Victim Reparations in Transitional Justice
— What is at Stake and Why

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Abstract: Based on the growing international and academic interest on victim reparations as a mechanism of transitional justice, and the abundant literature that has emerged in the past few years, this article takes a step back to ask what is actually at stake with victim reparations and why. Through a discussion of the core issues and choices present in developing victim reparations initiatives, the elements of an analytical framework for the study of specific reparation programs emerge. The framework highlights the social and contested character of reparation programs, arguing that such programs be seen in relationship to the political projects they support.

Keywords: Victim reparations, transitional justice, victims’ rights, reparation programs, victimhood.

A. Introduction

Processes of transition from armed conflict and authoritarian rule present a number of challenges for the societies and states involved, not only concerning the present and the future of their nations, but also their troubled past. The various ways such societies deal with their past in practical terms are commonly referred to as “transitional justice”, that is, the attempt to see justice done in relation to past sufferings and harm. The end of the Cold War, the democratic transitions in Latin America, and later the atrocities of the Balkan wars, in Rwanda and Sierra Leone, formed the background for the increased attention given to issues of transitional justice in the 1990s – from human rights organizations, public institutions and academics alike. Faced with the challenge of how to combine democracy with justice in a context of transition,† the growing body of literature on transitional justice paid most attention to mechanisms such as truth-finding missions (truth commissions and commissions of inquiry), criminal prosecutions of perpetrators, and institutional reforms that might enhance the rule of law.

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in democratizing societies. However, and in spite of the fact that truth commissions and trials often recommend(ed) reparation plans or sanction(ed) the payment of monetary compensation to the victims of abuse and human rights violations, little attention was given to the issue of reparations itself outside the sphere of specialized international agencies and human rights organizations. This has fortunately changed.

As a mechanism of transitional justice, victim reparations have emerged in recent years as a dynamic field of social and academic inquiry. In the past two years we have seen the prolific publication of comprehensive research on victim reparations, filling a gap long lamented by those working on transitional justice. For those not so familiar with this field though, the term “victim reparations” is often associated with “reconciliation” and/or “monetary compensation”. While it is true that reparations are related to both, current debates on victim reparations encompass much more, to the extent that the uninitiated risks losing sight of the core issues and trends that started this development. Furthermore, while there might exist a common normative ground in international law on the right to remedy and reparation, the socio-political context of each country attempting to establish a reparations program will play a decisive role in shaping the conceptual framework upon which the program is based – and this is a highly contested process. Another challenge – though one that contributes to its richness – is that the reparations literature cuts across several academic disciplines, the most prominent being law and philosophy, followed by social sciences and history. From different perspectives, the literature approaches the moral and legal frameworks as well as the politi-


cal, historical and administrative challenges involved in designing and implementing victim reparation programs. The inter-disciplinary interest is at least partially related to developments in the international human rights arena during the past two decades, and much of today’s literature on reparations is directly linked to them. All these features are indicative of the multi-dimensional character of victim reparations.

Based on the above, this article aims to take a step back and reflect on the core issues of victim reparations highlighting its contested nature, that is, what is stake and why. I argue that this is necessary because the way victim reparations are conceptualized in a given society has important implications for the interpretation and construction of the past – a past which reparations try to heal. In this sense, it is necessary to approach victim reparations as a social process, one which starts from an interpretation of the past and leads towards a re-interpretation of that past. The article begins with a brief presentation of significant developments in the international human rights arena that have advanced the right to remedy and reparation of victims of gross human rights violations in the past decades. I then move on to a conceptual clarification of victim reparation and related terminology, and discuss the most substantive issues of victim reparations, both normative and programmatic. This discussion is based on a review of the field of victim reparations as it has developed in the transitional justice literature since the mid 1990s.

In the final section, I outline an analytical framework for the study of victim reparations that takes into consideration the contested nature of reparation initiatives and their role in processes of history construction and nation-state building.

B. VICTIM REPARATIONS IN THE INTERNATIONAL ARENA

The increased interest in victim reparations since the end of the Cold War runs parallel to developments in the international arena, more specifically, in the realm of international law and human rights law. I highlight here three processes or “tracks” where the issue of victim reparations has been dealt with and directly contributed to the enhancement of the rights of victims of human rights violations and the right to remedy. The three tracks were initiated at different points in time over the course of 60 years and peaking in the 1990s. In their own manner, these tracks have been successful in putting the issue of victim reparations in the international agenda. These tracks are the work with the “Basic Principles and Guidelines on the Right to Remedy”; the International Criminal Court’s focus on victims’ rights; and the issue of redress in the Draft Principles on State Responsibility.

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5 This cannot possibly hope to summarize all that has been written about it, the literature is much too voluminous for that. Instead, I want to take a step back and ask what victims reparations in transitional justice are, basing my analysis on selected works within the literature.

6 The choice of these three “tracks” is based on their international presence and influence. Similar initiatives at the national level have also contributed to the advance of victim rights in individual countries.
1. **Basic Principles and Guidelines on the Right to Remedy and Reparation**

On December 16, 2005, the General Assembly of the United Nations approved 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.* This document had previously been adopted by the UN Human Rights Commission in April of that year, concluding a process that started in 1988, when the then Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on Promotion and Protection of Human Rights) recognized that all victims of gross human rights violations and fundamental freedoms should be entitled to restitution, fair and just compensation, and the means for as full a rehabilitation as possible for any damage suffered. In 1993, the Special Rapporteur Theo van Boven delivered a study which became the basis for the process completed in 2005.

As stated in the Preamble, the *Basic Principles* are directed “at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity.” Taking into account that the Basic Principles are based on the “obligation to respect, ensure respect for and implement international human rights law and international humanitarian law” the question arises as to whether there is a tension between reaffirming respect for both bodies of law, and choosing the categories of “gross” human rights violations and “serious” IHL offences as target areas. As Marten Zwanenburg has pointed out, the document does not include clear definitions nor an explicit list of which human rights violations are considered “gross” and which IHL offences are “serious”. After a careful analysis of the relationship between human rights law and IHL, Zwanenburg concludes that the absence of clear cut definitions need not be a limitation, but rather provides these types of concepts with much needed flexibility, as they are constantly evolving in legal theory and practice.

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7 GA Res. 147, UN GA, 60th Session, UN Doc A/RES/60/147 (2005). *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.* To be referred as the *Basic Principles*.


10 Marten Zwanenburg: “The Van Boven/Bassiouni Principles: An Appraisal” (2006) 24 *Netherlands Quarterly of Human Rights* 4, 641-668. Zwanenburg provides an extremely well informed and thorough analysis of the *Basic Principles* from a legal perspective, thus addressing a number of legal issues (such as the relation between human rights law and IHL) that fall outside the scope of this article.
The *Basic Principles* establishes that the right to remedy comprises two aspects, the procedural right to justice, and the substantive right to redress for injury suffered due to act(s) in violation of rights contained in national or international law. According to the *Basic Principles* “remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law”: equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and, access to relevant information concerning violations and reparation mechanisms.

Concerning reparation, the *Basic Principles* establish that “in accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.” The full and effective reparation envisaged by the *Basic Principles* includes: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. These forms of reparation are described in articles 19 to 23 of that document.

The *Basic Principles* operate with a broad definition of reparations, one which addresses also alternative or complementary transitional justice mechanisms (i.e. the right to justice, the right to truth). It is important to emphasize that the *Basic Principles* focus on remedy and reparations does not exclude the right to justice, or the duty to prosecute violations that constitute crimes under international criminal law. On the contrary, the Principles clearly state that

in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him.12

This reflects the current international trend promoting accountability for past crimes in post-conflict societies and post-authoritarian regimes, 13 while taking into account that accountability can take various forms, some aimed to fulfill the requirements of international criminal law (prosecutions), others focusing on the needs of victims and their families (as reparations).

The distinctions made between different forms of reparation, particularly restitution, compensation and rehabilitation, contribute to a much needed conceptual clarification in the field of victim reparations. While restitution aims to restore the victim to the original situation before violations were committed (addressing mainly personal but also material suffering),

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12 *Basic Principles* supra n 7 at Section III, paragraph 4.
compensation refers to economically assessable damage, and rehabilitation to medical and psychological care. These concepts will contribute to the operationalisation and design of specific measures in the context of reparation programs.

Furthermore, and in spite of its status as “soft law” since they are not legally binding, the Basic Principles provide legal support to representatives and advocates of victims’ rights in national settings to the effect that victims are legally entitled to reparations.14 Much as the Guiding Principles on Internal Displacement did for the plight of internally displaced persons in the political and humanitarian agendas, it is expected that the Basic Principles will constitute the beginning of a process of institutionalization and international involvement in the issue of reparations, the rights of victims, and the design and implementation of specific reparation programs. Even more, reparations have already entered the agendas of peace-negotiation processes around the world, such as in Northern Uganda; this development is likely to continue in the future.

2. The International Criminal Court

The International Criminal Court was established by the Rome Statute of the International Criminal Court, on 17 July 1998. The Rome Statute is an international treaty, binding only on those States which formally express their consent to be bound by its provisions (becoming “parties” to the Statute).15 The Statute entered into force on 1 July 2002. Today, 106 States are Parties to the Statute. Following the adoption of the Rome Statute, the United Nations convened the Preparatory Commission for the International Criminal Court. Among its achievements, the Preparatory Commission reached consensus on the “Rules of Procedure and Evidence” and the “Elements of Crimes”. These two texts were subsequently adopted by the Assembly of States Parties. Together with the Rome Statute and the Regulations of the Court adopted by the judges, they comprise the Court’s basic legal texts, setting out its structure, jurisdiction and functions.16

One of the innovations of the Rome Statute and the ICC’s Rules of Procedure and Evidence is a series of rights granted to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court. Furthermore, this is also the first time that an international court has the power to order an individual to pay reparation to another individual.

15 However, the Court may also exercise jurisdiction in those cases when the United Nations Security Council refers a particular situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime; when the accused is a national of a State that accepts jurisdiction without ratification; and in those cases where the crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court. http://www.icc-cpi.int/about/ataglance/jurisdiction_admissibility.html.
16 This section is based on material reviewed on the ICC website in September and October 2006: http://www.icc-cpi.int/victimsissues.html.
Pursuant to article 75, the Court may lay down the principles for reparation for victims, which may include restitution, indemnification and rehabilitation. On this point, the Rome Statute has benefited from all the work carried out with regard to victims, in particular within the United Nations. The Court may also enter an order against a convicted person stating the appropriate reparation for the victims or their beneficiaries. This reparation may also take the form of restitution, indemnification or rehabilitation. The Court may order this reparation to be paid through the Victims’ Fund, which was set up by the Assembly of States Parties in September 2002.

The ICC has developed a standard procedure for handling reparation claims. It has also a special unit, the “Victims’ Participation and Reparation Section”, responsible for giving all appropriate publicity to these reparation proceedings in order to enable victims to make their applications. These proceedings take place after the person prosecuted has been declared guilty of the alleged facts.

The Court has the option of granting individual or collective reparation, concerning a whole group of victims or a community, or both. If the Court decides to order collective reparation, it may order that reparation to be made through the Victims’ Fund and the reparation may then also be paid to an inter-governmental, international or national organization.

The institutionalization of victim reparations as an integral part of the work of the ICC brings the rights of victims to the highest level, and can be expected to have a strong effect upon national criminal courts, both in protecting the right to remedy as well as fighting impunity. As Falk suggests, “international law also helps by clarifying those forms of governmental abuse that constitute international crimes, and therefore cannot be shielded from legal accountability. … That is, by linking accountability for perpetrators to compensation for victims there is encoded in international law a conception of fairness and rectification of past harm that includes victims.”

3. DRAFT PRINCIPLES ON STATE RESPONSIBILITY

The topic of State responsibility has been on the agenda of the International Law Commission since 1949. The Commission confined the scope of the topic to be the study of international responsibility of States for internationally wrongful acts. In addition, the Commission has concentrated its study on the determination of the principles which govern such responsibility, the so-called “secondary rules”, rather than the substantive rules which define international obligations in each particular context.

In 1996 the Commission adopted an entire set of Draft Articles dealing with a range of legal issues, including the elements constituting an internationally wrongful act; the definition of an internationally wrongful act as an international crime; and the consequences resulting from such an act. The Draft Articles include the defenses or excuses that could preclude wrongfulness, such as distress, necessity and self-defense. They also define the rights of the State that is injured; deal with rights to reparation (by way of restitution, compensation or satisfaction); and provide for the possibility of resort to countermeasures. The Commission completed its second reading of the Draft Articles, adopting the final text of the Articles and

17 Falk supra n 14 at 497.
accompanying Commentaries in August 2000.\textsuperscript{18} The Draft Articles were presented to the UN General Assembly in 2001 and 2004 for consideration; the topic was included in the agenda for the sixty-second session, in 2007.

Although the Draft Principles deal with responsibilities and relationships between States and identify States as the subjects of international law, the document has implications for the issue of reparations, as it identifies forms for redressing injury caused in violation of international law.\textsuperscript{19}

The common thread that runs across these three international legal tracks is their focus on victims, both in terms of legal status and enhancement of rights. Work along these tracks has received inputs from operational actors, such as international organizations, NGOs and academics alike. The influence has also gone in the opposite direction, with international legal work setting the agenda for national/regional debates and operational practices as well. Similarly, the jurisprudence of regional human rights courts has influenced and been influenced by the international debate on victim rights.\textsuperscript{20} The drafting processes of international legal documents have involved lively academic debates, albeit confined to the field of law.\textsuperscript{21} The transitional justice literature of the past twenty years has opened up the field for other disciplines, particularly from social science, which are contributing at the analytical and empirical level. If we understand law as the codification of social relations, social sciences can play an important, socially critical role in the development and analysis of international legal tools.

**C. VICTIM REPARATIONS: BASIC DEFINITIONS**

In the context of transitional justice, there is a widespread consensus over the desirability and importance of victim reparation programs, as an effective way to address the needs of victims,\textsuperscript{22} as well as a means to reconciliation and peace.\textsuperscript{23} The term “reparation” was original-
ly used to refer to the monetary compensation that victorious nations required from those defeated parties in war. After World War II, reparations referred also to the compensation given to the survivors of the Nazi Holocaust, by far the most comprehensive reparations effort implemented in modern history. While a similar use has been applied to compensation programs for Japanese-Americans interned in relocation camps during World War II and the case of Asian comfort-women for Japanese soldiers, the concept has continued to develop since World War II. The term has been adopted by African-Americans seeking compensation for the enslavement of black peoples prior to the American Civil War, as well as Australian aborigines claims; in those particular cases, reparations are understood as a way to redress historical injustices. While the literature on the Holocaust has been abundant right since the end of World War II, the literature in historical injustices received an impetus since the end of the Cold War. According to Barkan, “the demand that nations act morally and acknowledge their own gross historical injustices” is a novel phenomenon, resulting from the introduction of questions of morality and justice in the realm of politics. While the Holocaust literature can be considered as a historical background for the contemporary study of reparations, and the historical injustice literature offers interesting philosophical and historical questions, their review falls outside the scope of this article. Here I limit myself to the discussion of victim reparations in situations of transition from authoritarian regimes and armed conflict, where the victims have been subject to human rights violations as defined by international human rights law.

The desire to see justice done for past wrongdoings in a society that has made a transition from an authoritarian regime and/or armed conflict can be fulfilled in various ways. One can choose to prosecute perpetrators and punish them; this is the aim of “retributive justice”. One may try to learn the truth about what happened; that is the aim of truth-seeking processes. Institutional reform can also be promoted, in order to address present and future needs to avoid the mistakes of the past; this is the aim of “prospective justice”. The issue of reparations in transitional justice emerges as a way of addressing the needs and demands for redress of those who suffered some form of harm in a previous regime, that is, the victims. This is what is commonly referred to as “restorative justice”, a dimension of transitional justice which focuses on the victims of such abuses, acknowledging their suffering and needs, and attempting to restore the damage done. The underlying assumption is that physical, psychological

25 Elazar Barkan: The Guilt of Nations: Restitution and Negotiating Historical Injustices (New York: Norton 2000). There is abundant literature on these understandings of reparations, as easily observed on the internet, where one can find numerous websites with resources on Holocaust and African-American reparation claims.
26 Philosophers would of course trace these topics back to medieval discussions about the justice of war, and justice in war; thanks to Andreas Føllesdal for bringing this to my attention.
and social damage must be acknowledged and addressed in order to heal and reconcile. Restorative justice seeks to repair or restore the injustice done, which is why victim reparations are commonly linked to restorative justice in the language of transitional justice. However, victim reparations constitute only one aspect of restorative justice, as restorative justice emphasizes the humanity of both offenders and victims, seeking to repair social relations and peace, and encouraging forgiveness and reconciliation.28 This latter feature points to the roots of restorative justice in the Roman Christian tradition. Furthermore, restorative justice has developed in Western societies as a mechanism of conflict mediation and/or conflict resolution, particularly related to criminal cases, where the participation of both victims and perpetrators is encouraged.29 It is mainly due to its emphasis on the ultimate goal of reconciliation, which moves beyond the focus on victims, that the concept of restorative justice is being challenged as inaccurate to address the needs of victims.

Rama Mani puts forward the concept of “reparative justice” as an alternative to restorative justice, in order to offer “a centralization of the principle of reparation, as the origin and core of the need for justice in times of violent and brutalizing transition”.30 While putting the victim at the centre of a concept of justice that addresses the need for reparations is indeed necessary, Mani undermines his own proposal when he later suggests that the agency (re)gained by the victim goes through the process of becoming “a survivor”, along with all other survivors of an armed conflict or authoritarian regime. This means that those formerly categorized as victims, perpetrators, bystanders, and the like, all become survivors. In my view, the specific character of the “victim” category dissolves in the overall category of survivors. In consequence, the focus of reparations as means to redressing the needs of victims is also weakened.31

Victim reparations encompass a number of related issues and concepts that are complex in nature and closely (sometimes messily) interlinked. To bring some clarity to the debate, I endorse Pablo De Greiff’s suggestion to distinguish between conceptualizations of reparations as used in international law and the one used in reparation programs. Although related to each other, these two contexts involve different choices and motivations in a conceptualization of victim reparations.32

28 Martha Minow supra n 2.
29 This is the case of the European Forum for Restorative Justice, established in 2000, with the aim to help establish and develop victim-offender mediation and other restorative justice practices throughout Europe. More information is available in their website: http://www.euforumrj.org/homepage.asp.
31 A related issue is, of course, the political and historical implication of transforming all actors involved in gross human rights violations into “survivors”, including perpetrators. While the “survivor” approach might support a reconciliation agenda, in my view, any serious attempt at “reconciliation” is bound to fail if it blindly does away with contextualization and historical interpretation.
In international law, reparations refer to all sorts of reparatory measures implemented to address human rights violations, without necessarily targeting specific violations. This juridical definition of reparations differentiates – as we have seen in the previous section – between the categories of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. It is particularly the latter two categories that make reference or are related not only to other mechanisms of transitional justice, such as disclosure of truth and judicial and administrative sanctions, but may even include reform processes, development projects, and symbolic acts, among others. The broadness of the juridical understanding of victim reparations can be explained, according to De Greiff, by the specific aim pursued in the judicial process, which is the achievement of justice for individuals, where the means of achieving justice is the trial of isolated cases. The “menu” of choices needs thus to be extensive in order to allow its adaptability to the individual case and to encompass as many situations as possible.

In the context of designing specific reparation programs, a narrow definition of reparations is needed, as it refers to a specific target group (the victims) and a specific type of crimes/human rights violations. This definition does not include truth-telling, criminal justice, or institutional reform. Instead, it operates on the basis of two fundamental elements: the types of reparations (material and symbolic), and the forms of distribution (individual and collective); this will be discussed in more detail in the next section. The narrow definition of reparations is, in a sense, an operational one, suggesting certain limits to the responsibilities of those in charge of designing reparation programs.

The distinction between a juridical and an operational conceptualization of reparations might prove useful at the analytical and operational level, yet it should also be said that the operational definition is not only grounded on the broader juridical definition, but it becomes itself a legal category which determines many aspects of the reparation involved. For this reason, the debate between jurists active in international law and reparation “officers” and advocates seems to be more a matter of form and scope rather than content. In my view, there is no inherent contradiction between juridical and operational definitions, as they both focus and acknowledge the victim’s right to redress. As we shall see in the next section, most debates on reparations centre on the applicability and implementation of juridical definitions to specific cases, particularly those involving massive human rights violations – which is usually the case in situations of transition from armed conflict and authoritarian regimes.

D. MAIN ISSUES ON VICTIM REPARATIONS

In spite of the apparent consensus over the right to remedy for victims of human rights violations, the design and implementation of reparation programs (including their legal framework and categories) are highly contested issues involving a series of substantive, ultimately political decisions to be taken by new regimes. Notwithstanding their grounding in international law and human rights, there is nothing universal about the way different countries go about

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taking these decisions. On the contrary, such decisions are highly contextual, depending not only on the political conditions of the post-conflict or transitional period, but also on the historical legacy of the previous regime, power structures, and even practical matters (such as the feasibility of implementation and funding). In this section, I present the core issues of victim reparations based on the most important decisions involved in the elaboration and implementation of reparation programs.

1. Reparations – Yes or No?

The first move in the process of establishing reparation programs is to decide for or against them. While truth commissions may recommend the need for reparations as an integral part of a transitional justice process, there is no immediacy in governments’ responses towards reparation. In order to opt for reparations, a political regime has first to acknowledge the existence of a situation that calls for reparations, as well as the existence of people who have been harmed and should be entitled to the attention of the state through a reparations program. Whatever the legitimacy of the claims and actors involved, these are not light decisions to take, as they will involve the initiation of a comprehensive and sensitive process of reparations which usually creates high expectations among the population (particularly among victim groups and potential beneficiaries). On the other hand, political will to develop and implement a reparations program might yield popular support and legitimacy to the new regime. Having said yes to victim reparations, regimes will then have to act effectively and timely in order to prove their commitment and sustain credibility. With all the pressing needs of post-conflict situations, these features might be highly volatile. In the case of post-authoritarian regimes, much will depend on the balance of power between former and current regimes.

2. Who is the Victim?

In transitional justice and human rights discourse, human rights violations are often depicted in terms of victim and perpetrator, those who have been harmed and those who have inflicted harm upon others, respectively. In the context of reparations, the identification of the victim is vital, as it is he/she who will be entitled to whatever form of remedy or benefit is to be provided. Through the use of legal categories, reparation programs can identify the universe of victims to which the program is addressed, often by reference to specific types of human rights violations. In that manner, victims tend to refer to all those who have suffered a specific type of violation. The most common types of violations in authoritarian regimes and armed conflict situations are murder, kidnappings, torture, forced disappearance, rape, sexual abuse, mutilation, forced draft, and displacement, among others. In other words, the victim is identified on the basis of the type of violation inflicted upon them.

Elster formulates the issue of victims by asking “what forms of suffering constitute victimhood”. He makes a distinction between three types of suffering, situations that are wider in scope than specific legally defined violations. Material suffering involves the loss of real
or personal property, the loss coming about either by destruction or confiscation; by personal property one refers to physical objects or financial assets. In some cases, the way the loss occurred may strengthened or delegitimize certain claims. Personal suffering refers to harm to life, body or liberty, which can take place both during and outside combat situations. Intangible suffering refers to the loss or lack of opportunities.

The different types of suffering call for different approaches to the issue of reparations, posing several challenges. In most cases, the burden of proof is usually left to the responsibility of the claimant. The main emphasis has usually been on the need to avoid paying compensation to those not entitled, rather than to avoid denying them to those who are entitled. The demand for rigorous proof of victimization may, for some victims, add to their burden.35 Another aspect is the issue of citizenship or residence: some victims might be excluded from reparations benefits because they are not citizens, or cannot proof permanent residence, even when harm has been done within national territories. Particularly in the context of intangible suffering, the debates seem to focus on what is to be considered the optimal or legitimate grounds for compensation: past suffering or present/future needs. Will reparation be enough to ensure that a victim not only recovers from past suffering/violations, but also meet her present and future needs? Could these needs be better satisfied through other mechanisms such as property restitution? How to deal with the issue of dual ownership then? Here again, we can see that there are no easy answers, but rather complex political choices.

While the identification of victims is the cornerstone of any victim reparation program, it is necessary to problematize the dichotomy victim/perpetrator. The human rights discourse that informs most of the transitional justice literature tends to reduce complex realities into neat, clear-cut, legalized categories.36 As a case in point, transitional justice processes always involve more than two types of agents. As the recent armed conflicts of the 1990s around the world have demonstrated, these two categories do not cover the universe of actors that take part in armed conflict or are involved in human rights violations. Neither are the boundaries of these categories always clearly delineated. Cutting loose from the dichotomy victim/perpetrator, Elster identifies eight agents of transitional justice:37

- Wrongdoers: those who committed wrongdoings
- Victims: those against whom wrongdoings were committed
- Beneficiaries: those who benefited from the wrongdoing
- Helpers: those who helped victims
- Resisters: those who fought against wrongdoing
- Promoters: those who promote transitional justice processes
- Neutrals: neither wrongdoers, victims, helpers nor resisters
- Wreckers: those who obstruct transitional justice processes

35 Elster supra n 33 at 183.
37 Elster supra n 33 at 99.
Drawing on historical examples from Western Europe, Elster moves on to discuss the many contradictions and complementarities that may exist when different roles are combined by the same social actors or groups. Independently of whether more categories could be identified, Elster’s expanded classification of agents highlights the fact that it is not uncommon to find that a single individual can have several roles, that is, be identified as several types of agent at different points in time. These alternate roles are a challenge for transitional justice processes, where clear legal identifications are at the basis for the decisions that need to be taken.

Closely related to the identification of victims is the identification of beneficiaries of reparation programs. Should reparation be limited to the victim herself, if she survived abuse? In the case of death and disappearance, it is often the closest relatives who become beneficiaries of reparations programs. Should they also be considered as victims? Can descendants claim reparations for violations committed a generation or more ago? The combination of time passed between the claim and the violation, and the degree of kinship/closeness to the primary victim can produce several surprising combinations when it comes to reparations.

3. TYPES OF REPARATIONS

The type of reparations that ought to be implemented in a particular situation is often the most discussed issue regarding reparations. In spite of an overall consensus on the complementarity of reparations in relation to other transitional justice mechanisms, human rights organizations, NGOs active in the field of transitional justice, and victim groups still tend to focus their debates on monetary compensation – while this is only one of the forms that reparations can take.

As mentioned earlier, there are two basic distinctions to be made concerning types of reparations, one regarding their form (symbolic or material), and the other concerning its distribution (individual and collective). Symbolic reparations include various forms of recognition and acknowledgement for the suffering of victims, such as commemorations, rituals in homage to the victims, changing the names of streets, places of memory, and apologies in the name of the nation, in public acts or private letters. Material forms of reparation include all tangible assets which are provided to repair the harm done, such as money, goods or services. These might in turn be provided as a single lump sum, or a series of payments (like pensions), the return of lost property, or privileged access to educational and health programs. There has been an expansion of the forms that material reparations may have, moving from what was previously the most dominant form of reparation (i.e. individual monetary compensation) towards services, such as mental health schemes, legal counseling, physical medical treatment, scholarships, priority in housing schemes, and more. Collective reparations, the most preferred option for governments facing redress for massive human rights violations, offer as well a variety of options, the most common being the provision of basic public infrastructure (water and sanitation, health posts, schools, bridges and local roads). In that particular case, the distinction between development projects and reparations becomes blurred, and there are

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38 This is not to be confused with Elster’s “beneficiaries” in the classification presented above.
those who argue that the development responsibilities of governments can never stand as reparation for human rights violations.39

Martha Minow reflects on the need to pay attention to the symbolic dimensions of reparatory justice, questioning the widespread assumption that what victims need the most was monetary compensation. She called instead for a restorative justice that was aware of the impossibility of “repairing the irreparable”. The problem arises however, when symbolic forms of reparations are not accompanied by other more tangible benefits; symbolic reparations might then be interpreted by the victims as empty words with no serious commitment to the victims.40

If monetary compensation is to be granted, how to measure the amounts of money to be granted as reparation for human rights violations? One criterion that has been applied in international law is *restitution in integrum*, that is, full restitution. There are standard methods for measurement of what “full restitution” might be, based in the socio-economic status of the victim, future earnings, and costs of living, among others. According to De Greiff, this is problematic not only because it is almost impossible to define what constitutes *full* restitution, but also because it is a mechanism designed for individual cases and therefore difficult to apply in cases of massive human rights violations, none the least, due to large amount of resources that the principle of full restitution would involve for countries that lack those resources from the outset.41

This leads us to the second basic distinction, that regarding the form of distribution of reparation benefits. Should reparations be granted individually, or should they be collective, given to groups? While the ideal reparation program should include both modalities, governments with limited resources would prefer collective reparation schemes, while human rights activists and not few victims’ organizations prefer individual reparations. Arguments in favor of one or the other form of distribution are many, and include pragmatic as well as normative and philosophical reasons. Would an individual victim of torture receive the acknowledgement and redress he deserves through a collective reparation scheme providing, say, housing and public services? There are those who argue that he would, because the program would address present needs, while others argue that the individual personal suffering drowns in the collective character of the reparation.

Individual and collective reparations need not be exclusive, nor do they have to limit the possibility of resorting to civil litigation. In the Western judicial system, monetary compensation is the most common form of redressing damage; this is particularly the case under tort law, where civil litigation is the common procedure. Can the torts approach be used to human rights abuse? Jamie E. Malamud-Goti and Lucas Sebastian Grosman offer a balanced discussion of the pros and cons of the applicability of tort law for human rights, arguing for the need

39 This is an ongoing debate in countries where collective reparation programs are being implemented, such as in Peru, where the author is currently conducting research on the reparations program. It is worth noting that there is no clear position among victim groups/beneficiaries and human rights organizations on whether or not development projects can or should be consider as an appropriate form of reparation. Different positions can be found in all groups.

40 Minow supra n 2.

41 De Greiff supra n 32 at 456.
to leave the legal option open, if the victim so wishes. According to De Greiff, the option of case-by-case proceedings de-contextualizes individual cases from their historical situation. Furthermore, it disaggregates the universe of victims and their collective claims while giving attention to those applicants who have the resources to access a legal action. In Latin America, for example, for every judicial action that reaches a positive outcome at the Inter-American Human Rights Court, there are hundreds others that will not even go as far as being registered or acknowledged. On the other hand, as Malamud-Goti and Grosman argue, “the torts approach can serve the goal of restoring victims’ dignity by emphasizing their individuality”. From an administrative and financial point of view, it is the risk of double-payment, or receiving reparations for the same violation more than once, that is behind most official arguments on the need to rule out the legal option. However legitimate these arguments might be, there is a need for creative mechanisms to reduce the risk of double-payment without sacrificing the victims’ right of access to justice.

4. THE AIMS OF REPARATION

Are there any aims to reparation programs other than to redress the needs of victims? In the context of transitional justice, the answer to this question tends to be positive, and on a normative basis. Recalling the broader definition of reparations applied in international law, we can see the links made to truth and justice as integral parts of the right to remedy. In the context of transitional societies, De Greiff highlights these links in order to recognize the inherent political potential of reparations:

In transitional periods reparations seek, in the last analysis, as most transitional measures do, to contribute (modestly) to the reconstitution or the constitution of a new political community. In this sense also, they are best thought as part of a political project.

The (re)constitution of this new political community lies in a conceptualization of justice that includes three elements; recognition, civic trust and solidarity. These elements are usually the aims of reparation programs, but simultaneously, they are also necessary conditions and consequences of justice. Recognition refers to the recognition of individuals as individuals (thus recognizing their agency), as citizens, and as victims (because individuals actually can become subject to harm effected by others). Civic trust refers to the expectation of a shared normative commitment, while social solidarity refers to the ability to empathize with the situation of others. In the particular case of reparations, victims can expect and trust that the state and society at large will recognize and address their needs; this will be the ultimate sign of social of inclusion in a society where their rights have previously been violated:

43 Ibid at 555.
44 De Greiff supra n 32 at 454.
45 De Greiff supra n 32 at 460.
Reparations, in summary, can be seen as a method to achieve one of the aims of a just state, namely, inclusiveness, in the sense that all citizens are equal participants in a common political project. De Greiff’s argument for thinking about the aims of reparations in explicitly political terms as opposed to more judicial terms of compensation in proportion to harm helps place the issue of victim reparations in the realm of politics, identifying the close interconnections existing between reparations and nation-state building, citizenship, and historical (re)construction.

The development of different measures of transitional justice has increasingly been incorporating analysis of the socio-political situations facing countries in transition, while endorsing a common platform of human rights and the rule of law. However, we have to take seriously the warning raised by Wilson that “ignoring the ideological dimensions of transitional justice is the quickest route to entrenching legal fetishism.” The expansion of human rights talk in the 1990s has developed into a universal language, or even more, into “a global human rights machinery” in which a positivist strand of human rights has achieved almost hegemonic status at the expense of other understandings. Although the authors do not specifically deal with the issue of reparations, I believe that their proposed “social critique of rights and the legal process” can bring fruitful insights to the study of victim reparation programs. According to their critique, the use of positivist accounts on social life within human rights institutions and discourse tends to flatten multiple subjectivities and complex practices and experiences. An individual becomes then either a victim or a perpetrator, and a violent act is either a human rights violation or not. As previously mentioned, such clear-cut definitions oversee the possibility that a person can be both a victim and a perpetrator at different points in time. For example, in situations of armed conflict, can “active combat” be defined as a human rights violation? According to the Peruvian Truth Commission, it can, if the victim is a member of the armed forces and the peasant patrols – but not if s/he is a guerrilla member. The explanation for this different treatment lies on a normative understanding of the legitimacy of the act of combat: present in the case of soldiers, absent in the case of guerrillas. The identification of victims and violations as neat categories, as necessary as they are for the practical formulation of a specific reparation plan, cannot be equated with a complex social reality. The problem is that through reparation schemes sanctioned by law, such categories become entrenched in the legal discourse of particular regimes of truth, thus setting the premises for what is to be recognized and included, and what is not.

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46 De Greiff, supra n 32 at 464.
On his work on the South African Truth and Reconciliation Commission, Wilson makes a link between human rights discourse and the nation-building project of the post-Apartheid state. He calls for “a critical understanding of the reformulation of human rights in the hegemonic project of states emerging from authoritarian rule”. He argues that states do not endorse human rights simply for their appreciation of liberal values, but because the language of rights can be inscribed in nation and state-building projects. From that perspective, the truth-writing project of truth commissions has the power to codify the history of a particular period, fixing memory and institutionalizing a view of the past conflict. This view is also endorsed by a growing body of literature on the politics of memory, where the debate centers on the socially constructed character of memory and history. Remembering, and forgetting should be understood as social processes where different versions of the past struggle for recognition and assertion as the official history, the true account of the past.

Through reparation programs, states can put into practice the interpretation of the past forwarded by truth commissions, with all the advantages and limitations this conveys. It is vital however, to be aware of the links between human rights discourse, the regime of truth and the nation-building project that such schemes support. In other words: what kind of nation-building project is being supported through the design and implementation of specific reparation programs? A critical analysis of reparation plans and programs that situate them not only in their immediate socio-political context, but also in regards to contesting interpretations of the past and state-nation building projects can provide answers to these most pressing questions.

50 Wilson supra n 46.
51 Ibid.
52 Ibid at 16.
D. AN ANALYTICAL FRAMEWORK FOR THE STUDY OF VICTIM REPARATIONS

From the previous sections, we can see that the core issues of any victim reparations initiative involve choices that reach well beyond the realm of the merely administrative or technocratic and deep into the realm of the political. The challenge at hand is thus how to reach a critical understanding of reparation programs that links them up to larger processes of history construction and nation-state building. In my view, the core issues discussed above serve as the basis for an analytical framework for the study of victim reparation programs, one that includes four basic and inter-related elements. Although not exhaustive, the framework provides the basic tools to analytically and systematically approach how different countries deal with the issue of victim reparations, while keeping an eye on contested social processes. One of the benefits of such a framework is to allow the comparative study of reparation programs, both in normative and process-oriented terms from a social critical perspective, thus emphasizing the multiple subjectivities and complex practices and experiences that armed conflicts and authoritarian regimes entail.

The point of departure for this analytical framework is a conceptualization of victim reparations as a contested social process. This implies a focus on the identification of social actors involved in contestation and negotiation for (i) framing the terms of engagement and (ii) influencing the content/form of specific the reparation programs. The dynamic of the process and social actors’ access to relevant decision-making processes will vary from case to case due both to socio-political factors as well as existing/competing notions of victimhood. The elements suggested for this analytical framework are discussed in turn.

Contextual origin of victim reparations: This element focuses on the immediate socio-political context where the reparations issued was raised, as well as on the nature of the conflict or regime prior to the transition. Questions to be asked include: How and when did the reparations issue come about? What is the social, political and economic background that gave rise to the reparations issue? Which social actors contributed in the framing of victim reparations as an issue? Which social actors opposed reparations and why? What is the basis/status of the issue in terms of ruling legislation and policy?

Basis of the benefit: This element focuses on the most basic definitions of a reparations program – identifying the victim and the basis of victimhood. A closely related definition is that of the beneficiary. What nuances are reflected and ignored by the basic concepts? What types of damages or events are entitled to reparation? Which ones are not? Given the basic concepts of a reparations program, what are the implications of these when applied to different groups of victims? Who becomes a beneficiary? Who does not, and why?

Implementation: This element deals with the basic distinctions of form and distribution of reparation measures; symbolic or material, individual or collective. These variables can be combined in many different ways, thus producing various kinds of reparation measures. What are the challenges posed to the actual implementation of reparation measures at both local and national levels? What are the advantages? How does the “menu” of reparation measures respond to the needs of different types of victims and beneficiaries?

Historical dimension: This element focuses on the implications that reparations programs have for the political and legal claims of different victim groups. In the construction of the past that emerges as hegemonic, what role is being assigned to the various groups? Are there any
aspects of the assigned roles that do not correspond to the groups’ self-defining role, and why is this so? Is there public recognition for contesting claims, or are alternative claims doomed to oblivion? Ultimately, what history is the specific reparation program helping to construct?

E. CONCLUSION

Based on the growing international and academic interest in victim reparations as a mechanism of transitional justice, and the abundant literature that has emerged in the past few years, this article takes a step back to ask what is actually at stake with victim reparations and why. As we have seen, the conceptual clarification in this emerging field is a fairly recent development, and categories are still being challenged in the academic debate. Similarly, while consensus has been reached about the legitimacy of victims’ rights, there is an ongoing debate over how best to address the needs of victims, both in form and content.

Reparations are a highly normative and ethical issue. They are also a highly sensitive, political one. I therefore argue that any reparations program must be seen in relation to the political project it supports. Through a discussion of the core issues and choices present in developing victim reparations initiatives, the elements of an analytical framework for the study of specific reparation programs emerge. The framework highlights the social and contested character of reparation programs by situating the issue of victim reparations in a political and historical context. This may well lead to a certain “loss of innocence” of victim reparation programs, but the awareness of what is at stake in the (re)construction of painful histories will contribute to an open process of recognition of social actors and what they endured in the past.