



OFFICE OF THE UNITED NATIONS  
HIGH COMMISSIONER  
FOR HUMAN RIGHTS



# **RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES**

*Reparations programmes*



UNITED NATIONS

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## **NOTE**

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With the publication of *Reparations Programmes* and *Maximizing the Legacy of Hybrid Courts*, the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations system's lead entity on transitional justice, launches the second part of its series of transitional justice tools for post-conflict States. These publications are meant to help develop sustainable institutional capacity within United Nations missions, as well as to assist transitional administrations and civil society to better craft their responses to transitional justice needs.

Countries emerging from conflict often suffer weak or non-existent rule of law, inadequate law enforcement, insufficient capacity in the administration of justice, and increased instances of human rights violations. This situation is often exacerbated by a lack of public confidence in State authorities and a shortage of resources.

In the wake of conflict or authoritarian rule, reparations programmes are essential in the delivery of justice to victims of human rights abuses. Our tool on this subject is intended as a practical guide to assist with implementing effective reparations programmes. Grounded in international human rights standards and inspired by best practices, *Reparations Programmes* provides the indispensable information required to target interventions with regard to reparations programmes. Its goal is not dictating strategic and programmatic decision-making, since this must be shaped in the field as an appropriate response to specific circumstances and environments.

*Reparations Programmes*, jointly with the parallel publication of *Maximizing the Legacy of Hybrid Courts*, builds on our previous series, which we released in 2006. The first series included *Mapping the Justice Sector*, *Prosecution Initiatives*, *Truth Commissions*, *Vetting* and *Monitoring Legal Systems*. Each of these tools can stand on its own, but also fits into a coherent operational perspective. The principles used in these tools have been primarily garnered from previous experience and lessons learned in United Nations operations.

In line with its engagement in transitional justice policy development and responding to requests from the United Nations system, particularly its field presences, as well as other partners, OHCHR will continue to develop rule-of-law tools.

I would like to take this opportunity to express both my appreciation for the feedback received from our partners thus far and my gratitude to all those who have contributed to this important initiative.



Louise Arbour

United Nations High Commissioner for Human Rights

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The Office of the United Nations High Commissioner for Human Rights (OHCHR) has long been committed to promoting work on reparations for victims of human rights violations. Some of these efforts have borne fruit in recent years with the adoption by the General Assembly 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.<sup>1</sup> Similarly, OHCHR stood behind the work that led to the Updated Set of principles for the protection and promotion of human rights through action to combat impunity<sup>2</sup> and the accompanying reports,<sup>3</sup> which also contain important references to reparations.

This publication is intended to assist in the implementation of the principles contained in the above-mentioned documents. It is a practical tool to provide guidance on implementing reparations initiatives. Its focus is not on redressing single or isolated human rights violations, but on how to establish (out-of-court) reparations programmes to help redress cases of gross and serious violations of human rights in the wake of conflict or authoritarian rule. In such situations large numbers of victims deserve and call for reparations, but their claims cannot be redressed through individual cases in a court of law, in part because of their numbers and in part because of the incapacity of the legal system.

In response to the myriad violations and abuses of fundamental rights that take place particularly during conflicts and under authoritarian regimes, a variety of measures have been developed. They include criminal prosecutions, truth-telling strategies, various forms of institutional reform—for instance, vetting strategies—local justice and reconciliation initiatives, and reparations for victims.<sup>4</sup> All of these are important; hopes have been pinned on each, both for corrective and for preventive reasons (albeit each to different degrees); and for each there are successes and failures. No country that has experienced gross and systematic human rights violations<sup>5</sup> can argue that it has achieved total success in their implementation.

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<sup>1</sup> Resolution 60/147 of 16 December 2005. The Basic Principles and Guidelines are based on the work of Theo van Boven and M. Cheriff Bassiouni.

<sup>2</sup> E/CN.4/2005/102/Add.1.

<sup>3</sup> “Independent study on best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity, by Professor Diane Orentlicher” (E/CN.4/2004/88) and “Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher” (E/CN.4/2005/102).

<sup>4</sup> See the OHCHR rule-of-law tools for post-conflict States on truth commissions, prosecution initiatives and vetting.

<sup>5</sup> The Basic Principles and Guidelines do not define either “gross violations of international human rights law” or “serious violations of international humanitarian law.” Although not formally defined in international law, “gross violations” and “serious violations” denote types of violations that, systematically perpetrated, affect in qualitative and quantitative terms the most basic rights of human beings, notably the right to life and the right to physical and moral integrity of the human person. It is generally assumed that genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination fall into this category. Deliberate and systematic deprivation of essential foodstuffs, essential primary

Yet, some countries have successfully transitioned out of authoritarianism or conflict, at least in part owing to measures of this sort. So, aside from the morally and politically compelling reasons for such measures, as well as the legally binding commitments to them, there is now sufficient international experience to learn some lessons from them.

Recently, however, the understanding and implementation of these justice measures have changed. There is a keen understanding of the need to link the different justice initiatives, and to design and implement them with the participation of those they are meant to serve, including the victims themselves. Consequently, it is now clearer than ever that there is no single approach that will work everywhere. For example, the Secretary-General, in his report on the rule of law and transitional justice in conflict and post-conflict societies,<sup>6</sup> persuasively argues that “where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof.” Furthermore, he points out that “the most successful transitional justice experiences owe a large part of their success to the quantity and the quality of public and victim consultation carried out.” Finally, he insists that “we must learn... to eschew one-size-fits-all formulas and the importation of foreign models” and reminds us that “although the lessons of past transitional justice efforts help inform the design of future ones, the past can only serve as a guideline. Pre-packaged solutions are ill-advised. Instead, experiences from other places should simply be used as a starting point for local debate and decisions.”

This publication takes on board these conclusions, and tries to articulate their rationale and to illustrate them. It will stress the importance of designing and implementing reparations programmes in close association with other justice initiatives and with the participation of various stakeholders, and will offer observations based on experience in the hope that it will stimulate local deliberations about the shape that reparations should take in context.

Stressing the importance of linking reparations programmes to other transitional justice or redress measures, however, does not preclude that reparations may play a particularly important role in a comprehensive policy to redress human rights abuses for the simple reason that they are the only measure that immediately and specifically targets victims. While prosecutions and to some extent vetting are, in the end, a struggle *against perpetrators*, and truth-seeking and institutional reform have as their immediate constituency society as a whole, reparations

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health care or basic shelter and housing may also amount to gross violations of human rights. In international humanitarian law, “serious violations” are to be distinguished from “grave breaches”. The latter refers to atrocious violations that are defined in international humanitarian law but only relating to international armed conflicts. The term “serious violations” is referred to but not defined in international humanitarian law. It denotes severe violations that constitute crimes under international law, whether committed in international or non-international armed conflict. The acts and elements of “serious violations” (along with “grave breaches”) are reflected in article 8 of the Rome Statute of the International Criminal Court under “War crimes”. See Redress, *Implementing Victims’ Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation* (London, 2006).

<sup>6</sup> S/2004/616.

are explicitly and primarily carried out *on behalf of victims*. Hence, in terms of potential direct impact on victims at least, they occupy a special place among redress measures.<sup>7</sup> The hope is that this publication will provide some guidance in the design of fair and effective reparations policies.<sup>8</sup>

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<sup>7</sup> Two caveats are important. First, the positive consequences of a well-designed reparations programme go well beyond the victims alone. Second, to argue for the special importance for victims of a particular justice measure does not justify, either legally or morally, asking them—or anyone else—to trade off among the different justice initiatives. Thus, Governments should not try to buy, say, impunity for perpetrators by offering victims “generous” reparations.

<sup>8</sup> This publication distinguishes between reparations “efforts” and “programmes”. The latter should be reserved to designate initiatives that are designed from the outset as a systematically interlinked set of reparations measures. Most countries do not have reparations programmes in this sense. Reparations benefits are most often the result of discrete initiatives that come about incrementally rather than from a deliberately designed plan. When appropriate, this tool will use the terms interchangeably.



## I. REPARATIONS IN INTERNATIONAL LAW

International law traditionally addressed States as its major subjects. For example, it dealt with wrongful acts and ensuing reparations as a matter of inter-State responsibility.<sup>9</sup> The leading opinion in this regard is set out in the often cited judgment of the Permanent Court of International 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.”<sup>10</sup>

Before the proclamation of internationally protected human rights, the prevailing view in international law was that wrongs committed by a State against its own nationals were essentially a domestic matter and that wrongs committed by a State against nationals of another State could give rise to claims only by that other State as asserting its own rights.

Since the Second World War, with the establishment of the United Nations and the acceptance of the Charter of the United Nations as the principal instrument of international law, the international legal framework has gradually been transformed from a law of coexistence to one of cooperation. The internationalization of human rights was part of this process. With the adoption of the Universal Declaration of Human Rights and the International Covenants on Human Rights, it was recognized that human rights were no longer a matter of exclusively domestic jurisdiction and that consistent patterns of gross violations of human rights warranted international involvement. Furthermore, international human rights law progressively recognized the right of victims of human rights violations to pursue their claims for redress and reparation before national justice mechanisms and, if need be, before international forums.

As a result of the international normative process, the legal basis for a right to a remedy and reparation became firmly enshrined in the elaborate corpus of international human rights instruments, now widely accepted by States. Among these instruments are the Universal Declaration of Human Rights (art. 8), the International Covenant on Civil and Political Rights (art. 2), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

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<sup>9</sup> See “Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report submitted by Mr. Theo van Boven, Special Rapporteur” (E/CN.4/Sub.2/1993/8).

<sup>10</sup> 1927, P.C.I.J. (Ser. A) No. 9 at p. 21.

(art. 14) and the Convention on the Rights of the Child (art. 39). International humanitarian law and international criminal law are also relevant in this regard, in particular the Hague Convention respecting the Laws and Customs of War on Land (art. 3), the Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (art. 91) and the Rome Statute of the International Criminal Court (arts. 68 and 75).

At the same time, customary international law, as embodied in the law of State responsibility and in interaction with the progressive development of human rights treaty law, is solidifying the legal basis of a right to a remedy and reparation for victims of human rights violations. While the International Law Commission, in its recent formulation of the law of State responsibility, largely focused on the State as the subject of wrongs committed against other States, it cannot be overlooked that the emergence of human rights in international law has altered the traditional concept of State responsibility. Obligations assumed by a State under international human rights and humanitarian law entail legal consequences not only vis-à-vis other States but also with respect to individuals and groups of persons who are under the jurisdiction of the State. The integration of human rights into State responsibility has brought about the basic premise that, in instances of breaches of international obligations, redress and reparation are due not only to States but also to the injured persons and groups themselves.

It is generally understood that the right to reparation has a dual dimension under international law: (a) a substantive dimension to be translated into the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and, as the case may be, guarantees of non-repetition; and (b) a procedural dimension as instrumental in securing this substantive redress. The procedural dimension is subsumed in the concept of the duty to provide “effective domestic remedies” explicit in most major human rights instruments. As stated authoritatively by the Human Rights Committee, the duty of States to make reparations to individuals whose rights under the Covenant have been violated is a component of effective domestic remedies: “without reparation to individuals whose Covenant rights have been violated, the obligation to provide effective remedy [...] is not discharged.”<sup>11</sup> This affirms the jurisprudence of several human rights bodies which attaches increasing importance to effective remedies as implying a right of the victims and not only a duty on States.

It is characteristic of the legal approach to claim and materialize rights by means of (quasi-)judicial adjudication which, in human rights cases, generally involves the applicant victim and the State concerned. In legal texts and commentaries the right to reparation is usually viewed from the perspective of judicial adjudication and case law thus developed. Decisions, as outcome of such a legal process, may be of considerable importance for the applicant victim but would not in itself have an effect on other victims who may find themselves in similar situations as a result of gross and systematic violations of human rights. Therefore, particularly in situations of transitional justice where national societies are seeking to repair serious harm and injury inflicted as

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<sup>11</sup> General comment N° 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.

a result of gross and massive violations of human rights, States are under a moral and political duty to take comprehensive remedial measures and introduce elaborate programmes offering reparation to broader categories of victims affected by the violations. Equally, States are expected to embark upon structural programmes and projects aimed at the cessation and non-recurrence of facts and conditions inherent in the gross and systematic violations that occurred. This programmatic approach and the judicial approach should interrelate and interact to make the right to reparation a reality and afford justice to victims. The Basic Principles and Guidelines may offer a frame of reference for this purpose.

While, under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparation for victims, implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. In this respect, national Governments possess a good deal of discretion and flexibility. Again, the Basic Principles and Guidelines are to serve as a source of inspiration, as an incentive, and as a tool for victim-oriented policies and practices.

The Basic Principles and Guidelines offer a broad categorization of reparations measures:<sup>12</sup>

- *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,” for example, 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* “should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law,” such as lost opportunities, loss of earnings and moral damage.
- *Rehabilitation* “should include medical and psychological care as well as legal and social services.”
- *Satisfaction* is a broad category of measures, ranging from those aiming at a cessation of violations, to truth-seeking, the search for the disappeared, the recovery and reburial of remains, public apologies, judicial and administrative sanctions, commemoration and memorialization, and human rights training.
- *Guarantees of non-repetition* is another broad category which includes institutional reforms tending towards civilian control of military and security forces, strengthening judicial independence, the protection of human rights workers, human rights training, the

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<sup>12</sup> See General Assembly resolution 60/147, annex, paras. 19–23.

promotion of international human rights standards in public service, law enforcement, the media, industry, and psychological and social services.

Moreover, it is not only in doctrine, but also in practice, that a right to reparation is becoming firmly established. The International Court of Justice, for instance, continues to issue decisions on reparations. In the *Case Concerning Armed Activities on the Territory of the Congo*, the Court illustrates the continued relevance of inter-State reparations by finding that Uganda has an obligation to provide reparations to the Democratic Republic of the Congo for, among other things, the invasion and occupation of Ituri. At the same time it finds that the Democratic Republic of the Congo has an obligation to pay reparations to Uganda for, among other things, mistreating Ugandan diplomats at the Ugandan Embassy in Kinshasa as well as at Ndjili International Airport.<sup>13</sup> In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court finds that Israel has the obligation to make reparation for the damage caused to “all natural or legal persons having suffered any form of material damage as a result of the wall’s construction.”<sup>14</sup>

Finally, the Rome Statute of the International Criminal Court not only reaffirms the right of victims to reparations in cases tried by the Court (art. 75), it also establishes a trust fund for victims (art. 79). The contours of this reparations regime remain to be defined and generate complex challenges. However, the fact that this right is now an integral part of international criminal law not only supports existing practice but promises to stimulate further developments in the field of reparations.

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<sup>13</sup> The Court leaves it to the two parties to settle the specific forms reparations will take, but will do so itself if the parties fail to reach an agreement. See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports 2005.

<sup>14</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, I.C.J. Reports 2004, p. 136. Subsequently, the United Nations General Assembly, in its resolution ES-10/15 of 20 July 2004, 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. In October 2006, the Secretary-General proposed an institutional framework for the establishment of the Register of Damage (see A/ES-10/361).

## II. THE CONTEXT OF REPARATIONS

The very broad understanding of “reparations” that underlies the five categories in the Basic Principles and Guidelines—an understanding that is closely tied to the more general category of “legal remedies”—is perfectly consistent with the recent trend to look for complementarity among justice measures. There are binding obligations to provide these five kinds of measures. However, the five categories go well beyond the mandate of any reparations programme to date: no reparations programme has been thought to be responsible for “distributing” the set of “benefits” grouped under the categories of satisfaction and, especially, of guarantees of non-repetition in the Basic Principles and Guidelines. Indeed, it can be argued that the five categories in the Basic Principles and Guidelines overlap with the sort of holistic transitional justice policy that the Secretary-General recommends in his report on the rule of law and transitional justice.<sup>15</sup>

In practice, those who are responsible for designing reparations programmes are unlikely to be responsible for designing policies dealing, for example, with truth-telling or institutional reform. They concentrate on the design of programmes that are organized mainly around the distinction between material and symbolic measures and their individual or collective distribution. Rather than understanding “reparations” in terms of the wide range of measures that can provide legal redress for violations, it is as if they understood it more narrowly, in terms of whatever set of measures can be implemented to provide benefits to victims directly. Implicit in this difference is a useful distinction between measures that may have *reparative effects*, and may be obligatory as well as important (such as the punishment of perpetrators or institutional reforms), but do not distribute a direct benefit to the victims themselves, and those that do, “reparations” strictly speaking.

As the following section makes clear, even with the narrower understanding of the tasks involved in designing and implementing a reparations programme, the challenges are significant.

### A. Background and context

Before examining in detail some of the concrete challenges that reparations efforts usually face, it is important to pay attention to some general characteristics of the contexts in which they typically take place and to their possibilities and limitations.

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<sup>15</sup> See, e.g., S/2004/616, para. 26.

1. Reparations programmes are meant to (partially) redress gross and systematic human rights violations, not sporadic or exceptional ones. This has far-reaching consequences. It implies that the universe of potential beneficiaries is large and that they probably suffered various and multiple forms of abuse. It also means that a reparations programme cannot make the same contribution to strengthening the rule of law as it would if it were redressing exceptional violations of otherwise generally observed norms. Part of what needs to be redressed in the cases that are of concern here is not only a large number of individual violations, but violations that come about in systematic ways, either as a consequence of the deliberate adoption of abusive policies or as a predictable consequence of other choices. Reparations in these contexts must not only do justice to the victims, but also contribute to re-establishing essential systems of norms, including norms of justice, which are inevitably weakened during times of conflict or authoritarianism.
2. The contexts in which reparations programmes are established are frequently characterized by weak institutional capacity, fractured social relations, very low levels of trust and a scarcity of financial resources.
3. There is much less familiarity with reparations than with other redress mechanisms, especially criminal justice. With the exception of a few, mostly specialized NGOs,<sup>16</sup> human rights NGOs in situations of gross and systematic violations usually devote most of their energy to issues of basic legal protection, and much less to questions of reparations, which, in the midst of abuses always, understandably, seem nothing more than a distant possibility. Similarly, victims and victims' groups typically worry first and foremost about survival and recovery (of health, information, remains, etc.). Few Governments have had to deal with massive reparations in the past, and therefore few have any expertise. In fact, there is a lack of expertise at every level, including in the international and donor communities. As a result, expectations concerning reparations—which are also subject to other influences<sup>17</sup>—tend to be unrealistic and managing these expectations is always one of the greatest challenges in the design phase of reparations efforts.
4. The violations that reparations benefits are meant to redress are frequently of the sort that is, strictly speaking, irreparable. Nothing will restore a victim to the status quo ante after years of torture and illegal detention, or after the loss of a parent, a sibling, a spouse or a child. No amount of money and no combination of benefits can erase either such experiences or some of their consequences. This is no excuse for inaction. However, understanding the inherent limitations of the programmes in question affects the way they are established and run, the benefits they distribute, etc.

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<sup>16</sup> Redress, for example, has a long and distinguished history dealing with reparation ([www.redress.org](http://www.redress.org)).

<sup>17</sup> Decisions by regional human rights bodies play an important role in setting expectations. In Latin America, for example, decisions of the Inter-American Court of Human Rights have been crucial not only for providing redress to individual victims, but also for motivating States parties to establish broader reparations programmes for other victims. The incentive effect of these decisions is, however, a result of the level of compensation that they provide. This level is seldom met by broader programmes, but these decisions do raise expectations among the victims.

## B. Responsibility for the design of a reparations programme

There seems to be a trend towards establishing truth commissions in post-conflict societies and societies in transition and entrusting them with making recommendations concerning reparations. However, it is worth remembering that many truth commissions have not been given this responsibility (e.g., Argentina and El Salvador<sup>18</sup>). Moreover, some truth commissions that did receive this mandate formulated recommendations that went unheeded or that have been implemented only partially (e.g., South Africa, Guatemala, Haiti and, at least until late 2006, Peru). Finally, some countries have implemented reparations initiatives that did not stem directly from truth commission recommendations (e.g., Argentina, Brazil and Germany). Countries can therefore decide the way to go about designing reparations measures that best suits their different contexts.

However, to the extent that truth commissions continue to be a measure of choice for societies emerging from authoritarianism or conflict, this is probably how many reparations programmes will be articulated in the future. The advantage is that, first, in the course of their work, truth commissions can compile information about the victims which may be important in the design and implementation of reparations programmes—information which may otherwise be missing.<sup>19</sup> Second, truth commissions normally enjoy a very high degree of moral capital, and this might have a positive impact on how their recommendations on reparations are perceived. At least initially, it makes sense to think that recommendations stemming from a truth commission will be more credible than a plan developed solely by Government authorities. This is because, given their membership (most commissions include civil society representatives) but also their general purpose, it is easier for truth commissions than for ordinary Government institutions to establish participatory processes leading to the design of reparations programmes.<sup>20</sup> Finally, and importantly, it is easier to create both the reality and the perception of significant links between a reparations programme and other justice initiatives, including, of course, truth-seeking, if the responsibility for designing the former is primarily given to the entity in charge of designing a comprehensive transitional justice strategy.

Nevertheless, truth commissions, even those with high moral capital, are not necessarily strong political players over time. The fact that more often than not their recommendations are not binding means that Governments can ignore them. Even if they are binding, this does not guar-

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<sup>18</sup> Part of the Commission on the Truth for El Salvador's mandate was to recommend "legal, political or administrative measures" which could be "inferred from the results of the investigation," including "measures to prevent the repetition of such acts, and initiatives to promote national reconciliation." See Mexico Agreements, 27 April 1991.

<sup>19</sup> In Colombia, for example, the discussions about reparation have taken place without much information about the number of victims, their socio-economic profile or even their location. By contrast, by the time South Africa's Truth and Reconciliation Commission published its report, including its recommendations on reparation, it had collected a large amount of information about the potential beneficiaries.

<sup>20</sup> However, not all truth commissions do this and many have in fact been criticized for becoming distant from civil society, even if they included several commissioners with civil society backgrounds and were mindful of the importance of communicating with different stakeholders.

antee implementation, as the case of El Salvador shows. The temporary nature of truth commissions also means that, unless specific provisions are made in advance, there may be little or no follow-up on their recommendations, including those on reparations.<sup>21</sup> Finally, and perhaps more problematically, the drawing-up of the mandate of truth commissions, as well as some narrower decisions, for instance, on the internal structure and division of labour within commissions, obviously takes place long before the work on reparations starts. But the terms of a commission's mandate, including the way it defines victims, the types of crimes that it will investigate, and even the limit of its term, can all have a significant and not always positive impact on the reparations programme that the commission can propose. So can decisions of a more particular kind. Those involved in drawing up the mandates and designing the internal procedures of a commission are rarely familiar with the issue of reparations and therefore have no notion of how these early but fundamental decisions can affect an eventual reparations programme.

Not all reparations efforts stem from the recommendations of truth commissions. Some countries have established self-standing reparations commissions or procedures (e.g., Brazil, Malawi, Morocco<sup>22</sup> and Guatemala). Others have established their reparations efforts as a result of ordinary legislative initiatives with no particular institution being in charge of their overarching supervision (e.g., Argentina) and, as a consequence, in these cases, different programmes have come about as a result of discrete, independent legislative initiatives. This confirms that there is no single approach to the question of reparations. These efforts have enjoyed different degrees of success. Self-standing reparations commissions or procedures naturally find it harder to establish significant links between whatever benefits they distribute and other justice measures. This, in turn, makes it more difficult to endow the benefits with the sort of meaning that distinguishes effective reparations from purely financial compensation. Compensation is important but, if reparations are to be considered as a justice measure, they work best when seen as part of a comprehensive justice policy, rather than as an isolated effort. The situation is worse when this is the only redress on offer, with no truth-telling, criminal prosecutions or significant institutional reforms. This may give the impression that the reparations are a bribe to buy the silence or acquiescence of the victims. Furthermore, self-standing reparations commissions or procedures tend to focus on financial compensation and pay significant attention to financial issues in their proceedings. Some victims then complain that, whereas they were interested in talking about what happened to them, the officials on the other side of the table wanted to talk solely about numbers. (This problem is exacerbated when these commissions try to tailor reparations payments to the situation of each beneficiary. When they do, an additional complication arises, namely, that victims of the same human rights violation divide over the unequal payments they receive, even if these payments are relatively large.)

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<sup>21</sup> Two cases in point: although El Salvador's Truth Commission did not propose a reparations plan as such, it did make a few concrete recommendations, including dedicating 1 per cent of foreign assistance to reparation. Guatemala's Commission for Historical Clarification made even more ambitious recommendations. When the two commissions finished their mandates these recommendations were ignored.

<sup>22</sup> The Independent Arbitration Commission, which functioned in Morocco from 1999 to 2001, provided compensation to some 3,700 victims of various human rights abuses.

Some of these complications may also affect reparations efforts that come about through discrete legislative or executive initiatives, but they need not. However, designing a reparations programme as a systematically interlinked set of measures covering a large number of the relevant violations has advantages over a gradualist, incremental approach. It is more likely that different categories of victims will be treated fairly when a comprehensive programme is designed than when their fate is left to the vagaries of the myriad factors, including political clout, that can determine the outcome of separate legislative fights over a long period of time.<sup>23</sup> The fact that there are entire categories of victims that will have to keep up the struggle to receive what is owed to them as a matter of right, while others receive their benefits, is not only unfair to the former, it also detracts from the reparations effort's legitimacy, erodes the contribution to political stability and civic trust that reparations overall may make, and simply guarantees that the issue will remain on the political agenda for a very long time.

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<sup>23</sup> One of Chile's first reparations laws restored pension benefits to those who had been fired from government positions under Augusto Pinochet's dictatorship. This became one of the most expensive parts of Chile's reparations efforts, as well as one of the most difficult to administer. The benefits for those who were excluded from land reform programmes—largely a traditionally disempowered peasant constituency—were unusually low, on the other hand. For a thorough overview of Chile's different reparations initiatives, see Elizabeth Lira, "The reparations policy for human rights violations in Chile," in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford, Oxford University Press, 2006), and Elizabeth Lira and Brian Loveman, *Políticas de Reparación. Chile 1990-2004* (Santiago, LOM Ediciones, 2005).



### III. THE CHALLENGES FACED BY REPARATIONS PROGRAMMES

Reparations can be conceptualized as a relationship between three terms, namely, victims, beneficiaries and benefits. A reparations programme aims to guarantee that every victim will receive at least some sort of benefit from it, thereby becoming a beneficiary.

#### A. Achieving “completeness”

Whatever benefits a reparations programme ends up distributing and for whatever violations, its aim is to ensure that every victim actually receives the benefits, although not necessarily at the same level or of the same kind. If this is achieved, the programme is *complete*. Completeness refers to the ability of a programme to reach every victim, i.e., turn every victim into a beneficiary. Whether this happens depends, to some extent, on the way in which the categories of violations that give rise to benefits are determined (see below). Because completeness can be approached only if the goal is articulated early on and steps meant to guarantee it are put in place from the very outset of the process—as well as throughout the duration of a reparations programme—its challenges need to be dealt with before others are addressed. The completeness of a programme depends, in part, on the following factors:

- *Information*. There may be little or no accurate information about the victims. There may be a lack of absolutely basic information, such as the numbers of victims to be served by the programme, or of more detailed yet important data, such as the victims’ socio-economic profile. It is easier to design a reparations programme on the basis of information that at the very least is broken down according to age and gender of the victims and includes their family structure, links of dependence, level of education and income, type of work, as well as violations suffered and a brief account of their consequences. Not even truth commission databases and statement-taking procedures are designed with reparations in mind. But they should and, unless information-gathering processes are appropriately designed from the outset, the guesswork involved in designing and implementing reparations programmes will only increase.
- *Participation*. There are many reasons for incorporating participatory processes in the design and implementation of reparations programmes. First of all, they may make the

programmes more complete. In situations of gross and systematic abuse, large numbers of victims may not be registered anywhere at all or not all victims may be registered in a single place. In protracted conflicts, in countries where the violence has been targeted at particular regions or groups and where trust is naturally low, victims will not necessarily go to the authorities to report the violations they have suffered. This is only one factor among many that explain why it is difficult to gather information about the universe of victims. Civil society organizations may, on their own and, particularly, collectively, have more information about that universe than official institutions. Bringing these organizations into the process from an early stage increases the likelihood that they will share information that is relevant for the design of reparations programmes. Throughout the registration process these organizations may have closer links with, and a deeper reach into, victims' communities than official institutions. Their active efforts are, therefore, necessary to achieve completeness.<sup>24</sup> Similarly, participatory processes may turn victims into stakeholders. In addition to having a reparative effect in itself, this may draw into the process people who may otherwise have remained at the margins. Indeed, participatory processes catalyse the formation of civil society organizations. The mere fact that a reparations programme is on a country's agenda gives an incentive for potential beneficiaries to organize themselves. Participatory processes add an incentive for such organizations to build up their strength and capacity.<sup>25</sup>

- *Outreach.* Outreach in the context of reparations is normally understood in terms of efforts to publicize an already designed programme and to facilitate access to its benefits. However, if participatory processes of the sort just mentioned are to take place, outreach must start long before the programme is fully designed. This is particularly true in contexts in which there is, at best, a weak tradition of consulting citizens, or where such traditions were interrupted, as is frequently the case in post-conflict societies and societies in transition.

Even a well-designed reparations programme will fail to distribute benefits to every potential beneficiary if it is not accompanied by effective outreach efforts once it is set in place. Some of the difficulties with outreach can be seen from the work of truth commissions. Merely writing a good report does not guarantee its uptake by civil society, let alone its

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<sup>24</sup> Part of the reason why the reparations programme established by the United States for Japanese-Americans interned during the Second World War was so complete was that Japanese-American organizations had been working with victims for years and had records of virtually all of them. See Eric Yamamoto and Liann Ebesugawa, "Report on redress: the Japanese American internment", in *The Handbook*....

<sup>25</sup> Peru's strategy was twofold. Firstly, an international NGO, the International Center for Transitional Justice (ICTJ), teamed up with a local NGO, the Asociación Pro Derechos Humanos (APRODEH), to provide technical advice and capacity-building both to the Truth and Reconciliation Commission and to other local NGOs (human rights and victims' organizations). They also produced a document that sought to sketch the conceptual and normative framework of an eventual reparations programme (*Parámetros para el diseño de un programa de reparaciones en el Perú* (Lima, 2002)), which, through consultations, was adopted as a consensual approach to reparations both by the Truth and Reconciliation Commission and by the organizations. Secondly, to improve communication between the Commission and NGOs, a group of 10 organizations was formed to discuss reparation in detail with the Commission. For a detailed account of the reparations work in Peru, see Julie Guillerot and Lisa Magarrell, *Reparaciones en la transición peruana. Memorias de un proceso inacabado* (Lima, APRODEH, ICTJ and Oxfam, 2006).

impact, particularly on Government institutions.<sup>26</sup> In countries with high levels of illiteracy, difficult transport and deep social fractures (ethnic, linguistic, religious, class or regional differences), outreach is even more important. Furthermore, despite the incentive effect of the benefits, it has sometimes proven more difficult to draw people into a reparations programme than to encourage them to give testimony to a truth commission, because the former requires not just providing testimony, but making a request, filing applications, and presenting documents and evidence. The outreach that is called for, then, is particularly intensive not only in terms of dissemination of information about the existence of the reparations programme, but also in terms of assisting those going through the process. Whatever the outreach measures, it is important to be sensitive to gender differences and to be ready to adjust outreach efforts so as to draw in as many female beneficiaries as possible. Similarly, if the conflict has forced many into exile, it is important to establish outreach efforts that can capture exiled groups.

- **Access.** If a reparations programme aspires to provide benefits to all potential beneficiaries, it must create a structure that makes the benefits easily accessible. Short application deadlines,<sup>27</sup> requiring potential beneficiaries to file applications in person (as opposed to by post or by proxy) or creating a closed-list system (that is, a system in which the list of applicants is not only closed by a given deadline and not opened again, but also usually requires applicants to go through other hurdles such as being recognized by a truth commission) virtually guarantee that some victims as defined by the programme will not receive benefits, thus rendering the programme “incomplete.” Short application deadlines will have a particularly negative impact on female victims, as well as some minorities, who frequently require more time to overcome their reluctance to approach justice initiatives as well as official institutions, because they have traditionally been excluded, marginalized or outright abused.
- **Evidentiary thresholds.** The other structural factor that may exclude many otherwise deserving potential beneficiaries is the way in which evidentiary requirements are determined. Setting the bar too high will leave out many victims. In making these decisions, the general availability of records, including police records,<sup>28</sup> the role of the media at the time

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<sup>26</sup> Guatemala’s Commission on Historical Clarification as well as, more recently, Morocco’s Equity and Reconciliation Commission have been said to have had insufficient outreach efforts. In Morocco, for example, the report was posted on the Commission’s website, but six months after it finished its work hard copies of its report had not been widely distributed and no summaries had been produced. In a country with high rates of illiteracy and low rates of Internet access, clearly more could be done to make the report available. Peru’s Commission produced a summary that was widely distributed as a pamphlet in the country’s leading newspapers. In Sierra Leone the Truth and Reconciliation Commission produced pamphlets that relied mostly on graphics rather than text to get its message across to the illiterate population.

<sup>27</sup> This is a frequent complaint against reparations programmes in many parts of the world, including South Africa, Morocco and Brazil. Some countries, including Brazil, have introduced legislation extending application periods. On Brazil, see Ignacio Cano and Patrícia Galvão Ferreira, “The reparations program in Brazil”, in *The Handbook*....

<sup>28</sup> In some countries abusive security forces kept meticulous records which were subsequently recovered, while in others, even if records were kept, they were destroyed. In some countries security forces destroyed even the identity papers of their victims. These factors affect where the evidentiary threshold for accessing benefits should be.

of the conflict,<sup>29</sup> the existence of human rights NGOs that construct victims' files at the time the violations take place<sup>30</sup> and other contextual factors must be taken into account. Furthermore, these decisions must be sensitive to the type of violation in question. It is one thing to prove illegal detention (which can already be difficult), quite another to prove forms of torture or sexual abuse that leave no observable mark, especially in the long run.

The requirements for qualifying as a beneficiary should be sensitive not just to the *needs* of victims (for respect, avoiding double victimization, sparing them cumbersome, complicated, lengthy or expensive procedures), but also to their *possibilities*. The more demanding the evidentiary requirements, the more false claims will be excluded; but so will perfectly legitimate claims, preventing the programme from achieving completeness. In terms of standards of evidence and burden of proof, some Governments have assumed such burden and adopted fairly low evidentiary standards in their reparations programmes.<sup>31</sup> Considering their past suffering, the consequent risk of re-victimization, and the difficulties victims encounter in gathering the relevant evidence, these seem reasonable decisions.

## B. Which violations should be subject to reparations?

There is increasing consensus among human rights lawyers about the advisability of adopting a uniform definition of "victims." The Basic Principles and Guidelines (paras. 8–9), for example, offer the following definition:

[...] victims are 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.

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<sup>29</sup> In Argentina, for example, the reparations programme for the victims of arbitrary detention admitted press articles as a form of evidence among others. This presupposes that the press is interested in these types of cases, which is not always the case in every country. The programme for the victims of forced disappearance admitted testimony of witnesses. See María José Guembe, "Economic reparations for grave human rights violations: the Argentinean experience", in *The Handbook...*

<sup>30</sup> In Chile, for example, groups like the Vicaría de la Solidaridad started building files on the victims' cases very early on during the dictatorship. This made a tremendous difference later on.

<sup>31</sup> Morocco's Equity and Reconciliation Commission accepted at face value the testimonies it received and assumed the burden of proof. Some of Argentina's reparations programmes accepted as evidence the corroborating testimony of two persons or, in line with a decree passed precisely to make the evidence required to receive benefits more flexible, accepted and judged, with other parts of a petition, documents of national and international human rights organizations, press articles and consistent bibliographic material.

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.

It is foreseeable that this definition will be adopted by national reparations programmes, as they pay increasing attention to international law commitments.<sup>32</sup>

Even if a uniform and expansive definition of “victim” is adopted, this does not, on its own, settle a fundamental question that all reparations programmes face, namely, how to select the human rights violations that will trigger reparations. For a reparations programme to at least make sure that every victim is a beneficiary, in addition to satisfying the conditions outlined in the preceding section, it would have to extend benefits to the victims of *all* the violations that may have taken place during the conflict or repression. If it did that, the programme would be *comprehensive*. No programme has achieved total comprehensiveness. For instance, no massive reparations programme has extended benefits to the victims of very common human rights violations during authoritarianism, such as violation of the freedom of speech, of association or of political participation. There are other categories of violation that have only seldom been redressed through massive programmes, some of them life-threatening, others not, but nevertheless quite serious, such as forced displacement.<sup>33</sup> Most programmes have concentrated heavily on familiar civil and political rights, leaving the violations of other rights largely unrepaired:

- *Argentina*.<sup>34</sup> There is no single reparations programme in Argentina. Instead, there have been several initiatives, each stemming from a separate piece of legislation and covering a distinct category of victims. The main laws cover disappearance, arbitrary detention and grave injuries and death while in detention. A 2004 law offers redress to categories of victims that had been overlooked by the initial reparations laws, namely, persons who were born while their mothers were illegally detained, minors who remained in detention due to the detention or disappearance of their parents for political reasons or those who remained in military areas. The law also offers redress to the victims of identity substitution, the term used in Argentina to refer to cases of children of disappeared parents who were registered as the legitimate children of other families, in many cases the military or security personnel who stole them from their biological parents.

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<sup>32</sup> See already the reports by the truth commissions in South Africa, Peru and Morocco.

<sup>33</sup> The reparations programme proposed by the Peruvian Truth and Reconciliation Commission recommended giving symbolic reparations as well as various services, including education and health for the victims of forced displacement. Turkey has established an ambitious reparations plan that provides benefits to the victims of internal displacement. See *Overcoming a legacy of mistrust: towards reconciliation between the State and the displaced* (Istanbul, Turkish Economic and Social Studies Foundation, Norwegian Refugee Council and Internal Displacement Monitoring Centre, 2006).

<sup>34</sup> See María José Guembe, “Economic reparations for grave human rights violations: the Argentinean experience”, in *The Handbook...*

- *Brazil*.<sup>35</sup> Brazil's programme provided reparations only to the victims of disappearance and death of non-natural causes in police or similar premises. It ignored important categories of victims, including those illegally detained or tortured and those in exile—nonwithstanding the expansive interpretation of the general criterion by the commission in charge of the programme.
- *Chile*.<sup>36</sup> Chile has tried to redress different types of crimes by means of individual legislative initiatives. Initially, efforts focused on the crimes covered by the mandate of the Truth and Reconciliation Commission, namely, human rights violations under the previous dictatorship that resulted in the death of the victims. So the crimes giving rise to reparations were deadly political violence, political executions and disappearance while in detention. Additional initiatives were taken to provide different forms of assistance—not, strictly speaking, reparations—to returning exiles, to the fewer than 400 political prisoners still in jail after the Pinochet regime came to an end (*Cumplido* laws), to those who had been dismissed from their jobs for political reasons, and to those excluded from agrarian reform or expelled from their land. The Chilean Government also launched a comprehensive health-care programme for victims of political violence (PRAIS), which makes medical services, including mental health care, available to them through the national health-care system. Chile's reparations efforts long ignored the victims of the most prevalent human rights violations during the regime, i.e., illegal detention and torture. In 2004, a commission was appointed to examine precisely these crimes. It submitted a comprehensive report at the end of that year with recommendations on reparations. The recommendations, accepted by the Government, stipulated that the victims of these crimes should receive a monthly pension and benefit from other symbolic reparatory measures. (They were already receiving medical services through PRAIS.)
- *Morocco*. The Equity and Reconciliation Commission was established in January 2002 to shed light on the events leading to, and provide compensation for, forced disappearance; arbitrary detention with or without due process and/or followed by execution; the killings, injuries or arbitrary detention during urban demonstrations or riots; forced exile; and sexual violence.
- *South Africa*. The Truth and Reconciliation Commission made far-reaching recommendations for the reparation of the human rights violations under apartheid. A "victim" was someone who had "suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or substantial impairment of human rights, (i) as a result of a gross violation of human rights; or (ii) as a result of an act associated with a political objective for which amnesty has been granted." A gross violation of human rights, in turn, was defined as "(a) the killing, abduction, torture or severe ill-treatment of any person; or (b)

<sup>35</sup> See also Cano and Ferreira, "The reparations program in Brazil" in *The Handbook*....

<sup>36</sup> See Lira, "The reparations policy for human rights violations in Chile," in *The Handbook*....

any attempt, conspiracy, incitement, instigation, command or procurement to commit [killing, abduction, torture or severe ill-treatment].”<sup>37</sup>

The fact that programmes have concentrated on these types of violations is not entirely unjustified. When the resources available for reparations are scarce, choices have to be made and, arguably, it makes sense to concentrate on the most serious crimes. The alternative, namely drawing up an exhaustive list of rights whose violation leads to reparations benefits, could lead to an unacceptable dilution of benefits.

No programme has explained why the victims of some violations were eligible for reparations and others not. Not surprisingly and at least in part as a consequence of this omission, most programmes have ignored types of violations that perhaps could and should have been included. These exclusions have disproportionately affected women and marginalized groups. So the mere requirement to articulate the principles or at least the grounds for selecting the violation of some rights and not others is likely to remedy at least the gratuitous exclusions.<sup>38</sup>

It also bears repeating that decisions about which types of violations will be redressed are taken before the reparations programmes are set up, often when the mandate of a truth commission is settled and in that context. No one will have in mind the consequences these decisions will have on subsequent reparations efforts. Some commissions have found themselves needing to interpret their mandates liberally, so as to include violations that, strictly speaking, were not covered, but that could not reasonably be excluded. This was the case in Morocco and in Brazil.

If distinct forms of violence were perpetrated against multiple groups, excluding some of the worst or some of the most prevalent forms of violence or some of the targeted groups automatically makes the reparations programme less comprehensive and, consequently, less complete. The problems generated by this are manifold. Firstly, there is a question of justice, of unequal treatment that could undermine the programme’s legitimacy. Secondly, such exclusions merely guarantee that the issue of reparations will remain on the political agenda, which may threaten the stability of the initiative as a whole.<sup>39</sup>

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<sup>37</sup> Promotion of National Unity and Reconciliation Act (1995), sect. 1(1)(ix)(a), 1(1)(ix). It has often been argued that this definition of “victim” and that of the categories leading to reparations were too narrow to adequately redress the enormity of the violations committed under the apartheid regime. For instance, they overlooked the victims of the routine violence that accompanied the operation of the social engineering aspects of apartheid, people who died in forced removals or were detained under provisions of the state of emergency.

<sup>38</sup> See Ruth Rubio-Marín, “The gender of reparations in transitional democracies”, in *Engendering Reparations*, Ruth Rubio-Marín, ed. (forthcoming).

<sup>39</sup> Perhaps the clearest example comes from Chile, where the exclusion of the victims of torture and the political detainees from most reparations programmes until 2004 (see the section on Chile above) meant that the largest group of victims continued to call for reparations benefits. After Augusto Pinochet’s return from detention in England, when it was clear that criminal prosecutions against members of the military were on the cards in Chile, the Unión Demócrata Independiente (UDI), traditionally supportive of Augusto Pinochet and usually lukewarm on reparations, suggested a major restructuring of the reparations programmes that had been in existence for more than 10 years, so as to expand their coverage and, importantly, significantly increase their benefits. But there was one catch: beneficiaries had to waive all claims against perpetrators. (See, for example,

Part of this challenge can be mitigated through creative design. Since one significant constraint is a programme's cost, fashioning one that distributes a variety of benefits (not all of them material or at least monetary) helps increase its coverage, without necessarily increasing its cost to the same degree.

### C. Which kinds of benefits should reparations programmes distribute?

The combination of different kinds of benefits is what the term *complexity* seeks to capture. A reparations programme is more complex if it distributes benefits of more distinct types, and in more distinct ways, than its alternatives. The forms of reparations spelled out by the Basic Principles and Guidelines (i.e., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) can, for purposes of simplicity in the design of more narrowly conceived reparations programmes, be organized around two fundamental distinctions: between material and symbolic reparations, and between the individual and the collective distribution of either kind. Material and symbolic reparations can take different forms. Material reparations may assume the form of compensation, i.e., payments in cash or negotiable instruments, or of service packages, which may in turn include provisions for education, health, housing, etc. Symbolic reparations may include official apologies, the change of names of public spaces, the establishment of days of commemoration, the creation of museums and parks dedicated to the memory of victims, or rehabilitation measures such as restoring the good name of victims. These would fall in the category of *satisfaction*.

There are at least two fundamental reasons for crafting *complex* reparations programmes. The first is that it will maximize resources. Programmes that combine a variety of benefits ranging from the material to the symbolic, and each distributed both individually and collectively, may cover a larger portion of the universe of victims than programmes that concentrate on the distribution of material benefits alone and therefore be more complete. Since victims of different categories of violations need not receive exactly the same kinds of benefits, having a broader variety of benefits means reaching more victims. Just as important, this broader variety of benefits allows for a better response to the different types of harm that a particular violation can generate, making it more likely that the harm caused can, to some degree, be redressed.

Reparations programmes, then, can range from the very simple, i.e., merely handing out cash, to the highly complex, i.e., distributing money but also health care, educational and housing support, etc., in addition to both individual and collective symbolic measures. In general, since there are certain things that money cannot buy (and there are certain things for which there is no money), complexity brings with it the possibility of providing benefits to a larger number of victims—as well as to non-victims, particularly in the case of collective symbolic measures—and

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“La Paz Ahora” (the UDI proposal), published in *La Nación*, 20 June 2003.) This could have destabilized an otherwise solid consensus about the main lines of the approach to reparations set in place almost 10 years before.

of targeting benefits flexibly so as to respond to a variety of victims' needs. All other things being equal, "complexity" is desirable.

Material compensation to individuals has received more attention than any other form of reparation, but other benefits are increasingly part of reparations programmes or are receiving more attention as possible elements of such programmes, for instance:

- *Symbolic reparations.* As many recent reparations programmes have been proposed by truth commissions (which have broader mandates and goals than typical judicial instances), they are becoming less like mere compensation mechanisms and are increasingly proposing more complex reparations measures, including symbolic ones. Individualized letters of apology signed by the highest authority in Government, sending each victim a copy of the truth commission's report and supporting families to give a proper burial to their loved ones are some of the *individual* symbolic measures that have been tried with some success in different contexts.<sup>40</sup> Some of the *collective* symbolic measures that have been tried are renaming public spaces, building museums and memorials, rededicating places of detention and torture, turning them into sites of memory, establishing days of commemoration and engaging in public acts of atonement. Like other reparations measures, symbolic benefits are, at least in part, geared towards fostering recognition. However, in contrast to other benefits, symbolic measures derive their great potential from the fact that they are carriers of meaning, and therefore can help victims in particular and society in general to make sense of the painful events of the past.<sup>41</sup> Symbolic measures usually turn out to be so significant because, by making the memory of the victims a public matter, they disburden their families from their sense of obligation to keep the memory alive and allow them to move on. This is essential if reparations are to provide recognition to victims not only as *victims* but also as *citizens* and as *rights holders* more generally.

Symbolic benefits, both individual and collective, deserve to be encouraged and promoted. Nevertheless, they cannot carry the whole weight of a complicated transition and should always be thought of as one benefit among others. Furthermore, the participation of civil society in the design and implementation of symbolic reparations projects is perhaps more significant than for any other reparations measure, given their semantic and representational function.<sup>42</sup>

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<sup>40</sup> The Chilean Truth and Reconciliation Commission sent its two-volume report to the families of every victim it had identified. The reparations programme for Japanese-American internees during the War included a personalized letter from the United States President to each victim (along with a \$20,000 cheque). The *urgent interim reparations* of the South African Truth and Reconciliation Commission gave support for tombstones. These measures seem to have been significant.

<sup>41</sup> See, e.g., Brandon Hamber, "Narrowing the macro and the micro: a psychological perspective on reparations in societies in transition", in *The Handbook...*

<sup>42</sup> The Human Rights Programme of Chile's Ministry of the Interior provides both material support and technical advice to organizations interested in a variety of symbolic reparations projects, including memorials and memory sites. Such programmes are one way for States to take symbolic reparations seriously, without taking control away from civil society, including victims' organizations.

- *Medical services.* According to the Basic Principles and Guidelines, the notion of “rehabilitation” owed to victims includes medical and psychological rehabilitation. Since 1992, Chile has been providing medical services to the victims of the dictatorship. The reparations programme proposed by the Peruvian Truth and Reconciliation Commission also covered health care, both physical and mental, and, interestingly, the Peruvian Truth and Reconciliation Commission and the Moroccan Equity and Reconciliation Commission included in-house medical units. In Peru, the unit, largely focused on mental health, worked with victims before, during and after public hearings and testimonies, and provided support to the Commission’s staff as well. The medical unit in Morocco’s Commission, which was not meant to replace other sources of medical services (although it did provide some services), had two main functions: to accompany the other units of the Commission in their work and produce a detailed study of the medical condition of the victims under the Commission’s mandate (a study that would help frame the reparations recommendations), and to identify particularly urgent cases that could not wait until the end of the process before receiving attention. There are some merits to this structure and it deserves further exploration.

Generally speaking, there are good reasons for reparations programmes to be concerned with health issues, not least the very high incidence of trauma induced by the experiences of violence.<sup>43</sup> Moreover, victims seem more prone to disease.<sup>44</sup> Providing medical services, including psychiatric treatment and psychological counselling, constitutes a very effective way of improving the quality of life of survivors and their families.

Providing these services effectively, however, is not easy. Some of the challenges are:

- It is a mistake to think that it is enough to make existing medical services available to the victims. First, victims have special needs, some of which the existing medical services may be unable to satisfy. The traumas produced by the voluntary infliction of violence are unlike other traumas and these patients, therefore, need specialized care. There are, however, not enough trained medical personnel to provide it. In most countries emerging from conflict and repression, there are few mental health specialists experienced in treating torture victims. Second, and perhaps more challenging still, victims of serious human rights violations have histories that make them unlike other patients—and not only regarding psychological counselling. Their prior experiences affect the way services of *all kinds* need to be delivered, and great efforts are required to make providers at all levels aware of these special needs.
- To a large degree the quality of the health-care services provided depends on the quality of the existing health-care institutions, for no country can afford, especially in the short run, to build up entirely new facilities for these patients. Creating specialized

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<sup>43</sup> In Chile the PRAIS programme offers mental health services as well as general and specialized physical care to more than 190,000 beneficiaries. More than 50 per cent of appointments are related to mental health. *Norma Técnica para la Atención en Salud de Personas Afectadas por la Represión Política Ejercida por el Estado en el Período 1973-1990.*

<sup>44</sup> *Ibid.*

teams dedicated both to providing special services and to liaising with regular medical service providers on behalf of victims is one way in which this problem can be mitigated. Experimenting with various insurance schemes may broaden options for victims as well. However, as long as the required expertise is not available, patients cannot get the necessary services, even if there is insurance-provided funding.

The inclusion of health services in a reparations programme has much to recommend it. However, it is critical to be aware of the challenges, for there are reasons to think that failing to deliver in this area once expectations have been raised is particularly pernicious to victims. This of course is not a reason not to provide health-care benefits, but rather a reason to strengthen the commitment to planning and budgeting adequately for it.

- *Other forms of rehabilitation.* Several reparations programmes have established specific measures to rehabilitate not just the health of victims but what may be called their “civic status.” These include measures to restore the good name of victims by making public declarations of their innocence, expunging criminal records, and restoring passports, voting cards and other documents. Their importance goes well beyond reasons of expedience; they should be part and parcel of any programme that seeks to provide recognition of victims as rights holders. In addition, learning from the traumatic experience of widows of the disappeared, particularly in Argentina, who clearly needed to resolve custody, matrimonial and succession issues, but were reluctant to ask for a death certificate for their disappeared spouses, programmes of this sort have started issuing certificates of “absence by forced disappearance.” These allow surviving spouses, for example, to recover or sell property, remarry or solve custody disputes, without generating in them the feeling of betrayal they so frequently reported to be part of a request for a death certificate.
- *Collective reparations.* Recently, the notion that reparations benefits can be distributed to “collectivities” has garnered interest and support. Indeed, both the Basic Principles and Guidelines (para. 13) and the Updated Set of principles to combat impunity (principle 32) endorse this idea. The underlying rationale seems to be that when collectivities have been the targets of violence, it makes sense to provide redress to them. Neither document spells out what collective reparations means.

The term “collective reparations” is ambiguous. “Collective” is used to qualify, on the one hand, the “reparations,” i.e., the types of goods distributed or the mode of distributing them, and, on the other, the “subject” that receives them, namely, collectivities, including legal subjects. Familiar examples of “collective reparations” in the latter sense abound. A public apology is a collective reparations measure, in the sense that the collectivity made up of all the members of a given group, say a State, a legal entity, receive a particular benefit, in this case an apology. The usefulness of collective measures is apparent in some circumstances. Few would dispute the significance and justifiability of a public apology. The aims of such measures include giving recognition to victims, but also reaffirming the validity of the general norms that were transgressed (and in this way, indirectly, reaffirm-

ing the significance of rights in general, including, of course, the rights of victims, thereby strengthening the status of victims not just as *victims* but as *rights holders*).<sup>45</sup>

Collective reparations are not only symbolic; some are material, as when a school or a hospital is built as reparations, and for the sake of a particular group.<sup>46</sup>

Collective material reparations are constantly at risk of not being seen as reparations at all or of having minimal reparative capacity. Part of the problem is that they do not target victims specifically. Collective programmes that distribute material goods frequently concentrate on “non-excludable goods,” i.e., goods that, once made available, it is difficult to keep others from consuming. If a collective reparations programme builds a hospital or a road, it is clear that victims and non-victims alike will use them. Non-victims cannot be excluded. It is not obvious how these goods can enhance the victims’ sense of recognition. Why would they think that they are getting these goods in recognition of the fact that their fundamental rights were violated?

The problem is compounded by the fact that such collective programmes tend to distribute goods that are not only non-excludable, but also basic, as happens when reparations programmes become folded into development programmes. Governments in developing countries facing demands for reparations are strongly inclined to argue that development *is* reparation.<sup>47</sup> Even when this is not in fact a ploy to call existing development programmes “reparations” and a means not to spend any resources on reparations, it warrants close scrutiny. Most development programmes concentrate on the production and provision of basic goods, which all citizens are entitled to as *citizens*. Making them available to victims is an ordinary obligation and function of the State that cannot count as reparation. Beneficiaries perceive them, correctly, as programmes that distribute goods to which they have rights as citizens, and not necessarily as victims.

It may be argued that the benefits provided by these development/“reparations” programmes in contexts of deprivation are not accessible to many citizens, and that making them available, say, in areas formerly affected by violence constitutes a benefit. As a result of prioritizing investment in these areas, the argument goes, victims have access to basic services *before* other citizens. This is true. The lingering challenge, however, is that since the benefit is not the goods themselves, but the *temporal ordering* of their distribution, once the ordering becomes irrelevant, as when the goods in question become generally available, the benefit dissipates.

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<sup>45</sup> See Pablo de Greiff, “The role of apologies in national reconciliation processes”, in *The Age of Apology*, Mark Gibney and others, eds. (Philadelphia, University of Pennsylvania Press, 2007).

<sup>46</sup> The Inter-American Court of Human Rights, for example, in the *Case of Aloeboetoe et al. v. Suriname*, ordered the Government of Suriname to reopen and staff a school and to make a medical dispensary operational as an act of reparation for the attack on 20 members of the Saramaka tribe. Judgement of 10 September 1993, Ser. C, No. 15.

<sup>47</sup> This was the case in South Africa and in Peru. See, for instance, Christopher Colvin, “Overview of the reparations program in South Africa”, in *The Handbook...*

Since the difficulties that have been pointed out with the collective material reparations programmes arise from the kind of goods that they typically distribute, namely, non-exclusive basic services, an obvious way to address them, and therefore to retain the distinctness of reparations programmes, is to at least organize them around non-basic services. Beneficiaries then have a reason to think that they are receiving something that citizens do not ordinarily receive simply by virtue of being citizens. Educational, cultural, artistic, vocational and specialized medical services targeting *the special needs of the victim population* are possibilities that deserve further exploration.

In summary, complex programmes make it possible to turn more victims into beneficiaries than simpler ones at similar overall cost and, more importantly, they may also be better. They respond to a greater variety of victims' needs, addressing not only material needs, but also the need for health, education and, through symbolic benefits, the need to make sense of a traumatic past.

## **D. Defining the goals of reparations, and how this affects the level and the modalities of compensation**

### *1. Levels of compensation*

One of the greatest challenges faced by reparations programmes is where, exactly, to set the level of monetary compensation. Practice varies significantly from country to country.<sup>48</sup> For instance, although the South African Truth and Reconciliation Commission had proposed giving victims a yearly grant of around \$2,700 for six years, the Government ended up making a one-off payment of less than \$4,000. The United States provided \$20,000 to the Japanese-Americans who were interned during the Second World War. Brazil gave a minimum of \$100,000 to the families of those who died in police custody. Argentina gave the families of victims of disappearance bonds with a face value of \$224,000. Chile offered them a monthly pension that distributed, originally, \$537 per month in preset percentages among the different members of the family.

The rationale offered (if at all) for selecting a given figure also varies. The South African Truth and Reconciliation Commission had originally recommended using South Africa's mean household income for a family of five as the benchmark. The Government's selected figure of \$4,000 was never justified in independent terms and does not correspond to anything in particular. The same thing can be said about the United States Government's choice and Brazil's decision. After some discussions took place suggesting that the reparations plan in Argentina could use the existing schedule for compensating job-related accidents, President Menem dismissed this possibility, arguing that there was nothing accidental about what victims had borne. He chose instead the salary of the highest paid government officials as the basic unit for calculating

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<sup>48</sup> See *The Handbook...*

reparations benefits. Chile did not offer a particular justification for its own basic unit of \$537. It is clear that these choices depend on the political bargaining that takes place and are made with an eye to feasibility rather than to questions of principle. This—and not only the generally low levels of compensation offered by most programmes—means that existing practice is of questionable value as precedent. Indeed, requiring future programmes to justify their decisions concerning compensation levels may in itself produce salutary results.

There is a significant difference in the compensation offered as a result of judicial resolutions of individual, sporadic and isolated cases of violations, and that stemming from a massive reparations programme faced with a large number of potential beneficiaries. A judicial approach to the question, where to set levels of compensation, which simply expresses both articulate convictions as well as deep intuitions, appeals to the criterion of *restitutio in integrum*, of making victims whole, of compensating the victims in proportion to the harm they have suffered. As explained before, for individual cases, this is an unimpeachable criterion, for it tries to neutralize the effects of the violation on the victim and to prevent the perpetrator from enjoying the spoils of wrongdoing.

Actual practice with massive reparations programmes, however, suggests that satisfying this criterion is rarely even attempted. However, it is too easy to draw the conclusion that reparations programmes have historically been manifestly unfair. This would tar all reparations programmes with the same brush, even those that have made an earnest effort to provide redress to victims—despite awarding less compensation than the same victims would have got if they had won a suit in a court trying their cases in isolation.

Since the size of the monetary compensation is not merely a pragmatic question of affordability, but one of justice, it is important to clarify what justice requires. What does “adequate, effective and prompt reparation for harm suffered” mean?<sup>49</sup>

Principle 18 of the Basic Principles and Guidelines provides room for departures from the criterion of full compensation:<sup>50</sup>

In accordance with domestic and international law, and *taking account of individual circumstances*, victims of gross violations of international human rights law and serious violations of international humanitarian law should, *as appropriate* and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation... (emphasis added)

The Basic Principles and Guidelines themselves integrate a “margin of appreciation”<sup>51</sup> which authorizes departures from “the principle of wiping out all the consequences [that

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<sup>49</sup> General Assembly resolution 60/147, annex, para. 11.

<sup>50</sup> See Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, “The right to reparation for victims of gross and systematic violations of human rights”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, K. De Feyter and others, eds. (Antwerp, Intersentia, 2006), pp. 345–500.

<sup>51</sup> *Ibid.*, p. 455.

nevertheless] remains the major principle."<sup>52</sup> In the special circumstances faced by the massive programmes, the double requirement of providing "fair and adequate reparation" replaces this criterion:

*Fair* reparation expresses the need of taking into account, on the one hand, the overall transitional context in which reparation takes place (including the large numbers of severely damaged victims), and on the other hand, the scarcity of available resources to be allocated for reparation purposes. Fair reparation implies that (unlike the principle of *restitutio in integrum*) the size of reparation cannot be determined *in abstracto* or in absolute terms... At an individual level, *fair* reparation requires that the distribution of reparation is done in a fair manner, this means, without discrimination among groups or categories of beneficiaries (i.e., victims). Non-discrimination does not mean, however, uniformity of treatment of all victims, yet the reason for differentiation has to be reasonable and justified.<sup>53</sup>

As for *appropriate* reparation,

it refers to the fact that the forms and modalities of reparation should be suitable, taking into account the harm, the victims, the violations, and the broader society. The scarce resources of countries in transition should be used in an optimized manner, both in qualitative and quantitative (i.e., effectiveness) terms.<sup>54</sup>

This conclusion underlines that there is a difference between awarding reparations within a basically operative legal system and awarding reparations in a system that in some fundamental ways, precisely because it either condoned or made possible systematic patterns of abuse, needs to be reconstructed (or, as in some countries, built up for the very first time). In the former case, it makes sense for the criterion of justice to be exhausted by the aim of making up the *particular* harm suffered by the *particular* victim whose case is before the court. In the case of massive abuse, however, an interest in justice calls for more than an attempt to redress the particular harm suffered by particular individuals. Whatever the criterion of justice, it is important to keep in mind the need to establish the preconditions for reconstructing the rule of law, an aim that has a public, collective dimension.<sup>55</sup>

Perhaps, however, more can be said about where the proper quantum of monetary compensation should be set, for these criteria of fairness and appropriateness are, in the end, very closely tied to judgements of feasibility. While these judgements are unavoidable, judgements about the feasibility of paying certain costs are usually of the *ceteris paribus* type, and in a transition or a post-conflict situation it makes little sense for all other things to remain equal. Unless there

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<sup>52</sup> Ibid., p. 459.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> See Pablo de Greiff, "Justice and reparations", in *The Handbook...*

is a budget surplus, it will be impossible to engage in aggressive reparations for victims without touching other State expenditures.<sup>56</sup>

By examining in detail reparations programmes and the history of their design, enactment and implementation, it is possible to reconstruct an account of how they aimed at bringing some sort of justice. Arguably, these programmes have pursued two goals that are intimately linked to justice: the first is to provide a measure of *recognition* to victims and thus to make a contribution to the full recovery of their dignity. The crucial point here is that the benefits provided by the programme are not meant to solidify the status of victims as *victims*, but rather as *citizens*, as holders of rights which are equal to those of other citizens. The benefits become a form of symbolic or nominal compensation for the fact that rights that were supposed to protect the basic integrity, possibilities and interests of citizens were violated. It is the violation of equal rights that triggers the provision of compensatory measures. And it is precisely because the benefits are given in recognition of the (violated) rights of citizens that this general aim of recognition is related to justice. Justice in a State governed by the rule of law is a relationship among citizens, that is, among the holders of equal rights.

One important consequence is that the proper metric for assessing the size of the compensation owed in fairness to victims stems directly from the very violation of rights held in common by human beings and particularly by citizens, and not from each individual's particular position prior to the violation. In other words, the fundamental obligation of a massive reparations scheme is not so much to return the individual to his or her status quo ante, but to recognize the seriousness of the violation of the equal rights of fellow citizens and to signal that the successor regime is committed to respecting those rights.

The other main justice-related goal that can be attributed to reparations programmes is to make a (modest) contribution to fostering trust among persons and particularly between citizens and State institutions—trust that stems from commitment to the same general norms and values and can exist even among strangers. The point is that a well-crafted reparations programme is one that provides an indication to victims and others that past abuses are taken seriously by the new Government and that it is determined to make a contribution to the quality of life of survivors. Implemented in isolation from other justice initiatives such as criminal prosecutions and, primarily, truth-telling, reparations benefits might be counterproductive and be perceived more like a payment in exchange for the silence or acquiescence of victims and their families. On the other hand, if integrated into a comprehensive transitional justice policy, reparations

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<sup>56</sup> For example, the Government of South Africa was buying two submarines for its navy, while refusing to implement the Truth and Reconciliation Commission's recommendations on reparations, arguing that to do so would be too expensive. See Brandon Hamber and Kamilla Rasmussen, "Financing a reparations scheme for victims of political violence," in *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence in South Africa*, Brandon Hamber and Tlhoki Mofokeng, eds. (Johannesburg, Centre for the Study of Violence and Reconciliation, 2000), pp. 52-59. The Government of Peru is, likewise, considering an expansion of its navy, even though the comprehensive recommendations on reparations from the Truth and Reconciliation Commission remain largely unheeded.

might provide beneficiaries with a reason to think that the institutions of the State take their well-being seriously, that they are trustworthy. To the extent that reparations programmes may become part of a political agenda that enjoys broad and deep support, they might even have a positive impact not just on “vertical trust,” i.e., trust between citizens and the institutions of the State, but also on “horizontal trust,” i.e., trust among citizens.

This conception of justice in reparations does not lead to a formula for quantification, yet it provides some guidance. Whether a particular level of compensation is fair cannot be decided a priori. Ultimately, it depends, in part, on whether beneficiaries feel that *all things considered* the amounts received constitute sufficient recognition, in the sense specified above, and whether they, as well as others, take the benefits to provide a reason for renewed (or novel) civic trust.<sup>57</sup>

## 2. Modalities of distribution

- *Lump sum or pension?* The beneficiaries' perceptions of the reparations benefits are in part shaped by the modalities of distribution. International experience suggests that it is better to distribute compensation awards in the form of a pension rather than a lump sum. Although lump sums in theory maximize individual choice, in some contexts coming into what may be seen as sudden wealth may cause divisions within communities and, more frequently, within families. There is also some evidence that lump sums are often misspent and that they have less impact in the long term than expected. Women, in particular, would seem to benefit more from a pension system than a one-off payment (which might make them the centre of demands for assistance and in effect do away with the whole award). Finally, and most importantly, a pension is more likely to be interpreted as a contribution to the quality of life of survivors rather than as the price that the Government puts on the life of a loved one or on the pain endured by victims. The very regularity of a pension may contribute to the experience of recognition of victims and to fostering trust in institutions from which they receive regular support.<sup>58</sup>
- *Apportioning.* Regardless of whether the compensation is paid as a lump sum or a pension, some countries have apportioned the payments in accordance with preset percentages among the family members. In Chile, the surviving spouse received 40 per cent of the benchmark figure of \$537. The mother or, in her absence, the father received 30 per cent. The surviving mother or father of a victim's out-of-wedlock children received 40 per cent. Each child of a disappeared person received 15 per cent until the age of 25 or for life if

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<sup>57</sup> This approach to the criterion of justice in reparations has already been adopted—and adapted—in the reports of the Peruvian Truth and Reconciliation Commission, of the recent Commission on Illegal Detention and Torture in Chile and of the Truth and Reconciliation Commission for Sierra Leone. Parts of it are also incorporated in E/CN.4/2004/88.

<sup>58</sup> Adopting a pension distribution system generates challenges of its own, however, one of the primary ones being the achievement of legal stability. A pension system requires the setting-up of institutions that will last, and this is possible only if there is sufficient political will and support. Many countries have, therefore, opted to pay out lump sums.

the child is disabled.<sup>59</sup> A beneficiary received the pension in the proportion determined by the law, even if there were no other beneficiaries in the family. By the same token, if the amount required by the number of beneficiaries exceeded the reference amount, each one of them still received the percentage established by the law. In Morocco, the Equity and Reconciliation Commission opted for apportioning explicitly to protect the interests of women. Spouses will receive 40 per cent of the awards, in contrast to the 8 per cent for female spouses in local inheritance law, which in accordance with tradition favours sons. Apportioning is worth considering particularly if there are patterns of unequal treatment that affect family relations as well. Women, in particular, stand to gain from this practice.

## E. Financing reparations

Low socio-economic development, on the one hand, and a large universe of potential beneficiaries, on the other, constrain a Government's ability to implement a reparations plan. In the Americas, for example, Guatemala, El Salvador and Haiti have not implemented reparations plans, whereas Chile, Argentina and Brazil have.

However, the correlation between socio-economic development and reparations is more complex than this factual observation suggests. First, while minimum economic development seems to be a precondition for implementing reparations, countries in comparable economic situations often take quite different paths, as shown most clearly in Chile and Argentina. Second, and perhaps more importantly, in the countries mentioned earlier that have not implemented reparations plans, the *political* constraints were perhaps as significant as the economic ones. An analysis of failed efforts clearly shows that, normally, without strong and broad coalitions in favour of reparations, no plans, or at best very modest plans, are implemented, even if the country can afford one or can afford a better one.<sup>60</sup>

Broadly speaking, there are two main models for the financing of reparations: creating special trust funds or introducing a dedicated line in the yearly national budget. Countries that have experimented with the first model have, so far, fared significantly worse than countries that have used the second. This may have to do with political commitment. Nothing illustrates commitment more clearly than the willingness to create a dedicated budget line. The expectation underlying the creation of trust funds that it will be possible to find alternative sources of funding for reparations may demonstrate weak political commitment or actually weaken the resolve that exists—emphasizing yet again that although socio-economic development is important, so are political factors.

Nonetheless, there is, in principle, no reason why creative funding efforts must all fail. Some possibilities are:

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<sup>59</sup> See the web page of the Human Rights Programme of the Ministry of the Interior: [www.ddhh.gov.cl](http://www.ddhh.gov.cl).

<sup>60</sup> See Alexander Segovia, "Financing reparations programs: reflections from international experience", in *The Handbook...*

- Special taxes targeting those who may have benefited from the conflict or the violations, like those that were proposed by the Truth and Reconciliation Commission in South Africa (but never adopted).
- Recovery of illegal assets. Especially where a State has accepted providing reparations for victims of third parties, nothing should prevent the State from attempting to recover from those parties. Peru devoted a portion of assets recovered from corruption to such ends and so did the Philippines with monies recovered from the Marcos estate. Colombia is attempting to do so with assets held by paramilitaries. However, reparations programmes should not be held hostage to, or made conditional upon, the recovery of such assets if the State bears clear responsibility for the violations.
- Debt swaps. It may be possible for Governments to negotiate agreements with international lenders so that the latter cancel a portion of the country's debt on condition that the same amount is spent on reparations and other support for victims. On a small scale, Peru was able to reach such agreements.

The fundamental point is that where reparations are a matter of *rights*, reparations programmes require stable sources of funding, and nothing guarantees stability in financing more than a dedicated budget line.

## F. Interpreting reparations benefits. Linking reparations and other justice measures

The size of reparations alone does not determine their success. It is useful to examine the fate of some stand-alone reparations efforts, some of which have distributed large sums of money by way of direct material compensation to victims. Experience suggests it is important to draw significant links between the different elements of a comprehensive justice or redress policy. Reparations efforts that are not linked to other justice initiatives tend to be more controversial than their supporters expect.<sup>61</sup>

Reparations efforts should be designed in such a way as to be closely linked with other transitional justice or redress initiatives, for example, criminal justice, truth-telling and institutional reform. There is conceptual backing for this as well. Programmes that achieve these connections are said to be *externally coherent* or to have *external integrity*.<sup>62</sup> This requirement is important for both pragmatic and conceptual reasons. Such connections provide an incentive to interpret

<sup>61</sup> Cf. the experiences in Brazil and in Morocco with the Independent Arbitration Commission, which operated from 1999 to 2001. See also Cano and Ferreira, "The reparations program in Brazil", in *The Handbook...*

<sup>62</sup> See Pablo de Greiff, "Addressing the past: reparations for gross human rights abuses", in *Civil War and the Rule of Law: Security, Development, Human Rights*, Agnès Hurwits and Reyko Huang, eds. (Boulder, Lynne Rienner Publishers, 2007). Whereas external coherence or integrity refers to the relationship between reparations efforts and other justice measures, *internal* coherence or integrity refers to whether the various benefits distributed by a reparations programme cohere and support one another.

the reparations benefits in terms of justice, rather than as an exchange of money and services for appeasement or acquiescence, and might contribute to improving the overall perception of the set of measures (despite their inevitable limitations). It is not just that truth-telling, without reparations efforts, can be seen by victims as an empty gesture. The relation holds in the opposite direction as well, since efforts to repair in the absence of truth-telling could be seen by beneficiaries as the State's attempt to buy victims' and their families' silence or acquiescence. The same tight and two-way relationship may be observed between reparations and institutional reform. Democratic reform without reparative efforts to dignify citizens who were victimized will have questionable legitimacy, especially in the eyes of the victims. By the same token, reparations benefits without institutional reforms to diminish the probability of the violence being repeated are futile.

Finally, a two-way relationship also links criminal justice and reparations. The condemnation of a few perpetrators, without any effective effort to provide positive redress to victims could easily be seen by them as inconsequential revanchism. On the other hand, reparations without any effort to achieve criminal justice may seem to victims as nothing more than blood money. As noted in the introduction, it is clear that a new understanding about the complementarity of the different obligations of justice has developed.<sup>63</sup> Consequently, it is not only important to establish significant links between criminal justice and reparations, but also inadmissible to trade off one measure against another. Offering reparations to victims of human rights violations does not exempt States from their responsibility to punish the perpetrators of such violations. The regime established by the International Criminal Court, for example, represents a step towards entrenching the coherence of justice and reparations.

Thus, empirical evidence as well as an argument about the place of reparations vis-à-vis other justice measures highlight the importance of designing these links from the outset, something that the broad notion of legal remedies underlying the Basic Principles and Guidelines encourages.

## **G. Linking reparations programmes to civil litigation**

One more challenge facing those who design reparations programmes is the link between the programme and civil litigation. At a broad level, it must be acknowledged that the judicial resolution of individual reparations cases has often played a very important role in catalysing the willingness of Governments to establish massive reparations programmes. Cases before the inter-American human rights system, for example, played that role in Argentina, and continue to exert this type of pressure in Peru and Guatemala. Although their typically large awards

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<sup>63</sup> "Where transitional justice is required, strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an appropriately conceived combination thereof." (S/2004/616, para. 26)

contribute to setting expectations that normally cannot be satisfied by massive reparations programmes, these awards can be used by victims and their representatives to put pressure on their Governments to establish massive programmes with high benefits. Given the usual reluctance of Governments to establish reparations programmes in the first place, this leverage becomes particularly important. Beyond this catalytic role of the judicial resolution of reparations claims, cases resolved in courts of law serve additional important functions, not least because gaining reparations in a court is one way of guaranteeing that there will be a close connection between the reparations awards and other justice measures inherent in the judicial process, including punishment and truth-telling. Although this is true especially at the individual level, the societal consequences of judicial cases go much further, in particular by affirming norms and rights and condemning forms of behaviour that transgress them.<sup>64</sup>

Programmes that stipulate that accepting their benefits forecloses other avenues of civil redress can be called *final*. The German programmes, as well as the programme established by the United States for the Japanese-Americans interned during the Second World War, are final in this sense: accepting benefits from these programmes requires waiving the possibility of pursuing civil cases in courts of law. But not all programmes are final in this sense. Those in Brazil and Chile do not require victims to surrender the possibility of pursuing reparations through the courts.

The Peruvian Truth and Reconciliation Commission formulated a sophisticated position in this respect: according to its recommendations, receiving benefits from the reparations plan would leave without effect suits against the State, but would not interrupt or impede penal cases against perpetrators. If those cases proceed and individuals receive civil reparations awards through judicial procedures, they are required to return to the State whatever compensation benefits they had received through the reparations programme, so as to prevent anyone receiving compensation twice for the same violation. This position tries to preserve the victims' access to courts, while protecting the stability of the reparations programme.<sup>65</sup>

It is difficult to decide, in the abstract, whether it is desirable, in general, for reparations programmes to be final. On the one hand, finality means that courts are made inaccessible to victims. On the other, once a Government has made a good-faith effort to create an administrative system that facilitates access to benefits, allowing beneficiaries to initiate civil litigation against the State poses not just the danger of obtaining double benefits for the same harm, but, worse, of jeopardizing the whole reparations programme. While the first problem can be easily addressed by stipulating that no one can gain benefits twice for the same violation, the second is not so easy to avoid, for the benefits obtained through the courts can easily surpass the benefits offered by a massive programme. This can lead to a significant shift in expecta-

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<sup>64</sup> See Jaime Malamud-Goti and Lucas Grosman, "Reparations and civil litigation: compensation for human rights violations in transitional democracies", in *The Handbook...*

<sup>65</sup> See also the careful study of reparations in Peru in Magarrell and Guillerot, op. cit., chap. 4.

tions, and to a generalized sense of disappointment with the programme's benefits. Moreover, the shift may be motivated by cases that probably are unrepresentative of the whole universe of victims, making civil litigation prone to entrenching prevalent social biases. Wealthier, more educated, urban victims usually have a higher chance of successfully pursuing reparations litigation in civil courts than poorer, less educated, rural individuals, who may also happen to belong to marginalized ethnic, racial or religious groups.

Contextual factors may play a significant role. In most post-conflict societies and societies in transition, particularly those where the legal system has been shattered, it is unlikely that courts will be flooded with civil claims. Furthermore, some jurisdictions have underdeveloped compensation laws or laws that set compensation at very low levels, diminishing the appeal of initiating judicial procedures that may have a negative impact on reparations programmes. Nevertheless, those who are entrusted with the responsibility of designing massive programmes should decide how the programmes will relate to judicial proceedings. Given the significance of the possibility of accessing courts, all other things being equal, there should be a presumption in favour of leaving that right untouched or as uncurtailed as possible, with the proviso that no one should be entitled to receive benefits both through programmes and through courts.<sup>66</sup>

## H. Making a reparations programme gender-sensitive<sup>67</sup>

Although several sections of this publication have already referred to the many ways in which decisions concerning reparations have an impact on women, the topic is so important, and reparations programmes have neglected it so often, that it warrants a section of its own.

- Even before a reparations programme is designed, gender-sensitive strategies must be set in place to gather gender-specific information that will be relevant for the programme downstream and to secure the participation of women in debates about the design of the programme. Their presence might be crucial if decisions about criteria of access (including, importantly, application deadlines and evidentiary thresholds) are to be taken in ways that increase the likelihood that women will be appropriately served by an eventual programme.
- In the critical issue of the choice of the list of rights whose violation will trigger reparations benefits, once again, the participation of women may help ensure that the sorts of violations of which women are predominantly victims are not left out. In general, requiring

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<sup>66</sup> In Argentina the victims of illegal detention were allowed to continue with legal proceedings already under way and could then choose whichever set of benefits was larger. The programmes were also made accessible to those who had judicial cases resolved, but with lower benefits than those provided by the programmes, so that they received the balance.

<sup>67</sup> "Gender sensitivity" need not mean greater sensitivity to the needs of women. However, the record of reparations programmes is in general so dismal in this respect that this tool concentrates on this sense of the expression. See the case studies in *What Happened to the Women? Gender and Reparations for Human Rights Violations*, Ruth Rubio-Marín, ed. (New York, Social Science Research Council, 2006).

those responsible for the design of reparations programmes to articulate the principles or reasons underlying the selection of “repairable violations” may have a positive impact from the standpoint of gender, by preventing gratuitous exclusions.

- More complex programmes, i.e., programmes that distribute a greater variety of distinct benefits, such as educational support, health services, truth-telling and other symbolic measures, in addition to material compensation, open possibilities for addressing the needs of female beneficiaries. These possibilities are not self-actualizing. Each type of benefit requires gender-sensitive design and implementation; for instance, truth-telling and memorialization can exclude all but the memories of largely male ex-combatants. Health services can be designed and implemented in ways that serve mainly the medical needs of male patients. But the different elements of a complex reparations programme can also be designed and implemented with an eye to female beneficiaries.
- Where the level of material compensation is set and how the compensation is distributed have a significant gender impact. All other things being equal, modes of distribution that ensure that women not only access, but also retain control over, the benefits are preferable.



## IV. THE ROLE OF THE INTERNATIONAL COMMUNITY

Many post-conflict or transitional societies would like to see the international community involved, primarily in the role of donor. Yet the international community rarely provides significant resources to finance reparations initiatives. The reason for this reluctance is twofold. First, given that reparations should always include an acknowledgement of responsibility, the international community has often argued that they should be primarily a local initiative. This is reasonable if responsibility for the conflict is indeed solely local, but more questionable otherwise. Second, given that implementing reparations plans always means taking sensitive political decisions, the international community has little incentive to get involved.

However, international actors could:

- Rethink their reluctance to provide direct material support to reparations efforts, particularly in those cases in which they themselves played an important role in the conflict;
- Provide technical assistance in the design and implementation of reparations programmes;
- Support local groups involved in reparations discussions;<sup>68</sup>
- Pressure multilateral institutions into fostering conditions under which post-conflict economies can afford to pay due attention to the victims of conflict;
- Contribute to the external coherence of reparations programmes by providing advice to, and exercising pressure on, the different components of Governments, so that the reparations programme is appropriately linked with the various elements of a comprehensive transitional justice policy;

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<sup>68</sup> This is important not only because recognition requires participation and technical capacity on this issue needs to be strengthened all around, but also because, in the end, whether a reparations plan is implemented or not depends heavily on a political struggle in which the participation of local groups is imperative and they will engage more effectively if their capacity is strengthened.

- Pressure Governments into establishing meaningful reparations programmes for victims, in connection with the support that international cooperation often provides to different peacemaking initiatives, including reintegration plans for ex-combatants. Indeed, international support for reintegration plans can be made conditional on comparable local commitment to reparations for victims.

## **FINAL REMARKS**

This publication has reviewed some of the relevant international law instruments on reparations, against the background 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. Additionally, it has raised some of the most difficult challenges that reparations programmes have faced in different parts of the world, especially those that can be properly and usefully addressed with the assistance and participation of the international community. It has not covered the internal politics of reparations. Establishing a reparations programme requires mobilizing large public resources and this is always at least in part a political struggle. Those who are interested in reparations must be prepared, at some point, to enter that arena. Most countries have domestic legislation that could be used in favour of reparations. International law on the subject is not entirely new. But reparation is not a legal issue alone. In addition to legal obligations, it is important to clarify the moral reasons for reparations, to address the political concerns and to be aware of the cultural aspects.



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