

# **Adverse Consequences of Reparations**

**By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel**  
Edited by Dr. Clara Sandoval

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## Foreword

It is with great pleasure that the Essex Transitional Justice Network (ETJN) of the University of Essex releases its first six briefing papers on reparations to the International Criminal Court. These briefing papers are the result of multiple talks held over the previous years with staff at the ICC, and specifically with the Victims Participation and Reparation Section (VPRS), about how to carry out its reparations mandate. These reports were possible thanks to the hard work of the staff team at the VPRS.

In the summer 2010, the VPRS of the ICC provided the ETJN with a list of questions on reparations, the answers to which would help the Court to better understand its possibilities and limitations in awarding reparations to victims of crimes under its jurisdiction. Drawing on the expertise in the area of reparations available at the University of Essex, specifically at the ETJN and its Reparations Unit, we endeavour to produce six briefing papers. The University of Essex supported this project as it awarded a Mini Knowledge Transfer Innovation Fund to publish and disseminate the papers.

Different members of the Reparations Unit of the ETJN, the majority of them students or former students of international human rights law at the University, were involved in the research and writing of these briefing papers. They were researched and written under the direction and guidance of Dr. Clara Sandoval, Director of the ETJN and of its Reparations Unit and Senior Lecturer at the School of Law. Different members of the ETJN were also instrumental in the preparation of these papers. In particular, Dr. Fabian Freyenhagen, Co-Convenor of the ETJN and Chair of the Normative Dimensions Unit; Professor Sabine Michalowski, member of the ETJN and Chair of the Economic Dimensions Unit; Diana Morales-Lourido, Programme Manager of the ETJN; and Sofie Johansen, Gil Surfleet and Rafael Charris, frontrunners of the ETJN. The ETJN expresses its gratitude to all of them. The views expressed in the briefing papers are not those of the International Criminal Court.

Each briefing paper complements the others so it is desirable to regard them as a whole. Nevertheless, each briefing paper could be read on its own. All papers are available as PDF files on the ETJN website and in printed version. The titles of the six briefings papers are:

**Briefing paper 1:** Reparation Principles under International Law and their Possible Application by the International Criminal Court: Some Reflections (By Octavio Amezcua-Noriega)

**Briefing paper 2:** Collective Reparations and the International Criminal Court (By Sylvain Aubry and María Isabel Henao)

**Briefing paper 3:** Prioritising Victims to Award Reparations: Relevant Experiences (By Paola Limón and Julia von Normann)

**Briefing paper 4:** The International Criminal Court and Reparations for Child Victims of Armed Conflict (By Evie Francq, Elena Birchall and Annick Pijnenburg)

**Briefing paper 5:** The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation (By Maria Suchkova)

**Briefing paper 6:** Adverse Consequences of Reparations (By Fiona Iliff, Fabien Maitre-Muhl and Andrew Sirel)

In relation to the goal of doing no harm through reparations awards, we were asked to consider the following questions: what adverse consequences can come out of a reparations process in post-conflict zones? How to deal with political, ethnic or other divisions among communities? How to deal with the risk of exacerbating conflict/tensions between

communities? What are the experiences of human rights courts, transitional justice mechanisms and mass claims bodies? And what responses have been found? This briefing paper provides important insights into these questions.

For more information on the ETJN, please visit <http://www.essex.ac.uk/tjn/>

Clara Sandoval

Colchester, July 2011

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# Adverse Consequences of Reparations

By Fiona Iliff<sup>1</sup>, Fabien Maitre-Muhl<sup>2</sup> and Andrew Sirel<sup>3</sup>

## I. Introduction

1. Implementing an adequate and effective reparations process is fraught with difficulties. There are obvious obstacles to its inception, such as bringing an end to the conflict, resources, and ensuring the political will to create the process; but there are also difficulties in the implementation of the process. One of the key difficulties in implementing a reparations process is to guarantee that existing problems which lie at the root of the conflict are not inflamed. Though each conflict has unique characteristics, this paper seeks to highlight four main possible adverse consequences of a reparations process that have been identified in a number of transitional justice policies, namely: (i) the exacerbation of political tensions; (ii) the re-traumatisation of victims or exacerbation of harm; (iii) the social marginalisation or exclusion of victims; and (iv) the creation of tensions with development or nation-building processes. By drawing on different experiences, the paper then seeks to illustrate ways in which these adverse consequences can be dealt with by the sound implementation of a reparations process.

## II. The Exacerbation of Political Tensions

2. The exacerbation of political tensions is a genuine risk in the implementation of any reparations process, particularly in transitional States where there has been recent political upheaval and regime change. Various considerations need to be taken into account, including, *inter alia*: how the process is perceived by all sides of the conflict, how the balance of power is affected, what form the reparations should take, and when and how to implement them.

### *a) Causes of Political Tensions*

3. The timing of the implementation of reparations processes may cause political tensions. For example, if the peace process or the handover of power from one regime to another is still underway, or even where these processes have been completed but tensions among different groups involved in the conflict remain particularly high, the implementation of reparations - which will inevitably

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benefit individual victims over other members of society - may be perceived as politically motivated or biased and result in an outbreak of political violence or distrust in the new regime.

4. The choice of the form of reparations may also be politically sensitive if it does not take into account the root causes of conflict and the continuing effects that the conflict has on society. In the case of Iraq, for example, a public monument built to commemorate victims in the Iraqi Kurdistan region “was vandalised by some members of the local community who complained that while the government had money to spend on the monument, the community still had no electricity or running water.”<sup>4</sup>
5. The payment of compensation can be a particularly politicised issue, given that it involves the impossible task of assigning a cash value to victims’ suffering, and results in different amounts being awarded to different victims. In Darfur, for example, one of the reasons the Darfur Peace Agreement (DPA) was rejected was that the rebel groups considered the level of compensation far too low. Compensation awards can also be perceived as “blood money”, a political act designed to silence victims and protect perpetrators of the old regime in order for power to be effectively transferred to the new regime, particularly where victims are denied the right to bring civil claims as a result of the implementation of a mass claims procedure.<sup>5</sup>
6. The distribution of compensation is also a politically sensitive problem. The partisan application of reparations creates discord amongst victim communities and distracts from the responsibility of the State.<sup>6</sup> For instance, in 2007 in Sudan, President Al-Bashir promised to compensate those affected by the Kajbar dam with five *feddans* of land for every one *feddan* taken;<sup>7</sup> however this generous policy was not implemented in more remote areas, such as certain regions of the Upper Nile where displacement and land expropriation took place in the 1970s.
7. What is often particularly problematic in the award of compensation, and reparations more generally is *who* is to bear responsibility for payment of the compensation; is it feasible to hold armed groups directly responsible for reparations, for example?<sup>8</sup> In Colombia, under the Justice and Peace Law,<sup>9</sup> the illegally gained assets of those prosecuted are seized. This has brought with it several problems, including a deterrent effect on those who would otherwise

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<sup>4</sup> Guillerot, J., Carranza, R., International Centre for Transitional Justice (ICTJ), *The Rabat Report: The Concept and Challenges of Collective Reparations*, 2009, at

[http://www.ictj.org/static/Publications/ICTJ\\_Reparations\\_RabatReport\\_pb2010\\_en.pdf](http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf).

<sup>5</sup> *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 (25 July 1996), at <http://www.saflii.org/za/cases/ZACC/1996/16.html>

<sup>6</sup> Baldo, S., and Magarell, L., ICTJ, *Reparation and the Darfur Peace Process: Ensuring Victims’ Rights*, 2007, p.20-21.

<sup>7</sup> *Ibid*, p.22; *Feddan* is a unit of area used in Sudan, Egypt and Syria, equivalent to 1.038 acres.

<sup>8</sup> *Ibid*, p.15.

<sup>9</sup> Law 975, 22 July 2005, ‘Justice and Peace Law’.

come forward voluntarily under the disarmament demobilisation and reintegration scheme, and it has also served to divert attention away from the Government's responsibility for abuses. Many victims perceived this as a political act in itself. In Peru – where it must be remembered that the Shining Path guerrilla group was responsible for more than half of the political killings and other grave violations of human rights law during the conflict – the Government decided that the State would take full responsibility for the payment of reparations on the basis that it failed in its duty to protect all citizens against the Shining Path. This approach/strategy acknowledged full responsibility and managed to keep members of the Shining Path involved in the process.<sup>10</sup> However, it failed to hold members of the Shining Path individually liable to victims for their actions.

8. Political tensions may also arise where international bodies ordering reparations freeze the assets of individual perpetrators to fund the reparations, as this can be seen as an imperialistic act and an unjustified intervention in the domestic affairs of the State. Equally, where the reparations process is internationally funded it may also be seen to lack legitimacy given that those who have the obligation to provide reparation failed to fulfil their duty.

### ***b) Ways of Dealing with Tensions***

9. As set out above, choosing appropriate timing for the implementation of a reparations process is important to prevent political tension and violence. The reparations process should be distinct from the peace process, which therefore should generally be completed first, prior to the implementation of reparations. If the State is not truly in transition, there is unlikely to be sufficient political will for the implementation of reparations and they may be rendered illusory. In Colombia, attempts to implement a reparations programme in coordination with the disarmament, demobilisation, and reintegration process have not been successful. The implementation of a reparations process immediately post-conflict may also be politically inflammatory, and may be compromised by political motives. The appropriate time to implement a reparations programme will, however, vary depending on the political situation in the country at hand.
10. If reparations processes are not awarded immediately post-conflict, the sequencing of reparations may be necessary and interim measures - such as urgent interim reparations measures - should be awarded so as to address victims' immediate needs. Public awareness campaigns may also be necessary prior to the implementation of the reparations process to educate the public on the causes of the conflict, the harm caused to victims, and the resulting need for a reparations process, thereby diffusing any potential political tensions based on misunderstanding.
11. The choice of the source of funding for reparations should be determined taking into account those responsible for the harm. Under international law, as set out in Principles 15 to 18 of the UN Basic Principles and Guidelines on the Right to a

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<sup>10</sup> *Supra* n.3, p.15.

Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>11</sup> (the Basic Principles), the responsibility for funding reparations lies with both individual parties and the State. Where a person, a legal person, or other entity is found liable for reparation, such a party is responsible for the reparation. However, if that party is unable or unwilling to meet their obligations, States should take responsibility for fulfilling the victim's right to full and effective reparation. States are also responsible for enforcing both domestic judgments for reparation against parties found liable for the harm suffered and valid foreign legal judgments for reparation in accordance with domestic law and international legal obligations. States should therefore provide under their domestic laws effective mechanisms for the enforcement of reparation judgments.

12. In accordance with these international law principles, there are of course clear reparative benefits to freezing the assets of parties who have been found liable for harm caused and using their assets to fund reparations. This is important for accountability and maintaining peace, so that victims see that individual perpetrators are not getting off lightly and are being held directly responsible to them. Where such parties are ordered to pay reparation however, particularly by an international body or tribunal, this should not detract from the State acknowledging its own responsibility for harm caused to victims. Particularly where there is widespread harm, the State should be encouraged to implement a domestic reparations programme for all victims of gross and serious violations based on their right to reparation under international law; and to publicly acknowledge responsibility for any State acts or omissions resulting in gross and serious violations. International claims procedures also require States to actively assist in the implementation and enforcement of reparations that have been awarded. Such procedures should be complemented by domestic reparations programmes and institutional reform. If all actors to the conflict take responsibility for their part in the conflict and contribute to ensuring reparations to victims in this way, then political tensions may be avoided.
13. An effective way of dealing with unintentional adverse political consequences in the delivery of a reparations process is also to improve victim participation in the process. This is not easy, given the general lack of resources and organisation among victims, but if victim groups are supported and consulted in relation to the design and implementation of reparations, then the potential tensions in the delivery of reparations can be addressed before they manifest into something greater.<sup>12</sup>
14. In order to further encourage the support of victims, the process by which reparations are delivered must be transparent, fair, and legitimate. There must be due process, procedural fairness and equality to all claimants in reparations processes, to avoid any real or apparent political bias. For example, there should

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<sup>11</sup> Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, at <http://www2.ohchr.org/english/law/remedy.htm>.

<sup>12</sup> Magarell, L., ICTJ, *Reparations in Theory and Practice*, 2007, p.9.



be equal access to claim proceedings with assistance provided to those who are in remote areas and are illiterate, and information in relation to claimant's rights and available remedies should be equally accessible to all.

15. Ultimately, reparations processes will be legitimate only if they are perceived to be fair. The process should not be based on political motives, but on objective international law principles and UN guidance on Transitional Justice processes applied to the context of the situation in the country at hand. It should also be designed in accordance with credible and objective research on the political situation to identify: the causes of the conflict; the type of violations perpetrated by both sides of the conflict; who the victims are; how many victims there are; whether they have been targeted individually or as a result of belonging to group; and the extent and nature of harm to victims. This is essential to avoid haphazard reparations programmes initiated for political gain, for example, the unbudgeted award of compensation to 'war veterans' in Zimbabwe in 1997, who subsequently became a politically oppressive group.<sup>13</sup> By undertaking such extensive research in relation to the political causes of past conflict, reparations processes can also be designed to facilitate reconciliation as opposed to re-igniting unresolved political issues and perpetuating the stigmatisation of political groups.
16. The form of reparations chosen should be politically and culturally sensitive according to the culture and situation in the country at hand, and the reparations should be designed to redress the specific harm caused to victims. The award of compensation in particular should be allocated according to the extent of harm caused to the victim, and should not be influenced by political factors. Public awareness campaigns in relation to the reparations process should include educating the public on the basis of the choice in form for particular reparations, and why particular types of reparations may be awarded to different victims. For example, in the initial compensation plan in Morocco there was a genuine reason for differentiated reparations between detainees, but a failure to adequately publicise the reasons and inform the victims resulted in the perception that reparations were based on social status, and the process sparked severe discontent.<sup>14</sup> The reparations process should accordingly address the perceptions of the society as a whole and ensure that the general public are aware of the causes of the conflict, the crimes committed and the extent and nature of the suffering in order to accept different types of reparation awards and avoid political tension.

### **III. Exacerbation of Harm and Re-Traumatisation of Victims**

17. Given that reparations are designed to redress harm caused to victims, the exacerbation of harm or re-traumatisation of victims is one of the most serious possible consequences of a reparations programme, and there are many ways in

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<sup>13</sup> See *Becoming Zimbabwe: A History from the Pre-Colonial Period to 2008*, B. Raftopoulos & A. Mlamba (eds), Weaver Press, 2009.

<sup>14</sup> *Supra* n.9, p.10.

which it can happen. The exacerbation of harm occurs where the administrative process of claiming reparations is either overly cumbersome and restrictive, or sets unrealistically high expectations for victims: by using a definition of 'victim' that is ambitiously wide and ambiguous, for example. Once reparations have been promised to victims they also need to be delivered effectively, otherwise the renewed failure of the State to protect victims' rights will cause additional disappointment to victims, and permanently affect their sense of dignity and civic trust. The involvement of perpetrators in the process also risks making a mockery of victims' suffering. Furthermore, care must be taken when awarding compensation so that there is a fair balance between individual and collective compensation. Attempting to avoid these various pitfalls is exactly what makes processes of transitional justice so difficult.

## ***a) Causes of Adverse Consequences***

### ***i. 'Victim' Status***

18. The DPA in Darfur represents an example where a wide definition of 'victim' was adopted, and of the adverse consequences this can have. The term 'war-affected' was used to determine who was entitled to 'victim' status, defined as: "persons or groups of people who have suffered persecution during the conflict in Darfur as well as those whose life and livelihood have been adversely affected as a result of the conflict".<sup>15</sup> The range of people who could take a claim before the DPA Compensation Commission encompassed "people of Darfur who have suffered harm, including physical or mental injury, emotional suffering or human and economic losses, in connection with the conflict".<sup>16</sup> Such a broad definition was thought to be a unifying feature of the process which recognised the number of victims of the conflict and thus provided relief to all. However, the reparations body thus raised expectations that everyone who has been 'war-affected' will receive, at the very least, individual and comprehensive reparation in a timely fashion. With so many victims this cannot possibly be a logistical reality without significant resources. Therefore, victims are left disappointed. A reparations process should not set itself up to fail. In addition, a wide definition means that a process cannot take account of the particular harms each victim has suffered.<sup>17</sup>
19. Though each transitional justice context is different, it is generally better to restrict reparations schemes to victims of gross violations of international human rights law and serious violations of international humanitarian law as set out in Principle 9 of the UN Basic principles, and of international crimes as incorporated in the Rome Statute. The definition in the Basic Principles clearly states that victims are persons who have suffered harm as a result of gross and serious violations, but also allows a certain amount of discretion to include the following as 'victims', where appropriate: immediate family members or dependants of the victim, or persons who have suffered harm in intervening to assist victims. This definition is clearly limited to those who have suffered harm

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<sup>15</sup> *Supra* n.3, p.26.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, p.28.

as a result of gross and serious violations, and does not extend to those who are 'war-affected'. Those who are 'war-affected' can be addressed through ancillary programmes which take on a collective form, such as community reconstruction and development, and veterans' pension schemes.<sup>18</sup>

## **ii. Differentiating Amongst Victims**

20. Another question raised by reparations processes is: what should be done with victims of gross and serious international human rights or humanitarian law violations who were also perpetrators, given the fact that their involvement in the process may have an adverse effect on other victims? This question is not so straightforward as there may have been victims who were abducted and/or forced to perpetrate crimes, or there may have been child soldiers involved in the conflict. In practice the distinction between victims and perpetrators can be a blurred one in conflict situations. Additionally, there are those who believe that the involvement of ex-combatants in transitional justice processes brings other advantages such as promoting truth and reconciliation.<sup>19</sup>
21. International human rights and international humanitarian law dictate that a perpetrator does not lose his own rights even if, as a consequence of his actions, some of his human rights could be limited in their enjoyment. For example, a perpetrator who is tortured has a legitimate claim under international human rights and humanitarian law, as applicable, to allege that his right not to be tortured has been violated. Should the perpetrator be treated differently from other victims or the same, given they may have suffered the same violation? Creating a class of 'good' and 'bad' victims does nothing to promote reconciliation in a post-conflict zone, yet treating all victims as the same can alienate those who were not perpetrators because they are grouped with those who were part of the cause of their suffering.<sup>20</sup> In the case of Peru, it was therefore decided that members of the guerrilla groups, even if victims, were not eligible for reparations.<sup>21</sup>
22. There is no clear answer to this adverse consequence, but it has been proposed that processes reintegrating ex-combatants that are also victims of the conflict could include distinct features such as compensation and resettlement. This was used to reasonable effect in the Aceh Province in Indonesia, where it attempted to compensate those who were victims but in a different sphere from the wider non-perpetrator community, thus circumventing potential alienation.<sup>22</sup>

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<sup>18</sup> *Ibid.*

<sup>19</sup> As in the context of Northern Ireland - see Essex Transitional Justice Network, *Shaping the future of Transitional Justice: growing synergies between theory and practice*, Justice Dimension Panel, 16-17 September 2010, at <http://www.essex.ac.uk/tjn/library/documents/ETJN%20Conference%20Report%20Sep%202010.pdf>

<sup>20</sup> *Supra* n.3, p.27.

<sup>21</sup> Article 4 of the Comprehensive Reparations Programme in Peru (Programa Integral de Reparaciones) states that "No son consideradas victimas y por ende no son beneficiarios de los programas a que se refiere la presente Ley, los miembros de organizaciones subversivas", Ley 28592, available at: <http://www.idl.org.pe/educa/PIR/28592.pdf>.

<sup>22</sup> Guillerot and Carranza, *The Rabat Report: the concept and challenges of collective reparations*, p.17.

23. Closely connected with the problem of treatment of perpetrators is the risk of arbitrarily 'ranking' violations when undertaking the unenviable task of deciding on the priorities of a reparations package, which may result in victims' harm being inadequately compensated or even exacerbated. Relevant factors to be taken into account when prioritising the amount of reparations to be awarded, and to whom, include the urgency of the need for reparation, the vulnerability of the victims, the seriousness of the violation committed, and the extent and nature of harm caused by the violation.<sup>23</sup>
24. In the past, reparations programmes have prioritised based on the seriousness of the violation, for example ensuring that relatives of those killed in the conflict, particularly wives with children, received greater and more timely reparation than victims of other types of serious violation, for example, torture. Indeed, torture as a violation has only gained notoriety as a "serious" violation in domestic reparation programmes in the past decade. Clearly, it is very difficult to draw the line based on "seriousness", as the effect of violations might vary depending on the cultural context and the nature of the conflict. Peru had relative success when it accepted it had to differentiate between victims: family members of those murdered or 'disappeared'; forcibly displaced people; torture victims; child soldiers; victims of rape; and children born out of rape, were all identified as specific categories of victim. It determined that all were entitled to free healthcare provided by the State as a minimum, but only those who suffered the most serious violation received compensation.<sup>24</sup>
25. In some circumstances victims may suffer additional harm if they are not differentiated in accordance with their particular needs. For example, some victims may suffer irreparable damage if their reparation awards are not prioritised and implemented more quickly than others. Such victims may require urgent interim reparations measures to prevent exacerbation of harm. In South Africa, while the Truth and Reconciliation Commission hearings were underway, its Committee on Reparations and Rehabilitation (CRR) recommended that urgent interim reparations be awarded to victims who had "urgent medical, emotional, educational, material and/or symbolic needs".<sup>25</sup> These victims were referred for appropriate services, and received financial assistance from the government to pay for these services.

### ***iii. The Process of Claiming Reparations***

26. The administrative process of claiming reparations can be extremely stressful for victims. This is due to the fact that they have to provide evidence that they have suffered harm, which involves recounting their experiences and therefore, at least in part, reliving them. The administrative body hearing the claims must therefore have sufficient expertise in dealing with the particular vulnerabilities

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<sup>23</sup> Baldo and Magarell, p.28.

<sup>24</sup> *Programa Integral de Reparaciones en Peru*, Ley 28592, Articles 2-6, available at: <http://www.idl.org.pe/educa/PIR/28592.pdf>.

<sup>25</sup> The Truth And Reconciliation Commission of South Africa Report, 2003, volume 6, section 1, chapter 5, p.82, at <http://www.info.gov.za/otherdocs/2003/trc/>.

and needs of victims, be they disability-related, linguistic, or to do with psychological trauma.

27. In a post-conflict situation, victims are generally in a weak position in terms of providing evidence of the harm they have suffered. For example, they are unlikely to have retained documents if fleeing persecution. Also, in the case of crimes carried out with the complicity of the State, such as enforced disappearances, evidence is likely to have been covered up if it existed at all. Many reparations processes also take place many years after the violations have taken place, and any evidence that could have been obtained at the time of the offence, for instance medical evidence of wounds sustained, may no longer be available to the victim. The vast majority of victims will also suffer from economic hardship and will not be able to afford legal representation to assist them with their claim, which will be seriously detrimental to their case where the administrative process is particularly complicated and demanding.
28. Where processes are not designed to be victim-friendly and victims are not provided with any additional assistance, genuine victims' applications for reparations are likely to fail, particularly if unreasonably high standards of proof are set, thus causing them additional distress.

### ***b) Ways of Dealing with the Exacerbation of Harm and Re-Traumatisation of Victims***

29. In essence, exacerbation of harm to victims can be avoided by carrying out all aspects of the reparations process (consultation, administration of claim procedures, design and implementation of reparations measures) with the clear purpose of *assisting* victims in accordance with the type and extent of harm they have suffered and any particular vulnerabilities and (individual or collective) needs they may have within the context of the situation in the country at hand.
30. Of primary importance is that the administrative process is fair and accessible. As set out above, it should include: equal access to claim proceedings; information accessibility in relation to claimant's rights and available remedies; assistance to claimants in gathering evidence and/or in presenting their claim where necessary; and procedural equality including lowering evidentiary standards to take account of claimants' relatively weak position in cases of gross and serious violations in post-conflict situations.
31. Simplicity is also integral to designing a successful reparations process which does not cause additional stress and suffering to victims. Processes which, for example, require extensive evidence such as medical records and psychological examinations are counter-productive and exclude many deserving victims. The simpler a process is, the easier it is for victims to understand and effectively access and benefit from the reparations process.
32. When designing the most appropriate reparations awards for different victims, the simple approach may also be the most effective. In Guatemala, there were

such great difficulties in ‘ranking’ violations – for example, a torture victim or a widow as a result of a massacre – that the position was to treat them the same. This can only be done in certain contexts, where the reparations are going to be more symbolic than restitution-based, but it had the advantage of simplicity and of attaching equal significance to all victims’ rights.<sup>26</sup>

33. In certain circumstances, for instance in communities where there exists a strong collective feeling, collective reparations are particularly effective, in part due to their simplicity, and also due to their appropriateness in alleviating particular types of harm. In such circumstances, individual reparations distinguishing particular individuals from the rest of the community may have adverse affects, whereas collective reparations are able to repair victims within their community.<sup>27</sup> In Peru, where there existed a strong collective feeling in the community, the victim communities worst affected by the conflict were asked to submit proposals for collective reparation projects that would benefit the entire community, with a \$30,000 USD cap. The projects were able to be implemented quickly and effectively, as the State had left it to the communities themselves to determine the appropriate type of reparation. These schemes were particularly successful due to effective victim participation (see §13 above).
34. Reparations processes must, however, also address the specific harm caused to victims through individualised reparations where appropriate. An important means to alleviate harm to victims, as opposed to exacerbating it, is therefore to ensure a fair, effective and achievable balance between individual and collective reparations as appropriate according to the harm suffered. In East Timor, individual reparations were administered in a way that also encouraged collective healing; for example, single mothers directly or indirectly affected by the conflict each benefited from grants allowing their children to go to school. In order to collect this individual reparation, the mothers would travel to a regional service centre where, together, they could take advantage of counselling, healthcare, and skills training.<sup>28</sup> This cleverly combined individual and collective reparations, and encouraged social integration. Collective and individual reparations were also effectively combined in Canada where reparations were awarded in relation to a State-Church policy which had taken aboriginal children away from their families and into residential schools in order to assimilate them into society. All survivors were entitled to a minimum “common experience payment” which required that they prove they went to school, with the amount received increasing depending on the length of time spent in the school. This recognised the collective harm that was suffered by the community, but in addition to the minimum payment, those who suffered extra individual harm in the school – physical or psychological – were also compensated accordingly.<sup>29</sup>

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<sup>26</sup> Magarell, *Reparations in Theory and Practice*, p.7-8.

<sup>27</sup> Lira, E., Policy for Human Rights Violations in Chile, in *The Handbook of Reparations* by Pablo de Greiff (ed), Oxford University Press, Oxford, 2006, p.63.

<sup>28</sup> Magarell, *Reparations in Theory and Practice*, p.6.

<sup>29</sup> A summary of the settlement agreement provisions for reparations can be found at <[http://www.irsrrqpi.gc.ca/english/pdf/IRS\\_SA\\_Highlights.pdf](http://www.irsrrqpi.gc.ca/english/pdf/IRS_SA_Highlights.pdf)>, last accessed 17 February 2011.

35. Most importantly, victims' expectations in relation to the outcome of the reparations process should be managed effectively. A realistic and appropriate mandate for the reparations process should be agreed from the outset, in terms of defining the 'victims' who will benefit for example, and then a comprehensive plan for implementation of the reparations awards should be put in place. As such, prior to the award of any reparations, an expert body should be set up to take full responsibility for the implementation process, an adequate budget should be in place, and there must be sufficient political will and legal safeguards to ensure that the awards are enforced. The implementation process needs to be designed according to the resources available and the situation in the country at hand. As such, reparations awards will not to be rendered illusory, and any additional harm that may have been caused to victims by disappointment in the process will be avoided.

#### **IV. Perpetuating Social Marginalisation and Exclusion**

36. Reparations processes in post-conflict societies are intrinsically linked to the organisation of the society in which they emerge. They significantly impact societal structures, including those causing marginalisation and exclusion of particular social groups, even though the nature of the link between reparations processes and the marginalisation or exclusion of certain group(s) of people or individuals is not always readily apparent.

##### ***a) Causes of Social Marginalisation and Exclusion***

##### ***i. Reparations Processes may Cause or Perpetuate Marginalisation or Exclusion of Victims from the Rest of the Society***

37. The above question mostly arises from misconceptions of the role and nature of reparations processes by beneficiaries and society more generally.

38. Firstly, there are misconceptions regarding the mandate of reparations processes, in that certain individuals or groups of individuals may feel they have been victimised "not only because of their political affiliation and activities, but because of the structural circumstances including their gender, poverty, race and general social marginalisation".<sup>30</sup> These individuals may feel that reparations processes which do not target these existing structural inequalities are not sincere and further marginalise or exclude them. Although 'development' and 'reparations' processes are distinct, root causes of conflict such as poverty may impact on the extent and nature of victims' suffering and therefore should be taken into account when determining appropriate reparations awards.

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<sup>30</sup> Hamber, B., Dr Jekyll and Mr Hyde: Problems of Violence Prevention and Reconciliation in South Africa's Transition to Democracy, in *Violence in South Africa*, E. Bornman, R. van Eeden & M. Wentzel (eds), Human Sciences and Research Council: Pretoria, Pretoria, 1998, p.349, 370.

39. Furthermore, where gross and serious economic social and cultural rights violations are a particularly prominent feature of a conflict or oppressive regime from which the State is in transition, victims of such violations should not be excluded from reparations programs. There is no rationale in international human rights law, international humanitarian law or international criminal law to justify prioritising victims of civil and political rights violations at the expense of victims of other violations, particularly where the harm caused by economic, social and cultural rights violations is greater. Failing to acknowledge such victims' harm will only marginalise them further and accentuate the threat to international peace and security.
40. Secondly, there are often misconceptions regarding the nature of reparations processes as they may not always be perceived by victims and the rest of the society as a 'right' and an obligation on the State, and therefore may be perceived as "[compromising] everyone's commitment to pursuing truth and justice"<sup>31</sup>. These misconceptions may lead to feelings of resentment from members of the society towards reparations bodies, and individuals whom they consider to be benefiting from illegitimate and unjust measures. Those who benefit may therefore be ostracised.
41. Finally, certain victims, due to their particular status, may be further marginalised or excluded during reparations processes. This is particularly the case with child soldiers, who are entitled to reparations measures as victims of a crime but are also known to be perpetrators within their communities. Therefore, singling out child soldiers "as victims of war crimes, and ascribing to them a particular status to the exclusion of other children who are also victims, may inadvertently lead to discrimination".<sup>32</sup> The Truth and Reconciliation Commission in Sierra Leone provides interesting insights on the necessity to avoid "new stigma or the reinforcement of existing stigma"<sup>33</sup> by considering all children together and by "increasing awareness and understanding of the specific needs of victims".<sup>34</sup> It also put the emphasis on the sustainability of the process by encouraging the empowerment of victims through reparations measures, as well as the "rehabilitation and reintegration of victims in their original communities".<sup>35</sup>

## ***ii. Marginalisation or Exclusion can also be Observed between Different Groups of Victims***

42. Tensions may arise between different groups of victims for a number of reasons, for example due to a lack of understanding of the fact that reparations processes are generally designed to redress harm caused by gross and serious violations recognised as such under international law. In post-conflict societies, many

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<sup>31</sup> In Chile, the government stated this clearly during the debates on the draft bill for Law 19.123. See Lira, p.62.

<sup>32</sup> Redress, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, 2006, at [http://www.essex.ac.uk/armedcon/story\\_id/000403.pdf](http://www.essex.ac.uk/armedcon/story_id/000403.pdf), p.32

<sup>33</sup> *Ibid*, p.58.

<sup>34</sup> *Ibid*.

<sup>35</sup> *Ibid*.



communities “identify themselves as victims”<sup>36</sup> of a violation and as such feel entitled to reparations measures. However, reparations processes do not necessarily target all the violations committed within a society. Within the ICC reparation system for example, only the victims of crimes incorporated in the Rome Statute will be able to claim reparation. Therefore victims of violations not included as ‘crimes’ within the Statute, will consequently be marginalised and denied access to the Court’s reparations proceedings and the benefit of its reparations awards unless the Trust Fund for Victims (TFV) provides them with assistance and/or reparations.

43. Furthermore, certain categories of victims may be excluded from reparations processes, as they do not qualify as a “victim” under the constitutive act of the reparations body or, even where they do qualify, are excluded from the benefits of the law for other reasons. This exclusion may, for example, be based on: (i) the social status of the individual - which was the case for instance in Chile, at the beginning of the process, where “unmarried partners of disappeared detainees [...] as well as the mothers of illegitimate children were excluded from receiving pensions”;<sup>37</sup> (ii) the former activities of the individual - for instance in Peru where the law establishing the reparations process excluded from the benefits of the process members of subversive groups<sup>38</sup> such as “victims suspected by the state of being connected with Sendero Luminoso, MRTA, or other alleged subversive organisations”;<sup>39</sup> and (iii) the identity of the alleged perpetrator – such as in Colombia where victims of crimes covered under the Justice and Peace Law committed by state agents<sup>40</sup> were excluded from the protection granted by the law.

44. Additionally, a lack of access to the registration system, for example for victims living in rural areas, may also exclude some victims over others and thus perpetuate their marginalisation.<sup>41</sup>

### ***iii. Reparations Processes may Perpetuate Marginalisation and Exclusion of Certain Individuals when they do not Take into Account their Particular Vulnerability***

45. The above statement is especially true of women. Women often face “isolation and ostracism [...] in their own environment (family, social or community)”<sup>42</sup>

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<sup>36</sup> Adjami, M., and Mushiata, G., ICTJ, *Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court*, 2010, at <http://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf>, p.5.

<sup>37</sup> *Supra* n.26.

<sup>38</sup> La Ley 28592 que crea el Programa Integral de Reparaciones (PIR), Artículo 4 “No son consideradas victimas y por ende no son beneficiarios de los programas a que se refiere la presente Ley, los miembros de organizaciones subversivas”.

<sup>39</sup> Guillerot and Carranza, *The Rabat Report: The Concept and Challenges of Collective Reparations*, p.31

<sup>40</sup> *Ley de Justicia y Paz* (Justice and Peace Law), Ley 975 de 2005, Article 5, available at: [http://www.cnrr.org.co/interior\\_otros/pdf/ley\\_975\\_05.pdf](http://www.cnrr.org.co/interior_otros/pdf/ley_975_05.pdf).

<sup>41</sup> Suma, M., and Correa, C., ICTJ, *Report and Proposals for the Implementation of Reparations in Sierra Leone*, 2009, at <http://ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf>, p.6

which presents a major obstacle to accessing adequate reparations. Reparations measures can be “a way to help restore victims to being equal rights holders; however, [this is difficult where] women often do not hold the same rights as men [even] during peacetime”.<sup>43</sup> Reparations measures should take account of structural inequalities affecting women, for example illiteracy, which might prevent women who qualify as victims from claiming and benefiting from reparations awards. If women do not know about their rights and cannot access reparations bodies, these bodies will only reinforce gender discrimination and marginalisation.

46. In addition, certain forms of gender violence may not always be incorporated in the reparations process, contributing to a sense of indifference to victims’ suffering.<sup>44</sup> Reparations awards are often insufficient, for example where sexual violence against women causes a “loss of their productive opportunities as a result of stigmatisation” but such harm does not qualify them for material restitution. It is also worth noting that certain collective reparations measures may *de facto* benefit only men due to discriminating structures of power. To counter this, the law in Peru, which created the reparations programme, explicitly identified the need to take into account the relative impediments to women in accessing reparations, as contrasted with their male counterparts.<sup>45</sup> Unfortunately, the law focused on women’s relative position of disadvantage without mentioning the particular impact of violence on them.<sup>46</sup> The law also initially established cumbersome requirements for the entry of victims into the Registry of Victims (“Registro Unico de Víctimas”) which prevented victims from accessing the process.<sup>47</sup> The law was, however, later modified to introduce more flexibility in the requirements for the registration of victims.

47. Indigenous people can also fall victim to marginalisation or exclusion as a result of a reparations process. In some indigenous communities, especially very poor ones, it has been observed that individual economic reparations could negatively

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<sup>42</sup> Rubio-Marin, R., ICTJ, *What Happened to the Women: Gender and Reparations for Human Rights Violations*, 2006, at [http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7Bd6d99c02-ea4a-de11-afac-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7Bd6d99c02-ea4a-de11-afac-001cc477ec70%7D.pdf), p.107

<sup>43</sup> Muddell, K., ICTJ, *Limitations and Opportunities of Reparations for Women’s Empowerment*, 2009, at <http://ictj.org/sites/default/files/ICTJ-Global-Limitations-Reparations-2009-English.pdf>.

<sup>44</sup> In Guatemala, the Plan for National Reconciliation “includes sexual violence and rape as separate category but leaves out other forms of gender violence including sexual slavery and forced labour, forced unions with captors and sexual torture, and amputation and mutilation of sexual organs”. *Supra* n.37.

<sup>45</sup> See Reglamento de la Ley 28592, Ley que crea el Plan Integral de Reparaciones, Decreto Supremo 015-2006-JUS, artículo 7 g): “Equidad de género e igualdad de oportunidades.

*Implica reconocer las situaciones de desventaja y diferencia que existen entre hombres y mujeres al acceder a recursos y tomar decisiones, por lo que estimula la creación de condiciones especiales para facilitar la participación y presencia de las mujeres en la toma de las mismas”*

<sup>46</sup> Humanas Centro Regional de Derechos Humanos y Justicia de Género, *Políticas de reparación para mujeres víctimas de violencia sexual durante dictaduras y conflictos armados*, 2008, at [http://www.mujereslideres.org/wp-content/uploads/sintregua\\_humanas.pdf](http://www.mujereslideres.org/wp-content/uploads/sintregua_humanas.pdf). “[el Reglamento del PIR] omite hacer referencia al impacto diferenciado de la violencia en las mujeres”

<sup>47</sup> *Ibid.* One of the requirements was the provision by the individual victim of a national identity card. This constituted a serious barrier for women to access to the process as many of them did not have such document living in rural areas

affect feelings of solidarity among family members, and could also affect family and community networks.<sup>48</sup> In addition, the lack of an intercultural approach in reparations processes may perpetuate the marginalisation or exclusion of indigenous communities who, unlike the rest of society, may not be in a position or may not choose to participate in the reparations programme and may have very limited knowledge of its existence.<sup>49</sup>

48. Finally, where 'victim' identities have developed during past conflicts, further classification of individuals or groups as 'victims' in reparations processes can perpetuate or cause further segregation amongst social groups.

### ***b) Ways of Dealing with the Potential Perpetuation of Social Marginalisation and Exclusion***

49. A number of principles may be followed to avoid marginalisation or exclusion during reparations processes. Firstly, reparations processes must “consider the perceptions of the society as a whole”<sup>50</sup> in their design and implementation and should appear to the rest of the population as fair and legitimate.<sup>51</sup> Although the singling out of victims is a necessary part of a reparations process, public awareness and reintegration campaigns may help to ensure reparations bodies are accepted as a process restoring civic trust, dignity and equality to society as a whole. An informed analysis of the different roles played in the conflict is therefore important<sup>52</sup> and stigmatisation of the victims should be avoided. In this sense, efforts should be made to accompany reparations processes with an “accurate sensitisation on reparations to affected populations”.<sup>53</sup>
50. Secondly, trust in the State’s institutions must be re-established through the reparations measures themselves (for instance, through symbolic measures such as public apology, memorialisation and guarantees of non-repetition such as institutional reform), but also through the inclusion of all victims in reparations processes. The selection of beneficiaries of reparations and the nature of reparations measures must take into account the reality of the community and its cultural characteristics.<sup>54</sup>
51. Finally, where there are victim groups from particularly vulnerable sections of society, such sections of society must benefit from measures of empowerment to increase their participation in the transitional justice process and in society as a whole.

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<sup>48</sup> *Supra* n.26.

<sup>49</sup> Asociación Pro Derechos Humanos and International Center for Transitional Justice, *Escuchando Las Voces de las Comunidades: Un estudio sobre la implementación de las Reparaciones Colectivas en el Perú*, 2008, at <http://www.paraquenoserepita.org.pe/documentos/escuchando%20las%20voces.pdf>.

<sup>50</sup> Magarell, *Reparations in Theory and Practice*, p.9

<sup>51</sup> *Ibid.*

<sup>52</sup> Arthur, P., ICTJ, *Identities in Transition: Developing Better Transitional Justice Initiatives in Divided Societies*, 2009, at <http://ictj.org/sites/default/files/ICTJ-Global-Divided-Societies-2009-English.pdf>.

<sup>53</sup> Victims’ Rights Working Group, *The Impact of the ICC on Victims and Affected Communities*, 2010, at <http://www.redress.org/Stocktakingreport2010.pdf>, p.39.

<sup>54</sup> *Supra* n.44.

## ***V. Tensions between Development or Nation-Building Processes and Reparations Processes***

52. Reparations processes and nation-building or development processes are often intrinsically linked in post-conflict societies, as their “agendas overlap during the period of planning and programming after a conflict has ended”.<sup>55</sup> This overlap is explained by the similar “transformative objectives”<sup>56</sup> of the two processes as they are both concerned with change towards improving human lives and societies.<sup>57</sup> Moreover, reparations programmes - whether individual or collective - are becoming more and more complex. They target many aspects of the human life such as access to health services, education and land, which may contribute to development. In addition, some of them require “input and participations from numerous government ministries, including health, education, land, housing, planning, and finance”<sup>58</sup>. These similarities and the simultaneous application of the two processes may raise tensions in their implementation.

### ***a) The Simultaneous Application of Reparations and Development Processes***

53. The interplay between reparations processes and development or nation-building processes and their contribution to one another is complex and goes beyond the scope of this legal brief. This section will therefore be limited to an assessment of how these tensions arise and how they may negatively affect the effective implementation of reparations processes. In this regard, two main phenomena causing tensions can arise: (i) a blurring of the distinction between reparations processes and development or nation-building processes, and; (ii) competition for State investment and provision of resources in these processes during post-conflict periods.

54. The blurring of the lines distinguishing these processes can affect the effectiveness of their implementation. Reparations processes often include measures that can be perceived as ‘development’ measures. Truth and Reconciliation Commissions often take account of situations of economic, social or cultural imbalance affecting victims or groups of victims<sup>59</sup> at the origin of the conflict for example. By proposing recommendations to redress such imbalances, they are in effect contributing to the transitional State’s

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<sup>55</sup> De Greiff, P., and Duthie, R., ICTJ, *Transitional Justice and Development: Making Connections*, 2009, at [http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf).

<sup>56</sup> Duthie, R., ICTJ, *Toward a Development-sensitive Approach to Transitional Justice*, 2008, p. 296.

<sup>57</sup> *Supra* n.50.

<sup>58</sup> *Ibid.*

<sup>59</sup> For instance the Moroccan Justice and Reconciliation commission recommended “communal reparations to strengthen the economic and social development of specific regions that were particularly affected by political violence and were marginalized and excluded” See Arbour, L., *Economic and Social Justice for Societies in Transition*, International Law and Politics, 2007, 1, p.19

development. In addition, certain collective reparations measures such as health or educational measures may be confused with “development policies that [...] communities are entitled to”.<sup>60</sup> This is particularly the case when governments fail to “give [reparations programmes] the stamp of ‘reparations’”<sup>61</sup> or when governments for “political gain”<sup>62</sup> do not establish clearly the nature and purpose of the reparations measure. On the other hand, certain governments may also try to “re-label as reparations a development initiative”<sup>63</sup> or humanitarian assistance measures depending on their political agenda.<sup>64</sup>

55. The line between these processes may also be blurred when reparations programmes are administered “through development agencies”,<sup>65</sup> which can “lessen the visibility of the underlying reasons for the reparations: that the people they serve are not only deserving of better living conditions along with their compatriots, but that they are the subject of reparations because of specific crimes committed against them”.<sup>66</sup>

56. This blurring of the distinction between these processes may undermine the reparative nature of measures taken during reparations processes, as the victim may no longer see itself as a right-holder *vis à vis* the State because of the harm suffered.<sup>67</sup> Moreover, this phenomenon “undermines the recognition of human rights violations, which is a critical element of any reparations policy”.<sup>68</sup> Indeed, “development projects though they may have some reparative value and sometimes may be used for this purpose, are not reparations programs because they do not specifically target victims of abuses”.<sup>69</sup>

57. Tensions may also arise between development or nation-building processes and reparations processes because of their competing priorities in post-conflict periods. As Ruben Carranza puts it “[e]ven in countries like Morocco and Peru, where reparations programs are relatively on track, there is still debate over how to balance reparations with the government’s obligations to encourage development”.<sup>70</sup> One of the main tensions comes from the often limited amount of resources in such periods where “budgets are finite, and competition for

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<sup>60</sup> Magarell, *Reparations in Theory and Practice*, p.6.

<sup>61</sup> Guillerot and Carranza, *The Rabat Report: The Concept and Challenges of Collective Reparations*, p. 33.

<sup>62</sup> Magarell, *Reparations in Theory and Practice*, p.6.

<sup>63</sup> *Ibid.*

<sup>64</sup> In Colombia for instance, the 2008 presidential decree establishing the administrative reparations program called “for humanitarian relief already received by victims to be deducted from the amount of reparations they would receive through this program”. See “La reparación que se les da a las víctimas de la violencia en Colombia sí es la debida” *El Tiempo* (May 2, 2010).

<sup>65</sup> Magarell, *Reparations in Theory and Practice*, p.10.

<sup>66</sup> *Ibid.*

<sup>67</sup> “En consecuencia, los reclamos por las reparaciones seguirán sin satisfacerse”. See Guillerot, J., and Magarell, L., *Reparaciones en la transición peruana, Memorias de un proceso inacabado*, p.137

<sup>68</sup> Guillerot and Carranza, *The Rabat Report: The Concept and Challenges of Collective Reparations*, p. 46.

<sup>69</sup> Duthie, p.299

<sup>70</sup> Carranza, R., ICTJ, *The right to reparations in situations of poverty*, 2009, at <http://ictj.org/sites/default/files/ICTJ-Global-Right-Reparation-2009-English.pdf>, p.3

resources is particularly fierce”<sup>71</sup> and where “the economy and infrastructure may be damaged or destroyed”.<sup>72</sup>

58. Where a State is particularly impoverished, the authorities may attempt to manage the competing interests of development or nation-building processes by implementing collective reparations measures targeting issues such as access to education or to health services. However, reparations are “a limited category of response to harm”<sup>73</sup> and although they are not meant to address directly “broader issues of social exclusion”,<sup>74</sup> if exclusion, marginalisation and or discrimination are at the root causes of conflict, reparations should also deal with these social issues or else it would be impossible to prevent repetition of atrocious crimes or to encourage reconciliation.

### ***b) Ways of Dealing with Tensions between Development or Nation-Building Processes and Reparations Processes***

59. Tensions between development or nation-building processes and reparations processes must be mitigated to ensure their efficacy. It is important to establish clearly the nature and objectives of these processes to avoid any confusion. Victims should also be adequately informed of what they receive firstly as their legitimate right for harm suffered, and secondly as a result of development programmes. It is also fundamental that any attempt to substitute one process for the other is avoided. In this sense, reparations processes must be accompanied by sufficient measures to ensure that their objective – of redressing harm caused by gross and serious violations under international law – is carried out and understood by its beneficiaries and by society as a whole.

60. Moreover, insufficient political will to implement reparations measures will seriously affect their potential impact. In this sense, it is fundamental that reparations programs are backed up by sufficient financial resources. If the financial burden of reparations measures is too heavy, governments should seek international aid in order to get the means necessary to implement the measures. However, while conceptually distinct, development and reparations processes are linked and in order to improve their impact they may be implemented in a manner which complements both processes.

61. Reparations of the sort commented in this brief cannot be successful unless the States take part in them. Where there is insufficient political will for reparations by the State, half-hearted implementation of reparations will reduce their impact, or they may not be implemented at all, generating further frustration in victims. To avoid this scenario, the reparations body must establish a good working relationship with State institutions, and establish clear implementation and monitoring plans and structures.

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<sup>71</sup> *Supra* n.52, p.173

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

## **VI. Conclusion**

62. The creation of an effective reparations process that fulfils its objectives without causing any adverse consequences to victims and the rest of society is a complicated task. This paper demonstrates the main possible consequences of these processes and how they may adversely affect society as a whole, or particular individuals or groups within society. It also demonstrates which consequences may adversely affect the efficiency of the reparations process itself.
63. Reparations processes must encompass a multi-faceted approach that takes into account their perception by society, their long-term impact on perpetrators, victims and society, and the existence of competing processes such as development processes. In addition, the inherent limitations and shortfalls of reparations processes must be acknowledged and explained during transitional justice processes so that these adverse consequences may be mitigated. In any case, all reparations processes must be tailored to the specific characteristics of the society they affect.

## **VII. Recommendations in Relation to Adverse Consequences of Reparations Affecting the Mandate of the ICC and the Trust Fund**

64. The adverse consequences of reparations programs identified above apply to State reparations programmes, as well as to international bodies such as the ICC and the Trust Fund. Thus, in order to mitigate adverse consequences of reparations, the ICC must be equally aware of the political tensions, root causes of conflict, structural inequalities, gender discrimination, and poverty affecting the country in which victims reside when awarding and implementing reparations. The ICC reparations bodies must also be aware of the risks of re-traumatising or marginalising victims through the reparations process.
65. The ICC's extensive reparations mandate and impressive institutional framework – incorporating the Court, the Trust Fund, the Registry, and the Victims' Participation and Reparations Section – are in a unique position to help satisfying victims' rights to adequate and effective reparation. However, they require high levels of coordination and effective judicial interpretation of the reparations provisions set out in the Rome Statute and the Rules of Procedure. In order to prevent potential delays or stress to victims, the Court is therefore recommended to develop Reparations Principles, in accordance with article 75 of the Rome Statute, to provide guidance to allow these bodies to carry out their mandate effectively and with procedural fairness.
66. The establishment of reparations principles under article 75 of the ICC Statute will also help to manage victims' expectations. Currently, the Statute allows for

victims (including indirect victims) to claim reparations provided they can demonstrate they have suffered harm “as a result of the commission of any crime within the [Rome Statute]... [provided the] crime within the jurisdiction of the Court can be established.” The crime does not need to be directly linked to prosecution proceedings. How the “harm” will be determined, and how the court will determine who is a “victim” however, is yet to be fully clarified. For example, the Statute does not refer to “collective” harm. Any Principles developed should, however, ensure that the awards satisfy the victims’ right to reparation on the basis of the specific harm they have suffered in accordance with the UN Basic Principles.

67. The Court should make full use of its extensive mandate to ensure public outreach, victim protection (under Article 68 (1)) and victim participation (under Article 68(3) of the ICC Statute) in reparations proceedings. The Registry is also encouraged to fully exercise its ability to “[assist] [victims] in obtaining legal advice and organising their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings” under Rule 16 (1)(b) of the ICC’s Rules of Procedure and Evidence. The Trust Fund’s mandate also allows for it to provide assistance to victims during on-going proceedings. These provisions are crucial to ensuring victims are protected and assisted, as opposed to re-traumatised, by the reparations process.
68. Given the Court and Trust Fund’s mandate to order collective reparations, ICC reparations awards may cause tension with State development projects, and this should be mitigated as set out above. Effective participation between the State and the Court is crucial to the effective implementation of reparations awards, for example in seizing assets of perpetrators (under Article 93(k)). In accordance with the principle of complementarity, domestic laws and frameworks should be in place for the effective enforcement of ICC reparations judgments to avoid disappointment to victims. In order to monitor this, the Court should also create a follow-up body.



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