

Reparations in Theory and Practice¹

I. THE NATURE AND OBJECTIVES OF REPARATIONS

A. A right under international law

The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* assert that victims of such abuses have a right to prompt, adequate and effective reparation.² This is held to include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status. Measures to satisfy victims, such as revealing the truth, holding perpetrators accountable, and ceasing ongoing violations are also steps that can have a reparative effect. Likewise, steps to prevent non-recurrence should accompany reparations, as this offers reassurance to victims that reparation is not an empty promise or a temporary stop-gap.

In the aftermath of massive or systematic violations or more generalized conflict, providing reparation in a meaningful way poses a daunting challenge. The number of victims may be massive. The harm done may have been devastating and irreversible, may be felt both individually and collectively, and may have long-term consequences both for individual victims and for society as a whole. Abuses of human rights or humanitarian law may have become the norm rather than the exception, and institutional guarantors of those rights – such as the courts or, in some communities, customary arbiters of redress – may have been overwhelmed by the scale of the challenge, destroyed in the course of the conflict, or warped and generally corrupted by political interference.³ In such contexts, broad policy measures to benefit victims are often the most effective way to accomplish reparation rather than through a limited case-by-case approach in the courts.

International law is, by now, fairly clear that a duty exists to provide reparations. In practice, however, the duty lacks precision and questions have been asked about how to give content to that obligation in any given situation where massive harm has been inflicted.

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² Adopted and proclaimed by General Assembly Resolution 60/147, 16 December 2005. Accessible at: <http://www.ohchr.org/english/law/remedy.htm>. Accessed 27 August 2007.

³ See generally, Pablo de Greiff, "Justice and Reparations," in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press: 2006).

B. Reparations as a key element of justice in transition

Reparations are essential to any transitional justice initiative. This is in part because, out of all the dimensions of transitional justice, reparations focus most directly and explicitly on the victims' situation, as it seeks to provide some repair for rights that have been trampled, for harms suffered, for indignities endured. Crucially, care should be taken that reparations are not framed as a hand-out. Rather, a reparations program should uphold the status of victims as bearers of rights, and convey the sense that it is on this basis that they are owed reparations. Moreover, reparations should serve as a vehicle for acknowledging past violations and state responsibility for harms as well as a public commitment to respond to their enduring impact. Often public acknowledgement is indicated by victims as the most important element of the reparations they seek. It is also what is most frequently absent.

In negotiations to end a conflict as well as in post-conflict agendas, victims' needs are often lost in the priorities: victims groups do not possess the sort of political weight that parties to negotiations usually hold and they may not, moreover, be seen as an immediate threat to stability. Yet in the longer term, putting victims and victims' rights firmly on the post-conflict agenda is essential to building trust in the state and in its commitment to guaranteeing human rights in the future in an inclusive way. Responding to victims' needs has both value in itself, in terms of ethics and law, and a strategic value, in terms of long-term political advantages and producing a sustainable peace. These are all important objectives of reparations policy.

A necessary element, then, in any transitional justice approach, reparations are made significantly more effective when linked to other, complementary initiatives, such as truth-seeking, institutional reform, accountability mechanisms and commemoration. Moreover, reparations projects that are not accompanied by such measures can be counter-productive. Reparation without steps to ascertain the truth about past violations, for example, may be perceived as an effort to buy victims' silence – and thus may not only offend victims but also allow denial to flourish. Similarly, reparations without reform or other measures to prevent future abuses can make a mockery of the initiative, rendering empty the promise reparations hold of non-repetition. Likewise, a reparations program that is not accompanied by measures to ensure that perpetrators be held accountable effectively asks victims to trade away their right to justice in order to receive the support that is also their due.

At the same time, transitional justice approaches in which reparations do not feature are less effective because they do not *directly* change the situation in which victims find themselves. Other initiatives, though important, do not set out as deliberately to address the particular needs of victims and of communities that have been victimized. This direct focus on victims' needs, along with tangible measures of acknowledgment and recognition, can be served through reparations measures. Reparations have the potential to build trust and restore dignity through a felt, public commitment to human rights. They also serve the objectives of providing a measure of justice directly to victims, offering them a future that may alleviate, to some extent, the suffering they have endured.

C. Reparations in relation to reconstruction strategies

Reparations, like other dimensions of transitional justice, should not be understood or crafted in isolation from other reconstruction efforts. Conceptually as well as in practice, reparations should be understood to be one part of a much larger agenda. A post-conflict agenda necessarily includes an array of peacebuilding, reconstruction, relief, and nation-building efforts. While the objectives and nature of reparations are distinct and require specific and explicit attention, unless they are part of a broader agenda, other important basic rights will go unfulfilled – for victims as well as for the broader population. The fact that attending to basic socio-economic rights, such as housing, water, and education, are not reparations but separately existing rights does not make them less important to victims, or for the society as a whole. In post-conflict contexts, it is often necessary to construct the possibility of enjoying social and economic rights as well as civil and political rights from the ground up. Institutions must be reformed – and some altogether new ones created - to oversee and enforce these rights. Balancing this broader rights agenda with a thoroughgoing commitment to reparations is an important task for government. Neither one should eclipse the other. Crucially, victims should not be expected to sacrifice one set of rights to the other.

II. FORMS OF REPARATIONS

This paper does not address the potential judicial channels hold for victims seeking reparations. It should be emphasized that courts are critical for setting standards of legal obligation, and victims and their advocates should not ignore their strategic value. Nevertheless, in general, pursuing individual cases through the courts tends to be a very incomplete way of addressing the scale of the challenge represented by the victims in post-conflict settings. Courts only have the capacity to attend to a limited number of cases. Moreover, victims may be required to present detailed proofs of the violation, of the injuries incurred, and sometimes even of the identity of the perpetrator. Furthermore, those victims without resources or access to legal counsel and courts – though equally harmed – often go without redress. The focus here, therefore, is on reparations programs that are created by legislation for whole classes of victims rather than in response to individualized justice sought through the courts.

A. Reparations through administrative programs

Reparations programs created by legislation generally seek to provide repair, through a variety of measures, for specific types of violation as well as for various classes of victims. These actions are aimed at providing some combination of restitution, rehabilitation, and compensation, and should be undertaken alongside other steps to ensure that the society as a whole will not allow its citizens to again be victimized and unprotected. While not usually able to respond to the variables of each individual case, a reparations program can create generally descriptive classes of victims or their surviving family members who, given similar circumstances, can be treated alike. In Peru, for example, these classes of victims included, among others: family members of individuals killed or “disappeared”, torture victims, the forcibly displaced (some within their original

communities as well as those who were moved to resettlements or urban areas), victims of rape, child abductees into militias, and children born of rape. When implemented well, such programs can have a much broader reach than court-ordered redress, both in terms of the numbers who find some reparation and also in terms of the holistic nature of the measures undertaken.

It should be noted that reparations almost always fall short of victims' expectations. Yet some programs have at least been able to successfully convey, to victims and to the broader society, the necessity and value of affirming that victims, family members, and communities harmed by atrocities hold certain rights, and that addressing past abuses is crucial in creating a shared future.

B. Symbolic and material benefits

The specific kinds of actions that reparations programs rely upon to accomplish this modest but important goal are arrayed along a continuum from the purely symbolic to measures that are mostly material in nature. Such measures may range from a statement of apology or the naming of a street in honor of a victim through to locating the remains of loved ones; creating dignified burial sites; establishing rehabilitation and community centers; releasing pools of credit or directly funding targeted community reparations projects; or paying compensation or pensions.

By definition, all reparations have an important symbolic role in the process of building public trust and integrating victims into society. The material component of a reparation policy cannot, however, be underestimated. During discussions about symbolic reparations for genocide committed against some Mayan villages in Guatemala, one indigenous staff member of the national reparations program office put it this way: "Symbols! That's all we've been to this government and that's all we get from them. We need to see something concrete." A commitment to unity or to welcoming victims who have been excluded from society's care and protection will not be taken seriously by victims if it is not accompanied by at least some concrete material solutions for harm suffered. A reparation policy must usually include several measures that combine material and symbolic components rather than relying only on a single measure.

In massive reparations programs, where it may be impossible to make assessments of harm suffered by each individual victim or where fully repairing the damage done is going to prove similarly impossible, even the most generous program will fall short if the expectation is to repair all harm. However, it can provide concrete solutions to some of the problems derived from the harm suffered. In Chile, President Aylwin offered a moving apology to the nation about the years of repression and human rights abuses under General Pinochet. This apology would have rung hollow, however, if Chile had not also made a commitment to pay a pension to family members of Pinochet's victims. In East Timor, a massive need was evident for communities to come to terms with victims and perpetrators living in the same village. In the case of less serious crimes, local reconciliation panels received the perpetrators, listened to victims, and formulated conditions whereby a perpetrator could make amends and rejoin the community.

Sometimes this involved rebuilding homes that had been destroyed or providing an agreed number of hours of community service. In this way, symbolic atonement and concrete projects were combined to constitute one small step toward reparations.

Material measures must have some symbolic accompaniment to give them meaning. Nonetheless, reparations may comprise important symbolic gestures that do not have a significant material component. Included in this category would be public apologies from state authorities, public rites and ceremonies, and the establishment of memorials. The public dimension in such symbolic actions is crucial in facilitating recognition by broader society of what happened and who was victimized. Public acknowledgment, both by the state authorities and – crucially – by the rest of society, can play an important role in overcoming the exclusion victims have suffered.

C. Collective and individual reparations

Reparations may be directed at individuals or at collectives, such as communities, groups, or regions.

Individual measures require a precise identification of the persons entitled to them as well as a way to deliver the concrete benefits to the individual recipient. Individual measures are important because international human rights standards are generally expressed in individual terms. Reparation to individuals therefore underscores the value of each human being and their place as rights-holders. This avoids considering all victims together in a way that risks minimizing the particular harm done or makes the meaning of reparations vague. On the other hand, individual measures – depending on the specifics and how well they are complemented by other actions – necessarily are selective, so that in any one group or community some victims will be entitled to individual reparations and others, whether victims or fellow citizens in general, will not. This can, sometimes, exacerbate tensions. For example, if twenty people in a community suffered detention, torture, or the loss of a family member and are to receive individual reparations for their loss and suffering, others in the community who have suffered in other ways, such as displacement, or who have needs because government attention to their social and economic rights has been minimal, may protest their exclusion from reparations that are purely individual in nature.

Collective reparations are focused on delivering a benefit to people that suffered from human rights violations as a group. For example, collective reparations measures might address identity-based dimensions of individual violations (such as the violation of women's rights and dignity in a campaign that used rape as a means of repression, or systematic attacks on a particular ethnic group). In other instances, they might address violations such as bombings or a destruction of villages that had the intention of terrorizing a whole population, affecting means of subsistence, dismantling organizations or destroying public trust among residents. In such contexts, collective reparations may offer an effective response to damage to community infrastructure, identity and trust, by supporting, for example, a community-generated project that helps locate missing

relatives or that builds a meeting lodge to promote renewed community life and governance.

In East Timor, the truth commission recommended a process that combined individual benefits with a form of delivery designed to promote collective healing. As foreseen by the East Timor commission, single mothers, including war widows and victims of sexual violence, would benefit from scholarship grants for their school-aged children. In picking up their benefits, the mothers would have to travel to a regional service center, where they would, in turn, have access to peer support, skills training, healthcare, and counseling. In Chile, many group therapies have been implemented for survivors of torture, which help them to find support in each other. Stimulating the creation of victims' organizations through collective reparations can also be a way to provide a network of solidarity.

Collective reparations can also be formulated as a way of simplifying delivery of reparations either in the context of practical limitations or of concerns about drawing too stark a line between classes of victims or between victims and non-victim groups. In this way, a specific village that was particularly affected by various kinds of abuses might, for example, receive a fund for community projects, even though not every individual in the village was affected in the same way and even if some people there contributed to the harms. In Peru, for example, communities hardest hit by the violence have been asked to submit community funding proposals up to a \$30,000 limit. These projects would benefit the entire community, generally, rather than only serve specific victims and would be implemented regardless of whether some former perpetrators also live there.

Collective reparations avoid the potentially disruptive effect individual payments can have on communities. In Chile, it has been reported that payment of individual reparations to members of indigenous communities that had a strong collective ethos had an adverse effect on internal harmony in those communities.⁴ In Peru, a similar collective identity prevails in many of the highland areas, but victims there demanded individual as well as collective reparations as a way to assert their status as individual citizens of equal value to their urban counterparts. They insisted on this as a way to overcome the amorphous group identity that made it easier for urban elites to be indifferent to their fate during long years of repression.⁵

Collective reparations have their own challenges. They are not easy to implement and they risk being resisted by individual victims because they do not respond to the often quite intimate, individual nature of the violations and suffering. Often, it will be difficult to define the communities that stand to benefit or to justify benefiting some to the exclusion of others. Moreover, the process can be used for political gain and the measures can become confused with development policies that those communities are entitled to anyway. This was the case in Peru, where the government tried to simply re-label as

⁴ Elizabeth Lira, "Policy for Human Rights Violations in Chile," in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press: 2006), p. 63.

⁵ See Julie Guillerot and Lisa Magarrell, *Memorias de un proceso inacabado – Reparaciones en la transición peruana*, (Lima: ICTJ-Aprodeh, 2006), p. 46 n.75, p. 138 n.37.

reparations a development initiative that was already under way. Victims protested that they were already entitled to development programs and, moreover, that the project was not designed to recognize the abuses they had suffered. In some cases, such as those noted above where reparations are delivered collectively to a whole community, these broad brush strokes can inadvertently serve to benefit perpetrators residing there. This kind of reparation can advance the unity of the group, but if it is perceived as unjust it can also easily ignite division or tensions.

In the end, some combination of reparations measures is probably the best way to convey the most meaning to even modestly funded programs.

III. POLICY DESIGN OF REPARATIONS

A. Defining beneficiaries of specific reparations measures

In addition to determining the kind of reparations to be delivered, reparations policy is generally defined by first describing the full universe of victims and then identifying various classes within that to receive specific measures of reparation. Most programs do this by the type of violation or harm that has been suffered, within a defined period. It may be possible to classify groups of victims according, for example, to whether they lost a family member, or were detained, or used as sex slaves, or displaced, or became disabled after torture. Specific measures can be assigned to specific categories of victims in ways designed to provide relief for the general consequences of such harms. Victims of rape, imprisonment and torture, for example, might receive a pension, while victims of forced displacement might receive a one-time assistance with housing or farming tools. However, the more complex the categories, the more administratively burdensome a program can become, so care should be taken to keep things simple enough to allow the program to be easily implemented.

The criteria developed should be on principled grounds. Fairness and feasibility should be emphasized and every measure taken to avoid political favoritism and exclusion. Reparations that are the same regardless of the specifics of the harm each individual suffered may emphasize the symbolic nature of each individual's right and the recognition of that individual's value to society; reparations that are more finely tuned to the harms caused emphasize the concrete need to repair specific damage. The treatment of survivors of Canada's residential school system (a state-church assimilation policy that took aboriginal children away from their families, culture and language) exemplifies these two approaches. Survivors are entitled to a "common experience payment," that requires they demonstrate only that they were at a school, with the payment increasing for each year of internment. This reinforces the notion that the very fact of being in a residential school was a violation of the children's rights. At the same time, a more rigorous administrative procedure is available for those who wish to prove additional serious forms of physical and psychological harm - and receive additional compensation

in accordance with the seriousness of the harm incurred and the impact on the individual.⁶

In Guatemala, some staff members struggling with questions about how to differentiate reparations for family members of a massacre, as well as those for torture victims, said they would prefer to treat them similarly, since individual experiences were so thoroughly different that they could not assign greater weight to one over another. Where reparations are more symbolic than restitution-based, this may be the most just approach because it asserts the equal value of every citizen's rights. In other contexts, where there is a possibility of tailoring the response, to some extent, to the violations, it may be deemed important to distinguish loss of life or reproductive capacity, or disability arising from torture, for example, from imprisonment or loss of material goods.

For some types of crimes, an exhaustive process to determine who was a victim could also provoke new harm to the applicants, especially in relation to crimes that are difficult to prove after many years, such as torture, rape, or other forms of sexual abuse. A requirement that victims produce records of medical exams performed at the time of the events, for example, will exclude many victims, including individuals who never received medical attention or who are fearful of speaking about their experience. Psychological examinations performed years after the facts can be misleading. They can also force victims to choose between revisiting the experience and foregoing reparations, thus producing a further form of victimization. Moreover, if full therapy or other forms of support are not available, it might well be irresponsible to demand examinations that could re-open dreadful memories.

Some victims want to talk about what happened to them and others prefer to avoid going into details they have been trying to forget for many years. In addressing this challenge, the Chilean Commission on Political Imprisonment and Torture recognized as victims those people who could provide some evidence about their detention, and simply presumed that most of them suffered torture, given the conditions of detention attested to unanimously by all the victims that did give testimony. Additionally, the Commission could not make distinctions among victims, because it was impossible to compare situations on an objective basis. Instead, the Commission recommended similar reparations for all.⁷

B. Defining priorities

Setting priorities within a reparations program that involves attending to some categories of victims before others poses a daunting challenge that policy-makers must face at the outset. The truth commission in East Timor observed that, "All East Timorese people have been touched and victimized by the conflict in one way or another. However, in the

⁶ A summary of the settlement agreement provisions for reparations can be found at http://www.irsr-rppi.gc.ca/english/pdf/IRS_SA_Highlights.pdf. Accessed 27 August 2007.

⁷ The report of the Chilean Commission, Informe de la Comisión Nacional sobre Prisión Política y Tortura, is available in Spanish at http://www.gobiernodechile.cl/comision_valech/index.asp. Accessed 27 August 2007.

course of its contact with many communities the Commission became acutely aware of those among us who still suffer daily from the consequences of the conflict and whose children will inherit the disadvantages their parents face as a consequence of their victimization. They include those who live in extreme poverty, are disabled, or, who – due to misunderstandings – are shunned or discriminated against by their communities.” Such was the case of women raped by Indonesian occupying forces, who then bore children of mixed descent, for example. The Commission concluded, “We are all victims but not all victims are equal. We must acknowledge this reality and lend a hand to those who are most vulnerable.”⁸

Many reparations programs define certain groups of victims as particularly at risk and in need of urgent attention. Factors generally considered are age, ill health, and the disadvantages some victims face within the social system - such as widows left to be the sole caretakers of their families. The challenge to identify priorities occurs at several levels, including phases of attention - who deserves attention first – and eligibility for scarce resources in specific reparations programs, such as pensions or compensation.

Some forms of reparations should be directed to the full universe of victims, since even the most wealthy, advantaged people in a society also need acknowledgment of the violation of their rights. That said, other forms of reparations should be dedicated to those in greatest need of help or who face the largest obstacles in rebuilding their lives. In establishing priorities based on need or vulnerability, reparations programs will be most effective if they make it clear that the measures are a duty owed - not a handout.

C. The importance of process

The participation of victims and victims groups in the design, implementation, and oversight of reparations programs can be critical to ensuring that reparations are meaningful, timely, and have an impact. Ensuring victim participation is not necessarily an easy thing to accomplish, given the usual heterogeneity of victim groups, their frequent lack of resources and organization, and, in many cases, the security risks and repression they may face as they seek redress. Protecting and helping develop victim organizations, as well as advocates who can credibly represent victims, can make consultation more effective and ensure that victims are well-informed.

Even though victims’ needs and expectations are very important to the success of a reparations program, they are not the only constituency involved. A reparations program has to consider the perceptions of society as a whole and should ideally be viewed by the rest of the population as fair and legitimate. In order to avoid any perception of

⁸ The Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR). 2005. *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary*, p.200. Accessible at <http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>. Accessed 23 August 2007.

favoritism, the criteria for determining the reparations measures and the selection of beneficiaries have to be transparent. The general public must also understand, at least in general terms, the crimes committed and the suffering victims endured, if they are to provide the political support necessary for reparations policies to move forward. For this reason too, when other citizens are in comparable situations of hardship due to poverty, underdevelopment, or the secondary effects of a war economy, reparations that are undertaken without attention to general reconstruction and development needs can engender discontent and resentment, regardless of how just the reparations measures may be.

Likewise, even principled reparations can run into problems of public perception if the criteria on which they are based are not transparent. This was the case in an initial compensation plan in Morocco, where victims observed differences among reparations amounts for detainees that they speculated were based on social status. In fact there was a principled reason for the distinctions, but because these were not public, discontent and rumors were rampant.

Reparations should also be explicit in purpose and meaning. This is crucial in safeguarding their quality as public acknowledgment of harms suffered and as the legitimate recognition of rights. The tendency to roll reparations programs into development plans or to administer them through development agencies can lessen the visibility of the underlying reasons for the reparations: that the people they serve are not only deserving of better living conditions along with all their compatriots, but that they are the subject of reparations because of additional, specific crimes committed against them. It is that betrayal of their rights as citizens and of their trust in the protection of the state that must be recognized as giving public credence – and priority – to the process of redress.

IV. RESPONSIBILITY FOR REPARATIONS

In general, states are responsible for ensuring the enjoyment of human rights by all the citizens within their borders, as well as for ensuring that justice will be delivered equally to all when abuses occur. Responsibility for reparations is no exception. This is particularly clear when it is state agents that have been directly involved in carrying out the crimes. State responsibility also extends to the actions of militias it has armed and enabled. In Colombia, for example, the state has been repeatedly found liable by the Inter-American Court of Human Rights for reparations in cases of human rights abuses by right-wing paramilitary groups that it created and fostered. Moreover, the notion of the continuity of the state ensures that, even after a repressive regime, the state continues to bear responsibility for the actions and policies of its predecessors. Such is the case in South Africa, despite the stark contrast between the Apartheid regime and the democratic government that took its place.

The state should also provide reparations to victims of rebel groups as well as of groups that were not under government control or acquiescence. This duty can arise either as a matter of law - for failure to guarantee rights, as is recognized in the Inter-American

Human Rights system - or out of basic fairness to victims, who should be treated similarly regardless of who the perpetrator is, since this is out of their control. One of the purposes of reparations is to help facilitate victims' integration in society, to make them feel that the rest of society cares about what happened to them by providing some kind of redress. It is also a way to distribute across society the costs of providing redress for harm. In this way, the state can provide reparations not because it was responsible for wrongdoing, but because of its obligation to provide for the common good and to assist in reintegrating victims - without making distinctions as to who committed the crimes.

For its part, the international community has generally been reluctant to shoulder any share of responsibility for reparations. The argument is that if a state is responsible for harms done, it should not escape accountability by asking international donors to carry the burden of cost. However, where the state takes on the bulk of responsibility, support from the international community in general – and sometimes specific states in particular - may well be appropriate. Experience tells us that even where international actors have played a role in the conflict, unless they are ordered by a court to make reparations they are unlikely to do so explicitly. Nevertheless, they may be willing to contribute to related efforts, freeing up state resources for reparations. While such contributions may support material responses to violations, they lack the symbolic resonance of public acknowledgment of wrongdoing.

East Timor's truth commission called upon Indonesia to make reparations for its occupation, but recognized that "the struggle to gain reparations from an invading nation is one that may take time. In the meantime, many of the victims can no longer wait. East Timor must step into the void. The international community, who looked the other way when atrocities were committed, also bears a portion of this responsibility."⁹ In an unusual development, the World Bank provided funds for an urgent interim reparations program during the operation of the truth commission, but reparations since the truth commission have not yet been implemented.

V. FINANCING AND IMPLEMENTATION

A. Planning for feasibility

In recent years, particularly in places where truth commissions have been given the task of formulating recommendations on reparations measures, societies have expressly recognized their obligations under international law and started to design reparations policy with much greater creativity and sophistication. Nevertheless, the implementation of those recommendations continues to be the point at which plans – and victims' expectations – can, and often do, fall apart.

⁹ The Commission for Reception, Truth, and Reconciliation Timor-Leste (CAVR). 2005. *Chega! The Report of the Commission for Reception, Truth, and Reconciliation Timor-Leste: Executive Summary*, p.202. Accessed 23 August 2007 at <http://www.etan.org/etanpdf/2006/CAVR/Chega!-Report-Executive-Summary.pdf>.

Implementation is no less a problem where truth commissions have not operated. The absence of a truth recovery process may necessitate several additional, preliminary steps in a reparations program - identifying who the victims are, for example, and what harms are to be addressed. Effective implementation requires an early and realistic assessment of victims' situation and the formulation of ways to assure their access to reparations – for example, through a decentralized process that is flexible about the showing required of victims to make a valid claim. The implementation of reparations should be sensitive and consciously avoid re-victimizing recipients and entrenching prior inequalities or existing discrimination.

Clearly, at the outset of the design stage, the reparations program should take into account the limitations and opportunities for implementation that will surely emerge. In some places, cash compensation may be one of the easiest programs to deliver, but this does not necessarily resolve the primary need for land or other material or service needs that may not become easily available through cash payment. In other settings, plans for mental and physical healthcare will either be workable (as in Chile, which had a fairly developed social security system in place, though it still proved insufficient to meet the demand and expectations of victims) or very incremental, with little (albeit growing) delivery envisaged for several decades (as in Peru, where the national health system had only a handful of specialists in psychological healing). In Peru, this deficiency was noted early on and emphasis in the reparations plan was placed on training in this area and in facilitating community mutual support groups.

It is also important for the bodies charged with defining the eligibility of victims for specific programs or with implementing reparations to have the power and capacity to take decisions and to move the process forward. If that responsibility is placed on non-functional bodies, the process will be undermined and lead to widespread frustration. The implementing bodies and those charged with registering victims must have the trust of victims and other citizens to ensure that implementation is fair and just. In Turkey, local compensation commissions were created to implement a program to provide compensation for material damages “arising from acts of terror or from measures taken to fight against terror” since 1987, in connection with the conflict between Turkish armed forces and the Kurdistan Workers Party (PKK) in the south-eastern part of the country. Made up of local government officials supplemented by only one representative of civil society (from the local bar association), some of these commissions have reportedly tended to favor cases in which the rebels are at fault and downplayed government abuses, though they are empowered to compensate for these as well. This clearly has an impact on how reparation is understood and how it actually works on the ground.¹⁰

In Guatemala, a bilateral commission made up of government representatives and victim representatives was so reflective of the divisions in these communities and the

¹⁰ Turkish Economic and Social Studies Foundation (TESEV) report: “Overcoming a legacy of Mistrust: Towards Reconciliation between the State and the Displaced.” (Geneva and Istanbul: Norwegian Refugee Council and TESEV, May 2006), 41-42. Accessible at: http://www.tesev.org.tr/eng/events/Turkey_report_1June2006.pdf. Accessed 27 August 2007.

government's ambivalence toward effective action on reparations that it was unable to resolve basic policy decisions about how to move forward and led to government taking over the implementation role. The Peruvian commission charged with overseeing reparations policy was, at one point, moved from the portfolio of the President of the Cabinet to the Ministry of Justice. Since Justice had no real ability to convene and direct the coordination of relevant ministries, this was ineffective, and responsibility was eventually returned to the cabinet's president.

B. Immediate action, long-term strategy

Reparation is an urgent issue that often cannot wait if victims are to feel included in the nation's future. In some contexts, such as South Africa, East Timor, and Canada, interim measures have been introduced to respond to urgent needs. However, there may be some risk insofar as interim reparations may seem – and be – somewhat arbitrary, given the partial information available at the time about the victims and their situation. A further risk is that interim reparations may effectively diminish prospects for a more complete program later.

In the context of ongoing conflict, the top priorities may well be security and resettlement for internally displaced persons (IDPs) and other war-affected populations. Other reparations may have to wait until conditions allow. Whatever measures are undertaken in the interim, they need both to maximize their immediate reparative effect and foster trust in future measures to acknowledge and repair harm. It should also be recognized that victims' perceptions and demands regarding reparations change over time, as their security improves and as basic survival needs are met.

Reparation is almost always a long-term issue, requiring political support that transcends the period of one government and legal norms designed to ensure continuity. Educating the political class and society generally about the right of victims to reparations can be critical to initial and ongoing implementation. Legislation can be one way to provide some guarantee that reparations policy will not be easily overturned in changing political conditions. Long-term strategies need to accompany immediate action so that reparations are not isolated bandages on a grievously harmed population, but rather steady steps, fairly and logically prioritized over time, toward more holistic repair.

C. Financing reparations

Often, the first issue to arise in any discussion of reparations is the cost. There are real constraints on societies in post-conflict settings and important competing priorities for scarce resources. The way the state balances these competing priorities will reflect the nation's commitment to reparations. Political will and adequate planning for implementation over time can overcome resource and other constraints to some extent. As Alexander Segovia has pointed out, "... [W]hen there is a balance of political forces favorable to reparations, they are effectively financed, even if partially and gradually."¹¹

¹¹ Alexander Segovia, "Financing Reparations Programs," in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press: 2006), p.670.

When that political will is lacking, victims will face a long and often difficult road to redress.

Social sensitization, strategic alliances, and insistence from the international community can help to create the broad political support required for financing reparations. Even so, reparations will represent a significant expenditure that goes to a constituency that is usually not a powerful voting bloc. Nor is this constituency likely to be satisfied with the state's efforts at repair, since even the best-funded program will fall short of full restitution for victims. These factors become powerful disincentives to allocate resources for reparations. In South Africa, the truth commission made the case that reparations represented an extremely reasonable share of the national budget, particularly in comparison to military spending. Yet government remained reluctant to alienate the economic elite or to readjust its expenditures, and eventually paid out a fraction of the compensation recommended. Now, years later, the government has been pressured to release additional funds for reparations and has taken a small step toward making housing available to victims, who continue to demand greater attention.

Reparations in the present can avoid greater social harms - and their resulting costs - in the future. Moreover, the potential inadequacy of current measures should not be a justification for failure to act at all. These are the arguments that advocates will have to advance to ensure that some progress is made.

Governments tend to favor reparations programs that accomplish multiple purposes, such as social development projects, but these responses can lose their reparative effect for victims, as we have noted. Likewise, there is a tendency to favor the creation of special funds without guaranteeing their functionality. Government financing for reparations has been shown to be most effective when it is an integral part of a nation's budget rather than a special fund relying on donations. This requires advance planning, and in the case of victims' advocates who seek to influence policy, specialized knowledge in the area of national budgets and economic policy.

As already noted, the fact that reparations are linked to responsibility accounts for why the international community tends to be reluctant to contribute directly to this area of transitional justice. This in turn contributes to the marginalization of reparations on the justice agenda locally as well as internationally. Nevertheless, there have been some innovative approaches to assisting states with reparations. These have included recovery of stolen assets as well as agreements to exchange a certain amount of foreign debt for attention to victim populations. In some cases, funding has gone to reparations-oriented development projects, or to help support efforts to create a fair and just victim registry. To the extent that international actors are committed to acknowledging the importance of reparations within the peacebuilding agenda, incentives can be created and international support can be mobilized to ensure the state fulfills its obligation.

About the ICTJ:

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unsolved.

In order to promote justice, peace, and reconciliation, government officials and nongovernmental advocates are likely to consider a variety of transitional justice approaches including both judicial and nonjudicial responses to human rights crimes. The ICTJ assists in the development of integrated, comprehensive, and localized approaches to transitional justice comprising five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.

The Center is committed to building local capacity and generally strengthening the emerging field of transitional justice, and works closely with organizations and experts around the world to do so. By working in the field through local languages, the ICTJ provides comparative information, legal and policy analysis, documentation, and strategic research to justice and truth-seeking institutions, nongovernmental organizations, governments and others.

The ICTJ's Reparations Unit:

Reparation is a critical dimension of transitional justice and is specifically focused on the recognition of victims' rights and harms suffered. The ICTJ's work on reparations policy wrestles with the difficult question of how nations can repair harm, restore rights and dignity, and build trust through reparations. Differences in country contexts, institutional frameworks, and resources require a nuanced approach and varied policy options for reparations programs. Yet, the challenges are similar: defining concepts and objectives clearly; addressing financial questions; responding fairly to massive numbers of victims and a range of violations; attending to gender and other disparities; and reinforcing victims' dignity by relating reparations to truth-seeking, accountability, and reform.

The Center's groundbreaking studies on reparations programs and critical issues in this field, coupled with in-depth country work on reparations policy and implementation are helping to develop this important dimension of transitional justice. Through an experienced reparations team and consultants, the ICTJ provides technical assistance and policy input to our regional and country experts and to partners in countries where reparations is on the transitional justice agenda; continues to develop the field of transitional justice with respect to reparations policy and to advance research on reparations in specific cases; and facilitates the exchange of expertise and insights across experiences.

