The London School of Economics and Political Science

The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practice?

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others.

Abstract

This thesis analyses the international legal standing of the right to reparations for victims of serious human rights and humanitarian law violations and assesses the degree of practical implementation of the right at the national level through post-conflict and transitional justice measures. The central objective of this study is to chart and evaluate developments in law and practice in order to substantiate arguments in favour of an emerging customary right for individuals to receive reparations for serious violations of human rights and a corresponding responsibility of States.

To this end, Part I explores the customary nature of human rights and humanitarian law provisions, outlines the basic premise of State responsibility in relation to violations and identifies the general international norms which establish the obligation of States to provide reparations. An examination of the jurisprudence of the International Court of Justice, the Articles on State Responsibility of the International Law Commission and the convergence of norms in different branches of international law, notably human rights law, humanitarian law and international criminal law as well as extensive human rights jurisprudence, international as well as regional, supports the position that the right to reparations is gaining customary recognition. The adoption in 2006 of 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* by the General Assembly of the United Nations further strengthens this claim.

Following the legal analysis, Part II of the study explores State practice in relation to reparations through four case studies; Guatemala, Sierra Leone, East Timor and Colombia between 1999 and 2009. Analysis is undertaken of peace agreements and to what extent post-conflict measures, such as Truth Commissions, have promoted State responsibility for reparations, been supported by the United Nations, interacted with human rights mechanisms and prompted subsequent elaboration of domestic legislation and reparations policies.

The thesis concludes that there is significant convergence in law in favour of the right to reparations. The lacuna between norm and implementation should be overcome by reinforcing State responsibility to provide reparations for victims.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
CAT	Committee against Torture
CAVR	Commission for Reception, Truth and Reconciliation of Timor-Leste
CEH	Historical Clarification Commission in Guatemala
CRC	Committee on the Rights of the Child
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
GA	United Nations General Assembly
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	Ad hoc Tribunal for Rwanda
ICTY	Ad hoc Tribunal for Former Yugoslavia
ILC	International Law Commission
MINUGUA	United Nations Human Rights Verification Mission in Guatemala
OAS	Organisation of American States
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
UNCC	United Nations Compensation Commission
UNHCR	United Nations High Commissioner for Refugees
UNTAET	United Nations Transitional Administration for East Timor

The Right to Reparations in International Law for Victims of Armed Conflict: Convergence of Law and Practice?

1. Introduction, Objectives and Method

1.1 Introduction of the Research Topic and Context

The rationale for conducting this study is the importance of charting the legal standing of the right to reparations for victims of serious violations of human rights and humanitarian law and to explore the challenges associated with the implementation of this right, including the role played by the United Nations (UN) in this regard. The research explores the developing legal norms relating to the rights of victims of serious human rights and humanitarian law violations, identifies implementation gaps in recent international justice accountability initiatives and considers the advancement of the practical implementation of victims' rights, in particular those relating to reparations.

The past few decades have been distinguished by significant advances in the concept of State responsibility for serious violations of human rights and humanitarian law. Progress has been made in various branches of international law and long overdue steps towards implementation have been taken, notably through the development of human rights jurisprudence and the establishment of international criminal tribunals and truth commissions. Based on experiences to date, there is increasing awareness that post-conflict justice initiatives need to be comprehensive, complementary, and in particular, pay due attention to the rights of victims. There is emerging recognition that it is the responsibility of the State to provide justice for victims of armed conflict, and that sustainable justice requires three different components; judicial accountability, truth and reparations.[1] This is reflected in recent developments in general international law and *lex specialis* such as human rights and humanitarian law, as well as post-conflict policy initiatives undertaken by international organisations, primarily the UN. However, due to the tensions surrounding the State responsibility to provide reparations, this component of justice continues to be overlooked in favour of what are perceived to be more pressing exigencies to establish accountability and rule of law. This thesis argues that the rights of victims of serious human rights and humanitarian law violations have traditionally

[1] *UN Principles to Combat Impunity*, adopted by the UN Commission on Human Rights in 1997, updated in 2005, UN Doc. E/CN.4/2005/102/Add.1, also e.g. Bassiouni, Cherif, "Accountability for Violations of International Humanitarian Law and other serious Violations of Human Rights" in Bassiouni (ed.) *Post-Conflict Justice*, Transnational Pub, 2002, p 26, Minow, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon Press, 1998 and Mani, Rama, *Beyond Retribution, Seeking Justice in the Shadows of War*, Polity Press, 2002

been neglected and that there is a pressing need to promote and apply the emerging norms in order for their rights to be realised and to ensure that a "tripartite" balance of justice is achieved. Considering the standing individuals have gained in international law, the need to translate consequences of serious violations, such as reparations, in favour of individual victims has become an important aspect of affirming the legitimacy and credibility of the international legal order and human rights standards.

The surge of the human rights movement and the progress made towards universal ratification of human rights instruments over the past few decades has influenced the recognition of individuals as subjects under general international law and their rights versus the State. Both at the international and regional levels, rapidly growing jurisprudence confirms State responsibility to provide reparations for human rights violations caused by State agents or by the failure of States to prevent violations by non-State actors. However, as human rights mechanisms were not designed to deal with large scale violations in conflict situations, the developing doctrine on redress provided for individual victims of human rights violations stands in stark contrast to the inadequate responses that have thus far been offered in practice to the victims of serious human rights and humanitarian law violations. Victims of ordinary crimes are still more likely to receive redress than those who have suffered serious human rights violations, in particular when the victims are numerous in the context of an armed conflict. Many victims of serious violations continue to suffer stigma, social exclusion and re-victimisation as a consequence of the lack of reparations and assistance in order to overcome the impact of armed conflict. Among the victims most affected are women, children and victims of torture and sexual violence. For a majority of these victims, the absence of reparations has impeded their ability to resume their lives and move beyond the trauma they have endured.

Humanitarian law primarily contains provisions related to the protection of victims, i.e. civilians during conflict, but also affirms the duty of responsible parties to pay compensation. The historical doctrine in international law on inter-State reparations has to a large extent impeded the ability of victims of conflict to seek reparations. States had the discretion of claiming reparations against other States for injuries to their nationals. The defendant State's duties were considered to be owed not to the injured alien, but rather to the alien's national State.[2] However, this doctrine has been challenged at the national level by a number of

[2] Brownlie, I, *Principles of Public International Law*, Clarendon Press, Oxford, 1990, p. 432- 476, Cassese, A, *International Law*, Oxford University Press, Oxford, 2001, pp. 182-210

international redress movements, which in turn have been inspired by the graduation erosion of State immunity in relation to human rights violations. The convergence of human rights and humanitarian law norms which cover the same serious violations, such as for example violations of the right to life and acts of torture, exposes gaps as victims are able to seek redress through human rights mechanisms, while humanitarian law fails to provide comparable implementation procedures.

The recent codification of international criminal law has significantly influenced the discourse on post-conflict justice, while legal research on post-conflict justice has been inspired by the rapid developments in international justice mechanisms. As a result, much focus has been on the accountability of perpetrators, in particular in the application of universal jurisdiction. Victims have largely remained in the background, analogous to their position in municipal criminal law where reparations are seen as part of civil law, and victims are still primarily perceived according to their capacity as witnesses. However, as awareness of the importance to affirm the rights of victims increases, there is a pressing need to identify gaps in their legal protection as well as effective modalities that can address their situation in practice. The Rome Statute of the International Criminal Court (ICC) establishes new ground by affirming the rights of victims to reparations. Yet, the key challenge of how to transform these rights into practice remains, particularly as the coverage of the ICC, and that of its Trust Fund, will be limited by its jurisdiction and capacity to interact with and reach out to victims.

There is a potential problem in focusing on individual responsibility as it may divert attention away from State responsibility. In practical, as well as conceptual terms, the issue of reparations for victims of armed conflict is difficult to substantiate in terms of individual responsibility. This research argues that there is a need to reinforce the notion that the State carries the principal responsibility for providing redress. Although a State may not have been directly and solely responsible for all violations in question, responsibility can, as is evidenced in international law and succinctly illustrated by case law from the Inter-American human rights system, result from complicity, omission as well as failure to prevent and demonstrate due diligence.[3] It is submitted that once peace has been achieved and

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Malanczuk, P, Akehurst's Modern Introduction to International Law, 7th ed., Routledge, 1997, pp. 256- 257
Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, 2nd ed., 2005, pp. 56-83

[3] Cancado Trindade, A, "Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited" in Ragazzi, M (ed.) *International Responsibility Today, Essays in Memory of Oscar Schachter,* Martinus Nijhoff Publishers, Leiden, 2005, pp 253-269
See further references in case law discussed in chapter 3 and in particular in relation to jurisprudence of the Inter-American Court relating to Guatemala and Colombia, discussed in Part II of the thesis

negotiations concluded, the State assumes responsibilities towards the demobilised opponents with respect to e.g. reintegration measures, and as a logical consequence, should also be responsible to the victims of these former combatants.[4] As is demonstrated by numerous peace agreements, there is recognition that victims are entitled to receive reparations.[5] Examples of such peace agreements are highlighted and explored in Part II of the thesis. Authorities in post-conflict scenarios need to consider the harm that has been inflicted upon civilians in a non-discriminatory manner irrespective of the perpetrators of the acts, and State practice indicates growing recognition of such responsibility.

As noted above, different branches of law are contributing to the development of norms on victims' rights. The convergence of human rights provisions and those related to war crimes under international humanitarian law and international criminal law, for example the prohibition of extrajudicial executions, torture, racial discrimination and child recruitment indicate that victims would benefit from claiming their right to reparations with reference to different branches of law. There is recognised value in merging the rights of victims currently found in the different strands of international law,[6] however the adoption of a legally binding instrument that clearly consolidates the rights of victims[7] and the establishment of effective operative redress mechanisms have yet to be realised.

In 2005, the UN Commission on Human Rights adopted, after some 15 years of drafting negotiations, *UN 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*

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[4] For a thorough discussion see; Zegveld, L, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002
Sooka, Y, "Dealing with the past and transitional justice: building peace through accountability", *International Review of the Red Cross (IRRC)*, June 2006, Vol. 88, No. 862, pp.324-325
De Geiff, P, "Contributing to Peace and Justice, Finding a Balance between DDR and Reparations", Paper presented/published at conference; *Building a Future on Peace and Justice*, Nuremberg, 25-27 June 2007

[5] Bell, C, *Peace Agreements and Human Rights*, Oxford University Press, 2000
Report to the Human Rights Council of the Office of the High Commissioner for Human Rights, *Analytical Study on Human Rights and Transitional Justice*, A/HRC/12/18, 6 August 2009
Addendum, *Inventory of human rights and transitional justice aspects of recent peace agreements*, A/HRC/12/18/Add.1, 21 August 2009

[6] An example, the ICJ *Case Concerning Armed Activities on the Territory of the Congo*, (Democratic Republic of the Congo v. Uganda), ICJ Report 2005, affirms the dual and complementary application of human rights and humanitarian law, paras. 217-219
Further references on the mutually complementary and reinforcing nature of human rights and humanitarian law; *Report to the Human Rights Council of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict*, A/HRC/11/31, 2 June 2009

[7] Meron, T, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument" in *American Journal of International Law*, Vol 77, No. 3 July 1983, pp. 589-606
Bassiouni, C, "Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights" in Bassiouni (ed.) *Post-Conflict Justice*, Transnational Pub, 2002, pp. 26-54

International Humanitarian Law (hereafter Basic Principles on the Right to Reparation for Victims or the Principles). The Principles clearly aim to merge international humanitarian and human rights law, and stress the importance of and obligation to implement domestic reparations for victims of conflict. In March 2006, the Principles were adopted by the General Assembly (GA) of the UN, further strengthening their status even if they are formally non-binding.[8] Significantly, the Principles detail the range of components which reparations consist of, namely; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Principles, while still in draft form, were been referred to in the jurisprudence of numerous human rights treaty bodies, figure in several recently adopted international legal instruments[9] and domestic legislation, and have also been applied by a number of truth commissions, as explored in Part II of the thesis.[10] As will be explored, the Principles largely reflect already established norms in international law and make an important contribution in unifying and reinforcing them. To a significant extent, the Principles draw upon the *Draft Articles on State Responsibility* adopted by the International Law Commission (ILC) in 2001.[11] This study examines the different elements of reparations and identifies aspects which are deemed to be the most essential by those victims who remain particularly vulnerable after the armed conflict. As noted by Nowak and MacArthur; *"usually, victims of torture are not primarily interested in monetary compensation but in other means of reparation which are better suited to restore their dignity and humanity".* [12]

Although reparations clearly are a State responsibility, the UN plays a considerable role in promoting the rights of victims in conflict mediation and post-conflict peace building. The authority of the UN, empowered by the Charter with the duty to maintain international peace and security in conformity with the principles of justice and international law, faces a major challenge in promoting normative standards on victims' rights in its operative work. The

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[8] *UN 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*, preamble, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted in the General Assembly without a vote on 21 March 2006, UN Doc. A/RES/60/147

[9] The Rome Statute of the International Criminal Court (ICC) contains an implicit reference to the principles in article 75, they are also explicitly mentioned in the International Convention on the Protection of All Persons against Enforced Disappearance, article 24 (adopted 20 December 2006, yet to enter into force)

[10] For example, the truth commissions in South Africa and Sierra Leone, as underlined by Ms. Yasmin Sooka, former Commissioner in the South African and Sierra Leone TRCs during Workshop to Combat Impunity and Provide Reparations at OHCHR Geneva on 19 September 2005. Also, cited in Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999, p. 350.

[11] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Commission 2001, 53rd session contained in the Official Records of the General Assembly, 56th session, Supplement no. 10, UN doc A/56/10, chap. IV.E.I

[12] Nowak, M, and McArthur, E, *The United Nations Convention against Torture, A Commentary*, Oxford University Press, 2008, p. 483

expanded role of the UN in peacekeeping missions,[13] and in post-conflict justice initiatives undertaken over the past 15 years, underlines the position of the organisation that State responsibility towards victims should not be abandoned during accountability and reconciliation processes. This study explores the role of that the international community, and notably the UN, in ensuring victims' rights in peace negotiations and the establishment and operation of, as well as follow-up to, transitional justice mechanisms. As expressed by Kofi Annan in his 2005 reform proposal, *"we must move from an era of legislation to an era of implementation".*[14]

1.2 Aim and Objectives of the Study

The overall aim of this thesis is to analyse the international legal standing of the right to reparations for victims of serious human rights and humanitarian law violations and assess the degree of practical implementation of the right at the national level through case studies on post-conflict and transitional justice measures. The central objective is to chart and evaluate developments in law, based on comprehensive analysis of provisions and jurisprudence, as well as in practice, in order to substantiate arguments in favour of an emerging customary right for individuals to receive reparations for serious violations of human rights and the corresponding responsibility of States.

Although research on reparations has gained increased attention, considerable research has been compartmentalised and focused on either redress in human rights,[15] international humanitarian law[16] or international criminal law.[17] This thesis rather promotes the position that victims benefit from a reparations concept which merges provisions, especially since the prohibition of the most serious human rights violations coincide with provisions in international humanitarian law and international criminal law. The focus on these synergies follows as a natural consequence of increased convergence and cross-referencing regarding

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[13] Report of the Secretary General to the General Assembly, "Investing in the United Nations, for a stronger Organisation worldwide", released 7 March 2006, A/60/692 details that; *"in the first 44 years of the history of the UN, only 18 peacekeeping missions were set up. In the 16 years since 1990, 42 new missions have been authorised"*, para. 4

[14] Report of the Secretary General to the General Assembly, *In Larger Freedom, Towards Development, Security and Human Rights for All*, UN Doc. A /59/2005, 25 March 2005, para. 132

[15] Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999

[16] MacDonald, A, *Rights to Legal Remedies for Victims of Serious Violations of IHL*, Doctoral Thesis, Queen's University of Belfast, 2003, Zegvald, L, "Remedies for Victims of Violations of International Humanitarian Law", *IRRC (ICRC Journal)*, September 2003, Vol 85, pp. 497-526

[17] McKay, F, "Are Reparations Appropriately Addressed in the ICC Statute?" in Shelton, D (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court"*, Transnational Publishers, NY, 2000, pp. 163-178.

victims' rights between the different branches of law. As Bassiouni notes; "*if the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes should be re-conceptualised...such distinctions are of little significance to victims in their quest for redress*".[18] The right of individuals to receive reparations for serious violations is an indispensable corollary to an effective remedy for the violations suffered. The study focuses on the reparations aspects of victims' rights rather than on their right to access to justice and their right to a legal remedy. The objective is to apply a victim-oriented approach by using as a key evaluation tool the comprehensive concept of the victims' right to reparations established in the UN Basic Principles on the Right to Reparation for Victims, rather then referring to the polarised "truth versus justice" discourse,[19] which until recently has tended to dominate assessments of post-conflict reconciliation measures.

Parallel to legal developments, it is pertinent to scrutinise how actual post-conflict measures on the ground have managed to incorporate victims' rights elements and to what extent this has been achieved by initiatives constructed to promote retributive, transitional or restorative justice. There is a lacuna as the concept of State responsibility has evolved, alongside an emerging customary right to receive reparations, yet in practice a national legal framework and forum to which victims can submit claims commonly remains lacking. Thus the right cannot be effectively guaranteed. The study aims at assessing the degree to which concrete measures have been taken to bridge this gap. The research contrasts legal norms with State practice by exploring a number of case studies of countries recently emerged or emerging from conflict, in which the UN plays or has played a significant role in peace negotiations, the establishment of transitional justice mechanisms and in their follow-up. The impact of specific provisions on reparations in peace agreements and mandates of UN supported transitional justice initiatives is examined.

The establishment of numerous truth commissions has sparked considerable interest in their restorative value, in particular among scholars in the field of political science, sociology and psychology. However, only recently has the contribution of truth commissions become recognised among legal scholars as having a complementary, rather than alternative function.[20] This research suggests that approaches to post-conflict analysis have tended to be

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[18] Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review*, Vol. 6, 2006, pp. 204-205

[19] An example of such literature; Rotberg, R and Thompson, D, (eds.), *Truth v. Justice, The Morality of Truth Commissions*, Princeton University Press, 2000

[20] Goldstone, R, "Advancing the Cause of Human Rights: The Need for Justice and Accountability", in Power, S and Allison, G, *Realising Human Rights, Moving from Inspiration to Impact*, St. Martin Press, 2000, chapter 9

short sighted and failed to pay due consideration to an aspect crucial for the victims, namely the right to reparations. Therefore, this study sets out from the perspective of the victims, for whom the absence of reparations undermines the concept of justice. The second part of the study assesses the role of the UN in relation to transitional justice mechanisms, both courts and truth commissions, and the degree to which these have managed to influence the national discourse and promote State responsibility and responsiveness to victims' claims for reparations.

Specifically, the study discusses State practice and the extent to which truth commissions have provided a basis for subsequent elaboration of domestic legislation and comprehensive reparations measures. The study furthermore considers to what extent truth commissions have played, and will continue playing, a significant role in promoting the practical implementation of the right to reparations for victims of armed conflict. The case studies aim at identifying which factors are decisive in promoting the right in practice. For this reason, the case studies document the interplay between transitional justice processes and human rights mechanisms, both international and regional, and to what extent these have effectively promoted State responsibility. Finally, the case studies analyse the degree of engagement and support by the international community, along with geo-political factors, as these provide key elements in prompting States to recognise and assume their responsibilities *vis-à-vis* victims of serious human rights violations. With a view towards the future, suggestions for concrete measures, such as the creation of trust funds, are identified and put forward.

1.3 Methodology and Sources

The thesis proceeds with a study of *lege lata* and assess it in relation to *lege ferenda*. The material drawn upon reflects the sources of international law as set out in article 38 of the Statute of the International Court of Justice (ICJ).[21] The research is divided into two parts, which concentrate on international legal norms (Part I) versus national practice (Part II).

Stahn, C, "United Nations peace-building, amnesties and alternative forms of justice: A change in practice" in *International Review of the Red Cross (IRRC)*, Vol. 84, No. 845, March 2002, pp. 191-205
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Zacklin, R, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, No. 2, 2004, pp. 541-545

[21] Article 38 of the Statute of the International Court of Justice
Discussed in Brownlie, I, *Principles of Public International Law*, (6th edition), Clarendon Press, Oxford, 1990
Malanczuk, P, *Akehurst's Modern Introduction to International Law*, Routledge, 1997
Lepard, B, *Customary International Law: A New Theory and Practical Applications*, Cambridge University Press, 2010

Part I explores aspects of human rights and State responsibility which can be considered to have attained recognition as customary law. Specific consideration is given to the convergence of different branches of law by tracing relevant provisions in treaty law and inter-linkages between them. References are made to *travaux preparatoires* and interpretations by the ILC. The development of jurisprudence on victims' rights to reparations by international courts and tribunals, notably the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ), the European Court of Human Rights, the Inter-American Court of Human Rights (IACHR), the ad hoc Tribunals for former Yugoslavia and Rwnada (ICTY and ICTR) and the International Criminal Court (ICC), is analysed and systematised in order to provide an overview of the current standing of the victim in international law. Human rights case law, both international and regional, illustrating significant progress in favour of the right to reparations, is examined. Consideration is also given to the operative challenges faced by international courts and human rights mechanisms and the rules of procedure, which regulate their practice. Furthermore, the study examines international standards which are formally non-binding, with emphasis on the Basic Principles on the Right to Reparation for Victims, as these illustrate the emerging fusion in international law in favour of victims.

Part II of the thesis draws primarily upon State practice and *opinio juris* by identifying provisions on victims' right to reparations which have had a significant impact and been implemented at the national level. In relation to the case studies referred to in Part II, analysis is made of peace agreements, mandates and reports of truth commissions, national legislation and government policies on reparations for victims of armed conflict. In conjunction with the case studies, particular consideration is given to reports and resolutions of the UN relating to a number of entities, including; the Secretary-General, the Security Council, the General Assembly, the Office of the High Commissioner for Human Rights and the Human Rights Council (former Commission on Human Rights). The case studies draw upon personal field experience, informal conversations and interviews conducted with victims, NGOs, academics, ICRC and UN human rights staff, as well as representatives of national authorities. To date, the author has undertaken human rights work with victims of armed conflict in Guatemala and Colombia.[22] The study reflects materials and developments until early 2010.

[22] In 1999 the author spent 6 months in Central America, mainly Guatemala, doing field research on the outcome of the UN sponsored Truth Commission, as well as, volunteer work with a victim's rights organisation in rural areas. Between 2003 and 2005 she worked in Colombia as a human rights and humanitarian law observer for the UN Office of the High Commissioner for Human Rights (OHCHR). Since 2005 she works in the Human Rights Treaties Division with OHCHR in Geneva.

1. 4 Structure and Outline

Part I

The first chapter of Part I explores the customary nature of human rights and humanitarian law, outlines the basic premise of State responsibility in relation to violations and identifies the general international norms which establish the obligation to provide reparations. The convergence of norms and legal sources is documented by reference to the status of reparations in relation to individuals, as demonstrated in jurisprudence from the International Court of Justice, the Articles on State Responsibility of the ILC,[23] as well as in provisions in humanitarian and human rights instruments. The influence of international human rights law on general international law is particularly highlighted. The chapter acknowledges some of the reservations expressed in relation to the status of the right to reparations and notes how such concerns have been overcome by developments in international law.

The second chapter studies in further detail developments in the area of reparations on the basis of the international and regional human rights systems. The chapter charts the evolving concept of reparations for serious human rights violations through a comparative study of case law under the international and regional human rights systems. Focus is set on cases which illustrate elements of reparations for serious human rights violations relating to: restitution, no repetition, compensation, satisfaction and rehabilitation, according to the elements as affirmed in the Basic Principles on the Right to Reparation for Victims.

The third chapter of Part I provides an overview of the gradual incorporation of reparations provisions in international criminal law. In particular, the chapter studies the lack of attention for victims in the ad hoc tribunals (ICTY and ICTR), the unsuccessful attempts to create compensation mechanisms for the ad hoc tribunals and the impetus behind the groundbreaking provisions in the Rome Statute of the International Criminal Court. Some reflection is also made in relation to victims in the hybrid international tribunals (Sierra Leone, East Timor and Cambodia). Finally, the chapter also traces some of the major influences on this branch of law, such as the victimology movement, as well as restorative justice theory and feminist legal critique.

Part II

[23] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission, Report of the International Commission, 53rd session contained in the Official Records of the General Assembly, 56th session, Supplement no. 10, A/56/10, chap. IV.E.I

Building on Part I of the thesis on legal standards and reparations provisions in different branches of international law, Part II applies the affirmed right of victims to reparations as a yardstick to assess the realisation of the right in practice. Thus, the objective is to contrast the situation *de jure* and the situation *de facto* in a number of countries in different regions by considering State practice and how actual post-conflict measures on the ground have managed to incorporate victims' rights elements, in particular the right to reparations.

Transitional justice measures, such as truth commissions, have provided important impetus to the promotion of the right to reparations by creating forums for large-scale claims from victims of armed conflict. Truth commissions have permitted a comprehensive assessment of the impact violations have had on victims and, through a victim participatory process, proposed recommendations for large-scale reparations.

Part II explores aspects of reparations during a decade (1999-2009) in four case studies; Guatemala, Sierra Leone, East Timor and Colombia.[24] The case studies represent different geographic regions that have suffered armed conflict and where the UN has played a significant role in promoting transitional justice initiatives. Given the key role of the UN in advocating for greater State responsibility *vis-à-vis* victims, the second part of this research studies to what extent it has been possible to provide reparations in practice through UN supported transitional justice processes and which factors have been decisive in promoting State responsibility and responsiveness to victims' claims for reparations. Brief mention is made of the role of the Security Council, in particular the unique reparations measures which formed part of the United Nations Compensation Commission and of the challenges to date of addressing reparations for victims in Darfur.

The selected case studies consider the issue of reparations in peace agreements, as well as in statutes of transitional justice mechanisms, notably truth commissions, and in their final reports. The impact of truth commission reports is analysed and the degree to which there has been political will to implement the recommendations of such reports. The case studies note the national developments that have taken place with regard to legislation and policies on reparations and explore practical challenges in developing reparations programmes. When

[24] The selection of two case studies from Latin America is due to a number of factors. Primarily, because it represents the region where the most interesting procedural, legal and political developments have taken place at the national level and where the regional human rights system has played a particularly important role in promoting reparations for victims. Secondly, it is the region where the author has personal experience and expertise and was able to access primary materials in Spanish.

concrete reparations measures have been adopted, consideration is given to which push and pull factors were applicable in the national circumstances, such as the degree to which international and regional human rights mechanisms have influenced national reparations policies. The strength and influence of civil society and victims' organisations is assessed. The degree to which UN peacekeeping presences or other UN entities, in particular the Office of the High Commissioner for Human Rights, have focused and followed up on reparations is studied. Furthermore, the case studies consider the relationship between different transitional justice initiatives such as truth commissions and international criminal tribunals and courts.

A key aim of the thesis is to identify ways whereby the discrepancies between standards and implementation can be addressed by drawing on good practices, while also acknowledging shortcomings. The case studies identify the reparations measures provided or deemed to be priority in future programmes and which categories victims are most likely to be favoured or excluded. Furthermore, the case studies observe the obligations of non-State actors and study the degree of responsibility assumed by States for such violations. The overall aim is to consider to what extent State practice converges with legal norms and supports the argument that the right to reparations is attaining customary status in international law.

1.5 Definition of Key Concepts

There is a common misconception that reparations are synonymous with monetary compensation. Although compensation is a common component of reparations, the concept of reparations has evolved and now covers a wide range of measures. The various elements that reparations consist of have been affirmed in recent years in the International Law Commission *Draft Articles on State Responsibility* (2001) and in the Basic Principles on the Right to Reparation for Victims (2006).

As will be further explored in the first section of this research, *reparations* consist of five key elements, namely; restitution, compensation, rehabilitation, satisfaction (disclosure of the truth) and guarantees of non-repetition. *Remedy* in this context is a general term and refers to access to legal remedies as well as to reparations. In this study, the term reparations will be used as it is generally understood to comprise the aspects aside from access to justice.[25]

[25] Different terminology is used by leading scholars and advocates who use different terms when referring to the same concept, e.g. Dinah Shelton uses the term "remedies" when referring to reparations (Shelton, D, *Remedies in International Human Rights Law*, op.cit.) while the NGO *"Redress"* prefers for the term "reparations". See http:// www.redress.org and also discussion in McKay, F "Are Reparations Appropriately Addressed in the ICC

Redress is most commonly the noun which describes the action involved, but may also be used as a synonym for remedies.

The concept of *victim* applied in this study is drawn from the Basic Principles on the Right to Reparation for Victims, as it offers a clear and comprehensive definition consistent with human rights norms and jurisprudence from the international as well as regional level.[26] Accordingly;

> *"victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights...also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".*[27]

International humanitarian law does not define the concept of victim. The Rome Statute of the International Criminal Court does not contain a definition of victims; however this is defined in the Rules of Procedure, Rule 85.[28] The author notes that certain victims' organisations prefer the term *survivor* rather than the term *victim,* as an indication of their active resilience in overcoming the violence perpetrated against them. This study refers to the term *victim* for legal reasons, however without prejudice to other terms which may be preferred in different contexts.

Statute?" in Shelton, D (ed.) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court",* Transnational Publishers, NY, 2000, pp. 163-178. Both terms are reflected in the title of the 2006 UN *Basic Principles*

[26] Examples of regional cases include; *X v. Federal Republic of Germany*, App. 4185/69, Eur. Comm. HR Dec & Rep, 1970, also *Loayza Tamayo Case*, Reparations, Inter-Am Ct H.R., Ser. C, No 42, 1998

[27] *UN 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*, UN Doc. A/RES/60/147, para. 8

[28] Rule 85 *"For the purposes of the Statute and the Rules of Procedure and Evidence:*
(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;
(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes."

Part I

Responsibility and Legal Standards

"If the country in which genocide was committed is not to be held responsible for reparations, who is?"[29]

[29] *Official Comments on Article XIII of the Draft Convention on the Crime of Genocide,* page 48, UN. Doc. E/447, prepared 26 June 1947 by the UN Secretary General upon request by the General Assembly
Article XIII stated; "*When genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations.*"
Article XIII was eliminated during the final stages of the political negotiations on the treaty. The Genocide Convention as approved by the General Assembly on 9 December 1948 contains no provision on reparations.

2. State Responsibility, the Legal Order and the Development of Legal Norms for Victims

2.1 Introduction

The aim of this chapter is to give an overview of the shift that has taken place in the international legal order, in particular since WWII. International law is developed between States, based upon the principle of sovereignty and as such, has largely been dictated by the interests of States rather than individuals. In the past, claims for individual compensation could only be lodged through inter-State complaints.[30] There was no obligation for the State whose nationals had been injured to present claims against other States. In fact, there was no impediment stopping States to waiver their claims without any consultation with the victims concerned.[31] Mechanisms were not available for individuals to seek redress for violations committed by their own State. During the past sixty years, a considerable shift has taken place whereby treaty law, jurisprudence and customary law has been developed affirming the right of the individual against the State, clearly recognising the individual as a subject of international law.[32]

Particularly in the field of international human rights law, States have voluntarily consented to the establishment of mechanisms, whereby individuals have been given procedural standing to present claims against the State. However, the position of the individual under general international law is more complicated and interlinked with recognition of respect for human rights and humanitarian law as legitimate concerns for the world community as customary law. In this chapter, the standards affirming victims' rights in different branches of law will be identified and the relationship between general international law and *lex specialis,* in particular, that of humanitarian and human rights law, is explored.

2.2 Recognition of Human Rights as Customary Law

The 1945 Charter which established the United Nations marked a turning point in international law as it identified universal protection of human rights as one of the principal objectives of the organisation, as stated in Articles 1(3) and 55. Article 56 of the Charter

[30] Brownlie, I, *Principles of Public International Law*, Clarendon Press, Oxford, 1990, p. 432- 476, Cassese, A, *International Law*, Oxford University Press, Oxford, 2001, pp. 182-210, Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999, pp. 48-49

[31] Brownlie, I, *op cit.* pp. 457-473, 580-594

[32] Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review*, Vol. 6, 2006, pp. 203-279

obliges members of the organisation to pledge themselves to *"take joint and separate action in cooperation with the organisation for the achievement of the purposes set forth in Article 55"*. The Charter, although recognising State sovereignty, created the Security Council and authorised it to undertake measures to maintain international peace and security. The Charter placed human rights as a legitimate concern for the international community, set in motion the gradual development of normative standards on human rights and sowed the seeds for human rights supervisory mechanisms.

The Charter also established the International Court of Justice (ICJ) as the principal judicial organ of the United Nations. The ICJ reflects traditional international law and is a forum in which only States can present claims against other States[33]. Individuals can benefit from reparations only if they are able to present a claim through their own State against another. Should the case be favourably decided, the victims still depend upon the goodwill of State authorities to distribute reparations to individual beneficiaries.

Article 38 of the Statute of the ICJ states that it shall apply from the following sources;

a. *International conventions, whether general or particular, establishing rules expressly recognised by the contesting States;*
b. *International custom, as evidence of a general practice accepted by law;*
c. *The general principles of law as recognised by civilised nations;*
d. *...judicial decisions and the teachings of the most highly qualified publicists of various nations, as subsidiary means for the determination of rules of law.*

Historically, the ICJ was somewhat reluctant in referring to human rights instruments in its decisions.[34] However, during the past two decades, the Court has come to play a significant role in advancing recognition of human rights and humanitarian law as customary law, based on the provision in article 38 (b) of its Statute.

Human rights law has developed as a separate branch of law built on recognition of the individual as a subject under international law and the State as the responsible entity to

[33] The Statute of the ICJ (art 65-68) also establishes that principal UN organs may request Advisory Opinions
[34] Higgins, R , "The International Court of Justice and Human Rights" in Wellens, K (ed.) *International Law: Theory and Practice,* Kluwer Law International, 1998, pp. 691-705.
Higgins, R, *Problems and Process, International Law and How we Use it,* Clarendon Press, Oxford, 1994, ch. 6
Higgins, R, "The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights", Speech at the ceremony marking the 50th Anniversary of the European Court of Human Rights, 30 January 2009, available

guarantee the rights of all people within its territory. The foundations of human rights law are established in the UN Charter and the Universal Declaration of Human Rights (UDHR). During the past three decades, nine international core human rights treaties have entered into force, four of which have been adhered to by more than 75 percent of States.[35] It is important to underline that States voluntarily have agreed to be bound by the obligations contained in the treaty upon accession or ratification.

Humanitarian law has been developed as a separate branch of law and was originally based on customary norms that date further back than human rights law.[36] The core of humanitarian law was established by the four Geneva Conventions in 1949, which have now been universally ratified by all 192 States. The principal difference between human rights law and humanitarian law is that the latter only applies in times of armed conflict, is binding upon all parties, including non-State actors, and that the majority of its provisions apply exclusively in international conflict. Only Common Article 3 of the Geneva Conventions and the Additional Protocol II apply in internal armed conflict. The language used in humanitarian law is primarily focused on the regulation of combat methods and the protection of civilians, and *prima facie* does not address individual rights. It should, however, be recognised that human rights and humanitarian law are intricately interlinked by the nature of their principal concern, the protection of human beings.[37] The ICJ has affirmed that application of human rights and humanitarian law can be dual and complementary.[38] More recent instruments of humanitarian law, such as the two Additional Protocols (1977) to the Geneva Conventions make explicit references to human rights.[39] Conversely, certain human rights instruments contain clear references to humanitarian law, such as the Convention of the Rights of the Child (1989) and its Optional Protocol on the involvement of children in armed conflict (2000). Jurisprudence

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[35] As of 1 June 2009, all States have ratified at least one of the core human rights conventions and 75% of all States parties have ratified four or more conventions. The number of ratifications of human rights conventions has exploded in relative terms, from a total of 243 ratifications in 1980, to 553 in 1990, 926 in 2000 and 1380 by June 2009. Source: UN Office of Legal Affairs; http://treaties.un.org

[36] For an overview of the development of international humanitarian law, see Karlshoven F, Zegveld, L, *Constraints on the Waging of War, An Introduction to IHL,* ICRC, 2001

[37] For further discussion; Provost, R, *International Human Rights and Humanitarian Law,* Cambridge University Press, 2002, Sassoli, M, "The victim-oriented approach of International Humanitarian Law and of the International Committee of the Red Cross", in Bassiouni, C, *International Protection of Victims,* Nouvelle Etudes Penales, Association International de Droit Penal, Eres, 1988, pp. 147-180

[38] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo and Uganda), ICJ Report 2005
Further references on the mutually complementary and reinforcing nature of human rights and humanitarian law; *Report to the Human Rights Council of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict,* A/HRC/11/31, 2 June 2009

[39] Protocol I art 72, Protocol II Preamble. Further detail and analysis in Meron, T , *Human Rights in Internal Strife, Their International Protection,* Grotius Publications Limited, Cambridge, 1987

by human rights bodies refers increasingly to the importance of, and interrelation with, humanitarian law.[40]

There are a number of areas where human rights law and humanitarian law overlap. Some key points of convergence are found in basic prohibitions of extrajudicial executions, torture and cruel, inhuman and degrading treatment, discrimination on the grounds of race, sex, language or religion, slavery and the right to a fair trial.[41] All the above violations are addressed by Common Article 3 and are considered to constitute grave breaches of the Geneva Conventions. Conversely, the above mentioned rights are established as non-derogable by the Human Rights Committee.[42]

The concept of customary law, as envisaged in Article 38 (b) of the ICJ Statute implies that certain provisions in international law are binding upon all without the need for ratification. In 1951, an Advisory Opinion of the ICJ relating to the Genocide Convention proclaimed that; *"the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation"*, thereby setting an important precedent in the development of the law of treaties.[43] Furthermore, it has been established through the 1996 ICJ Advisory Opinion on the *Legality of the Threat or Use of Force of Nuclear Weapons*[44] with regard to the Hague and Geneva Conventions that;

> *"a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human being...these are to be observed by all States*

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[40] References to IHL by human rights bodies is further noted in the following chapter on jurisprudence. See also; Droege, C, "Elective Affinities? Human Rights and Humanitarian Law", *IRRC*, Vol. 90, No. 871, September 2008, pp. 501-548

[41] Meron, T, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument" in *American Journal of International Law*, Vol 77, No. 3 July 1983, pp. 589-606
Further discussion on overlaps of provisions and critique of inconsistencies in their development, see Ratner, S, "The Schizophrenias of International Criminal Law", *Texas International Law Journal*, No. 33, 1998 pp. 237-257

[42] Human Rights Committee is the body of independent experts that monitors implementation of, and interprets, the International Covenant on Civil and Political Rights. Although not explicitly listed as non-derogable, the provision on non-discrimination as well as the provisions on detention and the right to a fair trial are considered non-derogable by the Human Rights Committee, see CCPR General Comment No. 29, CCPR/C/21/Rev.1/add.11, 2001, para. 8-16
Hampson, F, "The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body", *International Review of the Red Cross*, Vol. 90, No. 871, September 2008, pp. 549-572

[43] Higgins, R op. cit. p. 695, Tomuschat, C, *Human Rights, Between Idealism and Realism*, Oxford Univ.Press, 2003, pp 192-193, *Reservation to the Convention on Genocide*, Advisory Opinion, ICJ Report 1951, para. 15

[44] *Legality of the Threat or Use of Force of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports, para. 79. Further discussion in Chetail, V "The Contribution of the International Court of Justice to International Humanitarian Law", *International Review of the Red Cross*, June 2003, Vol.85, No.850, pp. 235-269

whether or not they have ratified the conventions that contain them because they constitute intransgressible principles of international customary law".

This position was restated in the 2004 ICJ Advisory Opinion on the *Legal Consequences of the Contruction of a Wall in the Occupied Palestinian Territory.*[45] The ICJ reaffirmed that rights recognised under customary law entail obligations for all States irrespective of the ratification status of a specific country or whether the breach occurred during internal or international conflict, a position further affirmed by the ICTY in the 1995 *Tadic case* (Interlocutory Appeal).[46] Numerous scholars recognise the significant growth of customary international law by jurisprudence from a number of international tribunals and by codification in new instruments, which serve to expand the concept and status of serious violations of humanitarian law.[47] Notably, the Statute of the International Criminal Court reinforces the status of the prohibitions contained in the fundamental guarantees paragraphs of the Additional Protocols to the Geneva Conventions,[48] which cover e.g. child recruitment and sexual crimes.[49]

In 2005, the ICRC published an extensive international study of State practice, conducted over a period of eight years, in relation to humanitarian law and asserted the existence of twelve fundamental guarantees for the protection of civilians, concluding that they have attained status as customary law and are applicable in all armed conflict, whether international or internal.[50] The study originated from recommendations by an international conference and an intergovernmental group of experts for the protection of war victims (1993 and 1995).

In 1969, the concept of *jus cogens* was established by the Vienna Convention on the Law of Treaties, defining it as;

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[45] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion of 9 July 2004, ICJ Reports, para 157

[46] Cassese, A, *International Law*, Oxford University Press, Oxford, 2001, pp. 340-346 and Tomuschat, C, *Human Rights, Between Idealism and Realism*, Oxford University Press, 2003, pp 253, Meron, T ,"The Continuing Role of Custom in the Foundation of International Law" in *The American Journal of International Law*, Vol.90, No.2, 1996, pp. 238-249; all cite the *ICTY Tadic case* (Interlocutory Appeal), Judgement 2 October 1995, para 97

[47] Greenwood, C, "International Humanitarian Law" in Karlshoven, F (ed.) *The Centennial of the First International Peace Conference*, Kluwer Law, 2000, para. 5.2, Cassese, A, op cit., Tomuschat, C, *Human Rights, Between Idealism and Realism*, op cit., p. 253, Bassiouni, C, *Post–Conflict Justice,* Transnational Publishers, NY, 2002, pp.10-30

[48] Additional Protocol I, para 75, Additional Protocol II, para. 4

[49] For further analysis of sexual crimes in humanitarian law, see Dixon, R "Rape as a Crime in International Humanitarian Law. Where to from here?", *European Journal of International Law*, pp. 697-719 and May, L, *Crimes Against Humanity, A Normative Account*, Cambridge University Press, 2005, pp. 96-111

[50] Henckaerts, J-M and Doswald-Beck, L, *Customary International Humanitarian Law,* Cambridge University Press, 3 vol., 2005

"a peremptory norm of general international law is one which is...accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a norm of general international law having the same character... if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with the norm becomes void and terminates."[51]

Although there is some dispute among legal scholars about the exact meaning of *jus cogens*, it is generally understood to entail breaches which are considered to be an affront to the entire world community and carry a high level of acceptance of customary law.[52] Shortly after the term *jus cogens* was defined, the ICJ applied a mirror term by the creation of obligations *erga omnes*, which are applicable at all times without derogation. As stated by the ICJ in the *Barcelona Traction Case, 1970;*[53]

" ..an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human being, including protection from slavery and racial discrimination."

The ICJ has repeatedly referred to the concept of *erga omnes* in numerous cases, however it has not put forward an exhaustive list of obligations.[54] The lack of defined obligations *erga omnes* is partially due to the evolving nature of international law and the norms which may be considered to have reached customary status. Undeniably, the sensitive political implications that an expanded understanding of the concept in general international law would have on State responsibility must also be taken into account. It is noteworthy that the ICJ stated as

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[51] Vienna Convention on the Law of Treaties, 1969, United Nations, Treaty Series Vol. 1155, p. 331 art. 53, 64

[52] For further discussion on the criteria for consideration as *jus cogens* norms see Brownlie, I, op cit. pp. 509-517, May, L, *Crimes Against Humanity, A Normative Account*, Cambridge University Press, 2005 and Bassiouni, C, "International Crimes: *Jus Cogens* and *Obligatorio Erga Omnes*" in *Law and Contemporary Problems*, No 59, Fall 1996,

[53] *Barcelona Traction, Light and Power Company Limited* Second Phase. ICJ Reports 1970, para 33

[54] *East Timor Case* (Portugal v. Australia) ICJ Reports 1970, p.3, *Application of the Convention on the Prevention and Punishment of the Crimes of Genocide, Preliminary Objections*, ICJ Reports 1996, p. 595, 616

early as 1970 that obligations *erga omnes* cover rules concerning *"the basic rights of the human being".*[55] However, the case was decided at a time when little international human rights law was codified and thus drew examples largely from international humanitarian law.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) entered into force in 1969 and although the two principal human rights Covenants on Economic, Social and Cultural Rights (ICESCR) as well as on Civil and Political Rights, (ICCPR) were opened for ratification in 1966, neither entered into force until 1976. As previously mentioned, the number of States parties to the core human rights treaties has rapidly increased during the past two decades and now ratification or accession by a majority of states has been reached for six of the core treaties.[56] As noted by some scholars, the strength of human rights provisions has over time been questioned due to a lacking number of ratifications. Meron,[57] writing in 1983 noted that the difficulty of affirming customary status of human rights treaties, compared to the Geneva Conventions (1949) and the Hague Regulations (1907), was partly due to the low number of States parties to human rights instruments (CERD at the time had the highest number of ratification at 115), while the Geneva Conventions enjoyed 152 States parties.

Of importance is thus that today five (CERD, ICCPR, ICESCR, CEDAW and CRC) of the core human rights treaties have acquired more than 152 States parties, i.e. the number of ratifications by which the Geneva Conventions were considered to have attained customary status. It is relevant to note that in its comprehensive study on customary law, the ICRC includes reference to human rights norms and practice which support, strengthen and clarify analogous principles of humanitarian law[58]. Although scholars recognise the impact of human rights law in general international law, they tend to be careful in defining of delimiting specific human rights provisions as customary norms.[59] Meanwhile, the Human Rights

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[55] More analysis; Gaja G, "Obligations Erga Omnes, International Crimes and Jus Cogens, A Tentative Analysis of Three Related Concepts" in Weiler, J, Cassese, A, and Spinedi, M(eds.) , *International Crimes of States, A Critical Analysis of the ILC's Draft Article 18 on State Responsibility,* Walter de Gryter, 1998, pp. 151-160

[56] As documented in Bayfesky, A, *The UN Human Rights Treaty System in the 21th Century*, Kluwer Law Publ. 2001, the number of ratifications of core human rights treaties increased by 75% in the past two decades.
In July 2009 the total number of ratifications of all human rights treaties by States reached 1380. For updated information; UN Office of Legal Affairs; http://treaties.un.org

[57] Meron, T, "On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument" in *American Journal of International Law*, Vol. 77, No.3 July 1983, pp. 589-606

[58] Henckaerts, J-M, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" in *International Review of the Red Cross,* Vol. 87, No. 857, March 2005, p. 196

[59] Akehurst, M A *Modern Introduction to International Law*, 6th edition, Routledge, 1993, 76-81, Tomuschat, C, *Human Rights, Between Idealism and Realism*, Oxford University Press, 2003, pp. 34-35, Cassese, A, *International Law,* Oxford University Press, Oxford, 2001, p. 372. Orentlicher, D "Settling Accounts: The Duty

Committee affirmed in 2001 that "*the category of peremptory norms extends beyond the list of non-derogable provisions in Article 4, para. 2*"(of the ICCPR).[60] As noted above, considerable advances have taken place regarding the extent of human rights obligations in relation to State responsibility in international law. Serious violations which are enshrined in both humanitarian and human rights law have gained recognition in customary law, yet the there is reluctance to define such violations exactly in order not to unduly restrict the coverage of such protection and to allow for continuous developments in this area.

Having noted some of the interpretations of State responsibility in relation to human rights obligations, we now turn to the International Law Commission (ILC), established by the GA in 1947 to promote the progressive development of international law and its codification. Already in 1949, the importance of reaching a legal definition of State responsibility was identified as one of the principal areas of work for the ILC.[61] As noted by Brownlie,[62] the ILC, although formally integrated by independent experts, reflects a variety of political standpoints and thus its agreed drafts provide a realistic basis for acceptable and recognised legal obligations.

The issue of State responsibility proved so contested that it took four decades of drafting before the ILC could adopt its Articles on State Responsibility in 2001.[63] The same year the ILC recommended that the General Assembly take note of the Articles, however consensus remains lacking within the ILC as well as the GA regarding the possibility of codifying State responsibility in an international convention.[64] Nevertheless, already prior to their formal adoption, the Articles were cited in a number of ICJ cases and advisory opinions, as well as by regional and international human rights bodies.[65]

To Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal*, June 1991 noted 15 years ago that; "*Although publicists disagree about the range of human rights protected by customary law, there is general agreement that customary law prohibits torture, disappearances, and extra-legal executions and that these prohibitions are peremptory norms.*"
An exception is however provided by Leper, B, *Customary International Law, A New Theory with Practical Applications*, Cambridge, 2010

[60] CCPR General Comment No. 29, CCPR/C/21/Rev.1/add.11, 2001, para. 11

[61] Crawford, J, *The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 1

[62] Brownlie, I, *Principles of Public International Law*, Clarendon Press, Oxford, 1990, p. 30

[63] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL Report to the GA, A/56/10, chap IV, E.1)

[64] Crawford, J and Olleson, S, "The Continuing Debate on a UN Convention on State Responsibility" in *International and Comparative Law Quarterly*, Vol. 54, October 2005, pp. 959-971

[65] Ibid.

The Articles of the ILC define State responsibility as arising from a breach of an international obligation, and it is important to underline that such liability might arise from action as well as from omission (article 2), a principle which has been developed by human rights jurisprudence, but derives from precedents in general international law, such as the ICJ *Corfu Channel Case* of 1949.[66]

Chapter 3, Article 40 of the ILC Articles on State Responsibility establishes a distinction with regards to particularly serious breaches;

> *"1. This chapter applies to the States responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.*
> *2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."*[67]

The official Commentaries to the ILC Articles cite the prohibitions established as *jus cogens* norms by the ICJ, however also stress that;

> *"the examples given may not be exhaustive...the Vienna Convention contemplates that new peremptory norms of general international law may come into existence through the processes of acceptance and recognition by the international community of States as a whole."*[68]

Crawford, the ILC Special Rapporteur on State Responsibility, restates this position in his account of the *travaux preparatoires,* noting that the ILC deliberately avoided defining the coverage of peremptory norms in order to keep interpretation open for inclusion of other breaches of international law which carry serious consequences.[69] Furthermore, the reference to peremptory norms provided an acceptable solution while the proposal to mention State crimes was eliminated as it obstructed completion of the project.[70]

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[66] *Corfu Channel Case* (UK v. Albania), Merits, ICJ Report 1949. The case is discussed at length by Brownlie, *op cit.* pp. 432-472 and cited in the International Law Commission, *Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art.2, para. 4

[67] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.1) art. 40

[68] International Law Commission, *Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art.40, para. 6

[69] Crawford, J, *The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries,* Cambridge University Press, 2002, pp. 37- 38

[70] Ibid. pp16-20. Acccording to US ILC member Rosenstock *"rejection of proposals concerning so-called crimes of states...reflected members' recognition that such proposals simply would not fly"*. For further context of the controversy see; Rosenstock, R, "The ILC and State Responsibility", *American Journal of International*

Regarding coverage of the Articles on State Responsibility, Article 33 sets forth that the obligations of the responsible State, depending on the circumstances, may be owed to other States and to the international community and are without prejudice to any right which might accrue directly to any person or entity other than a State. Furthermore, the official Commentaries clarify that;

> *"an internationally wrongful act may involve consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States. Thus State responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation is not a State."*[71]

Although the ILC Articles recognise State responsibility towards individuals, this recognition is subtle, especially in view of the fact that human rights law represents one of the branches of law where codification, adherence and development of customary law has been exceptionally strong during recent years, as discussed above. The timidity of the provisions in the Articles highlights the tensions surrounding the notion of State responsibility in general international law, compared to *lex specialis* such as human rights. However, the Articles on State responsibility contain a provision in Article 55, which confirms the maxim *lex specialis derogate legi generali,* i.e. specialised law takes precedence over general law, thereby ensuring that human rights law will not be displaced by the less defined provisions set forth by the ILC.[72] A subsequent study by the ILC in 2006 on challenges relating to fragmentation of international law stated that, *"fragmentation and diversification account for the development and expansion of international law in response to the demands of a pluralistic world",*[73] which can be interpreted as a recognition of the influence of human rights on general international law .

Law, Vol. 96, 2002, pp. 792-797; Wyler, E, "From State Crime to Responsibility for Serious Breaches of Obligations under Peremptory Norms of General International Law" in *European Journal of International Law,* Vol. 13, No. 5, 2002, pp. 1147-1160; Dupuy, P-M, "A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility" in *European Journal of International Law,* Vol. 13, No. 5, 2002, pp. 1053-1081

[71] International Law Commission, *Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 28, para. 3

[72] Ibid. art.55 paras. 1-6

[73] International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, A/CN.4/L.702, 2006

Having set out the basic provisions of State responsibility in relation to violations of human rights, we move on to review the specific provisions in international human rights and humanitarian law which affirm the right to reparations and consider the legal shifts which have taken place in favour of individuals.

2.3 Individuals as Beneficiaries of Reparations, Recognition in General International Law

The principle in international law affirming the obligation to provide reparations dates far back. Already in 1927 and 1928, the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice, stated in the *Factory at Chorzów Case* that;

> *"It is a principle of international law and even a general conception of law that any breach of an engagement involves an obligation to make reparation in an adequate form...reparation is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."*[74]

> *"reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have excited if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear...such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."* [75]

The dictum established in the sentence of the PCIJ in the *Factory at Chorzów Case* has been widely cited and reaffirmed in a number of court decisions of the ICJ, including the *Gabcikovo-Nagymaros Project Case,*[76] the more recent *Case Concerning Armed Activities on the Territory of the Congo*[77] and numerous international and regional human rights case law.[78]

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[74] *Factory at Chorzów Case*, (Germany v. Poland) Jurisdiction,1927, P.C.I.J , Ser A, No. 9, p. 21
[75] *Factory at Chorzów Case*, (Germany v. Poland) Merits,1928, P.C.I.J , Ser A, No. 17, p. 47
[76] *Gabcikovo-Nagymaros Project Case* (Hungary/Slovakia), ICJ Report 1997, p. 7, para 149-152
[77] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo and Uganda), ICJ Report 2005, p 82, para 259
[78] Examples include *Papamichalopoulos v. Greece* (art.50), ECHR, Series A, No. 330-B, 1995, para 36, *Velásquez Rodríguez*, Inter.Am. Ct HR, Series C, No.4, 1989, pp 26-27, 30-31, see further references in the next chapter on human rights jurisprudence

As seen above, the *Factory at Chorzów Case* only deals with two forms of reparations, namely restitution and compensation. These components historically constituted the basic foundations for the concept of reparations, which has been furthered in particular due to interpretations in human rights jurisprudence. In cases of serious violations of human rights, it clearly is impossible to achieve *restitutio in integrum* i.e. re-establish the situation which existed before the wrongful acts.

As already noted, historically, general international law viewed reparations as an inter-State measure. However, the convergence of a number of developments in international law over the past decades has produced important shifts which have become recognised in general international law. A number of these have been identified in the previous section, namely the affirmation of State responsibility in relation to certain fundamental human rights through the advancement of multiple treaty provisions in humanitarian as well as human rights law. Several of these have acquired recognition as customary law, and in some cases, even as peremptory norms that the world community has a common interest in protecting. The ILC Articles on State responsibility adopted in 2001 support this affirmation. The Articles define reparation as consisting of the following components; guarantees of non-repetition (article 30), restitution (article 34), compensation (article 36) and satisfaction (article 37). Although human rights are not specifically referred to in the ILC Articles, the official Commentaries clarify;

> *"When an obligation of reparation exists towards a State, reparation does not necessary accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights."*[79]

Despite a generally positive reception of the ILC Articles among human rights scholars, the references to the rights of the individual in relation to human rights violations are described as somewhat peripheral and only figure in the Commentaries rather than the actual Articles. This sparked criticism, in particular considering the practical challenges which persist when

[79] International Law Commission, *Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001 (extract of ICL to the GA, A/56/10, chap IV, E.2) art. 33, para. 3

defining reparations during reconciliation efforts and the pressing need to define State responsibility in this area.[80]

Additional affirmation of the acceptance of the right of individuals to reparations in general international law can be found in the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004[81] which repeatedly affirms the duty of Israel to seek restitution and compensate individuals and *"all natural and legal persons having suffered any form of material damage as result of the wall's construction"*. Regrettably, the ICJ *Bosnia Genocide Case* of 2007 provided significantly less clarity on State obligations to provide reparations and has been criticised for backtracking and creating inconsistency in the jurisprudence of the Court.[82]

With the recognition of human rights as *jus cogens*, individuals appear as rights bearers and subjects in general international law. The logical consequence of such recognition implies that there is a clear need to translate consequences of breaches, such as reparations, in favour of individual victims. While the provision of reparations remains primarily a State responsibility, it is submitted that the gap between international legal standards and their application represents a key challenge to the international legal order and the human rights regime.

Although general international law has been slow in embracing individuals as direct beneficiaries of reparations, the concept of reparations has itself undergone changes and expanded to comprise a number of aspects. Again, the move towards a comprehensive perception of reparations is largely due to human rights law codification and jurisprudence. In addition, support has also come from reinterpretations and analysis of provisions in humanitarian and international criminal law.

2.4 Reparations in International Humanitarian Law

[80] Shelton, D "Righting Wrongs: Reparations in the Articles on State Responsibility" in *The American Journal of International Law*, Vol. 96, No. 4, October 2002, pp. 833-856

[81] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Report, paras. 145, 152-153

[82] *Application of the Genocide Convention Case* (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Report 2007 discussed in Gaeta, P (ed.), *The Genocide Convention, A Commentary*, Oxford University Press, 2009

References to reparations in international humanitarian law can be traced to Article 3 of the 1907 IV Hague Convention, wording which is repeated in Article 91 of the Additional Protocol I to the Geneva Conventions.[83] It states that;

> *"A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."*

The official ICRC Commentary[84] gives some further guidance on the interpretation of the provisions. In line with general international law, the article is construed on the presumption that it be exercised through an intra-state mechanism. The ICRC Commentary, however, gives little guidance as to how States should ensure that non-State parties to a conflict fulfil the obligation of paying compensation. Given that the world of today is largely marred by internal armed conflicts involving non-State entities, this illustrates a major lacuna in international humanitarian law.

It is important to point out that the Commentary affirms that State responsibility may also be incurred by omission when due diligence to prevent violations from taking place has not been demonstrated and, once occurred, repression of the acts has not been ensured.[85] It is worthwhile noting that Article 91, although it only figures in Additional Protocol I, makes specific reference to coverage of all provisions of the Geneva Conventions. A weak point is that no corresponding provision exists in the Additional Protocol II.

Furthermore, the official Commentary provides no clear explanation why the term *compensation* figures rather than the more comprehensive term *reparation*, which would have been consistent with the jurisprudence of the ICJ. Nevertheless, the Commentary explains that the term compensation, generally perceived of as a reference to monetary redress, in this context comprises the obligation to ensure restitution to the extent possible in addition to financial compensation. While a conservative interpretation of Article 91 fails to recognise it as a source of rights in favour of individuals,[86] several scholars, including Karlshoven and

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[83] Gillard, E-C, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 529-553

[84] 1977 Protocol Additional I to the Geneva Conventions, ICRC Commentary to article 91, paras. 3645-3661, www.icrc.org

[85] Ibid, para. 3660

[86] Provost, R, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002, pp. 47-56. Provost nevertheless makes the point that while expressing reservation regarding the right to reparations in humanitarian law, certain such violations are "*coexistensive with violations of non-derogable human rights, for*

Greenwood, have made important contributions to broaden the interpretation of Article 91. They have based their arguments on the *travaux preparatoires* of the 1907 Hague Convention IV, which indicate that the provision was not intended to be confined to claims between States but was to be conceived to create a direct right to compensation for individuals[87]. The debate on the re-interpretation of Article 91 in part stems from the redress movement against the Japanese government in the 1990s, during which both scholars submitted legal advice on the right to reparations.[88] Furthermore, it has been noted that the establishment of the United Nations Compensation Commission (UNCC) by the Security Council in 1991 following the Iraq war demonstrated State responsibility in relation to reparations for violations of humanitarian law.[89] The influence of different international and national redress movements and the role of the UN in relation to State practice are further explored in subsequent chapters.

Although the implication of reparations provisions in humanitarian law are still being explored and the implementation thereof is lacking, some scholars have stated that provisions on reparations have attained customary law status and consequently, States cannot absolve themselves or other States for liability with respect to grave breaches.[90] Karlshoven and Zegveld state that; "*the rule of responsibility, including the liability to pay compensation, has acquired a much broader scope. Although formally written for the Conventions and the Protocol as treaties, it is not too daring to regard it as applicable to the whole of international humanitarian law, whether written or customary.*"[91]

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which there is undoubtedly a right to a remedy and that the complementarity of human rights and humanitarian law ensures that the victims will not be left without a right to reparation for their injuries", p.49
Tomuschat, C, "Reparation for Victims of Grave Human Rights Violations", *Tulane Journal of International and Comparative Law*, Vol. 10, 2002, pp. 178-179

[87] Greenwood, C, "International Humanitarian Law" in Karlshoven, F (ed.) *The Centennial of the First International Peace Conference*, Kluwer Law, 2000, p. 250, Karlshoven, F " State Responsibility for Warlike Acts of the Armed Forces", *International and Comparative Law Quarterly*, Vol. 40, 1991, p. 827, 830. This argument is also supported by Zegveld, L, "Remedies for Victims of Violations of International Humanitarian Law", *IRRC (ICRC Journal)*, September 2003, Vol. 85, pp. 497-526 and Gillard, E-C, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol. 85, No. 851, September 2003, pp. 529-553 and Pisillo Mazzeschi, R, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview", *Journal of International Criminal Justice*, Vol. 1, 2003, pp. 339-347

[88] Hae Bong, S, "Compensation for Victims of Wartime Atrocities, Recent Developments in Japan's Case Law" in *Journal of International Criminal Justice*, No. 3, 2005, p. 189

[89] Gattini, A, "The UN Compensation Commission; Old Rules New Procedures on War Reparations" *European Journal of International Law*, Vol. 13, No.1, 2002, pp. 161-181

[90] Karlshoven F, Zegveld, L, *Constraints on the Waging of War, An Introduction to IHL*, ICRC, 2001, p. 147, Zegvald, L, "Remedies for Victims of Violations of International Humanitarian Law", *IRRC (ICRC Journal)*, September 2003, Vol 85, p. 507, Sassoli, M, "The Victim-oriented Approach of International Humanitarian Law and of the International Committee of the Red Cross", in Bassiouni, C, *International Protection of Victims*, Nouvelle Etudes Penales, Association International de Droit Penal, Eres, 1988, pp. 1165-166

[91] Karlshoven and Zegveld, *Constraints on the Waging of War*, op.cit. p. 147

Importantly, the ICRC has affirmed, in its 2005 in-depth study of customary international humanitarian law previously cited, that State responsibility for reparations has become established as a customary norm both in international and non-international armed conflicts.[92] A weak aspect of humanitarian law however is its lack of enforcement and monitoring mechanisms. Henckaerts notes that the renewed interest in the relationship between humanitarian law and human rights law relates to victims' ongoing search for a forum in order to obtain remedies for violations of their rights during armed conflict.[93]

Furthermore, it is significant that the ICRC Customary Law study affirms some of the general principles established by the ICJ regarding the criteria for assessing rules and practice as customary. The ICRC study notes the position of the ICJ in the *North Sea Continental Shelf Cases*;

> *"Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been extensive and virtually uniform in the sense of the provision invoked and should moreover have occurred in such a way as to show a general recognition that a rule of law or general obligation is involved."*[94]

Furthermore, regarding the criteria for virtually uniform practice, it should be noted that the ICJ has stated in the *Nicaragua Case*;

> *"The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indication s of the recognition of a new rule."*[95]

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[92] Henckaerts, J-M and Doswald-Beck, L, *Customary International Humanitarian Law*, Cambridge University Press, 3 vol. 2005, pp. 537-550, Rule 150 *"A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused"*

[93] Henckerts, J-M, "Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective" in Arnold, R and Quenivet, N, *International Humanitarian Law and Human Rights Law, Towards a New Merger in International Law*, Martinus Nijhoff Publishers, 2008, pp. 237-267

[94] *North Sea Continental Shelf Cases*, ICJ Reports 1969, p. 43

[95] *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), ICJ Report 1986, p. 98

The above criteria for assessing customary law are applied throughout this study, which charts extensive State practice, both in intergovernmental settings and at the national level, and emphasizes the *opinio juris* of *"States whose interests are specially affected"* in relation to State responsibility to provide reparations for serious violations.

2.5 Reparations in International Human Rights Law

In contrast to humanitarian law, provisions on remedies and reparations are key features in all human rights instruments, which establish a multitude of legally binding and quasi-judicial enforcement mechanisms. Some scholars have argued that breaches of humanitarian law could be address through human rights mechanisms due to the absence of enforcement mechanisms in humanitarian law.[96] Human rights jurisprudence has played an important role in defining different forms of reparations and has provided considerable guidance on the development of non-monetary forms of remedies.

The origins of reparations in human rights law stem from the adoption of the UDHR in 1948, as Article 8 states that;

> *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."*

The International Covenant on Civil and Political Rights (ICCPR) echoes the provision above as a legally binding norm in Article 2 (3a); *"any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."* In addition, Articles 9 (5) and 14 (6) provide a right to compensation for unlawful arrest, detention and conviction. The Human Rights Committee has given considerable interpretation of the content of the concept "effective remedy" in its decisions in cases of individual petitions, general comments on the interpretation of treaty provisions and also in its concluding observations of State party reports.[97] This is further explored in the subsequent chapter on jurisprudence by human rights bodies.

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[96] These include Greenwood, Pisillo, Hampson, Zegveld and Droege, op.cit.

[97] Detailed and updated information on the work of the Human Rights Committee can be found on the official webpage of OHCHR at; http://www.ohchr.org/english/bodies/hrc/index.htm
Further exploration of the jurisprudence of the Human Rights Committee is contained in the subsequent chapter

In 2004, the Human Rights Committee adopted its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, largely inspired by the adoption of the ILC Draft Articles on State Responsibility in 2001 and the then draft Basic Principles on the Right to Reparation for Victims. The General Comment makes the link between the terms "remedy" and "reparation" explicit by stating that;

> *"Article 2, paragraph 3 requires that States Parties make reparations to individuals whose Covenant rights have been violated. Without reparations to individuals whose rights have been violated, the obligation to provide an effective remedy...is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."* [98]

Other human rights treaty provisions, such as article 14 of the Convention against Torture (CAT), article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and article 39 of the Convention of the Rights of the Child (CRC), affirm the right to reparations in different forms and have explored this in relation to the specific rights protected in the respective instruments. The above mentioned treaties, with the exception of CRC,[99] also have monitoring mechanisms which have the competence to receive individual complaints, pending the recognition of the State party, and to recommend reparations.

2.6 Provisions in Regional Human Rights Instruments

The first provision which established the competence to emit legally binding case decisions figures in the European Convention on Human Rights (ECHR), which entered into force in 1953.[100] Individuals can file complaints directly with the Court (since the entry into force of Protocol 11 in 1998) and the States parties undertake not to hinder the exercise of this right in any way.[101] Article 13 of the ECHR affirms the right to an effective remedy and declares that;

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[98] CCPR General Comment No. 31 (The Nature of General Legal Obligation Imposed on States Parties to the Covenant), CCPR/C/21/Rev.1/Add.13, 2004, para. 16

[99] A working group was however established by the Human Rights Council in 2009 in order to explore possibilities for a complaints mechanism under the CRC

[100] Further information at the official webpage of the European Court of Human Rights http://www.echr.coe.int/echr

[101] Article 34, European Convention on Human Rights

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Furthermore, Article 41 of the ECHR establishes that;

"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The jurisprudence of the European Human Rights Court has been somewhat conservative in its interpretation of an effective remedy and just satisfaction and has largely limited its interpretation to monetary forms of reparations.[102] This is probably explained by the nature of the claims which during the first decades of the Court did not involve serious human rights violations relating to armed conflict. However, the jurisprudence has undergone significant developments, in particular during the past decade. This aspect will be further explored in the subsequent chapter on judicial decisions from international and regional human rights bodies.

The American Convention on Human Rights, which entered into force on 18 July 1978, provides another legally binding and enforceable complaint mechanism at the regional level. Article 25 of the Convention affirms the right to a legal remedy and Article 63 of the Convention specifies the right to reparations.[103]

The Convention establishes two human rights monitoring bodies, a Commission as the first instance, which has the competence to investigate, recommend friendly settlements and, as a final resort, refer cases to the Court, which then emits legally binding decisions and monitors their implementation. In its very first decision, *Velasquez Rodriguez,* the Inter-American

[102] Nowak, M, "The Right to Reparations for Victims of Gross Human Rights Violations" in Ulrich, Krabbe and Boserup (eds.) *Human Rights in Development, Yearbook 2001,* Kluwer Law International, 2002, pp. 277-308
Cases examples; *Kurt v. Turkey*, App. No. 24276/94 (1998) and *Tas v. Turkey*, App. No. 24396/94 (2000)
Webpage of the European Court of Human Rights; http://www.echr.coe.int/ECHR/

[103] Article *63 (1) "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."*

Court established the much cited dictum in subsequent case law by affirming positive obligations of the State. [104]

The Inter-American Court has played a significant role in developing jurisprudence in relation to reparations and it has extensively widened the concept, which only later gained recognition as a comprehensive concept within the UN human rights system. The Court has also developed innovative measures to provide collective redress for example in relation to claims from indigenous peoples who have suffered serious human rights violations.[105] Furthermore, the Inter-American Human Rights system has explored the notion of State responsibility in situations of armed context, including by drawing from principles of international humanitarian law, and has made important contributions to the notion of obligations and responsibility following omission and complicity with non-State actors.[106]

Unlike the other international and regional human rights instruments previously referred to, the African Charter contains no clear provision on individual complaints and lacks a general reference to the right to a remedy for violations. This has limited the ability of the African Commission on Human and People's Rights (ACHPR) to address reparations. However, the situation is likely to change once the African Court on Human and People's Rights, established by the Protocol to the Charter, becomes operations as Article 27 of the Protocol contains a broad provisions regarding reparations, "*If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.*"

2.7 Basic Principles on the Right to Reparation for Victims

As outlined above, the international and regional human rights mechanisms have contributed to an expanded concept of reparations for victims of serious human rights violations. Their work has also benefited from a number of UN non-binding standards, which reinforce and

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[104] *Velásquez Rodríguez v. Honduras*, Inter. Am. Ct HR, Series C, No.4, 1988, paras. 166-167 (quoted in chapter 2 of this thesis)

[105] *Aloeboetoe et al. v. Suriname*, (Reparations) Inter. Am. Ct. HR, Series C, No. 15, 1993
Mayagna Awas Tingni v. Nicaragua, Inter. Am. Ct. HR, Series C, No. 79, 2001
Yakye Axa Indigenous Community v. Paraguay (Reparations), Inter. Am. Ct. HR, Series C, No. 142, 2006
Moiwana Community v. Suriname (Reparations), Inter. Am. Ct. HR, Series C, No. 145, 2006

[106] See discussion in Zegveld, L, "Remedies for Victims of Violations of International Humanitarian Law", *IRRC (ICRC Journal)*, September 2003, Vol. 85, pp. 497-526
Further information at the official webpage of the Inter-American Commission on Human Rights http://www.cidh.org/ or the webpage of the Inter-American Court of Human Rights http://www.corteidh.or.cr/

assist in defining the notion of remedies and reparations.[107] In particular, the Basic Principles on Reparation for Victims, which were developed during a 15 year period prior to their adoption in 2006, provide an important benchmark as they synthesize and define the areas of reparations as consisting of; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. [108]

The Principles aim to reflect the normative connection between international humanitarian and human rights law, and stress the importance of and obligation to implement domestic reparations for victims of armed conflict. The Principles explicitly state in the preamble that they *"identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and international humanitarian law, which are complementary though different as to their norms"*. The Principles decline to define what exactly gross human rights violations and serious humanitarian law violations are, leaving this definition open to interpretation and forthcoming legal developments. As previously noted, the Principles, even when still in draft, were referred to in jurisprudence by numerous human rights bodies, they figure in several recently adopted legal instruments[109] and, as will be explored in Part II of the thesis, have been applied by a number of Truth Commissions.[110] A key provision in the Basic Principles is contained in paragraph 16 which affirms that; *"States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligation"*. This provision is particularly important for the practical implementation of the Basic Principles, as will be illustrated in the subsequent case studies.

The finalisation of the Principles was delayed for a number of reasons and among them the debate on historical reparations for slavery and colonialism and well as the political

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[107] Examples of UN non-binding standards which relate to reparations;
1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, A/Res./40/34
1997 Revised Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Joinet principles), E/CN.4/Sub.2/1997/20/Rev.1
2005 Updated Principles on Action to Combat Impunity, E/CN.4/2005/102/Add.1

[108] For a full commentary and description of the *travaux preparatoires* of the Basic Principles see;
Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review,* Vol. 6, 2006, pp. 203-279 and
Van Boven, T, "Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 19-40

[109] The Rome Statute of the ICC contains an indirect reference to forthcoming principles in art. 75, they are also mentioned in the International Convention on the Protection of all Persons from Forced Disappearances, adopted in December 2006; http://untreaty.un.org/English/notpubl/IV_16_english.pdf

[110] See examples of Truth Commissions citing the Principles in Part II of this thesis.

controversies which occurred in conjunction with the World Conference against Racism, held in Durban in 2001.[111]

In March 2006, the Principles were adopted by the GA of the UN, which further strengthened their status in international law although they are formally non-binding. The Principles make an important contribution by defining remedies for human rights violations. To a significant extent, the Basic Principles draw upon the Draft Articles on State Responsibility adopted by the ILC in 2001.

The various mandate-holders who have acted as the UN Special Rapporteur on Torture, Sir Rodley, Van Bowen and Nowak, have consistently expressed strong support the Principles, both throughout their elaboration and subsequent to their formal adoption.[112] Van Boven, the Special Rapporteur on Torture between 2001 and 2004, provided the original impetus towards the development of the Principles through the groundbreaking study he undertook in 1992 on "*The question of the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*" while a member of the Subcommission on Prevention of Discrimination and Protection of Minorities.[113]

2.8 A Customary Right to Reparations?

Based on the examples noted above, which arguably indicate recognition of the right of the individual to reparations in human rights and humanitarian law, as well as under general international law, it appears reasonable to state that this right has acquired a degree of recognition as forming part of customary law. Certain scholars consider the right already well-grounded in customary law,[114] while others identify it as an emerging rule.[115] It has also

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[111] Van Boven, T, "Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 19-40

[112] *Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* Sir. Nigel Rodley, Report to the General Assembly 2000, UN Doc. A/55/290
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, Report to the General Assembly 2003, UN Doc. A/58/120
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Theo van Boven, Report to the General Assembly 2004, UN Doc. A/59/324
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Report to the Human Rights Council 2007, UN Doc. HRC/4/33

[113] Report presented to the Commission on Human Rights, UN. Doc. E/CN.4/Sub.2/1993/8

[114] Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2nd edition, 2005, p.238,
Karlshoven F, Zegveld, L, *Constraints on the Waging of War, An Introduction to IHL,* ICRC, 2001

been claimed that individual reparation claims, based on article 14 of CAT, can be presented without territorial restrictions.[116]

While there is overwhelming support in the international legal community for the right to reparations for individuals, Tomuschat provides a dissenting opinion.[117] While not disputing the right to reparations *per se*, he denies that it is an individual right. Among his claims, he puts forth State immunity as an argument and argues that reparations provisions in human rights treaties do not provide a right as they depend on discretionary incorporation into national law.[118] In addition, Tomuschat gives an incomplete description of human rights provisions and refers critically to jurisprudence by human rights courts, which he describes in terms such as "erratic" or "sweeping" and based on a "misunderstanding".[119]

As for the defence of State immunity and the claim that human rights are discretionary and dependant on the national order, Higgins has clearly affirmed a divergent position; *"Once it is recognised that obligations are owed to individuals, then there is no reason or logic why the*

Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review,* Vol. 6, 2006, p. 217; *"Treaty based and customary law reflect the principle that States' nationals and aliens should have the right to a remedy for violations committed with a State's territory"*
Bassiouni, C, "Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights" in Bassiouni (ed.) *Post-Conflict Justice*, Transnational Pub, 2002
International Commission of Jurists (together with 15 other NGOs and Foundations including Amnesty International, the Association for the Prevention of Torture, the International Federation for Human Rights, the Redress Trust and the World Organisation Against Torture), Joint Written Statement at the Commission on Human Rights 2005; http://www.icj.org/IMG/pdf/reparationsws.pdf (last visited in March 2007)

[115] Pisillo Mazzeschi, R, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview" in *Journal of International Criminal Justice,* Vol. 1, 2003, pp. 339-347
Gardam, J and Jarvis, M, *Women, Armed Conflict and International Law,* Kluwer Law International, The Hague, 2001, p. 87-92
Droege, C, "Elective Affinities? Human Rights and Humanitarian Law", *International Review of the Red Cross,* Vol. 90, No. 871, September 2008, pp. 501-548
Provost, R, *International Human Rights and Humanitarian Law,* Cambridge University Press, 2002, p. 44

[116] Hall, C K, "The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad", *The European Journal of International Law*, Vol. 18, No. 5, 2008, pp. 921-937

[117] Public lecture by Prof. Tomuschat at the Graduate Institute of International and Development Studies, HEI, Geneva, 10 December 2009
Tomuschat, C, *Human Rights, Between Idealism and Realism,* 2nd ed. Oxford University Press, 2008, chapter 13
Tomuschat, C, "Darfur-Compensation for the Victims" in *Journal of International Criminal Justice,* Vol. 3, 2005, pp. 579-589
There is a certain irony to the conservative stance of Tomuschat, given that he in fact has contributed significantly to advancing the right to reparations in practice through the role he played in Guatemala, where he co-chaired the UN Truth Commission, this is explored in Part II of the thesis. His current position may in part be related to his legal representation of the German State in international compensation cases dating back to the WWII.

[118] Tomuschat, C, *Human Rights, Between Idealism and Realism,* op. cit.

[119] Tomuschat, C, "Reparation for Victims of Grave Human Rights Violations", *Tulane Journal of International and Comparative Law*, Vol. 10, 2002, pp. 157- 184
"one may conclude that the jurisprudence of the Inter-American Court is predicated on a basic misunderstanding"p.166

obligation should be owed only to foreign nationals. It becomes unsustainable to regard the treatment of one's own nationals as matters falling essentially within domestic jurisdiction...Human rights cannot be given or withdrawn at will by any domestic legal system, that system is not the source of the right. International human rights law is the source of the obligation albeit the obligation is reflected in the content of the domestic law."[120]

The ILC has underlined the irrelevance of internal law as a justification for failure to comply with international obligations.[121] The Human Rights Committee and the European Court of Human Rights are both unequivocal regarding the duty of the State to ensure that its domestic legal system complies with applicable international human rights obligations.[122] Furthermore, the ILC Articles on Diplomatic Protection adopted in 2006 specifically note that a State should hand over compensation to their own nationals, should a State raise a claim against another on the basis of diplomatic protection.[123]

2.9 Conclusions

To sum up the conclusions in this chapter, the initial section identified certain core human rights violations, which have in common that they figure both in human rights law as well as humanitarian law, are non-derogable and have been acknowledged as carrying status as

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[120] Higgins, R, *Problems and Process, International Law and How We Use it,* Clarendon Press, Oxford, 1994, pp. 96-97

[121] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted 2001, op.cit. Article 32; *"Irrelevance of internal law- The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part."*

[122] CCPR, General Comment No. 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 13; *"Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees."*
The Committee of Ministers of the Council of Europe (which supervises the execution of the judgements of the European Court of Human Rights in accordance with article 46), *Monitoring of the payment of sums awarded by way of just satisfaction,* 15 January 2009, para. 4; *"The Committee of Ministers has regularly pointed out that the obligation to abide by the judgments of the Court is unconditional, a State cannot reply on specificities of its domestic legal system to justify failure to comply with the obligations by which it is bound under the Convention"*

[123] International Law Commission, *Draft Articles on Diplomatic Protection,* adopted 2006, Article 19, *"A State entitled to exercise diplomatic protection according to the present draft articles, should: (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions."*
International Law Commission, *Commentaries on the Draft Articles on Diplomatic Protection,* 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10). Article 19, para. 8; *"public policy, equity and respect for human rights support the curtailment of the States discretion in the disbursement of compensation."*
International Law Commission, *Seventh Report on Diplomatic Protection by Special Rapporteur John Dugard,* A/CN.4/567, 2006, paras. 93-103

customary law, which makes them universally applicable without treaty adherence. In some cases, certain core human rights are even considered to form part of *jus cogens* norms.

Subsequently, the chapter documented that reparations are a legally inseparable corollary to human rights violations, which by definition constitute violations whereby the State is responsible towards the individual. Human rights law contains specific references to reparations as a right and basis for the individual right to reparations can also be found in humanitarian law. Until recent time, individuals who were primarily perceived of as victims of humanitarian law breaches received little redress, while victims who argued their cases as human rights violations have stood a better chance of receiving reparations. It is hoped that recognition of the victim as a beneficiary under both branches of law will contribute to advancing gradual implementation of their rights.

The convergence of norms and legal sources which explore and define the nature of reparations in relation to individuals is demonstrated in jurisprudence from the ICJ, the Articles on State Responsibility of the ILC, as well as humanitarian law and human rights instruments (both legally binding and non-binding) and jurisprudence. All these elements support the argument that State responsibility for reparations in favour of individuals has acquired certain customary standing.

3. Human Rights Jurisprudence on Reparations, International and Regional

3.1 Introduction

This chapter seeks to build upon the conclusions of the previous chapter and explore the concept of reparations for serious human rights violations through a comparative study of jurisprudence and its evolvement within the international and regional human rights systems. The overview will permit to identify the specific contributions from the different regions towards developing a broader notion of reparations. The chapter is structured according to the separate systems, whereby case law will be identified as it highlights different components of reparations. Focus is set on cases which illustrate elements of reparations for serious human rights violations, in particular violations involving torture, disappearances and extra-judicial executions. Where possible, examples will be drawn from countries in armed conflict and, if available, from the countries which are the focus in the case studies in Part II of the thesis. The aim is to chart the elements of reparations as affirmed in the Articles on State Responsibility[124] and the UN Basic Principles on the Rights to Reparation for Victims;[125] namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution measures seek to restore the victim to the situation prior to the violation, something which in most cases of serious violations is impossible. However, restitution may involve return to one's place of residence, restoration of liberty and return of property. Compensation should be provided for economically assessable damage, proportional to gravity of the violations, and for example include consideration for loss of material assets and income, physical and mental harm and suffering and costs for legal assistance. Rehabilitation involves providing assistance for medical and psychological care. Satisfaction is a broad term which commonly is conceived of as covering a series of measures, including investigations and sanctions against perpetrators, protection of witnesses and the victim's relatives, search for the whereabouts of disappeared, public disclosure of the truth about violations and official recognition of State responsibility along with public apologies and commemorations to victims. Finally, reparation measures which seek to guarantee non-repetition include for example review and reform of laws allowing for violations, institutional reform of the military

[124] *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission Report of the International Commission, 53rd session (2001) contained in the Official Records of the General Assembly, 56th session, Supplement no. 10, UN doc A/56/10, chap. IV.E.I

[125] *UN 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*, adopted by the UN Commission on Human Rights in 2005 E/CN.4/RES/2005/35, adopted in the UN General Assembly without a vote 21 March 2006, A/RES/60/147

ensuring it is under civilian control and accountability, as well as human rights and humanitarian law training for police and armed forces.

Particular attention is paid to the jurisprudence of the Inter-American human rights system which has provided important contributions in this field. In order to limit the chapter, national case law has been excluded. The chapter will also note some of the differences in the provisions regarding reparations in international and regional human rights instruments and highlight variations and certain inconsistencies in the awards of remedies. An attempt is made to identify some of the remaining challenges in order to advance a more coherent approach in international law to reparations for victims of gross human rights violations. Ultimately, the chapter seeks to reaffirm the position that individual victims and their right to comprehensive reparations have gained enhanced legal standing in international law. The principal obstacle remains, however, in transforming the standards into practice in situations of armed conflict, particularly as international human rights instruments and mechanisms were not originally developed to address claims stemming from large scale serious violations of human rights.

3.2 The International Human Rights Treaty Body System

As noted in the previous chapter, several international human rights treaties contain references to remedies and compensation, however the language used in these provisions varies and the interpretations of them have developed gradually. The Covenant on Civil and Political Rights (ICCPR) provides a reference to the right to an "effective remedy" in Article 2 (3).[126] The remedy is to be determined by "competent authorities" and there is no description of what a remedy entails other than it should "develop the possibilities of judicial remedy". However, the State party is obliged to "ensure that the competent authorities shall enforce such remedies when granted". The Covenant only refers to the word "compensation" in the context of unlawful arrest, detention and conviction in Articles 9 (5) and 14 (6).

[126] Article 2(3) of the CCPR states; *"Each State Party to the present Covenant undertakes:*
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted."

The Human Rights Committee was established by Article 28 of the Covenant to oversee its implementation at the national level.[127] The Committee has given considerable interpretation of the content of the concept of a remedy in its decisions on individual petitions, as well as in Concluding Observations in relation to periodic State party reports and in General Comments on the interpretation of treaty provisions.[128] While the Committee does not have the competence to issue legally binding decisions, it adopts "views" upon analysis of petitions from individuals who claim to have suffered violations in States that have ratified the Optional Protocol of the Covenant[129]. The Optional Protocol entered into force in 1976 and the Committee has since adopted views on some 1500 petitions.[130] While the Committee lacks enforcement mechanisms, it affirms that State responsibility to comply stems from the legally binding obligations adhered to in the Covenant.[131] The Committee is gradually seeking to develop follow-up mechanisms and requests States parties to provide information within 90 days on measures to implement the Committee's views[132].

With regards to article 2 (3), the Committee, when finding violations of the right to life (Article 6) and the prohibition against torture (Article 7), commonly concludes that the victim has a right to an effective remedy, including compensation, and that the State party is under an obligation to prevent that similar events occur again in the future. The Committee rarely explores in detail the implications of what an effective remedy entails in individual cases, nor how the State party should proceed in order to prevent reoccurrence of similar

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[127] The Human Rights Committee is a quasi-judicial body of 18 independent international expert members who meet three times a year in Geneva or in New York. Members serve in an honorary capacity and are not remunerated.

[128] Nowak, M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd ed, NP Engel Publisher, 2005

Joseph, S, Schultz, J, and Castan, M, *The International Covenant on Civil and Political Rights; Cases, Material and Commentary*, 2nd ed. Oxford University Press, 2004

Further detailed and updated information on the work of the Human Rights Committee can be found on the official webpage of OHCHR at; http://www.ohchr.org/english/bodies/hrc/index.htm

[129] As of March 2007 the CCPR Optional Protocol had 109 State parties. Updated information on ratification status is available at the United National Treaty Bodies Collection at the UN Office of Legal Affairs; http://untreaty.un.org/English/access.asp . Among the key admissibility criteria, applicable to all international and regional human rights mechanisms, the petitioner must prove prior exhaustion of domestic remedies.

[130] By February 2010, 1926 individual petitions to the Human Rights Committee had been registered from 82 different States parties, of which 432 petitions remained open.

Survey of Human Rights Committee jurisprudence by OHCHR, 3 February 2010

http://www2.ohchr.org/english/bodies/hrc/docs/SURVEYCCPR97.xls *last visited 2 April 2010*

[131] For further discussion see; Echeverria, G, "Redressing Torture, a Genealogy of Remedies and Enforcement" in *Torture* (IRCT journal), Vol. 16, Number 3, 2006, pp.152-181 available at http://www.irct.org/

[132] Schmidt, M, "Follow-up Procedures to individual Complaints" in Alfredsson, Grimheden, Ramcharan and de Zayas (eds.), *International Human Rights Monitoring Mechanisms,* Kluwer Law International, The Hague, 2001, pp. 201-215, De Zayas, A, "The examination of Individual Complaints by the United Nations Human Rights Committee under the Optional Protocol of the CCPR" in Alfredsson, Grimheden, Ramcharan and de Zayas (eds.), *International Human Rights Monitoring Mechanisms,* Kluwer Law International, The Hague, 2001, pp. 67-121 (both authors recognise the difficulties in conducting follow-up on cases and the lack of responsiveness among States parties, however point to recent improvements)

violations. However, the Committee stated in *Rodriguez v. Uruguay*[133], a case of torture and arbitrary detention in 1984 during the military dictatorship, that amnesties for gross human rights violations are incompatible with the obligations under the Covenant. The Committee specifically urged; *"the State party to take effective measures (a) to carry out an official investigation into the author's allegations of torture, in order to identify the persons responsible for torture and ill-treatment and to enable the author to seek civil redress; (b) to grant appropriate compensation to Mr. Rodríguez; and (c) to ensure that similar violations do not occur in the future."* Notably, among its early jurisprudence, *Quinteros v. Uruguay*[134], the Committee took the position that the anguish suffered by family members of victims of disappearances constitutes in itself a violation of torture.

In the case *Bautista v. Colombia*[135] regarding the disappearance, torture and killing in 1987 of a member of a radical left-wing group (M-19), by members of the armed forces, the Committee went one step further by noting that disciplinary measures against the military officials and the award of a compensatory claim by an administrative tribunal were insufficient. The Committee insisted that the State party should expedite criminal proceedings leading to the prompt prosecution and conviction of the persons responsible; *"because purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights"*. The body of Nydia Bautista was identified in 1990 and the family suffered death threats for pursuing the case, thus the Committee also noted in its decision that the State party was under an obligation to provide appropriate protection for members of the Bautista family.

In the case *Laureano v. Peru,*[136] regarding a 16 years old girl disappeared in 1992, presumably by army officials who had threatened her family and previously detained the girl on suspicion of being a member of the guerrilla group the Shining Path. The Committee determined that the State had failed its positive duty to protect the life of the victim and confirmed its previous jurisprudence, in considering that the suffering imposed upon her and her family through the disappearance constituted torture.

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[133] *Rodriguez v. Uruguay,* No. 322/1988, Final Views of 9 August 1994, para. 14
[134] *Quinteros v. Uruguay,* No.107/1981, Final Views of 21 July 1983, para.14
[135] *Bautista v. Colombia,* No. 563/1993, Final Views of 27 October 1995, paras. 8.2, 10
Case also discussed in Nowak, M, *UN Covenant on Civil and Political Rights, CCPR Commentary,* 2nd edition, NP Engel Publisher, 2005, p 65
[136] *Laureano v. Peru,* No. 540/1993, Final Views of 16 April 1996, paras. 8.2-11

In *Jegatheeswara v. Sri Lanka*[137], a case relating to a suspected Tamil Tiger sympathiser (LTTE) disappeared by the army in 1990, the Committee commented in further detail upon the suffering by family members; "*Moreover, noting the anguish and stress caused to the author's family by the disappearance of his son and by the continuing uncertainty concerning his fate and whereabouts, the Committee considers that the author and his wife are also victims of violation of article 7 of the Covenant. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant both with regard to the author's son and with regard to the author's family*". The case is noteworthy because of its admissibility *ratione temporis* as the disappearance took place prior to the accession by Sri Lanka to the Optional Protocol in 1997. The decision to admit the case was based upon the position that continuing violations of the Covenant may take place after the entry into force. Furthermore, in its decision on remedies the Committee added as an extra element the right of the family to receive information relating to the investigations of the case; "*the State party is under an obligation to provide...a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation*".

With regards to cases where violations of torture have been found, the Committee has only occasionally specified the obligation of the State party to provide medical attention.[138] Curiously, the Committee took this position in *Setelich v. Uruguay,*[139] decided back in 1981, however has rarely repeated the demand. The victim in the above case was at the time of the decision still in detention; yet it is undisputed that victims of torture require medical attention and rehabilitation for prolonged periods after the violations have taken place. Therefore, it appears a significant omission that reference to medical attention and rehabilitation is largely absent in jurisprudence of the Committee.

As a measure of acknowledgement and satisfaction for the victims, the Committee has gradually developed a practice of explicitly requesting that the State party publish the Committee's Views upon the finding of violations.[140]

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[137] *Jegatheeswara v. Sri Lanka,* No. 950/2000, Final views of 31 July 2003, paras.9.5, 6.2, 11

[138] Examples of cases where the petitioners were found to be victims of torture however no mention is made in the decisions regarding medical attention and rehabilitation;
Isidore Kanana v. Zaire, No. 366/ 1989, Final Views of 8 November 1993,
Rodriguez v. Uruguay, No. 322/1988, Final Views of 9 August 1994,
Ndong Bee v. Equatorial Guinea, Nos. 1152/2003 and 1190/2003, Final Views of 30 November 2005

[139] *Setelich v. Uruguay*, No. 63/1979, Final Views of 28 October 1981, para.21

[140] *Kurbonov v. Tadjikistan,* No.1208/2003, Final Views of 16 March 2006, para.9
Medjnoune v. Algeria, No. 1297/2004, Final Views of 14 July 2006, para. 11

In addition to receiving individual communications, one of the Human Rights Committee's key functions is review of State party reports on the implementation of the rights in the Covenant. In accordance with Article 40 of the Covenant, all States parties should submit a periodic report every four years detailing progress in implementing the rights at the national level. These reports are subsequently reviewed in a public session by the Committee, which also relies upon alternative reports from NGOs and other publicly available material, and subsequently adopts Concluding Observations on the situation in the State under scrutiny.[141] Regarding the interpretation of remedies for serious violations occurred in the context of armed conflict, the Committee has explored this in detail in several Concluding Observations, for example in its review of Bosnia and Herzegovina in 2006; "*The Committee notes with concern that the fate and whereabouts of some 15,000 persons who went missing during the armed conflict (1992 to 1995) remain unresolved. It reminds the State party that the family members of missing persons have the right to be informed about the fate of their relatives, and that failure to investigate the cause and circumstances of death, as well as to provide information relating to the burial sites of missing persons increases ...suffering inflicted to family members and may amount to a violation of article 7 of the Covenant. (arts. 2(3), 6 and 7)*". The Committee goes on to issue detailed recommendations regarding satisfaction; "*The State party should take immediate and effective steps to investigate all unresolved cases of missing persons and ensure without delay that the Institute for Missing Persons becomes fully operational...It should ensure that the central database of missing persons is finalized and accurate, that the Fund for Support to Families of Missing Persons is secured and that payments to families commence as soon as possible*".[142] The above extract relating to Bosnia and Herzegovina provides a particularly good example of a comprehensive interpretation of remedies, in particular satisfaction, by affirming the right of family members of victims to truth and knowledge of past violations and by proposing concrete measures to be taken by the State party.

The Committee noted further examples of remedies in the periodic review of the Central African Republic (2006) and notably invoked the congruence of serious violations under human rights and humanitarian law, affirming that the State party should; "*ensure in all circumstances that victims of serious violations of human rights and international*

Mulezi v. Democratic Republic of Congo, No. 962/2001, Final Views of 8 July 2004, para. 8

[141] Updated information regarding the periodic reviews of State party reports by the Human Rights Committee available at OHCHR's webpage; http://www.ohchr.org/english/bodies/hrc/index.htm

[142] CCPR Concluding Observations on Bosnia and Herzegovina, November 2006, CCPR/C/BIH/CO/1, para. 14

humanitarian law are guaranteed effective remedy, which is implemented in practice, including the right to as full compensation and reparations as possible... act swiftly to implement recommendations of "national dialogue" on establishment of a truth and reconciliation commission...provide detailed information in next report on complaints filed ...and on reparations paid to victims over past three years... improve training provided to law enforcement personnel".[143] As another example, in the Concluding Observations on the Democratic Republic of the Congo (2006)[144], the Committee also affirmed the importance of investigations and effective reparations for victims.

As noted above, the Committee has gradually interpreted the provision establishing the right to an effective remedy. It has affirmed this right in the form of; restitution (return to one's place of residence and restoration of property), allocation of compensation (for material as well as mental and physical damage), rehabilitation (medical and psychological care for victims), satisfaction (for example investigations, sanctions, disclosure and public acknowledgement of State responsibility for violations) and guarantees of non-repetition (for example review and reform of laws allowing for violations, institutional reform of military ensuring it is under civilian control and accountability, human rights and humanitarian law training for police and armed forces).[145] However, as demonstrated above, in relation to individual petitions the Human Rights Committee maintains a limited interpretation of Article 2 (3) and remedies have only been explored to a limited extent. While the Committee lacks a mandate to order financial awards in individual cases, one may argue that other components of reparations, e.g. concrete measures of satisfaction and rehabilitation, could have been further explored in its jurisprudence. Nonetheless, a more comprehensive approach has been taken in its Concluding Observations adopted upon review of periodic State party reports.

As noted in the previous chapter, in 2004 the Human Rights Committee clarified its position on reparations in a General Comment No. 31 on the Nature of the General Legal Obligation

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[143] CCPR Concluding Observations on the Central African Republic, July 2006,CCPR/C/CAF/CO/2, paras. 8, 12
[144] CCPR Concluding Observations on the Democratic Republic of the Congo, March 2006, CCPR/C/COD/CO/3, para.16
[145] Nowak, M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, (2nd edition), NP Engel Publisher, 2005, pp. 65-75. Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2nd edition, 2005, p.183-185. Illustrative cases decided by the Human Rights Committee include;
María del Carmen Almedia de Quinteros et al. v. Uruguay, No. 107/1981
Laureano v. Peru, 540/1993
Bautista v. Colombia, No. 563/1993
Jegatheeswara Sarma v. Sri Lanka, No. 950/2000

Imposed on States Parties to the Covenant,[146] which affirmed that reparations are a central part of an effective remedy and reiterated the components of reparations; restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.[147] It should also be noted that the above quoted General Comment also clearly sets out the positive obligations of the State as enshrined in the Covenant; *"There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".*[148] The General Comment has entrenched the position taken by the Committee in individual decisions and Concluding Observations, particularly in relation to cases of disappearances.

The Committee against Torture, established by Article 17 of the Convention with the same name has given further interpretation to the concept of reparations, specifically with regards to the need for rehabilitation for victims. Article 14 (1) of the Convention clearly states that; *"Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation".*

The Committee against Torture may consider complaints from individuals for violations occurred within the jurisdiction of States parties that have made a declaration under Article 22 of the Convention (significantly less than the number of States parties to the Optional Protocol of the Covenant on Civil and Political Rights). By late 2009, the Committee had concluded 310 cases.[149] The Committee against Torture, similarly to the Human Rights

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[146] CCPR General Comment No. 31, The Nature of General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 16
The General Comment is further discussed in; Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2nd edition, 2005, p.117

[147] CCPR/C/31/Rev.1/Add.13, para. 16, *"Article 2, paragraph 3 requires that States Parties make reparations to individuals whose Covenant rights have been violated. Without reparations to individuals whose rights have been violated, the obligation to provide an effective remedy...is not discharged...the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."*

[148] Ibid. para. 8
Further discussion in Clapham, A, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006, pp. 328-332

[149] Survey of CAT jurisprudence by 24 November 2009, available at http://www2.ohchr.org/english/bodies/cat/docs/CATSURVEY42.xls last visited 4 April 2010

Committee, seldom explores the concept of reparations in detail in its decisions on individual cases. However, the Committee took a strong position in the case of *Kepa Urra Guridi v. Spain,* decided in 2005 in relation to torture inflicted upon an ETA suspect in 1992. While certain compensation had already been paid to the victim, the Committee against Torture stated that; "*Article 14 of the Convention not only recognizes the right to fair and adequate compensation but also imposes on States the duty to guarantee compensation for the victim of an act of torture...compensation should cover all the damages suffered by the victim, which includes, among other measures, restitution, compensation, and rehabilitation of the victim, as well as measures to guarantee the non-repetition of the violations, always bearing in mind the circumstances of each case*". [150]

The Committee against Torture, also in a manner analogous to that of the Human Rights Committee, reviews periodic State party reports and adopts Concluding Observations on the implementation at the national level of the rights enshrined in the Convention.[151] The Committee has provided further analysis of different components of reparations in its Concluding Observations, for example upon reviewing Sri Lanka in 2005 it noted; "*with concern the absence of a reparation programme, including rehabilitation, for the many victims of torture committed in the course of the armed conflict. The State party should establish a reparation programme, including treatment of trauma and other forms of rehabilitation, and provide adequate resources to ensure its effective functioning*". [152] Subsequent to the adoption of the adoption of the UN Basic Principles on the Right to Reparation for Victims in 2006, the Committee has made explicit reference to these in its Concluding Observations, including those on Colombia in 2009, whereby it called for the Principles to be taken into account in the establishment of a comprehensive reparations programme.[153] The Committee against Torture is currently exploring the possibility of issuing a General Comment on article 14.

In this context it should be noted that the Convention on the Rights of the Child (CRC) and its Optional Protocols on children in armed conflict and on the sale of children contain specific references to reparations. Article 39 of the CRC reads; "*States Parties shall take all*

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[150] *Kepa Urra Guridi v. Spain*, No. 212/2002, Final Views adopted 17 May 2005, para.6.8
See further discussion regarding the significance of the case in; Nowak, M, and McArthur, E, *The United Nations Convention against Torture, A Commentary*, Oxford University Press, 2008, pp 453, 481-482

[151] For updated information about the periodic reviews of State party reports by the Committee Against Torture, see OHCHR's webpage; http://www.ohchr.org/english/bodies/cat/index.htm

[152] CAT Concluding Observations on Sri Lanka, November 2005, CAT/C/LKA/CO/2, para 16

[153] CAT Concluding Observations on Colombia, November 2009, CAT/C/COL/CO/4, para 24

appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts".[154] The CRC and its Protocol relating to armed conflict both contain cross references to the applicability of humanitarian law.[155] While the Committee on the Rights of the Child cannot receive individual communications, it emits Concluding Observations, similar to other treaty bodies, upon review of the periodic reports of States parties, currently numbering 193 States. Following review of States currently undergoing armed conflict, the Committee has stressed aspects relating to reparations, for examples in the 2006 Concluding Observations on Colombia, the State party was urged to; "*Substantially increase the resources for social reintegration, rehabilitation and reparations available to demobilized child soldiers as well as for child victims of landmines. Legal advice should be sought from OHCHR on... the legal framework of peace negotiations, with special attention to the basic principles of truth, justice and reparations for the victims*".[156]

While a comprehensive concept of reparations has been gradually developed through the jurisprudence of human rights treaty bodies and been supported by soft law texts such as the Basic Principles on the Right to Reparation for Victims, to date the concept has not been explicitly enshrined in a legally binding instrument. However, this is likely to change within the not so distant future. On 6 February 2007, the International Convention for the Protection of all Persons from Disappearances was formally opened for signature. The Convention clearly re-affirms a comprehensive concept of reparations and specifies the same five elements as the Basic Principles.[157] On the same day as the Convention opened it was signed by 57 States parties and by the end of 2009 it was ratified by 18 States. The Convention will enter into force thirty days after the deposit of the ratification of 20 States parties.[158]

To sum up, the treaty bodies of the international system for human rights protection have explored the concept of reparations for serious violations to a varying degree. Although

[154] Full text of the Convention on the Rights of the Child and its Optional Protocols and updated information on periodic reviews available at the webpage of OHCHR; http://www.ohchr.org/english/bodies/crc/index.htm
[155] CRC Article 38, Optional Protocols on children in armed conflict Preamble and Article 5
[156] CRC Concluding Observations on Colombia, June 2006, CRC/C/COL/CO/3, para. 81
[157] International Convention on Disappearances, Article 24 (4,5) "*Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:(a) Restitution;(b) Rehabilitation;(c) Satisfaction, including restoration of dignity and reputation;(d) Guarantees of non-repetition.*"
[158] For the text and updated status of ratification of the Convention on Disappearances, see the UN Office of Legal Affairs (OLA) webpage, http://treaties.un.org/Pages/ParticipationStatus.aspx *last visited 3 March 2010*

individual decisions from the Human Rights Committee are not legally enforceable *per se*, they would benefit from providing more specific guidance on what an effective remedy and reparations entail. To date, the decisions have tended to focus on access to justice rather than other aspects of reparations. Despite the relevant General Comment adopted by the Human Rights Committee in 2004, the concept of reparations therein has yet to be reflected in the jurisprudence of the Committee; in particular the areas of rehabilitation, satisfaction and guarantees of non-repetition are underexplored. The more specific language in article 14 of the Convention against Torture has allowed for further detailed jurisprudence in this regard. However, it should be noted that the various treaty bodies provide a more comprehensive analysis of remedial measures in their Concluding Observations adopted upon the periodic review of States parties' reports. Importantly, both the individual decisions and the Concluding Observations of the treaty bodies affirm positive obligations of the State by exploring its responsibility, including for actions not directly attributable to State agents. A principal challenge facing the international system is the lack of effective monitoring and follow-up of compliance with treaty body jurisprudence at the national level. Among the proposals to address this problem it has been suggested, including by Nowak, that a World Court for Human Rights be established.[159]

3.3 *The European System for Human Rights Protection*

As noted in the previous chapter, the Council of Europe created the first human rights system with the faculty to deliver legally binding and enforceable judgements on remedies. These provisions figure in the European Convention on Human Rights (ECHR), which entered into force in 1953.[160] Individuals who have exhausted all domestic remedies can file complaints directly with the European Court of Human Rights (since the entry into force of Protocol 11 in 1998) and all States parties undertake not to hinder the exercise of this right in any way.[161]

Article 13 of the ECHR affirms the right to an effective remedy and declares that; *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective*

[159] Nowak, M, "The Need for a World Court of Human Rights", *Human Rights Law Review*, Vol. 7, No. 1, 2007, pp. 251-259

[160] Further information at the official webpage of the European Court of Human Rights http://www.echr.coe.int/echr

[161] European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 34; *"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."* All references to article numbers refer to the Convention as amended after Protocol 11 entered into force in 1998 (replacing the Commission with a single instance of a full-time Court).

remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". Interpretation of Article 13 has been done in conjunction with Article 41 of the ECHR which establishes that; *"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party".*

The jurisprudence by the Court relating to the above articles has been much debated and several scholars agree that Article 13 has been one of the most difficult articles of the Convention to interpret, which in turn has resulted in certain inconsistencies in the practice of the Court.[162] These difficulties are partly due to a lack of clarity in the drafting of the provisions and also to the Court's traditionally restrictive interpretation of them.[163] The Court has battled with concepts such as what constitutes an effective remedy and to what extent national authorities should be given the discretion to ensure the effectiveness of a remedy.[164]

For decades, the Court focused on the right to access a remedy rather than taking a position on what constitutes an effective remedy. Furthermore, the interpretation of Article 41, which indicates that the Court shall afford just satisfaction *"if necessary",* has been criticised, among others by judge Higgins, as it has been interpreted in jurisprudence as optional and that the judgement in itself may afford satisfaction for victims.[165] In a dissenting opinion, judge

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[162] Ovey C and White, R, *The European Convention on Human Rights*, Oxford University Press, Oxford, 3rd edition, 2002, pp. 386-395
Harris, D, O'Boyle, M, Warbrick, C, *Law of the European Convention on Human Rights,* Butterworths, London, 1995, p. 443
Gomien, D *Short Guide to the European Convention on Human Rights*, Council of Europe Publishing, 2nd edition, 1998, pp. 124-127
Van Dijk, P and Van Hoof, G, *Theory and Practice of the European Convention on Human Rights,* Kluwer Law International, The Hague, 1998, p 697 cites the partly dissenting opinion of Judges Matscher and Farinha in the Malone Case, judgement 2 August 1984, p.41; *"Article 13 constitutes on of the most obscure clauses in the Convention and its application raises extremely complicated problems of interpretation. This is probably the reason why, for approximately two decades, the Convention institutions avoided analysing this provision, for the most part advancing barely convincing reasons"*
[163] Nowak, M, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd edition, NP Engel Publisher, 2005, Nowak, M, "The Right of Victims of Gross Human Rights Violations to Reparation" in Coomans, F(ed.), *Rendering Justice to the Vulnerable,* Kluwer Law International, The Hague, 2000, pp. 203-224
Shelton, D, *Remedies in International Human Rights Law*, op.cit. , p. 195, 197, 200
[164] *Leander v. Sweden*, Eur. Ct. H.R. Judgement 26 March 1987, para. 84. The case is discussed in Harris, D, O'Boyle, M, Warbrick, C op. cit. pp. 456-458 and Dutertre, G, *Key Case Law Extracts European Court of Human Rights*, Council of Europe Publishing, Strasbourg, 2003, p. 353. Further discussion on the concept of an effective remedy also in Nowak, M, "The Right to Reparations for Victims of Gross Human Rights Violations" in Ulrich, Krabbe and Boserup (eds.) *Human Rights in Development Yearbook 2001*, Kluwer Law International, The Hague, 2002, pp. 288 and Ovey C and White, R, *The European Convention on Human Rights*, op cit., p. 390
[165] Judge Rosalyn Higgins has criticised this practice; *"the intention is not that a party has to rest content with the judgement as his satisfaction. In spite of the unclear terminology, the intention is exactly the opposite -that*

Bonello stated that; *"I consider it wholly inadequate and unacceptable that a court of justice should "satisfy" the victim of a breach of fundamental rights with a mere handout of legal idiom".* [166] As noted by Shelton, the narrow interpretation of the Convention has hampered the evolution of remedies in the European system and to some degree undermined the remedial purpose of the articles in question.[167] Part of the explanation to the initial conservative approach to remedies can be explained by the pioneering role of the European human rights system and that it initially did not envisage the individual as the primary focus, but rather retained an inter-state traditional approach.[168] It should also be noted that the European system, in contrast to other regional human rights systems in Americas and Africa, was not initially confronted with large numbers of cases relating to serious violations, such as to the right to life.

However, significant changes have taken place with the expansion of the number of States parties, the reform and creation of the full-time Court in 1998 and the increasing number of cases received relating to serious human rights violations, including in the context of armed conflict. In 1996, the Court for the first time issued a sentence finding State officials directly responsible for torture (Article 3) in the case of *Aksoy v. Turkey.* The case represented a groundbreaking shift in the jurisprudence of the Court as it finally defined that; *"the notion of an effective remedy entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the effective identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure".*[169] In 1994 the applicant was killed, allegedly for bringing the claim to the Court. His father continued his application and for the first time the Court awarded the full amount claimed, including 25'000 pounds for non-pecuniary damages.[170]

During the 1990s the Convention was ratified by an additional 20 States parties and the expansion eastwards significantly increased the number of cases filed. The number of annual applicants rose from 5'900 in 1998 to 27'000 in 2003 and during 2008 the number of

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the Court shall itself be able to assist by providing, if necessary, for just satisfaction" cited in Shelton, D, *Remedies in International Human Rights Law*, op cit. p 195, further discussion pp. 257-260

[166] Judge Bonello in *Nikolova v. Bulgaria,* Eur. Ct. H.R. Judgement 25 March 1999 cited by Mowbray, A, *Cases and Materials on the European Convention on Human Rights,* Butterworths, London, 2001, pp. 730-732

[167] Shelton, D, *Remedies in International Human Rights Law*, op.cit. , p. 197

[168] Ibid. p. 200

[169] *Aksoy v. Turkey,* Eur. Ct. H.R. Judgement of 18 December 1996, para. 98
The victim, resident in south east Turkey, was detained in 1992 upon suspicion of belonging to the PKK (Workers' Party of Kurdistan) and was tortured by police during a two week period.

[170] Case discussed in Mowbray, A, *Cases and Materials on the European Convention on Human Rights,* Butterworths, London, 2001, pp.87-90, Shelton, D, *Remedies in International Human Rights Law*, op. cit. p 297

applicants was 49'000.[171] The latter figure is higher than the number of cases registered during the system's first thirty years of existence. The Court issued 180 judgements during its first thirty years, while in 1999 alone the Court emitted almost as many (177)[172]. During 2005 the Court delivered 1105 judgements, of which 60 percent were against Turkey, Ukraine, Greece, Russia or Italy. It is noteworthy that during 2008 the European Court of Human Rights issued as many judgements (1543) as the Human Rights Committee has emitted decisions during its entire existence.

Through the number of cases filed in the European system relating to serious violations of human rights, including the right to life and prohibition against torture, the Court has gradually evolved its jurisprudence in the area of remedies. In 1993, a seventeen year old girl in south east Turkey was detained together with her family upon suspicion of belonging to the PKK. She was subsequently raped and subjected to torture at the hands of State security forces. The case, *Aydin v. Turkey,* was decided in 1997 and marked the first time rape was explicitly defined as torture by the Court. The Court further criticised the lack of a thorough and effective investigation into the allegation of rape in custody and that the victim was not examined by competent, independent medical professionals.[173]

In yet another Turkish case, *Mahmut Kaya v. Turkey*, the Court commented upon the positive obligations of the State to prevent violations and demonstrate due diligence, including in the context of armed conflict. The Court took the position that although it could not be established beyond doubt whether State agents were directly involved in the killing, it was clear that the State party was aware of the threats against the victim and failed to take preventive action and conduct a criminal investigation subsequent to the events.[174] The decision marks a progressive shift in the Court's position on the positive obligations of the

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[171] European Court of Human Rights, *Annual Report 2008*
The European Court of Human Rights, Some Facts and Figures 1959-2008, available at www.echr.coe.int *last visited 2 March 2010*

[172] Shelton. D, op. cit.198

[173] *Aydin v. Turkey,* Eur. Ct. H.R., Judgement 25 September 1997. Case discussed in Mowbray, A, *Cases and Materials on the European Convention on Human Rights,* Butterworths, London, 2001, pp.91-92 and Nowak, M, "The Right to Reparations for Victims of Gross Human Rights Violations" in Ulrich, Krabbe and Boserup (eds.) *Human Rights in Development Yearbook 2001*, Kluwer Law International, The Hague, 2002, p. 288
Case summaries available at Utrecht Law School (SIM)Database; http://sim.law.uu.nl/SIM/Dochome.nsf?Open

[174] *Mahmut Kaya v. Turkey,* Eur. Ct. H.R., Judgement 28 Match 2000. Case discussed in Mowbray, A, *Cases and Materials on the European Convention on Human Rights,* Butterworths, London, 2001, pp. 62-65 and in Clapham, A, op. cit. p. 365
In 1993, a medical doctor in south east Turkey left home to treat a wounded member of the PKK. Six days later he was found murdered, shot in the head with his hands tied. Prior to the killing, the victim had expressed concern over surveillance by State agents. In 1998, a government report, containing details of State sponsored extra-judicial killings in the region, was made public.

State to prevent violations, notably compared to its restrictive interpretation in the decision of the case *Osman v. United Kingdom.*[175]

Regarding the consideration of family members of victims who have suffered serious violations, the Court is more likely to recognise parents rather than siblings as having suffered in cases of disappearances and extra-judicial killings. While the Court issued only nominal non-pecuniary damages to the brothers (applicants) in the cases *Mahmut Kaya v. Turkey* and *Cakici v. Turkey*[176], they recognised the mother of the victim in the disappearance case *Kurt v. Turkey*[177] as an indirect victim of a violation of Article 3 due to the anguish she had suffered not knowing the fate of her son. The Court, somewhat ambiguously, stated that *"the Kurt case does not establish a general principle that a family member of a disappeared person is thereby a victim of treatment contrary to Article 3. Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation".* [178] The position of the Court regarding claims from family members of victims does not clearly state what "special factors" are required to fulfil the criteria of secondary victimisation. Clearly, such special factors were excluded in the decision of the case *McCann and Other v. the United Kingdom,*[179] one of the Court's most criticised judgements, where despite finding a violation of the right to life, family members of the three suspected IRA terrorists killed were denied any damages. Also, in *Gulec v. Turkey*[180] the Court controversially reduced the damages awarded to the family of a 15 year old boy killed in a demonstration, apparently based on presumption that his presence at the demonstration indicated a mitigating factor in relation to State responsibility. Nevertheless, despite inconsistencies in the jurisprudence, the Court has set important precedents by establishing the right of family members to know the fate of disappeared persons and by considering this as an additional violation.[181]

In a case relating to serious violations in Chechnya, *Khashiyev and Akayeva v. Russia,* several family members of the applicants had been extra-judicially executed by Russian Army forces

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[175] *Osman v. United Kingdom,* Eur. Ct. H.R., Judgement 28 October 1998. Case discussed in Mowbray, op. cit. pp.60-62, Dutertre, op. cit. pp. 30-32, Clapham, A, op. cit. pp. 361-365
[176] *Cakici v. Turkey,* Eur. Ct. H.R., Judgement 8 July 1999
[177] *Kurt v. Turkey,* Eur. Ct. H.R., Judgement 25 May 1998
[178] *Cakici v. Turkey,paras 98-99,* noted in Dutertre, G, *Key Case Law Extracts* op. cit. pp. 80-81
[179] *McCann and Other v. the United Kingdom,* Eur. Ct H. R , Judgement 27 September 1995
Case discussed in Shelton. op. cit. pp. 264-265
[180] *Gulec v. Turkey,* Eur. Ct H. R, Judgement 27 July 1998, Case discussed in Shelton. op. cit. p. 304
[181] Naqvi,Y, "The Right to the Truth in International Law, Fact of Fiction?", *International Review of the Red Cross (IRRC),* Vol. 88, No. 862, June 2006, pp. 257

in 2000. In the judgement emitted 2005 the Court; *"recalled its case-law in this area and the need, in cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The obligations under Article 2 could not be satisfied merely by awarding damages. The investigation had to be timely, effective and not to be dependent for its progress on the initiative of the survivors or the next of kin".* [182]

In the case of *Isayeva and others v. Russia*, also decided by the Court in 2005, the applicant complained of indiscriminate bombing of a village in Chechnya in 2000.The Court stated regarding the aerial bombings that; *"using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, was impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society...the use of indiscriminate weapons stood in flagrant contrast with this aim and could not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents."* It is interesting to note that while the applicants invoked humanitarian law (common Article 3 and II Additional Protocol) in their claim, the Court made no specific reference to this in the judgement and simply stated *"while the situation that existed in Chechnya at the relevant time called for exceptional measures by the State...no state of emergency had been declared and no derogation has been entered under Article 15 of the Convention".*[183] With regards to reparations, the case provides an unusual example as the applicant was awarded pecuniary damages for the loss of earnings of her deceased son, upon whom she was financially dependant. In subsequent case law in 2008, *Korbely v. Hungary* the Court made explicit references to humanitarian law.[184]

As noted above, the European Court of Human Rights has played an important role in developing human rights jurisprudence as it was the first such institution to emit legally binding decisions. The system has developed, from initially being rather conservative, to responding to a rapidly escalating, almost exploding, number of complaints. Critics, including Nowak, have noted the reluctance of the Court to define and expand the concept of *just*

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[182] *Khashiyev and Akayeva v. Russia,* Eur. Ct. H.R. Judgement 24 February 2005
Analysis of European Court of Human Rights case law of 2005, available at http://www.echr.coe.int/ECHR/ (last visited 4 March 2007)

[183] *Isayeva v. Russia,* Eur. Ct. H.R. Judgement 24 February 2005. Case discussed in Lubell, N, "Challenges in Applying Human Rights Law to Armed Conflict". *International Review of the Red Cross(IRRC),* Vol. 87, No. 860, December 2005, p 742-744
As a result of the attack, the son and three nieces of the applicant were killed. It was also alleged that in total some 150 people died during the bombing, many internally displaced fleeing from other parts of Chechnya. A national criminal investigation, opened in September 2000, confirmed the applicant's version of events. The national investigation was however closed in 2002; the actions of the military were found to have been legitimate in the circumstances, as a large group of illegal fighters had occupied the village.

[184] *Korbely v. Hungary,* Eur. Ct. H.R. Judgement 19 September 2008

satisfaction in conjunction with Article 13.[185] The reticence to award damages and the position that judgements alone provide satisfaction for victims have been overturned during the past decade as the Court has been faced with a rapidly growing number of cases involving serious human rights violations, many in the context of internal armed conflict. The Court has drawn upon principles of humanitarian law, and as noted above, developed jurisprudence clearly affirming the positive obligations of the State, including when the violations may not be directly attributable to State agents. While the Court now routinely awards both pecuniary and non-pecuniary damages as well as compensation for legal costs, the Court has rarely ventured into awarding other types of reparations. Controversially, non-pecuniary damages vary depending on the Court's assessment of the victim's moral conduct and in the case of deceased victims, of his/her relationship with the family member presenting the claim.[186] To date, the Court has in no case specifically awarded rehabilitation for victims of torture. Only exceptionally has the Court resorted to restitution of property as a measure of reparations.[187] The *travaux preparatoires* of the Convention indicate that the Court does not have the faculty to review legislation and overturn national judgments.[188] The Court, however, has affirmed the obligation of the State to conduct effective investigations, *ex officio* if necessary, in order to establish accountability and inform complainants about investigation efforts undertaken.

The principal challenge currently facing the European Court is the booming number of cases filed and that many of them essentially refer to similar circumstances and type of violations. The Court in principle does not accept collective claims or *actio popularis,*[189] however it will be forced to address the quickly growing burden of cases. In many of the Turkish cases, the applicants requested the Court to identify systematic practices, yet the Court generally responded with a standard phrase that; "*it did not find it necessary to determine whether the*

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[185] Nowak, M, CCPR Commentary, op. cit, p. 74
Shelton, S, *Remedies,* op. cit. p 238, 280
Loucaides, L, "Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum", *European Human Rights Law Review,* Vol. 2, 2008, pp. 182-192
Redress, *Enforcing Reparations, Enforcement of Awards for Victims of Torture and Other International Crimes,* The Redress Trust, London, 2006, p. 30

[186] Notably in the case, *McCann v. United Kingdom,* Eur. Ct. H.R. Judgement 27 August 1995. Discussed in Shelton, S ,*Remedies,* op. cit. p. 197, 264-265, 303-304 and Wildhaber, L, "Article 41 and Just Satisfaction in the European Convention on Human Rights", *Baltic Yearbook of International Law,* Vol. 3, 2003, p. 6, 13 and also in Mowbray, A, *Cases and Materials on the European Convention on Human Rights,* Butterworths, London, 2001, pp.35-50

[187] *Papamichalopoulos v. Greece,* Eur. Ct. H.R, Judgement 31 October 1995,
Discussed in Shelton, S, *Remedies,* op. cit. p. 199, 238

[188] Shelton, S, *Remedies,* op. cit. p 281, Ovey C and White, R, *The European Convention on Human Rights,* op.cit. p. 394

[189] Van Dijk, P and Van Hoof, G, op cit., p 46

failings identified are part of a practice adopted by the authorities".[190] However, in 2004 the Committee of Ministers, which oversees the execution of judgements in accordance with article 46 of the Convention, requested the Court to identify systemic problems and the source of such problems in order to assist States in finding necessary remedial measures.[191] The European Court has since sought to apply a "pilot judgement procedure" which aims to identify human rights violations which affect large numbers of applicants and suggest effective domestic remedies in order to reduce the backlog of cases.[192] This approach may gradually orient the Court towards ordering reparations which have a policy impact[193] in order to assert guarantees of non-repetition of violations. The Committee of Ministers is a significant strength of the European human rights system as it has the specific mandate to monitor the domestic compliance with judgements. In 2008, a Human Rights Trust Fund was established at the Council of Europe with the aim of assisting States in the full and timely execution of judgements.[194]

3.4 The Inter-American System for Human Rights Protection

The jurisprudence of the Inter-American human rights system provides without doubt the most innovative examples of reparations. The American Convention on Human Rights, which entered into force on 18 July 1978, provides the second legally binding and enforceable complaints mechanism at the regional level. Article 25 of the Convention affirms the right to a legal remedy[195] and Article 63 of the Convention specifies the right to reparations;

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[190] *Mahmut Kaya v. Turkey,* Eur. Ct. H.R., Judgement 28 March 2000, para. 128

[191] Shelton, S, *Remedies,* op. cit. p 284. Recommendation no. 6 (2004) from the Committee of Ministers; further detailed and updated information can be found at the Committee of Minister's webpage the for supervision of execution of judgements; http://www.coe.int/T/E/Human_rights/execution/

[192] Fribergh, E, Registrar, European Court of Human Right, Presentation at Stockholm Colloquy, 9 June 2008; "*the Court it identifies the shortcoming in the legal order – the systemic problem – that is the cause of the violation which affects a whole class of individuals. The specific feature of the PJP is that instead of dealing with each individual case, the Court singles out one or a small number of applications for priority treatment and adjourns all other applications until the pilot case has been decided...the Court gives advice to the Government on how to solve the systemic problem. The basic idea is that the Court should be dispensed from dealing with all the follow-up cases, which would be dealt with through a new domestic remedy introduced as a result of the implementation of the pilot judgment.*"

[193] Wildhaber, L, "Article 41 and Just Satisfaction in the European Convention on Human Rights", *Baltic Yearbook of International Law*, Vol. 3, 2003, p. 17

[194] Committee of Ministers, Supervision of the execution of judgments, 2nd Annual Report, 2008
It is however too early to assess the operation of the Trust Fund and its impact at the national level

[195] Article 25 of the American Convention;
1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:

"63 (1) If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

Upon comparison, Article 63 of the American Convention is more explicit than Article 41 of the European Convention, which merely contains vague reference to just satisfaction. The *travaux preparatoires* indicate that early draft versions of the American Convention only contemplated financial compensation as a measure of reparation. However, during the negotiation process of the Convention, the Guatemalan delegation proposed that it be expanded. Finally, the Convention contains references to the obligation to ensure future respect for the exercise of the violated right, and to the award of remedies as well as compensation.[196] This language, whereby remedies are referred to as separate from compensation, has allowed the Inter-American Court of Human Rights to interpret the concept of remedies in a creative manner, bearing in mind the particular characteristics of the region. The motivation to expand the concept of remedies stems from the nature of the violations in the region. Among the cases that have reached the Inter-American Court, there was been few surviving victims among the applicants. The military dictatorships that plagued the region resulted in high numbers of cases relating to torture, disappearances and extra-judicial executions. Several of the recent judgements of the Court refer to massacres, notably in Guatemala and Colombia.[197] Due to the nature of the violations, restitution has often been impossible. Relatives of the victims have generally been more interested in receiving reparations in the form of satisfaction that seek to restore the dignity of the victims, who were often discredited by the authorities and accused of being subversives.

Two human rights monitoring bodies interpret the Convention, a Commission as the first instance, which has the competence to investigate, recommend friendly settlements and, as a

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a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state
b. to develop the possibilities of judicial remedy; and
c. to ensure that the competent authorities shall enforce such remedies when granted.

[196] Pasqualucci, J, "Victim Reparations in the Inter-American Human Rights system: A Critical Assessment of Current Practice and Procedure" in *Michigan International Law Journal,* Vol 1, No 18, 1996, pp. 8-12, also Shelton, S, *Remedies,* op. cit. p. 217

[197] Examples of cases include;
Plan de Sanchez Massacre v. Guatemala, Inter. Am. Ct. HR, Judgement 29 April 2004, Series C, No.105,
Mapiripan Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 15 September 2005, Series C, No.134,
Pueblo Bello Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 31 January 2006, Series C, No. 140,
Ituango Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 1 July 2006, Series C, No. 148

final resort, refer cases to the Court, which emits legally binding judgements and monitors their implementation. All complaints must be submitted to the Commission as the Court has no faculty to receive cases directly. The Commission pre-dates the Convention and started to receive individual communications already in 1965.[198] The Court came into existence in 1979.[199] Unlike the Council of Europe, where member States are *ipso facto* parties to the European Convention on Human Rights, this is not the case in the Organisation of American States. To date the Convention has been ratified by 25 States parties, of which 22 have recognised the jurisdiction of the Court.[200] Canada and the United States of America are notably absent among the States parties to the Convention.

The jurisprudence of the Inter-American Court has tended to link remedies for violations to the general provision on State responsibility set forth in Article 1 of the Convention.[201] This contrasts to the Human Rights Committee and the European Court of Human Rights that have interpreted violations primarily in conjunction with Article 2 (3) of the Covenant and Article 13 of the European Convention. Furthermore, the Inter-American Court has adopted a standard phrase in much of its jurisprudence affirming that; *"Article 25 is one of the basic pillars not only of the American Convention but of the very rule of law and of a democratic society".*[202]

Unlike the European Court which operates full-time since its reform, the Inter-American Court only meets in a limited number of sessions during the year, often around 10 weeks. The human resources available within the two systems vary considerable, as the European Court in addition to having full-time judges also has around six times as many staff.[203] During the Inter-American Court's first decade of existence it only emitted 20 judgements; however since 2005 it has decided around 15 cases per year and many of the cases have related to collective victims' claims. In order to expedite the number of cases, both Courts have moved towards including its decision on reparations within the main judgement rather than as a subsequent separate stage of proceedings. Within the Inter-American system, Advisory

[198] Cerna, C, "The Inter-American Commission on Human Rights" in Harris, D and Livingstone, S (eds.), *The Inter-American System of Human Rights*, Clarendon Press, Oxford, 1998 pp. 65-114
[199] Cancado Trindade, A, "The Operation of the Inter-American Court of Human Rights" in Harris, D and Livingstone, S (eds.), *The Inter-American System of Human Rights*, Clarendon Press, Oxford, 1998 pp.133-149
[200] OAS webpage with links to both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights http://www.oas.org/OASpage/humanrights.htm
[201] Nowak, M, "The Right to Reparations for Victims of Gross Human Rights Violations", op.cit. p. 281
[202] *Loayza Tamayo v. Peru,* Inter. Am. Ct. HR, Judgement (Reparations) 27 November 1998, Series C, No.42,1998 para 169 , *Blake v. Guatemala,* Inter. Am. Ct. HR, Judgement 22 January 1999, para. 63, Shelton, S, *Remedies,* op. cit. p.140
[203] Heyns, C, Padilla D, Zwaak, L, "A Schematic Comparison of Regional Human Rights Systems" in *African Human Rights Law Journal*, Vol. 5, No. 2, 2005

Opinions of the Court have played an important role in the interpretation of the obligations contained in the Convention. This possibility also exists in the European system but has not been a prominent feature.[204]

While the European system has developed a legal aid programme and the Court awards successful applicants the recovery of legal costs, this was not initially applied in the Inter-American system despite the starker socio-economic realities in the region. The Inter-American Court presumed that the Commission, when bringing the case to the Court, would act on behalf of the victims and failed to see the importance of independent representation for victims, especially at the reparations stage. This was however amended in 1998 when the Court adopted new Rules of Procedure, which also allowed for the presence of victims during the reparations stage of proceedings.[205]

Already in the first judgement of the Inter-American Court emitted in 1988, *Velasquez Rodriguez v. Honduras,* relating to the disappearance of a university student in 1981, the much cited dictum was established by affirming positive obligations of the State;

"The obligation of the States Parties is to "ensure" the free and full exercise of the rights recognised by the Convention to every person subject to its jurisdiction...As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation... Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm." [206]

The Court set important precedents in its early jurisprudence with regards to reparations, e.g. in *Aloeboetoe v. Suriname*[207]. In the judgement, the Court, in addition to financial

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[204] Van Dijk, P and Van Hoof, G, op cit., p. 690

[205] Shelton, S, *Remedies,* op. cit. pp. 378-379, Pasqualucci, J, "Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure", op.cit. p. 47

[206] *Velásquez Rodríguez v. Honduras*, Inter. Am. Ct. HR, Judgement 29 July 1988 C, No.4, 1988, paras. 166-167 *Velásquez Rodríguez v. Honduras*, Inter. Am. Ct. HR, Judgement (Reparations) 21 July 1989 Series C, No.7, 1989, paras. 26

[207] *Aloeboetoe et al. v. Suriname,* Inter. Am. Ct. HR, Judgement (Reparations) 10 September 1993, Series C, No. 15, 1993

The case involved the killing by the army of members from a maroon tribe (descendents of African slaves that live traditionally in the jungle), in total six men and a minor. In 1988 they were beaten in front of the community, taken away, forced to dig their own graves and executed.

compensation to relatives, also awarded measures of a collective nature, including the setting up of a school and a medical dispensary, which previously were unavailable in the rural area of the tribe.[208]

In the case of *Loayza Tamayo v. Peru*,[209] a university professor was arbitrarily detained in 1993 upon suspicion of collaborating with the Shining Path (guerrilla group). She was sentenced in a military trial by faceless judges and subjected to torture. In the judgement the Court expanded on the spectrum of reparations. In addition to pecuniary and moral damages, it ordered the State to provide restitution by reinstating her in her teaching position at the university, provide support for medical rehabilitation, publicly apologise in the major newspapers in order to clear her name, and to bring its anti-terrorist legislation in line with the provisions of the Convention.[210] Furthermore, the judgement invented the concept of *proyecto de vida* (life plan), which seeks to establish compensation for damages to the victim's professional and personal development.[211] The concept has been difficult to define and has rarely been resorted to in subsequent jurisprudence. [212] Nevertheless, it may be noted that the European Court has applied similar reasoning judgements in relation to the loss of earnings of victims, e.g. as seen above in *Isayeva v. Russia.*

Among later jurisprudence, the Court has been presented with the challenge of deciding cases relating to massacres with large numbers of victims. The atrocities of the case *Massacre Plan de Sanchez v. Guatemala*[213] occurred in a Mayan indigenous village during the civil war in 1982. As part of the scorched earth policy applied by the military dictatorship at the time, the village was surrounded by the army and paramilitary units (PAC) and around 280 people were executed, many of them women and children. The children were saved until last and forced to watch the atrocities. The massacre was one of 626 massacres documented by the United Nations Truth Commission in Guatemala (CEH), which is further discussed in Part II of this thesis. The CEH report, published in 1999, estimated that approximately 200'000 people were killed during the armed conflict. Furthermore, the report noted that the vast majority of victims had been indigenous and concluded that the Guatemalan State had conducted a policy

[208] Shelton, S, *Remedies,* op. cit. pp. 244-245
[209] *Loayza Tamayo v. Peru,* Inter. Am. Ct. HR, Judgement (Reparations), 27 November 1998, Series C, No.42,1998
[210] Pasqualucci, J, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge University Press, 2003, p. 248
[211] Carrillo, A, "Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past" in De Greiff, P, (ed.) *The Handbook of Reparations,* Oxford University Press, 2006, pp. 504-538
[212] Shelton, S, *Remedies,* op. cit. pp. 314- 316
[213] *Plan de Sanchez Massacre v. Guatemala*, Inter. Am. Ct. HR, Judgement 29 April 2004, Series C, No.105

of genocide.[214] The above case presented the Court with a very particular challenge of awarding fair reparations and also highlighted the difficulties facing other victims of similar violations but who had been unable to litigate their case. The case set an important precedent by recognising the community as beneficiary of collective reparations and by recognising that there may be individuals who could not be identified among the victims.[215] The Court ordered in its judgement in 2004 that the State, in addition to compensation, should undertake a series of measures aimed at achieving restitution, rehabilitation, and satisfaction through acknowledgment. The measures included a public act of recognition in the village, translation of the Convention and judgement into indigenous languages, the provision of free medical and psychological services, and in particular to undertake efforts to promote indigenous culture by the establishment of an educational institution. As for restitution, the State was requested to ensure that all survivors from the village be guaranteed a decent standard of living with access to clean water. In a concurring opinion attached to the judgement, judge Cancado Trindade affirmed that the nature of the violations indicated an aggravated responsibility of the State,[216] however the judgement omits reference to the genocide charge presented in the UN Truth Commission report.[217] Due to the affirmation of genocide by the Truth Commission, the State was reluctant to assume responsibility for the Plan de Sanchez massacre but gradually relented.[218] Following the judgement, the Vicepresident visited the village, paid his respects at the mass exhumation site and apologised directly to the community. Parts of the judgement were translated into the local Mayan language, Achí.[219]

Regarding compensation, the Guatemalan State basically complied with the order of the Court and paid 25'000 USD to each for 236 victims, in total an amount of 7.9 million USD. Unfortunately, the payment of such a large sum to individual members of the indigenous community resulted in significant divisions within the community and with neighbouring

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[214] The United Nations Guatemalan Truth Commission report (1999) is available in electronic format at; http://shr.aaas.org/guatemala/ceh/report/english/toc.html

[215] Sandoval-Villalba, C, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 243-282

[216] Judge Cancado Trindade concurring opinion is available at the end of the judgement (Spanish only). http://www.corteidh.or.cr/docs/casos/articulos/seriec_116_esp1.doc , Last visited 10 May 2007

[217] Dill, K, "Reparation and the Elusive Meaning of Justice in Guatemala" in Johnston, B and Slyomovics, S (eds.), *Waging War, Making Peace, Reparations and Human Rights,* Left Coast Press, 2009, pp. 183- 204

[218] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala" in Due Process of Law Foundation, *Victims Unsilenced: The Inter.-American Human Rights System and Transitional Justice in Latin America,* DPLF, Washington, 2007, pp.7-32

[219] La Rue, F, Speech at Conference on Reparations in the Inter-American System American at American University in Washington 6 March 2007, published in *American University Law Review,* Vol. 56, 2007, pp. 1459-1463

villages. Unprepared to receive such sums, some victims, many of them illiterate, squandered the amount and others were victims of attacks as the State had published information on how the payments would be realised. To avoid this scenario, in subsequent cases relating to indigenous communities the Court attempted to resort to measures such as the establishment of a trust fund.

During the past few years, the Guatemalan State has adopted a policy of friendly settlements for a significant number of cases and in 2003 established a national programme for reparations as a way to ward off cases being brought to the Inter-American human rights system. The national reparations programme, one of the recommendations of the UN Truth Commission, is further discussed in Part II of this thesis. While the amounts foreseen by the national reparations programme are significantly less than those awarded by the Inter-American Court, the experience in Guatemala highlights the nexus between the regional human rights system and its impact on the overall policy of the State regarding reparations. While this development is largely very positive, the discrepancies between the amounts awarded for the same type of serious violations will continue to pose a challenge in the future and it likely to result in friction between victims due to their unequal treatment.

In another case involving a massacre in Colombia, *Mapiripan Massacre v. Colombia*[220], the Court established that the State party was responsible for the extra-judicial executions of some 49 people, although the actual killings were perpetrated by paramilitaries (AUC). The AUC surrounded the village of Mapiripan during six days in 1997 and proceeded to identify suspected guerrilla collaborators, who were executed, dismembered and whose bodies were thrown in the river. The Court found proof that the military had collaborated and deliberately failed to prevent or stop the massacre, having assisted in the transportation of the paramilitaries to the village and disregarded the pleas for help by civilian authorities during the first days of the massacre. The Court in its judgement of 2005 raised serious concerns over the lack of investigations into the case and the extensive delay caused by remitting it to the military justice system, which was clearly unsuitable to conduct an impartial investigation. Furthermore, the Court made reference to the Justice and Peace Law 975 of 2005 (discussed in detail in chapter 10 of this thesis). While the Court declined to make an express assessment of the law, it nevertheless underlined the incompatibility of amnesties with international

[220] *Mapiripan Massacre v. Colombia*, Inter. Am. Ct. HR, Judgement 15 September 2005, Series C, No.134

human rights obligations in relation to serious violations.[221] Regarding reparations, in addition to financial compensation, the Court ordered the State party to pay particular attention to the rights of relatives of the victims by ensuring proper identification of all victims, provide adequate medical and psychological assistance for their families, offer a public apology as well as a remembrance monument and human rights training for members of the military. The case provided an important precedent regarding the responsibility of the State to demonstrate due diligence and assume its positive obligations to protect and prevent violations, even in the context of armed conflict. Finally, the concurring separate opinion of judge Cancado Trindade underlined the complementarity of State responsibility and international criminal responsibility of individuals, no doubt hinting at the "warning letter" sent to the Colombian government by the International Criminal Court in early 2005 against the backdrop of the ongoing negotiations with the paramilitaries.[222]

The above two cases relating to massacres illustrate some of the challenges in providing redress when many victims have suffered similar violations to the cases brought before the Court. While in the European system the repetition of resembling cases is a major concern, nevertheless the European Court has considerably better capacity to deal with the rising number of cases. In the Inter-American system it is simply not feasible for many victims to present neither their claims nor is there capacity to process a large influx of cases. Some observers have suggested that the creation of a claims fund for victims under the auspices of the Inter-American Court might be an option to obtain better equity, however this proposal has not yet been developed.[223]

As regards the application of international humanitarian law, the Inter-American system has taken an ambivalent position. The Inter-American Commission has referred to international humanitarian law in several cases that have subsequently been referred to the Inter-American Court. However, in the final judgements the Court has declined to confirm the reference to this branch of law other than as a tool of interpretation or in passing in separate opinions of the judges.[224] In the case of *Las Palmeras v. Colombia*[225], relating to the extra-judicial

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[221] Rodriquez Pinzon, D, Speech at Conference on Reparations in the Inter-American System American at American University in Washington 6 March 2007, published in *American University Law Review*, Vol. 56, 2007, pp. 1390-1396

[222] Judge Cancado Trindade concurring opinion is available at the end of the judgement (Spanish only). http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_esp1.doc , Last visited 10 May 2007

[223] Pasqualucci, J, "Victim Reparations in the Inter-American Human Rights System:", op. cit. p. 23

[224] McCarthy, C, "Human Rights and the Laws of War under the American Convention on Human Rights", *European Human Rights Law Review*, Vol. 6, 2008, pp. 762-780

[225] *Las Palmeras v. Colombia*, Inter. Am. Ct. HR, Judgement 6 December 2001, Series C, No. 90

execution of six civilians who were later dressed in military uniforms by the army and presented as subversives killed in combat, the State party opposed the reference to humanitarian law. However, judges Cancado Trindade and Pacheco-Gómez noted in a separate opinion attached to the judgement that humanitarian law offers parallel duties and that these simply reinforce the obligations the State party has to abide by.

One aspect that differs from the European system is the approach to the non-pecuniary damage inflicted upon relatives of victims. While the European Court has applied certain criteria and at times exercised judgement with respect to the level of suffering of relatives[226], the Inter-American Court on the contrary has taken a more generous approach whereby the suffering of family members of victims does not require proof or an assessment of the moral character of the victims.[227]

As noted above, the Inter-American Court has from its inception taken a very creative approach to reparations and sought to interpret the concept as broadly as possible. It has attempted to specify concrete reparations with particular emphasis on aspects of satisfaction and guarantees of non-repetition. Particular attention has been paid to ordering concrete reparations measures in favour of victims, such as remembrance monuments, public apologies and provision of access to education and medical services.

Furthermore, the Court has taken into account socio-economic realities and cultural considerations, in particular the relevance of reparations for victims of large-scale violations in the context of armed conflict and has paid particular attention to the vulnerability of minorities and indigenous peoples. Reparations may be distributed through tri-partite trust funds and the Court itself seeks to monitor compliance with judgements and can, in accordance with article 65 of the Convention, submit a report to the General Assembly of the Organization of American specifying cases in which State has not complied with its judgments. However, the Inter-American system lacks an entity to explicitly supervise the execution of judgements such as the Committee of Ministers of the Council of Europe.

Case discussed in Lubell, N, "Challenges in Applying Human Rights Law to Armed Conflict", *International Review of the Red Cross(IRRC)*, Vol. 87, No. 860, December 2005, p.742 and in
Pisillo Mazzeschi, R, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview", *Journal of International Criminal Justice*, Vol. 1, 2003, p. 343

[226] Shelton, S, *Remedies*, op. cit. p. 242

[227] Pasqualucci, J, *The Practice and Procedure of the Inter-American Court of Human Rights*, op.cit., p. 268

3.5 The African System for Human Rights Protection

The human rights system in Africa is the youngest of the regional mechanisms. The African Charter on Human and Peoples Rights entered into force in 1986 and the African Commission on Human and People's Rights (ACHPR) was established in 1987 within the framework of the Organisation of African Unity (in 2001 transformed into the African Union).[228]

Unlike the other international and regional human rights instruments previously referred to, the African Charter contains no clear provision on individual complaints and lacks a general reference to the right to a remedy for violations. Nonetheless, the Commission has interpreted the provision on "communications other than those of States parties" in article 55 of the Charter to refer to the possibility of receiving complaints from individuals and NGOs.[229] Furthermore, the African Charter, unlike the United Nations human rights treaties and the European Convention on Human Rights, contains no specific provision on individual victim requirement (i.e. that the applicant must be directly affected by the violation). This has permitted NGOs, both national and international, to submit cases to the African Commission and allowed for the review of cases relating to large scale human rights abuses. In practice, the Commission has tended to combine various complaints which allege related violations in the same country.

The Commission emits its recommendations on cases in conjunction with the publication of its annual session report.[230] The recommendations are quasi judicial in nature, analogous to that of the United Nations treaty bodies, such as the Human Rights Committee.[231] Nevertheless, the Commission has affirmed in its decisions that it expects the States parties comply with its findings and recommendations.

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[228] Further information at the official webpage of the African Commission on Human and Peoples Rights; http://www.achpr.org/
Heyns, C (ed.), *Compendium of Key Human Rights Documents of the African Union,* Pretoria University Law Press, 2005
Murray, R, *Human Rights in Africa: From OAU to AU,* Cambridge University Press, 2004

[229] Umozurike, O, "The Complaint Procedures of the African Commission on Human and Peoples' Right" in Alfredsson, Grimheden, Ramcharan and de Zayas (eds.), *International Human Rights Monitoring Mechanisms,* Kluwer Law International, The Hague, 2001, pp. 713-730
Viljoen, F, "Admissibility under the African Charter" in Evans, M and Murray, R (eds.), *The African Charter on Human and Peoples' Rights, the System in Practice 1986-2000,* Cambridge University Press, 2002, pp. 61-99

[230] Evans, M and Murray, R, The African Charter on Human and Peoples' Rights, the System in Practice 1986-2000", Cambridge University Press, 2002

[231] Naldi, G, " Reparations in the Practice of the African Commission on Human and Peoples' Rights", *Leiden Journal of International Law*, Vol. 14, 2001, p. 684

The issue of reparations has so far received insufficient attention in the jurisprudence of the African Commission.[232] It must be noted with regret that in some cases finding serious human rights violations no reparations figure at all. In an early case *Commission Nacionale des Droits de l'Homme et des Libertes v. Chad*[233], decided in 1995, the Commission found numerous cases of extra-judicial killings, disappearances and torture. The State argued that violations had taken place in the context of armed conflict and were the responsibility of parties other than the State. The Commission however affirmed that while it *"could not be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders"*. The decision set an important precedent in affirming the positive duty of the State to prevent violations of non-State actors[234] and is consistent with jurisprudence of the international treaty bodies and two other regional human rights systems above discussed. The Commission also noted that the African Charter has no derogation clause *"thus, even a civil war in Chad cannot be used as an excuse for the State violating or permitting violations of rights"*. The decision concluded that there have been serious and massive violations of human rights in Chad, however remains completely silent regarding the duty of the State to guarantee non-repetition and reparation measures.

In the case *Organisation Mondiale Contre la Torture and Others v. Rwanda,*[235] decided in 1996, the Commission combined several complaints documenting a series of different violations, primarily relating to massacres and extra-judicial killings by armed State forces on the basis of ethnicity. While the Commission concluded findings of serious or massive violations the decision contains no reference to victims' right to reparations, but *"urged the government of Rwanda to adopt measures in conformity with the decision"*, without providing any guidance regarding what such measures should entail. This example is paradigmatic in illustrating the failure to address reparations within the African regional human rights system.[236]

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[232] Naldi, G, op. cit. pp. 681-693

[233] *Commission Nacionale des Droits de l'Homme et des Libertes v. Chad,* Communication 74/92, Decided 18th Ordinary Session October 1995, 9th Annual Activity Report

[234] Heyns, C, "Civil and Political Rights in the African Charter" in Evans, M and Murray, R (eds.), *The African Charter on Human and Peoples' Rights, the System in Practice 1986-2000,* op.cit. p. 148
Clapham, A, *Human Rights Obligations of Non-State Actors*, Oxford University Press, Oxford, 2006,pp.433-434

[235] *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Democrates, International Commission of Jurists, Union Africaine des Droits de l'Homme v. Rwanda,* Communications 27/89,49/91 and 99/93, Decided 20th Ordinary Session, October 1996, 10th Annual Activity Report

[236] *"Contrary to the important impact of the regional human rights protection mechanisms in several European and Latin American cases, it may be concluded that, in the case of Rwanda, the regional level has had no impact at all in terms of reparations"* in Rombouts, H and Vandeginste, S, "Reparation to Victim in Rwanda: Caught between Theory and Practice" in De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the*

In 1999, the Commission decided a series of combined communications in *Amnesty International and Others v. Sudan.*[237] The complaints described numerous serious violations that took place in different parts of the country, primarily between 1989 and 1993. Among the violations figured cases of extrajudicial and summary execution, torture and discrimination on the basis of religion.[238] The Commission concluded that the government had been sufficiently aware of the situation prevailing within its territory as well as the content of its international obligations and that despite the civil war; *"civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law"*. The reference to humanitarian law is novel, however the Commission did not explore further on the implications of this affirmation. The Commission finally, rather flatly; *"recommends strongly to the government of Sudan to put an end to the violations in order to abide by its obligations under the African Charter"*. Given the gravity of the violations found, it is highly questionable that the Commission did not provide further details and orientation in relation to the obligations of the State party to prevent, ensure non-repetition and provide reparations for the victims.

The case *Malawi African Association and Others v. Mauritania,*[239] constitutes a significant leap forward regarding reparations for serious human rights violations in the African regional system. The complaints again consist of a range of massive violations relating e.g. to extrajudicial executions, disappearances, torture and slavery. In the decision of 2000, the Commission declared that grave and massive human rights violations took place between 1989 and 1992 and recommended a series of concrete reparations measures including; to establish an independent inquiry into disappearances, replacement of identity cards and reparations for people forcibly expulsed, appropriate measures to ensure payment of a compensatory benefit to widows and other beneficiaries of victims of violations, carry out an assessment of degrading practices with a view to identifying the deep-rooted causes and put in place a strategy aimed at eradication, take measures to effectively enforce the abolition of

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Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations, Intersentia, Antwerpen, 2005, p.319

[237] *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan,* Communications 48/90, 50/91, 52/91, 89/93, Decided 26th Ordinary Session, November 1999, 13th Annual Activity Report

[238] For a critical discussion of the case see; Murray, R, "Current Developments, Recent Decisions of the African Commission on Human an Peoples Rights, *South African Journal on Human Rights*, No. 17, 2001, pp. 146-156

[239] *Malawi African Association, Amnesty International, Ms. Sarr Diop, union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits del'Homme v. Mauritania*, Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, Decided 27th Ordinary Session, May 2000, 13th Annual Activity Report

slavery. The case stands out as a positive example among the regional jurisprudence in its detailed list of reparations measures.[240] Regrettably, the case has not yet managed to establish a model for comprehensive reparations by the African Commission as subsequent jurisprudence has reverted to more spartan decisions.[241] Nevertheless, given the focus on systematic human rights violations in the African system, the Commission in the *Malawi African Association and Others v. Mauritania* demonstrated its potential to interpret reparations in a broad manner so as to respond to the seriousness of the violations.

As a distinction between the African system and other regional systems and that of the United Nations treaty body system, one can make the following observation; namely that the African Commission initially adopted a particularly conservative approach to the issue of reparations. Early jurisprudence by the African Commission simply failed to consider reparations. It has been noted that the language of the African Commission is significantly weaker than that of for example the Human Rights Committee, which consistently affirms the individual's right to a remedy.[242] Yet the African Commission, when faced by numerous cases of serious human rights violations, has taken the innovative approach to explore policy oriented and collective reparations measures. Furthermore, the African Commission openly cites humanitarian law in its jurisprudence, indicating a progressive approach to using this branch of law as a reference tool. The challenge on the other hand remains to enforce collective and policy oriented recommendations for reparations at the individual level, a particular challenge as the victims are not identified.

At the practical level, a major challenge to the effectiveness of the African Commission has been the lack of resources of its Secretariat, which consists of a small group of professional legal staff. The Commissioners, eleven in total, meet at the sessions of the Commission, which normally takes place twice a year.[243] The Commission has gradually dedicated further attention to the challenges in enforcing and following-up on recommendations at the national level. In November 2006, the Commission adopted a resolution specifically requesting States

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[240] Murray, R, "Current Developments, Recent Decisions of the African Commission on Human an Peoples Rights, *South African Journal on Human Rights*, No. 17, 2001, p. 169

[241] For example in *African Institute for Human Rights and development (on behalf of Sierra Leonian refugees in Guinea v. Republic of Guinea,* Communication 249/2002, Decided 36th Ordinary Session, December 2004, 20th Activity Report (the decision is ambivalent, although it recognises massive violations there is no conclusive affirmation of the rights of victims, yet there is a brief recommendation that a Commission be established to assess losses by victims)

[242] Naldi, G, op. cit. p. 692

[243] Heyns, C, Padilla D, Zwaak, L, "A Schematic Comparison of Regional Human Rights Systems" in *African Human Rights Law Journal*, Vol. 5, No. 2, 2005

parties to provide information on implementation of recommendations affirming that the Commission will compile a report on compliance for each session. [244]

In 2004, the Protocol establishing the African Court of Human and Peoples' Rights entered into force.[245] The Court has slowly been set up in Tanzania, a far distance from the Commission which is based in the Gambia. Concern has been raised over the delays in establishing the Court.[246] Regarding admissibility of cases, the Court will act as a second instance in a manner analogous to that of the Inter-American Human Rights System.[247] Only in exceptional cases will petitioners be able to file cases directly to the Court, pending whether the State party in question deposited a declaration to this effect upon ratification of the Protocol.[248]

Lack of clarity remains regarding the future relationship between the Commission and the Court[249] and some fears have been expressed over the referral power of cases, which potentially could end up as a legal ping pong on politically sensitive cases.[250] On a positive note, the Protocol contains some very progressive provisions, for example allowing it to apply as sources of law, in addition to the Charter; *"any other relevant human rights instrument".*[251] Finally, it has been noted that Article 27 of the Protocol contains what might be considered one of the most progressive and broad provisions regarding reparations, potentially allowing the future Court to play a pioneering role in this respect.[252] Major challenges however persist in the African human rights system, principally among them inadequate political will to place

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[244] *Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples Rights by States Parties,* adopted by the African Commission at its 40th Ordinary Session in Banjul, 29 November 2006 http://www.achpr.org/english/resolutions/resolution102_en.html

[245] 15 State party ratifications were required for the Protocol to enter into force. As of March 2007, 23 out of 53 States in Africa had ratified the Protocol to the Charter (49 signatures)

[246] Murray, R, "Recent Developments in the African Human Rights System 2007", Human Rights Law Journal, No. 8:2, 2008, pp. 356-376

[247] Padilla, D "An African Human Rights Court: Reflections from the Perspective of the Inter-American system" in *African Human Rights Law Journal,* Vol. 2, No.2, 2002, pp. 185-194

[248] Article 34 (6) of the Protocol. Further discussion in; Pieter van der Mei, A "The New African Court on Human and Peoples' Rights; Towards an Effective Human Rights Protection Mechanism for Africa?", *Leiden Journal of International Law,* Vol. 18, 2005, pp. 112-129

[249] Sarkin, J, "The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People's Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States", *Inter-American and European Human Rights Journal, Vol.* 1, No. 2, 2008, pp. 199-242

[250] Articles 5 and 6 of the Protocol. Further discussion in; De Wet, E, "The Protection Mechanism under the African Charter and the Protocol on the African Court of Human and Peoples' Rights" in Alfredsson, Grimheden, Ramcharan and de Zayas (eds.), *International Human Rights Monitoring Mechanisms,* Kluwer Law International, The Hague, 2001, pp. 713-730 and in Padilla, D, op. cit. p. 194

[251] Article 7 of the Protocol.

[252] Article 27(1); *"If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."* Shelton, S, *Remedies,* op. cit. p. 226

human rights as a priority. Notably, in the transition from the Organisation of African Unity to the African Union, the Constitutive Act of 2000 failed to recognise the African Commission on Human and People's Rights as one of the principal organs, which in turn reflects the inadequate importance given to human rights protection in the region.

3.6 Conclusions

The comparison of jurisprudence of the international and regional human rights systems reveals that the approach to reparations varies considerably depending on the applicable provision on reparations as well as the mandate and interpretation given by the relevant Committee, Court or Commission. Clearly the Regional Human Rights Courts wield great advantages in their authority to order legally binding judgements; this has resulted in significantly high compliance rate on reparations compared to the United Nations treaty bodies. Although the jurisprudence contains variations, there is convergence within the international and regional systems on key points such as the affirmation of positive obligations of the State and the responsibility to prevent and protect against violations, including those committed by non-State actors in the context of armed conflict. As demonstrated in the previous chapter, this is consistent with and has most likely supported the position taken by the International Law Commission in its Draft Articles on State Responsibility, adopted in 2001.

In cases where violations have occurred in the context of armed conflict, the analysis in the jurisprudence shows increasing recognition of and reference to principles of international humanitarian law. As demonstrated in the previous chapter, this reinforces the legal argument for reparations as it unites claims under the two branches of law. Furthermore, consideration of humanitarian law principles such as distinction and proportionality would assist in determining the responsibility of the State in preventing and responding to attacks having resulted in civilian casualties.

The international and regional systems also differ regarding whether they consider individual or collective reparations measures. The United Nations treaty body system considers both aspects; while the decisions on individual petitions tend to take a conservative approach, a more collective policy oriented approach is applied in the recommendations contained in Concluding Observations. The European human rights system is faced with a sharp increase of cases, of which an increasing number have occurred in the context of armed conflict. While

the European Court of Human Rights has traditionally been conservative with regards to reparations, it is important to acknowledge the precedent setting role of the Court and that it over time has developed an extensive and more victim-oriented jurisprudence. The European Court is gradually moving towards emitting policy oriented judgements in order to address the overlap and backlog of cases. The Inter-American human rights system has been of key importance due to its demonstrated focus on ordering detailed and specific reparations measures in favour of victims and their relatives. The Inter-American Court has played a leading role in expanding the concept of reparations regarding satisfaction and guarantees of non-repetition and its recent jurisprudence has established ground breaking collective measures, which take into account the socio-economic conditions of the victims. Such measures are clearly deemed to be of particular importance for victims of serious human rights violations in the context of armed conflict. The African human rights system is still developing its position with regards to reparations; the Commission initially lacked consideration for reparations, however jurisprudence indicates a gradual shift and the Court, which is just becoming operational, has the potential to offer a broad and innovative approach to reparations for victims.

The jurisprudence reviewed in the present chapter indicates the significant jurisprudential progress made towards ordering comprehensive victim-oriented reparations measures; however it also points towards the need to further develop and clarify the concept of reparations. While the provisions on remedies in the different instruments vary, the interpretation of them by the various treaty bodies, Courts and Commissions would benefit from harmonisation and by drawing on each others best practices. Certain concerns have been expressed over the current development of divergent jurisprudence on reparations.[253] In view of the backlog of cases confronting both the international and regional systems, it is submitted that particular consideration should be given to addressing collective claims, which would allow for the identification of systematic practices and underscore the State responsibility to cease violations, comply with remedies and ensure non-repetition. Nevertheless, it is important that a policy oriented approach to reparations in jurisprudence complement, but not substitute, individualised awards in order to retain focus on the victims directly affected and ensure that they ultimately are recognised as beneficiaries. It is crucial that reparations measures be developed as victim-oriented, comprehensive and specific as possible. The major challenge for all the human rights systems is ensuring a high compliance rate among States

[253] Cutter Patel, A, Deputy Director of the International Centre for Transitional Justice (ICTJ), Interview in ICTJ Newsletter *Transitions, January 2010,* available at www.ictj.org , last visited 10 March 2010

parties. In order to do so, judgements must contain detailed reparations awards as this allows for follow-up on the implementation at the national level, and, most importantly, lies in the interest of furthering the rights of victims of serious human rights violations. While the responsibility to provide reparations principally remains the duty of the State, it may be argued that the international community bears positive obligations to assist developing States in fulfilling their responsibilities and therefore consideration should be given to the establishment of Trust Funds within the regional human rights systems to support the effective implementation of reparation measures.

The standards established by the international and regional human rights systems provide the norm setting basis for Part II of this thesis on the practical challenges involved in the implementation of reparations in countries that have endured armed conflict. Identification of specific linkages between human rights mechanisms and standards will be made in relation to transitional and post conflict justice initiatives. The subsequent chapter, the last chapter of Part I, explores the gradual development of the right to reparations in international criminal law. In particular, the influences of human rights law are highlighted as these have provided key impetus towards the recent recognition and gradual implementation of victims' rights.

4. Reparations in International Criminal Law

4.1 Introduction

The objective of this chapter is to chart the origins and the gradual development of reparations provisions in international criminal law and consider their contribution to the standing and rights of victims of armed conflict in international law.

Until the adoption of the Rome Statute of the International Criminal Court, the rights of victims in international criminal proceedings were largely marginalised. Reparations provisions in international criminal law have evolved at a slower pace than corresponding rights in human rights law. This development can partly be explained by the significant influence of municipal criminal law in the evolution of this sphere in international law. While it has been argued that international criminal law now can provide the bite that international human rights law has lacked,[254] one notes that from a victim's perspective, experiences seeking reparations to date have been more successful on the basis of human rights law. Expectations are high that the emerging practice of the International Criminal Court and its Trust Fund will provide a radical shift in favour of victims. However, it is submitted that responsibility for reparations should maintain an element of State responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of State authority. There are inherent dangers in shifting responsibility from States towards individuals as this may ultimately leave victims without redress. While the shift towards recognising victims and their right to reparations in international criminal law is welcome and positive, ideally this should operate alongside measures to establish State responsibility *vis-à-vis* victims.

Following a largely chronological order, the chapter will seek to identify the gradual incorporation of reparations provisions in international criminal law. In particular, the chapter studies the provisions and practice of the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) and the impetus which resulted in the groundbreaking provisions in the Rome Statute of the International Criminal Court. Consideration is given to the influences prompting the recognition of victim's rights in international criminal law, which are traced to human rights law, the victimology movement, feminist interpretations of international law as well as restorative justice theory and practice. Albeit delayed, the right of victims to claim reparations has now been established in

[254] Simpson, G, *Law, War and Crime*, Polity Press, Cambridge, 2007, p. 57

international criminal law. This recognition largely took place due to influences from international and regional human rights treaties and jurisprudence and furthermore sought inspiration from the development of the Basic Principles on the Right to Reparation for Victims (2006).[255] The chapter identifies the elements of reparations which have been addressed to date in the practice of international criminal law. Due to purposes of delimitation, procedural aspects of victim participation and witness protection are largely excluded. These aspects have been dealt with extensively by other authors.[256]

The chapter builds upon previous chapters and completes Part I of the thesis on legal standards, which aims to provide an overview of reparations provisions in different branches of international law and consider the current status of victims and their rights.

4.2 Origins of Reparations Provisions in International Criminal Law

Reparations provisions in international criminal law reflect a recent development. Their incorporation in part can be explained by growing attention to victims within national criminal justice systems and also as a reaction to criticism for the manner in which victims' concerns were considered by the ICTY and the ICTR.[257]

When seeking to trace victims' provisions in international criminal law it may be noted that the Nuremberg and Tokyo Charters did not even mention victims.[258] The Convention on the Prevention and Punishment of the Crime of Genocide obliges States parties to provide effective penalties, but is silent with regard to victims. Nevertheless, it is significant that the

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[255] *UN 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*, preamble, adopted by the UN Commission on Human Rights on 19 April 2005, UN Doc. E/CN.4/RES/2005/35 and adopted in the General Assembly without a vote on 21 March 2006, UN Doc. A/RES/60/147

[256] Academic literature which addresses aspects of victim protection and participation includes for example;
Friman, H, "The International Criminal Court and the Participation of Victims: A Third Party to the Proceedings?", *Leiden Journal of International Law*, Vol. 22, 2009, pp. 485-500
McLaughlin, C, "Victim and Witness Measures of the International Criminal Court: A Comparative Analysis" in *The Law and Practice of International Courts and Tribunals*, No. 6, 2007, pp.189-220;
Tolbert, D and Swinnen, F "The Protection of, and Assistance to, Witnesses at the ICTY" in Abtahi, H and Boas, G (eds.), *The Dynamics of International Criminal Justice*, Martin Nijhoff Publishers, 2006, pp. 193-229;
Sluiter, G, "The ICTR and the Protection of Witnesses", *Journal of International Criminal Justice*, No. 3, 2005, pp. 962-976;
Haslam, E, "Victim Participation at the International Criminal Court, A Triumph of Hope over Experience" in McGoldrick, D, Rome, P and Donnelly, E (eds.), *The Permanent International Criminal Court, Legal and Policy Issues*, Hart Publishing, Oxford, 2004, pp. 315-334

[257] Zegveld, L, "Victims' Reparations Claims and International Criminal Courts, Incompatible Values?", *Journal of International Criminal Justice*, Vol. 8, 2010, pp. 79-111
Stover, E, *The Witnesses, War Crimes and the Promise of Justice in the Hague*, University of Pennsylvania Press, 2005

[258] Zappala, S, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p. 220

travaux preparatoires of the Convention, notably the draft Convention on the Crime of Genocide, prepared by the Secretariat of the UN Secretary General in 1947 contemplated a specific provision for reparations.[259] Draft Article XIII stated;

> *"When genocide is committed in a country by the government in power and by sections of the population, and if the government fails to resist it successfully, the State shall grant to the survivors of the human group that is a victim of genocide redress of a nature and in an amount to be determined by the United Nations"*

Furthermore, the Official Comments on the Draft Convention by the Secretariat of the UN state; *"If the country in which genocide was committed is not to be held responsible for reparations, who is?".*[260] The draft provision on reparations remained in early 1948, however was lost in the final political negotiation process.[261] While the Genocide Convention, as adopted in December 1948, failed to contain a provision on redress and reparations, it is nevertheless significant that the notion of State responsibility for reparations had significant international support already in the late 1940s.

4.3 Reparations and the Ad Hoc International Tribunals

Following the standstill in international criminal law during half a century, after the WWII International Military Tribunals, the creation of the Statutes of the International Criminal Tribunals for Former Yugoslavia in 1993 and Rwanda in 1994 failed to provide significant progress in the recognition of victims. Nevertheless, the experiences of victims in the ad hoc Tribunals have provided an impetus for advocacy towards recognition of victims' rights.

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[259] *Draft Convention on the Crime of Genocide,* UN. Doc. E/447, prepared 26 June 1947 by the Secretary General upon request by the General Assembly, available at the UN Official Documentation System, http://documents.un.org
Among the States that supported the inclusion of a provision on reparations for victims were the United Kingdom, France, Belgium and Syria
The Official Comments on the Draft distinguished between criminal and civil State responsibility.

[260] The Official Comments by the Secretariat of the UN, contained in *the Draft Convention on the Crime of Genocide,* UN. Doc. E/447, page 48

[261] See the French version of the Draft Convention, reparations still figured in article 7, presented 9 February 1948, UN Doc. E/623/Add.1
The Genocide Convention as adopted in the General Assembly on 9 December 1948 contains no provision on reparations
Schabas, W, *Genocide in International Law, the Crime of Crimes,* Cambridge University Press, 2000, p. 400
Abtani, H and Webb, P, *The Genocide Convention, the Travaux Preparatoires,* Vol. 1, Martinus Nijhoff Publishers, 2008

The objectives of the ad hoc Tribunals are not expressly stated in the Security Council resolutions creating their Statutes.[262] However, the preamble of the resolutions give some orientation of their purposes; in the case of the ICTY the resolution 827 of 1993[263] states that the Tribunal was established for *"the sole purpose of prosecuting persons responsible for serious violations"* yet also to *"contribute to ensuring that violations are halted and effectively redressed"*. The Security Council resolution 955 of 1994 establishing the ICTR[264] echoes the above but also states that among the aims of the prosecutions is *"contribution to the process of national reconciliation"*. The judgements of the ICTY and the ICTR contain ample references to the purposes of sentencing. Curiously each judgement contains a separate analysis of applicable principles and purposes of punishment. The majority of sentences indicate that the primary objectives of the Tribunals are deterrence and retribution, for example in the cases of *Prosecutor v. Tadic* and *Prosecutor v. Akayesu.*[265] Certain judgements of the Tribunals also state that one of the aims of sentencing is reconciliation, for example in the case of *Prosecutor v. Furundzija.*[266] References have been made to rehabilitation of offenders as a purpose of sentencing, however the degree to which in particular the ICTY has recognised this as a stated aim has varied and it has been noted that *"the rehabilitative purpose of sentencing will not be given undue prominence"*.[267]

Victims are generally given scant recognition in the exploration of purposes of punishment, however in some judgements retribution is described as *"the expression of condemnation of grave violations of fundamental human rights...it is also recognition of the harm and suffering caused to the victims"*.[268] The lack of consistency in the formulation of principles relating to the objectives of punishment is unfortunate.[269] Undeniably, all the cases brought before the ad hoc Tribunals involve victims of serious violations and it would have been

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[262] Security Council resolution no. 827 adopted on 25 May 1993 and Security Council resolution no. 955 adopted on 8 November 1994
Available at the official webpage of the ICTY; http://www.un.org/icty/ and the official webpage of the ICTR; http://www.ictr.org *(last visited 20 February 2010)*

[263] Security Council resolution no. 827, preamble, S/RES/827 (1993)

[264] Security Council resolution no. 955, preamble, S/RES/955 (1994)

[265] *Prosecutor v. Tadic*, Case No. IT-96-21-Y, Judgement 16 November 1998 para. 21. *Prosecutor v. Kayishema and Ruzindana*, Case No: ICTR-95-1-T, Sentence, 21 May 1999, para. 2; *Prosecutor v. Akayesu*, Case No.: ICTR-96-4-T, Sentence, 2 October 1998, para. 19. See further discussion in; Schabas, W, *An Introduction to the International Criminal Court*, second edition, Cambridge University Press, 2004, p.164 and also in; Dixon, R and Khan, K, Archbold, *International Criminal Courts, Practice, Procedure and Evidence*, Sweet & Maxwell Limited, London, 2005, p. 484

[266] *Prosecutor v. Furundzija*, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 288

[267] Earlier judgements of the ICTY made restrictive references to rehabilitation e.g. *Prosecutor v. Delalic et al.* Case No: IT-96-21, Judgement 20 February 2001, para. 806. Citation from *Prosecutor v. Blagojevic and Jokic*, Case No. IT-02-60, Judgement 17 January 2005, paras. 814-825

[268] *Prosecutor v. Nikolić* ,Case No. IT-02-60/1, Judgement 2 December 2003, para.86

[269] Cryer, R (et al.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, pp.395-396, contains further discussion on inconsistencies in the current purposes of sentencing

important to provide equal recognition of justice for victims in a standard formulation on the objectives of the Tribunals.

A closer review of the Statutes of the ICTY and the ICTR reveals that references to victims are scarce. Generally, references to victims in the Statutes of the ad hoc Tribunals primarily refer to their relevance as witnesses and as passive contributors to the proceedings. Article 15 of the Statute of the ICTY (mirrored by article 14 of the ICTR) mentions that the protection of victims and witnesses should be taken into account in the adoption of Rules of Procedure. Article 20 (1) of the Statute of the ICTY (corresponds to article 20 (1) of the ICTR Statute) established that trials be conducted with *"full respect for the rights of the accused and due regard for the protection of victims and witnesses"*. It appears as if the rights of the accused are given priority as they must be *"fully respected"*, whereas for victims the proceedings are merely required to show *"due regard"*. The difficult balancing of rights of the accused versus witnesses has caused significant controversy in the Tribunals and protective measures in favour of witnesses, especially victims of sexual violence, have been challenged by the defence and criticised by human rights lawyers for their inadequacy.[270] As recognised by the former President Jorda of the ICTY, victims have largely been considered as *"object-matter or an instrument"* in the proceedings of the ad hoc Tribunals.[271]

There is no direct reference to reparations in the Statutes other than restitution. The Tribunals have no faculty to award compensation but may decide on cases relating to restitution. Article 24 (3) of the Statute of the ICTY (mirrored by article 23 (3) of the Statute of the ICTR) reads *"in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owner"*. The use of the term restitution, however, does not indicate State responsibility. According to the Statutes, States are only responsible in so far as they should enforce orders between individuals. As described in the Rules of Procedure and Evidence (RPE), Rule 105 which is common to both Tribunals, the request for restitution cannot be initiated by the

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[270] For contrasting views regarding measures undertaken for witness protection refer to;
Mumba, F "Ensuring a Fair Trial Whilst Protecting Victims and Witnesses-Balancing of Interests" in May, R (eds.), *Essays on ICTY Procedure and Evidence*, Kluwer Law International, 2001, pp. 359-371, and also;
Chinkin, C, "The Protection of Victims and Witnesses" in Kirk-McDonald and Swaak-Goldman (eds.) *Substantive and Procedural Aspects of International Criminal Law*, Kluwer Law International, 2000 and;
Sluiter, G "The ICTR and the Protection of Witnesses", *Journal of International Criminal Justice*, No. 3, 2005, pp. 962-976 and;
Tolbert, D and Swinnen, F, "The Protection of, and Assistance to, Witnesses at the ICTY" in Abtahi, H and Boas, G (eds.), *The Dynamics of International Criminal Justice*, Martin Nijhoff Publishers, 2006, pp. 193-229

[271] Jorda, C and Hemptinne, J, "The Status and Role of the Victim" in Cassese, A, Gaete P and Jones, J (eds), *The Rome Statute of The International Criminal Court*, Oxford University Press, 2002, pp.1387-1419

victim but must be presented by the Prosecutor or the Chamber. Disappointingly, the Tribunals have been unwilling to use their authority to order restitution, including in cases where it was clearly established that property was illegally taken from victims.[272]

In the drafting process of the RPE of the Tribunals, some attempt was made to address the issue of compensation. However, as noted by Cassese, this possibility was compromised due to the absence of a corresponding provision in the Statutes[273]. Rule 106 of the RPE provides that the Registrar of the Court shall transmit judgements detailing convictions to relevant national authorities and that the judgement shall be considered final and binding as to the criminal responsibility of the convicted perpetrator. The same Rule further states that it is up to the victims themselves to claim compensation before national courts *"pursuant to the relevant national legislation"*.

Morris and Scharf examined the *travaux preparatoires* of the ICTY and the considerations presented during the negotiations of the provisions relating to restitution and compensation.[274] Among the arguments used to justify the exclusion of reparation provisions was the wording of the Security Council resolution establishing the Tribunal for the *"sole"* purpose of prosecution. It was feared that dealing with cases involving restitution and compensation would distract the Tribunal by forcing it to operate as a claims commission and thereby "divert" its limited resources. The Security Council resolution no. 827 which created the ICTY however notes that the work of the Tribunal *"shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law"*. The resolution gives no indication of what the term *"through appropriate means"* refers to, but it is worthwhile noting that at the time it was considered a possibility that the Security Council establish another body for restitution claims.[275] Morris and Scharf affirm that *"the prosecution and punishment of individuals responsible for war crimes does not relieve the State of its responsibility for the violations of international law and its obligation to provide compensation"*.[276]

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[272] Malmström, S, "Restitution of Property and Compensation to Victims" in May, R (eds.), *Essays on ICTY Procedure and Evidence*, Kluwer Law International, 2001, pp. 373-384
[273] Cassese, A, *International Criminal Law*, Oxford University Press, 2003, p. 429
[274] Morris, V and Scharf, M , *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, 1995, in particular pp.283-289
[275] Ibid. p. 288
[276] Ibid.

The mandates and proceedings of the ad hoc Tribunals reveal numerous deficiencies. Importantly, the lack of recognition of the rights of victims stands out in disharmony with developments in international law, both in general international law and human rights law, as documented in the previous chapters. Proceedings of the ad hoc Tribunals cite richly from human rights law concerning the right to a fair trial and in relation to the rights of the accused, however omit the application of human rights law in the area of victims' rights. Leaving victims at the mercy of their domestic legal systems renders them dependent on whether the national legislation foresees the possibility of compensation claims. Domestic legislation and political policy thus determine whether victims have access to present their claims. As a consequence, redress may be available to some victims but not others. To date, there are few, if any, reports of domestic claims being successful as they depend on the national legal and institutional framework, whether resources can actually be extracted from the perpetrator of the violations as well as the political goodwill of the specific State to assume responsibility.[277] Stateless victims are left entirely without any recourse.

The approach of the Tribunals thus results in indirect discriminatory treatment of victims depending on their nationality and origins. Most disconcertingly, the provisions of the Tribunals recognise the rights to restitution for victims of property theft but in contrast provide no right to remedies for victims of serious human rights violations who have survived genocide and torture.[278]

There were attempts to modify the mandates of the ad hoc Tribunals. These initiatives were largely undertaken in view of the credibility challenge facing the Tribunals due to their restricted ability to recognise victims' rights, criticism raised by victims' groups and the successful incorporation of provisions regarding victims' rights in the Rome Statute of the International Criminal Court. In November 2000, the Prosecutor strongly advocated for the creation of a Claims Commission to compensate victims in an address in the Security Council affirming that "*it is regrettable that the Tribunals' statutes ...make only a minimum of provision for compensation and restitution to people whose lives have been destroyed...my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it...I would therefore respectfully suggest to the Council that the present system falls short of delivering justice to the people of Rwanda and*

[277] Malmström, S, op.cit.
[278] Bottigliero, I, *Redress for Victims of Crimes under International Law,* Martinus Nijhoff Publishers, Leiden 2004, p. 202

the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna". [279]

In a parallel move, also in November 2000, the judges of the ICTY presented a report to the Security Council through the Secretary General of the United Nations.[280] The report specifically expressed concern over the Tribunal's lack of authority to deal with compensation for victims. In the report the judges affirmed that *"in order to bring about reconciliation in the former Yugoslavia and to ensure the restoration of peace, it is fundamental that persons who were the victims of crimes that fall within the jurisdiction of the Tribunal receive compensation for their injuries".* The report noted the general trend towards recognising a right to compensation in international law, not only to States but also to individuals based on State responsibility. The report reached the conclusion that victims of the crimes over which the Tribunal has jurisdiction are entitled to benefit from a right to compensation. The report focused on financial compensation and deliberately avoided discussion of other forms of remedies, such as rehabilitation, stating that such measures would require further study.

In support of the position that individual victims have a right to compensation, the report cited in particular the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly in 1985.[281] The Declaration of Basic Principles of Justice states that victims should receive restitution, compensation and assistance. It furthermore states that national legislation and procedures should be amended in order to allow victims access to remedies and that States should endeavour to provide compensation when it cannot be obtained from the offender, e.g. by the establishment of national funds for compensation. The report also cited the then draft UN Basic Principles on the Right to Reparation for Victims[282], discussed in the previous chapters, as well as the relevant provisions established in the Rome Statute of the International Criminal Court, to be discussed below.

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[279] Address by the Prosecutor of the ICTY/ ICTR, Carla del Ponte, to the Security Council on 21 November 2000, ICTY Press Release JL/P.I.S./542-e http://www.un.org/icty/pressreal/p542-e.htm (last visited November 2007)

[280] Report UN. Doc. S/2000/1063, 3 November 2000

[281] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, General Assembly resolution 40/34 adopted on 29 November 1985

[282] *UN 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*, preamble, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted in the General Assembly without a vote on 21 March 2006, UN Doc. A/RES/60/147

The report advised against amending the Tribunal's Statute and Rules and Procedure in order to incorporate a compensation mechanism as this would imply several practical difficulties, which would affect the length of the trials. However, the judges of the ICTY advocated for the creation by the Security Council of another body which could operate as an international compensation commission. An official reply from the Security Council was not received; no such measure was adopted and it now appears unlikely to be undertaken given that the Tribunals are phasing out their work.

Despite the obstacles outlined above, it is noteworthy that both ad hoc Tribunals have a Victims and Witness Support Unit, established by Rule 34 of the RPEs. The Units, which are based in the Registry on the basis of its neutrality, largely provide advice, assistance and protection arrangements during the trial period but operate with scarce resources[283] and have little means of ensuring follow-up and long-term safety of witnesses upon completion of prosecution.[284] While the RPEs of the two ad hoc Tribunals coincide in the majority of their text, it should be noted that Rule 34 provides an exception. In the case of the ICTR, the Rule was amended in 1998 to extend the mandate of the Victims and Witness Support Unit to; "*Ensure that they receive relevant support, including physical and psychological rehabilitation, especially counselling in cases of rape and sexual assault; and to develop short term and long term plans for the protection of witnesses who have testified before the Tribunal and who fear a threat to their life, property or family.*"

In the case of the ICTY, Rule 34 merely refers to the mandate to provide counselling and support, and there is no mention of physical and psychological rehabilitation and the duty to develop long term plans for protection of victims. ICTR has thus to be noted for its attempt to address certain urgent and practical needs of victims, in particular in relation to victims of sexual violence and their access to rehabilitation measures. Such measures were undertaken in response to the outcry from victims and witnesses, in particular those who found themselves HIV positive with no access to medical attention, whilst such was provided for defendants. However, as documented by De Brouwer,[285] the ICTR made some progress in providing medical assistance, including antiretroviral treatment, for victims who have appeared as witnesses. Certain efforts were also made to sustain assistance after the trial period. While the

[283] Ingadottir, T, Ngendahayo,F and Sellers, P, "The Victims and Witnesses Unit" in Ingadottir, T(ed.), *The International Criminal Court: Recommendations on Policy and Practice,* Transnational Publishers, 2003, p. 5
Stover, E, *The Witnesses, War Crimes and the Promise of Justice in the Hague,* op.cit. p. 129
[284] Tolbert, D and Swinnen, F "The Protection of, and Assistance to, Witnesses at the ICTY", op. cit.
[285] De Brouwer, A, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and the Trust Fund for Victims and Their Families", *Leiden Journal of International Law*, 2007, Vol. 20, pp. 207-237

initiative taken to afford rehabilitation measures for victims of sexual violence is commendable, its weakness lays in its limited application as only victims who have provided testimony qualify for assistance.[286] Also, it is worth noting that the medical assistance programme for victims and witnesses was only established several years after the ICTR became operational and following considerable critique of the discrepancies in relation to medical assistance for the accused *vis-à-vis* their victims.

Only limited research has documented the experiences of victims and witnesses in international criminal proceedings. Stover, following extensive interviews in the former Yugoslavia with witnesses who had previously testified in the ICTY, concluded that a majority of them *"resisted a definition of justice that focused solely on the punishment of suspected war criminals...justice had to include an array of social and economic rights for the persecuted, including the right to move about freely and without fear, the right to have the bodies of loved ones returned for proper burial and the right to receive adequate treatment for the psychological trauma as a result of witnessing wartime atrocities".*[287] The findings of the study indicated that while a majority of witnesses described their experiences at the ICTY as positive, nevertheless *"by and large, war crimes trials are generally ill-suited for the sort of expansive and nuanced story-telling so many witnesses yearn to engage in".*[288]

Further reflections on the results of the Tribunals recognise their shortcomings and the need for accountability mechanisms which take victims' concerns into account. Zacklin states; *"Criminal Courts exist for the purpose of establishing individual accountability, not to uncover the fates and remains of loved ones. Nor is it their purpose to provide an official history. To the extent that a historical record is integral to individual trials it might be said that this is incidental to the work of the ICTY but it is not its primary purpose. Even less so is the awarding of compensation for victims... The hope was that the establishment of the ICTY would promote reconciliation. There is little evidence to date that this is the case. Clearly, the Tribunal itself is not sufficient to promote reconciliation. Additional mechanisms, such as functioning national courts and truth commissions are needed."*[289]

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[286] Ingadottir, T, Ngendahayo, F and Sellers, P, "The Victims and Witnesses Unit", op. cit. 29
[287] Stover, op.cit. pp.119-120
[288] Ibid. p. 129, 134
[289] Zacklin, R, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, No. 2, 2004, pp. 541-545

Although initiatives existed and continue to exist for the setting up of a truth commission in former Yugoslavia, in particular in Bosnia, such plans have to date not prospered. A main reason was the strong opposition by the ICTY to the proposal of a truth commission, especially during the late 1990s.[290] Debate however remains ongoing and victims groups have continued to advocate for the establishment of an independent truth commission.[291] Other transitional justice mechanisms have however played an important role in advancing victims' rights the region, notably the Human Rights Chamber for Bosnia Herzegovina, which was set up by the Dayton Peace Agreement in 1995 and remained in existence until 2003. The Human Rights Chamber had unique features as it acted as an international human rights court (based on the European Convention on Human Rights) in a national setting and enjoyed a broad mandate to award reparations, in accordance with article XI (1) of the Dayton Agreement. [292] The Human Rights Chamber played a particularly important role in reaffirming the right of relatives of those disappeared and, while excluded *ratione temporis* to decide on cases that occurred during the war, was able to set significant precedents for the right to truth and collective reparations, notably in the *"Srebrenica Disappearance Case"*. While still in draft form at the time, the Basic Principles on the Right to Reparation for Victims were relied upon in the reparation decisions of the Human Rights Chamber.[293]

Nor did initiatives for a truth commission prosper in Rwanda, where domestic political emphasis and donor attention were placed on the *gacaca* trials. A national reconciliation commission was established; however it lacked investigatory functions and rather conducted public awareness campaigns on peace and unity.[294] A limited and controversial reparations

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[290] Stover, op. cit. p.115-117. The proposal for a truth commission in Bosnia was initiated by Jacob Finci, head of Bosnia's small Jewish community. However, during the years 1998-2002 the ICTY vigorously opposed the proposal. While the ICTY has abandoned its opposition, financial funds and political impetus for a truth commission remain lacking.
Hayner, P, *Unspeakable Truths: Confronting State Terror and Atrocity*, op.cit. pp. 207-209

[291] Clark, JN, "The Limits of Retributive Justice, Findings of an Empirical Study in Bosnia and Hercegovina", *Journal of International Criminal Justice,* Vol. 7, 2009, pp. 463-487

[292] Nowak, M, "Reparations by the Human Rights Chamber for Bosnia Herzegovina" in in De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations,* Intersentia, Antwerpen, 2005, pp. 245-288
Article XI (c) of the Dayton Peace Agreement mandated the Human Rights Chamber to address in its judgements " *What steps shall be taken by the State party to remedy such breach, including orders to cease and desist, monetary relief (including pecuniary and non-pecuniary injuries), and provisional measures*"

[293] Ibid.
Selimovic and 48 Others v. RS, CH/01/8365 et al., decision of 7 March 2003 is known as the "*Srebrenica Disappearance Case*"

[294] In Rwanda the government established a National Unity and Reconciliation Commission in 1999, however its function are not investigatory but rather public promotion of peace culture and unity.
Sarkin, J, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda", *Human Rights Quarterly*, Vol. 21, No. 3, 1999, pp. 767-823
Drumbl, M, "Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide", *Contemporary Justice Review,* Vol.5 (1), 2002, pp. 5-22

programme was set up in 1998, it focused primarily on educational grants and has been criticised for giving priority for ethnic tutsi victims.[295] Furthermore, strongly critical observations have been made regarding the disproportionate amounts spent by the international community on DDR, detainees and genocide trials in contrast to the lack of reparations for survivors in Rwanda.[296]

In conclusion, the overall attention given to victims' rights in proceedings of the ad hoc Tribunals has been inadequate and mainly focused on urgent protection measures for witnesses, rather than more long term considerations such as the right to reparations. Lack of adequate outreach programmes and sustained protection measures both in the ICTY and the ICTR has left victims in doubt of the value of international criminal justice. In the debate on the compatibility of measures taken to protect witnesses with the rights of the accused, considerable attention has been dedicated to the applicable minimum human rights standards guaranteeing a fair trial.[297] In this context, it is remarkable that the corresponding rights of victims of serious human rights violations have not been equally invoked. Given the significant developments in human rights law regarding the right of victims to seek redress, it is regrettable that such provisions were not reflected in the Statutes and Rules of Procedure of the ad hoc Tribunals. Although the establishment of responsibility by the Tribunals relates to that of individuals rather than States, clearly the violations and the suffering of the victims in cases under international criminal law is equal to that of victims who present cases of serious violations to human rights mechanisms. Progress made in one branch of international law, in particular in the realm of human rights, should have been transferred into international criminal law.

Despite the deficient attention to victims' rights in the Statutes and Rules of Procedure of the ad hoc Tribunals, the experiences drawn from their operation nevertheless present important precedents valuable to the creation of the International Criminal Court. The challenges faced by the Tribunals due to their restrictions regarding victim participation and redress have

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Neuffer, E, *The Key to My Neighbour's House, Seeking Justice in Bosnia and Rwanda,* Picador, 2002

[295] Rombouts, H and Vandeginste, S, "Reparation to Victim in Rwanda: Caught between Theory and Practice" in De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations,* Intersentia, Antwerpen, 2005, pp. 309-341

[296] Waldorf, L, "Goats and Graves: Reparations in Rwanda's Community Courts" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 515-539

De Geiff, P, "Contributing to Peace and Justice, Finding a Balance between DDR and Reparations", Paper presented and published for the Conference; *Building a Future on Peace and Justice*, Nuremberg, 25-27 June 2007

[297] Mumba, F "Ensuring a Fair Trial Whilst Protecting Victims and Witnesses-Balancing of Interests" op. cit.
Chinkin, C, "The Protection of Victims and Witnesses" op. cit.

provided important lessons in order to construct a concept of justice for serious violations which recognises of victims' rights. As concluded by Jorda, the former President of the ICTY, reparations for those who have suffered such harm is a *"sine qua non for the establishment of a deep-rooted and lasting peace"*. [298]

4.4 Reparations and the Rome Statute of the International Criminal Court

The provisions of the Rome Statute of the International Criminal Court represent a significant landmark for the affirmation of the rights of victims of serious violations in international law. The preamble of the Statute gives recognition that *"during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity"*.[299] For the first time, victims were acknowledged as stakeholders in international criminal proceedings and numerous articles in the Statute relating to victim participation and protection, as well as their right to reparations, bears evidence to this effect.

Importantly, for the first time an international Court was provided with the authority, at its own discretion, to award reparations in favour of victims. Article 75 of its Statute states that;
1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation....
2. The Court may make an order directly against a convicted person specifying reparations.... Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

It should however be noted that the original draft of the Statute presented in 1994 by the International Law Commission (ILC)[300] did not contain specific references to reparations, apart from a vague reference to the possibility of creating a trust fund for victims. Rather, the inclusion of reparations provisions occurred during the preparatory negotiation meetings, "PrepComs", due to the pressure from NGOs, who were particularly anxious not to see the weaknesses from the ad hoc Tribunals repeated and fixed in international law. NGOs formed a specific coalition working group on victims' rights and strongly advocated for the incorporation of principles of human rights law and restorative justice. Yet, in the draft

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[298] Jorda, C and Hemptinne, J, "The Status and Role of the Victim" in Cassese, A, Gaete P and Jones, J (eds), *The Rome Statute of The International Criminal Court,* Oxford University Press, 2002, pp.1398
[299] Available at the official webpage of the ICC; http://www.icc-cpi.int/ *(last visited 20 February 2010)*
[300] See further details of the *travaux preparatoires* of the ILC in relation to the Statute of the ICC; http://www.un.org/law/ilc/ and full text of the Draft Statute as adopted by the ILC in 1994; http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf (last visited December 2007)

Statute, upon which the Rome negotiations initiated, the article relating to reparations was still in square brackets due to the lack of consensus and support among States.[301] Certain States opposed the inclusion of a mandate to order reparations by arguing that, similarly as was done in conjunction with the creation of the ad hoc Tribunals, such a provision would distract from the main purpose of the Court i.e. to prosecute.

Originally, the term that figured in the draft text was *"compensation"*, echoing the language of the RPE of the ad hoc Tribunals. However, NGOs advocated for the inclusion of the more comprehensive term *"reparations"* which eventually prevailed, as did specific references to *"restitution, compensation and rehabilitation"*. Ultimately, the inclusion of the final text in the article on reparations was possible thanks to the political will displayed during the negotiations by certain States, notably the United Kingdom and France. [302]

Major debates took place regarding whether reparations would be considered as part of the penalty and whether reparation orders from the Court could be aimed not only at convicted individuals but also at States. However, in both cases there was an overall lack of support for the endorsement of such provisions.[303] States were wary of the potential inclusion of State responsibility in the context of reparations and the exclusion of such references was a compromise to ensure the approval of article 75. Robertson has noted that States suffering from "human rights amnesia" deliberately declined to allow the Court to order reparations against governments and that *"this omission reflects one of the key weaknesses in the current philosophy behind the international justice movement, which denies the existence of collective responsibility in order to fasten upon the blameworthy individual. Where crimes against humanity are concerned, the two are not mutually exclusive."*[304]

Nevertheless, article 25 (4) of the Statute affirms that *"no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law"*. As noted by Muttukumaru, the Statute *"does not diminish any responsibilities assumed by States under other treaties and will not- self-evidently- prevent the Court from making its*

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[301] Muttukumaru, C, "Reparations to Victims" in Lee, S (ed.), *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, pp. 262-270

[302] Donnat-Cattin, D "Article 75" in Triffterer, O (ed.) *Commentary on the Rome Statute of the International Criminal Court- Observers' Notes, Article by Article*, Nomos Verlag, Baden Baden, 1999, pp. 965-978

[303] McKay, F "Are Reparations Appropriately Addressed in the ICC Statute?" in Shelton, D (ed.) *International Crimes, Peace and Human Rights: The Role of the International Criminal Court"*, Transnational Publishers, NY, 2000, pp. 163-178

[304] Robertson, G, *Crimes Against Humanity, The Struggle for Global Justice*, Penguin, Second ed., 2002, p. 386

attitude known through its judgements in respect of State complicity in a crime".[305] In this context, it is pertinent to recall the wording of the ILC in its Articles on State Responsibility, specifically in article 5, which affirms that the conduct of a person who has status as an organ of State or of a person *"empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law".*[306]

Given the likely coincidence between State and individual responsibility for the crimes within the jurisdiction of the Court, which is *"limited to the most serious crimes of concern to the international community",* it is inevitable that the debate on State responsibility in relation to the Court continues.[307] As there are potential future overlaps between the jurisdiction of the Court and human rights mechanisms, this aspect has to be given further consideration, especially given the likelihood that convicted individuals may seek to avoid responsibility by claiming they lack funds to pay reparations. It should also be noted that there is considerable State practice relating to State responsibility for paying reparations to victims of violent crimes when the offender is without resources or not identified. At the regional level, a treaty exists within the Council of Europe since more two decades which affirms such responsibility on the basis of equity and social solidarity.[308] Furthermore, the UN Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), affirm that:
"In cases where the Government under whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims... When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation."[309]

The mention in article 75 (1) of the Rome Statute of the establishment of *"principles relating to reparations"* was intended as an indirect reference to the UN Basic Principles of Justice for Victims of Crime and Abuse of Power and the then draft UN Basic Principles on the Right to Reparation.[310] Yet, as the latter were still under negotiation in the former Commission on

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[305] Muttukumaru, op.cit. p. 268
[306] *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted in 2001 by the International Law Commission, op cit. footnote 1
[307] For example discussion by Nollkaemper, A, "Concurrence between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly,* Vol. 2, No. 3, 2003, pp. 615-630
[308] European Convention on the Compensation of Victims of Violent Crimes, CETS. 116, the Convention *(10 June 2010)* has 25 State parties and entered into effect in 1988.
http://conventions.coe.int/Treaty/en/Treaties/Html/116.htm *(last visited 10 June 2010)*
Further discussion in Zappala, S, Human Rights in International Criminal Proceedings, op. cit. pp. 230-231
[309] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 adopted on 29 November 1985, articles 11 and 12
[310] Op. cit. Further discussion in McKay, op.cit. p. 174

Human Rights, the reference was deliberately vague with a view to their future adoption. The language was used to defer to the definitions contained in the UN Principles regarding the concepts of victims and reparations. It is worthwhile noting that the Rules of Evidence and Procedure and the Regulations of the Court do not establish or expand on specific *"principles relating to reparations"*. This appears to confirm the acceptance of the UN principles as the standard to be applied by the Court. Their practical elaboration will be developed over time through jurisprudence. By the end of 2009, no case had yet been concluded and thus no reparations orders issued by the Court.[311] In November 2009, the Court adopted its official overall strategy in relation to victims; it specifically affirms that it draws on the UN Basic Principles of Justice for Victims of Crime and the Basic Principles on the Right to Reparations.[312]

While the Statute does not provide a definition of who is a victim, article 75 nevertheless speaks of *"reparations to, or in respect of, victims"*. This is considered to signal recognition of family members and successors of victims[313] and is consistent with jurisprudence of human rights mechanisms as explored in the previous chapter. Rule 85 of the Rules of Procedure and Evidence define victims as *"natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court"*.[314] Furthermore, organisations or institutions, dedicated to religion, art, science, charitable or humanitarian purposes as well as historic monuments and hospitals can also be considered as victims.

According to Rule 97 (1) of the Rules of Procedure, awards can be determined on *"an individualized basis or, where it deems it appropriate, on a collective basis or both"*, thus the Court has considerable discretion and flexibility to decide how it chooses to approach the matter of reparations. The Court should *"apply applicable treaties and the principles and rules of international law, interpretation of law"* and *"must be consistent with internationally recognized human rights"* according to article 21 of the Statute. The reference to human rights in the Statute is an important recognition of victims' rights as jurisprudence on redress in international and regional human rights systems, as explored in the previous chapter, has

[311] Bitti, G and Gonzalez Rivas, G, "The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court" in International Bureau of the Permanent Court of Arbitration (ed.) *Redressing Injustices Through Mass Claims,* Oxford University Press, 2006, p.311

[312] International Criminal Court, *Report of the Court on the strategy in relation to victims*, 10 November 2009, ICC-ASP/8/45, para. 6
See discussion in; Redress, *Victims central role in fulfilling the ICC's mandate,* Paper for the 8th Assembly of States Parties, The Hague, 18-26 November 2009 available at www.redress.org *last visited April 2010*

[313] Donnat-Cattin, op. cit. p. 969

[314] ICC Rules of Procedure and Evidence, Adopted by the Assembly of States Parties, New York, 3-10 September 2002, Official Records ICC-ASP/1/3

significantly contributed to developing the concept of reparations.[315] Furthermore, Rule 86 of the Rules of Procedure establish as a general principle that "*organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68* (protection), *in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence*". This principle underlines the importance that the Court should give to particularly vulnerable groups in their proceedings. Article 43(6) of the Statute provides for a Victims and Witnesses Unit within the Registry of the Court which is responsible for protection and counselling and should have staff with expertise in trauma, including sexual violence. Thus the Unit was created as a statutory body, unlike the Victims and Witnesses Units of the ad hoc Tribunals which were established as an afterthought by the Rules of Procedure and Evidence.[316] Additionally, in 2005 the Court established the Office of Public Council for Victims to specifically provide support and assistance to victims and their legal representatives in obtaining reparations.[317]

Among the most controversial provisions of the Rome Stature is article 68(3), which states that "*where the personal interests of victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court*". The Court has already drawn on human rights standards and jurisprudence in its various decisions on victim participation.[318] The introduction of the right to victim participation in international criminal law was a novelty which continues to be contested and the practical implications of which has raised considerable concern both inside and outside the Court. As could be expected given the situations under investigation, large numbers of victims have filed requests to participate in various stages of the proceedings; by the end of 2009 some 1'800 individual applications had been submitted. Approximately 450 victims had by late 2009 participated in the investigation into the situation in the Democratic Republic of the Congo *(Prosecutor v. Lubanga* and *Prosecutor v. Katanga and Chui).*[319] Questions regarding at which stage and how victims may participate continues to be debated and while there is recognition of the importance of victim participation, there are legitimate

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[315] Bitti, G and Gonzalez Rivas, G, "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", op.cit. p.312

[316] Ingadottir, T, Ngendahayo,F and Sellers, P, "The Victims and Witnesses Unit", op. cit. pp.1-33

[317] Report of the International Criminal Court to the General Assembly of the United Nations 2006, A/61/217

[318] Zegveld, L,"Victims' Reparations Claims and International Criminal Courts", op.cit. p. 101

[319] Report of the International Criminal Court to the General Assembly of the United Nations 2007/2008, A/63/323

Report of the International Criminal Court to the General Assembly of the United Nations, 2008/2009, A/64/356

Redress, *Victims central role in fulfilling the ICC's mandate, op.cit.*

Prosecutor v. Lubanga ICC-01/04-01/06 *Prosecutor v. Katanga and Chui* ICC-01/04-01/07

fears that it may delay proceedings.[320] It is likely that some victims file to participate in the early stages of the proceedings out of concern that they may otherwise not be considered at the reparations stage.

A relevant observation is that the victim is defined as a person who has suffered harm due to *"a crime within the Court's jurisdiction"* i.e. the definition does not hinge on the crime already being under investigation or decided by the Court. Commentators have noted that this could be interpreted as affecting the presumption of innocence of the accused.[321] However, victims' ability to recur to reparations provisions is anyway subjected to considerable restrictions. Although the victim does not have to refer to a specific investigation in his or her reparation claim,[322] nevertheless the request for reparations must ultimately be linked to criminal proceedings against the person responsible for the harm. Reparation orders can only be issued once a case is decided. Should the defendant be acquitted there may be no reparations for the victims.[323] Given the experiences of international tribunals so far it appears unlikely that the reparations provisions, although groundbreaking, will live up to expectations among victims and NGOs. The complexity of the cases before the Court result in proceedings that last several years and eventual reparation orders depend on whether there is a conviction.

4.5 Trust Fund for the Victims of the International Criminal Court

An additional challenge for the Court relates to the implementation of the reparation orders as these are made against individuals. Experiences from international tribunals indicate that the defendants often claim indigence.[324] As State responsibility is not reflected in the Rome Statute, it was deemed necessary to provide the Court with alternative means to ensure reparations for victims, who otherwise would be dependant on the financial solvency of the perpetrator.[325] In this context, article 79 of the Statute foresaw the creation of a Trust Fund by the Assembly of States parties for the benefit of victims and their families. The Trust Fund for Victims was formally created in 2002, when the Rome Statute entered into force; it is

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[320] Friman, H, "The International Criminal Court and the Participation of Victims: A Third Party to the Proceedings?", *Leiden Journal of International Law,* Vol. 22, 2009, pp. 485-500
Judgment on victim participation in the investigation stage of the proceedings by Appeals Chamber, ICC-01/04-556, 19 December 2008
Conversation with staff member of the Office of the Prosecutor of the ICC, 8 December 2009
[321] Jorda, C and Hemptinne, J, "The Status and Role of the Victim", op.cit. p. 1403
[322] Bitti, G and Gonzalez Rivas, G, "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", op.cit. pp. 312-314
[323] Ibid.
[324] Schabas, W, *An introduction to the International Criminal Court,* op cit. p. 175
[325] Jorda, C and Hemptinne, J, "The Status and Role of the Victim", op.cit. p. 1408

independent from the Court and managed by the Assembly of States parties. The Statute does not detail how it will be financed except from stating that the Court may order money and other property collected through fines and forfeiture (article 109) to be transferred to the Trust Fund. The Assembly of States parties has subsequently defined that the Trust Fund may receive voluntary contributions from Governments, international organisations, individuals, corporations and other entities.[326]

As defined in Rule 98 of the Rules of Evidence and Procedure, the Court may depend on the Trust Fund in several ways. It can order that an award against a convicted person be deposited through the Fund, which in turn shall forward it to the individual victim. The Court may also resort to the Trust Fund when the *"number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate"*. Furthermore, the Court can, in consultation with the Trust Fund, order an award for reparations to an intergovernmental, international or national organization approved by the Fund. The Court has discretion to decide whether to order awards for victims and it should also be noted that the Court may act on its own initiative, without a specific request from a victim. This is of note, in particular in situations where it is clear that many victims cannot approach the Court for practical reasons, such as the remote geographic location of the communities affected. The official webpage of the Fund states that *"unless ordered by the Court to award reparations to individuals, the Trust Fund favours reparations activities which are directed at groups, based on similarities in their claims or situations"*.[327] The Trust Fund can only act in situations where the International Criminal Court has jurisdiction. It is foreseen that projects will be linked to some stage of investigations. However, it is important to note that the Fund is formally independent from the Court and may assist victims even in the absence of ongoing investigations.[328]

The Regulations of the Trust Fund were adopted in 2005, a Board of Directors (*pro bono*) appointed and in early 2007, the Trust Fund became operational. The activities of the Trust Fund have to date been undertaken in the framework of article 50 (a)(i) of the Regulations of the Trust Fund which enables it undertake such measures on its own accord *"when the Board of Directors considers it necessary to provide physical or psychological rehabilitation or*

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[326] Bitti, G and Gonzalez Rivas, G, "The Reparations Provisions for Victims under the Rome Statute of the International Criminal Court", op.cit. pp. 315-316

[327] Information about the Trust Fund at the website of the International Criminal Court including, Resolution ICC-ASP/4/Res. 3, Regulations of the Trust Fund for Victims, adopted 3 December 2005 http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/ *last visited 15 April 2010*

[328] Resolution ICC-ASP/4/Res. 3, art. 48, 50

material support for the benefit of victims and their families." Such measures are based on voluntary contributions to the Fund rather than on seized assets from the accused. In January 2008, the Trust Fund notified the Trial-Trial Chambers of its intention to carry out activities in the Democratic Republic of the Congo and Uganda, these were in turn approved by the Chambers once deemed that they would not *"pre-determine any issue to be determined by the Court".*[329] By the end of 2009, some 34 projects were being implemented in partnership with local non-governmental organisations, grass-roots organisations and women's associations. The majority of the projects provided rehabilitation assistance and counselling for victims and also contributed to creating livelihood opportunities, such as micro-credit projects, for survivors. Many of the projects specifically targeted women and children in their interventions. The Trust Fund for Victims estimated that in late 2009, some 42'300 persons were benefiting directly from such assistance and that some 182'000 family members benefit indirectly through improved well-being and reduced stigma.[330] The Fund expected to be able to reach some 380'000 direct and indirect victims through their current projects, which in 2008 carried a budget of 1'650'000 Euros. This leads to the remarkable conclusion that the cost per victim beneficiary would be less than 5 Euros.

As noted by Redress, local victims' organisations report on positive reactions to the projects and *"for many, the work of the Trust Fund in providing assistance to victims under its "other mandate" might be the most tangible impact they might experience from the ICC."*[331] The activities carried out by the Trust Fund in this regards are considered as a form of humanitarian assistance rather than reparations measures, which from a legal point of view have to be formally awarded by the Court.[332] Nevertheless, this distinction is likely to be of limited relevance to victims whose urgency is grave and whose lives simply cannot be resumed without immediate assistance. While not negating that compensation will remain an important element of reparations for victims, the direct impact of assistance focused on rehabilitation and access to basic health, education and livelihood opportunities enables victims to overcome stigma in their communities and equips them, in a gender and child sensitive manner, with tools to look to the future. Such results cannot be achieved by financial compensation alone.

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[329] Report of the International Criminal Court to the General Assembly of the United Nations 2007/2008, A/63/323, paras. 18 and 27

[330] The Trust Fund webpage http://trustfundforvictims.org/projects *last visited 15 April 2010*

[331] Redress, *Report on the Impact of the Rome Statute System on Victims and Affected Communities*, 22 March 2010, p. 15

[332] Kristjansdottir, E, "International Mass Claims Processes and the ICC Trust Fund for Victims", in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers, Leiden, 2009, p. 175

The establishment and operation of the Trust Fund of the ICC drew inspiration from the United Nations Voluntary Fund for Victims of Torture, which was established by the General Assembly in 1981.[333] Over the years, the activities of the Voluntary Fund for Victims of Torture have expanded and in 2008 it allocated 8.5 million dollars to 191 different projects providing direct assistance for victims through NGOs in 65 countries. The type of assistance provided may be psychological, medical, social, legal or, to some extent, economic. Clearly, there is a need to ensure that the two Funds exchange information about their activities due to the potential overlap of their mandates. Also, it may also be necessary to coordinate information exchange between Trust Funds established by regional human rights mechanisms and, in the future, with national reparations programmes, which as indicated in Part II, are increasingly being established and are sometimes linked to recommendations by Truth Commissions.

Concerns have been raised regarding the financial means available to the Trust Fund of the ICC.[334] As the International Criminal Court and the Trust Fund are not part of the United Nations, they are not guaranteed a regular budget from the United Nations Secretariat. In 2007 when the Fund became operational it had received voluntary contributions of 1'450'000 Euros. A future challenge faced by the Fund will be its ability to sustain funding, especially once the Court starts to issue orders for reparations as these are likely to be in favour of large numbers of victims and involve considerable sums. To date, the majority of the voluntary funding for the Trust Fund has come from Governments. By the end of 2009, although the Trust Fund had only been operational for two years, contributions had been received from 24 States.

Among the numerous difficult issues which remain to be resolved, the Court must clarify how it intends to assess reparations claims, to what degree these will be done on an individual or

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[333] The Fund was established by General Assembly resolution 36/151 of 16 December 1981. Information about the United Nations Voluntary Fund for Victims is available at the webpage of the UN Office of the High Commissioner for Human Rights (which acts as the Secretariat of the Fund);
http://www2.ohchr.org/english/about/funds/torture/index.htm
Report of the Secretary General on the United Nations Voluntary Fund for Victims of Torture, A/63/220, 5 August 2008

[334] Ingadottir, T, "The Trust Fund of the ICC" in Shelton, D (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court"*, Transnational Publishers, NY, 2000, pp. 149- 161
Garkawe, S, "Victims and the International Criminal Court: Three Major Issues" in *International Criminal Law Review*, 2003, No. 3, pp. 345-367

collective basis and which standards of proof will be applied.[335] The latter aspect has considerable practical implications as certain victims will have had limited access to formal education, which even with the aid of legal representation, will impact on their ability to present their claims. Furthermore, many of victims come from areas where civil registries and birth registration are lacking, as are medical facilities in order to document sexual violence; this in turn has a deleterious effect on victims' possibilities to present relevant documentation and supporting evidence. It has been observed that before the Court starts issuing reparation orders, it would be advisable that it refer to and incorporate lessons learnt from previous mass claims processes. Notable among these was the United Nations Claims Commission (UNCC).[336] The experiences of the UNCC in relation to reparations are explored to in the initial chapter of Part II of the thesis on practical measures supported by the UN in order to transfer standards into reality.

It is important to acknowledge the novelty of the creation of a Trust Fund linked to international criminal proceedings. However, as outlined above, the reactions of victims and their organisations with regard to the reparations regime of the International Criminal Court are likely to be marred with disappointment due to their high expectations. Among the challenging issues relating to reparations that the Court will be faced with are; delays in concluding prosecutions, inability to ensure enforcement of reparations against individual perpetrators, restrictions due to the limited jurisdiction, inadequate funding of the Trust Fund and lack of outreach and information access for the victims most in need.[337] The Court will also have to define how to address the situation of numerous victims who carry the dual identity of perpetrators, such as children who have been recruited and used in hostilities.

Nevertheless, the Court, in particular through the Trust Fund, can play a vital role in reaching out to victims and putting true meaning into the justice and reconciliation for victims by providing them with the practical means of resuming their lives as they were before being disrupted by armed conflict. Through the independent Trust Fund, projects can be carried out in a collective manner and reach victims who are unable or reluctant to approach the Court

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[335] Ferstman, C and Goetz, M, "Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 313- 350

[336] Kristjansdottir, E, "International Mass Claims Processes and the ICC Trust Fund for Victims", op.cit.

[337] Greco, G, "Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis", *International Criminal Law Review,* 2007, No. 7, pp. 531-547

Redress, *Report on the Impact of the Rome Statute System on Victims and Affected Communities,* The Redress Trust, London, 22 March 2010

personally.[338] Furthermore, assistance can be delivered as interim measures pending the outcome of investigations and be tailored in consultation with affected communities to correspond to their needs. These activities, many of which focus on rehabilitation, will be an important complement to formal reparation orders, which are more likely to focus on financial compensation. The Court and the Trust Fund have the opportunity to further develop the complementing concepts mentioned in the Rome Statute of *"restitution, compensation and rehabilitation"* as the practical implementation of reparations will require a creative approach towards developing measures which are deemed important by the victims themselves. Furthermore, the jurisprudence of the Court will probably prompt impetus at the national level to establish reparations programmes. Such programmes will be essential to avoid discrimination among victims and ensure that as many as possible can benefit from reparations, while they at the same time provide an important recognition of State responsibility *vis-à-vis* the victims.

The perceived injustices and blatant discrepancies in the treatment of defendants compared to victims and witnesses by the ad hoc Tribunals have provided fundamental lessons on the importance of not ignoring the tragic reality of the victims. Although faced with high expectations, the reparations regime of the International Criminal Court can provide a turning point in international criminal law by vindicating its credibility among those most concerned: the victims themselves.

4.6 Steps Backwards? The Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia

Regrettably, the provisions regarding victims' rights in the statutes of the hybrid criminal justice initiatives in East Timor, Sierra Leone and Cambodia did not follow the precedent of the Rome Statute of the International Criminal Court. Rather, they were largely modelled on the ad hoc tribunals for former Yugoslavia and Rwanda. However, despite the limited provisions on victims' rights in the respective Statutes, the hybrid Courts have managed to incorporate some practical elements in their operative work. This shift has been prompted following pressure from victim's and human rights organisations. While largely neglected in

[338] Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2nd edition, 2005, p. 236

the Courts in East Timor and Sierra Leone, the issue of reparations is receiving greater attention in conjunction with the ongoing prosecutions in Cambodia.

East Timor

The establishment of the Special Panels for Serious Crimes was unprecedented as the UN at the time was fully responsible for the transitional administration in East Timor. Following the violence of the referendum regarding independence on 25 October 1999, the Security Council adopted resolution 1272 under Chapter VII of the UN Charter, whereby the peacekeeping mission UNTAET was given total administrative and executive authority in the territory, including for the administration of justice.[339]

In June 2000, UNTAET established the Special Panels for Serious Crimes through Regulation No. 2000/15.[340] Unlike subsequent hybrid Courts, the legal basis of the Special Panels stemmed from the authority of UNTAET, as there was no State counterpart with whom the UN could negotiate a bilateral treaty.[341] While other ad hoc Courts were specifically mandated to focus on those carrying the greatest responsibility, this was not the case in East Timor and resulted in an unclear prosecution strategy which included mid and low level perpetrators. The prosecutions were established within the local Dili courts, each panel was staffed by two international judges and one national judge. The process faced the significant challenge of simultaneously establishing and training an East Timorese judiciary. Investigations, initially conducted by the human rights unit of UNTAET, were transferred to a Serious Crimes Unit (SCU) within the Public Prosecutor in mid 2000. The SCU was established and operated separately from the Panels. In this sense, the Serious Crimes process in East Timor differed significantly from other ad hoc Courts, which were created up as one institution.[342]

The Regulation No. 2000/15 which established the Special Panels did contain specific reference (section 24) to witness protection, mentioning specifically measures for sexual and

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[339] Security Council Resolution on the Situation in East Timor , S/RES/1272, adopted 25 October 1999
Chesterman, S, "East Timor" in Berdal, M and Economides, S (eds.), *United Nations Interventionism 1999-2004,* Cambridge University Press, 2007, pp. 192- 216

[340] UN. Doc. UNTAET/REG/2000/15 adopted 6 June 2000

[341] Reiger, C, "Hybrid Attempts at Accountability for Serious Crimes in East Timor" in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, p. 149

[342] Reiger, C and Wierda, M, *The Serious Crimes Process in Timor Leste: In Retrospect,* Prosecution Case Studies Series, International Center for Transitional Justice, March 2006, pp. 11-13

gender violence and violence against children. It also mentioned (section 25) the possibility of setting up a Trust Fund for victims;

"A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims. The panels may order money and other property collected during fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund."

The practical experience of the Panels however indicates a significant discrepancy between legal provisions and reality. The Serious Crimes process in East Timor was completely under funded given its task and lacked earmarked funding. Furthermore, establishing accountability for past crimes was one of several competing priorities of UNTAET.[343] The Serious Crimes Panels have faced considerable criticism for numerous aspects of their operative work. Having to operate in four languages was a major obstruction and caused serious mistakes.[344] Considerable critique has pointed to a lack of due process and violations of rights of the accused, many of whom were provided inadequate defence assistance.[345] Despite provisions to the contrary, no witness protection measures were provided during the prosecutions.[346] Incidents such as that of a rape victim, who due to testify and was forced to travel for hours on public transport with the alleged perpetrator, are indicative of the lack of sensitivity towards victims. Due to poor preparedness and coordination within the Panels, victims were forced to repeatedly recount distressing accounts of atrocities without any psychosocial support and endure multiple exhumations of relatives' graves.[347] The Trust Fund for victims foreseen in the 2000/15 regulation was never established. [348] The issue of reparations was left for the Truth Commission to deal with, as will be further explored in Part II of this thesis.

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[343] Chesterman, S, "East Timor"

[344] Cohen, D, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor, East West Center Special Report, Number 9, June 2006, pp.26-29*

[345] Linton, Suzannah, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *Criminal Law Forum*, vol. 12, 2001, pp. 226-230
Reiger, C and Wierda, M, *The Serious Crimes Process in Timor Leste: In Retrospect*, op.cit.
Cohen, D, *Indifference and Accountability*, op.cit.

[346] In contrast with the Special Court in Sierra Leone, which had a witness protection unit of some 55 specialised staff, the issue of witness protection East Timor was assigned to one single person, see Cohen, *"Hybrid Justice in East Timor, Sierra Leone and Cambodia"*, op cit. p.21

[347] Cohen, D, "Hybrid Justice in East Timor, Sierra Leone and Cambodia; Lessons Learnt and Prospects for the Future", *Stanford Journal of International Law*, No. 43:1, 2007, p.18
Reiger, C " Hybrid Attempts at Accountability in Timor Leste" op. cit. p. 160
Katzenstein, S "Hybrid Tribunals: Searching for Justice in East Timor" in *Harvard Human Rights Journal*, Vol. 16, 2003, p.261

[348] Linton, S, *Putting Things into Perspective: the Realities of Accountability in East Timor, Indonesia and Cambodia*, Maryland Series in Contemporary Asian Studies, School of Law, University of Maryland, Number 3, 2005, pp. 75-76

The Serious Crimes investigations in East Timor were discontinued in early 2005. The process was characterised by a lack of ownership within both the UN and East Timorese authorities, this was particularly notable in the context of the Wiranto indictment.[349] The prosecutions largely lacked support from the civilian population as people questioned the lack of focus on those who carried the greatest responsibility, the end result being a high conviction rate of mid-level perpetrators, while the majority of the indicted, including those carrying the greatest responsibility, remained sheltered in an uncooperative Indonesia. Furthermore, the Serious Crimes process lacked an outreach programme to explain its objectives to the population and its relationship with victims' organisations was poor.[350] Chapter 9 in Part II of this thesis explores in further detail the relationship between the prosecutions, the Truth Commission (CAVR) and that of other transitional justice initiatives for East Timor, and in particular consider the implications for the issue of reparations.

The Special Court for Sierra Leone

Following a request from the Security Council, an agreement between the United Nations and the government of Sierra Leone established the hybrid Special Court for Sierra Leone in January 2002.[351] The Statute of the Court (article 16) established a Victims and Witnesses Unit within its Registry. Article 19 provides for possible restitution; "*the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone*". The reference to restitution echoes from the ad hoc tribunals and the absence of a clear reparations provision for victims has been noted as a major failing.[352] Furthermore, as all defendants charged by the Special Court so far have declared themselves indigent, restitution efforts seem unlikely.[353] To date, none of the judgements of the Special Court address issues of restitution.

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[349] Reiger, C " Hybrid Attempts at Accountability in Timor Leste" op. cit. pp. 160-161
De Bertodano, S, "East Timor: Trials and Tribulations" in Romano, C, Nollkaemper, A and Kleffner, J (eds.) *Internationalized Criminal Court, Sierra Leone, East Timor, Kosovo and Cambodia,* Oxford University Press, 2004, pp. 84-86

[350] Reiger, C " Hybrid Attempts at Accountability in Timor Leste" op. cit. pp. 159-160

[351] Official webpage of the Special Court for Sierra Leone; http://www.sc-sl.org/ *(last visited 25 April 2009)*
Security Council Resolution, S/RES/1315 , 14 August 2000 "requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court"- unlike the previous ad hoc tribunals set up by the Security Council under Chapter VII of the UN Charter

[352] MacDonald, A, "Sierra Leone's Shoestring Special Court" in *IRRC (ICRC Journal),* March 2002, Vol. 84, pp. 121-142

[353] Cohen, D, "Hybrid Justice in East Timor, Sierra Leone and Cambodia; Lessons Learnt and Prospects for the Future", op.cit.

As a point of controversy, article 17 of the Statute provided jurisdiction over children above the age of 15. Although the Statute potentially allowed for the accountability of children, it also provided certain recognition that they also remain victims, without specifically referring to the term, by including reference to rehabilitation and reintegration measures. The Court chose not to exercise its jurisdiction over children, but rather to focus investigations on those carrying the greatest responsibility for war crimes.[354]

Part of the explanation for why reparations were not considered in the drafting of the Statute of the Court may be related to the Lomé Agreement of 1999, which made unclear references to the creation of a Special Fund for War Victims. After several years of delay, the Fund was finally set up in December 2009 with support from the United Nations Peace-building Fund. However, funding sustainability and the willingness of the State to assume responsibility for its continued operation remains unclear.[355] Chapter 8 of this thesis explores in further detail the issue of reparations in relation to the Lomé Peace Agreement and the Truth Commission in Sierra Leone and to how the relationship between and the parallel operation of the Special Court and the Truth Commission were perceived from a victims' perspective.

Cambodia

In Cambodia, protracted negotiations between the United Nations and the government of Cambodia resulted in an agreement in 2003, followed by a law in 2004 establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC).[356] Victims do not figure in the legislation other in a vague reference which notes that they are entitled to protection measures. Although the law contains a provision on restitution in article 39, it specifically excludes reference to individuals; "*the Court may order the confiscation of personal property,*

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[354] See detailed analysis in International Crisis Group Briefing, "The Special Court for Sierra Leone: Promises and Pitfalls of a "New Model", *Africa Briefing* N°16, 4 August 2003, available at www.icg.org (last visited 20 February 2008)
Horovitz, S, "Transitional Criminal Justice in Sierra Leone" in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, pp. 43-69

[355] Hayner, P, "Negotiating Peace in Sierra Leone, Confronting the Justice Challenge", Study of the Humanitarian Dialogue project *Negotiating Justice,* December 2007, pp.1- 37
International Center for Transitional Justice (Suma, M and Correa, C), *Report and Proposals for the Implementation of Reparations in Sierra Leone*, December 2009

[356] Official webpage of the Extraordinary Chambers in the Courts of Cambodia; http://www.eccc.gov.kh/english/ *last visited 20 April 2010*
Barria, L and Roper, S "Providing Justice and Reconciliation: The Criminal Tribunals for Sierra Leone and Cambodia", *Human Rights Review,* October-December 2005, pp. 4-25

money, and real property acquired unlawfully or by criminal conduct. The confiscated property shall be returned to the State." Thus, the language would appear to the exclude the possibility of restitution for victims.

Although the law contains no reference to a Victims Unit, nevertheless such a unit was established by the Internal Rules, adopted in June 2007.[357] The Internal Rules contain innovative provisions regarding victims as they, for the first time in an international criminal court, can be formally recognised as civil parties in a case.[358] This allows victims to request representation of a lawyer and participate actively during the various stages of the criminal proceedings. The degree of participation of victims has proven to be one of the most contested features of the ECCC.[359] Furthermore, the Internal Rules foresee the creation of Victims' Associations to assist civil parties.[360]

Despite the lack of references to reparations in the 2004 national legislation establishing the ECCC, mention to reparations was inserted in the Internal Rules. Rule 23 states that civil parties, i.e. victims, can seek collective and moral reparations and that these shall be awarded against and be borne by convicted persons. Reference to compensation is the Rules is however omitted. The Internal Rules further specify that awards may include publishing the judgement in the news or funding of a non-profit activity or service that is intended for the benefit of victims.[361] The ECCC official webpage suggests that reparations could entail memorials and the establishment of mental health clinics.[362]

Reparations in the context of the ECCC raise several problematic issues. Individuals cannot claim reparations and financial compensation cannot be awarded. In any case, the Internal Rules note that reparations are to be borne by convicted persons which, based on claims of indigence of defendants in other international criminal courts, raises doubts of the viability of successful reparation claims. Furthermore, it should be noted that reparations only figure in the Internal Rules and not in the agreement between the Cambodian government and the UN, nor in the national legislation creating the ECCC. The legal basis for reparations is thus not particularly solid. There is growing recognition that unless concrete measures are taken to

[357] ECCC Internal Rules, 5th revised version February 2010
[358] Ibid. Rule 23, see also ECCC Press Release "*Historic achievement in international criminal law, victims of the Khmer Rouge crimes fully involved in proceedings of the ECCC*", 4 February 2008
[359] ECCC Press Release "*Trial Chamber issues reasoned decision defining Civil Party rights during trial proceedings*", 13 October 2009
[360] ECCC Internal Rules, Rule 23 quarter; Victim Associations
[361] Zegveld, L, "Victims' Reparations Claims and International Criminal Courts", op cit. p 99
[362] ECCC website www.eccc.gov.kh/english/victims_rights.aspx *last visited 20 April 2010*

ensure the availability of funds for the implementation of reparations, it is unlikely they ever materialise. This has lead to calls among NGOs for the establishment of a Trust Fund for Victims, based on inspiration from the International Criminal Court.[363] To date, the Cambodian government has not indicated support for such an initiative.

4.7 Contributing Factors to the Shift in the Focus on Victims' Rights within International Criminal Law

In order to contextualise further the development of reparations provisions in criminal law as set out above, we will now consider some of the influences which contributed to improved focus on victims. Without doubt, the primary influence can be traced from human rights law and jurisprudence, which has been explored in detail in the previous chapter. However, it should also be acknowledged that other movements in law and related disciplines, such as criminology, sociology and political science have had significant impact. Among these, the role played by the victimology movement, restorative justice initiatives and feminist critique of international humanitarian and criminal law will be briefly touched on

Victimology

The victimology movement originated in the 1970s and developed, largely by criminologists, in response to the general disregard for victims of crime within national justice systems.[364] The movement was also linked to the increasing crime rates in many developed countries and the discontent among victims of crime regarding their treatment in the criminal procedure. The objectives of the movement were to visualise and strengthen the position of victims of crime by stressing the need for victims' services and lobbying for the right to compensation. Among the outcomes of the victimology movement were the establishment of victim support networks and government programmes for compensation for victims of crime, primarily in developed countries.

While the movement assisted in highlighting the vulnerability of individual victims and their lack of standing in criminal procedure, it may also be noted that the focus was on victims of

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[363] Redress, *Considering Reparations for Victims of the Khmer Rouge Regime, A Discussion Paper,* November 2009

[364] Rock, P(ed.), *Victimology,* Dartmouth Publishing Company, 1994
Elias, R, *The Politics of Victimization, Victims, Victimology and Human Rights,* Oxford University Press, 1986
Hoyle , C and Young, R, *New Visions of Crime Victims,* Hart Publishing, 2002
http://www.worldsocietyofvictimology.org/activities.html

ordinary crimes. Scarce attention was paid to victims of human rights violations.[365] This in turn is reflected in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985).[366] The Declaration is divided into two sections, as the title indicates one part deals with victims of (ordinary) crimes and the second part with victims of abuse of power. The first part it notably more elaborated and sets out specific provisions on access to justice, restitution, compensation and social assistance, while the provisions relating to victims of human rights violations (i.e. abuse of power) are much shorter and primarily call for legislative review in order to provide remedies.[367]

Restorative justice

Related to the victimology movement was the development of restorative justice theory, which started during the 1980s and 1990s. Restorative justice, like victimology, seeks to affirm the status of the victims and their rights. However, restorative justice is based on a larger picture as it seeks to take into account and consider the interest of the victim, the offender as well as the community. In essence, restorative justice questions traditional retributive criminal justice, which has as primary objective to maintain the rule of law and punish the offender. Rather, restorative justice argues that successful resolution of crime requires analysis of the impact on all involved parties and their active participation in the process.[368] A description by practitioners states that; "*Restorative justice is a theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders*".[369]

Proponents of restorative justice underline the need for a value shift away from retribution and stress the importance of mediation between victims and perpetrators in order to identify the harm caused. Perhaps not surprisingly, the theory largely stems from juvenile justice initiatives in developed countries. The origins of restorative justice have also been traced to indigenous peoples' traditions in North America and New Zealand.

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[365] Elias, R, *The Politics of Victimization*, op.cit.
[366] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 adopted on 29 November 1985 (see also previous mention in this chapter in relation the Rome Statute of the International Criminal Court)
[367] Fattah, E (ed.), *Towards a Critical Victimology*, St. Martin's Press, London, 1992, p. 402
[368] Zehr, H, *Changing Lenses: a New Focus for Crime and Justice*, Herald Press, Scottsdale, 1990
Zehr, H, *The Little Book of Restorative Justice*, Good Books, 2002
Braithwaite, J, *Restorative Justice and Responsive Regulation*, Oxford University Press, 2002
[369] http://www.restorativejustice.org/intro "*What is Restorative Justice*", May 2005 *(last visited 13 March 2008)*

By the 1990s, restorative justice became associated with transitional justice initiatives as it was attributed by Desmond Tutu as a principle guiding the work of the Truth Commission in South Africa.[370] This in turn triggered interest among restorative justice proponents to "export" their theory to countries where serious human rights violations had occurred.[371] The theory has subsequently gained appeal among certain governments seeking non-retributive measures to deal with human rights violations and eschew accountability. There is a danger that States see restorative justice as an escape route from complying with their human rights obligations. This in turn may result in undue amnesties and, in situations where perpetrators still exercise control, risk of the lives of victims. This aspect will be further explored in the case studies, notably that of Colombia, in Part II of this thesis.

The incorporation of elements of restorative theory in post-conflict justice mechanisms may be positive and contribute to a broader and more comprehensive concept of justice. However, although restorative justice theory supports the rights of victims and sets important focus on their right to reparations, caution is advised against presenting restorative justice as an alternative to formal justice. In 2002, the United Nations adopted Basic Principles on the use of restorative justice programmes.[372] While the preamble states that *"restorative justice does not prejudice the right of States to prosecute alleged offenders"*, regrettably there is no mention of human rights law or the obligation of the State to ensure accountability for human rights violations. Furthermore, the Principles call for the provision of technical assistance to developing countries in order to promote restorative justice programmes. Again, this highlights the dangers involved in trying to export restorative justice to countries where the ordinary justice system remains inadequate. The tendency to promote of restorative justice as an alternative, rather than a complementary measure, may result in a lack of accountability and contribute to impunity.[373]

Feminist critique

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[370] Wilson, R, A, The Politics of Truth and Reconciliation in South Africa, Legitimising the Post-Apartheid State, Cambridge University Press, 2001, p. 25
Minow, M, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, Beacon Press, 1998, p.81-82

[371] Braithwaite, J, *Restorative Justice and Responsive Regulation,* Oxford University Press, 2002, chapter 6 "World Peacemaking.
As an example; "An International Symposium on Restorative Justice in Colombia", was held in Cali, Colombia 9-12 February 2005 (attended by author)

[372] Basic principles on the use of restorative justice programmes in criminal matters, Resolution 2002/12 adopted by the United Nations Economic and Social Council, 24 July 2002 , E/RES/2002/12

[373] Roche, D, *Accountability in Restorative Justice*, Oxford University Press, Oxford, 2003
Roche, D, "Gluttons for Restorative Justice", *Economy and Society*, Vol. 32, No.4 Nov 2003, pp. 630-643

To conclude this chapter, some final reflections will be made on the role feminist critique has played in promoting a focus on victims in international criminal law. As the enforcement of international criminal law is based on provisions of international humanitarian law, the use of discriminatory terminology in the latter has provoked significant criticism.[374] As noted by Gardam and Jarvis; "*the regime of special protection of women during armed conflict reveals a picture of women that is drawn exclusively on the basis of their perceived weakness, both physical and psychological, and their sexual and reproductive functions.*"[375] International humanitarian law, including the 1977 Protocols Additional to the Geneva Conventions, is particularly conservative in its provisions relating to sexual violence. Rape is described as an attack on the honour of the women, a form of indecent assault and as an outrage upon personal dignity. Askin notes that; "*this mischaracterization of sexual violence as a violation of the victim's dignity or honour stigmatizes the victim by inferring that she is somehow dishonoured, defiled or shamed by the sexual violence committed against her*".[376] Furthermore, women are referred to as being in need of protection, rather than in language indicating the prohibition of violations against them. [377]

Analysis and critique of the application of international criminal law and its treatment of female victims of violations was triggered by the operation and jurisprudence of the ICTY and the ICTR. Gender and sex based crimes were widespread in the conflicts under the jurisdiction of the Tribunals and prosecutors were faced with the challenge of applying terms from international humanitarian law which were discriminatory against women. Nevertheless, the ad hoc Tribunals provided important contributions to the recognition of women as victims of sexual violence, notably by defining rape as torture, by acknowledging that the rape of a single woman can constitute an international crime and by establishing that rape can be considered as a crime against humanity.[378]

While the jurisprudence of the ad hoc Tribunals provided recognition of violations against women, it also served to underline the importance of reparations for victims by exposing the

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[374] Gardam, J and Charlesworth, H, "Protection of Women in Armed Conflict", *Human Rights Quarterly*, No. 22, 2000, pp. 148-166

[375] Gardam, J and Jarvis, M, *Women, Armed Conflict and International Law*, Kluwer Law International, The Hague, 2001, pp. 93-97

[376] Askin, K, "Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC" in Shelton, D (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court"*, Transnational Publishers, NY, 2000, pp. 47-63

[377] Gardam, J and Charlesworth, H, op. cit. p. 159

[378] Chinkin, C and Charlesworth, H, "Building Women into Peace, the International Legal Framework" in Third World Quarterly, Vol. 27 no. 5, 2006, pp. 937-957
Askin, K, op. cit.

hardships of female survivors and the inadequacies of international criminal law in this regard[379]. The experiences of the female victims in the ad hoc Tribunals galvanized support for the inclusion of gender sensitive victims' provisions during the negotiations of the Rome Statute of the International Criminal Court.[380] In 2000, the Security Council passed resolution 1325 on Women, Peace and Security, which calls for the inclusion of the special needs of women and girls and for rehabilitation, reintegration and post-conflict construction.[381] Yet, a lack of gender sensitive implementation of rehabilitation and reparations measures for victims however still remains a key challenge. In 2007, an international meeting of civil society and gender experts in Kenya adopted the *Nairobi Declaration on the Rights of Women and Girls to a Remedy and Reparation* with the aim for supporting the recently adopted UN Basic Principles on the Right to Reparation for Victims, while encouraging further consideration of gender aspects in their implementation.[382]

Women and children remain the most affected by violence in armed conflicts and generally suffer the continued social stigma after having been victims of sexual violence. At the national level, women's organisations have been particularly active in placing reparations on the public agenda in numerous post-conflict contexts.[383] The case studies in Part II of the thesis provide some further illustration of the role played by women's organisations in this regard.

4.8 Conclusions

This chapter has explored the gradual recognition of victims' right to reparations in international criminal law. The consideration given to victims in this branch of international law has been deficient and inconsistent. This in turn relates to its corresponding analogies with municipal criminal law with regard to the status of victims and witnesses, who traditionally have been considered peripheral to the objectives of criminal justice. As demonstrated in the chapter, shifts towards a more victim-oriented international criminal law

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[379] Gardam, J and Charlesworth, H, op. cit. p. 157
Charlesworth, H, "Feminist Methods in International Law" in *American Journal of International Law,* Vol. 93, No. 2 April 1999, pp. 379-394
[380] Women's Caucus for Gender Justice and The Women's Initiatives for Gender Justice, http://www.iccwomen.org/ *(last visited 11 March 2008)*
[381] Security Council Resolution 1325 on Women, Peace and Security, 31 October 2000
Chinkin, C and Charlesworth, H, op.cit. p 938
[382] Couillard, V, "The Nairobi Declaration:Redefining Reparations for Women Victims of Sexual Violence", *International Journal of Transitional Justice,* Vol. 1, 2007, pp. 444-453
[383] Rubio-Marín, R, *What Happened to the Women? Gender and Reparations for Human Rights Violations,* New York, Social Science Research Council, 2006

have however taken place in the past two decades due to significant impetus from the human rights movement and women's organisations.

The Statutes and Rules of Procedures of the ad hoc Tribunals, the ICTY and the ICTR, lacked reference to provisions on reparations other than brief mention to restitution, which remained inoperative and deferred compensation claims to national court. The treatment of victims and witnesses during the proceedings of the Tribunals has been subject to criticism. The disproportionate attention given to perpetrators and the continued disregard for victims in the aftermath of armed conflict has raised considerable concerns over the credibility and legitimacy of the kind of justice offered by international criminal law. Neglecting victims in transitional justice processes undermines efforts to promote reconciliation.

The adoption of the Rome Statute of the International Criminal Court in 1998 signalled a momentous change whereby victims and their rights were given prominent recognition. For the first time, the role of victims as participants in proceedings was acknowledged and their right to reparations was defined in a comprehensive manner as consisting of restitution, compensation and rehabilitation. Although still in draft form at the time, the Basic Principles on the Right to Reparation for Victims provided a foundation for the recognition of victims' rights during the adoption of the Rome Statute and the development of the Rules of Evidence and Procedure of the ICC.

The innovative creation of the Trust Fund of the ICC, which acts independently of investigations and the stage of proceedings of the Court, illustrates how concrete measures can be undertaken in order to reach victims. Although reparations cannot be formally awarded until the Court issues a conviction, nevertheless the Trust Fund has provided assistance for victims in the form of rehabilitation and livelihood opportunities. Such reparation measures are likely to have a considerable positive impact on changing the situation for victims, rather than rendering them entirely dependent on protracted international criminal proceedings. In societies where armed conflict has largely affected poor and vulnerable groups of society, reparations are an indispensable element of transitional justice in order for victims to be able to re-establish their dignity, resume their lives and participate on equal footing in society.

While the progress made with regards to victims' rights in the ICC is remarkable, numerous tensions and unresolved challenges remain. Among them are the divergent interests of victims versus the need for expediency in the criminal justice process. Irrespective of the recognition

given to victim participation, it is unlikely that international criminal proceedings will ever provide the adequate forum for victims to relate their experiences. While certain victims experience closure when testifying, others conclude that they are considered secondary to the interests and the objectives of the Court. Extensive victim participation will delay proceedings and sentences against individuals cannot address the questions relating to institutional and State responsibility which victims want to explore.

Reparation awards against convicted individuals are unlikely to be effectively implemented without a degree of recognition of State responsibility, which may be concurrent for those carrying the greatest responsibility for the crimes committed. As demonstrated by human rights mechanisms, State responsibility can also result from failure to show due diligence and prevent violations. From a victims' perspective, being able to present evidence against a specific individual, attend international trial proceeding and await the outcome of proceedings is something few victims of serious violations will be able to undertake. As is illustrated in the current ICC investigations in relation to Sudan, the concurrent application of State responsibility and international criminal law will have to be given further consideration.

Without disregard for the importance of judicial accountability, many victims perceive the concept of justice alien unless accompanied with reparations. The establishment of Trust Funds for victims, notably of the ICC, shows recognition of the importance that the right to reparations be implemented. Ideally, such Funds should be operated with some allocations by the State where the violations took place and in tandem with national reparations programmes. Trust Funds also offer the opportunity for the international community to demonstrate commitment to, and solidarity with, the victims. Regrettably, despite the precedent setting example of the Trust Fund of the ICC, similar initiatives have not been consistently established in other situations where hybrid criminal justice initiatives have been undertaken.

While important progress has been made with regard to victims' rights and reparations in international criminal justice, significant challenges remain in order to prove that victims are no longer an afterthought and to ensure that their rights are effectively enjoyed not only in law, but also in practice.

5. Conclusions Part I: Legal State of Play: Convergence of International Law and Reparation as an Individual Legal Right with Customary Recognition

Historically, international law viewed reparations as an inter-State measure. However, the convergence of a number of developments in international law over the past decades has produced important shifts. Part I of this thesis has identified the fundamental changes in State responsibility through the advancement of multiple treaty provisions in human rights law. Significant changes have also taken place in international humanitarian law and international criminal law, whereby victims' rights have gained recognition. Increasing cross-references and linkages between different branches of international law, in particular in relation to the rights of the individual, and the significant increase in State party ratifications of treaties, voluntarily undertaken over the past two decades, notably in the realm of human rights, are all indicative of such shifts. Furthermore, the establishment of numerous human rights monitoring mechanisms, at the international and regional level, points towards a universal acceptance by States of human rights obligations and responsibilities *vis-à-vis* the individual. Several of these provisions on human rights have acquired recognition as customary law, and in some cases, even as peremptory norms that the world community has a common interest in protecting. The jurisprudence of the International Court of Justice and the Articles on State Responsibility adopted by the International Law Commission in 2001[384] support this affirmation.

The logical consequence of the recognition of human rights as *jus cogens* implies that individuals appear as rights bearers or subjects in general international law. Having afforded individuals such standing in international law, the need to translate consequences of breaches, such as reparations, in favour of individual victims becomes apparent. The right of individuals to receive reparations for serious violations is an indispensable corollary in order to provide an effective remedy for the violations suffered. As noted by Higgins *"rights suppose a correlative obligation on the part of the State...without a remedy, a right may be but an empty shell."*[385] State responsibility entails positive duties and may be incurred also when the State has omitted or failed to demonstrate due diligence to prevent violations.

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[384] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Commission, 53rd session contained in the Official Records of the General Assembly, 56th session, Supplement no. 10, UN doc A/56/10, chap. IV.E.I

[385] Higgins, R, *Problems and Process, International Law and How We Use it,* Clarendon Press, Oxford, 1994

The concept of reparations has gradually evolved and consolidated through specific provisions in numerous treaties, in particular those of human rights, but also in humanitarian and criminal law. The dual and complementary nature of human rights and humanitarian law provisions has been affirmed, notably by the ICJ.[386] As noted in preceding chapters, the specific language on reparations in different treaties may vary in detail, however it is significant that such provisions exists in all major human rights treaties. Considerable jurisprudence at the international as well as regional level confirms a growing consensus regarding the elements and importance of reparations for the individual victim of serious human rights violations. State compliance with reparations awards varies, however within regional human rights systems where follow-up mechanisms on compliance exist (Europe and the Americas) compliance rates are relatively high.

The ICRC, following a lengthy and comprehensive study on State practice in relation to humanitarian law, concluded in 2005 that State responsibility to provide reparations has attained customary status.[387] While provisions regarding reparations for victims have developed at a slower pace in international criminal law and in particular in relation to the ad hoc tribunals, the importance of the ground-breaking reparations provisions, notably articles 75 and 79, in the Rome Statute of the International Criminal Court (1998) and the creation of its Trust Fund cannot be underestimated. Although the ad hoc Tribunals, the ICTY and the ICTR, largely disregarded victims and their rights in the criminal procedure, considerable recognition is given to victims in the provisions of the Rome Statute and the Trust Fund has proceeded to provide assistance for victims independently of investigations of the Court.

Parallel normative developments regarding reparations are also reflected in general international law, notably in recent jurisprudence of the International Court of Justice[388] and in the Articles on State Responsibility adopted by the International Law Commission in 2001.

The adoption of the Basic Principles on the Right to Reparation for Victims in 2006 following 15 years of negotiations, provided yet an important benchmark as these reflect the normative

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[386] *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo and Uganda), ICJ Report 2005
Further references on the mutually complementary and reinforcing nature of human rights and humanitarian law; *Report to the Human Rights Council of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict*, A/HRC/11/31, 2 June 2009

[387] Henckaerts, J-M and Doswald-Beck, L, *Customary International Humanitarian Law,* Cambridge University Press, 3 vol. 2005

[388] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004*, ICJ Report, paras. 145, 152-153

connection between international humanitarian and human rights law and synthesize and define the areas of reparations as consisting of; restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[389] While formally non-binding, the Principles reflect already established norms in international law. The status of the Principles is strengthened by the fact that they have already been widely cited and referred to, including when they were still in draft form, in jurisprudence by numerous human rights bodies. Furthermore, they figure in several recently adopted legal instruments[390] and, as will be explored in Part II of the thesis, have been referred to by a number of truth commissions and in national legislation in several countries. It is therefore submitted on the basis of the findings set forth in Part I of the thesis that State responsibility to provide reparations in favour of individuals has acquired certain customary standing.

While the legal basis for claiming the right to reparations for victims of serious human rights violations has become firmly entrenched, the preceding chapters in Part I acknowledge some of the challenges which have arisen and which remain in order to assert that the right can be effectively exercised in practice. The major challenge continues to be that of implementation. While human rights mechanisms have increased their efficiency, expanded their jurisprudence in the realm of reparations and sought to undertake measures to monitor compliance by States, these measures and mechanisms were not designed to address large numbers of victims in conflict situations. This worrisome lacuna needs to be addressed; the concept of State responsibility is maturing, alongside a customary right to receive reparations, yet it remains all too common that a national legal framework and forum to which victims can submit claims is lacking. While the provision of reparations remains primarily a State responsibility, the gap between international legal standards and their application represents a challenge to the international legal order and the international organisations entrusted with the promotion of human rights. The establishment of various trust funds for victims, both at the international and regional level, provides avenues for victims to present claims. However, their sustainability is dependant on voluntary funding by the international community and

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[389] *UN 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*, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted by the General Assembly without a vote on 21 March 2006, UN Doc. A/RES/60/147
For a full commentary and description of the *travaux preparatoires* of the Principles see; Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review*, Vol. 6, 2006, pp. 203-279

[390] The Rome Statute of the ICC contains an indirect reference to forthcoming principles in art. 75, they are also mentioned in the International Convention on the Protection of all Persons from Forced Disappearances, adopted in December 2006; http://untreaty.un.org/English/notpubl/IV_16_english.pdf

ultimately their impact is dependant on their ability to invoke the responsibility of concerned States and harmonise efforts with broader national measures to address reparations.

Jurisprudence on reparations by human rights Courts and entities set important precedents and standards; however major challenges are visible in their limited and stretched capacity to monitor compliance by States. Comprehensive measures are required to be undertaken at the national level in order to ensure that the number of beneficiaries is expanded and that the most vulnerable victims are identified and prioritised when it comes to redress claims. Transitional justice initiatives have gradually incorporated more emphasis on the rights of victims and sought to promote the adoption of national legislation and reparations programmes to that end. Part II of the thesis specifically seeks to explore such efforts, undertaken in collaboration and with support of the United Nations in a number of countries which have faced armed conflict, in order to compare and contrast the right to reparations and its application and enforcement in practice.

Part II
Transferring Standards into Reality

"In honouring the victim's 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 principles of accountability, justice and the rule of law."[391]

[391] *UN 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*, preamble, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted in the General Assembly without a vote on 21 March 2006, UN Doc. A/RES/60/147

6. The Role of the UN and Promotion Victims' Rights and Reparations in Practice

6.1 Introduction to Transitional Justice and Truth Commissions

Building on Part I of the thesis on legal standards and reparations provisions in different branches of international law, Part II seeks to apply the affirmed right of victims to reparations as a yardstick to assess the realisation of the right in practice. Transitional justice measures, such as truth commissions, have provided important impetus to the promotion of the right to reparations by creating forums for large-scale claims from victims of armed conflict. Truth commissions have permitted an assessment of the impact violations have had on victims and, through a victim participatory process, proposed recommendations for comprehensive reparations. Therefore, the second part of the thesis will explore the situation *de jure* and *de facto* by considering how actual post-conflict measures on the ground have managed to advance this right in practice. The overall aim is to consider to what extent State practice supports the argument that the right to reparations has customary status in international law.

Part II explores the aspects of reparations in four case studies (Guatemala, Sierra Leone, East Timor and Colombia) from different geographic regions that have suffered armed conflict and where the UN has played a significant role in promoting transitional justice initiatives. Given the key role of the UN in advocating for greater State responsibility *vis-à-vis* victims, the second part of this research will study to what extent it has been possible to provide reparations in practice through UN supported transitional justice processes and which factors have been decisive in promoting State responsibility and responsiveness to victims' claims for reparations. Brief mention will also be made of the unique reparations measures which formed part of the United Nations Compensation Commission.

Chapter 2 of Part I of the thesis identified State responsibility in international law to provide victims of grave or serious human rights violations with reparations. As noted in chapter 3 on human rights jurisprudence, the concept of reparations has benefited vastly from the expansion of case law of human rights bodies, both international and regional, during the past decades. Yet the main challenge remains in the limited applicability of such case law in countries where serious human rights and humanitarian law violations have taken place. International human rights courts and bodies, while important standard setters, were not conceived of for the purpose of dealing with large-scale claims and generally national

enforcement mechanisms are poor. Thus the impact of human rights jurisprudence is restricted due to the limited number of beneficiaries and the lack of systematic follow-up at the country level.

With regard to international criminal law, as noted in chapter 4, reparations have only been considered to a very limited extent in retributive accountability measures. The ad hoc Tribunals, ICTY and ICTR, largely disregarded victims and their rights in the criminal procedure. This has been addressed by the considerable recognition given to victims in the provisions of the Rome Statute of the International Criminal Court (ICC), however the practical implementation of these rights remains to be proven. Positive step have nevertheless been taken by the Trust Fund of the ICC, which has proceeded to provide assistance for victims, independently of investigations by the Court. The Extraordinary Chambers in the Courts of Cambodia are contributing to the recognition of victims' rights in international criminal law by allowing them to participate as a party during the proceedings and to present collective claims through associations of victims.

While the different branches of law over time have provided the essential legal framework for victims' right to reparations, their practical impact on the ground for the most affected victims has been limited. Meanwhile, the UN has been present on the ground in numerous conflict and post-conflict situations through peace mediation and peace-keeping operations. The UN, which is vested by the Charter with the authority and duty to maintain international peace and security in conformity with the principles of justice and international law, has faced and continues to face major challenges in promoting normative standards for victims in its operative work. The expanded role of the UN in peacekeeping missions,[392] and in post-conflict justice initiatives undertaken over the past fifteen years, underlines the importance played by the organisation in ensuring that State responsibility towards victims is not be abandoned during accountability and reconciliation processes.

In seeking new modalities to deal with the complex legacy of accountability in post-conflict countries, numerous countries have implemented transitional justice measures. As the rule of law and institutional judicial structures generally collapse during armed conflict, the UN has often been called upon to provide assistance in rebuilding their credibility. Transitional justice

[392] Report of the Secretary General to the General Assembly, "Investing in the United Nations, for a stronger Organisation worldwide", released 7 March 2006, A/60/692 details that; *"in the first 44 years of the history of the UN, only 18 peacekeeping missions were set up. In the 16 years since 1990, 42 new missions have been authorized"*, para. 4

measures have commonly been linked to peace agreements and to a varying and increasing degree involved the UN in their establishment and operation. Alongside the setting-up of the ad hoc Tribunals (as explored in Part I of the thesis), the UN has been instrumental in the establishment and operation of several truth commissions across the globe, initiated by the El Salvador Truth Commission, established by the peace accords in 1992. Experiences over time have lead to the acknowledgement that;

"the United Nations must assess and respect the interests of victims in the design and operation of transitional justice measures. Victims and the organisations that advocate on their behalf deserve the greatest attention from the international community".[393]

Research conducted on transitional justice mechanisms only started to focus on the issue of reparations during the past few years and in particular since the adoption of the Basic Principles on the Right to Reparation for Victims in 2006.[394] Hayner was among the first to conduct comparative international research on truth commissions.[395] As non-judicial accountability mechanisms such as truth commissions were originally seen as a trade off regarding accountability, the initial debate focused on the dichotomy of *"truth versus justice"* and explored issues relating to impunity, amnesties and the potential of achieving reconciliation.[396] Wilson underlined the importance that truth commissions not compromise fundamental human rights norms and the expectations and rights of victims by allowing

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[393] Report of the Secretary General to the Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc. S/2004/616, 23 August 2004, p. 7

[394] Prominent examples of such recent research include;
De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations,* Intersentia, Antwerpen, 2005
De Greiff, P, (ed.) *The Handbook of Reparations,* Oxford University Press, 2006
Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009

[395] Hayner, P, *Unspeakable Truths, Confronting State Terror and Atrocity, How Truth Commissions around the World are Challenging the Past and Shaping the Future,* Routledge, 2001 also
Hayner, P, "Fifteen Truth Commissions 1974 to 1994: A Comparative Study", *Human Rights Quarterly,* Vol.16, 1994, pp. 597-655.
Hayner, P, "Commissioning the Truth: Further Research Questions", *Third World Quarterly,* Vol. 17, 1996, pp. 19-29
Notable in this regard is also the research done by the International Center for Transitional Justice, webpage www.ictj.org

[396] Barahona de Brito, A, Gonzalez Enriquez, C and Aguilar, P (eds.), *The Politics of Memory, Transitional Justice in Democratizing Societies,* Oxford University Press, 2001
Minow, M, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence.* Boston, Beacon Press, 1998
McAdams, A. J, (ed), *Transitional Justice and the Rule of Law in New Democracies,* University of Notre Dame Press, 1997
Kritz, N, (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes.* 3 vols. Washington: U.S. Institute of Peace Press, 1995
Rigby, A, *Justice and Reconciliation after Violent Conflict,* Rienner Pub, 2001
Rotberg, R and Thompson, D, (eds.), *Truth v. Justice, The Morality of Truth Commissions,* Princeton University Press, 2000

political interests to take precedence.[397] Cohen emphasised the importance that victims be fully aware and informed about the circumstances of the violations they are expected to forgive.[398] Mendez has firmly argued in favour of the right to truth for victims.[399]

Over time, critique of international tribunals for their lack of consideration for victims in judicial proceedings and the recognition of the value of victim participation in transitional justice mechanisms,[400] lead to a reassessment of the role played by truth commissions. This has been reflected in a gradual recognition that transitional justice measures, consisting of both tribunals for accountability and truth commissions for victim participation, may be complementary in the overall pursuit of justice.[401]

Unlike criminal investigations, truth commissions are set up to establish a comprehensive public record of large scale abuses which have taken place during a determined period in the past, commonly during a period of internal armed conflict or dictatorship. The findings of truth commissions are presented with an analysis of the instigating factors and circumstances surrounding the violence in order to paint an overall picture and suggest specific as well as comprehensive recommendations. Unlike during prosecutions, the victims and witnesses play an active and central role in providing testimony, either in public or in private, of their personal experience of abuses. As such, truth commissions assist in overcoming the inherent limitations of criminal justice processes,[402] in particular by addressing the needs of victims

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[397] Wilson, R, The Politics of Truth and Reconciliation in South Africa, Legitimising the Post-Apartheid State, Cambridge University Press, 2001

[398] Cohen, S, "State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past", *Law and Social Inquiry,* Vol. 20, No.1, 1995

[399] Méndez, J, "Accountability for Past Abuses", *Human Rights Quarterly*, Vol. 19, 1997, pp. 255-282

[400] Zacklin, R, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, No. 2, 2004, pp. 541-545

Stover, E "Witnesses and the Promise of Justice in the Hague" in Stover and Weinstein (eds.) *My Neighbour, My Enemy, Justice and Community in the Aftermath of Mass Atrocity",* Cambridge University Press, 2004, pp. 104-120

Haslam, E, "Victim Participation at the International Criminal Court, A Triumph of Hope over Experience" in McGoldrick, D, Rome, P and Donnelly, E (eds.), *The Permanent International Criminal Court, Legal and Policy Issues,* Hart Publishing, Oxford, 2004, pp. 315-334

Fletcher, L and Weinstein, H, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation", *Human Rights Quarterly,* 24, 2002, pp. 573-639

[401] Goldstone, R, "Advancing the Cause of Human Rights: The Need for Justice and Accountability", in Power, S and Allison, G, *Realising Human Rights, Moving from Inspiration to Impact*, St. Martin Press, 2000, chapter 9

Stahn, C, "United Nations peace-building, amnesties and alternative forms of justice: A change in practice" in *International Review of the Red Cross (IRRC)*, Vol. 84, No. 845, March 2002, pp. 191-205

Schabas, W, "The Relationship between Truth Commissions and Courts: The Case of Sierra Leone", paper presented at conference on the Inter-Relationship between Truth Commissions and Courts, Galway, 4 October 2002

[402] Zacklin, R, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, No. 2, 2004, pp. 541-545 states; "*Criminal Courts exist for the purpose of establishing individual accountability- not to uncover the fates and remains of loved ones. Nor is it their purpose to provide an official history...Even less*

and their relatives, by the establishment of a comprehensive historical record and by issuing policy-oriented recommendations for reparations.[403]

Truth commissions initially set out as nationally driven processes and originated from the South Cone of Latin America. While the concept of truth commissions has been adopted as a transitional justice mechanism by the international community, it is important to note that the establishment of such inquiries requires approval and sanctioning, although this may be conceded reluctantly, by the State concerned in order to gain official status and recognition.[404]. In attempting to comprehensively address past wrongs in large-scale and complex situations of conflict, it is imperative to assess the extent of the violations and if possible identify institutional structures and root causes which enabled the violence. To ensure that such an assessment is as neutral and multifaceted as possible, while ensuring the participation of victims, is a principal challenge. Over the past two decades, it has been recognised that involvement of the international community, notably the UN, in the conduct of inquiries and truth commissions has been crucial to underline their neutrality.[405] Over time, the value of mechanisms such as truth commissions has been recognised as they have provided a solid basis for the elaboration of reparations measures to comprehensively deal with past violations, specifically taking into account the needs of victims. This is further elaborated in the subsequent case studies in the chapters in Part II.

Transitional justice mechanisms have often been assessed by scholars by way of comparison of their mandates or according to the perception of reconciliation achieved. More recently, studies based on direct interviews with victims of armed conflict demonstrate that reparations are a key priority for those affected by serious violations and en essential element in order to undertake more long-term evaluations of the impact of transitional justice mechanisms.[406] It is

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so is the awarding of compensation for victims... the Tribunal (ICTY) itself is not sufficient to promote reconciliation. Additional mechanisms, such as functioning national courts and Truth Commissions are needed"

[403] Report of the Secretary General to the Security Council, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc. S/2004/616, 23 August 2004, p. 15

[404] Hayner, P, *Unspeakable Truths, Confronting State Terror and Atrocity, How Truth Commissions around the World are Challenging the Past and Shaping the Future,* Routledge, 2001, p.14

[405] Examples of Truth Commissions which the United Nations has assisted in setting up at the national level include; El Salvador 1992, Guatemala 1996, East Timor 2001 and Sierra Leone 2002. In additional, it should be noted the UN, through OHCHR, is increasingly being requested to undertake investigative missions to assess serious and systematic human rights violations in the context of internal unrest and armed conflict, for example in Sudan 2004 and Kenya 2008.

[406] OHCHR, *Making Peace Our Own, Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda,* 2007

OHCHR Uganda Office Annual Report of the Office of the High Commissioner for Human Rights to the Human Rights Council for 2007, A7HRC/7/38/Add.2

ICTJ, *Unfulfilled Expectations, Victims Perceptions of Justice and Reparations in Timor-Leste*, February 2010

submitted that future research should consult victims directly and seek to establish a more comprehensive overview of the degree and kind of reparations awarded to victims as this is a key indicator of the State's willingness to accept responsibility for past violations, even if by manner of succession. Although the gravity of the harm cannot be undone, certain reparations are a prerequisite in order for victims to be able to resume their lives. The civilians most affected in armed conflict are commonly among the most vulnerable and voiceless in society. Without attempts to repair the harm they have suffered, the violations committed will perpetuate their exclusion in society and become continuous impediments to their ability to enjoy and exercise their rights on equal footing with others.

While the importance of the issue of reparations is gaining recognition, there is still only limited research and studies on the practical implementation of this right, in particular after armed conflict.[407] Different stakeholders, importantly among these the victims themselves, are likely to express reservations in relation to transitional justice mechanisms, whether tribunals or truth commissions, as long as their achievements in the area of reparations remains neglected and unmonitored.

Part II of this thesis explores, through case studies, four such transitional justice measures and the extent to which they have managed to promote State responsibility for providing reparations. This first chapter of Part II of the thesis has briefly introduced the notions of transitional justice and truth commissions. The contribution of four specific Truth Commissions in the realm of reparations is explored through the subsequent case studies; Guatemala, Sierra Leone, East Timor and Colombia over the period of a decade from 1999 to 2009. The selected case studies consider the issue of reparations in peace agreements, as well as in statutes of transitional justice mechanisms, notably truth commissions, and in their final report. The degree to which UN peacekeeping presences or other UN entities have followed-up on reparations in consultation with authorities is studied.

ICTJ, *Perceptions and Opinions of Colombians regarding truth, justice and reconciliation*, Survey 2006 http://www.ictj.org/en/where/region2/514.html available 20 February 2009

[407] Examples of recent research on the degree of implementation of the right to reparations in post-conflict contexts include;
Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers, Leiden, 2009
De Greiff, P (ed.), *The Handbook of Reparations*, Oxford University Press, 2006.
De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, Antwerpen, 2005
Rombouts, H, Victim Organisations and the Politics of Reparation: a Case Study on Rwanda, Intersentia, Antwerp, 2004

The impact of the Truth Commission reports is analysed as well as the degree to which there has been political will to implement the recommendations of the reports. The case studies note the national developments that have taken place with regard to legislation and policies or programmes in relation to reparations and explore practical challenges in developing reparations programmes. The relationship between truth commissions and criminal accountability initiatives is considered. When reparations measures have been adopted, attention is given to which push and pull factors were applicable in the national circumstances, such as the degree to which international and regional human rights mechanisms have influenced national reparations policies and the strength of civil society and victims' organisations. The case studies identify the reparations measures provided or deemed to be priority in future programmes and which victims are most likely to be favoured or excluded. Furthermore, the case studies discuss the obligations of non-State actors and study the degree of responsibility assumed by States for such violations.

As will be documented, the Truth Commissions have made significant contributions to the practical realisation of the right to reparations for victims following armed conflict. However, the follow-up given by States to the Truth Commission recommendations has generally disappointed victims. Nevertheless, the recommendations for reparations measures contained in the Truth Commission reports remain a comprehensive platform for future action. The case studies indicate that although recognition by the State may not be immediately forthcoming, the Truth Commission recommendations for reparations continue to carry weight in policy making and international relations through insistent lobbying by civil society.

Notably, the case study of Guatemala illustrates that despite initial government hostility to the Truth Commission recommendations and its deliberate intents to ignore those relating to reparations, subsequent governments have made significant policy changes in this area. The case studies of Sierra Leone and East Timor highlight the challenges involved in undertaking parallel transitional justice initiatives without coordination regarding the issue of reparations. Colombia illustrates the impact coordinated international, regional and national pressure can have on the public discourse and domestic legislation on reparations. Thus, as subsequently described in the case studies, there is an emerging shift in State practice towards not only recognition in law but also in implementation regarding the responsibility of the State to provide reparations for victims of armed conflict.

A common element among the countries selected as case studies is their commitment to international human rights and humanitarian law. Guatemala, Colombia, Sierra Leone and East Timor are all States parties to the following human rights treaties; CERD, CCPR, CESCR, CAT, CEDAW, CRC and its Optional Protocol on the involvement of children I armed conflict (CRC-OPAC). With regard to humanitarian law, the four selected countries are all parties to the Geneva Conventions as well as their Additional Protocols I and II. Three of the countries; Sierra Leone, Colombia and East Timor have ratified the Rome Statute of the International Criminal Court, while Guatemala has yet to do so. The focus on the study is on reparations for serious violations in armed conflict, which in any case are recognised as customary obligations as set forth in chapter 1 of the thesis. The Basic Principles on the Right to Reparation for Victims link to these violations, which in the Principles are described as gross and serious violations of human rights and humanitarian law. The States' explicit undertakings, by way of ratifications, in the realms of international human rights, humanitarian and criminal law underline their acceptance of State responsibility for reparations to victims. In all four case studies, the Truth Commission reports have made clear references to applicable human rights and humanitarian law standards. These specific references, as well as their translation into national policy and legislation, are explored in further detail in the case studies. When applicable, attempts to issue national amnesties have been explored as have their impact on the issue of reparations.

Before embarking on the case studies, the following pages give a brief introduction of the unique reparations modalities of the United Nations Compensation Commission (UNCC) as it demonstrates the potential role the UN could play in implementing the right to reparations in practice. However, the unprecedented operational modalities of the UNCC have not been repeated in other instances as the Security Council has failed to endorse subsequent initiatives, notably the recommendation for a compensation commission in Darfur.

6.2 The United Nations Compensation Commission

Although the UNCC[408] was set up under challenging and politicised circumstances, it was an innovative mass claims mechanism and it is worthwhile noting some of its particular features which are of direct relevance to the right of victims to seek reparations for violations that have taken place in the context of armed conflict. Experiences of the UNCC are of relevance for

[408] Official webpage of the United National Compensation Commission; www.uncc.ch , *last visited 15 April 2010*

mass claims processes which are gradually being established at the national level, in certain situations subsequent to truth commission recommendations, as is further documented in Part II of the thesis. Furthermore, the practices of the UNCC may also provide useful references in the context of the emerging challenges which face the International Criminal Court and its Trust Fund. It is also relevant in view of the various trust funds which are being established or considered in conjunction with human rights mechanisms, both at the international and regional level (as set out in Part I of the thesis).

The Security Council established the Compensation Commission and the Fund it was to administer in 1991[409], only a few weeks following the end of the Iraqi occupation of Kuwait. The decision of the Security Council to set up the Commission followed a series of resolutions and referred back to the official recognition of responsibility that was made by Iraq. Security Council resolution 687 affirmed that;

"Iraq...is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's unlawful invasion and occupation of Kuwait". [410]

Despite the political and legal controversy during and after its establishment[411], the Compensation Commission sets a unique precedent in international law as the first mechanism created by the UN whereby individual victims could claim compensation for violations in armed conflict. The Commission was established as a subsidiary organ to the Security Council, its Governing Council mirrored the composition of the Security Council while the determination of the claims were made by independent and geographically diverse panels of Commissioners for whom a Secretariat reviewed and prepared the claims.[412]

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[409] Security Council Resolution No. 687 of 3 April 1991 and Security Council Resolution No. 692 of 20 May 1991

[410] Security Council Resolution No. 687, paragraph 16

[411] Caron, D and Morris, B, "The UN Compensation Commission, Practical Justice, not Retribution", *European Journal of International Law*, 2002, Vol. 13, No. 1, pp. 183-199
Gattini, A "The UN Compensation Commission: Old Rules, New Procedures on War Reparations" *European Journal of International Law*, 2002, Vol. 13, No. 1, pp. 161-181
Christenson, G "State Responsibility and UN Compensation Commission: Compensating Victims of Crimes of State" in Lillich, R, *The United Nations Compensation Commission*, Transnational Publishers, NY, 1995, pp 311-364
Bederman, D, "Historic Analogues of the UN Compensation Commission" in Lillich, R, *The United Nations Compensation Commission*, Transnational Publishers, NY, 1995, pp 257-308

[412] Van Houtte, H, Das, H and Delmartino, B "The United Nations Compensation Commission" in De Greiff, P, (ed.) *The Handbook of Reparations*, Oxford University Press, 2006, pp 322- 389

As noted by the Secretary General in his report of May 2 of 1991 "*The Commission is not a court or an arbitral tribunal before which the parties appear, it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims.*"[413]

The Commission was mandated to offer compensation to individuals, governments, corporations and international organisations. Individuals could not petition the Commission directly but had to submit their claims through their governments. However, the system was not based on the diplomacy principle as individuals themselves rather than States were considered as beneficiaries. The rules specifically stipulated that States were under an obligation to distribute the compensation awards to individuals. It should be noted that certain governments presented claims by refugees and asylum-seekers. International organisations, notably the United Nations Development Programme (UNDP), the United Nations High Commissioner for Refugees (UNHCR) and the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) submitted claims, in total some 3'000, on behalf of individuals, in particular of stateless persons.[414]

The Compensation Commission received some 2.7 million claims and defined 6 categories (A to F) for processing the awards. Categories A to C referred to claims by individuals. More specifically, category A claims were submitted by individuals who were forced to abandon Kuwait or Iraq between August 1990 and March 1991. Category B included claims from individuals for serious personal injury and death. Category C included claims for all types of individual loss, including non-pecuniary losses such as mental pain and anguish, up to US$ 100'000. The other categories included claims, primarily large-scale ones, from corporations, governments and international organisations.

The UNCC did not define violations in accordance with human right or humanitarian law. However, individual claims in the categories A to C were processed as a priority on humanitarian grounds.[415] All category B claims were paid in full by the end of 1996.[416] It has

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[413] *Report of the Secretary General of 2 May 1991 Pursuant to Article 19 of Security Council Resolution 687*, UN Doc. S/22559

[414] Taylor, L, "the United Nations Compensation Commission, in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp. 197-214
Caron, D and Morris, B, op. cit. p. 188

[415] Decisions of the Governing Council of the UNCC on criteria for expediting urgent claims and definition of personal injury and mental pain and anguish, UN Docs. S/AC.26/1991/1 , S/AC.26/1991/3

[416] Van Houtte, H, Das, H and Delmartino, B, op. cit. p. 360

been noted that; *"the first phase of the UNCC's work is one of the most significant and underreported success stories of the United Nations. Over two and a half million A, B and C claims were filed. The merits in all these claims were determined and the monies awarded were paid to the individual claimants within less than 10 years after the liberation of Kuwait".*[417]

The claims awarded in the above categories were defined according to fixed amounts and modest given the gravity of the violations. For categories A and B, the sum was set at USD 2'500 per individual and category. In category B the total amount for a family was established at USD 10'000. Some 90 nationalities, Iraqis excluded, submitted claims to the Commission and it should be noted that a substantial number of the beneficiaries were foreign workers who were forced to flee during the invasion. The largest number of category A claims came from Egypt, India and Sri Lanka.[418] Fixed amounts and lenient standards of proof were established to provide a speedy and effective remedy based on equal treatment and humanitarian urgency.[419]

In this context, it is worthwhile noting that Kälin, the UN Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, following two investigative missions *in situ,* affirmed in his report in 1992 the responsibility of Iraq for gross and systematic human rights violations during the conflict as well as for breaches of humanitarian norms, including summary and arbitrary executions, widespread and systematic torture and the deportation of large numbers of civilians to Iraq. The Special Rapporteur supported the establishment of the Fund for compensation and urged it to interpret its mandate broadly in order to include compensation for both material and non-material damages, in accordance with the international law principle of compensation for victims of human rights violations.[420]

The funding of the UNCC was a unique characteristic and a major source of controversy surrounding its operation. The Security Council, following a recommendation of the Secretary General, determined that the funding for the UNCC would come from 30 percent (later 25 percent) of the annual Iraqi oil export revenue, and as such was part of the framework of the

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[417] Caron, D and Morris, B, op. cit p. 188
[418] Ibid.
[419] Van Houtte, H, Das, H and Delmartino, B, op. cit. p. 371
[420] UN Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Reports to the Commission on Human Rights E/CN.4/1992/26, paras. 240-262
Discussed in Shelton, D, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 2nd edition, 2005, pp. 404-405

so-called Oil for Food programme.[421] In determining the amount to be diverted to the Commission, a number of considerations regarding the Iraqi economy were taken into account, such as previous military expenditure, foreign debt payments and requirements of the population.[422]

Nevertheless, the manner in which the Compensation Fund was financed lead to critique on the basis that it formed part of a politically motivated sanctions regime. In particular, the negative impact that the Oil for Food programme had on the Iraqi civilian population has been widely criticised as being punitive. It has also been noted that among the large-scale claims by companies to the UNCC, there was a pre-dominance of US and Kuwaiti submissions.[423] This in turn raised critique that the UNCC, although operating under the authority of the Security Council, was a form of victors' justice in violation of due process. Although certain procedural aspects of the UNCC have been subject to critique, the State responsibility of Iraq for compensation has generally not been questioned.[424] It has also been noted as an inconsistency that some States, who have raised critique against the UNCC, are also creditors who have at the same time continued to pursue pre Gulf War debts against Iraq.[425]

It is submitted that although the UNCC was created under particular political circumstances and financed in a controversial manner through Iraqi oil revenues, the UNCC provided an exceptional example which highlights the Security Council position regarding State responsibility to provide victims with reparations and demonstrated the capacity of the UN to implement, in a relatively expedient manner and on a large scale, the right of victims to reparations. Despite the lack of clear references to violations of human rights and humanitarian law in the mandate of the Commission, in its practice it interpreted that the remedy of violations affecting individual civilian victims was a priority. It has been noted that *"the privileged position of the individual in the UNCC system is to be welcomed as possibly the most significant contribution of the UNCC to the development of international law in the field of claims settlement."*[426]

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[421] Security Council resolution 705 of 15 August 1991
[422] Caron, D and Morris, B, op. cit p. 197 and Van Houtte, H, Das, H and Delmartino, B, op. cit. p. 363
[423] Shelton, op. cit. p. 410
[424] Christenson, G "State Responsibility and UN Compensation Commission: Compensating Victims of Crimes of State, op.cit.
Frigessi di Rattalma, M and Treves, T (eds.) *The United Nations Compensation Commission, A Handbook,* Kluwer Law international, 1999, pp. 30-37
[425] Caron, D and Morris, B, op. cit p. 198
[426] Gattini, A , op.cit., pp. 170, 181

6.3 Compensation in Darfur?

Regrettably, despite the invocation of State responsibility to provide compensation for victims in the creation of the UNCC, the Security Council has not given equal priority to this issue when confronted with subsequent conflicts in other parts of the world. This is most blatantly demonstrated in the case of Darfur in Sudan. The 2005 Report of the Commission of Inquiry, appointed by the Secretary General, made two specific recommendations regarding measures to be taken by the Security Council.[427] One was referral of the situation in Darfur to the ICC and the other was the establishment of a compensation commission. The Report specifically stated that such a compensation commission should be considered as a complementary measure to that of the referral to the ICC. The Report underlined "*States have the obligation to act not only against the perpetrators, but also on behalf of victims.*"[428]

The Security Council endorsed the referral of the situation in Darfur to the ICC in resolution 1593 but failed to acknowledge the recommendation from the Commission of Inquiry regarding the establishment of an international compensation commission.[429] Only a timid reference in the preamble of the resolution hints at the issue; "*recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims*". The indirect mention of the Trust Fund for Victims is the only mention of the word "victims", while the terms "compensation" or "reparation" do not figure at all in the resolution. Scholars and the public debate at the time mainly focused on the political dimensions of the referral to the ICC, while the recommendation regarding compensation was treated as a peripheral issue.[430]

The continued lack of reparations remains among the pending debts owed to the victims in Darfur. The Darfur Peace Agreement signed on 6 May 2006 makes explicit reference to the

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[427] *Report of the Commission of Inquiry on Darfur to the Secretary General,* Submission of the Report to the Security Council, UN Doc. S/2005/60, 1 February 2005, paras. 590-603

[428] Ibid. para. 590

[429] *Security Council Resolution No. 1593 on referral of the situation in Darfur to the ICC,* UN. Doc S/RES/1593, Adopted 31 March 2005

[430] Cryer, R, "Sudan, Resolution 1593 and International Criminal Justice", *Leiden Journal of International Law*, Vol. 19, 2006, pp.195-222
Schabas, W, "Darfur and the 'Odious Scourge': the Commission of Inquiry's Findings on Genocide", *Leiden Journal of International Law*, Vol. 18, 2005, pp. 871-885
Tomuschat is a notable exception, he explicitly argued against the creation of a Compensation Comission, see reference to certain of his arguments in chapter 1 of this thesis; Tomuschat, C "Darfur-Compensation for the Victims" in *Journal of International Criminal Justice,* Vol. 3, 2005, pp. 579-589
See references on the neglect of victims' rights in Darfur; *Report to the Human Rights Council of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict,* A/HRC/11/31, 2 June 2009, para.39

creation of a compensation commission; this was a likely echo from the unheeded recommendations of the 2005 Commission of Inquiry. While the Security Council did not initially acknowledge reparations, it is significant that the mandate of the peacekeeping operation in Darfur, UNAMID, established in 2007 by the Security Council resolution 1769, contains specific reference to the need to focus on compensation.[431] Also in 2007, the Human Rights Council mandated a High Level Mission to asses the human rights situation in Sudan. Their mission report identified compensation for victims in Darfur as one of the six critical areas which needed to be addressed in order to improve the human rights situation.[432] Furthermore, the Human Rights Committee, following its review of Sudan in 2007, identified the lack of reparations and compensation for victims, especially in Darfur, among its principal concerns.[433]

While UNAMID continues to promote compensation for victims in its dialogue with local authorities, progress on the ground in Darfur has been slow. Ongoing conflict and the lack of Sudanese cooperation with the ICC make it difficult for the Trust Fund to access victims in the region. However, experiences in Darfur highlight the importance that State responsibility and reparations be kept squarely on the agenda. While reparations may be slow in coming to Darfur, it is crucial that human rights mechanisms and the international community retain significant pressure on the issue of reparations in order to signal that victims are no longer considered to be of secondary importance in international justice.

[431] *Security Council Resolution No. 1769 on the establishment of UNAMID*, UN. Doc. S/RES/1769, Adopted 31 July 2007, http://www.un.org/en/peacekeeping/missions/unamid/mandate.shtml *last visited 25 April 2010*
[432] *Report of the High-Level Mission on the situation of human rights in Darfur pursuant to Human Rights Council decision S-4/101*, UN. Doc. A/HRC/4/80, 9 March 2007
[433] CCPR Concluding Observations on Sudan, August 2007, CCPR/C/SDN/CO/3, paras 9 and 11

7. Case Study: Reparations in Guatemala

7.1 Introduction

The first case study to be explored in Part II of the thesis is Guatemala and the recommendations issued in relation to reparations by the Truth Commission operating there between 1997 and 1999. The rationale for choosing Guatemala as one of the case studies is that it represents one of the first instances where the international community supported a truth commission and provides an opportunity to study the degree of follow-up during the past ten years. The Truth Commission's final report contained a strong and comprehensive set of recommendations; however the implementation of these has been slow and inadequate.

Nevertheless, despite having been issued a decade ago, the recommendations of the Truth Commission continue to figure as a platform for action for human rights and victims' organisation. Through legal and political international human rights mechanisms, Guatemala continues to receive pressure to ensure their effective implementation. The aim of this chapter is to look closer into the extent to which reparations figured in the peace process and transitional justice mechanisms and which have been the key factors to advance the realisation of reparations in practice. Notably, the post-conflict context in Guatemala was marked by a strong UN presence through a UN peace building mission between 1994 to 2004, the continued presence of an OHCHR country office and the gradually increased engagement with international human rights mechanisms. The Inter-American human rights system has played a particularly strong catalyst role in promoting reparations for victims of the armed conflict and has been a strong influence in the national debate on this issue.

The Truth Commission in Guatemala built on previous experiences from Truth Commissions in Latin America, notably in Argentina, Chile and El Salvador.[434] In the cases of El Salvador and Guatemala, the Truth Commissions were established by the peace accords that ended the internal armed conflicts and the UN played an instrumental role in their establishment and operation. The unprecedented involvement of the UN in the Truth Commissions in El Salvador and Guatemala represented the first occasions when the UN officially sponsored and set up Truth Commissions as transitional justice mechanisms.

[434] Popkin, M, and Roht-Arriaza, N, "Truth as Justice: Investigatory Commissions in Latin America", *Law and Social Inquiry: The Journal of the American Bar Foundation* Vol. 20, No. 1, 1995, pp. 79-116

7.2 Brief Historical Background

The origins of the armed conflict in Guatemala can be traced back to the longstanding racial and social exclusion of the indigenous majority by the ladino minority.[435] To a large extent, the conflict was also a consequence of US Cold War policies. In 1954, a CIA sponsored coup overthrew the democratically elected president after he had attempted to initiate one of the first agrarian land reforms in Latin America. A series of military dictatorships followed, all of which received significant military support from the US.

Initial popular protest movements by farmers, students, trade unionists and left wing sympathisers were crushed and turned to clandestine guerrilla activities. State sponsored death squads persecuted left wing sympathisers and large-scale offensives were launched against rural indigenous communities. The violence peaked in the 1980s. Indigenous youth were systematically recruited from indigenous communities and forced to participate as paramilitaries, *Patrullas de Autodefensa Civil (PAC).* A deliberate policy of disintegration of the indigenous peoples was conducted through the PAC, who were responsible for some of the most brutal atrocities against their own communities. The legacy of distrust and division among indigenous communities remains tangible today; decades after the violations took place. Hundreds of massacres took place among indigenous communities, whole villages were exterminated through a scorched earth policy, women and girls raped on a large scale, pregnant women were tortured to death and children murdered in front of their parents. Around a million fled across the border to Mexico as refugees. Priests were also targeted due to their participation in the liberation theology movement.

In 1985, a new Constitution was adopted and elections brought the first civilian president in two decades. New institutions were created such as the Congressional Human Rights Commission and the Human Rights Ombudsman, the latter was given a wide reaching mandate to investigate violations and promote legal action.[436] However, large scale human rights violations persisted. The Ombudsman, despite its strong mandate, proved a facade intended to placate the international community. Civil society and human rights organisations

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[435] O'Kane, T, *In Focus Guatemala, A Guide to the People, Politics and Culture,* Latin America Bureau, UK, 1999
Simon, JM, *Guatemala; Eternal Spring, Eternal Tyranny,* WW Norton & Company, NY, 1987
Ball, P, Kobrak,P and Spirer, H, *State Violence in Guatemala, 1960 –1996; A Qualitative Reflection,* AAAS, 1999

[436] Guatemalan National Law, Decree 54-86, article 13,14 (a copy of the law is held by author)

were repressed, auto censorship ruled in the media and several prominent human rights defenders, such as Myrna Mack, were executed by government agents.

7.3 Peace Negotiations

The peace talks between the Guatemalan government and the guerrilla movement, the Guatemalan National Revolutionary Unity (URNG), started in the late 1980s. In fact, the guerrilla movement in Guatemala, unlike its counterparts in Colombia, was never a particularly strong force and was only integrated by a few thousand members. During the early 1990s a series of peace accords were negotiated through UN meditation. In 1996, the final agreement was signed and brought all previous accords into force. In total thirteen agreements were signed committing the Guatemalan government to a comprehensive agenda for building a more democratic state. Major issues covered by the separate agreements related to human rights, judicial reforms, resettlement of the displaced, demobilisation of the guerrilla, reduction and restructuring of the army, the status of the indigenous population.[437] References to human rights appear in several of the agreements and there is a significant overlap of issues relating to the rights of victims of the armed conflict.[438]

The Comprehensive Agreement on Human Rights was the only agreement to enter into effect immediately upon signing in 1994. It affirms a commitment to end impunity and in section VIII recognises *"that it is a humanitarian duty to compensate and/or assist victims of violations. Said compensation shall be effected by means of government measures and programmes of a civilian and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social position".*[439]

The same agreement established a UN verification mission, MINUGUA, which was set up the same year and remained in operation during a decade, during which it played a key role in monitoring and reporting on the implementation of the peace accords. OHCHR, upon invitation of the government, opened a small office in Guatemala in the late 1990s, primarily focused on the provision of technical cooperation. Following the closing of the MINUGUA mission in 2004, OHCHR has been given a more active role in monitoring human rights.

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[437] *The Guatemala Peace Agreements,* UN Publication, NY,1998

[438] International Council on Human Rights Policy, *Negotiating Justice, Human Rights and Peace Agreements,* Geneva, 2006, pp.28-30

[439] *The Guatemala Peace Agreements,* UN Publication, NY, 1998, "Comprehensive Agreement on Human Rights", section VIII, p. 28

7.4 Establishment and Mandate of the Truth Commission

In 1994, a separate agreement to establish the Historical Clarification Commission (CEH) was signed. The Clarification Commission was expected to cover over three decades of internal armed conflict from the early 1960s until the signing of the final peace agreement in 1996.

The agreement on the Basis for the Legal Integration of the URNG, concluded in 1996, refers to the importance that the Clarification Commission ensure that the truth be known in order to avoid repetition of events. Paragraph 19 of the same agreement notes that *"on the principle that any violation of human rights entitles the victim to obtain redress and imposes on the State the duty to make reparation, the (National Reconciliation) Act shall assign to a State body responsibility for implementing a public policy of compensation for and/or assistance for the victims of human rights violations. The body in question shall take into consideration the recommendations to be formulated in this regard by the Clarification Commission."* Thus, the issue of reparations figures prominently in several of the peace agreements that affirm the duty of the State to provide reparations to victims and foresee the establishment of a government programme for this purpose. However, it should be noted that the exact wording refers to *"compensation and/or assistance"*, which leaves some room for interpretation and speculation whether assistance and not compensation would suffice.

With regard to the Clarification Commission, its mandate specifically set out three goals;

1. *"To clarify with all objectivity, equity and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict.*

2. *To prepare a report that will contain the findings of the investigations carried out and provide objective information regarding events during this period covering all factors, internal as well as external.*

3. *Formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights and to strengthen the democratic process."*[440]

Unlike other Truth Commissions previously established, the mandate specified that abuses to be investigated were *"human rights violations causing the population to suffer"*, without a qualifying element to only include the most serious acts of violence. This meant there was no

[440] *The Guatemala Peace Agreements*, UN Publication, NY, 1998, "Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer", p. 54

doubt that torture practices would be investigated.[441] On the other hand, it set an impossible task for the Commission as it was expected to cover a period of over 30 years. Finally, the Commission determined that priority had to be given to attacks on life and personal integrity, in particular extrajudicial executions, forced disappearances and sexual violations.[442]

A significant restraint on the work of the Commission was the inclusion of clause in the agreement specifying that it "*not attribute responsibility to any individual in its work, recommendations and report, nor shall these have any judicial aim or effect*".[443] In particular, the final phrase severely crippled the expectations of the Commission and caused significant concern disappointment among human rights and victims organisations. However, the international member of the Commission, Prof. Tomuschat, affirmed upon termination of the report that "*it would be totally inappropriate to maintain that the report can never serve as evidence if and when its findings may determine the outcome of proceedings. It is the relevant rules of procedure that must be used to determine whether such indirect proof can be relied upon in a case*".[444]

7.5 Operational Aspects of the Historical Clarification Commission

The Commission was finally set up in 1997 and operated for two years before delivering its final report. The Commission was headed by three members, one was appointed by the Secretary-General of the United Nations and the other two were Guatemalans, one of whom was selected by the national university presidents. In total, more than 250 professionals were contracted by the Commission, about half of them Guatemalan and the other half foreign, from more than 30 different countries. Among the specialists hired were e.g. anthropologists, political scientists, lawyers, military experts, human rights workers and translators. The Commission faced substantial challenges regarding translations as the indigenous communities speak over twenty different languages.

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[441] The 1991 national Truth Commission in Chile focused on victims who had been killed or disappeared, excluding torture victims from its mandate, see Popkin, M, and Roht-Arriaza, N "Truth as Justice: Investigatory Commissions in Latin America", *Law and Social Inquiry: The Journal of the American Bar Foundation* Vol. 20, No. 1, 1995, p.84. Not until 2004 did a revised Chilean Truth Commission inquiry include reference to victims of torture and arbitrary detention.

[442] Tomuschat, C, "Clarification Commission in Guatemala", *Human Rights Quarterly*, Vol. 23, No. 2, 2001, p. 239

[443] *The Guatemala Peace Agreements*, "Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations", p. 55

[444] Tomuschat, C, "Clarification Commission in Guatemala", op. cit. p. 244

In order to collect testimonies, the investigators visited about 2'000 rural communities and collected more than 8'000 testimonies. 14 regional offices were set up. The Commission benefited from the presence of the MINUGUA mission and based most of their regional offices in the same locations. The Commission worked in different areas focusing on e.g. thematic studies of violence, legal evaluation, in-depth case studies, historical analysis, foreign involvement and final recommendations. When preparing the recommendations in the report, the Commission invited organisations of civil society to a national forum where they were able to make suggestions. The forum was held in May 1998, with more than 400 participants from 139 organisations.[445] In addition, members of various organisations were asked to submit their suggestions for consideration in the final document. Human rights organisations expressed satisfaction regarding the consultation process and the manner in which they were invited to contribute to the Commission.[446] The Commission maintained close contact with non-governmental organisations from whom it received significant documentation on human rights violations, including a comprehensive study done as a parallel Truth Commission report (The Recuperation of Historical Memory Project, REMHI) by the human rights office of the Catholic church. As retaliation, the bishop Gerardi was assassinated two days after presenting the REMHI report to the public in 1998.

The Commission furthermore received assistance from three teams of forensic anthropologists who conducted exhumations of mass grave sited and handed over their documentation files. All the interviews recorded by the Commission were kept confidential as there were considerable fears for the safety of victims and witnesses. Unlike for example the Truth Commission in South Africa, no testimonies were given in public sessions in Guatemala.

7.6 The Final Report of the Historical Clarification Commission

On the 25 of February 1999, the final report was finally presented at a public ceremony.[447] Despite the vague mandate of the Commission, excluding the possibility of individualising responsibility, it nevertheless succeeded in releasing a strongly worded report.[448] Based on its

[445] CEH report, vol 1, op cit., p 48
[446] Author's interview in with Helen Mack, founder and head of the Myrna Mack Foundation, leading human rights organisation in Guatemala (Guatemala City, 2 Nov 1999)
[447] In total, the complete report of the CEH encompasses twelve volumes and consists of more than 4'000 pages. It is available in full text at; http://shr.aaas.org/guatemala/ceh/report/english/toc.html *last visited 20 July 2008*
[448] Ball, P, and Audrey C, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala", *Human Rights Quarterly,* Vol. 23, 2001, pp. 13, 28, 33

findings, the Commission estimated that a total of about 200'000 people were killed or disappeared. In over 80 percent of all violations the victims were Mayan, and in more than 90 percent of all cases the perpetrators were presumed to be State agents.[449] This suggested an extent of violence beyond previous estimations of both international and national human rights organisations. The conclusions state that *"the violence was fundamentally directed by the State against the excluded, the poor and above all, the Mayan people, as well as against those who fought for justice and greater social equality"*. A significant section of the report was dedicated to historical analysis of political and socio-economic factors behind the conflict. Among these institutionalised racism was identified as key factor. Over 600 massacres of Mayan communities were identified; the definition of massacres was applied on cases involving the killing of more than five people. Several of the massacres involved some 200 people, often large numbers of women and children. The majority of the massacres took place in the early 1980s, but some were committed as late as in 1995.

An unexpectedly strong conclusion in the report was its affirmation that a State policy of genocide took place during the early eighties. The Commission analysed the application of the Genocide Convention in four rural regions and found that during the dictatorship of General Rios Montt between 1981 and 1983, the State of Guatemala was responsible for acts of genocide against the Mayan population.[450]

The section on recommendations in the report established a broad platform for a comprehensive reparations policy as well as for institutional reform. The first recommendation was that parties to the conflict recognise and apologise for the violations committed. The President of Guatemala offered a tactic apology a few months before the Commission report was released but refused to reiterate it once the full extent of the violence was revealed. It was not until 2004 that the then President recalled the recommendations of the Commission and offered a public apology to the victims of the armed conflict. The guerrilla offered a formal apology in March 1999 and published a full page apology in the major daily newspapers.[451] Further recommendations related to remembrance of the victims

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Seider, R, "War, Peace and Memory Politics in Central America" in Barahona de Brito, A, Gonzalez Enriquez, C and Aguilar, P (eds.), *The Politics of Memory, Transitional Justice in Democratizing Societies*, Oxford University Press, 2001, pp. 161- 189

Sanford, V, *Buried Secrets, Truth and Human Rights in Guatemala,* Palgrave Macmillian, 2003,p. 259

[449] CEH report, vol 5, Conclusions, article 2 and 15

[450] CEH report, Conclusions, paras. 108- 123

[451] *El Perdón de URNG,* El Periódico, 13 Marzo 1999.

It may be added that Bill Clinton during a visit to Guatemala in March 1999 apologised in public for the role played by the US in the conflict. CIA was instrumental in the military coup in 1954 and provided significant military and intelligence support to the dictatorships during the subsequent decades. The Clarification

by commemoration by the designation of a national day of dignity for the victims. The construction of monuments in accordance with Mayan culture and reclaiming of Mayan sacred sites was also recommended.

Importantly, a National Reparation Programme was proposed, as foreseen in the peace agreements. The Commission specifically recommended that a reparations programme be based on the principles relating to restitution, compensation, rehabilitation and satisfaction and restoration of the dignity of the victims.[452] It is of note that already in 1999 the proposed reparations programme reflected the, at the time draft Basic Principles on the Right to a Reparation for Victims of Gross Human Rights Violations, which were not be formally adopted by the General Assembly until 2006.[453] The fact that these principles were already referred to and applied in practice while still at a draft stage supports their legal value.

Furthermore, it was proposed that reparatory measures of the programme could be individual and collective, the latter was encouraged for violations that had been suffered collectively by entire communities and care was urged to promote reconciliation and avoid any stigmatisation of victims or perpetrators. With regard to the beneficiaries, it was suggested that these be victims or their relatives and with regards to individual economic indemnification, prioritisation be given according to economic situation and social vulnerability and by paying particular attention to the elderly, widows, children or those who were found to be disadvantaged in any other way. It was put forward that victims of cases contained in the annexes of the Commission report be automatically qualified as victims without the need for further documentation.[454] The reparations programme, it was suggested, should be operative for at least a period of ten years.

Further recommendations related to the high incidence of disappearances during the armed conflict and it was specifically recommended that a National Commission for the Search of Disappeared Children be established.[455] It was also recommended that a bill of law be passed whereby the declaration of absence due to forced disappearance would be recognised as a legal status for e.g. reparation and succession matters. The government was also urged to

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Commission, on the basis of its mandate to take into account both internal as well as external factors, documented the role played by the US and Cuba during the conflict.

[452] CEH report, Recommendations, paras. 7-21

[453] *UN 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*, adopted by the UN Commission on Human Rights in 2005 (E/CN.4/RES/2005/35) and by the General Assembly in 2006 (A/RES/60/147)

[454] CEH report, Recommendations, para. 18 (b)

[455] CEH report, Recommendations, para. 24

establish an active policy on exhumations by providing support to non-governmental organisation specialised on forensic anthropology and the national human rights ombudsman. Exhumations should be carried out bearing in mind the cultural values of the victims, the majority of whom were indigenous.

Additional recommendations in the report related to measures of satisfaction and non-repetition. Among educational measures proposed were recommendations relating to dissemination of the report among the public, its translation into indigenous languages and incorporation into the school curricula. Among proposed measures relating to the administration of justice and human rights was prosecution of crimes not extinguished by the Law on National Reconciliation of 1996. The law, which in essence contained an amnesty provision, nevertheless excluded amnesties for crimes of genocide, torture, forced disappearances and crimes not subject to prescription or which according to international treaties ratified by Guatemala did not permit extinction of criminal liability.[456] Furthermore, the report recommended recognition of the competency of individual complaints mechanisms of UN human rights treaty bodies, which Guatemala subsequently complied with.[457]

Regarding measures to prevent repetition of events the report proposed the development and adoption of a new military code and military training in accordance with human rights standards and the creation of civilian police (previously part of the military). The report also recommended measures to combat the legacy of institutionalised racism and fiscal reform by adopting progressive taxation. Importantly, the report recommended the creation of an institution responsible for follow-up of the overall implementation of the recommendations, it was suggested that such a mechanism be composed of representatives of both government and civil society.[458]

7.7 Follow-up and Implementation of the Recommendations regarding Reparations

[456] Roht-Arriaza, N, "The Role of International Actors in National Accountability Processes" in Barahona de Brito, A, Gonzalez Enriquez, C and Aguilar, P (eds.), *The Politics of Memory, Transitional Justice in Democratizing Societies*, Oxford University Press, 2001, p. 41

[457] CEH report, Recommendations, paras. 39, 47 Guatemala has recognised the competency of the Human Rights Committee, the Committee against Torture and the Committee for the Elimination of Discrimination against Women to receive individual complaints

[458] CEH report, Recommendations, paras. 55, 56, 60, 62-65, 77, 78, 79-84

The initial reception of the CEH report by the government was one of reluctance and there were deliberate attempts to downplay the importance of the report and its findings.[459] As previously mentioned, the government initially refused to acknowledge the findings and offer an apology. The establishment of the cross-institutional mechanism for follow-up, the Commission for Peace and Harmony, was delayed until 2001. Contrary to the recommendations of the CEH, it was established by executive decree rather than by the adoption of legislation through Congress.[460]

In 2003, a National Programme for Reparations (PNR) was established and similarly to the mechanism for follow-up it was created by an executive decree rather the through a legislative initiative in Congress. The lack of a solid legislative basis has rendered the programme volatile for changes to its operation as it thus depends of the political will of the sitting government, which unilaterally has the power to amend its mandate.[461] In 2005, the then government changed the decree regarding the composition of the National Commission for Reparations, responsible for executing the reparations programme. Previously it consisted of equal representation of government officials and representatives of human rights, women, Maya and victims' organisations. The change of the decree made it exclusively a government entity, without consultation with affected organisations.[462] The rifts between civil society organisations and their distrust towards government officials has been a major impediment in making the programme operative. OHCHR has consistently insisted that the PNR should have a solid legal basis in order to guarantee its independence and sustainability; however progress in this regard has been slow. By early 2010 no legislation had yet been adopted.[463]

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[459] The author spent three months in Guatemala in 1999 shortly after the release of the report of the CEH to document its impact through extensive interviews with different stakeholders; victims, civil society organisations, government representatives, former Commissioners and staff of the CEH, academics, journalists, UN peacekeepers and diplomatic representatives
Tepperman, J "Truth and Consequences", Foreign Affairs, Vol. 81, No. 2, 2002, pp.128-145

[460] MINUGUA, Report on progress in implementation of the Peace Accords 2000-2004, November 2004

[461] Programa Nacional de Resarcimiento (National Programme for Reparations, PNR), *La Vida No Tiene Precio, Acciones y Omisiones de Resarcimiento en Guatemala,* Guatemala City, 2007, pp. 179, 186
MINUGUA Final Human Rights Assessment Report, November 2004, pp. 22-23
Procurador de los Derechos Humanos de Guatemala (National Human Rights Ombudsman), Seguridad y Justicia en Tiempos de Paz, Cumplimiento e institucionalizaron de los compromisos contraídos por el Estado en los Acuerdos de Paz, Guatemala City, 2006, pp. 100-103

[462] Correa, C, Guillerot, J and Magrell, L, "Reparation and Victim participation: A Look at the Truth Commission Experience" in Ferstman, C, Goetz, M and Stephens, A (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, Systems in Place and Systems in the Making,* Martinus Nijhoff Publishers, Leiden, 2009, pp 385- 414

[463] OHCHR Guatemala Office Annual Report to the Human Rights Council for 2007, A/HRC/7/38/Add.1, para. 42
OHCHR Guatemala Office Annual Report to the Human Rights Council for 2009, A/HRC/13/26/Add.1 para. 50

The delayed creation of the follow-up mechanism and the reparations programme and the manner in which they were established can in part be explained by the political dynamics. Unlike some other countries that have emerged from periods of armed conflict, in Guatemala this process was not accompanied by a political transition. The former guerrilla movement URNG was relatively speaking[464] never a particularly strong actor; their military strength even during the armed conflict was limited. The strong wording of the peace agreements was secured through the active role of the UN and the international community.[465] Following the peace process, the URNG was converted into a minor political party. The conservative regime and the army retained their political positions,[466] illustrated by the fact that the former military dictator Rios Montt launched himself as a presidential candidate in 1999 and continued to head the Congress during the early 2000s. During this period, considerable debate centred on compensation benefits for the paramilitary PAC.[467] Large numbers of former PAC soldiers united and claimed compensation.[468] While many PAC soldiers carried the dual identity of perpetrator as well as victims, the fact that they received compensation created major resentment among victims' organisation, who had yet to receive any response from the government to their claims.

As noted by Tomuschat, in the first years after the release of the Truth Commission report, civil society and victims' organisation remained too weak to lobby for faithful compliance with the recommendations.[469] The insistence on maintaining reparations for human rights violations on the political agenda has been achieved through a combination of factors such as the presence of the UN mission MINUGUA and an OHCHR country office, support from UNDP, the interest of international donors who contributed towards the Truth Commission,[470] and the rapidly increasing number of cases brought to the Inter-American human rights

[464] For example compared with the FARC-EP guerrilla in Colombia that has controlled significant parts of the territory for the past four decades

[465] International Council on Human Rights Policy, *Negotiating Justice, Human Rights and Peace Agreements*, Geneva, 2006, p.29

[466] Seider, R, "War, Peace and Memory Politics in Central America" in Barahona de Brito, A, Gonzalez Enriquez, C and Aguilar, P (eds.), *The Politics of Memory, Transitional Justice in Democratizing Societies*, Oxford University Press, 2001, pp. 161- 189

[467] Roht-Arriaza, N, "Reparations in the Aftermath of Repression" in Stover, E and Weinstein, H (eds.), *My Neighbour, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, 2004, p. 126

[468] Amnesty Report, *The Civil Defense Patrols Re-emerge in Guatemala*, AI Index: AMR 34/053/2002, 4 September 2002

[469] Tomuschat, C, "Clarification Commission in Guatemala", op. cit. p. 245

[470] Principally the Nordic countries, the European Union and the United States

system, some 200 cases by 2000.[471] By the early 2000s, the government started to seek friendly settlements through the regional human rights system, by 2004 decided to accept State responsibility for all cases pre-dating 1996 and appointed persons known for their human rights work to head the Presidential Commission on Human Rights (COPREDEH) to undertake negotiations. The ground breaking judgement of the Inter-American Court in 2004 regarding the Plan de Sanchez massacre (discussed in Part I, Chapter 3 of the thesis), whereby record awards for compensation of nearly 8 million USD were ordered, prompted the commitment of the government to make the PNR operational in order to stem the number of cases brought to the regional human rights system.[472] Mr. La Rue, the head of COPREDEH at the time of paying the compensation for the Plan de Sanchez massacre noted that "*given the number of people killed and the atrocities that were committed, I personally believe it was a modest and reasonable decision.*"[473]

As noted above, the PNR[474] started its work in difficult political circumstances and its initial steps were slow. The programme was criticised for its ineffectiveness, the initial funding available was limited and it was unable to execute the delivery of reparations due to divisions within victims' organisations and due to lacking real political support. The Decree that established the programme in 2003 did not specifically define the violations that were to be compensated, the beneficiaries to be prioritised or what kind of reparations were to be distributed.[475] These issues were debated over a period of two years until a revised Decree was adopted in 2005; it defined and clarified in a mostly positive manner the above concerns. The revised Decree covered a broad range of serious human rights violations, defined the groups that should be prioritised, according to the recommendations of the CEH, and added some categories such as orphans and the disabled. Women's organisations noted as positive the specific inclusion of sexual violence and rape among the violations.[476] Furthermore, the revised Decree included a comprehensive definition of reparations measures, defined as

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[471] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala" in Due Process of Law Foundation, *Victims Unsilenced: The Inter.-American Human Rights System and Transitional Justice in Latin America,* DPLF, Washington, 2007, pp.7-32

[472] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala", op.cit.

[473] La Rue, F, Speech at Conference on Reparations in the Inter-American System American at American University in Washington 6 March 2007, published in *American University Law Review,* Vol. 56, 2007, pp. 1459-1463

[474] Official webpage of the Guatemalan National Reparations Programme; http://www.pnr.gob.gt *last visited 18 April 2010*

[475] Guatemalan Government Decree 258-2003, revised by Decree 619-2005

[476] Paz, C and Bailey, P, "Guatemala: Gender and Reparations for Human Rights Violation" in Rubio-Marín, R, *What Happened to the Women? Gender and Reparations for Human Rights Violations,* New York, Social Science Research Council, 2006, pp. 93-135

individual or collective, which took into account the Basic Principles on the Right to Reparation for Victims.

However, the practical implementation of the reparations programme remains a major challenge. A principal obstacle is the difficulty of documenting the victims as many were never registered at birth, the majority being indigenous and from remote rural areas, also many civil registries were deliberately burned during the war.[477] Progress towards the establishment of a national registry of victims has been slow.[478] Additional ongoing challenges for the programme include continued uncertainty over funding and that not enough attention has been given to comprehensive reparations measures. So far, the programme has mostly provided individual financial compensation (for some 3'700 persons in 2008), while psychosocial and rehabilitation measures have been neglected. The programme officially affirms that measures should include support for rehabilitation and satisfaction, for example through the assistance for exhumations and the construction of memorials.[479] In practice, measures have been uncoordinated and victims' have complained over the lack of collective reparation measures for their communities.[480] Concerns have also been raised over the lack of consideration for gender aspects and the persistence of racial discrimination.

While the programme continues to be criticised by victims' organisations and concerns remain over the sustainability of its funding, nevertheless certain progress has been made.[481] The impact of the programme cannot be properly judged until it has been operative over a longer period of time, however it is crucial that critique be addressed and that reparation measures are carried out in consultation with affected communities. The programme is expected to exist for thirteen years; the number of years was defined with reference to the positive significance of the number thirteen in Maya indigenous culture.

Many victims stress the importance of apologies, public recognition of State responsibility and psychosocial assistance as their key priorities regarding reparations.[482] However, from the

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[477] Bejarano, C, "Legalidad versus Conciencia, Implicaciones Jurídicas del Trabajo de PNR" in *La Vida No Tiene Precio, Acciones y Omisiones de Resarcimiento en Guatemala,* op.cit. , pp. 173-191

[478] OHCHR Guatemala Office Annual Report to the Human Rights Council for 2006, A/HRC/4/49/Add.1, para. 32

[479] Press release April 2008, "Primeras Acciones de Resercimiento Integral" at http://www.pnr.gob.gt *last visited 20 April 2010*

[480] Viaene, L, "Life is Priceless: Mayan Qeqchi Voices on the Guatemalan National Reparations Program", *International Journal of Transitional Justice*, Vol. 4, 2010, pp. 4-25

[481] OHCHR Guatemala Office Annual Report to the Human Rights Council for 2008, A/HRC/10/31/Add.1, para. 61

[482] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala", op.cit. p. 26

perspective of the victims, a main concern is that the attention given to reparations in Guatemala is used to silence calls for criminal accountability. In fact, some victims have abandoned calls for investigations following the receipt of reparations, which in turn may be explained by their deep-seated distrust and scepticism of the justice system. [483] Some human rights defenders have warned that viewing reparations, without simultaneously considering the context of structural poverty in which the most vulnerable victims remain, may in fact offend the victims as they are not provided with long-term solutions to their situation.[484]

While the jurisprudence of the Inter-American human rights system has provided crucial impetus to the national policy regarding reparations, it has also created some challenges which will be difficult to resolve. As noted in Part I of the thesis, an aspect that has caused controversy is the discrepancy between the reparation awards by the Inter-American Court (25'000 USD per person for extrajudicial executions in the Plan de Sanchez massacre case), while the same violations only amount to reparation awards around 5'000 USD through the national scheme. The amounts at the national level may appear excessively low but given the estimated number of people having killed during the conflict, some 200'000, this aspect raises issues of equity and that of realistic expectations on the State's capacity to finance reparations for as many as possible rather than for the select few able to undertake the cumbersome process of litigation at the national and regional level.

7.8 Conclusions

In conclusion, through insistent mediation of the UN, reparations provisions figured prominently in the peace agreements. The transitional justice mechanism; the Historical Clarification Commission, managed despite the limitations of its mandate to provide an important legacy upon which victims organisation have been able to continue their advocacy for truth, justice and reparations.

While at the national level criminal proceedings have been unsuccessful, it is significant that Guatemala over the last few years has recognised State responsibility for all cases of violations dating back to the armed conflict which have been brought to the Inter-American

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Dill, K, "Reparation and the Elusive Meaning of Justice in Guatemala" in Johnston, B and Slyomovics, S (eds.), *Waging War, Making Peace, Reparations and Human Rights*, Left Coast Press, 2009, pp. 183- 204

[483] Ibid.

[484] Helen Mack cited in Due Process of Law Foundation, *Después de Procesos de Justicia Transicional, Cual es la situación de las victimas? Los casos de Chile y Guatemala,* Public conference report, 2008, p 7

human rights system.[485] In total this relates to more than 200 cases filed and in many of them the Guatemalan government has negotiated a settlement with the petitioners. Furthermore, the reparations orders in Guatemalan cases that have been decided by the Inter-American Court on Human Rights have by and large been complied with and the award of reparations by the Court have provided key impetus to the establishment of a large-scale reparations scheme at the national level. In a number of cases, the report of the CEH was submitted to the Court as evidence.[486] As noted by Mersky and Roht Arriaza, the recognition of State responsibility for crimes committed during the armed conflict has had a cumulative effect and the Inter-American human rights system has complemented the work of the CEH and the REMHI reports in order to reverse State denial of the role of the State in the crimes.[487] Thus, the experience in Guatemala highlights the reciprocity between efforts by transitional justice initiatives and human rights jurisprudence in order to advance in the realm of reparations.

At the international level, human rights treaty bodies have also contributed to the promotion of the implementation of the recommendations of the CEH regarding reparations and continue to do so nearly a decade after its completion.[488] During the Universal Periodic Review of Guatemala by the Human Rights Council in May 2008, following questions from other States regarding reparations, the Guatemalan government representatives publicly affirmed the commitment of the State to recognise responsibility for human rights violations committed during the armed conflict and noted that the State budget had been restructured to allow for comprehensive compensation in financial, cultural, legal and psychosocial terms through the national reparations programme.[489] These examples illustrate the importance of the interplay between transitional justice mechanisms and human rights bodies, both at the international and regional level, in order to advance in the implementation of reparations.

The establishment of the PNR may have been motivated as a measure to prevent further human rights complaints, dating back to the armed conflict, from being brought to the Inter-

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[485] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala", op.cit.

[486] Some sentences of the Inter-American Court on Guatemalan human rights cases which refer to the report of the CEH include; I/A Court H.R., Case of the Plan de Sánchez Massacre v. Guatemala. Merits. Judgment of April 29, 2004. Series C No. 105; I/A Court H.R., Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs. Judgment of November 27, 2003. Series C No. 103; I/A Court H.R., Case of Myrna Mack-Chang v. Guatemala. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101

[487] Mersky, M and Roht-Arriaza, N, "Case Study Guatemala", op.cit. p. 28

[488] CAT Concluding Observations on Guatemala 2006, CAT/C/GTM/CO/4, para 15
CRC Concluding Observations on Guatemala under OPAC 2007, CRC/C/OPAC/GTM/CO/1, paras. 20-21

[489] Report on Guatemala of the Working Group on the Universal Periodic Review of the Human Rights Council, A/HRC/8/38, 29 may 2008, paras. 19 and 78. However, it should be noted that the UPR of Guatemala focused primarily on the issues of impunity and racial discriminations, while the issue of reparations featured more dominantly e.g. during the UPR of Colombia, see reference in case study of Colombia

American human rights system. Nevertheless, the programme has gradually made progress and offers a measure of resort for the large number of victims who have yet to receive any reparations after the conflict. While international and regional human rights jurisprudence set important precedents regarding reparations, it is nevertheless impossible for the majority of victims to access such mechanisms, thus the establishment of comprehensive national reparations programmes will remain crucial in order to ensure that the maximum number of victims benefit. While the amounts offered by the programme will remain in stark contrast to the reparation orders of the Inter-American Court of Human Rights, they will provide a degree of equity among victims. In this sense, the Guatemalan government has taken significant steps. However challenges remain, such as ensuring that the programme carries out its activities in a culturally sensitive manner, that it is provided with sustainable and adequate funds and that its mandate becomes entrenched in legislation, rather than executive decree.

The role of national civil society and its ability to invoke the attention of the international community to the Guatemalan State's reparations policy is vital. Unfortunately, civil society organisations in Guatemala continue to be relatively weak and divided compared to for example civil society in Colombia (see subsequent case study on Colombia for further references). The OHCHR office in Guatemala has contributed to maintaining focus on reparations for violations committed during the conflict, however has played a less prominent role regarding this issue than the OHCHR office in Colombia. This in part is a reflection of the varying public debate on reparations and the difference in strength of the civil society. The public debate on reparations may be less strong in Guatemala than in Colombia, however the government does engages in a largely constructive manner, unlike for example in East Timor where the debate on reparations is stigmatised and opposed by the government (see subsequent case study on East Timor for further references).

While attempts have been made to address aspects of truth and reparations in Guatemala, it is nevertheless clear that the third element of justice; that of accountability, remains absent. Despite that the amnesty provisions specifically exclude serious human rights violations; the Guatemalan judiciary has been unable and unwilling to break the impunity of the past.[490] Human rights and victims groups fear that the issue of reparations may overshadow the need to make progress in establishing accountability for the past. The delicate balance between

[490] Human Rights Watch, Annual Report on Guatemala released in January 2008 states that only 2 of the 626 massacres documented by the CEH have successfully been prosecuted in the domestic criminal justice system. www.hrw.org *last visited 20 July 2008*

these elements represents the principal challenge the Guatemalan State faces in order to comprehensively assume its responsibility for the violations of the past.

8. Case Study: Reparations in Sierra Leone

8.1 Introduction

The transitional justice process in Sierra Leone was characterised by the unprecedented parallel operation of the *ad hoc* Special Court and the Truth Commission, both mixed with international as well as national elements. The two mechanisms were established in separate processes and operated without much regard for each other, which resulted in confusion among victims as well as perpetrators. The Truth Commission originated in the Lomé Peace Agreement of 1999 while the Special Court was created after reignited violence in 2000, following a request by the government. While the term reparations did not specifically figure in the Lomé Agreement, there was ample reference to victims, rehabilitation and the creation of a Special Fund for War Victims. The Truth Commission, while not always victim-oriented in public hearings, did focus its final report on the rights of victims and expounded at length a comprehensive set of recommendations to ensure non-repetition of events as well as detailed proposals for a reparations programme. The Special Court on the other hand interpreted its mandate as essentially retributive, did not replicate the provisions relating to victims and reparations in the Rome Statute of the International Criminal Court and to date has declined to order restitution in its judgements.[491] The two transitional justice institutions regrettably did not take advantage of the momentum to leave a coordinated legacy in favour of victims.

The United Nations peacekeeping mission in Sierra Leone and OHCHR played a key role in supporting national civil society actors and in highlighting the rights of victims throughout the process. Despite the existence of a regional human rights system in Africa, this was regrettably inactive during both the conflict and post-conflict period. Furthermore, Sierra Leone lacked a national human rights institution for independent monitoring and follow-up to human rights obligations at the domestic level; however such an entity was created in 2006 and it is likely that it will play a prominent role in promoting compliance with the recommendations of the Truth Commission, including those relating to reparations. Following the presentation of the Truth Commission Report in 2004, the government has been slow in taking action and in part motivated this with the scarcity of State resources. The support provided in 2008 by the UN Peace Building Commission towards a reparations programme

[491] Further details of the provisions of the Special Court for Sierra Leone are contained in chapter 4 of this thesis on reparations in International Criminal Law.

for victims provides a significant impetus, however its sustainability will continue to depend on genuine political will to advance the rights of victims in practice.

8.2 Brief Historical Background

The armed conflict in Sierra Leone is generally dated to 1991 when an armed group, the Revolutionary United Front (RUF) lead by Foday Sankoh, started to launch attacks with support from Liberia. Their stated objective was to overthrow the one-party government which had been ruling the country for three decades.[492] The RUF soon gained international notoriety for its brutal practices of amputation, child recruitment and sexual violence. During the armed conflict, Civil Defense Forces (CDF) were set up in support of the national armed forces, they also both engaged in brutal war crimes against the civilian population. In 1996, attempts were made to broker peace and an accord was signed between the government and the RUF in Abidjan. In 1997, a military coup overthrew the government and the affiliation of the different armed groups and forces became increasingly difficult to distinguish as the country descended into chaos. "Sobels" was a commonly used term at the time, indicating the transient nature of fighters' shifting allegiances between rebels and government soldiers.

Meanwhile, the international community was slow to react. In early 1998, forces of the Economic Community of the West African States Monitoring Group (ECOMOG) intervened against the military regime and reinstated the exiled government. In 1998, a small unarmed UN mission (UNOMSIL) was established to oversee demobilisation.[493] Yet, in January 1999, the RUF and the AFRC, a group of disaffected soldiers who had adopted the characteristics of rebels, lead a major attack against the capital Freetown, causing large losses of civilian lives and leaving the city in ruins.[494] Faced by the fact that the rebels controlled approximately two thirds of the country, the government again initiated talks with the RUF.

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[492] Schabas, W, "The Sierra Leone Truth Commission" in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, p. 22

[493] O'Flaherty, M, "Case Study: The United Nations Human Rights Field Operation in Sierra Leone" in O'Flaherty, M (ed.), *The Human Rights Field Operation; Law Theory and Practice*, Ashgate, 2007, pp. 287-315

[494] Hayner, P, "Negotiating Peace in Sierra Leone, Confronting the Justice Challenge", Published report part of the Humanitarian Dialogue project *Negotiating Justice,* December 2007, pp.1- 37 (available at www.hdcentre.org)

8.3 Lomé Peace Agreement

The peace negotiations took place during several months in Togo and concluded in the signing of the Lomé Peace Agreement in July 1999. Similar to the previous negotiations, there was a general presumption that the rebels had to be awarded a degree of amnesty and the final text of the agreement included reference to a blanket amnesty.[495] However, the United Nations participated in the negotiations and the representative of the organisation attached a well-known, and not uncontroversial, handwritten disclaimer upon signing the accords whereby he noted that *"the agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law".*[496]

The Lomé Agreement included reference to the establishment of a truth and reconciliation commission. As O'Flaherty notes, national human rights groups played an important role in lobbying for the inclusion of a truth commission during the negotiations, which they had been invited to observe.[497] Article XXVI of the Agreement states that;
"A Truth and Reconciliation Commission shall be established to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation...the Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonian conflict in 1991...this Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations... and shall, not later than 12 months after the commencement of its work, submit its report to the Government for immediate implementation of its recommendations."

The Lomé Agreement thus foresaw a truth commission with an open-ended and broad mandate to address human rights violations. The far-reaching objective of breaking the cycle of violence was attributed to the Truth Commission and while it was also expected to address impunity, the Agreement gave few clues how this should be done in concrete terms.

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[495] Lomé Peace Agreement, Article IX
International Council on Human Rights Policy, *Negotiating Justice, Human Rights and Peace Agreements,* Geneva, 2006, pp. 32-33, 78-79
[496] *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN. Doc. S/2000/915, 4 October 2000, paras. 22-24
Hayner, P, "Negotiating Peace", op. cit.
[497] O'Flaherty, M, "Sierra Leone's Peace Process: The Role of the Human Rights Community" in *Human Rights Quarterly,* Vol. 26, No.1, 2004

While the Lomé Agreement unfortunately contained no direct reference to the specific term reparations, it did refer to rehabilitation in Article XXVIII which states that; *"The Government, through the National Commission for Resettlement, Rehabilitation and Reconstruction and with the support of the International Community, shall provide appropriate financial and technical resources for post-war rehabilitation, reconstruction and development."* The same Article referred to women as a group particularly victimised during the armed conflict.[498] There was, however, no mention of other groups of vulnerable victims who were targeted, such as children.

It is noteworthy that the Agreement did make specific reference to compensation for "incapacitated war victims", financed by proceeds from natural resources, notably gold and diamonds, exportation of which was to be State controlled and licensed.[499] Furthermore, Article XXIX refers to rehabilitation and a specific Fund for War Victims; *"The Government, with the support of the International Community, shall design and implement a programme for the rehabilitation of war victims. For this purpose, a special fund shall be set up."*

National human rights organisations advocated for the establishment of a reparations fund for victims of serious human rights violations during the negotiations.[500] All parties to the Agreement were in favour of such a fund, as there were victims on all sides. However, the language of the provision has been criticized for its vagueness as it contains no clear definition of who would be considered a war victim (civilians as well as demobilised?) nor does it contain any reference to State responsibility.[501]

The Peace Agreement also foresaw the creation of a more long-term body for monitoring human rights violations through an *"autonomous quasi-judicial National Human Rights Commission"*.[502] Both the Truth Commission and the National Human Rights Commission were supposed to be set up, with technical assistance from the international community, within 90 days of signing the Agreement. In practice, their establishment was postponed due

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[498] Lomé Peace Agreement, Article XXVIII, *"2. Given that women have been particularly victimized during the war, special attention shall be accorded to their needs and potentials in formulating and implementing national rehabilitation, reconstruction and development programmes, to enable them to play a central role in the moral, social and physical reconstruction of Sierra Leone."*

[499] Lomé Peace Agreement, Article VII
Schabas, W, "Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission" in De Feyter, K, Parmentier, S, Bossuyt, M and Lemmens, P (eds.), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations,* Intersentia, Antwerpen, 2005, p. 293

[500] O'Flaherty, M, "Case Study Sierra Leone", op. cit. p 306

[501] US Ambassador Melrose cited in Hayner, P, "Negotiating Peace", p. 20

[502] Lomé Peace Agreement, Article XXV

to a variety of factors, including continued instability, delays in adopting relevant national legislation and insufficient technical and financial support from donors, who had pledged to support the process. The lack of a monitoring body for implementation of human rights components of the Peace Agreement was a significant shortcoming. National human rights organisations, with UN support, created a coordinated follow-up mechanism among themselves.[503] While national NGOs played a prominent role, the absence of an independent national human rights institution was a lacuna, especially for monitoring the implementation of recommendations from the Truth Commission. The National Human Rights Commission was only created and set up in 2006.[504]

In October 1999, a new UN mission UNAMSIL with a stronger mandate was established by the Security Council; however the deployment of troops was slow.[505] The RUF refused to demobilise and fighting continued despite the signing of the Lomé Peace Agreement. Hundreds of peacekeepers were taken hostage by the RUC and its allies in May 2000, which prompted the rapid deployment of British armed forces to regain control of the capital area.[506] Foday Sankoh was arrested in May 2000 and the government of Sierra Leone formally requested the assistance of the United Nations to bring RUF members to justice, leading to the agreement on the Special Court for Sierra Leone in 2002.[507] The provisions relevant to reparations in the Statute of the Special Court are referred to in chapter 4 of this thesis, while this chapter will explore the issue of reparations in relation to the Truth Commission and how the relationship between and the parallel operation of the Special Court and the Truth Commission were perceived from a victims' perspective.

Following the instability and arrest of Sankoh in May 2000, new negotiations were undertaken with the RUF and additional agreements signed, essentially reaffirming the validity of the Lomé Agreement.[508] In January 2002, the civil war was officially declared by the government to be over. The armed conflict in Sierra Leone killed between 50'000 and

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[503] International Council on Human Rights Policy, *Negotiating Justice, Human Rights and Peace Agreements,* op.cit. p.33

[504] Hayner, P, "Negotiating Peace", p. 29

[505] Poole, J, "Post-Conflict Justice in Sierra Leone" in Bassiouni, C, *Post Conflict Justice,* Transnational Publishers, New York, 2002, pp. 563-592

[506] O'Flaherty, M, op.cit. p 292

[507] *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, UN. Doc. S/2000/915, 4 October 2000,
Horovitz, S, "Transitional Criminal Justice in Sierra Leone" in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, pp. 43-69

[508] Hayner, P, "Negotiating Peace", p. 24

75'000 people and rendered almost half the country's population of 5 million either internally displayed or refugees.[509]

8.4 The Truth and Reconciliation Commission Act of 2000

As Sierra Leone is a dualist State, domestic legislation creating the Truth and Reconciliation Commission (TRC) was required. This was, following consultations with civil society, enacted by Parliament in February 2000.[510] The Act, section 6.1, specifically mandated the TRC with five principal tasks, namely to;

- *"create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the conflict in 1991 to the signing of the Lomé Peace Agreement;*
- *to address impunity;*
- *to respond to the needs of the victims;*
- *to promote healing and reconciliation, and;*
- *to prevent a repetition of the violations and abuses suffered."*

As indicated above, the mandate of the Truth Commission was very ambitious and thus from the outset created expectations which were impossible to fulfil. In contrast, the Truth Commission in Guatemala, as noted in chapter 6 of this thesis, set out more modest objectives which indicated that the recommendations put forward in its final report, rather than the actual Truth Commission process itself, would simply seek to *"encourage peace and observance of human rights"*.

With regard to the first objective of establishing an *"impartial historical record"*, this wording has been the subject of considerable critique by historians and sociologists in various countries where Truth Commissions have had such an aim. Following scrutiny of the operation and final reports of several Commissions, these have generally been found to demonstrate certain biases and in some cases, clear influences of national political considerations which have overshadowed the voices of victims.[511] A more modest expectation

[509] Horovitz, S, "Transitional Criminal Justice in Sierra Leone", op.cit, pp. 43-69
[510] O'Flaherty, op.cit. p. 311
[511] For critical analysis of the aim of establishing an impartial historical record see for example;
Ball, P, and Audrey C, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala", *Human Rights Quarterly,* 23, 2001, pp. 1-43

has been set forth by Ignatieff, who stated that; *"all that a truth commission can achieve is to reduce the number of lies that circulate unchallenged".*[512] In fact, the Final Report of the Sierra Leone Truth Commission recognises that;

"*Parliament was surely ambitious in thinking that the Commission could create anything resembling a comprehensive historical record of the conflict in Sierra Leone. In any event, the proximity of the events to the writing of the historical record makes any aspiration to a thorough study troublesome and possibly unrealistic. While it may be illusory to think that bodies like Truth Commissions can establish a complete historical record, they can nevertheless discredit and debunk certain lies about conflicts".*[513]

Regarding the second objective of the Commission to *"address impunity"*, the attribution of such an aim was clearly at odds with the blanket amnesty provisions of the Lomé Agreement, yet can be explained by the fact that it pre-dates the violence in May 2000 which prompted the request for prosecutions. As the national political environment changed through the negotiations for the Special Court, the retention of such an objective for the Truth Commission highlights the incongruity of the two institutions and became the source of confusion among both victims and perpetrators.

The third objective, that of *"addressing the needs of victims"*, presented another significant challenge to the Commission. The Commission had little available means to actually address the needs of victims as it lacked resources for psycho-social counselling and support and had no reparations measures to offer. All the Commission could do was take note of the needs and concerns expressed by victims and suggest overall recommendations for their benefit. Unfortunately, the vague wording in its mandate lead many victims to believe that the Commission would be able to award them reparations, as evidenced by observers to the public sessions of the Commission.[514]

A questionable aspect of the Commission was the treatment of victims in public hearings. Some commentators have noted that, contrary to the mandate of the Commission, the hearings

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Maier, C, "Doing History, Doing Justice: The Narrative of the Historian and of the Truth Commission" in Rotberg, R and Thompson, D, (eds.) *Truth v. Justice, The Morality of Truth Commissions,* Princeton University Press, 2000, pp. 261-278

[512] Ignatieff, M, *The Warrior's Honor,* Vintage, 1999, p. 173

[513] Final Report of the Sierra Leone Truth Commission, chapter 1, para. 26.
Available at; www.trcsierraleone.org *last visited 15 April 2009*

[514] Kelsall, T, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone", *Human Rights Quarterly,* Vol. 27, 2005, pp. 361-391
Shaw, R, "Rethinking Truth and Reconciliation Commissions, Lessons from Sierra Leone", *United States Institute for Peace,* Special Report 130, February 2005

tended to focus more on perpetrators and their reintegration rather then on victims and their suffering. At times, victims were interrogated in public in a court-like manner. While clearly fearful of reprisals, many victims were reluctantly prompted into participating with the understanding that they would receive some benefits in return, rather than motivated by a desire to relate their personal experience. [515] In this context, it is of interest that in Guatemala, the only other major Truth Commission at the time where the UN had played an instrumental role in its establishment; there were no public sessions or hearings. Rather, for safety reasons, the interviews with victims, witnesses and perpetrators were conducted in private sessions, although sometimes with groups with up to around 15 victims.[516] The modality of public hearings was a feature that was transferred from the Truth Commission in South Africa, where the unique shift in political circumstances allowed for these to take place without major fears of retaliation. In retrospect, the use of public hearings without conditions or guarantees that victims could participate safely risked undermining the process and is an important lesson learnt for the future.

As regards the fourth objective of reconciliation, the setting up of the Truth Commission in Sierra Leone again drew largely from the experience in South Africa and came to repeat some of its controversial aspects, such as the disproportional focus on the promotion of national reconciliation with religious undertones[517] and the presumption that public hearings with victims and perpetrators would, in Desmond Tutu's words; *"cleanse wounds in order for them to not fester but heal"*. As explored by Wilson, the equation of human rights with reconciliation and amnesty by the South African Truth Commission caused damage to the understanding of human rights and served to de-legitimize the concept of justice.[518]

Regarding the final objective of the mandate to *"prevent a repetition of the violations and abuses suffered"*, this phrasing again placed an unfair burden on the Truth Commission. A more realistic formulation would have been to *"formulate recommendations, the implementation of which, shall contribute to the prevention of a repetition of violations"*. In any case, the Final Report of the Truth Commission dedicates significant effort to suggest recommendations regarding concrete measures to avoid a repetition of violence.

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[515] Ibid.
[516] Ball, P, and Audrey C, op.cit.
[517] Kelsall, T op.cit, Shaw, R op.cit.
[518] For a detailed analysis and critique of the South African Truth Commission, see;
Wilson, R, A. *The Politics of Truth and Reconciliation in South Africa, Legitimising the Post-Apartheid State,* Cambridge University Press, 2001, pp. 228-230
Hamber, B and Wilson, R, "Symbolic Closure Through Memory, Reparation and Revenge in Post-Conflict Societies", *Journal of Human Rights*, Vol.1, No 1, 2002

Unfortunately, as will be further explored below, the degree of implementation of these recommendations has been modest and many of the structural factors which caused the origins of the conflict remain unchanged.

8.5 Operational Aspects of the Truth and Reconciliation Commission

The Truth Commission was not established until 5 July 2002, when the seven Commissioners appointed by the President were formally sworn in during a public ceremony. Among the seven Commissioners, three were internationals. The Special Representative of the Secretary General and the OHCHR were responsible for recommending the non-Sierra Leonean members of the Commission to the President for his endorsement.[519]

The Truth Commission in Sierra Leone, similarly to that of Guatemala and East Timor, benefited from the presence of a UN peacekeeping mission. UNAMSIL provided considerable logistical support and conducted awareness raising activities of the mandate of the Truth Commission.[520] However, unlike the Truth Commission in Guatemala, which was created directly through the peace agreements and run by UN administration, the Truth Commission in Sierra Leone was constituted under domestic law and considered a national institution. Nevertheless, the OHCHR played a significant role in fundraising among donors, who paid the majority of the costs of the Commission. The Truth Commission faced delays which were caused in part by a lack of clarity as to the responsibility of its administration and fears of national political interference.[521] This in turn resulted in donor fatigue. In the end, the Truth Commission received less than half of the amount budgeted for its operation and had difficulties to fulfil its activities and the completion of its report.[522] It is relevant to note that the Special Court, which was set up in parallel, over a three year period cost more than 20 times as much as the Truth Commission.[523] As victims' provisions were weak in the mandate

[519] The Chairman of the TC was Bishop Humper (Sierra Leone). The three international Commissioners were Ms. Yasmin Sooka (South Africa), Ms. Satang Jow (Gambia) and Prof. William Schabas (Canada).

[520] OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Commission on Human Rights for 2001, E/CN.4/2002/37, p. 17

[521] International Crisis Group, *Sierra Leone's Truth and Reconciliation Commission: A Fresh Start?,* Africa Briefing, 20 December 2002
International Center for Transitional Justice, The Sierra Leone Truth and Reconciliation Commission, Reviewing its First Year, Case Study Series, January 2004

[522] The Sierra Leone Truth Commission was originally budgeted at 10 Million USD, however only received approx. 4 Million USD. In contrast, the Guatemalan Truth Commission operated on a budget of approx. 10 Million USD and the South African Truth Commission's budget was around 33 Million USD.
Schabas, W, "The Sierra Leone Truth Commission", op.cit. p 23
Ball, P, and Audrey C, "The Truth of Truth Commissions: Comparative Lessons, op.cit. 16-17

[523] Between 2002 and 2005 some 80 Million USD were spent on the Special Court
Horovitz, S, "Transitional Criminal Justice in Sierra Leone", op.cit, p. 60

of the Special Court (explored in chapter 4 of the thesis), the disproportionate allocations of funding for the Court in relation to that of the Truth Commission indicate that the international community failed to adequately acknowledge victims and their rights in the transitional justice process in Sierra Leone.

The Truth Commission worked in three stages. It only had approximately 40 core staff, the majority of whom were nationals. Between December 2002 and March 2003, focus was on statement taking. With the assistance of civil society organisations, some 7'700 statements from victims were compiled throughout the country. A deliberate effort was made to ensure that a significant percentage of the statement takers were women.[524] This was followed by public hearings in a number of regions between April and August 2003. The descriptions of the public hearings vary, and as noted above, certain observers raised considerable critique against the manner in which they were conducted and the way in which victims were treated.[525] The hearings with women and children who had suffered sexual violence were always held in private. Unfortunately, the hearings phase concluded with a rather poor performance of President Kabbah, who in public refused to recognise responsibility or apologise for his own role in the conflict.[526] The final stage of writing up the report took more than a year as it was not publicly presented until October 2004.

8.6 The Relationship between the TRC and the Special Court

The Special Court for Sierra Leone became operational mid 2002 and thus coincided with the setting up of the Truth Commission. Much speculation surrounded the unprecedented parallel existence of the two transitional justice initiatives. A clear challenge was the fact that they were set up at different times with little regard for each other. The Statute of the Special Court shows no recognition of the previously established Truth Commission despite their overlapping mandates. A letter from the Secretary General Kofi Annan to the Security Council in 2001 expressed concern that "*care must be taken to ensure that the Special Court and the Truth and Reconciliation Commission will operate in a complimentary and mutually supportive manner, fully respectful of their distinct but related functions*".[527] Considerable analysis was done by NGOs as to the overlaps between the two mandates and the need for

[524] Schabas, W, "The Sierra Leone Truth Commission", op.cit. p. 25
International Center for Transitional Justice, The Sierra Leone Truth and Reconciliation Commission,, op.cit. 3
[525] Kelsall, T op.cit, Shaw, R op.cit.
[526] Schabas, W, "The Sierra Leone Truth Commission", op.cit. p. 26
[527] Letter dated 12 January 2001 from the Secretary General to the President of the Security Council, UN Doc. S/2001/40, para.9 cited in Schabas, "The Sierra Leone Truth Commission", op.cit. p. 34

them to conclude an agreement to clarify their relationship and possible ways of cooperation. Most of the debate centred on technical and procedural aspects and whether the Special Court would be able to request confidential information from the Truth Commission.[528]

Finally, no agreement was concluded between the two institutions. The Prosecutor publicly announced that he would not request information from the Truth Commission.[529] However, disagreement prevailed over the hierarchy of power between the institutions and it became apparent that perpetrators were hesitant to cooperate with the Truth Commission in fear that their testimonies might end up in the Special Court, which was simultaneously issuing indictments.[530] Schabas, a former Commissioner in the Truth Commission, has insisted that the *"relationship between the two mechanisms was synergistic"* and proved the *"usefulness of a genuinely complementary approach by which international prosecutions coexist with alternative accountability mechanisms."*[531] Horovitz, a former staff member of the Special Court, has on the other hand suggested that for the future it may be wise to prevent the contemporary existence of such institutions. Rather it would preferable to sequence them; had the Truth Commission been completed prior to the establishment of the Special Court, there would have been less confusion among the general public, more willingness to cooperate with the Truth Commission and its Final Report could subsequently have been used as evidence during prosecutions.[532]

In retrospect, it seems that much of the attention given to the parallel existence of the two transitional justice institutions focused on technicalities and paid insufficient attention to the importance of coordinating the legacy they would leave, not least among the victims. Although public awareness campaigns were conducted separately on their respective mandates, they both neglected the crucial aspect of clarifying their relationship and the implications this would have for victims as well as perpetrators. A particular area which

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[528] Human Rights Watch Policy Paper on the Interrelationship Between the Sierra Leone Special Court and the Truth and Reconciliation Commission, 18 April 2002 available at www.hrw.org
International Center for Transitional Justice (Wierda, Hayner and van Zyl), Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone, 24 June 2002, paper available at www.ictj.org
Schabas, W, "The Relationship between Truth Commissions and Courts: The Case of Sierra Leone", *Human Rights Quarterly,* No. 25, 2003, pp. 1035-1066

[529] Prosecutor Crane of the Special Court announced this publicaly, e.g. in national media in Sierra Leone and at international conferences, including at a Conference held at the Irish Center for Human Rights on the Inter-Relationship between Truth Commissions and Courts, Galway, 4-5 October 2002 (attended by author)

[530] International Crisis Group, *Sierra Leone's Truth and Reconciliation Commission,* op.cit. p.4
Kelsall, op.cit. p. 381, Shaw, op.cit. p. 4

[531] Schabas, "The Sierra Leone Truth Commission" op. cit. p 39

[532] Horovitz, op.cit. p.56

would have merited coordination was that of reparations. A united position on this issue would have strengthened the possibilities to pursue the effective implementation of reparations for victims and significantly contributed to the credibility of the respective institutions. Despite the precedents set by the International Criminal Court in this area, in Sierra Leone the issue of reparations was perceived by the Special Court to have been delegated to the Truth Commission, which in turn only had a mandate to propose recommendations. As a result, victims were surrounded by two significant and costly international transitional justice initiatives, neither of which was able to provide them with any concrete reparation measures. In this context, it is of note that the Truth Commission in East Timor implemented an Urgent Reparations Scheme, albeit small-scale, which was able to provide some interim reparations, mostly aimed at medical and psycho-social care for the most vulnerable victims (see chapter 9 of the thesis).

8.7 The Final Report of the Truth Commission and its Recommendations

The Truth Commission publicly presented its Final Report to the President of Sierra Leone in October 2004. The Report dedicated a considerable section analysis of the root causes of the conflict. A common perception both within Sierra Leone and abroad was that the RUF were the principal culprits and that the diamond industry was the main triggering factor. The Commission did indeed find the RUF to be responsible for the majority of the serious violations committed.[533] However, the Commission when exploring the roots causes of the conflict underlined the failure of governance and accountability, the interplay of poverty, social marginalisation and endemic corruption, in addition to years of denial of basic human rights, as key factors that caused and sustained the war.[534] As noted by Schabas, the Sierra Leonian Truth Commission operated under very different circumstances than in South Africa, where there was a clear political transition and the root evil of apartheid was unquestionable. In Sierra Leone, the depressing conclusion was a lack of real political change after the civil war, despite elections.[535] Unlike in Guatemala, the Truth Commission in Sierra Leone was not restricted from indicating names of persons in authority who bore responsibility for violations and decided to do so in its Final Report.[536] This aspect was considered necessary among the Commissioners, however, hardly endeared the Report within the government, where key figures remained the same as during the internal armed conflict.

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[533] Sierra Leone Truth Commission Final Report, Vol. 1, Introduction, para. 16
[534] Ibid. Vol. 1 para. 11 and Vol. 2, p. 6
[535] Schabas, "The Sierra Leone TRC", op.cit. p. 28, 39
[536] Ibid. pp. 24, 28

The Final Report dedicated specific chapters to analysis of the violations which affected women and children. Former Commissioner Sooka has highlighted that; *"contrary to the belief that amputations had been the main violation carried out, the Commission was able to establish that, in fact, rape and sexual violence were the most prevalent crime. Rape had been the silent crime that most women and girls in Sierra Leone had suffered during the conflict."*[537] The Commission analysed gender-based violence and its orgins in detail and, following extensive consultations with women's rights organisations,[538] set forth broad-ranging recommendations which touched on root causes, including for example customary practices, such as female genital mutiliation (FGM). The Final Report furthermore proposed concrete measures, such as repealing discriminatory legislation and gender-specific reparations, which dealt with the consequences, notably the stigma and medical complications that female victims have suffered after the extensive sexual violence during the conflict.[539] Surveys and estimates by NGOs indicate that approximately one third of the female population was subjected to rape, sexual slavery and other forms of sexual violence during the conflict.[540]

Unlike certain other Truth Commissions, such as in South Africa, in Sierra Leone the mandate of the Commission did not delimit it to only investigating the most serious violations.[541] Consequently, the Commission was able to interpret its mandate broadly and analysed violations of civil and political rights and their linkages to structural violations by the denial of economic, social and cultural rights as well. The interrelationship between these rights was strongest in the section of the report which dealt with Recommendations and Reparations. The majority of the victims who had suffered serious physical violence expressed a yearning to have improved access to economic and social rights. The Commission based its recommendations on the needs and requests expressed by victims and indicated these clearly in the Final Report in order of the expressions of priority; housing, education and medical

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[537] Sooka, Y, "Dealing with the past and transitional justice: building peace through accountability", *International Review of the Red Cross (IRRC)*, June 2006, Vol. 88, No. 862, p. 319

[538] Millar, H, "Facilitating Women's Voices in Truth Recovery: An Assessment of Women's Participation and the Integration of a Gender Perspective in Truth Commissions" in Durham, H and Gurd, T (eds.), *Listening to the Silences, Women and War*, Martinus Nijhoff Publishers, 2005, pp. 171-222

[539] Sierra Leone Truth Commission Final Report, Vol. 2, Chapter 3 Recommendations, Chapter 4 Reparations
King, J, "Gender and Reparations in Sierra Leone" in Rubio-Marín, R, *What Happened to the Women? Gender and Reparations for Human Rights Violations*, New York, Social Science Research Council, 2006, pp.247-283
Schabas, "The Sierra Leone Truth Commission", p. 32

[540] Physicians for Human Rights, *War-Related Sexual Violence in Sierra Leone; A Population-Based Assessment*, 2002 quoted in Amnesty International, *Sierra Leone: Getting Reparations Rights for Survivors of Sexual Violence*, Report AI Index AFR51/005/2007, 1 November 2007, pp. 1-36

[541] Truth and Reconciliation Act 2000, section 6

care.[542] The Report set out extensive recommendations, many of them structural, institutional and legislative and ranked them according to importance and urgency as; "imperative", "work towards" and "seriously consider".

In addition to a comprehensive chapter on recommendations, the Final Report dedicated a whole separate chapter on recommendations specifically to reparations. The Report identified the consequences of the violations, specifically in the case where these continued to have an impact on the lives of victims, notably by permanent physical disability, stigma and social exclusion. For many victims, the lack of assistance and reparations after the conflict meant that they were not able to resume their lives and move beyond the trauma of the violence. Many victims, especially women, continued to be re-victimised.[543] The report identified five specific groups of victims who had been specifically vulnerable; amputees, war wounded with physical disabilities, victims of sexual violence, children and war widows.[544] The Commission argued that these groups of victims should be the beneficiaries of a reparations programme primarily aimed at rehabilitation, restoring their dignity, reduction of their dependency and at bringing them on an equal footing with a larger category of victims.[545] While the Commission considered all victims entitled to some form of reparations, the proposed delimitation was essentially pragmatic in view of very limited resources. The Commission set out that the reparations programme should consist of health care, pensions, education, skills training and micro-credit projects as well as community and symbolic reparations. Importantly, the Report did not restrict the beneficiaries to those who had cooperated with the Commission, unlike in South Africa where this had been an eligibility criteria.[546] Such delimitation would primarily have had a negative impact on women, many of whom had been reluctant to give testimonies due to fears of stigma and rejection in the community.[547]

As foreseen by the Lomé Agreement, Article XXIV, the programme should be financed by the setting up of a Special Fund for War Victims and the Commission proposed that its

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[542] The Report demonstrates that among the 7700 statements given to the Commission, 49% requested assistance with housing/shelter, 41% with education and 27% with medical care.
Sierra Leone Truth Commission Final Report, Vol. 2, Chapter 4 Reparations, paras. 30-31.
[543] The continuing impact of sexual violence on women is for example documented by Amnesty International, *Sierra Leone: Getting Reparations Rights for Survivors of Sexual Violence*, op.cit.
[544] Ibid., paras. 53-99
[545] Ibid., para 42-46, 57
Schabas, W, "Reparation Practices in Sierra Leone and the Truth and Reconciliation Commission", op.cit. p. 300
[546] Sierra Leone Truth Commission Final Report, op.cit. para 54
Schabas, "Reparations", op.cit. p. 301
[547] King, J, "Gender and Reparations in Sierra Leone", op. cit. p. 261

funding should come from the State budget, revenue from mineral resources (also foreseen in the Lomé Agreement) and donor support. Another potential source of funding identified was that of seized assets from convicted persons, with indirect reference to article 19 of the Statute of the Special Court on restitution. Unfortunately, to date the Special Court has not referred to restitution in any of its judgements.[548]

In giving their testimonies to the Commission, victims clearly indicated that they wanted to see State responsibility for reparations. Many victims were simply unable to identify the perpetrators due to the at times blurred distinction between soldiers and rebels and therefore had no other recourse than the State. With regards to State responsibility, the Report affirmed the following;

"The Commission took the view that the State has a legal obligation to provide reparations for violations committed by both State actors and private actors. The Commission is of the opinion that all victims should be treated equally, fairly and justly. Given the nature of the conflict in Sierra Leone, it was not always possible to identify the perpetrators or the groups they belonged to. States have an obligation to guarantee the enjoyment of human rights... and that reparations are made to victims...If governments fail to apply due diligence in responding adequately to, or in structurally preventing human rights violations, then they are legally and morally responsible."[549]

In formulating its position on the issue, the Commission cited reparations awards in human rights provisions and jurisprudence, including for example in the Inter-American human rights system. Although the Basic Principles on the Right to Reparation[550] were still in draft form at the time, the Commission stated that they were "indicative of the current status of international law of the right to redress from victims of such violations"[551] and explicitly endorsed them.[552] An additional consideration given by the Commission was that the majority of victims expressed discontent over the assistance provided to some 50'000 perpetrators through Disarmament, Demobilization and Reintegration (DDR) programmes. The Report notes that *"the widely held perception that the State had taken better care of ex-combatants*

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[548] Article 19 of the Statute of the Special Court for Sierra Leone provides for possible restitution; "*the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone*". See details in chapter 4 of this thesis on reparations in International Criminal Law.

[549] Sierra Leone Truth Commission Final Report, Vol. 2, Chapter 4 Reparations, para. 21

[550] UN 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, UN Doc. A/RES/60/147

[551] Sierra Leone Truth Commission Final Report, Vol. 2, Chapter 4 Reparations, para. 19

[552] Schabas, "Reparations", op.cit. p. 299

than victims...created an onus on the government to replicate these efforts on behalf of victims".[553] Schabas underlines that although the term "reparations" did not appear either in the Lomé Peace Agreement or in the Truth and Commission Act, the Commission clearly understood its mandate to be centred on the needs and rights of victims and that these could best be promoted through a reparations programme.[554]

8.8 Follow-up and Implementation of the Recommendations regarding Reparations

The Report underlined that the Truth and Reconciliation Commission Act set forth a clear obligation on the government to implement the recommendations of the Commission;
"Section 17 the Act requires that Government shall faithfully and timeously implement the recommendations of the report that are directed to State bodies and encourage or facilitate the implementation of any recommendations that may be directed to others."

Despite the commitment to give effect to the recommendations of the Commission, in practice the response of the government was reluctant. As noted previously, during the hearings phase of the Commission, the President refused to recognise and apologise for the role played by himself and the government during the conflict. It took almost a year for the government to officially respond to the Commission report, this was done by the issuing of a White Paper in mid 2005 which accepted the recommendations in principle, however without demonstration of a clear commitment to advance their implementation.[555]

Human rights' and women's NGOs applauded the comprehensive recommendations set out in the Truth Commission report and their persistent lobby has been key to maintaining attention and pressure on the government to implement the recommendations. In the area of legal reform, some progress has gradually been achieved as several bills relating to women and children's rights were, after considerable delay, approved by parliament in 2007.[556] The National Human Rights Commission, as noted above, was only established in 2006 following

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[553] Sierra Leone Truth Commission Final Report, Vol. 2, Chapter 4 Reparations, paras. 36-37
[554] Schabas, "Reparations", op.cit. p. 293
[555] Hayner, P, "Negotiating Peace", op. cit. p. 27
OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Commission on Human Rights for 2005, E/CN.4/2006/106, para. 52
Amnesty International, "Sierra Leone Government urged to implement the recommendations of the Truth and Reconciliation Commission", Public Statement AFR 51/012/2005, 29 November 2005
[556] OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Human Rights Council for 2007, A/HRC/7/66, para. 59

considerable technical advice and "encouragement" by OHCHR.[557] It is hoped that the Human Rights Commission can play an important role in promoting implementation of the recommendations from the Truth Commission and it is positive that it has been officially designated as the "Follow-Up Committee" for this purpose. The Human Rights Section of the successor of the peacekeeping mission; the UN Integrated Office in Sierra Leone (UNIOSIL), has continued to support the Human Rights Commission and jointly organised a national consultative conference with stakeholders regarding implementation of the Truth Commission recommendations in 2008, which concluded that 20 of the 56 overall recommendations have been fully or partially implemented.[558]

An area where the government showed little interest in implementing recommendations was disappointingly, however not unexpectedly, that of reparations. The Truth Commission Report recommended that an already existing government body, the National Commission for Social Action (NaCSA), be given responsibility to implement the reparations programme. The government was reluctant to set up the Special Fund for War Victims, but in 2006 established a task force to advise on a reparations programme and conceded that the NaCSA could be the implementing entity of such a programme.[559] One negative aspect of the Truth Commission's Final Report was that it was not able to estimate an approximate total number of victims.[560] The government was initially disinclined to document the number of victims, in part due to the financial implications involved with reparation claims.

Some critique has also been raised regarding the role of the UN in relation to the issue of reparations. Schabas has noted that at the time when the Truth Commission Report was published, references to reparations were suspiciously absent from UN reports and documents.[561] However, as is revealed by a review of the annual OHCHR human rights reports on Sierra Leone to the Human Rights Council and of the more recent reports of UNIOSIL to the Security Council, the issue of reparations has become a key concern and a

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[557] OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Human Rights Council for 2006, A/HRC/4/96, para. 45
Hayner, P, op cit. p. 29
[558] OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Human Rights Council for 2008, A/HRC/10/52, para. 38
[559] OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Human Rights Council for 2007, para 61
Amnesty International, *Sierra Leone: Getting Reparations Rights for Survivors of Sexual Violence*, op.cit. p. 23
[560] King, J, "Gender and Reparations in Sierra Leone", op. cit. p. 273
[561] Schabas, "Reparations", op.cit. p. 294

focus for follow-up.[562] In fact, the attention given to the issue and the explicit criticism voiced by the UN regarding the lack of national political will and resource allocation has been a major contributing reason as to why the spotlight has been kept on the issue of reparations.

While progress has been slow, some important progress has taken place. Sierra Leone remains at the very bottom of the UNDP development index (ranked as number 179 in 2008[563]) and thus it is evident that State funds for a reparations programme must be supplemented by international assistance. The Sierra Leone Poverty Reduction Strategy (PRSP), adopted in 2005, made reference to the implementation of the recommendations of the Truth Commission as one of its priorities. However, the World Bank Country Assistance Strategy for Sierra Leone 2006 to 2009 failed to reflect the issue of reparations, but rather centred on disarmament, demobilisation and reintegration (DDR) of former combatants.[564] Sooka has underlined the disproportionate investment by the international community in DDR programmes in stark contrast to the lack of support for victims and signalled that failure to sustain support for Truth Commission recommendations relating to reparations may result in a crisis of legitimacy of transitional justice processes.[565]

In 2005 a new UN entity, the Peace Building Commission, was established. One of its principal objectives, and of its accompanying Peace Building Fund, is to support long-term strategies for post-conflict peace-building.[566] Sierra Leone was selected among the first countries to qualify for assistance. In July 2008, a project grant allocated 3 Million USD specifically to establish a Reparations Unit within the NaCSA, provide initial funding for the establishment of the Special Fund for War Victims and the setting up of a database on victims. Data collection was done on the estimated number of victims (presumed to be around 55'000) and some 30'000 victims came forward to register themselves. The Special Fund for War Victims was finally established in December 2009. Some 20'000 victims received reparations in the form of medical assistance and a minor grant of 100 USD. The majority of

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[562] For example see references to reparations in; OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Human Rights Council for 2007, A/HRC/7/66, para. 59,
OHCHR Annual Report on the Situation of Human Rights in Sierra Leone to the Commission on Human Rights for 2005, E/CN.4/2006/106, para. 54
Sixth Report of the Secretary General to the Security Council on the United Nations Integrated Office in Sierra Leone, S/2008/281, 29 April 2008, para. 44

[563] UNDP Human Development Report 2008, http://hdr.undp.org/en/ *last visited 25 April 2009*

[564] World Bank Country Page Sierra Leone, http://go.worldbank.org/COWMCN2VS0 *last visited 25 April 2009*

[565] Sooka, Y, op.cit. pp.324-325

[566] Official UN webpages of the Peace Building Commission http://www.un.org/peace/peacebuilding/ and the Peace Building Fund http://www.unpbf.org/ *last visited 25 April 2009*

these were children, war widows and victims of sexual abuse.[567] The funding from the Peace Building Commission provided an important momentum to advance concrete progress in the area of reparations for victims in Sierra Leone, yet concerns remain over the sustainability of the reparations programme.[568] Ultimately, national political will and a degree of allocation of State resources will be essential in order to sustain and demonstrate a genuine commitment to implement the right to reparations in practice.

8.9 Conclusions

The issue of reparations in the transitional justice process in Sierra Leone illustrates some important lessons. The references to victims' rights and a fund for rehabilitation in the Lomé Peace Agreement set an important framework. The active involvement and presence of the United Nations throughout the setting up of the transitional justice initiatives contributed to enhancing their impartiality and also provided essential support for the national human rights movement, particularly in the context of an ineffective regional human rights system and the absence of a national human rights institution. The Truth Commission, although under-funded and at time criticised for lacking a victims' perspective in its hearings, provided a Final Report with in-depth analysis of human rights violations, their consequences for victims, elements of State responsibility and clear proposals for the establishment of a reparations programme.

The Special Court regrettably did little to advance reparations and has so far failed to even explore aspects of restitution in its judgements. Despite the limitations in the Statute of the Court, it is unfortunate that it has not taken greater advantage of its presence in the country to promote the issue of reparations and the recommendations of the Truth Commission. While it may be noted that the judgments issued by the Special Court provide victims with a kind of reparation in the form of "satisfaction", this measure alone does not change their situation in practice.

The lack of coordination between the two transitional justice institutions was a missed opportunity to leave a stronger legacy in favour of victims. Ultimately this raises questions at the national level of the credibility of transitional justice as the absence of reparations effectively blocks the ability of many victims to restart their lives and re-establish their

[567] International Center for Transitional Justice (Suma, M and Correa, C), *Report and Proposals for the Implementation of Reparations in Sierra Leone*, December 2009
[568] Ibid.

dignity. Sierra Leone challenges the solidarity of the international community to replicate the assistance given to demobilised perpetrators with equal support for the victims. Despite wavering political will and scarce resources, the recommendations of the Truth Commission provide a solid basis for progress on victims' rights. Attention should remain focused on the allocation of the State for the newly established Special Fund for War Victims and also on the sustainability of the support provided by the international community.

9. Case Study: Reparations in East Timor

9.1 Introduction

The transitional justice process in East Timor[569] was, similar to that in Sierra Leone, characterised by two parallel mechanisms, one aimed at prosecutions and the other at establishing a narrative overview of violations during the conflict based on testimonies of victims. In Sierra Leone, the mandate of the Truth Commission was drafted in a hurry while significant reflection was dedicated to and political support was ensured for the Special Court. The scenario was the opposite in East Timor. The unprecedented mandate awarded to the UNTAET mission by the Security Council raised expectations that it deal with criminal accountability as an urgent priority. However, the result of the Serious Crimes Process remains questioned as it only managed to establish accountability for a small number of low and mid-level perpetrators, while those bearing the greatest responsibility remain sheltered in Indonesia. Overall, the Serious Crimes Process in East Timor was critically under-resourced and lacked a victim's perspective.

On the other hand, in East Timor, the Commission for Truth, Reception and Reconciliation (CAVR), was developed through a process of consultation, enjoyed local ownership and received international support which resulted in considerable financial and human resources. The Truth Commission was specifically designed to complement the Serious Crimes Process and developed a number of victim-oriented measures, including the provision of psychosocial support and interim reparations as well as victim participation in community reconciliation processes.

The Asian region has lacked a regional human rights system to promote accountability[570] and East Timor did not have an independent national human rights institution until 2006, both factors which have played important roles in promoting victims' rights in previous case studies. On the positive side, the establishment of transitional justice initiatives in East Timor was facilitated by the extensive mandate awarded to the UN administration. However, the outcome with regard to accountability and reparations remains seriously compromised due to the lack of cooperation by Indonesia, which bears primary State responsibility for the violations committed and the principal obligation to provide reparations. While the Truth

[569] Although the name was changed from East Timor to Timor Leste after independence on 20 May 2002, this chapter uses the term East Timor for the sake of consistency.
[570] However, in December 2008 the ASEAN Charter entered into effect and in late 2009 the ASEAN Intergovernmental Commission on Human Rights was gradually being established.

Commission recommendations provide an important foundation for the realisation of the right to reparations for victims, their implementation to date remains stalled, pending insufficient political will both at the domestic level and in the international community.

9.2 Brief Historical Background

Unlike other case studies reviewed, the armed conflict in East Timor was set in the context of decolonisation. In 1974, Portugal was in the process of withdrawing from East Timor after four centuries of colonial rule. Following a brief civil war, in late 1975 Indonesia invaded and occupied East Timor. The following twenty-four years were characterised by military suppression whereby those suspected of supporting the liberation movement were systematically tortured and killed. Forced displacements took place, under the pretext of dislodging guerrillas, and this policy resulted in extensive famine. The Indonesian military strategically sought local militia allies among opponents of the main independence movement in order to divide the local population. It has been estimated that one quarter of the East Timorese, around 200'000 people died during the occupation.[571]

The country was largely closed to foreign media during the Indonesian rule. Following the fall of the Indonesian President Suharto in 1998, the subsequent interim President Habibi allowed a referendum to be held in East Timor in 1999. The referendum was arranged by the UN in August 1999, however the security remained the responsibility of the Indonesian military (TNI). The turnout was more than 99 percent of those registered to vote, of whom an overwhelming majority 78.5 percent of the East Timorese voted for independence, much to the surprise of the Indonesians who prior to the ballot had arranged a campaign of intimidation.[572] Leaving security arrangements to the Indonesian police and military was a serious mistake as they refused to accept the result of the vote. Many East Timorese anticipated the reaction and immediately took to the hills as soon as they had cast their vote. The Indonesian army, in collaboration with East Timorese militia groups, instigated a massive revenge against the civilian population. The majority of the population, around half a million were displaced, large numbers among them to West Timor. Some 1'400 people were killed

[571] Burgess, P, "A New Approach to Restorative Justice- East Timor's Reconciliation Process" in in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, pp. 178-180

[572] Chesterman, S, "East Timor" in Berdal, M and Economides, S (eds.), *United Nations Interventionism 1999-2004,* Cambridge University Press, 2007, p. 195

and hundreds of women were raped. Approximately 60'000 houses were burned and 75 percent of government buildings and infrastructure were destroyed.[573]

In response to the violence, the Security Council adopted resolution 1272 under Chapter VII of the UN Charter on 25 October 1999, whereby the peacekeeping mission UNTAET was created and given an unprecedented (although similar to the parallel mandate in Kosovo) complete administrative and executive authority in the territory, including for the administration of justice.[574]

A number of inquiries issued late 1999 or early 2000 identified a systematic pattern of serious violations against the civilian population and called for prosecution of the Indonesian military (TNI). Among the reports were a joint UN Special Rapporteurs' fact-finding mission[575], an International Commission of Inquiry on East Timor of the Secretary General[576] and, somewhat surprisingly, the Indonesian independent national human rights institution KomnasHam.[577] Paragraph 146 of the International Commission of Inquiry report underlines the importance of the issue of reparations as it states that: "*The Commission believes it has a special responsibility to speak out on behalf of the victims who may not have easy access to international forums. They must not be forgotten in the rush of events to redefine relations in the region, and their basic human rights to justice, compensation and the truth must be fully respected*".

9.3 Prosecutions and the Truth Commission

As noted in chapter 4 on reparations in International Criminal Law, the first measure undertaken by UNTAET to establish accountability was the adoption of Regulation No.

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[573] Burgess, P, "Justice and Reconciliation in East Timor, the Relationship between the Commission for Reception, Truth and Reconciliation and the Courts", *Criminal Law Forum,* Kluwer Academic Publishers, Vol. 15, 2004, pp. 135-158

[574] Security Council Resolution on the Situation in East Timor , S/RES/1272, adopted 25 October 1999
Chesterman, S, "East Timor" in Berdal, M and Economides, S (eds.), *United Nations Interventionism 1999-2004,* Cambridge University Press, 2007, pp. 192- 216

[575] Joint UN Special Rapporteurs' of the Commission on Human Rights Fact-Finding Mission to East Timor (Arbitrary Detention, Torture and Violence against Women), December 1999, A/54/660

[576] Report of the International Commission of Inquiry on East Timor to the Secretary General, UN. Doc. A/54/726-S/2000/59, 31 January 2000

[577] See further discussion regarding the reports and their findings;
Reiger, C and Wierda, M, *The Serious Crimes Process in Timor Leste: In Retrospect,* Prosecution Case Studies Series, International Center for Transitional Justice, March 2006, pp. 8-10
Linton, Suzannah, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', *Criminal Law Forum,* vol. 12, 2001, pp. 207-208

2000/15 in June 2000 which created the Special Panels for Serious Crimes.[578] It soon became apparent that the Special Panels faced an insurmountable task for a number of legal, practical and political reasons. While the mandate of the Special Panels was modelled on the Rome Statute of the International Criminal Court, their temporary jurisdiction was limited from 1 January to 25 October 1999 and thereby excluded violations that has occurred during the more than two decades of Indonesian occupation. The Special Panels and the Serious Crimes Unit within the Public Prosecutor were seriously underfunded and critique was raised in relation to the number of prosecutions of serious crimes which took place as part of a widespread and systematic pattern of violations, but where the charges were presented individually as single homicide cases, without linking them to related crimes.[579]

Among the practical obstacles were the nearly complete lack of qualified national staff and non-existent infrastructure. During the occupation, professionals were specifically brought in from Indonesia and the majority of the East Timorese lacked the training and skills necessary to take over administration of justice. The number of concurrent working languages, in many cases four, caused significant difficulties during the proceedings. Political considerations constituted additional obstacles as those who carried the main responsibility remained in Indonesia which, in the face of repeated calls for prosecutions and the threat of an international tribunal, decided to set up its own ad hoc human rights court to investigate incidents during the referendum. However, the Indonesian prosecutions of atrocities in East Timor are generally considered to have been a sham, seriously criticised by the UN High Commissioner for Human Rights[580] and described by an International Commission of Experts in 2005 as "manifestly deficient".[581] The senior military commanders in Indonesia were not indicted and of the eighteen people tried, all but one, an East Timorese militia member, were acquitted upon appeal.[582]

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[578] UN. Doc. UNTAET/REG/2000/15 adopted 6 June 2000

[579] Linton, S, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice', op cit. p. 218

[580] Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Timor Leste to the Commission on Human Rights, E/CN4/2004/107, paras. 50-51

[581] Report of the UN Commission of Experts to review the Prosecution of Serious Violations of Human Rights in East Timor (appointed by the Secretary General) to the Security Council, S/2205/458, 24 June 2005, Annex II, para. 371

[582] De Bertodano, S, "East Timor: Trials and Tribulations" in Romano, C, Nollkaemper, A and Kleffner, J (eds.) *Internationalized Criminal Court, Sierra Leone, East Timor, Kosovo and Cambodia,* Oxford University Press, 2004, pp. 92-94

Reiger, C, "Hybrid Attempts at Accountability for Serious Crimes in East Timor" in Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, p.156

Burgess, P, "A New Approach to Restorative Justice- East Timor's Reconciliation Process", op.cit. p. 200

Following independence, President Xanana Gusmao indicated that he did not intend to pursue calls for criminal accountability of the Indonesian military. Conscious of the geo-strategic location of East Timor, he decided to favoured friendly relations with its giant neighbour. As will be explored below, this political position of the East Timorese Government had considerable implications both for the possibility of conducting prosecutions as well as for the work of the Truth Commission.

9.4 Establishment of the Commission for Reception, Truth and Reconciliation

In view of considerable obstacles to prosecutions, including those mentioned above, other transitional justice measures were contemplated to address the legacy of the conflict and a truth commission was proposed. In some ways, the scenario was the opposite of that in Sierra Leone, as described in the previous chapter, where the Truth Commission was included as a rushed measure in the peace agreement, while the Special Court was more carefully elaborated and benefited from considerably more funding. In East Timor, the hasty establishment of, and difficulties faced by, the Serious Crimes Panels prompted reflection on the need for complementary measures which could offer a comprehensive overview of the violations during the occupation, promote reconciliation and address victims' rights.

The idea of a truth commission was supported by the CNRT (coalition of the East Timorese pro-independence groups) and was developed by a steering committee consisting of representatives of East Timorese groups and the United Nations.[583] Following consultations in the National Council, UNTAET adopted resolution 2001/10 on 13 July 2001 whereby the Commission for Reception, Truth and Reconciliation (known as CAVR, the Portuguese acronym) was established.[584]

The mandate of the Commission included a broad range of objectives, namely;
(a) inquiring into human rights violations in the political conflicts in East Timor;
(b) establishing the truth regarding past human rights violations;
(c) reporting the nature of the human rights violations and identifying the factors that may have led to such violations;

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[583] See introduction in CAVR, Chega!, Final Report of the East Timorese Commission for Reception, Truth and Reconciliation (CAVR), Dili, October 2005
Burgess, P, "Justice and Reconciliation in East Timor, the Relationship between the Commission for Reception, Truth and Reconciliation and the Courts", op. cit. p. 143
[584] Regulation on the Establishment of a Commission for the Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001

(d) identifying practices and policies, whether of State or non-State actors which need to be addressed to prevent future recurrences of human rights violations.
(e) the referral of human rights violations to the Office of the General Prosecutor with recommendations for the prosecution of offences where appropriate;
(f) assisting in restoring the human dignity of victims;
(g) promoting reconciliation;
(h) supporting the reception and reintegration of individuals who caused harm to their communities through the commission of minor criminal offences through the facilitation of community based mechanisms for reconciliation.

The mandate of the Truth Commission is more specific than most previous such inquiries and included some novel features, such as quasi-judicial powers and a clear relationship with prosecutions as well as a provision for community reintegration for low-level perpetrators.[585] Unlike Sierra Leone, the regulation for the Truth Commission in East Timor stipulated that the Prosecutor General could request access to its information in practice and a detailed Memorandum of Understanding (MOU) between the institutions was drawn up to clarify procedures for witness and victim protection. In practice, this did not hamper the work of the Commission, but rather clarified the relationship and respective roles of the two entities.[586]

While the objectives of the mandate did not make specific reference to the issue of reparations, the Commission clearly considered this an integral aspect of restoring the dignity of victims.[587] Within its mandate to work with victims, the Commission established a dedicated victim support division and, as will be described below, undertook a range of measures specifically focused on victims.

In contrast with the Serious Panels Process, which was limited to events during 1999, the Truth Commission was established to cover the time period between 25 April 1974 and 25 October 1999 and also included the internal conflict prior to the occupation. The mandate expressly covered State as well as non-State actors and referred to "*persons, authorities,*

[585] Stahn, C , "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor", *American Journal of International Law*, Vol. 95 , No. 4 , Oct. 2001, pp. 952-966
[586] UNTAET/REG/2001/10, 13 July 2001, section 44
Lyons, B "Getting Untrapped, Struggling for Truths; the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor", in Romano, C, Nollkaemper, A and Kleffner, J (eds.) *Internationalized Criminal Court, Sierra Leone, East Timor, Kosovo and Cambodia,* Oxford University Press, 2004, p. 117
Burgess, P, "Justice and Reconciliation in East Timor", op. cit. pp. 144-146
[587] CAVR, Chega!, Final Report, Part 11.12 Recommendations, p. 36

institutions and organisations".[588] The Commission was vested with significant powers of inquiry, similar to that of the Truth Commission in Sierra Leone.[589] Following independence, the new Constitution of Timor Leste adopted in March 2002 included recognition in Section 162 of the Commission for Reception, Truth and Reconciliation.

9.5 Operational Aspects of the Commission for Reception, Truth and Reconciliation

The CAVR was established as an independent national authority and not subject to the control or direction of any member of Cabinet. While formally approved by the UN transitional authority, the Commission members were nominated by a selection panel, consisting of national political parties and civil society organisations following a process of public consultations.[590] Although a provision of the mandate allowed for two members to be internationals, the final selection of members was exclusively East Timorese.[591] Among the seven commissioners, five were men and two women. Another novel feature of the CAVR in East Timor was the nomination of 29 regional commissioners at district level, which allowed for more grassroots contact and community accessibility. The Commission started its work in April 2002 and was initially given two years to operate, however this was extended to a total of 39 months. Nearly 8'000 individual statements were collected, the overwhelming majority from victims, and eight thematic public hearings were held and broadcast live through media.

The Commission had significantly more resources, both human and financial, than the Serious Crimes Unit and Panels as it benefited from earmarked funding from a range of international donors. At the peak of the work of the Commission, it had some 278 staff. While the human rights unit of UNTAET and OHCHR played an important role during the starting-up phase[592], staff in the Truth Commission were primarily national. The Commission decided that internationals would not hold management positions, but rather act as advisors or short-term consultants on specific areas of work.[593] This contrasts with the Serious Crimes Unit which was dominated by internationals, resulting in subsequent difficulties regarding national

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[588] Regulation on the Establishment of a Commission for the Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001, section 13

[589] Lyons, B "Getting Untrapped, Struggling for Truths; the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor", op.cit, p. 106

[590] CAVR, Chega!, Final Report, Part 1.3 Introduction, Formation of the Commission, p 16

[591] Lyons, B "Getting Untrapped, Struggling for Truths; the Commission for Reception, Truth and Reconciliation (CAVR) in East Timor, in Romano, C, Nollkaemper, A and Kleffner, J (eds.) *Internationalized Criminal Court, Sierra Leone, East Timor, Kosovo and Cambodia,* Oxford University Press, 2004, pp.99-124

[592] Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Timor Leste to the Commission on Human Rights, E/CN4/2004/107, paras. 38-43

[593] CAVR, Chega!, Final Report, Part 1.3 Introduction, Formation of the Commission, pp. 39-42

ownership. In comparison with the Truth Commission in Sierra Leone, its contemporary counterpart in East Timor benefited from significantly more staff, a longer period to work, a much smaller country to cover and a broader and more carefully drafted mandate.

The innovation of the Community Reconciliation Process (CRP) of the CAVR has received significant attention. In essence, it was devised to promote reconciliation and some limited accountability among low-level perpetrators of minor offences, such as for example theft and destruction of property. Those responsible for serious crimes were excluded from the process. Applicants would approach the Commission and deposit a statement which was forwarded to the Office of the Prosecutor General, who would decide if it would be an appropriate case to be dealt with in a CRP. If approved, a community panel would conduct a public hearing, in which victims and traditional leaders would participate, where the offender publicly admitted wrongs and apologised. Collectively, the community would agree on conditions on the basis of which the offender could reintegrate into the community. Interestingly, despite being a community decision, the approval of the affected victims was crucial and in practice victims could veto the process, which occurred in some instances.[594]

The conditions that the offenders were be obliged to comply with, described as "acts of reconciliation", were in many cases symbolic and limited to a public apology, however could also consist of community service, such as participation in reconstruction work, or include reparations measures, such as restitution by returning stolen property or the payment of a minor amount.[595] Once the "act of reconciliation" was complied with, the offender received immunity from criminal liability. While an innovative process and largely viewed favourably according to preliminary assessments, there were drawbacks. One of them was the pressure that communities placed on individual victims to forgive perpetrators in the interest of the "greater good".[596] While the system contemplated a reparations mechanism, these were largely symbolic, which in turn related to the fact that the majority of the offenders were destitute.

In total some 1 400 offenders participated in CRPs, however it was estimated that double as many would have been willing to do. As indicated by Burgess, the high degree of community

[594] Burgess, P, "A New Approach to Restorative Justice", op.cit. p. 191
[595] Regulation on the Establishment of a Commission for the Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001, section 27
Burgess, P, "Justice and Reconciliation in East Timor", op. cit. pp. 150-152
[596] Burgess, P, "A New Approach to Restorative Justice", op.cit. p. 194

participation in CRPs across the country, in total estimated between 30 000 to 40 000 people, indicated a relatively high degree of approval of the process, which was specifically designed to be in accordance with local customs.[597]

While having received less attention than the CRP process, the Truth Commission also applied innovative practices specifically with regard to victims. A Victim Support Division was set up within the CAVR and it established a network throughout the various districts in order to implement grassroots activities.[598] During a three-month period, the process of statement taking was coupled with a range of other community activities organised in a participatory manner with victims. Among these were Community Profile Workshops at village level to discuss the impact of the conflict. At district level, each statement taking period was completed with a public Victims Hearing, which focused entirely on victims. The Victims Hearing was an opportunity for the Commission staff to report back to the community about its activities and it allowed victims, who had chosen to participate and previously made a statement to the CAVR, to give their testimony in public. The Commission followed up with a survey in 2004 among victims who had participated in district Victims Hearings (in total 52 hearings were conducted) and the overwhelming response was that it had been a positive experience and an important step for victims to regain their dignity.[599] The Commission also arranged a widely broadcast National Public Hearing exclusively focused on victims.

Towards the later stage of the Commission's work, in 2003 an internal evaluation determined that it would be important to provide additional assistance to victims who were particularly vulnerable and had been severely affected by violations during the conflict. Therefore, the Victim Support Division identified a minor group of victims and arranged for them to participate in a number of small "healing" workshops, one of which was arranged for women only. In partnership with local NGOs, the Commission arranged so that professional mental health workers conducted the workshops.[600] Although the number of beneficiaries was very limited, in total only around 150 people, this initiative of the CAVR in East Timor should he heralded as recognition of the importance of counselling and psychosocial support, an aspect generally overlooked by previous Truth Commissions as well as International Courts.

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[597] Burgess, P, "A New Approach to Restorative Justice", op cit. p. 187
Also noted in Grenfell, Damian, "When Remembering Isn't Enough: Reconciliation and Justice in Timor-Leste", *Arena Magazine,* Issue 80, December-January 2005-06, pp. 32-35.
[598] CAVR, Chega!, Final Report, Part 10 Acolhimento and victim support
[599] Ibid. pp. 26-30
[600] Ibid. pp. 30-38

Another unprecedented measure undertaken by the Truth Commission in East Timor was its initiative to provide, within its own mandate, some degree of reparations directly to victims. No previous Truth Commission had done such an undertaking and although the measures provided were very limited, and only reached a small category of beneficiaries, they are of significant symbolic importance for the affirmation of victims' right to reparations. The Truth Commission simply considered that it was *"not enough to tell survivors to wait until the recommendations of the Final Report had been acted on for help to come".*[601] An Urgent Reparations Scheme was established to assist victims *"who were clearly vulnerable and whose need was severe, immediate and related directly to a human rights violations which had occurred between 1974 and 1999".* The majority of the beneficiaries were survivors of torture or rape or had suffered indirectly through the disappearance or killing of family members. Many of those selected were widows, orphans, persons with a disability or who had suffered stigmatisation within the community.

The reparations provided were modest and primarily consisted of urgent medical and psychosocial care, equipment for the disabled and an emergency grant of 200 dollars. The financing of the scheme was provided through the Trust Fund for East Timor, administered by the World Bank. In total 712 people participated in the Urgent Reparations Scheme, of these 516 were men and 196 women.[602] Considering the attention that the Truth Commission placed on gender-based violence, it is surprising that its Report does not comment on why men were overrepresented among the beneficiaries of urgent reparations. A likely explanation is that much fewer women than men approached the Truth Commission to make statements, despite attempts to hire female staff and the application of gender-sensitive working methods.[603]

The Report underlined that the Urgent Reparations Scheme was *"developed as a temporary measure and does not prejudice in any way any right of victims to full reparations as part of a long-term settlement... (and) was not to be regarded as full restitution. Nor was it considered*

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[601] Ibid. pp.38-39
Linton, S, *Putting Things into Perspective: the Realities of Accountability in East Timor, Indonesia and Cambodia,* Maryland Series in Contemporary Asian Studies, School of Law, University of Maryland, Number 3, 2005, p. 56

[602] Ibid. p. 41 All those who participated in healing workshop also received emergency reparations

[603] Wandita, G, Campbell-Nelson, K and Pereira, M, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims", in Rubio-Marín, R, *What Happened to the Women? Gender and Reparations for Human Rights Violations,* New York, Social Science Research Council, 2006, pp. 285-334

to extinguish the duty of the State to provide reparations for victims of human rights violations."[604]

9.6 The Final Report of the Truth Commission and its Recommendations

The Final Report of the CAVR was handed to President Xanana Gusmao in a formal ceremony in Dìli on 31 October 2005. The title of the report was *Chega!*, which roughly means "no more, stop, enough!" in Portuguese.[605] In total the report consisted of some 2000 pages and was published in three languages; Indonesian, English and Portuguese and a partial version was produced in Tetum.[606] A 200 page Executive Summary was also made available. The final report explored in significant detail the causes of the conflict and unsurprisingly focused to a large extent on the responsibility of Indonesia in conjunction with the 1975 invasion, the 24 year occupation and the 1999 referendum. The Report specifically studied the role played by the Indonesian military and police, studied command responsibility for specific periods and events and named a number of senior military officials. The report estimated that 18'600 killings and disappearances took place during the occupation and that the Indonesian military bore responsibility for approximately 85 percent of the violations. The Report concluded that the serious and systematic nature of the violations amounted to crimes against humanity.[607]

The Report also studied the internal conflict and the responsibility of East Timorese armed groups prior to the Indonesian occupation. The role of Portugal towards the end of the colonial period and the passive reaction by Western countries, among them the US and Australia, to the occupation was also brought forth in the report. Like in Sierra Leone, the Report dedicated specific attention to analysis of violations which affected women and children.[608]

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[604] Ibid. p. 39
[605] CAVR, Chega!, Final Report, Foreword, p. 6
[606] CAVR, Chega!, Final Report, Introduction, p 21.
Chesterman, op. cit p. 210 The language issue was (and remains) a major challenge in East Timor. The Constitution adopted upon independence in 2002 recognised two official languages, Tetum and Portuguese. For political reasons Indonesian was not chosen although this was the dominant language spoken among the population. Less than 10% of the population could understand Portuguese and virtually no one under thirty.
[607] CAVR, Chega!, Final Report, Chapter 8, Responsibility
[608] Millar, H, "Facilitating Women's Voices in Truth Recovery: An Assessment of Women's Participation and the Integration of a Gender Perspective in Truth Commissions" in Durham, H and Gurd, T (eds.), *Listening to the Silences, Women and War,* Martinus Nijhoff Publishers, 2005, pp. 171-222

The Final Report, like previous Truth Commissions in other countries, contained a comprehensive set of recommendations.[609] The recommendations can be broadly identified according to three categories. The first category of recommendations explored a range of human rights violations and set out measures which should be taken to address specific groups of victims and to establish an institutional framework to promote respect for human rights. Many of the recommendations of the CAVR were forward-looking and provided a platform for a future national human rights policy.[610] The second category of recommendations related to responsibility and squarely placed the principal duty upon Indonesia to ensure accountability and reparations.

In a controversial move, the Report dedicated a specific section of recommendations relating to justice and commented in depth on the failure of the Serious Crimes Panels to hold accountable those carrying the greatest responsibility and underlined that a majority of the Indonesians indicted also figured, listed by name and institutional affiliation, in the Truth Commission Report. At the time of the publishing of the Report, the Serious Crimes Panels had recently been discontinued. The Report recommended that their mandate be renewed by the United Nations and, should Indonesia persist in the obstruction of justice, the possibility of establishing an International Tribunal should be considered.

The third category of recommendations related specifically to reparations and contained a detailed proposal for a national reparations programme, which the Government was urged to implement and finance through the establishment of a trust fund. Like in Sierra Leone, the proposal identified particularly vulnerable groups of victims and underlined; *"we are all victims- but not all victims are equal".*[611] The Report identified six categories of victims; namely individuals who had suffered torture, sexual violence, disabilities (mental and physical), widows and single mothers, children and also communities particularly effected by a high concentration of violence.[612] The Final Report highlighted the experiences from the Urgent Reparations Scheme implemented by the Commission, the focus on victims upon whom the violations was having a continuing effect and the humble nature of what the majority of survivors sought, simply to enable them and their children to participate on a more or less equal footing in society. The Commission report therefore urged the main aim of the

[609] CAVR, Chega!, Final Report, Chapter 11, Reparations,
[610] OHCHR Report on Technical Cooperation in the Field of Human Rights in Timor Leste to the Commission on Human Rights for 2004, E/CN4/2005/115, para. 38
[611] CAVR, Ibid. p.35
[612] Ibid. p. 41

reparations programme to be rehabilitation through social services and medical and psycho-social care, scholarships for children as well as symbolic measures aimed at restoring dignity, such as commemorations and honouring of victims through grave memorials.

At the time of the presentation of the Report, the Basic Principles on the Right to Reparation for Victims had recently been adopted by the Commission on Human Rights in April 2005, and the Report specifically endorsed them as an applicable human rights standard for reparations.[613]

With regards to funding for a reparations programme, the Final Report noted that a fixed allocation should be designated from the East Timorese national budget, however underlined repeatedly that reparations should be the prime obligation and State Responsibility of Indonesia. The Report also suggested that permanent members of the Security Council who had given backing to the Suharto regime, particularly the US but also the UK and France, contribute to the provision of reparations for victims. Portugal was also recommended to provide financial support, as well as business corporations that profited from the sale of weapons to Indonesia during the occupation. Finally, the Report suggested that international agencies, foundations and civil society provide support based on the principle of social justice.

9.7 Follow-up and Implementation of the Recommendations regarding Reparations

The reaction of the President upon receiving the Report was predictable. The Government lead by Xanana Gusmao had determined to steer clear of a collision course with Indonesia and out of geo-strategic considerations was conducting a policy of reconciliation with the giant neighbour. The insistence of the CAVR report on accountability and prosecutions and the responsibility of Indonesia to provide reparations was deemed by the President to be counterproductive to the country's foreign policy interests and described as "*grandiose idealism*".[614]Consequently, the President refused to officially endorse the report and deliberately delayed its official publishing and the nomination of a follow-up institution.[615]

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[613] UN 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, UN Doc. A/RES/60/147, endorsed by the UN Commission on Human Rights in April 2005 and unanimously adopted in the General Assembly without a vote on 16 December 2005

[614] Kingston, J, "Regaining Dignity: Justice and Reconciliation in East Timor", *Brown Journal of World Affairs,* Vol. XIII, Issue 1, 2006, pp. 227-240

[615] Grenfell, D, "When Remembering Isn't Enough: Reconciliation and Justice in Timor-Leste", op.cit. p. 32

In anticipation of the finding of the CAVR, the East Timorese Government approached Indonesia and in late 2004 established a bilateral alternative inquiry; The Commission of Truth and Friendship (CTF), which was launched under the pretext of supporting restorative justice. The CTF was established without any public consultation, its Terms of Reference (TORs) lacked legal basis and there was no provision that its Commissioners from both countries act independently of the Governments that appointed them. The mandate of the CTF contained provisions which permitted amnesty for human rights violations, only allowed it to focus on events in 1999, omitted mentioning victims and specifically excluded references to reparations. Although the CAVR report was supposed to be taken into account, the final CTF report showed no recognition of the CAVR recommendations.[616]

The UN specifically refused to collaborate with the CTF initiative and vigorously objected to its amnesty provisions. In June 2005, another inquiry; the international Commission of Experts (CoE), appointed by the UN Secretary-General, made public its report to the Security Council.[617] The CoE Report underlined the lack of accountability and reparations for East Timorese victims and strongly criticised Indonesia's lack of cooperation and its attempts to divert international justice through the setting up of a domestic ad hoc human rights court and the CTF. The CoE expressed renewed calls for justice and urged the Serious Crimes Process to be continued and, in the absence of progress towards establishing accountability, recommended that the Security Council again consider the possibility of establishing an international tribunal. The CoE report was rejected by both East Timor and Indonesia and a lack of political support within the international community resulted in an absence of action. As described by Kingston; *"Gusmao's dilemma is being caught between high public expectations for justice and insufficient international support to make this happen".*[618] Burgess notes that *"the unlikely prospect of a Security Council mandate targeting those responsible in the world's largest Islamic nation has become even more remote in the post September 11 world".*[619]

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[616] International Center for Transitional Justice (Hirst, M), *Too Much Friendship, Too Little Truth, Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor Leste, January 2008*
International Center for Transitional Justice (Hirst, M), *An Unfinished Truth: An Analysis of the Commission of Truth and Friendship's Final Report on the 1999 Atrocities in East Timor*, March 1999
Reiger, C, "Hybrid attempts at accountability for Serious Crimes in Timor Leste", op. cit. pp. 157-158

[617] Letter from the Secretary General to the Security Council containing the Report of the UN Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in East Timor, S/2205/458, 24 June 2005

[618] Kingston, op.cit.

[619] Burgess, P, "Justice and Reconciliation in East Timor", op.cit. p. 139

The civil unrest in East Timor in May and June 2006 provided another "distraction" from the need to establish accountability for the 1999 events. In July 2006, the Secretary General submitted a report on justice and reconciliation in East Timor to the Security Council.[620] In view of the political opposition to further accountability measures, the report toned down recommendations on prosecution but highlighted the issue of reparations for victims and encouraged the creation of a solidarity fund in order to provide victims of serious crimes with "*collective and individual restorative measures*". The report was cautiously drafted and replaced the term "reparations" with "restorative measures", although in effect it recommended the same type of reparations as the CAVR report.

In this context, it is also worth noting that in comparison with Sierra Leone, OHCHR played a less prominent role in East Timor and after 2005, the annual OHCHR report on the human rights situation to the Human Rights Commission, and later the successor Council on Human Rights, was discontinued. International NGOs, notably Amnesty International and Human Rights Watch, have played an important role in promoting and maintaining focus on the CAVR and its recommendations.[621] National civil society organisations on the other hand have kept a relatively low profile and on the issue of reparations there has been much less public debate than for example in Sierra Leone. One of the main reasons for this was the hesitation to publicly challenge a government that consisted of key resistance leaders. As noted by Wandita, Campbell-Nelson and Pereira; "*Those who believe that reparations are part of the international tribunal package and who fear the social stigma in Timor Leste currently associated with calls for justice are, therefore, reluctant to discuss reparations*".[622]

While in Guatemala and Sierra Leone, the independent national human rights institution played an important role in following up on the implementation of the recommendations of the Truth Commission, this has not been the case in East Timor. Legislation establishing a Human Rights *Provedor* was passed in 2004, however the institution was only set up in 2006 and has not been vocal in advocating follow-up to the CAVR recommendations. [623] The Final

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[620] *Report of the Secretary General to the Security Council on Justice and Reconciliation in Timor-Leste*, UN. Doc.S/2006/580, 26 July 2006

[621] Joint letter from Amnesty International and Human Rights Watch to the President of the Timor Leste National Parliament "Honoring the Report of the Commission for Reception, Truth and Reconciliation", 14 March 2007, available at www.hrw.org *last visited 20 May 2009*

[622] Wandita, G, Campbell-Nelson, K and Pereira, M, "Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims", op.cit. p 318

[623] OHCHR Report on Technical Cooperation in the Field of Human Rights in Timor Leste to the Commission on Human Rights for 2004, E/CN4/2005/115, paras. 21-22
The legislation establishing the Human Rights *Provedor* in Timor Leste can be found at the webpage of the Asia-Pacific Forum; http://www.asiapacificforum.net/members/apf-member-categories/full-members/timor-leste

Report of the CAVR identified the Parliament as the national entity for follow-up. Parliamentary debate on the Report was delayed, and not until 2008 was a resolution adopted in Parliament which expressed support for the CAVR recommendations and endorsed the proposal of setting up a reparations scheme for victims.[624] However, the realisation in practice of a reparations scheme remains outstanding and as noted this in part relates to the reluctance of civil society to push for this issue. Unlike Sierra Leone, East Timor has to date not benefited from being selected as one of the pilot countries to receive support from the UN Peace Building Commission and Fund.

9.8 Conclusions

Like in other case studies in this research, the experiences in East Timor indicate the difficulties of harmonising measures for accountability with consideration of victims' rights and the difficulties implied in conceptually linking reparations with retributive measures. East Timor, unlike other case studies explored in this study, has undergone a fundamental transition through its political independence. The violations that occurred during the Indonesian occupation were documented by a number of internationally supported transitional justice initiatives and inquiries. However, ultimately the progress made towards establishing accountability remains weak. Only East Timorese perpetrators carrying a relatively low degree of responsibility were held accountable through the Serious Crimes Process and Community Reconciliation Processes. Those bearing the greatest responsibility remain sheltered in Indonesia and unlikely to stand trial. The international community failed to establish an effective accountability mechanism in 1999 and did not provide adequate resources and political support to the Serious Crimes Process. The result was characterised by am almost complete lack of consideration for victims, and in particular their needs for protection and counselling.

The Truth Commission, on the other hand, applied several novel features in its operational work. It enjoyed a high degree of political support both internationally and domestically and was well supported with financial and human resources. It resorted to a grassroots approach to its work and had a high percentage of local staff, which enhanced its legitimacy and sense of national ownership. Its mandate was detailed and the relationship with prosecutions was relatively clear, thereby largely avoiding the confusions which marred the process in Sierra Leone. Importantly, the Truth Commission worked closely with victims at the community

[624] Parliamentary resolution of 2008 on CAVR endorsement available at; http://www.cavr-timorleste.org

level, involved them in CRPs, provided psychosocial support and symbolic efforts were undertaken by the actual Commission to provide a limited degree of reparations for victims as an interim measure.

Despite considerable documentation supporting reparations for victims in East Timor, the primary hurdle resides in the fact the Indonesia denies to collaborate with such efforts despite the clear evidence of its State responsibility for violations. Victims have been let down as the national political leadership in East Timor has failed to promote their rights *vis-à-vis* Indonesia, instead favouring a "restorative justice" approach which omits reparations. As noted by several commentators, despite the geo-strategic location of East Timor, it is surprising and unfortunate that an inter-State compensation process has not been initiated.[625] This indicates, as noted in the first chapter of this thesis, the weakness of making victims dependent on the initiation and outcome of such a political process.

The impetus for providing reparations is temporarily stalled due to political factors, however the national political climate may well change in the near future and East Timor has a very solid basis for requesting compensation from Indonesia. While Indonesia is unlikely to proceed in prosecutions against TNI military officials, it may well concede to the provision of financial compensation as a measure to placate the international community, pending the application of political pressure applied. While reparations without accountability provide an incomplete measure of justice, it may provide an important stepping stone for victims in East Timor to move beyond past violations.

[625] Linton,"*Putting Things into Perspective: the Realities of Accountability in East Timor, Indonesia and Cambodia*", op.cit. pp. 55-57 – also notes the ironic fact that Indonesia is seeking compensation for Indonesian individuals and companies in East Timor who sustained damages during post-referendum violence in 1999 (!). Lyons, op. cit. p. 115

10. Case Study: Reparations in Colombia

10.1 Introduction

Colombia is the final case study which will be elaborated in this study. The rationale for selecting Colombia is based on the particular set of circumstances which have conditioned the application of transitional justice mechanisms at the national level and the considerable degree of attention given to the issue of reparations in this context. Unlike the other country case studies, Colombia is characterised by the absence of a comprehensive peace process as only one of the armed groups engaged in government negotiations; namely the paramilitary United Self-Defense Forces of Colombia (AUC). The United Nations was only involved in the process to a limited extent, however it together with other actors, notably the Inter-American Commission on Human Rights (IACHR), advocated vigorously for compliance with minimum human rights standards and the inclusion of victims' rights. As part of the negotiation and demobilisation process, which started in 2003, the Colombian government resorted to transitional justice measures by adopting specific legislation regarding the accountability of perpetrators, the establishment of a kind of national Truth Commission and reparations measures for victims.

The route chosen by the government has been strongly flavoured with restorative justice elements, resulting in amnesties for serious violations. Criticism has been raised against the government for failing to comply with its international obligations adhered to through human rights instruments and the Rome Statute of the International Criminal Court (ICC) and for using the issue of reparations in order to distract attention from the duty to establish accountability of perpetrators.[626] An important factor which has yet to demonstrate its impact at the national level is the entry into force of the full jurisdiction of the ICC in 2009 and the requirement that Colombia counteract claims that it is "unwilling and unable to genuinely carry out investigations or prosecutions".[627]

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[626] Among the principal critics; the UN Office of the High Commissioner for Human Rights, the Inter-American Commission on Human Rights, Human Rights Watch, Amnesty International, the International Crisis Group and the Colombian Commission of Jurists.
International Crisis Group, *Correcting Course; Victims and the Justice and Peace Law in Colombia,* 30 October 2008

[627] The Rome Statute of the International Criminal Court, article 17. Upon ratification in November 2002, Colombia submitted a declaration requesting exemption from the category of war crimes during a seven year period, as provided for in article 124 of the Statute.
However, the temporary exemption of war crimes does not apply to the other categories specified with the jurisdiction of the court, notably crimes against humanity. OHCHR, within its mandate of observation of international human rights and humanitarian law, has in its annual reports to the UN Commission on Human

Despite its failure to establish accountability for serious violations, the transitional justice process in Colombia stands apart for its unprecedented focus on victims' rights, achieved by a vibrant civil society and the active involvement of the international community. The national Truth Commission has so far only played a limited role as it has an unclear mandate and lacks neutrality. The government has accepted the legal concept that victims have a right to reparations, although significant challenges remain in defining the extent of State responsibility and effective operation of a reparations programme which does not discriminate between victims. Yet, as will be explored in this section, the recent recognition of victims' rights in domestic legislation and jurisprudence is likely to retain the issue of reparations on the national political agenda for some time. It is also likely to continue to figure as one of the issues of concern in the context of international human rights mechanisms, as *inter alia* illustrated by the focus on reparations during the debate at the Universal Periodic Review (UPR) of Colombia in the Human Rights Council in December 2008.[628]

10.2 Brief Historical Background

Colombia stands out as one of the countries in the Latin American region with one of the longest democratic traditions relatively uninterrupted by military dictatorships apart from a brief period in the 1950s. However, Colombia also suffers from one of the longest civil wars in the world, ongoing since the 1960s and has for decades had one of the highest homicide rates in the world. The country is marked by significant polarisation and inequity[629] coupled with a historically weak State apparatus, unable to control the national territory. The 1980s saw the gains from the narcotics trade filter into the financial and political sphere, also resulting in a corrupt and paralysed judiciary and deepened socio-economic divisions.[630]

The principal left-wing guerrilla groups in Colombia, FARC and ELN, were both founded in the 1960s and have ties with other agrarian reform movements and communist parties in Latin America. In the late 1990s the government initiated negotiations with the FARC, which

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Rights repeatedly affirmed that crimes against humanity have occurred in Colombia due to the systematic nature of the violence (E/CN.4/2004/13 report for 2003 para. 67, E/CN.4/2003/13 report for 2002 para. 42)

[628] Report on Colombia of the Working Group on the Universal Periodic Review of the Human Rights Council, A/HRC/10/82, 9 January 2009

[629] OHCHR Colombia, Annual Report to the Human Rights Council for 2007, A/HRC/7/39, para. 75; "*The GINI coefficient is the third worst in Latin America*"

[630] UNDP national development report on Colombia 2003; *El Conflicto, Callejon con Salida*, Bogotá , 2003, p. 32

Richani, N, *Systems of Violence, The Political Economy of War and Peace in Colombia*, NY, 2002, p. 25

Livingston, G, *Inside Colombia, Drugs, Democracy and War*, Latin American Bureau, London, 2003, p. 8

included the granting of a demilitarised zone in the south of the country. The peace talks collapsed in 2002 and the FARC were largely considered at fault for not having adhered to a cease fire.[631]

During the 1990s the paramilitaries consolidated their power in various parts of the country and in 1997 the AUC was formed with support from the elite of the business and large scale farming sectors. Lack of faith in the State military and the justice system are factors which partly explain the political support for private armed forces. Like the FARC, the paramilitaries built their power base on funds from cocaine production and sought to dominate regions with natural resources, in particular petroleum and minerals. [632]

The paramilitaries have acted with varying levels of complicity with the armed forces, which have allowed their gradual strengthening throughout the country. In numerous regions during the 1990s, the reduction of the number of human rights violations committed by the army related to the transfer of power to paramilitary groups. In the areas controlled by paramilitaries, extra-judicial killings became commonplace and targeted left wing sympathisers, social leaders, NGO members and trade unionists. According to the Colombian Commission of Jurists, 953 massacres were committed between July 1996 and June 2001, the responsibility of 66% of these was attributed to paramilitaries.[633]

The power play over territorial control between several armed groups caused a humanitarian crisis and the number of civilians displaced annually rose from 27'000 in 1985 to over 300'000 in 2002[634]. During the past decade, the internally displaced population in Colombia has been one of the world's largest and according to the UN High Commissioner for Refugees (UNHCR) amounted to approximately one million people in 2004[635], while unofficial figures estimate that two to three million people continue to be affected. The guerrilla and paramilitary groups have all demonstrated grave disregard for international humanitarian law

[631] Reasons for the collapse of the negotiations can also be traced to the simultaneous signing by the government of Plan Colombia, whereby large scale military support of the US was secured. Furthermore, scepticism also relates to Union Patriotica (UP), a political party formed by the FARC in the mid 1980s. Within a period of approx. five years more than 3'000 members were assassinated, including two presidential candidates. The case of the UP is currently subject to "friendly settlement" negotiations in the Inter-American Human Rights system.

[632] Richani, N, *Systems of Violence, op.cit. chapter 5* .The political support for paramilitary units dates back several decades. In the mid 1960s the Congress enacted legislation which authorised the forming of paramilitary units in order to promote public order

[633] Colombian Commission of Jurists, *A Growing Absence of Guarantees, Situation of HR and IHL in Colombia 1997-2003*, Bogotá, 2003, p. 25 Other human rights NGOs commonly assess the figures regarding responsibility of the paramilitaries at higher percentage rates.
Also Gallon, G, " Human Rights- a path to democracy and peace in Colombia" in Welna, C and Gallon, G (eds.) *Peace, Democracy and Human Rights in Colombia,* University of Notre Dame Press, 2007, pp. 353-410

[634] UNDP national development report on Colombia 2003, *op. cit.* , p. 122

[635] *www.unhchr.org statistics available, June 2004*

and in particular the principle of distinction. According to estimates by Amnesty International, some 60'000 people have died due to the internal armed conflict in Colombia between 1985 and 2003, approximately 80% of them civilians[636].

Colombia is distinguished by a significant discrepancy between a sophisticated legal framework and its dysfunctional operation in practice. The very high rate of impunity is aggravated by the extreme congestion in the justice system of some one million cases and by the constant threats directed against members of the judiciary.[637] Additional difficulties arise due to continuous clashes of jurisdiction between the ordinary justice system and the military justice system. As regards international legal obligations, Colombia is a State party to most regional and international human rights treaties.

Colombia has no UN peacekeeping mission, however there is significant UN presence in the country through twenty different UN agencies, of particular relevance are OHCHR and UNHCR.[638] OHCHR's mandate entails monitoring of human rights and humanitarian law and providing advice to the government on human rights matters. During the peace negotiations with the FARC, the UN Secretary General appointed a Special Adviser on Colombia to mediate, however the government requested this mandate to be terminated in 2005.[639] The ICRC also is present throughout the country and, in addition to its usual mandate of promoting compliance with international humanitarian law, plays an important role in providing victims of the armed conflict with humanitarian assistance.

10.3 Negotiations with the Paramilitaries

In August 2002, Alvaro Uribe Vélez assumed the presidency with a hard-line campaign to fight the war on internal terrorism by implementing a policy of "democratic security". Even though the presence of police and armed forces was increased throughout the country, the territorial gains were not accompanied by an increased presence of civilian authorities[640]. Although the democratic security policy gradually made certain progress in the human rights

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[636] Livingstone, G, op. cit. p 8

[637] *UNDP National development report on Colombia 2003,*op cit, *p 167,* Livingstone, G, op cit, *p 32* International Crisis Group, *Colombia, Negotiating with the Paramilitaries,* Report, September 2003, p 24

[638] Both OHCHR and UNHCR have been present in Colombia since the signing of bilateral agreements with the government in 1996

[639] UN Press release SG/A/823, 1 November 2002 http://www.un.org/News/Press/docs/2002/SGA823.doc.htm The termination of the mandate by the government followed critical comments by the Special Adviser Mr. LeMoyne on the negotiations with the paramilitaries

[640] OHCHR Colombia annual report for 2003, E/CN.4/2004/13 para. 18-19

field, such as a decreased number of displaced people and reduced homicide rate, it is disconcerting that the rate of disappearances increased by 20% in 2003.[641]

The Uribe government initiated a dialogue with the AUC shortly after coming into power and he became the first president to negotiate with the paramilitaries.[642] The AUC saw a favourable political momentum in Uribe's right-wing government,[643] and in December 2002 a unilateral cease fire was announced by the AUC. The impetus for the AUC to seek negotiations originated partly due to pressure caused by its international classification as a terrorist organisation and partly because of the increasing demands from the United States to extradite leaders on drug trafficking charges. An additional factor seen as a concern by paramilitary leaders was that the ICC could have jurisdiction in Colombia after November 2002.[644] It should be noted that the ratification of the ICC was done during the last days of the previous government and that the Uribe administration was faced with the looming threat of the ICC invoking its jurisdiction.[645] As will be explored below, however, both the paramilitaries and the government underestimated the reaction of the international community and the legal implications of initiating the demobilisation process, in particular, in relation to the international norms which restrict the application of amnesties and provide victims with the right to claim reparations.

Among the first challenges the government faced was open questioning by human rights organisations, among them Amnesty International, with regards to the contradictory concept of a peace process between the government and the paramilitaries. This contradiction is illustrated by the long-standing and close links between the security forces and paramilitaries, whose *raison d'être* was the defense of the Colombian State.[646] As discussed by Gallon, the Colombian government has persuasively counter-argued by resorting to the "fallacy of the State as victim theory", whereby the government eschews responsibility by shifting it to the

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[641] Colombian government, *Annual Human Rights and IHL Report,* 2003, chapter 7

[642] Laplante, L and Theidon, K, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz" in the *Michigan Journal of International Law,* Vol. 28:49, 2006, pp. 49- 108

[643] It should be noted that after Uribe's re-election in 2006, the Colombian Supreme Court initiated investigations against e.g. numerous right–wing politicians belonging to Uribe's coalition parties for links with paramilitary groups. In 2007 investigations were formally opened against 45 Congressmen, 18 of whom were jailed. OHCHR Colombia Annual Report to the Human Rights Council for 2007, A/HRC/7/39, para. 15

[644] However, the Colombian government upon ratification of the Rome Statute of the ICC on 5 August 2002 submitted a declaration under article 124, exempting jurisdiction over war crimes for a period of seven years.

[645] Colombia ratified the ICC on 5 August 2002, see UN Office of Legal Affairs Treaty Database; http://untreaty.un.org/English/access.asp
Mr. Uribe assumed the presidency on 7 August 2002.

[646] Amnesty International cited in Laplante, L and Theidon, K, op. cit. p. 62

narcotics trade and armed groups, without acknowledgement of entwined links with political and financial interests.[647]

The first step taken by the government to facilitate the negotiation process with the paramilitaries was the adjustment of the legal framework for demobilisations, previously based on law 418 of 1997, by adopting modifications through law 782 of 2002 and decree 128 of 2003. In brief terms, the government sought to apply amnesty provisions to the paramilitaries. The legislation excluded pardons for a number of violations, namely; atrocious and barbaric acts, terrorism, genocide, kidnappings, homicide committed in non-combat situations or by placing the victim in a state of defencelessness.[648] Furthermore, it was established that no benefits would be offered to anyone who "when demobilising is being prosecuted or has been condemned for crimes contrary to the Colombian Constitution or international treaties ratified by Colombia".[649] Upon closer scrutiny, it is apparent that the above provisions are inadequate and contrary to Colombia's international obligations. The list of violations for which pardons cannot be given is very brief and the exclusion would only apply if the person is actually being prosecuted or has been sanctioned. In practice, persons who sought to be demobilised according to decree 128 of 2003 were assessed by the Operational Committee for Disarmament (CODA), which upon review of the applicant's criminal record determined whether to issue a certificate and approve incorporation into the reintegration programme of the Ministry of the Interior and Justice, which enabled the demobilised person to receive socio-economic benefits.[650] The widespread impunity for serious human rights and humanitarian law violations in Colombia rendered this provision practically useless, in particular when applied to collective demobilisations which the judiciary did not have the capacity to respond to. Furthermore, the legislative framework was criticised for omitting and disregarding the rights of victims.[651]

In July 2003, the government and the AUC signed an agreement, the pact of Santa Fe de Ralito, to demobilise and publicly declared that 13'000 men would demobilise by the end of 2005. The process quickly drew additional international and domestic criticism for a number

[647] Gallon, G, "Human Rights- a path to democracy and peace in Colombia", op.cit. pp. 353-410
[648] Law 782 of 2002, article 19
[649] Decree 128 of 2003 article 21
[650] Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilisation of the AUC and the first judicial proceedings*, OEA/Ser.L/V/II., Washington, 2 October 2007, p.10
Uprimny Yepes, Rodrigo and Lasso Lozano, L "Verdad, reparación y justicia para Colombia: algunas reflexiones y recomendaciones" in Friedrich Ebert Stiftung, *Conflicto y Seguridad, Democracia en Colombia, Temas Críticos y Propuestas,* Conference Publication, Bogotá, 2004, p 165
[651] OHCHR Colombia Annual Report covering 2003, op cit, annex 3, para. 8

of reasons. The declared cease fire, a stated pre-condition of the government to conduct negotiations with any illegal armed group, was openly breached and hundreds of violations recorded by national and UN human rights monitors. [652] Furthermore, it became apparent that the legal framework described above and the resources of the Attorney General's office were completely inadequate as several of the initial demobilisation initiatives, paraded in a farcical manner on television, resulted in mass pardons, including for numerous paramilitaries under investigation for having committed serious human rights violations.[653]

In an attempt to claim transparency and legitimacy of the process, the government requested the Organisation of American States (OAS) to verify the demobilisation. In February 2004, the General Assembly of the OAS passed a resolution establishing the mandate of the OAS verification mission in Colombia.[654]At the last minute, a reference was included in the resolution, inviting the IACHR to advise the OAS verification mission. The OAS mission in Colombia adopted a low profile and limited its mandate to passively report on violations to the cease fire.[655] The IACHR on the other hand vigorously stepped up its "advisory services" to the Colombian government and together with OHCHR in Colombia made numerous public calls for the adoption of a legal framework for demobilisations in line with international obligations.

10.4 The "Alternative Justice" Bill

In the face of mounting controversy and critique, the government attempted to pass legislation which could be applied to demobilised paramilitaries responsible for serious violations. The first botched attempt was launched in August 2003 and known as the "Alternative Justice" bill. It claimed to be inspired by restorative justice theory and proposed alternative justice sanctions which basically translated into amnesty provisions, without exclusion of those responsible for gross human rights violations. The bill was sent to congress without prior consultations with civil society and considerable objections were raised by members of the

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[652] OHCHR Colombia Annual Report covering 2003, op.cit para. 54
Colombian Human Rights Ombudsman Report on breaches of the cease fire, September 2004 – documents 342 cases of violations by the AUC between January- August 2004
http://www.defensoria.org.co/pdf/informes/informe_107.pdf, visited 12 February 2009
Amnesty International, *Annual Human Rights Report on Colombia for 2003, available at* www.amnesty.org

[653] Procuraduría General de la Nación, cited in Laplante, L and Theidon, K, op. cit. p. 65

[654] It should be noted that the OAS Secretary General at the time, Mr. Cesar Gaviria was a former Colombian president. Queries were raised with respect of the incentive behind the OAS commitment to the verification mission, which was strongly promoted by Mr. Gaviria himself. Mr. Gaviria has since returned to national politics.

[655] Camilleri, M, "The OAS in Colombia; MAPP/OEA, paramilitary demobilisation and civil society" in *Revista CEJIL*, No. 2, 2006, pp. 156-158

judiciary, the NGO community, academia and the international community. OHCHR in Colombia analysed the proposed bill and raised a number of concerns; the bill did not make any reference to human rights obligations and the sanctions proposed were clearly lacking proportionality to the violations committed and were in breach of the State duty to investigate and sanction gross violations. Particular concern was expressed over the provision establishing presidential discretion regarding pardons as this would interfere with the independence of the judiciary. Furthermore, the references to reparations for victims were unclear, there was no implementation mechanism contemplated and importantly, the obligation of the State to guarantee reparations for victims was entirely absent.[656]

The draft "Alternative Justice" bill illustrated an example whereby the concept of restorative justice was deliberately distorted to justify impunity. The bill displayed a notion of victims as passive beneficiaries and its drafting excluded the participation of victims' groups. This runs contrary to the concept of restorative justice as "a process whereby all the stakeholders come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future" and "involves the victim, the offender and the community in a search for solutions which promote repair and reconciliation".[657] As noted by the Constitutional Court judge Uprimny, any attempt to apply restorative justice in the Colombian context is complicated due to a number of reasons; including the consideration that restorative justice is aimed at addressing "ordinary" crimes and not gross violations and therefore implies sanctions which are disproportionate in relation to the seriousness of the crimes. Furthermore, from a practical perspective, it is very difficult to find a suitable and safe modality to bring together victims and perpetrators in Colombia.[658]

10.5 Law 975 of 2005- *Ley de Justicia y Paz*

During 2004 and 2005 there was intense debate in Colombia concerning the legal framework for demobilisation of the paramilitaries. Due to significant international pressure from

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[656] For OHCHRs analysis see; OHCHR Colombia annual report for 2003, op cit, annex 3, para. 9-11 and the public statement made by the OHCHR Director in Colombia Mr. Fruhling at the Colombian Senate, 23 September 2003, available at: www.hchr.org.co

[657] On restorative justice theory, see mention in chapter 4 and also;
IDEA, *Reconciliation after Violent Conflict, A Handbook*, Stockholm, 2003, p. 111
Braithwaite, J, Restorative Justice and Responsive Regulation, Oxford University Press, 2002
Marshall, T, *Restorative Justice: An Overview*, London, 1999, p. 5
Zehr, H, *Changing Lenses: A New Focus for Crime and Justice*, Pennsylvania, 1990, p 181 quoted at www.restorativejustice.org

[658] Uprimny Yepes, Rodrigo and Lasso Lozano, L "Verdad, reparación y justicia para Colombia: algunas reflexiones y recomendaciones", op.cit. p. 125

OHCHR[659], IACHR as well as the academic and NGO community, the government was forced to rework its draft legislation proposal for "Alternative Justice". In total some nine bills were debated in Congress before the adoption on 21 June 2005 of Law 975/2005, re-named *La Ley de Justicia y Paz,* the Justice and Peace Law. As indicated in the title of the law, the government strategically changed the name following the controversy of the Alternative Justice bill.

The Justice and Peace Law 975 indicates a significant shift in recognition of human rights standards and cites at length provisions relating to truth, justice and reparations, making indirect references to the Rome Statute of the International Criminal Court as well as to UN soft law Principles on Action to Combat Impunity, the Basic Principles on the Right to Reparation for Victims and the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power. The first article of the Law 975 seeks to set a balance and states that its objective is to "facilitate peace processes and reincorporation, collective or individual, into civilian life by members of armed groups while guaranteeing the rights of the victims to truth, justice and reparations". Furthermore, the Law 975 through articles 4 to 8, 44, and 46 to 49 expounds on the definition of victims and on the content of the right to truth, justice and reparations.

Regarding reparations, the Law 975 affirms that this right should be comprehensive and cites the same components as the Basic Principles on the Right to Reparation, namely; restitution, compensation, rehabilitation, satisfaction and guarantees of no-repetition. In this sense the Law 975 demonstrates a very progressive approach by embracing and enshrining the emerging concept of reparations in international law. The Law 975 (article 5) also has an inclusive definition of victims, which encompasses direct family members affected by the killing or disappearance of the victim. On the other hand, one of the drawbacks of the law is that the definition of victims is expanded to include members of the armed forces, which has been heavily criticised by victims' organisations.

Although the Law 975 seeks to give the impression that the victims are to be given due consideration, the law nevertheless retains its core element, namely that of alternative sentences for perpetrators (articles 3 and 29). The law, which is only intended to be applied to

[659] During 2004 and 2005, OHCHR presented and published six public statements with considerable analysis of the international norms for truth, justice and reparations, in particular calling for their inclusion in the negotiation process with the paramilitaries. All statements are available in Spanish at OHCHR's Colombian webpage: www.hchr.org.co

perpetrators who have committed crimes of such severity that they cannot be pardoned by law 782 of 2002 and decree 128 of 2003, foresees deprivation of liberty of between 5 to 8 years (article 29). The location where the prison sentence is to be carried out shall be determined by the government and the period during which the demobilisation took place may be deducted from the sentence (article 30).

The lack of proportionality of the proposed sentences in relation to the gravity of the crimes was the key propellant behind a number of legal challenges presented against the Law 975 for being unconstitutional. In addition to concerns regarding disproportional sentences, the law was challenged on a number of procedural aspects regarding the participation of victims in the proceedings and in relation to the funding of reparations.[660] The principal lawsuit against the Law 975 was submitted by the Colombian Commission of Jurists and it was supported by extensive *amicus curie* briefs by, among others, ICTJ and CEJIL. [661] The subsequent sentence of the Constitutional Court C-370 of 19 May 2006 required the Law 975 to be adjusted in a number of areas, although essentially conceded that alternative penalties could be applied in the interest of achieving peace.[662]

10.6 Reparations in Law 975 of 2005

In relation to the issue of reparations, the Law 975 contains, and retains after the Constitutional Court ruling, a number of problematic aspects. Although the right to reparations is affirmed at length, upon closer inspection it is clear that the law presents serious drawback clauses and major practical challenges. A key problem relates to the issue of State responsibility.[663] Article 42 states that it is the duty of members of armed groups to provide reparations following their judicial sanctioning. Thus, despite lengthy affirmations of the right

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[660] See extensive discussion of the Colombian Constitutional Court sentence C-370/2006 in Laplante, L and Theidon, K, op. cit. pp. 81- 108

[661] CEJIL, *Amicus Curie brief to Colombian Constitutional Court regarding Law 975, 2006* http://www.cejil.org/documentos/AMICUS%20FINAL.doc available 22 January 2009
ICTJ *Amicus Curie brief to Colombian Constitutional Court regarding Law 975*, 17 January 2006 http://www.ictj.org/static/Americas/Colombia/colombia.justicepeacebrief.spa.pdf available 22 January 2009

[662] See extensive discussion of the law 975 and the Colombian Constitutional Court sentence C-370/2006, see; Laplante, L and Theidon, K, op. cit. pp. 81- 108
Guembre, MJ and Olea, H "No justice, no peace, discussion of a legal framework regarding the demobilisation of non-state armed groups in Colombia", Roht-Arriaza, N and Mariezcurrena, J (eds.), *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice,* Cambridge University Press, 2006, pp. 120-147
Gomez Isa, F "Justicia, verdad y reparación en el proceso de desmovilización paramilitar en Colombia" in Gomez Isa, F (ed.), *Colombia en su laberinto, una mirada al conflicto,* Catarata, Madrid 2008, pp. 87-166

[663] International Crisis Group, *Colombia: Towards Peace and Justice?,* Latin America Report No. 16, 14 March 2006, pp. 11-12
Guembre, MJ and Olea, H, op.cit. p.134

to reparations for victims, it is clear that the government sought to use politically correct terminology regarding reparations as "window dressing" while denying the core element of State responsibility. Throughout Law 975 there is no mention of State responsibility *vis-à-vis* the victims. The absence of State responsibility stands in stark contrast with the fact that the Colombian State between 2004 and 2007 was condemned and sanctioned by the Inter-American Court on Human Rights for its responsibility in relation to five major massacres committed by paramilitary groups against civilians. In all five cases, the Court explored at length the extent of State responsibility through active participation by State agents and collusion with paramilitaries or by omission to prevent the violations.[664] As clearly set out in the Basic Principles on the Right to Reparation for Victims; *"a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations".*[665]

A second major obstacle to making the right to reparations operational is the link to prosecutions. Reparations are to be paid pursuant to the individual conviction, or if there is proof of the responsibility of the particular paramilitary group of the perpetrator, then the victim should apply to the Reparation Fund for Victims (articles 42 and 54). These provisions make the award of reparations conditional upon a number of factors, among them; 1.) the outcome of the investigation, 2.) the ability of the victim to present proof to support his/her claim[666], 3.) if the perpetrator has relinquished his/her property to the Reparations Fund[667] and 4.) whether the Reparations Fund holds sufficient resources to distribute. Linking the award of reparations to prosecutions significantly limits the prospects of making this part of the law operational, especially given the judiciary's entrenched structural difficulties in breaking impunity in Colombia. Although Law 975 foresees the setting up of a specific unit within the Attorney General's Office (article 33), in practice there have not been significantly increased allocations of resources for investigations. By mid 2006, some 31 000 paramilitaries had

[664] For further reference, see chapter 3 regarding reparations in human rights jurisprudence. The sentences of the Inter-American Court on Human Rights are;
19 Comerciantes v. Colombia, Inter. Am. Ct. HR, Judgement 5 July 2004, Series C, No.109
Mapiripan Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 15 September 2005, Series C, No.134
Pueblo Bello Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 31 January 2006, Series C, No. 140
Ituango Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 1 July 2006, Series C, No. 148
La Rochela Massacre v. Colombia, Inter. Am. Ct. HR, Judgement 11 May 2007, Series C, No. 163

[665] UN 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, 2006, op.cit. para 15

[666] Critique has been raised as victims are forced to carry the burden of proof in court and must present evidence of filed complaints and residence, see Fundación Ideas para la Paz, *Siguiendo el conflicto, hechos y análisis,* Bogotá, No. 50, June 2007, p. 5

[667] The demobilised paramilitaries have generally been unwilling to relinquish their assets and very few have contributed to the Reparations Fund, see International Crisis Group, *Correcting Course, Victims and the Justice and Peace Law in Colombia,* Latin America Report No. 29, 30 October 2008, p 10

demobilised and among them approximately 3'000 requested to be judged according to the Law 975, an implicit recognition of their responsibility for serious crimes which cannot be pardoned by Law 782. Only 23 prosecutors were assigned to investigate all the cases.[668] Meanwhile some 275'000 victims have filed claims for reparations under the Law 975. By the end of 2009, not a single conviction had been handed down and effectively the reparations provisions have been blocked. Furthermore, it is of additional concern that several people who presented themselves as victims in the legal proceedings have been killed in retaliation attacks.[669]

10.7 National Commission on Reparations and Reconciliation

As described above, Law 975 sets out a transitional justice process primarily based on judicial procedures which allow perpetrators to dominate while victims are left dependent on the outcome of the investigations. During the debate regarding the law, there was significant discussion of establishing a form of a truth commission as a complement to a process otherwise limited to a strictly "judicial truth", without victim participation or an overview of the factors causing the conflict.[670] OHCHR, with reference to the UN Principles on Combating Impunity, stressed the need to establish an extrajudicial commission for clarification of historical and sociological factors, i.e. an initiative similar to Truth Commissions previously established in other transitional or post-conflict countries.[671] There

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[668] Comisión Nacional de Reparación y Reconciliación, Informe al Congreso, *Proceso de reparación a las victimas, balance actual y perspectivas futuras*, 2007, pp. 156-158
International Crisis Group, *Correcting Justice*, op.cit. p. 8

[669] OHCHR Colombia Annual Report to the Human Rights Council for 2007, A/HRC/7/39, para. 50
OHCHR Colombia Annual Report to the Human Rights Council for 2009, A/HRC/13/72, para. 81
Annual Report 2009 of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II, 30 December 2009

[670] For an illustrative example of the role of victims in international criminal procedures, see Stover, E "Witnesses and the Promise of Justice in the Hague" in Stover and Weinstein (eds.) *My Neighbour, My Enemy, Justice and Community in the Aftermath of Mass Atrocity"*, Cambridge University Press, 2004, pp. 104-120
For further reflections, based on empirical examples, regarding the need to balance judicial accountability with mechanisms for the establishment of a comprehensive record of truth, see;
Goldstone, Richard, 'Advancing the Cause of Human Rights: The Need for Justice and Accountability' in Power, S and Allison, G, *Realising Human Rights, Moving from Inspiration to Impact*, 2000, chapter 9
Minow, M. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, Beacon Press, 1998
Hayner, P, Unspeakable Truths: Confronting State Terror and Atrocity. New York, Routledge, 2001
Cohen, Stanley, 'State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past' *Law and Social Inquiry*, Vol. 20, No.1, 1995

[671] *Public statement made by the OHCHR Director in Colombia Mr. Fruhling"* Para lograr la paz en Colombia se necesitan justicia, verdad y reparation" *at International Seminar on Alternative Justice in Barcelona, 28 February 2004, available at: www.hchr.org.co*
UN principles on combating impunity (Joinet principles of 1997), op. cit. note in paras. 17-24 that , as an extra element to prosecutions of perpetrators of human rights violations, extrajudicial commissions of inquiry fulfil the *"objective of the right to know as a collective right"*.

was significant support for the creation of a truth commission from leading NGOs, such as the Colombian Commission of Jurists,[672] academics, and members of the judiciary.[673] However, among the key features of the initiatives presented by civil society organisations and discussed in public was significant involvement of the international community, notably the UN, and it was suggested that a truth commission, following examples in other countries such as Guatemala and Sierra Leone, be composed of both nationals and internationals in order to establish a degree of impartiality.

The government responded by discarding the involvement of the international community in the setting up of such a mechanism and at first openly rejected the concept of a truth commission in Colombia.[674] However, the law did finally provide for the establishment of a kind of Truth Commission, yet with an atypical mandate and composition. Article 50 of Law 975 creates the National Commission for Reparations and Reconciliation (NCRR) and provides it with a sprawling mandate. Among the multitude of tasks, the NCRR should; 1.) guarantee the rights of victims and their participation in judicial proceedings, 2.) present a public report about the emergence of illegal armed groups, 3.) conduct follow-up and verify the process of reincorporation and the work of local authorities to ensure the full demobilisation of members of illegal armed groups, 4.) recommend criteria for reparations, conduct follow-up of their implementation and present a report to government on the issue after two years; and 5.) coordinate the activities of Regional Commissions for Property Restitution. The NCRR should be composed of twelve members, all nationals, of whom only two represent victims' organisations, 1 represents the human rights ombudsman's office and the rest are representatives of various government entities. The NCRR was established in 2005 for a period of eight years and differs significantly from traditional models of Truth Commissions,[675] as it will not take victims testimonies or work during a brief period with the aim of publicly presenting a consolidated and impartial report with an analysis of causes to the conflict and a comprehensive set of recommendations. Furthermore, as evidenced by the

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For some further reflections on truth commissions and prosecutions, see Dugard, J, "Possible Conflicts with Truth Commissions" in Cassese, A, Gaete, P and Jones, J (eds), *The Rome Statute of The International Criminal Court, A Commentary*, Oxford University Press, 2002, p. 693

[672] The Colombian Commission of Jurists, was a longstanding supporter for the creation of a truth commission and conducted an alternative inquiry in 2000, together with 18 other NGOs, titled the *Nunca más* project (named after of previous investigations in South America which created the concept of Truth Commissions in the 1980s)

[673] Constitucional Court magistrate Uprimny Yepes, Rodrigo and Lasso Lozano, L *"Verdad, reparación y justicia para Colombia: algunas reflexiones y recomendaciones"* op.cit., pp. 128-135

[674] The Colombian negotiator, the High Commissioner for Peace Luis Carlos Restrepo publicly opposed the proposal,*"Colombia no necesita comisiones de verdad"*,(Colombia does not need truth commissions), press release 16 February 2004

[675] Hayner, P, *Unspeakable Truths: Confronting State Terror and Atrocity*, New York, Routledge, 2001 Hayner, P, "Fifteen Truth Commissions 1974 to 1994: A Comparative Study", *Human Rights Quarterly* 16, 1994, pp. 597-655

selection of members to form part the NCRR, there was no attempt to establish neutrality as the vast majority of members are government representatives.

It seems unclear what the government intended to be as the prime objective of the NCRR as it appears to have been deliberately given an impossible and incompatible number of tasks to simultaneously guarantee the rights of victims in proceedings, verify the reintegration process of perpetrators, as well as recommend and simultaneously evaluate the policy for reparations. Victims' organisations, notably among them MOVICE[676], and human rights NGOs have openly rejected to collaborate with the NCRR, which they consider politicised and incapable of undertaking the tasks assigned to it.[677] The lack of support from civil society organisations has effectively undermined the work of the NCRR to date.

10.8 Administrative Reparations Programme

Despite the controversy surrounding the creation of the NCRR, several of its members have publicly spoken out against the ineffectiveness of the reparations provisions of the Law 975 and called for the State to assume a clearer responsibility towards the victims by allocating resources from the national budget and by establishing an alternative process to claim reparations outside judicial proceedings.[678] The IACHR supported this position and strongly advocated for the establishment of an administrative reparations process, independent from judicial proceedings, accessible to victims, and expedient at processing claims. Furthermore, the IACHR reiterated the central and principal responsibility of the State to ensure that victims have effective access to reparations.[679]

Faced by growing discontent among victims' organisations and the evident ineffectiveness of Law 975, the government issued Decree 1290 in April 2008, whereby an administrative programme for individual reparations was created. The programme was aimed at providing reparations, primarily financial compensation, to victims without requirements of resorting to the judicial system or dependency on the funds handed over by perpetrators. The Decree 1290

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[676] MOVICE, Movimiento de Crimenes de Estado, major NGO representing large numbers of victims of State and paramilitary violence, which was set up in 2005 in the context of the adoption of the Justice and Peace Law

[677] Laplante, op.cit. p. 94

ICG, *Correcting Justice*, op.cit. p 4

Fundación Ideas para la Paz, *Siguiendo el conflicto, hechos y análisis*, Bogotá, No. 30, September 2005

[678] Comisión Nacional de Reparación y Reconciliación, Informe al Congreso, *Proceso de reparación a las victimas, balance actual y perspectivas futuras*, 2007, p. 10 and 109

[679] Inter-American Commission on Human Rights, *Report on Principal Guidelines for a Comprehensive Public Policy on Reparations*, OEA/Ser.L/V/II.131, Washington, 19 February 2008

repeatedly underlines (articles 2 to 5) that the programme is based on the principle of solidarity and that the State only assumes subsidiary responsibility. Victims of violations committed by State agents are deliberately excluded. The decision on the claims is to be made by an Administrative Reparations Committee which, similar to the NCRR, consists principally of government representatives.

NGOs and victims' organisations reacted by criticising the Decree 1290 for lacking public consultations during its drafting stage and for the continued attempts to deny State responsibility.[680] Critique was also raised for excluding victims who have suffered violence directly at the hands of State agents, as this creates discrepancies in the treatment of victims and confusion over available mechanisms.[681] Further criticism was raised for the deliberate exclusion of restitution of land, a key contentious issue due to the high incidence of displacement among the population. The Decree failed to indicate awareness of the needs of specific groups which may be more vulnerable, among them women and children, who constitute a majority of victims, as well as those living in rural areas or belonging to a minority or indigenous group. Finally, concerns were raised that the programme attempted to dissuade victims from continuing to claim reparations through judicial procedures and that it deliberately confused reparations with humanitarian assistance. By late 2009 some 10'500 individual request for compensation had been paid and priority has been given to three specific categories of victims, children who have been recruited or used in conflict, victims of landmines and victims of sexual violence.[682] While the programme claims to apply a comprehensive approach, it appears that reparations have primarily been provided as financial compensation. It remains unclear to what extent psychosocial and rehabilitation measures are available for victims.

The Decree 1290 inevitably draws parallels with the Law 387 of 1997, which provides victims of forced displacement the right to seek three months of humanitarian assistance from the State. The Law 387 offers an important legal basis for the rights of the displaced population and, from an international comparative perspective, in many ways constitutes a best practice. However, the experience of implementing the law has presented significant

[680] Colombian Commission of Jurists, *Position Paper on Decree 1290 of 2008- Reparación o Revictimizacion,* Bogota, 19 June 2008

[681] Victims of serious violations committed directly State agents can only seek compensation through civil litigation, *la jurisdicción contenciosa-administrativa,* which is notoriously slow and inefficient

[682] Replies of Colombia to the Human Rights Committee, April 2010, CCPR/C/COL/Q/6/Add.1

challenges, documented by UNHCR, as only 50% of the displaced population registered between 2002 and 2004 received any assistance.[683]

Overall, the establishment of the administrative reparations programme by Decree 1290 indicates a positive step as it signals a gradual recognition of State responsibility for acts committed by armed groups. Although the responsibility is perceived of as "subsidiary", it indicates an important conceptual shift and is consistent with human rights jurisprudence whereby the State may be held accountable by omission of failure to prevent violations. The effectiveness of the programme has yet to be assessed, however it provides an important avenue for victims, including those who may not know the identity of the perpetrators, and in legal terms sets a rather unique precedent compared to developments in other countries emerging from armed conflict. The key challenge will, however, remain in ensuring its effective implementation in a manner which does not discriminate among victims and takes into account the particular needs of vulnerable groups, including afrocolombians and indigenous peoples.

There are few studies on the attitude of the general population with regards to the issue of reparations, however in early 2006 the ICTJ conducted a survey among 2000 persons (selected to be representative however limited to urban areas, less likely to have been affected by the armed conflict). The study revealed some scepticism regarding the application of severe penalties in the framework of Law 975 (68 percent), however 89 percent of the participants in the survey wanted victims to receive reparations and among them it is significant to note that 68 percent wished to see State responsibility for paying reparations.[684]

10.9 Conclusions

The transitional justice process in Colombia has so far produced little progress in the realm of accountability, however the public debate surrounding the paramilitary demobilisation process has set focus on international legal obligations in an unprecedented manner and contributed to significant recognition of the rights of victims to receive reparations. Among

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[683] UNHCR Colombia, *Balance de la política publica de prevención, protección y atención al desplazamiento interno forzado en Colombia 2002-2004*, Bogota 2004, p. 30
For detailed critique of the lack of implementation of law 387 see Constitutional Court sentence T-025 of 2004
Richani, N, Systems of Violence, op.cit., p. 122 noted that the "*application and effectiveness of the law remains at best a shy attempt to redress the injustices committed*"

[684] ICTJ, *Perceptions and Opinions of Colombians regarding truth, justice and reconciliation*, Survey 2006 http://www.ictj.org/en/where/region2/514.html available 20 February 2009

the elements that will continue to influence developments in Colombia is the jurisdiction of the ICC. To date, the Prosecutor of the ICC has visited the country twice and issued repeated warnings that the implementation of the Justice and Peace Law 975 is under the scrutiny of the ICC.[685] The threat of the ICC invoking its jurisdiction will continue to be a concern for the government of Colombia and it is apparent that Law 975 has been designed to seek to shield off admissibility of cases under articles 17 and 20 of the Rome Statute.

During 2008 a number of paramilitary leaders were extradited to the USA on charges of narcotics trafficking.[686] Resorting to extradition is a convenient escape route for the Colombian government, however sends an unfortunate signal to the international community that drug trafficking is a more serious offence than committing war crimes against civilians. Furthermore, the authorisation by the executive of the extraditions undermines faith in the judiciary and deprives victims of the possibility of demanding justice and reparations.

Regarding the element of truth, the Truth Commission created in Colombia, the NCRR, is an apparent failure as its lacks independence, suffers from an unclear mandate and has been publicly discredited by victims' organisations and national civil society actors. By burdening the NCRR with unrealistic and incompatible tasks, the institution is unlikely to play a significant role in advancing its stated objectives of achieving reparations and reconciliation. Nor is it likely that the NCRR will be considered a useful model for the establishment of Truth Commissions in other countries. The future creation of a truth commission with an impartial mandate remains a possibility. In November 2009 both OHCHR and the Committee against Torture renewed calls for a truth commission in Colombia as such a mechanism would favour the rights of victims.[687]

While the outcome of prosecutions under Law 975 remains pending, the transitional justice framework set up has been strongly influenced by debate over the participation and rights of victims. The issue of reparations has, through extensive public debates, become a core focus of the process and gained significant awareness and support. This is evident in the gradual push for recognition of the right to reparations through adjustments in the applicable legal

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[685] ICG, *Correcting Justice*, op.cit. p 4
Additionally, in early 2005 the Prosecutor of the ICC sent a letter to the Colombian Senate signalling that he was following closely the debate over a legal framework for the demobilisations.
[686] ICG, ibid.
[687] *Public statement made by the OHCHR Director in Colombia Mr. Salazar "Intervención en el XII Encuentro de la Jurisdicción Ordinaria de la Corte Suprema de Justicia",6 November 2009, available at: www.hchr.org.co Committee against Torture (CAT), Concluding Observations, CAT/C/COL/CO/4, para. 26*

framework. The consistent pressure by international and regional human rights mechanisms as well as by national civil society organisations has played a major role is highlighting concerns relating to reparations and will be crucial to sustain calls for implementation. The active engagement of the Colombian government with human rights mechanisms is positive as it provides important momentums to retain focus on the issue of reparations.

From an international legal perspective, the Colombian example sets an interesting precedent by "de-linking" reparations from prosecutions and also with regard to acceptance of State responsibility for cases where violations have occurred due to collusion between State agents and armed groups or due to omission by the State to prevent violations. The recognition of the Basic Principles on the Right to Reparation for Victims in domestic legislation is significant as it indicates support for this developing norm and acceptance of a comprehensive concept of reparations.

In practical terms, however, victims continue to face significant challenges in accessing and claiming reparations due to the lack of a clear and consistent mechanism accessible to all victims. Specific concerns also relate to the uncertainty over funding for the administrative reparations programme and the lack of adequate consideration for vulnerable groups of victims. Furthermore, it is likely that the elements of reparations relating to restitution, in particular land rights, and to rehabilitation, in particular mental health services, will not be priorities and remain neglected.

The implementation of reparations will depend to a significant degree on public support and awareness of the need to adopt such measures and on the ability of victims' organisations to exert pressure in relation to State responsibility. In this regard, Colombia has made considerable progress; however the long-term outcome of the transitional justice process will depend on the continued pressure by the international community for the State to comply, in law as well as in practice, with international human rights norms.

11. Conclusions Part II
Reparations in Practice: Comparative Analysis of Practice, Lessons Learnt and Future Challenges

Part II of the thesis set out to study the degree of implementation of reparations in four different national contexts; Guatemala, Sierra Leone, East Timor and Colombia over the period of a decade from 1999 to 2009. The objective is to assess to what degree the right to reparations for victims of armed conflict exists in practice and what extent State practice supports the argument that the right to reparations has attained customary status in international law.

The case of the UNCC was briefly mentioned as it provides an exceptional example which highlights the Security Council's position regarding State responsibility to provide victims with reparations. While not explicitly based on human rights and humanitarian law, the UNCC demonstrated the potential of the UN to implement, in a relatively expedient manner and on a large scale, the right of victims to reparations. Without negating that the principal obligation to provide reparations is that of the State, the UNCC illustrates the possibility that the UN could play a more proactive role in promoting the right in practice. The Security Council has however not approached the issue in a consistent manner, as evidenced in the situation of Darfur.

As stated in the introduction to Part II, the case studies were selected because they illustrate a variety of factors which have affected the degree of developments regarding reparations during one decade in different geographic regions that have suffered armed conflict. Given the key role of the UN in advocating for greater State responsibility *vis-à-vis* victims, a main factor in the selection of the case studies has been the ability of the UN to promote accountability and transitional justice initiatives. Thus, the second part of the study identifies some of the principal factors which have enabled progress towards the recognition of the right to reparations in transitional justice, notably through the establishment of truth commissions, and which aspects have been decisive in promoting State responsibility and responsiveness to victims' claims for reparations. The case studies consider the degree to which reparations have been addressed in national legislation and policies as well as in practice. Conditions and factors which have contributed to attaining progress, especially as they coincide in the case studies, are highlighted with a view to further promote the right in practice. Furthermore, some of the principal obstacles to the practical realisation of the right are identified, and in

particular as they coincide in the case studies. It is submitted that truth commissions have made important contributions to the right of victims to receive reparations, especially when compared to transitional justice initiatives aimed primarily at criminal accountability such as ad hoc tribunals.

All the four case studies illustrate a varying degree of State practice in favour of reparations. Clear and explicit references to reparations for victims can be found in UN mediated peace agreements for Guatemala and Sierra Leone. In both countries, the establishment of UN supported Truth Commissions were directly linked to peace agreements. In the case of Sierra Leone, the peace agreement specifically referred to the setting up of a Special Fund for War Victims. In East Timor, the Truth Commission was established during the UN administration. The mandates of the Truth Commissions studied had in common that they clearly aimed at providing a comprehensive analysis of violations during the armed conflict, their impact on victims and also authorised the Truth Commissions to emit recommendations regarding reparations for victims. While the legal standing of international peace agreements may remain subject to debate, it is clear that human rights provisions therein, including those of reparations for victims, provide examples of evolving State practice. All Truth Commission mandates in this study were clearly established on the basis of international human rights and humanitarian law and their reports cited the Basic Principles on the Right to Reparation for Victims, although these at the time were in draft form. [688]

The Truth Commission reports in the countries studied (except in Colombia where the mandate differs) identified categories of victims who were particularly affected by violations and who have continued to suffer stigma, social exclusion and re-victimisation as a consequence of the lack of reparations and assistance in order to overcome the impact of the armed conflict. All the reports specifically identified women, children and victims of torture and sexual violence among the victims most affected. For a majority of these victims, the absence of reparations has impeded their ability to restart their lives and move beyond the trauma they have endured. For these groups of victims, the reports affirmed that they should be priority beneficiaries of reparations programmes primarily aimed at rehabilitation, restoring their dignity, reduction of their dependency and at bringing them on an equal footing

[688] *UN 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*, UN Doc., A/RES/60/147, adopted in the General Assembly without a vote 21 March 2006
Bell, C, *Peace Agreements and Human Rights*, Oxford University Press, 2000, p. 290
"The UN Basic Principles and Guidelines on the right to a remedy and reparation evidences a beginning to how the broader demands of a peace process can be accommodated in international legal frameworks"

with other victims. The urgency, yet scarcity, of rehabilitation and psychosocial assistance measures for victims has been identified as a general challenge. All reports underlined the importance of fair treatment of victims irrespective of whether the perpetrators were known or whether the violations occurred under State control. In all instances, the reports documented omissions of the State to prevent violations, which in turn incurred a degree of obligation as States should provide reparation to victims of acts or omissions which may be attributed to the State.[689] Victims are entitled to non-discriminatory treatment and the Truth Commission reports recommended, in line with the Basic Principles on the Right to Reparation for Victims, that States should endeavour to establish national programmes for reparation and other assistance for victims in the event that the party liable for the harm is unable or unwilling to meet his or her obligation. Significantly, after several years of delay, such reparations programmes have been or are being established in Guatemala, Colombia and Sierra Leone.

The case studies illustrate the tensions between criminal accountability, truth and reparations. While justice requires all these elements to be fulfilled, the links between these components of justice are rarely clear. As has been documented in Part I of the thesis, most transitional justice initiatives aimed at establishing criminal accountability of perpetrators have disregarded victims. This lacuna in international criminal law has been recognised and progress has been made, notably through the victims and reparations provisions in relation to the Statute of the International Criminal Court. However, in the case studies herein, it remains true that the rights of victims largely remained disregarded by the prosecutions by the Special Court in Sierra Leone and the Special Panels for Serious Crimes in East Timor. The Truth Commissions in these countries played an imperative role in setting focus on the rights of victims and in promoting their right to reparations. The mandate of the Truth Commission in Guatemala limited its ability to point to criminal accountability; however it underlined the existence of a State policy of genocide. Compared to the other case studies described, the experience to date in Guatemala is characterised by an absence of criminal accountability for responsibility of violations during the armed conflict. The renewed attention to the issue of reparations in Guatemala has dual implications; it has led to greater acknowledgement of State responsibility for violations and thereby retained awareness of the fact that criminal accountability remains outstanding. On the other hand, the Guatemalan government has resorted to the discourse of reparations in order to dissuade victims' organisation from further

[689] Ibid.

legal action. In Colombia, the government has applied a similar emphasis on reparations in attempts to dissuade calls for criminal accountability.

In East Timor, the Truth Commission issued recommendations which advocated for criminal accountability for those responsible, not only for the post-referendum violence, but generally for the violations occurred during Indonesian rule. The closely linked calls for criminal accountability and reparations for victims in East Timor, also echoed in several UN reports and inquiries, has prompted the government to refute and disregard reparations and resulted in stigmatisation of human rights defenders seeking to pursue such claims.

In Guatemala, the recommendations of the Truth Commission emitted in 1999 regarding reparations remained dormant for years, however gradually re-emerged following government changes. International human rights monitoring mechanisms and the presence of the UN verification mission MINUGUA and the subsequent OHCHR office have sustained the claims of victims for reparations. The Inter-American human rights system has played a particularly important standard setting role in the area of reparations for gross human rights violations by developing comprehensive reparations awards for entire communities. The jurisprudence of the Inter-American Court on Human Rights entrenched the notion of State responsibility and provided the key impetus for the establishment of the National Reparations Programme in Guatemala. While the design of the Guatemalan reparations programme applied an ample concept of victims and reparations, the progress made has so far been limited. However, the lack of progress can partly be explained by divisions within victims' groups and civil society rather than lack of State funding. The time lapse since the armed conflict has perpetuated the social exclusion of the most vulnerable victims who remain mired in the divisions created among them during the conflict.

In Sierra Leone, the establishment of the Truth Commission (2000) predated the creation of the Special Court (2002), which was a contributing factor as to why the Statute of the Court largely omitted references to reparations, despite the precedents already established by the reparations provisions in the Rome Statute of the International Criminal Court. The Special Court declined to act on its ability to order restitution; rather it was presumed that the Truth Commission would address aspects of reparations. The discrepancies in relation to resources available to the Truth Commission, significantly less than the resources for the Special Court, resulted in an overall process which prioritised retributive justice over the rights of victims.

In the case of East Timor, the issue of reparations figured already in the Report of the International Commission of Inquiry on East Timor to the Secretary General (2000). However, the subsequent establishment of the Serious Crimes Panels (2000) demonstrated little considerations of victims in the criminal proceedings. On the other hand, the Truth Commission in East Timor (2001) was carefully designed to address the concerns of victims and undertook innovative reparations measures as part of its mandate. The Truth Commission facilitated small-scale restitution through community reconciliation processes and established and implemented an urgent reparations scheme, albeit on a small-scale, primarily in order to provide medical and psychosocial care.

The three Truth Commission reports of Guatemala, Sierra Leone and East Timor have in common that they were reluctantly received by the respective national governments, who in turn delayed the designation of authorities responsible for follow-up and implementation of recommendations. Notably, in the cases of Guatemala and Sierra Leone, the post-conflict political leadership was integrated by persons who retained their position since before (and during) the armed conflict. The case of East Timor is unique because of the creation of a government consisting of leaders who had spearheaded the independence movement. Nevertheless, the government in East Timor was among those most opposed to the recommendations of the CAVR and explicitly appointed an additional parallel inquiry to undermine its finding. Despite the successor obligation of Indonesia with regard to reparations for victims in East Timor, progress has been blocked by geopolitical considerations.

Colombia represents an anomaly among the case studies as a comprehensive peace agreement is still lacking and the so-called Truth Commission established (2005) is a government entity. However, it provides an illustrative example of State practice with regard to extensive references to reparations for victims in national legislation. Although initially legislation sought to refute the obligation to provide reparations to victims of violations by non-State armed groups, revised legislation acknowledges that it is indeed a State responsibility. Although the recognition of State responsibility is mentioned as "subsidiary", it nevertheless provides an important precedent and is an example of domestic legislation which seeks consistency with the Basic Principles on the Right to Reparation for Victims, whereby, as noted above, the State provides reparation to victims for acts or omissions which may be attributed to the State. Similar as with the case of Guatemala, the existence of considerable case law from the Inter-American Court on Human Rights affirming the responsibility of the

State for large scale human rights violations, including massacres, either by direct participation of State agents or by omission to prevent, has prompted the adoption of domestic legislation on reparations for victims.

While the existence of progressive legislation on reparations in Guatemala and Colombia set valuable examples internationally, it should be recognised that such legislation has been adopted by the Executive by decree. Parliamentary debates on the adoption of comprehensive legislation on victims' rights remain ongoing. It is essential that future legislation be entrenched by parliamentary approval in order to ensure that implementation of legislation is sustained. Despite the loopholes in legislation and the inadequacies in national reparations programmes, their existence is still significant. The fact that in three of the four case studies national reparations programmes for victims have been established, albeit after certain delays, demonstrates important examples of State practice in favour for reparations for victims of human rights and humanitarian law violation in armed conflict.

The degree of strength among civil society in the different case studies varies significantly. Without doubt, civil society organisations in Colombia, despite the fact that they continue to be virulently persecuted, stand out as the strongest example. While they may have been unable to exert faithful compliance with their demands, the State nevertheless engages with them as well as with international human rights mechanisms and the debate on reparations, albeit legalistic, is more sophisticated than in many other contexts. In Guatemala, as noted above, civil society organisations have made considerable progress in advancing their compensation claims; however their internal divisions remain an obstacle to achieve concrete advances. In Sierra Leone and East Timor, civil society organisations depended and largely continue to depend on support from international NGOs, UN agencies and the donor community. In the Latin American context, the regional human rights system has catalysed the national human rights organisations. In Africa, the presence of the regional human rights system has been significantly weaker, while in Asia the lack of such a regional system has meant that national human rights organisations have no regional mechanisms to resort to.

The existence of independent national human rights institutions (NHRIs) is another factor which has played an important role in advancing reparations claims from victims. While in Guatemala and Sierra Leone, the NHRIs played a role in following up on the implementation of the recommendations of the Truth Commission, this has not been the case in East Timor. In the case of Colombia, the NHRI has played an ambivalent role.

An aspect of particular contention is that of funding for reparations. Many States that have experienced armed conflict wish to focus on future development rather than pay attention to aspects of the past, in particular when these have financial implications. However, as previously mentioned, unless victims of serious human rights violations receive reparations, they are likely to continue to suffer social exclusion and stigma. States have a general obligation to implement economic, social and cultural rights to the maximum extent of their available resources. However, the right to reparations goes well beyond the need to ensure that victims of serious human rights violations are given an opportunity to participate in society on equal footing with others. Reparations for victims should not be viewed as a gesture of solidarity in the interest of development but rather as a fundamental State party responsibility based on human rights and equality. The right to reparations for serious violations is an indispensable corollary to an effective remedy for the injuries suffered. Unless victims receive reparations this obligation will not be fulfilled and perpetrators will retain a more powerful standing over victims in society.

Notably, the case studies, in particular in Guatemala, Sierra Leone and Colombia, illustrate the challenges regarding funding for demobilisation (DDR) of former combatants versus funding for victims. To date, the disproportionate investment by the international community in DDR programmes stands in stark contrast to the lack of support for victims.[690] Furthermore, failure to sustain support for the Truth Commission recommendations relating to reparations may undermine trust among victims and result in a crisis of legitimacy of transitional justice processes. On a more hopeful note, the case studies also illustrate growing recognition in the international community of the need to re-prioritise the rights of victims. Among the positive examples are support from the Peacebuilding Fund in Sierra Leone and World Bank financing of the urgent reparations scheme in East Timor. While the obligation to provide reparations is that of the State, in certain instances it is clear that the international community bears positive obligations to assist poorer States in fulfilling their responsibilities.[691]

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[690] Sooka, Y, "Dealing with the past and transitional justice: building peace through accountability", *International Review of the Red Cross (IRRC)*, June 2006, Vol. 88, No. 862, pp.324-325
De Geiff, P, "Contributing to Peace and Justice, Finding a Balance between DDR and Reparations", Paper presented and published for the Conference; *Building a Future on Peace and Justice*, Nuremberg, 25-27 June 2007
Roht-Arriaza, N, "Reparations in the Aftermath of Repression" in Stover, E and Weinstein, H (eds.), *My Neighbour, My Enemy, Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, 2004, p. 126

[691] Salomon, M E, *Global Responsibility for Human Rights, World Poverty and the Development of International Law*, Oxford University Press, 2007

In conclusion, significant challenges remain in relation to the implementation of the right to reparations for victims. In general terms, the contribution of truth commissions for the advancement of reparations claims is yet to be fully appreciated.[692] However, the case studies in Part II of this study on State practice and the impact of the growing number of truth commissions across the world indicate that they have played, and will continue to play, a significant role in promoting the practical implementation of the right to reparations for victims of armed conflict.

[692] Bassiouni, C, "International Recognition of Victims Rights", *Human Rights Law Review,* Vol. 6, 2006, pp. 203-279

12. Final Remarks
The Right to Reparations and Implementation of the Legal Norm: Convergence of Law and Practice?

The overall aim of this thesis was to analyse the international legal standing of the right to reparations for victims of serious human rights and humanitarian law violations and assess the degree of practical implementation of the right at the national level through case studies on post-conflict and transitional justice measures. The central objective was to chart and evaluate developments in law and practice in order to substantiate arguments in favour of an emerging customary right for individuals to receive reparations for serious violations of human rights and the corresponding responsibility of States.

To this end, Part I of the study explored the customary nature of human rights and humanitarian provisions, outlined the basic premise of State responsibility in relation to violations and identified the general international norms which establish the obligation to provide reparations. Analysis of the jurisprudence of the ICJ, the ILC Articles on State Responsibility (2001) and the convergence of norms in different branches of international law, notably human rights law, humanitarian law and international criminal law as well as extensive human rights jurisprudence, international and regional, supports and consolidates the position that the right to reparations is gaining customary recognition.

The adoption by the UN General Assembly of the Basic Principles on the Right to Reparation for Victims in 2006 further strengthens this claim. The Principles reflect the normative connection between international humanitarian and human rights law, and stress the importance of and obligation to implement domestic reparations for victims of armed conflict. The Principles explicitly state in the preamble that they *"identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and international humanitarian law, which are complementary though different as to their norms"*.

Following the legal analysis, Part II of the study explored State practice in relation to reparations through illustrating developments in four case studies; Guatemala, Sierra Leone, East Timor and Colombia during the period of a decade between 1999 and 2009. The case studies represented different geographic regions that have suffered armed conflict and where the UN has played a significant role in promoting transitional justice initiatives. Emphasis

was placed on the extent to which it has been possible to provide reparations in practice through UN supported transitional justice processes, notably truth commissions, and which factors have been decisive in promoting State responsibility and responsiveness to victims' claims for reparations. A detailed examination was undertaken of relevant reparations provisions in peace agreements, mandates and reports of truth commissions, national legislation and government policies on reparations for victims of armed conflict.

While the legal standing of international peace agreements may remain subject to debate, it is clear that human rights provisions therein, including those of reparations for victims, provide examples of evolving State practice. All the Truth Commission mandates in the case studies were clearly established on the basis of international human rights and humanitarian law and their reports all cited the Basic Principles on the Right to Reparation for Victims, although these were in draft form at the time.

The outcome of the study indicates that significant progress has been made in relation to the right to reparations for victims who have suffered violations in armed conflict. The normative basis of the right has developed through significant convergence in different branches of law, yet the principal lacuna remains in transferring the right into reality for victims. Nevertheless, the selected case studies are indicative of important progress in practice and illustrate a degree of *opinio juris* in favour of the right as progressive legislation and reparation policies have been adopted at the national level.

The study envisaged to use the right to reparations for victims, established as an international legal norm, as a yardstick to measure implementation of the right in practice. The study however reveals a dynamic and reciprocal process with considerable synergies between a number of factors including: international legal developments, human rights mechanisms at the international and regional level, transitional justice mechanisms and the creation of constituencies in favour of victims' rights and their interaction with the international community, in particular international organisations such as the UN, but also wider actors, such as donors and international financial institutions.

The creation of a global constituency for victims' rights has been a determining factor which has brought the right to reparations to the forefront of the debate on international justice. The constituency which specifically advocates in favour of reparations is closely linked to the human rights movement and the growth of a global civil society with ready access to and

exchange of advocacy information. Engagement was furthermore triggered as a reaction against how victims were treated in international criminal justice mechanism. The ad hoc Tribunals underscored the disproportional efforts dedicated to pursue retributive justice while victims were largely neglected. The adoption of the Rome Statute of the International Criminal Court galvanised victims' organisations and the successful incorporation of provisions on victims' rights inspired further attention to the practical implementation of the right to reparations and towards developing the potential and operation of the ICC Trust Fund for Victims. Accountability of perpetrators and access to a judicial remedy for victims remain core objectives of justice. However, there is a growing recognition that the absence of reparations for victims raises fundamental questions about the credibility of international law and international organisations and, if neglected, could potentially undermine the concept of international justice.

The expansion of transitional justice mechanisms brought a more victim-oriented approach to post-conflict justice initiatives and has gradually emphasised the effect of violations upon victims and the perpetuation of such consequences, unless concerted efforts are made to provide reparations. A particularly strong impetus has come from women's organisations and emerged alongside greater awareness of sexual violence in armed conflict and of the stigmatisation of the civilians most vulnerable in conflict: women and children. Significant contributions from human rights organisations and transitional justice initiatives in Latin America were brought into the human rights systems of the UN and supported the development of increased international awareness of victims' rights.

The UN in turn has gradually brought attention to victims' rights in post-conflict and transitional justice initiatives at the global level and has played a vital role in supporting national efforts for victims' rights, including in countries with a weak civil society, such as Sierra Leone and East Timor. Victim-oriented transitional justice measures, many supported by the United Nations, have spread across continents during the past decade and have been established in a significant number of countries. Some of these measures have been volatile to the political circumstances and designed without sufficient attention to victims' perspectives. However, there is growing recognition of the value of transitional justice measures such as truth commissions, precisely because they enable large-scale consultations with the affected victims and allow for their voices to be heard and their needs expressed. As stated in the Guidance Note of the Secretary General on the United Nations Approach to Transitional Justice, adopted on 10 March 2010; *"successful transitional justice programmes recognise*

the centrality of victims and their special status in the design and implementation of such processes. The UN must respect and advocate for the interest and inclusion of victims where transitional processes are under consideration."

Truth commissions have played a particularly valuable role in identifying vulnerable groups of victims and their needs in relation to reparations. The reports of truth commissions provide compelling evidence of the effects that armed conflicts have on vulnerable civilians and they underscore the importance of a comprehensive reparations concept, which should includes rehabilitation and measures which seek to restore the dignity of victims. However, as illustrated in this study, an element of the Basic Principles on the Right to Reparation for Victims which remains particularly neglected, both in human rights jurisprudence and transitional justice measure, is the provision of medical and psychological rehabilitation for victims.

The influence that human rights jurisprudence from the Inter-American region has had at the international level cannot be underestimated. While it remains true that human rights mechanisms were per se not designed to deal with large scale violations in the context of armed conflict, a rapidly expanding number of such cases have challenged the traditional litigation of human rights cases, which primarily related to individual violations. The regional systems are increasingly seeking to develop modalities in order to deal with complaints of violations affecting large numbers of victims in conflict situations. Efforts have been made to analyse such violations with reference to humanitarian law, which in turn is yet another indication of the convergence of victims' rights in international law. Furthermore, intents have been made to respond to such violations by awarding collective reparations. The Inter-American Court of Human Rights has been particularly prominent in this regard and issued comprehensive reparations measures for the benefit of affected communities, including measures that have taken into account cultural aspects, such as the preferences of victims of indigenous origin. The European Court of Human Rights is gradually also developing judgements which seek to address systematic violations. The judgements of regional courts are binding and the compliance rate relatively high. While the jurisprudence of human rights courts can only benefit a limited number of victims, it nevertheless sets a benchmark for reparations and has played an important role in influencing the national discourse on reparations. Impetus from the regional human rights system in Latin America has contributed to consolidating a normative framework for reparations. This is particularly evident in

Guatemala and Colombia, where national legislation and policies for reparations have been adopted.

Awareness has increasingly focused on the need to ensure that reparations reach as many victims as possible. Over the past few years, several trust funds have been established by human rights mechanisms and notably also by the ICC. However, expectations are likely to exceed the potential of such trust funds, which, while they offer a clear indication of the commitment of the international community, will only be able to reach a limited number of beneficiaries. The challenge of reaching the victims also points to the need to ensure that reparations measures are not unduly tied to judicial processes, as this severely restricts the number potential beneficiaries. Practical measures, such as the establishment of trust funds and national reparations programmes which operate independently of judicial procedures are essential. Only a small percentage of victims of serious violations will ever be likely or able to undertake litigation or seek assistance from international or regional trust funds. Therefore, in the interest of non-discrimination and equity for victims, the primary measures should be taken through reparations programmes at the national level. Furthermore, this is a particularly important signal that State responsibility, even if for a successor government, is being assumed.

While individuals may be held responsible for reparations in international criminal procedures, experience to date demonstrates this to be an unlikely avenue for the majority of victims. Many victims may never have known the perpetrator's identify or be able to link responsibility for the violations they have suffered to those indicted for carrying the greatest responsibility for war crimes. It is submitted that responsibility for reparations should maintain an element of State responsibility as those considered to have carried the greatest responsibility for serious violations may, and indeed are likely to, have exercised functions of State authority. There are inherent dangers in shifting responsibility from States towards individuals as this may ultimately leave victims without redress. While the shift towards recognising victims and their right to reparations in international criminal law is welcome and positive, this should operate alongside measures to establish State responsibility *vis-à-vis* victims. The concurrent application of individual and State responsibility and its practical implications for reparations is an area in international law which requires significant further consideration.

This thesis concludes that the State should bear primary responsibility to provide reparations for victims of armed conflict. This argument can be supported both on legal grounds as well as on general moral obligations to promote and ensure equity, fairness and non-discrimination.

Based on the analysis of the current state of international law, it is clear that the State has positive duties to prevent violations and demonstrate due diligence. It has become increasingly frequent that States have been found to carry a degree of responsibility for omission to protect civilians when the perpetrators have been non-State actors. To this effect, there is a convergent approach in international law on State responsibility. This is illustrated in Article 2 of the ILC Articles on State Responsibility which define that *"there is an international wrongful act of a State when conduct consisting of an action or omission... constitutes a breach of an international obligation when arising from a breach of an international obligation of the State".*[693] The Official Commentary of the ICRC on Article 91 of the Additional Protocol I to the Geneva Conventions also affirms that State responsibility may be incurred by omission when due diligence to prevent violations from taking place has not been demonstrated. The Human Rights Committee, in its General Comment No. 31, concurs; *"There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".* Jurisprudence from regional human rights courts have further consolidated positive obligations of the State to prevent violations and demonstrate due diligence, including in the context of armed conflict, examples of such cases are *Mahmut Kaya v. Turkey* and *Mapiripan Massacre v. Colombia.* The consistent and convergent affirmation of positive obligations of the State translates into an obligation to assume responsibility for such violations, including with regard to reparations.

As for moral grounds, the difficulties victims face in seeking reparations have been extensively documented in relation to international criminal law and the transitional justice initiatives in the selected case studies. It is immoral, unfair and discriminatory that disproportionate amounts of resources are spent on offenders and the demobilisation of former combatants, while the victims are left empty-handed. As noted in the Report of the

[693] *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted in 2001 by the International Law Commission, Article 2, op cit.

Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies; "*States have an obligation to act not only against perpetrators, but also on behalf of victims, including through the provision of reparations.*" [694]

The international community plays a key role in advocating for a balanced approach in post-conflict measures and should assume positive obligations in assisting developing States to fulfil their obligations and support the effective implementation of reparation measures. While the State where violations occurred carries the principal responsibility, it is foreseeable that the international community will continue to be called upon to support post-conflict measures and reparations programmes where State institutions are weak and resources are scarce. As this study indicates, there is growing recognition of this obligation through numerous States' support for a variety of trust funds and for providing donor contributions to national reparation programmes. The sustainability and commitment of the international community to support such efforts and to ensure that due consideration is given to victims' rights in this context will remain a vital challenge.

It is pertinent to recall the preamble of the Basic Principle on the Right to Reparation for Victims, which reminds us of the path forward;

> "*In honouring the victim's 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 principles of accountability, justice and the rule of law.*"[695]

The right to reparations is gaining customary recognition in international law and significant progress has been made, however the effective practical implementation of the right at the global level remains the principal challenge. Progress will depend on vigilant scrutiny of the obligations of States and the degree of solidarity of the international community in order to prove that victims are no longer an afterthought and that their rights are ensured not only in law, but also in practice.

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[694] *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, S/2004/616, 23 August 2004, para.54

[695] *UN 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*, preamble, 21 March 2006, UN Doc. A/RES/60/147

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Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)
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