decisions entailed a certain degree of recognition of exile cases. Currently, there are several legislative initiatives before the National Congress that foresee an extraordinary benefit for cases of forced exile.

Of the 10,123 applications made under Law N° 24.411, 7781 received favourable decisions. There were 31 applications under Law N° 25.192 of which 25 received favourable decisions. 1,618 applications were made under Law N° 25.914, of which 619 received favourable decisions.

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[15] In accordance with article 46 of the American Convention on Human Rights.
[16] Statistics up to 3 June 2008.

Reparations according to different legislation

Law	Injuries					Other reparations for:			
N°	Very serious		Serious		Mild	Detention	Death/Disappeared		Substitution of identity	Born in captivity and/or detained
24.043	$ 137,518.00		X		X	$ 107.52 (per day)	X		X	X
25.914	$ 71,877.12	$ 225,792.00	$ 51,340.80	$ 161,280.00	X	X	$ 102,681.60	$ 322,560.00	$ 322,560.00	$ 102,681.60
24.411	X		X		X	X	$ 322,560.00		X	X

2. *Non-Pecuniary Reparations*

a. *Integral Reparations*

The consequences, both physical and psychological, of state terrorism are linked to the magnitude of the trauma suffered as a result of human rights violations. They derive from a situation of exception, both in the individual and social spheres, and affect not only those who have endured the horrors and crimes, but also – and especially-the next generation due to the long-term repercussions of the experiences. Experiences of the Holocaust teach us that lasting effects are transmitted from one generation to the next, especially in societies where "conspiracies of silence" have inhibited families from healing by failing to assume collective responsibility of the memory.[17]

Therefore, reparations should include not only payment of compensation to victims, but should also permit the articulation of different forms of reparation, including accompanying victims, ensuring a victim-sensitive treatment during the application process as well as recognition of the value of their story in the reconstruction of a historical memory and enforcement of judicial accountability. Reparation programmes should thus be comprehensive.

Along these lines, the Basic Principles and Guidelines include restitution, rehabilitation, satisfaction and guarantees of non-repetition as non-pecuniary measures. All of these can be found in some form in the Argentinean reparations programme. A fundamental element of a reparations programme, which may fall under the notion of satisfaction, is the public recognition of the violations, which can be done either through judicial or non-judicial measures. Satisfaction as a form of reparation can entail a wide range of measures encompassing both long-term and long-lasting measures.

b. *Judicial Accountability*

According to the Basic Principles and Guidelines, satisfaction as a form of reparation includes "judicial and administrative sanctions against persons liable for the violations",[18] which is one of the most common types of reparations.

As is mentioned above, the two laws, known as the "Full Stop" and the "Due Obedience" Laws blocked the trials against military personnel who committed crimes during the dictatorship and were considered to have acted in the line of duty. Furthermore, Decree N° 1002 issued in 1989 granted presidential pardon to certain persons accused of having committed human rights violations.[19]

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[17] See Ch. 3 by Yael Danieli in this volume.

[18] Basic Principles and Guidelines, paragraph 22(f).

[19] Further, through Decree N° 2741/1990 (30 December 1990), the Junta leaders received a Presidential pardon and did not complete their sentences.

However, on 2 October 1992, the Inter-American Commission on Human Rights declared, *inter alia*, that the Full Stop and Due Obedience Laws as well as Decree N° 1002/89 were incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 25 of the American Convention on Human Rights.[20] The Inter-American Commission recommended that the Argentinean Government pay the petitioners just compensation for the violations incurred and that it also adopt measures necessary to clarify the facts surrounding these cases and identify those responsible for human rights violations that occurred during the military dictatorship.

Even if Argentina was not involved, it is worth mentioning that in the *Barrios Altos*[21] case against Peru, the Inter-American Court of Human Rights declared that the "self-amnesty" laws in force in Peru at the time violated the right to judicial guarantees because they sought to hinder the investigation and punishment of those responsible for grave violations of human rights, such as the commission of torture, summary executions and forced disappearances. Indeed, Peruvian Law 24.479 granted an amnesty to all members of the security forces and civilians who had been accused, investigated, prosecuted or convicted, or who were carrying out prison sentences, for human rights violations. Moreover, Law 26.492, declared that the amnesty granted in accordance to Law 24.479 could not be revised by a judicial instance and that its application was obligatory, expanding its scope of to all military, police or civilian officials who might be the subject of indictments for human rights violations committed between 1980 and 1995, even though they had not been charged.

As mentioned above, even if the "Full Stop" and "Due Obedience" Laws banned the courts from holding criminal trials against those allegedly responsible for the crimes, the former sought a means of continuing investigations into what happened to the victims of the dictatorship. In this manner, "Truth Trials" were established. These trials are *"sui generis"* insofar as they only include a phase of presentation of evidence without entailing any criminal consequences. The courts construed "right to the truth" whereby it was recognised that relatives have a right to know what had happened to the disappeared persons. Since 1995, a number of cases were opened with the goal of investigating the facts, even though those responsible could not be tried or convicted.[22] The National Appeals

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[20] Inter-American Commission on Human Rights, Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, 2 October 1992. Available at www.cidh.org/annualrep/92eng/Argentina10.147.htm.

[21] *Barrios Altos v. Peru*, Judgment 14 March 2001 Series C, No. 75.

[22] One of the first cases was the one regarding the French nuns who had disappeared during the military dictatorship. In the context of this case, the Anthropologic Forensic Team discovered the whereabouts of the bodies of one of the French nuns, Leonie Duquet and Azucena Villaflor, one of the founders of the organization "Mothers of Plaza de Mayo". This led them to

Chambers of the city of Buenos Aires and the city of La Plata started to carry out proceedings whereby they investigated existing leads to discover the whereabouts of the disappeared and receive testimonies. For example, in the *Lapacó Case*, on 18 May 1995, the National Court of Appeal for Criminal and Correctional Matters of the city of Buenos Aires asserted that "it was appropriate for it to exercise its jurisdictional power" and that "although Laws 23.492 and 23.521, and Decree 1002/89, which benefited the members of the Armed Forces, curtailed the possibilities for prosecution, they did not imply the culmination of proceedings".

That case eventually reached the Inter-American Commission on Human Rights and, in the context of a Friendly Settlement Agreement, the Argentine Government accepted and guaranteed the right to the truth, "which involves the exhaustion of all means to obtain information on the whereabouts of the disappeared persons. It is an obligation of means, not of results, which is valid as long as the results are not achieved, not subject to prescription". The State also undertook to "adopt the necessary laws to ensure that the national federal criminal and correctional courts throughout the country have exclusive jurisdiction in all cases to determine the truth regarding the fate of persons who disappeared prior to December 10, 1983".[23] The right to the truth is not only an individual right, but it is also a collective right: society has the right to know what happened, its history, so it can heal and learn from it. Furthermore, in 2005, in accordance with this policy and on the basis of its experience, Argentina drafted a resolution on the right to the truth, which was sponsored by 48 states and was approved by consensus by the members of the Human Rights Commission as Resolution 2005/66.[24] This resolution recognises, *inter alia*, that the victims and the society in general, have the right to know the circumstances in which serious violations of human rights took place, as well as the causes, facts and the identity of the perpetrators.

Finally, in 2003, Law N° 25.779 was adopted declaring that the "Full Stop" Law and "Due Obedience" Laws were null and void, reopening the possibility of bringing those responsible for gross violations of human rights to trial. Subsequently, on 14 June, 2005,[25] the National Supreme Court of Justice declared the said laws unconstitutional and confirmed the constitutionality of Law N° 25.779. In a leading case, known as the *Simon Case*, the Supreme Court

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uncovering the methodology of the so-called "Death Flights", whereby the detained persons were thrown into the river from planes.

[23] Report n° 21/00, Case 12.059 *"Carmen Aguiar de Lapacó"*, 29 February 2000.

[24] United Nations Human Rights Commission 59th meeting, 20 April 2005.

[25] National Supreme Court of Justice, *"RECURSO DE HECHO Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc. Causa N° 17.768C" 14 June 2005.*

based its decision on international human rights law and international instruments that enjoy the highest level of constitutional hierarchy in relation to Argentinean domestic law.[26] The Court asserted that to the extent that every amnesty is oriented towards "oblivion" of grave violations of human rights, they oppose the norms of the American Convention of Human Rights and the International Covenant on Civil and Political Rights, and are thus constitutionally intolerable.[27] The Court went on to state that, even if the Peruvian *Barrios Altos* case presented a different set of characteristics, the decisive factor was that the "Full Stop" and "Due Obedience" Laws possessed the same vices that led the Inter-American Court to reject the Peruvian self-amnesty laws, because all of them had resulted in the impossibility of prosecuting grave breaches of human rights.[28] Moreover, the parliamentary debate that took place prior to the approval of Law 25.779 shows that the intention of the legislators was to abide by international human rights standards eliminating everything that could obstruct investigation of such violations and that could facilitate the fulfilment of the obligation to repair harm committed in the broadest form possible.[29]

Therefore, numerous trials against those responsible for grave violations of human rights during the dictatorship are now being reopened. According to information provided by the Attorney General's Office, there are more than 1,200 claims filed for gross violations of human rights throughout the country. Moreover, there are approximately 245 individuals currently in preventive detention. The said office has created, through resolution N° 163/04, the Assistance Unit for Cases of Human Rights Violations during State Terrorism.

The National Secretariat for Human Rights has acted as a private prosecutor in 46 criminal cases and has collaborated with the courts through the records of the Archive of CONADEP, which is its depositary.

Finally, through the issuance of a Presidential Decree, those who were part of intelligence bodies, the Armed Forces, the Police or the Security Forces have been released from their duty of confidentiality to enable them to give testimony or answer to an indictment when so requested in this context.

3. *Accompanying the Victims*

The Argentinean reparations programme is a wide-ranging programme because, in addition to establishing pecuniary and satisfaction measures, it also includes

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[26] Article 75.22 of the National Constitution establishes that certain international human rights instruments possess constitutional hierarchy, including, *inter alia*, the American Convention of Human Rights.

[27] "Simon" case, paragraph 18.

[28] "Simon" case, paragraph 24.

[29] "Simon" case, paragraph 32.

measures for the rehabilitation of victims.[30] During the military dictatorship, human rights organizations fought for truth and justice, and became pioneers of a completely new field of mental health, offering aid to those directly affected by state terrorism. To this end, it was necessary to redefine concepts, theories and techniques, as well as the idea of mourning or trauma in order to provide responses to the suffering of victims, creating the new field of "Mental Health and Human Rights". This generated a vast theoretical investigation and even a new course was included at the School of Psychology in the University of Buenos Aires once democracy was restored.

From the exchange of experiences with other Latin American and European professionals involved in the issue, it was decided that it was more appropriate to speak of "psychic suffering" as opposed to "pathology" in the traditional sense, because the psychological effects presented certain specificities and were the consequence of traumatic situations.

During the first years of the constitutional government after the dictatorship, there was an expectation that truth and justice could be obtained at the Juntas' Trial; however, the impunity that stemmed from the "Full Stop" and "Due Obedience" Laws – and subsequent Presidential Pardons – brought about oblivion and silence and created a somewhat perverse context surrounding the pecuniary reparations laws that were in place, in what seemed to be an exchange for impunity. Indeed, the local legal scenario at the end of the 1980's and beginning of the 1990's presented two different, almost opposite situations. On the one hand, the Junta leaders had been granted a presidential pardon and the abovementioned "Full Stop" and "Due Obedience" Laws prevented trials against those responsible for the violations of human rights from continuing. On the other hand, the State offered pecuniary reparations to the victims of those unpunished crimes. Once again, the mental health professionals had to face the challenge of dealing with this new grief caused by the prevailing social discourse encouraged by the State, which silenced the suffering and incited oblivion of the past.

If the burden of demanding justice is placed on the victims and their relatives alone, without being vindicated by society as a whole, the latter can become trapped in an unbearable impasse. Thus, the application of the reparations laws should not be left only to technical-legal execution, but should also take into consideration the consequences that such application may produce in the subjectivity of the victims.

It is necessary to consider that the application process for reparations – formal or merely administrative – at first sight recreates a work of "historisation" of the subject, who, when giving testimony of his or her condition as a victim faces

[30] Basic Principles and Guidelines, paragraph 21.

once again traumatic episodes. If he or she does not receive help in the re-elaboration of the reparation from a symbolic standpoint, the latter will only be associated with the pecuniary, which translates into compensatory money as a substitution for the life of the lost loved one, without fulfilling its reparative function of the damaged suffered.

For example, the latest of the reparation laws, Law N° 25.914, grants reparation to the most vulnerable during the military dictatorship: children. As stated in an expert report presented in a judicial case: "to speak of a child in gestation or born from a captive and tortured mother, is to speak of a captive and tortured child. It is not an analogical extension of the situation of the mother to the child, but given the state of dependency of the pre and post natal development of every child, it is obvious that he or she irreplaceably needs the body and psyche of the mother to develop as a person. Everything that happens in the body and psyche of the mother literally has concrete effects on the child".[31]

Given the diverse and severe physical and psychological effects that generated persistent emotional damage, the State must be careful not to re-victimise these children – today adults. In order to avoid doing so, it should take into account international standards, which entail integrated psychological and legal perspectives, thus requiring specialised professionals. At the beginning of the process, the applicants have to account for their status as children of disappeared parents using the relevant application form as foreseen by the laws. No matter which form is used the process will imply facing episodes of loss. The clinical experience shows different reactions provoked by this traumatic recreation in each subjectivity, as the unconscious mind works in its own logical time, not chronological time, renewing that which returns from a prior time.

This brings us to another aspect of the reparations policy. In the context of the recently re-opened trials, the National Secretariat of Human Rights has proposed a *National Plan of Accompaniment and Integral Assistance to Witnesses and Private Prosecutors*, to which the totality of the provincial representatives forming the Federal Council of Human Rights has adhered. Its main purpose is to protect not only the evidentiary value of the testimonies, but also their social value insofar as they contribute to the collective memory and history of our country, transmittable to all citizens as a public reparations policy of the National State. The Plan consists in offering accompaniment to witnesses, coordination of the actions with an integral psychological and legal perspective at the national level, follow-up of the cases and the construction of a network of capable professionals for their accompaniment.

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[31] Expert Report presented in the case N° 10.326 on children's robbery elaborated by Eva Giberti, M.I. Punta de Rodulfo, Ricardo Rodulfo and Fernando Ulloa, 1998.

In the context of this Plan, there is a training seminar coordinated by the programme "Current Consequences of State Terrorism on Mental Health", addressed to all organisations, professionals or persons who in the public or private space interact with those affected, including witnesses and private prosecutors. The consequences examined by this programme are twofold: a) those relating to the construction of the subjectivities and the effects stemming from particular forms of reconstruction of social bonds, and b) those relating to persons affected in a direct way by state terrorism.

The underpinning of this Plan is that the process of giving testimony does not merely entail telling one's story again, but it also means reliving, renewing and re-editing an extremely traumatic situation that affects the witness once again.

In this sense, the notion of "victim" is a legal term granted by a judicial framework through which the State is held responsible for actions perpetrated against its citizens. Nevertheless, the notion of "victim" is always complex and may place the subject in a paralysing position with no way out for his or her subjectivity. The passage of the story from the particular and private to the public realm generates in the subject an initial reparative movement insofar as it enables the social and legal recognition as an injured party for violations of human rights.

The second movement is connected with the effects of the dissemination and transmission of memory. In both movements, the accompanying professional is an articulator who enables the reparative effect with his or her intervention by assuming the testimony as having evidentiary value.

At this point, the reparations policy acquires influence over the social space regarding the support, dissemination and transmission of the memory, as well as the analysis of the diverse generational impacts produced by the facts, and so becomes a collective patrimony of the society.

One of the most destructive effects of the experiences of horror on affected persons is that the individual becomes fixed in a "victim" identity. In this sense, the identity crystallises the suffering, the guilt of having survived, the moral of sacrifice, the self-guilt, or the feeling that something heroic supports his or her being. All these continue the work of the perpetrator.[32] Therefore, giving testimony, collaborating to obtain justice or going from the affected persons' passive voice to the active voice, are all ways of transforming their memory of what happened, whereby they can become leading characters of their history, enabling them to give it a different meaning.

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[32] *Acompañamiento a testigos y querellantes en el marco de los juicios contra el terrorismo de Estado. Estrategias de intervención*, Colección Derechos Humanos para Todos, Serie: Normas y Acciones en un Estado de Derecho, Secretaría de Derechos Humanos, Ministerio de Justicia y Derechos Humanos de la Nación, 101.

It is important to indicate that the account of a borderline experience is fundamentally impossible to transmit, thus when the testimony takes place, it implies bordering and elaborating each time the non-transmittable experience. Therefore, accompanying the witness assists in the creation of a space of trust so that his or her testimony produces a political act regarding the memory, truth and justice. Accompanying victims is a protective measure because often the existence of a safety net supporting the witness avoids situations where terror paralyses and prevents the process from continuing.

In order to carry out this task, it is necessary to regard the role of the State agent in the accompanying task as serving a reparative function. The State agent articulates the private and public realms. Furthermore, the accompaniment may, due to the complex characteristics of this situation, entail a need to offer support in the face of possible psychological manifestations that might come up. Interventions that focus on support are able to relieve those affected and help the accompanying agent obtain certain key principles of reference vis-à-vis the terrible story, avoiding the re-victimisation of the witness.

4. *Recovery of Identity*

The Basic Principles and Guidelines foresee that satisfaction as a form of reparation can include "the search (…) for the identities of the children abducted…".[33] Many small children were abducted together with their mothers and many were born in captivity. The system of repression included an unlawful appropriation of those children who were then adopted or registered as the children of those who took them. The "Grandmothers of Plaza de Mayo"[34] have worked on the right to identity since 1977. In the context of their demands to Government, in July 1992 they requested the creation of a specialised technical commission. As a result, the National Commission on the Right to Identity (CONADI) was created in November 1992, establishing a working relationship between NGOs and the State. Its initial objective was the children who disappeared during the dictatorship. However, its activities were quickly broadened to respond to the complaints of theft, trafficking of children, mothers deprived of their children in borderline situations and adults whose identities had been changed. Thus, the commission quickly transformed into an organ specialised in the topic of identity,

[33] Basic Principles and Guidelines, paragraph 22(c).

[34] The "Grandmothers of Plaza de Mayo" is an organization of women who, during the dictatorship, started looking for their grandchildren, whose mothers were pregnant at the time of their abduction, and thus were born during the captivity, or for their grandchildren who were abducted together with their parents. They gathered at the "de Mayo" Square, in front of the government's house. Up to May 2008, the number of children found reached 90.

guarding the respect of articles 7 and 8 of the International Convention on the Rights of the Child (also called "the Argentinean articles").[35]

Resolution N° 1328/92 of the then Sub-Secretariat of Human and Social Rights of the Ministry of Interior created a Technical Commission destined to promote the search of disappeared children whose identities were known and of children born in captivity. Article 5 of the resolution authorised the Commission to request the collaboration and advice of the National Bank of Genetic Data.[36] In September 2001, Law 25.457 was approved, giving the CONADI a legal framework. Nowadays, the Commission functions under the umbrella of the National Secretariat of Human Rights, Ministry of Justice and Human Rights. In 2004, the National Executive Power created a Special Unit of Investigation of the Disappearance of Children as a Consequence of the Actions of State Terrorism,[37] which assists in related cases and is also empowered to initiate its own investigations, which it then transmits to the judicial authorities.

The leading case *Mónaco de Gallichio, Darwinia Rosa c/ Siciliano, Susana* established that adoption – or full adoption-of child victims of forced disappearance can be declared null and void due to the procedural fraud involved when suppressing biological identity, thus changing the existing case-law up to that point. Indeed, until then, adoptions carried out by Law 19.134 were irrevocable. The child lost all links with his or her biological family and there was nothing that could be done. The three judicial instances agreed on the fact that adoption of child victims of state terrorism were null and void because they were carried out in breach of the law.

There is an ongoing debate about the benefits of restitution as reparative truth at the individual and social levels. The National Supreme Court of Justice in the case *"Scaccheri de López María Cristina s/ denuncia"*, of October 1987, paid special attention to expert psychological reports and concluded that "the presence of traumatic circumstances related to absences during the initial months of life can subsequently usher in determinate pathologies (…) a lie is not an isolated fact, it is a construction, a network which includes false statements, secrets and prohibitions (conscience and unconscious), which circulate and are transmitted by all

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[35] Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990.

[36] Created by Law 23.511. Its main objective is to obtain and store genetic information that facilitates the determination of resolution of conflicts regarding biological identity. The law established that genetic analysis must be provided free of charge, the obligation of the judges to order a DNA test for any person suspected of being the son or daughter of a disappeared person, and the functioning of the Bank until 2050, which marks the average life of the grandsons and granddaughters sought for by the Grandmothers of Plaza de Mayo.

[37] Decree 715/04 (9 June 2004).

details of the upbringing (…) the uncover of the truth constituted the first repairing action".

Today, 568 young persons have come before the National Commission on the Right to Identity to clarify their identities. 224 of them have undertaken DNA analyses in the National Bank of Genetic Data, cross-checking their DNA with stored data. At the time of writing, positive results were obtained in seven cases.

5. *Places of Memory*

According to the Basic Principles and Guidelines, satisfaction should include "acknowledgement of the facts and acceptance of responsibility (…)" and "commemoration and tributes to the victims".[38] In this sense, it is the responsibility of the constitutional institutions of the Republic to maintain a permanent reminder of this cruel phase of Argentinean history as a collective exercise of memory, with the goal of teaching present and future generations the irreparable consequences of the substitution of the rule of law with the application of illegal violence by those who took over the State, in order to avoid oblivion from being the seed of future repetitions. Therefore, the recovery of physical locations, where the repressive apparatus used to operate, as places of memory forms part of the symbolic restitution process. Similarly, the recovery of names and graves that were denied to the victims, also contributes to the reconstruction of the historical memory of Argentineans, so that the commitment to life and unrestricted respect of human rights can be the founding values of a new, fair and generous society.

Thus, in December 2003, the National Executive Power issued a decree[39] creating the National Memory Archive with the goal of obtaining, centralising and preserving information, testimonies and documents on the violations of human rights and fundamental freedoms, and on the social and institutional responses of such violations. Its mission is to promote the exercise of a diversity of memories which contribute to a reflection on the experience of state terrorism, the conditions which made it possible, their consequences and the irreparable damage it has had on the social fabric which continues to affect us today.

The Archive contains historical documents of CONADEP, files incorporated after the publication of the report "Never Again" and the archives of the Reparation Laws, of which the Secretariat of Human Rights is the depositary. The National Memory Archive functions within the Secretariat of Human Rights to reflect its political importance.

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[38] Basic Principles and Guidelines, paragraph 22(e) and (g).
[39] Decree 1259/03.

Furthermore, a "Federal Network of Places of Memory" was created[40] to articulate work and exchange of experiences on methodology and resources among governmental human rights organs, which at a provincial and municipal level, and in the City of Buenos Aires, are in charge managing "places of memory" of state terrorism throughout Argentina. In addition, the creation and management of these places and their integration in the network aims at providing information to ongoing trials, contributing to the clarification of the truth concerning each clandestine detention centre and its corresponding repressive circuit. The management of these "places of memory" also assists in the identification of victims and perpetrators, promotion of knowledge and reflection on the genocidal experience, as well as analysis of its causes, meaning and consequences, preserving the memory of state terrorism.

During 2002 the City of Buenos Aires started to work on the recovery of several clandestine detention centres because it was considered that regardless of the punishment of perpetrators of crimes against humanity, the right of the relatives and the society as a whole to know the truth still remained.

On 24 March 2004, the President of Argentina, Nestor Kirchner, transferred the estate of the clandestine detention centre known as "ESMA" (the Navy Mechanics School) converting it into a "Place of Memory and Promotion of the Defence of Human Rights". The "ESMA" was not the first clandestine centre destined to the representation of state terrorism. There were some precedents, such as the *"Mansión Seré"* located in Morón, in the province of Buenos Aires and the *"Club Atlético"* in the City of Buenos Aires, as well as many other experiences where initiatives of civil society organizations were articulated with the participation of the local governments.

The places of memory that were formerly clandestine centres of detention reflect different circumstances. Some places were completely destroyed with no traces left (the case of *"Mansión Seré"*), others were destroyed with new buildings or public works erected (the case of *"Club Atlético"*, whose building was demolished by the dictatorship itself to build a highway). Some estates were transferred to new owners or remained abandoned for many years. There are also some places that remained in the hands of the Armed or Security Forces until the constitutional authorities decided to order that they be vacated, as is the case of *"El Olimpo"* (where a section of the Federal Police used to operate) and the "ESMA", where after more than twenty years of democracy, numerous training schools of the Navy continued to function.

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[40] Secretariat of Human Rights, Resolution, 14/2007.

In addition, on 24th March 2007, on the 31st anniversary of the coup, the National Executive Power and the Provincial Memory Commission entered into an agreement whereby the clandestine detention centre called *"La Perla"*, located in the province of Cordoba was consecrated as a place of memory.

There are other initiatives where the place in question was not a clandestine detention centre, but it was used as a planning centre of the repressive state apparatus. This is the case of the Intelligence Directorate of the Police of the Province of Buenos Aires, located in the city of La Plata, holding one of the few archives the perpetrators did not destroy or hide and which was handed to the Provincial Commission for Memory. For example, the archive, which was created in 1956, contains more than two hundred thousand personal files of political and ideological follow-up covering a period that starts at the end of the 1930's and continues to 1998. Similarly, a "Memory Museum" in the city of Rosario will be established where the headquarters of the *II Commando* of the Army used to function.

Lastly, there are other examples where monuments or other symbolic or historical structures have been erected in places of symbolic importance. For instance, a "Memory Park" is located in the City of Buenos Aires, on the Plata river where many disappeared persons were thrown in. Here, several sculptures and commemorative inscriptions with the names of the victims have been erected in a space especially created for the remembrance of state terrorism.

In line with these actions, the Minister of Defence set up identifying plaques within the properties of the Armed Forces that had functioned as clandestine detention centres during the 1976–1983 period.[41] Further, all construction works on estates, places and/or building where clandestine detention centres used to be located were suspended, and all alterations thereof were banned. The Minister also authorised access to all military archives for the investigation of human rights violations as means of contributing to the search for truth, justice and reparations. Those documents will remain at the disposition of the National Memory Archive so that they can be examined by those with a legitimate interest.[42]

6. *Witness Protection*

The Assistance Unit of the General Attorney's Office, through the Office of Protection of Witnesses and Accused of the Ministry of Justice and Human Rights has channelled applications towards the Ministry of Security of the province of Buenos Aires which implements the Vigilance and Attention to Witnesses at Risk of Exposure Programme, and aims to limit the exposure of witnesses who, due to the importance of their testimonies can find themselves in dangerous situations.

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[41] National Ministry of Defence, Resolution 1309/2006.
[42] National Ministry of Defence, Resolution 173/2006.

The programme offers each witness an electronic monitoring device that continuously provides its geo-reference, together with a panic alert. It also offers a mobile phone that allows for a 24 hour communication with the Monitoring Centre and provides advice on the safety conditions of the witnesses' homes.

Finally, Decree N° 606/07 created the "Programme for Truth and Justice"[43] which functions under the umbrella of the Ministry of Justice, Security and Human Rights.[44] The goals of this programme are to co-ordinate and articulate with the rest of the State agencies all tasks needed to encourage and strengthen at the institutional level the process of truth and justice regarding the crimes against humanity committed by state terrorism; to guarantee the protection, support and safety of the witnesses, victims, lawyers and judicial workers who intervene in those cases or investigations; to strengthen the State's capacity to obtain information and to offer support to the investigations; and to identify and propose legal modifications to improve the development of the trials and the protections of the people involved.

C. *Some Conclusions*

The Argentinean reparations programme has seen several reforms in search for the best means of facing the terrible consequences of the last military dictatorship and its impact on the individuals directly affected and on society as a whole. The attempt to include judicial accountability was cut short in the mid 1980's, and by the beginning of the 1990's, the programme only included pecuniary reparations. Nevertheless, today the programme has become more comprehensive, encompassing a range of reparative measures, as a clear sign of the need to rebuild national history and the collective memory.

One of the main tools of a reparations scheme is legislation; it is imperative to have a legal framework that organises and gives formal support to the programme. As former Judge of the Inter-American Court of Human Rights, Antônio A. Cançado Trindade held in the *Bulacio* case, "the Law intervenes to reconcile the surviving victims with their fate, to free human beings from brute force and revenge" and "to avoid repetition of the wrong, in other words, to establish, as one of the non-pecuniary forms of reparation of damage resulting from violations of human rights, the guarantee of non-recidivism of the injurious acts".[45]

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[43] In charge of Marcelo Saín.
[44] Decree 589/2008.
[45] *Bulacio vs. Argentina* case, Judgment 18 September 2003, Reasoned opinion of Judge A.A. Cançado Trindade, paragraphs 31 and 35.

However, the law is not enough; when planning and implementing a reparations scheme, the impact of the legal sphere over the subjectivity of victims and society as a whole should be taken into consideration. The letter of the law touches upon the history of the individuals and its application certainly has consequences on their subjectivity. The application process sets in motion a work of historisation of the subject, who may need to face traumatic episodes in order to be eligible for the programme.

Thus, the reparative value of a reparations programme is not only related to the payment of compensation given by the State to victims of human rights violations, but also to the accompaniment which involves recognising the testimonies as evidence, thereby regarding them as legitimate. Giving value to the story, dignifying it, is a fundamental fact in the significance of the reparation.

Reparations programmes for gross violations of human rights can never achieve *"restitutio in integrum"*. They can "only provide victims the means to attenuate their suffering, making it less unbearable, perhaps just bearable".[46]

Psychological damage is a legal category that purports to establish a reference; to measure the magnitude of what happened to a subject, translating it into "an amount" of damage. From the psychological viewpoint, such damage is neither measurable nor foreseeable. And yet, it is necessary to find the intersection of these two discourses, without mixing these dimensions.

This task is carried out in a coordinated way with lawyers, psychologists, applicants and their representatives. Thereby, the existence of a network among public health institutions, civil society and the State is appropriate in setting up an effective reparations programme that will fully serve its purpose.

[46] *Id. at* paragraph 25.

Reparations for Victims in Colombia: Colombia's Law on Justice and Peace

By Julián Guerrero Orozco and Mariana Goetz***

> The lack of recognition of the injury caused […], that is the source of the injustice […]. Injustice not only because they killed, because they did not pay, because they did not give back, but because from every angle we women have always been treated unjustly: they never recognise the harm that is done to us.[1]

Criminal investigations and prosecutions against members of self-defense groups or so-called "paramilitaries" responsible for committing serious crimes, have no antecedents in international practice. Some characteristics make this a unique and unprecedented experience: i) these groups were not defeated militarily but decided to hand in their weapons voluntarily as a result of a political negotiation; ii) the Colombian judiciary started to investigate and prosecute members of the self-defense groups from the outset of the peace process; iii) it is the first attempt to frame the peace process in Colombia within the confines of international criminal justice, and as such it presents the challenge of balancing legal principles with the need to achieve national peace; iv) there are few "standards" in transitional justice that allow one to evaluate the levels of truth, justice and reparation necessary to satisfy victims; v) the current legal framework moves away from previous amnesties and will have lasting impacts on future peace negotiations, given that many armed groups other than the paramilitaries are still active.

This chapter has the purpose of analysing the challenges of applying justice in times of transition and proposing some conclusions that may help guide these processes. Besides this overview and the conclusions, this text is divided in three parts. In the first part a brief explanation of the background of the Colombian conflict is presented. The second part analyses the national legal instruments

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[1] Statement of a female victim taken by the *Grupo de trabajo Mujer y género*, *Recommenda-ciones para garantizar los derecos as la verdad, la justicia y la reparacion de la mujeres victimas del conflicto armado en Colombia*, April 2008, at 108, available at: www.ciase.org/documentos.shtml?s=d&apc=a-151–.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 435–458.

that have been developed to address the issues of individual criminal responsibility, the truth about serious crimes and the obligations of members of illegal armed groups to repair victims. This part analyses in particular the 2005 Law on Justice and Peace. The third part provides an evaluation of the application of this legal framework and points out the obstacles and challenges in the implementation process.

A. *Background to the Conflict*

For the last forty-four years Colombians have suffered from political violence arising from an internal armed conflict between the Colombian State, left-wing rebels and right-wing paramilitaries. The main left-wing groups have been the Revolutionary Armed Forces of Colombia or *Fuerzas Armadas Revolutionarias de Colombia* (FARC), officially established in 1964, and the smaller National Liberation Army or *Ejercito de Liberacion Nacional* (ELN), founded in 1965. Other leftist groups to emerge were the M-19, a communist group, the indigenous group led by Quintin Lame, and the Ejercito Polular de Liberación EPL. On the other hand right-wing paramilitary groups emerged in the late 1970s to fill the gap left by the State in fighting back against the rebels. In 1997 these groups gathered together to create a confederation under the name of AUC Colombian United Self-Defenses *Autodefensas Unidas de Colombia*. Both sides have become increasingly active in the illegal drugs trade producing 80% of the world's cocaine; the millions of dollars raised through drug trafficking and kidnapping allow these groups to continue the violence.

The human cost of the violence on the civilian population can most notably be seen in the fact that Colombia has one of the world's largest displaced populations, with almost 4 million people displaced by violence between 1985 and 2007.[2] While the FARC is famed for resorting to kidnappings,[3] according to the World Bank, 50–60 percent of displaced civilians are said to have been forced off their land by the paramilitaries.

Over the past decades, various government efforts were undertaken to achieve peace with the leftist guerrillas. Amnesty negotiations in 1982 and a Peace Accord[4] in 1984 with FARC provided some hope. Later the government of

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[2] See: www.internal-displacement.org/.

[3] The FARC are said to currently hold 40 high profile hostages amongst 700 other captives. BBC news, "Betancourt urges Farc peace talks," 4 July 2008, available at: http://news.bbc.co.uk/1/hi/world/americas/7488996.stm.

[4] The Uribe Accord, was signed on 28 March 1984, under the Belisario Betancur administration. The Accord included initial agreements to address issues such as modernising political

Virgilio Barco focused on negotiations with other groups. The *Movimiento 19 de Abril* (M-19) and *Quintin Lame* signed peace agreements with the Government before the 1990 elections. They were demobilised and along with other leftist and social movements, were involved in the drafting of Colombia's new progressive Constitution in 1991.

After these peace deals had been reached, members of these groups were granted amnesties with little or no recognition of the rights of victims to truth, justice and reparation. Indeed, today some of the former members of these groups participate actively in politics. Some are members of Congress; others have been made part of the Government or are important regional leaders.

More recently, between 1998 and 2002, the most ambitious effort to achieve peace with the FARC, took place. The government of President Andrés Pastrana, elected in 1998, made considerable concessions to the FARC as a means of providing incentives for a peaceful solution. For instance, in 1999 Pastrana granted an off-limits safe-haven to the FARC the size of Switzerland in the South East of the country. In 2001 the Los Pozos Accord was signed which promised a "new Colombia" based on social change. However the FARC failed to fulfil the obligations derived from this and other agreements and continued using the so-called distension zone to kidnap people and become increasingly involved in drug-trafficking. For this reason credibility of the process waned as it dragged on in the midst of hostilities and continued violence from the FARC. President Pastrana, on whom the process rested, lost support and after almost 4 years of negotiations the peace process came to an end.

Between 1994 and 2004, the paramilitary groups multiplied in numbers and became increasingly involved in drug trafficking, land acquisition through intimidation and violence as well as other criminal activities.

It is estimated that paramilitary group members increased from 4,500 in 1998 to 13,500 in 2004.[5] Together with the FARC, they were responsible for the majority of massacres and forced disappearances, kidnapping and terrorist attacks against towns committed during this period in addition to other crimes committed against the civil population. As a result of the close links of these groups with drug-trafficking, and under the principle of shared responsibility in the fight against drugs, during the same time period, the Government convened with the United States' anti-narcotics assistance through "Plan Colombia". The global "war against terrorism" also contributed to placing pressure on groups such as the

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institutions, enabling agrarian reform, facilitating the mobilisation of *campesinos* and indigenous groups and strengthening education, health, housing and labour policy, as well as the establishment of a bilateral ceasefire.

[5] Human Rights Observatory, Vice Presidency of the Republic of Colombia. www.derechoshumanos.gov.co.

FARC. Thus, as a result of the strengthening of the Army and a convincing foreign policy under the name of Diplomacy for Peace, *Diplomacia para la Paz*, the Colombian Government was in a stronger position to deal with both the paramilitary and guerrillas auguring a new phase of negotiations.

At the end of 2002, the Colombian Government began negotiations with the paramilitary groups and the guerrilla movements. As a result 31,671 paramilitary group members demobilised collectively in thirty-seven separate demobilisation acts; and a total of 13,081 individuals, 7,311 of FARC members, 1,768 ELN members and 4,200 from other groups, including paramilitaries demobilised individually.[6]

B. *The Legal Framework for the Peace Process with the Paramilitaries and the Justice and Peace Law*

The legal framework adopted by the Colombian State to guide with success the peace process with the self-defence groups made a clear distinction between those members of these groups responsible for ordering or committing serious crimes and those who had not. The later were subject to Law 782 of 2002 and Decree 128 of 2003, which provided a favourable social and legal framework that included pardons, conditional suspension of sentences or criminal procedures, immunity from future prosecution as well as extensive social and economic benefits.[7] Most rank and file members received the benefits of Law 782 of 2002.

The reintegration process received the support of the Organization of American States (OAS) through the Peace Process Support Mission (*Misión de Apoyo al Proceso de Paz*).[8] While the OAS Support Mission had a verification role, its mandate was confined to verifying the ceasefire, demobilisation of paramilitaries, weapons return and reinsertion of paramilitaries into civilian life. It was not mandated to comment on issues of truth, justice and reparation.[9]

Thus, the great majority of these persons, against whom there were no criminal accusations, entered unchecked, into the reintegration programme under Law 782 receiving social and economic benefits. Many others were pardoned or simply returned home uncharged. The process was criticised as providing

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[6] National Reparation and Reconciliation Commission (NRCC), *Report to Congress 2007: Victims' Reparation Process: Balance and Future Perspectives*, at 120–121, available at: www.cnrr.org.co/new/interior_otros/informe_congreso2007.pdf.

[7] Decree No. 128 of 22 January 2003. Official Journal No. 45.073, available at: www.dafp.gov.co/leyes/D0128003.htm.

[8] See, www.oas.org/documents/spa/colombia.asp.

[9] Amnesty International. Colombia, *The Paramilitaries in Medellín: Demobilization or Legalization*, Sept. 2005, *AI Index: AMR 23/019/2005*, at 15, available at: www.amnesty.org/en/library/info/AMR23/019/2005/en.

"back-door impunity".[10] When the demobilised were moved to specially created off-limits "concentration zones" (*zones de ubicación*), a government verification process was supposed to take place on the basis of intelligence and other records examining the possibility of human rights atrocities. In practice however, identity checks were made and weapons recovered, but the checks only considered pending arrest warrants, avoiding scrutiny of evidence or allegations.

While the top leaders of the paramilitary groups and those accused of having committed atrocities were not entitled to take part in the reintegration programme and were supposed to remain or be sent to the concentration zones, in December 2004, the *Procurator General* (Inspector General) revealed that over 160 members of the paramilitary *Bloque Cacique Nutibara* (BCN) were pardoned under Decree 128 while they had in fact been under investigation for non-pardonable offences, including human rights violations.[11] The failure to require paramilitary groups or their members to disclose any information about their structure, assets, sources of financing, or past crimes, in a sense allowed significant benefits to be bestowed on the demobilised paramilitaries without affecting the structure, activities and capacities of these powerful groups to continue their activities.[12] The benefits conferred by Decree 128 could be lost if beneficiaries were later found to have perpetrated human rights violations, and they would have to submit themselves to the new system under the 2005 Law on Justice and Peace.

As the demobilisation process started to take hold, critical questions were raised both nationally and internationally about how to deal with members of the paramilitary that had committed gross violations of human rights and were responsible for serious crimes. Should they be entitled to amnesties and pardons or should they be prosecuted? The challenge was to strike the right balance between justice and accountability on the one hand and progress towards peace on the other.

The 2003 pledge to disarm made by the United Self-Defence Forces of Colombia (AUC) in exchange for government assurances of amnesty-like conditions triggered an in-depth debate, with international standards and victims' rights taking centre stage. After analysing Colombia's international obligations, the Government presented its *Ley de Justicia y Paz* (Law on Justice and Peace) to Congress, which aimed at striking a balance between these two values. Too much emphasis on accountability would lack the "carrot" needed to persuade the paramilitaries to continue the peace process, too much leniency would result in a

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[10] Human Rights Watch. *Colombia: Letting Paramilitaries Off the Hook*, Jan 2004, available at: www.hrw.org/backgrounder/americas/colombia0105/2.htm#_Toc93401470.

[11] Amnesty International, *supra*. n. 9 at 13.

[12] Human Rights Watch, *supra*. n. 10, see section "Key Deficiencies."

lack of "stick", with the consequence of impunity or limited recognition of the rights of victims.

The Law was debated for over two years in the media and amongst academics, both nationally and internationally. Pressure groups effectively asserted that international principles of human rights should be respected and that blanket or unconditional amnesties could not be tolerated.[13] Attempts to pass the law in 2003 and 2004 failed due to criticisms that the law did not satisfy victims' right to truth, justice and reparation. In the end however, the bill presented to Congress was watered down, to the extent that the UN High Commissioner for Human Rights stated in a letter to the Colombian Congress: "In view of the Office, most of the changes [to the then bill] appear inadvisable since they do not conform to international principles and norms on the right of victims of serious crimes in accordance with international law".[14] The Colombian Congress finally adopted the Law on 25 July 2005[15] with many modifications introduced in the deliberations.

The Law was initially designed to fill the gap left by Law 782 and Decree 128, which were intended to provide benefits to those who had not committed human rights abuses. Law 975 therefore places greater emphasis on justice over demobilisation, aiming to "regulate investigation, prosecution and punishment as well as judicial benefits to be conferred on individuals associated to armed groups organised at the margins of the law, as authors or participants in illegal activities, […] and who have decided to demobilise and contribute to national reconciliation".[16]

It contains two main parts; the first refers to judicial investigations and procedures as well as the conditions under which the members of illegal armed groups, either paramilitary or guerrilla groups,[17] can benefit from "alternative punishment". In theory beneficiaries of the Law are entitled to alternative punishment if they confess their crimes, are subjected to a criminal procedure by independent prosecutors and judges and, most importantly, if they repair the victims for the harm they have suffered as a result of their criminal behaviour. The second part of the Law details the rights of victims to truth, justice and reparation.

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[13] See for instance the position papers of the Association of Family or Detained and Disappeared, *Asociación de Familiares de Detenidos Desaparecidos* (ASFADDES), available at: www.asfaddes.org.co/fdocumentacion.htm.

[14] Letter to Legislators from the First Commissions of the Senate and House of Representatives: Observations on the "Justice and Peace" Draft Law, 30 March 2005, DRP/175/05, quoted in Amnesty International, 2005, *supra*. n. 9 at 22.

[15] Law 975/2005 was adopted by Congress on 25 July 2005. Daily Official Journal 45,980 of 25 July 2005.

[16] Article 2 of Law 975/2005, *id*. (translation by author).

[17] There is a discussion as to whether guerrilla groups would accept the type of accountability established by the Law on Justice and Peace being applied to paramilitaries as part of future peace negotiations. The current perception is that guerrilla groups would not accept anything less than blanket amnesties.

However, there was significant criticism of the law after its approval by Congress. Statements were made by the United Nations, the Inter-American Commission on Human Rights, the Colombian Commission of Jurists, Amnesty International, Human Rights Watch[18] as well as national civil society groups.

Law 975 was then formally challenged before the Constitutional Court in ten different law suits brought by civil society organisations including a consortium of 105 civil organisations,[19] including the *Movimiento de Víctimas de Crímenes de Estado* (Movement of Victims of State Crimes, or Victims' Movement), established in response to the Law.[20] The consortium's petition pointed to the unconstitutionality of thirty-three of the seventy-two articles.[21] In its judgment of 18 July 2006 in the case of *Gustavo Gallón Giraldo y otros*,[22] the Constitutional Court decided that the Law was constitutional as a whole. However it introduced significant modifications to critical portions of the Law. These made the Law much stricter in its application with respect to perpetrators and wider with regards to victims' rights to truth, justice and reparation.

When analysing the relationship between justice and peace and their effect on victims' rights, the Constitutional Court held that "[a]chieving stable and lasting peace may require certain restrictions to the objective value of justice and the correlative right of the victims to justice […] However peace doesn't justify it all. It doesn't have an absolute value. It is necessary to materialise the essential content of the value of justice and the rights of victims to justice in spite of the legitimate limitations they may be subject to in order to bring a conflict to an end".[23]

1. *The Compromise of "Alternative Punishment"*

The Constitutional Court found that the central concept of "alternative punishment" (*alternatividad*) enshrined in article 3 of the Law, was indeed constitutional.[24] The article reads as follows:

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[18] See Human Rights Watch. *Smoke and Mirrors: Colombia's demobilization of paramilitary groups* (2005), available at: http://hrw.org/reports/2005/colombia0805/.

[19] Lisa Laplante and Kimberly Theidon, "Transitional Justice in Times of Conflict: Colombia's *Ley de Justicia y Paz*," 28 Mich. J. Int'l L. 49 (2006).

[20] For the *Movimiento de Victimas de Crimenes d'Estado's* petition, see: www.movimientodevictimas.org/node/157, 2006.

[21] A number of groups also intervened as *amicus curiae*, including the Colombian Commission of Jurists, the Bar Human Rights Committee and the International Free Trade Unions Confederation (*Confederación Internacional de Organizaciones Sindicales Libres*).

[22] *Gustavo Gallón y otros* [18 May 2006] Sentencia C-370/2006, Expediente D-6032 (Colombian Constitutional Court), available at: http://www.derechos.org/nizkor/colombia/doc/corte.html#de%202005.

[23] *Id*. at para. 5.5.

[24] *Id*. at para. 6.2.1.5.2.

> The concept of alternative punishment, that provides a benefit consisting in suspending the execution of a specific punishment and replacing it with an alternative punishment in return for the beneficiary's contribution to the achievement of peace, collaboration with justice, reparation of victims, and an adequate re-socialisation, is granted in accordance with the conditions established in the present Law.[25]

However, it was deemed constitutional only insofar as the envisaged "collaboration with justice would be directed towards ensuring victims' effective rights to truth, justice, reparation and non-repetition".[26] A further provision on the notion of "alternative punishment" was deemed partially unconstitutional. This was the guarantee provided in article 20(2) on the accumulation of sentences, which stipulates that "under no circumstances could an alternative punishment be higher than sentences foreseen in the current Law". This phrase was deemed unconstitutional, as it would extinguish prior outstanding sentences that may have been pronounced following formal investigations and prosecutions. Findings based on confessions under the new Law might not reveal crimes to the extent of prior findings, so extinguishing prior sentences would be disproportionate to victims' right to obtain justice and could be seen as a means of obtaining hidden pardons.[27]

In article 25, demobilised paramilitaries who had benefited from the Law could technically lose their benefits if subsequent investigations revealed that they had in fact committed offences that had not been expounded at the free hearings under the Law. However, in order to extinguish the benefits conferred under the Law, it would have to be proved that the individual had intentionally withheld information, which would be virtually impossible to prove. The Constitutional Court equally found this provision to be unconstitutional.

2. *The Right to Truth*

The petitioners claimed that Law 975, and in particular article 25, violated victims' right to truth as it did not include any loss of benefits for not confessing fully. Articles 48 and 58 were also said to have violated the right to truth as they did not impose any obligations to disclose the whole truth. Furthermore, the petitioners claimed that there was also a violation of the right to truth in article 10 of the Law due to the lack of any obligation to notify the whereabouts or fate of disappeared persons. In accepting these arguments, the Constitutional Court found parts of articles 10, 17, 25, 48 and 58 to be unconstitutional, and stated that:

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[25] Art. 3 of Law 975/2005, *supra*. n. 15.
[26] Para. 6.2.1.5.2 of the Constitutional Court Judgment, *supra*. n. 22.
[27] Para. 6.2.1.6.5 of the Constitutional Court Judgment, *id*.

> When dealing with the occultation of crimes as serious as massacres, widespread kidnappings, murders, disappearances, bombing of towns or places of worship and mass recruitment of children, amongst others, then the transition of perpetrators to civilian life, facilitated by the benefit of a reduced punishment supposes, at least, that the rights of the victims to truth are completely and faithfully satisfied […] The criminal benefits granted by the Law to those who have committed serious crimes can only be conferred to those who have fully satisfied the victims' rights to truth. Therefore they must have confessed, completely and faithfully, all the crimes in which they have participated as members of illegal groups.[28]

Measures of satisfaction and non-repetition that the authorities are obliged to adopt as part of the national reconciliation process were also challenged in the context of victims' right to the truth. According to articles 48 and 49, the relevant authorities are to ensure verification of the facts and public dissemination of the judicially ascertained truth, in a manner that does not cause further *unnecessary victimisation* or place risks on witnesses or *other persons*. Petitioners claimed that this provision violated victims' right to the truth as "unnecessary victimisation" and "other persons" could be interpreted in a manner that would protect the perpetrators. The Court clarified that the relevant provisions should be interpreted in line with international standards on victims' rights.

3. *Victims' Right to Justice in the Context of "Free Hearings"*

Another area that was challenged was the notion of "free hearings and confessions" (*versión libre y confesión*), to take place before a prosecutor designated by the demobilisation process. The "free hearings," detailed in article 17 of the Law, are intended to illicit details about the time, location and nature of illegal activities that members of armed groups took part in, either individually or as part of the group. The prosecutor may interrogate the defendants, who are to give details of goods that are intended for the benefit of repairing victims of the illegal activities. The account provided by the demobilised paramilitary as well as any other statements collected through the demobilisation process are then to be put at the disposal of the National Justice and Peace Prosecution Unit created under the Law, allowing a prosecutor of that Unit to verify the information. The demobilised paramilitary is then placed in one of the confinement zones designated under the Law for thirty-six hours. During this time, the prosecutors can request a magistrate to call a preliminary hearing to formulate an accusation (*formulación de imputación*) on the basis of the information or evidence if it could be reasonably inferred that the individual authored or participated in illegal activities. Following the accusation hearing, the prosecutor from the National Justice

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[28] Para. 6.2.2.1.7.24 of the Judgment, *id*.

and Peace Prosecution Unit has sixty days to investigate and present charges at a confirmation hearing.

Significant questions were raised on how the "free hearings", essentially based on spontaneous confessions, would affect victims' right to justice and truth. The provisions on free hearings (article 17) as well as provisions on formulating and confirming charges (articles 18 and 19), and in particularly the time frames set down in the Law for achieving these steps, were challenged as unconstitutional and contrary to the applicable norms of the Colombian Criminal Procedure Code.

Petitioners claimed that the provisions enabled but did not compel individuals to provide information about offences committed in order to benefit from the law. The hearings did not allow for effective participation and truth finding, as they restricted victims' procedural right to hear and challenge findings, denying them the possibility to defend their interests. Furthermore, the time frames were unrealistically short and would prohibit proper or effective investigations, which were measures that provided victims with a remedy that could facilitate adequate clarification of the truth and realisation of their right to justice.

The Constitutional Court had no objection to the mechanisms provided in the Law that deviated from the course of normal investigation and prosecution, given that the Law had to be seen in the context of the peace process. However, it clarified that the thirty-six hour period, within which the prosecutor was to "immediately" call and carry out an accusation hearing, was to be interpreted not as the period in which the prosecutor was required to present an accusation, but the time limit imposed on the magistrate for listing the accusation hearing. The magistrate would have to list the hearing within thirty-six hours of the prosecutor's request, after the individual had submitted himself to the National Justice and Peace Prosecution Unit and after the prosecutor had established its investigation protocol in accordance with the Penal Code.

As for the sixty-day time period for investigations, which runs from the end of the accusation hearing and not the "free hearing", the Constitutional Court interpreted this time frame as the maximum time limit for the prosecutor to formulate the basis of his investigation and request a confirmation of charges hearing, as opposed to actually confirming the charges.[29]

With respect to the provisions *benefiting* the demobilised, these included for instance, provisions allowing for time spent in demobilisation or concentration zones (*zonas de ubicación*) to be discounted from future sentences (Article 31). The Court held that "it is obvious that the obligation to sanction perpetrators of serious crimes cannot be reduced to a mere formality, and that instead it must be

[29] Para. 6.2.3.1.7.6 of the Judgment, *id*.

translated into the implementation of an effective sanction".[30] Consequently, the whole of Article 31 was declared unconstitutional.

4. *Victims' Procedural Rights in all Phases of Proceedings*

The petitioners claimed that articles 17, 18 and 19 limited victims' procedural rights in a number of ways. They claimed that these provisions denied victims access to participate in all phases of the proceedings, as no explicit provision for their participation had been mentioned, as it had been for instance in article 37 of the Law, which provided for victims to be assisted by a lawyer during the trial. However, the Constitutional Court clarified that while some provisions refer to victims' rights during a particular phase, and other provisions do not mention their right to participate at all, all provisions should be interpreted in line with international standards, which provide that victims should have access to all phases of proceedings.[31]

5. *The National Reparations and Reconciliation Commission*

Article 50 of the Law establishes a National Reparations and Reconciliation Commission[32] (*Comisión Nacional de Reparación y Reconciliación, CNNR*). It is composed of five representatives of civil society, two representatives of victims' organizations, a delegate of the Vice-president of the Republic (who presides it), the National Attorney General or their delegate, a delegate from the Ministry of the Interior and Justice, the Minister of Finance and Public Credit or their delegate, the People's Defender, and by the Director of the Presidential Agency for Social Action and International Cooperation, who carries out the functions of Technical Secretary. Two of its members must be women.

The commission is mandated to guarantee victims' participation in proceedings of judicial clarification and in the realisation of their rights. It is to recommend the criteria for victims' reparations and make recommendations to the government regarding the implementation of an institutional collective reparation program. In addition it is charged with writing a report on reparations for victims under the Law within a two-year period and a report on the underlying causes and evolution of illegal armed groups in Colombia.

In describing the mandate of the CNNR, its president stated that:

> The CNRR holds the dear conviction that without the truth, neither justice nor reparations nor reconciliation are possible. Consequently, reconstruction of the truth, both factual and historical, will be one of the main tasks of our Commission.

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[30] Para. 6.2.3.3.2 of the Judgment, *id*.
[31] Para. 6.2.3.2.2 of the Judgment, *id*.
[32] For the official CNNR website, see www.cnrr.org.co.

> To that end, and in line with the text of the law, it is essential to distinguish judicial from historical truth. The former is an essential task of the judiciary, even though the Commission will need to insure active participation by victims in the judicial investigations. The latter, on the other hand, will be fundamentally the task of the CNRR. One and the other, however, are not mutually exclusive and must accordingly nurture each other.[33]

6. *Judicially Determined Reparations for Victims*

With respect to provisions ensuring reparation to victims, article 8 of the Law provides for a variety of forms of reparation, namely restitution, compensation, rehabilitation (physical and psychological), satisfaction and guarantees of non-repetition, in line with international standards.[34] The Law provides for material and moral reparations, which can be awarded both individually and collectively. Reparations are judicially determined as part of the sentences to be handed down in the context of "alternative punishment."

In considering the type of assets that should be destined for reparations, the Court questioned whether it was acceptable that in a transitional justice context, the perpetrator, who was given the incentive to participate in national reconciliation through the receipt of certain benefits, should have to repair victims fully, with the possibility that this would deplete his or her resources and present a significant disincentive to participate. In its analysis of the law and the particular context, the Court concluded that the provisions confining reparation to illegally obtained property were unconstitutional. Both legal and illegally obtained assets should be available to ensure full and just reparation in accordance with constitution and international standards:

> There does not appear to be any constitutional reason that would allow an exception to be made to the principle that those who are responsible for causing a legal injury are obligated to repair the injury […]. Secondly, even if the State were to accept a transferred responsibility, it is clear that it cannot pardon either criminal or civil responsibility for atrocities and widespread and massive violence. To completely exempt perpetrators from their civil responsibility would amount to a blanket amnesty. Finally, it would appear to be constitutionally disproportionate to renounce pursuit of the patrimony of those responsible for serious injury, particularly in cases where it can be shown that those responsible have amassed immense fortunes and

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[33] Quoted and translated by Laplante & Theidon, *supra*. n. 19. *CNRR, Elementos para la Construcción de una Hoja de Ruta* (17 January 2006), available at: www.presidencia.gov.co/sne/2006/enero/17/ruta.pdf.

[34] See the United Nations 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, adopted by the General Assembly 16 December 2005.

> those who have been victimised have been uprooted and live in painful conditions of poverty.[35]

It was also held that perpetrators are not only to remedy the injury they caused *themselves;* there is also a collective obligation of solidarity among the members of a specific group. This means that all the members of a specific group must repair and account for the damages of all the others members.

In interpreting the extent of the term "victim" the Constitutional Court widened the definition to include not only "first degree blood relations". Quoting jurisprudence from the Inter-American Court,[36] the Constitutional Court widened the notion of "victim" in line with international criteria. Victims must be able to demonstrate that they have suffered real harm (concrete and specific) – if they satisfy the probative requirements then their rights should be validated. The Court clarified nonetheless that this did not imply that the State has to assume the injury in relation to all relatives of the direct victim, or that all relatives have the exact same rights, however, what could be inferred from the jurisprudence and established norms is that the State can not obstruct victims' access to processes foreseen to validate their rights.[37]

According to the Law reparations were limited to the budget of the Victims Reparation Fund (*Presupuesto del Fondo para la Reparación de las Victimas*). In its decision the Court held that no budgetary constraint might be used as an argument to excuse the State from repairing the victims.[38] Moreover, where perpetrators cannot repair the victims directly, the State has the subsidiary obligation to fully repair the individual victims.

With respect to guarantees of non-repetition, while the Government had such obligations spelled out in article 8 of the Law, petitioners claimed that other provisions were in direct contradiction to this right and voided it of any meaning. Of most concern for the petitioners was the lack of obligations placed on the perpetrators to stop their illegal activities. What would guarantee that criminal activities would not be resumed after the reduced sentences had been served? The Court found that some of the rectifications already imposed in relation to other provisions partially remedied the petitioners' fears. For instance, the interpretation of "alternative punishment" defined in article 3 was deemed constitutional only insofar as it envisaged that "collaboration with justice would be directed towards ensuring victims' effective rights to truth, justice, reparation and

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[35] Paragraph 6.2.4.1.11 of the Constitutional Court Judgment, *supra*. n. 22.

[36] For instance, Case of the 19 Tradesmen v. Colombia (Merits, Reparations and Costs), Judgment of 5 July 2004, Series C No. 109; the Case of *Myrna Mack Chang v. Guatemala*, 25 November 2003. (Merits, Reparations and Costs), Judgment of 25 November 2003, Series C No. 101.

[37] Paragraph 6.2.4.2.12 of the Judgment, *supra* n. 22.

[38] Paragraph 6.2.4.3.3.2 of the Judgment, *id*.

non-repetition",[39] and that any non-compliance would entail a loss of the benefits conferred upon the demobilised perpetrator. Corrections made in relation to article 20, whereby prior sentences would not be extinguished by new sentences pronounced in proceedings under the Law, as well as a further correction made to article 29(4) which clarified that early release on probation was conditional on the non commission of illegal activities, also reinforced victims' guarantees to non-repetition.

C. *Implementation of Victims' Rights in the Context of the Law on Justice and Peace & Other Measures*

For the first time in Colombia's history, victims' rights were given concerted attention, as their rights hold the balance between justice and peace. The incorporation of international human rights law, and reference to principles on victims' rights as well as attention given to judgments of the Inter-American Court of Human Rights have all contributed to victims' rights being strengthened following the Constitutional Court's judgment on the Law on Justice and Peace.

However, giving effect to victims' rights to truth, justice and reparation through the framework of the modified Law *in practice* is extremely challenging. Decrees and Resolutions have been introduced regulating provisions of Law 975, in particular the procedures of the "free hearings",[40] conditions for victim participation and representation and procedures for claiming reparation.[41] However, due to delays in the judicial proceedings, plans for administrative reparation have also been introduced. As such, in the aftermath of the Law on Justice and Peace, there are currently four main avenues in which victims can seek truth, justice and reparation. First, victims can seek to participate in the proceedings foreseen under the Law. Second, victims can seek to access ordinary criminal proceedings against those who have not submitted themselves to cooperating with the peace processes under the Law, and who are therefore to be tried in regular courts. Thirdly, victims can make *civil* claims against actors being tried in regular criminal courts; and finally, victims can seek to obtain administrative (as opposed to judicial) reparation from the Government in accordance with new provisions especially introduced.

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[39] *id*.

[40] Resolution 0-3998 of 6 December 2006, resolution 0-0387 of 12 February 2007, and Decree no. 423 of 16 February 2007 available at: www.fiscalia.gov.co/justiciapaz/ReglamentacionVer.htm, regulating the "Free Hearing" proceedings.

[41] Decrees include: Decree no. 4760 of 2005, no. 2898 of 2006, no. 3391 of 2006, no. 4417 of 2007, no. 315 of 2007 and no. 432 of 2007.

This section will consider the challenges in implementing the Law in practice and in the context of the on-going peace process and the strengthening of the judiciary, which has seen an increased focus on apprehending paramilitaries for their involvement in the drugs trade, having significant impact on victims' rights.

1. *Implementation of the Right to Truth*

Decree 3391 of 2006 on complete and truthful confession provides that with respect to free hearing proceedings described in article 17 of Law 975, "the applicant shall make a complete and truthful confession of all the illegal acts in which he participated or of which he has knowledge as a result of his association to an illegal armed group, and will provide information concerning the causes, circumstances, timings, methods and locations of his participation in those acts or of acts that he has knowledge of, in order to ensure victims' right to truth".[42]

According to the National Commission for Reparation and Reconciliation (CNRR) only 5% of the crimes actually committed by the paramilitaries have been confessed.[43] Of the approximately 31,000 paramilitaries who have taken part in demobilisation programmes, 92% submitted themselves to Law 782 of 2002 and Decree 128 of 2003, which did not require any confession of the truth. The remaining 8%, which amount to 2,935 individuals have applied to benefit from Law 975. According to CNRR official figures in 2007, of the 2,935 applicants (*postulados*), 63 had been listed to attend free hearings, 35 actually presented themselves, eight failed to present themselves, three requested to be excluded from Law 975, and 32 had effectively completed a free hearing. Of these 32 only one, *Wilson Salazar Carrascal, alias El Loro*, was the subject of an accusation hearing and formal prosecution, which took place between 16 and 20 April 2007.[44] Those who had participated up to this time confessed to approximately 4,800 crimes, providing a significant amount of information to prosecutors on crimes that up until now had remained unpunished. However, CNRR has indicated that resources for the Prosecutor's Justice and Peace Unit must be significantly increased in order to speed up the process.[45]

With respect to the obligation to give the location of the victims of forced disappearance and contribute to their identification, 1,213 bodies have been unearthed, up until December 2007. Of these, only 3 have been fully identified. This is important yet is a slow beginning for a country that has an estimated

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[42] National Reparation and Reconciliation Commission, *Report to Congress 2007, supra*. n. 6, *at* 67, (author's translation).
[43] *Id*. 42
[44] *Id*. 69.
[45] *Id*.

22,000 cases of this crime. A National Commission for the Search of Disappeared Persons has also established to contribute to this purpose.

Confessions have helped to uncover links between paramilitaries and certain politicians and the Supreme Court of Justice has initiated investigations against politicians. These persons will not receive the benefits of the Law. In what has become known as the "parapolitics" scandal the extensive criminal alliance between political leaders and paramilitaries been brought to light. The fact that Colombian judicial institutions are conducting serious and independent investigations and trials against members of Congress and political leaders demonstrates the strength of Colombian democratic institutions.

Several members of the army are also currently under investigation. In some cases these investigations have been transferred from the military to the ordinary justice system. As with politicians, they are not entitled to the benefits of the Law.

The relationship between paramilitaries and national and multinational companies has also started to be uncovered. A fine of $ 25 million was imposed on Chiquita Brands for financing these groups,[46] and other cases are likely to follow. Colombia's National Reparation and Reconciliation Commission has made a formal request to Prosecutor Peter Keisler in the United States to assign this money for the reparation of victims in Colombia.[47]

a. *Extradition of Paramilitary Leaders on Drug-trafficking Charges*

Since May 2008 fifteen high-ranking paramilitaries have been extradited to the United States under drug trafficking charges in the context of cooperation with the United States in the fight against drug-trafficking. While paramilitary bosses will now face serious prosecution and sentences for some drug trafficking activities, it is feared that plea-bargaining deals may be entered into, whereby reduced sentences will be given in exchange for information on the drugs trade. Victims groups have been distressed about the mass extradition because, even though this takes key paramilitaries out of action, it violates their right to truth, justice and reparation.[48] Victims fear that they will now never know the fate of their relatives who have disappeared given that these notorious crime bosses have no incentives to cooperate with the Government. It is hoped that US authorities will fulfil

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[46] See NY Times, "Victims of Colombian conflict sue Chiquita Brands," 15 November 2007, available at: www.nytimes.com/2007/11/15/business/worldbusiness/15chiquita.html; and Corp-watch, "COLOMBIA: Colombia seeks extradition of 8 people in Chiquita payments to terrorists," available at: www.corpwatch.org/article.php?id=14428.

[47] Reuters, *Colombia pushes US to hand Chiquita fine to victims*, Sept. 19, 2007, www.alertnet.org/thenews/newsdesk/N19349106.htm.

[48] *Movimiento de victimas de crimenes de estado en Colombia* (MOVICE) for instance issued a joint statement co-signed by a large number of civil society organizations, 17 May 2008. See: www.movimientodevictimas.org/node/430.

their duties to investigate the countless allegations against the individuals for serious human rights abuses as well as the links with state officials and corporations. The American ambassador in Colombia has recently announced that three of the fifteen persons extradited have already been sentenced to 17 (two of them) and 30 (one of them) years of prison.

The CNRR has sought to facilitate some assurances for victims' rights in relation to those extradited, stating:

> As far as the National Commission on Reparation and Reconciliation is concerned, it is clear that if evidence exists proving that the paramilitary leaders continue to commit crimes within the frame of the Justice and Peace Law, they should lose their benefits from said law and be subjected to the full extent of ordinary justice and, especially, the recourse of extradition. However, this sanction cannot be applied in detriment of the rights of victims to truth and reparation. Thus, the CNRR demands from the national Colombian Government as well as that of the United States that these rights are not, in any way, sacrificed.
>
> To that end, it is indispensable to employ two strategies simultaneously. Firstly, signing a cooperation agreement between the Justice Department of the United States and the Prosecutor General of Colombia, to insure that the rights of the victims are given a central role in the judicial agenda. The CNRR will review this agreement and exercise oversight for the victims' sake. Secondly, use to the fullest extent the Alien Torts Claims Act for the protection of Colombian victims […].

The extradited warlords have surrendered some US $4.6 million to the Government's Victims' Reparation Fund, however, this is estimated to be only a fraction of the tens of millions that they have accumulated; Chief Prosecutor Mario Iguaran estimates that the unforfeited assets amount to over $200 million. Eduardo Pizarro, director of the National Reparation and Reconciliation Commission has stated that as the properties of these 14 men are expropriated, this should increase the amount available in the fund 10 or 20 fold.[49]

2. *Implementation of the Right to Justice*

As highlighted above, despite all the efforts, the institutional structure for judicial proceedings established by the Law on Peace and Justice has proven to be insufficient given the amount of information and the high number of cases. Nobody expected that paramilitaries confessed such a high number of crimes. The judicial procedures to be carried out by ordinary prosecutors and judges established in the Law on Justice and Peace require a significant increase in resources if they are going to be effective. A group of 23 prosecutors distributed in three cities (Medellín, Bogotá, Barranquilla) were appointed and 8 judges were

[49] AP, "Colombian warlords' victims uneasy about extradition," 14 May 2008.

selected to conduct the investigations and trials. While having the ordinary judicial system responsible for investigations and trials has the benefit of strengthening Colombia's judiciary, not enough investigations and prosecutions are taking place following the "free hearings" established by the Law 975.

Victims have been recognised as having the right to participate in all stages of the judicial processes. While some prosecutors have used radio and local press to publicise the hearings to which victims are invited to attend, and a detailed calendar of hearings is available on the CNRR website,[50] there is still insufficient outreach or sensitisation about the proceedings, and as such, not all victims have exercised their rights and attended the hearings.[51] Nonetheless, over 140,000 claims have been registered and some victims are participating in investigations, providing information and in some cases they have actually questioned paramilitaries during public hearings. Separate rooms have been set up to protect the victims from any retaliation and to reduce the psychological impact of confronting the victimisers. In order to effectively exercise their rights, victims are assisted by a public attorney. A representative from the *Procuraduría General*, a figure similar to an ombudsman, is also able to participate in judicial proceedings in order to guarantee the rights of the victims and the protection of the assets for reparation.

a. *Concerns over Protection of Victims*

One of the main and very serious setbacks of the process has been the lack of effective victims' protection. At least sixteen participating victims have been killed, among them the high profile community leader Yolanda Izquierdo Berrio, who was murdered in January 2007, in the context of free hearing proceedings, where she represented 800 peasants whose land had been violently taken by paramilitaries. She had informed the authorities of threats she had received and had requested protection, but unfortunately none was granted.

The Inter-American Court of Human Rights has repeatedly expressed that victims should be enabled to participate fully in the clarification of the truth, punishment and claiming of fair reparation. In its judgment of May 2007, in the case of the *La Rochela Massacre v. Colombia*, the Inter-American Court ordered the Colombian Government to institute "an effective system of protection for justice officials, witnesses, victims and their families" who take part in the investigations carried out under the Justice and Peace Law.[52]

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[50] See, www.cnrr.org.co.

[51] See FIDH. *Colombia, La desmovilización paramilitary, en los caminos de la Corte Penal International*, October 2007, at 20.

[52] *Case of the Rochela Massacre v. Colombia*, (Merits, Reparations and Costs). Judgment of 11 May 2007, Series C No. 163.

On 28 August 2007, a domestic Court ruling also ordered the Government to provide protection for victims and witnesses participating in the justice and peace proceedings, giving it 30 days to design, implement and execute a Protection Programme for Victims and Witnesses of the Justice and Peace Law.[53]

This situation appears to put the whole process at risk and discourages victims from coming forward to denounce the crimes committed against them. In response, the Government has subsequently created the Victims and Witnesses Protection Programme[54] with an estimated budget of 4 million euros for 2008.

b. *Invisibility of Women in the Peace and Justice Process*

The perception in Colombia has been one where sexual violence crimes have essentially gone unnoticed. On the one hand, impediments to such crimes coming to light include the reluctance of women to speak out for fear of their lives and for fear of stigmatisation. Additionally, violence in territories occupied by armed groups is so routine, that women have expressed a resignation to their victimisation and subjugation which they see as necessary for their survival:

> It happened to me twice: they arrived to the house and appropriated it. The woman of the house had to wash them and cook for them. They sat there watching television because they were the bosses of the household. […] One has to collaborate … everybody gets there, if you have to cook for them, you have to do it; if they take your house, you have to let them […].[55]

On the other hand, there is a corresponding lack of focus by investigators and prosecutors on such crimes. In practice investigations under Law 975 have focussed on crimes that are considered to be "more serious", such as homicide and forced disappearance, to the detriment of other crimes, such as sexual violence.[56]

While there are no precise figures on victimisation against women and crimes of sexual violence in particular, indirect figures from which sexual violence can be inferred reflect widely under reported cases due to fears of speaking out and lack of investigations into such crimes. For instance, the National Institute for Legal Medicine and Forensic Science (*Instituto Nacional de Medicina Legal y Ciencias Forenses*) carried out 18,474 sexual examinations in 2005 allowing individuals to have an independent determination of whether they had been victims of sexual violence. 13,697 of the examinations were for women and of these 4,817 were for girls aged ten to fourteen.[57]

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[53] See CEJIL press release, at www.cejil.org/comunicados.cfm?id=796.
[54] Decree no. 3570 of 18 September 2007.
[55] Grupo de trabajo "Mujer y género", *supra* n. 1 at 51.
[56] *id*. at 50.
[57] *id*. at 109.

While such services exist, one of the difficulties for women victims of sexual violence to materially access justice in the proceedings still remains the requirement of presenting probative evidence. Direct physical evidence is not usually recorded at the time of the commission of the crime and it is feared that simply testimony of women will not be considered sufficient in the process.[58]

Recommendations cited for increasing women's participation and access to reparations include enhanced attention to women through training and gender sensitive selection as well as improvements in security and protection measures. "Free hearings" should always take place in official premises prepared for such events. Premises should include protected areas and be staffed with trained personnel. Officials must be trained and sensitised on working with vulnerable victims and be briefed on their security needs as well as needs for psychosocial protection. There is equally an urgent need for protection programmes to be developed. These would include early warning response systems, monitoring facilities including mapping of areas of increased vulnerability, the use of safe houses and the possibility of relocation able to respond to threats and immediate needs.[59]

3. *Implementation of the Right to Reparation*

Due to the length of the ongoing judicial processes, the reparations phase of proceedings, which is the final phase before sentencing, has not yet been reached in any of the cases. There are already clear signs of the difficulties that will need to be surmounted for victims to benefit from the reparations provisions when cases reach this stage.

A main concern is victims' access and protection in relation to the proceedings. Reparation needs to be claimed individually and expressly by each victim, or can be raised *propio motu* by the Inspector General (*Ministerio Público*) in a given case. The victim has to indicate the reparation that he or she is claiming, bring sufficient evidence of loss or injury, and enter into a conciliation exercise with the offender. If reconciliation is achieved, this is taken into account in the sentencing. It is feared that victims, who are generally vulnerable and belong to groups that suffer from discrimination, will find it very difficult to satisfy the procedural and evidential requirements, fear of reprisals, lack of evidence and confronting their tormenters being significant impediments.

a. *Collective Reparations Programmes and the Role of the NRCC*

In the meantime, the National Commission on Reparation and Reconciliation started working on collective reparations, issuing a strategy document[60] that

[58] *id*. at 67.
[59] *id*. at 96–100.
[60] CNRR, "*Definiciones Estratégicas de la Comisión de Reparación y Reconciliación*," available at: www.cnrr.org.co/new/cd/pdf/Definiciones_estrategicas.pdf.

defines victims[61] and reparations.[62] Both definitions are wide in scope and allow for all forms of reparation in line with international principles. The Commission has also been charged with recommending criteria for judicial reparations and has issued a document to assist judges in their decisions.[63] In particular, they have recommended that reparations be made in close consultation with victims.

In order to enhance dialogue with victims' communities, the Commission has decentralised its activities by creating seven regional offices in order to enhance accessibility.

The NRCC has established two collective reparation programmes, namely an Institutional and a National Reparations Programme. The Institutional Reparations Programme is short-term and aims at assisting specific groups, such as children, women, indigenous people, and afro-Colombians with psychosocial care, being accompanied to free hearings and other such services. The Commission has launched a pilot project in ten communities from which they hope to learn lessons to be replicated on a wider scale. However, according to NRCC statistics of those assisted between September 2006 and March 2008, minority groups are still the least likely to receive assistance. 8% of those assisted were indigenous Colombians and 12% were Afro-Colombians, while the remaining 80% are not from a specific minority group.[64] In terms of assistance in relation to crimes committed, those victimised through homicide or forced displacement received the most attention, while victims of sexual violence only made up 1.8%. The National Reparations Programme, is a longer term project and will take into account other criteria such as the gravity of the crimes and the profiles of the beneficiaries for assigning reparations. It is estimated that its implementation will take between ten and fifteen years.

These two collective programmes are of importance because individual judicial reparations are slow and onerous for victims. Acknowledging the difficulties, the NRCC presented a proposal for administrative reparations, which, as will be discussed below, have now been established in decree 1290 of 2008.

Of the various forms of reparation, restitution has been given special attention by NRCC. Property restitution will be difficult mainly because of the lack of title

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[61] It defines victims as "any person or group of persons, that with the occasion or because of the internal armed conflict, since 1964, has suffered individual or collective injury by acts or omissions that violate the rights established in the Constitution, in International Human Rights Law, in International Humanitarian Law and International Criminal Law, and that are considered a crime in Colombian law".

[62] "Reparation consists in dignifying the victims by measures that will alleviate their suffering, compensate their social, moral and material losses, and restoring their rights".

[63] CNRR, "*Recomendación de Criterios de Reparación y Proporcionalidad Restaurativa*," available at: www.cnrr.org.co/index2008.html.

[64] CNNR, Statistics on victims assisted between September 2006 and March 2008, available at: www.cnrr.org.co/new/cifrasweb.html.

deeds. There is an enormous lag in asset registration and information is dispersed and incomplete. In addition paramilitaries have used front men, usually relatives, to hide the properties they have acquired by illegal means.[65]

Several paramilitaries have promised to hand in assets to the Victim's Reparation Fund. Alias *"Macaco"*, for example has announced assets for an estimated value of 35 million euros, however only around 20 paramilitaries have effectively contributed to the Reparations Fund in most cases with very minor contributions.[66] The State has an enormous challenge ahead with regards to the seizure of assets from the paramilitaries. Although the Law of Justice and Peace foresaw this problem and established Regional Commissions for the Restitution of Assets, these Commissions do not directly restore the assets but are responsible for identifying the legitimate owner of lands or goods and their title deeds, and of protecting such property for future restitution.

With regard to measures of non-repetition the Commission, with the assistance of the Organisation of American States, oversaw the handing of 18,050 paramilitary weapons. On 15 December 2007 the weapons were melted at an ironworks facility in the central province of Boyaca after having been registered in case they were needed as evidence in future investigations. The metal was to be turned into plaques honouring 9,000 civilian victims of the AUC paramilitary group.[67]

b. *Administrative Reparations Established in Decree 1290 of 2008*

In April 2008, decree 1290 was adopted establishing an administrative reparations programme. This has been considered to be a complement to reparations through the Justice and Peace process under Law 975 which is proving to be lengthy and may be unable to satisfy victims' right to reparation in the short term. The administrative reparation programme is said to consist of $4 billion, to be paid out over 10 years by the Social Action branch of the Presidency. The vice President, Francisco Santos, who was behind the plan, has indicated that funds should begin to be distributed immediately to some of the 140,000 victims who have filed claims for loss of property or to their relatives, admitting that the judicial proceedings would still take a long time to complete.[68]

According to Decree 1290, the individual reparations programme will concentrate on violations to the right to life, physical integrity, physical and mental

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[65] Paradoxically, front men may be facing longer sentences than the paramilitaries themselves as they are excluded from the benefits of the Law.

[66] For an up to date list of the assets handed to the Victim's Reparation Fund please see: www.accionsocial.gov.co/contenido/contenido.aspx?catID=455&conID=1667.

[67] ABC News, "Colombia destroys mountain of weapons," 15 December 2007.

[68] LA Times, Blogs, "Suddenly, reparations in Colombia," 26 April 2008, available at: http://latimesblogs.latimes.com/laplaza/2008/04/suddenly-repara.html.

health, individual liberty and sexual liberty. Reparation for other types of crimes will continue under other modalities and procedures.

The Constitutional Court had specified that reparation by perpetrators under Law 975 should include legal as well as illegal assets, and that while handing in legal property was not a condition to eligibility under the Law, both legal and illegal assets could be the object of sentences to be enforced by the State. The Court specifically excluded terms that suggested that reparation awards would be conditional on availability of the assets in order to make the obligation to repair fully all the more clear. It also clarified that the State was responsible for guaranteeing restitution of property and goods, and that budgetary availability of the Victims' Reparation Fund should not be a restriction. Once a reparation award is pronounced, the State is under an obligation to ensure the reparation.

D. *Conclusion*

The 2005 Law on Justice and Peace, with its subsequent amendments and implementing regulations has created a comprehensive legal framework with the aim of achieving peace with illegal armed groups, while at the same time providing a significant degree of accountability for those responsible for serious crimes.

This is an ample and ambitious national effort as it addresses a wide range of aspects of the Colombian transition process, including the rights of victims to justice, truth and reparation. Although it takes into account international experience in the field of transitional justice, it is innovative and to a large extent stricter than many transitional justice processes in terms of judicial remedies it is able to provide.

However, the implementation of the Law has proven to be much more difficult than initially foreseen and has demanded a continuous effort of improvement in a process of learning by doing. In this respect, the constructive criticism of international and non-governmental organizations has been fundamental. Up until now 3,126 members of illegal armed groups have applied to benefit from the reduced sentences that this judicial procedure has to offer, and the proceedings are experiencing serious delays with the consequent perception that impunity may prevail if the lack of resources and capacities are not addressed properly and in a timely manner. The National Government has promised an estimated 27 million euros for 2008 for the creation of 230 new posts for prosecutors and 800 new posts for criminal experts. It is yet too early to evaluate the results of this decision.

The peace process as a whole together with the strengthening of Colombia's civil and military institutions have made possible a very significant reduction in the levels of violence in the country. Homicide rates have gone from 23,500 in

2003 to 17,189 in 2007. Kidnappings have dropped from 1,257 in 2003 to 226 in 2007. The homicide rate in Bogotá, Colombia's capital city, for example is currently at 18 per 100.000 inhabitants, a relatively low figure when compared with cities like Caracas (87), Rio de Janeiro (53) or Washington (34). The levels of violence are still high but there is a sustained tendency of improvement.

The efforts undertaken by the Colombia State have no antecedents in the world. It is perhaps the most complete and demanding legal framework for providing both truth and justice as well as still giving armed groups incentives to disarm and reintegrate as compared to other transitional justice efforts worldwide. It has been, therefore, a process of learning by doing, where mistakes are common and rapid and adequate corrections are necessary. This *"Colombian Experience"* of transitional justice, although far from perfect, may well serve as an example in other countries of how to address the challenges posed by societies seeking reconciliation and, in particular, how to recognise the rights of victims to truth, justice and reparation.

Policy Challenges for Property Restitution in Transition – the Example of Iraq

Peter Van der Auweraert *

A. *Introduction*

There are many ways in which violent conflict or authoritarian regimes can be the source of significant alternations in land and property relations amongst the affected populations. Conflicts often cause mass displacement and the abandonment of homes, land and business which may subsequently be taken over by others.[1] Iraq is maybe the most prominent recent example where sectarian strife and violence have led to the flight of hundreds of thousands of people.[2] As was the case in the "ethnic-cleansing" campaigns during the war in the former-Yugoslavia,[3] some of this displacement has been caused through deliberate violence aimed at creating homogenous areas in places where once multiple communities lived side by side.[4] Disputes over land and property are also frequently amongst the root causes of especially internal conflict. This is the case for example in Darfur, where the conflict finds its origins in a competition between different communities over farming and grazing land.[5] In authoritarian regime contexts, land and property rights will often become political commodities that

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[1] For a summary overview of housing, land and property rights challenges in post-conflict environments, see e.g. Scott Leckie, *Housing, Land and Property Rights in Post-Conflict Societies: Proposals for a New United Nations Institutional and Policy Framework* (UNHCR, Geneva, 2005), at 11–14.

[2] A recent overview of the displacement situation can be found in International Organisation for Migration (IOM), *Iraq Displacement. 2007 Year in Review* (Amman, IOM, January 2008), 7.

[3] See, for example, Noel Malcolm, *Bosnia. A Short History* (London, Macmillan, 1994), 213–252.

[4] On sectarian cleansing in Baghdad and its consequences see, for example, International Crisis Group, *Iraq's Civil War, the Sadrists and the Surge* (Brussels, International Crisis Group, 7 February 2008), 7.

[5] See e.g. Molly Miller, "The Crisis in Darfur", *Mediterranean Quarterly* (Vol. 18, 2007), 112–130.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 459–482.

are instrumentalised for maintaining or expanding political power. This was certainly the case in Iraq during the Baath Party reign, as will become clear later in the chapter. The denial or limitation of access to land and property rights can also be used as a tool in pursuit of racial or sectarian state policies, as was for example the case in South-Africa during the Apartheid era.[6] Finally, authoritarian regimes can also engage in large-scale expropriations on the basis of ideological considerations. The struggle over property restitution in the formerly communist countries of Eastern Europe is still recent and, at this very moment, many Cuban exiles are undoubtedly awaiting the fall of the current regime to reclaim the properties they lost through communist nationalisation.[7]

What all these situations have in common is that successful, durable transitions will require that policy makers find ways to address the aftermath of the alterations of land and property relations that were unjust, illegal or a violation of the rights of for example refugees and displaced persons. While the political urgency with which land and property rights issues should be addressed will vary from context to context, past experience has shown that where tensions, conflicts or significant injustices in respect of land and property rights exist, their exclusion from post-conflict or post-authoritarian regime transition arrangements seldom turn out to be a good strategy.[8] This chapter will look at post-Baath Party Iraq where a significant attempt is being made to address a long legacy of forced displacement and the forcible acquisition of land and property by the former regime and touch upon some of the key issues that policy makers are likely to face when they try to address land and property rights issues in transitional contexts.

B. *Land and Property During the Baath Party Era*[9] *– a Brief Backgrounder*

Land and property and especially the unequal distribution of agricultural land played an important role in the 1958 Revolution in Iraq which paved the way for the Baath Party's eventual rise to power. A contemporary observer wrote that

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[6] On the attempts to deal with the aftermath of these policies, see, for example, Lionel Cliffe, "Land Reform in South Africa", *Review of African Political Economy*, Vol. 27, 2000, 273–286.

[7] E.g., Douglas Harper, "Restitution of Property in Cuba: Lessons Learned from Eastern Europe" in Association for the Study of the Cuban Economy (ed.), *Cuba in Transition* (Florida, ASCE, 1999, Vol. 9), 409–424.

[8] One example is East-Timor, where the failure of the UN-administration and subsequent national governments to address simmering land and property rights conflicts is generally seen as one of conflict drivers for the 2006 violence. See, for example, Cynthia Brady and David Timberman, *The Crisis in Timor-Leste: Causes, Consequences and Options for Conflict Management and Migration* (Dili, USAID Timor-Leste, 2006), at 20.

[9] Historically, it is not entirely correct to present the era of the Baath Party rule as one unified whole: the ascension to power of Saddam Hussein – who became President of Iraq in 1979 – in

those with some knowledge of recent Iraqi history would not fail to recognise that the Revolution and the overthrow of the Iraqi monarchy was "but the most serious of a series of unrests and uprisings largely attributable (in addition to other political factors) to the prevailing old land tenure and inequitable ownership and income".[10] According to one country study, at the time two thirds of all cultivated land was concentrated in a mere two percent of the land holdings, with sixty-eight percent of the holdings covering less than ten percent of the cultivated land.[11] The political importance of the land distribution issue was such that it took the first revolutionary government just over three months to pass a land reform law. This law envisaged to drastically change the pattern of land holdings in Iraq through a state-run programme of large-scale expropriation and redistribution of arable land.[12] After the Baath Party seized power in July 1968,[13] it initially continued a programme of land reform, further tightening the land reform legislation and pursuing a large-scale nationalisation of land throughout the 1970s in a drive to modernise Iraqi agriculture.[14] Land and property would, however, also quickly become one of the key tools of the regime to consolidate and expand its hold over Iraq.

From as early as 1970, a pattern started to emerge whereby individuals, families, tribes, religious organizations and whole communities saw their properties confiscated by the Iraqi state with little or no compensation as soon as the Baath Party regime perceived them as a threat to its reign over Iraq or considered that their continued presence in certain areas of the country was against its interests.[15] Especially Iraqis of Assyrian, Turkmen, Kurdish and Shiite origin often formed the target of those policies.[16] In addition to the forcible taking of property, the Baath

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many ways initiated a new period in Iraq (for more background see e.g. Thabit Abdullah, *Dictatorship, Imperialism and Chaos: Iraqi since 1989* (London/New York, Zen Books, 2006, 18–38). Forced displacement and land and property rights violations, however, occurred throughout the whole time the Baath Party ruled Iraq, hence the use of "Baath Party era" and "Baath Party regime" throughout this chapter.

[10] Rasool Hashimi and Alfred Edwards, "Land Reform in Iraq: Economic and Social Consequences", *Land Economics* (Vol. 37, 1961), 75. Of course, the question of land reform was but one, be it very important, issue that led to the revolution (see Thabit Abdullah, *supra* n. 9, 18–21).

[11] Helen Metz, *Iraq, a Country Study* (Washington, Library of Congress, 1988), at 149.

[12] Helen Metz, *ibid.*, at 150. See also Warren Adams, "Reflections on Land Reform Experience in Iraq", *Land Economics* (Vol. 39, 1963), 199–203.

[13] The BBC News website contains a summary, but useful timeline of Iraqi history since it was placed under British mandate in 1920 until the present day. Available at: http://news.bbc.co.uk/2/hi/middle_east/737483.stm.

[14] United Nations/World Bank Join Iraq Needs Assessment, *Housing and Urban Management* (Washington, World Bank, October 2003), at 6.

[15] For a more extensive overview, see David Romano, "Whose House is this Anyway? IDP and Refugee Return in Post-Saddam Iraq", *Journal of Refugee Studies* (Vol. 18, 2005), esp. 431–435.

[16] Also the few remaining Iraqi Jews were targeted in the early period of the Baath Party reign – the vast majority of the at one stage almost 120,000 strong Iraqi Jewish community had, however,

Party regime also resorted to the whole-scale destruction of property as a way to punish communities for their resistance or opposition. Notorious examples include the razing of Kurdish villages and the destruction of livestock in Northern Iraq during the so-called Anfal Campaign[17] and the draining of marshes and the destruction of Marsh Arab villages in Southern Iraq in retaliation for the 1991 uprising.[18] Orders to expropriate or seize property were almost invariably given by the Revolutionary Command Council which was the most important decision-making body within the Iraqi state throughout the Baath Party era, holding both legislative and executive powers.[19] Typically, its decisions would list the targeted properties, order their expropriation and subsequent allocation to a specified Iraqi state authority and instruct this authority to sell or transfer the properties in accordance with the decision.[20]

This taking and destruction of property often took place within the frame of policies aimed at forcibly transferring parts of the population from one part of Iraq to another or expulsing them from the country altogether as happened with thousands of Shiite families during the Iraq-Iran war in the 1980s.[21] One example is the so-called "Arabisation policy" which was designed to ensure the regime's control over the Kirkuk region's oil fields and arable land through the replacement of Assyrian, Kurdish and Turkmen Iraqis with Arab Iraqis from other parts of the country.[22] Tens of thousands of Iraqis were forced from their homes and land in pursuit of this "Arabisation" of the Kirkuk area.[23] Expropriations also occurred out of materialistic considerations, as under the prevailing economic

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already fled the country by the time the Baath Party came to power in 1968. See e.g. Thabit Abdullah, *supra* n. 9, at 33 and Nissim Rejwan, *The Last Jews in Baghdad: Remembering a Lost Homeland* (Austin, University of Texas Press, 2004), at 272.

[17] Human Rights Watch, *Iraq's Crime of Genocide: the Anfal Campaign against the Kurds* (New York, Human Rights Watch, 2003).

[18] Human Rights Watch, *The Iraqi Government Assault on the Marsh Arabs* (New York, Human Rights Watch, 2003).

[19] Article 42 of the 1970 Interim Constitution of Iraq provided that the RCC can exercise the following competencies: (a) issuing statutes and decrees having the force of law and (2) issuing decisions indispensable for applying the rules of the enacted laws.

[20] E.g. RCC Decision No. 480 of 17 April 1979 which orders the expropriation of lots of agricultural land in the Kirkuk area and their transfer to the Kirkuk municipality which is instructed to distribute them to the indicated beneficiaries. Similarly, RCC Decision No. 1102 of 13 July 1980 orders the expropriation of lands in Dahuk and their subsequent allocation to the Dahuk Municipality. Many more examples could be given (RCC Decisions on file with the author).

[21] See e.g. Thabit Abdullah, *supra* n. 9, at 33 who quotes a regime spokesman at the time as saying that "deportation procedures apply to any Iranian family whose loyalty to the home land and revolution is not proven even if it has Iraqi nationality".

[22] John Fawcett and Victor Tanner, *The Internally Displaced People of Iraq* (Washington, The Brookings Institution, 2003), at 11.

[23] For an estimation of the number of people displaced in the frame of the Arabisation campaign, see the discussion in John Fawcett and Victor Tanner, *id*, at 16.

regime the powerful "were free to expropriate any land or business they found desirable".[24] Finally, it is important to underline that land and property rights violations seldom occurred in isolation. They were part of a much wider pattern of serious human rights abuses including mass killings, assassinations, forced disappearances and torture of those targeted by the regime. The Anfal campaign, for example, involved the destruction and confiscation of Kurdish properties but also the use of chemical weapons against the Kurdish civilian population.[25]

These types of policies together with the brutal and oppressive nature of the regime resulted in the forced displacement of hundreds of thousands of Iraqis throughout the Baathist era. According to US Committee for Refugees estimates, Iraq had, before the US-led invasion of the country in 2003, more than one million internally displaced persons and between one and two million refugees living all around the world.[26] The exact number of Iraqis whose property was destroyed or taken away from them during the Baath Party rule remains unknown up until today. The fact, however, that the Commission for the Resolution of Real Property Disputes (CRRPD) has so far received more than 150,000 property claims from inside Iraq alone, gives some indication as to the scope and seriousness of the land and property rights violations that occurred during the Baath Party era.[27]

C. *Towards the Establishment of the Commission for the Resolution of Real Property Disputes*

In the run-up to the war in Iraq, observers predicted that the overthrow of the Baath Party regime would trigger a large-scale return movement that, unless it was properly managed, had the potential to cause serious social and political unrest. Human Rights Watch, for example, argued that the intervening military force would need to be prepared to deal with a humanitarian crisis as "internally displaced people will seek to return to the homes from which they were forcibly expelled by the Iraqi government".[28] The organization warned that "in the absence of an orderly mechanism for the gradual return of the internally

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[24] Sami Zubaida, "Democracy, Iraq and the Middle East", *Open Democracy* (18 November 2005). This article can be retrieved from www.opendemocracy.net.

[25] See Human Rights Watch, *supra* n. 17, at 22.

[26] US Committee for Refugees, *World Refugee Survey of 2003* (Washington, US Committee for Refugees, 2003), at 162.

[27] The CRRPD Statute determines that individuals residing outside Iraq can submit their claims through the Iraqi Embassies or CRRPD branches opened for that purpose in their current country of residence (Art. 30, CRRPD Statute). So far very few Iraqis living outside Iraq have filed a claim.

[28] Human Rights Watch *Iraq: Forcible Expulsion of Ethnic Minorities*, 2003, at 2–3.

displaced, the likelihood of inter-ethnic violence erupting as individual families seek to re-establish claims to property and assets [would be] very high".[29] Especially Kirkuk and the area surrounding it were seen as particular flashpoints in this respect. In light of its strategic importance, its multi-community make-up and the past Arabisation policies many feared that "Kurdish returnees would violently force out Arab residents and settlers, Kurd and Turkmen returnees would fight over the control of Kirkuk or the army of nearby Turkey would intervene on behalf of the Turkmen".[30]

Shortly after the regime fell in April 2003 those predictions proved to have been accurate: thousands of internally displaced persons and (to a lesser extent) refugees did indeed start to return to their general areas of origin. Many ended up living in temporary accommodation in public buildings and tents, unable to re-possess their earlier properties as they were now occupied by others.[31] Reports from Kirkuk soon talked about Arab settlers fleeing their homes out of fear for what was to come or forced out of their homes by returnees and Kurdish armed groups.[32] From its part, the US Administration announced its full intention to help reversing the Arabisation of the Kirkuk area. The first US Administrator of Iraq, Jay Garner, promised the establishment of a Bosnia-style property commission to resolve disputes between Arabs, Kurds and Turkmen, "arbitrate what is just and fair", and reverse "years of ethnic cleansing" of Kurds and other minorities.[33] In the meantime, the newly displaced, comprised of persons who had returned to the South of Iraq often ended up living in temporary accommodation, as they had given up their homes in their native regions when they moved to the North, often years if not decades earlier.[34]

One of the very first regulations issued by Paul Bremer -the successor of Jay Garner- in his capacity as the Administrator of the Coalition Provisional Authority (CPA) addressed return-related land and property rights conflicts. CPA Regulation

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[29] *Id*.

[30] David Romano, "Displaced Iraqis – Caught in the Maelstrom", *Forced Migration Review* (Vol. 22, 2005), 48. See also Human Rights Watch, *Iraq: Impending Ethnic Violence in Kirkuk* (New York, Human Rights Watch, 28 March 2003).

[31] David Romano, *supra* n. 15, at 435. Estimates of the International Organisation for Migration (IOM) and the UNHCR put the number of returnees at more than 500,000 as of April, 2006. For an overview of the different figures see the website of the Internal Displacement Monitoring Centre at www.internal-displacement.org/idmc.

[32] See e.g., Human Rights Watch, *Claims in Conflict. Reversing Ethnic Cleansing in Northern Iraq* (New York, Human Rights Watch, 2004) and also International Organisation for Migration, *Phase II IDP Monitoring Report, October–December 200, Tameem/Kirkuk* (IOM-Iraq, Amman, January 2006), 1.

[33] Michael Howard, "US advances Bosnian solution to ethnic cleansing in Iraq", *The Guardian*, 24 April 2003, available at: www.guardian.co.uk/international/story/0,,942302,00.html.

[34] David Romano, *supra* n. 15, at 436.

4 issued on 26 June 2003, established the Iraqi Property Reconciliation Facility (IPRF) for the purpose of "collecting real property claims and promptly resolving such claims on a voluntary basis in a fair and judicious manner".[35] The Regulation's Preamble refers to the Baath Party policies of forced displacement and how the fact that many individuals have conflicting claims to the same properties is now "resulting in instability and occasional violence". It expresses the hope that some of these claims may be "amendable to voluntary reconciliation immediately" and indicates that the IPRF is intended to be an interim measure pending "the establishment of a means to finally resolve property-related claims by a future Iraqi government".[36] The Regulation is sparse on the details of how the IPRF was intended to go about implementing its mandate or about what was understood by "voluntary reconciliation" as a way to resolve property claims in this context. In the end, however, the IPRF never became operational. The CPA lacked the staff and the capacity to start the IPRF, and the International Organization for Migration, to which the IPRF had turned for support, soon had to withdraw its international staff together with the UN agencies following the deadly bombing of the UN office in Baghdad in August 2003.

CPA Regulation 4 was subsequently replaced by CPA Regulation 8 of 14 January 2004 whereby the CPA authorised the Iraq Interim Governing Council to establish the Iraq Property Claims Commission (IPCC) as the successor body to the IPRF.[37] The IPCC Statute contained in Regulation 8 was the outcome of protracted negotiations between the CPA and the Interim Governing Council. It abandoned voluntary reconciliation as the sole manner to resolve property claims and instead mandated the IPCC to adjudicate such claims itself, merely providing that the IPCC would "encourage voluntary resolution of the claims".[38] Soon after CPA Regulation 8 was issued, the IPCC opened its National Secretariat office in Baghdad and commenced working on the establishment of regional offices throughout Iraq. By July 2004, the IPCC had received over 6000 claims through twenty-two regional offices established in ten governorates.[39] CPA Regulation 8 was eventually superseded by CPA Regulation 12, issued a few days before the CPA handed over governing authority to the Iraqi Interim Government

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[35] Section 1.1., CPA Regulation 4, 26 June 2003. All CPA Regulations can be retrieved from the former CPA website at www.cpa-iraq.org.

[36] *Id*.

[37] Section 1, CPA Regulation 8, 14 January 2004.

[38] Appendix A, CPA Regulation 8, 14 January 2004.

[39] *Administrator's Weekly Report: Governance 19–28 June 2004* (Baghdad, CPA, 2004). By June, the IPCC had operating offices in Duhol, Mosul, Arbil, Sulaimaniyya, Tuz, Tikrit, Kanaqin, Baquiba, al-Hilla and Basra in addition to three offices in Baghdad an a main office with five satellite and two mobile offices in Kirkuk CPA (*Administrator's Weekly Report: Governance 29 May – June 2004* (Baghdad, CPA, 2004). The Administrator's Weekly Reports remain available at the former CPA website: www.cpa-iraq.org.

of Prime Minister Ayad Allawi. Regulation 12 amended the IPCC Statute in recognition of the fact that Regulation 8 had not provided "adequate mechanisms for the appointment, management and operation of the IPCC" and contained quite detailed "instructions for operation" that set out the rules for the various stages of the claims process.[40] In early 2006, however, the Transitional National Assembly voted to revoke CPA Regulation 12 and replace the IPCC with a new body called the Commission for the Resolution of Real Property Disputes (CRRPD).[41]

According to the Preamble of the CRRPD Statute, the principal motivation to replace CPA Regulation 12 was to bring the property claims resolution mechanism more in line with Iraqi law and to address some of the shortcomings of the IPCC Statute.[42] Undoubtedly, however, there also was a strong desire to "Iraqize" and thereby legitimise the sensitive process of adjudicating Baath Party era property claims by giving it the formal stamp of approval of the Iraqi parliament. The fact that a considerable number of Iraqi parliamentarians themselves had been victims of forcible property takings by the former regime probably further underscored the feeling that the Iraqi parliament should act in this area. While the CRRPD essentially has the same mandate as the IPCC, the Transitional National Assembly did introduce a number of important changes compared to CPA Regulation 12. They include new rules on the valuation of property and compensation of the current occupiers[43] of the disputed properties, a different composition of the Judicial Committees reviewing and deciding the property claims and the introduction of explicit references to Iraqi civil procedure law as well as Sharia law.[44] Operationally the CRRPD simply took over the IPCC infrastructure and staff. Claimants who had already filed a claim with the IPCC were not required to resubmit their claims as all claims pending before the IPCC were simply taken over by the CRRPD. However, an estimated 9000 decisions already taken by the IPCC had to be re-reviewed in view of the new valuation and compensation rules introduced by the CRRPD Statute.[45] Like the IPCC, the CRRPD remained a national commission with exclusively Iraqi staff and judges.

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[40] Preamble, CPA Regulation 12, 24 June 2004.

[41] Statute of the Commission for the Resolution of Real Property Disputes, 9 January 2006, published in the Al-Waqi Al-Iraqyia Gazette No. 4018, issued on 6 March 2006 (hereafter "CRRPD Statute").

[42] See e.g., the Preamble to the CRRPD Statute.

[43] While this chapter will use the term "current occupier" throughout, the term "current right holder" could have been used as well. Most cases before the IPCC/CCRPD involve "current occupiers" who have formal legal rights to the properties they are now occupying.

[44] Regarding Sharia law, the CRRPD Statute foresees that the Cassation Commission (which is the appeals body of the CRRPD) shall, upon request of one or more of the parties refer to experts on the Sharia law and follow their opinions (Article 38, CRRPF Statute). In practise, this Article appears to be rarely used.

[45] This figure is a CRRPD estimate.

D. *Property Restitution and the Impact of Time*

The basic policy approach that was adopted to deal with the aftermath of forced displacement and property takings in Iraq was very similar to what was done in Bosnia.[46] It includes a focus on the right to return and the restitution of property and the establishment of a special-purpose commission to adjudicate competing property claims. Like in Bosnia, the fundamental principle underlying the commission's mandate is that returnees with a "genuine" claim to the property will, if they want, obtain the restitution of that property, independent of the wishes, status or situation of the current occupier.[47] One important distinction between Iraq and Bosnia, however, is the timeframe within which forced displacement and property takings occurred.

In Bosnia this timeframe was very short: it saw half of its population displaced in a war that lasted from 1992 to 1995.[48] In Iraq, forced displacement and property takings started a few years after the Baath Party's ascent to power in July 1968 and continued more or less unabated for over three decades until the fall of the regime in April 2003.[49] By the time the main national restitution laws were passed in Bosnia in 1998, the longest war refugees or victims of ethnic cleansing had been away from their properties was six years. When the IPCC finally started operating in mid-2004 it was facing restitution claims relating to events which took place anywhere between thirty six to one or two years earlier. One consequence of this much longer timeframe is that the land and property picture in Iraq is even more complicated than it was in Bosnia. The fact that much more time lapsed between the restitution effort and the original displacement means that many more properties have changed hands multiple times through sale; lease; inheritance; or a combination of those at the time the

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[46] On the approach in Bosnia, see, for example Rhodri Williams, "Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice", *New York University Journal of International Law and Politics* (Vol. 37, 2006).

[47] This is reflected in the CRRPD Statute which in most cases provides the original rights holder with the option to choose either restitution or compensation – if the claimant opts for restitution and has a valid claim, the property will be returned, independent of the wishes of the current occupier (Art. 6, CRRPD Statute).

[48] Rhodri Williams, *supra* n. 46, at 442. The structures put in place as part of the Dayton Peace Agreement focused exclusively on restoring property rights to the pre-war (1992) situation. They did not purport to deal with the process of nationalisation of private property that took place in the former Yugoslavia after the Second World War. Had they done so, their challenge would have been closer in nature and scope to that of the CRRPD than is now the case.

[49] As indicated earlier, forced displacement started before the Baath Party regime and also continues today, when an estimated four million Iraqis have fled the sectarian violence and general breakdown of the state in many areas. On post-2003 internal displacement, see, for example, International Organisation for Migration (IOM), *Iraq Displacement 2007 Year in Review* (IOM-Iraq, Amman, January 2008), 7.

restitution claim needs to be reviewed and decided. It also means that a far greater proportion of the properties in question have been significantly altered since the dispossession took place or simply no longer exist in any real sense of the word. This much more complicated land and property picture in Iraq has a number of significant implications for the ongoing restitution effort.

For one, it makes the restitution process far more cumbersome and time consuming. While property restitution after large-scale displacement is always complex, it requires a truly Herculean effort in a context where displacement and land and property rights violations continued over decades. In Iraq, current indications are that it will take the CRRPD many more years, if not decades to finalise its current claim load of 150,000 plus claims, and this without any future substantial increase in claims e.g. from the many Iraqis who left Iraq during the Baath Party era.[50] The fact that the finalisation of the restitution process in Iraqi may take decades to complete does, in and by itself, of course not plead against the fact that such process was undertaken in the first place. It does, however, raise serious doubts whether such a process, in Iraq or other countries in a similar situation, can indeed "contain" a large-scale return movement and prevent return-related land and property conflicts from breaking out. At least in Iraq, the timeframe of the CRRPD process simply does not match with the timeframe of the returnees, many of whom had already returned by the time the IPCC finally became operational. While some of this may be context-specific, it is difficult to imagine a situation whereby displaced persons would be willing to wait for years or decades to return after the conflict or the authoritarian regime that caused their displacement has come to an end simply to allow time for their property claims to be settled. While, as the chapter will argue later, neither the nature of the CRRPD process nor, obviously, the continued violence and strife in post-Baath Party Iraq has helped to speed-up the claims process, it is doubtful whether, given the complexities involved, this basic problem could have been resolved simply through designing a better formal legal process.

Another consequence of the protracted nature of forced displacement in Iraq is that the issue of "secondary occupancy"– i.e. the issue of what to do with those that are currently living or using the properties that the displaced want back – raises a number of significant social, political and even philosophical challenges. To start with the latter: few will argue against a process that compels those who used their positions of power and prominence in Baath Party Iraq to get their hands on their current homes or businesses to now return those properties to the

[50] It remains unclear to what extent the post-2003 security situation has hindered or prevented victims from filing a claim with the CRRPD. It may be that when stability returns to Iraq, the number of claimants from inside Iraq would increase further. On property claims of Iraqis living outside Iraq, see *supra* n. 27.

victims of forced displacement and property takings, independent from how long ago the violations occurred. It becomes more complicated, however, when such process affects also ordinary citizens who had neither responsibility nor influence on the earlier displacement process and some of whom may well have had little choice but to move into the properties where they are now currently residing. Many may simply be ordinary and poor Iraqis who seized an opportunity to improve their lives, like the so-called "10,000 Dinar Arabs".[51] To compel those type of people to leave their homes of maybe twenty or thirty years so that they can be restituted to their original owners is not so easy to justify. At the very least, the state should ensure that they will have access to alternative accommodation, as they will often no longer have a place to return to. Paying compensation – as is foreseen under the CRRPD Statute – may not always be sufficient in a context like, for example, Iraq where a severe and chronic housing shortage exists.[52] Finally, the political complexities of ensuring that a restitution process that will affect tens of thousands of people does not derail the peace process or the reconstruction of a new political order are likely to be even greater in protracted displacement contexts, as both returnees and the current occupiers will in the end need to be satisfied that the restitution process was fair or, at least, acceptable. Otherwise the restitution process risks, just like the forced displacement before it, to create a new set of grudges that, one day, may again be the source of violence and conflict.

E. *Property Restitution and the Need for a Holistic Approach*

In Bosnia, the decision that the refugees and the internally displaced should be allowed to return and have their properties restituted to them was part of a commitment to the protection of the rights of the displaced that all warring parties had agreed to, however grudgingly, in the Dayton Peace Agreement.[53] While it was true that the international community pushed hard to get these provisions included, it still remains that they were the outcome of a political

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[51] Those, not so respectfully, called "10,000 Dinar Arabs" are Arab Iraqis who moved from the South and the Centre of Iraq to the North in the frame of a 10,000 Dinar incentive programme of the then Iraqi Government (see e.g. David Romano, *supra* n. 30, at 49).

[52] A housing needs assessment carried out by the World Bank and the UN in September 2003 found that "Iraq presently is experiencing a housing sector shortage of between 1.0 to 1.5 million units, a magnitude that by international standards constitutes "Crisis Level" (United Nations Development Group/World Bank, *Housing and Urban Management Sector Report* (Baghdad, World Bank/United Nations, 10 September 2003), at 9. This report can be retrieved from www.unhabitat.org.

[53] Art. VII, General Framework Agreement for Peace in Bosnia Herzegovina, 14 December 1995, *International Legal Materials* (Vo. 35, 1995), at 67.

process involving all warring parties and that they formed part of a larger framework of provisions and measures to achieve a durable peace in Bosnia contained in the Dayton Peace Agreement. In Iraq, however, property restitution to those displaced by the former regime was approached in isolation. The IPCC and the CRRPD are not the outcome of a larger political agreement between the different political parties and movements about how to construct a new Iraq, nor are they part of a holistic approach of how to deal with a legacy of massive human rights violations committed by the former regime. This situation presents a number of potentially serious drawbacks especially when looked at from a wider transitional justice angle.[54]

One issue is the increased risk of an unequal treatment of victims. While the Iraqi High Tribunal continues to carry out its controversial criminal process of punishing senior Baath Party leaders,[55] until today no reparations have been forthcoming for victims of other serious human rights violations committed by the former regime. The Martyrs and Political Prisoner Foundations have been formally established by law, but neither has so far started to fully operate or yielded any substantive benefits for the victims in question.[56] Despite the fact that the land and property rights violations under the Baath Party regime clearly formed part of a much larger pattern of massive human rights violations, the reality is that only victims of the former violations have so far had access to systematic redress. Another issue is that the fact that the CRRPD works outside an overall framework for addressing a legacy of oppression and human rights violations by the former regime diminishes the incentive for external coherence between the CRRPD and other government policies. One concrete example in this respect is the practice of the Ministry of Finance to routinely appeal all CRRPD decisions in which the Iraqi state stands to lose, i.e. either because it has to return a property to its original owner or because it has to pay compensation to the claimant or the current occupier as the case may be. The objective that the

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[54] On the link between reparations and transitional justice generally, see Pablo De Greiff (Ed), *The Handbook of Reparations* (Oxford, Oxford University Press, 2006), at 1020.

[55] See, for example, Human Rights Watch, *The Former Iraqi Government on Trial* (New York, Human Rights Watch, 2005), at 20.

[56] There have been a number of reparations initiatives that, however, never came to fruition. Administrator Paul Bremer announced back in May 2004 that a Victims Compensation Commission would be established to compensate "Saddam's victims" (see: www.cpa-iraq.org/transcripts/20040526_bremer_compensation.html). The Fund, however, never started operating. Also the Iraqi Constitution that was adopted by referendum on 15 October 2005 provides that "the State guarantees care for political prisoners and victims of the oppressive practices of the defunct dictatorial regime" and that "the State guarantees compensation to the families of martyrs and those injured due to terrorist acts". Today, the issue of compensation to victims of Saddam Hussein continues to be discussed in the Iraqi Parliament without, however, any

Ministry pursues with this practice, i.e. the protection of the state finances and interest, is of course perfectly legitimate and desirable when it comes to an ordinary litigation involving the state. But the systematic opposition of one state organ, the Ministry of Finance, to decisions taken by another state organ, the CRRPD, in favour of the victims of earlier land and property rights violations which has as its main purpose redressing wrongs committed by the state in the past, sends a rather diffuse message about the state's current views on its past behaviour, to say the least.[57] It also significantly delays remedies for the victims and dramatically increases the workload of an already largely overstretched system. If the CRRPD would have been an integral part of an overall transitional justice policy that would have been perceived by the whole government – and ideally also (part of) the opposition- as an exceptional effort by the Iraqi state as a whole in favour of the victims of the past regime such contradictory practices may have been easier to avoid.

A final concern with an isolated approach to land and property rights violations has to do with the allocation of state resources. The overall resources a state has available for transitional justice will not be unlimited, as transitional justice will always have to compete with other pressing needs and priorities especially in transitional contexts where as a rule, needs are high and resources are low. If the political decision about how to address land and property rights violations is made in isolation from the larger question of redress for all victims of a former regime, the risk is that overgenerous provisions of the partial effort will consume so many resources that there remains very little financial or political space for reparations efforts in respect of other, equally deserving categories of victims. This is a real concern also in Iraq as, as will be explained in more detail later, the Iraqi state will be liable to pay compensation equivalent to the present day value of the property to either the victim or the current occupant in what risks to be a significant proportion of its cases.[58] How this will work out once the Iraqi state starts seriously considering redress for other victims of the Baath Party regime – not to mention the victims of the post-2003 violence and displacement – remains to be seen.

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immediate, concrete implementation activity. See e.g. the debate in the Parliamentary session of 21 January 2008 around the first reading of the General Amnesty Draft Law. The transcripts can be retrieved (in Arabic) from www.parliament.iq.

[57] Other ways would be available to verify that no financial irregularities occur such as, for example, regular sample audits of past decisions by the CRRPD Secretariat or an independent outside body.

[58] To date, out of 41,906 decisions taken by the IPCC/CRRPD, close to 35,000 have been against the state (meaning that the liability of the state is engaged in one way or another) (CRRPD, *Weekly Statistics for the Period of 08.02.2008-14.02.2008*) (document on file with the author).

F. *The Mandate and Remedies Provided by the CRRPD*

1. *The Mandate of the CRRPD*

The CRRPD is competent to rule on claims related to three types of land and property rights violations: the confiscation or seizure of property for "political, religious or ethnic reasons" or in relation to "ethnic, sectarian or nationalistic" displacement;[59] (2) the appropriation or seizure of property "without consideration, with manifest injustice or in violation of the application legal rules";[60] and (3) state property allocated without consideration to members of the previous regime.[61] It is not necessary that victims of the property rights violation had full ownership rights to obtain redress from the CRRPD, as the CRRPD mandate also covers the violation of various types of usage rights.[62] This is especially important in rural areas where a proportion of the agricultural land is owned by the Iraqi state with the farmers having extensive, long-term usage rights that are transferable and registered as such with the relevant property registration office. As already indicated earlier, the CRRPD mandate does not cover the destruction of property per se. Nor does it cover compensation for property that was not expropriated but damaged or for the loss of income due to the inability of the displaced to exercise their property rights during their period of displacement.[63] The temporal jurisdiction of the CRRPD is limited to claims that relate to land and property rights violations that took place in the period between 17 July 1968 and 9 April 2003, i.e. the period between the date on which the Baath Party came to power and the moment Baghdad fell to the US-led invasion forces.[64] For claims that fall within its mandate, the CRRPD has exclusive jurisdiction and the courts and tribunals are instructed to transfer any such claims pending before them to the CRRPD.[65]

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[59] Art. 4, I, CRRPD Statute.

[60] Art. 4, II, CRRPD Statute.

[61] Art. 4, III, CRRPD Statute.

[62] See, for example, the Cassation Commission Advisory Opinion 52/2005 of 6 April 2005 which holds that "the provisions that govern expropriation of the right of usage are not different from those that govern expropriation of ownership rights" and the "holder can obtain either restitution of those rights or compensation in accordance with the Statute" (unofficial translation by IOM, Advisory Opinion on file with the author).

[63] An example of law where such loss of income is compensation is Law 5233 in Turkey which establishes a compensation programme for IDPs (Law 5233 on the Compensation of Damages that Occurred Due to Terror and the Fight Against Terror of 17 July 2004, *Turkish Official Gazette*, 27 July 2004).

[64] Article 37 of the CRRPD statute refers to the establishment of special committees within the CRRPD to deal with property rights violations that took place in the period between 14 July 1958 and 16 July 1968, i.e. the period between the overthrow of the Iraqi monarchy installed under the British mandate and the final seizure of power by the Baath party. The further legislative action that is necessary for this extension of jurisdiction to enter into force has, however, not yet been taken.

[65] Art 5 II and III, CRRPD Statute.

2. *Remedies Provided by the CRRPD*

The rules on remedies in the CRRPD Statute describe a number of different scenarios and then determine in some detail what rights and obligations the "original right holders", i.e. those who lost their rights under the Baath Party regime, and the current occupiers of their properties have.[66] From the perspective of the original rights holders there are two types of scenarios: one where the remedy is limited to restitution and another where the original right holders can choose between restitution and compensation. The first scenario applies in cases where properties are still owned by the Iraqi state and no improvements have been made to them. In such cases, the CRRPD will simply order the reinstatement of the original right holder's rights over the property.[67] Arguably, it would be less time-consuming if the CRRPD Statute would have instructed the State to return those properties immediately without going through the full CRRPD claims process.[68] The same rule applies when the property was illegally acquired by a senior member of the former regime or anyone "who took advantage of their power", provided the property has remained unaltered and has not been sold after such acquisition.[69] In all other scenarios, the original right holders will have the option to either request restitution or the payment of compensation. The value of the compensation will be determined in reference to the worth of the property at the time the claim was filed.[70] In principle, claimants will be compensated for the full value of the property at that time.

Even though the CRRPD Statute unequivocally prioritises the rights of the original right holders over the rights of the current occupiers of the disputed properties, it does provide certain current occupiers with a remedy in case they lose their current rights over the property subsequent to a CRRPD decision to return the property to the original right holder. On the condition that the current occupier is not the party that first sold the property after its expropriation, the CRRPD gives him or her the right to receive compensation equivalent to the value of the property at the time the original right holder filed the claim with the

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[66] Art. 6, CRRPD Statute. For a critique of the ad-hoc nature of those rules and the argument that it would have been more appropriate for the IPCC/CRRPD to rely on the provisions of the Iraqi Civil Code in this respect, see Dan Sigall, "Courts, Confidence and Claims Commissions: The Case for Remitting to Iraqi Civil Courts the Tasks and Jurisdiction of the Iraqi Property Claims Commission", *Army Lawyer* (Vol. 28, 2005).

[67] Art. 6 (II), CRRPD Statute.

[68] Arguably, a holistic, transitional justice oriented approach would have facilitated the adoption of such a solution.

[69] Art. 6 (IV), CRRPD Statute.

[70] This temporal criterion may lead to difficulties in the future. If, as seems likely today, it will take the CRRPD many years to resolve the cases pending before it, the values awarded will at some stage no longer reflect the real value of the property at the time of the decision, raising the issue of unequal treatment with claimants who had their claims decided closer to the time they filed their claims.

CRRPD.[71] This "first seller exclusion" reflects the particular manner in which expropriations usually occurred during the Baath Party rule over Iraq. As explained earlier, expropriations typically took place on the basis of Revolutionary Command Council decisions, which would allocate the properties to the Ministry of Finance or another central or local state authority and instruct this authority to sell or distribute the properties to others.[72] Hence in most cases the first seller will be the Iraqi state. This particular practice also explains why the CRRPD Statute renders the first seller responsible for paying the compensation awarded to either the original right holder or the current occupier by the CRRPD.

One additional rule regarding remedies in the CRRPD Statute has to do with the vexed issue of how to deal with the investments made in respect of the property since it was taken away from the original right-holder. Again this is an issue that is especially relevant in contexts of protracted displacement where much time may have past between the original displacement and the moment of restitution. The CRRPD Statute stipulates in this respect that the current occupier has the right to receive an amount of compensation up to the value of the improvements or additions made from the original right holder to whom the property is being returned.[73] There are, however, two unfortunate aspects about how the CRRPD Statute deals with this issue. Firstly, it does not make a clear distinction between a good and a bad faith current occupier. This could lead to the unjust situation whereby the victim of the land and property rights violations has to pay compensation to a current occupier who, for example, used his or her connections to have the property expropriated in the first place. Secondly, it remains silent on what should happen in case the beneficiary of the restitution decision is unwilling or unable to pay the compensation to the current occupier. Should the enforcement of the restitution decision be frozen until such compensation is paid or, on the contrary, should such a decision be enforced regardless of such a payment? It is unclear how this situation is resolved in practice.

G. *The CRRPD and the Challenge of Funding a Large-Scale Property Restitution Effort*

As explained earlier, the CRRPD effort imposes a considerable financial liability on the Iraqi state, as it includes an important compensation component that will to a large extent be carried out by the state. Both the administrative and

[71] Art. 7, CRRPD Statute.
[72] See *supra* n. 20 and accompanying text.
[73] Art. 6 (VI), CRRPD Statute.

compensation costs will need to be entirely funded through the normal state budget, most likely for many years to come. The CRRPD Statute indicates in this respect that "the Ministry of Finance shall pay the compensation amounts that the government is liable to pay according to the decisions issued [by the CRRPD]" and that "the Government shall ensure that the [CRRPD] has all necessary funds to cover its administrative duties and to have appropriate premises for its secretariat and its branches".[74] There are no provisions that would oblige the government to allocate a fixed amount to the CRRPD in its yearly budget. The actual allocation of funds to the CRRPD will thus be part of the normal budgetary process with all the political negotiation and wrangling between many institutions and actors that, as anywhere in the world, go with such a process. While so far the funds allocated to the CRRPD have been sufficient, it is not unimaginable that at some stage in the future the Iraqi parliament will decide that its priorities lie elsewhere and cut back on the allocation to the CRRPD. One factor in this respect is that the Iraqi state will have to allocate resources for a reparations effort in respect of the post-2003 violence and displacement. Another is the dire need of almost all basic public sectors in Iraq for significant investment and upgrading after ten years of crippling sanctions and mismanagement by the Baath Party regime. A final factor is that with increased stability in Iraq, there is likely to be a considerable increase in the social and economic demands from a variety of organised population groups at least if experiences of other transitions to democratic regimes and from war to peace are anything to go by.[75]

There is no easy answer to this sustainability question, but one concrete step to address this issue early on is to make an initial estimate of the total funding a large-scale property restitution programme is likely to require at the time the establishment of such a programme is being discussed. Accurate predictions will usually be difficult to make, but even ballpark estimates are very useful for assessing to what extent the financial effort is realistic for the state in question by matching them against expected state income and expenditure in other areas. While this will not resolve the funding question, it may protect against undertaking commitments to victims that are unlikely to be met. At the end, however, past international experience appears to suggest that the most successful way to address the funding question is maybe also the most obvious one, i.e. through the creation of a broad social and political coalition in favour of reparations that renders the political cost of abandoning or reducing an ongoing effort too high for most politicians to take.[76]

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[74] Art. 3, CRRPD Statute.

[75] Alex Segovia, "Financing Reparations Programs: Reflections from International Experience", in Pablo De Greiff (ed.), *supra* n. 54, 653.

[76] Id., 671.

Especially in transitions from an authoritarian to a democratic regime, the use of current state resources to provide redress to victims of the past regime also raises important social justice issues. It is not uncommon that in such context the state's resources have effectively been plundered by the very elite that is also responsible for the human rights violations that now stand in need of redress.[77] More often than not, this former elite will have stashed away part of the assets it stole in investments or bank accounts outside the country and may themselves have left the country altogether. Put somewhat simplistically, it will thus be the current tax payers who will have to shoulder the financial burden of providing reparations to victims of the former elite's abuse of state institutions, taxpayers whom themselves will have suffered from the authoritarian rule and whom include the victims themselves. Basic fairness may thus require that large-scale reparations efforts go hand in hand with a systematic policy of recovering assets stolen or illegally acquired by the former elite. This is also an area where the international community could play an important role in assisting the state in question with recovering assets that were moved abroad.[78] States cannot and should not condition victims' redress to the successful implementation of such efforts, but recovering stolen state assets should form an integral part of a country's transitional strategy.

H. *The Institutional Nature of the CRRPD*

Once a property restitution effort engenders more than a few thousand cases of competing property claims, it will most likely be beyond the capacity of an ordinary court system to resolve. This is true in all contexts but even more so in the early stages of a transition when most state institutions will be in need of profound restructuring and reconstruction. Large-scale restitution effort will thus typically require the establishment of special-purpose procedures and institutions.

In essence, policy makers will have a choice between two extremes and anything in between in this respect. On the one end of the scale, policy makers can opt for an "administrative approach", where the procedures to access the property restitution and resolve competing property claims will not be judicial but

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[77] This was the case also in Iraq. For an overview see e.g. the statement made on 14 May 2003 by David D. Aufhauser of the General Counsel Department of the US Treasury before the US House of Representatives Financial Services Subcommittee on Oversight and Investigations. This document can be retrieved from www.treas.gov/press/releases/js373.htm.

[78] Efforts like the Stolen Asset Recovery Initiative are an important step in the right direction in this respect (see United Nations Office on Drugs and Crime and World Bank, *Stolen Assets Recovery Initiative: Challenges, Opportunities and Action Plan* (Washington, World Bank, 2007), 48.

administrative in nature.[79] Typically, these procedures will be highly standardised and simplified, limiting the direct participation of the victims or potential beneficiaries to the initial filing of the property claim. Sometimes they will allow for mass claims processing, whereby groups of similarly situated claims are decided together. Administrative restitution or reparations frameworks will tend to employ evidentiary standards that are (much) more relaxed than what is common in an ordinary judicial setting. Finally, where compensation is available as a remedy under such an administrative regime, it will usually be standardised amounts for set categories of victims.[80] On the other end of the scale is a "quasi-judicial approach" whereby procedures will be closer to what is common in ordinary judicial settings. Typically, claims will be resolved on an individual basis with an opportunity for victims to actively participate through one or more hearings. The available remedies will be closer to the "ideal of compensation in proportion to harm" as it is practiced in the resolution of individual judicial cases.[81] The corollary is that more evidence will need to be gathered about what happened to the individual victims or beneficiaries and the size of the exact losses they sustained. Quasi-judicial restitution efforts will require more complex and detailed procedural rules than an administrative effort.

The CRRPD process falls into the second category of a quasi-judicial restitution programme. It includes features like the obligation for the Judicial Committees to hold at least one hearing in each case;[82] an individualised valuation process allowing for multiple valuations by multiple experts in case of disagreement amongst the parties to a claim; the requirement to obtain extensive formal, documentary evidence;[83] the possibility of site visits by the Judicial Committees; and the application of ordinary Iraqi civil and procedural law in areas where the law is silent.[84] Parties also have an unlimited appeal right to the

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[79] See e.g. Jaime Malamud-Gotti and Lucas Grosman, "Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies", in Pablo De Greiff, (ed.), *supra* n. 54, 540.

[80] One example of an administrative reparations programme is the compensation programme that was established by the German Foundation Law in August, 2000, for people who lost property or were used as forced labourers by the German Nazi-regime in the period of the Second World War. See, for example, Peter Van der Auweraert, "The Practicalities of Forced Labour Compensation. The Work of the International Organization for Migration as one of the Partner Organizations under the German Foundation Law", in Peer Zumbansen (Ed), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung/ NS-Forced Labor: Remembrance and Responsibility. Untertitel: Juristische und zeithistorische Betrachtungen / Legal and Historical Observations* (Baden-Baden, Nomos, 2002) 301–318.

[81] Pablo De Greiff, "Justice and Reparations", in Pablo De Greif, P. (ed.), *supra* n. 54, 451 (discussing how it differs from a standard of justice for large-scale reparations programmes).

[82] Art. 10, CRRPD Statute.

[83] Art. 7, IV, CRRPD Statute.

[84] Art. 23 and 25, CRRPD Statute.

so-called Cassation Commission established by the CRRPD Statute. There is only one Cassation Commission which can either uphold the first instance decision or amend and return it to the Judicial Committee which made it. The latter will then be required to rule on the case again, but now in accordance with the amendment made by the Cassation Commission.[85] Finally, ordinary Iraqi law applies for the enforcement of restitution decisions, involving a relatively cumbersome bureaucratic process with the Property Registration Department and the so-called Enforcement Department of the Ministry of Justice that, where necessary, will call upon the police to ensure eviction.

While a detailed analysis of the bottlenecks in the CRRPD process goes beyond the scope of this chapter, it appears certain that, without major reforms, it will probably take the CRRPD at least two more decades to fully resolve the claims it currently has before it. This period may be reduced if Iraq would become fully secure and stabilised in the near future, but even if that would be the case the process will still take many more years. This experience shows how vital the right choice of process is for a large-scale property restitution effort's success or failure. Creating a special-purpose body is, in and by itself, not enough: also the applicable rules and procedures need to be adapted to processing a very large amount of claims. It is doubtful that a quasi-judicial process will ever be well-suited to deal with tens of thousands of competing property claims. For such a claim load an administrative process may, from an operational perspective, be the only viable option.[86]

I. *Large-Scale Property Restitution and the General Capacity of the State*

The experience of the CRRPD and other similar efforts have shown that, even when a special-purpose body is established to resolve competing property claims, it will still be important to consider the general capacity of the state at the time the restitution process is designed, as such a process will invariably have to rely also on already existing state institutions. Concrete examples include the provision of documentary evidence (cadastre or property registration department); the enforcement of property transfer protection rules while the claims are pending (court system; cadastre or property registration department); enforcement of restitution decisions (police); the payment of compensation (Ministry of Finance; banking system); and the re-registration of

[85] Art. 21, CRRPD Statute.

[86] In this vein see also Rhodri Williams, *The Contemporary Right to Property Restitution in the Context of Transitional Justice* (New York, International Centre for Transitional Justice, May 2007), 51.

property (cadastre or property registration system). In the concrete case of the CRRPD, the process has, for example, suffered from a limited capacity and occasional unwillingness to collaborate amongst the property registration departments.

The lack of capacity and resources in existing state institutions can to some extent be offset by, on the one hand, allocating additional resources and capacity including training to deal with the extra workload caused by the restitution process and, on the other hand, ensuring through outreach and training that all relevant staff fully understand the restitution process and their role in it. In countries where the general capacity of the state is very low, however, a state-driven process of large-scale property restitution may not be a viable option as the capacity and resources gap may simply be too large to fill. A similarly insurmountable obstacle may be posed by the situation where existing state organs are politicised or corrupt and the rule of law and good governance is weak or non-existent. In such circumstances the establishment of an international structure may be an option, even though also such a structure will have to rely on local state institutions at some stage of the process. It also brings with it its own challenges e.g. in terms of an (initial) lack of local knowledge, a significantly higher cost and a difficult integration into the local legal framework. No miracle solution exists, but it is crucial that these factual circumstances are taken into account when the restitution process is designed.

J. *Concluding Remarks: Restituting Property During Conflict and Ongoing Displacement*

One of the more remarkable aspects of the CRRPD is that, despite the ongoing sectarian violence and political instability in Iraq, it has managed to continue working at all. At the time of writing, the CRRPD had taken approximately 41,000 decisions out of a total current claim load of close to 140,000 claims.[87] CRRPD statistics indicate that out of those decisions, a little over 19,000 are enforceable, meaning that either no appeal was lodged against them within the legal period of thirty days or the Cassation Commission confirmed the ruling by the Judicial Committee. This is an impressive figure given the complexities of the claim load and the situation in Iraq since 2003. However, in terms of the actual outcome for the victims, the situation is less positive than these figures suggest and this is for a number of reasons.

[87] Figures from the CRRPD Weekly Report for the Period from 01.02.2008 until 07.02.2008 (report on file with the author). Note that these numbers include decisions taken by the predecessor of the CRRPD, the IPCC.

The first reason is that, according to the CRRPD itself, approximately 9,000 enforceable decisions will have to be re-reviewed as a consequence of the changes introduced by the CRRPD Statute compared to CPA Regulation 12 under which these decisions were taken. As the Law changed the valuation criteria for compensation, all compensation decisions that were decided in application of the IPCC statute now have to be reconsidered as to the awarded amount. At the same time, also restitution decisions involving a secondary occupant will have to be re-reviewed, as the CRRPD introduced the formal right of the secondary occupant to receive compensation in case the property is returned to the original owner. This review process is ongoing at the moment but it is unclear how long it will take and to what extent it will delay decision making in other cases. The second reason is perhaps more serious in that it has to do with the difficulties victims or secondary occupants face in obtaining the enforcement of CRRPD decisions that are in their favour.

As to the decisions awarding compensation by the state, it was only in December 2006 that the Ministry of Finance and the CRRPD agreed on a procedure to pay compensation to beneficiaries of a CRRPD compensation decision. At the time of writing, the CRRPD has paid out compensation for about 380 decisions, suggesting that the payment of compensation will continue to take considerable time. No accurate figures exist as regards the enforcement rate of restitution decisions, but anecdotal evidence suggests that, while the situation varies from region to region, a significant proportion of such decisions have remained unenforced. Causes are multiple and include an initial unwillingness of some Property Registration Departments to transfer property title on the basis of an enforceable CRRPD decision, a situation which appears to have improved over the past year or so subsequent to a number of interventions by the Head of the CRRPD. A continuing problem, however, is the difficulties faced by the Enforcement Department of the Ministry of Justice to evict unwilling current occupants. This appears to be due to a lack of capacity and, especially, the ongoing conflict and lawlessness in many parts of Iraq.

This situation points toward one of the central challenges faced by the CRRPD, i.e. that it is trying to implement a large-scale restitution process in the midst of ongoing sectarian conflict and new large-scale forced displacement. It is difficult to quantify the exact impact on the process but it is clear that it impacts everything the CRRPD does. Anecdotal evidence suggest that in some areas it is unsafe for victims to come to the local CRRPD branch office, as it will give away the fact that they have filed a claim over a property, which may be sufficient to put them in physical danger. A number of CRRPD offices have had to temporarily close or relocate because of threats made against them. CRRPD staff have been killed and targeted for assassination because they belonged to the 'wrong' community, worked for the 'wrong' organisation or

sometimes for reasons unknown.[88] Some areas are so dangerous that it is impossible for the CRRPD to notify the parties to the claim, halting the review process. The new displacement also means that some of the claimants and the current occupants have in the meantime (again) become displaced, rendering them unable to pursue their claim and the CRRPD unable to contact them. Add to that the sectarian competition over political structures and power-distribution in Iraq and all that comes with it and it becomes clear just to what extent the current context complicates the implementation of an effective and comprehensive property restitution programme.

There is little hope that the situation will become any easier in the future. In fact, a whole new range of land and property issues have added themselves to the unresolved issues from the Baath Party era. The displacement of close to five million Iraqis since the fall of the regime has brought with it a new set of land and property rights violations. In many areas of Iraq and, especially Baghdad where most displaced are from, some properties belonging to the displaced have been destroyed, severely damaged, occupied by other displaced persons or taken over by armed groups who now rent them our for profit.[89] The relatively few returns that have started to take place in the past few months have already exposed to what extent land and property issues will arise if more Iraqis would start to go home.[90] In addition, there remains the unresolved issue of an unknown number of Arabs who have been subject to extra-legal evictions from their homes in the north at the hands of Kurdish returnees or armed groups, and whose claims also fall outside the mandate of the CRRPD. One thing is certain: any political plan to bring Iraq back on the road to stable recovery will need to give a central place to meaningfully address these different layers of displacement and land and property rights violations. Unless Iraq's political class gets this one right, durable peace risks to remain elusive.

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[88] The end of last year saw the assassination of the Head of the Cassation Commission, Judge Almadamgha, in a drive-by shooting in Baghdad by unknown assailants. He was most likely killed because of his prominence in Iraq.

[89] See, for example, International Crisis Group, *Iraq's Civil War, the Sadrists and the Surge* (International Crisis Group, Brussels, 7 February 2008), at 7.

[90] See, for example, IRIN, *Iraq: Return to Destroyed, Looted or Occupied Houses*, 9 December 2007 retrievable at www.irinnews.org.

Reparations in Dayton's Bosnia and Herzegovina

Carla Ferstman and Sheri P. Rosenberg ***

The 1992 to 1995 conflict in Bosnia and Herzegovina saw about 250,000 people killed,[1] with torture, rape, expulsions, property destruction and 'ethnic cleansing' perpetrated on a massive scale, and which caused the displacement of about two million people. The conflict resulted in financial and human costs that completely devastated the country. Broad segments of society experienced different forms of victimisation. Even for those who managed to resume their lives after the conflict, the lack of formal acknowledgment of the crimes, patchy efforts of accountability and many war-time violations left unaddressed made the process of moving forward all the more difficult.

On 26 February 2007, the International Court of Justice ruled that Serbia was not responsible for genocide in Bosnia and Herzegovina. It did conclude that the 1995 massacres at Srebrenica that resulted in the deliberate killing of 7,000 or more Bosnian Muslims was 'genocide.' It also determined that the Serbian Government failed to fulfil its legal duties under the Genocide Convention by not preventing or punishing these events. In its pleadings, the State of Bosnia and Herzegovina had claimed extensive reparations for war-time damages but the Court in its final ruling provided that the declaration of responsibility set out in its judgment was sufficient satisfaction, and ordered Serbia to hand over Bosnian Serb General Ratko Mladic to the International Criminal Tribunal for the Former Yugoslavia.[2]

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[1] The estimate that 250,000 people were killed during the conflict is the most widely cited, although research published in 2005 by Mirsad Tokaca, head of the Sarajevo-based Research and Documentation Centre, puts the number at around 100,000.

[2] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits) 26 February 2007 ["Bosnia-Genocide" case]. See generally, Conor McCarthy, "Reparation for Gross Violations of Human

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 483–514.

Many had hoped that the ruling of the International Court of Justice would go some way to afford a remedy and reparations to the many victims of the conflict. But as one leading advocate put it, shortly after the ruling was announced:

> survivors, rushing these days into my office having lost even the ultimate hope that the world will confess the horrible crime committed upon them and clearly name the responsible ones … Already for two days, throughout the scaffold of Bosnia and Herzegovina, the criminals celebrate. The victims have lost, even this time. Only emptiness fills me out; I feel it so painfully.[3]

The failure of the International Court of Justice to deal effectively with the question of reparations follows directly from its determination that it was not shown that the genocide would have in fact been avoided if Serbia had acted preventively, and its findings were necessarily limited to the case before it. Nonetheless, the decision underscores the failure thus far to adequately and effectively deal with the question of reparations for the victims of the conflict in Bosnia and Herzegovina.

Reparation is not a new issue in Bosnia and Herzegovina. A variety of measures have been put in place though they have largely been piece-meal. At the international level, the rulings of the International Criminal Tribunal for the Former Yugoslavia have been important in acknowledging the crimes and bringing a measure of accountability. Rule 106 of its Rules of Procedure and Evidence provides that judgments establishing guilt are to be binding as to the criminal responsibility of the convicted person for the purpose of an action for compensation, which might be brought by victims in national courts. This provision has not been of particular use to victims in bringing reparations claims. Judge Jorda, then President of the Yugoslav Tribunal, expressed the need to develop appropriate mechanisms for reparations,[4] as did the President of the Rwanda Tribunal, but the idea didn't go far for fear that becoming involved in reparations might well prevent the Tribunals from carrying out their main objective.[5]

Several foreign courts have considered claims for compensation resulting from the conflict in Bosnia and Herzegovina. In the United States, two default judgments were entered against Radovan Karadzic[6] and in 2002, a Georgia court issued a judgment against Nikola Vuckovic and others for torture, cruel, inhuman

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Rights Law and International Humanitarian Law at the International Court Of Justice," in this edited collection.

[3] Comments of Dr. Irfanka Pasagic, read out at the Conference Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making, The Peace Palace, The Hague, The Netherlands, 1–2 March 2007.

[4] UN Doc. S/2000/1063 (3 November 2000).

[5] *Id*. See, C. Ferstman, "The Reparation Regime of the International Criminal Court: Practical Considerations," 15 Leiden Journal of International Law 667–686 (2002) at 670–73.

[6] *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996).

or degrading treatment, arbitrary detention, war crimes, crimes against humanity and genocide.[7] In the Netherlands, families of Srebrenica victims have brought a lawsuit against the United Nations and the Dutch Government, on the basis that they failed to protect civilians. The lawsuit was still pending at the time of writing.[8]

Within Bosnia and Herzegovina, efforts to secure reparations for victims have been patchy, and the lack of a comprehensive approach to address the causes and consequences of victimisation has left many victims without a remedy. This is perhaps surprising given the extensive international attention on Bosnia and Herzegovina in the years following the conflict and the intensive pressure placed on the Bosnian authorities in the context of the implementation of the General Framework Agreement for Peace in Bosnia and Herzegovina (the Dayton Peace Agreement). While there has been some progress with trials and vetting of public officials, and with the Commission for Investigation of the Events in and around Srebrenica between the 10th and 19th of July, 1995 (the "Srebrenica Commission"), a body established by the *Republika Srpska* National Assembly in response to a ruling of the Human Rights Chamber,[9] issuing a key report on the atrocities in 2004, the establishment of a truth commission has proved elusive and attempts to deal more comprehensively with the scale of victimisation have gone unheeded.[10]

This chapter will consider the issue of reparations in Bosnia and Herzegovina, looking in particular at the role of two of the institutions established under the Dayton Peace Accords. The signing of the Dayton Peace Agreement in December 1995 brought a formal end to the conflict and the Agreement provided the structure for the military and civilian implementation of the ceasefire. The civilian provisions of the Agreement were coordinated by the High Representative, under a quasi-protectorate system, which some have come to criticise for its failure sufficiently to promote state-building.[11] The Dayton Peace Agreement prioritised the return of displaced people and re-creation of a multiethnic society in Bosnia

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[7] *Kemal Mehinovic, et al. v. Nikola Vuckovic, a.k.a Nikola Nikolac*, US District Court for the Northern District of Georgia, Atlanta Division, 198 F. Supp. 2d 1322, 29 April 2002.

[8] On 27 November 2007, a district court in The Hague, The Netherlands ordered that the lawsuit could proceed. See, Anes Alic, "Srebrenica Massacre: UN Not Immune," ISN Security Watch 12 December 2007, available at: www.isn.ethz.ch/news/sw/details.cfm?ID=18433.

[9] The Human Rights Chamber was an institution created under the Dayton Peace Agreement and is discussed more fully below.

[10] International Center for Transitional Justice. *Bosnia And Herzegovina: Selected Developments in Transitional Justic*e, October 2004.

[11] See, European Commission For Democracy Through Law (Venice Commission) (2005) *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, AD(2005)004 (Venice: European Commission For Democracy Through Law); European Stability Initiative (2004) *Waiting For A Miracle? The Politics of Constitutional Change in Bosnia and Herzegovina* (Berlin and Sarajevo: European Stability Initiative).

and Herzegovina. Annex 6 of the Agreement provided for the establishment of the Commission on Human Rights, comprised of an Ombudsman institution and a Human Rights Chamber. Annex 7 affirmed the right of refugees and displaced persons to have their property restored to them (or to be compensated where restitution is not possible) and included the general responsibility to create "conditions suitable for return" such as the repeal of discriminatory laws and prevention of incitement of ethnic hostility.[12] It also established a specific institution to deal with property claims – the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC).

The Dayton institutions played important roles in the immediate post-war context in securing rights to the disenfranchised, in particular the Human Rights Chamber and the Commission for Real Property Claims of Refugees and Displaced Persons. However, each suffered from limitations owing to the political and legal contexts in which they operated. These two institutions will be considered from a number of perspectives. Firstly the authors will consider the extent to which these institutions contributed to the vindication of victims' rights and afforded adequate and effective remedies and reparation. Secondly, the authors will analyse the procedural innovations employed by these institutions to deal with the massive influx of claims and will identify lessons learned for possible future application. Lastly, it will be considered whether and to what extent the institutions, as quasi-international bodies with *sui generis* status and limited mandates fostered adequate and appropriate domestic responses to victimisation.

A. *The Human Rights Chamber*

Chapter 2 of Annex 6 of the Dayton Peace Agreement established the Commission on Human Rights, which consisted of the Office of the Ombudsman and the Human Rights Chamber ("the Chamber").

The Chamber, modelled on the European Court of Human Rights, considered alleged or apparent violations of human rights within the responsibility of one of the Parties to the Dayton Peace Agreement (the State of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the *Republika Sprska*), as provided for in the European Convention on Human Rights (ECHR) and the Protocols thereto.[13] The Chamber also was mandated to consider alleged or *apparent* discrimination arising in the enjoyment of the rights and freedoms

[12] GFAP, Annex 7, Chapter One, art. I (1)–(3).

[13] The Parties are also held responsible for human rights violations committed by Cantonal and Municipal organs or any "individual acting under the authority of such official or organ." See Article I, 2, b, Annex 6.

provided for in the ECHR and sixteen additional international agreements listed in the Appendix to Annex 6 of the Dayton Peace Agreement. Claims brought to the Chamber had to have occurred or continued after the entry into force of the Dayton Peace Agreement on 14 December 1995.[14]

The Chamber was composed of fourteen members. Four were appointed by the Federation of Bosnia and Herzegovina and two by the *Republika Srpska*. The other eight members were internationals and were appointed by the Committee of Ministers of the Council of Europe. Since the Chamber was first constituted in March 1996, and until it merged with the Constitutional Court and became part of the Human Rights Commission in December 2003, the Chamber deliberated on and decided thousands of cases involving a diverse range of alleged violations of human rights.

The Chamber was established as a Court of last instance under Annex 6 of the Dayton Peace Agreement. It allowed for direct intervention into the legal system of Bosnia and Herzegovina by providing immediate remedies, by way of final and binding court decisions for human rights violations, and through legal precedents that immediately became part of domestic jurisprudence. Annex 6 provided for the competencies of the Chamber to transfer to national institutions five years after the entry into force of the Dayton Peace Agreement. The Chamber's mandate, however, was extended and competencies were eventually transferred on 31 December 2003 to a Human Rights Commission within the Constitutional Court, with a mandate to decide on cases received by the former Human Rights Chamber that had not been decided by the expiry of its mandate.[15] The Commission was also entrusted with a mandate to examine complaints about non-enforcement of the decisions of the Human Rights Chamber and to issue declarations in this connection, without offering any other redress.[16] From 1 January 2004 until 31 December 2006, these special chambers were named the "Human Rights Commission within the Constitutional Court." Although the special chambers continued to operate thereafter, they are no longer named the Human Rights Commission.[17]

Applications to the Chamber could be made directly by any Party to Annex 6 or from any person, non-governmental organisation or group of individuals

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[14] *Josip, Bozana and Tomislav Matanovic v. the Republika Srpska* (Case No. CH/96/01), decision on the merits 6 August 1997 (*Matanovic case*), 1997.

[15] By the end of the Human Rights Chamber's mandate in December 2003, 15,191 applications had been registered, 6,242 of which had been resolved. As of 31 December 2003, 8,949 applications were pending. *See* Human Rights Chamber Monthly statistical summary at www.hrc.ba/ENGLISH/stat_summaries-eng/summary.asp.

[16] See Rule 62 of the Rules of Procedure published in the Official Gazette (OG) of BiH no. 23/05 of 19 April 2005 and Rule 56 of the Rules of Procedure published in OG BiH no. 38/07 of 22 May 2007.

[17] See the Agreement of 16 January 2007 published in the OG BiH no. 43/07 of 11 June 2007.

claiming to be a victim of a violation or acting on behalf of alleged victims who are deceased or missing.[18]

The Chamber developed a system of priorities to deal with pending applications. In accordance with Rule 35 of the Chamber's Rules of Procedure, in general, the Chamber dealt with applications "in the order in which they become ready for examination." However, the Rules enabled the Chamber to give precedence to any particular application and indicated that it should give particular priority to allegations of especially severe or systematic violations[19] and those founded on alleged discrimination on prohibited grounds. In practice, the Chamber also gave priority to applications which raised novel legal issues that could serve as precedent for domestic decision-makers, or were understood to be particularly important for the promotion of the rule of law in the country.[20]

As a first step, the Chamber considered whether a particular application was admissible. Decisions on admissibility took into account criteria listed in Article VIII:

(a) whether effective remedies exist, and the applicant has demonstrated that they have been exhausted and that the application has been filed with the Chamber within six months from such date on which the final decision was taken;
(b) whether the application is substantially the same as a matter that the Chamber has already examined;
(c) whether the application is incompatible with the Human Rights Agreement, manifestly ill-founded, or an abuse of the right of petition; and
(d) whether the application concerns a matter currently pending before another international human rights body or another Commission established by the Dayton Peace Agreement.

Following a decision that a particular application was admissible, the Chamber requested written observations from the applicant and the respondent Party. It also had the possibility to hold public hearings to receive additional evidence from witnesses and experts, and to hear the parties' oral arguments. It could also invite *amicus curiae* submissions. It then deliberated and decided the case.

The Human Rights Chamber decided upon a variety of alleged human rights violations. A large proportion of cases relate to the repossession of pre-war

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[18] Rule 32(1) of the Rules of Procedure of the Human Rights Chamber, available at: www.hrc.ba/ENGLISH/rules/rules_of_procedure.htm.

[19] E.g., obstruction of the refugee return process resulting in violations of property rights; employment and other forms of discrimination against minorities; disappearances.

[20] 2001 Annual Report, available at: www.hrc.ba/ENGLISH/annual_report/2001/ann_report01.htm.

housing, but in addition, cases dealt with, *inter alia*, the right to life, missing persons, arrest and detention, right to a fair hearing in civil and criminal proceedings, expulsions, discrimination in employment and other areas, pensions and freedom of expression. As a result of the high backlog of applications, the Chamber developed a number of strategies for dealing efficiently with its caseload. For instance, it developed model decisions for use in certain cases, in particular relating to the repossession of pre-war property. Similarly, the Chamber gave priority to "lead-cases", which were time consuming, but which, if properly implemented impacted upon many other cases, which could be disposed of en masse if the major issue had been resolved by appropriate action, including legislative action, by the competent local authorities. It also used the decisions of the International Criminal Tribunal for the former Yugoslavia, where appropriate, to set the historical context and underlying facts of key events.[21]

If the Chamber found a violation, it could, in its written decision on the merits, issue an order indicating the steps the respondent Party must take to remedy the breach. The Chamber also had the possibility to order provisional measures[22] or facilitate a friendly settlement[23] at any stage of the proceedings. Decisions of the Chamber were final and binding, though a review of a decision of a panel could be undertaken by the full Chamber upon motion of the Ombudsman or a party to the case.

Article XI, para. 1(b), of Annex 6 provided that if the Chamber found a violation it shall address in its decision "what steps shall be taken by the respondent Party to remedy the breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures". This power to order remedies is broader than the power of the European Court of Human Rights to order "just satisfaction." Common remedies ordered by the Chamber include compensation and the return of property. Other remedies have been awarded, including orders for: the investigation of allegations of ill-treatment and other human rights crimes with a view to bringing perpetrators to justice; the prompt conclusion of proceedings

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[21] See, in particular, *Ferida Selimović et al. v. the Republika Srpska*, Decision on Admissibility and the Merits, 7 March 2003. Here, the Human Rights Chamber applied the trial chamber decision of the International Criminal Tribunal for the Former Yugoslavia decision of *Prosecutor v. Radislav Krstić*, [IT-98-33-T], to provide overall context for the events at Srebrenica: "As the *Krstić* judgment contains a comprehensive description of the historical context and underlying facts of the Srebrenica events, established after long adversarial proceedings conducted by a reputable international court, the Chamber will utilise this judgment to set forth the historical context and underlying facts important for a full understanding of the applications considered in the present decision." [*Selimović*, at para. 16].

[22] Rule 36 of the Rules of Procedure of the Human Rights Chamber.

[23] Rule 44 of the Rules of Procedure of the Human Rights Chamber.

which have lasted an unreasonable time; and release from detention and reinstatement in employment.[24]

The Chamber typically ordered the respondent Party concerned, in each of its decisions where an order was made, to report to it within a set time limit on the steps taken to implement the decision. Cooperation with the Parties was conducted mainly through appointed agents who represented the Parties in the proceedings before the Chamber. The agents were responsible for informing the respondent Parties of the Chamber's decisions and their obligation to implement fully the orders of the Chamber and for reporting to the Chamber on the steps taken by them to implement the decisions. Though the Chamber's mandate only permitted it to order the Federation of Bosnia and Herzegovina, the *Republika Srpska* or the State of Bosnia and Herzegovina to remedy a violation, it is assumed, as it is in the European Court of Human Rights, that a Party which signed up to the obligations under Annex 6 has the means to ensure that the remedies required can and will be implemented. For example, if the Chamber found that the actions of a publicly-owned company operating within a municipality of one of the Entities offended the European Convention, the relevant Entity would be obliged to undertake negotiations with the municipality and the company to seek a solution, which remedies the violations in accordance with the directives of the Chamber. Where no response, or an inadequate response, was received, the matter would be taken up with the Office of the High Representative, who is the body under the Dayton Peace Agreement responsible for the coordination of the implementation of the civilian provisions of the Agreement. In addition, the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations presence in Bosnia and Herzegovina also monitored compliance by the Parties of Chamber decisions. Implementation of Chamber decisions increased from 10% in early 1999 to over 70% by the summer of 2003.[25] Some of the orders which proved difficult and politically sensitive to enforce include the decision of the Chamber to restore the property rights of members of the Yugoslav National Army (JNA); to investigate the whereabouts or fate of disappeared persons, and to order the issue of permits for the reconstruction of mosques in Banja Luka, discussed below. By the end of the Chamber's mandate it had established itself into an effective and impartial judicial body that had earned the trust and confidence of the citizens of Bosnia and Herzegovina, as evidenced by the steady rise in applications it received each year.

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[24] See, generally Manfred Nowak, "Reparation by the Human Rights Chamber for Bosnia and Herzegovina," in *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations*. K. De Feyter, S. Parmentier, M. Bossuyt, P. Lemmens (eds.). Antwerp: Intersentia, 2005.

[25] Statistical information on file with the authors.

1. *Key Cases from the Perspective of Victims' Right to a Remedy and Reparations*

The Human Rights Chamber decided a wide variety of cases relating to the violation of human rights in the aftermath of the conflict. The authors will consider some of the key themes treated by the Chamber, detailing several of the Chamber's landmark decisions and considering the impact these decisions had on victims' right to a remedy and reparations and more broadly in the society. Whilst the Human Rights Chamber in most ways followed the practices and procedures of the European Court of Human Rights, its approach to remedies and reparations was arguably far more innovative, with a variety of measures employed, including most significantly, orders for specific performance – obliging administrative authorities to take precise measures to implement its decisions, such as reversal of laws, creating investigative commissions, obliging authorities to issue building permits or reinstate individuals to their properties. Procedurally, the Chamber's decisions on remedies were equally instructive, often requiring the relevant Party to report back to the Chamber within a specified period to detail measures taken to implement awards, and at times affording to the applicant the possibility to revert to the Chamber with further submissions on measures for redress.[26] As with other human rights institutions, enforcement of the Chamber's decisions proved difficult and not always immediately satisfactory, however as will be explained, important progress was made in most areas as a result of the willingness of the Office of the High Representative and other international actors to monitor and exert pressure to improve the record of compliance.

a. *Enforced Disappearances*

More than 20,000 persons were reported missing in Bosnia and Herzegovina during the war. The Human Rights Chamber received many applications from family members seeking to learn the whereabouts of their loved ones, and to the extent that the disappearances could be said to be violations which continued after the entry into force of the Dayton Peace Agreement, the Human Rights Chamber determined such applications to be admissible.[27]

In the case of *Palić v. Republika Srpska*,[28] which related to the disappearance of Avdo Palić, an army officer defending the Muslim enclave of Zepa against Bosnian

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[26] See, for example, *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, Case No. CH/97/46, 10 September 1998.

[27] Some of the key cases on 'enforced disappearances' include: *Palic v. Republika Srpska*, Case No. CH/99/3196, Decision on admissibility and merits of 11 January 2001; *Unkovic v. Federation of Bosnia and Herzogovina*, Case No. CH/99/2150, Decision on admissibility and merits of 9 November 2001; *Josip, Bozana and Tomislav Matanovic v. the Republika Srpska* (Case No. CH/96/01), decision on admissibility 13 September 1996, decision on the merits 6 August 1997, decisions on admissibility and merits, March 1996–December 1997.

[28] *Palic v. Republika Srpska*, *Id*.

Serb forces who was taken away by Serb soldiers in front of UN military monitors, the Chamber found a violation of articles 2 (Right to life), 3 (Prohibition of torture), 5 (Right to liberty and security) and 8 (Right to respect for privacy and family life) of the ECHR and ordered the respondent Party "to carry out immediately a full investigation capable of exploring all the facts regarding Colonel Palić's fate from the day when he was forcibly taken away, with a view to bringing the perpetrators to justice; to release Colonel Palić, if still alive or, otherwise, to make available his mortal remains to Ms. Palić; and to make all information and findings relating to the fate and whereabouts of Colonel Palić known to Ms. Palić." In addition, it ordered the *Republika Srpska* to pay Ms. Palić DM15,000, by way of compensation for her mental suffering, and in respect of her husband, DM50,000 by way of compensation for non-pecuniary damage.

Efforts to enforce the Palić decision were lengthy and complex. The *Republika Srpska* authorities had three months to implement the Chamber's decision handed down in January 2001, and compensation was paid to Palić's wife at the end of 2001. The RS Ministry of Defence was said to have revealed that Mr. Palić was taken to a garrison in Bijeljina in August 1995 and was subsequently removed in order to be part of a prisoner transfer. In 2005, Mr. Palić's wife applied to the Human Rights Commission (the body which replaced the Human Rights Chamber in 2003) and in September 2005, it confirmed that the Chamber's decision had not been fully implemented. The RS authorities were given three months to carry out a complete investigation into the "disappearance" to keep Mrs. Palić informed. In January 2006, the Human Rights Commission published a further decision finding that the RS authorities had failed to provide adequate details to establish the facts of the 'disappearance' of Colonel Avdo Palić. Following this decision, the Office of the High Representative ordered the *Republika Srpska* to form a Commission to gather information about his fate and whereabouts. The Commission was formed and issued its report in April 2006, in which it claimed to reveal the location of Palić's remains.[29] The remains were exhumed in 2007, though none of the six bodies located at the site were Palić's.

The *Matanović* case[30] concerned the enforced disappearances of Josip and Bozana Matanović, residents of Prijedor in the *Republika Srpska*, and their son Tomislav Matanović, a Roman Catholic priest in that town. The Human Rights Chamber found that Father Matanović and his parents were arrested in July 1995 in Banja Luka and were held continuously in detention within the territory of the *Republika Srpska* after their disappearance in September 1995. The Chamber

[29] OHR Press Statement, "RS Palic Commission Report Received", 21 April 2006.
[30] *Supra* n. 14.

rejected evidence put forward by the respondent that the applicants were released on 10 October 1995 and found a violation of article 5 (arbitrary detention), and ordered the respondent party to take all necessary steps to ascertain the whereabouts or fate of the applicants and to secure their release if still alive. In early September 2001 the bodies of three persons were discovered in a well about 15 km outside Prijedor. Forensic examination indicated that these were the bodies of Father Matanović and his family, and that they were shot in the head before being dropped in the well. An indictment was issued against the persons believed to be responsible (on charges of unlawful deprivation of liberty – not of murder), and on 11 February 2005, a District Court in Banja Luka acquitted all 11 defendants.[31] The reasoning of the judge in handing down the acquittal was the lack of evidence, which underscores the inadequacy of the investigations conducted by the *Republika Srpska* authorities.

b. *The Srebrenica Case*

In *Selimović & others v. the Republika Srpska* ("the Srebrenica case"),[32] the 49 applicants, who were all immediate family members of Bosniak men presumed to have been massacred in Srebrenica, alleged a violation of their human rights as a result of the lack of specific information on the fate and whereabouts of their missing relatives.

The Chamber found violations of articles 3 and 8 of the European Convention resulting from the *Republika Srpska*'s failure to make accessible and disclose information requested by the applicants about their missing family members and failure to inform the applicants about the truth of their fate and whereabouts, including conducting a meaningful and effective investigation into the massacre at Srebrenica. In addition, it found that the *Republika Srpska* discriminated against the applicants due to their Bosniak origin. It held that "in the context of the Srebrenica cases, these violations are particularly egregious since this event resulted in the largest and most horrific mass execution of civilians in Europe in the second half of the twentieth century. Moreover, the violations reflect a total indifference by the authorities of the *Republika Srpska* to the suffering of the Bosniak community".[33]

The Chamber struggled in finding an adequate and appropriate remedy and reparations befitting the violation. It indicated:

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[31] Ulrich Garms and Katharina Peschke, "War Crimes Prosecution in Bosnia and Herzegovina (1992–2002): An Analysis through the Jurisprudence of the Human Rights Chamber," J Int Criminal Justice 4: 258–282.

[32] *Ferida Selimović et al. v. the Republika Srpska*, CH/01/8365 et. al Decision on Admissibility and the Merits, 7 March 2003.

[33] *Id.*, at para. 202.

> Whilst the Chamber attempts to fashion a remedy for the egregious violations of the applicants' human rights, it recognises that it cannot order a perfect remedy which will re-establish the *status quo ante*. It cannot restore what was taken from the applicants in July 1995 at Srebrenica, and it cannot repair the suffering and torment caused to them by seven years of uncertainty about the fate and whereabouts of their missing loved ones. As the Inter-American Court of Human Rights (the "Inter-American Court") has said: "Every human act produces diverse consequences, some proximate and others remote. An old adage puts it as follows: *causa causae 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." (Inter-Am. Court HR, *Aloeboetoe and Others v. Suriname*, judgment on reparations of 10 September 1993, Series C no. 15, paragraph 48 (1993)).[34]

The *Republika Srpska* was ordered, as a matter of urgency, to "release all information presently within its possession, control, and knowledge with respect to the fate and whereabouts of the missing loved ones of the applicants, including information on whether any of the missing persons are still alive and held in detention and if so, the location of their detention, and whether any of the missing persons are known to have been killed in the Srebrenica events and if so, the location of their mortal remains".[35] The *Republika Srpska* was also ordered to immediately release any missing persons still alive and held unlawfully, and to disclose the international and national agencies undertaking forensic work, all information with respect to the location of any gravesites, individual or mass, primary or secondary, of the victims of the Srebrenica events not previously disclosed. The Chamber also ordered the *Republika Srpska* to conduct a full, meaningful, thorough, and detailed investigation into the events with a view to making known to the applicants, all other family members, and the public, the *Republika Srpska*'s role in the massacre and subsequent cover-up, to bring perpetrators to justice, and to uncover the fate of the missing. In addition, the Chamber ordered the *Republika Srpska* to publish the entire decision on admissibility and merits in the Official Gazette of the *Republika Srpska* within two months from the date of delivery of the decision.

As for compensation, the Human Rights Chamber decided to focus exclusively on collective compensation. It ordered the *Republika Srpska* to make a lump sum contribution to the Foundation of the Srebrenica-Potocari Memorial and Cemetery for the collective benefit of all the applicants and the families of

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[34] *Id.*, at para 205.
[35] *Idem.*, at 211.

the victims of the Srebrenica events in the total amount of 4 Million Convertible Marks (4,000,000 KM). The compensation was to be paid in the form of an initial lump sum of two million Convertible Marks (approximately US$1.2 million) to the Foundation of the Srebrenica-Potocari Memorial and Cemetery. Over the following four years, *the Republika Srpska* was required to make four additional payments of 500,000 Convertible Marks (approximately US$300,000) to the Foundation. Certain victims' groups criticised the Chamber's failure to award individual compensation, and its failure to consider the social and economic needs of victims. This controversy was heightened by the decision of the Chamber to strike out further applications against the *Republika Srpska* regarding Srebrenica, on the basis that the *Selimović* ruling had covered all issues.[36]

The "*Commission for Investigation of the Events in and around Srebrenica between the 10th and 19th of July, 1995*" (the "Srebrenica Commission") was established by the *Republika Srpska* in December 2003, in response to the Chamber's decision and following significant pressure exerted by the Office of the High Representative. It delivered its first interim report in April 2004, to which the High Representative delivered a scathing response, indicating that the Report "highlights sustained and systematic obstruction and inaction by the Government of *Republika Srpska*," and ordering the dismissal and replacement without delay of the Commission's Chairman.[37] The work of the Commission improved significantly, and in its final report published in June 2004, it is established that several thousand Bosniaks were "liquidated" and the perpetrators and others "undertook measures to cover up the crime." In November 2004, the *Republika Srpska* published a formal apology on its official website: "The government of the *Republika Srpska* commiserates with pain of relatives of the perished people of Srebrenica, and truly regrets and apologises for the tragedy they experienced".[38]

c. *Reconstruction of Banja Luka Mosques*

The case of *The Islamic Community in Bosnia and Herzegovina*[39] related to the destruction of 15 mosques in Banka Luka during the conflict. The Islamic Community maintained that Banja Luka authorities "destroyed and removed remains of the mosques, desecrated adjoining graveyards – or allowed these acts to happen – and failed to take certain action requested by the applicant for the

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[36] Case of *Alija Ibišević and 1804 Others v. The Republika Srpska*, case no. CH/01/7604 *et al.*, Decision to Strike Out, 3 June 2003.

[37] Office of the High Representative. Press Release: High Representative Announces Srebrenica Commission Support Measures, 16 April 2004.

[38] "Serbs sorry for Srebrenica deaths," BBC News, 10 November 2004, available at: http://news.bbc.co.uk/1/hi/world/europe/3999985.stm.

[39] *The Islamic Community in Bosnia and Herzegovina v. The Republika Srpska*, case no. CH/96/29, Decision on Admissibility and Merits delivered on 11 June 1999.

protection of the rights of its members. In particular, the Municipality has refused the Islamic Community permission to rebuild destroyed mosques",[40] and asserted violations of the right to property, freedom of religion and discrimination on the basis of religion.

The Chamber ordered provisional measures, ordering the *Republika Srpska* to "take all necessary action to refrain from the construction of buildings or objects of any nature on the sites of the mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such construction by any other institution or person, whether public or private. The respondent Party was further ordered to refrain from the destruction or removal of any object remaining on the sites of the mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such destruction or removal by any other institution or person, whether public or private".[41]

The Chamber determined that the Islamic Community's right to property and freedom of religion had been violated and that it had been discriminated against in the enjoyment of its rights. It ordered the *Republika Srpska* to take immediate steps to allow the applicant to erect enclosures around the sites of the 15 destroyed mosques to preserve the sites from damage and further vandalism and to maintain those enclosures. It also ordered the *Republika Srpska* to ensure that there is no construction, destruction or removal of buildings or objects of any nature on the sites of the 15 destroyed mosques and on the cemeteries and other Islamic sites indicated in the application, and not to permit any such construction by any other institution or person, apart from the applicant and persons acting under its authority. It also ordered the *Republika Srpska* to grant the applicant the necessary reconstruction permits.

The *Islamic Community* decision was delivered on 11 June 1999. After a great deal of stalling, and extensive pressure exerted by the High Representative and other members of the International Community, the authorities in Banja Luka issued a permit for the reconstruction of the Ferhadija Mosque in March 2001. The 7 May 2001 ceremony to mark the laying of the first stone for the Ferhadija mosque was marred by a crowd of Serb demonstrators that had gathered, threw stones at visitors, burned the Islamic flag, and set fire to buses, and the ceremony had to be cancelled. The violence was summarised in a statement issued by the High Representative:

> This morning, several thousand people rallied at the site of the Ferhadija Mosque. Some started to hurl abuse and throw eggs and stones at domestic and international dignitaries and Islamic Community leaders who were gathering to attend the corner

[40] *Id.*, at para. 1.
[41] *Id.*, at para. 12.

> stone laying ceremony, scheduled for 11.30 hours. Most of the guests managed to escape to the nearby Islamic Community Centre. Several buses carrying additional guests were also stoned and reportedly later set on fire. The car of BiH Foreign Minister Zlatko Lagumdzija and several other cars were smashed. In the ensuing clashes between local police and demonstrators, several people have been injured, including journalists, guests and policemen.[42]

A second ceremony took place on 18 June 2001. Whilst it too was fraught with violence, police were better prepared and the ceremonial stone was laid.

Some of the mosques destroyed in Banja Luka have subsequently been reconstructed, though the reconstruction process of the Ferhadija mosque was still underway at the time of writing, and civil suits for compensation were pending in Banja Luka courts.[43]

d. *Muslim Burial Sites*

The Prnjavor cases arose out of a 1994 ordinance issued by the Municipality of Prnjavor, in *Republika Srpska*, which closed the Muslim Town Cemetery. No reason for this closure was ever communicated to the Islamic Community. In the first application decided by the Chamber concerning this closure, the applicant complained of the municipalities' order to exhume the body of his wife who had been buried in the cemetery in 1998.[44] The Chamber found that ordering the exhumation of the applicant's wife because of an ordinance issued in pursuit of a policy of ethnic cleansing, discriminated against the applicant on the grounds of his religion and national origin in the enjoyment of his rights to family life (Article 8) and his freedom of religion (Article 9). The Chamber ordered the *Republika Srpska* to refrain from taking any steps to remove the remains of the applicant's wife and to pay a sum in moral damages and legal fees. The *Republika Srpska* complied in full.

However, the municipality took no steps to remover the ordinance from the books. In February of 2000, the Chamber issued its decision in a case brought by the Islamic Community concerning the municipality's continued prohibition of Muslim burials in the town cemetery.[45] The Chamber held that the continued enforcement of the ordinance constituted discrimination against the Muslim population in Prnajvor. The Chamber ordered the *Republika Srpska* to revoke the ordinance and to desist from any further steps of enforcement, such as prohibiting

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[42] Office of the High Representative. Press Statement: "High Representative appalled at outbreak of violence in Banja Luka," 7 May 2001.

[43] Nadzida Cano, "Bosnian Muslims Sue Serbs Over Destroyed Heritage," 10 April 2008, Balkan Insight, available at: www.balkaninsight.com/en/main/analysis/9303.

[44] *Mahmutovic v. RS* CH/98/892 of October 1999.

[45] The Islamic Community of Bosnia and Herzegovina ("Prnjavor Graveyard")_CH/99/2177 of February 2000.

burials at the cemetery or ordering exhumations. The ordinance was revoked as a result of this decision.

e. *Repossession of Pre-war Housing*

One of the central features of the conflict in Bosnia and Herzegovina was the dispossession of individuals from their property and land, largely as a result of ethnic cleansing. At the end of the conflict, there were approximately 2,200,000 internally displaced persons and refugees in Bosnia and Herzegovina who had either fled their homes or had been expelled as a result of the ethnic cleansing policies. Approximately 412,000 housing units had been damaged or destroyed, and numerous other properties became occupied by individuals other than their owners, often by other displaced persons who were forced to flee their properties in other parts of the country. The Dayton Peace Agreement placed a strong emphasis on putting in place the conditions to enable returns, and established the Commission for Real Property Claims of Refugees and Displaced Persons to deal with the enormity of the problem. This specialised mechanism is discussed in detail below. However, the scale of the property crisis meant that the Human Rights Chamber was not immune from such considerations. Indeed, a large proportion of the Chamber's applicants sought relief for property-related violations, several of which are described below.

According to Article VIII(2)(b) of Annex 6 of the Dayton Peace Agreement, the Human Rights Chamber shall not address any application which is substantially the same as a matter which has already been examined by it or which has already been submitted to another procedure of international investigation or settlement. In many instances, the Chamber had before it cases that were pending or had already been decided by the Commission for Real Property Claims of Refugees and Displaced Persons. The Chamber accepted as admissible those cases in which the applicant raised issues other than those within the competence of the Commission for Real Property Claims,[46] particularly in relation to obstruction of persons seeking to enforce Commission decisions and regain possession of their properties.

The Human Rights Chamber's jurisprudence also played an important role in reviewing the laws, policies and practices of the Parties relating to 'the return process'. One of the types of cases dealt with by the Chamber concerns the right of return by the pre-war occupants under the war time property laws. In the case of *Ivica Kevesevic*,[47] the applicant had an "occupancy right"[48] to an apartment

[46] Rasim Jusufović v. the Republika Srpska, decision on admissibility and merits, case no. CH/98/698 of 9 June 2000.

[47] *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, Case No. CH/97/46, 10 September 1998.

[48] An occupancy right was a right, subject to certain conditions, to occupy an apartment on a permanent basis.

since 1982. In 1993, he fled the area with his family as a result of the hostilities, and returned in July 1995. He was informed a year later by the municipal administration that as the apartment had been declared "permanently abandoned" he had returned unlawfully to the apartment and would have to vacate within seven days, or else face eviction.

The Law on Abandoned Apartments was enacted during the war, and governed the so-called occupancy rights over apartments.[49] Under the Law an occupancy right was temporarily suspended if the apartment was abandoned after 30 April 1991 (the onset of the war) and provided for the temporary allocation of an apartment to "an active participant in the fight against the aggressor against the Republic of Bosnia and Herzegovina" or to a person who had lost her apartment due to the hostile activities. Essentially, it took apartments from disfavoured ethnic groups and handed them to soldiers from the favoured ethnic group. The Law also provided that the occupancy right holder would lose her or his occupancy right if she or he did not resume using the apartment within 7 days (in the case of persons living within the territory of Bosnia and Herzegovina) or 15 days (in the case of persons living outside the borders of Bosnia and Herzegovina) from the date the Decision on the Cessation of War was published. It was first 'published' on a bulletin board in a building in Sarajevo. Formal publication of this decision was not published in the Official Gazette until 5 January 1996.[50]

The Human Rights Chamber determined that the time-limit of seven days (in the case of persons living within the territory of Bosnia and Herzegovina) or fifteen days (in the case of persons living outside the borders of Bosnia and Herzegovina), running from the date of publication of the Decision on the Cessation of War, within which interested persons could claim the right to return to housing to which they had held an occupancy right was unrealistic. It indicated that:

> [I]t would be wholly unrealistic to expect the contents of a notice posted on a single bulletin board in the capital to come to the notice of such a public […]
>
> Irrespective of the above mentioned difficulties resulting from the date of publication of the Decision on the Cessation of War, compliance with the time-limits in question (a seven-day time-limit applying to persons living within the borders of

[49] An occupancy right entails "*inter alia*, the right to use an apartment undisturbed and permanently, the possibility for cohabiting members of the holder's household to obtain the occupancy right after the holder's death or after the termination of the latter's occupancy right on other grounds, and the automatic [obtaining] by the holder's cohabiting spouse of a joint occupancy right." Essentially, an occupancy right, as distinct from outright ownership, allows a person, subject to certain conditions, to occupy an apartment on a permanent basis. An occupancy right holder was not free, however, to sell or otherwise transfer the apartment.

[50] Law on Abandoned Apartments of 15 June 1992.

> the country and a fifteen-day time-limit applying to persons living abroad was in any case practically impossible. It is not acceptable that a law should deprive persons permanently of their rights if they do not fulfill a wholly unreasonable condition, such as the time-limit referred to, which could not possibly be fulfilled by the vast majority of those affected. This Law does therefore not meet the requirements of the rule of law in a democratic society.[51]

The Chamber ordered the Federation of Bosnia and Herzegovina to take all necessary steps by way of (legislative or) administrative action to annul the decision of 22 November 1996 declaring the applicant's apartment abandoned and to reinstate the applicant into this apartment. The applicant was eventually reinstated into his apartment and received compensation for pecuniary and non-pecuniary damages ordered by the Chamber.

In another property-related matter, the Chamber determined, in the case of *Medan, Bastijanović and Marković*[52] the rights of individuals who had contracted to purchase properties from the former Yugoslav National Army. The contracts were annulled by legislation passed shortly after the Dayton Peace Agreement came into force in December 1995. The Chamber determined that legislation providing for the retroactive nullification of the applicants' contracts for the purchase of their apartments violated the applicants' property rights.

After the Chamber's decision in *Medan*, Federation authorities, including the Ministry of Defence, failed to take any steps to remedy the violations by recognising the contracts. Discussions ensued between the Ministry of Defence and the Office of the High Representative regarding the implementation of the decision.

Legislation was eventually enacted by the High Representative which allowed most persons whose purchase contracts had been annulled by the 1995 legislation to be registered as owners and to repossess the apartments in question. However, the legislation excluded certain classes of persons, in particular persons who were not registered citizens of Bosnia and Herzegovina on 30 April 1991 and were in active service with the Yugoslav National Army on that date, and also excluded persons who were in active military service of any armed forces outside Bosnia and Herzegovina after December 1995. In the *Miholic* case,[53] the Human Rights Chamber determined that the exclusions in the legislation were based in part on discriminatory grounds. The case is controversial in that it recognises the competence of the Chamber to consider the human rights

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[51] *Ivica Kevesevic case, supra* n. 47, at paras. 55, 57.

[52] Cases nos. CH/96/3, 8 and 9, Decisions on Admissibility and Merits 1996–1997.

[53] *Andrija Miholic, Bozo Corapovic, Milorad Ciric, Dusan Ristic and Mihailo Buzic v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, Cases nos. CH/97/60, CH/98/276 CH/98/287 and CH/98/362 and 99/1766, Decision on admissibility and merits, 7 December 2001.

implications of legislation imposed by the High Representative, even though the Respondent Party was obliged to implement it. In this respect, the Chamber determined that the law was "national law both in form and substance".[54]

The Chamber ordered the Federation of Bosnia and Herzegovina to take all necessary steps swiftly, by way of legislative or administrative action, to render ineffective the annulments of the contracts of three of the applicants and to allow for registration of ownership of their apartments and to take all necessary steps to enable them to regain possession of their apartments.

B. *The Commission for Real Property Claims FF Refugees and Displaced Persons*

The Commission for Real Property Claims of Refugees and Displaced Persons (CRPC) was established pursuant to Article XI of Annex 7 of the Dayton Peace Agreement. Under the terms of Annex 7, "the Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for the return of the property or for just compensation in lieu of return".

Similar to the Human Rights Chamber, the CRPC was a mixed body, comprised of nine members, including representatives of all three Parties (two representing Bosniaks from the Federation of Bosnia and Herzegovina, two representing Croats from the Federation of Bosnia and Herzegovina, and two representing Bosnian Serbs from the Republika Srpska) and three international members appointed by the President of the European Court of Human Rights. Its decisions were final and binding on the Parties.

Annex 7 specified that the CRPC had the authority to determine property ownership, and to value the property for the purpose of awarding compensation. It also set out that the CRPC could set aside transactions made under duress during the conflict, sell, lease or mortgage properties which are found to be abandoned or in respect of which a claimant has received compensation, and issue compensation bonds for the future purchase of property. However, the operating context for the CRPC is the general statement in the Dayton Peace Agreement that "all refugees and displaced persons have the right freely to return to their homes of origin," and indeed the international community placed great emphasis

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[54] "In certain cases, the High Representative substitut[es] himself for the national authorities and acts as an authority of Bosnia and Herzegovina and the law which he enact[s]is in the nature of a national law and must be regarded as a law of Bosnia and Herzegovina., or, as in the cases presently before the Chamber, as a law of the Federation." *Id.*, at para 131.

on returning displaced persons to their pre-war properties (as opposed to fostering any other durable solution).

The procedures of the CRPC were very different from that of the Human Rights Chamber. As a quasi-judicial administrative body tasked with handling hundreds of thousands of claims in a short period of time, the Commission developed a stream-lined approach aimed at maximising efficiency, and its operating procedures bore greater resemblance to a mass arbitration or claims process than to a judicial process. It operated in accordance with a Book of Regulations, which was drafted and adopted by the Commissioners, and amended several times in the life of the Commission.[55] The Book of Regulations stipulated the operating procedures of the Commission as well as rules and evidentiary principles upon which the Commission's decisions were based. This included methods of claims registration, how data was processed by the Commission, the role of the Commission in supplementing and collating evidence provided by claimants, verification and decision-making procedures.

The Commissioners developed a claims process which took into account the massive scale of displacement and the exigencies facing most refugees and displaced persons in the aftermath of the conflict, many of whom were far from their homes and experienced difficult living and personal circumstances. The process also reflected the prevailing political environment in the country, which was characterised by suspicion and mistrust, efforts by local political authorities to entrench ethnic consolidation and thereby actively prevent minority returns, and the high potential for abuses.

A decentralised claims process was established with regional claims collection offices scattered throughout Bosnia and Herzegovina staffed by multi-ethnic claims teams and in several countries hosting large numbers of Bosnian refugees. In addition, several mobile claim-collection teams were established to cover remote areas within Bosnia and Herzegovina. The staff conducted personal interviews with claimants, to check whether the claim fell within the Commission's mandate,[56] and assisted them to complete detailed claim forms, which included details about the claimants and the registered right holders; details about the

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[55] Annex 7 of the Dayton Peace Agreement specified at Article XV that "The Commission shall promulgate such rules and regulations, consistent with this Agreement, as may be necessary to carry out its functions. In developing these rules and regulations, the Commission shall consider domestic laws on property rights." As is later discussed, the Commission did take into account local property laws though disregarded those laws, particularly those enacted during or immediately after the conflict, that were not consistent with international standards and/or the overall purpose of the Dayton Peace Agreement, which is understood as enabling all refugees and displaced persons to exercise their right to freely return to their homes of origin.

[56] The Commission's mandate was restricted to claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property.

claimed property, including a description of the property, its location and parcel number, fixtures and classification; as well as details about the scope of property rights and the evidence presented to prove the rights. In addition, the claim form collected information on the claimant's preference for the exercise of his or her rights, be this to have the property right confirmed, to re-enter into possession of the property or for compensation in lieu of return. Difficulties arose when some claimants did not possess even the most basis details of the property, having had to flee their homes in haste and without time to collect documents, which made more complicated the evidence verification and decision making process as described below. Once information was collected from the claimants, it was entered into a database with a print-out of the entry provided to the claimant.

Several challenges occurred during the claims registration process, most of which were fixed over time. At the outset, due in part to the inexperience of claims collection staff, evidence of property ownership such as cadastre records or property title deeds which were brought by some claimants to provide proof of their entitlements were not uniformly copied by claims personnel, who operated under the assumption that under the evidence verification process described below, the Commission would have access to the original municipal records and thus the claimants' personal copies would not be required. In addition, there was an inevitable backlog in the claims registration and evidence verification processes, and consequently many claimants registered their claims in several of the Commission's regional offices believing that this would speed up the resolution of their claims. This led to duplicate claims which were not immediately traceable by the Commission due to challenges in the establishment of a centralised claims database.

Upon receipt of a claim, the Commission sought to determine the lawful owner or right holder of the property. Each claim was reviewed by Commission lawyers at the regional level and confirmed by a central legal department.

In order to verify claims, the Commission was highly dependant on domestic property records. Annex 7 of the Dayton Peace Agreement provided to the Commission a right to gain access to "any and all property records in Bosnia and Herzegovina […] for purposes of inspection, evaluation and assessment […] of a claim",[57] however in practice access proved difficult for a number of reasons. In many parts of the country, reliable property records simply did not exist. Some of the original property books kept by the municipal courts had been destroyed during the Second World War or subsequently. Many of the property books that

[57] Article XII (1) of Annex 7 provided that: "The Commission, through its staff or a duly designated international or nongovernmental organization, shall be entitled to have access to any and all property records in Bosnia and Herzegovina, and to any and all real property located in Bosnia and Herzegovina for purposes of inspection, evaluation and assessment related to consideration of a claim."

remained were removed from the courts with the dispersing population, some were subsequently destroyed or were exceedingly difficult for the Commission to track down and access. Indeed, in the immediate aftermath of the conflict, some property books and cadastral records registering land usage were taken with the fleeing population to the opposite entity (e.g. Bosniaks fleeing *Republika Srpska* took RS property records to the Federation of Bosnia and Herzegovina; Serbs fleeing areas taken over by Bosniaks or Croats brought property records to the *Republika Srpska*), and efforts to make these return or otherwise make the records available to the municipalities the records referred to was a slow, cumbersome and politically sensitive process. Many of the remaining property books and cadastre records were unlawfully tampered with.

Additionally, the property books that existed were frequently out of date owing to the beaurocratic, time consuming and expensive system of land registration that had been in place for many years, which meant that many property transactions had proceeded on an informal basis between the parties without ever having been formally registered in the property books. This informal system went unchallenged and proved relatively unproblematic in stable times where most transactions proceeded between neighbours who new and trusted each other. However, the practice became highly contested in the post-war context of ethnically divided communities in which incontrovertible proof of ownership became essential for the assertion of rights.

Owing to the unreliability of the majority of property books, the Commission began a process of collecting and digitising cadastral records which it viewed as the most accurate and update recording system, and ultimately resulted in the establishment of a national database of cadastral (land survey) data. It entered into complex negotiations with entity and federal geodetic administrations, and additionally sought to obtain copies of records from other individuals and/or former officials who had unlawfully taken records into their private possession. At times, owing to the early mistrust between the entities, the Commission was in a far better position to secure the return of records that had been taken across entity borders, than the entity administrations themselves, and became the sole body with access to records throughout the country.[58]

The Commission became in possession of the pre-war cadastre databases for approximately half of the pre-war municipalities. For the other municipalities and for all cases where the cadastre database did not provide a conclusive

[58] Often, records were provided to the CRPC on the basis that it did not further disclose them to the opposite Entity administration. This proved contentious as the situation in the Entities began to normalise and domestic property administrations began to address property problems directly. After a complex negotiation process, the records were eventually handed over the Federal level administration.

determination of ownership or rights of use, verification officers were sent to the property book courts and administrative bodies to check the claim against any other available property records. Where no records were available or accessible, lawyers needed to examine documents from different authorities, including verified contracts, court decisions, decrees of administrative authorities, etc.

The CRPC's decision-making procedures followed traditional mass claims techniques whereby evidentiary standards and rules regarding decision-making were set out in the Book of Regulations. Commission lawyers prepared draft decisions based on standardised templates for approval by the Commission in its plenary sessions, and also drew to the attention of the Commission all legal and policy issues that were not covered by the Book of Regulations in order for the Commission to adopt new procedures or policies to address particular categories or types of claims, or to develop new evidentiary standards which reflected the realities in the country. In order to ensure quality control, a special legal working group, made up of several Commissioners would work closely with the Commission's legal department to prepare the draft decisions, and a percentage of the draft decisions were presented to the plenary for its scrutiny. Decisions were then adopted by the Commission in plenary session.

In order to process the vast number of claims in the most expedient and efficient manner, the Commission did not conduct oral hearings, but instead rendered decisions only on the basis of the claim document and the available evidence. Annex 7 of the Dayton Peace Agreement was silent on the nature of the process before the Commission, and left the Commission to determine its own procedures. The expedited decision-making process was seen as necessary in light of the large number of claims, however it did also limit the ability of the Commission to deal with some of the more sensitive aspects of its mandate, in particular, rulings on illegal war-time transfers,[59] discussed more fully below.

Commission decisions confirmed the pre-war rights of claimants entitling them to resume possession of the property or to transfer the interest to a third party.[60] The scope of the decisions was far more modest than was initially anticipated by the Dayton Peace Agreement. In addition to determining the lawful owner of the property and awarding its return, Annex 7 referred to valuation, just compensation in lieu of return, lease arrangements, the power to effect any transactions necessary to transfer or assign title, mortgage, lease, or otherwise dispose of property with respect to which a claim is made, or which is determined

[59] Article XII (3) of Annex 7.

[60] Whilst the claims forms required applicants to choose how they wished to exercise their rights (confirmation, repossession, compensation), in practice, the Commission decisions only confirmed the property right.

to be abandoned, the award of a monetary grant or a compensation bond for the future purchase of real property. The Commission never proceeded with these other aspects of its mandate.[61] As indicated by Garlick,[62] in respect of the failure by the Commission to initiate a compensation scheme:

> The lack of any initial capital funding to initiate the compensation system – to provide the first contribution to a compensation fund, as contemplated in Annex 7 Article XIV – is cited by CRPC as the main reason for its non-establishment Immediately after Dayton, for many donor countries and institutions, the concept of committing to such a fund under the control of a new and untried organ such as the CRPC was probably seen as too risky, and doubtless too uncertain to produce concrete, visible benefits which could be invoked by donor states as successful contributions to the rehabilitation process for political or other purposes. Later, in and after 1996–97, the reconstruction and assistance bill for Bosnia and Herzegovina and neighbouring countries continued to rise above initial projections. Donors sought to prioritise and reduce their contributions, and the previously unestablished fund did not attract commitments from existing sources, which were under pressure to limit their spending on existing initiatives, rather than to branch into new areas.[63]

There were fears that affording compensation in the immediate aftermath of the conflict would simply exacerbate and entrench ethnic cleansing. As very few refugees and displaced persons were in the position to return (largely as a result of the failure of authorities to create conditions conducive to return), it was believed that claimants would choose compensation as the only viable option, when indeed, return would hopefully become possible in time. The Commission rationalised this position by indicating that those who wished to sell or transfer their interests could use their CRPC certificates as irrefutable proof of their property interests in subsequent transactions for sale or transfer.

Under the Dayton Peace Agreement, the Commission's decisions are final and binding, meaning that they would prevail over inconsistent findings of other institutions, including local courts and administrative bodies. The decisions constituted irrefutable proof of pre-war ownership or other property rights, in other words they provided a final and binding decision as to the legal situation at a particular moment in time. However the fact that CRPC decisions only confirmed pre-war entitlement proved to be a major stumbling block to their enforcement (either for repossession, transfer or sale), in that local administrative procedures could not be bypassed as it would be necessary to confirm that

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[61] See, generally. E. Rosand, "The right to compensation in Bosnia: an unfulfilled promise and a challenge to international law" (2000) 33 *Cornell International Law Journal* 113.

[62] Madeline Garlick. "Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) In Bosnia and Herzegovina," *Refugee* Survey Quarterly, VoL 19, No. S, 2000.

[63] *Id*. at 80.

there had been no intervening factors affecting ownership or other property rights. CRPC decision holders would therefore have to enter what seemed to be an interminable queue with no priority over non-decision holders, prior to entering into any further transaction in respect of their property interest.

1. *Key Challenges the Commission Faced*

a. *Which Rights to Confirm*

As has been indicated, owing to the poor state of the property books, the primary source of evidence utilised by the Commission for the verification of property rights was cadastral records which recorded the use, as opposed to the ownership of property. Accordingly, decisions based on cadastral records invariably confirmed possessory rights over property, as opposed to full ownership rights. For those claimants who wished to return into possession of their property, the confirmation of possessory rights was in principle sufficient for this purpose, however these decisions could not be used for sale or transfer purposes.

Annex 7 specified that "[t]he Commission shall receive and decide any claims for *real property* in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property"[64] [emphasis added]. An early question that the Commission had to consider was the scope of the term "real property" and in particular, whether the CRPC was mandated to consider claims related to socially owned property, a remnant of the socialist pre-war structure in the country. In Bosnia and Herzegovina, the majority of apartments belonged to companies, government organs or social entities, which gave their employees an "occupancy right," a quasi-ownership right, which enables the right holder to occupy the property for life and allows family members to inherit. It is contingent on continuous occupancy and the payment of rent and fees, and it cannot be sold. As had occurred in many former socialist states, the Government had started the process of privatisation of these apartments before the war, though the process had not been completed and many properties remained under social ownership at the outbreak of the conflict.

During the war, many socially owned apartments had to be vacated and legislation put in place during and shortly after the end of the conflict declared as permanently abandoned properties that had not been re-occupied within 15 days after the proclamation of the cessation of hostilities.[65] Once declared permanently abandoned, the apartments were allocated to a new occupant on a permanent

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[64] Article XI of Annex 7.

[65] This issue is discussed in several decisions of the Human Rights Chamber. See, *supra* n. 47 and accompanying text, relating to the decision of *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, Case No. CH/97/46, 10 September 1998.

basis. The Commission decided to disregard such legislation, on the basis that it violated the applicants' right to property as it didn't afford the prior right holders sufficient time or opportunity to regain possession of their properties, and the right to return set out in Dayton Peace Agreement. The Commission decisions were particularly important at this stage as they set an early precedent that such war-time legislation should not be taken into account, leading to the suspension of the offensive provisions by the High Representative.[66]

b. *The Commission's Handling of Property Transfers*

Annex 7 provides that "[i]n determining the lawful owner of any property, the Commission shall not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing. Any person who is awarded return of property may accept a satisfactory lease arrangement rather than retake possession".[67]

In its interpretation of this provision, the Commission decided to disregard all wartime sales and other related contracts and in this respect operated on the basis of the assumption that all such contracts were made under duress, irrespective of the degree of link or connection between a specific incident of ethnic cleansing or other indicator of duress and the resulting contract.

The CRPC decision contains a clause to this effect, stipulating that: "[a]ll legal acts passed by competent Republic of Bosnia-Herzegovina or Entity administrative or judicial bodies after April 1, 1992, i.e. the outbreak of war, which cancelled or restricted the legal rights to the designated real property of the claimants and all legal transactions concluded after April 1992 without the free will of those persons, which gave rise to a change in the legal or factual status of the designated real property, are made ineffective by this decision."

Given the practice of the Commission of determining claims on the basis of a presumption of illegality of war-time sales or transfers, questions relating to the validity of such sales or transfers invariably delayed and complicated the administrative process relating to the enforcement of Commission decisions. Whilst it was recognized that Commission decisions were final and binding upon the parties, the *Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees*, decided by the High Representative on

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[66] The Law on the Cessation of the Application of the Law on Temporarily Abandoned Real Property owned by Citizens and the Law on Cessation of the Application of the Law on Abandoned Apartments, *Official Gazette* of the Federation of Bosnia and Herzegovina 11/98, 3 Apr. 1998; the Law on Cessation of Application of the Law on the Use of Abandoned Property, voted by the National Assembly of Republika Srpska on 2 Dec. 1998.

[67] Article XII (3) of Annex 7.

27 October 1999,[68] set out a special framework for the consideration of transfer and sale contracts. This confirmed the Commission's presumption in respect to the illegality of war-time contracts,[69] however set out a framework in which such contracts could be considered in accordance with domestic law. Persons with a legal interest in the property at issue that was acquired after the date referred to in the dispositive of the Commission decision, were entitled to appeal the permission on enforcement ruling issued by the competent domestic body. In other words, the finding of the Commission as to the pre-war status of the property was not subject to challenge as it was final and binding, however the decision of the administrative body to enforce the Commission decision was subject to domestic appeal.[70] In order to avoid subjecting the enforcement of the Commission's decision to extensive Court delays in respect of questionable appeals, the *Law on Implementation* provided that administrative enforcement proceedings could not be suspended pending the outcome of the appeal, unless the verified contract on the transfer of rights was made after 14 December 1995 (the official end of hostilities).[71]

c. *Enforcement of Commission Decisions*

Article VIII of Annex 7 stipulates that the parties were obliged "to co-operate with the work of the Commission, and shall respect and implement its decisions in good faith." When the CRPC first began to issue decisions on property rights, there was a strong resistance from local authorities to implement the decisions, which had a major impact on the Commission's work. Much of the opposition came from local political forces, who sought to maintain the new ethnically divided 'status quo' post Dayton, which was seen as crucial for the maintenance of the new centres of political power. Such authorities were fearful that the

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[68] Decision on the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, Federation of Bosnia and Herzegovina entry into force on 28 October 1999; Decision on the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, Republika Srpska, entry into force 28 October 1999.

[69] Ibid. Article 13 Paragraph 2 of the Law on Implementation of the Decisions of the CRPC provides that "If the transfer of rights was conducted between 1 April 1992 and 14 December 1995, and its validity is disputed by the respondent, the burden of proof shall lie on the party claiming to have acquired rights to the property under the transaction to establish that the transaction was conducted voluntarily and in accordance with the law."

[70] *Id*. Article 10 Paragraph 2 of the Law on Implementation of the Decisions of the CRPC provided that "A person with a legal interest in the property or apartment at issue which was acquired after the date referred to in the dispositive of the Commission decision, may lodge an appeal against the conclusion on permission of enforcement issued by the competent administrative organ, only as permitted by the provisions of this Law. The appeal procedure mentioned in this paragraph may not refute the regularity of the Commission decision."

[71] *Id*., Article 12.

inevitable process of evicting displaced persons from their ethnic group who had sought refuge in their areas, in favour of the pre-war occupants would undermine their political support and undo the fragile peace. Some groups insisted that Annex 7 could only be implemented through the compensation scheme envisioned under the Dayton Agreement, and initially refused to partake in implementation as such a scheme had not been established.

Obstruction came in a number of forms. In some hard-line areas, CRPC decisions were simply ignored or torn-up, and acts of intimidation were carried out to prevent minority returns. In most cases, however, obstruction was more nuanced. Without strong leadership or direction from the Entity level administrations, municipal bureaucracies simply sat on the decisions, professing ignorance at how decisions of this *sui generis* body could be enforced in the domestic context, and arguing that implementation contravened domestic legislation in force. Further still, implementation in most cases required the current occupants to be evicted and local authorities were reluctant to proceed with evictions without clear accommodation alternatives.

Whilst Annex 7 clearly contemplated that domestic authorities would be bound to take whatever steps were necessary to enforce CRPC decisions, the Entity legal framework remained unclear. War-time legislation on the use of abandoned property allowed municipal authorities to declare privately owned housing abandoned and to allocate its use on a temporary basis to other occupants. With respect to socially owned apartments, apartments were considered to be permanently abandoned if the occupancy right holder did not repossess the apartment within seven days – for refugees 15 days – of the cessation of the state of war. When the majority of refugees and displaced persons did not manage to return within the designated period, their occupancy rights were terminated. In the *Republika Srpska*, the initial post-war laws provided further that returns would not be authorised unless the temporary occupant had not moved to his original home or received fair compensation.

The implementation process was virtually at a standstill, until the High Representative, using his "Bonn powers",[72] began an aggressive campaign to repeal war-time legislation and foster returns. Draft legislation was introduced by the High Representative in 1997, and was eventually passed in 1998. As a result of several gaps in the legislation, obstruction continued. A series of further

[72] The High Representative's "Bonn Powers" refers to powers conferred on him at the Peace Implementation Council Conference in Bonn in December 1997. Elaborating on Annex 10 of the Dayton Peace Agreement, the Peace Implementation Council requested the High Representative to remove from office public officials who violate legal commitments and the Dayton Peace Agreement, and to impose laws as he sees fit if Bosnia and Herzegovina's legislative bodies fail to do so. These highly controversial powers were used regularly in the years following 1997 and continue to be in place today.

reforms were imposed by the High Representative in October 1999. As part of this reform package, the *Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees* was imposed. It specified with precision the exact responsibilities of administrative and legal officials to enforce CRPC decisions.

From this point forward, distinct progress was made in the property return process, in all parts of the country. This was helped by a tight coordination plan instituted by the international community[73] and a mix of conditionality and sanctions, including the removal of several municipal officials from office for their failure to comply with the property legislation. When the CRPC terminated its work at the end of 2003, the local authorities had decided and closed approx. 92.48 % of claims.

C. *Did the Dayton Institutions Foster Adequate and Appropriate Domestic Responses to Victimisation?*

As *sui generis* bodies with mandates limited in time and scope, both the Human Rights Chamber and the Commission on Real Property Claims for Refugees and Displaced Persons had to consider early on, the extent to which their work, if successful at all, could foster adequate and appropriate domestic responses to victimisation. Given the particularity of these institutions and the different ways in which they related to national systems, the issue of legacy and skills or institutional transfer arose at different times and in different ways.

The Human Rights Chamber was modelled specifically on the European Court of Human Rights. The decision of the Parties to have an "internal" Bosnia-specific European Court was novel and ground-breaking. It recognised that in the post-conflict context, violations of the European Convention, its Protocols and related instruments would be rife, and that Bosnia and Herzegovina would eventually accede to the Council of Europe,[74] and thereby come within the direct jurisdiction of the European Court. In many ways, therefore, the Human Rights Chamber was a training ground for the Entities of *Republika Srpska* and the Federation of Bosnia and Herzegovina and State level institutions to bring their laws and practices in line with the European Convention.

According to Annex 6, the Human Rights Chamber's mandate expired on 31 December 2003. The European Commission for Democracy through Law (also known as the "Venice Commission"), which is the Council of Europe's advisory

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[73] See, OSCE, UNMIBH, OHR, UNHCR, CRPC. Property Law Implementation Plan (PLIP) Inter-Agency Framework Document, October 2000.

[74] Bosnia and Herzegovina became the 44th member State of the Council of Europe on 24 April 2002.

body on constitutional matters, conducted a review of the human rights protection mechanisms in Bosnia and Herzegovina and concluded that, as a result of the partially overlapping fields of competencies of the Constitutional Court and the Human Rights Chamber, it was desirable for the bodies to merge. The Venice Commission noted that:

> [E]ntrusting the Constitutional Court with the task of dealing with individual human rights applications requires a simultaneous transfer of expertise, experience, resources, procedural and other capacities, which can best be achieving by the proposed merger. One way of realising the transfer may be to establish a separate human rights section within the Constitutional Court. This merger will also ensure continuity in the Chamber's case-law and contribute to achieving the legal security and stability which the legal order of Bosnia and Herzegovina so much needs.[75]

A lengthy process to further consider the potential for merger ensued, which resulted in several phases of progressive formalised co-operation between the institutions, a transitional period during which the Chamber ceased to receive new cases and ended with the cessation of the Chamber's activities. A Human Rights Commission operated between 1 January 2004 and 31 December 2004 within the Constitutional Court of Bosnia and Herzegovina, with jurisdiction to consider pending cases received by the Human Rights Chamber on or before 31 December 2003. From 1 January 2004 forward, new cases alleging human rights violations are decided by the Constitutional Court, and as with other Council of Europe countries, applications may be submitted to the European Court of Human Rights when local remedies are exhausted.

In accordance with Annex 7 of the Dayton Peace Agreement, "[f]ive years after this Agreement takes effect, responsibility for the financing and operation of the Commission shall transfer from the Parties to the Government of Bosnia and Herzegovina, unless the Parties otherwise agree. In the latter case, the Commission shall continue to operate as provided above".[76] The mandate of the Commission was extended until it concluded its activity in 2003. Unlike the Human Rights Chamber, there was no institutional domestic "home" for the Commission to transfer activities to; the substantive issue for which the CRPC was established to deal with (reinstatement of rights to pre-war property) had been ostensibly resolved and there was no need to create or assign a special institution to cater for such issues. Nonetheless, several remarks can be made on the role of the CRPC in fostering adequate and effective responses to domestic victimisation.

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[75] Venice Commission. Preliminary proposal for the restructuring of Human Rights protection mechanisms in Bosnia and Herzegovina, CDL-INF(1999)012, 25 June 1999.

[76] Article XVI of Annex 7.

After the conflict, the CRPC was the only available mechanism by which refugees or internally displaced persons could obtain proof of property rights. The issuance by the CRPC of numerous decisions confirming claimants' ownership and occupancy rights helped to draw attention to the plight of decision holders, and indeed all refugees and internally displaced persons who could not exercise their property rights. This attention helped to galvanise the support of the international community to amend the domestic legal framework and increase the pressure on local authorities to enable large-scale returns.

As Commission decisions required the action of local administrative and legal officials for enforcement, and given that the pressure exerted on local authorities was not only to implement CRPC decisions but also to encourage them to issue domestic (non-CRPC) decisions to re-instate pre-war occupants to their properties, by the time the enforcement of CRPC decisions was unblocked, the stranglehold on the domestic property adjudication system was equally unblocked. In this sense, by the end of the CRPC's mandate, there was no further need for the CRPC as the domestic property adjudication system had begun to function.

Goats & Graves: Reparations in Rwanda's Community Courts

*By Lars Waldorf**

Urwagwa ntirukura urwangano mu nda.
(Banana beer does not lift hate from the stomach.)
– Rwandan proverb[1]

For *rescapés* [survivors], reconciliation comes after compensation.
– Francine Rutazana, former Executive Secretary, *Ligue des droits de la personne dans la région des Grands Lacs* (LDGL)[2]

A. *Introduction*

Post-genocide Rwanda has nearly completed the most ambitious and participatory transitional justice mechanism ever attempted: more than 10,000 community courts (*gacaca*) with over 100,000 lay judges have tried over one million genocide cases. Despite the growing literature on *gacaca*, there has been relatively little attention paid to its role in providing reparations to genocide survivors.[3] In some ways, this reflects the priorities of many transitional justice scholars and policymakers: reparations are often an afterthought, while economic rights and poverty reduction are rarely thought of at all.[4]

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[1] Pierre Crepeau & Simon Bizimana, *Proverbes du Rwanda* (Tervuren: Belgium: Musée Royal de l'Afrique Centrale, 1979), at 552. Throughout this chapter, all translations from French sources are by the author. In Rwanda, the exchange of banana beer consummates and symbolises reconciliation.

[2] Interview with Francine Rutazana, former Executive Secretary, *Ligue des droits de la personne dans la région des Grands Lacs* (LDGL), Kigali, 20 June 2006.

[3] The notable exception is Penal Reform Int'l, *Le Jugement des Infractions Contre les Biens Commises Pendant le Génocide: Le Contraste entre la Théorie de la Réparation et la Réalité Socio-économique du Rwanda* (London: Penal Reform Int'l, July 2007) [hereafter Penal Reform Int'l, *Infractions contre les biens*].

[4] There is increasing attention paid to reparations. *See, e.g.*, Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Baltimore: John Hopkins University Press, 2001);

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 515–540.

Rwanda's *gacaca* courts provide a fascinating case study on the costs and benefits of using community-level dispute resolution mechanisms to provide both individualised and community reparations. This chapter will begin by situating *gacaca* within the broader context of recovery and reparations in post-genocide Rwanda. It will then examine three forms of reparations provided by *gacaca*: (1) financial restitution to genocide survivors; (2) community service from convicted genocidaires; and (3) symbolic reparations in the form of perpetrator apologies and locating remains. The chapter will focus largely on financial restitution. Finally, it will discuss the lessons and implications of using community-based mechanisms to provide reparations after mass violence.

B. *Background*

1. *Genocide, Post-Genocide Recovery, and the Place of Victims*

Economic grievances and land scarcity were contributing factors to the 1994 genocide in which approximately three-quarters of the Tutsi minority were slaughtered over the course of a hundred days.[5] During the genocide, government officials and "hate radio" incited massacres by stoking fears among the predominantly Hutu peasantry that Tutsi would dispossess them of their land. Killers were often rewarded with their victims' livestock, crops, houses, land, and personal belongings. Economic desperation fuelled some killing and pillaging. One detainee confessed how he had joined a group of attackers to take an old woman's cattle: "When we arrived at her house, certain people among us decided to kill her, [saying] '*If we leave this old woman, she will reclaim her cows at the end of the war*'".[6] Yet, in interviews with 220 confessed killers, Scott Straus found that few had been

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Pablo De Grieff, (ed.), *The Handbook of Reparations* (Oxford University Press, 2006); Rhodri C. Williams, *The Contemporary Right to Restitution in the Context of Transitional Justice* (New York: International Center for Transitional Justice, May 2007). However, the relationship between reparations, poverty reduction, and economic rights remains under-studied. *See, e.g.*, Jane Alexander, "A Scoping Study of Transitional Justice and Poverty Reduction" (London: DFID, January 2003); Louise Arbour, "Economic and Social Justice for Societies in Transition," 2006 Annual Lecture on Transitional Justice, New York University School of Law, 25 October 2006.

[5] *See, e.g.*, Penal Reform Int'l, *Infractions contre les biens, supra* n. 3 at 19–50; Herman Musahara & Chris Huggins, "Land Reform, Land Scarcity and Post-Conflict Reconstruction: A Case Study of Rwanda" in Chris Huggins & Jenny Clover, eds., *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (Pretoria: Institute for Security Studies, 2005); Peter Uvin, *Aiding Mass Violence: The Development Enterprise in Rwanda* (Bloomfield, CT: Kumarian Press, 1998); Philip Verwimp, "An economic profile of peasant perpetrators of genocide," *Journal of Development Economics* 77 (2005), at 297–323.

[6] *Gacaca* hearing, Northern Province, 12 September 2002.

motivated by greed: "For most, the looting came later, after the killing was done".[7] Some local actors also used the genocide to settle scores with their neighbours.[8]

Massive population displacements after the genocide led to further property conflicts. In July 1994, the predominantly Tutsi rebel group the Rwandan Patriotic Front (RPF) defeated the genocidal government. The extremist Hutu militia (*Interahamwe*) and defeated army fled to Tanzania and Zaire, taking approximately two million Hutu refugees with them. Over the next several years, almost a million Tutsi refugees returned to Rwanda seeking to reclaim land and houses they had been forced to abandon in the 1950s, 1960s and 1970s during previous bouts of anti-Tutsi violence. After Rwanda invaded Zaire in late 1996, hundreds of thousands of Hutu refugees, who had left after the genocide, returned to Rwanda. Some found their property occupied by recent Tutsi returnees. Competing property claims were sometimes resolved on an *ad hoc* basis by local officials or through revived customary mechanisms.[9]

Despite impressive economic gains since 1994, Rwanda remains one of the poorest and most densely populated countries in the world: per capita GDP is less than US$250 per year and 80% of the population depends on agriculture for its livelihood.[10] Customary inheritance practices have led to land fragmentation so that the average household has only 0.81 hectares – just less than that needed to feed a household.[11] Rural households still suffer the consequences of the genocide and civil war. For example, violent destruction of a house between 1990 and 1996 "led to a decreased probability of escaping poverty and a significant decrease (62%) in average incomes".[12] Similarly, households that lost cows during that

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[7] Scott A. Straus, *The Order of Genocide: Race, Power, and War in Rwanda* 149 (Ithaca, NY: Cornell University Press, 2006).

[8] Neighbours often opportunistically use national or regional episodes of collective violence to settle scores that have little, if anything, to do with the larger causes of the conflict. *See* Stathis Kalyvas, *The Logic of Violence in Civil War* (Cambridge: Cambridge University Press, 2006). For example, in one Rwandan community with few Tutsi, Hutu killed Hutu over land issues. Catherine André & Jean-Phillipe Platteau, *Land Relations Under Unbearable Stress: Rwanda Caught in the Malthusian Trap*, 34 J. *Econ. Behav. & Org*. 1, at 1–3 (1998).

[9] Alice Karekezi, "Juridictions Gacaca: Lutte contre l'Impunité et Promotion de la Reconciliation Nationale," *in, Cahiers du Centre de Gestion des Conflits* 1, at p. 32 (Butare, Rwanda: Center for Conflict Management, 2000). Under the law, returning Tutsi refugees could not reclaim land and houses that they had vacated more than ten years earlier. In practice, however, some of those returnees managed to regain their property with the help of local officials. Human Rights Watch, *Uprooting the Rural Poor in Rwanda*, at pp. 7–10 (New York: Human Rights Watch, May 2001).

[10] United Nations Development Programme, *Turning Vision 2020 into Reality: From Recovery to Sustainable Human Development. National Human Development Report, Rwanda* at pp. 10 & 15 (Kigali, Rwanda: UNDP, 2007).

[11] *Id*. at 14–15.

[12] Patricia Justino & Philip Verwimp, "Poverty Dynamics, Violent Conflict and Convergence in Rwanda" (April 2006) (unpublished paper) 29.

period are poorer, partly because they lack manure for fertilising their fields.[13] Today, land scarcity poses one of the greatest threats to Rwanda's long-term stability and economic development.[14]

The Rwandan Government has grown increasingly authoritarian over the years.[15] In the process, it has politically marginalised the Francophone Tutsi survivors. At first, this seems surprising given how much of the RPF's moral and political legitimacy is built on having stopped the genocide. But the RPF's Anglophone Tutsi leaders, who grew up in exile in Uganda and Tanzania, have an uneasy relationship with those survivors. In the late 1990s, Tutsi survivors publicly opposed the RPF, particularly over the reintegration of suspected *génocidaires* into the government, the failure to create a reparations fund, and the RPF's manner of commemorating the genocide. The RPF reacted in 2000 by accusing prominent Tutsi elites of corruption and plotting the return of the Tutsi king from exile. Some fled, others were arrested, and one was assassinated under mysterious circumstances. That same year, the RPF installed one of its central committee members as the president of IBUKA, the leading survivors' organization.[16]

2. *Reparations*[17]

After the genocide, the Rwandan Government went further than any other successor regime in pushing for arrests and trials of tens of thousands of low-level genocide suspects. As a result, the Government and international donors spent

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[13] Lode Berlage, Marijke Verpoorten, & Philip Verwimp, "Rural households under extreme stress: Survival strategies of poor households in post-genocide Rwanda" (Report for the Belgian Department of International Cooperation, September 2003) 3.

[14] *See, e.g.*, Musahara & Huggins, "Land Reform, Land Scarcity and Post-Conflict Reconstruction; Management Systems International," *Rwanda Conflict Vulnerability Assessment* (October 2002).

[15] *See* Front Line, *Rwanda: Disappearances, Arrests, Threats, Intimidation and Co-option of Human Rights Defenders 2001–2004* (Dublin: Front Line, 2005); Human Rights Watch, *Preparing for Elections* (New York: Human Rights Watch, 2003); Int'l Crisis Group, *Rwanda at the End of the Transition: A Necessary Political Liberalization* (Brussels: Int'l Crisis Group, 2002); Filip Reyntjens, "Rwanda, Ten Years On: From Genocide to Dictatorship," *African Affairs* 103:177 (2004).

[16] *See* Gérard Prunier, *The Rwanda Crisis: History of a Genocide* 358–59 (New York: Columbia University Press, 2d ed., 1999); Filip Reyntjens, "Rwanda, Ten Years On" at 180; Claudine Vidal, *"Les commemorations du genocide au Rwanda," Les Temps Modernes* (2001) at 1; Human Rights Watch, *The Search for Security and Human Rights Abuses* at 10–11 (New York: Human Rights Watch: 2000); Int'l Crisis Group, *Rwanda at the End of the Transition*: at 4; Heidi Rombouts, *Victim Organisations and the Politics of Reparation: A Case Study on Rwanda* (2004) (unpublished Ph.D. dissertation, University of Antwerp) (on file with author) [hereafter Rombouts, *Victim Organisations*].

[17] This chapter only focuses on reparations for genocide survivors. The RPF has rarely prosecuted its soldiers for war crimes and crimes against humanity committed against Hutu civilians in Rwanda or the Democratic Republic of Congo, let alone compensated the victims of those crimes. *See* Human Rights Watch, *Law and Reality: Progress in Judicial Reform in Rwanda* (New York: Human Rights Watch, 2008); Fédération Internationale des Ligues des Droits de

millions of dollars on detainees and genocide trials – money that might well have been better spent on reparations for the estimated 282,000 needy survivors.[18]

a. *Compensation*

Successor regimes invariably face the dilemma of whether to use scarce resources (including international assistance) to compensate individual victims for past suffering or to create future-oriented development projects to benefit a broader cross-section of the population. Where victims are especially numerous, new governments are often reluctant to provide individual compensation.[19] This has certainly been the case in Rwanda.

Fourteen years after the genocide, the Government has not created the compensation fund promised in its 1996 law on punishing genocide. The fund was supposed to help cover court-awarded damages to victims. Under Rwanda's civil law system, victims can intervene in criminal proceedings as civil parties and recover damages. National courts have awarded millions of dollars in compensation to victims, but those judgments have rarely been enforced, largely because the defendants are indigent.[20] The Rwandan Government also granted itself immunity from civil liability, arguing that its responsibilities are met by payments to a survivors' rehabilitation fund and acknowledgment of the former Government's role in the genocide.[21]

L'homme, *Victims in the Balance: Challenges Ahead for the International Criminal Tribunal for Rwanda* at 64 (Brussels: FIDH, 2002).

[18] *See* Heidi Rombouts & Stef Vandeginste, "Reparations for Victims in Rwanda: Caught Between Theory and Practice," in K. De Feyter et al., eds., *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* at 310 (Oxford: Intersentia: 2005) (citing government census of needy survivors).

[19] Naomi Roht-Arriaza, "Reparations in the Aftermath of Repression and Mass Violence," in Eric Stover & Harvey Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* at 121, 127 (New York: Cambridge University Press, 2004).

[20] For a discussion of compensation awards by Rwanda's ordinary courts, see Rombouts & Vandeginste at 328–30 (summarising findings from *Avocats Sans Frontières*). In a recent decision, the Supreme Court set forth the amounts of compensation to be paid out for the loss of family members, which ranged from $1800 for distant relatives to $5400 for parents, children, and spouses. The Supreme Court did not provide the basis for calculating these amounts. *Theophile Twagiramungu*, Judgment No. RPAA 0004/Gen/05/CS (12 February 2008) at 11.

[21] *Organic Law No. 40/2000 of 26/01/2000 Setting Up 'Gacaca Jurisdictions' and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity, Committed between October 1, 1990 and December 31, 1994*, art. 91 [hereafter 2001 Gacaca Law]. The Rwandan Supreme Court has upheld that provision in the face of legal challenges from civil parties. *Theophile Twagiramungu*, Judgment, *supra* n. 20 at 11. The court did not address the law's conflict with international norms, such as the UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which provides that successor governments shall pay restitution to the victims of state agents. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, ¶11, U.N. Doc. A/Res/40/34/Annex 12 February 2008 (29 Nov. 1985) [hereafter *UN Declaration for Victims of Crime*].

In the past several years, top Rwandan officials have publicly stated that the country cannot afford a compensation fund. The Executive Secretary of the National Service for Gacaca Jurisdictions (known by its French acronym, SNJG) told me in mid-2006:

> Compensation in a legal sense, we think it's impossible for us. … We cannot commit ourselves on something we are not sure to achieve. Even our internal budget depends on outsiders for over 50 percent. … You're going to stop other lines of development of the country.[22]

Similarly, the Executive Secretary of the National Unity and Reconciliation Commission informed me:

> The will from the Government is there, but the challenge is funding for that … because Rwanda is a poor country. From a reconciliation point of view, a form of reparations – even if it would be symbolic – would be important so survivors can also feel there is really a drive to rehabilitate them [and] restore their dignity.[23]

Some find the Government explanation unconvincing. A representative of AVEGA, the genocide widows' association, told me: "The government says it is poor. That doesn't satisfy us. It is being killed two times".[24] One diplomat who works in the justice sector criticised the Government for being "more interested in [creating] a beautiful Kigali" than in the welfare of genocide survivors: "The *rescapés* are only poor people. They are people from the hills. They are not important people. … Giving all the tax breaks to Ugandan [returnees] is more strategic for the Government".[25]

The Government has drafted several compensation bills since 1997, but, as of June 2008, none had been enacted. The 2001 bill would have required complicated calculations using a schedule that specified different amounts for different categories of murdered kin and stolen property.[26] In early 2002, IBUKA, the most influential survivors' organization, proposed a wholly different, lump-sum approach to the Ministry of Justice – without consulting its partners or member organizations.[27] That resulted in the 2002 compensation bill, which would have given each beneficiary approximately $23,000. Beneficiaries were broadly defined

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[22] Interview with Domitilla Mukantaganzwa, Executive Secretary, National Service for *Gacaca* Jurisdictions, Kigali, 6 June 2006.

[23] Interview with Fatuma Ndangiza, Executive Secretary, National Unity and Reconciliation Commission, Kigali, 13 June 2006.

[24] Interview with Consolee Mukanyiligira, former Executive Secretary, AVEGA-AGAHOZO, Kigali, 27 June 2006.

[25] Interview with diplomat, Kigali, 21 June 2006.

[26] The precise formula was unclear, though it was modeled after a draft law for compensating victims of road accidents. Rombouts, *Victim Organisations, supra* n. 16 at 348.

[27] Rombouts, *Victim Organisations, id*. at 349–50; Rombouts & Vandeginste, *supra* n. 18 at 331.

as anyone targeted because of their ethnicity or opposition to the genocide (plus their relatives) – regardless of whether they had suffered any actual injury.[28] Compensation would have been funded through eight percent of the Government's tax revenues and appeals to the international community. Recognising that this would still have been insufficient to compensate such a large category of beneficiaries, the 2002 bill provided that compensation could be made either in cash or in services, that the amount of the fixed sums could be adjusted according to the amount of money in the fund, and that priority would be given to the most needy (without, however, defining need).[29]

The Council of Ministers approved the bill in August 2002, but, before it could be debated in Parliament, the Ministry of Justice withdrew it.[30] Explaining why the bill was shelved, a high ranking justice official told me:

> We thought it was not a very realistic draft. … At the level of disbursing [compensation], let the law clearly indicate there are cases which are in acute need to whom compensation would be applied … and let the law make clear what we mean by acute need. Compensation is a right, yes, but let it be a compensation fund – not compensation for each and every person in a court of law.[31]

As of June 2008, there had been little further movement on establishing a compensation fund.

b. *Rehabilitation*

While the law on creating a compensation fund has languished, the Government has paid five percent of tax revenues into a rehabilitation fund each year.[32] Unlike a compensation fund, the *Fonds d'Assistance aux Rescapés du Génocide* ("FARG"),

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[28] *Projet de loi Portant Création, Organisation et Fonctionnement du Fonds d'indemnisation des Victimes des Infractions Constitutives du Crime de Génocide ou de Crimes Contre l'humanité Commises Entre le 1 Octobre 1990 et le 31 Décembre 1994*, art. 17 [hereinafter Draft 2002 Compensation Law]. Under international human rights norms, however, priority should be given to compensating "[v]ictims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes," as well as their immediate family members. UN *Declaration for Victims of Crime, supra* n. 21 at ¶ 12.

[29] Draft Compensation Law 2002, *id.*, arts. 14, 20, 22, & 23.

[30] Rombouts, *Victims Organisations, supra* n. 16 at 349–50 & n. 165.

[31] Interview with Johnston Busingye, then Secretary General, Ministry of Justice, Kigali, 12 June 2006.

[32] *Law No. 02/98 of 22/01/1998 Establishing a National Assistance Fund for Needy Victims of Genocide and Massacres Committed in Rwanda Between October 1, 1990 and December 31, 1994*, art. 12 (1), *in Journal Officiel* No. 3, 1 Feb. 1998, at pp. 217–24 [hereinafter FARG Law]. Under the 2002 bill, the proposed compensation fund would have replaced this rehabilitation fund. Rehabilitation is also mandated by the 2003 Constitution: "The State shall, within the limits of its capacity, take special measures for the welfare of the survivors of genocide who were rendered destitute by the genocide committed in Rwanda from October 1st, 1990 to December 31st, 1994, the disabled, the indigent and the elderly as well as other vulnerable groups." Rwanda Const. (2003), art. 14.

which was set up in 1998, cannot be tapped to pay awards ordered by national or *gacaca* courts. Rather, FARG largely provides education scholarships (especially for secondary school) and free medical care to the neediest survivors.[33]

Interestingly, the FARG assists "survivors" rather than "victims".[34] Survivors are defined as anyone who survived genocide (extermination based on ethnicity) or massacres (extermination based on opposition to genocide).[35] Thus, survivors can be either Tutsi or Hutu. In practice, however, FARG has mostly benefited Tutsi survivors. As two scholars observed, this is partly due to Rwanda's patrilineal system:

> An orphan who lost his Tutsi father in the genocide, but lives with his Hutu mother is automatically considered a *rescapé* [survivor]. … On the contrary, a child that lost his Tutsi mother during the genocide, but lives with his Hutu father is not considered a *rescapé*.[36]

The FARG's preferential treatment of Tutsi survivors is also political: FARG administrators have close links to the RPF and the survivors' organizations, whose leadership are predominantly Tutsi.

The FARG has earned an unenviable reputation for both discrimination and corruption. A sizeable percentage of Rwandans see the fund as discriminating against Hutu – something that only creates new ethnic resentments.[37] To make matters worse, the FARG has been marred by several corruption scandals.

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[33] The FARG's provision of housing and micro-credit has been sporadic and largely unsuccessful. Rombouts & Vandeginste, *supra* n. 18 at 333.

[34] By contrast, international instruments talk in terms of victims. The UN General Assembly has defined victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions" that are violations of criminal laws or gross violations of international human rights law. UN *Declaration for Victims of Crime, supra* n. 21 at ¶ 1; *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law*, G.A. Res. 60/147, ¶ 8, U.N. Doc. A/Res/60/147/Annex (21 March 2006) [hereafter *UN Principles on Reparations*]. Victims also may include immediate family members who suffered harm in protecting victims or preventing victimisation. *Id*. A person can be a victim "regardless of the family relationship between the perpetrator and the victim." UN *Declaration for Victims of Crime, supra* n. 21 at ¶ 2; UN *Principles on Reparations* at ¶ 9.

[35] FARG Law, art. 14. By contrast, the 2004 *Gacaca* Law uses the term "victim." *Organic Law No. 16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide or Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994*, art. 34 [hereafter 2004 *Gacaca* Law].

[36] Rombouts & Vandeginste, *supra* n. 18 at 337.

[37] *See* Stef Vandeginste, "Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation," in John Torpey ed., *Politics and the Past* 265 (London: Rowman & Littlefield Publishers, 2003) (citing a government survey); Rombouts & Vandeginste, *supra* n. 18 at 334.

Consequently, the government has proposed replacing the FARG with a new and better financed rehabilitation fund, the *Fonds de soutien et d'assistance aux rescapes* (FSARG). The government did not consult survivors' organizations when it first drafted the legislation for that new fund.[38] As of June 2008, the FSARG had not yet been created.

c. *Memorialisation*

The Rwandan Government has built or maintained 78 genocide memorials and nearly 400 mass tombs.[39] With assistance from international donors and NGOs, the Government has created four high-profile genocide memorials in Kigali, Murambi, Ntarama, and Nyamata. These have become pilgrimage destinations where visiting dignitaries ritualistically express remorse for the international community's failure to halt the genocide. The most striking aspect of these memorials – and the most controversial – is the exhibiting of skulls, bones, and, in one location, mummified corpses. Such displays are at odds with Rwandan cultural traditions as well as the dominant Catholic faith. The sociologist Claudine Vidal argues that "the rituals, as well as the memorial sites where the bodies are exposed, constitute a symbolic violence that is extreme in regard to Rwandan representations of death and the survivors' mourning. No doubt, this violence is linked to the work of forced memorisation done by the state".[40] While IBUKA, which is very close to the Government, backs the display of bodies, some individual survivors would prefer to bury the remains.

Genocide memorialisation is highly politicised. President Paul Kagame generally uses the annual genocide commemoration on April 7 to denounce political opponents and the international community. At the 2002 genocide commemoration, for example, President Kagame attacked his predecessor, Pasteur Bizimungu, who had attempted to create a new opposition party. Bizimungu was arrested three weeks later. For the past three years, President Kagame and other government officials have used the commemoration to denigrate Paul Rusesabagina, the real-life inspiration for the film "Hotel Rwanda."

It is far from clear whether the memorials and commemoration ceremonies help advance reconciliation. In a recent interview, an older Hutu woman who lives near the second-largest genocide memorial stated: "Since the commemorations

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[38] Penal Reform Int'l, *Infractions contre les biens, supra* n. 3 at 95.

[39] Louis Marie Rugendo, "Murambi: Remembering the Rwandan Genocide," Int'l Just. Trib., No. 86 (7 April 2008) at 3.

[40] Claudine Vidal, *"La commémoration du génocide au Rwanda: Violence symbolique, mémorisation forcée et histoire officielle," Cahiers d'études africaines* 64:175 at 575–592 (2004). *See* Vidal, *Les commemorations du genocide, supra* n. 16; Sara Guyer, Rwanda's Bones (unpublished manuscript).

are very official, with very harsh speeches, we all feel like we are considered guilty of genocide and we prefer to remain unobtrusive".[41]

C. *Reparations in Gacaca*

1. *Gacaca*

Gacaca was a pragmatic and political solution to overcrowded prisons and overwhelmed courts.[42] Approximately 120,000 genocide suspects were crammed into Rwanda's prisons and communal jails by 2000.[43] This posed an insurmountable challenge to Rwanda's judicial system: between December 1996 and December 2006, the courts had only managed to try about 10,000 suspects. To speed up trials, the Government created an ambitious and innovative system of community courts comprised of lay judges and named after a "traditional" dispute-resolution mechanism that had largely fallen into disuse.

Under modernised *gacaca*, 1545 sector-level courts[44] were responsible for trying more than 500,000 accused of murder, manslaughter, assault, and sexual violence (the most high-ranking suspects are still tried by the national courts). Those suspects who pled guilty received reduced sentences which included community service.

Meanwhile, the 9201 cell-level courts were charged with trying nearly 300,000 suspects accused solely of property crimes – unless they had reached an amicable

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[41] Rugendo *supra* n. 39 at 4.

[42] For detailed analyses of *gacaca*, see Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice," 79 Temple L. R. 1 (2006); Avocats Sans Frontières, *Monitoring of the Gacaca Courts, Judgment Phase, Analytical Report No. 3, October 2006-April 2007* (February 2008); Avocats Sans Frontières, *Monitoring des Juridictions Gacaca, Phase de Jugement, Rapport Analytique, Mars-Septembre 2005* (2005); Penal Reform Int'l, *Rapport de Synthèse de Monitoring et de Recherché sur la Gacaca: Phase Pilote Janvier 2002-Décembre 2004* (Dec. 2005).

[43] Some had been detained on false accusations: "For a house, for a field or a tool, people are denounced without evidence, and awkward neighbours are arrested." Andre Sibomana, *Hope for Rwanda: Conversations With Laure Guilbert and Herve Deguine* at p. 107 (London: Pluto Press, 1999). For a fascinating account of Rwanda's genocide detainees, see Carina Tertsakian, *Le Château: The lives of prisoners in Rwanda* (2008).

[44] Rwanda's administrative organization has changed several times since the genocide and is still being transformed. *Gacaca* is based on the former administrative division of the country into 11 provinces, 106 districts, 1545 sectors, and 9201 cells. At that time, a cell averaged 830 people, though there were considerable variations. Stef Vandeginste. "Rwanda: Dealing with Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition," in Nigel Biggar, ed., *Burying the Past: Making Peace and Doing Justice after Civil Conflict*. Expanded and updated. Washington, D.C.: Georgetown University Press. (2003) 251 at 252 n. 60.

settlement beforehand.[45] They could only order restitution (not the prison sentences prescribed for ordinary theft in the Penal Code) and there was no appeal from their judgments.[46] These cell-level courts more closely resembled "traditional" *gacaca*, which only handled minor civil disputes and only awarded restitution.[47]

In October 2001, local communities elected lay judges. Those elections were not as democratic as they first appeared: local officials often nominated candidates in advance and many of those candidates were already involved in local administration.[48] Over the next several years, there was considerable turn-over as some judges resigned voluntarily and others were forced to step down (sometimes because of genocide accusations). Those judges were replaced through a mix of community elections or appointments of reserve judges. Most judges had limited education. The initial training in 2002, which lasted just six days, was criticised as insufficient.[49] Since then, the SNJG has conducted periodic trainings for judges, usually after significant amendments to *gacaca*. Nevertheless, it has been difficult for poorly educated gacaca judges "to follow and understand a procedure that evolves without end" – an evolution that has entailed three amended laws and 15 instructions (five alone in 2007) as of June 2008.[50]

2. *Individualised Restitution*

Gacaca was meant to lay the foundation for compensating genocide survivors, with community courts tallying up human and material losses. The initial manual for *gacaca* judges stated that the lists of damages compiled by those courts "will be transmitted later to the Compensation Fund".[51] The 2004 *Gacaca* Law subsequently deferred the issue of compensation. Thus, *gacaca* raised and then dashed survivors' expectations that they would receive meaningful compensation for all their losses.[52] Instead of compensation, it has promised survivors

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[45] The inclusion of property offenses in the 1996 genocide law and the various *gacaca* laws was always legally problematic. Property crimes do not figure in the definition of genocide in either the 1948 Genocide Convention or 1998 Rome Statute for the International Criminal Court. Furthermore, it is far from clear whether most of the looting in Rwanda in 1994 was committed with the specific genocidal intent to destroy the Tutsi *qua* Tutsi.

[46] PRI *Infractions contre les biens, supra* n. 3 at 53.

[47] *See* U.N. High Comm'r for Human Rights, *Gacaca: Le Droit Coutumier Au Rwanda* 20 (1996).

[48] Penal Reform Int'l, *Gacaca Jurisdictions and its Preparations, July – December 2001*, at 34–35.

[49] African Rights, *Gacaca Justice: A Shared Responsibility* at 4–12 (January 2003).

[50] Penal Reform Int'l, *Le temoignage et la preuve devant gacaca* at 32 (June 2008 draft).

[51] Departement des Juridictions Gacaca, *Manuel explicatif sur la loi organique portant creation des juridictions gacaca* 69 (2001). This Department, which formed part of the Supreme Court, was the predecessor of the National Service of Gacaca Jurisdictions (SNJG).

[52] *See* Rombouts, *Victims Organisations, supra* n. 16 at 358.

restitution. Indeed, *gacaca* is the most ambitious effort at post-conflict restitution ever attempted. Week after week across Rwanda's hills for the past two years, neighbours have argued over who stole what from whom and how much should be repaid.

a. *Evidence-Gathering*

The 9201 cell-level *gacaca* courts were responsible for itemising and valuing each claimant's losses. During this evidence-gathering phase, victim households listed their material losses and *gacaca* courts recorded the details on standardized forms. Judges were given limited written instructions on how to accomplish this task:

> … it is necessary to write down the material damage suffered by the household. For example, the house has been destroyed, the livestock have been stolen.
>
> Construction. If a household's house has suffered damage, it is necessary to specify the material (mud bricks, semi-durable material, or durable material). Specify if the damage is a part of the house (doors, windows, enclosures, other construction).
>
> Livestock. Write down if the damage also includes livestock: large livestock (how many cows) and small livestock (how many goats, sheep, pigs rabbits, fowl). For example, 1 cow, 3 goats and five fowl.
>
> Household goods. Household goods are the goods which are in a house (tables, chairs, pots, radio…). There are also vehicles and crops. Write down the household goods which have been destroyed or stolen.[53]

This imprecise guidance from the Government led to local-level disagreements over how to itemise and value goods.

Initially, victims had to enumerate their damages in *gacaca*'s public hearings, but this process proved cumbersome and contentious. Some community members publicly accused survivors of inflating their property losses, while survivors sometimes complained that suspects had sold off property to preclude restitution. Others voiced resentment that *gacaca* was only handling claims from genocide survivors – rather than including property losses blamed on the RPF or returning Tutsi refugees. In one *gacaca* hearing, the presiding judge asked why the assembled population did not talk about stolen property. An old man responded:

> Most of the people who stole things fled to the Congo. When they returned, they already paid [this] back so it's not necessary to mention it. When the RPF arrived here, there were also people who took from people who had fled from the *inkotanyi* [RPF soldiers], so it's very difficult to know.[54]

The Rwandan Government has taken the position that property crimes committed by their forces cannot be equated with those that occurred during the

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[53] Departement des Juridictions Gacaca, *Manuel explicatif, supra* n. 51, at 70.
[54] *Gacaca* hearing, Northern Province, 13 November 2002.

genocide. "[T]hese two pillagings do not arise from the same juridical context: pillages committed [against Hutu] during their exile are a common crime, whereas the pillaging of goods of Tutsi were part of a genocidal plan".[55]

In 2005, the Government made *gacaca*'s information-collection phase more efficient by delegating the task to local administrators – even though that was never authorised by the *gacaca* laws and the administrators had received little or no training. That made *gacaca* less participatory and more susceptible to corruption, while also reinforcing the power of state officials at the expense of *gacaca* judges and local communities.[56] Local administrators generally collected information from victim households and ignored exculpatory evidence.[57] In addition, defendants were not permitted to challenge accusations during the information-gathering stage.[58] Penal Reform International criticised this process for encouraging false accusations: "as an accusation can be made without objection and since false testimony is neither contradicted nor, moreover, punished, some people were able to take advantage of this and falsely accuse their neighbours in order to settle personal conflicts, particularly pertaining to property".[59]

b. *Amicable Settlements*

Over the past seven years, Government policy on *gacaca* trials for property crimes has evolved considerably. Initially, trials were to take place for all property offences, unless the parties had reached an amicable settlement before 15 March 2001, the date the first *gacaca* law came into force.[60] Obviously, that created a disincentive for further settlements. So, the Government amended the *gacaca* law in 2004 to encourage settlement up until the moment of judgment.[61] When the evidence-gathering and indictment phase ended in 2006, there were more than 300,000 people accused solely of property offences (this figure later doubled). This enormous number of suspects prompted a further amendment to the *gacaca*

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[55] *Service National des Juridictions Gacaca, Observations du Service National des Juridictions Gacaca au rapport du Penal Reform International sur les infractions contre les biens* at p. 2 (undated), attached as appendix to Penal Reform Int'l, *Infractions contre les biens* [hereafter SNJG, Observations].

[56] Penal Reform Int'l, *Monitoring and Research Report on Gacaca: Information-Gathering during the National Phase*, at 2 & 6–24 (2006).

[57] Penal Reform Int'l, *Infractions contre les biens, supra* n. 3 at 56.

[58] *Id*. at 17 & 34. Penal Reform International also noted that the SNJG's forms for collecting information did not provide space for noting exculpatory testimony. *Id*. at 31.

[59] *Id*. at 29.

[60] 2001 Gacaca Law, *supra* n. 21, art. 51. The manual for judges took a somewhat more pragmatic approach: if the parties had reached a settlement after 15 March 2001 but before the trial, "the goal of the public audience is to verify that there has been a good settlement. If that is indeed the case, the court will write the settlement into the judgment. The affair is definitively terminated." Departement des Juridictions Gacaca, *Manuel explicatif, supra* n. 51 at 127.

[61] 2004 *Gacaca Law, supra* n. 35, art. 51.

law in 2007: all genocide-related property crimes were required to go through mediation first and, only if that failed, would the cases be heard by *gacaca* courts.[62] At the same time, the Government pressed cell-level judges and local authorities to "sensibilise" the population to reach amicable settlements.

The Government justified this pragmatic shift in favour of mediation in terms of reconciliation. For example, the SNJG, which is charged with administering *gacaca*, stated:

> … with restitution or reparation, we have not forgotten that one of the objectives of the *gacaca* jurisdictions is reconciliatory justice. That is why, before introducing a demand before the jurisdiction, one must first verify if there is the will to make restitution and pay without the intervention of the *gacaca* jurisdiction. This is because this will show that the authors of these offenses are conscious of what they have done and repent.[63]

While most property cases have been resolved through settlements rather than *gacaca* trials, this does not seem to have much to do with reconciliation. First, "the refusal to settle is considered a lack of will to reconcile which must be punished severely".[64] Second, both sides evinced "a certain realism" about their prospects at trial: "The pillagers know that if they go to trial they will be sentenced to pay back elevated amounts, and the victims know that it is probable that the actual value of the goods will never be paid".[65]

Penal Reform International also found that Rwandans on the hills were somewhat confused about the difference between settlements and *gacaca* judgments. This is not surprising. A mediation I attended closely resembled a *gacaca* trial. There were two main differences: the judges did not wear their judicial sashes (thus indicating that they were not sitting as judges) and the local official (rather than the presiding judge) dominated the proceedings.[66] Confusion may also result because a settlement has to be formally validated by the *gacaca* court.

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[62] *Organic Law N° 10/2007 of 01/03/2007 modifying and complementing Organic Law n°16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1, 1990 and December 31, 1994 as modified and complemented to date*. [hereafter 2007 Gacaca law]. In contradictory fashion, though, the 2007 law reinstated language limiting the effect of amicable settlements to those made before this law took effect. *Id.* at art. 11. That provision appears to have been largely ignored in practice.

[63] *Service National des Juridictions Gacaca, Poursuite des infractions contre les biens endommages pendant le génocide* (3 August 2006) at p. 3 [hereafter SNJG, *Poursuite*] (French translation by Penal Reform International).

[64] Penal Reform Int'l, *Infractions contre les biens, supra* n. 3 at 76.

[65] *Id*. at 72.

[66] Mediation hearing, Northern Province, 10 September 2007.

c. *Trials and Judgments*

Trials in cell-level *gacaca* courts generally followed the procedures laid down in the 2004 *gacaca* law and the handbooks for *gacaca* judges.[67] Hearings usually opened with a minute of silence to commemorate victims of the genocide, followed by the reading of the procedural rules. Before calling the first case, a presiding judge often invited those who had not yet confessed their crimes to come forward and do so. The actual trials normally began with the court reading out the list of stolen property and the names of those accused. The victims (civil parties) generally testified first, followed by the accused, and then the victims responded. As the proceedings progressed, other witnesses were called on or spoke up. Eventually, the courts issued public judgments after deliberating in private.

Cell-level *gacaca* judges were given little guidance on how to assess the credibility of competing testimonies or how to weigh evidence. For example, the original manual for judges states:

> It is possible that there is contestation over a settlement that happened after 15 March 2001. It is possible that there is a settlement, but that other victims claim damages. It is possible that the accused defends his innocence. It is possible that the accused accepts his responsibility, but that he does not accept the valuation of damages.
>
> All these questions of disagreement are discussed in the public audience. The first question will be the responsibility of the accused. Has he committed the acts of which he is accused? If no, he must be declared not guilty. If yes, are these acts the cause of damage to victims? If no, the accused must not make reparation for the damage caused by someone else. If yes, what is the importance of the damage? And how can it be repaired? If the accused has caused damages with other persons, he is only partly responsible, and he must make reparations for only a part of the damages.[68]

As this extract makes clear, *gacaca* judges were reminded to apply the presumption of innocence, assess causation, and determine individual criminal responsibility. During the actual trials, however, some *gacaca* courts did not fully respect these principles.

Trials often grouped together all those accused of pillaging from the same household. One trial I observed involved 28 accused. The SNJG promoted such group trials as the only appropriate means of assigning collective responsibility and assuring restitution:

> The co-authors of a property offence who are at liberty must be judged at the same time in order to divide up the restitution. We adopted this strategy … because the genocide has been perpetrated *en masse*. If one considers the individual, one risks

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[67] *See* 2004 *Gacaca* Law, *supra* n. 35, art. 68.
[68] Departement des Juridictions Gacaca, *Manuel explicatif supra* n. 51 at 128.

> not realising the restitution, but if one does it collectively, the problem is resolved.[69]

At the end of group trials, *gacaca* courts often divided the restitution awards equally among those found guilty – without taking into account varying degrees of responsibility.[70] A *gacaca* judge told me his court divided the value of replacing a slaughtered cow equally among all those who had eaten its meat.[71]

Cases involving cattle have highlighted the difficulties of rendering justice where so many participated in and benefited from the pillaging.

> S: I would like to know if G didn't eat the meat from stolen cattle.
> G: I swear to you that I did not steal cows.
> Confessed perpetrator: It is G who pointed out to us where we could find other cows.
> [The court then calmed a verbal argument between G and the confessed perpetrator.]
> G: Perhaps I ate the meat, but I bought it with my own money.
> Judge: Tell us those you saw pillaging.
> G: [Says nothing.]
> L: The cows were slaughtered very close to G's house. Wasn't he curious to see what was going on there?
> G: No, I am innocent.[72]

On a separate occasion, a Rwandan informant wondered aloud whether everyone who purchased meat during the genocide would be convicted of a property offence.[73]

The *gacaca* laws provided judges with no clear guidance on how to calculate restitution.[74] The original manual for gacaca merely states:

> To determine the sum of money to pay, the court takes several things into account. First, it takes into account the victims' damages. Then, it takes into account the real possibilities of the accused: his wealth and his poverty. Sometimes, it is better to sentence an accused to pay a realistic sum of money each month to the victim. In this case, the court specifies how many months the accused must pay this sum.[75]

One *gacaca* court impressed me with its handling of this difficult issue. To come up with the replacement value for each looted item, the court asked the assembled audience for each item's current value in the community.[76] That trial ended

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[69] SNJG, *Poursuite supra* n. 63 at 3.
[70] Penal Reform Int'l *Infractions contre les biens supra* n. 3 at 4, 74–75.
[71] Interview with cell-level *gacaca* judge, Northern Province, Aug. 2006.
[72] *Gacaca* trial, Northern Province, 30 August 2006.
[73] Northern Province, 10 September 2007.
[74] SNJG subsequently clarified that restitution of a pregnant cow is limited to one cow – not a cow and a calf. SNJG, Observations *supra* n. 55, at 4.
[75] Departement des Juridictions Gacaca, *Manuel explicatif, supra* n. 51 at 128.
[76] *Gacaca* trial, Northern Province, 30 August 2006.

with the acquittal of seven accused and the sentencing of nine who had confessed. The latter were ordered to repay the amounts they admitted stealing (mostly, 15 or 30 kilograms of beans) plus their (equal) share of the other stolen goods ($90). While this amount may seem relatively small, it is worth remembering that per capita income is less than US$250.

Gacaca trials have been criticised on two main grounds. First, *gacaca* courts had considerable difficulty conducting adversarial hearings that would have enabled them to assess credibility.[77] Even where there were lively debates, they mostly focused on calculating damages and restitution, rather than the larger questions of innocence and guilt.[78] Inevitably, fear, mistrust, intimidation, corruption, and micro-politics shaped who spoke and who stayed silent, who told the truth and who lied, who the *gacaca* judges believed and who they ignored. This was all the more problematic given that local officials had largely ignored exculpatory evidence during the evidence-gathering phase. Second, *gacaca* judgments are generally issued with little in the way of evidentiary findings or justifications. This was not simply attributable to the judges' lack of formal education and limited training. It was also the result of government pressure on *gacaca* courts to complete all trials by the end of 2007.[79]

d. *Executing Judgment*

The 2004 *gacaca* law provided three methods for accomplishing restitution: return of the looted items, monetary payment for those items, or "carrying out the work worth the property to be repaired".[80] In the proceedings described above, the *gacaca* court gave confessed defendants those three options for making restitution for the beans or sorghum they stolen. Where a convicted person fails to make the ordered restitution, the law provides for the seizure of that person's goods.[81] A SNJG Instruction clarifies that judgments can only be executed by local authorities – not by the victims themselves.[82]

Early on, when *gacaca* was still in its pilot phase, IBUKA raised concerns that genocide suspects were transferring their property to evade making restitution to

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[77] Penal Reform Int'l, *Infractions contre les biens, supra* n. 3 at 56–60; Penal Reform Int'l, *Le temoignage, supra* n. 50 at 25.

[78] Penal Reform Int'l *Infractions contre les biens, id.*, at 56.

[79] In fact, trials of genocidal killing and assault continued into 2008.

[80] 2004 *Gacaca* Law, *supra* n. 35, art. 95.

[81] 2004 *Gacaca* Law, *id.*, art. 95.

[82] SNJG, *Instruction No. 14/2007 du 30/03/2007 du Secrétaire Exécutif du Service National des Juridictions Gacaca concernant le dédommagement des biens endommagés pendant le génocide et d'autres crimes contre l'humanité commis entre le 01 octobre 1990 et le 31 décembre 1994* (30 March 2007). Available on website in Kinyarwanda only (French translation by Penal Reform International).

survivors. The Government subsequently amended the law so that *gacaca* courts could take temporary protective measures to prevent a suspect from disposing of his property.[83] It is unclear whether *gacaca* courts have taken advantage of this legal provision to preserve assets for restitution.

Gacaca has attempted to strike a balance between the survivors' need for restitution and the perpetrators' ability to pay. For example, to help survivors, "those who have the means are going to pay for those who don't and these last are going to exercise a recovery action [against their co-perpetrators] before the ordinary courts".[84] Yet, the main obstacle to restitution is that the vast majority of those judged guilty are indigent. To prevent impoverishing the perpetrators, the SNJG issued an instruction in March 2007 specifically exempting certain goods from seizure:

> 2/3 of provisions that will serve as food for the author of the damage and his family;
> 2/3 of the salary of the author of the damage;
> 1/3 of the pension of the author of the damage;
> 1/2 hectares of fields used by the author of the damage and his family;
> The house inhabited by the author of the damage and his family;
> The mattresses and clothing of the author of the damage as well as those of the members of his family;
> The material necessary for the work of the author of the damage which assures his survival and that of his family.[85]

This provision is an important and pragmatic accommodation to the widespread poverty among Rwanda's perpetrators.

In the trial I observed, those found guilty asked the court if they could begin paying restitution at the end of the year after the harvest. The court gave them to 25 December to repay $50, with the remaining $40 to be paid thereafter. The court also reminded defendants that they could pay that sum by working for the civil party. A local observer told me that there is a standard rate in the community for paid, unskilled labour (300 FRW, or $0.55, per day). Given that most perpetrators are indigent, *gacaca* will often result in Hutu perpetrators paying restitution to genocide survivors in the form of labour. This is problematic in Rwanda as it could be perceived as a return to pre-colonial and colonial practices under which poor Hutu provided forced labour to Tutsi elites.[86]

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[83] 2004 *Gacaca* Law, *supra* n. 35, art. 39.
[84] SNJG, *Poursuite, supra* n. 63 at 4.
[85] SNJG, Instruction No. 14/2007, *supra* n. 82, art. 7.
[86] For a description of the *ubureetwa* clientship system, see Catharine Newbury, *The Cohesion of Oppression: Clientship and Ethnicity in Rwanda 1860–1960* at 140–43 (New York: Columbia University Press, 1988).

3. *Community Service*

Most of those convicted by sector-level *gacaca* courts for genocidal killing and assault will serve a large part of their sentences doing community service (*travaux intérêt générale*, or TIG).[87] Originally, community service was supposed to consist of non-remunerated labour three days a week to benefit a convicted *genocidaire*'s local community through construction and repair of roads, bridges, and schools.[88] In 2005, however, the Government radically redesigned TIG, creating regional labour camps where those sentenced to community service spend six days a week working for the state (breaking stones for roads, digging anti-erosion trenches, building houses, etc.). While the large labour camps made TIG more manageable and less costly, it undercut the goal of reintegrating convicted *genocidaires* back into their local communities and having their community service indirectly benefit local survivors.[89] As of June 2008, 19,000 persons were performing community service in 47 labour camps, while another 46,000 were doing "TIG in proximity" (i.e. while living in their home communities).[90] Those sentenced to lengthy TIG stints are typically assigned to the labour camps so they can complete their sentences more quickly.[91]

The Government initially rejected proposals that community service be used to directly compensate victims.[92] As one justice official explained: "That's how the old Rwandan system was built. It would be bad to introduce that system because it is looked at as a form of forced labour, which can be used as a pretext for bringing animosity".[93] Since 2006, however, community service has been

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[87] Sector-level *gacaca* trials quickly led to renewed prison overcrowding. To rectify that, the Government announced in June 2007 that those convicted would serve the community service portion of their sentences first – before going to prison. *Service National des Juridictions Gacaca, Procès verbal de la réunion des partenaires au processus gacaca tenue en date du 03 juillet 2007* 2 (6 July 2007) [hereafter, SNJG, *Procès verbal*].

[88] Presidential Order No. 26/01 of 10/12/2001 Relating to the Substitution of the Penalty of Imprisonment for Community Service, arts. 25 & 32.

[89] Penal Reform Int'l, *Community Service (TIG): Areas of Reflection* (March 2007); *see also Arrête Présidentiel No. 10/01 du 07/03/2005 déterminant les modalités d'exécution de la peine alternative a l'emprisonnement de travaux d'intérêt général*, Official Journal No. 6 (15 March 2005), art. 35 (stating that a prisoner's place of residence and facilities for social reinsertion should be taken into account when deciding where he will do his community service).

[90] TIG Official, Remarks during site visit to TIG camp as part of the International Conference on the Impact of Judicial Reforms in Rwanda, Kigali, 16 June 2008 (on file with author). Different figures are presented in African Rights and REDRESS, *Survivors and Post-Genocide Justice in Rwanda: Their Experiences, Perspectives and Hopes,* Nov. 2008, 105.

[91] *Id*.

[92] See *Arrête Présidentiel No. 10/01 du 07/03/2005* at article 25 (listing types of projects for TIG). Nonetheless, it is possible that survivors will benefit from the construction of "houses for the indigent." *Id*.

[93] Alberto Basomingera, then-Attorney General, Ministry of Justice, Remarks at the CLADHO Conference on *Gacaca*, Kigali, Rwanda (14 Feb. 2003) (on file with author).

used to build houses for survivors.[94] This is risky as TIG could come to be perceived as a return to the forced labour system under which Hutu clients worked for Tutsi patrons.

4. *Satisfaction*

Having removed the promise of compensation, the 2004 *gacaca* law sought to increase symbolic reparations to survivors by requiring confessed *genocidaire*s to make public apologies and reveal the locations of their victims' remains. In fact, apologies have remained largely formulaic requests for forgiveness.[95] One well-educated Tutsi survivor told me she does not go to *gacaca* because "they have no remorse".[96] In some cases, survivors have reacted to the lack of remorse by challenging the truthfulness of confessions in the hopes of persuading judges to hand down harsher sentences.

What many genocide survivors seem to want most, apart from compensation, is to find the remains of their family members and to rebury them with dignity. During the genocide, many victims were tossed into pit latrines and anti-erosion ditches or left scattered on hillsides. The 2004 *gacaca* law required genocidaires to help locate their victims' remains in order to earn reduced sentences. At a September 2006 *gacaca* trial, the presiding *gacaca* judge took this a step further, telling the accused "For you to be innocent, it is necessary that the bodies be found".[97] The largest survivors' organization, which has an understandably ambivalent stance toward *gacaca*, has credited it with helping survivors to locate their dead.[98]

D. *A Preliminary Assessment*

This section presents an early and incomplete appraisal of *gacaca*. As this chapter was finished, *gacaca* was winding down. While *gacaca* courts have approved amicable settlements and issued judgments, it is still too early to assess compliance, enforcement, and consequences.

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[94] SNJG, *Proces verbal supra* n 87 at 3.

[95] Other researchers also found confessions formulaic and insincere. *See, e.g.* Alice Karekezi et al., "Localizing Justice: Gacaca Courts in Post-Genocide Rwanda," in Stover & Weinstein, *My Neighbor, My Enemy*, at 79; Avocats Sans Frontiéres, *Rapport Analytique*, Mars-Septembre 2005 at 10; Penal Reform Int'l, *Report IV, The Guilty Plea Procedure, Cornerstone of the Rwandan Justice System* 23 (Jan. 2003).

[96] Kigali, 12 April 2007.

[97] *Gacaca* trial, Kigali, September 2006.

[98] Interview with Benoît Kaboyi, Executive Secretary, IBUKA, Kigali, 14 June 2006.

1. *Participation*

Gacaca's lowest level community courts were meant to provide speedy, accessible, and participatory justice for property offences. However, even these courts proved too slow and too formal to cope with the enormous number of suspects accused during the evidence-gathering phase. Consequently, the Government pushed official mediation over trials. Such informal alternative dispute resolution was a far cry from the community trials originally envisioned by *gacaca*. Indeed, such mediation more closely resembled the neo-traditional *gacaca* run by local officials before the genocide.[99]

Gacaca also turned out to be far less participatory than promised. Public interest in *gacaca* waned as proceedings dragged on. Most Rwandans could ill afford to spend the day neglecting their fields or foregoing itinerant labour. Also, many Rwandans (including Tutsi survivors) foresaw few direct benefits from *gacaca*. In response, government officials employed coercive strategies to ensure attendance and participation at *gacaca* trials and property mediations. Local officials closed shops, rounded up the population, and fined (or threatened to fine) late arrivals and absentees. *Gacaca* judges also threatened and imposed sanctions on individuals who failed to speak up during *gacaca*.[100]

2. *Fairness*

Cell-level *gacaca* trials are unfair in two fundamental respects. First, they are one-sided in that they do not hear property offences committed by the RPF or returning Tutsi refugees.[101] Second, these trials violate international fair trial standards.[102] *Gacaca* judges are not truly independent and impartial given their family and neighbourly ties with accusers, defendants and witnesses, their personal knowledge of events, and their personal stakes in the outcomes. The poor education and limited training of most judges also renders them susceptible to pressure from the community, local elites, and government officials.[103] Judges rarely set forth their reasoning and evidentiary findings, making it difficult to assess the

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[99] *See* Filip Reyntjens, *«Le Gacaca ou la Justice du Gazon au Rwanda», Politique Africaine* 31–41 (1990).

[100] *See, e.g.*, Avocats Sans Frontières, *Monitoring Mars-Septembre 2005* at 4 & n. 9; Penal Reform Int'l, *Phase Pilote Janvier 2002-Décembre 2004* at 32, 41, 62, 70, 73.

[101] "Fundamentally, restitution should be conceived of as a *legal remedy* available on equal terms to all victims of wrongful dispossession." Williams, *Right to Property Restitution, supra* n. 4 at 49.

[102] Rwanda ratified the International Covenant on Civil and Political Rights in 1975.

[103] Penal Reform Int'l, *Le temoignage et la preuve devant gacaca, supra* n. 50 at 44–50 (June 2008 draft) (discussing corruption in gacaca).

fairness of their judgments. Furthermore, there is no right of appeal from property crime convictions.[104]

3. *Truth-Telling*

Gacaca has not promoted truth-telling on Rwanda's hills. In fact, it would be more surprising if it had. Local-level dispute resolution mechanisms are often shaped more by "the micropolitics of local standing" than by the quest for truth.[105] More importantly, modern *gacaca*'s insistence on public truth telling is deeply at odds with Rwanda's "pervasive" culture of secrecy.[106] Furthermore, *gacaca* appears to have heightened fear and suspicion in many communities. Rumours abound that Hutu have engaged in a conspiracy of silence (*ceceka*). In some places, survivors and witnesses have been intimidated and killed to prevent them from giving evidence in *gacaca*.[107]

The poverty of survivors, which has been aggravated by the absence of a compensation fund as well as the mismanagement and corruption of the rehabilitation fund, distorts *gacaca* in two different ways. First, it encourages survivors to level false accusations. A prominent Rwandan scholar observed, "There are survivors who visibly lie and other survivors say so…. Family members denounce their own kith and kin over land – the demographic pressures come into play".[108] Secondly, this impoverishment makes it easier for perpetrators to buy the survivors' silence.[109]

4. *Reconciliation*

The Rwandan Government created unreasonably high expectations when it promised that *gacaca* would foster reconciliation. Reconciliation is too much to ask of people – especially survivors – a mere 14 years after genocide. Survivors often express (understandable) reluctance to forgive during *gacaca* hearings.

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[104] The Human Rights Committee has stated that the right to have a criminal conviction and sentence reviewed by a higher tribunal "is not confined to only the most serious offenses." Human Rights Committee General Comment 13, para. 17.

[105] Sally Falk Moore, "Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running 'Their Own' Native Courts," *Law & Society Review* 26:11 (1992) at 11.

[106] Danielle De Lame, *A Hill Among a Thousand: Transformations and Ruptures in Rural Rwanda* 14–15 (Madison, WI: University of Wisconsin Press, 2005). *See* C.M. Overdulve, «Fonction de la langue et de la communication au Rwanda,» *Nouvelle Revue de Science Missionaire*, vol. 53 (1997). "Traditional" gacaca normally involved community elders and family heads, not the entire community.

[107] See U.S. Dep't of State, Country Reports on Human Rights Practices 2007: Rwanda (2008); Penal Reform Int'l, *Le temoignage, supra* n. 50 at 28; Human Rights Watch, "There Will Be No Trial": Police Killings of Detainees and the Imposition of Collective Punishments (New York: Human Rights Watch: July 2007).

[108] Address of Alice Karekezi.

[109] Penal Reform Int'l, *Le temoignage, supra* n. 50 at 42.

> Accused: It is this cow that I reproach myself for having eaten. For that reason, I have demanded pardon because I had no intention of stealing but rather I wanted to save these cows.
>
> Survivor: To me personally, this man has never demanded pardon. It is after hearing that he must appear [here] today that I took the decision to come testify. Today it is Wednesday and I learned that he demanded pardon of my mother at K___ two days ago. The old woman told me that she cannot forgive him after the years and years of this man's bad faith.[110]
>
> *Gacaca* President to Survivor: Did N demand pardon from you?
>
> Survivor: Yes, he demanded pardon from me but he did not want to tell me the names of the others who had pillaged my house. …
>
> *Gacaca* President to N: Can you tell us who destroyed M's house?
>
> N: It was lots of people. I can't remember any particular person.
>
> Survivor: Everyone is saying that they can't remember who destroyed the house. How can one pardon these people who lie?[111]

In addition, *gacaca*'s amicable settlements are more often motivated by fear or official pressure than by reconciliation.

> *Gacaca* president: The people who gave your property back, do you think they stole your stuff or they were keeping it for you?
>
> Woman: I don't know. She's my neighbour living in front of my house. …
>
> *Gacaca* president: Do you think it was a way to reconcile you and her, or you were thinking she was afraid?
>
> Woman: I think she was afraid that if I found the stuff, I would think she had stolen it and participated in pillaging.[112]

As *gacaca* shows, restitution may be necessary, but not sufficient, for reconciling neighbours after conflict.[113]

5. *Gender Sensitivity*

Since the war and genocide, the number of female-headed households has increased dramatically.[114] Those households are less likely to have access to land

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[110] *Gacaca* trial, Northern Province, 6 September 2006.
[111] *Gacaca* trial.
[112] *Gacaca* trial.
[113] For a more detailed discussion of gacaca's contribution to reconciliation, see Waldorf, "Mass Justice" *supra* n. 42 at 74–80; Lars Waldorf, "Rwanda's Failing Experiment in Restorative Justice" in *A Handbook of Restorative Justice: A Global Perspective* 422–434 (Dennis Sullivan & Larry Tifft eds. 2005)
[114] Penal Reform Int'l *Infractions contre les biens, supra* n. 3 at 72.

because, under customary law, widows (particularly those who were not legally married) have to return land to their husband's family.[115] Despite the Government's laudable efforts to tackle gender discrimination, particularly by reforming the inheritance laws, *gacaca* courts have been reluctant to award restitution to women who were not legally married and to illegitimate children.[116] In one *gacaca* hearing, the vice-president told a woman she had no right to make a claim because she was not legally married.[117] Another *gacaca* court ruled that a woman married before the genocide had no right to ask for compensation for the death of her parents; rather, only her unmarried siblings could demand compensation.[118]

E. *Conclusion*

Rwanda's *gacaca* points to some of the potential and pitfalls of using less formal justice mechanisms for reparations after mass violence. The UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* encourages the use of informal dispute resolution mechanisms (including "indigenous practices") to provide redress for victims.[119] Less formal mechanisms have several clear advantages over national courts, particularly in post-conflict settings where state institutions have been weakened and discredited. Such mechanisms can handle larger numbers of low-level perpetrators who were often motivated more by material gain than by ideology. They also reach bystanders who engaged in opportunistic looting or who otherwise benefited from widespread violence. Furthermore, these mechanisms can provide restitution – what the UN *Principles on Housing and Property Restitution for Refugees and Displaced Persons* describe as "a key element of restorative justice" – to a large number of victims.[120] This is particularly important given that most post-conflict states lack the material resources and political will to provide meaningful compensation.

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[115] Berlage, et al., "Rural households under extreme stress" at 9–10, 12. *See* Jennie E. Burnet and the Rwanda Initiative for Sustainable Development, "Culture, Practice and : Women's Access to Land in Rwanda," in L. Muthoni Wanyeki, ed., *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (London: Zed Books, 2003); Laurel Rose, "Women's Land Access in Post-Conflict Rwanda: Bridging the Gap Between Customary Land Law and Pending Land Legislation," *Texas Journal of Women and the Law* 13:197 (Spring 2004).

[116] For a full discussion of the gender aspect of reparations in Rwanda, see Heidy Rombouts, "Women and Reparations in Rwanda: A Long Path to Travel", *in* Ruth Rubio-Marin, ed. *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006).

[117] Pre-trial *gacaca* hearing, Southern Province, 8 Aug. 2002.

[118] Pre-trial *gacaca* hearing, Southern Province, 27 Dec. 2002.

[119] UN *Declaration for Victims of Crime, supra* n. 21 at ¶ 7.

[120] UN *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, UN Doc. E/CN.4/Sub.2/2005/17 (28 June 2005) at ¶ 2.2.

As *gacaca* demonstrates, less formal mechanisms face serious obstacles as a means of providing restitution. First, they will rarely meet the minimum standards for fair trials under international human rights norms. Arguably, this is of less concern because these mechanisms cannot impose prison sentences.[121] Also, such mechanisms are less apt to make restitution awards that accord with individualised responsibility. Second, the emphasis on restitution seems woefully inadequate in the wake of mass violence. *Gacaca*'s tedious cataloguing of stolen and damaged property was inherently banal and always risked trivialising genocide: instead of "accounting for horror," *gacaca* courts often seemed content with counting goats.[122] Third, less formal justice mechanisms, while more restorative than retributive, may not promote truth-telling or reconciliation. Finally, these mechanisms are unlikely to make gender sensitive restitution given the prevailing social structures and cultural norms in local communities.[123]

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[121] However, Penal Reform International found that some accused preferred prison to restitution because they feared restitution would cause greater suffering to their families. Penal Reform Int'l *Infractions contre les biens, supra* n. 3 at 54.

[122] This phrase is borrowed from Nigel Eltringham, *Accounting for Horror: Post-Genocide Debates in Rwanda* (London: Pluto Press, 2004).

[123] Gender sensitive restitution is stressed in paragraphs 4.2, 4.3, and 12.2 of the UN *Principles on Housing and Property Restitution for Refugees and Displaced Persons, supra* n. 121. In the Rwandan context, it is also important to recall that women were not just victims, but also perpetrators – though they were more likely to hunt out victims, cheer on *genocidaires*, or loot the dead than to kill themselves. *See* African Rights, *Not So Innocent: When Women Become Killers* (August 1995); Straus, *supra* n. 7 at 100. As one confessed killer recalled, "Anyone who couldn't loot … could send his wife. You would see wives running through the houses. … They stole blood-soaked clothing that they were not afraid to wash." Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* at 86 (Linda Coverdale trans.) (New York: Farrar, Straus & Giroux, 2005).

Still not Talking: The South African Government's Exclusive Reparations Policy and the Impact of the R 30,000 Financial Reparations on Survivors

*By Oupa Makhalemele**

> The unfinished process is a festering sore in our collective life – one which may bear consequences for us for a long time into the future and may leave us with major regrets that we failed ourselves and our country and its people. This failure represents a break in trust between a leadership and its people – a trust that can only be earned when promises made are promises kept.[1]

A. *Introduction*

This chapter highlights the views of survivors of the Apartheid regime about the R30,000 reparations granted by the South African Government. This money was granted to those identified as survivors[2] of gross human rights violations by the South African Truth and Reconciliation Commission (TRC). The views expressed by twenty survivors of gross human rights violations living in the Vaal townships,[3] south of Johannesburg, demonstrates the frustrations experienced by survivors in persuading the Government to effectuate a comprehensive reparations policy. This study was the first impact assessment reflecting on the detailed needs of the survivors since the grants started being paid out in 2003. The chapter argues that by failing to consult with survivor groups before deciding on the final amount of reparations, the Government wasted an opportunity to learn about

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[1] Jobson, Khulumani press statement, 16 December 2002.

[2] The term 'survivor' is used to describe both the direct victims of abuses as well as the surviving relatives of victims who have died.

[3] The Vaal townships include Sebokeng, Sharpeville, and are located in the southern part of Gauteng Province.

Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 541–566.

the different needs of survivors, which would have helped it in designing a more comprehensive and effective reparation policy. The chapter also characterises that failure as a lost opportunity for Government to mend a difficult relationship between itself and survivor groups, including NGOs and other stakeholders lobbying for reparations.

B. *The Government's Reparations Programme*

1. *Background*

In April 2003 the President of the Republic of South Africa announced the one-off payments of government grants of R30,000 to each of the approximately 18,000 survivors named by the TRC.[4] Many, including survivors, civil society organisations and most of the commissioners who presided over the TRC, were disappointed by this announcement. The main complaint was the lack of proper consultation with relevant stakeholders before deciding on the amount. The Centre for the Study of Violence and Reconciliation (CSVR), an NGO which has done extensive research on the TRC, wrote in a press statement that by failing to involve survivors, parliament had embarked on a process that was "neither participatory nor inclusive".[5] The CSVR noted in its submission to the Ad Hoc Committee on Reparations that the Government had over the previous four years refused to submit a policy on reparations for public debate.[6] This has robbed the Government of the opportunity to draw useful information to inform a comprehensive reparations policy. Despite several attempts to engage the TRC Unit on its obligations and progress thus far, the Unit has failed to explain itself to these key stakeholders.

There is evidence that reparations may not have ranked high in the Government's priorities during transitional negotiations. This can be linked to the context within which the Promotion of National Unity and Reconciliation Act of 1995[7] was promulgated. The negotiations that culminated in the Multi-Party Negotiating Process began in an environment of high political instability and state-sponsored violence. It became important to appease the incumbents as the protagonists wished to secure a stable transition. Thus granting amnesty to perpetrators of gross human rights violations became a priority. Dullar Omar later said this about the strategy:

> Now [granting amnesties] was very important because we were in effect asking the apartheid government to give up power, and we could not say to it at the same time

[4] T. Mbeki, (2002). "Who shall guard the guardians?" ANC Today, Volume 2, number 30.
[5] Centre for the Study of Violence and Reconciliation Press Statement, 2003.
[6] *Id.*
[7] The Act that established the TRC, also referred to as "the TRC Act" in this Chapter.

> that once you've given up power we're going to arrest you and charge you with crimes against humanity. There would have been no settlement in our country, the bloodbath would have continued. So the issue of amnesty was part of the political settlement.[8]

Such was the primacy of amnesties that the series of transitional negotiations that led up to the settlement reached between the key proponents (the ANC leadership and the Government's representatives) were held up at the final hurdle by the issue of amnesties. Apart from the Interim Constitution, reparations were not mentioned in any of the documents from these negotiations.[9]

The wording discussing amnesties and reparations in the Interim Constitution emphasises amnesties vis-à-vis reparations, proclaiming that amnesties "shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past".[10] The "Postamble" continues that Parliament must design the "mechanism, criteria and procedures" for granting amnesty to individuals.

Where reparations are mentioned in the Interim Constitution, they are presented in broad terms that do not spell out any clear legal responsibility. When the TRC Act came into being it established the Committee for Reparations and Rehabilitation (CRR), tasked with the issue of reparations. Whereas the committee dealing with amnesty was empowered to grant amnesties, the CRR could only make recommendations, to be implemented via legislation. It was only later during the process of debates amongst political parties, civil society, nongovernmental organisations, churches, survivors and academic institutions who were meeting with experts from other countries who had experienced similar processes of transition that the issue of reparations gained a more prominent mention.[11] It was therefore only with the interventions of civil society that the issue of reparations assumed a more central role in the drafting of the TRC Act.

This context within which the issue of reparations was dealt with during transition, the debates around the meaning of reparations as well as the process within which reparations were disbursed, highlights the low ranking of reparations on the scale of priorities of the transitional process in South Africa.

2. *The President's Fund*

The President's Fund was established in terms of section 47(1) of the Promotion of National Unity and Reconciliation Act, 1995 (Act No. 34 of 1995). The Fund

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[8] D. Omar, 2002, interviewed by author.
[9] C. Colvin, (2003). "Overview of the Reparations Programme in South Africa", Unpublished CSVR Report commissioned by ICTJ.
[10] Interim Constitution, 1993, Postamble.
[11] Colvin, *supra* n. 9.

was established for the purpose of payment of all forms of reparations to victims in terms of regulations made by the President. To date the Fund has been used for the payment of urgent interim and individual once-off reparations. The Act has been amended to also allow for the monies in the Fund to be used towards community rehabilitation programmes.[12]

In terms of this act, notwithstanding the dissolution of the TRC, the President's Fund shall continue to exist until a date fixed by the President by proclamation in the Gazette.

The President's Fund has handed over the responsibility for additional aspects of the reparations to other institutions. These are broader reparations measures such as community reparations; symbols and monuments to contribute to the restoration of the dignity of apartheid's victims and acknowledge the role played by those who fought against apartheid. The institutions involved are the Freedom Park Trust, Department of Arts and Culture and the South African Heritage Resources Agency (SAHRA).[13]

3. *The TRC Unit*

Upon tabling the TRC Report in Parliament on 15 April 2003, President Thabo Mbeki mandated the Department of Justice & Constitutional Development to monitor the implementation of programmes giving effect to the adopted TRC recommendations. The Department would monitor the implementation of these programmes and report to the Cabinet on an ongoing basis.[14]

Subsequently the TRC Unit was established in 2005 with a view to monitor, audit and coordinate the implementation of the TRC recommendations.

The work of the TRC Unit has been somewhat of a mystery to many role players among survivor groups and other civil society stakeholders. The Unit has not made efforts to reach out to communities and to relevant stakeholders, particularly the victims groups. Efforts to elicit information about the work of the unit to date have only yielded a sketchy response, with nothing said in terms of the progress made so far. This and the Government's general attitude towards reparations has led survivors to see Government as having betrayed their trust, and thus compromising the imperative of reconciliation and reconstruction in post-conflict South Africa. This also fuels feelings of marginalisation among survivors during the period of transition.

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[12] Report of the Auditor-General to Parliament on the Annual Financial Statements of President's Fund for the Year Ended 31 March 2007, available online: www.justice.gov.za/reports/other/2006–2007_ANR_Presidnet%Fund.pdf.

[13] The respective roles played by these institutions shall be discussed later in the chapter.

[14] T. Mokushane, Deputy Director, TRC Unit, Communication with author, 23 June 2008.

4. *CRR Recommendations*

Reparations were meant to provide more than financial and other material outputs. Essentially reparations were about restoring the dignity of the survivors and the victims' families. The process of disbursing reparations would therefore be as important as the reparations themselves. The CRR drew from the international literature their working definition of reparations. This was organised in terms of the so-called 5 Rs: redress, restitution, rehabilitation, restoration of dignity and reassurance of non-recurrence.[15] After broad consultations with civil society, churches and NGOs, the CRR drafted recommendations that can be broadly categorised as individual, community, and institutional reparations.

5. *Individual Reparation Grants*

In its findings the committee reported in 1998 that there were major arguments for individual grants in the form of money.[16] An overwhelming majority indicated that money or services that could be purchased should money be provided, was a preferred form of reparations. Basing its decision on the median annual household income in 1997 for a family of five, the CRR report recommended a benchmark amount of R21 700 per victim for each year over a six-year period.[17] This grant would be viewed as addressing three components of survivors' needs: the acknowledgement of suffering (50% of the grant total); access to services and the daily living costs (each 25%). Those in rural areas or with large numbers of dependants would receive more.[18] The highest possible grant per year would be R23,023 and the smallest would be R17,029. These grants would be paid out in six-month installments and would continue for six years.

6. *Symbolic Reparations, Legal and Administrative Measures*

The CRR's symbolic reparations recommendations were designed in line with the stated wish of the TRC to help restore the dignity of survivors of gross human rights violations. Interventions at different levels were therefore determined and recommended as follows:

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[15] Colvin, *supra* n. 9.
[16] Truth and Reconciliation Commission of South Africa Report, Vol. 5, para. 45.
[17] *Id.*, at para. 69.
[18] C. Colvin, (2000). "'We Are Still Struggling': Storytelling, Reparations and Reconciliation after the TRC". Research report written for the Centre for the Study of Violence and Reconciliation in collaboration with Khulumani (Western Cape) Victims Support Group and the Cape Town Trauma Centre for Survivors of Violence and Torture.

Individual interventions:

- Issuance of death certificates;
- Exhumations, reburials and ceremonies;
- Headstones and tombstones;
- Declarations of death;
- Expunging of criminal records; and
- Expediting outstanding legal matters related to the violations.

Community interventions:

- Renaming of streets and facilities;
- Memorials and monuments;
- Culturally appropriate ceremonies.

National interventions:

- Renaming of public facilities;
- Monuments and memorials; and
- A Day of Remembrance.

7. *Community Rehabilitation*

The CRR conceded that it would not be enough to target reparations to TRC designated survivors only and recommended that communities also be the focus of a special type of reparation. This was in light of the fact that the gross human rights violations that visited South Africans during apartheid also adversely affected communities at large. The measures necessary for this kind of rehabilitation were tabled as follows:

- National demilitarization;
- Resettlement of displaced persons and communities;
- Construction of appropriate local treatment centres (for physical and psychological needs);
- Rehabilitation of perpetrators and their families;
- Support for community-based victim support groups;
- Skills training;
- Specialised trauma counseling services;
- Family-based therapy;
- Educational reform at the national level;
- Study bursaries;
- Building and improvement of schools;
- Special educational support services;
- Provision of housing; and
- Institutional Reform.

In addition to these community rehabilitation measures the CRR made recommendations with regard to institutional, legislative and administrative matters. These were aimed at preventing the recurrence of human rights violations by engendering a human rights culture. It was recommended that these would cover a wide range of sectors in society including the judiciary, media, security forces, business, education and correctional services.[19] The overall aim of these measures was the promotion of a human rights culture and the prevention of the kinds of violations that characterised apartheid.[20]

8. *The Disbursement of Reparations*

To fulfill its mandate, the CRR identified survivors, sought input from civil society on the forms reparations should take and designed recommendations for a government administered final reparations programme. From June 1998 the CRR began paying about 12,000 survivors Urgent Interim Reparation (UIR) sums of between R2,000 and R3,500 per victim. In exceptional cases up to R6, 000 was paid. By the end of 1999, the President's Fund had paid out R16, 754, 921 of UIR to 15,078 survivors.[21] These payments were made in cases where survivors had urgent need for intervention.

However, many survivors felt that the Government was reluctant to implement a clear reparations policy. In the public debate on the issue of reparations, survivors and civil society on the one hand and the Government on the other, assumed increasingly adversarial positions. The Government started construing demands for reparations as opportunistic and as debasing the noble nature of the anti-apartheid struggle by demanding financial recompense for it.[22] Arguing that whole communities suffered, the Government favoured community development programmes as opposed to paying out individual reparations. The survivors on the other hand deemed the Government's stalling unfair as perpetrators had already been granted amnesty. Survivors complained that the TRC was not as friendly to them because it denied them the right to seek legal recourse through the amnesty process, without offering them reparations. This variance of views concerning the meaning of reparations precipitated an often acrimonious relationship between the Government and survivors.

The slow pace of the Government in disbursing reparations led to some civil society organisations starting their own initiatives in order to provide some of

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[19] TRC Report, 1998, *supra* n. 16 at para. 115.
[20] Colvin, *supra* n. 18.
[21] M. Leseka, (undated). Summary of the recommendations of the South African Truth and Reconciliation Commission, CSVR information leaflet.
[22] Mbeki, *supra* n. 4.

the urgently needed services to survivors. In October 1999, the organisation Khulumani,[23] together with The Evangelical Association of South Africa (TEASA) distributed over 30 donated wheelchairs to survivors who needed them.[24] Following this ceremony Khulumani marched to the Ministry of Justice demanding to know what the Government's plans were for reparations. Beginning early 2000 a number of campaigns and debates over the issue of reparations ensued. In April 2000, during the Freedom Day celebrations in Pretoria, Khulumani staged a highly visible protest. Subsequently the issue of reparations was broadly covered in the media and in May of that year the most comprehensive debate on reparations ensued in the media. An article in the Sunday Independent which appeared on 7 May 2000 exposed interviews with survivors who related their stories, saying that they had not received reparations. This article was later mentioned in Parliament when President Mbeki was asked a question about reparations. Mbeki argued that the struggle was never about money, saying that people that were asking for reparations were implying that the struggle was about money.

On 16 December 2000, the Day of Reconciliation, Khulumani issued a press release entitled 'The Truth and Reconciliation Commission's unfinished business'. Khulumani urged the Government to engage with them in addressing many of the unresolved issues related to the work of the TRC. The central issue focused around the many survivors whose statements were either rejected or were not considered at all by the TRC commissioners; for various reasons that were not the fault of the survivors.[25] Khulumani cited the survivors living in KwaZulu Natal whose cases were never investigated as an example. Khulumani urged the Government to:

- Commit to establishing a TRC desk at the South African Human Rights Commission through which the outstanding matters may be addressed, including the pursuit of prosecutions against identified perpetrators who failed to apply for amnesty; and the investigation of cases of disappearance including those who disappeared in exile;
- Provide statement-taking opportunities to all those denied such opportunities, especially survivors living in KwaZulu-Natal; those who made statements in

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[23] Khulumani (Zulu for 'Speak up') Support Group is a survivors' support group which has been lobbying government for a comprehensive reparations policy. It is made up mostly of survivors, some of whom testified at the TRC.

[24] A. Mokabane, (2002) Project Manager, The Evangelical Association of South Africa (TEASA), interviewed by author.

[25] Khulumani leaders claimed that many of their members did not testify before the TRC because, among other reasons, they were not adequately informed about the process of the TRC, some statement takers took their statements incorrectly, or did not know about the TRC (this was especially so for rural communities).

> good faith to statement-takers who failed to transfer the statements to the TRC; and those whose statements were rejected where language difficulties were encountered.[26]

Khulumani stated that it was committed to organising mass protests of survivors if there was to be no satisfactory response to the proposals it had tabled. The year 2001 marked the third anniversary of the TRC's 1998 report. Khulumani provided a list of the victim support work it has been engaged in. This work included:

- Community mobilisation (setting up support groups);
- Reparations applications and appeals;
- Disappearances investigations;
- Victim empowerment programmes (psychological, referrals, theatre for healing);
- Direct assistance to victims and their families (medical, psychological educational); and
- Commemoration services in honour of fallen victims.[27]

In April 2001 Khulumani sent a letter to the President voicing the organisation's anxiety sparked off by both the time lapse since the TRC's report (October 1998) and the confusion brought about by the speculations the delay had caused. The letter pointed out that the imminent closure of the TRC exacerbated the anxiety. The letter ended by making a request to the President to notify Khulumani when regulations pertaining to the CRR recommendations could be expected to be promulgated.[28]

The Cape Town branch of Khulumani held a "Reparations Indaba," where Medard Rwelamira, advisor to Justice Minister Penuel Maduna, informed Khulumani that the draft Government's reparations policy would be completed in two weeks time. He promised that the policy would be made public by the end of May 2001.[29] According to Colvin, the two-day Indaba was the most sustained, large-scale and coordinated effort Khulumani had organised. Colvin describes the indaba as follows:

> It sought to involve as many role players and stakeholders in the reparations issue as possible. Medard Rwelamira from the Justice Department attended as well as representatives from the Departments of Arts, Culture, Science and Technology (DACST) and Finance. Former TRC commissioners attended (including the chair of the CRR) and the list of NGOs included the CSVR, the Institute for Justice and

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[26] Khulumani Press Statement. 16 December 2000.
[27] Khulumani newsletter, 2001.
[28] Khulumani Newsletter, 2002.
[29] Colvin, *supra* n. 18.

> Reconciliation, the Trauma Centre, Jubilee South Africa, Black Sash, IDASA and the South African Council of Churches. Khumbula, the other victim support group in the Western Cape was also represented.[30]

The core concern of this meeting was gaining access to the Government's final reparations planning process. For Khulumani it was a major coup that the Government had been brought to the table with survivors and other NGOs around the issue of reparations. Many believed that at least the meeting had been the catalyst for getting the final reparations policy finalised.[31] The euphoria and optimism that was brought about by the verbal commitment from Rwelamira to present Khulumani with a government policy document on reparations soon disappeared when the Government failed to produce the promised document. It was not before 15 April 2003 when President Thabo Mbeki announced that there would be a once-off payment of reparations grants to the TRC identified victims, and announcing the establishment of the Priority Crimes Litigation Unit, entrusted with, among others, following up on some of the TRC recommendations. A clear, comprehensive policy on reparations for victims has not, however, materialised. Khulumani, together with civil society organisations and NGOs, continued lobbying through media statements and forums involving academics, lawyers and experts in the field of reparations.

The Government started talking with those involved in advocacy work on reparations, soliciting advice as to how to go about addressing the issue of reparations. These consultations, however, were not broad as many concerned organisations were left out of the process. CSVR issued a press statement noting its concerns that consultations had been minimal and that the Government could have broadened the process.[32] Nevertheless, in April 2003 the President announced the once-off R30,000 grants for the identified TRC survivors.

9. *Monuments and other Symbolic Measures*

The Department of Justice in 2004 started to co-ordinate an inter-departmental Joint Committee tasked with drafting the regulations relating to the following categories: symbols, monuments, rehabilitation of communities and medical benefits and 'other forms of social assistance'.[33]

Cabinet approved in June 1998 a national government project, the Freedom Park, this being a response to requests from civil society, NGOs, academics and various political interest groups for some kind of symbolic reparation.[34]

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[30] *Id.*
[31] *Id.*
[32] CSVR, *supra* n. 5.
[33] A. Mabotja, (22 July 2004) Researcher, Department of Health (Legal Services) author's notes.
[34] Freedom Park website. Available online: www.freedompark.co.za/namesDatabase.html.

The Freedom Park runs a number of memorialisation projects. These include Sikhumbuto, a memorial dedicated to those who died in the struggle for freedom. The project spans eight conflict eras, going back to Pre-Colonial, Genocide, Slavery, Wars of Resistance, South Africa War (Anglo-Boer War), First World War, Second World War and the Liberation Struggle. The names of those who died in these conflicts are inscribed on the Wall of Names.[35] These are clearly efforts to acknowledge the role played by various people in the history of South Africa. By honouring these people for the roles they played, these initiatives are fulfilling important aspects of the community reparations, as recommended by the TRC.

Another body entrusted with the monuments and related work is the South African Heritage Resources Agency, established as a statutory body in terms of the National Heritage Resources Act of 1999. SAHRA has been tasked with playing the role of administrative management for the protection of South Africa's cultural heritage. One of the mandates of this body is to locate the graves of those who died in the anti-apartheid struggle and to conserve these. SAHRA has also been working in those neighbouring countries that harboured exile communities from South Africa during the struggle, working to identify burial grounds of South Africans. The end-goal is to develop a strategy of exhuming, repatriating and reburying those remains.[36]

It was the belief of CSVR that a research report like the one commenced by the Department of Justice in 2004, would have helped to provide some insight into issues relevant to reparations. It would also provide useful information regarding survivors' needs. The research would also give voice to an otherwise largely marginalised constituency of survivors. The recommendations that were made by CSVR were based on the actual experiences and expectations of the very survivors the Government was trying to assist, and were intended to serve as a resource for the Government's efforts at meeting its moral and legal obligation to bring about restitution for the survivors. As reflected earlier on, however, the TRC Unit has not engaged with civil society and victims groups particularly, on the issues raised.

C. *The Alien Tort Claims Act Litigation*

In the apparent absence of a clear policy on reparations and the sometimes acrimonious relationship with the Government, survivors have sought other methods of seeking reparations. Survivor groups and other lobbying groups have

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[35] *Id.*

[36] T. Phili, (2 July 2004) Project Manager, South African Heritage Resources Agency, interview with author.

initiated a lawsuit in the United States' courts against businesses that 'aided and abetted the apartheid regime'.[37] The lawsuit was based on common law principles of liability and the U.S. Alien Tort Claims Act. The lawsuit was predicated on the belief that since institutional corporations and banks refused to acknowledge their complicity in the apartheid regime and seek amnesty during the TRC process, they 'have opened themselves to litigation'.[38] The Government was swift to denounce this action, with President Mbeki asserting that the Government found it 'completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility of the well-being of our country'.[39] In supporting this position, the then Minister of Justice, Penuel Maduna, presented an affidavit to Judge Sprizzo in New York calling for the case to be dismissed.[40]

Judge Sprizzo, on 29 November 2004, granted the defense's motion to dismiss, explaining that the Khulumani et al's complaints failed to allege sufficiently that these corporate defendants violated international law.[41]

Khulumani appealed against this ruling, however, and on 12 October 2007, two of the three judges reversed the dismissal at the Second Circuit Court of Appeal, agreeing that aiding and abetting a violation of the law of nations is an actionable tort under the ATCA.[42] The United States Supreme Court issued an order in May 2008 that the ruling of the Second Circuit Court of Appeal in the case stands.[43]

Khulumani welcomed this decision, stating that it was a key test case to create global standards for ethical corporate behaviour and for promoting a culture of corporate responsibility.[44]

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[37] See I. Evans, "Multinationals Face Damages Claim from Victims of Apartheid", found online at: www.guardian.co.uk/buisiness/2008/18barclaysbusiness.bp. See also "Briefing on the Reparation Lawsuit facilitated by the Apartheid Debt and Reparations Campaign of Jubilee South Africa", Press Release Jubilee South Africa Campaign, 21 February 2003. Quoted in W. Buford and H. van der Merwe (2004), "Reparations in Southern Africa" *Cahiers d'études africaines*, Volume 44, Issue 1–2.

[38] Buford and van der Merwe, *id*.

[39] Statement by President Thabo Mbeki to the National Houses of Parliament and the Nation on the occasion of the tabling of the Report of the Truth and Reconciliation Commission, Cape Town, 15 April 2003. Found online: www.info.gov.za/speeches/2003/ 03041514011003.

[40] G. Dor, (2004). "Reparations Lawsuits in the Spotlight", *Jubilee South Africa Newsletter*, First and Second Quarters. For a detailed and analytical account of this and related judgments, see Kristen Hutchens, "International Law in the American Courts – *Khulumani v. Barclay National Bank Ltd*.: The Decision Heard 'Round the Corporate World," German Law Journal, Vol. 9, No. 5.

[41] Kristen Hutchens, *id*.

[42] *Id*. at 657.

[43] Khulumani Press Statement, "US Supreme Court Clears the Way for Khulumani Lawsuit" 13 May 2008, available online: www.khulumani.net/press-releases/5-press/226-united-states-supreme-court-order-clears-the-way-for-the-khulumani-international-lawsuit-to-go-forward-.html.

[44] *Id*.

D. *The Plight of Survivors*

Few people can deny the enormity of the task facing the South African Government. Some of the Government's urgent priorities include poverty alleviation, HIV/AIDS, unemployment, and crime prevention. Even within this list of priorities, some of these focus areas attract more public and government response than others. In part because of this it has been difficult for TRC survivors to bring their specific plight to the fore. Furthermore, as the TRC has closed, the public's attention shifted to other 'flavours of the month'. To fully understand the positioning of survivors within South African society and the need for reparations to address their often-marginalised situations, it is important to get a sense of the plight of survivors. Fourteen years into democracy, it is safe to say that many of the survivors profiled here continue to remain in the margins of society.

1. *Survivors' Profile*

Our respondents live in the Vaal, a poor settlement approximately 50 kilometres south of Johannesburg. It is a sight of the infamous 21 March 1960 Sharpeville massacre, where police killed more than 69[45] defenseless demonstrators protesting against the 'pass laws'.[46] That incident marked the dawn of a period of heightened state repression that led to a brief era of a lull in open political protest inside South Africa. This lull was broken only in the 1970s with the rise of the Black Consciousness Movement. By the 1980s, as in many townships across South Africa, the Vaal townships were a sight of the many popular protest actions against the apartheid institutions. These attacks included violent attacks on people that were seen to be collaborating with the regime of the day. In the late 1980s and early 1990s a spate of raids by hostel based Inkatha[47] members

[45] Many of our respondents assert that this official number of the dead is an underestimation as many people who did not die on the day died in days that followed from the injuries they sustained on the day.

[46] Pass laws effectively tightened the control of the movement of Africans in 'White South Africa'. Africans had been 'given' land in reserves, which constituted 13% of the land mass in South Africa. According to the pass laws, Africans were required to carry a reference book, a 'pass', which allowed them restricted movement within 'White South Africa'. Part of the 'Influx Regulations', pass laws were responsible for the arrest of thousands of Africans in urban South Africa, and affected the daily lives of Africans; provoking deep resentment among them.

[47] Inkatha (later rechristened the Inkatha Freedom Party, or IFP) was a predominantly Zulu cultural organisation with membership limited largely to rural KwaZulu and among Zulu speaking migrant workers in urban hostels. It was implicated in much of the political violence of the late 1980s and early 1990s which, it was later established, Inkatha carried out with the full knowledge and assistance of the SADF's top ranking officials and the full knowledge of the top executive structure of the Government of the day.

terrorised the local community, leaving many dead as it sparked off a series of revenge attacks from either side.

The survivors we spoke to were affected in the many acts of violence perpetrated during these turbulent years. While not all of them appeared before the TRC they were all directly affected, either personally or through family members, to the extent that their current situation is at least in part attributable to the violations investigated by the TRC.

Ten of the eleven respondents of our sample that testified at the TRC received the R30,000 reparation grant. Nineteen of the 20 survivors are unemployed, while the twentieth is running a struggling public telephone business, established using part of the R30,000 grant. Many of the survivors present themselves as survivors, as opposed to victims.[48] They demonstrate resilience in the face of despair, keen to do whatever they can to better their lives. All survivors expressed a desire to acquire skills, either for themselves or their children, in order to have the means of sustaining themselves. Fifteen of the respondents do not have formal education beyond matriculation, while eleven of these do not have more than ten years of formal schooling. Three reached matriculation but did not go beyond.

The majority of our respondents cited poverty as the reason for leaving school. Their parents had been employed in menial labour jobs, providing little, if any, security for their families. Many of the respondents left school in order to supplement family income, often necessitated by the death or loss of work by the family breadwinner. Limitations in education and skills are not the only challenges facing these survivors. Post Traumatic Stress Syndrome is cited frequently as a problem that needs adequate treatment.[49] Brandon Hamber points out that this psychological condition can:

> [I]nclude a range of immediate and sometimes delayed emotional responses, including self-blame, vivid re-experiencing of the event, fear, nightmares, feelings of helplessness, depression, relationship difficulties, anxiety and even substance abuse related difficulties. Some or all of these can be experienced by direct victims at differing times after the exposure to a traumatic or violent event. Similar emotional reactions can also be experienced by indirect survivors or family members, and bereavement related issues can be assumed to be common for those who have lost relatives during the conflicts of the past.[50]

These responses were spoken about prominently in the Western Cape during focus group discussions with the survivors in 2002. Our Vaal respondents also mentioned some of these experiences as having affected them. Many cited the

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[48] Workshop discussion, 16 July 2004.
[49] B. Kekana, (12 December 2002), Social Worker at CSVR. Interviewed by author.
[50] B. Hamber, (1995). "Do sleeping dogs lie?: The psychological implications of the Truth and Reconciliation Commission in South Africa", CSVR Seminar No. 5, 26 July.

psychological counseling they received as having helped them a great deal. Also, belonging to a support group helps them by providing them a space to talk about their pains and suffering. Lack of understanding of their plight from the community is a major problem for them, as they feel they are denied the opportunity to bring their plight as survivors to the fore in public forums.[51]

A sense of isolation and neglect by the formal political structures was also cited as a major problem. Eleven of our 20 respondents claimed that they were politically involved when they were victimised. Nine said they were not. However, less than a quarter of the respondents were still involved in politics at a substantial level, i.e. they were not part of the leadership structures of the political organisations. This has led many to perceive themselves as politically insignificant, and as being neglected by the new political players in local politics. One survivor, whose MK commander son was killed by police outside her house, said none of the comrades he fought alongside even bothered to find out how she and her family were doing.[52]

2. *The Process of Reparation as a Healing Mechanism*

In addition to the imperative of promoting a human rights culture, the very process of the TRC was seen as potentially a psychologically rehabilitative mechanism.[53] The survivors' hearings served the important function of providing the commission with a record of the human rights violations as well as an acknowledgment of the suffering experienced by survivors during apartheid. In addition, the TRC made recommendations to establish human rights and accountability as the core characteristic of public institutions, thus giving reassurances that human rights violations would not be repeated in future. Symbolically these interventions had a huge impact for survivors as it assisted survivors in the healing process.

There were, however, dangers in the public discourse on reconciliation, which tended to urge people to forgive and forget and to move on. This was not a view held by everyone. Hamber warned against the tendency toward 'forgiving and forgetting'. He pointed out that psychological trauma cannot disappear and that psychological restoration and healing could only occur through providing the space for survivors to feel heard and for every detail of the traumatic event to be re-experienced in a safe environment.[54]

The Victims Hearings provided ample space for survivors to re-live their trauma. Victims' stories of suffering were acknowledged, and thus the process of

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[51] Workshop discussion, 16 July 2004.
[52] N. E. Nhlapho, (11 May, 2004) KSG member, interview by author and P. Rampa.
[53] Hamber, *supra*. n. 50.
[54] Hamber, *id*.

healing was started. However, with the TRC having closed, the Government's continued active engagement with the issue of reparations could have gone a long way in consolidating this healing process. By taking on reparative measures comprehensively the Government could have concretised its acknowledgement of the violations suffered by survivors. It could have helped to further restore the survivors' dignity, and raise public consciousness about their moral responsibility to participate in healing those hurt in the past.[55]

3. *Survivors' Actual Needs*

We shall now turn to the issue of the survivors' needs as expressed by them. Reparation can be presented in monetary forms. It can also come in many other forms. These are, *inter alia*:

- Acknowledgement of wrong done;
- Revelation of the truth;
- Exhumation of the bodies of victims;
- Pension Rights;
- Medical and educational services;
- Social security;
- Housing; and
- Restoration of reputation.

> I just remember myself receiving a letter that was highlighting education, housing, medical and later I received a letter that said I would receive the final reparation.[56]
>
> In reality I need medical treatment and psychological treatment and these things require of me to use money. So with the R30 000 that I received I am trying to buy myself the best treatment ever available but the money is about to finish. What is going to happen is when that money is all gone I will once again be confronted with realities that the pain is still here. We thought we would receive medical reparations and maybe assistance in terms of employment so we wouldn't rely only on R30 000. That never materialized. So we are faced with the same problem once again.[57]
>
> As I have explained we laid a tombstone for my brother and his child and we were able to unveil the tombstones.[58]

The CRR had made recommendations that recognised the need for a comprehensive rehabilitation programme that did not necessarily emphasise monetary payments at the expense of other needs: education, health, medical assistance and housing for example. By acknowledging the multifaceted nature of

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[55] B. Hamber (2000). "Repairing the irreparable: Dealing with the double-binds of making reparations crimes of the past", *Ethnicity and Health*, Vol. 5, No. 3 & 4.
[56] H. Sefune (13 May 2004), KSG member, interviewed by author.
[57] S. Kasa (11 May 2004), Member of KSG, interviewed by author.
[58] T. Phethane (6 May 2004), KSG member, interviewed by author.

victimisation, the CRR sought a remedial programme that would address the various needs arising from the different consequences of victimisation.

The once-off R30,000 grants therefore fell short of this goal. Without a targeted strategy of addressing the other aspects of reparation, these once-off financial grants have left survivors unfulfilled, both in terms of addressing their actual needs – that arose from their victimisation – and in their satisfaction that the transitional deal-making was fair.

Furthermore, this ran contrary to the spirit of reparations, as set out in the principles on which the CRR recommendations were made. Reparations are meant to make the lives of those who suffered human rights violation to be as whole as possible.[59] The CRR recommendations pointed out that reparations should be implemented so that healing and reconciliation could be promoted.

International norms and institutions of transitional justice support reparations that go beyond pecuniary terms. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides in paragraph 19 that remedies to survivors should include restitution and/or compensation. It also states that necessary material, medical, psychological and social assistance should be accorded.[60] The international law of State responsibility also binds the State to establish accountability in order to preclude the continuation or repetition of the breach of law.[61] Professor van Boven maintains that granting such satisfaction to the survivors may "individually and collectively" have broader implications, "pertaining to matters of political, social and criminal justice".[62]

By establishing the TRC, and starting a process of institutional transformation in South Africa, the Government can be said to have fulfilled the latter requirements. On the strength of survivors' perception of the R30,00 grants, however, the Government still has a long way to go to fulfill its role towards bringing about restitution.

E. *Broader Reparations*

There is paucity of information about progress with respect to reparations. The TRC Unit, established to monitor this work, has failed dismally to furnish any useful information in this regard. Khulumani victims support group has itself

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[59] M. Hausfeld (27 October 2004), Lawyer acting for KSG, author's notes from briefing.

[60] Cited in, Van Boven. (1990). "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms:" *Treatment and compensation of victims*, United Nations Commission on human rights, sub-Commission on prevention of Discrimination and protection of minorities, preliminary report.

[61] Van Boven. *id* at 509.

[62] *Id.*

struggled to find out what government is doing with respect to broader reparations.

According to the report of the Accounting Officer of the President's Fund, as at the end of the financial year ending March 2007, 15,610 of the 16,837 applicants for reparations approved by the TRC had been paid the once-off individual grants of R30,000.[63] The report states:

> There are 1,227 beneficiaries still to be paid …The President's Fund is consulting with the families of the deceased to establish the next of kin in terms of the regulations directing the disbursement of individual grants.[64]

The National Prosecuting Authority, charged among other things with prosecuting those cases for which amnesty applicants were denied amnesty, and those who simply did not approach the committee, also hosts the Priority Crimes Litigation Unit (PCLU). The mandate of the PCLU is to assist with the exhumation and return of the mortal remains of missing persons reported to the TRC during the amnesty hearings. The unit undertakes investigations to establish the whereabouts of the remains; conduct DNA testing and hands over the remains to the families.

Examples of comprehensive reparations programmes can be found in the efforts made in South America, specifically in Chile. In Chile the Government recommended the creation of a government body to oversee reparations to victims' families. They also specified a programme that included:

- A lump-sum payment equal to a year's pension;
- A monthly pension (based on the average wage) for spouses, parents and children of those killed or disappeared;
- Scholarships for children of those killed or disappeared allowed for secondary or university study until they turned thirty-five;
- Free medical and psychological care, through the Ministry of Health's "Program of Reparation and Integral Health Care".[65]

Chile's report made public the details of the suffering of the survivors and victims. A copy of the TRC's report was sent to the family of each person killed or disappeared, and the president apologised on behalf of the state.[66] The comprehensiveness of this programme and the role the government played in providing reparations could provide important lessons for South Africa and other

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[63] M. Simelani, President's Fund Annual Report: 2006/07, Department of Justice and Constitutional Development.

[64] *Id.*

[65] N. Roht-Arriaza (2004). Reparations decisions and dilemmas, *Hastings International and Comparative Law Review*, University of California, Winter, at 171.

[66] *Id.*

nations trying to deal with the issue of reparations in the aftermath of conflict. These efforts are a clear indication of this South American Government's sensitivity towards survivors' needs.

The survivors we spoke to raise a variety of urgent needs which if not addressed, they contended, they would not be able to move on. Furthermore, they felt that they would be less inclined to reconcile with those who wronged them while they continue to be suffering the consequences of those wrongs. The violations they suffered have given rise to some needs. These needs, in no particular order, include:

- Skills training;
- Employment opportunities;
- Education for the children;
- Trauma counseling;
- Medical assistance and health services; and
- Housing.

1. *Skills Training and Employment Opportunities*

Many of our respondents expressed a desire to be employed or to open their own small businesses. Since many of these survivors suffer one form of physical impairment or another, the viability of labour intensive work becomes very limited.

> As I am talking to you right now I have zinc plates on my back in my body on my legs. And look at my hand you can easily see the bones …. The zinc plates are coming out just at anytime of the day things like that. So when I am working I cannot work like a normal human being in a day long kind of working condition I just work temporarily. So at present I do shut down for two weeks three weeks just like that.[67]

> I mean if they can provide our needs things that we will live through them like establishing community centre for us so we can be able to work in that centre engaging in handy craft and other important skills that will be necessary to empower us.[68]

Job opportunities are scarce in the Vaal, and there is a marked dearth of skills amongst the survivor community and the broader community of Vaal. Furthermore, most of the respondents' education does not go beyond matriculation. In this context, skills training and community development projects are regarded as key interventions to contribute towards poverty alleviation amongst the survivors.

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[67] L. Potlako (20 May, 2004), KSG member, interview by P. Rampa.
[68] M. Sithole (20 May, 2004), KSG member, interview by P. Rampa.

2. *Education for Children*

Older survivors expressed frustration that they could not afford to educate their children, or help them acquire skills that could enhance their chances of finding gainful employment.

> … I have my child who is in Grade Ten and she looks very bright and able with her school work. So I think it is best if when they give us this money I could save a certain amount so she can have money to go to school at the later stage. And I have her brother who after the death of his elder brother was affected and I think this has an impact because he failed during that year and also today he failed his Standard Eight two times you see. But the thing is he is good in art and hand work so I went to talk to his teachers and I told them that it is best that he could enrol in a technical college because at school he is experiencing problems with learning. So I have to save some money so I can be able to send him to such school even though it is expensive because you ought to pay every trimester so you see money is the problem.[69]

Four of the ten respondents that received the R30,000 grants used some of the money to pay for the education of their children or children in their care. The desire to educate children and frustration at the difficulty of achieving this was expressed generally by parents with children of school-going age.

3. *Counseling Services*

A need expressed by most respondents is trauma counseling. Most said counseling was critical in their own strategies to cope with the aftermath of their victimisation. Asked how she is coping with her trauma, one of the respondents said:

> Khulumani helps me to receive counseling even though I am not there yet. But they are trying their level best to help me get better. I am haunted by past events and they do not want to disappear, they hang around me like a shadow but I do not know when it will disappear.[70]

Another respondent said the counseling she received since joining Khulumani had helped her to rejoin society. After her son was killed she withdrew from the community and it was only through the counseling she received after joining Khulumani that she regained her strength and rejoined society.

Isolation from the broader community seems to be a common response after the trauma experienced by these respondents. Khulumani seems to be one of the few outlets that helps them to deal with their trauma. Other coping strategies are family support, political conviction – which seems to demand a certain degree of

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[69] S. Bosigo (5 May, 2004), Member of KSG, interviewed by author.
[70] Respondent, 13 May, 2004.

stoicism on the part of adherents to a particular course, and religious faith. The efficiency of these coping strategies should be critically appraised and a multi-pronged strategy could be an appropriate intervention to deal with specific needs of individuals or groups that speak to their different circumstances and inclinations.

Trauma counseling and management as an intervention is critical if cross generational victimisation is to be dealt with. Simpson[71] argues that we cannot talk of transformation while failing to attend to factors that may continue the marginalisation of survivors. He argues that failing to deal effectively with the survivors' experience of marginalisation can only lead to continued marginalisation, the residual trauma of which may be transmuted in forms of violence.[72] Citing the Latin American situation, Roht-Arriaza shares this view:

> Those killed were often derided as subversives and terrorists, worthy of no better fate. Often, in the midst of state terror or civil conflict, families could not even reclaim the bodies of their dead loved ones. The trauma is passed on to the next generations, spawning a legacy of violence and dysfunction that may persist for many years.[73]

Research done by CSVR on former foot soldiers of the anti-apartheid movement's military wings; show that many ex-combatants struggle with reintegration back to their communities. This is in part because of the unresolved trauma these former combatants have to contend with, and the negative stereotypes associated with their role in the struggle era.[74]

Sustained trauma counseling programmes, run either by government or NGOs with the support of government, would mark the Government's acknowledgement of the dire consequences of victimisation, and a restorative attempt at the same time. Such interventions might also ameliorate the impact of amnesties to perpetrators which come with the automatic obligation on survivors to waive their right to seek legal redress against the former.[75] In other words the survivors can live with the fact that the perpetrators are walking free if they are afforded the opportunity to escape the poverty the perpetrators' actions may have precipitated, and are free from debilitating effects of the trauma of their experiences.

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[71] G. Simpson (1997). "Reconstruction and Reconciliation: Emerging from transition", Development in Practice, Vol 7, No. 4.

[72] *Id*.

[73] Roht-Arriaza, *supra* n. 65.

[74] See for example, M. Bandeira (2008), "Restoring Dignity: Current psychological interventions with ex-combatants in South Africa: A Review, Discussion and Policy Dialogue Project, A CSVR report.

[75] See Media summary of the judgment, of Justice Ismail Mohammed, 25 July 1996, found online: www.constitutionalcourt.org.za/uhtbin/cgisirs/20080723102511/SIRSI/0/520/S-CCT17-96.

4. *Medical Assistance and Health Services*

> I think deep down I am hurt because the fact that I am paralyzed remains a pain to me always. When I look back I know I was active and healthy but because of what happened I am no longer able to live my life to the way I used to. I am now confined to a wheelchair and I was not involved in gangs. So it gave me a pain because I was taking this person home and so when they shot him they also shot at me so it is still troubling me in my spirit my life is no longer the same.[76]

The cost of medical assistance and the impact of the physical and psychological injuries suffered by survivors is a cause for concern. Unable to escape the impact of physical pain, survivors are forced to spend money on the medication needed to ease their pain.

> At times the Government thinks it has done us a favour with these R30,000 because in reality we need doctors, we qualify for medical treatment. They should have provided us with papers that will help us access medical treatment from any other doctor in the community you see?[77]

The health department began in 2004 to gather information, to find out what were the different health needs of survivors. CSVR, drawing on its extensive experience of working with survivors, used this rare opportunity to state the various kinds of interventions that the state could make with regard to health needs of survivors. However, the Government has not made further approaches to civil society regarding this initiative. The TRC Unit, set up in 2004, has not made public its mandate and scope of work. There is clearly a need to consolidate initiatives aimed at providing medical assistance to survivors. A body such as the TRC Unit could co-ordinate or at least oversee a coordinated process where survivors are provided health services free of charge from service providers.

5. *Housing*

> I live in this house with my divorced sister, my mother and my two children.[78]

One responded, talking about how his father died and subsequently the family lost their house said,

> He just became ill because he couldn't eat properly. That caused his death. And the fact that he was always ill resulted in his death. He was subjected to harsh torture and interrogation and that affected him dearly as he lost his mind and he stopped living at home – things like that – until I decided to leave my parents' house. I left the family

[76] M. Sithole (20 May, 2004), KSG member, interview by P. Rampa.
[77] S. Kasa (11 May 2004), Member of KSG, interviewed by author.
[78] Phethane, T, 6 May, 2004, KSG member, interviewed by author.

> house in 1983 and someone came in to rent some rooms and he ended up taking over our house just in that way.[79]

Since the publication of the TRC's Final Report in 1998, there were no clear policy guidelines in respect of providing housing for a target group of the TRC victims, despite the CRR's recommendations that housing be provided. In June of 2007 the Minister of Housing, Lindiwe Sisulu, announced at her department's budget speech in Parliament that TRC survivors would be prioritised as beneficiaries of housing projects.[80] No systematic evaluation has been done to ascertain how many designated individuals have benefited from this scheme so far. Such a gesture would contribute to survivors' confidence in the transitional process addressing their needs.

F. *Reparations as a Form of Justice, Empowerment and Transformation*

As discussed earlier, survivors continually express a desire to be gainfully employed and live independent sustainable lives despite experiencing debilitating violations. This clearly demonstrates that survivors are not merely seeking hand-outs from the Government, but are instead keen to find jobs or sustain themselves in other ways such as by running small businesses.

During the debates concerning the issue of the sustainability of financial reparations, NGOs in Cape Town argued that reparations were actually symbolic and were not meant to be the survivors' means of support.[81] Reparations ought to be seen as important for their 'restitution' value and for addressing other needs such as mourning and memorialisation. Arguments that reparations are about self-enrichment thus fall short. Given the dearth of skills amongst survivors, it is necessary that targeted skills development projects can be implemented to absorb survivors into self-sustainable employment through entrepreneurial programmes.

While running a workshop with the survivors in the Vaal, many told us that they would happily take part in projects that take forward the reconciliation work. Since memorialisation is part of this work, prioritising survivors for such work would be both a symbolic and practical way to deal with unemployment amongst survivors. Such an approach could also lead to community buy-in and therefore render such memorial sites sustainable.

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[79] L. Potlako (20 May 2004), KSG member, interview by P. Rampa.

[80] L. Sisulu, Speech of Minister of Housing at the occasion of the Budget Vote 2007/08 for the Department of Housing, National Assembly, Cape Town.

[81] W. Orr (2000). Reparations Delayed is Healing Retarded. In C. Villa-Vicencio & W. Verwoerd (Eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*. Cape Town: University of Cape Town Press.

G. *Recommendations*

The Government's reluctance to engage the issue of reparations precipitated a series of campaigns to demand a policy on reparations. These campaigns however, leaned too heavily on the issue of final financial grants. While it was important to raise the issue of the final grants as a matter on which survivors were not going to compromise, the danger of such an emphasis has been the fact that it moved attention away from the need to address other survivor needs. This study shows that the R30,000 grants received have not made any meaningful impact on the survivors' quest to overcome the consequences of their victimisation.

With the many competing needs that the Government has to address, it would be hard to expect more financial grants to survivors from government. Furthermore, as this report shows, financial grants fall short of addressing the day to day and long term needs of the survivors. There are other urgent needs, which the individual financial grants cannot address. These include:

- Health services;
- Skills development;
- Education; and
- Housing.

Government departments responsible for these need areas can prioritise survivors in their ongoing work to provide such services to South Africans in need. In addition to such interventions, the Government can use the money in the President's Fund that was allocated for reparations to meet some of the survivor needs. According to Finance Minister Trevor Manuel, the Government had allocated R800 million rand in the 2001/02 Budget to pay for reparations.[82] So far the Government has paid out about R30,000 grants to approximately 16,000 survivors. This means that by the time the Government has paid out financial reparations to the approximately 18,000 designated beneficiaries, a balance of about R200 million plus interest will be left in this fund. This money could be used for some of the post-TRC work. It could be used also to deal with some of the restorative work, especially memorialisation processes. Working together with survivors to address these needs could provide government an opportunity to form a strong relationship with survivors.

By soliciting information from the survivors and civil society organisations on ways to address their specific different needs, government will be empowering survivors on the one hand, and gaining much needed insight into the various needs expressed by survivors. This will have a positive impact in informing a

[82] M. Sebelebele (2004). "Reparations: grants still unclaimed".

relevant reparation policy. An effective strategy would involve developing programmes that would promote sustainable forms of income generation for survivors. With limited skills among this group, skills development should be prioritised. This should be done in consultation with the survivors themselves, and should reflect a nuanced understanding of the market needs where such operations are run.

Education for the surviving children of the victims is a critical intervention. As a vulnerable group with very limited prospects for the future arising from the loss of their parents and guardians, these children should be given priority in the offers of bursaries and scholarships. Failing here would be leaving these children trapped in a circle of poverty, which has the potential of manifesting itself in violent, criminal and other anti-social behaviour. Health services should be understood in a broad sense, which involves comprehensive, multi-pronged interventions to effect psychological healing and medical or physical needs of the survivors. In addressing the important issue of counseling, this means finding out from survivors and those who have worked with them what the relevant interventions are. Sometimes in doing trauma counseling it is important to acknowledge the importance of methods that go beyond the western convention.[83] This could mean combining psychosocial counseling with traditional ways to which people attribute healing powers.

Housing was identified by the CRR as one of the urgent needs to effect restitution for survivors. Prioritising survivors in the provision of housing will be greatly welcomed, as suggested by the emphasis made by many respondents on the importance of housing in helping them to move on with their lives. Setting up a desk on reparations within the UN, with the mandate to draft reparations principles and the powers to monitor the implementation thereof can benefit those societies that are dealing with transition.[84]

H. *Conclusions*

Reparation is an obligation of the state and in terms of international law is automatically warranted when gross human rights violations have been committed. However, the issuing of reparations has internationally been effected with various degrees of success. Politicians have demonstrated a reluctance to tackle this issue during the transitional arrangements. Often it is civil society that brings the issue on the transitional agenda. Apart from legally binding, reparation is an

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[83] L. Kgalema (12 December 2002), Researcher at CSVR, interviewed by author; B. Kekana (12 December 2002), Social Worker at CSVR, interviewed by author.

[84] E. Naidu 2004, Researcher at CSVR, author's notes.

important component of transition. A reparation policy that is sensitive to the needs of the survivors has the potential of encouraging reconciliation and providing the impetus to move on. This is not to reduce the complex process of reconciliation to the provision of reparations. As a gesture, however, reparations demonstrate in concrete terms the desire to subvert the negative consequences of past violations, thus concretely encouraging an inclination for forgiving and moving on.

The respondents we spoke to express bitterness and a sense of betrayal on the part of government. There is a strong feeling amongst them that the failure of government to consult with survivors before deciding on the R30,000 grants reflects government's arrogance and lack of sensitivity to their needs. Survivors do not come across as seeking self-enrichment, despite claims from some that that is the case. Instead they wish for sustainable means of earning an income.

The amount granted by government does not address other urgent needs such as trauma counseling, medical and health needs, education and skills development, as well as housing. These needs, being urgent, present survivors with difficult choices when it comes to how the money proffered will be used. Drawing on reparative practices elsewhere, such as in Chile, government can devise a reparations programme that addresses these outstanding areas. Because government failed to consult with survivors, either through representatives or civil society groups that have worked with survivors, crucial information relevant to the needs of survivors was lost. Such information can inform an improved reparations policy if pursued.

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Ferstman et al. (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, pp. 567–576.