

REPARATIONS FOR VICTIMS OF GENOCIDE, CRIMES AGAINST HUMANITY AND WAR
CRIMES: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING

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“In honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law,

Convinced that, in adopting a victim-oriented perspective, the international community affirms its human solidarity with victims of violations of international law, including violations of international human rights law and international humanitarian law, as well as with humanity at large...”¹

Genocide, crimes against humanity and war crimes are recognised worldwide as the most abhorrent of crimes; and the perpetrators understood as enemies of all mankind (*hostis humani*). It has long been recognised that the perpetrators of such crimes must be held to account and that the institutions, organisations and governments that enabled the abuses to occur should not escape liability. International law recognises the obligation to provide reparations for international wrongful acts.² This has been repeatedly reaffirmed in the jurisprudence of national and international courts, is reflected in a range of international treaty texts and has recently been confirmed by the United Nations with the adoption by the General Assembly of the *Basic*

¹ Preamble, *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted by the UN General Assembly on 16th December 2005.

² See Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); Article 1 of the draft Articles on State Responsibility adopted by the International Law Commission in 2001: “Every internationally wrongful act of a State entails the international responsibility of that State. (UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001” (ILC draft Articles on State Responsibility).

Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violation of International Human Rights Law and Serious Violations of International Humanitarian Law in December 2005.

The Conference

The emphasis of this Conference is not on ‘whether’ there is a right to reparation, and if so ‘what’ this right entails. The Conference recognises that there is already a sound legal basis for the right to reparation as well as detailed expositions of the different forms that reparation may take.

Instead, this Conference focuses on the effective implementation of the right to reparation. It will explore the practice of governments, national and international courts and commissions to consider questions of application, process, implementation and enforcement. It will consider the practice from the perspective of the beneficiaries - survivors and their communities; and from the perspective of the policy makers and implementers who are tasked with resolving the range of technical and procedural challenges in bringing to fruition adequate, effective and meaningful reparations in the context of mass victimisation.

Rights and Procedures

Reparations for genocide, crimes against humanity and war crimes and other serious violations of international human rights and international humanitarian law have been traditionally conceived in the context of State responsibility for injurious international wrongs, particularly at the end of a conflict. The progressive recognition of the status of individuals under international law owed in large part to the developments in international human rights law since the Second World War, has impacted on the concept and progressive application of the principle of reparations in a number of fundamental ways:

- i) Reparations is understood as a right of victims, not only as an inter-State prerogative or an act of compassion or charity*

Reparation is a moral imperative seeking to mend what has been broken. It can contribute to the individual and societal aims of rehabilitation, reconciliation, consolidation of democracy and restoration of law. It can also help overcome traditional prejudices that have marginalised certain sectors of society and contributed to the crimes perpetrated against them.

It is also a legal right owed to the survivors.

- ii) *The positive implementation of the right to reparations entails both a procedural right of access to the remedy as well as the substantive form of the relief*

Procedural Challenges: For example, to consider the extent of outreach to and consultation with targeted beneficiaries about reparations measures and whether the special needs of particularly vulnerable or marginalised sectors of society (including women, children and minority groups) are adequately considered. The effectiveness of reparations measures can also be judged with respect to their accessibility to victims, considering whether the adopted measures adequately address evidentiary, logistical or other hurdles. For example, beneficiaries that were forced to flee their homes may not have access to the same level of documentation; low literacy and education levels may mitigate against complicated forms or procedures.

Substantive Challenges: It is important that the form(s) of reparations (e.g., restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition) as well as the quantum and quality of the adopted measures adequately respond to the injurious acts and to the rights, needs and priorities of beneficiaries and survivor communities. Yet the nature of the crimes of genocide, crimes against humanity and war crimes, means that it is impossible to put survivors back where they were prior to the violation or to ‘repair’ the violation. Necessarily, reparation measures will be symbolic.

This Conference reflects these key precepts in its orientation, organisation, choice and emphasis of speakers.

Survivors’ Perspectives

A holistic appreciation of the adequacy and appropriateness of reparation measures (both access to reparations and the reparation measures themselves) requires consideration of survivors’ perspectives, including their initial experience of victimisation as well as the impact this has had subsequently. Survivors’ expectations of and satisfaction with reparations will reflect this, and will impact on how they relate to procedures for claiming reparations and the measures themselves.³

³ Danieli, Y. (1992). Preliminary reflections from a psychological perspective. In T.C. van Boven C. Flinterman, F. Grunfeld & I. Westendorp (Eds.) *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Netherlands Institute of Human Rights [Studieen Informatiecentrum Mensenrechten], Special issue No. 12 (pp. 196-213). Also published in N.J. Kritz (Ed.) (1995). *Transitional justice: How emerging democracies reckon with former regimes*. 1 (pp. 572-582). Washington, D.C.: United States Institute of Peace.

Reparation measures should reflect the particularities of the victimisation and its impact on vulnerable groups and whole communities. In many instances of mass victimisation, women represent a disproportionately large number of the survivors and the violations they face are distinct and have differential impact on them and their communities. Equally, the use and abuse of children in conflicts will impact on them, their families and successive generations. As is noted in the preamble of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation*, “Contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively.” Crimes such as genocide which by their nature target national, ethnical, racial or religious groups impact not only the individual victims but the collective identity of the group.

The Relevance of the Post Holocaust Experience

The horror of the Holocaust led to major shifts in international law and the many restitution measures which resulted are important benchmarks for future national and international reparations processes. Some of the key markers include:

- Rallying, unifying and building consensus within survivors’ communities to strengthen political leverage and support for reparations and to aid with distributions;
- Contributing to the procedural evolution of mass claims processes, by identifying special beneficiary categories with both individualised and collective awards schemes, utilising streamlined claims processes with flexible evidentiary standards, innovative engagement of civil society groups, governments, specialised administrative tribunals and courts;
- Experience in the recovery of public and private assets and property.

The post-Holocaust experience must also be seen in a broader context, considering the range of mass claims processes that have developed alongside. Various mechanisms have been employed to address the multitude of situations and objectives. Some of these mechanisms have served more political than judicial objectives, performing fact-finding functions and assessing payments, as opposed to evaluating liability that has been pre-determined by settlement or agreement. Certain processes have developed on a purely adversarial basis whereas others have sought to incorporate dispute resolution or settlement facilities into their activities, including conciliation and mediation.

Some tribunals have adjudicated claims against States, brought by States either on their own behalf or representing claims of nationals of States that have been espoused and presented on their behalf by their national governments. Claims mechanisms have also been established to resolve the claims of individual victims against their own State or a third-State, as well as to resolve claims of victims against various corporate entities or organizations. Some tribunals have dealt only with the restitution of victim assets, whereas others have sought to compensate for a broad range of harms caused. Some mechanisms have focused exclusively on monetary awards for verifiable real losses whereas others have sought to restore property or other assets.

Many claims mechanisms have successfully used categorisation schemes to determine separate processes for different types of claims, with differing applicable rules and procedures. In determining the most appropriate approach, there is a tension between the adoption of measures aimed at maximising procedural efficiency and cost-effectiveness, and the need to maintain a minimum of procedural fairness and the overall legitimacy of the mechanism as a legally sound institution capable of accurate decision-making and compatible with generally accepted principles of international law.

Also relevant are the important steps taken by regional human rights courts, in particular the Inter-American Court of Human Rights, and the work of certain national post-conflict truth and reconciliation commissions which have sought to address reparation in the context of mass victimisation. To note is the frequent resort to health and education programmes to strengthen victims' capacity for personal and social development and to rebuild lives and communities.

In the examples cited, liability for the injurious act(s) rests with the State. This has, in some instances, aided the funding and implementation of both individual and collective reparations programmes. States that have recognised their responsibilities to repair past abuses have set aside lump sums for distribution to victims, identified portions of annual State budgets, and introduced special taxes to collect funds. However, in some other cases, the will of governments to contribute to reparations programmes has waned quickly, with reparations falling below other demands on the States' budget, such as general societal development.

The examples also stand in contrast to reparations processes before national criminal courts, and indeed the International Criminal Court, whose mandate is limited to individual (as opposed to State) responsibility. Funding reparations for mass victimisation from the resources collected from individual convicted perpetrators is necessarily a challenge. Also, placing the burden of

reparations on the few who are convicted before a criminal court is difficult conceptually, given the nature of the crimes which require the extensive organisation and planning of governments or other entities. Certain crucial reparation measures will be difficult to implement using the sole lens of individual responsibility. For example, most measures of satisfaction and guarantees of non-repetition would require State involvement. This is also the case for other symbolic measures such as public acts and civic rituals designed to restore social ties between citizens. The reparations regime of the ICC can therefore not operate in a vacuum nor can its measures ever hope to fully satisfy victims' rights to reparations.

The International Criminal Court's Victims' Trust Fund should remedy some of the resource gaps created by indigent defendants unable to pay the reparations awards ordered against them. The Trust Fund is an important counterbalance to the Court's reparations process that can pool resources from a variety of sources, including voluntary contributions, for the benefit of victims and their communities. Whilst the mandate of the Trust Fund is in many ways broader than that of the Court, it will remain difficult for it to adequately address the context of mass victimisation within which the Court's work is situated. Key questions remain unanswered:

- Who are the beneficiaries of the ICC's reparations programme - how closely connected must they be to the persons convicted by the Court? How does or should this impact on applicants' access to Court?
- Is the definition of the beneficiary class contingent on the conviction of the perpetrator(s) or can it be recognised that individuals' right to reparations exists notwithstanding? The *UN Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recognise that "A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim," and the Court will need to consider how this principle relates to its procedures.

In determining methods, priorities and approaches to reparations there are a range of factors to consider which include:

- *How to ensure that the forms of reparations best address the needs of survivors and their communities?* There is no magic formula for reparations; identifying the most suitable

remedies requires careful analysis of and consultation with beneficiary groups, taking into account variances of perspectives within beneficiary groups, and other divergences such as time, age, and experience during and post victimisation. Given the impossibility to fully repair the harm that was caused, most reparations measures (however concrete) will be symbolic.

- *How to ensure that procedures for claiming and receiving reparation do not constitute a secondary victimization of beneficiaries?* The reparation process is designed to restore the dignity of survivors, not to further alienate or traumatize them.

- *How to secure assets:* This will depend on the nature of the assets (victim assets or property, assets belonging to a judgment/debtor or a criminal defendant in respect of proceeds of crime) as well as the purpose for the asset recovery - to reconstitute stolen assets, to compensate beneficiaries for their losses, or to ensure that perpetrators do not benefit illegally from their crimes. The key to improving enforcement efforts is to ensure courts have adequate information about the financial circumstances of defendants. Information about assets and about the defendant's likely strategies regarding dissipation/relocation of assets is key to any successful enforcement action.