Reparations Programs: Patterns, Tendencies, and Challenges

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The topic of this paper is the massive reparations programs for gross human rights violations such as those established by countries as diverse as Argentina, Chile, Morocco, and South Africa. Reparations can also be mandated by courts following the adjudication of typically isolated cases of human rights violations. Proposals for the implementation of out-of-court, administrative, large scale programs have become a staple of most transitional situations – which does not mean that programs (let alone ambitious or effective ones) are implemented in the end.

The normative-legal basis for the establishment of these programs has been strengthened and clarified significantly in the last few years, so the right to reparations is no longer considered to be merely "emergent."[2] But in addition to legal obligations, governments have other grounds for establishing such programs, which I will examine below. Broadly speaking, they are now perceived to be a part of a comprehensive transitional justice policy.

In this paper I will not provide a detailed overview of past experiences with reparations programs, nor attempt to provide guidance for their design or implementation; this I have done elsewhere.[3] Rather, after a short summary of a few of the critical variables in the design of reparations programs (section I), I will concentrate on briefly

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2 Thus, 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*, (A/RES/60/147, March 21, 2006) is said not to create new obligations but to encapsulate already existing ones. See also UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, February 8, 2005 and the accompanying reports by Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, E/CN.4/2004/88, February 27, 2004 and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, E/CN.4/2005/102, February 18, 2005. The Inter American Court of Human Rights, since the Velásquez-Rordríguez case has forcefully affirmed this right. See Velásquez-Rordríguez Judgment, Inter-Am. C.H.R., Ser. C, No. 4 (1988). See also Arturo Carrillo, "Justice in Context: the relevance of Inter-American Human Rights Law and Practice to Repairing the Past," in *The Handbook*, and Dinah Shelton, *Remedies in International Human Rights Law*, 2nd, ed. (New York: Oxford University Press, 2006).

3 Cf. Pablo de Greiff, "Addressing the Past: Reparations for Gross Human Rights Abuses," in *Civil War and the Rule of Law: Security, Development, Human Rights*, Agnés Hurwits and Reyko Huang, eds. International Peace Academy (Boulder, CO: Lynne Rienner Publishers, 2007); "Justice and Reparations," and "Repairing the Past: Compensation for Victims of Human Rights Violations," in *The Handbook of Reparations*, Pablo de Greiff, ed. (Oxford: Oxford University Press, 2006); "The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints," in *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, K. de Feyter, S. Parmentier, M. Bossuyt, P. Lemmens, eds. (Brussels: Intersentia, 2006); "Reparations Efforts in International Perspective; What Compensation Contributes to the achievement of Imperfect Justice," in *Repairing the Irreparable: Reparations and Reconstruction in South Africa,* Charles Villa-Vicencio and Erik Doxtader, eds. (Cape Town: David Phillips, 2004).

listing some of the recent patterns, tendencies, and challenges in discussions about reparations (section II). I will examine, in particular (although, per force, not in detail) the expansion of the transitional justice agenda, as revealed in the fact that it is increasingly expected to be an effective way of addressing not only the legacies of authoritarianism but also of conflict, and to be effective as a development tool or as a way of redressing socio-economic imbalances.

I. The basics of a reparations program[4]

The very broad understanding of the term «reparations» that underlies the five categories in the Basic Principles and Guidelines (restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition), 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 program to date: no reparations program 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.[5]

In practice, those who are responsible for designing reparations programs are unlikely to be responsible for designing policies dealing, for example, with truth-telling or institutional reform. They concentrate on the design of programs that are organized mainly around the distinction between material and symbolic measures and their individual or collective distribution. Rather than understanding "reparation" 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 measures that do, "reparations" in the strict sense.

Even with the narrower understanding of the tasks involved in designing and implementing a reparations program, the challenges are significant. To begin with, we should recognize that the violations which reparations programs seek to redress, are normally, strictly speaking, irreparable. There is of course no way of returning victims or their families to the "*status quo ante*", when the abuses involve the disappearance of a family member, torture, sexual abuse, years of illegal detention, etc. That there are victims who overcome such abuses is more a testimony to their own fortitude than to the effectiveness of any program. And yet, of course, this is no excuse for not trying to establish such programs. It is rather an invitation to conceptualize their aims more clearly, and to be mindful of the role that victims should play in that process.

Leaving aside the fact that reparations have a goal that cannot possibly be satisfied, I will concentrate on more modest (but still far-reaching) ambitions. In a paper in this same issue, I defend the view that the aims of reparations programs, as well as of other transitional justice measures, should be considered in terms of providing recognition to victims, not just in terms of their status as victims but primarily as *citizens,* and of making a contribution to fostering civic trust.[6] I will not rehearse that argument here, but merely add that reparations programs can accomplish these two goals, to the extent that they can, largely because of the norm-affirming capacity of transitional justice measures, especially when they coordinate with one another. In a nutshell, the argument is that both in terms of procedure and outcomes, reparations can signal that breaches to the norms establishing the basic rights of citizens are taken seriously, either again or anew, by the successor regime and other citizens, and sufficiently so to include the mobilization of resources in favor of those who had their rights violated. Since the basic norms of citizenship are part of the apparatus through which (a political conception of) justice is enshrined by means of law, in affirming those norms, reparations can serve the ultimate goal of transitional justice interventions, namely that of justice.

Now, turning over to questions of basic design, it makes sense to start by thinking about reparations programs in terms of a three-way relationship

4 This section tracks closely the work de Greiff did for OHCHR , *Rule of Law Tools for Post-Conflict States: Reparations Programmes.* HR/PUB/08/1(Geneva: OHCHR, 2008).

5 See, e.g., S/2004/616, para. 26.

6 For reasons of space I will not deal here with the two other, "final" goals which I argue reparations measures also serve, namely those of reconciliation and democratization.

between three categories, namely victims, beneficiaries, and benefits. A reparations program, then, can be considered as a mechanism that seeks to guarantee that every victim will receive at least some sort of benefit from it, thereby becoming a beneficiary. How is this accomplished?

A. Who is a victim?

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.
>
> 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 programs, as they pay increasing attention to international law commitments.[7]

B. Who is a beneficiary?

Even if a uniform and expansive definition of "victim" is adopted, this does not, on its own, settle a much more difficult question, one that all reparations programs face, namely how to select the human rights violations that will trigger access to benefits. For a reparations program to at least make sure that every victim is a beneficiary, 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 program would be *comprehensive*. No program has achieved total comprehensiveness. For instance, no massive reparations program 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 programs, some of them life-threatening, others not, but nevertheless quite serious, such as forced displacement.[8] Most programs have concentrated heavily on a few civil and political rights, those most closely related to violations of rights to very basic freedoms and to physical integrity, leaving the violations of other rights largely unrepaired, a trend that at least in discussions is being increasingly questioned as we will see in Section II.

Now, the fact that programs 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.

Having said this, however, no program has explained why certain violations trigger reparations benefits and not others. Not surprisingly and at least in part as a consequence of this omission, most programs 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

7 See the reports by the truth commissions in South Africa, Peru and Morocco, which already include long discussions about the international legal obligations concerning reparations.

8 The reparations program proposed by the Peruvian Truth and Reconciliation Commission recommended giving symbolic reparations as well as various services, including education and health, to 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).

others is likely to remedy at least the gratuitous exclusions.[9]

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 reparation program less comprehensive and consequently less complete.[10] The problems generated by this are manifold. Firstly, there is a question of justice, of unequal treatment that could undermine the program's legitimacy. Secondly, such exclusions merely guarantee that the issue of reparation will remain on the political agenda, which may threaten the stability of the initiative as a whole.

Part of this challenge can be mitigated through creative design. Since one significant constraint is a program'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 programs distribute?

The combination of different kinds of benefits is what the term *complexity* seeks to capture. A reparations program 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 programs, 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 programs. The first is that it will maximize resources. Programs 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 programs 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 programs, then, can range from the very simple, i.e., merely handing out cash, to the highly complex, i.e., distributing not only 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 of targeting benefits flexibly so as to respond to a variety of victims needs. All other things being equal, "complexity" is a desirable characteristic in a reparations program.

9 See Ruth Rubio-Marín, "The gender of reparations in transitional democracies", in *The Gender of Reparations*, Ruth Rubio-Marín, ed. (New York: Cambridge University Press, 2009). It also bears recalling that decisions about which types of violations will be redressed are usually taken before the reparations programs are set up, often when the mandate of a truth commissions 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, as was the case in Morocco and in Brazil.

10 "Completeness" refers to the ability of a program to reach every victim, i.e., turn every victim (of at least the types of violations that trigger access to the program) 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 only be approached 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 program — its challenges need to be dealt with before others are addressed. The completeness of a program depends, in part, on factors such as effective outreach, ample and flexible registration deadlines, easy access, effective information-gathering, realistic evidentiary thresholds, and involvement of NGOs including local groups, victims and human rights organizations.

D. Defining the goals of reparations, and how this affects the levels of compensation

One of the greatest challenges faced by reparations programs is where, exactly, to set the level of monetary compensation. Practice varies significantly from country to country. 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 bonds with a face value of $224,000 to the families of the disappeared. Chile offered them a monthly pension that distributed, originally, $537 per month in preset percentages among the different members of the family.[11]

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. Instead he chose the salary of the highest paid government officials as the basic unit for calculating 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 programs — means that existing practice is of questionable value as a precedent. Indeed, requiring future programs 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 resolution of individual, sporadic and isolated cases of violations, and that stemming from a massive reparations program faced with a large number of potential beneficiaries. A judicial approach to the question of 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. 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 programs, however, suggests that satisfying this criterion is rarely even attempted. It would be too easy to draw the conclusion that reparations programs have historically been manifestly unfair. This would tar all reparations programs with the same brush, even those that have made an earnest effort to redress victims — despite awarding less compensation than the same victims would have received 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?[12] 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 compensating for 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 the 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

11 See, e.g., the case studies in *The Handbook.*

12 Basic Principles, para. 11.

for reconstructing the rule of law, an aim that has a public, collective dimension.[13]

By examining reparations programs in detail 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 programs 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 program 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 programs 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 program 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 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 programs 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

13 Of course, where the proper quantum of monetary compensation should be set depends largely on the criteria of fairness and appropriateness, but these are not entirely isolated from judgments of feasibility. Judgments about the feasibility of paying certain costs are usually of the *ceteris paribus* type. It is clear that in a transition or a post-conflict situation it makes little sense for all other things to remain equal. Unless there is a budget surplus, it will be impossible to engage in aggressive reparations for victims without touching other State expenditures. To illustrate the point, while the government of South Africa refused to implement the Truth and Reconciliation Commission's recommendations on reparations, arguing that to do so would be too expensive, it was buying two submarines for its navy. 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, likewise, considered an expansion of its navy, while the comprehensive recommendations on reparations from the Truth and Reconciliation Commission remained largely unheeded.

well as others, take the benefits to provide a reason for renewed (or novel) civic trust.[14]

F. Interpreting reparations benefits. Linking reparation 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.[15]

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. Programs that achieve these connections are said to be *externally coherent* or to have *external integrity*.[16] This requirement is important for both pragmatic and conceptual reasons. Such connections provide an incentive to interpret 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).

G. Linking reparations programs to civil litigation

One more challenge facing those who design reparations programs is the link between the program 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 catalyzing the willingness of Governments to establish massive reparations programs.[17] Although their typically large awards contribute to setting expectations that normally cannot be satisfied by massive reparations programs, these awards can be used by victims and their representatives to put pressure on their Governments to establish sizable programs with high benefits.

Programs that stipulate that accepting their benefits forecloses other avenues of civil redress can be called *final*. The German programs, as well as the program established by the United States for the Japanese-Americans interned during the Second World War, are final in this sense: accepting benefits from these programs requires waiving the possibility of pursuing civil cases in courts of law. But not all programs are final in this respect. 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 suits against the State without effect, 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 whatever compensation benefits they had received through the reparations program to the State, so as to prevent anyone from receiving compensation twice for the same violation. This position tries to preserve the victims access to courts, while protecting the stability of the reparations program.[18]

14 There are aspects of the modalities of distribution, beyond the issue of the magnitude of the benefits, which can help achieving these two goals. Experience suggests that it is better to distribute compensation awards in the form of a pension rather than a lump sum; aside from the fact that pensions are less likely to be misspent and thus they may make a more sustainable contribution to the quality of life of victims, the point to stress here is that pensions do not invite the interpretation which lump sums frequently invite, namely, that the particular sum is the price that the government pays on the life of a victim. 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. Whether a reparations program should also apportion the benefits it distributes by percentages to specific family members may also have an impact on how the program is perceived by beneficiaries. See Rule of Law Tools: Reparations Programmes. The general approach to the criterion of justice in reparations defended here 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.

15 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….*

16 See de Greiff, "Addressing the Past." 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 program cohere and support one another.

17 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.

18 See also the careful study of reparations in Peru in Magarrell and Guillerot, op. cit., chap. 4.

It is difficult to decide, in the abstract, whether it is desirable, in general, for reparations programs 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, even worse, of jeopardizing the whole reparations program. 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 program. This can lead to a significant shift in expectations, and to a generalized sense of disappointment with the program'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 programs. Nevertheless, those who are entrusted with the responsibility of designing massive programs should decide how the programs 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 favor of leaving that right untouched or as uncurtailed as possible, with the proviso that no one should be entitled to receive benefits both through programs and through courts.[19]

19 In Argentina, the victims of illegal detention were allowed to continue with legal proceedings already in progress and could then choose whichever set of benefits was larger. The programs were also made accessible to those who had judicial cases resolved, but with lower benefits than those provided by the programs, so that they received the difference.

H. Making a reparations program gender-sensitive[20]

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 programs have neglected it so often, that it warrants a section of its own.

- Even before a reparations program is designed, gender-sensitive strategies must be set in place to gather gender-specific information that will be relevant for the program downstream and to secure the participation of women in debates about the design of the program.
- 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 those responsible for designing reparations programs 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 programs, i.e., programs 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. Each type of benefit requires gender-sensitive design and implementation.
- 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.

I. 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 imple-

20 "Gender sensitivity" need not mean greater sensitivity to the needs of women. However, the record of reparations programs 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).

mented 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 favor 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.[21]

Broadly speaking, there are two main models for financing 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:

- Special taxes targeting those who may have benefited from the conflict or the violations, like those that were proposed (but never adopted) by the Truth and Reconciliation Commission in South Africa..
- Recovery of illegal assets. Especially where a State has accepted to provide reparations for victims of third parties, nothing should prevent the State from attempting to recover illegal assets 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 programs 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 reparation is a matter of *rights*, reparations programs require stable sources of funding, and nothing guarantees more stability in financing than a dedicated budget line.

II. Recent patterns and trends

1. From authoritarian to conflict and postconflict settings

The application of transitional justice measures has migrated from the context in which they originally emerged, namely post-authoritarian settings, to post-conflict contexts, and indeed to contexts in which conflict is still ongoing such as Colombia. Whether this is a wise idea or not remains to be established. There are two factors which distinguish the authoritarian from the conflict-setting which ought to be kept in mind: first, the authoritarian settings were settings characterized by higher degrees of institutionalization than most of the contexts in which conflict has occurred in the recent past. Second, transitional justice measures were selected in the postauthoritarian settings to redress a particular kind of violations, namely those that stemmed from the abusive exercise of State power. In the postconflict setting the abuses stem much more from something akin to social collapse, or civil wars with many agents of violence, most of them non-state actors, and unconventional warriors and warfare.

It remains to be seen whether transitional justice measures can migrate from one context to another and still prove themselves effective (even if the conflict is actually over). In general, because most transitional justice measures aspire to making some attributions of responsibility (not in all cases coextensive with attributions of criminal responsibility), and to the extent that these are much more difficult to make in conflict and postconflict settings than in postauthoritarian settings, there are reasons to be

21 See Alexander Segovia, "Financing Reparations Programs: reflections from international experience", in *The Handbook.*

cautious. Another factor that needs to be taken into account is that the implementation of transitional justice measures depends upon a minimum but still demanding threshold of institutional capacities and resources which are often lacking in countries ravaged by conflict. So, to illustrate, discussions about reparations in a country like the Democratic Republic of Congo, whose victims number in the millions, where various agents of violence participated in the violence, where state institutions are notoriously fragile, and where a substantial part of the national budget comes from international cooperation can reasonably be expected to take a course very different from that of similar discussions in the contexts in which reparations programs have typically functioned.[22]

Reparations in postconflict settings also have to face the challenge of being long perceived as competitors for scarce resources that could be used for security and reconstruction purposes. The number of postconflict countries that have implemented, often with international support, programs for the disarmament, demobilization, and reintegration of excombatants, *without* implementing a reparations program for the victims of the conflict, is large indeed.[23]

2.The Expansion of the transitional justice agenda

For a variety of reasons, which include perceptions of success, showcasing effects, and lack of clear alternatives, transitional justice measures have become the vehicles for addressing problems that were not part of the agenda that motivated the implementation of these measures in their original context. There are increasing calls for transitional justice measures to tackle the following issues:

-developemental and socioeconomic deficits.

Over time, pressure on transitional justice measures to make themselves relevant for purposes of development has increased.[24] The sources of this tendency are diverse. The shift in transitional justice work to contexts marked by poverty and underdevelopment is of course a primary impetus. The dismal socio-economic condition of most victims in states ravaged by violence provides strong motivation for them to seek measures that contribute to the improvement of their living conditions. Governments, in turn, feed into the tendency, not always with either clarity or good intentions, by attempting to pass existing developmental programs as reparations programs.[25] And finally, there is the fact that truth commissions, which by now invariably include analyses of some of the structural and institutional "root causes" of violence, always claimed that this was one of the functions they performed better than judicial procedures did.

There is no question that victims often experience violence in ways that negatively impacts their usually already dismal socio-economic opportunities. Nor that most countries in which conflict rages face severe developmental deficits. Caution needs to be exercised, however, concerning the expectations of transitional justice measures in this domain. Truth commissions can indeed provide insight into some of the contextual, institutional, and structural factors that led to abuses. This is important, among other reasons, to catalyze motivations for change,[26] and some of the means for change, since it is well known by now that one of the consequences of putting transitional justice measures on a public agenda is the formation of civil society organizations. But truth commissions are temporary bodies, and governments record of implementation of their recommendations is mixed at best. Institutional reforms of the sort that are usually a part of transitional justice policies are often, and for good reason, more narrowly focused on addressing the more immediate security sector gaps that enabled violations. And reparations programs, the subject both of our concern here and of the greatest expectations in the spheres of development and socio-economic issues, are far from ideal vehicles for redressing deep and entrenched economic imbalances: their budgets have traditionally been far too meager to make a difference of this sort (frequently dwarfed when they have coexisted, by the budgets of DDR programs or of even deficient

22 Experience thus far seems to warrant caution; it is difficult to think of postconflict settings that have implemented transitional justice measures as comprehensively as, say, Argentina or Chile. On the other hand, the history of the application of these measures in postconflict settings is not as long, so it may be that these countries will "catch up."

23 See, de Greiff, "DDR and Reparations. Establishing links between peace and justice instruments," in *Building a Future on Peace and Justice: Studies on Transitional Justice, Conflict Resolution and Development*, Kai Ambos, Judith Large, and Marieke Wierda, eds., (Berlin: Springer, 2008).

24 See *Transitional Justice and Development; Making Connections*, Pablo de Greiff and Roger Duthie, eds., (New York: Social Sciences Research Council, 2009).

25 For recent illustrations of this tendency, see, ICTJ, "The Rabat Report: the Concept and Challenges of Collective Reparations," p. 46. Document available at: http://www.ictj.org/en/news/features/4095.html

26 See, e.g., Rolando Ames and Félix Reátegui, "Toward Systemic Social Transformation: Truth Commissions and Development," in *Transitional Justice and Development*.

social services).[27] Furthermore, the focus of reparations programs is, correctly, on the effort to provide benefits to victims by virtue of the fact that their fundamental rights were violated, rather than the provision of basic goods that *all* citizens deserve insofar as they are citizens. In short, reparations programs have not been designed primarily as a developmental tool. Having said this, however, the arguments in section I of this paper concerning the importance of "external coherence" speak for the coordination of reparations plans with development efforts. Furthermore, by affirming the importance of certain basic norms, as other transitional justice measures, reparations can arguably make a positive (but modest and largely indirect) contribution to developmental aims; development, after all, is not a process of haphazard accumulation, but one in which choice is maximized in an orderly, equitable, and sustainable way, something which is not possible without respect for certain basic norms.[28]

-Collective Reparations.

The dynamics leading to an increased interest in collective reparations are similar to those underlying the interest in using reparations with developmental aims.[29] Some of the positive reasons include the argument that, when violence targeted people for reasons having to do with collective factors, such as gender, or more fittingly, particular identities or group membership, it is appropriate to redress these violations by means that recognize and highlight the factors that led to people being targeted in the first place.[30] An even simpler, and in many ways uncontroversial, use of material reparations is ensuring that benefits target communities which are geographically located in areas that were the subject of the equivalent of "guilt by association," a form of collective punishment. Perhaps the clearest instance of such phenomenon is the set of communities in the vicinity of illegal detention centers established by the government in Morocco that were deliberately isolated and bypassed by all government plans *for that very reason*. These communities, which were in no way culpable for the abuses that took place in the detention centers, were left with huge developmental deficits over time. The Moroccan truth commission (IER) recommended community reparations plans to redress the developmental deficits generated by this plainly discriminatory treatment.[31] Although, strictly speaking, these plans may go beyond the purview of legalistic conceptions of human rights violations, from the standpoint of justice there is nothing particularly problematic about them.

Much more problematic are instances in which governments, as mentioned before, and on the (often incorrect) assumption that the collective is cheaper than the individual, propose reparations plans that fail to deliver benefits to individuals directly despite the possibility of establishing individual violations of rights, and of distinguishing between victims of those violations and others. There are three reasons why such cases should give especial pause: first, it is often the case that victims of conflict are precisely those who have traditionally not been recognized as individual rights-holders, but as part of undifferentiated masses, the wholly "other." Indeed, this often plays a role in identity-based forms of abuse, in which people are targeted by virtue of their membership in (usually ascribed, rather than chosen) groups.[32] So, precisely under these circumstances, it is important to recognize *not only* the identity-based factors leading to violations, but the fact that the members of those groups are *also* individual rights-bearers. Second, to the extent that collective reparations programs usually distribute goods that are "basic," they can be rightly interpreted to distribute goods that people are entitled to, not as a form of redress for violations they have suffered but as part of what it means to be a member of a shared social and institutional project. And finally, as mentioned before, because these goods are not only basic but also "public", i.e., non-excludable, they are usually shared by victims and non-victims alike, further diminishing their capacity to constitute themselves as markers of redress. When collective reparations programs force victims and perpetrators to collaborate with one another, as they often do, they impose a further burden on those victims that are not ready for this form of interaction.

27 See, e.g., de Greiff, "DDR and Reparations."

28 See, e.g., de Greiff "Articulating the Links between Transitional Justice and Development: Justice and Social Integration," in *Transitional Justice and Development.*

29 Discussions about collective reparations typically fails to establish some basic distinctions. Thus, there is nothing particularly problematic or controversial about using collective symbolic means such as apologies or memorials as means of reparations. More controversial is the distribution of material benefits to collectivities, rather than to individuals. This includes the distribution of "public goods," goods whose use cannot be limited to particular individuals or groups. For a more extensive discussion cf. OHCHR, *Rule of Law Tools: Reparations Programmes.*

30 See, e.g., Ruth Rubio-Marín "Gender and Collective Reparations in the Aftermath of Conflict and Political Repression," in *The Gender of Reparations*.

31 See the report at http://www.ier.ma/?lang=en.

32 On the relevance of transitional justice measures for dealing with identity-based conflicts, see the essays in *Identities in Transition*, Paige Arthur, ed., (New York: Cambridge University Press, 2010), a research project of the ICTJ.

Now, none of this speaks about the *impossibility* of designing collective reparations programs that meet these challenges, or about the absolute inappropriateness of such measures (as mentioned before). These considerations speak more against the tendency to substitute this kind of programs for programs that benefit individual victims of violations, in other words, about the advantages of thinking about ways in which collective reparations programs can, where possible and appropriate, *complement* individual programs.

-Economic Crimes.

Again, partly due to the characteristics of the new contexts in which transitional justice measures are being applied, namely contexts in which, for example, corruption is rampant and environmental crimes common, the measures are also supposed to redress these types of crimes. There is no question about the importance for transitional societies to control both (broad) categories of crimes. The question is more about the contribution that transitional justice measures can make to this end. Truth commissions seem to be broadening their mandate in that direction. This raises some specific challenges, important to keep in mindand to anticipate: the skills required to carry out investigations into human rights violations on the one hand, and economic crimes on the other, are quite different (not the least because the normative framework concerning the latter is much less developed, even at the international level, than that concerning the former). Second, the types of crimes are not only differently distributed in terms of participation (corruption, for instance, is arguably much more widespread than, say, disappearing people), and they occupy a different space in a given culture. Third (and perhaps consequently), there is the risk that mixing up the different categories of crimes may give the impression of a sort of "moral equivalence" amongst different types of crimes. Fourth (and perhaps ironically), political resistance on the part of stakeholders whose collaboration in the short run is required for a successful transition may increase with the expansion of the transitional agenda.

Once again, these are not necessarily insurmountable challenges, but ones that need to be kept presently in mind in order not to awaken unfulfillable expectations. Although no settled practice concerning the redress of "economic crimes" has emerged, what is certain is that issues about corporate responsibility, the recovery of illegal assets, and the prevention and redress of despoliation will only increase in significance over time. Similarly, in contexts of conflict, displacement and its attendant problems, including land restitution, are increasingly salient issues. One can expect these to become ever more frequent parts of the agenda of reparations programs.