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Reparation

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9.1 Introduction

The concept of political transition in a post-conflict state and the notion of reparation are in their very essence interrelated and interdependent. On the one hand, reparation is a key element of any true transitional justice and reconciliation process. A transition must go beyond the introduction or reform of norms, institutions and procedures to mandate elected representatives if it is to eliminate discrimination and imbalances. This also involves the recognition and protection of individual rights and freedoms, and the state is under a corresponding obligation to provide redress if there have been abuses of these fundamental rights by state actors or former armed insurgents. On the other hand, transitional justice in practice has reshaped the notion of reparation. The concept has long been oriented to compensation and to the past. Today, however, reparative measures taken in the context of actual political transitions have broadened the very definition of reparation, which today includes important symbolic and future-oriented measures.

Reparation is a key element of any true transitional justice and reconciliation process.

9.2 What is Reparation?

9.2.1 Clarification of the Terminology

In international and national norms and case law, and in the political and historical literature, different terms are used to express sometimes identical or similar concepts - reparation, restitution, compensation, rehabilitation, satisfaction and redress. This chapter will use the term “reparation” as the most comprehensive notion, including all these concepts and covering a wide range of measures that are taken to redress past wrongs which may or may not qualify as human rights violations and/or as criminal offences. It will therefore not limit the use of the term reparation to the international law of state responsibility.

Traditionally in international law, “restitution” (or “re-establishment of the situation which existed before the wrongful act was committed”) was the main and preferred form of reparation, and was therefore often considered almost synonymous with “reparation”. It remains an important component of reparation as it relates to essential “belongings”, such as the return of property, the restoration of liberty, citizenship and other legal rights, the return to place of residence and the restoration of employment.

“Compensation” is the payment of money as a recognition of the wrong done and to make good the losses suffered. A distinction can be made between nominal damages (a small amount of money symbolizing the vindication of rights), pecuniary damages (intended to represent the closest possible financial equivalent of the loss or harm suffered), moral damages (relating to immaterial harm, such as fear, humiliation, mental distress or harm to a person’s reputation or dignity) and punitive damages (which are of a different nature, and intended rather to punish or deter than to make up for the loss suffered).

“Rehabilitation” can be defined as the restoration of a victim’s physical and psychological health. Including rehabilitation in a full reparation programme will normally require an initiative on the part of the state and its active involvement in the provision of medical and psychological care and of legal and social services. (The mere reimbursement of medical and other related expenses can be considered a form of compensation.)

The term “satisfaction” applies to those types of redress that do not aim to make good specific individual losses or harm. The main forms of satisfaction are: (a) the verification of the facts and the disclosure of the truth; (b) an apology; (c) sanctions against individual perpetrators; and (d) commemorations of and tributes to the victims.

All reparation measures have some minimal deterrent effect. Guarantees of non-repetition are specifically and purely preventive: they include structural reforms relating to the independence of the judiciary, civilian control of military and security forces, and the protection of those who defend human rights.

9.2.2 The Nature and Types of Reparation

The terminological clarification above has shown that reparation is an evolving concept and one that is becoming broader. Policy makers and victim support groups designing or advocating a reparation programme need to be aware of the different types of reparation measures:

- reparation rights and reparation politics;
- individual and collective measures;
- financial and non-financial measures; and
- commemorative and reform measures.

Reparation Rights and Reparation Policies

Some forms of reparation may find a legal basis in domestic law or in international human rights law, while other forms are a matter of policies and priorities. For instance, the right to compensation for victims of torture is an individual subjective right in most domestic legal systems and is justiciable in criminal, civil, administrative or other proceedings, depending on the national legal setting. In addition, after domestic remedies have been exhausted, international complaints procedures may be available, as a result of which an international judicial body, such as the Inter-American Commission on Human Rights or the European Court of Human Rights, can order a state to pay compensation in cases where the court finds that a violation has occurred.

There is no individual subjective right to other reparation measures, such as reform of the judiciary or the commemoration of torture victims. Even so, the impact of these elements of reparation may be much more important at a structural level, and they must therefore logically be included in a reparation policy. The work of international reporting mechanisms (such as the UN Committee Against Torture) may be helpful for civil society groups when designing proposals or lobbying for such structural reparation measures.

It is nevertheless important to stress the interaction between the enforcement of reparation rights and the adoption of reparation policies. In Argentina, for instance, proceedings instituted by victims before the Inter-American Commission on Human Rights were an essential incentive for the adoption of a national reparation policy, which included, among other things, the issuing of “certificates of forced disappearance”. This allowed the relatives of those forcibly “disappeared”, for instance, to deal with questions of inheritance.

Individual and Collective Measures

Irrespective of the legal or exclusively political nature of a specific form of reparation (see above), reparation measures can be taken individually or collectively. Transitional justice schemes will often need to deal with large numbers of violations committed under a previous regime. In such a context, almost paradoxically, the provision of purely individual reparation measures will often be insufficient and may be impossible. They will be insufficient because individual reparation measures are unlikely to truly remedy situations that have resulted from a long-standing practice of oppression. They should therefore, ideally, be supplemented by collective measures, such as access to medical services, education and employment for specific disadvantaged ethnic, religious or other groups or minorities. However, this combination of individual and collective approaches will often raise questions of logistical feasibility, financial constraints, and political and financial priority setting.

Financial and Non-Financial Reparation Measures

Some of the individual, non-financial reparation measures which can be considered for inclusion in a reparation programme are the restoration of citizenship, the issuing of death certificates of those who have been “made” to disappear, the facilitation of exhumations and reburials, and the expunging of criminal records. When designing a reparation programme it should be taken into account that a balanced package, including both financial and non-financial elements, is most likely to meet victims’ expectations and needs.

Commemorative and Reform Measures

Fairly recently there has been an increase in the incidence of claims for reparation related to injustices committed a long time ago, such as the Holocaust or the transatlantic slave trade. In this context, the US historian John Torpey distinguishes between two types of reparation claim. The first type is based on commemorative projects which call attention to the barbarity and humiliation associated with the past oppression. These claims are largely backward-looking, built on a perception - both internal (among the victims) and external (among the general public) - of victimhood, and not related to any current economic damage suffered as a result of past oppression. A second type of claim is rooted in a continuing economic disadvantage which is the result of a past oppressive system. These claims are forward-looking and non-systemic, tactical instruments used as part of larger projects of social transformation which seek to fundamentally alter the social and economic conditions of disadvantaged groups.

9.3 Why Reparation?

The close link between reparation, on the one hand, and post-conflict reconciliation and democratization, on the other hand, and the importance of including a reparation component in transitional politics and law can be shown from different perspectives.

A new post-conflict state, which commits itself to upholding the rule of law should guarantee the individual rights of all its citizens. If the state is responsible for acts of torture or other human rights violations committed under a previous regime, it should immediately show the seriousness of that commitment by living up to its obligation to provide reparation to the victims. In international legal terms, the responsibility of a successor regime or government for abuses committed by the previous regime is beyond any doubt. Honouring this commitment from the very start will shape the new political identity.

Reconciliation aims to break a cycle of violence and promote peaceful coexistence. In order to

achieve this, acts of revenge by victims of past oppression should be stopped - or, putting it more positively, victims' legitimate hunger for justice should be accommodated. This entails public recognition of their status as victims, public recognition of their suffering and the damage they have sustained, and a serious public effort to repair at least symbolically the harm done. It is a crucial instrument in allowing a society to get on with life.

Acknowledging and repairing the suffering of victims is a way of recognizing them as human beings, as equals, with their own human and civic dignity. In order to get on with life individually and to be able to function properly in the new society, each victim needs a renewed self-confidence. For the restoration of his or her psychological health and dignity, reparation - not only in its immaterial but also in its material, financial dimension - is an important tool. Moreover, continued preoccupation with their own distress cannot but hinder people's ability to be reconciled with others. The actual psychological impact of receiving reparation can differ greatly between people. For some victims reparation may mean the end of a personal healing process; for others it may be just the start of it.

Reparation gives victims a role in the transitional justice process. Theoretically, a political transition could limit itself to legal and institutional reforms (of the army, the judiciary, the constitution and so

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on) and to sanctioning perpetrators, leaving the victims out of the picture; but victims are likely to be better integrated into the transitional process if a reparation component is included. As a consequence, the confrontation between victims and perpetrators and the issue of reconciliation become much more immediately relevant. The

Guatemalan Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, CEH), for instance, recommended in particular that collective (as opposed to individual) reparation measures be implemented in such a way as to facilitate reconciliation between victims and perpetrators, without stigmatizing either.

Reparation, in the context of political transition, acts as a bridge between the past and the future. It combines the backward-looking objective of compensating victims with the forward-looking objectives of political reform. Thus, it also helps the new state in reconciling itself with its past.

In some cases, reparation can function as a compromise. In some post-conflict societies, systematic criminal prosecution of all those involved in the past oppression may threaten political stability and undermine democratic consolidation. On the other hand, requests by members of the previous regime that the past be simply forgotten are equally unacceptable. Reparation, which necessarily includes a form of sanctioning and honouring of victims' rights, is therefore in itself a useful instrument of compromise. This is all the more true in those cases where an amnesty law denies victims the right to institute civil claims against perpetrators: a state reparation programme may counter, to some extent, the effects of the amnesty legislation.

9.4 Sources of Reparation

Claims for reparation are most often based on two different types of source:

- Fundamental feelings that justice needs to be done and that harm needs to be undone may provide a strong moral basis.
- International (human rights) law and national legislation may provide a solid legal basis.

In many cases the two will be mutually reinforcing.

9.4.1 The Ethics and Politics of Reparation

Reparation is not an exclusively legal notion, and sources in international law are only one perspective from which to look at the recent, global practice of reparation.

The ever-increasing trend of attempts to repair historical injustices has led some observers to conclude that a new moral order is emerging in world politics and a critical shift taking place in political and economic bargaining. According to Elazar Barkan, a historian at Claremont Graduate University, USA: “The discourse of restitution encourages governments to admit that their policies were unjust and discriminatory and to negotiate with their victims over morally right and politically feasible options”. Looking at it from this perspective, reparation is primarily a matter of ethics and politics, and both national and international law will necessarily be framed according to the desired political end.

Roy Brooks distinguishes four mainly political and ethical conditions that need to be fulfilled for any demands for reparation to be successful: (a) claims for redress must be addressed to legislators rather than to judges: they must reach the hearts and minds of lawmakers and citizens; (b) strong political pressure is needed (which, according to Barkan, can be most effectively based on a system of “public shame”); (c) they will need strong and unquestioned internal support from the victims; and, critically important, (d) claims must be meritorious: showing that a well-documented human injustice has been committed, with lasting harmful effects for a distinct group of victims.

9.4.2 Reparation in Human Rights Law **International Human Rights Law**

Under international law, any conduct which is attributable to the state and which constitutes a breach of an international obligation of the state is an international wrongful act. An international wrongful act entails a corresponding responsibility on the part of the state. The legal consequences of this international responsibility are (a) the obligation to cease the wrongful conduct and (b) the obligation to make adequate reparation. In strictly legal terms, reparation may be defined as the various ways in which a state can redress an international wrong and, in doing so, discharge itself from state responsibility towards injured state parties and individuals or groups of victims for a breach of an international (human rights) obligation.

These general principles of public international law, laid down in the UN draft Articles on State Responsibility of the International Law Commission, are firmly embodied in a large number of international and regional human rights conventions. The obligation on states to provide reparation to victims of human rights violations has been further refined by the jurisprudence of a large number of international and regional courts, as well as other treaty bodies and complaints mechanisms. International human rights law has thus created a wide range of remedies, which include declaratory judgements with findings of violations, awards of (importantly, differentiated amounts of) compensatory damages, and orders for specific state action.

At the universal level, the UN Commission on Human Rights (UNCHR) has created various monitoring mechanisms dealing with particular human rights issues and remedies for human rights violations, outside the context of specific human rights treaties. In addition, UN treaty bodies monitor state compliance with specific human rights conventions. These conventions generally include provisions on reparation which have often been further defined and refined by treaty bodies.

Both these extra-conventional and conventional mechanisms may receive petitions or communications by or on behalf of victims within their specific jurisdictional limits. The procedural issues are not dealt with in detail here. Reference can be made, for instance, to the UN Working Group on

Disappearances, the Human Rights Committee and the Committee Against Torture. Although their findings and recommendations are not binding, the work of these mechanisms can usefully inspire policy makers, as well as victims, their relatives and their representatives, in their attempts to obtain reparation from the responsible state authorities.

At the regional level, international norms and mechanisms have been established by the Organization of American States (OAS), the Council of Europe and the Organization of African Unity (OAU, now the African Union). The jurisprudence of these mechanisms can be found on the websites listed in the Annex to this Handbook.

The above deals with state responsibility for reparation. As far as the responsibility of individuals is concerned, there is no international mechanism for bringing an international civil action against an individual perpetrator. The two ad hoc international criminal tribunals for the former Yugoslavia

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(the ICTY) and for Rwanda (the ICTR) do not allow victims to participate in the criminal trials as civil claimants. While the statutes and rules of procedure and evidence of both tribunals do contain some provisions on reparation, in practice these have yielded little or no result so far. More importantly, the 1998 Rome Statute on the establishment of a permanent

International Criminal Court (ICC), which entered into force on 1 July 2002, deals more extensively with reparation. It provides for the establishment of a Trust Fund for the benefit of victims which could fill an important gap, although the ICC's actual role remains uncertain.

The most recent, still ongoing effort to bring together various reparation rights and components is the draft UN Basic Principles and Guidelines on the Right to Reparation for Victims of Violations of Human Rights and International Humanitarian Law by special rapporteurs van Boven and Bassiouni. Although a number of important issues remain to be resolved, such as the distinction between violations and gross violations, they are nevertheless already being used as an authoritative source of inspiration, including by the ICC's Preparatory Commission and some national legislators.

Reparation under National Law

It is important to conclude that international norms and mechanisms primarily deal with the responsibility of the state for violations and with the state's obligation to provide redress to victims. Furthermore, most of the international mechanisms cannot themselves issue binding reparation judgements. These conventions primarily oblige states to adopt and implement national legislation. This legislation will necessarily deal with, inter alia, the criminal prosecution of suspected perpetrators, the right to compensation for victims and so on.

It is, for obvious reasons, not possible to provide an overview of all national norms and mechanisms. However, generally speaking, at the national level a distinction can be made between judicial and non-judicial reparation mechanisms.

The judicial mechanisms can again be subdivided into (a) reparation proceedings which are closely associated with the criminal prosecution of individual perpetrators, with victims participating and seeking reparation as civil claimants (*constitution de partie civile*), and (b) tort proceedings which may allow victims to claim compensation independently of the criminal prosecution of the perpetrator. Examples of the latter type are the US Alien Tort Claims Act and Torture Victims Protection Act.

A wide variety of mechanisms are non-judicial, that is, they do not operate in the context of formal court proceedings. They range from state-administered compensation funds for victims of violent crime and abuse of power, to mediation programmes which involve both offender and victim, to

traditional means of conflict resolution based on a restorative justice approach. (See chapter 7 on restorative justice.)

These judicial and non-judicial mechanisms and programmes may be specifically designed to deal with reparation for victims of particular forms of human rights violations (for instance, a fund for the rehabilitation of victims of torture) or may deal with victims of crime in general. The 1985 UN Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power calls upon states to guarantee certain rights to victims of criminal offences and of human rights violations relating to access to justice and fair treatment, restitution, compensation and (material, medical, psychological and social) assistance. The UN Commission on Crime Prevention and Criminal Justice has drafted a *Guide for Policymakers on the Implementation of the 1985 UN Declaration* and a *Handbook on Justice for Victims on the Use and Application of the 1985 UN Declaration*.

9.5 How to Develop and Run a Reparation Programme

Decisions on the establishment of a reparation programme will depend on a set of factors which also shape the overall political transition. These include the nature and the popular support of the previous regime, the type of transition, the democratic or other nature of the new political regime, and the extent of support from the international community. It is therefore extremely difficult to prescribe a particular model. Nevertheless, this section tries to identify the dilemmas and constraints likely to be faced by all governments and civil society groups seeking to create a reparations programme.

As far as possible, recommendations are formulated to help in responding to these difficulties. However, they should be considered as suggestions which may need to be adapted to the particular circumstances, not as guaranteed solutions.

9.5.1 A Major Strategic Choice: Taking the Best from both Judicial and Non-Judicial Approaches

In the context of political transitions, reparation cannot be provided effectively to a large number of victims through an exclusively judicial approach. Access to justice and legal remedies is obviously extremely important for victims seeking redress for the harm they have suffered. The developments in international law and in many national legal systems mentioned above, which strengthen victims' rights, are therefore encouraging for victims. However, there are certain restrictions associated with approaching reparations solely as the outcome of a successful judicial exercise. A victim may lack legal skills, solid evidence or financial resources, and amnesty legislation may have been passed. All these factors can make access to judicial mechanisms extremely difficult for the victim, if not impossible, but they should not deprive him or her of the exercise of his or her right to reparation and should not discharge the state of its obligation to provide redress. At the same time, if a non-judicial approach to reparation is chosen, policy makers need to try to incorporate the strengths of a judicial approach. For instance, the value of a judicial precedent in determining standards of compensation or in recognizing certain categories of people as victims should be reflected in the reparation programme.

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This section presents some of the advantages and risks of a judicial approach. These may apply to both criminal and civil proceedings, although some inherent distinctions between the two need to be borne in mind.

The Judicial Approach: Limitations and Merits

Limitations

1. A judicial approach presupposes the existence of a properly functioning system of justice. However, in post-conflict societies the justice system itself may have been a victim of past oppression. Neither the legislation, the personnel nor the infrastructure are likely to be adequate.
2. Criminal justice systems are not designed to deal with large numbers of violations or of perpetrators, or to accommodate such subtleties as the differences between direct and indirect victims. Rendering justice and providing reparation to victims within a reasonable period of time is therefore likely to be beyond the capacity of any system.
3. A judicial approach will in most cases be designed to deal with individual guilt or civil responsibility and individual harm and redress. In a transitional context, the issue of responsibility (of the leaders, the “ordinary” perpetrators or the beneficiaries of past offences) is likely to be much more complex than it is in normal situations and requires a broader approach. Also, the total amount of reparation needed is likely to add up to more than the sum of individual needs. A judicial approach is unlikely to be able to respond fully to needs which have a strong collective dimension.
4. In a judicial approach, procedural guarantees and conditions of legitimacy should be carefully taken into consideration in order not to impose (criminal) sanctions and reparative payments on suspected perpetrators and/or beneficiaries in an unsubstantiated or arbitrary manner. In a judicial process the human rights of suspected perpetrators must be respected. This contrasts with an administrative procedure before a compensation commission, where obtaining reparation is not linked to establishing the guilt or civil responsibility of an individual.
5. As a result of these guarantees, the standards of evidence required under a judicial procedure may be too high for the victim. He may be able to provide sufficient evidence that he has suffered damage as a result of the abuse, but it may be much more difficult to prove “beyond all reasonable doubt” the responsibility of an individual. A non-judicial body can give the “benefit of the doubt” to claimants in awarding reparation, which is not possible in a judicial procedure.
6. Asking beneficiaries (see chapter 5) - offenders who, legally speaking, are not responsible for the violations - to contribute to reparation is normally impossible through a judicial approach. Only when beneficiaries can be shown to be directly or indirectly complicit does this become a potential avenue. It may be easier to involve beneficiaries through a non-judicial mechanism, thus giving them the opportunity to acknowledge the benefit they have enjoyed from past oppression or abuse, to express solidarity with the victims and to contribute to reparation schemes. This may be an important factor in a wider effort to promote reconciliation and unity.
7. Judicial proceedings against suspected perpetrators may in practice not be an option, for example, because of amnesty legislation, temporary immunities granted within the framework of a peace agreement or statutes of limitation. Although such legislation may, if contested, be found to be contrary to international law (as it certainly is in the case of international crimes), in practice the safest strategy for victims and their representatives may be to advocate the use of non-judicial mechanisms.

8. Irrespective of the particular domestic legislation, access to a judicial process may not be more than a theoretical option for the poorest victims: they will often lack the information, legal assistance or financial means needed to initiate civil claims against perpetrators, to travel to a court or to participate as civil claimants in criminal proceedings. This is all the more likely in countries where international or national support groups have limited capacity. A relevant question in this context relates to the admissibility of class actions under the relevant national legislation.

Merits

Despite these limitations, judicial approaches set important precedents, both at a symbolic and at a practical level.

1. A judicial decision sends a very strong signal that a certain practice will not be tolerated and that victims of that practice are entitled to redress. This in itself may provide victims with a certain degree of satisfaction, despite the fact that criminal trials are usually more focused on perpetrators than on victims. The judicial decision also confirms the validity and the binding nature of the norms that were violated.

2. At a practical level, a successful legal claim may be the most convincing argument for a government to acknowledge the suffering of victims and to adopt reparation legislation and establish other, non-judicial reparation mechanisms. For instance, the decision by the Japanese Government to seriously consider the issue of reparation for around 20,000 so-called comfort women, abused as sex slaves during World War II, was prompted by the legal action undertaken by one individual victim. It should be noted that, in cases where domestic legal action is not an option, proceedings before an international human rights body or before national judiciaries in other states may have a similar effect.

3. Even if non-judicial mechanisms are created, the judicial enforcement of the right to reparation should preferably remain an option for those victims who are not satisfied with the non-judicial approach. Reparation should indeed remain an individual, justiciable right, whatever supplementary reparation policies are developed.

Illustrations of a Non-Judicial Approach

Several bodies have been established to deal with reparation for past abuses at the international and at the national level. This section will briefly present three different types of non-judicial bodies, looking at specific examples:

- the United Nations Compensation Commission (UNCC);
- truth commissions; and
- national administrative bodies.

The UN Compensation Commission

The UNCC was created in 1991 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damages suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in August 1990. The funds are raised through a tax on Iraqi oil exports. The UNCC's approach to reparation is strictly limited to compensation.

Claims which are broader than just damage resulting from gross human rights violations must be submitted through standard forms to the UNCC Secretariat and have been classified into six categories. Type A claims concern individuals who were forced to leave Iraq or Kuwait as a result of

the invasion; type B claims concern serious personal injury or death; type C claims concern other cases of personal injury, including mental pain and anguish, and losses of property or other interests; type D claims concern losses over USD 100,000 and are paid after A, B and C claims have been compensated; type E covers corporate claims; and type F concerns claims by governments and international organizations. As of July 2001, most of the 2.6 million claims filed with the commission had been processed. The compensation awarded against the claims processed so far amounts to USD 35.4 billion; the 10,000 claims yet to be resolved represent requests for over USD 200 billion in compensation.

The UNCC sets an important precedent which shows that, if only there is sufficient political interest, it is possible to process a large number of individual compensation claims, even at the highest international level: the normative framework has been created, a secretariat established and a funding mechanism found. The UNCC experience offers inspiration for the processing of claims on a very large scale - the use of standard submission procedures, classification into different categories, the use of fixed sums for certain types of injury and the use of compensation ceilings. Such procedures may be of use for the management of other reparation mechanisms.

However, the UNCC has also highlighted the way in which the objectives of reparation and reconciliation can remain completely disconnected. In the UNCC case, reparation has been reduced to a technical, financial operation that is exclusively backward-looking. Moreover, it operates one-sidedly, deliberately excluding the suffering of Iraqi nationals as a result of the military operations of their own government or of the US Government and its allies. Finally, the financing mechanism of the UNCC raises serious questions given that it is intimately linked to a wider sanctions regime which has been denounced for its impact on human rights.

Truth Commissions

The work of a truth commission, when properly done, automatically leads to some form of reparation, as understood in the broader sense defined above. (Their work is the subject of chapter 8.) Allowing victims to speak out and be heard, investigating and establishing the truth about violations, public acknowledgements (possibly combined with apologies or expressions of regret), memorials to victims and recommendations to reform public institutions - all are important aspects of a full reparation package. Other reparation needs of victims are at least partly dependent on some form of payment: analysis of a representative sample of statements before the South African Truth and Reconciliation Commission (TRC) revealed that deponents' prime expectation of the TRC was financial assistance. The second most common request was for investigation of violations.

The Reparation and Rehabilitation Committee (RRC) of the TRC recommended a reparation and rehabilitation policy consisting of five components: (a) urgent interim reparation payments for people in urgent need, to enable them to access services and facilities; (b) individual reparation grants for each victim of a gross human rights violation paid over a period of six years; (c) symbolic, legal and administrative reparation measures; (d) community rehabilitation programmes; and (e) institutional reforms. The TRC Act provided for the establishment of a President's Fund to administer the individual reparation grant system. Contributions to the fund would come from the national budget, international and local donations, and interest earned on the fund. The TRC report recommended that each of the approximately 22,000 victims registered should receive between ZAR 17,000 and ZAR 23,000 (ca USD 1,678–2,270), with the total budget amounting to some ZAR 2.8 billion (USD 0.28 billion) over six years.

The TRC sets an important example through its holistic approach to reparation as both a back-

ward- and a forward-looking concept, which goes beyond financial compensation and is thoroughly embedded in a wider search for truth, justice and reconciliation. Reparation should indeed be linked to truth and justice: if compensation is used merely to buy the victims' silence in the absence of truth, their psychological rehabilitation is likely to be impeded. On the other hand, the RRC's power was limited to formulating recommendations: it did not have the same decision-making powers as the Human Rights Violations Committee and the Amnesty Committee. Three years after the publication of the TRC's report, the South African Government is coming in for strong criticism both for failing to pay out reparation grants and for adding insult to injury by paying no more than token amounts.

Reparation should indeed be linked to truth and justice.

National Administrative Bodies (Trust Funds, Compensation Commissions)

Several countries have enacted legislation and established reparation funds or commissions to compensate victims of human rights abuses committed under a previous regime. The creation of such administrative bodies may be the direct or indirect result of a truth commission, or they may be established independently. Some examples follow:

1. Brazil in 1995 established by law a Reparations Commission to compensate the relatives of 135 members of an armed rebel movement who disappeared under Brazil's military rule.
2. A 1991 Hungarian law established a National Damage Claims Settlement Office to remedy the harm unlawfully caused by the state seizure of property through the payment of lump-sum compensations.
3. Prompted in part by the friendly settlement procedure of the Inter-American Commission on Human Rights, Argentina in 1991 adopted reparation legislation to compensate victims of specific human rights violations, focusing especially on disappearances. The government Human Rights Office was the implementing body.
4. In 1992, the Chilean legislature established the National Corporation for Reparation and Rehabilitation which was mandated to implement the Chilean Truth Commission's recommendations on reparations.
5. In 1997, in Australia, the report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families recommended the payment of compensation to people affected by forcible removal through a National Compensation Fund.

9.5.2 Other Strategic Issues

This section presents some of the strategic choices that arise within judicial and non-judicial approaches, as well as a number of dilemmas and constraints that governments and/or civil society groups may face when developing, advocating and/or running a reparation programme. As far as possible, recommendations are formulated to assist in responding to these difficulties. The strategic issues are divided into five categories on the basis of the following questions:

- Who will qualify as a beneficiary of the reparation measures?
- Which reparation measures will be provided for?

- How does reparation relate to other developmental or humanitarian needs?
- How will the reparation programme be funded?
- What are common logistical issues?

It should be noted at the outset that, in many countries, reparation has been and continues to be the subject of a long process of campaigning, with the actual end result remaining uncertain. This process towards a “negotiated justice”, when it is sufficiently inclusive and “owned” by the victims, may well be important in itself. It allows people to become actively involved, to have their experiences recognized by and shared with others, and to regain a sense of dignity. This process is valuable. However, this should not be used as an excuse by the state to forget about the end result.

The Beneficiaries of Reparation

If an integrated approach is adopted to deal with issues of justice, reparation and reconciliation, the range of potential beneficiaries of a reparation programme must logically be defined taking into account the notion of victim that is used under other justice and reconciliation mechanisms. It is likely that the criminal justice mechanism will deal only with a limited range of violations. Truth commissions and mediation programmes may deal with other consequences of past oppression. Any reparation programme should take into account how victims are to be approached under all the instruments being used in the transition and then decide how to select them. Two examples may clarify this dilemma.

First, reparation should not be seen as a “reward” for testifying in a criminal case or before a truth commission, so the link between testifying and reparation must be correctly conceived.

Second, victims of practices which have not been included in criminal justice or truth commission mandates or in mediation programmes may have valid and unmet reparation needs. To exclude them from a reparation programme may be perceived as unjust and create feelings of resentment. The example of Chilean torture victims, who are not covered by the mandate of the Corporation for

Reparation and Reconciliation, is a clear illustration of this dilemma.

It is extremely important to provide adequate information and avoid creating unrealistic expectations.

Reparation programmes should avoid strengthening existing or creating new discriminatory practices. Reparation should not be perceived as a form of revenge in the hands of the new regime. Victims of torture, whether at the hand

of agents of the past regime or of former rebels, should in principle be given access to the same reparation regime. Politically biased or one-sided reparation will make reconciliation more difficult and should be avoided at all costs.

Similarly, attention should be paid to instances of victim competition. Some categories of victim may, as a result of experience, good organization or political affiliation, be able to make themselves heard better than others. Policy makers must be aware of the strength of, and competition between, victim support groups and design their programmes accordingly.

The above issues also have an impact on victim registration. The registration of victims as beneficiaries of reparation can, in part, build on the work of a truth commission or the criminal justice system, but should ideally go beyond that threshold. In any case, it should be depoliticized and non-discriminatory. Further, the threshold for reparation for all victims who meet the criteria should be sufficiently low. For example, victims living in remote areas should not be excluded in practice because they are geographically isolated.

Should victims be categorized in terms of their suffering, with priority given to those who are judged to have suffered the most? This raises the question whether it is possible to quantify and compare suffering. Should reparation, rather, be prioritized in accordance with victims' current needs? Or should all victims who meet the criteria and who are eligible as beneficiaries receive equal compensation?

In the case of wrongful death or disappearance, a range of indirect victims (see chapter 4) may claim reparation. The reparation programme should consider carefully who to accept as indirect victims - only spouses, children and parents, or other relatives and dependants as well? Furthermore, will these indirect victims receive compensation for the suffering of the direct victim only, or also for their own mental suffering and financial damage as a result of the wrongful death or disappearance of their relative? Victim support groups may find arguments in international human rights law which clearly affirm a state's obligation to repair an indirect victim's own suffering as well.

Whichever categories of victim are in the end eligible for reparation, it is extremely important to provide adequate information and avoid creating unrealistic expectations. This applies both to the range of reparation measures and amounts of compensation and to the role of the various transitional mechanisms: victims may well testify before a court or a truth commission, but it should be made absolutely clear what the powers of the court or the commission, if any, might be in awarding compensation.

The Range of Reparation Measures

Crucial decisions need to be taken on the nature of the reparation and as to whether to offer cash or services to those who suffered or a combination. The South African RRC identified a number of disadvantages of a "services package" - a package of access to health, housing, education and other basic services. These included higher administrative and logistical costs, less flexibility to adapt to victims' changing needs, the potential for tensions within a community as a result of a select group of individuals having preferential access to services, and (less predictably) budget implications. The committee therefore chose to give the recipients some freedom of choice and recommended financial reparations at a level which would enable reasonable access to essential basic services, thus generating the opportunity for people to achieve a dignified standard of living within the particular socio-economic context.

The determining argument for the RRC was the expectations of the victims themselves. It is important to design a reparation package consisting of a considered balance of services and financial reparation. The package should consider all the practical and financial factors affecting victims' ability to access basic services as well as the preferences expressed by victims and their support groups or other representatives.

This approach obviously presupposes that basic services are available to all concerned.

Careful consideration should be given to the different kinds of compensatory damages to be included - nominal, pecuniary, moral and/or punitive (see section 9.2.1).

The financial element of a compensation package is quite important. At the very least, adding insult to injury should be avoided. It may not be realistic to aim to provide financial compensation that is proportionate to the suffering of each individual victim, but any payment made should be enough at least to make some difference. Pecuniary awards may be either determined on a strictly individual basis - i.e., in accordance with the actual loss and suffering of an individual victim - or determined on the basis of fixed compensation schemes, with statutory or administrative regulations laying down certain amounts of damages for each type of injury, for example, one day of unlawful imprisonment, the loss of a thumb, or one day in hospital.

As noted above, full individual reparation to all victims after mass victimization will be neither sufficient (because of the structural damage) nor possible (because of the number of people who were victimized). Collective measures will be necessary to deal with past abuses adequately. In order to be effective, the threshold for collective reparation measures will necessarily be low, which in itself will make them more attractive. Thus collective measures have the advantage of reaching a larger number of victims. There is also less risk of an artificial and arbitrary limitation on the range of beneficiaries. Furthermore, they seem better suited to offer a remedy for a past which has, in actual fact or in people's perceptions, collectively victimized certain groups, beyond the violations suffered by individual members of the group.

The beneficiaries of a collective reparations programme should ideally have ownership over its design. The Guatemalan CEH, for instance, highlighted the need for the Mayan population to be involved in defining the priorities of the collective reparation process.

This said, the extent to which collective measures can replace or supplement individual reparation measures should be carefully considered. As far as possible, individual reparation rights should be respected and existing judicial mechanisms should remain available to deal with individual reparation

It is important to maintain some link between the material reparation awarded to victims and acknowledgement of wrongdoing and responsibility.

claims. In many cases, as illustrated by the South African situation, the threshold (particularly in financial terms) to access these mechanisms will in any case be excessively high for the "average" victim. Ideally, some combination and integration of the individual and the collective dimensions should be achieved. Providing better and more easily accessible health services to previously oppressed minorities in

remote areas, for instance, is likely to be a useful collective reparation measure. However, for this to be psychologically restorative at the individual level, it may need to be personalized: for those members of the target group who have been tortured, for instance, specific personalized and free counselling services may also be organized.

Generally, it is important to maintain some link between the material reparation awarded to victims and acknowledgement of wrongdoing and responsibility. Japan's financial compensation for the "comfort women" through the establishment of the Asian Women's Fund was criticized for being a welfare-oriented system based on gender and development needs rather than on acceptance of responsibility for wrongdoing and an obligation to provide reparation. The risk of this kind of response is certainly greater where exclusively collective reparation measures are used.

International legal scholars generally award primacy to restitution as a preferred form of reparation. This theoretical debate is not without practical repercussions: primacy should not rule out a certain flexibility when designing reparation schemes under transitional justice mechanisms. Ideally, even when full restitution remains materially possible, victims may wish to opt for financial compensation. On the other hand, reparation programmes should not allow the responsible state to renounce some of its obligations at its own discretion: for instance, the payment of compensatory damages should not be used as a substitute for returning citizenship to members of a formerly oppressed minority.

Victims' expectations and perceptions of reparation may vary widely. The variables which affect their view of reparation include their cultural background, their post-conflict socio-economic position, whether they are in exile or not, gender, and the passage of time since the violations suffered. It is therefore highly unlikely that it will be possible to meet all expectations of all victims on an individual basis. Generally, it seems advisable to have a balanced package of individual and collective, pecuniary and non-pecuniary, and commemorative and reformatory reparation measures.

Reparation versus Other Development or Humanitarian Needs

Any serious reparation programme will have important budget consequences. Although it will be difficult to tell at exactly what point the state has exhausted its financial resources for reparation, this logically raises the issue of priorities. One of the main arguments of the South African Government against the immediate full-scale implementation of the RRC recommendations was the need to budget for other development needs (housing, education, health infrastructure). Striking the right balance between reparation and other needs is a difficult exercise.

Some comments may help to give guidance in addressing this issue:

1. A successful reparation claim before a judicial body, resulting in the state's being obliged to provide compensation to victims, is an important lever for victim support groups. These awards will normally - i.e., under the rule of law - outweigh other policy needs - in fact, judicial awards have to be implemented irrespective of other needs. Although a purely judicial approach may not be feasible for a large number of claims (see above), the mere possibility of this avenue may be an important lever when negotiating a programme.

2. One way for the government to express its sincere commitment to providing reparation to victims is for it to review its overall policy goals in the light of victims' collective reparation needs. As a consequence, budget allocations to the justice, health, education and housing sectors will logically take priority, for example, over defence budgets and income tax reductions. This should also be part of the public political debate: policy decisions, for instance, dealing with public infrastructure, should be explicitly motivated from a reparation perspective.

3. To distinguish between urgent humanitarian and other reparation needs, a two-track approach, similar to the one adopted - at least theoretically - in Rwanda may be interesting. Rwanda, on the one hand, established a National Fund for Assistance to Survivors of the Genocide and Massacres, and, on the other hand, intends to establish a Compensation Fund for Victims. The latter will deal with the implementation of judicial awards in favour of survivors or relatives of victims. The aim of the former is of a more humanitarian nature: the most economically disadvantaged victims of the genocide are eligible for assistance with housing, education, health and social reintegration, irrespective of judicial recognition of their right to reparation.

Financing a Reparation Programme

As a rule (although this might often leave a bitter taste), state responsibility for injustices committed under a previous regime lies with the new regime. In most cases, however, there will already be other enormous political challenges which go well beyond the state's financial resources. How, then, can additional funds be found for a reparation programme?

1. Civil responsibility should lie with former leaders and other perpetrators individually. However, a victim's right to reparation should not be dependent on the availability or accessibility of perpetrators' individual resources. It is the responsibility of the state to secure reimbursement from perpetrators for reparation payments made to victims.

There is an important role in this regard for the governments of foreign countries where perpetrators have assets. In October 2001, a US Federal District Court in New York ruled that President Robert Mugabe in his capacity as leader of the Zimbabwe African Nationalist Union-Patriotic Front

(ZANU-PF) party was liable to pay compensation to various victims of human rights violations by members of this party. The Marcos litigation in the USA is another example. Both cases present interesting illustrations not only of innovative procedures being used to deal with large numbers of claims in a judicial context but also of the role which foreign assets and governments can play in financing part of a reparation programme.

2. It is highly unlikely that this source of financing will be enough. A further contribution may come from a “reparations tax”, although this will be highly unpopular if it is designed in such a way as to cause victims to suffer a second time. Careful thought should be given to designing a tax scheme which targets primarily the least vulnerable (while, obviously, at the same time not financially “chasing” them out of the country).

3. National and international law deals with the responsibility of perpetrators. A legal approach pays little or no attention to the different types and hierarchies of guilt. Under national or international law primary perpetrators carry legal criminal guilt and legal civil responsibility. In the case of indirect offenders, guilt is of a political and/or moral nature (see chapter 5). Their offence is caused by the direct or indirect advantages they enjoyed during the pre-transitional period (as “beneficiaries”), by their inaction when witnessing human rights violations (as “bystanders and onlookers”) or by unintentional harmful action. When designing a reparations process, the inclusion of indirect offenders among those who bear responsibility should be one of the core issues considered.

Financially speaking, some of the most interesting indirect offenders are companies which have benefited from the abusive policies of the past. Careful attention should be given to the question whether corporate conduct under the former regime qualifies as corporate complicity in past abuses and therefore leads to legal responsibility on the part of the company. Another option is to advocate indirect offenders’ financial involvement through voluntary contribution schemes.

4. An additional problem - that of “intergenerational justice” - arises when a period of time passes before a reparations programme is established. Can successor generations of perpetrators and beneficiaries be expected to pay for the wrongs perpetrated by regimes long gone to successor generations of victims who may (or may not) suffer from the continuing effects of the past injustices?

Legally speaking, there is no such thing as succeeding generations’ personal responsibility. However, the continuing moral and political duty of the state to provide redress to the victims or their succeeding generations may lead to the adoption of a fiscal policy which obliges them to pay. In such cases, their duty to contribute might be more easily conceived and presented as primarily linked to their citizenship (and their general status as taxpayers) rather than based on some sort of inherited “perpetratorship”. It is also likely that, in this context, reparation will take a collective form as social redistribution policies or affirmative action-type programmes.

5. To ease some of the immediate budget constraints, a system of compensatory payments through yearly or other periodic instalments, possibly pension plans, might be an option, instead of immediate payments of the full amount.

6. One delicate question relates to contributions from foreign governments. Although in some cases the political and even legal responsibility of foreign states may be unquestionable, it may be highly problematic for a newly democratic state to claim compensation from other states through legal

proceedings. This is notably the case for Rwanda, which could, theoretically and probably successfully, initiate reparation claims against the UN, Belgium and possibly other states. For primarily diplomatic reasons, no such initiative has been taken so far.

The contribution of foreign states can also, obviously, be other than merely financial: any truth-telling exercise may require information to be provided by third countries or former allies of the past regime.

The inclusion of indirect offenders among those who bear responsibility should be one of the core issues considered.

Logistics

Even in the case of large-scale victimization, the decision to recognize a victim's right to reparation and to award reparation can to some extent be carried through by the regular transitional justice mechanism, be it a classical criminal tribunal or a truth commission. However, the actual implementation of a reparation programme will be better done by a separate reparation body. Some examples have been mentioned above. The operational requirements in terms of logistics alone are completely different from those required of institutions dealing with truth-telling or criminal prosecution. Also, the other transitional justice mechanisms may necessarily be of limited duration - the end of their term symbolizing a return to "normality" - whereas a reparation body may require a much longer period of activity.

The different components of a reparation programme may require partly similar, but also largely different, approaches in terms of organization, personnel and skills. Some of the issues that may arise include the following:

- Listing the victims who meet the criteria of beneficiaries of the reparation programme is generally a first logistical challenge. Part of this work may be based on the activities of the courts, a truth commission or other transitional justice mechanisms, but the reparation programme should preferably also be open to those who do not wish to participate in such mechanisms. Listing the victims presupposes nationwide information campaigns and easily accessible registration mechanisms.
- Statement takers need to be recruited and trained in registering victims' reparation needs and in explaining the limitations of the reparation programme.
- Awarding compensation requires a preliminary assessment of damages or, if lump-sum amounts are to be used, at least a verification that the damage has been suffered as a result of the past oppression. This requires effective corroboration of victim statements, which is a very time-consuming exercise. Otherwise false statements are likely to jeopardize the whole operation.
- Sufficient time and personnel are needed to undertake the administrative processing of claims. To give just one example, the award of reparation in response to multiple claims by several indirect victims for the suffering of the same person should be avoided.
- Appropriate payments procedures need to be developed, in particular for people who do not have bank accounts.

9.6 Concluding Remarks

Reparation is an essential item on any post-conflict agenda: it should be solidly integrated into a wider approach to truth, justice and reconciliation. This chapter has shown how reparation has recently been shaped and redefined in the light of the legitimate expectations of victims of grave abuses. Their right to reparation is finding an increasingly solid basis in international human rights law. However, bridging the gap between theory and practice remains an enormous challenge, particularly in the case of large-scale victimization. Several strategic choices need to be made and a whole range of dilemmas

and constraints need to be dealt with, at a time when few examples of “best practice” are available.

As a general rule, when designing and implementing a reparation programme, great attention should be paid to inclusiveness, appropriateness and effectiveness as guiding principles. Inclusiveness

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should inspire the accurate definition, identification and involvement of all relevant players in the reparations process, victims as well as perpetrators, including, ideally, beneficiaries of past abuses. In so doing, “ownership” and links between reparation and responsibility can be achieved. Appropriateness

should guide decisions on the range of reparation measures and assist in striking the right balance between financial and immaterial measures as well as between reparation and other post-conflict challenges. Effectiveness goes hand in hand with the treatment of reparation as an individual legal right while at the same time seeking to overcome the important limitations of classical judicial enforcement methods. Effectiveness as a guiding principle should guarantee access and delivery.

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