

**The right to reparations in the context of transitional justice: Lessons
for Burundi from South Africa, Chile, Peru and Colombia**

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Plagiarism declaration

I, Berry Didier Nibogora, do hereby declare that the dissertation '**The right to reparations in the context of transitional justice: Lessons for Burundi from South Africa, Chile, Peru and Colombia**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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Dedication

To my parents who, ignorant of some of their fundamental rights, have been fully aware of their moral and legal duties in a continent of lack of awareness. May this study be a voice for reparations you deserve for damage you suffered from the Burundian civil conflict;

To you, Marie Jeanine Ndayishimiye, for your endless love and the warm support and blessings you keep giving to my everyday work. You make every of my days a bright day.

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List of abbreviations

ACHPR: African Commission on Human and Peoples' Rights

ADC-IKIBIRI: Alliance for Democratic Change-*Ikibiri*

AFDD: Group of the Families of Disappeared Detainees

AHRLR: African Human Rights Law Journal

ANC: African National Congress

APRA: Arusha Peace and Reconciliation Agreement

ARP: Administrative Reparations Programmes

AZAPO: Azania People's Organisation

BOB: Bulletin Officiel du Burundi (Burundian official Gazette)

CAD: Committee of self-defence

CAT: Convention Against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment

CC: Constitutional Court

CCA: Comprehensive Ceasefire Agreement

CMAN: High-Level Multisectorial Commission for Design and Monitoring of a Policy of Peace, Collective Reparations and National Reconciliation

CNDD-FDD: National Council for the Defence of Democracy-Front for the Defence of Democracy

CNRS: Commission Nationale pour la Réhabilitation des Sinistrés

CNTB: Commission Nationale Terres et Autres Biens

Committee on ESCR: Committee on Economic Social and Cultural Rights

CRC: Convention on the Rights of the Child

CRR: Committee on Reparation and Rehabilitation

CSVR: Centre for the Study of Violence and Reconciliation

CVR: Commission Verite et Reconciliation

ECtHR: European Court of Human Rights

ELN: National Liberation Army

EPL: Ejercito Popular Liberacion

FARC: Revolutionary Armed Forces of Colombia
FNL: National Liberation Front
FRODEBU: Front for the Defence of Democracy
GCA: General Ceasefire Agreement
HRC: Human Rights Committee
IACtHR: Inter-American Court of Human Rights
ICC: International Criminal Court
ICCPR: International Covenant on Civil and Political Rights
ICERD: International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR: International Covenant on Economic Social and Cultural Rights
I CJ: International Court of Justice
ICRC: International Committee of Red Cross
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for former Yugoslavia
IDP: Internally Displaced Person
IRG: Individual Reparation Grant
IHL: International Humanitarian Law
KAS: Konrad Adenauer Stiftung
LDGL: League for Human Rights in the Great Lakes Region
LRC: Legal Resource Centre
MOLIBA: Movement for the Liberation of *Bahutu*
NC: National Consultations
NCRR: National Corporation for Reparations and Reconciliation
NGO: Non-Governmental Organisation
NTRC: National Truth and Reconciliation Commission
OAS: Organisation of American States
OHCHR: Office of High Commissioner for Human Rights
PALIPEHUTU: Party for the Liberation of *Hutu* People

PCIJ: Permanent Court of International Justice

PIR: Plan for Integral Reparations

PRAIS: Comprehensive healthcare programme for victims of human rights violations

SACTJ: South African Coalition for Transitional Justice

Ser: Series

SL: Shining Path

TC: Truth Commission

TJ: Transitional Justice

TRC: Truth and Reconciliation Commission

UIR: Urgent Interim Reparations

UN: United Nations

UN/SG: Secretary General of the United Nations

UN/GA: United Nations General Assembly

UPRONA: National Union for Progress

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CHAPTER ONE

INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1 Background and justification of the study

I believe that the most important components of transitional justice must be the rights of victims, which include the right to the truth, the right to acknowledgment, the right to reparations and the obligation to take steps to ensure that violation will not occur again.¹

In many societies, transition from war to peace or from dictatorship to democracy has been dominated by a debate on how best past massive human rights violations can be addressed without undermining a fragile and transitional peace.² Therefore, political considerations have entirely shaped legal solutions adopted to bring about transitions with less regard to accountability and appropriate remedy for victims of human rights abuses and violations.

Hence, as stressed out by Saffon and Uprimny,³ law has not been seen as a real limit to the politics of transition, but has rather been used as an instrument to fulfill its goals. Although there has been a 'paradigm shift' in international law towards more recognition of reparations as a human right through the adoption by the United Nations General Assembly of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of Human Rights and Serious Violations of International Humanitarian Law (the Principles),⁴ the realisation of the right to reparations in transitional justice (TJ) context is negotiated in political transitions whose type affects the nature and the implementation of reparations adopted in national jurisdictions.⁵

In the Burundian context of negotiating TJ mechanisms, this study follows my previous discussion on 'The place of criminal law in the process of TJ in Burundi.'⁶

¹ Y Sooka, Foreword to the book by S Pete & M Du Plessis (eds) *Repairing the past? International perspectives on reparations of gross human rights abuses* (2007).

² See a similar point by Roht-Arriaza 'The new landscape of transitional justice' in N Roht-Arriaza & J Mariezcurrena *Transitional justice in the Twenty-first Century: Beyond truth versus justice* (2006) 1.

³ P Saffon & R Uprimny 'Uses and abuses of transitional justice in Colombia' in *Transitional Justice without transition? Truth, justice and reparations for Colombia* (2006).

⁴ UN/General Assembly Resolution A/RES/60/147, adopted on 16 December 2005.

⁵ J Elster (ed) *Retribution and reparations in transition to democracy* (2006) 8-9.

⁶ See BD Nibogora 'The place of criminal law in transitional justice process in Burundi' (2011) 7 *KAS African Law Study Library* 92-126.

Drawing lessons from South Africa, Chile, Peru and Colombia, the study seeks to contribute to the debate around reparations in a society where the likelihood of prosecutions against suspected perpetrators is limited.

South Africa⁷ is chosen because its transitional process is more documented and fascinated the governmental delegation of Burundi during the recent negotiations for designing TJ mechanisms.⁸ Peru and Chile are interesting for their relative success and their contribution in the development of the right to reparations in Latin America,⁹ while Colombia may be insightful for its judicial approach to reparations.

1.2 Definitions and scope of the study

The right to reparations encompasses different forms that may not be comprehensively explored in such a limited study.¹⁰ Further, there is a difference between reparations, reparation and repair. De Greiff writes that the word reparations can be used in two different contexts: in a broad or narrow perspective.¹¹ The first refers to international law and gives reparations a broad legal meaning, encompassing different forms.¹² Associated with TJ, the second context refers to reparations as programmes designed to provide benefits directly to the victims of certain types of crimes, either in material or non material form, on individual or collective basis.¹³ Quite clearly, this study focuses mainly on reparations as conceived in the second context, with a bias on material benefits. However, it does not depart completely from the perspective of international law underscored by the first conception, since TJ remains a by-product of the history of international criminal justice.

⁷ South African TJ was influenced by the Chilean and Argentinean models. See J Dugard 'Retrospective justice: International law and the South African model' in AJ McAdams *Transitional justice and the rule of law in new democracies* (1997) 270.

⁸ Nibogora (n 6 above) 121.

⁹ Chileans developed one of the most pro-victim reparations programmes, while Peruvian TJ is acclaimed for its compliance with international standards and the collective reparations programme.

¹⁰ These are restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. See the Principles, particularly Principles 11&18.

¹¹ P De Greiff 'Justice and reparations' in P De Greiff (ed) *The handbook of reparations* (2006) 452.

¹² n 10 above.

¹³ De Greiff (n 11 above) 452-453.

On the other side, reparation consists of returning the victim in the situation he or she would have been, had the violation not occurred. This is often referred to as *restitutio in integrum*, i.e integral reparation, which seeks to place the victim in the situation prior to the violation. TJ does not tackle the issue of victims' right to reparations from this perspective, since there is no value or amount of money that can replace the loss of the loved one or compensate the emotional suffering caused by sexual assaults. The impracticability of individual claims due to evidentiary obstacles and the huge number of victims also favour the approach of reparations schemes.¹⁴

Lastly the word 'repair' means the act of fixing something or someone that has been broken, affected or damaged as a result of an unforeseen act or conduct – namely an accident or incident. Obviously, this is not a relevant discussion in the context of this study.

This study also refers to vertical and horizontal application of the right to reparations. For the purpose of this study, vertical reparations are reparations due to victims by the state. Horizontal reparations, on the other side, are reparations that victims can claim against third parties, either against individual perpetrators or corporate companies or any other non-state actor.¹⁵

1.3 Significance of the Study

The outcome of this study may be significant to the law related to reparations granted in TJ. It attracts an attention on the shift in the state's obligations on the basis of which reparations are made in the context of TJ, namely from an obligation 'to respect' to more emphasis on the obligation 'to protect'. It further discusses how the socio-legal dimension of reparations has been overlooked and the quantum of reparations been arbitrary fixed rather than being in relation to the harm and loss suffered by victims.

Finally, this study underscores the fact that reparations programmes involve a vertical relation between the victim and the State, regardless a prior establishment of the responsibility of the perpetrator.

¹⁴ J Edelstein 'Rights, reparations and reconciliation: Some comparative notes' (1994) CSVR, Seminar 6 available at www.csvr.org/wits/papers/papedel.htm (accessed 23 July 2011).

¹⁵ Those claims are generally lodged in civil lawsuits.

1.4 Objectives of the study

The objectives of this study are to:

- a) Understand how the nature and the application of the right to reparations have evolved under international law and ‘reshaped’ by transitional justice.
- b) Assess how the right to reparations has been applied through reparations schemes in South Africa, Chile, Peru and Colombia in order to identify the strengths and weaknesses of each model.
- c) Identify lessons that transitional justice reparations in Burundi can learn from those experiences.

1.5 Assumptions

This study is based on the assumption that granting reparations to victims of human rights violations can strategically serve as a provisional form of accountability and can give to victims an opportunity to participate effectively in the TJ processes. Pragmatic politics of human rights in transitions¹⁶ recommend a sequence between the TJ mechanisms of truth-telling, reparations and judicial accountability. Further, the state’s attention to reparations demonstrates its commitment to place the victims at the centre of the TJ response.¹⁷

The study simultaneously seeks to question the notion that in all reparations programmes victims are not compensated in proportion to the harm they suffered.¹⁸ Judicial reparations may be more appropriate and influence the meaningfulness of administrative reparations.

On the other hand, if perpetrators are still key actors with whom the cooperation is required for designing all TJ mechanisms, the likelihood of prosecutions is illusory as long as they remain in power.¹⁹ In the meantime, interim reparations are a viable option.

¹⁶ See Méndez, ‘Accountability’, 271; Mc Carthy, ‘Coming to Terms’, 768; Kiss, ‘Moral Ambition’, 72; A Schaap, *Political Reconciliation* (2005), 21&151 quoted in M Freeman ‘Back to the future: The historical dimension of liberal justice’ in Peté and Du Plessis (n 1 above) 51.

¹⁷ UN-OHCHR ‘*Rule-of-law tools for post-conflict states: Reparations programmes*’ (2008) 2-3.

¹⁸ De Greiff refers to such a state of affairs as ‘the near impossibility of fulfilling the juridical criterion of justice in reparations in massive cases’. See De Greiff (n 11 above) 472, endnote 1.

¹⁹ Roht-Arriaza makes a similar point when she argues that in conditions where prior perpetrators hold a good deal of power, and can credibly threaten transitions, amnesties are an inevitable concession. She qualifies this situation as ‘trading justice for the past in exchange for justice in the future’. See Roht-Arriaza (n 2 above) 2-3.

However, without being preceded by the disclosure of truth and followed by the meting out of other measures of justice, interim reparations might not be regarded as ‘true reparations’.

1.6 Research questions

The study aims to achieve the objectives by addressing two research questions:

- 1) How have South Africa, Chile, Peru and Colombia, achieved the right to reparations within their respective TJ contexts, and what can be the lessons for the TJ process in Burundi?

This question has three sub-questions:

- a. How have the nature and the application of the right to reparations evolved in international law and what is the effect of TJ on this right?
 - b. What reparations have South Africa, Peru, Chile and Colombia adopted, and to what extent have the benefits remedied the needs of the victims?
 - c. What can the TJ debate in Burundi learn from these models, taking into account the Burundian specific transition?
- 2) To what extent may reparations achieve justice in a society where criminal accountability is less achievable in a near future?

1.7 Literature review

An extensive literature explores reparations either from the perspective of international human rights law,²⁰ regional human rights systems,²¹ or from national laws’ perspective, under the delictual or tort claims.²² Equally abundant are the studies on reparations in societies in transition from dictatorship or conflict to democracy. Thus, the issue of reparations for victims of gross and systematic human rights violations committed in the

²⁰ D Shelton *Remedies in International Human Rights Law* (2005).

²¹ GF Musila ‘The right to an effective remedy under the African Charter on Human and Peoples’ Rights’ (2006) 6 *African human Rights Law Journal* 442-464; C Sandoval-Villalba ‘The concept of “injured party” and “victim” of gross human rights violations in the jurisprudence of the Inter-American Court of Human Rights: A Commentary on their implications for reparations’ in C Ferstman et al. *Reparations for victims of genocide, war crimes and crimes against humanity: Systems in place and systems in making* (2009) 243-282.

²² GP Fletcher *Tort liability for human rights abuses* (2008).

past has become an exciting subject of academic inquiry. Questions such as ‘what to repair?’²³ ‘what form should reparations take?’ ‘how and who should finance reparations?’ ‘how far should we go in dealing with the past through reparations?’²⁴ have been answered differently by different scholars. Some discussed the issue of reparations as a form of accountability or considered prosecutions as a form of reparations that gives moral satisfaction to victims.²⁵

In the TJ debate, an interdependent relationship has been acknowledged between reparations and other mechanisms of accountability and truth seeking.²⁶ Such recognition was pushed further by considering reparations as a key element of TJ,²⁷ or simply making a case for meaningful reparations as being capable to bring justice to victims, deterrence to society and preventing violations for the future.²⁸

However, not enough attention has been paid to the changing nature of the right to reparation from its association with judicial proceedings and horizontal application to its administrative nature shaped by transitional justice exigencies and its vertical application against the state under the responsibility to protect. Assuming the responsibility for gross violations without proving individual responsibility of the perpetrators, states have responded by formulating massive reparations programmes that do not necessarily take into account the proportion of the loss or harm in the granting of benefits and services, but rather depend on available resources. Thus, states have had discretion in designing and implementing such administrative reparations, as they constitute one of the other pressing needs which compete in budget allocations according to government’s

²³ S Pete & M Du Plessis ‘Reparations for gross violations of human rights in context’ in Pete & Plessis (n 1 above) 15-27.

²⁴ T Cowen ‘How far back should we go?’ in J Elster (ed) *Retribution and reparation in the transition to democracy* (2006) 17-32.

²⁵ Roberts ‘Justice and rectification’, 26-7; D Markel ‘The justice of amnesty? Towards a theory of retributivism in recovering states’ (1999) 49 *University of Toronto Law Journal* 421, 427-30; Lomasky ‘Reparations’, 33 quoted in Freeman ‘Back to the future: The historical dimension of liberal justice’ in Pete & Plessis (n 1 above) 49; Du Plessis (n 23 above) 149.

²⁶ UN-OHCHR (n 17 above) 33.

²⁷ F Val-Garrijo ‘Reparations for victims as a key element of transitional justice in the Middle East Occupied Territories: A legal and institutional approach’ (2010) 6 *International Studies Journal* 39-62.

²⁸ R Mani ‘Reparations as a Component of Transitional Justice’ in K De Feyter et al. (eds) *Out of the ashes: Reparations for victims of gross and systematic human rights violations* (2005); M Freeman (n 25 above) 38-41.

priorities. This led some authors to consider reparations as a political project,²⁹ leaving aside its original and powerful judicial aspect capable of securing effective remedies.³⁰ Thus, the state's duty to make reparations based on a court order, which is unequivocal and enforceable, differs from a broad commitment to a programme of reparations. Ultimately, this study argues that TJ administrative reparations ought to leave a room for judicial avenues that may make reparations more meaningful and the obligation to provide them more binding, while securing not only vertical but horizontal reparations as well.

1.8 Research methodology

This is a desk research which applies qualitative methods. The methodology used is a case-study research on the right to reparations as applied in TJ processes in South Africa, Chile, Peru and Colombia. Strengths and weaknesses may inform lessons for Burundi.

The study relies on primary sources consisting of national laws and policies, jurisprudence of judicial and quasi-judicial bodies, commissions' recommendations and relevant policy documents, secondary sources consisting of state practice, and academic publications.

1.9 Structure

The study is divided into five chapters. Chapter one sets an introduction to the study and clarifies the common concepts used in the study, particularly, the 'right to reparations' and 'vertical or horizontal application' of this right in the context of transitional justice. Chapter two discusses the right to reparations by tracing it from international law perspectives. Chapter three presents the four case studies on the right to reparations:

²⁹ De Greiff (n 11 above); R Mani (n 28 above) 77.

³⁰ On the judicial nature of the remedies, see for instance the jurisprudence of the African Commission on Human and Peoples' Rights (ACHPR) in *The case of Ilsnami v Nigeria*, Comm. 268/2003, para 42; *Interights and Others v Mauritania* (2004) AHRLR 87 (ACHPR 2004) paras 27&30; *Cudjoe v Ghana* (2000) AHRLR 127 (ACHPR 1999) para 13; *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004) para 55; *Aksoy v Turkey*, ECtHR, Judgment of 18 December 1996, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para 98; *Aydin v Turkey*, ECtHR, Judgment of 25 September 1997, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para 103.

South Africa, Peru, Chile and Colombia. The purpose here is to identify best practices and lessons that Burundi may emulate from such countries. Chapter four discusses the ongoing 'negotiations' of transitional justice in Burundi and the lessons that should be drawn for reparations design. Chapter five presents findings and recommendations of the study. Such recommendations are directed at Burundi to take lessons from South Africa, Peru, Chile and Colombia in its reparations mode of transitional justice.

CHAPTER TWO

THE RIGHT TO REPARATIONS UNDER INTERNATIONAL LAW AND THE CONTEXT OF TJ

2.1 Introduction

This chapter discusses the human right to reparations from international law perspectives. It traces its origin slightly before the emergence of the human rights movement which consecrated, in addition to states, individuals as subjects of international law. This part also scrutinises the contribution of transitional justice in the application and the nature of the right to reparations in relation to the corresponding state obligations.

2.2 Right to reparations under international law

International law was originally designed to govern interstate relations.³¹ Therefore, only recognised subjects of international law could claim reparations – i.e. states vis-a-vis other states – to the exclusion or on behalf of individuals. Thus, following the First World War, article 231 of the Treaty of Versailles held Germany solely responsible for all ‘loss and damages’ suffered by the allies and served as the basis for reparation claims made by states against conquered states for wrong committed against civilians.³² Moreover, when the Permanent Court of International Justice stated in the *Chorzow Factory case* that ‘it is a principle of international law that the breach of engagement involves an obligation to make reparation in an adequate form’,³³ it referred to interstate reparations and not to possible claims by individuals.

After the end of the Second World War, individuals were additionally recognised as subjects of international law, especially for their protection as they were the main victims of the new type of conflicts.³⁴ Subsequently, it became possible to bring an

³¹ Pete & Du Plessis (n 22 above) 11.

³² As above.

³³ 1927, PCIJ (Ser. A) No 9, 21.

³⁴ For an account of the changing theory of conflicts, see Y Spies ‘The changing nature of international conflicts’ (2011) unpublished class notes. Estimating that 10 civilians die for every fighter killed in battle.

individual claim for reparations before either national courts or an international forum for harms suffered due to the conduct of the state or its agents.

The first legal document to recognise the individual right to redress is the Paris Agreement on German Reparations concluded in January 1946. This document included a clause allocating a share of war reparations for stateless 'non repatriable' victims of Nazism.³⁵ Although the Agreement seemed to dismiss individual claims in general,³⁶ it recognised claims by individual refugees against the future German government.³⁷

Further, victims' right to reparations has been also considered a key element of the human rights system, albeit the fact that it was not always explicitly mentioned in human rights instruments as an individual right.³⁸ These instruments emphasise the state's duty to make reparation for violation of rights.³⁹ However, it is submitted that duties of the duty-bearer and entitlements of the rights-claimer are two sides of the very same reality. As Val-Garijo writes,⁴⁰

[S]uch duty is but the other side of a legal relation involving the violating party and the ... victims, who will ultimately be individuals. Such individuals, then, have the right to obtain the reparation owed by the violating party, an assertion rooted in a general principle of law, (...).

This general principle informs international law as whole, but its interpretation and enforcement vary depending on the branch of international law and the extent to which this branch protects the rights of the individual.⁴¹ Therefore, I conclude that, as human

³⁵ Pete & Du Plessis (n 23 above).

³⁶ JM Hankaerts & L Doswald-Beck (eds) *Customary international humanitarian law* (2005) Vol II, 3531.

³⁷ Art 8 (1) of the 1946 Paris Agreement on Reparations from Germany quoted in Hankaerts & Doswald-Beck (n 36 above).

³⁸ Val-Garijo (n 27 above) 41.

³⁹ As above.

⁴⁰ As above. See also N Roht-Arriaza (ed) *Impunity and human rights in international law and practice* (1995) 17, noting that the obligation to make reparations is 'among the most venerable and most central of legal principles', quoted in Musila (n 21 above) 447.

⁴¹ As above. A similar argument of the self-evidence of the right to remedy has been used to justify the absence of specific provisions on the right to reparations in the African Charter on Human and Peoples' Rights. See Musila (n 21 above).

rights law and international humanitarian law (IHL) are the two bodies of norms that seek the most to protect individuals, the reference they clearly make to the state's obligation to ensure an effective remedy amounts to an explicit recognition of the individual's right to reparations.

Given the distinction that can be drawn between the right to a remedy and the right to reparations⁴² because of the use of the two expressions in human rights instruments, the Human Rights Committee has made the interconnectedness clear that 'without reparation ... the obligation to provide an effective remedy...is not discharged.'⁴³

The right to reparations is recognised under different human rights and IHL instruments,⁴⁴ some instruments referring specifically to compensation.⁴⁵ The latter has been underscored by the UN Security Council,⁴⁶ the jurisprudence of the treaty bodies,⁴⁷ regional human rights courts,⁴⁸ and authoritative scholars.⁴⁹ Further, the International

⁴² It has been argued that the right to remedy is a procedural right to seek redress in a court of law, whereas the right to reparation refers to the substantive outcome that will be awarded.

⁴³ Human Rights Committee, General Comment No 31, para 16.

⁴⁴ Art 8, Universal Declaration of Human Rights (Universal Declaration); art 2(3), International Covenant on Civil and Political Rights (ICCPR); art 6, International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD); art 14, Convention Against Torture and Other Cruel, Degrading Treatment or Punishment (CAT); art 39, Convention on the Rights of the Child (CRC); art 3, Hague Convention Respecting the Laws and Customs of War on Land (The Hague Convention); art 91, Protocol I to the Geneva Conventions relating to the Protection of Victims of International Armed Conflict (Geneva Protocol I or Protocol I), etc.

⁴⁵ Art 9(5), ICCPR; art 14(1), CAT; art 24 (4), International Convention on the Protection of All Persons Against Enforced disappearance (ICPED); art 15, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; arts 15(2), 16(4) & 16(5) of the International Labour Organisation, Convention No 169 Concerning Indigenous and Tribal peoples in Independent Countries; art 5 (5), European Convention for the Protection of Human Rights and Fundamental Freedoms; art 10, American Convention on Human Rights; art 21 (2), African Charter on Human and Peoples' Rights.

⁴⁶ Already in 1990s, the UN Security Council stated that 'the work of the International Tribunal shall be carried out without prejudice to the right of victims to seek through appropriate means, *compensation* for damages incurred as a result of violations of international humanitarian law.' See S/Res/827(1993) (my emphasis).

⁴⁷ HRC, General Comment No 31, para 16; *Junior Leslie v Jamaica*, communication 564/1993 (HRC 1998) para 11; *Madoui v Algeria*, communication 1495/2006 (HRC 2008) para 9; *Celis Laureano v Peru*, communication 520/1993 (HRC 1996) para 10.

⁴⁸ *Aksoy v Turkey*, application 21987/93 (ECtHR 1996) para 112(a); *Saloman v Turkey*, application 21986/93 (ECtHR 2000) para 137; *Merchants v Colombia*, judgment, Ser C no 109 (IACtHR 2005) para 250; *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) para 174.

Court of Justice confirmed the individual right to reparations by stating that 'Israel has the obligation to make reparation for the damage caused to all the *natural or legal persons*'.⁵⁰ Arguably, this is also attributable to the shifting focus of international criminal justice,⁵¹ and an emergence of a new morality, focusing on victims in international relations, pointed out early in 21st century by some scholars.⁵²

This focus on victims' rights can be found in the Rome statute and in the statutes of other international courts or tribunals. The Rome Statute guarantees reparations and victims' rights to participation, while offering a 'paradigm shift' from retributive justice to restorative justice.⁵³ Article 75 requires the Court to establish principles relating to reparations, and where appropriate the Court may order that the award for reparations be made through the Trust Fund provided for in Article 79.⁵⁴ The procedure for reparations can be triggered by the victim's application submitted to the Registry under Rule 94, or in exceptional circumstances by the Court on its own motion under Rule 95. Pursuant to Rule 97, the Court may grant reparations on an individual or collective basis.

This victim-orientated goal was underscored where the Court stated that one of the main aspects of its mandate is 'to provide justice for victims by ordering measures

⁴⁹ LN Henderson, 'The Wrongs of victims' rights' (1985) 37 *Stanford Law Review* 937-1007, where he observes that 'while many propositions advanced on the behalf of past victims may be of marginal concern to them, *compensation* for injuries can be of central importance. If victims have 'rights,' the right to recover from the wrongdoer is the most tenable individually based right.' See R Hofmann 'Reparations for victims of war and non-state actors?' (2007) 32 *South African Yearbook of International Law* 293.

⁵⁰ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I. C. J. Reports 2004, para 152-153.

⁵¹ Roht-Arriaza (n 2 above) 9-13; RG Teitel 'Transitional Justice Genealogy' (2003) 16 *Harvard Human Rights Journal* 69-94.

⁵² E Barkan *The Guilty of Nations. Restitutions and negotiating historical injustices* (Baltimore – London: The Johns Hopkins University Press, 2000); RL Brooks (ed) *When sorry isn't enough. The controversy over Apologies and Reparations for Human Injustice* (New York – London: New York University Press, 1999) quoted in R Ludi 'Historical reflections on Holocaust reparations' in Pete & Du Plessis (n 1 above) 120-121.

⁵³ See arts 68 to 75 & 79 of the Rome Statute of the International Criminal Court (ICC or Rome Statute); See also in general GM Musila 'Restorative justice in international criminal law: The Rights of victims in the International Criminal Court' (2009) Phd Thesis, University of the Witwatersrand, Johannesburg.

⁵⁴ Art 75 provides for restitution, compensation or rehabilitation that may be ordered after hearing representations of all interested parties, including victims. See Art 75(1), (2) & (3) of the Rome Statute.

geared towards full repair of harm suffered by them.⁵⁵ Arguably, the reference to the Principles as ‘appropriate guidance’ for the definition of a ‘victim’ in the *Lubanga* case,⁵⁶ and the inclusion of the Principles’ forms of reparations in the Convention for the Protection of all persons against enforced disappearances adopted in 2006 gives them the status of customary international law.⁵⁷

In the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), victims may be granted reparations according to Rule 106 of the Rules of Procedure and Evidence of the ICTY and ICTR.⁵⁸ However, unlike the ICC, the ICTY and ICTR require victims claiming reparations to bring an action before a national court or other competent body. Articles 24(3) of the ICTY Statute and 23(3) of the ICTR Statute indicate that a Trial Chamber may order return of property and proceeds acquired by criminal conduct. Rule 105 of the ICTY Rules of Procedure and Evidence regulates restitution. In the Special Tribunal for Lebanon, article 25 of the Statute of the Special Tribunal for Lebanon allows also for reparations to the victims.⁵⁹

Admittedly, however, the development of reparations as a full-fledged right under international law really came into its own with the adoption of the Principles by the General Assembly,⁶⁰ in which the individual right to reparations is systematically and

⁵⁵ Situation in the DRC in *The Case of Prosecutor v Thomas Lubanga Dylo*, Decision on victims’ participation No ICC-01/04-01/06 (18 January 2008).

⁵⁶ As above.

⁵⁷ TV Boven ‘The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’ *United Nations Audiovisual Library* (2010) 5, available at <http://www.un.org/law/av1> (accessed 12 April 2011).

⁵⁸ Rule 106 of the 2010 Rules of Procedures and Evidences of the ICTR, available at <http://www.unictl.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf>, and the ICTY available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf (accessed on 26 October 2011.)

⁵⁹ For further studies on reparations to victims in international criminal courts or tribunals, see A Cassese *International Criminal Law* 2 ed (2008) 422-423; C Muttukumaru, ‘Reparation to victims’ in Roy S Lee (ed) *International Criminal Court: The making of the Rome Statute –Issues, negotiations and results* (1999) 262; I Bottiglierio *Redress for victims of crimes under international law* (2004); S Zappala ‘Reparations to victims’ in A Cassese (ed) *The Oxford companion to international criminal justice* (2009) 487 - 489.

⁶⁰ n 4 above. The Resolution was a result of the work of the Special Rapporteur Theo Van Boven.

comprehensively developed.⁶¹ The Principles draw much on the Draft Articles on State Responsibility,⁶² which can also serve as a basis for individual reparations claims.⁶³ While Principle 11 provides that ‘the right to a remedy [...] consists of the victim’s right to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparations mechanisms’, Principles 18 to 23 detail different forms of reparations. These include restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition.⁶⁴ Therefore, although the Principles do not create new obligations, they add an important value to the international regime of the right to reparations.

First, they take into account the two dimensions of the right to reparations, namely the procedural and substantive aspect.⁶⁵ Secondly, they provide for a broad definition of the term ‘victim’ to include persons who individually and collectively suffered harm as a consequence of conducts that constitute gross violations of international human rights law or serious violations of IHL.⁶⁶

The Principles extend this definition to the immediate family or dependants of the direct victim and persons who suffered harm in intervening to assist victims in distress or to prevent victimisation.⁶⁷ They further recognise the individual and collective dimension of victimhood.⁶⁸

Reparations must be proportional to the harm so as to wipe out all consequences of the violation, the principle being *restitutio in integrum* i.e integral reparation. However,

⁶¹ Val-Garido (n 27 above) 45.

⁶² Draft Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility) adopted by the International Law Commission in 2001. Boven discusses the Articles on State Responsibility in his study submitted together with the Principles in his Report as a Special Rapporteur. See E/CN.4/Sub.2/1993/8 (2 July 1993) 16.

⁶³ Art 33 (2) of the Draft Articles on State Responsibility states that: ‘This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State’.

⁶⁴ n 4 above, Principle 18.

⁶⁵ The procedural dimension of the right to reparation entails ‘access to justice’, which means an effective judicial remedy as provided under international law. Practically, it is the right to fair and impartial judicial proceedings. See n 27 above, 46.

⁶⁶ n 4 above, Principle 8 .

⁶⁷ As above. This reflects the distinction between direct and indirect victims.

⁶⁸ As above.

the practice of reparations in the aftermath of widespread abuses has failed to apply this principle.⁶⁹ It is submitted that this situation is explained by the fact that TJ reshaped the nature and the application of the right to reparations.

2.3 TJ and reparations: The changing nature and application of the right to reparations

2.3.1 Reparations within the framework of TJ

TJ has been defined as the conception of justice associated with periods of political change, characterised by legal responses to confront the wrongdoings of repressive predecessor regimes.⁷⁰

While some writings rightly situate the emergence of TJ just after the World War II, by reference to the Nuremberg and Tokyo tribunals,⁷¹ TJ crystallised as a full-fledged subject of academic inquiry during the 1990s, after the end of the Cold War.⁷² At this time, rapid and simultaneous transitions from dictatorship in East and Central Europe, and the resolution of long-standing conflicts in different countries, raised the need for reckoning with the legacy of human rights violations.⁷³ TJ refers, therefore, to the variety of measures adopted in states undergoing transition. It focuses on how emerging democracies deal with such violations perpetrated under predecessor regimes, in order to deal with the past whilst stabilising the present and building the nation for the future.⁷⁴

⁶⁹ De Greiff (n 11 above) 457-458.

⁷⁰ Teitel (n 51 above) 72. Roht-Arriaza highlight the difficulties of such a definition as it does not tell us what the state is 'transitioning' to, and the fact that it is limited to a short period while transition may cover many decades. See Roht-Arriaza (n 2 above) 1-2.

⁷¹ S Ratyner & J Abrams *Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy* (1997) quoted in Mani (n 28 above) 54; Teitel (n 51 above) 70.

⁷² Mani (n 27 above) 53; Roht-Arriaza (n 2 above) 1.

⁷³ JE Mendez 'In defense of transitional Justice' in AJ McAdams *Transitional justice and the rule of law in new democracies* (1997) 2-4.

⁷⁴ These measures have evolved over the time and reshaped TJ models from the primary focus on criminal accountability associated with universal values of human[ity] rights to alternative goals of forgiveness and politics of reconciliation dictated by particular political and legal conditions and driven by local institutions promoting the ideas of amnesty and truth instead of justice. For a helpful debate, see Teitel (n 51 above) 69-94.

Even when defined in a narrow perspective, TJ mechanisms encompass formal reparations programmes.⁷⁵ Indeed, many discussions about reparations have arisen in post-conflict situations, within the TJ debate.⁷⁶ Thus, among the challenges of how to address past human rights violations emerges the question of how to redress the harm caused by the violation.

The Principles establish a twofold right to a remedy and reparations which encompasses a procedural aspect, access to justice and access to information; and a substantive aspect – adequate and effective reparations in various forms.⁷⁷

TJ has partly responded to the procedural aspect of the right to reparations. Seeking to hold the previous regime accountable by strict application of international criminal law through trials, the first generation⁷⁸ of TJ – referred to as the Nuremberg model – secured the access-to-justice component of the right to a remedy.⁷⁹ However, it was questioned whether international accountability is always responsive to the local needs of domestic ownership and social justice.

The second generation reacted to the dilemmas and irregularities generated by the previous model. It was questioned whether deterrence is better advanced by international accountability, which was viewed as highly selective and less promoting the rule of law, as required by national political conditions.⁸⁰ In reaction to that, the second generation of TJ underscored local context and domestic institutions. Peace and reconciliation took precedence over the labelled ‘incompatible’ values of accountability and justice. Beyond individual victims, the important goal was to heal the entire society at the price of individual criminal responsibility that was deemed to be a threat to

⁷⁵ Roht-Arriaza (n 2 above) 2, discussing the broad and narrow definitions of TJ.

⁷⁶ S Parmentier & K De Keytser ‘Introduction’ in De Feyter (n 28 above) 1.

⁷⁷ Principles 11 & 18.

⁷⁸ On different generations of TJ, see Teitel (n 51 above) 72-93, situating the first phase of TJ between the end of World War II to the end of the Cold War, the second from 1990s to the end of the 20th Century and the last and current phase began with the 21st Century.

⁷⁹ Mani (n 28 above) 62.

⁸⁰ JE Mendez ‘In defense of Transitional Justice’ AJ McAdams *Transitional justice and the rule of law in new democracies* (1997) 8-22; Teitel (n 51 above) 74-75.

stability.⁸¹ The prominent feature adopted as the 'second-best' alternative was the mechanism of truth commissions (TCs).

This second phase of TJ served the right to reparations in its component of access to information. TCs secured the right to truth as a component of reparations. Amnesties, where granted, undermined however the access-to-justice component of the right to remedy, and consequently the possibility of meaningful reparations that may have been ordered by courts. Broadly speaking, the general design of TJ under its second phase deprived the administration of the TJ response in general, and particularly the right to reparations, from the legality associated with judicial proceedings'.⁸²

Therefore, it is contended that TJ processes have sacrificed the procedural aspect of the right to reparation as developed in the Principles. Access to justice for securing substantive reparations has been overtaken by political programmes of reparations.⁸³ Consequently, this has weakened victims' claims, downplayed by a formal or practical denial of legal actions that may have secured meaningful reparations through judicial proceedings.⁸⁴ The 'judicial truth' was substituted by a 'political truth', for the purpose of securing a negative peace required by a highly volatile situation.⁸⁵ The perpetrators were often the powerful persons whose cooperation was deemed essential for bringing an end to the conflict or the authoritarian regime to step down.⁸⁶ This enhanced the need for either power sharing, amnesties or safe exile.⁸⁷

The third generation of TJ – associated with a parallel run of truth and justice⁸⁸ – is securing the right to remedy in its procedural dimension. However, access to justice

⁸¹ See for a thorough discussion Roht-Arriaza (n 2 above) 2-8; Teitel (n 51 above) 81-82.

⁸² Teitel (n 51 above) 89.

⁸³ TCs merely recommended administrative reparations.

⁸⁴ This was the case in South Africa where the Promotion of National Unit and Reconciliation Act 34 Of 1995 rejected the individual right to file a civil or criminal lawsuit against perpetrators or against the State for civil damages. In Chile, different laws guaranteed the compatibility of reparation grants with a judicial action, but the Supreme Court ruled against judicial claims for reparations where the claimant had already benefited from reparations policy.

⁸⁵ Mani (n 28 above) 55. She opposed negative peace, referred to as the post-conflict relative stability, to the positive peace – referred to as the long-term peaceful and just society.

⁸⁶ Mendez (n 80 above) 4.

⁸⁷ As above.

⁸⁸ Roht-Arriaza (n 2 above) 8-9.

promoted by the next generation of TJ is still failing to secure integral reparation for political reasons or practical obstacles, despite the influential pro-victims activities of the Victims' Fund of the ICC.

2.3.2 'Reshaping' effect of TJ on the nature and the application of the right to reparations

Individual human rights have been reshaped by transitions as a result of the historical, socio-political conditions associated with the context of TJ.⁸⁹ The right to reparations does not stand as an exception to this rule, and has been affected both in nature and in application throughout the three phases of TJ.⁹⁰

First, TJ as a field has heightened new principles that differ from the intuitions we had of compensatory or corrective justice.⁹¹ The conception of the rule-of-law values has changed, moving from an over-investment in legal principles of accountability and human rights, to the principles of nation-building, community healing and collective responsibility.⁹² Teitel highlights the fact that transitional reparations measures recognised individual victims without individuating wrongdoing and presumed the liability of the successor regime for the wrongful acts of previous government.⁹³ Therefore, not only the legality and the legitimacy of the individual right to reparations against identified perpetrators has been weakened, but in some instances the right to secure civil and criminal damages, through litigation, was explicitly 'outlawed'. If this was not the case, designed reparations were far from being what would have been declared due to the victims by a court of law. Considerations of distributive justice in present and future have overridden victims' claims for backward-looking justice.⁹⁴ Admittedly, TJ reparations,

⁸⁹ See A Paige 'How "Transitions" reshaped Human Rights: A conceptual history of transitional justice' (2009) 31 *Human Rights Quarterly* 321-367

⁹⁰ Teitel (n 51 above) 72-93.

⁹¹ The leading principle is no more *restitutio in integrum* i.e integral reparation, but to provide benefits and services to victims that alleviate their sufferings and, more importantly, prevent violations and victimisation in the future.

⁹² The idea of collective responsibility that justifies state massive reparations was strongly supported by Hannah Arendt in rejection of the notion of collective guilty considered as a plea of irresponsibility. See A. Schaap 'Subjective Guilt and Collective Responsibility: Jaspers, Arendt and the "German Problem"' quoted in Mani (n 28 above) 81.

⁹³ RG Teitel *Transitional Justice* (2000) 146.

⁹⁴ Roth-Arriaza makes a similar point (n 2 above) 3.

bearing little or no relation to the material loss, are not truly compensatory from a legal viewpoint.⁹⁵

Secondly, the right to reparations in peacetime context may not fall in the same 'generation' of rights as TJ reparations. First-generation rights impose specific and easily 'implementable' obligations upon states.⁹⁶ Thus, some have qualified these civil and political rights as 'freedoms', given that they mainly impose negative duties on the state: to refrain from interfering with the enjoyment of the rights or ensure that third parties are not undermining their realisation.⁹⁷ Consequently, states have an obligation of result, i.e immediate realisation, as opposed to an obligation of conduct, i.e progressive realisation that give rise economic, social and cultural rights, due to resources constraints. Thus, with regard to the second-generation rights, the state's duty to fulfil entails positive obligations to take reasonable steps to ensure a *progressive realisation* of these rights within its available resources.⁹⁸

Admittedly, the right to a remedy and reparations is function of access to justice and to fair procedures which would secure substantive damages.⁹⁹ As such, it may be classified as one of the first-generation rights. It imposes on the state a negative attitude to refrain from limiting access to justice of victims for the sake of obtaining remedies. Consequently, it entails one of these state's obligations of immediate effect. However, TJ reparations have not been considered as giving rise to state's negative obligations immediately claimable. Judicial reparations have been neglected at the expense of

⁹⁵ Teitel (n 93 above) 146.

⁹⁶ Immediate realisation of civil and political rights, as compared to progressive realisation of socio-economic rights. See Human Right Committee (HRC), General Comment No 31 and Committee on ESCR, General Comment No 3.

⁹⁷ The negative duties result from the state's obligation to respect the rights, whereas the duty to ensure respect of the rights by private persons or entities may of course give rise to positive obligations: to take administrative, legislative and judicial measures or to prevent, punish, investigate or redress the harm caused by the violation. See HRC, General Comment No 31, paras 7-8.

⁹⁸ Art 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); UN Committee on ESCR, General Comment No 3, para 2 (my emphasis).

⁹⁹ In addition to the fact that UN treaty bodies (HRC) and Regional human rights (quasi-) judicial bodies (African Commission on Human and Peoples' Rights and the European Court on Human Rights) insist on judicial remedies and leading scholars have asserted that reparations entail twofold intertwined dimension. See D Shelton 'The UN Basic Principles and Guidelines on Reparations: Context and content' in De Feyter (n 28 above) 20-21. Discussing how the remedial right is naturally associated with access to justice and substantive remedies.

political programmes of administrative reparations. Not only have states had a positive obligation to provide reparations, but with the competing needs of reconstruction, the state's duties have become obligations of conduct than of result.¹⁰⁰ In other words, as it is the case for socio-economic rights, states' reparations programmes have been hostage of resources constraints. As the case may be for socio-economic rights, the positive obligation to make TJ reparations and the corresponding victims' right has been considered as the one to be realised step by step.

Moreover, the politics of reconciliation and amnesty-like legislations downplay the importance of reparations. This raises the question whether one could talk of a 'right' where it is not claimable before a court of law, a situation which has been qualified as a 'right without remedies'.¹⁰¹

Thirdly, TJ is associated with considerations that are conducive to politicisation of the law.¹⁰² Therefore, TJ reparations take into account not what is proportionally appropriate so as to wipe out all consequences of violation, but what is deemed symbolically and morally appropriate for a political reconciliation.¹⁰³

The right to reparations has also changed in its application. Originally claimed between states, it involved a horizontal application between equal subjects of international law- the states. With the emergence of the human rights movement in international law, the individual right to reparations has been recognised.

In normal context then, the right to reparations was enforced horizontally against an identified violator. Even when the perpetrator was an agent of state, the rule of law obliges the court to treat both parties equally.¹⁰⁴ However, TJ brought new considerations due to the systematic and systemic character of widespread violations, the difficulties to establish individual responsibilities¹⁰⁵ and the unwillingness or inability

¹⁰⁰ Bearing in mind this less compelling nature of transitional justice reparations, symbolic reparations become more visible in a context of scarce resources. See De Greiff (n 11 above) 70.

¹⁰¹ Teitel (n 93 above) 147.

¹⁰² Teitel (as above). Stating that in transitional practices, the law in its reparatory function advances purposes that are explicitly political.

¹⁰³ De Greiff (n 11 above) 454; P De Greif 'Justice and reparations' in J Miller & R Khumar *Reparations: Interdisciplinary inquiries* (2007) 156-157.

¹⁰⁴ For the interest of justice, the relationship between the parties is kept horizontal by the Court.

¹⁰⁵ The judiciary system lacks capacities or has been so involved in the violations that it is no more trusted.

of the perpetrators to provide reparations. Among the state's obligations, the duty to protect serves as a ground on which reparations are due.¹⁰⁶

TJ reparations involve, therefore, a vertical relation between the victim and the state. This ground, I argue, also justifies the weakness and difficulties of the victims' reparations claims against a government that was not responsible of past violations, assuming the liability of reparations without individuating responsibilities,¹⁰⁷ while facing challenges of building a more just future. As a result, reparations were neglected for future-oriented policies.

Hopefully, the focus of victims' rights in the ICC and in the Principles will have positive effect on transitional reparatory justice. Reparations to be designed in the new generation of TJ should rehabilitate the right to reparations from the neglect that it has been dealt with so far.¹⁰⁸

In summary, I have explored, in this chapter, the place of the right to reparations under international law and how the individual right evolved and was reshaped by TJ context. The main conclusions are that while the right to reparations has been recognised in international law as arising a state's obligation of result in instances of violation of a right: to provide effective remedy and reparations, TJ has reshaped the nature of the state's obligation. The same duty shifted in an obligation of conduct that states in transition realise to the extent of the possibilities offered by available resources, on which there are other competing and equally pressing needs. Downplaying the judicial dimension of reparations, states have taken the responsibility to provide reparations vertically to victims without individuating responsibilities of the violations, on the ground of the duty to protect that the state failed to secure during the period of gross violations of human rights. The horizontal reparations that victims would have secured either through civil litigation or in amicable settlements against perpetrators or accomplices of the violation, have until now not been successful.

In the following chapter, I proceed with an assessment of how these factors have been applied in South Africa, Chile, Peru and Colombia.

¹⁰⁶ Teitel (n 96 above) 146; stating that [transitional] reparatory [justice] understandings imply state assumptions of responsibility.

¹⁰⁷ As above.

¹⁰⁸ Mani makes a strong case for reparative justice that may be more suitable than restorative and transformative justice. See n 28 above, 78-80.

CHAPTER THREE

ACHIEVING THE RIGHT TO REPARATIONS IN TJ IN SOUTH AFRICA, CHILE, PERU AND COLOMBIA: CASE-STUDIES

3.1 Introduction

This chapter discusses how the factors described above have impacted on reparations in South Africa, Chile, Peru and Colombia. After depicting the political and legal frameworks, the chapter explores the relationship that reparations generated between the victim and the state. It considers, too, whether reparations policies allowed for judicial remedies or not. Finally, I conclude in every case study with an evaluation of the strengths and weaknesses.

3.2 Delivering reparations in South Africa: A long and winding road

3.2.1 Context

The South African process of negotiating the end of apartheid was locally driven, without or with little external influence.¹⁰⁹ As the apartheid regime had become impossible to sustain around 1980s-1990s, with a widespread and state-sponsored violence perpetrated both by the apartheid regime and the liberation movements,¹¹⁰ formal negotiations started in 1990s after the announcement of the liberation of all political prisoners and the unbanning of antiapartheid organisations.¹¹¹ Apartheid has been qualified as a crime against humanity.¹¹² It institutionalised both physical and structural inter-racial violence in form of killings, torture, disappearances, exploitation, systemic subjugation, land dispossession, population transfer, categorisation in racial groups where white were legally ensured domination, and other forms of discrimination on racial and ethnic grounds.¹¹³ The apartheid rule during which gross and systematic violations of human rights were committed and the negotiations to transit from this situation to

¹⁰⁹ CSVR 'Negotiating transition: The limits of the South African model to the rest of Africa' (2009) 7 Seminar report.

¹¹⁰ These include *Inkata* Freedom Party (IFP), African National Congress (ANC), etc.

¹¹¹ CJ Colvin 'Overview of the reparations programmes in South Africa' in De Greiff (n 11 above) 177.

¹¹² General Assembly Resolution 3068(XXVIII), art.1. See also Report of the South Africa TRC, vol1, ch 4, 94 (appendix).

¹¹³ For a historical account of apartheid and the kind of victimisation it produced, see South African Truth and Reconciliation Commission Report, Vol. 1, 24-44.

democracy were ended by the first democratic elections held in 1994, which were won by the African National Congress (ANC).

However throughout the negotiation process, the issue of amnesty for perpetrators captured more attention than reparative guarantees for victims. Reparations were sporadically discussed but no clear policy was ever codified during the peace talks.¹¹⁴ The negotiators only considered the possibility of offering opportunity for storytelling to victims and truth-telling by perpetrators.¹¹⁵ Therefore, the least that can be said is that reparations were included in the process only as an afterthought on which no much attention had been focused.¹¹⁶

3.2.2 Legal and policy framework

Although reparations were not a major concern for those who negotiated the end of apartheid, they appeared in the Interim Constitution in a paragraph before the amnesty provisions, but only in abstract terms without any legal character. It was stated that the abusing effects of apartheid ‘can now be addressed on the basis that there is a need for understanding, but not for vengeance, a need for reparations but not retaliation, a need for *Ubuntu* but not for victimisation’.¹¹⁷

This explicit reference to reparations was removed from the final 1996 Constitution, which maintained the only provisions related to amnesty. The Constitution states that¹¹⁸

[A]ll the provisions relating to amnesty contained in the previous Constitution are deemed to be part of the new Constitution...for the purposes of the Promotion of National Unity and Reconciliation Act, 1995 (Act 34 of 1995) [the Act] as amended, including for the purposes of its validity.

¹¹⁴ Colvin (n 111 above) 178. Reparations were brought to the agenda of the negotiations by academics and the civil society. See J Torpey *Making whole what has been smashed: On reparations politics* (2006) 143.

¹¹⁵ Colvin (n 111 above) 178.

¹¹⁶ As above; See also J Torpey (n 114 above) 136; O Makhalemele ‘Still not talking: The South African government’s exclusive reparations policy and the impact on the R30 000 financial reparations on survivors’ in Ferstman (n 21 above) 543.

¹¹⁷ South African Interim Constitution, 1993, Postamble.

¹¹⁸ South African Constitution, 1996, Schedule 6, s 22.

It has been contended, however, that the validity of the amnesty provisions upheld by the Constitutional Court provides a basis for reparations.¹¹⁹ But this is only an interpretation of the Court's ruling which maintained that:¹²⁰

[T]he reparations authorised in the Act are not alien to the [amnesty] legislation contemplated by the [Postamble]. Indeed, they are perfectly consistent with, and give expression to, the extraordinary generous and imaginative commitment of the Constitution to a philosophy which has brought unprecedented international acclaim for the people of our country.

This is not the sole possible interpretation, as elsewhere the Court has not explicitly acknowledged the link between amnesty provisions and individual reparations. Adopting a wider conception of reparations, Justice Mohamed used a language which allowed for the government to overrule the needs of the victims in favour of the reconstruction of the whole society. Mohamed's decision states that:¹²¹

The election of the makers of the Constitution was to permit Parliament to favour the 'reconstruction of society' involving in the process a wider concept of 'reparations', which would allow the state to take into account the competing claims on its resources.

However, in a minority judgment,¹²² Justice Didcott held that:¹²³

Reparation is usually payable by the states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those. It therefore does not contemplate that the state will go scot-free.

Further, the Act contains a number of provisions on reparations. First, the Act sets the granting of reparations as one of the objectives of the Truth and Reconciliation Commission (TRC or the Commission).¹²⁴ The latter has also the mandate to

¹¹⁹ G Marcus & M Chaskalson 'Amnesty, Pardons and Reparations Memorandum' (2002) 3, LRC, Johannesburg, quoted in Colvin (n 111 above) 186.

¹²⁰ *AZAPO and Others v the President of the Republic of South Africa and Others* 1996 8 BCLR 1015 (CC) 48 (*Azapo* case).

¹²¹ As above, 45.

¹²² TRC Report, Vol. 5, chap V, para 71: referring to Didcott's judgment to assert the legal authority of reparations in South African domestic law.

¹²³ *Azapo* (n 120 above), 62.

¹²⁴ Preamble to the Act.

recommend urgent and final reparations. Indeed, section 4 of the Act provides that in order to achieve its objectives the Commission shall recommend reparations policy to the President, including the measures for urgent interim reparations.¹²⁵

Secondly, one of the three committees created by the Act was tasked to deal with reparations. The Committee on Reparations and Rehabilitations (CRR) was to determine whether or not individuals qualified as victims for the purposes of reparations, and to 'make recommendations [to the President] which may include urgent measures ..., as to appropriate measures of [final] reparations to victims.'¹²⁶

Thirdly, the Act allows the President to establish a Fund from which all money payable to victims shall be disbursed.¹²⁷ This constitutes a clear basis for financial or monetary reparations that should be paid to victims.

The TRC Report includes reparations and rehabilitation policy proposals.¹²⁸ While the Commission insisted on the fact that 'it is the President and Parliament who will decide what to do with the proposals, and how to implement them',¹²⁹ its proposals consist of:¹³⁰

- urgent interim reparation (UIR),
- individual reparation grants (IRG);
- symbolic reparation, legal and administrative measures;
- community rehabilitation programmes; and
- institutional reform.

Although the TRC was reluctant before, it finally opted for financial grants either as IRG or, to some extent, UIR. The Commission argued that the payment of an amount of money will help to acknowledge the suffering of victims and to give them agency and autonomy to decide what to do with the benefits, to enable access to services and

¹²⁵ s4(f) of the Act.

¹²⁶ s25(b)(i) of the Act.

¹²⁷ s42 of the Act.

¹²⁸ Chapter V of the TRC Report.

¹²⁹ 'A summary of reparation and rehabilitation policy, including proposals to be considered by the President', available at <http://www.justice.gov.za/trc/reparations/summary.htm#top> (accessed 21 July 2011).

¹³⁰ TRC Report, Vol. 5, 175-176 & 182-195.

facilities and to subsidise daily living cost, based on their needs.¹³¹ Furthermore, 38 percent of the Commission's deponents requested financial assistance as reparations, and 90 percent asked for a range of services which can be purchased if money was made available – for example education, medical care, housing, etc.¹³²

Thus, although the CRR took the responsibility to administer the UIR programme to over 14 000 victims in urgent need,¹³³ their implementation took longer than expected.¹³⁴ Commenced in 1998, the implementation process was completed in 2001; almost three years after the first payments were made.¹³⁵ Among all forms of reparations recommended by the TRC, the issue of individual financial reparations took the centre of the debate in South Africa, and has become an indicator of the government's political, legal and moral commitment to justice for victims.¹³⁶

Engaging in an increasingly acrimonious conflict with the representatives of victims, the government stated that 'people did not get involved in the struggle for the money'.¹³⁷ The question is whether this can be a justification for the delayed government's implementation of the TRC recommendations on reparations.¹³⁸ The unfortunate fact is that government's policy on reparations has not been shared with the

¹³¹ As above, 184.

¹³² As above.

¹³³ Torpey (n 114 above) 145; See Colvin (n 111 above) 189.

¹³⁴ Colvin (n 111 above) 188-189.

¹³⁵ The CRR decided to take the responsibility for processing reparations applications instead of waiting for the delayed implementing body – the President's Fund. See Torpey (n 114 above) 146. See also, W Orr 'Reparations delayed is healing retarded' in C Villa-Vicencio & W Verwoerd (eds) *Looking back, reaching forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000) University of Cape Town Press; Y Sooka 'The unfinished business of the TRC' in B Hamber and T Mofokeng (eds) *From rhetoric to responsibility: Making reparations to the survivors of past political violence in South Africa* (2000) 2, quoted in Colvin (n 111 above) 189.

¹³⁶ CJ Colvin 'Overview of the reparations programmes in South Africa' (2003) Centre for the Study of Violence and Reconciliation, Cape Town, p. 29 quoted in Torpey (n 114 above) 145.

¹³⁷ As above, 146. See also Comments by President Thabo Mbeki where he stated that '*What do we understand by reparation? Did our people engage in a gigantic struggle...with the prospect of financial reward in their minds?...any such suggestion is an insult to them and to all of us who enjoy the freedom that they fought for.*' President T Mbeki, May 2000, Parliament; in Sooka (n 135 above) 29; JJ Llewellyn 'Doing justice in South Africa' in E Doxtader & C Villa-Vicencio (eds) *To repair the irreparable: Reparation and reconciliation in South Africa* (2004) 181.

¹³⁸ On the urgency to implement reparations, see Llewellyn (n 137 above) 178-180.

public, which attracted criticism from the victims' organisations.¹³⁹ Only in 2003, victims who testified before the TRC received a once-off final reparations grant of R30 000. This was totally different from the TRC's recommendation that payments should be made each year for six years.¹⁴⁰

Up until 2011, the reparations grants are still controversial.¹⁴¹ The recent publication of the Department of Justice and Constitutional Development's proposals on health and education benefits in the Government Gazette in May 2011 - Notice 282 Regulations - were criticised from victims' organisations in the South African Coalition for TJ (SACTJ).¹⁴²

In sum, the fight between representatives of victims and civil society on the one hand, and the government on the other hand has been characterised as a 'call and response'. This means that where government officials comment on one aspect of reparations, civil society responds with its counter-arguments and pleas for consultation. The issue has been the affordability and individual focus of reparations. Another has been the representation and the comprehensiveness of the list of victims, as well as the question of consultation and participation, which are answered differently by different sides.¹⁴³

In a society where the transition was built on a social pact on the basis of exchange, namely amnesty for perpetrators, truth for the society and reparations for victims,¹⁴⁴ it makes sense for the overwhelming majority of victims who have been waiting, in vain, for reparations for years to feel betrayed, while the perpetrators who qualified for amnesty received it promptly. Reparations does much of the conciliation

¹³⁹ B Hamber 'The dilemmas of reparations: In search of a process-driven approach' in De Feyter (n 28 above) fn 40, 143.

¹⁴⁰ TRC Report, Vol V, Chap V, 175.

¹⁴¹ A TRC Unit was established in 2005 within the Department of Justice and Constitutional Development to deal with the 'unfinished businesses' of the TRC.

¹⁴² SACTJ 'Comments on education assistance and medical benefits regulations' (issued in June 2011); available at http://www.csvr.org.za/index.php?option=com_content&view=article&id=2499%3Asactj-comments-draft-regulations-department-of-justice-reparations&Itemid=37 (accessed 13 July 2011).

¹⁴³ Colvin (n 111 above) 202.

¹⁴⁴ M Mamdani 'Amnesty or impunity' in Pete & Plessis (n 1 above) 112.

work to which the transitional process aspired.¹⁴⁵ In their absence, the prospect of restorative justice is seriously undermined.¹⁴⁶

3.2.3 Vertical versus horizontal reparations in South Africa

The right to reparations can be enforced by a victim either horizontally against an individual or a non-state actor responsible of the violation, or vertically against the state for the conduct of its employees. The TRC Act provides a legal basis for reparations in South Africa on basis of which the TRC report recommended financial reparations for the victims. The recommended reparations were administrative in nature, involving a vertical relation between the State and the victims. Thus, only the State has to pay reparations and not the perpetrators.¹⁴⁷

The TRC Act, in fact, denies the victims of gross human rights violations the right of criminal or civil recourse against officials of the apartheid who have been granted amnesty.¹⁴⁸ Thus, one could say that in South Africa the right to reparations has been watered down to the status of an act of charity, one the government does not consider itself compelled to execute.¹⁴⁹

Notwithstanding the difficulties inherent to the South African common-law system to secure civil or criminal reparations for various form of loss,¹⁵⁰ the horizontal enforcement of reparations for human rights violations perpetrated during the apartheid era is still a viable option against perpetrators who have been denied amnesty,¹⁵¹ and against national and transnational companies. Such an action is being pursued in New York

¹⁴⁵ Llewellyn (n 137 above) 179.

¹⁴⁶ As above.

¹⁴⁷ B Hamber & K Rasmussen 'Financing reparations schemes for victims of political violence' in Hamber & Mofokeng (n 135 above) 61.

¹⁴⁸ See s20(7) of the Act.

¹⁴⁹ Hamber (n 139 above) 147.

¹⁵⁰ See a discussion of the statutory regime of the rights to reparations in J Pickering 'The rights to restitution, reparations and rehabilitation in a post-apartheid South Africa' in T Boven et al. (eds) *Seminar on the right to restitution, reparations and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (1992) 146-149.

¹⁵¹ On 7,116 applications for amnesty, only 1,167 have been successful. See IJR 'South African Truth and Reconciliation process' (2008) a 12-episode course on the TRC (documentary).

under the Alien Tort Claims Act.¹⁵² The action in domestic courts is still undermined not only by the amnesty, but also the special dispensation process that was enacted to grant presidential pardon to those perpetrators who did not benefit from amnesty.¹⁵³ The refusal of victims' representation during the process of granting pardons was successfully challenged by pro-victims organisation. In the case of *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 5 BCLR 391 (CC) (*Albutt case*), the Constitutional Court upheld that victims of crimes under the special dispensation are entitled to a hearing before the President makes a decision to grant pardon,¹⁵⁴ and the decision to exclude them would be inconsistent with principles and values that underlie the Constitution, namely accountability, responsiveness, openness and participation of victims in seeking to achieve national unity and reconciliation.¹⁵⁵ However, in the absence or inefficiency of judicial avenues, the state remains vertically liable to mobilise funds for meaningful reparations. The calls for a 'wealth tax' or 'reparations tax', although rejected by the government, can be a starting point to get the beneficiaries of apartheid indirectly involved in funding reparations.¹⁵⁶

3.2.4 The judicial versus non-judicial reparations

The controversial reparations grants in South Africa are non-judicial in nature. Therefore, the state's duty to provide reparations to victims in the form of financial grants, educational or health benefits, etc. remains of administrative character and cannot easily be enforced in a court of law. The state has a wider margin of discretion in adopting a programme of reparations it deems fair and appropriate, according to the different needs

¹⁵² Hamber (n 139 above) 143. Discussing the Kulhumani Support case against multinational banks and other companies which did business with the apartheid regime.

¹⁵³ Under section 84(2)(j) of the Constitution of South Africa, the President of the Republic is responsible of '...pardoning or relieving offenders...'. To deal with unfinished business with regard to amnesty, the President Mbeki announced in November 2007 a special dispensation process to grant pardon to those convicted of politically motivated crimes but who could not apply for amnesty during the TRC process. In 2008, a multiparty Reference Pardon Group was established to help the President to discharge his constitutional duties and a period of application was set from January to May 2008 (Terms of Reference for a Special Dispensation on Presidential Pardoning Process Relating to Certain Offenders).

¹⁵⁴ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 5 BCLR 391 (CC) para 74.

¹⁵⁵ *Albutt case*, para 71.

¹⁵⁶ Colin (n 111 above) 205.

of reconstruction. The sole criterion is the available resources and the competing demands for them, as spelled out by Justice Mohamed in the *AZAPO* case.¹⁵⁷

Justice Didcott added that ‘the Statute does not ... grant any legally enforceable rights in lieu of those lost by claimants whom amnesties hit’.¹⁵⁸ However, judicial reparations would have provided victims with a form of satisfaction, sent a message that certain practices will not be tolerated and will give victims an enforceable right to redress, confirmed for the future the binding nature of the norms violated, and been a strong incentive for the state to acknowledge the sufferings of victims and to design a meaningful programme of reparations.¹⁵⁹

This study does not argue that the courts have a comprehensive response to the problems raised by reparations in the aftermath of gross and systematic violations of human rights. Rather, it sees judicial action as a rights-based complement to the holistic dealing with the past.

3.2.5 Strengths and weaknesses of the South African TRC reparations

The precedence that amnesty has taken in South Africa reminds us that the transition was built on a political compromise.¹⁶⁰ Therefore, one should not expect many positive aspects of a process designed to serve the interests of those from whom a concession needed to be made for the transition to happen. But as Roht-Arriaza wrote, in some circumstances, ‘amnesties [are] inevitable concession’.¹⁶¹

One of the positive contributions of the reparations designed in South Africa is that the individual reparations acknowledge the individual autonomy and dignity by giving agency to victims who can, definitely, decide what to do with financial benefits, however small they are.

One of the criticisms of the South African model is that, although the TRC has recommended five components of the reparations policy, the debate has been reduced

¹⁵⁷ *Azapo* (n 121 above).

¹⁵⁸ *AZAPO* case, para 65.

¹⁵⁹ De Feyter (n 28 above) 490.

¹⁶⁰ Mamdani (n 144 above) 83.

¹⁶¹ Roht-Arriaza (n 2 above) 3.

to the individual financial grants.¹⁶² But this is partly justified by the government's delay and reluctance to implement the TRC recommendations, and its neglect in consulting the victims in a meaningful way.

The TRC has also been criticized for not identifying all victims entitled to reparations and for not making provision for those latecomers who could not attend TRC hearings for whatever reason. The TRC has also been taken to task for vesting the Amnesty Committee with wide amnesty-granting powers while limiting the powers of the CRR to gathering information, identifying victims qualified for reparations and making only *recommendations* of reparations policy to the President. This has made TRC process look more perpetrator-orientated than being victim-centred. This resulted in anger and frustrations in the victim community.

Lastly, the TRC reparations focused on individuals rather than on victim and perpetrator groups of the apartheid order. As such, it could not address the deep roots of apartheid and ensure an effective transition. As Mamdani wrote, the TRC failed to capture the real feature of apartheid which 'sought to reproduce two distinct identities through its legal and institutional apparatus: a racial identity amongst [whites] beneficiaries and ethnic particularism amongst [blacks] victims.'¹⁶³

This categorisation produced a group victimisation and needed a similar approach to design an adequate reparations policy. Collective reparations may have been a more suitable approach to group-rooted injustices created by apartheid. The government might have considered such approach, rather than struggling with and looking down to victims. In the meantime, UIR could have been extended to the maximum of victims and rescue those unable to wait for a comprehensive reparations plan.

¹⁶² Hamber (n 142 above) 145.

¹⁶³ M Mamdani 'When does reconciliation turn into a denial of justice?' (1998) Sam Molutshungu Memorial Lectures in Heyns & Steffens (eds) *Human Rights, peace and justice in Africa: A reader* (2006) 373.

3.3 Providing victims of a military regime with reparations in Chile

3.3.1 Political context

Chile was under the military dictatorship of Augusto Pinochet from 1973 to 1990. His reign was marked by political executions, disappearances, torture, dismissal from jobs for political reasons, political imprisonments, forced expatriation and banning to return to the countries, land expulsions, etc.

In a plebiscite held in 1988, the majority of Chileans voted for democratic elections which brought Patricio Aylwin into power as the new President.¹⁶⁴ However, members of the Armed Forces who were involved in the human rights violations committed by the previous regime remained powerful, including Pinochet who kept his position of the Commandant-in-Chief of the Army.¹⁶⁵ Before leaving office, Pinochet and his collaborators passed several laws to make it very difficult to change the structure in the administration and to allow the armed forces to keep substantive advantages and a privileged voice in the political decision-making process.¹⁶⁶ Furthermore, the 1980 Constitution distinguished between various matters to be regulated by law and, therefore, increased the obstacles for amending things which the military *Junta* deemed unchangeable in the future.¹⁶⁷ In this context, a percentage of representation in Congress was guaranteed and nine senators were appointed by the Supreme Court, the Council of National Security and General Pinochet in his capacity of President of the Republic.¹⁶⁸ This prevented the incoming government of Aylwin from having an absolute majority in both chambers.¹⁶⁹

One month after the new President took his office, a National Truth and Reconciliation Commission (NTRC or the Commission)¹⁷⁰ was created with the purpose

¹⁶⁴ E Lira 'The reparations policy for human rights violations in Chile' in De Greiff (n 11 above) 55.

¹⁶⁵ M Quiroga 'National law and practice: The experience of Chile' in Boven et al. (n 150 above) 104.

¹⁶⁶ Quiroga (n 165 above) 104.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ As above.

¹⁷⁰ The creation of the Commission was already considered a first measure of redress, by giving partial satisfaction to the relatives of the victims with regard to their right to truth. It reached the conclusion that based on overwhelming

of disclosing the all truth on serious violations of human rights, committed for political reasons by agents of the predecessor regime or by private individuals, which resulted in death or disappearances. The Report of the Commission – the *Retting* Report – of 1991 contained a chapter on reparations understood by the Commission as ‘a series of actions that express acknowledgement and acceptance of the responsibility that falls to the State due to the actions and situations presented in this report.’¹⁷¹ Although contested by the Army and the Supreme Court, the various reparations measures identified in the Report served as a basis for a Bill sent to the Congress for the implementation of these measures. The reparations were meant to restore the moral dignity of the victim, and to achieve a better quality of life for those families directly affected.¹⁷²

The Group of the Families of Disappeared Detainees (AFDD) criticised the reparations proposed by the government on the basis that the proposal presumed the death of the victims.¹⁷³ It further expressed its mistrust in the creation of a public interest corporation with no judicial faculties to investigate the whereabouts of the disappeared detainees, and condemned as unfair, the ‘single pension’ for not taking into account all family members of the victims.¹⁷⁴ The NTRC identified, in fact, different groups of victims of human rights violations and political violence: 2 298 persons died for political reasons among which 2 130 were victims of human rights violations, 168 victims of political violence, 979 persons were listed as disappeared detainees, and 634 cases for which no satisfactory conclusion was reached.¹⁷⁵

3.3.2 Legal setting

Before leaving the power, Pinochet and his team passed several laws known among Chileans as ‘*leyes the amarre*’, i.e laws to tie things up. The NTRC was established by

evidences, there had been gross and systematic violations of human rights in Chile between 1973 and 1990. Every victim was also given a copy of the report.

¹⁷¹ Report of the Chilean National Commission on Truth and Reconciliation reprinted in De Greiff (n 11 above) 732-748.

¹⁷² As above.

¹⁷³ Lira (n 164 above) 58.

¹⁷⁴ As above.

¹⁷⁵ n 164 above, 59.

the Supreme Decree 355 of 25 April 1990 to investigate ‘serious violations’¹⁷⁶ of human rights perpetrated between 11 September 1973 and 11 March 1990, and handed its final report in February 1991, which included proposals for economic, symbolic and social reparations.¹⁷⁷

Moreover, the Report’s recommendations on reparations and the proposed bill for their implementation were criticised by the civil society. But in the end, the law enacted incorporated the proposals by the AFDD.¹⁷⁸ Three categories of reparations were established: symbolic reparations, legal and administrative reforms and financial reparations. Under this last category, a monthly reparations pension of 535US\$, to be expressly requested by the victims, was established.¹⁷⁹ One compensatory bonus of 12 months’ pension was also distributed in different proportions to beneficiaries.¹⁸⁰ Law 19.123 stated that the reparations pension was compatible with any other grant, including the compensatory damages that could have resulted from civil litigation.¹⁸¹

3.3.3 Implementing the NTRC reparations proposals

The TRC recommendations were implemented by a public institution created by Law 19.123 - the National Corporation for Reparations and Reconciliation (NCRR). The proposals of the NTRC were enriched by views from the victims’ organisations, unlike in

¹⁷⁶ Serious violations were identified with disappearances, summary and extra-judicial executions, torture followed by death, as well as unsolved kidnapping and death of individuals perpetrated by private persons on political pretexts.

¹⁷⁷ Report of the Chilean NTRC, University of Notre Dame, 1993, 837-51 reprinted in De Greiff (n 11 above) 732-48. The proposals for reparations include (1) recommendations for restoring the Good Name of the people and making symbolic reparations, (2) legal and administrative recommendations, (3) recommendations in the area of social welfare (pension, healthcare, education, housing, etc), and highlight some recommendations as being the most urgent and deserving special attention from the government authorities.

¹⁷⁸ Law 19.123 that was enacted. See Lira (n 164 above) 59.

¹⁷⁹ The pension was to be divided between the surviving spouse (40%), the mother of the petitioner or in her absence the father (30%), the surviving mother or father of a victim’s out-of-wedlock offspring (15%) and each of the children of the disappeared person (15%) until the age of 25 or with no age limit in the case of disabled children (art 20 of Law 19.123). Additional cases were added to the NTRC’s list after being validated by the National Corporation for Reparations and Reconciliation, a body created to implement the NTRC’s recommendations (art. 2).

¹⁸⁰ Art 23 of Law 19.123.

¹⁸¹ Art 24.

South Africa.¹⁸² But due to the political context described above, the reparations distributed were far from what the victims were demanding, and what the government itself would have wished to deliver.¹⁸³ Material reparations included the payment of a pension, social benefits such as healthcare facilities and educational assistance and other needs.¹⁸⁴ The Commission justified the social benefits by the fact that many of the individuals who were killed or disappeared might have qualified for social benefits, which their relatives had never received or had received partially.¹⁸⁵

The NCRR had also the powers to validate new cases of victims and to investigate the whereabouts of the victims who disappeared after being arrested and of those whose bodies have not been found, although they have been legally recognised as dead.¹⁸⁶ The Corporation was taken over by the Follow-up Programme for Law 19.123, the Human Rights Programme of the Ministry of the Interior, which initiated the Roundtable discussion between 1999 and 2000, and the 2003 government's proposal of the programme to solve the pending issues related to Pinochet's era. In October 2004, Law 19.123 was amended by Law 19.980, passed for broadening and adding new benefits for the next of kin of the victims, including a 50 percent increase in the amount of the monthly pension, the empowerment of the President to grant a maximum of 200 non-contributory pensions, and for broadening the scope of the health benefits.¹⁸⁷

What counts more seems to be the political commitment of coming governments to face the issue of reparations. The permanent character of the benefits and the continuous design of reparations programmes in Chile are an example of a government which dared to confront its past, bearing in mind that 'there is no tomorrow without

¹⁸² Asserting that the patrimonial and psychological effects of many years of violations had to be redressed with money and other types of financial support, the Commission suggested that this support should be discussed with the beneficiaries, since they know better than anyone which their most urgent needs are, and which is the best way to meet them. See NTRC Report, quoted in Quiroga (n 165 above) 111.

¹⁸³ Quiroga (as above) 104.

¹⁸⁴ See the *Retting* Report, in De Greif (n 11 above) 738.

¹⁸⁵ Quiroga (n 165 above)111. The educational benefits package includes registration fees, tuition fees and a monthly stipend to help people up to 35 years to pay their daily expenses (art 29).

¹⁸⁶ Art 2(2) of Law 19.123.

¹⁸⁷ Law 19.980, published in the Official Gazette on 29 October 2004.

yesterday'.¹⁸⁸ Such a commitment can further be found in the treatment reserved to the tortured and the political prisoners.¹⁸⁹

So far the process of reparations seems to have followed four steps: the establishment of the NTRC, which resulted in the *Retting* Report and; the creation of the NCRR to implement the *Retting* Report's recommendations; and the Dialogue Roundtable established in 1999, when General Pinochet was no longer Commander-in-Chief of the Army. During this dialogue the army acknowledged its involvement in the death of Chileans thrown into the sea or secretly buried.¹⁹⁰ Later, the National Commission on Political Imprisonment and Torture was established and produced the Valech Commission's Report. All these efforts were to seek for truth, justice and to deliver reparations to the survivors.¹⁹¹ Amongst the reparations programmes, the most visible was the comprehensive healthcare for victims of human rights violations (PRAIS).¹⁹² It was, however, completed by other programmes such as reparations for returning exiles in Chile, which was meant to provide assistance for reincorporation of returnees;¹⁹³ socio-economic reparations and reincorporation of political prisoners, designed to release and support financially the former prisoners to reintegrate the society;¹⁹⁴ recognition of politically dismissed victims by granting them a minimal single pension; reparations for peasants excluded from agrarian reform or excluded from their lands, and reparations for the victims of torture and political imprisonment identified by

¹⁸⁸ The expression is the title of the Human Rights proposal submitted to the Congress in 2003 by the President Ricardo Lagos. It included measures aiming at uncovering the truth about disappeared detainees.

¹⁸⁹ The Decree creating NTRC did not allow for registering them as victims, but a reparations programme was designed for them. Quiroga (n 165 above) 114.

¹⁹⁰ The programme was headed by the Ministry of the Interior from 1999 to 2000 and resulted in an agreement with the army to deliver the whereabouts of the disappeared detainees. Six months later, 200 cases were delivered as either killed or thrown in the ocean.

¹⁹¹ Report on Political Imprisonment and Torture (2005) Chile Reports, International Press No 15, 1.

¹⁹² Lira (n 164 above) 70, stating that PRAIS represented the programme with the widest coverage throughout Chile.

¹⁹³ The programme was implemented by the National Office for Returning Exiles created by Law Num. 18.994 of August 1990.

¹⁹⁴ The *Cumplindo* Laws – referring to the then Minister of Justice Francisco Cumplindo – were enacted and a programme of economic and social reincorporation was implemented between 1990 and 1992 to do justice to political prisoners in different aspects of a fair and impartial process, including their release.

the 2003 Commission.¹⁹⁵ The different pensions were not incompatible and one could cumulate three or four pensions of different kinds.

Moreover, the NTRC recommendations in the area of social welfare were meant to repair the moral as well as the material harm that the immediate relatives of the victims have suffered from.¹⁹⁶ This wording suggests that the reparations grants sought to compensate the loss and harm suffered, taking into account the irreparable loss of a family member and what many years of searching does to a family and its fortunes.¹⁹⁷ It may also imply that the social benefits were to be distributed in instances where the violations have only led to the death or disappearance of the victim, since the report talks of 'the relatives of the victims' and not the victims. This conclusion can be corroborated by the criticism that the Commission did not include the survivors of torture and political imprisonment on the list of victims.¹⁹⁸

Regarded as measures to support a process in which the quality of life of the victim's family members is enhanced, the social welfare measures were to be permanent rather than temporary. This differs from the South African case where the six years' payment period suggested by the TRC was reduced to a one-time payment of R30 000.¹⁹⁹

Declaring that the state is under the obligation to undertake measures which support the efforts the affected families have made to seek a better quality of life,²⁰⁰ the NTRC suggested a single pension, regardless of the harm suffered and the magnitude to which the victims' family members have been affected.²⁰¹ The sole criterion was that 'the name of the person who is *the source of the right* must appear on the list in the Report'.²⁰² This

¹⁹⁵ Created in the midst of a controversial debate, the Commission on Political imprisonment and Torture received 35,000 testimonies out of 42,000 denounced detentions in a period of six months. Lira (n 164 above) 92.

¹⁹⁶ NTRC Report, in De Greiff (n 11 above) 738. This differs from the South African case where, the reparations grants paid was deemed not to repair the harm suffered but just to recognise the sufferings and the search for the improvement of victims' quality of life envisaged in the wider context of development and job opportunities. See B Hamber 'Reparations as symbol: Narratives, resistance, reticence, and possibility' in Miller & Kumar (n 103 above) 261.

¹⁹⁷ NTRC Report, reprinted in De Greiff(n 11 above) 738.

¹⁹⁸ Unless it led to death, torture was not considered as 'serious violation of human rights'!

¹⁹⁹ See section 1 above.

²⁰⁰ NTRC Report, in De Greiff (n 11 above) 738.

²⁰¹ n 11 above, 739.

²⁰² As above (my emphasis).

raised two observations. First, the NTRC suggested a formal equality with regard to all beneficiaries regardless of their socio-economic conditions and the causation link between these conditions and the damage suffered. This might have led to a situation where the impact of reparations places the beneficiaries in substantive inequalities, since their original situation was probably not the same. Second, unlike in South Africa, the set of reparations package is a right to the beneficiaries and a compelling duty upon the State. This implies a possibility of claiming reparations before a court of law for secure an order that may give an appropriate compensation. This is true to the extent that the NCRR could send the information about the facts that appear to constitute an element of a crime to the ordinary courts.²⁰³

3.3.4 Vertical versus horizontal reparations in Chile

Unlike the South African case, the Chilean reparations process left an option for claiming reparations against individual perpetrators. But the nature of violations and the context make it clear that the main perpetrator of the violations was the State. Most of the time in fact, the violations involved an agent of the State either in official capacity or secretly to avoid tracing the fate of the victims.²⁰⁴

Therefore, either claimed in civil or criminal litigation or through the administrative channel of pensions and other types of social benefits, reparations involve mainly a vertical relation between the Chilean state and the beneficiaries.

3.3.5 Judicial versus non-judicial reparations

In the Chilean reparations process, not only the different pensions are compatible with any other grant, but also none of the laws establishing the reparations programmes has explicitly stated any incompatibility between receiving the benefits and filing a civil

²⁰³ Art 4 of Law 19.123.

²⁰⁴ Roht-Arriaza described that the context of repression in Americas was that 'a large numbers of people were disappeared, picked up by official or unofficial security forces that then refused to acknowledge the detention. Almost all were killed... and ...the bodies were never found. Unofficial death squads wore civilian clothes and provided measures of deniability'. n 2 above, 3.

lawsuit against the state, to seek reparations.²⁰⁵ Although the Chilean legislation allows for civil lawsuits, the Amnesty Law Decree 2.191 of 1978 and its restrictive interpretation by the Supreme Court were obstacles almost impossible to overcome.²⁰⁶ It was after the implementation of the legal reforms proposed by the NTRC that civil lawsuits were possible. Even though there were few civil lawsuits during the years 2002 and 2003,²⁰⁷ they increased during the last months of 2002 due to the dismissal of the case against Pinochet and the fact that reparations awarded by lower courts were hundreds of times higher than the amounts of reparations pensions. In one case decided in 2002 in the 30th Civil Court in Santiago, for instance, Judge Ruben Palma Mejias ruled that the arguments of the statute of limitations or not to grant compensation because the claimant has received reparations pensions are unacceptable.²⁰⁸ However, the Fourth Chamber of the Supreme Court has upheld these arguments and set aside a lower court's ruling that ordered the payment of compensation.²⁰⁹ This was a dangerous precedent against the procedural aspect of the right to reparations, namely access to justice.

Fortunately enough, the Inter-American Court of Human Rights (IACtHR) has ruled that by obstructing the investigation and by preventing the victims and their next of kin from knowing the truth and receiving the corresponding reparations, Chile has violated the right to a fair trial and the right to judicial protection enshrined in the Convention and must ensure that Amnesty laws do not continue to hinder the investigation and prosecution of those responsible of violations in Chile.²¹⁰

²⁰⁵ Lira (n 164 above) 87. In the Americas, the IACtHR included, the action has been individual or collective, what is referred to as 'class action'. See J Garcia-Godos 'Victim Reparations in the Peruvian Truth Commission and the Challenge of Historical Interpretation' (2008) 2 *The International Journal of Transitional Justice* 66.

²⁰⁶ The Supreme Court interpreted this Decree as preventing the judge to pursue an investigation. This interpretation has been declared as constituting a violation of the right to indemnification by the Inter-American Court of Human Rights in the case of *Garay Hermosilla et al. v Chile*, case 108430, Report Num 36/96, CIDH OEA/Ser. L/V/II. 95 Doc.7 rev. in 156 (1997).

²⁰⁷ They were around 170 by 2003. See Lira (n 164 above) 89.

²⁰⁸ As above.

²⁰⁹ Lira (n 164 above) 90.

²¹⁰ The case of *Amonacid-Arellado et al. v Chile*, Judgment of 26 September 2006, paras 127, 129 & operative para 6.

3.3.6 Positive and negative aspects of the Chilean reparations

As a bad record, the Chile's economic reparations generated tensions and distortions in the communities.²¹¹ There was, in fact, a reluctance and doubt about the moral and psychological grounds of economic reparations and beneficiaries demanded that other forms of reparations contemplated by the NTRC report be implemented.

Further, some insufficiencies of Law 19.123 were left uncorrected. For example, unmarried partners of the disappeared detainees and survivors of political executions were excluded from the list of beneficiaries. Moreover, some regarded the money received as a 'privilege' and dissociated the benefits from their background and reparative perspective.

On the other side, the question of accomplices and beneficiaries of the Pinochet's dictatorship has not been raised yet. Since some companies might have done business with Chile between 1973 and 1990, one might need to investigate how they were involved in or benefited from the violations.²¹²

Despite this, many regarded the reparations programmes as successful, except for the search for disappeared detainees of which the 1 000 cases were still pending by the time NCRR came to terms.²¹³ The majority of the beneficiaries also appreciated the economic reparations, although they demanded further recognition of harms they suffered as well as the vindication of the dignity and the good names of their families.

The prominent features of the Chilean reparations remain, however, the follow-up mechanisms of Law 19.123. A continuous effort is sustained in assisting members of the victims' families,²¹⁴ and conducting judicial and extra-judicial investigation to achieve the inalienable families' right to know the whereabouts the victims.²¹⁵ The involvement of survivors in the programmes' design, coupled with the detailed character of the government reparatory projects,²¹⁶ is also worth to be celebrated.

²¹¹ Economic reparations affected negatively family relations and community networks.

²¹² As Desmond Tutu has said, this is one way of ensuring that in future, the international business companies will not support a government that violates human rights.

²¹³ Lira (n 164 above) 62.

²¹⁴ Many beneficiaries received a life pension, which guaranteed a permanent income upon which the beneficiaries could improve the quality of their life.

²¹⁵ Art 6 of Law 19.123.

²¹⁶ Different violations of human rights like disappearances and land expulsions involve different reparations programmes.

3.4 Delivering reparations in Peru

3.4.1 Context of transition

During the last two decades of the twentieth century, Peru was in a bloody conflict marked by a fanatical insurgency which led to an armed conflict and a dictatorship established in the pretense of countering terrorism.²¹⁷ The armed insurgence that triggered the conflict was led by two groups: the Maoist ‘Shining Path’ or SL that began in 1980, and the *Tupac Amaru Revolutionary Movement* or MRTA, launched in 1984.²¹⁸

While the 1980s were marked by the highest record of disappearances and displacement, the 1990s saw a growing rate of unjust imprisonments and acts of torture under the draconian laws.²¹⁹ The massive military response and the brutal actions of different groups involved in the conflict resulted in a state of emergency that was maintained by different administrations.²²⁰ It resulted in the bulk of 69 268 deaths between 1983 and 1993.²²¹ In the meantime, elected in 1990, Alberto Fujimori suppressed the civil liberties as a response to the insurgence, perpetrated a self-coup in alliance with the Army by dissolving the National Congress and declaring the judiciary in reorganisation.²²² To address the international concerns, he organised the elections that established a National Assembly with constitutional drafting powers. Adopted by referendum in 1993, the new Constitution gave strong powers to the President. Yet, the apparent normalisation did not translate into a respect for the rule of law. However, the leader of the SL capitulated after being captured in 1992,²²³ and the conflict was

²¹⁷ EG Cueva ‘The Peruvian Truth and Reconciliation Commission and the Challenge of impunity’ in Roht-Arriaza & Meriezcurrera (n 2 above) 71.

²¹⁸ Cueva (n 217 above) 72.

²¹⁹ LJ Laplante ‘From theory to practice: Implementing reparations in post-truth commission in Peru’ in BR Johnston & S Slyomovics (eds) *Waging war, making peace: Reparations and human rights* (2009) 79; see also H Munoz ‘Human rights and Social referents: The Construction of new sensibilities’ in SJ Stern (ed) *Shining and other paths: War and society in Peru 1980-1995* (1998) 447, 451-53 quoted in LJ Laplante ‘The Law of remedies and the “Clean Hands Doctrine”: Exclusionary reparation policies in Peru’s Political Transition’ (2007-8) *American University International Law Review* 70.

²²⁰ Laplante ‘From theory to practice’ (n 219 above) 79.

²²¹ Cueva (n 217 above) 72.

²²² LJ Laplante & K Theidon ‘Truth with consequences: Justice and reparations in post-truth commission Peru’ (2007) *29 Human Rights Quarterly* 232.

²²³ Conaghan 2005, quoted in Laplante ‘From theory to practice’ (n 219 above) 79.

essentially over after the destruction of a last active cell in 1997.²²⁴ Despite, erosion of political accountability, emergency measures, and abuses of powers by the intelligence services added to shadowy death squads and other crimes were the footprint of Fujimori's regime.²²⁵ As if it was not enough, the Peruvian government decided in 1999 to withdraw from the jurisdiction of the IACtHR after an adverse decision condemned the anti-insurgent criminal framework.²²⁶ The issue became a source of criticism coming from the national opposition and international observers, worsening the already undermined government's image.²²⁷ A public video displaying a corruption scandal forced Fujimori to flee to Japan in 2000 and this pushed the regime to its collapse, offering to Peru an opportunity for transition.

A truth and reconciliation commission (CVR) was created in 2001 and published its Final Report in August 2003. The Report recommended institutional reforms, criminal justice and a Plan for Integral Reparations (PIR).²²⁸ The latter contained reparations that included physical and mental healthcare, symbolic reparations, restitutions of rights, such as new identification cards, individual economic and non-economic reparations and collective reparations.²²⁹

3.4.2 Peruvian CVR Report and the promises of reparations

The PIR's overall objective was to repair and compensate victims of the conflict for the social, moral and material damage suffered.²³⁰ Specifically, it aimed at acknowledging the victimhood and re-establishing their civil rights while rebuilding the civic trust, contributing to the moral and physical recovery of victims and their relatives, and compensating economic and social damages.²³¹

²²⁴ Cueva (n 217 above) 74.

²²⁵ As above, 72-73; Laplante 'From theory to practice' (n 219 above) 80.

²²⁶ Laplante (as above) 73.

²²⁷ As above.

²²⁸ Peruvian CVR Report, 2003.

²²⁹ Lapalante 'From theory to practice' (n 219 above) 80.

²³⁰ CVR Report, Vol IX, 147.

²³¹ Garcia-Godos(n 204 above) 75.

Additionally to this design,²³² PIR extended the definition of victims as including not only those who suffered from the armed conflict but even the members of the guerillas groups – provided that the violation they suffered did not occur during the combat – and the armed forces.²³³

The CVR distinguished between two types of beneficiaries: individuals and collectivities. Collective beneficiaries include peasant and native communities and settlements collectively affected by the armed conflict through the scorched-earth strategies, forced displacement, destruction of local institutions and loss of local private and public infrastructure, such as land, cattle and houses, community houses and community services.²³⁴ As a rule, the PIR excluded from reparations all those who might have received other forms of reparations from the State in order to avoid double reparations.²³⁵ Thus, the PIR recommended a repeal of the 1999 Reparations Decree, but said that those peasants who were receiving benefits under this Decree ought to be included as beneficiaries of the reparations plan.²³⁶

One of the projects that received public attention is the Programme of Economic Reparations. According to the CVR, economic reparations symbolise an acknowledgment of the suffering and contribute to the initiation of a new social pact based on human rights and the rule of law.²³⁷ It also asserted that economic reparations show respect for the victim as individuals by providing them with opportunity to decide independently what their needs are for their subsistence and the social reproduction.²³⁸

Like in the 1999 Reparations Decree, economic reparations were in the form of reparations or pension, including services targeting specific groups of victims and their relatives as described in the CVR report.²³⁹ But for some commentators, the PIR

²³² Previously under the Reparations Decree DS 068 passed in 1999, peasants who were members of the self-defence committees known, as CADs, and who supported the armed forces in their counter-subversive strategy against the SL received benefits. But they were identified rather as members than as victims.

²³³ CVR Report, Vol IX, 149. See also Garcia-Godos (n 205 above) 75.

²³⁴ As above, 76.

²³⁵ As above.

²³⁶ This Decree provided for reparations to be granted to civilian who have supported the Army to defeat the insurgency.

²³⁷ CVR Report, Vol IX, 189.

²³⁸ As above.

²³⁹ As above, 189.

advanced the cause of non-monetary reparations and did not go far enough concerning monetary reparations.²⁴⁰ The next section explores to what extent the legal and institutional framework reflects this assertion.

3.4.3 Development of a normative framework: Delaying reparations is denying justice

Amongst its objectives the Peruvian CVR's mandate included 'making moral and material redress proposals'.²⁴¹ Although the CVR recommended comprehensive reparations with an inclusive definition of victims, the development of a legal framework was slower. Several months after the report was published, President Toledo promised only a programme of social development.²⁴² This disappointed the victims who had high expectations of the CVR.

In 2004, the government formed a commission charged with developing a programme of reparations based on the PIR. In 2005, the Plan of Reparations 2005-2006 was presented and approved by the Council of Ministers through an Executive Decree.²⁴³ However, the Plan was criticised for falling short of the ambitious reparations recommended in the PIR. In the midst of the debate, the government also issued in 2004 an Executive Decree, urging various Ministries to begin developing reparations programmes.²⁴⁴

The adoption of Law 28.592 by the Congress in July 2005 was perceived as a triumph with regard to the making of reparations. But once again, NGOs and victim-survivors were disillusioned by the lack of enthusiasm to translate the promises into reality.²⁴⁵ At stake, there were technical obstacles to implement the enacted legal

²⁴⁰ R Gamarra 'Human rights, justice and democratic transition: Institutional review' in L Magarell & L Filipini (eds) *The legacy of truth – criminal justice in the Peruvian transition* (2006) 69, 74 quoted in Laplante 'The law of remedies and the "Clean Hands Doctrine"' (n 219 above) 79 fn137.

²⁴¹ Laplante 'The law of remedies and the "Clean Hands Doctrine"' (n 219 above) 73.

²⁴² LJ Laplante, *Reparations for Justice*, 40 *LATINAMERICAPRESS* 3-4 (17 Dec. 2003) quoted in Laplante & Theidon (n 222 above) 246.

²⁴³ Laplante & Theidon (n 222 above) 246-247.

²⁴⁴ As above, 247. Preliminary reparations were granted in 8 of the most affected regions. See Laplante 'From theory to practice' (n 219 above) 82.

²⁴⁵ The PIR Law was further criticised for discriminating against victims of human rights violations, for having collaborated with subversive groups. Art 4, Law 19.123.

requirements, such as the compilation of a National Registry for all victims.²⁴⁶ Moreover, the development of a normative framework dissatisfied civil society organisations, as it relied on the personal commitment of individual ministers.²⁴⁷ This was aggravated by the Minister of Economy and Finance's reluctance to transfer funds for reparations, even when they were symbolic.²⁴⁸ The 'there-are-no-funds' argument displayed an outright lack of political will and tolerated further impunity, while the same government approved huge budgets for the military and other politically popular causes.²⁴⁹ Beneficiaries had to await the appointment of a Reparations Council in October 2006,²⁵⁰ and the government's approval of the funding for collective reparations in 440 rural communities in March 2007.²⁵¹

In sum, the promises of reparations evolved from a legal right with a corresponding State's obligation elaborated in the PIR to a kind of political and moral State's prerogative with much more discretion. This made the victim-survivors' right to reparations hostage of the political will. Additionally, prosecutions as a form of justice for victims, and the reparations they may generate, has proved not to be an easy option in Peru despite the investigation strategy of and the cases handled to the Public Prosecutor by the CVR.²⁵²

Further, the conception of justice by victims-survivors has become more restorative and reparative, insisting on delivering reparations.²⁵³ Therefore, victims' organisations have considered government's delays in to implement the PIR as a way of furthering impunity and denying justice to them.²⁵⁴ Fortunately, the implementation started with a renewed interest in the matter in 2005 by the President, but it proved to be long-

²⁴⁶ PIR, Law 28.592 (art 9) quoted in Laplante & Theidon (n 222 above) 247.

²⁴⁷ Laplante & Theidon (as above).

²⁴⁸ As above.

²⁴⁹ *Un Poco Tarde: Reglamentan Fondos para FFAA y PNP*, CORREO (3 May 2005), quoted in Laplante & Theidon (n 222 above) 247.

²⁵⁰ Provided for in the PIR Law 28.592.

²⁵¹ Garcia-Godos (n 205 above) 79.

²⁵² At the end of its activities, the CVR transmitted 42 cases of gross violations to the Public Prosecutor for prosecutions but several obstacles including political factors did not allow the cases to be taken any further.

²⁵³ The preference of reparations to prosecutions, at least in the short and medium term, can be justified by pragmatic reasons. See Laplante & Theidon (n 222 above) 242-245.

²⁵⁴ As above, 247.

lasting²⁵⁵ and challenging.²⁵⁶ Even though reparations in form of health and educational benefits began in 2009,²⁵⁷ the inclusion of the sole victims of rape as the sole category under the section of victims of sexual violence in the Registry proves to be controversial and exclusionary.²⁵⁸

3.4.4 Vertical versus horizontal reparations and the question of judicial reparations in Peru

The administrative reparations designed in the PIR and framed in Law 28.592 involve a state's obligation of funding and delivering the benefits. Victim-survivors could only claim them against the government.²⁵⁹ Consequently, collective reparations have been implemented in rural communities.²⁶⁰

However, the availability of vertical reparations does not exclude claims for reparations against non-state actors for their involvement in the violations, insofar as their responsibility can be established. The recent case of confidential settlement of paying compensation, reached between the English mining corporation, Monterrico Metals, and the victims of torture illustrates such an option of horizontal reparations.²⁶¹

²⁵⁵ Comments by Jaime Urritia, Executive Secretary of the Commission Design and Monitoring of Collective Reparations and Reconciliation, the executive body charged by art 8 of the PIR Law to design, coordinate and supervise of the different reparations programmes contended in art 2 of the PIR Law, available at <http://ipsnews.net/news.asp?idnews=28534>, (accessed 19 July 2011), asserting that it will take at least 10 years to implement the reparations.

²⁵⁶ Victims' organisations have already warned for a risk of confusion between collective reparations and development projects. See Garcia-Godos (n 205 above) 80.

²⁵⁷ JPP Acevedo 'Reparations and prosecutions after serious human rights violations: Two pending issues in Peru's transitional justice agenda' (2010) *Oxford transitional justice working papers series 3*.

²⁵⁸ As above.

²⁵⁹ This is particularly true with regard to economic reparations whose delivery has been qualified by the CVR as a pressing need in the Peruvian context. See CVR Report, Vol IX, 189.

²⁶⁰ Garcia-Godos (n 205 above) 79.

²⁶¹ Monterrico had mining activities in Peru held by a company's subsidiary, Rio Blanco Copper SA. The Company was pursued before the High Court of London for transnational violations of human rights that were committed on the Copper's mine site for three days in 2005 against 33 protesters among which 5 were shot and two women sexually assaulted. As the Monterrico was delisting from London stock exchange and transferring its assets in China, the lawyers of the victims applied successfully for a freezing asset's injunction. The freezing injunction of 5 million £ was ordered against Monterrico, and while the case was scheduled for a ten-week trial in London in October 2011, a

Despite the numerous victims in Peru, only few of them received monetary and non-monetary reparations. This was mainly due to the IACtHR judgments that the transitional Government complied with to regain its legitimacy.²⁶² Such actions were filed either as individual cases or class actions.²⁶³ In the *Barrios Altos* case, the IACtHR held that all measures designed to prevent the investigation and punishment of those responsible for human rights violations are inadmissible because they violate non-derogable rights recognised by international human rights law.²⁶⁴ Further, the CVR's collation of evidences was to serve, among others, for criminal prosecutions against those responsible of heinous crimes.²⁶⁵ Therefore, the right to reparations affords victims an access-to-justice component that was not denied by the truth seeking process in Peru.²⁶⁶

The prominent feature of reparations in Peru has so far been the collective reparations given to victim-survivors collectively affected by the conflict through displacement, loss of local or common infrastructures and community services.²⁶⁷ They were, however, one of the programmes to be implemented by the Commission.²⁶⁸ The name of the latter is illustrative of their importance: High-Level Multisectorial Commission for Design and Monitoring of a Policy of Peace, *Collective Reparations* and National Reconciliation (CMAN).²⁶⁹ Their merit is to go beyond the individual approach to victims and to look at the community or group-rights based perspective. This was acclaimed as more suitable for low-income societies where victims are the historically

confidential settlement was reached under which victims received reparations payments. See the details of the case available at <http://www.edcl.org/cases/corporate-accountability/peru-mining-opponents-tortured/> (accessed 21 July 2011).

²⁶² Laplante 'From theory to practice' (n 219 above) 81.

²⁶³ This was done after the transitional government led by Valentin Paniagua rejoined the IACtHR's jurisdiction to reaffirm his commitment to the rule of law and respect for human rights.

²⁶⁴ *Barrios Altos Chumbipuma Aguirre et al. v Peru*, Judgment of 14 March 2001. Series C No. 75, para 41.

²⁶⁵ The CVR developed a prosecutorial strategy and transmitted cases for criminal prosecutions at the end of which criminal damages or punitive reparations may be awarded to victims.

²⁶⁶ Through civil litigation, economic compensation can still be secured. Neither the CVR report nor the PIR Law have implicitly or explicitly reject this option.

²⁶⁷ Garcia-Godos (n 205 above) 76.

²⁶⁸ Art 2(d), PIR Law.

²⁶⁹ Art 8, PIR Law (my emphasis).

poor groups, discriminated against on the ground of ethnicity, language and class.²⁷⁰ Collective reparations raise, however, concerns of ignoring individual autonomy and using patronised approach to the detriment of victims' agency and dignity. The challenge shows that an imperative room is still necessary for individualised reparations.

3.4.5 Positive and negative aspects of reparations in Peru: The way forward

The inclusive definition of victims and the comprehensive types of reparations adopted in the PIR could serve as a model likely to meet the expectations of victims. However, the implementation faced 'logistical obstacles, political stalwarts and other idiosyncrasies which quickly disappointed victim-survivors.'²⁷¹

The judicial avenues guarantee victims to satisfy their reparations claims. However, the State should not wait for a court order to make sound reparations, as it remains its legal obligation to provide remedy in case of violations of human rights.

Although the liberal model of individual rights-approach remains relevant, the emphasis on collective reparations accommodates the specific context of rural victims. The CVR Report concluded that 75 percent of the victims are poor non-spanish speaking groups who live in rural areas.²⁷² The damage they suffered the most was the loss of their community apparatus which facilitated their group-based way of life. Therefore, collective reparations seem suitable to satisfy their needs and to bring back to them hope and opportunity for a culturally adapted reconstruction. But the risk of confusing collective reparations and development projects adds to the set of questions raised by this approach, corroborating the assertion that collective as well as individual reparations should be complementary.

Beyond the technical obstacles to the PIR, one of the serious criticisms formulated against the Peruvian model concerns the discriminatory implantation of Law 28.534. It excluded certain category of victims, on the basis that they have participated in subversive activities.²⁷³ This exclusionary provision has been condemned as violating

²⁷⁰ CVR, Final Report (2003) General Conclusion 5-7, quoted in Laplante & Theidon (n 222 above) 233.

²⁷¹ Laplante 'From theory to practice' (n 219 above) 81.

²⁷² CVR, Final Report (2003), General conclusion 5-7.

²⁷³ Art 2, PIR Law.

the foundational human rights principle of non-discrimination.²⁷⁴ Indeed, while the state may regard itself as addressing past violations, the current application of the 'Clean Hands Doctrine' may result in new violations that will necessarily need to be addressed in the future.²⁷⁵

Finally, the legislative or executive mode of creation of a truth-commission can also have an impact on the binding or non-binding nature of the recommendations contained in its report, including reparations. This was the case in Peru with regard to the PIR.²⁷⁶ But as mentioned earlier, the political commitment to deliver reparations may solve this issue and many others.

3.5 TJ without transition: Making reparations for victims of ongoing armed conflicts in Colombia

3.5.1 Context

Colombia has been experiencing political violence from 1960s due to different armed movements both from the left-wing, mainly the Revolutionary Armed Forces of Colombia (FARC) established in 1964, the National Liberation Army (ELN) founded in 1964, and three others groups;²⁷⁷ and the right-wing self-defense groups called Paramilitaries that emerged late in 1970s. As a result, Colombia has the highest record of internally displaced persons in the world (IDPs).²⁷⁸ Other forms of victimisation include kidnapping, killings and disappearances, massacres, terrorist attacks, forced recruitment, sexual violence against women, etc.

²⁷⁴ This was against the IACtHR's jurisprudence which ordered reparations for victims convicted of participation in subversive movements. See *Algeria et al. v Peru*, Judgment of 19 September 1996, Series No 29, 5.

²⁷⁵ For a discussion on the application of the 'Clean Hands Doctrine', i.e. a victim should be granted reparations if he or she has not been involved in the violation in the past, in Peruvian reparations process, see Laplante 'The law of remedies' (n 219 above).

²⁷⁶ Laplante 'From theory to practice' (n 219 above) 82.

²⁷⁷ The M-19, a communist group; the indigenous group led by Quitin Lame and the Ejército Popular Liberación EPL. See, JG Orozco & M Goetz 'Reparations for victims in Colombia: Colombia's Law on Justice and Peace' in Ferstman (n 21 above) 436.

²⁷⁸ There were almost 4 million of IDPs in 2007. See <http://www.internal-displacement.org> (accessed 26 August 2011).

Previous efforts were made to end the conflict, some being more successful than others.²⁷⁹ In 1990s for instance, agreements were reached between the government and several guerilla groups such as the M-19, the EPL and the *Quitin Lame*. Members of these groups were demobilised and granted amnesties and they currently occupy influential political positions.²⁸⁰ More ambitious initiatives that started in 1998 to achieve peace failed, allegedly because of a lack of will from the FARC involved in drug-trafficking activities.²⁸¹ Although the Army was strengthened by the United States' anti-narcotics assistance and the armed groups were put under pressure by the global 'war against terrorism',²⁸² the Government preferred to negotiate. The negotiations led to large-scale demobilisation of the Paramilitary groups by the end of 2002.²⁸³ However, some armed groups are still active and others in reconstitution,²⁸⁴ while the judiciary has embarked on a process of prosecuting the members of the self-defense paramilitary armed groups. Judicial and administrative reparations for victims are provided for within the new legal and institutional framework described in the following section.

The question is whether the current context of actively violent conflicts offers enough standards to qualify as a 'transition' to democracy. Can TJ be designed where there is no political transition? Beside the fact that TJ is not just about political transition, it is important to make sure that the designed framework guarantees to victims' right to truth, justice and reparations as recognised under international law. Before thinking about TJ as mechanisms to respond to human rights violations committed in the past,

²⁷⁹ The Uribe Accord was concluded in 1984 with FARC, but it couldn't stop the conflict. See Orozco & Goetz (n 277 above) 436.

²⁸⁰ As above, 437.

²⁸¹ The *Los Pozos* Accord was signed with lots of concession to FARC, but the latter did not respect the terms of the agreement. It is estimated that 80% of the world's cocaine is traded by the Colombian armed groups.

²⁸² The Colombian conflict has been qualified as a war against drugs and drug-trafficking. More recently, it has also been described as part of the global 'War on Terror'. See C Diaz 'Colombia's bid for justice and peace: lessons from negotiated justice, options in South Africa and Colombia' (2007) Workshop 5, at 3.

²⁸³ National Reparation and Reconciliation Commission (NRRC), 'Report to Congress 2007: Victims' reparation process: Balance and future perspectives' (2007) 120-121.

²⁸⁴ The emergence of a new armed group was reported by the UN High Commissioner for Human Rights in 2007 that there was new paramilitary organisation. See A/HRC/4/48 (5 March 2007). The same observations were made in 2006 by the mission sent by the Organisation of American States (OAS) to support the peace process. See OEA/Ser.G CP/doc.4148/06.

the violence must stop. Otherwise, it is difficult to know from what to what the society is transiting. Either the response is anything but TJ, or the latter is to be redefined not as a retrospective mechanism but as a response for present-day or future violations.²⁸⁵

3.5.2 Legal and institutional framework for reparations

While the members of the self-defence groups who are not responsible for serious crimes have been subject to favourable conditions and received benefits prescribed in Law 782 of 2002 and Decree 128 of 2003,²⁸⁶ the high-level perpetrators were excluded from the reintegration process and had to face prosecutions. The benefits could be lost if the beneficiaries were later found to have committed human rights violations, and be submitted to the conditions prescribed in Law 975/2005 on Justice and Peace.²⁸⁷

Law 975/2005 was passed in 2005 after two years of national and international debate about the amnesty-like conditions that further stability and accountability that promote victims' rights within internationally accepted standards.²⁸⁸ Designed to fill the gaps of Law 782, Law 975/2005 contains two parts. The first refers to judicial investigations and 'alternative punishment' to those of the armed groups who confess their crime, including availing reparations for victims. The second part details the victims' rights to truth, justice and reparations.²⁸⁹ Law 975/2005 was challenged before the Constitutional Court which upheld its validity in 2006, while making it stricter in its application to perpetrators and wider with regard to victims' rights. It is interesting to notice that Colombia's transitional efforts are essentially based on judicial processes, conducted in a context of unsuccessful mutual offers between the government and the FARC on the topics of negotiations, including reparations for victims.²⁹⁰

²⁸⁵ Layus makes this point by arguing that transitional justice is not inseparable with political transition, as change to democratic regime does not necessarily go with establishing transitional justice mechanisms. See RF Layus *The role of transitional justice in the midst of ongoing armed conflicts: The case of Colombia* (2010) 91.

²⁸⁶ The majority of paramilitary members were pardoned from criminal prosecutions. They went through a reintegration process after having been demobilised and received social and economic benefits. Orozco & Goetz (n 277 above) 438.

²⁸⁷ As above.

²⁸⁸ Law 975/2005 adopted by the Congress on 25 July 2005.

²⁸⁹ As above, quoted in Orozco & Goetz (n 277 above) 440.

²⁹⁰ Diaz (n 282 above) 1.

The Constitutional Court has stated that perpetrators have to be held accountable and to ensure a just payment of reparations, their legally and illegally acquired assets should be availed.²⁹¹ The Court added that economic reparations are an element of the right to reparations of victims and a condition to fight against impunity.²⁹² While it widened the definition of the term 'victim' and aligned its scope with international criteria,²⁹³ the Court held that victims must fulfill probative requirements that they have suffered concrete and specific harm before their rights be validated.²⁹⁴ Fortunately, despite the limiting wording of the law, the Court added that 'no budgetary constraint might be used as an argument to excuse the state from compensating the victims.'²⁹⁵ The victims' right to reparations was furthered by the Court's ruling that there is also a collective obligation of solidarity among perpetrators.²⁹⁶

Law 975/2005 also established a National Reparations and Reconciliation Commission (CNR) as a consulting, assisting and monitoring body to guarantee victims' rights and promote reconciliation.²⁹⁷ As it stands, the CNR should not be confused with a truth commission.²⁹⁸ Its mandate was to guarantee victims' participation in proceedings of judicial clarification, to recommend criteria for reparations,²⁹⁹ including

²⁹¹ Colombian Constitutional Court [18 May 2006] Sentencia C-370/2006, Expediente D-6032, para 6.2.4.1. 11.

²⁹² Constitutional Court Judgment, para 6.2.4.1.12.

²⁹³ The Court quoted the jurisprudence of the IACtHR in the cases of *19 Tradesmen v Colombia*, Judgment of 5 July 2004, Series C No. 109 and the case of *Myrna Mack Chang v Guatemala*, Judgment of 25 November 2003, Series C No. 101.

²⁹⁴ This will complicate the process through which victims have to go, since most of them ignore exactly which of the several armed groups forced them to flee.

²⁹⁵ Constitutional Court Judgment, para 6.2.4.3.3.2.

²⁹⁶ Constitutional Court Judgment quoted in Orozco & Goetz (n 277 above) 447, where it stated that all members of the perpetrator's group, including the group itself, are liable to pay reparations if the assets of the convicted perpetrator are not sufficient for the purpose of full reparations to be granted to the victim.

²⁹⁷ Art 51 of Law 975/2005.

²⁹⁸ Colombia went for a judicial truth, unlike other countries which established quasi-judicial and political bodies – Truth Commissions and the historical truth recorded by the CNRR should complement the judicial truth established by the judiciary. See LJ Laplante & K Theidon 'Transitional justice in times of conflict: Colombia's *Ley de Justicia y Paz* (2006) 28 *Michigan Journal of International Law* 49 quoted Orozco & Goetz (n 277 above) 446.

²⁹⁹ The criteria would also assist judges to fix judicial reparations. See Orozco & Goetz (n 277 above) 455.

the implementation of an institutional collective programme. It was also to report on reparations within two years.³⁰⁰

The CNRR established two reparations programmes, namely the National and the Institutional Reparations Programmes. The latter was designed to respond in the short-term to the psychological-care needs and other urgent services of specific groups of victims such as children, women, indigenous people and afro-Colombians.³⁰¹

As the proceedings are slow, judicial reparations are not to be recovered in the short-term and the government felt a duty to pass Decree 129 in April 2008, creating Administrative Reparations Programme (ARP) to be implemented in August 2008 without any judicial proceeding.³⁰² Its slow implementation³⁰³ does not display the government's commitment to restore victims in the political community with equality and respect.³⁰⁴ The ARP was conceived as a complement to the judicial reparations to be funded by the paramilitaries' recovered assets, and was to consider only monetary reparations and the possibility of land restitutions.³⁰⁵

In June 2011, Law 1448 was passed by the Congress to establish judicial, administrative, social, individual and collective economic benefits for victims. While Law 1448 makes clear reference to TJ in many provisions,³⁰⁶ its ambitious promises to compensate victims still need to be seen in practice, since the different initiatives have been so far slow and inefficient.³⁰⁷

3.5.3 Horizontal versus vertical reparations: Judicial reparations complemented by administrative programmes

The outset judicial perspective of reparations in Colombia may be justified by the peculiarity of the Colombian conflict. On one hand, the political system seems to be

³⁰⁰ NCCR was charged to administer assets collected from the members of the demobilised armed groups, legally or illegally obtained.

³⁰¹ Orozco & Goetz (n 277 above) 455.

³⁰² Layus (n 285 above) 87.

³⁰³ As of May 2009, it had not started to be implemented. Layus, as above.

³⁰⁴ De Greiff 2008: 464, quoted in Layus (n 285 above) 88.

³⁰⁵ Layus (n 285 above) 87.

³⁰⁶ Arts 1, 8 & 9, Law 1448; defining transitional justice as mechanisms to bring perpetrators to satisfy victims' right to truth, justice and reparations (art 8).

³⁰⁷ Layus (n 285 above) 88.

democratic, with a strong and activist judiciary. On the other, perpetrators have acquired huge fortunes because of the drug-trafficking activities and the land acquisitions inseparable with the conflict.³⁰⁸ In this context, the Constitutional Court rightly found it³⁰⁹

[D]isproportionate to renounce pursuit of the patrimony of those responsible for serious injury, particularly where it can be shown that those responsible have amassed immense fortunes and those who have been victimised have been uprooted and live in painful conditions of poverty.

Law 975/2005 intends to facilitate the reconciliation process through judicial proceedings where victims prove the specific harm suffered and perpetrators confess their crimes and avail their assets for victim's reparations, before they are granted an alternative punishment which varies from five to eight years.³¹⁰ This horizontal relationship between perpetrators and victims with regard to reparations has to be mediated by the judiciary whose capacity has been strengthened to deal with massive cases and protect victims, while ensuring their participation.³¹¹

Moreover, the right and the corresponding duty to make reparations are not strictly limited to the horizontal relation between the victim and the perpetrator. Not only the Constitutional Court established a joint liability among members of the same group but also the government established later in 2008 an ARP which was designed to be state-funded and complement the judicial reparations. Despite delayed implementation, the ARP illustrates a vertical obligation so binding upon the state that 'no budgetary constraint might be used as an argument to excuse the state from repairing the victims'.³¹²

The new Law 1448 maintains judicial and administrative reparations, confirming the complementary relation between horizontal or perpetrators-funded and vertical or state-run reparations. At the time of writing, its implementation has not started.

³⁰⁸ This justifies partially the complexity of the Colombian conflict and unwillingness of the armed groups to join the peace and demobilisation process.

³⁰⁹ The Constitutional Court judgment, para 6.2.4.1. 11.

³¹⁰ Arts 30&31, Law 975/2005.

³¹¹ 20 prosecutors have been appointed and hearings are held in different regions to collect victims' testimonies.

³¹² This makes the state duty as compelling as the perpetrators' obligation to make reparations. See n 291 above.

3.5.4 Strengths and weakness of the Colombian reparations framework

The conflicts between the government and the FARC and other movements undermine TJ efforts, since the solutions are not only directed to past violations but to present ones, and perhaps future abuses. In such a setting, it is almost impossible to design and implement comprehensive reparations.

Notwithstanding possible gaps in the implementation, the existing framework presents some positive aspects. First, victims have been placed at the centre of the debate and the legal and policy measures highlight their procedural and substantive right to justice, truth and reparations.³¹³ This may be justified by the international organisations and the civil society's inputs in the debate on TJ, which guaranteed international standards.³¹⁴ Secondly, the combination of judicial and administrative reparations is likely to provide appropriate reparations to victims, whose quantum of benefits may be decided according to objective criteria, systematically submitted to a judicial review.³¹⁵ The contribution of perpetrators in the funding of reparations is likely to further moral satisfaction to victims. Third, the parallel run of reparations and criminal liability through judicial proceedings is likely to meet the victims' demand for reparative and retributive justice, while maintaining the reparative effect of the benefits.³¹⁶

On the other side, the reparations framework presents some shortcomings. First, the probative conditions required to victims before validating their rights limit the likelihood of making comprehensive reparations for victims who do not and could not know the identity of the perpetrators. This is worsened by the state of ongoing violations which threaten the victims and hinder their readiness to testify. Second, the use of the judiciary to tackle leaders of armed groups and secure horizontal reparations may be

³¹³ From Law 975/2005 to Law 1448/2011, including in the implementing decrees, the principles of accountability and reparations are underscored. The procedural aspect is mainly illustrated by their meaningful participation and involvement in the designing and implementation of reparations.

³¹⁴ The UN-OHCHR sent observations during the debate on the amendment of Law 975/2005, OAS has its permanent support mission and the IACtHR has ruled on the demobilization process and TJ in Colombia.

³¹⁵ The criteria of reparations that are to be determined by the CNNR serve as guidance to judges who are free to fix reparations they deem appropriate to provide as 'integral reparations' as possible.

³¹⁶ In many processes where reparations programmes are implemented separately, concerns have arisen about their link and other measures of justice. See P De Greiff 'Justice and Reparations' in De Greiff (n 11 above) 455-461.

perceived as manipulation of the courts system which might be further mistrusted during future negotiations, as having taken part to the conflict against one party. Thirdly, although the laws and policy seem to be pro-victims' on paper, their implementation is slow and is facing hard obstacles, with less participation of victims.

In conclusion, this chapter has provided an overview of the application of the right to reparations in four countries. Although the challenges, strengths and weaknesses are explained by specific local contexts of transition, there are lessons which can guide the design and the implementation of reparations schemes in the future. Burundi has embarked on a debate on the way TJ mechanisms should look like. The following chapter assesses the extent to which the Burundian TJ model in making can learn from the above-discussed experiences.

CHAPTER FOUR

NEGOTIATING REPARATIONS IN BURUNDIAN TRANSITION: LESSONS FROM SOUTH AFRICA AND THE AMERICAS

4.1 Historical background and the question of TJ

Burundi has been in a cycle of inter-ethnic violence since its independence in 1962.³¹⁷ After the assassination of Prince Louis Rwagasore, leader of the independence party – Union for the National Progress (UPRONA), a crisis exploded within the party's leadership about the succession.³¹⁸ It evolved along ethnic lines³¹⁹ due to the inter-ethnic rivalries inherited from the Belgian colonisers.³²⁰ *Hutu* and *Tutsi* have been in violent confrontation almost every decade. Starting from 1965, when civilians of both ethnic groups were killed subsequent to the assassination of the *Hutu* Prime Minister Pierre Ngendandumwe,³²¹ genocidal massacres allegedly took place particularly in 1972³²² and 1993.³²³ In the meantime, massive killings were reported in 1988³²⁴ and 1991.³²⁵

³¹⁷ R Schweiger 'Late justice for Burundi' (2006) 55 *International and Comparative Law Quarterly* 653.

³¹⁸ R Lemarchand *Burundi: Ethnic conflict and genocide* (1994), quoted in JT Hottinger 'Burundi: The causes of the conflict and its development' (2008) 2 available at http://www.bmlv.gov.at/pdf_pool/publikationen/09_fij_08_bbc.pdf (accessed 31 August 2011).

³¹⁹ Burundian conflict has evolved on all grounds – ethnic, political and regional – despite the fact that the Arusha Peace and Reconciliation Agreement (APRA) qualified it as an essentially political conflict with serious ethnic dimensions. Protocol I, art 4(a) of the APRA.

³²⁰ Like the conflict between Flemish and francophone communities in Belgium, the Belgian colonisers systematically implemented inter-ethnic exclusionary policies (under the indirect rule) in favour of the *Batutsi* (minority) against the *Bahutu* (majority). There exists a small minority of *Batwa* but they have not played a key role in the history of the Burundian conflict.

³²¹ Despite the victory of *Bahutu* in the 1965 legislative elections, the *Mwami* did not appoint *Hutu* Prime Minister to take over Pierre Ngendandumwe. Subsequently, an attempt of the *Hutu*-dominated 'Gendarmerie' to seize power in October 1965 led to an extremely violent repression by the army: virtually, the entire *Hutu* political elite was massacred, thousands of rurally based *Hutu* suspected of having supported the revolt. See Hottinger (n 318 above) 2.

³²² In reaction to a *Hutu* insurgency movement from the South that resulted in an estimated killing of 3 000 *Tutsi*, the *Tutsi*-dominated army killed around 10 000 - 20 000 *Hutu* from April to November 1972, forced many others to flee and expropriated their lands and other properties. See R Lemarchand 'Genocide in the Great Lakes: Which genocide?'

Moreover, Burundi was under a military and one-party rule since 1966 until the first pluralist elections held in June 1993.³²⁶ The killings of *Tutsi* that started in 1993³²⁷ and the subsequent massacres of *Hutu* by the army led to the emergence of active *pro-Hutu* armed movements around 1994 - 1995.³²⁸ In 1998, political negotiations started under the mediation of Julius Kambarage Nyerere, President of Tanzania and continued by Nelson Mandela, then President of South Africa. They resulted in the 2000 Arusha Peace and Reconciliation Agreement (APRA) which gives an account of the history of the Burundian conflict.³²⁹ Unfortunately, the main armed groups were not part of the negotiations and joined the process only later. In 2002 - 2003, the Global Ceasefire Agreement (GCA) was signed between the transitional Government and the National Council for the Defense of Democracy-Front for the Defence of Democracy (CNDD-FDD), including some other small armed groups.³³⁰ The transition officially ended with the 2005 elections which were won by the CNDD-FDD, which had become a political

Whose genocide?' (1998) 41 *African Studies Review* 6; R Lemarchand 'Selective genocide in Burundi', London, Minority Rights Group, Report No. 20, July 1974 quoted in Hottinger (n 318 above) 2.

³²³ UN Security Council, S/1996/682, 22 August 1996.

³²⁴ These killings targeted *Tutsi* who were suspected of witchcraft in Ntega and Marangara. The army responded by killing around 20 000 *Hutus* and 60 000 fled to Rwanda. See in general, JP Chretien et al. *La crise d'août 1988 au Burundi* (1989); Amnesty International 'Burundi: killings of children by government troops' (1988).

³²⁵ These killings illustrated inter-ethnic rivalries, hidden in arbitrary accusations of witchcraft. The five periods, 1965-1973-1988-1991-1993, were recommended by the *Kalomoh Report* to be the main focus of the TJ mechanisms in Burundi. See *Kalomoh Report*, S/2005/158, para 11.

³²⁶ After Micombero overthrew the monarchy in 1966 and proclaimed the Republic, other military coups were perpetrated by Jean Baptiste Bagaza in 1977, and Pierre Buyoya in 1987. All concentrated the executive, the legislative and the judiciary under the control of the single state-party, UPRONA.

³²⁷ By August 1994, already 50 000 *Tutsi* and *Hutu* non-FRODEBU supporters were killed. See Report of the Security Council Mission to Burundi on 13 and 14 August 1994, S/1994/1039, para 7.

³²⁸ There have been some *Hutu* armed groups starting from 1965 (Movement for the Liberation of *Bahutu* – MOLIBA) and 1980s (Party for the Liberation of Hutu People- PALIPEHUTU and Front for National Liberation), but they were not considered as serious threats by successive military regimes. Hottinger (n 318 above) 3.

³²⁹ The APRA is still the reference in Burundian legislation.

³³⁰ The APRA was then complemented and recognised by the GCA between the transitional government and the former rebel movement CNDD-FDD, and the Pretoria Protocol thereto on Political, Defense and Security Power Sharing in Burundi of 8 October 2003.

party.³³¹ However, there was still an active armed group which negotiated and signed the Comprehensive Ceasefire Agreement (CCA) in 2006.³³² During this long-standing conflict in which gross and systematic violations of human rights resulted in more than 500,000 victims,³³³ the victimisation took many forms: killings and assassinations, sexual assaults and other forms of violence against women, farms devastation and house destruction, expropriation without indemnification, robbery, summary executions and judicial trials without due processes, arbitrary detentions, forced exiles, internal displacement, torture, forced disappearances, destruction of private and public infrastructures, etc.³³⁴

Although the international community showed its concerns and the need for a judicial inquiry after the 1993 events by sending preparatory and fact-finding missions,³³⁵ the question of TJ was really debated during and included in the APRA.³³⁶ However, these provisions were not implemented until the promulgation of Law on TRC in 2004.³³⁷

³³¹ Some argue that there has been no transition because in 2005 there was still an active armed group (FNL). The same comments are formulated with regard to the withdrawal of several political parties, gathered together in the Alliance for Democratic Change ADC-IKIBIRI, from the 2010 elections and an alleged emergence of new armed groups.

³³² The FNL was the first-born armed group and the last to sign a peace agreement on 7 December 2006. The three political documents (APRA, GCA and CCA) serve until now as the reference of the historical Burundian transition from authoritarianism and armed conflict to [negative] peace.

³³³ These are mere estimations since there is no official statistics of the victims.

³³⁴ See for details, the Report of National Consultations on the Implementation of TJ in Burundi (2010) 54.

³³⁵ See the UN Report of the preparatory fact-findings mission; the 1995 'Ake Huslid' Report S/1995/157; the 1995 'Nikken' Report, S/1995/631; and the Report of the International Commission of Inquiry on Burundi, S/1996/682. The lack of follow-up to the recommendations of these commissions was criticised in the *Kalomoh Report* which warned for the effect of such inaction on the UN legitimacy and credibility to promote justice and the rule of law in Burundi. See *Kalomoh Report*, Doc./UN/S/2005/158, para 72.

³³⁶ Arts 6-8 of Protocol I of the APRA.

³³⁷ Previous 'constitutions' provided for an establishment of an international commission of inquiry to investigate and qualify the crimes committed in Burundi. These include the 1994 so-called 'Convention of Government' which stated that '... 30 days after the appointment of the cabinet, a Commission of International Judicial Inquiry shall be established...' (art 36 of the Convention of Government) ; the 2001 Interim Constitution of Burundi, Law No. 1/017 which required the Interim Government '... to request [the UN] the creation of an International Commission of Inquiry and, eventually, the establishment of an International Criminal Tribunal...' (Art 288 of the 2001 Interim Constitution).

This law was criticised and never implemented because of the lack of consultation and inclusive participation prior to its enactment.

The real TJ initiatives started in 2004 with the UN mission which was requested by the Government of Burundi and dispatched to assess the feasibility of establishing an international judicial commission of inquiry, as provided for in the 2000 APRA.³³⁸ The assessment mission produced a report which suggested the creation of a truth commission, and a special court chamber within the Burundian judiciary system.³³⁹ Adopted by the UN Security Council, the *Kalomoh Report* still serves as the basis of the TJ debate in Burundi.³⁴⁰

4.2 Negotiating TJ in a changing and fragile political context

The APRA was concluded under the regime of Pierre Buyoya, who came back to power after the 1996 coup d'état.³⁴¹ Article 8 of Protocol I to the APRA provided for the establishment of a National Truth and Reconciliation Commission (TRC), with three functions: investigation, arbitration and reconciliation, and clarification of the history.

First, the Commission was required to establish the truth regarding the serious acts of violence committed from 1 July 1962 until 28 August 2000. It had also to classify the crimes, establish the responsibilities, as well as the identity of the perpetrators and victims. But quite clearly, the Commission had limitations: it would lack the powers to classify acts of genocide, crimes against humanity and war crimes.³⁴² Interestingly, the TRC conceived by the APRA was not authorised to grant amnesties, although the transitional National Assembly might have done so for politically motivated crimes, had it or had the TRC found it appropriate.³⁴³

Secondly, upon completion of its investigations, the Commission must recommend measures aimed at promoting reconciliation and forgiveness. They include

³³⁸ Dispatched at the UN Security Council request (UN Doc. S/2004/72 of 26 January 2004), the mission submitted its report – the *Kalomoh Report* – on 11 March 2005 (UN Doc. S/2005/158).

³³⁹ The *Kalomoh Report*, para 53.

³⁴⁰ UN Security Council Resolution 1606/2005.

³⁴¹ The 1996 coup d'état raised an international condemnation and pressure by imposing an embargo which pushed President Buyoya to the table of negotiations that officially started in 1998. See AD Olinga 'The embargo against Burundi before the African Commission' (2005) *5 African Human Rights Law Journal* 425-426.

³⁴² Art 8 para 1(a) of Protocol I of APRA.

³⁴³ As above, para 1(b).

ordering restitution of disputed properties or deciding just indemnifications, or other measures deemed appropriate.³⁴⁴ Thus, the right to reparations was envisaged within this framework.

These provisions were not implemented, as the conflict continued and that the stakeholders were reluctant to criminal prosecutions against the incumbent elite who might resist judicial accountability, be it by violent means. As far as TJ is concerned, only provisions related to the release of political prisoners and the granting of temporary immunity or amnesties attracted much attention, as they were underscored in the Ceasefire Agreements.³⁴⁵

The TJ provisions were not incorporated into the APRA in response to a strong domestic demand.³⁴⁶ The factors that motivated the incorporation of TJ provisions in the APRA are attributable to political calculations of negotiating parties.³⁴⁷ Pro-*Tutsi* parties insisted on the need for TJ mechanisms before elections; the idea being that their *Hutu* challengers would be disqualified from an election contest because of having to face criminal charges for gross human rights violations committed in the past. For *Hutus*, who expected to gain from the election, TJ offered protection against possible prosecutions.³⁴⁸ Later on, it was viewed as a political tool to use against one's rivals.

Thus, although it was required by the Interim Constitution, one can understand why the request for the dispatching of the international commission of inquiry was sent in July 2002 to the UN Security Council under President Pierre Buyoya, a *Tutsi* from UPRONA. Equally, for implementing the TJ provisions, the unsuccessful Law on TRC was enacted under the second period of transition led by President Domitien Ndayize, a *Hutu* from FRODEBU. It is also during his regime that the UN mission was dispatched and the *Kalomoh Report's* recommendations adopted.³⁴⁹ The Security Council requested

³⁴⁴ As above, art 8 para 1(b).

³⁴⁵ Several commissions were established to deal with the question of political prisoners and the majority of those prisoners had been released by the year 2006. Equally, the granting of 'provisional immunity against prosecutions for politically motivated crimes' was implemented in November 2003. Provisional immunity was granted to political leaders returning from exile. See S. Vandengiste 'Transitional justice for Burundi: A long and winding road' (2007) Workshop report, 16-20.

³⁴⁶ Vandengiste (n 345 above) 10.

³⁴⁷ As above.

³⁴⁸ As above.

³⁴⁹ See the UN Security Council Resolution 1606/2005.

the Secretary-General to 'initiate negotiations with the government and consultations with all Burundian parties concerned on how to implement its recommendations.'³⁵⁰ Although the *Kalomoh Report* respected the spirit of the 2000 APRA, it is a new basis that took into account local and international developments that had taken place between 2000 and 2005.³⁵¹ Among new developments in Burundi features the decrease of ethnic rivalry in political debate, as compared to the 1993 elections. However, for the majority of the Burundians, legitimacy still depends on ethnic representation.³⁵² Also, the horrors of genocidal killings have altered the image that one group has of the other, to the extent that the notion of collective guilt remains the principal obstacle to national reconciliation.³⁵³

The rounds of the TJ negotiations started in March 2006 and March 2007 after a shift of the balance of power,³⁵⁴ and under the new CNDD-FDD regime which expressed reluctance to a judicial mechanism.³⁵⁵ The fact that the negotiations are conducted with a regime dominated by members of former armed movements involved in violations justifies the current state of affairs. Blockades and failures characterised these negotiations.³⁵⁶ But parties agreed on few issues, including the establishment of both

³⁵⁰ UN Security Council, Resolution 1606, Operative para 1.

³⁵¹ S Vandengiste *Stones left unturned: Law and Transitional Justice in Burundi* (2010) 199.

³⁵² J Nimubona 'La perception de l'identité ethnique dans le processus électoral au Burundi' (2005) Bujumura, LDGL, quoted in S Vandengiste 'Power sharing as a fragile safety valve in times of electoral turmoil: The costs and benefits of Burundi's 2010 elections' (2011) *49 Journal of Modern African Studies* 323. Stating that the majority of Burundians think that there is democracy because a representative of the ethnic majority is in power.

³⁵³ Lemarchand 'Genocide in the Great Lakes' (n 322 above) 5&11. The ethnic rivalry has engendered mutual accusation between *Hutu* and *Tutsi*, each seeing the other as responsible of what happened, and each denying to recognise the other's sufferings.

³⁵⁴ The 2005 elections were won by the former rebel movement CNDD-FDD. But the transition was based on a political compromise between new and old elites in a form of consociational power-sharing. International standards in the TJ debate are promoted by a national and international civil society supported by the UN.

³⁵⁵ The CNDD-FDD Government stated that justice will intervene only if the pardon turns out to be impossible. See *Communiqué du Gouvernement sur le Conseil des Ministres du 02 Février 2006*, Bujumbura (2006) 1.

³⁵⁶ Two rounds of negotiations were conducted in 2006 and 2007. The second failed as the two negotiating parties could not reach an agreement even on a press release. To increase the pressure on the Government, the UN sent its High Commissioner for Human Rights, Louise Arbour. See UN Security Council, 'First report of the Secretary-General on the United Nations Integrated Office in Burundi' S/2007/287, 17 May 2007, para 79.

mechanisms in two phases and the organisation of national consultations (NC) before further negotiations.³⁵⁷

To make the process transparent and participatory, national consultations (NC) were conducted.³⁵⁸ Negotiating parties agreed not to raise outstanding questions during the NC which were chaired by representatives of the government, the civil society and the UN.³⁵⁹ The NC were sanctioned by a report and recommendations submitted to the President.³⁶⁰ Further negotiations will be pursued under the CNDD-FDD second term, an almost single-party regime that resulted from the 2010 elections.³⁶¹ This will have an impact on the balance of power and the outcome of the next negotiations.

4.3 Reparations in the Burundian TJ debate

The APRA's negotiators were not much concerned with the issue of reparations. However, Protocol IV required the government to study the modalities of compensating the returnees for properties left in the exile.³⁶² The same Protocol deals with principles of restitution of land and other properties to 'survivors' of the conflict, with a special attention to refugees.³⁶³ If restitution proves to be impossible, each beneficiary must be

³⁵⁷ Framework Agreement between the Government of Burundi and the UN on the creation and definition of the mandate of the Steering Committee in charge of national consultations on TJ in Burundi, signed on 2 November 2007 (Accord-Cadre entre le Gouvernement de la République du Burundi et l'Organisation des Nations Unies portant création et définition du mandat du Comité de Pilotage Tripartite en Charge des Consultations Nationales sur la Justice de Transition au Burundi).

³⁵⁸ S/2005/158, para 75.

³⁵⁹ Para 10 of the General Framework signed between the Government and the UN on 2 November 2007. The outstanding questions concern the issue of amnesties, the relationship between the TRC and the Special Tribunal and the independence of the Prosecutor.

³⁶⁰ The report was finalised and submitted to the President in April 2010. Its public release was delayed until December 2010, due to the elections that took place from May to September 2010.

³⁶¹ The 2010 were contested by most the opposition parties, even though judged free and fair by the international community. The opposition parties withdrew from the electoral process after having been defeated by the ruling party during the first local elections and the subsequent legislative and presidential elections will establish more hegemonic control of the CNDD-FDD over the instruments of power. See for more details Vandengiste 'Power sharing as a fragile safety valve' (n 352 above) 332.

³⁶² Art 5(c), Protocol IV, APRA.

³⁶³ Art 8(b). The word used in the original document in French is 'sinistré' which designates all displaced, regrouped, dispersed persons and returnees.

indemnified equitably.³⁶⁴ Refugees who could not return may receive an equitable indemnification if they had been victim of land expropriation without compensation.³⁶⁵ Other provisions concerned symbolic reparations, for example erecting memorial monuments for all victims, identifying mass graves for the purpose of dignified burial and marking a national day of remembrance.³⁶⁶

Thus, the APRA reparations concerned limited losses and selected category of victims. For historical and cultural reasons, the land recovery and compensation attracted the attention of the negotiators. The prescribed National Commission for Rehabilitation of Victim-survivors (CNRS) was established by the transitional government in 2002 with members from different ethnic groups and political affiliation.³⁶⁷ Its mandate was to help returnees to recover their lands or to be compensated.³⁶⁸ The CNRS ceased to exist at the end of the transitional period,³⁶⁹ and was taken over by the current National Commission on Land and Other Goods (CNTB). Established in 2006, its function is to settle land disputes and to assist returnees to recover their lands and other properties.³⁷⁰

A progressive interpretation of the APRA's acknowledgment of victims of violence, and the general reference to international instruments may allow for an inference to be made to the right to reparations. Protocol III related to peace and security recognised as victims, *Hutu* and *Tutsi* alike.³⁷¹ The same Protocol further lists the state's duties to protect all fundamental rights, including all those recognised in the Universal

³⁶⁴ Art 8(c).

³⁶⁵ Art 8(d).

³⁶⁶ Art 6, Protocol I, APRA.

³⁶⁷ Art 3, Protocol IV, APRA. The Commission was called 'Commission Nationale pour la Réhabilitation des Sinistrés' (CNRS).

³⁶⁸ Law No. 1/017 of 13 December 2002 on the missions, powers, organisation and functions of the CNRS, *BOB No. 12/2002*.

³⁶⁹ In accordance with art 5, para 9, Protocol V of the APRA.

³⁷⁰ Law No. 1/18 of 4 May 2006 on the mandate, composition, organisation and functions of the National Commission on Lands and Others Goods, *BOB No 5/2006*. Law 1/18 was amended and replaced by Law No. 1/17 of 4 September 2009, *BOB No 9bis/2009*.

³⁷¹ Art 7(b).

Declaration and all human rights instruments ratified by Burundi.³⁷² The GCA and the CCA did not refer anyhow to victims' right to reparations.

Although the APRA may broadly be considered a legal basis for victims' rights, reparations were, arguably, left out by the negotiators. First, the parties were concerned with stopping political and military violence and they sought for an agreement that would allow *Hutu-Tutsi* coexistence, rather than making reparations to victims. For this reason, the APRA and the subsequent ceasefire agreements focused on power sharing and guarantees of no prosecutions for 'politically motivated' crimes.³⁷³

Secondly, the negotiators erred in viewing reconciliation as pacification among political elites, leaving behind the communities on the grounds that have been seriously affected by decades of unfinished violence. By so doing, they missed an opportunity of conceiving a long-term plan for future reconciliation at *micro* and community levels.³⁷⁴ This would have necessarily led to a debate around TJ reparations.

Thirdly as stated earlier, the entire issue of TJ was not a locally-driven demand and fascinated negotiators for political speculations.³⁷⁵ Moreover, the fact that South Africa played the role of mediation may have had a contaminating effect, offering an opportunity to 'export' the South African model. The fascination that the governmental delegation and the CNDD-FDD memorandum displayed to the South African 'model'³⁷⁶ coupled with the growing close relationship between the CNDD-FDD and the ANC

³⁷² Art 8(a). As Burundi is party to the ICCPR, CAT, CRC, and other human rights instruments that provide for the right to a remedy and reparations, one can conclude that the APRA recognised a victims' right to reparations.

³⁷³ This terminology was used in the APRA provisions on immunity of political leaders. See APRA, Protocol II, art. 22, para 2(c).

³⁷⁴ *Micro*-level reconciliation refers to reconciliation between individuals – the victim and the perpetrator, whereas reconciliation at *macro*-level refers to reconciliation as it has been conceived in Burundian transition, a reconciliation involving power-sharing among political elites. Reconciliation at community level refers, here, to a collective or group-based approach to reconciliation.

³⁷⁵ n 347 above.

³⁷⁶ Para 20 of the CNDD-FDD Memorandum on the TRC and the Special Tribunal (5 May 2007) refers to the South African TRC.

regimes may corroborate this claim.³⁷⁷ But is it appropriate for Burundi to frame its transition the South African way?³⁷⁸

On the other side, the *Kalomoh Report* did not tackle the issue of reparations, despite the growing attention of contemporary international practice on the victims' rights.³⁷⁹ However, reparations were one of the issues on which participants in the NC expressed their views. The NC Report states that participants expressed their preference more for collective and symbolic reparations,³⁸⁰ rather than individual material grants.³⁸¹ Interestingly, the questions asked to participants with regard to reparations were only limited to these three categories,³⁸² which restricted the choice of the participants.

At the time of writing, the government created a technical committee to work on methodological issues related to the creation of the TRC, including the amendment of the 2004 Law on TRC, the proposals of appointment criteria for the Commissioners and the budget of the TRC.³⁸³ The Committee does not include a member of the civil society and has a three-month term.³⁸⁴ It requested an additional time to complete its mandate.³⁸⁵ Definitely, the recommendations will only guide the negotiators and relevant reparations policy will probably be formulated by the forthcoming TRC. At that stage, time will be ripe to look deeper into the experiences from abroad, including the above-discussed cases for the design of comprehensive reparations schemes.

³⁷⁷ Five contracts on mining contracts were signed between South Africa and Burundi. See IWACU 'Le Burundi et l'Afrique du Sud signent 5 accords' (12 August 2011) available at <http://www.iwacu-Burundi.org/spip.php?article625> (accessed on 29 August 2011).

³⁷⁸ Some have wrongly made a parallelism between the South African and the Burundian transitions. See D Hakizimana *Le temps Mandela au Burundi: Ce que j'ai compris* (2001) Genève, Editions Remesha quoted in Hottinger (n 318 above) 7.

³⁷⁹ See chapter 2 above.

³⁸⁰ A total of 86% of the participants preferred collective reparations whereas as against 76% who preferred symbolic reparations and 61% who favoured individual financial reparations. See Report of National Consultations on the implementation of transitional justice mechanisms (2010) 51-52.

³⁸¹ Sixty one percent of the participants. As above, 52.

³⁸² Report of National Consultations, (n 380 above) Annexure IV, 107-108.

³⁸³ Decree No 100/ 152 of 13 June 2011 on the creation and appointment of the members of the Technical Committee in charge of preparing the establishment of transitional justice mechanisms.

³⁸⁴ Art 5, Decree No 100/ 152.

³⁸⁵ The time was extended of an additional one-month period.

4.4 Designing reparations within TJ in making in Burundi: Learning from other experiences

Each of the cases studied earlier provides for insightful lessons for the making of TJ in Burundi, despite the fact that local needs always suggest to eschew the one-fits-all solution.³⁸⁶ Therefore, the peculiar feature of Burundian context such as a fragile and unstable transition, the nature of victimisation, the collective guilt and mutual accusations, the long-standing culture of impunity, the control of power by members of former rebels groups and influential positions of the former military commanders, the possible emergence of new armed groups, the weak political institutions and the manipulated judiciary,³⁸⁷ the governance shortage and endemic corruption³⁸⁸ should be kept in mind.

The South African experience is less attractive with regard to the procedural aspect of reparations. Its lack of inclusive participation of victims with regard to the debate on reparations, coupled with the provisions of the TRC Act denying the access-to-justice component of reparations should be avoided by Burundian stakeholders. The provisions of the APRA excluding amnesties and the recent NC allow for hope, although the current CNDD-FDD regime stated that judicial accountability should only be undertaken if the TRC reconciliation and forgiveness process fail.³⁸⁹

On the other side, the South African experience may suggest positive insights on the importance of individual financial grants, as a form of recognising victims' autonomy and to give them agency to decide what to do with reparations benefits. The interim reparations are also a suitable approach to deal with victims in urgent need. However, the criticism of changing a six-year period recommended by the TRC in a one-time payment should serve as a negative experience.

The Chilean case is rich of lessons. First, the permanent character of the reparations pension has a potential to empower and reincorporate victims as worth

³⁸⁶ UN/SG Report S/2004/216.

³⁸⁷ M Ndikumasabo & S Vandengiste 'Mécanismes de justice et de réconciliation perspective au Burundi' (2007) *L'Afrique des Grands Lacs. Annuaire 2006-2007* 114.

³⁸⁸ It was classified 170th by the Transparency International World Corruption Index, available at <http://www.guardian.co.uk/news/datablog/2010/oct/26/corruption-index-2010-transparency-international?INTCMP=ILCNETTXT3487> (accessed 2 September 2011).

³⁸⁹ CNDD-FDD Memorandum (n 376 above) para 34.

citizens in the new community. Equally, the continuous design of reparations updates the meaningfulness of the benefits. The same practice may guide the Burundians with regard to reparations delivery.

Secondly, for different violations different programmes of reparations were undertaken without any incompatibility between different grants, including possible judicial compensation. As the conflict brought different forms of victimisation in Burundi, the diversification of reparations programmes is highly commendable.

Thirdly, victims of 40 years of conflicts may not be comprehensively identified within the limited period of TJ mechanisms.³⁹⁰ Therefore, follow-up programmes should be envisaged at the outset and the list of victims kept open, in order to avoid selectivity that may enhance tensions among ethnic communities.³⁹¹ However, this strongly depends on the state's commitment to translate its obligation to make effective reparations into reality. If this commitment has characterised the Chilean governments, the Burundian governments have not displayed any readiness to put forward victims' rights.

From the Peruvian experience, Burundi may learn the composition of the TRC and the compliance with international standards, including the TRC prosecution strategy and the transmission of a TRC list of alleged perpetrators to the judicial body as a way of TRC-Prosecutor collaboration. This did not erode the prosecutor's powers to undertake prosecutions on his or her initiative. The TRC list of perpetrators served as a complement. Burundi may learn from this practice and further consider the possibility for the judicial body to order satisfactory reparations for victims.

Secondly, the Peruvian process underscores the importance of collective reparations. As the identified victims were mainly the marginalised and poor groups, the collective reparations seemed appropriate to restore their community way of life, while providing them with opportunity to develop in dignity. This may be learnt as a good practice, since the Burundians recently consulted expressed their preference for collective reparations but also, the similarities of 'sorry' situation of rural victims strongly recommend a similar approach. However, it has to go with individualised reparations for earlier mentioned reasons.

³⁹⁰ It is the TCs which generally recommend reparations and have 2 to 4 years' mandate.

³⁹¹ This is drawn from the exclusion of survivors of torture and political imprisonment in Chile from the list of victims. Fortunately, the error has been recognised and corrected later by designing a programme of reparations for them.

Lastly, the Colombian case is also instructive. Not only Burundian TJ is negotiated in a context where there is no full-fledged transition towards an 'emerging democracy', but the need for a judicial solution and the contribution of perpetrators are expressed in similar terms.³⁹² Reparations in Colombia are based on judicial proceedings and involve a horizontal relation between the victim and the perpetrator. The later must avail the illegally and legally acquired assets for the repair of the victim, and the other members of the perpetrator's armed group are collectively liable, including the organisation itself, if the perpetrator's assets are not enough for just reparations for the victim.³⁹³ In the Burundian context the victim *versus* perpetrator confrontation is not advisable as the lack of efficient mechanisms of victims and witnesses' protection will put their life under serious threat.³⁹⁴ The innovative approach to compel perpetrators to fund victims' reparations should, however, be considered in addition to a state-funded reparations programme.³⁹⁵

In sum, the globalisation of TJ and the similarity of victims' claims worldwide justify the importance of drawing lessons from foreign experiences and adapting them to local needs. While taking into account the specific background of Burundi, a holistic learning and combination of the cases explored in this study is likely to result in a sound programme of reparations.

³⁹² Different UN Reports highlighted the need to end impunity through prosecutions. See n 335 above.

³⁹³ Chapter three, above.

³⁹⁴ This is justified by the fact that alleged perpetrators control the instruments of power and are capable of threatening the powerless victims.

³⁹⁵ This holds true to the extent that for instance the CNDD-FDD, former armed group, displayed its fortune by conducting a successful electoral campaign and building infrastructures for the party.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The findings of this study have been discussed in the previous chapter while identifying the lessons the above-discussed cases suggest for Burundi. This concluding chapter seeks to substantiate on recommendations, already discernible from the last section of chapter four, to the Burundian TJ role-players in relation to reparations. But before doing that, a case is made for reparative justice not only as a substantive component of TJ mechanisms but also with regards to its earlier place in the inevitable sequencing of the transitional mechanisms. This constitutes somewhat a response to the second research question of this inquiry, namely the way in which reparations may achieve justice in instances where conditions are not conducive for criminal accountability.

5.2 Making a case for reparations

In a time when tensions between [negative] peace and justice still exist, the success of TJ mechanisms needs innovative and accurate assessment of the *pro* and *cons* factors, both from a local context perspective and the international standards exigencies. It is suggested that reparations can do much work of reconciliation if enough attention is paid to victims' rights and inasmuch as the state is dedicated to secure benefits either through judicial channels, administrative programmes of reparations, or preferably both. Rights imply freedoms and entitlements, and their violation goes hand in hand with responsibility and costs. If the maxim *ubi jus ubi remedium* has a meaning, its practical manifestation should be more prompt when the state has failed to protect its citizens or, in worse instances, when its employees were actively involved in the violations.

Of course, truth will remain a prerequisite to design comprehensive reparations in all their aspects. Indeed, without an official track record of the violations that have been perpetrated, the forms they took, the nature of victimisation to which they led, the inventory of victims they produced; it is difficult to design a reparations' plan that would meet the expectations of the victims.

Thus, the sequencing of the TJ mechanisms in unstable societies becomes often inevitable, notwithstanding the uncompromised assertion that truth, justice and reparations are not mutually exclusive. Next to the truth, reparations are commendable to transitions that resulted from negotiations and compromises between new and old

political elites, tactical and pragmatic reasons support that reparative justice can provisionally give satisfaction to victims and empower them for an active participation as equal citizens in political processes. The prioritisation of reparations as an interim measure of justice to victims is supported by obvious reasons.

First, of the different mechanisms of TJ, reparations are the most victim-orientated and give meaningful and concrete response to victims' needs, in the aftermath of rights violations which affected them in their lives, their dignity and their welfare. If truth provides them with satisfaction, truth is not an ultimate goal and should always be with consequences³⁹⁶ – namely reparations for victims and accountability for perpetrators. Equally, retributive justice has always been prosecuting selected perpetrators and focuses less attention to victims before the prosecutions are successfully closed. The new trends in international criminal justice also support the view that victims have been always neglected and need more attention.³⁹⁷ With reparations, justice gets a tangible meaning for victims and their reincorporation in the new political community becomes a reality. Unlike prosecutions which are forcedly selective, they aspire to attend to all victims.³⁹⁸ This is corroborated by the unfortunate situation where perpetrators seem economically better than the victims in 'sorry' conditions, most of the time because of the way the former waged the conflict and the latter suffered from its horrors. In such dichotomy, comprehensive reparative plan is more suitable to shift the inequalities than slower transformative reconstruction strategies.³⁹⁹

Secondly, by their empowering potential, reparations restore victims' dignity and make them as 'whole' again as possible. If they are well designed and implemented, substantive and procedural reparations are likely to shift the situation of victims from victimisation to active participation in the politics of a new future, including the enhancement of their long-term capabilities to come together and pursue further accountability against perpetrators. This is important in the Burundian society where recurrence of violence has much to do with insufficient attention paid to victims and the

³⁹⁶ Laplante & Theidon 'Truth with consequences' (n 222 above) 250.

³⁹⁷ The ICC's Victims' Reparations Fund is clearly in this line.

³⁹⁸ E Barkan 'Reparations: A moral and political dilemma' in Miller & Khumar (n 103 above) 17.

³⁹⁹ This argument is in contrast with the South African approach where the question of victims' reparations is diluted by the inclusive development and reconstruction strategy in a transformative perspective.

frustration that was subsequently developed against the 'other' community, which easily led to a collective violence for revenge purposes.

Thirdly, beyond their function of compensating victims and rectifying the wrong they suffered, meaningful reparations can serve the purpose of deterrence traditionally associated with retribution. State-funded reparations may rightly be viewed as a sanction to the state which has failed to fulfill its responsibility to protect its citizens, since as *non personae* entities states cannot be held criminally accountable.⁴⁰⁰ This is not a simple rhetoric and the same function may be achieved against [individual] perpetrators by perpetrator-funded reparations. In fact, deterrence literature shows a correlation between the certainty of consequences and the reduction of offences, but little correlation between the severity of punishment and the reduced incidence of wrongdoing.⁴⁰¹ Arguably, reparations are more certain than criminal sanctions. Moreover, reparations can equally serve the purposes of retribution and reconciliation.⁴⁰²

Fourthly, the prosecutorial and the reparative are both complementary elements of justice.⁴⁰³ As victims of diverse human rights abuses share almost similar circumstances of poverty, dependence on perpetrators for welfare, sentiment of rejection by the community and situation of powerlessness,⁴⁰⁴ their conception of justice may be synonymous to reparations that would empower and acknowledge their long-standing victimising situation. Building a new liberal society requires an endorsement of the ethics of responsibility that struck the balance between the normatively desirable and the contextually possible. In one way or another, this implies a dialogue and agreement between all survivors of an era of human rights violations, mainly victims and perpetrators, for a new beginning of the continuous history.⁴⁰⁵ Reparations are more suitable and acceptable by both parties to bridge this historical transition.

Lastly, opponents of reparations often criticise their backward looking and their partisan focus on a sole category of the society, namely the victims and their next of kin. They compete with equal needs of inclusive development and reconstruction plans that

⁴⁰⁰ Laplante 'From theory to practice' (n 219 above) 79-80.

⁴⁰¹ Shelton (n 20 above) 14, quoting Nigel Biggar (eds) *Burying the past: Making peace and doing justice after civil conflict* (2003) 69.

⁴⁰² As above, 15.

⁴⁰³ De Greiff quoted in Balkan (n 398 above) 17.

⁴⁰⁴ Shelton (n 20 above) 15.

⁴⁰⁵ As above, 18.

advance all members of the society as a whole. In South Africa, the government's reluctance or resistance to design reparations that might call national and international companies in contribution has further been justified by the concern of an economic impact of debilitating or scaring them off. However, these arguments do not stand outside any political speculation. As far as South Africa is concerned, not every reparatory arrangement would have had catastrophic outcome on the economy, especially if a meaningful dialogue had been initiated between these companies, the government and the victims. Further, future-orientated politics do not exclude the needed room for reparative plans that take into account roots-orientated politics. Indeed, 'the road to the future runs through the disasters of the past',⁴⁰⁶ since the past is never ended and that the dividing line between past, present and future is fleeting and arbitrary.⁴⁰⁷ As such, reparations policies aiming at coming to terms with the past are not only fixed on the past but also on the future. As regard to the argument of the inclusive development, it is argued that reparations are morally significant even if egalitarian and developmental claims support the same kind of demands. Indeed, development projects do not necessarily acknowledge the victimhood lack a reparative effect. They are not directed to victims as such and the state remains liable to offer development opportunities to its citizens, regardless of human rights abuses that occurred in the past and the victims they produced. Victims are additionally entitled to development benefits not for redressing the damage caused by past atrocities, but for present and future-looking opportunities that every citizen is entitled to.

5.3 Recommendations

In light of the findings and lessons drawn from the cases studied, the following recommendations may address the question of 'who', 'how' and 'what' in relation to the design and the implementation of reparations.

The 'who' question refers to the beneficiaries and the source of reparations funds. Reparations schemes should be directed at victims identified in a comprehensive way, as such lessons may be learnt from the Peruvian case. Victims are the key focus of any sound TJ mechanism and should be given the primary priority for reconciliation

⁴⁰⁶ As above.

⁴⁰⁷ As above.

process. The definition of victims should be as inclusive as possible as to avoid any kind of selectivity which would amount to discrimination.

Taking lesson from Colombia in relation to financing reparations, beyond the binding duty of the state to bear the cost of reparations, measures to avail the assets and properties of perpetrator organisations – which are still identifiable as political parties or state institutions – should be taken to increase the financial capacities of an anticipated victims' reparations fund. Moreover, although reparations are an individual right of victims, collective reparations should be considered in light of the plight of poverty and their likelihood to have a structurally long-term and transformative impact on the Burundian society. This would allow for building a bridge between backward-looking reparations and future-oriented projects of development. It is important to remind that particular attention must be paid to vulnerable groups such as women, children, persons with disability, internally displaced persons, returnees and refugees. In this vein, necessary safeguards should be put in place from the outset to ensure that their voice is heard.

This raises the next question of how to secure reparations. This brings to the procedural aspects of reparations design and delivery. Issues of victims' participation are crucial to any process of transitional justice. To that effect, Chilean practice of taking into account victims' views can be a starting lesson for further consultation and participation. The determination of who is involved should also be done in a transparent way with effective involvement of all victims and the civil society organisations, since different categories of victims may claim different types of reparations. As in Chile, there are grounds to categorise reparations programmes, since victims of sexual violence and extended torture may and indeed do have distinct needs with victims of forced displacement and land dispossession for instance. The process of designing, implementing and monitoring reparations must therefore open opportunities for a meaningful engagement with various victims on an ongoing and equal basis. A government which claims to be democratic and seeks to do away with past bad practices, while ensuring a transition to a better future, should not regard demands of consultation as an embarrassing burden. This should rather be a prompt governmental attitude which would enhance a democratic culture of public participation.

Once the questions of 'who' and 'how' are answered, the 'what' cross-cutting dimension of reparations would respond to substantive aspects. In this regard,

notwithstanding the outcome of victims' ongoing consultation, programmes of reparations should address consequences of violations of, not only civil and political rights, but also economic, social and cultural rights. Issues such as access to the right to education as including public awareness and adult training, the right to an employment and equal treatment for equal work, equal access to resources and public services and their relation with the conflict should be thoroughly analysed. By so doing, the questions of inequalities and structural injustices as root causes of past violations of human rights would be looked into so as to design reparative responses in a long-term fashion, likely to guarantee non-repetition in the future.

Finally, it should be reminded that learning from earlier experiences does not only and exclusively mean taking best practices with due regard to local realities and needs, but also implies being aware of errors made in some instances so as to avoid them. To that effect, criticisms raised during the discussion of the country case studies such as victims participation, the definition of who is victim, the meaningfulness of reparations and the continuous updates of reparations pensions according to the inflation, etc. should be duly taken into account in the design, the implementation and the monitoring of TJ reparations in Burundi.

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