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# New Developments in the Law of Reparations

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To launch its latest Report on **Education and the Law of Reparations in Insecurity and Armed Conflict**, the British Institute of International and Comparative Law (BIICL) held a seminar on the latest developments in reparations. This event was kindly sponsored by Protect Education in Insecurity and Conflict (PEIC), the body which commissioned the Report. PEIC is a programme of the Education Above All Foundation, an independent organisation chaired by Her Highness Sheikha Moza Bint Nasser of Qatar and UNESCO Special Envoy for Basic and Higher Education.

Please note that the Report, which was authored by Francesca Capone, Kristin Hausler, Duncan Fairgrieve and Conor McCarthy, is available online at:

[www.biicl.org/research/reparations/](http://www.biicl.org/research/reparations/)

The Seminar was chaired by Dr Duncan Fairgrieve (BIICL) and the speakers were Carla Ferstman (REDRESS), Dr Francesca Capone (Sant'Anna School of Advanced Studies), Daniel Leader (Leigh Day & Co) and Peter Van der Auweraert (IOM).

**Carla Ferstman** initiated the debate by giving a broad brush overview on developments relating to reparations for human rights and humanitarian law abuses, as a stock taking on current issues to set the scene. Where are we now? Looking at the normative framework, it appears that most treaties recognise that there is an obligation to provide reparation for human rights and humanitarian law abuses, and this is replicated in the laws of many, if not most countries, around the world. There has also been quite an extensive development of soft law standards in this area, starting with the 2005 *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*.

Beyond that broad framework, which refers both to the procedural obligation of States to provide access to a remedy, as well as outlining what reparations should entail, a series of texts have been progressively developed looking at more concrete issues in relation to particular types of crimes. Recently, the United Nations (UN) Committee Against Torture issued a General Comment on reparations for torture, including the right to rehabilitation. The UN Special Rapporteur on violence against women conducted a study on what reparations should mean in the context of gender-based violence and sexual violence in particular. The Committee on the Elimination of Discrimination Against Women (CEDAW) has also issued a detailed recommendation on the types of measures States should take to remedy violence against women. The UN Special Rapporteur on trafficking in persons has also done an in-depth study on what reparations should mean for trafficked persons, with a focus on women and girls. There is of course the newly appointed UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. The International Committee of the Red Cross (ICRC), as part of its extensive study on customary international law (CIL), has included Rule 150, which provides that “[A] State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” Therefore it is the ICRC’s view that this Rule is so well-established, that it constitutes a principle of CIL. Even in relation to corporations, the Ruggie principles adopted the framework of ‘protect, respect and remedy’. So there is a variety of different standards which are starting to coalesce at the international level which, to a greater or lesser extent, recognise the right to reparations for a variety of human rights and humanitarian law abuses. The International Law Commission has also adopted the Articles on State Responsibility, which make clear that any internationally wrongful act committed by a State should be followed by reparations. More recently, the draft Articles on the Responsibility of International Organisations, which take an almost identical approach, provides that any internationally wrongful act committed by an international organisation should lead to reparations.

Regional bodies and courts at all levels have also regularly affirmed these general principles. But how have these principles been applied in practice? There are a lot of positive developments in the jurisprudence but also quite a number of shortcomings.

Firstly, with respect to regional human rights courts in particular, there is a growing challenge to access reparations. This is underscored by the delay it takes for a case to be decided at the European Court of Human Rights (ECtHR). The same is true for the Inter-American Court of Human Rights (IACtHR) where REDRESS had one claim that was initiated at the Commission in 2002, the admissibility decision came in 2005 and it was transferred to the Court in 2011, with the judgment only coming at the end of 2013. Now 80 years old, the claimant hopes this

judgment will be enforced in his lifetime. The ECtHR is going through a process of change and already some measures have been implemented to restrict access to its procedures. There is now a shorter limitation period for individuals to claim before the Court. There is also an array of other measures being considered to try to streamline the procedures.

On the positive side, regional and international courts have started to take reparations much more seriously and are becoming much more detailed in their decision making on reparations. Before, the IACtHR was the only court (out of all regional human rights courts and most international bodies) to consider reparations in detail in the course of its judgments. The ECtHR is becoming more detailed and descriptive in this regard, as is the African Commission on Human and Peoples' Rights and the UN Treaty Bodies. This is an excellent sign. The challenge with the African Commission and the UN Treaty Bodies is that they are routinely ignored by States. Therefore many of their final recommendations do not end up being implemented by States.

At the domestic level, there are mixed results depending on the rule of law which might exist in a particular country. In many countries, it is fair to say that victims of serious human rights abuses would not seek justice (1) because they have no trust in the legal system and do not believe that remedies will be forthcoming and (2) because they may fear reprisals by the State or its officials for trying to pursue that kind of action. In some parts of Asia and the Middle East, where there is no regional human rights court and the countries in question have not acceded to the treaty frameworks which allow for individual complaints before UN Treaty Bodies, victims have no remedies whether at the domestic, regional or international level. In other countries, there may be a 'black hole' of justice depending on who the victim is. For example, in the United States, with regard to individuals who were extraordinarily rendered or who were tortured and abused in the context of counter-terrorism measures, the courts have routinely said civil claims for reparations cannot proceed in US courts as they would reveal State secrets. This is the beginning and end of the story of reparations for counter-terrorism related abuses in the US courts. This can be contrasted to a certain degree with the process in the United Kingdom, where there is the use of special advocates and other kinds of measures. Although the use of special advocates has extensive drawbacks, the entire process of justice is not barred, as it is in the US. However, in several recent court rulings in the UK, there is another worrying trend. In relation to actions which have been taken with regard to drones, as well as in the case of Mr Belhaj from Libya, the courts have ruled that to inquire into the abuses that were alleged and engaged the complicity of the UK government in the actions of (primarily) US officials, would engage the Act of State doctrine. To proceed with these cases would require the UK courts to look into the practices of another State, something they were not prepared to do. As a result, these cases were not able to proceed.

In some other countries, there have been more positive developments with regard to mass claims. For example, a decision of South Korean courts allowing claims against Japanese companies for war crimes and abuses; a decision of the Libyan government to afford compensation to victims of the massacre at Abu Salim prison; and a decision in the UK which resulted in a settlement addressing colonial era abuses. Here, the statute of limitations did not bar the proceedings despite the significant passage of time. This was also the case of civil proceedings which were brought by Indonesian victims in the Netherlands.

What are the key barriers to justice which have become even more entrenched in recent years?

1) With regard to International Humanitarian Law, it is still extremely difficult (almost impossible) for victims of International Humanitarian Law abuses to take a case independently before a court of the country which is alleged to have taken part in those abuses. This was underscored by the ICJ in the case of *Germany v Italy*. While International Humanitarian Law recognizes that States have an obligation to afford reparation, there is no development on the right of victims to claims reparation, outside of a particular statutory basis which could exist in domestic law.

2) With regard to immunities, there is the recent ECtHR decision in *Jones v UK*, which concerned British nationals who were tortured in Saudi Arabia and sought to sue the Saudi Arabian government and the officials allegedly involved in UK courts. Those courts dismissed the matter on the basis of State immunity. Before the ECtHR, the decision of the UK courts was affirmed, making immunity an overall bar to proceedings even though Article 6 of the European Convention on Human Rights provides for a right of access to justice. While it has been recognised in criminal cases that functional immunity cannot be a bar, in civil cases immunity has had the effect of barring proceedings, or more correctly, that the UK's interpretation to this effect was in its appropriate margin of appreciation. With respect to the immunity of international organisations, there have been several developments. Following the massacre at Srebrenica, certain individuals (family members of those who were killed) sought to bring claims both against the Dutch government and the UN before Dutch courts. The case against the government was able to proceed but the one against the UN was thrown out. For similar reasons to the case of *Jones*, organizational immunities were deemed sacrosanct and the fact that these individuals had no other remedy against the UN seemed to make no difference in the determination of the courts. Similarly, despite scientific evidence of the role of Nepalese peacekeepers in the cholera epidemic in Haiti, the UN refused to deal with that issue. However, if the UN is immune before domestic courts, it should set up its own mechanisms to resolve these kinds of issues. However, the UN considered this case as a matter of policy (as opposed to a private claim like a motor vehicle accident), and has used this difference, and a (arguably overly) narrow reading of the UN immunities convention, to justify its lack of response. As victims have no access to any court, they cannot even challenge the UN's narrow reading of its own responsibility.

3) With regard to mass claims, there have been a huge number of incidents involving hundreds or even thousands of individuals who have suffered horribly. Obviously, courts can be ill-equipped to deal with such mass violations and determine what reparations measures should be put in place. International criminal courts and tribunals have started to grapple with this given the Statute of the International Criminal Court (ICC) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). In both of these instances, where the Courts have come to their first decisions on reparations, the decisions have been very swift. The ECCC decided that it is sufficient to give 'something' to the victims, without any concern of whether that 'something' satisfied international law understandings of adequacy and effectiveness of reparations. The mass claims context was seen as overriding the individual interests and rights of the victims concerned. Similarly, in the *Lubanga* case, the judges of the ICC detailed the existing legal framework and jurisprudence on reparations but ended by

transferring the resolution of the reparations issue to the Trust Fund for Victims, which now has to come up with a solution for that matter. Therefore, with regard to mass victimisation, it seems that judges tend to use the high numbers of victims as an excuse to avoid needed to determine an award that adequately corresponds to the harm; anything is acceptable so long as it is 'something'. This makes a clear distinction between the approach taken by other courts where there are more standard principles of just, effective and adequate reparations in place. It may be difficult to determine clear standards for mass claims reparations but it is not impossible. The challenge at the normative level is to consider how existing reparations standards can be best approximated; what is adequate and effective given the overall context of mass violence and given the needs of the victims, to ensure that these victims of international human right law and humanitarian law receive an adequate remedy. Without doing that, there is a risk: the worse a violation is, the less likely an individual will receive a remedy. This cannot be a solution for the vision of justice we all aspire towards.

**Francesca Capone** focused her presentation on two specific topics, namely the potential role of Non-State Actors (NSAs) and the new and highly debated concept of transformative reparations.

The first judgment the issue of reparations was dealt with was the case of the *Factory at Chorzów*, issued by the Permanent Court of International Justice in 1928. This judgment enshrined the main principles which govern the right to reparations. However, new developments challenge this statement. It is a principle of international law that the breach of an engagement involves the State's obligation to make reparation in an adequate form. Reparations must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Reparation is therefore a State obligation because when the judgment was issued it was accepted that reparation was both a State's right and an obligation towards other States. With the development of International Human Rights, it can be said that there is an individual right to reparation and an individual obligation to provide reparation. There is also the hope of having NSAs involved in this discourse. The goal of reparation was also said to wipe out all the consequences of the illegal act and restore the *status quo ante*. This can be challenged with the concept of transformative reparations.

Let's consider whether NSAs are part of the following equation: violations of International Human Rights Law or Humanitarian Law equal right to reparation for the victims. As a matter of general principle, treaty obligations are binding upon the States that have ratified the treaty and not upon NSAs. However, there are two ways under international law to ensure that the actions of NSAs have legal consequences. Firstly, under the law of State Responsibility, there is the so-called attribution to the State of acts perpetrated by NSAs. Secondly, there is the obligation to act with due diligence which is also an obligation upon States. Therefore, under certain circumstances, States are responsible for the actions of NSAs and liable for their consequences. What happens if an action cannot be attributed to a State? What does it entail for the victims? It is still far from becoming the rule but there are some shy developments in the field of reparations for the violations committed by NSAs. There was a glimpse of change in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation*, which state

that “[I]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”

In *Education and the Law of Reparations* (BIICL/PEIC 2013), two categories of NSAs are highlighted because of their potential impact on education: business enterprises and non-State armed groups (NSAGs). As mentioned by Carla, with regard to business enterprises the principles are now enshrined in the Ruggie Principles which adopted the “protect, respect and remedy” framework. Although States bear the main responsibility for violations committed by business enterprises, Principle 22 mentions that “[W]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” It does not set in stone that businesses can be held liable directly but it opens the door to it.

With regard to NSAGs, they are bound by Common Article 3 of the Geneva Conventions and Additional Protocol II (on armed conflict of a non-international character). This principle has been asserted in many instances, including the Hinga Norman case discussed before the Special Court for Sierra Leone. The responsibility to make reparation would be a natural consequence of the fact that organised armed groups are bound by International Humanitarian Law. But to date, such responsibility has mainly taken the form of individual criminal responsibility so there is a lack of enforcement mechanisms. However, there are two new tools that have been developed to engage NSAGs: the UN Monitoring and Reporting Mechanism established to systematically monitor and document gross violations against children in war torn countries. One of the crucial aspects of this mechanism involves the preparation and implementation of action plans, which are concrete time-bound commitments by the parties to a conflict against the recruitment and use of child soldiers, sexual violence, killings and maimings and attacks on schools and hospitals. So far 23 action plans have been signed by parties to armed conflicts, including both governments and NSAGs. At present these plans focus on the cessation of the violations against children but they could be amended along the way to include a remedial component. The second tool to engage NSAGs is the deeds of commitment, a document which is signed by NSAGs leaders and countersigned by the Canton of Geneva and Geneva Call, the organisation which develops these deeds. Up until now, Geneva Call has developed three types of deeds: one on the ban of mines, one on children in armed conflict and another prohibiting gender violence and discrimination. What makes this mechanism unique? It gives the opportunity to NSAGs to formally agree to abide by the rules of International Humanitarian Law and take ownership of these rules. Implementation measures are agreed upon with Geneva Call and generally include monitoring, sanctions and protecting measures. There is no remedial component yet but it is possible that it will be included in those deeds in the future.

The second development is the concept of transformative reparations. In *Factory at Chorzów*, it was stated that reparation wipe out all the consequences of the wrongful act. But what if this is not enough for a victim? Or not feasible or fair? Some individuals belong, before the wrongful act occurred, to a particularly vulnerable group. Vulnerability can be defined as the high exposure to risks leading to unacceptable level of well-being, measured through one’s physical and emotional development, inability to communicate needs, mobility, independence, etc. In *Education and the Law of Reparations*, we have identified several vulnerable victims,

including children, victims of sexual violence, refugees and persons with disabilities. These groups are all overly exposed to risks of abuses. Reparations could then not only address the consequences of the wrongful act but also tackle the causes that led to the victimisation in the first place. This is addressed by the idea of transformative reparations. But is it just an idea or is there already some practical application of transformative reparations? From a theoretical point of view, there are a lot statements and declarations where we can track the notion of transformative reparations. For example, there is the *Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation* which was adopted in 2007. More recently the UN Secretary General has emphasized that reparations are increasingly recognised as an important vehicle to address inequality. In December 2012, the Committee Against Torture underlined in its General Comment No 3 to Article 14 that, for restitution to be effective, efforts should be made to address the root causes of the violation including all contexts of discrimination.

With regard to the practice, examples are limited at present. There is the *Cotton Field* case before the IACtHR and the decision on the principles and procedures to be applied to reparations in the *Lubanga* case of the ICC, where it was emphasized that reparations must address any underlying injustices and when implementing, the Court should avoid replicating discriminatory practices or structures that predate the commission of the crime. There are concerns with regard to the notion of transformative reparations, in particular with regard to its feasibility. Mentioning transformative reparations could create false hopes among victims. In addition, it is difficult to distinguish transformative reparations from guarantees of non-repetition. The latter have a strong accent on prevention while the scope of transformative reparations focuses on the rectification of a situation that exacerbates for vulnerable groups the risks of being victimized. The purpose of transformative reparations is to correct vulnerability so there is a strong focus on victims while, with regard to guarantees of non-repetition, the focus is placed on the violations and preventing them from re-occurring. Reparations must be prompt, effective, concrete and the mechanisms must hear the victims in a timely manner. Therefore, as an expert from the International Centre for Transitional Justice said, a process for reparation may never reach the beneficiaries. However, without a transformative component, reparation may not be effective or helpful at all.

These developments show how the reparations discourse has evolved since *Factory at Chorzów* in particular as to the actors responsible to provide reparations and the ultimate goal of reparations.

**Daniel Leader** focused his talk on the so –called 'Mau Mau case', which was brought by Leigh Day, a firm with particular interest in bringing group claims to the English courts on behalf of affected communities in the developing world (see for example its case against Shell on behalf of the Ogoni fishing communities or its case against Trafigura on behalf of communities affected by pollution in the Ivory Coast). As a result, Leigh Day took on the Kenyan colonial torture case, inaccurately labelled as the 'Mau Mau case' because most of the victims of torture had little or nothing to do with the Mau Mau. In terms of facts, they were approached in 2003 by John Nottingham, a former colonial district officer in Kenya during the colonial era, who has lived in Kenya ever since. He wanted to share what happened in Kenya during

the colonial period, shortly before independence, including the crimes that were committed by the British colony. These crimes committed against the detainees were monumental, systematic and widespread. Thousands of people were tortured, injured and their lives ruined as a result. As that had taken place about 50 years ago, there was an initial doubt as to feasibility of bringing legal claims forward. However, as some compensation had been obtained for POWs in Japan had been obtained, it was decided to bring this case in London.

Before independence, in Kenya, a state of emergency was declared in 1952. There was a mass uprising, an insurgency, with feuds between those who remained loyal to the colony and others who wanted Britain to leave. As a result, a brutal crackdown followed, with at least 150,000 people were interned without trial (to contrast, that number was about 2,000 to 3,000 in Northern Ireland). Over a million people were forced to burn down their homes and displaced into camps. It was always known that there was a lot of brutality in the camps but it was seen as a case of a few 'rotten apples' rather than a comprehensive, widespread, systematic approach to abuses against detainees. As a result of the work published in 2005 by two historians, Caroline Elkins (Harvard) and David Anderson (Oxford, now Warwick), it emerged that if you trace archival material and talk to survivors, it was clear that people knew about these abuses, which were covered up when they were discovered. In fact, from 1957 onwards they were put on legal footing, with memos from the government of Kenya which describe the „dilution technique“ where the systematic infliction of violence against detainees was approved of by the authorities in Nairobi and London. The nature of the torture and violence used was particularly shocking. Dozens of interviewees said they were castrated with methods that would be used at the time on horses. Women were inserted with hot glass bottles during their interrogation. There was systematic beatings with wips and waterboarding used as interrogation techniques. These cases are documented by the Kenyan Human Rights Commission.

In 2009, following extensive research, it was decided a case could be brought and thus a test case was initiated at the High Court in London. These were standard tort claims brought on behalf of five victims, including an individual who had been castrated, another who had been beaten at Hola camp where 11 detainees had been beaten to death with batons by prison guards, and a 15 year old girl at the time who had suffered the glass bottle torture. The same year (2009), Leigh Day wrote to the FCO recognising the difficulties associated with such claims, as these abuses took place a long time ago, but stating that victims wanted the recognition of these past abuses and the creation of a welfare fund for the elderly victims who were still suffering from the physical and psychological trauma from their injuries. The case was not fundamentally about compensation, it was about recognition. They were not asking for a large amount of compensation.

However, the FCO made an application to strike the case out based on two grounds: 1) Britain is not liable in principle for the crimes of the colonial era (the Kenyan colony was a separate legal entity) and 2) these abuses happened a long time ago so this claim is time barred (and the time should not be extended under Section 33 of the Limitation Act). This litigation led to the Hanslope disclosure. The files of 37 colonies were taken out of their archives and placed in Hanslope, without ever being put in the public domain. Because of the disclosure obligations in the litigation, the government was forced to disclose them (some traces of their existence had appeared in the national archives during the research conducted).



There were thousands of documents providing a detailed picture of what happened in Kenya at the time, at all levels of decision-making. It filled the blanks historians could not fill. In addition to the 37 colonial era archives (which have now been put into the public domain) and there were also a further 1.2 million FCO files going back to 1850 which had never been put in the public domain either. Leading historians are contemplating a judicial review to have these files put into the public domain as well.

The legal argument of the case was as follows: liability could not be attached to Britain (it was seen as a parent company liability argument, with the colony being a subsidiary and a corporate veil between the two), liability was passed onto the Kenyan Republic. The Kenyan government was of course not willing to be held liable for the abuses committed by the British colony. African statesmen, as well as Desmond Tutu and Graça Machel, complained to David Cameron about it. However, the UK persisted with its argument. It emerged, in fact, that the British Army had been deployed and was running the counter-insurgency, directly reporting back to the War Office. It had under its control all of the colonial forces, which means that liability went straight back to London. So the judge decided strongly in favour of the claimants on that case. Nevertheless, the FCO decided to pursue with their limitation argument. In 2012, during the cross-examination of victims, the torture suffered by the victims was admitted by the QC conducting the cross-examination. However, he argued that the issue was that the senior decision makers had all died and therefore a fair trial on liability was not possible. While the judge recognised the absence of senior decision makers, he also stated that there is an incredibly a rich trail of documentary evidence, including through the Hanslope disclosure, as well as junior decision makers who are still alive and could provide further evidence in this case. As a result, he held that a fair trial was possible and exercised his discretion to allow the case to proceed despite the limitation bar.

After losing twice, the FCO agreed to enter negotiations to resolve this issue. It was again suggested that an apology should be issued and a welfare fund created as a means of collective reparations for the estimated 5,000 survivors. However, the FCO eventually decided it preferred to go the traditional route, with individual claims (group action model) leading to financial compensation and an apology but nothing more creative. Leigh Day then went through 50,000 records of interviews gathered by victim groups, out of which 15,000 people all over Kenya were identified for further interviews. Out of these 15,000 individuals, 5,288 individuals were identified as having serious evidence of torture. This took a team of 20 lawyers from Leigh Day deployed in Kenya to do this work who developed a huge database which is now being shared with academics. The negotiations led to the agreement to payment of a nominal sum of damages and William Hague gave a historic apology at the House of Commons. The government also agreed to pay for a monument for the victims of colonial era torture which should be built in Nairobi in October of this year. This case, which raised a number of complex questions with regard to reparations, was not expected to succeed. However, a more creative resolution would have been preferable. With a case going back this far it would have been interesting to look at museums, historical memorials, collective projects for the communities affected, etc. Nevertheless, there are now 5,288 Kenyan who are delighted that finally their suffering has been recognized by the British Government.

**Peter an der Auweraert**, Head of the reparations unit at the International Organisation for Migration (an inter-governmental organisation), shared his practical experience of working on reparations programmes all over the world. The IOM advises governments who want to or are forced to) set up a reparations programme and develop comprehensive reparations policies. In post-conflict and transitional settings, it is now commonly agreed that victims' reparations must be addressed in order to establish lasting peace. While it does not always happen, it has been increasingly argued that it has to become part of the normal approach in dealing with past large-scale human rights violations. In places like Colombia for example, a broad victims' law was established to provide reparations to 2.5 to 3 million individuals. In Libya, despite all the difficulties, the parliament has been looking at a reparations law for the victims of the Gaddafi regime. Iraq took measures in relation to property restitution and property compensation. There is also a reparations programme for civil war victims in place in Sierra Leone. These are only a few examples.

The first question that governments generally ask is: why should a comprehensive reparations policy be established if they are not forced to do so (through legal threats or otherwise)? Why not just rely on the courts to provide reparations to victims of human rights violations, war crimes and crimes against humanity? As Carla pointed out, courts are often ill-equipped to address the legacy of large scale violations and there is also the issue of access to justice. In countries such as Sierra Leone, Colombia and Libya, many of the victims do not have access to courts, either because of a lack of means, because of cultural barriers (this is for example the case in Colombia where many individuals would never go to court to defend their rights), etc. Very often courts simply lack the capacity to deal with thousands of victims. A universal characteristic of post-conflict contexts is that institutions tend to be quite weak and already have issues dealing with the normal course of affairs. Therefore, dealing with thousands of victims is not something they can handle.

The second issue that governments generally raise is that reparations are too costly and they do not have sufficient funds to satisfy millions of compensation claims. However, victims often seek foremost a formal recognition of what happened. For example, in the former Yugoslavia, 20 years after the Dayton agreement, there are still people in villages who are in concentration camps, and women who are raped, which shows that these individuals are still not recognised as victims. The local governments do not recognize that these people suffered from violations. These victims are not asking for millions of dollars, they are asking first and foremost for formal recognition, something courts are not very good at giving. This can be due to the adversarial system or the fact that only a small number of victims may have the means and strength to go to the courts. Formal recognition is a core element of reparations policies.

When reparations are provided through the courts, this can lead to other issues as well. For example, in situations like in Colombia where you have 3 million victims, singling out a small number of victims eligible to receive compensation can generate trouble in contexts which are still fragile and where most people may still be in difficulties. For example, family may start fighting internally if one member got reparations and another one not, although they both suffered from similar violations. Not establishing comprehensive reparations programmes (and relying on court determination) entails these risks. Therefore, establishing a

comprehensive reparations programme can assist governments in solidifying a peaceful future for communities.

The question of closure is also important. In addition to closure at the individual level (which needs to be dealt individually), comprehensive reparations policy can bring closure at the society level. If a reparations programme is carried by victims and accepted by broad strands of the population, you can close that issue politically. Cases may go on for 20, 30 or even 50 years. For example, with regard to the cases relating to forced labour during the Second World War, it was only in 2000 that a policy was established to provide compensation for these victims. Therefore, that sense of closure may be facilitated by a comprehensive reparations policy.

Another delicate issue is the expectation of people in relation to punitive justice. This is for example the case in ex-Yugoslavia, where the emphasis has been on punitive justice, with every perpetrator needing to be prosecuted and punished. While it is important to have punitive justice and punish the key perpetrators, in contexts of large scale violations like in ex-Yugoslavia, it is impossible to prosecute and punish every single perpetrator. Punitive justice cannot provide an exhaustive answer in such contexts and this should be taken into account. In Sierra Leone, where there is a large number of victims from the civil war, the issue is that government has no money and has other priorities that redressing the harm done. In that case, the international community decided not to pay for a reparations programme as it was seen as the responsibility of the national government. The only international investment in reparations came from the peace building fund in New York which donated 8 million dollars to the national commission for reparations for the victims. But who paid for the Charles Taylor trial conducted by the Special Court for Sierra Leone? It was not the Sierra Leone government but the international community which paid for this trial which cost about 200 million dollars. This was the trial of a single individual. This is not to say that Charles Taylors should not have been persecuted but it appears that there is an imbalance that needs to be addressed.

Finally, another critical issue related to transitional justice. Governments often ask how to go about developing a reparations programme. Governments now often develop these programmes with external experts and NGOs. The value in reparations as a policy lies in that process even more than in its content. It is critical to have a participatory process, whereby many people are involved in the discussion on reparations. It is therefore important to support government in process designs. In contexts such as in ex-Yugoslavia where there are strong victims' associations but also many victims who have never been members of those associations and have never gone forward to their local government, a way must be found to involve them in the reparations process. This is one of the most difficult technical issue to deal with but it is important to ask victims what they want and need. For example, following a survey in Uganda, where people were asked what they wanted (including rehabilitation, social support, compensation, access to medication). A lot of victims said they wanted animals as, due to displacement, they had lost their live stocks. Without animals, they felt their identity was lost and they could not carry out as they did before. Therefore, one or two cows were what victims really needed, something the government or experts may not have considered.

Following a Q&A period, the Report was formally launched by Professor Robert McCorquodale (Director, BIICL) and Sarah Green (Legal Advisor, PEIC).

**This Report was prepared by Kristin Hausler, Associate Senior Fellow at the British Institute of International and Comparative Law.**