

Where We Are? Where To Go?

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Reparations, Responsibility



Victimhood in Transitional Societies

REFLECTIONS ON THE COLLECTIVE DIMENSION OF REPARATIONS: WHERE WE ARE? WHERE TO GO?

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INTRODUCTION



Museo Casa de la Memoria, Medellín, Colombia by Luke Moffett

Over the past one hundred years reparations have evolved from being the concern between states to entitling individuals a right to reparation for gross violations of human rights.¹ Over the past thirty years there has been an increasing recognition of collective rights of victims, as right-holders as peoples and communities, as well as reparations collectively delivered to victim groups. As stated by the United Nations Special Rapporteur on Truth, Justice, Reparations and Guarantees of Non-Recurrence ‘the notion of collective reparation has recently garnered interest and support. The term “collective reparation” is ambiguous, as “collective” refers to both the nature of the reparation (i.e., the types of goods distributed or the mode of distributing them) and the kind of recipient of such reparation (i.e. collectivities).’²

The implementation of reparation in the aftermath of mass atrocities constitutes a major challenge for States. The mechanisms, procedures, and methods for complying with the States’ obligation to repair victims of gross human rights violations are usually expressed either through the ruling of a competent jurisdictional court or through the development of an administrative reparations programme. Drawing on the legal and political dimension of the notion of reparation and on lessons learned from specific cases and examples of the universal and regional human rights system, international criminal tribunals and truth commissions, this report provides theoretical, practical and specific elements to the debate on how reparations measures for gross human rights violations approach the collective dimension, not only with the specific forms of measures, but also with explicitly having a collective dimension both in their design and implementation.

1 OHCHR. *Reparations Programmes, Rule-of-Law Tools for Post-Conflict States*, United Nations, 2008, p.5.

2 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 2014, para. 38.

I. IS THERE A RIGHT TO COLLECTIVE REPARATIONS FOR MASSIVE HUMAN RIGHTS VIOLATIONS? EVOLUTION AND TENDENCIES

Public international law is based on private law concepts of civil liability for violation of an obligation, which gives rise to reparation for the damage caused by the responsible party.³ Human rights law recognises that states have a range of obligations to ensure and respect the rights of individuals within their jurisdiction, with a failure to do so giving rise to an obligation to ensure access to an effective remedy and reparations.

The obligations resulting from the State's responsibility for human rights violations entail corresponding individual right to reparation, which some human rights conventions recognize the existence of collective victims,⁴ not all the treaty law explicitly recognizes the same collective right.

The Preamble of the 2005 UN Basic Principles points out that '**contemporary forms of victimization, while essentially directed against persons, may nevertheless be directed against groups of persons who are targeted collectively**'. According to the Basic Principles, '**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, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law**'⁵ and that, '**in addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate**'.⁶ Similarly the Updated Set of Principles to Combat Impunity, specifies that reparations may be '**provided through programs (...) addressed to individuals and to communities**'.⁷

In this judicial sphere, reparation consists *prima facie* of restoring the victim's situation to the moment before the wrongful act (*status quo ante*), erasing or nullifying the consequences of the

3 See Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?*, in C. Lawther, L. Moffett and D. Jacobs (eds.), *Research Handbook on Transitional Justice*, Elgar (2017) 377-400. 'It is a principle of international law that any violation of an international commitment entails the obligation to make adequate reparation.', Permanent Court of International Justice, Sentence, September 1928, *Chorzow Factory Case (Germany v. Poland)*, in Serie A, N°17. Also: International Court of Justice, Judgment of merits, June 1949, *Corfu Strait Case (United Kingdom v Albania)*; International Court of Justice, Judgment of merits, *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986.

4 See: article 2 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women; article 34 of the European Convention on Human Rights; article 44 of the American Convention on Human Rights; Rule 97 of the Rules of Procedure and Evidence of the International Criminal Court.

5 UN General Assembly, *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*, Res.60/147, 2005, para.8. In the same line, see: art. 1 and 18 of the UN Declaration on Basic Principles of Justice for Victims of Crimes and Abuses of Power, UN General Assembly, Res. 40/34, Nov. 1985.

6 UN General Assembly, *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*, Res.60/147, 2005, para. 13.

7 Principle 32, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Addendum to the 'Report of the independent expert to update the Set of Principles to Combat Impunity', Diane Orentlicher, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005.

wrongful act or omission.⁸ Such measures should be proportional to the gravity of the violations and the harm suffered.⁹ According to the 2005 UN Basic Principles, full and effective reparation includes: restitution¹⁰, compensation¹¹, rehabilitation¹², satisfaction¹³ and guarantees of non-repetition.¹⁴ Especially in the last two categories, measures can have a group, collective, community, even societal scope: full and public disclosure of the truth, public apology, strengthening the independence of the judiciary or promoting mechanisms for preventing and monitoring social conflicts. In fact, an interviewee that we spoke to in Colombia suggested that measures aimed at non-recurrence of past harms were just as important in repairing victims as offering them material support is:

It is very difficult to repair a victim when you have another victimisation next month. How do you close the tap of the reparations then? Which is a little bit of what is happening with the Law of Victims. I mean, I will compensate you for one thing, but in two months you have another incident. Until when then? Then reparations also happen so that you have sufficient conditions so that that does not occur again.¹⁵

The content of these forms of reparation is usually defined and materialized through the sentence of a competent jurisdictional court, after a conviction, within the framework of case-by-case procedure. This allows measures to be customized on a case-by-case basis. In the face of systematic human rights violations that transitional justice usually responds to, the legal approach to reparations is limited; because it only allows reparation of cases that come within its jurisdiction hundreds (if not thousands) of people who suffered similar violations are excluded from the scope of reparation measures. Soon, the right to reparation began to be explored from another realm.

There is no single agreed way to implement reparations; reparation programmes have been created by states following truth commission recommendations, as independent redress schemes, or through legislation.¹⁶ Adopting a reparations policy makes it possible for the State to respond to their duty to provide adequate reparation to victims, while at the same time reaching a greater number than those who could reasonably have access to a court. This can obviate some of the difficulties and costs associated with litigation and overcome the inequality of different jurisprudential interpretations of a court to another or the often-discriminatory guidelines and practices of court systems.¹⁷

8 Inter-American Court of Human Rights, *Case of Trujillo-Oroza v. Bolivia*, Judgment of February 27, 2002 (Reparations and Costs), para. 61.

9 UN General Assembly, *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*, Res.60/147, 2005, para. 15.

10 Ibid, para. 19.

11 Ibid, para. 20.

12 Ibid, para. 21.

13 Ibid, para. 22.

14 Ibid, para. 23.

15 Interview Colombia 20.

16 OHCHR. *Reparations Programmes, Rule-of-Law Tools for Post-Conflict States*, United Nations, 2008, p.11.

17 *Promotion of truth, justice, reparation and guarantees of non-recurrence*, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/42/45, 2019, para. 32.

So far no established reparations policy or programme has implemented the set of five categories mentioned by the Basic Principles in accordance with domestic law and international law. In practice, it is unlikely that those in charge of designing reparations programs will also be responsible for designing policies on truth-seeking or institutional reform.¹⁸ In the administrative programmatic sphere, the term *reparations* is used more restrictively, referring to measures that seek to *directly* benefit the victims. In other words, implicitly, in the administrative programmatic sphere, a distinction is made between the measures that the notion of reparation encompasses according to international law, which, although they may have reparative effects for the victims, are not directed directly to them and do not distribute direct benefits to them, and measures that strictly “repair”.¹⁹ The adoption of a reparations policy allows the adoption of measures, methods and forms of reparations, certainly different from those of a judicial context, but adjusted to the national realities and the social, ethnic and cultural dimensions of the patterns of violations, as long as they satisfy the objective of “doing justice to the victims”²⁰.

Reparations policies focus on the design of programmes organized mainly around the distinction between material and symbolic measures.²¹ Material reparations can be both individual (i.e. a monetary compensation through a lump-sum or a pension, physical or mental medical care or a scholarship) and collective (i.e. the restitution of communal lands, the reconstruction of public buildings or collective social services); symbolic or moral measures can also be both individual (i.e. individual letter of apology or support for the burial) or collective (i.e. public apology, memorials or renaming a street). Although such distinctions can be helpful in the administrative planning and implementation of reparations, for victims these measures correspond to the diverse and pervasive harms they suffer as a result of gross violations of human rights.

18 Ibid., p.9.

19 Ibid. See *Promotion of truth, justice, reparation and guarantees of non-recurrence, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 2014, para. 19-21.*

20 Concept developed by Pablo de Greiff, former United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-Recurrence. The general objective of doing justice to the victims is achieved (in part) through the realization of specific objectives to which a reparations policy should aim: recognition, civic trust and social solidarity. See: De Greiff, Pablo. “Justice and Reparations”, in *The Handbook of Reparations* (Pablo de Greiff, ed.), Oxford: Oxford University Press, 2006, pp. 455-466.

21 OHCHR. *Reparations Programmes, Rule-of-Law Tools for Post-Conflict States*, United Nations, 2008, p. 9. Also, UN General Assembly, *Promotion of truth, justice, reparation and guarantees of non-recurrence, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518, 2014, para. 22.*

II. EVOLUTION AND TENDENCIES IN THE PRACTICE OF THE COLLECTIVE DIMENSIONS OF REPARATIONS

The practice of international and regional courts, and States through administrative policy schemes, provide us with a better understanding of the collective dimension of reparations. This includes understanding the reach of collective reparation, how it is tied to rights, how it is defined and how it is distributed.

2.1. In Courts

2.1.1. The Inter-American Court of Human Rights Approach to Collective Reparations

Based on article 63 (1) of the American Convention on Human Rights, the Inter-American Court has always stated that “[i]t is a principle of international law, which jurisprudence has considered «even a general concept of law,» that every violation of an international obligation which results in harm creates a duty to make adequate reparation”²².



Memorial cross, Rabinal, Guatemala by Luke Moffett

Working under the concept of integral or full reparations and the five categories defined by the Basic Principles²³, collective reparations have become an important element of IACtHR jurisprudence. Certainly, when compared to the European Court of Human Rights (ECtHR), the IACtHR has taken a more expansive and progressive approach to ordering collective reparations.

22 Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras, Judgment of July 21, 1989, (Reparations and Costs), para. 25.

23 The IACHR has always afforded moral satisfaction in conjunction with another modality of reparation because of the need to balance restorative and distributive justice.

While the ECtHR has not gone far beyond ordering monetary compensation, the IACtHR has ordered several measures designed to meet the collective needs of victimised communities.²⁴ However, the IACtHR has never actually tried to define collective reparation and definitional ambiguity remains over what exactly collective reparation is or should be.²⁵ Nevertheless, IACtHR jurisprudence is suggestive that collective reparations take different forms; that victims of gross human rights violations are seen as a collective group; they aim to repair a collective harm; and that there is a causal link between the harm and state responsibility.²⁶

On one hand, the IACtHR has ordered measures of satisfaction and guarantees of non-repetition that can be viewed as collective reparations that benefit society as a whole. This includes human rights education programs for the staff of the judiciary or members of security forces, memorials, public apologies and the publication of the court's ruling. For example, in the Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, IACtHR "orders the State to designate an educational center with a name allusive to the young victims in this case and to place in this center a plaque with the names of [the victims] (...) This will contribute to raising awareness in order to avoid the repetition of harmful acts such as those that occurred in the instant case and will keep the memory of the victims alive"²⁷. Here the Court ordered a collective reparation measure even though the group of individual victims has no legal personality, no cultural bond nor a previous existence as a local community. However, the motivation here is more dissuasive or preventive than properly reparative.

On the other hand, various types of collectives might be the beneficiaries. While the IACtHR has held that to benefit from collective reparations you have to be a victim, it has not held that every individual victim within a collective needs to be identified.²⁸ Its decisions have granted collective reparations to indigenous peoples, tribal communities or groups of individual victims, with or without legal personality, with or without prior existence to the violation of a right, with or without the violation of any collective right or a collective harm.

For example, in the milestone *Alboeboetoe v. Suriname* case, in which the IACtHR dealt with the extrajudicial killing of seven members of the Saramaccan Maroon boatmen by military forces, although the IACtHR held that 'the racial motive put forward by the Commission has not been duly proved and finds the argument of the unique social structure of the Saramaka tribe to be without merit'²⁹ it nevertheless ordered the State, additional to individual compensatory measures, to reopen a school and establish a medical dispensary at Gujaba.³⁰

24 Diana Contreras-Gadrano and Sebastian Rombouts, 'Collective reparations for indigenous communities before the Inter-American Court of Human Rights', *Merkourios*, (2010) 27 (72): 4-17.

25 Contreras-Garduño, Diana. "Challenges of Collective Reparations: The Experience of the Inter-American Court of Human Rights", in Anja Mihr (ed) *Rule of law and transitional justice: Towards a triangular learning, the case of Colombia*, Venice, EIUC, 2013.

26 Ibid.

27 Inter-American Court of Human Rights, Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Judgment of May 26, 2001 (Reparations and Costs), para. 103.

28 Contreras-Garduño, Diana. "Challenges of Collective Reparations: the Experience of the Inter-American Court of Human Rights", in Anja Mihr (ed) *Rule of law and transitional justice: Towards a triangular learning, the case of Colombia*, Venice, EIUC, 2013.

29 Inter-American Court of Human Rights, Case of Alboeboetoe et al. v. Suriname, Judgment of September 10, 1993 (Reparations and Costs), para. 84.

30 Ibid., para. 96.

Likewise, in the Case of the Plan de Sánchez Massacre v. Guatemala, without determining the violation of a collective right, but because the case implies a large number of victims from the same communities, in addition to individual compensatory measures the court ordered 'the sum of US\$25,000.00 (twenty-five thousand United States dollars) or its equivalent in national currency, for maintenance and improvements to the infrastructure of the chapel in which the victims pay homage to those who were executed in the Plan de Sánchez massacre'.³¹ It further ordered the State to implement the following programs in the impacted communities

'a) study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization; b) maintenance and improvement of the road systems between the said communities and the municipal capital of Rabinal; c) sewage system and potable water supply; d) supply of teaching personnel trained in intercultural and bilingual teaching for primary, secondary and comprehensive schooling in these communities, and e) the establishment of a health center in the village of Plan de Sánchez with adequate personnel and conditions, as well as training for the personnel of the Rabinal Municipal Health Center so that they can provide medical and psychological care to those who have been affected and who require this kind of treatment'.³²

According to interviewees we spoke to in Guatemala these measures reflected how 'the consequences [of violence] went beyond the family'³³ by having an 'affectation' across entire communities.³⁴

The Court has gone further in cases involving land rights and indigenous or tribal people, recognizing that collective reparations for harms against individuals that affect a group in its entirety should fit with the cultural particularities of that group. For example, it has shown a flexibility and willingness to allow victims to present their claim as a group, rather than as individuals.³⁵

In the landmark *Mayagna (Sumo) Awas Tingi Community* case, the IACtHR found that Nicaragua had violated the collective right to property to the detriment of the members of the said indigenous community³⁶:

"the Court rules that the State must carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community, within a maximum term of

31 Inter-American Court of Human Rights, *Case of the Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004 (Reparations), para. 104.

32 Ibid., para. 110.

33 Interview Guatemala 14.

34 Interview Guatemala 3.

35 Mayeux, Bridget and Justin Mirabal. "Collective and Moral Reparations in the Inter-American Court of Human Rights", University of Texas Law School, Human Rights Clinic, Working Paper Series, November 2009.

36 "Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations". Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001 (Merits, Reparations and Costs), para. 149. Also, para. 173.

15 months, with full participation by the Community and taking into account its customary law, values, customs and mores³⁷ and “considers that due to the situation in which the members of the Awas Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must also be repaired, by way of substitution, through a monetary compensation (...) [and] that the State must invest, as reparation for the immaterial damages, in the course of 12 months, the total sum of US\$ 50,000 (fifty thousand United States dollars) in works or services of collective interest for the benefit of the Awas Tingni Community, by common agreement with the Community and under the supervision of the Inter-American Commission”³⁸.

Following this jurisprudence, in two cases against Paraguay, *Yakye Axa*³⁹ and *Sawhoyamaxa*⁴⁰, the IACtHR noted ‘the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generations’⁴¹ and duly recognized that ‘the reparations take on a special collective significance’⁴². Accordingly, the Court ordered the State

‘to create a community development fund and program that will be implemented on the lands that will be given to the members of the Community... The community program will consist of the supply of drinking water and sanitary infrastructure. In addition to said program, the State must allocate US \$950,000.00 (nine hundred and fifty thousand United States dollars), to a community development program that will consist of implementation of education, housing, agricultural and health programs for the benefit of the members of the Community.’⁴³

The *Moiwana Community*⁴⁴ and *Saramaka People*⁴⁵ cases against Suriname also led to important rulings where the IACtHR recognized that, although the Maroons N’djuka people and Saramaka could not be seen as ‘indigenous’ or ‘first inhabitants’, they are subject to the same protection of their communal ownership on their lands, since they make up tribal communities⁴⁶, and deserved collective forms of reparations.⁴⁷ In *Moiwana v. Suriname*, the IACtHR noted “[g]iven that the victims of the present case are members of the N’djuka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole’.⁴⁸

37 Ibid, para. 164.

38 Ibid, para. 167.

39 Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs).

40 Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006 (Merits, Reparations and Costs).

41 *Yakye Axa Indigenous Community Case*, para. 124. Also, para. 131, 135-137, para. 154. Also, *Sawhoyamaxa Indigenous Community Case*, para. 118-121 and para. 222.

42 *Yakye Axa Indigenous Community Case*, para. 188.

43 *Yakye Axa Indigenous Community Case*, para 205. Also, *Sawhoyamaxa Indigenous Community Case*, para. 227. Other measures of acknowledgment were also ordered, *ibid.* para.226.

44 Inter-American Court of Human Rights, *Case of the Moiwana Community v. Suriname*, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs).

45 Ibid.

46 Ibid., para. 133-135. Also, *Saramaka People v. Suriname Case*, para. 80-84.

47 *Saramaka People v. Suriname Case*, para. 189.

48 *Moiwana Community v. Suriname Case*, para. 194.

Due to the cultural bonds of the victims the Court ordered the following communal measures: an effective, swift investigation and judicial process; legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community with their participation and informed consent; the establishment of a developmental fund, to consist of US \$1,200,000, which will be directed to health, housing and educational programs for the Moiwana community members; a public apology and acknowledgment of international responsibility; a memorial which design and location will be decided upon in consultation with the victims' representatives.⁴⁹

Evidently, then, the importance of tailoring collective reparations to the specific requirements of the collective beneficiary is at the core of IACtHR's decisions. This has even extended to symbolic measures of acknowledgment. For example, in *Yatama v Nicaragua* the court ordered that the duty to publicise had to be given effect through radio broadcasts and in indigenous languages. This, it was argued, was the most appropriate means through which remote communities could be reached.⁵⁰

2.1.2. International Criminal Court



Members of ANFASEP, Ayacucho, Peru by Luke Moffett

Collective reparations have become an increasing feature in cases before the International Criminal Court (ICC), where a number of cases have involved thousands of victims for multiple violations. The ICC has categorised reparations into individual and collective measures.⁵¹ The Rome Statute refers to three modalities of reparation - restitution, compensation, and rehabilitation.⁵² The Court has also recognised that 'other types of reparations, for instance those with a symbolic,

49 Ibid., para. 205, para. 209 and 210, para. 214, para. 216, and para. 218. Also, *Saramaka People v. Suriname Case*, para. 214.

50 *Yatama v Nicaragua*, Inter-American Court of Human Rights (2005) Series C No. 127; *Yakye Axa Indigenous Community v Paraguay*, Inter-American Court of Human Rights (2005) Series C No.125.

51 *Lubanga*, *supra* note 15, paras.41-67 and 222-236.

52 Article 75 (1). The Rome Statute itself only speaks of 'including' restitution, compensation and rehabilitation, though the Court's Rules speak of individual and collective measures, see also Rule 97(1).

preventative or transformative value, may also be appropriate'.⁵³ The Court has discretion on whether or not to order reparations, on an individual or collective basis or both.⁵⁴ In contrast the Extraordinary Chambers in the Courts of Cambodia explicitly limit reparations to collective and symbolic measures,⁵⁵ given the millions of victims and reluctance of the Cambodian government to set up a complementary reparations body.⁵⁶

The ICC may "order that an award for reparations against a convicted person be made through the Trust Fund for Victims (TFV) where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate".⁵⁷ Frédéric Mégret argues that the ICC Rules of Procedure and Evidence imply a definition of collective reparations as a) individual reparations whose award is disbursed collectively; b) reparations awarded to a collectivity (i.e. a legal entity); and c) reparations awarded to a large number of victims that effectively equates a group.⁵⁸

In the first case before the ICC of Thomas Lubanga involving the recruitment of child soldiers, the preference for collective reparations was seen as more feasible given the victims involvement in victimizing others and it being seen as controversial to award them individual compensation. As such a community-based approach was proposed by the TFV and other participants in the Lubanga case and accepted by the Trial Chamber in the first instance, as a way to broaden the benefits and utility of reparations beyond individual awards, as well as to minimise costly verification procedures.⁵⁹ However community-based reparations would allow those who perpetrated and supported the recruitment and conscription of child soldiers to benefit.⁶⁰ The Appeals Chamber rejected this broad interpretation of community-based reparations, re-affirming that reparation can be individual and collective, and requiring that reparations be awarded against a person for the crimes of which he/she was convicted.⁶¹ Consequently although the mandate to award reparations collectively is clear, the meaning of "collective basis" still remains ambiguous. However, the ICC's Trust Fund for Victims (TFV) views collective reparation as involving both collective awards and collective beneficiaries. Among collective beneficiaries it includes: victims of a collective rights violation; victims of collective harm; violation effecting a group or collective; and violations that effect society as a whole.⁶²

53 Lubanga, *supra* note 26, para.222.

54 Rule 97(1); and Lubanga, *supra* note 26, para.152.

55 Rule 23(1)(b) and 23 quinquies(1).

56 See Rachel Killean and Luke Moffett, What's in a Name? 'Reparations' at the Extraordinary Chambers in the Courts of Cambodia, (2020) *Melbourne Journal of International Law* 21(1) 115-143.

57 Rule 98 (3), Rules of Procedure and Evidence.

58 Frédéric Mégret, 'The case for collective reparations before the International Criminal Court' in Jo-Anne Wemmers (ed) *Reparations for Victims of Crimes against humanity: The healing role of reparation* (London: Routledge, 2014).

59 Lubanga, Decision establishing the principles and procedures to be applied to reparations, ICC-01/04-01/06-2904, 7 August 2012, para.274.

60 Lubanga, Observations on the Sentence and Reparations, ICC-01/04-01/06-2864-tENG, 18 April 2012, para.16.

61 Lubanga, *supra* note 26, para.214.

62 ICC (Filing) 3 November 2015, *Prosecutor v Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan, ICC-01/04-01/06-3177-Red, para 173-175.

The jurisprudence of the Court has confirmed that collective reparations can be awarded if the victim is a natural person or legal entity⁶³ or a large number of victims that equates to a group, who has suffered the violation of a collective right, a collective harm and violation that affect society as a whole, as a result of a crime within the jurisdiction of the Court and with a nexus to the crime for which the convicted person was convicted. The ICC has also held that a group of people may be a beneficiary of reparations even if that group is not vested with legal personality.⁶⁴ In the *Al Mahdi* case the community of Timbuktu was recognised as an eligible group of victims for the purposes of collective reparations. The Chamber also acknowledged that Mali and the international community suffered harm as a result of the destruction of the UNESCO World Heritage site in Timbuktu, awarding each a symbolic €1 each.⁶⁵ That said the community in Timbuktu, has a cultural and spiritual connection to the site, as recognised as the primary victim and prioritised in reparations to maximise its effects.⁶⁶ In identifying what constitutes a group of victims for collective reparations, Trial Chamber II in the *Katanga* case set down that,

“a group or category of persons may be bound by a shared identity or experience, but also by victimization by dint of the same violation or the same crime within the jurisdiction of the Court. Collective reparations may, therefore, benefit a group, including an ethnic, racial, social, political or religious group which predated the crime, but also any other group bound by collective harm and suffering as a consequence of the crimes of the convicted person.”⁶⁷

Collective awards have thus been ordered by the ICC. In the *Lubanga* case it ordered collective reparations in the form of construction of community centers and a mobile program to reduce stigma and discrimination against former child soldiers and service-based collective reparations in the form of physical/psychological rehabilitation, vocational training and income-generating activities.⁶⁸ In the *Katanga* case, the majority of victims wanted compensation rather than collective measures.⁶⁹ As a result the Court ordered a combination of individual and collective reparations designed to benefit identified victims only in the form of housing assistance, education assistance, income generating activities and psychological rehabilitation.⁷⁰ However due to ongoing insecurity in the area, these other collective benefits have not been implemented or victims have opted for more financial support instead, given the risk of displacement.

Finally, in the *Al Mahdi* case, the Court recognised that ‘the number of victims and the scope of the consequential economic loss make a collective award more appropriate’,⁷¹ but it also recognised that certain individual victims were entitled to reparation.

63 “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.”, Rule 85, Rules of Procedure and Evidence of the ICC.

64 ICC (Order) 24 March 2017, *Prosecutor v Germain Katanga*, ICC-01/04-01/07-3728, 24 March 2017, para 276.

65 *Al Mahdi*, *supra* note 30, para.53 and 106-107.

66 *Ibid.*, para.55.

67 *Katanga*, *supra* note 27, para.275.

68 Decision Establishing Principles of 7 August 2012 as amended by the Appeals Judgment and Amended Order for Reparations of 3 March 2015.

69 Registry, Report on applications for reparations in accordance with Trial Chamber II's Order of 27 August, 21 January 2015, ICC-01/04-01/07-3512-Anx1-Red2, para.49.

70 Reparations Order of 24 March 2017 confirmed by the Appeals Judgment on Reparations of 8 March 2018.

71 *Al Mahdi*, *supra* note 18, para.82.

It indicated that collective reparation 'should be aimed at rehabilitating the community of Timbuktu in order to address the economic harm caused.'⁷² Moreover, it suggested that the measures could include 'raising programmes to promote Timbuktu's important and unique cultural heritage, return/resettlement programmes, a 'microcredit system' that would assist the population to generate income, or other cash assistance programmes to restore some of Timbuktu's lost economic activity.'⁷³ The TFV draft implementation plan also proposed an Economic Resilience Facility (ERF) to support economic initiatives proposed by members of the Timbuktu community. The ERF would be a microcredit centre to support cultural activities and the affected tourism industry,⁷⁴ as well as creating a safe space for women and girls.⁷⁵ In the Ntaganda case the Court ordered 'collective reparations with individualised components', which included compensation, restitution, rehabilitation and satisfaction for a range of violations including killings, sexual violence and attacks on healthcare.⁷⁶

In the first four cases before the Court, reparations are to be fully implemented by the TFV, through funds made available by voluntary contributions, because the convicted persons have been found indigent.⁷⁷

Still, "the case-by-case approach to determining reparations has resulted in inconsistent jurisprudence, divergence in practice and lack of clarity for the victims even within the same situation before the Court".⁷⁸ Marissa Brodney also argues that while the Court may have initially taken a broad approach to repairing communities impacted by violations, the Appeals Chamber subsequently narrowed this by holding that collective reparations could not be awarded to unidentified beneficiaries. Instead, they can only be awarded to those beneficiaries within the community who satisfied the relevant criteria as being harmed by a crime that the convicted party had been found guilty of.⁷⁹ As Moffett and Sandoval note with the latest decision in the Ntaganda case the Court's use of 'collective reparations with individualised components' reflects a tension of a court dealing with mass claims that is 'perpetuating the individual/collective division of reparations is tying itself in semantic knots to meet victims' expectations against the limitations of the Court's capacity and liability of the convicted person. Really the Court is slowly recognising that victims need to be dealt with through a collective administrative process rather than as individual judicial claims in the face of contexts that have a background of ongoing violence.'⁸⁰

72 Ibid., para.83.

73 *Al Mahdi*, *supra* note 18, para.83.

74 ICC-01/12-01/15-291-Red2, para.120-137.

75 Ibid. para.148-155.

76 ICC-01/04-02/06-2659, paras.191-208.

77 Regulation 56 of the Regulations of the Trust Fund for Victims.

78 REDRESS, "Making Sense of Reparations at the International Criminal Court", *Background Paper – Lunch Talk*, 20 June 2018, The Hague.

79 Marissa Brodney, "Implementing International Criminal Court-ordered collective reparations: unpacking present debates", *Journal of the Oxford Centre for Socio-Legal Studies*, (2016) 1: pp. 1-35.

80 Luke Moffett and Clara Sandoval, *Tilting at Windmills: Reparations and the International Criminal Court*, *Leiden Journal of International Law* (2021) 34(3), 749-769.

2.2 In administrative programs

Although the German reparations to the Jews after World War II is perhaps the first example,⁸¹ it is not until the end of the 1990s that truth commissions began to commonly discuss recommendations for collective reparations. The truth commissions of Guatemala, Peru, East Timor, Sierra Leone, Morocco, Liberia, Aceh Province (Indonesia), and Colombia are an example of this.

For the purpose of this article, we will focus on the experiences of Peru, Morocco and Colombia. There are, of course, structural and contextual elements that set these sites apart: the nature of the conflicts; the types, capacity, and role of civil society; political, cultural, social and economic structures; and the extent and stage of the transitional justice / reparations processes that are designed and implemented. It is precisely this diversity that allows us to identify different practices and critically explore the understanding, design and implementation of collective reparations discussed in section III.

2.2.1 Peru

The Peruvian Truth and Reconciliation Commission (CVR for its acronym in Spanish) (2001-2003) recommended a Comprehensive Reparations Plan that combined individual and collective reparation programs. The Law 28592 (also known as the PIR-Law) established “the Normative Framework of the Integral Plan of Reparations for the victims of the violence that occurred during the period from May 1980 to November 2000, according to the conclusions and recommendations of the Truth and Reconciliation Commission Report”⁸², providing legal certainty and framing the process within the conceptual continuity of the CVR itself.



Mausoleums to massacre victims, Cocop, Guatemala by Luke Moffett

81 See Ariel Colonomos and Andrea Armstrong. “German Reparations to the Jews after World War II: A Turning Point in the History of Reparations”, in in *The Handbook of Reparations* (Pablo de Greiff, ed.), Oxford: Oxford University Press, 2006, pp. 390.419.

82 Law 28592, July 2005, art. 1. The regulation of the law - Supreme Decree 015-2006-JUS, July 6, 2006, modified by Supreme Decree 003-2008-JUS, Feb. 21, 2008 - developed the programs, principles, approaches, and criteria that should govern the reparation process, using a similar vocabulary and content to the CVR’s recommendation.

The Law defines the concept of victims, excluded cases and beneficiaries. It states that “persons or groups of persons who have suffered acts or omissions that violate human rights norms are considered victims”.⁸³ Beneficiaries are divided into two categories: individual and collective beneficiaries. It further specifies that “[t]hese qualities are not exclusive as long as the same benefit is not duplicated”.⁸⁴ The Law defines as collective beneficiaries: “a) Peasant communities, native communities and other population centers affected by violence, that present certain characteristics such as: concentration of individual violations, devastation, forced displacement, breakdown or cracking of the communal institution, loss of infrastructure family and / or loss of communal infrastructure. b) Organized groups of displaced non-returners, coming from the affected communities in their places of insertion”.

The Law also provides for the creation of the Single Registry of Victims (RUV for its acronym in Spanish) for the violence that occurred during the period from May 1980 to November 2000⁸⁵ by the Reparations Council⁸⁶. Book II is dedicated to the registration of collective beneficiaries based on the following criteria: concentration of individual violations, razing, forced displacement, institutional breakdown (number of dead, displaced and / or missing; weakening of assemblies, boards and other forms of local government; number of community organizations affected), the destruction of infrastructure and family assets (loss of land and work tools, livestock, housing, means of transport) and the destruction of infrastructure and community goods (loss of communal premises, communal productive infrastructure, communications infrastructure like bridges, roads, communal radios and others, basic services infrastructure like water, energy, sanitation and others)⁸⁷. The Reparations Council also developed a methodology for measuring the level of impact harms had⁸⁸: high, high, medium, low, very low. These then feed into how it prioritises its interventions.

The High-Level Multisectorial Commission in Charge of the State's Actions and Policies Related to Peace, Collective Reparation and National Reconciliation (CMAN for its acronym in Spanish)⁸⁹ designs, coordinates with national, regional, and local sectors, and supervises the implementation of the PIR-Law programs. Its Executive Secretariat is directly in charge of implementing the Collective Reparations Program (started in 2007) and the individual Economic Reparations Program (started in 2011); restitution of Civil Rights Program, Educational Reparations Program (started in 2012), the Health Reparations Program (started in 2006), and the Program for the Promotion and Facilitation of Housing (started in 2012) are implemented by the sectors. The staggered implementation of the various programs calls into question the integrality of the reparation plan as conceived by the CVR and recognized in the Law.

The PRC aims to “contribute to the reconstruction of the social and institutional, material and economic-productive capital of families and rural and urban communities affected by the violence process”⁹⁰.

83 Ibid, art. 3.

84 Ibid, art. 5.

85 Ley 28592, art. 9.

86 Ibid., First complementary and transitional provision.

87 Supreme Decree 015-2006-JUS, art. 50.

88 Supreme Decree 015-2006-JUS, art.70 c).

89 Supreme Decree 011-2004-PCM, Feb. 2004.

90 Ibid.

It states that the relationship between the State and the community cannot remain the same and that the State must guarantee the inclusion and the right to development of the community⁹¹. The intervention methodology of the PRC adds to this general objective a broad list of specific objectives:

- ▶ to compensate the social, economic and institutional damage that the peoples and human groups have suffered, so that they can recover their basic collective conditions of life and work and, above all, can be oriented towards their reconstruction with a vision of the future;
- ▶ to effectively combine measures of collective reparation with measures of symbolic reparation, through acts and public gestures expressed by the highest authorities and State officials;
- ▶ to recognize the role played by the peasant and native community in the struggle for the pacification of the country; achieve public recognition of responsibilities from the State for the excesses and abuses committed in the midst of the anti-subversive struggle;
- ▶ to commit from the State the affirmation of guarantees of non-repetition of events such as those that occurred between 1980 and 2000;
- ▶ to continue the task of historical clarification and recovery of the collective memory of the community;
- ▶ to promote the permanent solidarity of the State and society with those affected by violence;
- ▶ to promote training for peace, promoting the identification of local icons that build a positive imagery regarding the struggle for the pacification of the country and the defense of human rights;
- ▶ to promote a rejection of violence, by identifying icons that build a negative imagery about what should never have happened in our country.

91 Ibid.

Although the scope of the PRC contemplates four modalities⁹², in practice the single investment project of a maximum PEN 100,000⁹³, decided in a participatory manner by the community, are essentially linked to infrastructure and technical-productive activities⁹⁴.

However, the projects implemented through the collective program have faced challenges, including operational problems, sustainability challenges, deficiency and/or delay in delivery, and even an ignorance about the origin and reparative nature of the work within impacted communities. Moreover, many of these projects are not very different than other public investment projects. In many cases, community members were unaware of the reparatory intent, as the projects were implemented without connection to individual reparations, to programs of rehabilitation, healthcare, or education, or to criminal investigations or the search for the disappeared. Even though there were inauguration ceremonies for the projects that clearly framed them as reparations for the harm caused, this did not necessarily filter through to the targeted communities.⁹⁵ Furthermore, as public investment projects they achieved limited results because they were not coordinated with broader municipal or regional investment plans and so neither maintenance nor operation of the project was guaranteed.⁹⁶

This on ground reality was highlighted to us by interviewees in Peru. One interviewee argued that development programmes were being repackaged as collective reparations by the state even though they lacked any direct reparative link to victims:

It's a hilarious thing, because all the governments, the sectors, included in their report, were allocating millions to repair, and it was for example, if it was a road that crossed Ayacucho, it was an affected area, that was repair, then all their normal state actions became repair, if it geographically coincided with the affected area... we say that reparation is not an item of the budget so as we could monitor what things were being given in reparation. Then we did a whole formula to be able to convert what the Ministries published in the web page. In order to be able to extract what they considered to be reparation, and to be able to make a report on the fulfilment of the reparations, very complex, you realize, there is nothing to do with the victims, nothing, nothing.⁹⁷

92 See the Regulation of the Law that creates the PIR, article 27.

93 Around US\$32,000 at the exchange rate of the time, amount that has not been modified in 14 years, despite inflation and changes in purchasing power.

94 The most common are the construction or implementation of communal premises, medical posts, educational classrooms, truck paths, irrigation systems, livestock activities, and fish farming. they constitute modalities of the program of collective reparations: a) The institutional consolidation, that includes the incorporation of actions of support to the legal sanitation of the communities, the instauration of the authorities and local authorities, training in Human Rights, prevention and resolution of internal and inter-communal conflicts, based on a participatory community diagnosis that helps identify the necessary actions, within a rights-based approach that prioritizes education for peace and the construction of a culture of peace; b) The recovery and reconstruction of the economic, productive and trade infrastructure, and the development of human capabilities and access to economic opportunities; c) Support for return, resettlement and repopulation, as well as displaced populations as a consequence of the violence process; d) The recovery and expansion of the infrastructure of basic services of education, health, sanitation, rural electrification, recovery of the communal heritage and others that the group can identify

95 Secretaría ejecutiva de la CMAN, *Lineamientos generales del programa de reparaciones colectivas*, Lima, 2012.

96 See: ICTJ-APRODEH, *¿Cuánto de ha reparado en nuestras comunidades? Avances, percepciones y recomendaciones sobre reparaciones colectivas en Perú (2007-2011)*, Lima, 2011.

97 Interview Peru 1.

For another observer this meant that the state had departed from a rights based approach to reparation:

I am not saying that the state does not intervene in these communities; it intervenes with the JUNTOS program, with the Ministry of Agriculture, FONCODES, different state actors intervene. They intervene but in a disjointed manner. None of them incorporates the rights approach. FONCODES, which is the most monitored program with the most planning and indicators, does not incorporate the rights approach. Nor is it interested in whether those communities are affected by violence. That is, a community affected by violence in Ayacucho applies the same as one in Chiclayo that has lived nothing or does not consider the social harm they have suffered.⁹⁸

It was even claimed that victimised communities were having to compete with one another to access funding for collective reparation projects:

They had to present the classes on the productive projects, and there were 50 of them and they all had to compete, one against the other, to win the project and they were going to give them 1500 soles. Then they [victimised communities] said "no that is not reparation, if you want to do it as a social program, you do it as a social program, but that is not reparation, in no way are the victims going to compete against each other"... so that's not reparation. If you want, you do it as a social program... but you have no right to place it as a reparation program.⁹⁹

Notwithstanding this, implementation has fluctuated depending on the level of support from the different administrations. By the end of 2019, a total of 3,351 projects in 3,326 communities had been implemented, that is 58.2 percent of the communities registered among the most affected.¹⁰⁰ 2019 marked the highest number of communities served and investment in this reparation modality in the 13 years of implementation of this program. It not only marked a quantitative milestone, but it also marked the search for qualitative improvement. Since 2012, the CMAN has been carrying out a strong strategy of monitoring and verification of projects, to know the impact of each project in the intervened community, as well as to correct the deficiencies¹⁰¹. As a result, it adopted first the "Guidelines for the adoption of differentiated actions in the implementation of the Comprehensive Reparations Plan for women and the LGTBI population" which, regarding the PRC, includes the "Route for conducting a community assembly and promoting the participation of women" and guidelines for the care of women victims of violence and / or rape, after the community assembly¹⁰². It also adopted the so-called "Community intervention protocol in the Collective Reparations Program"¹⁰³ which develops detailed guidelines to ensure "working with communities through concrete actions and gestures but highly symbolic content, the reconstruction of its historical memory with a look towards the future"¹⁰⁴ in three key moments of the process: the

98 Interview Peru 23.

99 Interview Peru 12.

100 Secretaría ejecutiva de la CMAN, Informe anual 2019, Lima, abril 2020, p. 7. All the annual reports are available at: <https://www.gob.pe/institucion/minjus/colecciones/2472-informes-anuales-cman>

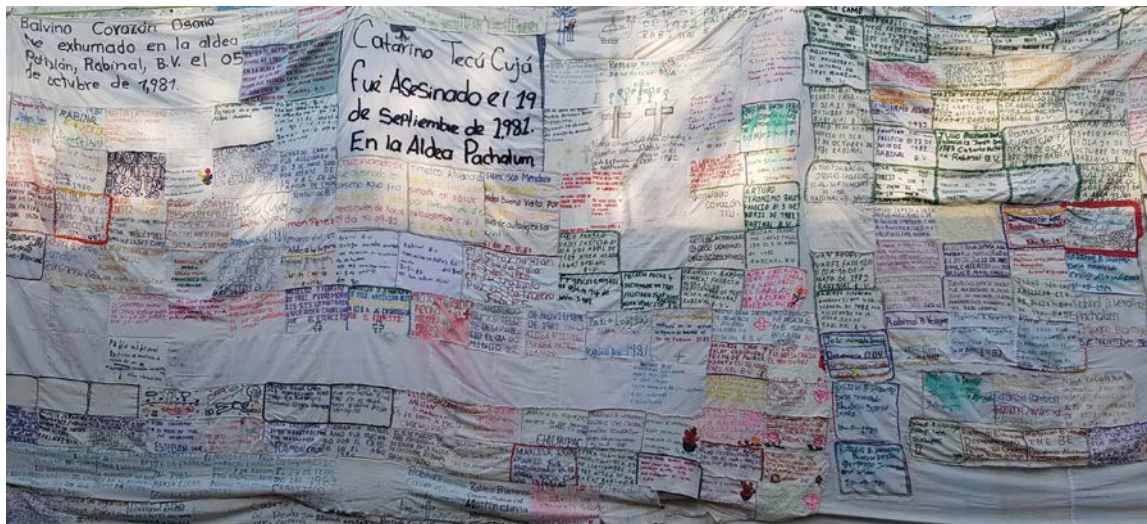
101 For example, in 2019, the CMAN carried out 788 follow-up and monitoring visits. Ibid.

102 CMAN, Lineamientos para la adopción de acciones diferenciadas en la implementación del Plan Integral de Reparaciones a mujeres y población LGTBI, Lima, 2019, p.13, annex 7 and annex 8.

103 Secretaría ejecutiva de la CMAN, Protocolo de intervención comunitaria en el Programa de Reparaciones Colectivas, Lima, 2019.

104 Ibid., p.4. It includes: an exercise of local historical memory, public apology, symbolic act organized by the community according to its own initiative and tradition, project's memorial plaque.

community assembly for project selection; the inauguration, where the execution of the financed project begins; and the delivery, where the executed work is inaugurated and the community receives it.



El Museo de la Memoria, ANFASEP, Ayacucho, Peru by Luke Moffett

2.2.2. Morocco

Morocco's truth commission called "Equity and Reconciliation Commission" (IER for its acronym in French) was established by Royal Decree (Dahir) in January 2004 to look into the violations committed between the country's independence in 1956 and 1999. The IER linked reparation to the other objectives it had been tasked with: the disclosure of the truth, the establishment of equity and the consolidation of reconciliation. As a result, the IER has sought to confer on reparation various symbolic and material implications that concern individuals, communities or regions, with the objective of restoring dignity and expressing the recognition of the State.¹⁰⁵

The IER has adopted a concept of reparation which encompasses all the measures and provisions aimed at remedying the prejudices suffered by victims of human rights violations, which take various forms, both classic ones, relating to financial compensation, than those relating to other modalities of reparation, such as rehabilitation, integration, the restoration of victims in their dignity and the recovery of looted rights, restitution, as well as collective reparation for damages and prejudices suffered in the regions where massive and systematic violations were recorded or in the regions where secret detention centers were located¹⁰⁶.

The IER initiated consultations to define what these collective reparation measures would be. It engaged with the local population, local authorities and elected officials, human rights organizations and development associations and government agencies through visits to the various regions affected by

105 Instance Équité et Réconciliation, *Synthèse du rapport final*, Conseil Consultatif des Droits de l'Homme, Rabat, 2007, p.18.

106 Instance équité et réconciliation, « Équité pour les victimes et réparations des dommages et préjudices », Rapport Final, Vol.3, Conseil consultatif des droits de l'homme, Rabat, 2007, p.32. The statutes of the IER established the principle of collective reparation measures. Dahir N° 1.04.42, 19 safar 1425 (April 10, 2004), art. 5.

collective damage. This approach enabled the IER to meet *in situ* the various actors and to collect and verify information in order to define the possible axes of the community reparation program. Several meetings, interviews and workshops were organized, including a national conference on community reparation¹⁰⁷. In doing so, the IER has determined that by 'community reparation' it means provisions intended to endure the damage suffered by communities and regions as a result of massive and systematic violations of human rights, and whose impacts and sequelae have been attacked against the whole society.

The objectives of community reparation, as defined by the IER, aim to:

- ▶ restore the community dignity of the victims on the basis of the nature and degree of the damage caused by violations relating to social events, detention centers, or disappearances recorded in those regions where these centers existed¹⁰⁸;
- ▶ restore confidence in state institutions and the rule of law¹⁰⁹;
- ▶ strengthen the spirit of citizenship; consolidate the social fabric and national solidarity, and strengthen social cohesion (and consequently the contribution to reconciliation)¹¹⁰.

The IER also defined the guiding principles that should frame the community reparation program, which are: maintaining links between the community reparation program and other programs; adopting a gender approach and taking into account the concerns of women and young people; the promotion of intermediation between public administrations and populations who have suffered harm; the involvement of civil society and development agencies and organizations; the design of precise commitments of the parties concerned by the community reparation program; guaranteeing the sustainability of community reparation actions¹¹¹.

The beneficiaries of the community reparation program, as defined by the IER, are therefore the regions and communities (groups of victims, particularly women and young people) whose populations have suffered directly from human rights violations or from collective punishment or economic and social marginalization due to the presence of former secret detention centers or the occurrence of political or "social" events. Eleven communities or areas were selected to benefit from the program.¹¹²

Compensation for collective damage has been understood by the IER in its double material and symbolic dimension: the material dimension, through socioeconomic development programs whose scope is not limited to taking damage into account, but also integrates the satisfaction of social and economic needs of the targeted communities; the symbolic dimension, in the form of recognition by the State of the damage caused, cultural development programs, organization of commemoration activities, reconversion of former detention centers, rehabilitation of cemeteries, etc.¹¹³

107 Organized in Rabat on September 30 and October 1 and 2, 2005.

108 Instance équité et réconciliation, « Équité pour les victimes et réparations des dommages et préjudices », Rapport Final, Vol.3, Conseil consultatif des droits de l'homme, Rabat, 2007, p.46.

109 Ibid.

110 Instance équité et réconciliation, « Synthèse du rapport final », Conseil consultatif des droits de l'homme, Rabat, 2007, p.29.

111 Original document from the President of the CCDH, Ahmed Herzenni. On file.

112 Figui, Nador, El Hoceima, Errachidia, Khenifra, Ouarzazate, Zagora, Hay Mohammadi in Casablanca, Tantan, Azilal, and Khémisset.

113 Ibid. Four axes are defined: Axis 1: Capacity building of local actors, Axis 2: Active preservation of memory, Axis 3: Promotion of income-generating activities, Axis 4: Integration of women and the youth.

This second dimension is closely linked to the mandate of the IER of preserving the memory,¹¹⁴ in the sense that the conversion of former illegal detention centers into community development centers makes yesterday's symbols of serious human rights violations into today's centers of active citizenship.

An institutional decentralized structure was put in place between 2007 and 2008 to implement the communal reparation program at operational and decision-making level: the National Steering Committee with the National Human Rights Council (CNDH for its acronym in French) at its head, the Program Management Units and Local Coordination bodies. This structure aims to encourage local participation and promote local good governance on the one hand and, on the other hand, to favor the involvement of the central government and provide the necessary human and financial resources for the program. From 2008 to 2010, through different calls from proposals funded by government agencies or international donors, local NGOs projects were selected by the National Steering Committee¹¹⁵. The amount granted for each project varies between USD 6,250 USD 62,500 over 12 to 24 months. Additionally, CNDH signed more than ten agreements with ministries and state agencies. In accordance with these agreements, the 11 regions covered by collective reparations will benefit from positive discrimination and, in the light of their respective mandates, ministries and state agencies will carry out projects along the communal reparations' thematic lines.

2.2.3. Colombia

The transitional justice and, within, the reparations process in Colombia is framed by Law 975, known as the Justice and Peace Law, approved in July 2005, which establishes special "peace and justice" criminal proceedings, first to provide reparations for victims, and a National Reparation and Reconciliation Commission¹¹⁶ (CNRR, for its acronym in Spanish) to recommend the criteria for victim's reparations and make recommendations regarding the implementation of an institutional collective reparation program. Subsequently, with the promulgation of Law 1448 of 2011, known as the Victims and Land Restitution Law, the collective reparation program is formally created, headed by the Unit for the Attention and Comprehensive Reparation of Victims (UARIV for its acronym in Spanish).

The Justice and Peace Law defines a victim as one who individually or collectively suffered harm as a result of actions that violate the law and that were committed by illegal armed groups.¹¹⁷ And the CNRR considers as "victims all those persons or groups of persons who, due to or on the occasion of the internal armed conflict that the country has been experiencing since 1964, have suffered individual or collective damage caused by acts or omissions that violate the rights enshrined in the norms of the Political Constitution of Colombia, International Human Rights Law, International

114 Dahir N° 1.04.42, 19 safar 1425 (April 10, 2004), art. 6.

115 E.g.: production of documentaries on Hay Mohammadi – Casablanca and on the events of 1984 in Nador; rehabilitation of a memory site in Douar Harat el Morabitine; project to write the History of Events 1958-1959 in the Rif region; modernization of the beekeeping sector, construction of irrigation wells, exploitation of agricultural land with drip system, promotion of solidarity ecotourism; integration of women into the dynamics of civil society, creation of a cultural center, strengthening of the technical capacities of managers and young people, Fadma Ouharfou Center for Training, Information and Guidance.

116 Article 50 of Law 975 establishes the National Reparation and Reconciliation Commission.

117 Law 975, July 25, 2005, art. 5.

Humanitarian Law and International Criminal Law, and that constitute an infringement of the national criminal law”.¹¹⁸

Three additional elements in the CNRR’s strategic definitions are that the Commission recognizes (1) the difference between reparations and social programs¹¹⁹; (2) the importance of the active participation of victims in the formulation of reparation¹²⁰; and (3) the concept of integrality of reparations in its external and internal sense.¹²¹ Importantly, it states “[t]he collective reparation program will not replace individual reparation nor will it prevent individual victims from claiming individual reparation through judicial channels or through the National Reparation Program that the Commission will propose to the country in the medium term”¹²².

According to the Law, the right of victims to reparation includes the five categories mentioned by the Basic Principles. Symbolic reparation is “understood as any provision made in favor of the victims or the community in general that tends to ensure the preservation of the historical memory, the non-repetition of the victimizing events, the public acceptance of the events, the public forgiveness and the restoration of the dignity of the victims” while collective reparation is any measure “oriented towards the psycho-social reconstruction of the populations affected by violence” and “provided specially for communities affected by the occurrence of acts of systematic violence”.¹²³ The Law also states that the institutional program of collective reparations should include “actions directly aimed at recovering the institutionality of the Social Rule of Law, particularly in the areas most affected by violence; to recover and promote the rights of citizens affected by acts of violence, and to recognize and dignify victims of violence”.¹²⁴

The decree 3391, that partially regulates Law 975, established that “[t]he National Reparation and Reconciliation Commission will formulate criteria of restorative proportionality that allow a weighting of the satisfaction measures, the guarantees of non-repetition and the different acts of reparation, especially those of a symbolic and collective nature, so that they may constitute in as a whole, a fair and adequate framework of comprehensive reparation to sustainably achieve the purpose sought by law 975”.¹²⁵ It adds that “[i]n the case of communities affected by the occurrence of acts of massive or systematic violence, collective reparation for the affected population is the special and suitable mechanism that entails compensation for each and every one of the victims of such communities, in addition to being oriented towards their psycho-social reconstruction”.¹²⁶

118 Comisión Nacional de Reparación y Reconciliación, *Definiciones estratégicas de la Comisión Nacional de Reparación y Reconciliación*, Bogotá: CNRR, 2007, p.2.

119 Ibid., p.8

120 Ibid.

121 Ibid., p.5.

122 Ibid., p.11.

123 Ibid., art. 8.

124 Law 975, July 25, 2005, art. 49.

125 Decree 3391, Sep. 29, 2006, art. 16.

126 Ibid.



Museo Comunitario Rabinal Achi, Guatemala by Luke Moffett

Thus, and with the goal of drafting a proposal on collective reparations, the CNRR decided to undertake a pilot project in a limited number of cases in order to gain experience that could help it design a general reparations plan¹²⁷. In January 2007, the CNRR approved 10 cases for the collective reparations pilot project, using combined criteria that included the impact of the violence, as well as the cultural, ethnic, geographic, and socioeconomic diversity of the communities, eight of which agreed to be part of this exercise. It is worth noting the nature of the communities or groups included:

- ▶ four are 'corregimientos', that is a territorial division of the municipality, considered in the Territorial Organization Plans;
- ▶ two are Afro-Colombian communities and indigenous people, which are recognized by the Colombian legal system as collective subjects with a series of fundamental rights;
- ▶ two are so-called 'social collectives'. One, the social union movement collective, made up of the three great labor unions that exist in the country; and the other, the Association of Victims Caminos de la Esperanza-Mothers of La Candelaria (Antioquia). Both have their own legal status; one has been formed on the occasion of human rights violations, the other existed prior to these.

Directing collective reparations at these communities reflected reality on the ground in how violence manifested itself during the Colombian conflict, with one interviewee pointing out that 'thirty-three per cent of Colombia's rural territory is ethnic. The armed conflict took place in rural areas; that means that at least 33% of the reparations will have an ethnic character'.¹²⁸

127 The CNRR decided that its responsibility would be to lead, coordinate, and supervise the implementation and evaluation of the pilot projects, but not to directly implement the collective reparations measures themselves, because it only legally has a mandate to formulate proposals, not implement reparations measures. International Center for Transitional Justice and Moroccan Advisory Council for Human Rights. *The Rabat Report. The concept and challenges of Collective Reparations*. ICTJ & Moroccan Advisory Council for Human Rights, 2009, p.20.

128 Interview Colombia 29.

The CNRR decided to use a participatory approach; in each case the citizens participate in every phase of the pilot project, resulting in the production of a document detailing the collective reparations measures,¹²⁹ that could include, for example, the construction or expansion of public services, the recovery and reconstruction of productive infrastructure, the creation of a community fund for the development of community activities or organization, the financing of works or activities that communities have defined in their community development plan or program, the adoption of mechanisms for the preservation of memory and the recovery of the dignity of the victims, among others.¹³⁰

However, this participative approach has not prevented certain problems emerging. For example, local communities often sought projects that were unfeasible, poor value for money or not suitable to their particular context:

In Bojayá we were asked for a third level hospital specializing in cancer. Not even Quibdó, which is the capital of the department because we are a middle income country coming out of poverty a little bit, or things like that. Or a 4G highway entering Mapiripán to benefit a community of 50 people - a highway that is worth 4 billion pesos. In other words, it will not pass, or it is impossible in conditions of equity for the rest of the country that are also in very complicated conditions... the Alto Andágueda which is an indigenous Emberá community that is between the departments of Chocó and Risaralda but they are literally on a mountain and they ordered us to build a solid waste plant. We haven't even been able to get there to take the materials to build the plant because the only way to get there is by helicopter, then a solid waste plant there is worth all the money in the world and we have tried to explain to the judge that we can do another type of process suddenly community, ecologically friendly, otherwise, but a solid waste plant is for the cities, this is not even a municipality is an indigenous reservation.¹³¹

Under the 2011 Victims Law recognises both victims' collective rights and collective reparations as a key part of redressing the effects of the armed conflict. Importantly within the Victims Unit victims have access to a collective pathway for reparations. This Collective Reparation Programme is aimed at 'social and political groups and organizations; [and] communities determined on the basis of legal, political or social recognition of the collective, or on the basis of the culture, area or territory in which they live, or a common purpose.'¹³² Decree 4800/2011 further outlines collective reparations within the programme aim 'to eliminate discrimination and marginalisation schemes of collective subjects, which could have contributed to the victimising events'.¹³³ This includes a number of elements:

- i. recovery of the state's own institutional structures through actions and measures seeking to strengthen the permanent presence of institutions;

129 The pilot projects occurred in two stages: an initial contact with each community, which involved a process of dialogue and assessment, followed by the intervention phase. Drawing upon various participatory exercises, the project will compile an account of the various violations and harms suffered by each community or group. The assessments will be validated by the community or group so that they can design reparations measures based on this analysis.

130 Comisión Nacional de Reparación y Reconciliación, *Definiciones estratégicas de la Comisión Nacional de Reparación y Reconciliación*, Bogotá: CNRR, 2007, p.12.

131 Interview Colombia 33.

132 Article 152, Law 1448 (2011).

133 Article 222(2).

- ii. collective construction of political citizenry through the promotion of participation and the strengthening of subjects to collective reparation in the public aspects of decisionmaking and advocacy;
- iii. reconstruction of the community, social and/or political projects affected through the recognition of victimisation, collective damage and its reparation through material, political and symbolic measures;
- iv. reconstruction of the social and cultural fabric of the subjects to collective reparation;
- v. community rehabilitation linked to psychosocial attention;
- v. reestablishment of the conditions that allow and strengthen the existence and role of communities, groups, and social and political organizations;
- vi. linkage of collective reparation material measures with other public policy measures on social, economic, cultural, and political rights; and
- vii. historical memory construction as a contribution to the right to truth of collectives.¹³⁴

Despite this improvement and widening of the collective reparations programme some communities failed to connect projects with repair for collective harms:

For example, the traditional seed festival is held in Montes de María and there at the age of 2 or 3, the Unit returns and delivers a community booth. So people no longer have the possibility of linking the festival that was held two years ago with this community booth, and understand that they are part of the same process of reparation. When measures are extended too much in time, when you don't have the possibility of linking one measure with another that greatly reduces the repairing potential of the measures.¹³⁵

This reality led one observer to tell us that:

Collective reparations have been now reformed now I don't know how many times, fourth of fifth time they've reformed this entire massive programme of collective reparations because they needed to acknowledge it's not working with a lot of kind of underlying conceptual problems of what is actually collective reparation and how do we actually separate collective reparations from everything else which a community might need or might actually demand from the State. So, that hasn't worked either and I think to the extent that you would suppose to have transformative reparations... you would say that Colombia is very, very far off.¹³⁶

134 Article 226.

135 Interview Colombia 28.

136 Interview Colombia 31.

III. CONCEPTUAL AND PRACTICAL KNOTS OF THE COLLECTIVE DIMENSION OF REPARATIONS

3.1. What victim? Victim of what?

Collective reparation poses many conceptual and practical questions including: does it entail the violation of a collective right; does it require the suffering of a collective harm; does it necessitate the sum of the violation of individual and collective rights or/and of individual and collective harms; what are the characteristics of the subject that has suffered violations or harms; and is it collective victims or collective beneficiaries?

Rosenfeld definition of collective reparations generates certain consensus among academics, on the basis that they are 'the benefits conferred on collectives in order to undo the collective harm that has been caused as a consequence of a violation of international law'.¹³⁷ This suggests that there are four elements to collective reparation: benefits; a collective as the beneficiary; collective harm; and a violation of international law. Building on Rosenfeld's definition, Navarro suggests that collective reparations tend to be defined as collective in three ways: the right violated was a collective right that impacted on a community; the beneficiaries of the reparation are a group of people; and the type of good given or the way that it is distributed is collective in nature.¹³⁸ Navarro further suggests that collective reparations tend to fall into three categories: measures to improve the investigation of facts; symbolic measures specifically related to the common culture of the group harmed; and development programmes aimed at improving or building the infrastructure in a given community or region. Similarly, Roht-Arriaza and Orlovsky affirm that collective reparations can respond to collective damages (including damages to social cohesion).¹³⁹



Memorial to victims of conflict, Derry/Londonderry, Northern Ireland by Luke Moffett

137 Friedrich Rosenfeld, 'Collective reparation for victims of armed conflict', *International Review of the Red Cross*, (2010) 92 (879): 731-746.

138 Nadia Navarro, 'Collective reparations and the limitations of International Criminal Justice to respond to mass atrocity', *International Criminal Law Review*, (2018) 18: 67-96.

139 Roht-Arriaza Naomi & Katharine Orlovsky. "A complementary Relationship: Reparations and Development", in *Transitional Justice and Development: Making Connections* (Pablo de Greiff and Roger Duthie, eds.), New York: Social Science Research Council and International Center for Transitional Justice, 2009.

Rubio-Marín, for her part, sees collective reparations as those aimed at facing “group-based harm”. Collective reparation, according to this view, should be understood as a way to compensate the damage to identity and social status of the individual members of the community, as well as the diffuse damages suffered by the group.¹⁴⁰

The UN Basic Principles put the criterion of distinction specifically on the suffering of a collective harm.¹⁴¹ The IACtHR, in its decisions granting different forms of collective reparations to different groups, does it with or without the violation of a collective right, asserting that the sum of individual victims from the same community or certain violations of human rights against individuals that affect a group in its entirety demonstrate the “collective dimension of damage”. However, the valuation of damages is not universal for all individuals and communities; the court will take into account their cultural, ethnic, political, generational and gender specificities, the magnitude of the violence and the context in which it occurred. IACtHR jurisprudence has thus shown a notable sensitivity towards collective reparation in cases involving tribal and indigenous peoples. Administrative programs, such as the Peruvian or the Moroccan examples, did not use the category of collective rights but a series of combined criteria of concentration of individual human rights violations and of collective material damages (losses of familiar or collective infrastructure, of access to basic services and “breakdown or cracking of community institutions”).

Accordingly, then, the existence of an explicit violation of collective rights does not appear as an indispensable or the sole prerequisite. It is, rather, the existence of direct or indirect consequences to a group in its entirety (a collective harm); either the violation of collective rights or the massive or systematic (or not) violation of individual rights of members of the collective.¹⁴² The common impact beyond that suffered by individuals is what is fundamental to the granting of collective reparations.

The primary meaning and understanding of the subjects holder of collective reparations in jurisprudence, administrative practices and among academics is that they are *collective subjects with strong cultural identities, linked by common ancestors and histories, with a traditional internal organization and often a strong link with a given territory*. This clearly encompasses groups that can be classified as indigenous peoples for the purposes of the provisions of Convention 169 of the International Labor Organization. In both the Peruvian PIR-Law and the Colombian collective reparations pilot project native communities are recognized as such, as are such communities recognized by the jurisprudence of the IACtHR.

However, not all the groups that are awarded collective reparations are recognized as autonomous rights holders or have legal personality. In some cases the defining criterion is that the same community or group identifies itself as a collective subject even if it is not a subject with legal personality recognized in the positive legal system but is seen as such in jurisprudence and practice. For example, the case of peasant communities that are auto-identified and assumed to

140 Rubio-Marín, Ruth. “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression”, in *The Politics of Reconciliation in Multicultural Societies*, (Will Kymlicka and Bashir Bashir, eds.), Oxford: Oxford University Press, 2008.

141 ‘Victims are persons who individually or collectively suffered harm’ UN General Assembly, *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*, Res.60/147, 2005, para.8, emphasis added.

142 An obvious example of how individual violations of members of collective subjects translate into collective damages is the murder or disappearance of religious, judicial or government traditional authorities.

be a collective entity, beyond the sum of their individual members.¹⁴³ Judicial and administrative practices also facilitate a broader range of possibilities when addressing the collective subject holder of collective reparations. Often this has gone beyond a conception premised on a common cultural identity; the ICC recognized former child soldiers in the Lubanga Case; the Peruvian collective reparations program recognized the organized groups of non-returning displaced people from affected communities; the Moroccan collective reparations program recognized certain regions and districts; the Colombian collective reparations pilot project recognized a labor unions movement and an organization of mothers of the disappeared. The diversity of these experiences demonstrates how groups that benefit from collective reparation may be premised on geography, gender, political or social struggles.

Indeed, depending on the particular context, the common link within the group might even arise as a result of, as opposed to existing prior to (as it will in other cases), the violation. Yet when the group was formed, or even worse, assumed to be formed, precisely on the occasion of the violation or damage, the implementation of collective reparation appears to be much more difficult.

For instance, in the Peruvian case with the “organized groups of non-returning displaced people”, an unjustified differentiation is being established with respect to the displaced people who are not organized or who are located in neighborhoods with non-displaced inhabitants. The displaced are being required to group together so that they can receive collective reparation. It is worth wondering if it is legally or ethically correct, in a reparative context that should aspire to rebuild solidarity, to oblige victims to organize themselves to effectively receive the rights they are titular of. Colombian examples reveal others difficulties. The organization of victims “*Madres de la Candelaria*”, which has been chosen by the CNRR in Colombia as one of the cases to develop pilot programs for collective reparation, did not exist as a collective subject when the crimes were committed. It was the common fight to know the truth about the fate of their disappeared children that led to it becoming an organization with its own legal status. Thus it is a traditional individual victims’ organization and their reparations demands have been mostly individual demands. The only demand formulated in terms of collective measures has been a publication with the stories of their family members.¹⁴⁴ The case of collective reparation to the relatives of the victims of the Villatina massacre (Medellín, Colombia) is even more illustrative.¹⁴⁵ Here it was recommended that a productive project that was primarily aimed at benefiting the children and youth population of the area would reflect the serious consequences that the massacre of eight children and a young man had within the neighborhood. However, the relatives of the direct victims did not consider it fair that other people would receive a benefit as a result of the murder of their children. Although the collective productive project ended up to be a small clothing company where the mothers of the victims had to become partners, the business ultimately did not work. Mothers and relatives insisted that it would have been better if the money that was used to establish and equip the company had been distributed among the relatives of the direct victims.

143 Díaz, Catalina. “La reparación colectiva: problemas conceptuales en perspectiva comparada”, in *Reparar en Colombia, los dilemas en contextos de conflicto, pobreza y exclusión*, Catalina Díaz Gómez, Nelson Camilo Sánchez, Rodrigo Uprimny Yepes (eds.), ICTJ & DeJusticia, Colombia 2009.

144 International Center for Transitional Justice and Moroccan Advisory Council for Human Rights. *The Rabat Report. The concept and challenges of Collective Reparations*. ICTJ & Moroccan Advisory Council for Human Rights, 2009.

145 For a complete overview, see: Zamora Prieto, Angélica. “La reparación a partir de la experiencia de las víctimas: los casos de Villatina y Trujillo”, in *Reparar en Colombia, los dilemas en contextos de conflicto, pobreza y exclusión*, Catalina Díaz Gómez, Nelson Camilo Sánchez, Rodrigo Uprimny Yepes (eds.), ICTJ & DeJusticia, Colombia 2009, pp. 347-461.

The diversity of the experiences discussed above demonstrates that there is no single way to define the collective subject holder of collective reparations or its constituent elements. It also shows that many practitioners are going beyond the collective subjects traditionally recognized by international law and some domestic laws. Yet the renewed creativity of reparation processes in transitional justice contexts embracing a greater number of direct and indirect victims has not been without limitations. Unless social and political organizations, indigenous communities, tribal and Afro-descendants, peasants, neighborhoods, towns and entire territories that may have suffered the impacts of political repression or war can identify themselves as autonomous and independent subjects for the sake of collective reparations, then feelings of injustice or frustration may arise. Not only would these contradict the reparative nature of the process but they would also prevent goals like solidarity, reconciliation and community cohesion from being attained.

3.2. What measures? Which differential?



Memorial to victims of Plan de Sanchez, Guatemala by Luke Moffett

The examples described in the second part of this report show how a wide range of measures have been awarded as collective reparations; symbolic measures like public acts of atonement, commemorative days, establishment of museums, and the changing of street names or public places as well as material measures like education, housing, health, electrification, road-systems, sewage systems and potable water supplies, and trade infrastructure. The overlap between these material kinds of measures and ordinary development and social investment programs is evident. However, as has been well discussed in the academic literature, this does not mean that development programmes are, or even should be, collective reparation measures.

Collective reparations and development are premised on two different legal obligations of the state; the first is to provide a remedy to those who have had their rights violated, while the second is to provide essential services to all its citizens.¹⁴⁶ There is also a moral aspect to reparation that development does not have; victims are entitled to reparations because they have had their rights violated, whereas everyone is entitled to the benefits of development programmes because they are citizens.¹⁴⁷

146 Naomi Roht-Arriaza, 'Reparation decisions and dilemmas', *Hastings International & Comparative Law Review* (2004) 27: 157-219.

147 Roht-Arriaza & Orlovsky (2009).



Memorial to Lukodi displaced person camp massacre, Northern Uganda by Luke Moffett

Even if collective reparations are what would normally be seen as development programmes in a context of peace and stability, in transitional justice contexts they carry symbolic and psychosocial connotations that set them apart from development projects.¹⁴⁸ Reparations, it is argued, have an origin in gross violations of human rights; they are premised on corrective justice and the state duty to repair harm; they are meant to recognise and undo the harm suffered by the victim; the intended beneficiary group is victims; and they are backward looking in trying to undo a past harm. Social services and development programmes, on the other hand, have an origin in poverty and discrimination; they are premised on distributive justice and responding to the needs of the population; they are meant to satisfy the current needs of people and to reduce inequality; the targeted beneficiaries are poor people and discriminated groups; and they are present looking in responding to immediate needs and forward looking in trying to reduce inequality.¹⁴⁹ Collective reparation and development are therefore based on two separate State obligations, have their own objectives, and have their own target beneficiaries.

Indeed, this distinction between collective reparation and development was highlighted by interviewees in various sites. For example, one Colombian interviewee argued that the provision of services that the state is already obliged to provide to communities should not be falsely conflated with collective reparations:

*People say “the State should build this bridge as a reparation to the people” but really, that is the duty of the State to do anyway. So why should we struggle in order for them to build a bridge as reparation when they should be doing that to start with? That is the duty of the State not with regards to victims but with people who live there.*¹⁵⁰

Likewise, a Ugandan observer commented that victims themselves did not see any reparative value in measures like this: ‘when you go to [names place] you would find there is a bridge that was constructed and “okay, the bridge was constructed but how do we benefit from this bridge”’.¹⁵¹

At the same time, though, the discussion, understanding and design of collective reparations programs should not avoid the reality that the population targeted by collective reparations programmes may overlap with the beneficiaries of development projects. This is particularly true in developing countries where the poor and marginalized peoples are not only victims of human rights abuses but also of historic economic and social injustice. We were informed by one interviewee that it is ‘very difficult’ and ‘complicated’ trying to ‘decouple issues of historical poverty from issues of reparation’.¹⁵² This is especially relevant in sites like Colombia where most of the 4 million displaced persons were already living in poverty, with displacement then driving them into extreme poverty.¹⁵³ Indeed, in Colombia it has been argued that collective reparations cannot really be delivered to under developed communities that do not currently enjoy minimum living standards. For instance, in the Afro-Colombian community of La Libertad the community’s

148 Firchow (2013).

149 Rodrigo Uprimny Yepes, ‘Transformative reparations of massive gross human rights violations: Between corrective and distributive justice’, *Netherlands Quarterly of Human Rights*, (2009) 27 (4): 625-647.

150 Interview Colombia 13.

151 Interview Uganda 22.

152 Interview Colombia 33.

153 Yepes (2009).

minimum living standards had to be improved before collective reparation could be fully implemented.¹⁵⁴ One Colombian interviewee outlined the logic behind this:

Most of the reparations, and perhaps the ones that are going to have the greatest effect, are collective reparations, aimed at communities that have suffered violence and that have had victims, dead, wounded, disappeared, imprisoned. So this repair is going to be of a collective nature. I say that it has to translate into community development, in improving their standard of living, in arranging their aqueducts so that people have, improve their roads, in their homes, it has to have an effect on all that, because then people say why then we were making such a big effort here for there to be repair and reincorporation, it wouldn't make sense. It has to result in that.¹⁵⁵

Likewise, it has been argued that while memory projects and educating future generations are important to indigenous communities in Guatemala who were harmed during violence linked to the Chixoy Dam project, these communities also need a sustainable local economy that is attuned to their traditions and cultures and that will lift them out of poverty.¹⁵⁶

Yet on the ground victims may, consciously or unconsciously, struggle to differentiate between collective reparations, development projects, social services, and/or humanitarian assistance. They may be confused by sudden state attention that gives them an advantage in gaining access to basic services before others. Confusion could be due to victims' lack of awareness of their rights or even because people tend to phrase their needs in whatever way they can or in accordance with whatever government program is being offered to them.¹⁵⁷ This is heightened where the State intentionally generates such confusion. In a post-armed conflict or post-dictatorship context budgets are limited and the competition for resources is particularly fierce. This is further compounded by the fact that the economy and infrastructure may be damaged or destroyed and common crime might surface. Fiscal stability and the need to create a favorable investment climate can clash with the need for additional social spending and additional government funding for a reparation program.¹⁵⁸

Faced with this reality, using ordinary social investment programs as a proxy for collective reparations can be an attractive shortcut for the state. As de Greiff, Rubio-Marín and Roht-Arriaza explain,¹⁵⁹ there are strong reasons for governments trying to pass off ordinary development plans as collective reparation processes.

154 Pamina Firchow, 'The implementation of the Institutional Programme of Collective Reparations in Colombia', *Journal of Human Rights Practice*, (2014) 6 (2): 356-375.

155 Interview Colombia 40.

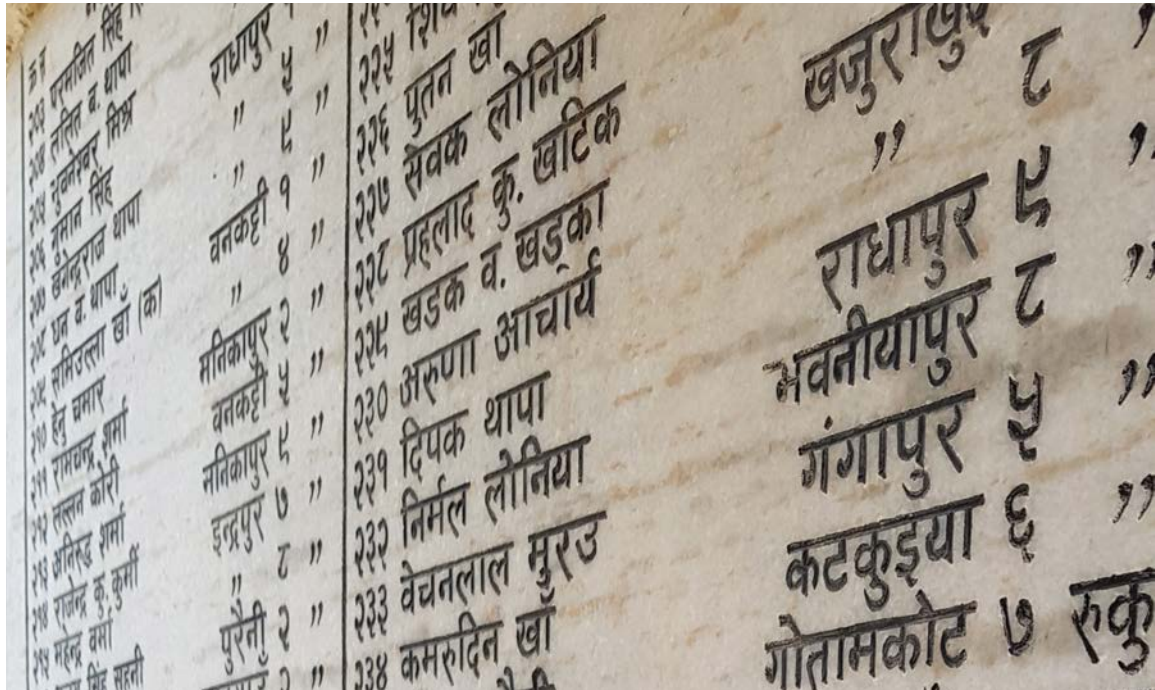
156 Arias (2010).

157 International Center for Transitional Justice and Moroccan Advisory Council for Human Rights. *The Rabat Report. The concept and challenges of Collective Reparations*. ICTJ & Moroccan Advisory Council for Human Rights, 2009, p. 46.

158 Roht-Arriaza Naomi & Katharine Orlovsky in "A complementary Relationship: Reparations and Development", in *Transitional Justice and Development: Making Connections* (Pablo de Greiff and Roger Duthie, eds.), New York: Social Science Research Council and International Center for Transitional Justice, 2009, p. 8.

159 See: de Greiff, "Justice and Reparations"; Rubio-Marín, "Gender and Collective Reparations"; Roht-Arriaza, "Reparations Decisions and Dilemmas" and "A Complementary Relationship: Reparations and Development".

Firstly, social investment plans or actions may be presented as ways to resolve the underlying structural causes - the 'backward-looking' problems of distributive justice - that fuel many conflicts.¹⁶⁰ Secondly, the goals of justice and development are capable of being achieved simultaneously through social investment actions. Thirdly, amalgamating development projects with collective reparations can avoid the dilemma of choosing between reparations and other equally pressing priorities.



Memorial to war victims, Nepalgunj, Nepal by Luke Moffett

At the same time, there are many powerful disadvantages in transforming a collective reparations program into a development and social investment program. To begin with, development measures are too inclusive (i.e. not directed specifically toward the victims) and normally focus on basic and urgent needs. Furthermore, collectively distributing reparation through development projects does not acknowledge individuals except as members of traditionally marginalized groups. Not only would this fail to recognise the individual victim as being entitled to a remedy for the violation of their rights under international law but it could also accrue collective goods to non-victims who were not harmed during the conflict and perhaps even to some of those who were complicit in harms.¹⁶¹ To add further difficulty to the matter, the long term nature of development plans brings uncertainty and complexity. In the worst cases they are easily converted into fodder for partisan political struggles.¹⁶² Finally, the greatest difficulty with confusing collective reparations with social programs is that it dilutes and distorts the reparative underpinnings of collective reparation

160 The growing argument among academics that reparations in general and collective reparations in particular should be transformative of the structures of inequality and unequal relationships that allowed these harms to happen in the first place entail conceptually this risk.

161 Brianne McGonigle Leyh and Julie Fraser, 'Transformative reparations: changing the game or more of the same?' (2019) *Cambridge International Law Journal* 8(1) 39-59.

162 International Center for Transitional Justice and Asociación Pro Derechos Humanos, *Design Parameters for a Reparations Program in Peru* International Centre for Transitional, Lima, September 2002, p. 40.

programmes: the relationship with human rights violations, the direct relationship with the victims, the reparative essence of the gesture and therefore its central objective is lost.

What, then, differentiates collective reparations from development or social investment programmes? Unlike the latter, reparations have their roots in a legal right based on the obligation to reverse damage and imply recognition of the harm suffered. As a response to specific harms they possess a significant symbolic component; they are gestures and actions of the State on behalf of society that materialize the recognition of the harm caused to victims, express social solidarity with victims, reaffirm the dignity of the victims and as rights holders and full and equal citizens, and (re) create civic trust.¹⁶³

This moral and political content of the reparations suggests that the way in which collective reparations are carried out is just as important – if not more so in some cases – than the material result.¹⁶⁴ This belief was echoed by one Colombian interviewee who argued that ‘the messages that you transmit are very important’. Elaborating further, they argued that with collective reparation:

*Messages are given that the victims suffered this, we do this for them, and that the weight of the symbolic is very strong and is often greatly underestimated in these processes. It is thought that the victims are only behind the material... but really much of the reparation has to do with the messages that you transmit.*¹⁶⁵

3.2.1. The symbolic and memorial dimension

The Moroccan and Peruvian programs provide interesting lessons on this front. Both programs include income generating activities and the development of economic, productive and trade infrastructure. However, the Moroccan program brings additional lines of strengthening the capacities of local actors and the actively preserving memory. Indeed, the first year of operation of the community reparation program was dedicated to strengthening the capacities of those involved. From the first call to projects in 2008, the active preservation of memory through the rehabilitation of places of memory, the transformation of the spaces that served as clandestine detention and torture centers into memorials that could also serve educational and productive purposes, the writing of the history of the communities, the organization of awareness-raising activities and the production of videos and documentaries was eligible for financing.

Regarding the Peruvian Collective Reparation Program, the results of an assessment carried out by Aprodeh and the International Center for Transitional Justice revealed that 41% of the population of the beneficiary communities did not know about the existence of such projects. In fact, only 23% of the population of the communities where projects had been approved understood them as being related to the collective impact of the armed conflict.¹⁶⁶ The same executive secretary of the CMAN recognized that, in many cases, community members were unaware of the reparatory

163 De Greiff, Pablo. “Justice and Reparations”, in *The Handbook of Reparations* (Pablo de Greiff, ed.), Oxford: Oxford University Press, 2006, p.461-466.

164 Roht-Arriaza Naomi & Katharine Orlovsky. “A complementary Relationship: Reparations and Development”, in *Transitional Justice and Development: Making Connections* (Pablo de Greiff and Roger Duthie, eds.), New York: Social Science Research Council and International Center for Transitional Justice, 2009.

165 Interview Colombia 28.

166 Aprodeh & International Center for Transitional Justice. *Sistema de Vigilancia de Reparaciones. Reporte Nacional de Vigilancia del Programa de Reparaciones Colectivas-Etapa II*. Lima, Aprodeh - ICTJ, 2009, p. 19.

intent.¹⁶⁷ Thus, one of the central problems in the implementation of the collective reparations program in Peru has been effectively communicating the reparative nature of these projects to the beneficiary communities who often mistake them for mere development projects. Trying to correct these deficiencies, the Peruvian CMAN had to incorporate elements that the Moroccan program had incorporated from the beginning - namely memory and symbolic activities and better training of the public and private local actors involved in the implementation of the projects. Field work carried out in 2019 revealed that the training activities and the availability of information on the meaning of the process at the level of local authorities and actors on the one hand and on the other hand memory activities through concrete symbolic gestures and the reconstruction of the local historical memory in three key moments of the process (the community assembly for project selection; the inauguration, where the execution of the financed project begins; and the delivery, where the executed work is inaugurated and the community officially receives it), organized by the CMAN in the post- 2011 phase of implementation of the PRC, offer better elements for the recognition of collective victims, improve the perception of the work as compensation and prevent these programs from being confused with those of social investment that the central government executes in the same areas.

Thus, the degree of understanding of collective reparation projects as reparation measures for the damages suffered can be increased with, on the one hand, the articulation of material measures of collective reparation and memory recovery projects;¹⁶⁸ and, on the other hand, the way the actors involved in the implementation consciously communicate publicly with the beneficiary communities and the messages they transmit at the different key moments in the execution of collective reparation projects.



Botero's Birds of Peace and Memorial to Victims of FARC Bombing, Medellín, Colombia by Luke Moffett

This message should include the clear acknowledgment that mass and systematic human rights violations were committed and an equally clear acknowledgement of the state's responsibility for

167 Secretaría ejecutiva de la CMAN, *Lineamientos generales del programa de reparaciones colectivas*, Lima, 2012.

168 Which is also in line with the view of the new United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-Recurrence who considers memorialization as a fifth pillar of transitional justice.

them and the recognition that the victims' circumstances as a group are different from the rest of the population. Additionally, this communication between the authorities and the community in itself is highly symbolic because, as noted by Roht-Arriaza, collective reparations may represent the first time that affected communities interact positively with the authorities, which constitutes an important step towards restituting dignity, overcoming stigmatization and rebuilding social integration¹⁶⁹.

Interview data reflected the importance that symbolic measures of memory preservation had for victims in marginalized communities. For example, one Guatemalan observer told us how:

*The victims, they did not ask for money despite their economic situation. They did not go that way. They asked deep things like the celebration for the victims of the armed conflict each May 23 and also the acknowledgment of the armed conflict in the textbooks for primary, secondary, and university level of education. Moreover, they asked for the construction of schools, the elaboration of videos so the Guatemala people will remember the genocide and the internal armed conflict that we lived through in this country.*¹⁷⁰

However, in other cases memory preservation was seen more as a communal activity driven and undertaken at grassroots level than as a reparative measure provided to victims by the state. One Ugandan interviewee informed us how:

*Some people were commenting and saying that "probably one of the things I don't like to do is remember dead people". Memorisation. Memorisation is not reparations. They say "but we need something we can use to remember our children, to remember our people who died during the conflict" but then also interestingly, these memorialisations are not funded by the government. It's initiatives that civil society come in to see what to do, how to support the people and all that.*¹⁷¹

3.2.2. Participation

A victim-centered approach is at the core of transitional justice process. According to the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, meaningful participation by victims prevents transitional justice measures from being carried out behind their backs. Preventing this can help fulfill objectives like recognizing victims and building confidence in and strengthening the democratic rule of law.¹⁷² The participation of victims in the definition of reparations is increasingly recognized as a principle that must be taken into account and as an important variable of their success.¹⁷³

169 Roht-Arriaza Naomi & Katharine Orlovsky. "A complementary Relationship: Reparations and Development", in *Transitional Justice and Development: Making Connections* (Pablo de Greiff and Roger Duthie, eds.), New York: Social Science Research Council and International Center for Transitional Justice, 2009.

170 Interview Guatemala 14.

171 Interview Uganda 22.

172 A/HRC/21/46, par. 54.

173 Correa, Cristián, Julie Guillerot and Lisa Magarrell. "Reparations and Victim Participation : A Look at the Truth Commission Experience, in *Reparations for victims of genocide, crimes against humanity and war crimes: Systems in place and systems in the making*, C. Ferstman, M. Goetz, A. Stephens (eds.), Martinus Nijhoff Publishers, The Netherlands", 2020 (2nd edition).

Not only have the three administrative experiences discussed above based their definition of collective measures on the participation of the beneficiary groups, but the jurisprudence of the IACtHR has similarly acknowledged the importance of common agreement with, participation and informed consent of the beneficiary communities.

The benefits of fostering genuine meaningful participation in the different stages of a collective reparation program are diverse and broad. To begin with, it allows communities to determine what reparations measures are the most needed and meaningful to the community, collectivity or group. In addition to helping beneficiaries take ownership of collective reparations projects,¹⁷⁴ it might even help expand the reparative imagination on what harms can and should be repaired. For example, one Colombian interviewee spoke of how participation by indigenous communities had helped to maximize the understanding of what harms were committed during the armed conflict and how these might be redressed:

*The ethnic communities, Afro-descendant, Rom, Raizal, Palenqueras and indigenous communities, they have taught us that the war has produced material damages, physical, but also collective damages that have to do with the impacts on the territory. Then there you have a concept [of harm] that is more complex. You have the person, the family but also the territory; my sense of belonging to a place is also affected and the way in which that territory is affected by the war. That is where we learned from the ethnic groups that there are other ways to understand the harm and that reparation has to be carried out in a collective way.*¹⁷⁵

It is true, too, that participation by victims can contribute to a better understanding of what collective reparations are and what the corresponding obligation of the State is. This increases the likelihood of these measures being accepted for their reparative and transformative value, thus helping to further differentiate reparations from regular development projects.¹⁷⁶ As a Ugandan interviewee pointed out:

*Now in practical terms is it possible to compensate a group? Now, that begins to readjust our notion of compensation as well. So far there's the element of money in the compensation, the so called victims fund and so on because then we think it's easy to account for this because they are individuals communicated.. but when you are talking about a group, that means your idea of compensation has to change and think more of this communal or group compensation which in a sense goes beyond money.*¹⁷⁷

Participation in collective reparations processes can also further the transformation of victims into coequal citizens and from being passive recipients of services to active bearers of human rights.¹⁷⁸ In this sense, participation can be considered as a restorative element. In any case, the participation processes make it possible to round off the greater social and political legitimacy of collective reparations measures and it is essential to restore trust in State institutions.¹⁷⁹

174 International Center for Transitional Justice and Moroccan Advisory Council for Human Rights. *The Rabat Report. The concept and challenges of Collective Reparations*. ICTJ & Moroccan Advisory Council for Human Rights, 2009, p.52.

175 Interview Colombia 23.

176 Ibid., p.48.

177 Interview Ugandan 13.

178 Ibid., p.44.

179 See: A/HRC/34/62, par. 25 and 26 y A/71/567 par. 5 y 6, on "epistemic" benefits and those related to "legitimacy" when advocating participation.



Museo Comunitario Rabinal Achi, Guatemala by Luke Moffett

Although the benefits of participation processes are important, they should not be mistaken as being problem free. It is necessary to critically examine who will act as representatives of the community, in particular ensuring that it is a democratic process that does not disadvantage or exclude the community's most vulnerable and subordinated groups - women, young people, members of minority groups including and lesbian, gay, bisexual and transgender persons. To avoid some of these challenges, experience shows that, at the time of designing the participation process, it is important to be aware of local power dynamics within the community and around the participation of the community's most vulnerable and subordinated groups.¹⁸⁰ Specific strategies to overcome any discriminatory dynamics should be designed if necessary.¹⁸¹ In Peru, the collective reparations program adjusted the consultations procedure for defining collective reparations projects to ensure the participation of women and lesbian, gay, bisexual and transgender persons, offering in this way an alternative to face the hierarchies and power relations within the communities, which could lead to the adoption as the only project one that would respond to the interests of those with more power and influence in the community.

180 International Center for Transitional Justice and Moroccan Advisory Council for Human Rights. *The Rabat Report. The concept and challenges of Collective Reparations*. ICTJ & Moroccan Advisory Council for Human Rights, 2009, p. 53.

181 Participants at the Rabat Symposium mentioned the following: Design a separate process of consultation for women, using "women's spaces" (field, river, kitchen, market, etc.) before the communal consultation; Use specific and appropriate media tools for communicating with women to allow them to better understand the message; Organize debates among different sectors in society and prepare women's organizations for discussions about how the gender dimension can best be incorporated in the process of deciding collective reparations measures; Work in parallel on the dissemination of information—and comprehension by the society as a whole—of the realities of the women before, during, and after the human rights violations, and the importance of an inclusive strategy during the collective reparations process. *Ibid.*, p.54.

3.2.3. Maintain external and internal comprehensiveness

Collective measures are of equal benefit to direct victims, neutral individuals and perpetrators, who make up the groups that will benefit from it. This reality poses some conceptual questions over whether these measures can be truly regarded as reparative if they accrue benefits to people other than direct victims. Both the academic literature and interview data show that there is no agreed consensus on this matter.

On the one hand, several practical and symbolic arguments have been forwarded in favour of collective measures even if they accrue benefits to people other than victims. Collective reparations are often easier to deliver because they avoid difficulties encountered with delivering individual reparations - the large number of victims, the scarcity of resources available, and difficulties in identifying and locating each individual victim.¹⁸² In some cases, like in Cambodia, the feasibility of providing individual reparations to all victims is doubtful, given that two million people were killed as a result of the Khmer Rouge regime and that almost every family in Cambodia could claim to have been harmed or victimised in some way.¹⁸³ Collective reparations processes also tend to have less administrative costs, be less resource intensive and take less time to process and deliver.¹⁸⁴ Thus one Peruvian observer told us that collective reparations allow the most victims to be repaired in the quickest time within a limited budget.¹⁸⁵ Similarly, a Colombian observer argued that delivering reparations collectively was 'much better' because collective reparations 'are much broader and have a greater impact' whereas 'the individual process is much more difficult and costly'.¹⁸⁶

A further argument has been made that by compensating everyone in the same broad category of harm in broadly the same way unequal and divisive outcomes can be avoided.¹⁸⁷ Unequal individual reparation had the effect, one interviewee from Nepal informed us, of creating division within victims' constituencies, and indeed wider society, over those who received sizeable payouts and those who did not:

*There is no concept of collective reparation in Nepal so far. So, reparation also has brought a sense of division in the society. The society says that some of the people are getting a large sum of money just because somebody in their opinion, just because somebody was victimised during the conflict. But they were also victimised in that process although nobody from the family was killed or disappeared. For example, in Bardiya or in Rolpa where the development is so in the lower level or poverty is very high, if a person gets now one million rupees, that is a huge amount of money. And in the society there is a kind of rift or a new kind of conflict that sees that person is getting that much money from the government and we are not getting anything.*¹⁸⁸

182 Koen de Feyter et al (eds), *Out of the ashes: Reparations for Gross Violations of Human Rights* (Oxford: Intersentia, 2006).

183 Renée Jeffery, 'Beyond repair?: Collective and moral reparations at the Khmer Rouge Tribunal', *Journal of Human Rights*, (2014) 13 (1): 103-119.

184 Navarro (2018).

185 Interview Peru 8.

186 Interview Colombia 26.

187 Rubio-Marin & De Greiff (2007).

188 Interview Nepal 6.

Compensating everyone within the same large category of victims in the same way, rather than measuring this in accordance with individual harms, means that collective reparation processes can avoid creating these hierarchies of victimhood.

Administrative collective reparation processes and schemes can also be preferable to court ordered processes emerging from court cases because it overcomes difficulties relating to access to the courts, difficulties in gathering evidence for cases, possible re-traumatisation through having to provide testimony and being cross examined, and overcoming lack of confidence felt by victims in the judicial process and criminal justice system.¹⁸⁹ This argument holds particular weight when it comes to gender based sexual harms. Opting for an administrative scheme here spares the victim the risk of re-victimisation and trauma through cross-examination and a protracted legal process, overcomes the financial and social barriers to participation in the legal process experienced by women and girls in some contexts, and it reduces the potential for reprisal, stigma and exclusion.¹⁹⁰

The symbolic importance of using collective reparations to repair victims has also been noted. This is of heightened relevance where and when collective reparations are awarded to a group on the basis that they were targeted specifically for being a particular group. In such instances the awarding of collective reparations can feed into social solidarity, reconciliation and community cohesion.¹⁹¹ According to Ruth Rubio-Marin and Pablo De Greiff, group-based reparations are integral to allowing these groups to reconstruct and/or recover their social identity, sense of self-worth, status and culture while reducing the scope for ongoing discrimination and exclusion premised on group membership.¹⁹² There are also practical ways that collective reparations might contribute to the rebuilding of social cohesion within conflict-ravaged communities. For example, collective reparations might involve repairing damaged communal infrastructure or it might involve the restoration or recreation of communal meeting spaces that are integral to communal life, which in turn can renew and regenerate the trust and social cohesion needed for communal identity.¹⁹³ One interviewee from Peru told us of how their community opted to build a community centre that 'serves the people'. The centre is used for 'for marriages, for baptisms, for many things, the local is multipurpose'.¹⁹⁴

On the other hand, arguments have been made against collective measures that shift the reparative focus off the individual victim. The practical argument here is that human rights violations impact on individual lives in very different ways.¹⁹⁵ Whether collective reparations can respond to this reality in an effective and meaningful way is questionable. Tension can therefore surface between individuals and the group as a whole,¹⁹⁶ leading in some cases to individual victims resisting or

189 Rubio-Marin (2009), p. 6.

190 Rubio-Marin & De Greiff (2007).

191 Frédéric Mégret, 'The case for collective reparations before the International Criminal Court' in Jo-Anne Wemmers (ed) *Reparations for Victims of Crimes against humanity: The healing role of reparation* (London: Routledge, 2014).

192 Rubio-Marin & De Greiff (2007).

193 ICTJ (2009), p. 10.

194 Interview Peru 3.

195 Fiona McKay, 'What outcome for victims' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (Oxford: Oxford University Press, 2013), p. 946.

196 Paul Dubinsky, 'Justice for the collective: The limits of the human rights class action', *Michigan Law Review*, (2004) 102 (6): 1152-1190.

rejecting collective reparations because they do not respond to the personal and intimate needs that they have.¹⁹⁷ A Ugandan interviewee spelt out this reality for us:

I remember one gentleman told us “when they were going to kill me they never collected us and put us together, no. Everyone had their own share so now, when it comes to reparations everyone should have their own share”. And also, what also stood out for me was in terms of this people were looking at more of tangible, they want something that they can feel, they want resources, they want money and they had those pressing needs of “my kids have an education, that is what matters to me”, you know. It was quite interesting. “How do you say you’re going to give us collective reparations because everyone had their own share”. So, that stood out for us very clearly.¹⁹⁸



Mural to Martyrs Killed, Archbishop's Office for Human Rights, Guatemala by Luke Moffett

Conceptually, the argument is also well made within the literature that individual and collective reparations serve different purposes. Individual reparations recognise the specific harms to an individual and recognise that individual's worth as a rights-bearing citizen. Collective reparations, in contrast to this, respond to collective harms and harms to social cohesion so that social solidarity is re-established and the effectiveness of existing resources is maximised.¹⁹⁹ The problem with stretching the meaning of reparations in order to force a fit between collective reparations and the needs of individual victims has been apparent in Cambodia where many individual victims have been left feeling that their individual needs have not been met through collective reparations.²⁰⁰

197 ICTJ (2009), p. 11.

198 Interview Uganda 22.

199 Naomi Roht-Arriaza and Katharine Orlovsky, 'A complementary relationship: Reparations and development' in Pablo De Grieff & Roger Duthie (eds) *Transitional Justice & Development: Making connections* (New York: Social Science Research Council, 2009).

200 Christoph Sperfeldt and Rachel Hughes, 'The projectification of reparations', *Journal of Human Rights Practice*, (2020) 12: 545-565.

This calls us back to a concept deeply developed by the former UN Rapporteur Pablo de Greiff: the integrity or coherence of the reparations programs into two different dimensions, internal and external.

‘External coherence expresses the requirement that the reparations program be designed in such a way as to bear a close relationship with the other transitional mechanisms, that is, with criminal justice, truth-telling, and institutional reform. This requirement is both pragmatic and conceptual. The relationship increases the likelihood that each of these mechanisms be perceived as successful (despite the inevitable limitations that accompany each of them), and, more importantly, that the transitional efforts, on the whole, satisfy the expectations of citizens.’²⁰¹



Collective reparations project, north of Ayacucho, Peru by Luke Moffett

If it is true that individual reparation measures fail to capture the collective impact of harms in situations of widespread human rights violations and repression of groups, then it is just as true that collective reparation measures fail to capture the often intimate, individual nature of human rights violations and victims' suffering. This suggests that while there is a role for collective reparations, States and policymakers should not use it as a means of simply avoiding or substituting individual reparations. Collective reparations should complement, but never replace, individual measures; both are needed to properly capture both individual and collective harms. As a Ugandan observer argued to us:

To me at an institutional level we need to look at the aspect of creating functional systems that can deliver services. But at victims level you also need to look at their cases and try to design something that works for them at individual level, at group level, at community level... So what can we do at a community level.... then at individual level we also need to

201 De Greiff, Pablo. "Justice and Reparations", in *The Handbook of Reparations* (Pablo de Greiff, ed.), Oxford: Oxford University Press, 2006, p. 467.

look at what needs to be done... but at individual level we also need to look at strategically identifying what kind of intervention do we give for those victims.²⁰²

This outlook was shared by a Colombian interviewee who argued that reparations processes should seek to be 'generating other types of reparations towards the family nucleus, towards the community and towards the collective' so that neither the direct victims nor extended communities would feel short-changed.²⁰³

Certainly, most, if not all, of the justice decisions and programs presented in the previous sections and that exist combine, at least conceptually (unfortunately not often in the implementation), symbolic as well as material reparations, and each of these categories include different measures and be distributed individually or collectively. As De Greiff concludes

*'a program of reparations, if it is to attain its proper goals, must always be a complex program that distributes different benefits, and the different components of the plan ought to be mutually coherent. That is, the program ought to be internally coherent. (...). Obviously, in order to reach the desired aims, it is important that benefits be part of a plan whose elements internally support one another.'*²⁰⁴

Collective reparation, then, must be built in a process that encompasses these different external and internal elements, in a creative and culturally appropriate way that balances its disadvantages with maximizing the benefits of each category.

202 Interview Uganda 9.

203 Interview Colombia 20.

204 De Greiff n.183.

CONCLUSION

Collective reparation is a concept under construction at the legal, theoretical and administrative levels. They are conceived from the perspective of who they are meant to benefit, but also from the perspective of what they are meant to deliver. They should be understood as the reparations due to collective victims; that is, to groups of people who assumed themselves not only as individuals, but also share a common identity and who have suffered damages of a collective nature as a result of serious individual or collective human rights violations. It is from the establishment of the damages that the thematic lines of each of the collective reparation measures are defined. The fact that the communities themselves specifically define in a participative manner which projects will be implemented as collective reparation increases the relevance and acceptability of the measures. This, together with the public discourse, symbolic gestures and the disposition and attitude of the authorities that process reparations with the victim communities are also decisive, to transmit the message to the beneficiary communities that they effectively receive it that the projects carried out are a measure of reparation and not just social investment actions. This distinction is important to ensure in collective reparations moving forward so as to avoid diluting victims' rights through development projects and to ensure that all those affected from conflict and gross violations of human rights have specific measures to respond to the harm caused to their collective.

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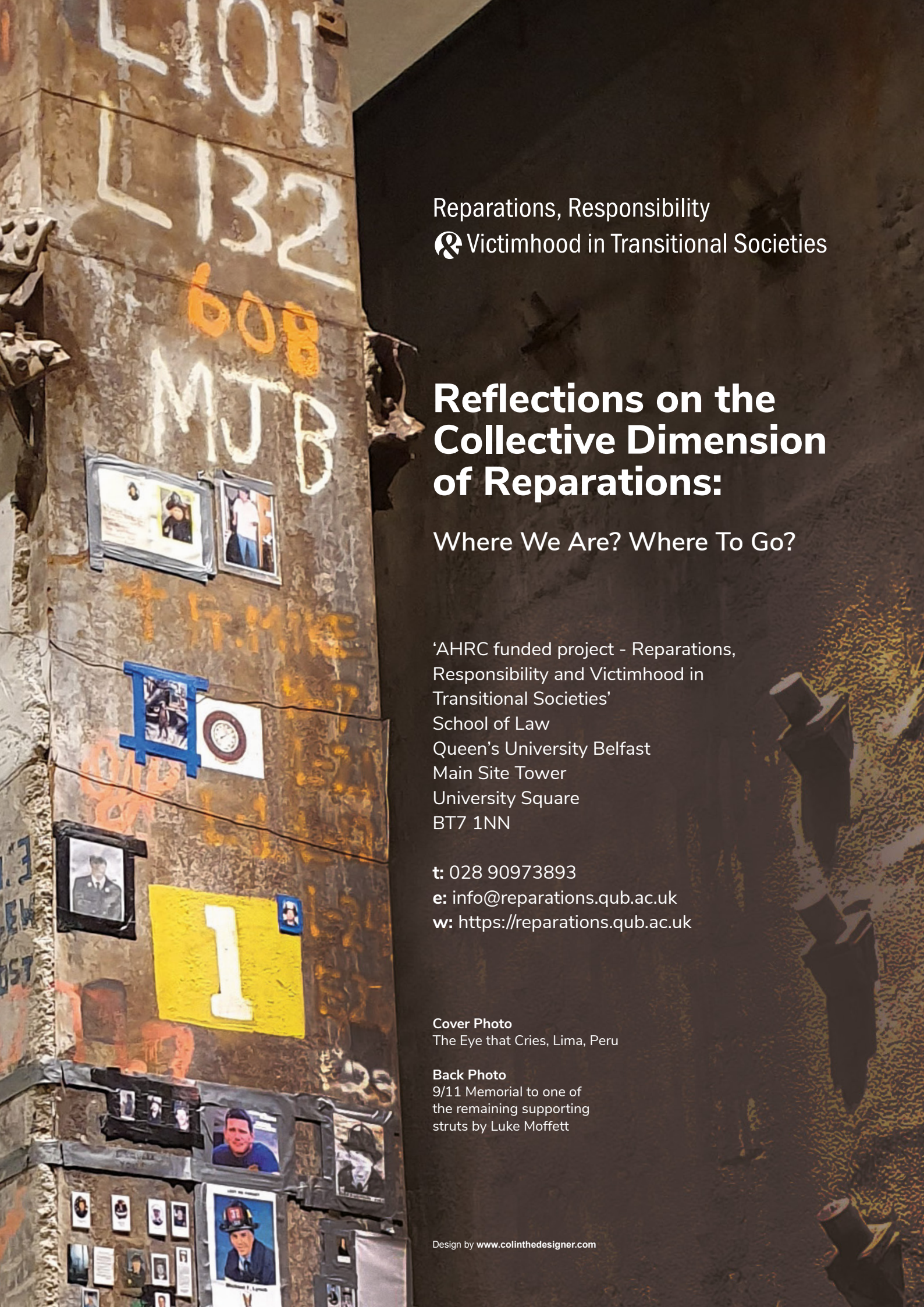
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Reparations, Responsibility

& Victimhood in Transitional Societies

Reflections on the Collective Dimension of Reparations:

Where We Are? Where To Go?

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The Eye that Cries, Lima, Peru

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9/11 Memorial to one of
the remaining supporting
struts by Luke Moffett