VII. PROVIDING REPARATION IN SITUATIONS OF MASS VICTIMIZATION

Key Challenges Involved

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1. SETTING A TREND TOWARDS REPARATIVE JUSTICE

Over the past century, millions of civilians have fallen victim to acts of violence during conflict. The scale of violence against civilians has been far greater in the previous century than ever before. This has not only led to a dramatic increase in the numbers of civilian casualties of war during the 20th century, but also to a likewise dramatic increase in the proportion of civilian casualties as opposed to military casualties: From about 14% in World War I over 67% in World War II, to 90% by the end of the last century (Levi & Sider 1997). Civilians, notably women and children, are increasingly targeted. Conflicts involving child soldiers, widespread attacks on civilian populations, destruction and looting of civilian residences and institutions, abductions, the use of rape as an instrument of warfare, and massive deportations and ethnic cleansing have become common practices.

According to the UNHCR's annual 'Global Trends' report of June 2010, at the end of 2009, the number of people forcibly uprooted by conflict and persecution worldwide stood at 43.3 million, the highest number since the mid-nineties.[1] The total includes 15.2 million refugees and asylum seekers and 27.1 million internally displaced people uprooted within their own countries.[2]

One particular aspect of addressing the terrible consequences of mass victimization is found in providing reparation to victims. Mass atrocities cause large scale sufferings inflicted on individual human persons, collectivities and entire populations. More often than not victims of mass atrocities are ignored.

1 Www.unhcr.org/4c11f0be9.html.

2 Even though the first Human Security Report of 2005, the Human Security Brief of 2007, and the latest Human Security Report of 2009 all document a dramatic, but largely unknown decline in the number of wars, genocides and human rights abuses over the past decade.

Many societies do not have a genuine interest in the fate of victims; there is great reluctance to face and acknowledge cruelties that occurred and a sense prevails of irreparable harm anyway. In addition, societies trying to overcome a period of conflict show several profound shortcomings, both in the legal and social order that also affect proper reparation afterwards. Tomuschat singles out four main general areas (Tomuschat 2008, 54). First, inadequate laws, restrictions in legal scope and content relating to the committed crimes, impediments in getting access to justice and restrictive attitudes of courts are some of the *legal obstacles*. Second, often societies face *political obstacles* mainly from authorities and certain groups in society unwilling to recognise that wrongs were committed. Third, *severe economic consequences* as a result of a shortage or unjust distribution of resources further preclude easy recovery. Especially in those countries that already belonged to the developing countries, ensuring economic recovery is extra difficult. In addition, most conflicts lead to an enormous number of victims, putting stress on any proposed reparation regime. Prioritizing the allocation of resources thus poses vexing questions (Duthie 2009). Fourth, *under-empowerment* of victims themselves should be mentioned, mainly because of a lack of knowledge and capacity to present and pursue their claims. The last aspect is compounded by the vulnerability of groups of victimized persons, notably women, children, and members of specific racial, ethnic or religious groups. In addition, most contemporary conflicts are intra-state in nature, posing additional pressure and difficulties for reparation processes (Garfield & Neugut 1997; Fletcher & Weinstein 2002).[3]

It is undeniable that law and society for a long time were not victim oriented. In international law, reparations were for long not to the benefit of human beings. States were the main subjects of law and reparations were a matter of inter-State relations and obligations. Only in recent times, reflecting a process of "humanization of international law" (Meron 2006), victims' rights are receiving wider international recognition, as evident in international human rights instruments and in opinions of international human rights adjudicators, notably the European and Inter-American Courts of Human Rights. Similarly, the Statute of the International Criminal Court (ICC) opened up ways and means for victims to participate in the proceedings before the Court and to be afforded reparations. Along the same line victims' rights were in recent decades explicitly recognized in transitional justice processes, particularly in Latin America and in Africa, in serious efforts to come to terms with a legacy of large-scale human rights abuses. In the light of these developments attempts were made to further spell out and create mechanisms and tools for combating impunity and strengthening the normative basis of reparative justice. Thus, the

[3] Fletcher & Weinstein (2002, 576–577) refer in particular to the human suffering on a communal level which is a shared feature in many contemporary conflicts, where neighbour-on-neighbour violence is characteristic of this form of aggression.

United Nations General Assembly adopted in 2005 after a lengthy process of preparations and negotiations 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* (hereafter Reparation Principles).[4] In the same year the United Nations Commission on Human Rights endorsed an *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Impunity Principles).[5]

International lawyers continue the discussions on reparative principles. As an expression of strong interest and commitment on the part of international civil society, women's rights groups and activists adopted in 2007 the *Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation*.[6] More recently, the International Law Association discussed a Draft Declaration containing principles for reparation for victims of armed conflict at its annual meeting in August 2010.

While the legal and judicial approach to victims' entitlement to redress and reparation largely focused on the rights of individual victims, the acknowledgement of mass abuses and gross violations made the principle of reparative justice a subject of legitimate international concern. In response, the United Nations developed special procedures of investigation and retribution as a political and moral commitment to deal with consistent patterns of mass atrocities and gross violations of human rights. The initial focus was on apartheid and colonialism with progressive extension to many other situations of large-scale repression and conflict entailing mass crimes. In a parallel fashion, at domestic levels in the wake of mass atrocities, mechanisms and processes of transitional justice were developed, often in combination, such as criminal prosecutions, truth and reconciliation commissions, reparation schemes, and institutional reform. Thus, a complex arsenal of domestic mechanisms and processes came into being with differing levels of international involvement.[7]

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4 The guidelines were adopted and proclaimed by the UN General Assembly on 16 December 2005 (resolution 60/147), after a 15-year period of negotiations. Note that the Preamble mentions that the principles and guidelines do not "entail new international or domestic legal obligations, but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms."

5 UNCHR, *Updated Set of Principles for the Prosecution and Promotion of Human Rights through Action to Combat Impunity*, UN doc. E/CN.4/2005/102/Add. 1.

6 Http://womensrightscoalition.org/reparation.

7 UN, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. Report of the Secretary General, S2004/616, Geneva: UN, 23th August 2004, para. 8.

2. OUTLINE CHAPTER

An abundance of scholarly literature exists on reparation theories and legal procedures or administrative programmes set up to provide reparation to victims of mass atrocities or international crimes, often also referred to as gross violations of human rights and humanitarian law. This chapter aims to provide an analysis of what we consider to be the main challenges to carefully consider when devising and implementing reparative justice measures, whereby the focus is on victims of international crimes leading to mass victimization. In all regions and countries violations of human rights and fundamental freedoms occur and victims should be entitled to redress and reparation. However, in the context of this book not incidental or sporadic violations are the subject of close attention. The focus is on situations involving gross and massive violations of human rights, often amounting to crimes under international law as defined in the Statute of the ICC.

A first challenge is how to conceptualize victimhood in post-conflict situations. As noted by Mani "conflict or repression is often so widespread and traumatising that the entire society is victimised, and there is a need to redefine victims as the entire society" (Mani 2005, 68). The conception on who should be considered victims in societies in transition poses several complexities that will be further reflected upon.

The second challenge is how to adapt the existing judicial right to an effective *individual* remedy to the context of mass victimization where it is often claimed that *collective* reparations might be better suited to provide reparative justice (Roht-Arriaza 2003–2004; Van Boven 1995). Implementing a collective perspective may also result in including general goals of development aid in reparative measures. The third challenge will reflect upon this, by some contested, inclusion of development strategies in reparation programmes (De Greiff & Duthie 2009; Saris & Lofts 2009). In order to present arguments on how to balance this individual versus collective perspective and the inclusion of development goals, we will draw from victimological studies into the needs of victims and notions presented by the human security concept.

We realize that providing reparative justice to victims of international crimes requires tailor-made solutions in which the specific (historical, cultural and economic) context of the country should be taken into account. That being said, we do believe that the challenges discussed in this chapter apply in general to situations of mass victimization.

3. PARAMETERS OF REPARATIVE JUSTICE

The processes by which a state seeks to redress violations of a past regime are often labelled under the heading of 'transitional justice' initiatives (Fletcher &

Weinstein 2002, 574). Following Mani (2005, 55), transitional justice focuses on

> *how to address the legitimate claims for justice of victims and survivors of horrific abuses in a way that treads the delicate balance between averting a relapse into conflict or crisis on the one hand, and on the other hand consolidating long-term peace based on equity, respect and inclusion – which often requires considerable institutional reform and systematic change.*

Where transitional justice is referred to, it often includes truth commissions and trials, and institutional reform, for instance in the justice or security sector (Mani 2005, 55).

3.1. RIGHT TO KNOW, RIGHT TO JUSTICE, RIGHT TO REPARATION

Restoring the rule of law in societies that have been struck by serious violations of basic norms of humanity requires the building of basic domestic justice capacities. Reparation to victims, in its various modalities and in individual and collective dimensions, is to be devised and materialized within the broader setting of transitional justice. In this connection the Impunity Principles, referred to above, provide important guidance in mapping out (i) *The Right to Know*, (ii) *The Right to Justice* and (iii) *The Right to Reparation*, which, together with Guarantees of Non-Recurrence, are basic premises to serve the plight of victims.

The Right to Know as an inalienable right of people and as a right of victims and their families includes the right to know the truth about heinous crimes committed and circumstances and reasons leading thereto as well as what happened to victims, individually and collectively.[8] Article 24 of the Reparation Principles mentions that victims are entitled to seek and obtain information on the causes leading to their victimization, and to learn the truth with regard to these violations. The right to learn the truth is not incorporated so prominently in other international victims' rights instruments.[9] For victims of international crimes, this is an important aspect that needs to be addressed when guaranteeing the right to information. It goes beyond existing regulations about providing

8 See in detail Impunity Principles 2–5.

9 It is also included in the International Convention for the Protection of All Persons from Enforced Disappearances, entered into force on 23 December 2010, which states in Article 24.2 that each victim has the right to know the truth. This Convention is strongly influenced by the Reparation Principles.

information on important developments in a possible criminal procedure or the availability of services.[10]

The Right to Justice involves the duty of states to carry out prompt and impartial investigations of violations of human rights and international humanitarian law and bring to justice those responsible for serious crimes under international law.[11] Multigenerational research findings suggest that the process of redress and the attainment of justice can be critical to the healing for individual victims, as well as their families, societies and nations (see also Danieli, this volume).

The Right to Reparation completes this trilogy of basic justice. It is a victim oriented right implying a duty on the part of the state to provide reparation and the possibility for victims to seek redress from the perpetrator.[12] The Right to Reparation is also the main thrust of the Reparation Principles. The overarching principle on reparations is contained in Part IX, para 18. It notes that

> *in accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation (…).*[13]

It should be noted that the right to a remedy entails two elements; the *procedural* right of access to justice and the *substantive* right to redress for injury suffered. The procedural dimension is reflected in the concept of the duty to provide "effective domestic remedies" as included in almost all human rights instruments. The substantive part relates to the duty to provide redress for harm suffered in the form of restitution, compensation, rehabilitation, satisfaction and – by way of institutional reforms and enhancing respect for the rule of law – guarantees of non-repetition and prevention of violations.[14] In our discussion we focus on these five forms of providing reparation.[15]

Restitution refers to restoring the victim to the original situation before the violation took place, including, among other things, restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's

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10 For more information on the Reparation Principles and reparation in general, see Shelton 2005, 11–32.

11 See Impunity Principles 19 ff.

12 See Impunity Principles 31 ff.

13 Previous drafts used headings such as 'victims' rights to reparations'; the current heading is reparation for harm suffered. Also previous drafts used the word 'shall' instead of should.

14 Although the two concepts are often confused, the terms 'remedy' and 'reparation' are therefore not synonyms. The definition of 'remedy' includes the right to equal and effective access to justice, the admission to relevant information concerning violations and redress mechanisms, and the right to prompt and adequate reparation.

15 See Reparation Principles 19–23.

place of residence, restoration of employment and return of property. This reflects the original meaning of the principle of *restitutio in integrum*.

Compensation is defined as providing for any economically assessable damage, listing the following items: physical or mental harm, lost opportunities, including employment, education and social benefits, material damages and loss of earnings, including loss of earning potential, moral damage, and costs required for legal or expert assistance, medicine and medical services, and psychological and social services. International mechanisms such as the Inter-American Court and the European Court of Human Rights appear to agree on the following interpretation of fair and adequate compensation: "The ideal behind reparations is 'full restitution' (restitutio in integrum), that is the restoration of the *status quo ante*". (De Greiff 2006, 455) In cases where this is not possible, for example when death has occurred, compensation is required. Case law of international and regional bodies has further elaborated this principle. See, for instance, the extensive case law of the Inter-American Court of Human Rights, which has also defined crucial concepts such as moral damage, damage to a life plan, and has interpreted the right to receive reparations taking into account the peculiarities of groups or communities (such as indigenous groups) which could serve as an exemplary model.

Rehabilitation includes medical and psychological care as well as legal and social services (Section IX, Article 21).[16] Article 22 elaborates the different forms of *satisfaction,* including, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations; (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgment of the facts and acceptance of responsibility; (f) Judicial and administrative sanctions against persons liable for the violations; (g) Commemorations and tributes to the victims;[17] (h) Inclusion of an accurate account of the violations

16 Special legislation for victims of terrorism often stipulates that social rehabilitation is one of the goals to achieve.

17 The setting up of commemorations is not always easy. Note, for instance, the discussions between the victims' families of 9/11 and the business developers regarding the reconstruction of the site of the World Trade Center. See for more information, Issacharoff & Mansfield 2006, 307 ff.

that occurred in international human rights law and international humanitarian law training and in educational material at all levels (Section IX, Article 22 a-h). Finally, States should take measures for the *guarantees of non-repetition*, which will also contribute to prevention (Section IX, Article 23).

The Reparation Principles have furthermore incorporated some of the general victims of crime rights, such as Article 10 relating to the treatment of victims (ensuring that victims should be treated with humanity and respect for their dignity, ensure their safety, physical and psychological well-being and privacy, and the prevention of secondary victimization). Another example of a classical victims' right is the right to information (Article 24), urging states to develop means of informing the general public and, in particular, victims of gross violations, of the rights and remedies contained in the Basic Principles, and of all available legal, medical, psychological, social, administrative and all other services to which victims may be entitled.

3.2. REPARATION-AS-RIGHT, AS-SYMBOL, AS-PROCESS

Before taking up the challenges of mass victimization and of affording reparative justice in those situations, it may be instructive to distinguish between three conceptual frameworks of reparations: *reparation-as-right*, *reparation-as-symbol*, and *reparation-as-process (*Saris & Lofts 2009, 86–87*).* Reparation-as-right as discussed in section 3.1 involves the victim's right to remedies, notably access to justice; adequate, effective and prompt reparations for harm suffered; access to relevant information concerning violations and reparation mechanisms.[18] Reparation-as-right is viewed from the perspective of the individual victim and often assessed and measured in terms of monetary compensation for the harm suffered in proportion to the gravity of the violation. This rests on the principle that the violation of an individual's rights creates a corresponding individual right to a remedy, and is thus consistent with the classic juridical understanding of the consequences proceeding from a violation of international law (Saris & Lofts 2009, 86). The law on State responsibility further prescribes that the breach of an international obligation by a state entails the duty of the state to make reparations.[19]

Reparation-as-symbol marks the symbolic meaning of certain forms of reparation and goes beyond individual victims' rights and interests. It represents strong social and community values. Reparation-as-symbol provides recognition to victims not only as victims but also as citizens and as rights holders more

18 See Reparation Principles, sections VII, VIII, IX, X.

19 *Factory at Chorzow*, Judgment No. 8, 1927, P.C.I.J., Series A, no. 17, at 29. Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd Session 2001.

generally.[20] It falls in the category of satisfaction and may include official declarations to restore the dignity, the reputation and the rights of victims, public apologies, commemorations and tributes, rededication of places of detention and torture, as well as inclusion of an accurate account of past wrongs in educational and training materials.

Finally, reparation-as-process establishes a link of the past with the future. It gives prominence to participation and empowerment, in particular with respect to victimized persons and groups. Its ultimate aim is reconciliation and a fair and equitable share in reconstruction efforts.

The 2005 Reparation Principles include these different conceptual perspectives on reparation. The Basic Principles acknowledge that

> *the judicial approach serves here as a means to activate non-judicial schemes and programmes for the benefit of large numbers of victims affected by gross and consisted violations of human rights. Both the judicial and the non-judicial approach should interrelate and interact in a complementary fashion for the reparation and other assistance to victims.* (Van Boven 2005, vii)

4. FIRST CHALLENGE – CONCEPTUALIZATION OF VICTIMHOOD

The conceptualization of victimhood in societies in transition poses several complexities. Important scholarly work within victimology has been done in conceptualizing victimhood by categorizing groups in primary, secondary and tertiary (or vicarious) victims. This part will analyse whether such categorization can offer useful tools in the conceptualization of victimhood in the context of international crimes (Letschert *et al.* 2010). At first let us explain how some of the existing international victims' rights instruments define who is entitled to victim protection. The 1985 UN *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* contains the following definition in Articles 1 and 2:

> *1. 'Victims' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power".*

[20] UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, p. 23.

> *"2. […] The term 'victim' also includes, where appropriate, the immediate family or dependants of the* direct *victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.* (emphasis added)

The Reparation principles in Article V.8 use the same definition. Legal persons are not entitled to protection under these two documents, contrary to the scope of protection offered by the Rules of Procedure and Evidence for the purpose of the Statute of the ICC. Rule 85 notes that the notion of victims may also include

> *organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*[21]

The reference in the UN definitions to individual *and* collective victims' suffering of various kinds of harm gives room for a broad interpretation of the concept of victimhood. The second paragraph, however, limits the protection by referring to the *direct* victim, thereby implying that the category under paragraph 1 should be directly victimized by the act. Broadening the scope of victim protection and thereby offering all the different victims' rights included in these documents to all categories (direct and indirect) of victims would make the implementation of these provisions unrealistic. Therefore, following an analysis that was made with regard to defining categories of victims of terrorism (Letschert *et al.* 2010), a distinction could be made between the following categories of victims:

- Primary victims: those persons who suffered harm, including physical or mental injury, emotional suffering or economic loss directly caused by the act.
- Secondary victims: consisting of dependants or relatives of the deceased and first responders to acts of terrorism (see also the definition in the UN Declaration and the Reparation principles).
- Tertiary victims: All others not listed under primary and secondary victims could be considered tertiary victims.[22]

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21 The Rules of Procedure and Evidence set out general principles and clear descriptions of specific procedures underpinning and supplementing the provisions of the Statute. They are subordinate to the provisions of the Statute.

22 This third category includes each and every person that feels victimized by the event, whether actually present during the conflict or a so-called 'outsider'. Research conducted after 9/11 revealed for instance levels of PTSD with persons who watched the plane fly into the World Trade Towers at the television. See also Schmid (2003) who refers, among others, to the constituency/society at large, or others who have reason to fear that they might be the next targets (referring to terrorism).

The distinction discussed before relating to reparation-as-right, as symbol or as process, could be an appropriate framework through which to address the entitlements and needs of these three victim categories. As to reparation-as-right, in several cases it was argued that compensation or reparation should be granted to other individuals as the direct victim as well. As Hofmann indicated in his commentary to the 2010 ILA Declaration (2010, 10)

> *harm can be suffered not only by the individual whose rights have been violated but also by third persons. As an example, the killing of a person may cause mental injury (e.g. posttraumatic stress disorder) to members of his or her family or persons present at the scene. There is precedence in State practice that such persons should have a right to reparation as well.*

The Inter-American Court of Human Rights acknowledged for example in the *Aloeboetoe* case that under limited conditions, third parties might file a claim for compensatory damages.[23] The UN Compensation Commission (Holtzmann & Kristjánsdóttir 2007, 59),[24] the European Court of Human Rights[25] as well as the Human Rights Committee have taken similar approaches. The Human Rights Committee goes even further by stating that

> *it is the suffering of harm which qualifies these third persons as victims. It sees no compelling reason to a priori restrict this group of third persons to members of the 'immediate family', 'dependants' or 'persons who have suffered harm in intervening to assist victims in distress or to prevent victimization' as done in the Basic Principles.*[26]

As to connecting the harm to the violation the Committee suggests that two considerations guide the choice of the appropriate criterion to apply: "first, the need to exclude harm that is too remote (such as e.g. unrelated persons far removed from the conflict who are emotionally affected by news of the suffering); and second, the need not to unduly limit the number of victims. The two aspects should be balanced carefully" (UN Human Rights Committee Communication

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23 *Aloeboetoe et al. v. Suriname*, Reparations (Article 63 (1) American Convention on Human Rights), Judgement of September 10, 1993, Inter-AmCtHR (Ser.C) No.15 (1994), paras 67, 76. See also *Loayza Tamayo v. Peru*, Judgement of November 27, 1998, Inter-AmCtHR (Ser.C) No.42; and *Blake v. Guatemala*, Judgement of January 22, 1999, Inter-AmCtHR (Ser.C) No.48. For further reference see Schönsteiner 2008, 133 ff.

24 According to decision S/AC.26/1991/3, Nr. 3 (c) of the Governing Council of the UN Compensation Commission, October 18, 1991, a spouse, child or parent of the individual who suffered death may claim compensation for pecuniary losses resulting from mental pain and anguish.

25 See e.g. *Velikova v. Bulgaria*, Application No. 41488/98, Judgement of May 18, 2000 and *Kurt v. Turkey*, Application No. 15/1997/799/1002, Judgement of 25 May 1998.

26 See e.g. *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003).

2000, 11). Also the 2008 UN Report[27] argues that setting the bar too high will leave out many victims.

> *The requirements for qualifying as a beneficiary should be sensitive not just to the needs of victims (…), but also to their possibilities. The more demanding the evidentiary requirements, the more false claims will be excluded; but so will perfectly legitimate claims, preventing the programme from achieving completeness.*

Taking these observations into account, from a purely legal point of view it seems reasonable to include both primary and secondary victims under the reparation-as-right formula. However, in situations of mass victimization this might be too ambitious and in the end raise false expectations by victims.

When providing reparation-as-symbol, or as process, the entitlements and the needs of communities affected by mass violence can be addressed, thereby including all three victim categories and depending on the form of reparation, also the community at large. Many conflicts are characterized by, as Roht-Arriaza calls it, shades of grey (2006, 4), whereby in the aftermath society (often through trials) tries to divide the population into a small group of guilty parties and an innocent majority, which was thereby cleansed of wrongdoing. Rama Mani (2005, 69) argued that

> *by ignoring (…) vast categories of society but creating deep and often fallacious and misleading distinctions between people defined solely in terms of victims and perpetrators, transitional justice as currently practiced divides and alienates. What is needed in the aftermath of conflict and political crisis for a peaceful and just transition is a more inclusive notion that encompasses all parts of society whatever their past role/s during the conflict or crisis. It is a notion based on all individuals within society defined collectively as "survivors" rather than victims, perpetrators or beneficiaries and bystanders.*

Rombouts for her part describes the differences in approach between the South-African and Rwandan reparation regime. The conception of victim in South-Africa is evidence of a holistic conflict approach, where in Rwanda a more segmental conflict approach is adopted (2004, 360). According to Fletcher and Weinstein (2002, 581)

> *there is a collective nature to mass violence that challenges the validity of the construct of the innocent bystander. The literature on social psychology suggests that individual action or inaction is influenced profoundly by social context, particularly in situations of conflict. This leads up to the question whether the consequences of collective violence*

[27] UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, p. 17, relating to evidentiary requirements.

> *can be effectively addressed without attending to the collective as a unit of analysis.* In addition, at 605, they assert that *we find evidence to support the proposition that there is communal engagement with mass violence and this dimension is not addressed by individualized criminal trials. Work of social psychologists forces us to rethink the question of collective responsibility.*

Another important aspect to take into account is that within the course of the same conflict groups and individuals may switch roles over time: a victim one day might turn perpetrator the next in a perceived struggle for survival (see also Smeulers, this volume):

> *As the OAU eminent panel documented, in Rwanda many ordinary dutiful Hutus were galvanised to slaughter their Tutsi neighbours by propaganda urging them to exterminate the Tutsi enemy before they were exterminated themselves. Children forced to commit atrocities in war, as in Sierra Leone and Uganda, are as much victims as perpetrators. In such situations to draw a categorical dividing line between victims and survivors is often both erroneous and divisive.* (Rama Mani 2005, 67)

Devising reparation measures in these contexts is therefore a difficult if not sometimes impossible task, especially if it entails categorizing individuals or groups in beneficiaries or victimized groups. Reparative measures in these contexts should therefore aim to be as inclusive as possible, thereby recognizing the tremendous harm suffered by different individuals and groups in society.[28]

5. SECOND CHALLENGE – INDIVIDUAL VERSUS COLLECTIVE REPARATIONS

As already mentioned and as situations of repression, conflict and abuse dramatically bear out, mass victimization poses great challenges to societies so as to repair the harm inflicted on people. Harm is understood in a material and immaterial sense and people comprise individual human beings and collectivities. In such situations different and seemingly opposing considerations and factors may play a role, such as on the one hand the legal and moral consideration to make reparations complete and inclusive with respect to all victims, and on the other hand the policy factor where to draw lines of

[28] See in this regard also: UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, where a further elaboration is given of the notions of inclusiveness and completeness. See a recent report of the International Center of Transitional Justice in which the regulations governing the distribution of reparations to victims of the apartheid era in the form of medical and educational benefits is criticized (at http://ictj.org/news/south-africa-new-reparations-plan-embitters-many-victims?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=739f317712-World_Report_Issue_1_June_20116_8_2011&utm_medium=email, May 2011.

demarcation in view of the large number of victims. Approaches to afford adequate, fair and rightful reparation to victims may differ. In the reparation-as-right formula legal and judicial means prevail, as reflected in the Reparation Principles and the Impunity Principles. However, the reparation-as-right approach in no way rules out non-judicial schemes and programmes offering redress and reparation for the benefit of large numbers of victims. The reparation-as-symbol approach is, generally speaking, not geared towards legal action but inspired by considerations of morality and compassion. Thus, a broad scala of reparation programmes may be introduced and made operative as transitional justice processes and mechanisms (see also Correa, this volume).

5.1. INDIVIDUAL (LEGAL) APPROACH TO REPARATIONS

In order to grasp the individual perspective in the reparation debate, some words on its historic origin seem appropriate. Considering the number of books and articles written on this topic, we shall be brief and only highlight the most important issues relevant for our argumentation.

As the result of an international normative process, the legal basis for a right to a remedy and reparation became firmly anchored in the elaborate framework of international human rights' instruments, now widely ratified by States (Van Boven 2009, 21; Shelton 2008, 12).[29] Traditionally, under international law, States were held accountable only for what they did directly or through an agent, rendering acts of purely private individuals outside the scope of state responsibility (see Articles 1 and 2 of the ILC Draft Articles on State Responsibility). Articles 31–34 prescribe the content of reparations (see for a commentary Kerbrat, in Crawford *et al.* 2010, 573 ff). Article 31 notes that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 34 lists the various forms of reparation, namely restitution, compensation and satisfaction, either singly or in combination. More recently, the concept of

[29] See specifically Article 8 of the Universal Declaration of Human Rights, Articles 2(3), 9(5) and 14(6) of the International Covenant on Civil and Political Rights, Article 39 of the Convention on the Rights of a Child., Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 5(5), 13 and 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Articles 25, 68 and 63(1) of the Inter-American Convention on Human Rights as well as Article 21(2) of the African Charter on Human and People's Rights.

state responsibility has expanded. Nowadays, obligations assumed by a State under international human rights and humanitarian law entail legal consequences not only vis-à-vis other States but also with respect to individuals and groups of persons who are under the jurisdiction of the State. The understanding of state responsibility for the acts of private actors, even though clearly developed in international human rights law, is not as such reflected in international public law in general. This is also evidenced from the work of the International Law Commission that drafted the Articles on State Responsibility. During the Articles' long development process, much of the action in international law in the field of determining state responsibilities shifted to specialized regimes, such as regional human rights bodies. Many have by now their own *lex specialis* on responsibility. This increasing specialization and fragmentation of international law will influence the ILC project of elaborating a general law of state responsibility (Bodansky & Crook 2002).

In international academic fora, intensive debates are being held whether individuals have a legal right to claim individual reparation under international law. Seibert-Fohr (2009, 246) notes that

> *although recent developments under the international human rights treaties and the provisions on reparations for victims in the Rome Statute (Article 75) all provide evidence that there are emerging principles, in the absence of further State practice it is too early to speak of a rule of general international law providing the individual with a right to claim compensation for human rights violations.*

On the other hand, Hofmann, rapporteur of the ILA Committee on Reparations for Victims of Armed Conflicts[30] notes that

> *in view of the relevant state practice and taking note of a strong majority among scholars, the Committee came to the conclusion that, until most recently, international law did not provide for any right to reparation for victims of armed conflicts. The Committee submits, however, that the situation is changing: There are increasing examples of international bodies proposing, or even recognising, the existence of, or the need to establish, such a right.*

In this situation, the ILA Committee on Reparations to Victims of Armed Conflicts decided to draft a Declaration which is reflecting international law as it is progressively developing. The Reparation Principles, the Impunity Principles and the Chicago Principles on Post-Conflict Justice (Principle 3) are further evidence of such development. A right to reparation has also emerged in international criminal law (De Brouwer & Heikkilä 2012, forthcoming). Article 75 of the Rome Statute stipulates that the court may award reparation while

30 International Law Association, *The Hague Conference, Reparation for Victims of Armed Conflict*, 2010, at 2; available through www.ila-hq.org/en/committees/index.cfm/cid/1018.

taking into account the scope and extent of any damage, injury and loss occurred (Zegveld 2010).

Nevertheless, there are still considerable difficulties for victims of international crimes to access effective and enforceable remedies and reparations for the harm they suffered (Falk in De Greiff, 491). Only few reparations have actually been paid in the aftermath of mass atrocities (Roht-Arriaza 2003–2004). Mere codification of this general overarching right in various national and international instruments is just a first step. A process of consistent implementation of and compliance with the various rights embodied under this general principle is one of the biggest challenges of the future (Tomuschat 1999, 161). So far, analytical strength did not find a response in operational strategies (Van Boven 1995). Whereas States are willing to ratify international or regional instruments, it appears more complex when it comes to truly granting remedies to the victims of a breach of an international obligation. The 2010 ILA Declaration added a provision on obligations for States aiming to strengthen the rights of victims in that regard. Article 11 notes:

1. Responsible parties shall make every effort to give effect to the rights of victims to reparation.
2. They shall establish programmes and maintain institutions to facilitate access to reparation, including possible programmes addressed to persons affected by armed conflicts other than the victims defined in this Declaration.

As the commentary to this provision notes "taking account of the dissociation of rights and enforcement mechanisms in international law, this provision represents a necessary complement to the victims' rights to reparation (…)".

Scholars and international lawyers question whether such a rule of general international law would be desirable in every case. Quoting Seibert-Fohr again (2009, 244),

> *especially in case of past large-scale human rights abuses, the reconstruction of a democratic government can be jeopardized if there is a right of every victim to claim adequate compensation. Such a right would give rise to an extensive financial burden for the new government.*

The UN report on implementing guidelines of reparation seems to acknowledge this by noting that

> *while, under international law, gross violations of human rights and serious violations of international humanitarian law give rise to a right to reparation for victims, implying a duty on the State to make reparations, implementing this right and corresponding duty is in essence a matter of domestic law and policy. In this respect, national Governments possess a good deal of discretion and flexibility. (…) The Basic*

> *Principles and Guidelines are to serve as a source of inspiration, as an incentive, and as a tool for victim-oriented policies and practices.*[31]

Indeed, we would say, the limits of the juridical individual approach become clear if we take into account the magnitude of harm done, especially when directed at a large class of victims and in societies in the setting of transitions to democracy, and also taking into account the difficulties in conceptualizing victimhood as discussed in section 4. This makes it impractical to evaluate individual claims on a case-by-case basis in most instances, and therefore might not be consistent with the international law approach based on the individual that is embedded in human rights law (Falk 2006, 495). With regard to international crimes, this is in many cases unrealistic. A scarcity of resources often makes it unfeasible to satisfy the claims of all victims. As put by De Greiff, "the capacity of the State to redress victims on a case-by-case basis is overtaken when the violations cease to be the exception and become frequent" (2006, 454). On the other hand, we should not forget that

> *international law has also contributed to a generalized atmosphere of support, a reparations ethos, for compensating victims as part of its overall dedication to global justice and the enforcement of claims, and thus lends support to the domestic willingness to provide reparations when contextual factors are favourable.* (Falk 2006, 497)

The question thus poses itself whether in situations where mass atrocities have occurred reparative justice may be better served by collective measures rather than by litigation and decisions on individual claims. The rationale is twofold; the number of victims is often so high which, combined with a lack of resources, makes a collective approach more realistic. In addition, the communal aspect of violence is important to underscore in any reparation programme. The overall social context of gross and systematic violations is different compared to cases of individual human rights violations because often the entire population is victimized (see also Shelton 2008, 389 ff; Saris & Lofts 2009, 84). The work of Fletcher and Weinstein (2002) also suggests that communal actions may require communal responses (at 612), also when implementing reparations programmes when the aim is to achieve social repair.

5.2. COLLECTIVE REPARATION; LATITUDES AND LIMITS

On the other hand, from an individual human rights perspective a purely collective approach may be problematic. Much depends on how concrete

[31] UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, p. 14.

meaning is given to "adequate, effective and prompt reparation for harm suffered".[32] As generally assumed in connection with the Reparation Principles, there are no 'one size fits all' solutions to reparative justice. The Reparation Principles provide a good deal of latitude in affording reparations, as is implied in such terms as "taking into account of individual circumstances" and "as appropriate".[33] While perceptions and policies of reparation are mostly discussed and understood in monetary terms, the importance of non-monetary forms of reparation, referred to above as 'symbolic reparations', must be appreciated as forms of rendering satisfaction. Acknowledgement of harm inflicted and suffered and attribution of responsibility for grave abuses are important steps on the path of reparative justice but cannot be considered a mere substitute for restitutional measures and compensatory schemes. Further, any margins or latitudes in shaping reparative policies and programmes may never ignore the principle of non-discrimination and non-exclusion as stipulated in the Reparation Principles.[34] Another basic consideration is the principle of equal and effective access to justice as a right of victims. The most vulnerable segments among victimized groups and persons often lack the knowledge and the means and encounter many obstacles depriving them of access to reparation to which they are entitled (Van Boven 2007).

Social psychologists have also reflected on the "competing and often diverging psychological needs of the individual and the society with regards to making reparations" (Hamber 1998c, 1). In a paper with Wilson (1999), Hamber warns that psychologising the nation is problematic. The authors caution against the subordination of individual needs to the exigencies of national unity and reconciliation, and suggest that there may be many divergences between individual psychological processes and national processes such as truth commissions. At the same time, they recognise that the two are in some ways closely bound, as evidenced by the psychological importance for some of speaking in public at the TRC hearings (See further also Haldemann and Peacock, both this volume).

5.3. COLLECTIVE REPARATION; AFFIRMATION AND ASSERTION

In situations where gross and massive violations of human rights have occurred and the abuses constituted crimes under international law, adequate and effective reparation may well imply and require a resort to collective redress and collective means of reparation. Already in the early stages of the preparation of the

32 Reparation Principles, principle 11 (b).
33 Reparation Principles, principle 18.
34 Reparation Principles, principle 25.

Reparation Principles attention was paid to individuals and collectivities as victims and it was submitted that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims and to receive collective reparation accordingly. In this connection it was mentioned that the coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples.[35] While in the drafting process and negotiations of the Reparation Principles, the notion of collective reparation was contested as at variance with the premise that the right to reparation was *per se* a right of individual victims, this view did not prevail. Thus, the Reparation Principles refer, in addition to individual access to justice, to groups of victims to present claims and receive reparation.[36] The acknowledgement of the victimological notion of collective victimhood makes this instrument conceptually truly innovative. The Preamble explicitly notes that "contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively".

In a similar vein, the Impunity Principles refer to individuals and communities to whom reparations programmes may be addressed.[37] However, neither the Reparation Principles nor the Impunity Principles spell out the meaning of collective reparations. In this regard the 2008 United Nations publication on Reparations Programmes, published in the series of Rule of Law Tools for Post-Conflict States, is lucid and informative. It argues that the term 'collective' applies to reparative measures and types of goods and services made available by way of reparations but may also aim at a victimized group or community as the beneficiary of reparations. Symbolic reparations, such as public apology and setting up memorials, are collective forms of satisfaction extended to victimized groups or communities. But also the provision of material goods and services so as to restore decent living conditions, and to secure health and educational facilities, may serve as a mode of collective reparation.[38]

Besides their inclusion in the Reparation and Impunity Principles, the concept of collective reparation has been less explored compared to individuals' claims for reparation. Still, there are some developments that indicate that international law endorses collective reparation (Rosenfeld 2010; Dubinsky 2004; Roht-Arriaza 2004; Lapante 2007). In the 2010 ILA commentary to the Draft

35 Theo van Boven, Special Rapporteur, Final Report, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN doc. E/CN.4/Sub.2/1993/8, paras. 14–15.

36 Reparation Principles, principle 13.

37 Impunity Principles, principle 32.

38 A notable example is provided in the *Case of Aloeboetoe et al. v. Suriname*, where the Inter-American Court of Human Rights ordered the Government of Suriname to reopen and staff a school and to make a medical unit operational as an act of reparation for the deadly attack on twenty members of the indigenous Saramaka tribe (Judgement of 10 September 1993, Ser. C. No. 15).

Declaration on Reparation to Victims of Armed conflicts,[39] several references can be found to case law of the Inter-American Court of Human Rights where collective reparations were awarded (Hofmann 2010, 19). In *Moiwana v. Suriname* the Court held the following:

> *Given that the victims of the present case are members of the N´duka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole.*[40]

The ILA Commentary also refers to recommendations from several Truth Commissions. Examples include the recommendations of the truth commissions for Peru,[41] Guatemala,[42] Sierra Leona,[43] and Timor-Leste.[44] Collective reparations are also endorsed by the Rules of Procedure and Evidence of the ICC which stipulate that the Court may order reparation "on a collective basis" and that, where appropriate, a "collective award" can be made through the Trust Fund (Articles 75 and 79.1).

The ILA report[45] claims that there is considerable State practice supporting the view that the non-performance of the obligation to make full reparation might be justified in immediate post-conflict situations. The Ethiopia Eritrea Claims Commission, for example, held:

> *[T]he Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious injury to its population if such damages were paid. It thus considered whether it was necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs.*

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39 International Law Association, *The Hague Conference, Reparation for Victims of Armed Conflict, including a Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, 2010; available through www.ila-hq.org/en/committees/index.cfm/cid/1018.

40 IACtHR, *Case of the Moiwana Community v. Suriname*, Judgement of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs), para. 194.

41 Peruvian Truth and Reconciliation Commission, Plan of Integral Reparations (PIR), June 2003, para. 3.6, available at: www.cverdad.org.pe/.

42 Guatemala, Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations, III, para. 10, available at: http://shr.aaas.org/guatemala/ceh/report/english/toc.html.

43 Final Report of the Truth & Reconciliation Commission of Sierra Leone, Vol. 2, Chapter 4, Reparations, para. 27, available at:http://trcsierraleone.org/.

44 Chegal, Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), available at: www.cavrtimorleste.org/en/chegaReport.htm.

45 International Law Association, *The Hague Conference, Reparation for Victims of Armed Conflict, including a Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, 2010, at 20; available through www.ila-hq.org/en/committees/index.cfm/cid/1018.

In support of this approach, it pointed at human rights considerations as well as the function of reparation, emphasizing that reparation has a remedial and not a punitive function.

Considering the collective nature of international crimes, or in some cases human rights violations in general, several Governments have set up specific reparation programmes providing forms of redress to victims. It is beyond the scope of this contribution to go into a detailed discussion of the specifics of these programmes (see further Correa, this volume). The Handbook edited by Pablo de Greiff (2006) provides an excellent resource with case studies on several programmes. It suffices to say that they vary as to what kind of measures they take (individual or collective) and who takes responsibility for the design. History shows examples where Truth and Reconciliation Commissions recommend what kind of measures should be taken and who the beneficiaries are (think of South-Africa, Guatemala), whereas in other cases government institutions or self-standing reparations committees or procedures were set up (Brazil, Germany, Malawi, Morocco).

6. THIRD CHALLENGE – LINKING REPARATIVE JUSTICE TO DEVELOPMENT AID

6.1. HUMAN SECURITY AND REPARATIVE JUSTICE

For some time now, discussions are held whether transitional or reparative justice initiatives should include also specific development aims that target not only the victimized groups but the community at large. We have seen that individual reparative measures can include providing housing, social services or other socio-economic benefits (think of pensions). Until recently, collective reparative measures mostly entailed symbolic reparation such as a public apology or organizing commemorations. The ICC Trust Fund has recently awarded collective reparations to victims' group that benefit the larger community as well.[46]

What becomes clear also from closely reading the Reparation Principles is that the focus is not merely on justice mechanisms. Especially measures relating to satisfaction and guarantees of non-repetition have a wide scope and will involve substantial resources. The idea behind it is to offer as much as possible a comprehensive approach in offering redress to victims. This ties in closely with the promoted concept of human security. Human security, as argued by one of its apostles, former Canadian Minister of Foreign Affairs Lloyd Axworthy, is "in essence, an effort to construct a global society where the safety of the individual

[46] For an update on their projects, see www.trustfundforvictims.org/.

is at the centre of international priorities and a motivating force for international action".[47] Three main reports form the basis for the human security concept as it stands today: the *Human Development Report* issued by the UN Development Programme (1994), *Human Security Now* (2003) drafted by the Independent Commission on Human Security (initiated by Japan), and *Human Security Report, War and Peace in the 21st Century* by the Human Security Centre of the University of British Columbia in Canada (2005).[48] Whereas its predecessor, the concept of human development, exclusively focused on the right to a long and healthy life, education and access to health care, human security adds the right to live free of violations of human rights, criminal acts and political violence. It highlights the interrelationships between the threats of global crimes and other security risks such as those of extreme poverty or health. The human security concept thus tries to complement other related notions. For example, many of the existing human rights, such as the right to food and the right to education, are part of the holistic approach the human security concept aims to promote.[49] Other notions which the human security concept aims to combine are those of national security, the previous mentioned concept of human development and humanitarian intervention such as the concept of 'responsibility to protect.'[50] Human security aims to overcome the compartmentalization of these other notions (Letschert 2010; Bodelier 2010).[51]

The concept aims to systematically and coherently address the various threats[52] to the security of human beings. It is a concept that comprehensively

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47 Lloyd Axworthy talks to *Canada World View*. www.dfait-maeci.gc.ca/canada-magazine/special/se1t3-en.asp.

48 Commission on Human Security, *Human Security Now, Final Report*, New York, 2003, p. 4. As the forward of the report makes it clear (pages iv-v), the said commission was inspired by the 2000 UN Millennium Summit; funded by Japan under UN facilitation. UNDP, 'New dimensions of human security', *Human Development Report 1994*. Human Security Centre (HSC), *Human Security Report 2005: War and Peace in the 21st Century,* University of British Columbia, Canada, New York/Oxford, Oxford University Press, 2005.

49 In addition, the often proclaimed specific characteristics of human rights, being universal, interdependent and interrelated, are also reflected upon in the human security debate. The 1994 Human Development Report, for instance, notes that human security is a universal concern, of which the components are interdependent. UNDP, *Human Development Report*, 1994, New Dimensions of Human Security, New York, Oxford University Press, p. 22.

50 For a description of the similarities and differences between these notions, see Tadjbakhsh & Chenoy 2007.

51 There is still discussion how wide the scope of human security should be. The narrow approach limits it to violent threats to individuals from internal violence (an approach promoted by Canada), while the broad approach also includes threats like hunger, disease and natural disaster (as promoted in the UNDP Human Development Report of 1994 or by the Government of Japan). The wide approach of the human security concept aims to include under its scope each and every individual living in each and every country; everyone means the women who survived the multiple rapes in Rwanda, but also the single mother living in a dangerous neighbourhood in New York, or the business man residing in Tokyo.

52 Note that the meaning of the word 'threat' also includes helping countries to recover from conflicts. See also Human Security Now. Protecting and Empowering People. Commission

addresses both 'freedom from fear' and 'freedom from want'. It aims to deal with the capacity to identify threats and the underlying interdependencies, prevent them when possible and mitigate their effects when they do occur. In order to do so, a wide range of actors as potential providers of security and protection need to be involved, multiplying the opportunities for coordinated, international responses within a normative framework as well as for new institutional arrangements.[53]

Its relevance to the field of victimology and reparative justice is that human security claims to be people-oriented, thereby moving away from the State-centred approach that we see in traditional security debates (Tadjbakhsh & Chenoy 2007, 238). The individual human being is not only defined in terms of vulnerabilities, but also as someone who is capable of affecting change, that is, of empowering him or herself. Both elements of protection and empowerment play an important role.[54] Emphasis is therefore placed on a bottom-up approach: on communication, consultation, dialogue and partnership with the local population in order to improve early warning, intelligence gathering, the mobilization of local support, implementation and sustainability.[55] The emphasis is thus on the strength of individuals, particularly relevant to the human security debate in the sense that it prioritizes people above institutions. This actor-oriented approach forms a sharp contrast to established approaches in the national security domain that often present people as passive victims of violence or merely recipients of emergency relief.

By conceptualizing reparation or reparative justice not only as an individual right but also as a symbol or process (see section 3), emphasis is put on the role that reparations play in the complex transition out of a period of mass crimes and human rights violations, for individuals and society. In facilitating this process, reparations should aim to be both participatory and empowering (see also Saris & Lofts 2009).[56] Next to the participatory aspect, providing a comprehensive set of reparative measures is just as important. As Fletcher and Weinstein (2002, 623) describe

> *one of the consequences of mass violence is that the social fabric of a society is torn apart. Despite the fact that the prior social arrangements may not have guaranteed adequate respect and protection of human rights, there was a measure of stability. Yet*

on Human Security. Washington 2003: "cease-fire agreements and peace-settlements mark the end of violent conflict, but they do not ensure peace and human security", p. 57.

53 For critical remarks regarding the concept, see Letschert 2010; Paris 2001.

54 See also the Barcelona Report of the Study Group on Europe's Security Capabilities,' A Human Security Doctrine for Europe, Barcelona, 15 September 2004, executive summary.

55 "A key consideration must also be how, if and where possible, to involve the individual in the promotion of his/her own human security after all; individual empowerment is both a means as well as an objective of human security." Tadjbakhsh & Chenoy 2007, 238.

56 See also UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, 15.

> *the destabilization brought about by mass violence is so profound that the old ways are no longer viable options. Thus, social and institutional arrangements in this new era may not necessarily duplicate those prevailing during the pre-conflict period. Rather than reconstruction, peace and stability require construction of new societal structures and relationships.*

Following their analysis, this process of social reconstruction should consist of multiple approaches, consisting of the following elements: 1. justice initiatives; 2. democracy; 3. economic prosperity and transformation and 4. reconciliation. Fletscher and Weinstein's ecological model of responses to social breakdown demonstrates the different elements that need to be addressed in order for any reparation measure to have lasting effects. Such a comprehensive approach to address threats is also encouraged by the human security concept (see also on the different elements in providing reparative justice Danieli 2009).

Some prioritization is of course necessary. Already in 1968, Maslow developed his pyramid of needs. Taking a closer look at these needs, we can argue that he was not far away from promoting a human security concept (Maslows' needs theory was also applied to victims of international crimes by Wemmers & De Brouwer 2010). According to Maslow, people first have to satisfy their basic needs such as food and shelter as well as medical care. Often victims have lost their house, their family and are unable to work due to injuries suffered as a result of the victimization. These victims will, in the first place, need urgent medical care for their injuries as well as food and a place to stay. In addition, immediate trauma counselling is of utmost importance. However, Becker *et al.* argue that "victims know that individual therapeutic intervention is not enough. They need to know that their society as a whole acknowledges what has happened to them" (1990, 174).

The second level of needs identified by Maslow is safety. People need to feel safe and secure. The third and fourth levels of needs are a feeling of belonging or affection and self-esteem. Informal support can provide victims with a sense of feeling loved and accepted which in a conflict setting is often difficult to realise because of the many casualties within families and communities. The fifth need of self-actualization is the last stage, and according to Maslow only achievable if all the other needs are satisfied. While Maslow's hierarchy of needs was developed independent of both human security and victimology, it is important to note the convergence between the needs identified by Maslow and those of victims of international crimes (Wemmers & De Brouwer 2010; Letschert 2010). Both Amartya Sen and Martha Nussbaum, two prominent human security scholars, closely touch upon Maslow's ideas with their capabilities theory (Nussbaum & Sen 1993). Lastly, also Fletcher and Weinstein argued, referring to Maslow's theory, that

> *reconciliation – which requires empathy, forgiveness, and altruism – draws on higher order manifestations of need that cannot be addressed until the more basic needs are satisfied. An ecological model addresses this dynamic by assuring that attention is paid to these multiple levels of unsatisfied need both at an individual and community level.* (2002, 625)

6.2. LINKING REPARATIVE JUSTICE AND DEVELOPMENT GOALS

Several academics argued that transitional justice without a focus on socio-economic development would not achieve the goals it aims for (Miller 2008; Carranza 2008). Miller wrote that the separation of development strategies from transitional justice "allows a myth to be formed that the origins of conflict are political or ethnic rather than economic or resource based" (Miller 2008, 267–268). Others argued that even without a specific focus on social and economic development, transitional justice initiatives will undoubtedly also affect such development by creating conditions that may facilitate development. Duthie noted that

> *such measures as individual and collective reparations, property restitution, rehabilitation, and reintegrating victims and perpetrators (…) may alleviate marginalization, exclusion, and vulnerability by bringing people and groups into the economy, recognizing and empowering them as citizens, and perhaps generating economic activity.* (Duthie 2009, 20)

While in societies that have been struck by gross and massive violations of human rights, collective reparations focusing also on development aid can be considered a possible and effective means to achieve a fair degree of reparative justice, such an approach is not without perils. One such problem is that what is being offered by way of reparation, for instance basic social services is to be provided anyway to all citizens as an entitlement under general human rights law (Rombouts, Sardaro & Vandeginste 2005). Reparations are a means to achieve justice for the benefit of individual and collective victims by redressing harm done to them but they are no substitute for meeting targets that are pursued on other grounds. This also poses the question of the relationship between reparation programmes and development programmes. Both 'developing' and 'developed' countries may prefer for expeditious policy reasons to avoid honouring obligations arising from the duty to afford reparations. 'Developing' countries facing demands for reparations are inclined to argue that development *is* reparation. Similarly, 'developed' countries that are called upon to repair historical wrongs (slavery and colonialism), argue that compensatory measures are not the appropriate means for redressing historical injustice, but that instead

greater development efforts are needed to achieve a more just and equitable distribution of wealth and resources, in particular vis-à-vis disadvantaged, deprived and systematically injured groups.[57] It is enticing indeed to make a shift from reparation to development. Complex and agonizing issues of accountability are being avoided as well as troublesome classifications of people, as victims and as perpetrators. Such expeditious policy considerations appear to be attractive but they fail to recognize the essential notion of reparation as constituting part of a process towards peace, justice and reconciliation. They also fail to acknowledge a victim-oriented perspective that keeps faith with the plight of victims and survivors (Saris & Loft 2009, 90).[58] Quite significantly the Nairobi *Declaration on Women's and Girls' Right to a Remedy and Reparation* distances itself from development as a substitute for reparation. It urges the retention of reparation programmes but as an integral part of reconstruction and development programmes. The relevant section of the Nairobi Declaration reads:

> *Governments should not undertake development instead of reparation. All post-conflict societies need both reconstruction and development, of which reparation programmes are an integral part. Victims, especially women and girls, face particular obstacles in seizing the opportunities provided by development, thus risking their continued exclusion. In reparation, reconstruction and development programmes, affirmative action measures are necessary to respond to the needs and experiences of those women and girls.*[59]

7. VICTIMS' PERSPECTIVES ON REPARATIONS

Several surveys conducted in the last decade have analysed victims' perspectives on reparations. The Human Rights Centre of Berkeley University analysed victims' perspectives on different forms of reparations. Surveys were, for instance, carried out in DR-Congo, Cambodia and Northern Uganda. In the Northern Uganda survey (Pham, Vingh, Stover 2007) respondents were asked "what should be done for victims". Direct compensation to individuals was the

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57 Netherlands Advisory Council on International Affairs, *The World Conference against Racism and the Right to Reparation*, Report No. 22, June 2001.

58 Also UNHCHR, *Rule-of-Law Tools for Post-Conflict States; Reparations Programmes*, HR/PUB/08/1, 2008, p. 26.

59 See also Brooks 1999, 89: "Japan's approach to monetary redress in fact turned out to be controversial. The Government set up the 'Asian Women's' Fund' which is funded by donations from private individuals and organisations and does not pay compensation to individual survivors but rather is used to improve the conditions of all the women. This attempt at a community rehabilitative approach has been severely criticised by survivors. They have argued that it is a welfare-type system based on socio-economic need rather than on moral restitution, and thus fails to take responsibility for the wrongs committed."

most common answer, including financial compensation (52%), food (9%), and livestock/cattle (8%). Equal numbers (7%) mentioned counselling and education for children. Apologies, justice, or reconciliation were mentioned by 10 percent of respondents. Ninety-five percent of respondents said they wanted memorials to be established to remember what happened in Northern Uganda during the war (2007, 10 and 33). The Congo survey revealed that victims mostly wanted

> *material compensation, including money (40%), housing (28%), food (28%), and other material compensation (40%). Most respondents said such reparations should be provided to both individuals and the community as a whole (43%); 35 percent said it should be for individuals only, and 22 percent for the community only. One out of five considered that punishing those responsible should be done for the victims, and 17 percent indicated that an official recognition of the victims' suffering would also be important.* (Vinck *et al*. 2008, 52)

In March 2011, a Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the DRC was submitted to the UN High Commissioner for Human Rights.[60] Victims foremost expressed their need for health care and education, focussing on socio-economic reintegration programmes. Also, the need for recognition and acknowledgment of the enormous suffering was repeatedly expressed, for instance through public apologies, monuments and other forms of tribute. Some information on collective reparations is provided in the report. The panel noted that some of the victims who obtained court judgments expressed concern that collective reparations will benefit everyone, and not particularly those who were victimized.[61] The Panel gave as main reason the toll that their individual cases have taken on them.

In Cambodia, the ECCC judges have the authority to rule that only reparations of a collective, symbolic, and moral – but not financial – nature be provided to certain groups of victims (i.e., civil parties) (see further De Brouwer & Heikkilä 2012, forthcoming). Such reparations could include building statues, memorials, renaming public facilities, establishing days of remembrance, expunging criminal records, issuing declarations of death, exhuming bodies, and conducting reburials. Following a survey conducted in 2009,

> *the vast majority of our respondents (88%) said reparations should be provided to victims of the Khmer Rouge, and that they should be provided to the community as a whole (68%). Over half (53%) said reparations should be in a form that affects the daily lives of Cambodians, including social services (20%), infrastructure development (15%), economic development programs (12%), housing and land (5%), and provision of livestock, food, and agriculture tools (1%).*

60 UNHCHR, *Report of the Panel on Remedies and Reparations for Victims of Sexual Violence in the Democratic Republic of Congo to the High Commissioner for Human Rights*, 2011.

61 *Idem*, p. 50.

Based on these results, it was recommended to

> *recognize that the vast majority of Cambodians view themselves as direct or indirect victims of the Khmer Rouge and desire some form of collective and symbolic reparations. Why this is a pressing issue for the ECCC is reflected in the finding that most respondents said it was more important for the country to focus on problems Cambodians face in their daily lives than the crimes committed by the Khmer Rouge. This suggests that the ECCC must find ways to ground its activities in the current concerns and needs of the population. Providing reparations – especially those aimed at providing social services and infrastructure development – could help meet this need.* (Pham *et al*. 2009, 4, 6)

Research on the perspectives of victims of the South-African Apartheid regime towards reparations also demonstrated the difficulty of establishing what victims need in terms of reparations because victims' perspectives change over time (the surveys were carried out by the Centre for the Study of Violence and Reconciliation). One of the tasks of the South African Truth and Reconciliation Committee (TRC) was to implement measures aimed at the granting of reparation to, and the rehabilitation and restoration of the dignity of, victims of violation, and to this end, a Reparations and Rehabilitation Committee was established (see further Peacock, this volume). In 1998 a first survey was conducted. The report found

> *that a majority of participants regarded reconciliation and reparation as integrally linked, and that there would be no resolution without some form of reparation. Also of concern were the ongoing psychological problems of survivors and the lack of mechanisms for their continuing support. Participants generally were in favour of symbolic reparation to help do away with the legacy of the past.*[62]

The second CSVR paper (2000) analyses the views of survivors on reparation two years after the TRC final report. Here the authors note a shift in perceptions:

> *at the time of the first study, people thought about reparation primarily in terms of their immediate needs arising from the traumas suffered, for example medical treatment, reburial of bodies or erecting of tombstones. The idea of restitution was seldom expressed, and the authors suggest that it was beyond the belief of most that the damage could be repaired or that they could be returned to the financial position they had lost. Feelings of entitlement to restitution or demands for large sums of money were not usually expressed. However, according to the second piece of research, the passage of time, combined with the treatment of both victims and perpetrators, led to a change in victims' attitudes toward and expectations of reparation. In particular, seeing the granting of amnesties and legal assistance to perpetrators while most victims had no*

62 Quoted in Redress, *Torture Survivors' Perceptions of Reparations. Preliminary Survey*, 2001, 45, www.redress.org/downloads/publications/TSPR.pdf.

> *assistance with their statements to the TRC, or with challenging its findings, led to a certain bitterness.*[63]

The authors conclude that these factors have led to a situation where "victims now understand that it is only through reparations that there could be any sort of equity and justice resulting from the TRC process" (p. 2). Victims, it seems, are still waiting for a "fair deal" and are increasingly likely to regard reparation as the only route that may yield this.

The third piece of research relating to South-Africa is Simpson's (1998) evaluation of the TRC process. He found that the needs of victims were complex and changed over time, particularly when it came to the issue of reparation. For some, principal desire was for information; for others it was for widespread public acknowledgement of what had happened to them. Some rejected the TRC process entirely, including any form of reparation, as an inadequate substitute for punishment, and demanded "full justice"; others wanted direct confrontation with the perpetrator(s). Simpson found that the needs of some survivors were personal and private, whereas for others the goal was community-based or political vindication. He also found that needs changed over time for the same individual.[64]

8. CONCLUDING REMARKS

Whereas the three challenges discussed in this chapter are likely to be applicable to all post-conflict situations, providing general answers on how to address them in different contexts becomes more difficult. We stated already before that the need for contextualization of reparative justice processes is increasingly acknowledged. Orentlichter notes that "given the extraordinary range of national experiences and cultures, how could anyone imagine there to be a universally relevant formula for transitional justice" (2007, 18). Or "is it helpful for international law to mandate particular responses to past atrocities and thereby narrow the scope of local variation in responding to similar atrocities? Or, instead, is the best response invariably particular to each society?" (2007, 11) We would argue that the latter is the case. Increasingly, scholars argue that transitional justice initiatives should be established 'bottom down', 'from the grass root level', 'including local ownership'; an understanding also encouraged by the human security concept or the ecological model of Fletcher and Weinstein as discussed in the previous sections. This also fits into the notion of reparation-

63 *Idem*, p. 46.

64 *Ibidem*. See also Picker, R., *Victims' Perspectives about the Human Rights Violation Hearings*, Research Report Written for the Centre for the Study of Violence and Reconciliation, 2005; www.csvr.org.za/docs/humanrights/victimsperspectivshearings.pdf (last visited: 12 February 2010).

as-process where concepts such as participation and empowerment of victims take a prominent role. The brief review of victims' perceptions on reparations in the previous section also demonstrates the importance of including victims' voices in the design of reparative measures.

The idea of local ownership reflects also the increasing tendency to give due regard to tradition-based or tradition-inspired conceptions of providing justice. The chapter by Schotsman in this volume illustrates the variety of different tradition-inspired mechanisms used in countries such as Sierra Leone, Uganda and Rwanda to deal with the atrocities of the past. Differences in culture and tradition may impact upon processes of community repair that may be very different from previous applied models in other countries (Fletscher & Weinstein 2002, 633). Also relating to the inclusion of development aims similar observations are made. Higonett notes that

> *post-atrocity legal structures must incorporate elements of local justice and culture or, at the very least, be sensitive to realities and norms on the ground. A useful parallel to draw here is the near universal consensus in development philosophy that local involvement is critical to sustainable long-term development.* (2006, 360)

The UN Secretary-General also acknowledged that "we must learn as well to eschew one-size-fits-all formulas and the importation of foreign models, and, instead, base our support on national assessments, national participation and national needs and aspirations".[65] How, and if, such local traditions correspond to international norms merits further research (see for some research done already, Viaene & Brems 2010).

That being said, various studies reveal that it is still exceptional that transitional justice efforts, including reparative measures, are based on perceptions of future beneficiaries (Redress 2001; Pham *et al.* 2009). In addition, the impact of interventions, be it tradition-based or internationally influenced, or mixtures of both, is hardly consistently evaluated. This makes it difficult to give far-fledged or evidence-based statements regarding the short or long term effects of such measures on individual or collective groups of victims or society at large.

What appears from international (quasi) legal instruments is the need to find a balance between individual and collective and judicial and non-judicial forms of reparation. While the judicial approach to reparation characterizes the Reparation and Impunity Principles, non-judicial schemes and programmes offering redress and reparation do also contribute to reparative justice for the benefit of large number of victims. The Reparation principles also reflect this by combining individual measures intended to implement the right to reparation

65 UN SG, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. Report of the Secretary General, S2004/616, 23th August 2004.

(restitution, compensation and rehabilitation) as well as a strong focus on collective measures of satisfaction and guarantees of non-repetition.

Providing reparations to victims of international crimes is a fundamental requirement of law and morality, most directly for relieving the suffering of and affording justice to victims individually and collectively but also for the sake of healing a society whose integrity may be profoundly affected. There is a close link between the right to reparation and the right to know the truth. Verification of the facts and full and public disclosure of the truth are an important means to provide satisfaction to victims.[66] At the same time the process of linking reparations to revealing the truth forms part of the deployment of efforts to create safeguards against recurrence of violations. Guarantees of non-repetition imply a combination of looking backward and looking forward. As the UN Secretary-General stated in a report to the Security Council on transitional justice, looking backward and looking forward are inherent in processes of transitional justice in "a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".[67] Reparation is imperative in situations of gross, consistent and massive violations. Consequently, the *opinio iuris* is shaping steadily and progressively towards the abolition of legal prescriptions that foster a culture of impunity and for that matter impede or adversely affect policies and programmes of reparation. Developments in that direction are encouraging, but they do not as yet represent a general *acquis*. At any rate, the requirement of squarely facing the past, opening up the truth, repairing harm done, restoring the rule of law and preventing the recurrence of abuses must be a standing assignment in implementing domestic and global reparative justice agendas.

In this chapter we discussed three main challenges which illustrate the complexities in providing reparative justice in post-conflict societies. In section 3 we presented the conceptual framework of reparation as right, as symbol and as process. Analysing reparation through such an analytical lense helps addressing the three challenges discussed in this chapter. We first discussed the difficulties in conceptualizing victimhood in post-conflict situations (challenge 1), where the demarcation between victim and perpetrator groups is not always clear-cut and which poses several complexities; not only with regard to determining who is considered eligible to reparative measures, but also with regard to assessing the possible negative impact of reparative measures on wider societal concerns such as encouraging reconciliation and (re)-constructing the socio-economic infrastructure of post-conflict societies. A distinction was made between three different groups of victims, consisting of direct victims, indirect victims such as family members, and society at large. The first two categories

66 Reparation Principles, principle 22 (b).

67 UNCHR, *Updated Set of Principles for the Prosecution and Promotion of Human Rights through Action to Combat Impunity*, UN doc. E/CN.4/2005/102/Add. 1, para. 8.

should be entitled to individual reparative measures. We also acknowledged, however, that implementing this right in situations with huge numbers of victims will not be realistic. The impediments mentioned in the introduction of which the economic consequences of conflicts are most apparent, will often hinder governments in guaranteeing individual reparation. Also, having individual perpetrators actually pay for reparative measures is highly unrealistic. For this reason, providing collective reparations might be a more realistic solution. We have presented arguments against and in favour of collective reparations (challenge 2). Especially the provision of symbolic reparations, such as public apology and setting up memorials, are collective forms of satisfaction which extend to victimized groups or communities. But also the provision of material goods and services so as to restore decent living conditions, and to secure health and educational facilities (thereby also including development objectives in reparative justice measures which was discussed under challenge 3), may serve as a mode of collective reparation which will not only benefit victimized communities but also has the potential to benefit society at large. Such latter measures may never stand alone; various victimological studies reveal that denying specific acknowledgment and recognition of a person's individual victimization can have negative effects on victim's recovery.

What seems to be the biggest challenge for the future therefore is how to find an appropriate balance between satisfying individual victims' needs and collective needs, not only of victim groups, but also society at large. This requires more research, whereby insights from relevant fields such as international law, development studies, traumatic stress studies, the social psychology of group conflict and resolution, and the psychology and sociology of national and international legal processes should be closely integrated.