



# INTEGRATING DEVELOPMENT AND REPARATIONS FOR VICTIMS OF MASSIVE CRIMES



Cristian Correa  
Senior Associate, International Center for Transitional Justice

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# Integrating development and reparations for victims of massive crimes

Cristian Correa<sup>1</sup>

## Introduction

In the aftermath of internal armed conflicts there is the need to provide conditions for development and wellbeing to the entire population, helping to rebuild trust and to strengthen security. Armed conflicts cause the destruction or disruption of local economies, and the provision of basic services. In some cases, previous policies, marginalization or simple neglect have caused or contributed to the conflict, but hidden under other labels, such as ethnic or political divisions. The implementation of policies that may help rebuild those economies, provide basic services for the population and help integrate marginalized communities is not only an obligation under international law,<sup>2</sup> but a basic condition for peace and stability. That is how it has been understood by reconstruction efforts performed in several countries, which are framed as peace-building efforts.<sup>3</sup> A society divided by the conflict needs to rebuild itself and provide conditions for wellbeing to its entire people.

However, it may be difficult to guarantee conditions for sustained development, rebuilding trust and guaranteeing security if there is no examination of what happened, if some type of accountability for those responsible for gross violations of human rights is not implemented, and the worst consequences of violence towards those who suffered from them are not addressed. Sustained peace and development can be better achieved if the process of peace building includes those most affected by the violence, recognizing them as right bearers and providing them with forms of reparations for the harm they have suffered.

Additionally, reconstruction from systematic violations of human rights differs from just reconstruction from natural disasters, as there is a specific obligation to provide reparations to victims of the most

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<sup>1</sup> Senior Associate, International Center for Transitional Justice. This paper does not necessarily represent positions held by ICTJ.

<sup>2</sup> According to the International Covenant on Social, Economic and Cultural Rights, as well as the Declaration on the Rights to Development (General Assembly Resolution 41/128 of 4 December 1986), to mention just the two more prominent documents, which are reinforced by other instruments in regards to ethnic or linguistic minorities, indigenous people, or specific rights in regards to children.

<sup>3</sup> Affirmed by the General Assembly Resolution 60/180 of 30 December 2005, which created the UN Peace Building Commission, founded on the recognition “that development, peace, and security and human rights are interlinked and mutually reinforcing.” As such, one of the main purposes of the Commission is “to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundations of sustainable development.”

serious human rights violations. This obligation derives from customary international law,<sup>4</sup> as well as from the obligation to provide victims of human rights violations an effective remedy.<sup>5</sup> This obligation is referred to a more specific category of people, such as those who have suffered the most serious violations,<sup>6</sup> but this, in many cases, includes tens of thousands of people.

In defining and implementing reparations for massive violations of human rights in contexts of transition, three closely related challenges, often portrayed as competing priorities in regards to the need for broader development policies, emerge. One is the need to invest in the reconstruction of the country, especially in the aftermath of armed conflict. Another is how to devote scarce resources for providing reparations to victims of human rights violations, when a large segment of the population lives in extreme poverty. The third is the question of how to address also the violations of social, economic, and cultural rights, and not just to focus on victims of civil and political rights, especially after oppressive regimes that have neglected the development of certain regions or communities for decades. Looking at the practical implementation of some reparations programs that have been executed effectively helps to draw lessons and ideas that can offer some responses to these dilemmas.

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<sup>4</sup> It has been affirmed that “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation (*Factory at Chorzów*, Merits, 1928, P.C.I.J., Series A, No. 17, p. 29), as “the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself” (*Factory at Chorzów*, Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21.), as well as article 31 of the Articles on Responsibility of States for International Wrongful Acts prepared by the International Law Commission and approved by the UN General Assembly (A/56/49(Vol. I)/Corr.4).

<sup>5</sup> According to article 2.3 of the International Covenant on Civil and Political Rights (ICCPR), as well as other instruments of international law, including article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination,; article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; article 39 of the Convention on the Rights of the Child; article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance; and articles 68 and 75 of the Rome Statute of the International Criminal Court. It had been systematized by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), 21 March 2006 (hereinafter, UN Basic Principles on the Right to Reparation), which, according to its preamble, it doesn’t establish new obligations but identifies “mechanisms, modalities, procedures and methods of implementation of existing legal obligations.”

<sup>6</sup> Article 2.3 of ICCPR refers to violations of any of the rights established by that convention, but the UN Basic Principles on the Right to Reparation refers to gross violations of international human rights law and to serious violations of international humanitarian law. The specific violations that fall under these two categories are not defined, but from its preparatory work and from the Rome Statute they could be referred as genocide; crimes against humanity, understood as a series of crimes committed as part of a widespread or systematic attack directed against any civilian population; and grave breaches of the Geneva Conventions, comprising also violations committed in armed conflict not of an international character, particularly when committed as part of a plan or policy of large scale commission. The list of crimes includes murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, any other form of sexual violence of comparable gravity, enforced disappearance, and others (see Commission on Human Rights, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Final report submitted by Mr. Theo van Boven, Special Rapporteur - E/CN.4/Sub.2/1993/8, 2 July 1993, paragraphs 8 to 13).

How can states provide effective reparations for massive numbers of victims, in contexts of scarcity and where reconstruction is also an imperative? Answering this question requires consideration of the interdependency of reparations and development policies. A development approach to how reparations are conceived might include defining reparations in a way that reparations could provide some substantive improvement in victims' lives. Reparations should be designed in a way that can produce long-term impacts on victims' wellbeing, and at the same time be capable of reaching a large number of them. In terms of development, the question would be how to provide conditions for the fulfillment of basic socioeconomic rights to the areas most affected by the conflict. This requires understanding reparations as part of a broader transitional justice process; exploring ways of defining reparations for massive crimes that differ from the traditional legal/individual framework for reparations; and examining how those forms of reparations can be supported by development policies, which need to be simultaneously implemented. In looking into this the perspective offered by the notion of human development and particularly the capabilities approaches of Sen and Nussbaum are particularly useful.

### **1. Limitations of using reparations to respond to poverty and marginalization**

Despite the imperative character of the obligation to provide effective remedies to victims of human rights violations, responding to the rights of those victims who suffered the worst crimes, without addressing the needs of other people affected by the conflict, its destruction and the poverty and marginalization that affects them, can create a perception of disenfranchisement and discrimination. Neighbors living in similar conditions to direct victims of extreme violence might feel resentful of those receiving reparations.

Limiting transitional justice, and specifically reparations, to only violations of some civil and political rights has been highly contested.<sup>7</sup> It is reasonable to argue that reparations for victims cannot be implemented without addressing the most serious forms of discrimination or marginalization that, in many cases, contributed to the conflict or resulted from it. The concentration of power and wealth by an oppressive regime, for example, may have caused violations of social and economic rights of many other people, in addition to those who were detained, tortured or killed by repressive forces, as with the case of the Ben Ali regime in Tunisia.<sup>8</sup> In South Africa, political repression, torture and forced disappearances were instruments for a system of explicit marginalization, exclusion and imposition of poverty.<sup>9</sup> In Timor-Leste, military occupation and armed conflict forced many people to take refuge in desolated

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<sup>7</sup> The international Journal for Transitional Justice contributed to this discussion through a collection of essays by several scholars and practitioners challenging a narrow approach limited to violations to civil and political rights to transitional justice, several of which are discussed in this paper. See IJTJ, vol. 2, issue 3, December 2008.

<sup>8</sup> The law on transitional justice of December 2013 (Loi Organique Relative à l'instauration de la Justice Transitionnelle et à son Organisation) adopts an approach that includes acts of corruption together with disappearances, killings and marginalization of regions and communities in its transitional justice framework.

<sup>9</sup> Mahmood Mamdani, "The Truth According to the Truth and Reconciliation Commission," in Amadiume, I., and An-Naim, A., (eds.), 2000, *The Politics of Memory: Truth, Healing and Social Justice*, Zed Book - New York, 176-183.

areas, where they were deprived of minimum conditions of survival, as attested by the Commission of Reception, Truth and Reconciliation.<sup>10</sup>

Should transitional justice, and particularly reparations, include victims of violations of civil, economic and cultural rights? This issue has been part of a contested debate between scholars and practitioners working on reparations for massive violations. Understanding human rights as indivisible should lead to an affirmative answer. For many communities it might be difficult to argue a strong distinction between victims of killings and victims of policies that caused death by starvation, as was debated in Timor-Leste.<sup>11</sup> In the case of Nepal, Carranza argues that reparations need to be accompanied by the recognition that the economic and social rights of the Dalits and Janajatis were deliberately denied as root causes of the conflict, and thus reparations must also address the mechanisms of exclusion and discrimination that still affects them.<sup>12</sup>

Other authors recommend maintaining some distinctions, and acknowledging the limitation of transitional justice to effectively produce broader change. Duthie answers this question based on the distinction between corrective justice and distributive justice. He warns, quoting de Greiff, that this should not be understood as a watershed distinction, but one about emphasis, assuming a cautionary approach.<sup>13</sup> A similar approach is used by Waldorf, based on the Peruvian case, where marginalization and economic and social exclusion was recognized by the truth commission, but reparations was focused on victims of violent crimes and repression.<sup>14</sup> They all make an important distinction between immediate obligations and long-term processes, considering that overcoming long-term marginalization and conditions---even those that have resulted from violations of social, economic and cultural rights---may require a political struggle that requires the legitimacy of the open, internal political process.

Looking at some truth commissions' findings and their recommendations can help shed light on this question. Addressing the consequences of long-term discrimination, sometimes deeply rooted in the mindset of a wide portion of a countries' population, is not something that a reparations program can address, or that can be solved in a short period of time. The distinction made by the Peruvian Truth Commission is useful. The Commission identified that it was not a coincidence that most of the victims of 20 years of internal armed conflict were indigenous people living in the marginal provinces of the Andes and the Amazon, establishing that most of the victims of killings and disappearances belonged to

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<sup>10</sup> The report concluded that an estimated number of 102,800 persons died as result of the 1974-1999 conflict, of which 18,600 were killed or disappeared and the remaining 84,200 died due to hunger and illness. The Commission also reported violations of economic and social rights committed during the Indonesian occupation. Chega! The Report of the Commission of Reception, Truth and Reconciliation in Timor-Leste (CAVR), Executive Summary (2005).

<sup>11</sup> Ruben Carranza, "The Right to Reparations in Situations of Poverty" (ICTJ - New York, 2009).

<sup>12</sup> Ruben Carranza, "Relief, Reparations and Root Causes of Conflict in Nepal" (ICTJ - New York, 2012).

<sup>13</sup> Roger Duthie, "Transitional Justice, Development and Economic Violence," in D.N. Sharp (ed.), *Justice and Economic Violence in Transition*. Springer Science+Business Media, New York, 2014, 171.

<sup>14</sup> Lars Waldorf, "Anticipating the Past: Transitional Justice and Socio-Economic Wrongs," *Social and Legal Studies* 21, no. 2 (2012): 178. See also Lisa Magarrell, "Reparations for massive or widespread human rights violations: Sorting out claims for reparations and social justice." *Windsor Yearbook of Access to Justice* 22: 85-98.

those marginalized populations, and 75% of them had native languages as their mother tongues.<sup>15</sup> However, the Commission did not try to determine why vast numbers of Peruvians had suffered historical marginalization, or who was responsible for violations of social, economic and cultural rights. As result, the Commission didn't bundle up all its recommendations as reparations. The Comprehensive Reparations Plan it developed was directed to victims of specific violations. This included killings, disappearances, torture, sexual violence, as well as those whose identity documents were destroyed, or communities affected by massacres, destruction or the killing of their leaders.<sup>16</sup> Additionally, the Commission made recommendations for addressing historical marginalization, but not as reparations but as institutional reforms. The consisted on policies for strengthening democratic institutions aimed at "modifying the conditions that generated and deepened the conflict."<sup>17</sup> Other commissions that included violations of social and economic rights in their analysis also maintained distinctions regarding how to address them, recommending institutional reforms, and focusing the language of reparations on violations only to the right to life or physical integrity.<sup>18</sup>

Following a slight different approach, the Truth, Justice and Reconciliation Commission of Kenya not only made a connection between violations of the right to life and physical integrity and violations of social and economic rights, but also examined the latter as violations of human rights in and of themselves, identifying "... corruption, systematic land grabbing..." as violations. Consistent with this, it made recommendations to address these violations as reparations. However, tellingly, it established an order of priorities for implementing reparations, assigning the highest priority, in terms of urgency, to reparations for violations of the rights to life and physical integrity of those vulnerable victims, according to age and socioeconomic conditions.

The solutions differ according to the context to which they are attempting to respond, especially in situations of armed conflict or prolonged forms of repression that imposed conditions of marginalization to some groups. However, in all cases, some distinctions between such marginalization and specific

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<sup>15</sup> Informe Final de la Comisión de la Verdad y Reconciliación, vol. VIII 108. The Commission included in its analysis of violations of the rights to life, physical integrity, freedom of movement, freedom of residence and other socioeconomic correlations that helps explain why violence was committed, tolerated and ignored. It also analyzed the different consequences of such violence, including socioeconomic, psychosocial and sociopolitical effects. It concluded, though, that severe conditions of marginalization, political, social and economic invisibility of the people living in those areas help explained the lack of respect of their culture and rights demonstrated by all fighting factions, but also by the indifference that with which the violations were received by the elites and middle classes living in the coastal cities.

<sup>16</sup> Informe Final de la Comisión de la Verdad y Reconciliación, vol. IX 107 - 111.

<sup>17</sup> The reforms recommended included measures for improving representation, inclusiveness and the appreciation of cultural diversity and local leadership, as well as strengthening the provision of public services and development in the affected regions. Informe Final de la Comisión de la Verdad y Reconciliación, vol. IX 85 and 87 - 102.

<sup>18</sup> That is the case of the commissions of Timor-Leste (*supra* 10) and the Truth and Reconciliation Commission of Sierra Leone.

violations of the rights to life and physical integrity are maintained, resulting in the prioritization, at least with regard to urgency, to respond to those most vulnerable among the victims of the latter.<sup>19</sup>

This distinction might also help to clarify the targeted population for each policy. Reparations policies can have a greater impact if focused on victims of the most severe crimes, addressing the obstacles to their current wellbeing (measured according to equal conditions of the general population) which resulted from the effects of violations and which they now face. Development policies, or addressing violations of socioeconomic rights that affected large number of people should have a broader focus on all those who suffer from marginalization and poverty, and should attempt to make economic sense for the common good. Defining how to guarantee social and economic rights should not be based on the map of violence, but on the map of marginalization, following the most efficient routes that can better guarantee accessibility to everybody.<sup>20</sup>

Despite the recognition of the indivisibility of rights, it is possible to affirm that there is some hierarchy among them. Systematic, massive and intentional killings of unarmed persons, forced disappearances, torture and rape are crimes that without doubt generate specific obligations to investigate, try those found responsible and provide reparations. If the killings are perpetrated by forced and intentional conditions of starvation, they may also qualify as mass murder. This could be a first layer of reparations, focused on the individual victims who suffered the most severe violations and which have a greater impact on their lives. In certain conditions, other violations to the right of freedom of movement, like arbitrary detention, kidnapping or forced recruitment, could also qualify as severe violations. Making these distinctions don't mean denying the obligation states have to respect and protect other civil and political rights, or to respect, protect and fulfill economic, social and cultural rights. Nor does it mean that the failure to comply with these obligations is not also a violation of human rights, nor that those violations do not generate an obligation to provide effective remedies and reparations to the victims. What it means is that when facing violations of this kind, providing redress to them should be a priority, given their seriousness. Defining such priorities might be important when political or economic

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<sup>19</sup> However, that sense of urgency has not translated into effective, timely implementation. After more than 10 years since the truth commission of Peru made its report public, the level of implementation of these reforms has been limited. Implementation of reforms has also been slow. The most remarkable has been some forms of decentralization and the documentation of millions of inhabitants from marginalized regions into the civil registration system (see Cristián Correa, "Reparations in Peru: From Recommendations to Implementation," ICTJ – New York, 2013). Reparations recommended by the commission of Sierra Leone have been limited to an interim payment, urgent medical interventions, and some community ceremonies (See Mohamed Suma and Cristián Correa, "Report and proposals for Implementation of reparations in Sierra Leone," ICTJ - New York, 2009). In the case of Timor-Leste, recommendations on reparations had been ignored, as pensions to veterans had been prioritized (International Crisis Group, "Timor-Leste's Veterans: An Unfinished Struggle?" Asia Briefing No. 129 - Brussels, 2011).

<sup>20</sup> One senior staff at the Ministry of Health of Mexico warned the author about the lack of sense it makes to him to build a hospital in a community affected by severe repression and massive forced disappearances. He argued that to run the hospital and staff it with the professionals it needed required a location that corresponds to the overall coverage of health care for that specific region (author notes of meeting held in Mexico City in June 2010). This doesn't exclude the possibility of reinforcing a local clinic with some specialized services, but it requires looking at the whole network of services in unison.

conditions don't allow implementing comprehensive forms of reparations that could include all victims under ideal but unrealistic circumstances. Establishing such priority might be important, especially considering the poor record of effective implementation that characterizes comprehensive programs designed by most truth commissions. Priorities could help increase the chances that at last those who suffered the most will effectively receive reparations. Finally, distinguishing between reparations for the most serious violations and other measures of reconstruction or of addressing conditions of historical marginalization could help targeting better possibilities for funding. International donors and aid agencies are often reluctant to invest on reparations for crimes, but are more willing to get involved in development policies that could target marginalized areas.

In situations of massive and multiple violations and weak capacity, a transitional justice approach can make a valuable contribution by providing elements for prioritizing what to do first and how to keep connections with the broader picture. The need to prioritize forces the establishment of some hierarchies among violations, even if all of them constitute serious violations or even international crimes, so that which violation to repair first can be identified. This might not mean ruling out the obligation to provide reparations and remedies for other violations, as demonstrated by the examples of "waves" of reparations and remedies with regard to violations committed by the Nazis and their supporters in different European countries, as well as in the cases of Argentina and Chile, whose reparations programs spanned several decades, adding categories of victims and reopening registration processes, and even in the actual implementation of reparations in Peru.<sup>21</sup> Postponing some categories of victims entails some risks, though. It can cause resentment and distrust, decreasing the ability of the new regime's claim to be working for reconciliation. Furthermore, it is possible that some of the excluded categories won't be ever addressed as deserved, because the ability to mobilize political will for it can fade or diminish. However, it is important to keep in mind that the alternative to establishing priorities between types of violations and ways to address them is not between prioritizing, and

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<sup>21</sup> All these processes have taken decades, with successive additions of categories of victims excluded at the beginning and being added as result of political pressure. Only in the case of Peru was the reparations program defined in a broad and comprehensive way from the start, but implementation has also been piecemeal, as mentioned before. This is not to underscore the complexities and difficulties of providing meaningful forms of reparations even by developed or middle income countries. The challenges for poor countries, where the situation of poverty and weak institutions is worse, makes it even more difficult. Despite the comprehensive nature of the reparations plan recommended by the CVR and defined by a Law, its actual implementation has suffered different waves and priorities. A first one, during the Toledo Administration, was characterized by what Laplante describes as "confusion and tension" (Lisa Laplante, "On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development," *Yale Human Rights and Development Journal*, vol. 10, Issue 4, 2014), and only in last weeks of his Administration was a Decree passed, making more concrete definitions of all its components. The García Administration prioritized some programs over others and focused on effectively implementing those selected. It started executing a narrow definition of the collective reparations program, and only in the last weeks before president Humala took office, did the economic reparations program (consisting on single cash payments to individual victims) start to be implemented. The Humala Administration has changed its approach also, and only lately has starting the implementation of the programs in education and health care, while continuing the execution of the programs started by García (see Cristián Correa 2013, *supra* 19; and Defensoría del Pueblo, "A Diez Años de Verdad, Justicia y Reparación. Avances, Retrocesos y Desafíos de un Proceso Inconcluso," Informe Defensorial No. 162, 2013).

responding to all serious violations that affirm the indivisibility of rights, but between trying to respond to all violations and not being able to address any of them. A limited implementation of a broad and ambitious reparations policy not only might cause the natural problems of broken promises with regard to the ability to strengthen civic trust among victims, but also might mean excluding some of them by other criteria different than the consideration of the harm they suffered; for example, issues of accessibility for those who do not have enough evidence of the harm they suffered; who learned too late about these programs; didn't know how to make their claims; or who didn't feel safe to speak out--- all obstacles that frequently occur when measures are insufficiently implemented. In most cases, those excluded for these or other factors will be the poor, living in rural or marginalized areas, women, children and the elderly: the ones most in need.

Finally, what should be done with other violations and harms like massive displacement, exile, confiscation or the destruction of property, and loss of jobs? Perhaps some solutions can be implemented to address not so much the consequences of the violations of rights to be repaired, but the fulfilling of the obligation to provide conditions for return, resettlement and reintegration. This should include, when needed, development policies targeting the areas for return or resettlement, guaranteeing minimum conditions in regards to education, health care and economic opportunities for those areas. Addressing property and job loss may be more difficult, at least on strict proportional bases that would require many resources to respond to those victims who suffered the heavier losses. In doing so, special care should be taken to not sacrifice the measures directed to those most in need, considering the scarcity of resources.

## **2. The need for a different approach to reparations for massive crimes: responding to the socioeconomic and psychosocial consequences of violations**

Even when focusing only on the worst violations to the right to life and physical integrity, the question remains with regard to the ability of poor countries to implement reparations that can address the consequences of such violations. The socioeconomic consequences to most victims of human rights violations are enormous.<sup>22</sup> The impact of the killing or disappearance of a breadwinner can be directly associated with the impoverishment of the rest of the family. The same has been reported with regard to survivors of torture, who often return traumatized, depressed or unable to perform normal jobs, even when not physically impaired. Blacklisting, social mistrust and/or stigmatization frequently leads to

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<sup>22</sup> Socioeconomic impacts of massive human rights violations have been assessed through numerous studies. Moreover, several truth commissions, through their massive assessment of the violations reported, have also found widespread evidence of this kind of impact. See for example the reports of the commissions of Peru (Informe Final de la Comisión de la Verdad y Reconciliación, vol. VIII, section third, chapter 3), Guatemala (Guatemala: Memoria del Silencio, chapter 3), and Chile (Informe de la Comisión Nacional de Verdad y Reconciliación, vol. II, chapter 4, on victims of disappearance; and Informe de la Comisión Nacional sobre Prisión Política y Tortura, chapter 7, on survivors of torture). The truth commissions of South Africa and Sierra Leone dedicated special sections on the impact on women and children as direct, as well as indirect, victims, and the Peruvian report also included a section on the differentiated impact on women.

chronic unemployment or underemployment. If the violations are part of a massive policy of repression, victims are also affected by the diminishment of their social capital. In certain context women victims of rape are often abandoned by their husbands and rejected by their family, or they become “unmarriageable”, which often has an impact on her socioeconomic status, condemning them and their children to poverty. Beyond a direct connection to breadwinners, missing a family member who didn’t provide primary income is still significant, as their (unpaid) economic contributions may have been as important as that of the breadwinner. But it is primarily the emotional impact on the rest of the victim’s family that can be devastating. The victim’s insecurity, distrust and fear naturally affect all family members. Furthermore, families devote days, months and years looking for their loved ones, incurring expenses and increasing their sense of isolation and vulnerability. The impact reaches the next generation, for in many cases the support children need from their parent is missing, or they are unable to continue their education in their full potential. If the economic situation of victims is too dire, receiving financial compensation, as often is the case,<sup>23</sup> will have a very limited capacity to improve their long-term wellbeing. Reparations measures will serve in some way to help victims survive, pay some debts or start some businesses, but, overall, will provide nothing more than temporally relief.<sup>24</sup>

As result of these consequences, victims and their families find their ability to enjoy socioeconomic rights diminished, even if some of these rights are provided for free by the state. A widow needs to send her oldest child to work, interrupting his or her education, to help her raising younger children. A victim of rape doesn’t find the specialized services needed for her rehabilitation and the benefit of her right to health. The provision of free education or health care for the whole population is not enough for many victims, nor is the construction of schools or clinics.<sup>25</sup> Prioritizing victims for accessing those services, a magic word usually included in reparations policies and laws, is not enough if they are not accompanied by an expansion of the offer (so victims do not just jump to the front of the line, leaving other poor people behind), nor do they often address the additional obstacles victims face in exercising their socio-economic rights. Reparations should offer something additional to victims, that will allow them to

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<sup>23</sup> Even when defined as comprehensive programs, as in the case of Peru and Colombia, massive implementation of reparations is often limited to delivering one-time cash payments that vary in different countries. In Peru, the compensation payment paid to the families of those killed or disappeared is 10,000 nuevos soles (approximately USD 3,700). In Colombia such amount is 40 sueldos mínimos legales mensuales (approximately USD 13,266).

<sup>24</sup> A welcomed, but only a temporarily relief are words chosen from some victims in Colombia to describe amounts paid to them as reparations. The amounts are not insignificant, but in many cases, victims report that they used them to pay some debts, a couple of semesters for college education of one child, private health care services, and some home improvements (ICTJ, “Estudio sobre la Implementación del Programa de Reparación Individual en Colombia 2011-2013,” forthcoming 2014).

<sup>25</sup> This is precisely one of the criticism victims in Peru have about the collective reparations program being implemented. The inhabitants of communities affected by the 1980-2000 internal armed conflict receiving an investment project of their choice as reparations welcomed the project, but most of them didn’t recognize them as reparations, for frequently they had not been tied to the consequences suffered by the community; the projects had not been sufficient for responding to the harms suffered, neither to address the high degrees of historical marginalization that was reinforced during the conflict; and in its implementation the program started including workshop on historical memory about the violence experienced only as an afterthought (see Sonia Paredes and Cristián Correa. “¿Cuánto se ha reparado en nuestras comunidades? Avances, percepciones y recomendaciones sobre reparaciones colectivas en Perú (2007-2011),” APRODEH & ICTJ – Lima & New York, 2011.

remove the specific obstacles they face in order to exercise these rights, or that consist of a specialized service tailored to them. However, this should be done in a way that still is simple to administer and deliver, and that can be implemented for all those victims that require them. This way, reparations can help victims to access development in similar conditions to their neighbors.

Considering the situation of victims forces the question of how appropriate a traditional understanding of reparations is. The notion of reparations is intrinsically rooted to the goal of full restitution. Its sources in civil law, as well as in international law, are based on the damage caused by a wrongful act.<sup>26</sup> This means that reparations “should be proportional to the gravity of the violations and the harm suffered”<sup>27</sup> or should attempt to make its economic impact neutral. The standard of proportionality is a basic measure of fairness. However, in a context of massive violations, the need to guarantee accessibility to all victims of the most serious violations, especially those with more difficulties to present evidence or to speak out about the violations, may require usual measures of strict proportionality to be complemented or moderated.

When examining individual claims, or even in class action cases involving property losses, courts need to assess damages to determine appropriate compensation. However, victims of massive crimes will face difficulties presenting evidence of the harm suffered, which can translate into the exclusion of many of those who are unable to comply with such a requirement. For many victims it will be difficult not only to prove the harm suffered, but even to present their claims in formal procedures that are foreign to them. Additionally, individual assessments of harms run the risk of exposing victims to secondary victimization, and complex questions about assessing personal losses and suffering. Finally, there is the risk of the program being perceived as unfair by creating differences among victims.

The standard of strict fairness can lead to another type of unfairness: excluding those who, in many cases, will be the most poor, the least educated, and those most affected by violence. In many cases, these might be the elderly, children or women. Those categories of victims will have problems presenting claims and evidence to support them, even if a lawyer is not required to do so. Administrative programs of reparations have been established as a means of strengthening accessibility, lowering the burden of evidence, implementing outreach initiatives and covering broad categories of victims.<sup>28</sup>

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<sup>26</sup> “It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage [...] suffered as a result of the act which is contrary to international law.” PCIJ, case concerning the factory at Chorzów, merits, series A No. 17, September 13<sup>th</sup>, 1928, 27-28.

<sup>27</sup> UN Basic Principles on the Right to Reparations, *supra* 5, paragraph 15.

<sup>28</sup> In Peru, registration used a variety of mechanisms for registering victims, including the declaration of community leaders and the analysis of contextual information (Consejo de Reparaciones, “Todos los Nombres: Memoria Institucional del Consejo de Reparaciones 2006-2013,” Lima, 2013). In Chile a significant number of victims registered by the National Commission for Political Imprisonment and Torture were accredited based on contextual information. A lower threshold was implemented for cases that occurred during periods and for places where documentation of imprisonment was more difficult, considering the socioeconomic and educational level of victims and the context, including the consistency with other testimonies (Informe de la Comisión Nacional sobre Prisión Política y Tortura, chapter 2, *supra* 22).

Additionally, for some victims, it will be difficult to come forward and present a claim, if that requires providing details about their suffering that they are not ready to discuss openly. If cross examined, or if the registration includes questions that make the victim feel intimidated, or as if they are being examined or questioned, victims with severe trauma will be exposed to significant suffering, or “re-traumatization.” When registering victims, a balance between listening and welcoming should be found along with the need to find evidence. If the reparations award depends on providing evidence not just about the fact that the violation occurred (which is already very difficult in many cases), but about details about the violations or the loss suffered, the interview may be perceived by the victim as an interrogation by a distrustful agent.<sup>29</sup>

A third objection to applying strict proportionality for massive processes of reparations is the dilemma of how to set a value for human suffering. Should a massive reparations program distinguish between the wealthy and the poor, by providing compensation according to their respective economic loss? If that is the case, the reparations program might end up as an economically regressive policy. This is a challenge also for judicial reparations, but when it is a massive reparation policy making this distinction, it can be more problematic. In a context of limited resources, when reparations compete with the need for reconstruction and the provision of basic services to the regions affected by the conflict, devoting significant amounts of financial resources to those who are economically well off poses a serious dilemma. Another dimension of this question is how to evaluate the impact of different degrees of suffering between certain categories of violations; for example, assessing the harm caused by torture that doesn’t translate into physical disability? Should reparations limit the definition of suffering related to illegal detention and torture solely to the duration of the deprivation of liberty? If it is difficult to demonstrate two decades later that one person was imprisoned for political reasons, how much more difficult will it be to demonstrate how long they were imprisoned, or if they actually were subjected to torture or not, when it was a common pattern for those imprisoned to have been subject to torture? Similar challenges arise when trying to provide evidence of the causal link between certain health conditions and torture suffered decades before, or when requiring those receiving scholarships as reparations to prove that their studies were actually interrupted by the violation suffered. When trying to determine the harm and causal links in such detail, the question of accessibility is raised again. How can reparations programs guarantee that those without much evidence concerning not the violation itself, but more precise facts, will not receive less compensation due to their inability to provide such evidence?

Finally, when different amounts are given to victims of similar incidents or covered by the same program, there is the risk those receiving less will become dissatisfied, or suspicious, even if the process of determining those amounts is transparent. If those differences reflect the wealth of the victim (as

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<sup>29</sup> Assessment of claims and examination of victims by physicians, as part of the implementation of reparations in Germany for victims of Nazism, resulted in frequent accounts of secondary victimization. See Christian Pross, “Paying for the Past: The Struggle over reparations for Surviving Victims of Nazi Terror,” John Hopkins University Press – Baltimore & London, 1998; and Ariel Colonomos and Andrea Armstrong, “German Reparations of the Jews after World War II: A Turning Point on the History of Reparations,” in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press – Oxford & New York, 2006).

derived from applying a notion of loss of income or opportunities) there is the risk of establishing a hierarchy of the suffering that runs along the lines of social and economic hierarchies in society.<sup>30</sup>

One way to answer these questions is to provide similar forms of reparations to all victims of the same type of violations, making as few distinctions between them as possible. This has been done through the provision of reparations packages comprised by several measures, including payments, health care, scholarships, access to housing, and symbolic forms of reparations. A combination of different measures, accessible to all victims, may address the differing impacts of the violence suffered by victims. They also may provide ways to respond to their different needs, but without sending a message of a differentiated value of their suffering. Some victims may be more in need of scholarships, for example, while others may benefit from health care later on life. This is the approach followed in Peru, Chile, Colombia, and the truth commission of Sierra Leone and Kenya, among others.<sup>31</sup>

### **3. Defining a standard for reparations: a concrete message of membership and dignity**

Accepting that it is not convenient, nor possible, to make reparations proportional to an individualized assessment of the harm suffered, requires replacing the test of individual proportionality with another measure that can better guarantee fairness. This requires examining the consequences of massive human rights violations in order to define a standard applicable to massive violations that can be compatible with the demand for fairness and accessibility.

The violence suffered by gross violations of human rights, like summary executions, forced disappearance, torture, rape and others, can be seen as a message communicated through concrete, mostly physical means, denying the victim's dignity and membership in the community. The violence, the lack of any human consideration, the disregard for rights, and the abuse of the violations carry this powerful message. Later, the inaction and even mistreatment by the police, the judiciary, and authorities, as well as the insensitivity or complicit silence by the press and public opinion often reinforces and replicates the message over time. It is a message expressed through multiple means, with violence and disrespect for the victims' dignity and sense of belonging to society, over a long period of time.

The goal of reparations can be defined as delivering the opposite message. This can help define a standard for the reparations measures, as well as for the way they should be delivered. Reparations should then be understood as an expression, by concrete means, including verbal language but mostly material language, of a message of dignity and membership. Reparations should have the ability to

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<sup>30</sup> Naomi Roth-Arriaza and Katharine Orlovsky, "A Complementary Relationship: Reparations and Development," in Pablo de Greiff and Roger Duthie, *Transitional Justice and Development: Making Connections*, Social Science Research Center - New York, 2009, 193.

<sup>31</sup> For Peru and Chile see Cristián Correa, "Reparation Programs for mass Violations of Human Rights: Lessons from Experiences in Argentina, Chile and Peru," in Felix Reátegui (ed.), *Transitional Justice. Handbook for Latin America*, ICTJ & Amnesty Commission - New York & Brasilia, 2011), 409-4041. For Colombia see ICTJ, "Estudio sobre la Implementación del Programa de Reparación Individual en Colombia 2011-2013," *supra* 24.

communicate to victims that they are acknowledged as human beings, entitled to rights and dignity, and that they are important members of the community (the nation or the state in which they live).

This means that reparations should be sufficient enough to guarantee a standard of living that affirms dignity and membership, and should be delivered in a way that is consistent also with the message of dignity and membership. This has consequences for a) what standards the reparations measures included in the program should have; b) the way symbolic reparations are integrated into the program; c) the definition of how the measures should be delivered in time; d) the role of participation in its definition and execution; and e) the importance of effective implementation.

#### **a) Defining the standards for reparations measures**

To affirm the dignity and sense of membership for victims requires reparations to reach a certain standard, which could be the claim that it is fair. This standard demands measures that are capable of guaranteeing a level of wellbeing that is similar to the average person in the country, including those measures needed to overcome specific obstacles that victims might be facing in order to achieve those standards. The reference amount for the pension paid to victims of the disappeared and killed in Chile was defined according to the average family income, which was the same for each family.<sup>32</sup> A similar concept was used by the South African Truth and Reconciliation Commission for its recommendation about payment of compensation.<sup>33</sup>

In terms of rehabilitation and health care, this standard might mean not only providing access for victims to the basic health care coverage that the country offers to those who cannot pay, but something additional that can allow them to remove the obstacles that they specifically face to having average health care quality. This might be, in addition to regular health care free of charge, forms of psychosocial support and physical rehabilitation for those who in need, designed specifically considering the needs and profiles of victims.<sup>34</sup>

Another component that victims often value is education, for themselves, but mostly for their children. One of the most distressing impacts of human rights violations, and subsequent years of impunity and denial, and blacklisting for jobs and discrimination, is the inability of victims to advance socially and economically, and the impact this has on the ability to educate their children. This is sometimes what victims most regret, for they grow frustrated seeing how the violence they suffered affects not only

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<sup>32</sup> Informe de la Comisión Nacional de Verdad y Reconciliación, p. 829. The reference amount was used for determining the individual amounts for each family member. The spouse obtaining 40% of that amount; each child under 25 years of age or disabled 15%; and the mother and in his absence, the father, 30%. Key to the provision was that if there were family members that in total exceeded the 100%, as in the case of a spouse, a mother and three children, their portions were not reduced and the whole group received more than 100% of the reference amount. See Law 19,123, art. 20.

<sup>33</sup> Unfortunately, the recommendation was not followed and the government ended up paying. See Christopher J. Colvin, "Overview of the Reparations program in South Africa," in Pablo de Greiff (2006), *supra* 29, 194.

<sup>34</sup> This is the case of the Comprehensive Reparations and Health Care Program (PRAIS) in Chile, which adds to universal coverage to the public health care system the support of specialized teams providing psychosocial and medical support to victims.

them, but the future of those for whom they care the most. Providing support for the education of victims, as well as their children, can help remove and compensate some of the consequences of the violence. This shouldn't be confused with simply granting victims free education at the primary level, or at levels the state already provides services, nor to building schools or guaranteeing placement. Reparations must consider the obstacles victims may face in accessing services that are available to all, or, in the case of services accessible to just a few, such as paid higher education, specific forms of additional assistance. Providing scholarships or conditioned payments for making sure victims can access to education could be both a measure of social rehabilitation and compensation.

Other measures that could complement those already described is access to housing for those victims of the most serious crimes who do not have adequate housing. By providing special subsidies or access to credit, reparations can guarantee that victims are in equal standing with other people to obtain housing, by remove the obstacles that resulted from the crime they suffered, and that thus prevented them from accessing regular housing programs offered by the state.

#### **b) The symbolic nature of reparations**

Reparations need to be symbolic and material.<sup>35</sup> Symbolic forms of reparations have been part of reparations programs recommended by truth commissions and/or implemented in several countries.<sup>36</sup> However, understanding reparations as a message also implies guaranteeing that the way material reparations are delivered is consistent with the recognition of membership and dignity. In Peru, registered victims receive a certificate expressing respect for their dignity, affirming his or her rights, and expressing that the state apologizes for the vulnerability and harm suffered. A letter containing a similar message is given to victims in Colombia. In Chile, victims received a copy of the truth commission report in which they were individually listed, with a letter from the President.

Understanding reparations as a message can also help deepen the interrelation between material and symbolic reparations. In order for material reparations to be capable of carrying a message of dignity and membership, they need to be sufficient to improve the living conditions of and opportunities for victims so that they can overcome the worst consequences of the violations and achieve the economic and social status of an average family. If the quality of the measures is not high enough, in terms of its ability to improve the life of the victims or help remove some of the obstacles they face to live like other members of society, the message gets truncated. On the other hand, if material reparations, even sufficient in quality, are provided in isolation from any symbolic component, or are accompanied by a

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<sup>35</sup> As result from the combination of measures of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, as recommended by the UN Basic Principles on the Right to Reparation (*supra* 5). This has also been affirmed by the jurisprudence of the IACHR (*Gelman v. Uruguay*, series C 221, paragraphs 266, 267 and 271; *Chitay Nech et al. v. Guatemala*, series C 212, paragraph 245; *Cepeda Vargas v. Colombia*, series C 213, paragraphs 227 – 230 and 233; and *Bámaca Velásquez v. Guatemala*, series C 91, paragraphs 81 – 82, among others).

<sup>36</sup> Including Guatemala, Chile, South Africa, Morocco, Timor-Leste, Peru and Kenya.

speech about solidarity,<sup>37</sup> assistance, help, relief<sup>38</sup> or paternalism, but not the acknowledgment of state responsibility, the message also gets truncated. Moreover, if the way reparations are actually delivered does not consider victims to be right bearing citizens, or is done without some degree of personalized approach, the reparative effect is diminished.<sup>39</sup> Finally, if reparations are not accompanied by acknowledgment of the truth, investigations of the violations, trials, and guarantees of non-repetition they can be seen as only payments for buying victims' consciences. It can be said, then, that it is not just that there are symbolic and material reparations, but that all forms of reparations are both symbolic and material, and all of them, together, express a message that needs to be coherent.<sup>40</sup>

Furthermore, to be consistent, the message also needs to recognize the limitations of the reparations measures implemented. Reparations provided by a massive program will not be able to address every consequence suffered by victims. The discourse of reparations needs to be conscious of the limitations of what is being provided, and not to oversell itself. Excessive propaganda and complacency in a program can produce adverse effects. Overambitious goals that cannot possibly be fulfilled by the

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<sup>37</sup> In the case of Colombia, a succession of comprehensive reparations programs has been established over time, the latest being defined by the 2011 Victims' Law. However, the programs are based on the notion of solidarity with victims, and are confused with the programs for humanitarian assistance also implemented, which undermines the message that they respond to crimes for which the state is responsible, or that should have prevented (see Cristián Correa, forthcoming 2014).

<sup>38</sup> In Nepal, a relief program has been executed with international funding. By refusing to define it as reparations, both parties of the conflict, the Maoist and the former Government, refuse to acknowledge their responsibility.

<sup>39</sup> The institution responsible for implementing reparations for victims of forced disappearance and murder in Chile, the *Corporación Nacional de Reparación y Reconciliación*, and its continuation, the Human Rights Program of the Interior Ministry, included a team of social workers who interviewed and helped the relatives of the registered victims to access the different reparations measures, through a personal, "friendly face". The same approach characterizes the services provided by the Comprehensive Reparations and Health Care Program (PRAIS), which, in addition to universal health care coverage, provides medical, social and psychological support by regional teams of professionals who are sensitive to the human rights nature of the program. Another example is the implementation of reparations in Colombia, where victims are individually interviewed to define which programs among the different forms of reparations offered they can access. Unfortunately, not all the programs established by the Victims' Law are available, and it is taking a long time for the different ministries and agencies to set up the concrete measures they are responsible for.

<sup>40</sup> Understanding reparations as the concrete expression of a message of inclusion and dignity helps reinforce the interdependency between reparations and other transitional justice components. For reparations to have any meaning, victims need to know what happened and why it happened, and societies need to acknowledge the violations committed. Investigating the crimes and trying those responsible for them affirms the values violated, and affirms the dignity of victims as right-bearers. Guaranteeing non-recurrence also affirms the dignity of victims and responds to victims' first, and most basic need, for security. This comprehensive approach to reparations is expressed by the UN Basic Principles on the Right to Reparations, which understand that reparations include "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition," including under satisfaction the "verification of facts and full disclosure of the truth;" the search for the whereabouts of the disappeared; and judicial and administrative sanctions against persons liable for the violations." This explains why victims in some cases have rejected reparations when not accompanied by criminal investigations or acknowledgment of responsibility. The search for the truth; investigating the most serious crimes, and trying those responsible for them; reforming institutions to guarantee non-repetition; and providing reparations to victims are not menu options for the government responsible for implementing them to choose from, but components of a comprehensive approach based on the consideration of victims as right-bearers, as members of the polity.

measures can create more resentment and distrust.<sup>41</sup> On the other hand, over caution about the limited capacity of the reparations program can be perceived as minimizing the serious nature of the violations and their impact.<sup>42</sup> Keeping a balance between these two situations is not easy. Obtaining political support and resources for reparations may require praising the impact and ability of the program to produce change and satisfaction. However, overselling such impact could backfire for victims, who may not feel that they have been fully repaired. One approach that might help in finding a balance is acknowledging that, despite the efforts being made by providing reparations, publicly acknowledging to victims that the program is not enough to respond to the consequences of the violations, neither can the reparations be proportional to the harm caused them. Additionally, messages communicating that these reparations provide closure for victims and allows the nation to turn the page over past violations, must be avoided, as both are based on false pretenses. This is perhaps a main difference between reparations for massive crimes and reparations for individual civil claims. The state responsible for massive human rights violations can never say that it has paid the debt owed to victims.

### **c) The need for a repeated message and long term effects**

The extent of harm caused by massive human rights violations needs to be responded to by looking into durable forms of reparations that have the ability to improve the lives of victims. This brings the definition and implementation of reparations closer to development policies, reconstruction and the obligation to respond to social and economic rights.

One-time payments are easy to implement. They are also associated with the most general understanding of reparations, which derives from the individualized approach to reparations based on the concept of compensation. One-time payments are demanded by victims, who prefer “a bird in the hand” rather than “two in the bush,” especially in a context where there is a lack of trust in the ability of the state to comply with promises, or budget resources for long-term obligations. This explains why they are the preferred form of reparations, and the one implemented in most countries.<sup>43</sup>

However, only if consisting of significant amounts can one-time payments effectively provide conditions for victims to improve their lives. This may happen in cases of judicial reparations, if the amounts are defined according to a serious assessment of the harms and losses, but can rarely happen with massive

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<sup>41</sup> In an activity distributing payments for the comprehensive reparations program in the city of Pasto, Colombia, one of the leading messages provided by the staff directing the activity was that with the compensation amount (equal to 40 minimum-wage salaries), they were going to receive, victims would be able to “reconstruct their life projects”. Some victims expressed the desire to buy a house, or to buy land to build one. Another victim, however, in a more realistic assessment, said that he just expected to buy some bricks (direct observation by the author).

<sup>42</sup> Victims of torture in Chile reacted angrily to President Lagos’ announcements that the creation of a truth commission, which included registering all victims of torture, would lead to “austere and symbolic reparations.” Some of them complained that what they had suffered “was not austere and symbolic” (direct observation by the author).

<sup>43</sup> The Truth Commission of Ecuador decided on one-time payments after consulting victims. Resumen Ejecutivo Informe de la Comisión de Verdad (2010). Recomendaciones, paragraph 34.

programs, since the total investment required could be enormous.<sup>44</sup> Measures that involve a long-term approach, combining pensions, education and health care, can not only provide sustainable support overtime, and particularly when victims are old, but also the costs are distributed through several fiscal years, thus having a lower impact on the national budget than when concentrating payments in just few years. In the end, the total transfer of funds and services to victims can be of much higher quality than what could be given to them through single payments, and their effect on victims' quality of life of victims can be higher too.

Looking at reparations as a message strengthens the importance of a program that consists of more than a one-time delivery. After the degree of suffering caused to victims, and the years of lack of response to their claims, it might not be enough to just say sorry once. An official apology perhaps might be something authorities will not want to over use, but as with other forms of recognition, frequent affirmation reinforces the message. That is why periodical, often annual, ceremonies exist to remember national independence, or the sacrifice of heroes, veterans and martyrs. Recognition that is provided regularly can have the positive impact of reminding victims once and again the acknowledgment of responsibility and the recognition of their dignity that states manifest through such recognition, especially if the measures or the way they are communicated expressly contain such message.<sup>45</sup>

#### **d) Recognizing victims as citizens and the importance of participation**

The right to participate in public life is recognized as part of the freedom of expression and opinion, the right to peaceful assembly and association, and especially the right to take part in the conduct of public affairs.<sup>46</sup> However, if massive human rights violations were committed, participation of victims in how reparations are defined and implemented is even more important, as an acknowledgment of the victims' citizenship. Recognizing their dignity and membership implies relating to victims as agents, and not as passive recipients of benefits.

The way a process of defining and then implementing reparations relates to victims will reinforce or diminish this message of dignity and membership. If victims were targeted precisely because of their political opinions, or because they belong to a group that has been historically marginalized, it might be even more important to demonstrate that the state will relate to them in a different way. However, this is not a simple issue, as victims are diverse and cannot be bundled up in a single voice or organization.<sup>47</sup>

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<sup>44</sup> Argentina paid reparations to victims of forced disappearance and political imprisonment elevated amounts, funding them by issuing public bonds that would mature after 16 years. Victims could sell those bonds, at a lower price, on the bonds market. See María José Guembe, Economic reparations for Grave Human Rights Violations: The Argentinean Experience, in Pablo de Greiff (2006), *supra* 29.

<sup>45</sup> As one survivor of torture receiving a pension in Chile expressed to the author: "The amount is not much, but every month, through that check, I receive a message from the state acknowledging its responsibility for what they did" (direct observation by the author in 2005).

<sup>46</sup> ICCPR, arts. 19, 21, 22 and 25.

<sup>47</sup> For more about participation and reparation programs see Cristian Correa, Juie Guillerot and Lisa Magarrell, "Reparations and Victim Participation: A Look at the Truth Commission Experience," in C. Ferstman, M. Goetz, A. Stephens (Eds.), *Reparations for Victims of Genocide, Crimes Against Humanity and War Crimes: Systems in Place and Systems in the Making*, Martinus Nijhoff Publishers – Leiden & Boston, 2009 385-414.

Also, opening the debate of how to define or implement reparations cannot mean leaving victims to do the job, since these are responsibilities of the state. The interests of victims need to be balanced with the interest of the whole society, and a process of reparation cannot hijack the nation's economy or development.<sup>48</sup> Nevertheless, the complexities and nuances that must be considered for the participation of victims should not imply that it is an impossible task, or that victims are an obstacle to efficient implementation. Their involvement, and sense of ownership, is not just a requirement so that the project is perceived as being fair or effective, but is part of the core message that a reparations program should attempt to deliver.

#### **e) Fulfilling the promises**

Finally, a message of membership and dignity cannot be delivered if a well-intentioned and inclusively designed program is never delivered. This might sound obvious, but many reparation programs, even some defined by law and not just part of commissions' recommendations, have been only partially implemented or are being executed at such a slow pace that victims are forced to wait for years.<sup>49</sup> Other programs are designed to be implemented over long periods of time, sending a message that recipients are recognized as victims, but that because of budgetary constraints, they have to wait their turn.<sup>50</sup>

Being able to fulfill reparations promises requires first making promises that are possible to be fulfilled. Some reparations programs are designed with so much ambition and complexity that they are simply unrealistic in concrete terms. In the effort to include every aspect that needs to be included, or to respond to every demand, the amount of resources and operational capabilities required turns into unrealistic policy. As much as participation is an essential component of the message, as is the importance of addressing victims' different needs, simplicity and realism also need to be kept in mind, so that implementation can be possible in a reasonable timeframe, and can include all the components defined in the program designed, not just some of them (as with the disbursement of cash, which is usually the easiest to do). This requires realistic planning in terms of the budgetary requirements of the program, as well as the readiness of certain government agencies or ministries that need to be involved if the program includes health care rehabilitation, educational benefits, housing, or the involvement of local governments.

#### **4. Collective or community reparations**

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<sup>48</sup> Reparations being paid in Bosnia and Herzegovina, mostly focused on veterans, though, consume such a portion of the state budget that has been identified as an obstacle for the country's economy by the World Bank. See Linda Popic and Belma Panjeta, "Compensation, Transitional Justice and Conditional International Credit in Bosnia and Herzegovina," Independent research publication supported by the Royal Norwegian Embassy and the Embassy of Switzerland in Bosnia and Herzegovina - Sarajevo, 2010.

<sup>49</sup> Programs recommended by truth commissions, defined as comprehensive and including several measures that support each other, have been only partially implemented by the disbursing of lump sums to registered victims, as in the case of Peru, Ghana, South Africa, Colombia and Sierra Leone.

<sup>50</sup> This is also the case of Peru and Colombia, where implementation was supposed to take place over a span of ten years. However, so many victims have already registered, and received a certificate acknowledging them as victims due reparations, that they will have to wait for the availability of more funds in order to receive reparation.

Some reparations programs have strong similarities to development policies, particularly with regards to collective reparations. These are forms of reparations for groups that have been affected by violence or by neglect. Some practitioners feel that collective reparations should be a first step or an initial effort by the state to provide decent living conditions to affected communities, and development policies should take the lead afterwards.<sup>51</sup> Different approaches exist for collective reparations, depending very much on the context in which were proposed.

One approach has been to focus on specific villages, indigenous communities or small areas inhabited by people who have a special identity or connection to their land. Reparations are designed in response to harm suffered by the collectivity, as result of massacres; the targeting of their leaders; the destruction of communal property or services; the occupation by an armed group for a substantive period; or massive displacement. In these cases, it is clear that, in addition to the individual harm suffered by the direct relatives of victims who suffered from the killings or disappearances, or the direct victims of torture, forced labor or sexual violence, there is a collective harm that affected those whose community life was seriously destroyed. This is easier to establish with regard to communities with a strong sense of belonging, where the communal identity is an important part of people's life, or is characterized by a special culture that values community membership. It is more difficult to identify in urban settings, but should not be excluded a priori.

Examples of community reparations vary. Some have been based on the implementation of a single project. Others involve a broader social investment on the community. The first is the case of Peru, where community reparations programs have been implemented in approximately 1,946 communities since 2007, consisting of the execution of an infrastructure project chosen by the community for a maximum amount of USD 37,000.<sup>52</sup> Despite victims' appreciation for the projects implemented, most do not consider them appropriate as reparations however, as they weren't accompanied by significant recognition of the violations, and individual victims had not, at the time, received any other types of reparation.

Other experiences involve a more flexible approach to social investment in the communities, such as the one implemented in the Indonesian province of Aceh as result of the 2005 Helsinki peace agreements, which led to the implementation of a disarmament, demobilization and reintegration program. The accord included a policy for community development, assisted by the World Bank through a broader national policy named *Kecamatan* Development Program. Each *kecamatan*, or sub district, could present development projects for between USD 5,000 and USD 14,000, depending on variables that included

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<sup>51</sup> In 2009, ICTJ organized a symposium with practitioners of different countries engaged in the implementation of collective reparations. See ICTJ, "The Rabat Report: The concept and challenges of collective reparations," ICTJ – New York, 2009.

<sup>52</sup> Most projects have been executed in the areas of irrigation, productive projects in agriculture or livestock, building or equipping schools or classrooms, infrastructure for drinking water, or sewage. The communities elect a five-member commission to direct the implementation of the project, one of whom has to be a woman. The project and the members of the commission are selected during a community assembly. Correa 2013, *supra* 19. For a more complete assessment of the program, see Sonia Paredes and Cristián Correa, *supra* 25.

conflict intensity and population size. Most of the funds were used for productive investment in agriculture and livestock, through the purchase of seeds or cattle. They were also used in building community infrastructure. Similarly to the program in Peru, it covered a significant number of villages (1,724 up to June 2007). However, the emphasis of the program was on reintegration of former combatants and community development. The voices of victims weren't heard when the projects were defined, which created significant dissatisfaction and resentment among victims.<sup>53</sup>

Colombia is starting a process of collective reparation, which includes a component of community reparation. The methodology starts with a process of consultation with the community and a diagnosis of their existing conditions. Based on this information, a community plan is decided upon. However, given the complexities of these plans and the need to coordinate different state institutions (municipalities, regional governments, and different ministries and agencies) it is not clear if such a comprehensive approach is workable. In 2012, it was decided that the program would be executed in 833 communities, organizations and groups, with a total budget of USD 222 million, but the program is still mostly in its initial stages of diagnosis and consultation.<sup>54</sup>

Another approach is to define regional development policies to guarantee access to social and economic rights for people who have been historically marginalized, in addition to some of them being subjected to individual violations as well. This is what has been implemented in Morocco.

The program was focused on 11 regions, or areas, which were subjected to special types of repression, or that were marginalized from development and social policies during the "Years of Lead" because of their connection with insurgency or opposition movements, or for the location of a secret detention center. For each of them a community development plan was designed and implemented, including strengthening the capacity of local organizations; the preservation of memory; improving living conditions through economic projects and environmental protection; and improving the condition of women and children. In addition to this, a fund (of USD 6.5 million, including a USD 3.7 million contribution from the European Union) for projects presented by community organizations of eight of the 11 regions was created.<sup>55</sup>

The program offers an interesting model, combining targeted development and community reparations. However, there were some problems in the implementation stage. Some organizations criticized the program for not having made sufficient consultation efforts, or for having excluded those organizations that were critical of the program or of the government. Additionally, regions in the Western Sahara,

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<sup>53</sup> Ross Clarke, Galuh Wandita and Samsidar, "Considering Victims: The Aceh Peace Process from a Transitional Justice Perspective," ICTJ – Jakarta, 2008.

<sup>54</sup> The program was designed based on a pilot exercise implemented in seven communities with the same degree of complexity, which after six years of execution weren't yet completed. Cristián Correa. "From Principles to Practice: Challenges for Implementing Reparations for Massive Violations in Colombia," ICTJ - New York, forthcoming 2014.

<sup>55</sup> Advisory Council on Human Rights. "Follow-up Report on the Implementation of the Equity and Reconciliation Commission Recommendations. Main Report," CCDH - Rabat, 2009.

which suffered intense repression and marginalization, were excluded from the program.<sup>56</sup> Finally, despite efforts made in terms of capacity building, the methodology of a fund for receiving applications for projects tends to benefit those organizations that have better capacities to define a good project in the first place. This resulted in the exclusion of projects presented by weaker organizations, perhaps those in most need, or comprised of people who don't have the necessary training or experience. More often than not, those excluded are women's organizations.<sup>57</sup>

All these modalities call for integration with development policies. In the case of community reparations, as the one implemented in Peru or designed in Colombia, several of the measures to be implemented require the involvement of development agencies and ministries. If the communities are in need of schools, health care centers or economic infrastructure their design, construction and operation needs to be defined and implemented by development agencies and the respective ministries. Moreover, they need to be part of the general strategies of those ministries and agencies to guarantee maintenance and future operation, and be part of the general service plan particularly in the case of projects that involve services, as education or health care.

Additionally, a focus on specific communities affected by violence cannot leave out the surrounding areas. Many projects might need improvement on the network of services that can make them function. It sounds obvious, but one project in Peru consisted of building several hundred meters of a canal to improve irrigation in a community, but failed to include an improvement to the canal that the newly-built canal was supposed to connect to, beyond the limits of the community. Furthermore, improvement in local economies, without addressing the needs of broader regions, which also suffered from violence or marginalization, may have little impact.

## **5. Regional development or reconstruction policies to complement reparations**

Even if a reparations policy effectively addresses the different consequences of violence on victims, there still exists a broader population that is also affected by the violence, or by the historical marginalization that accompanied it, caused it or derived from it. Furthermore, for the effectiveness of the reparations policies implemented for victims of the most serious violations, some forms of reconstruction and development policies are needed, even if reparations are limited to individual forms of redress, and not the forms of collective reparations described above. Providing some forms of specialized health care to victims of the most serious violations requires having a functioning health care center close to where victims live. Providing scholarships to children of those killed, disappeared, raped or tortured requires a functioning school that can provide quality education to help them improve their life choices. Roads, electric lines, and irrigation canals might be needed for businesses created by victims with the reparations they received, in order to function and commercialize their product. They are also

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<sup>56</sup> Amnesty International. "Broken Promises: The Equity and Reconciliation Commission Recommendations and its Follow-up," Amnesty International - London, 2010.

<sup>57</sup> Julie Guillerot, Naima Benwakrim, Maria Ezzaouini and Widad Bouab. "Morocco: Gender and the Transitional Justice Process," ICTJ - New York, 2011.

needed for teachers, health care workers, students and patients to access the communities and provide or receive the services.

It is clear also that those centers and schools cannot be limited to victims, but must be open to all, even if the specialized victim-centered services or the scholarships are focused just on them.<sup>58</sup> Reparations must be accompanied by these development and reconstruction policies that should both provide conditions to effectively implement reparations, as well as to address the needs of others who suffer marginalization and poverty. The same holds true concerning the implementation of community reparations, as previously explained, for even a policy consisting of small projects targeting certain communities needs infrastructure and services beyond those communities in order to make them functional, and this will benefit other communities as well.

This necessarily requires defining development policies by listening to the communities in order to assess what is needed. It requires listening to victims about the obstacles they face in order to access and maximize benefits from reparations measures in the areas of education, health care, productive projects or others, as well as listening to the rest of the inhabitants about the obstacles they face in order to exercise minimum economic, social and cultural rights. For reparations to be able to effectively remove those obstacles, decision-making must be flexible and participatory.

These development policies can even be carried with some reparative focus if they acknowledge that the need for them derives from the recognition of responsibility for years of marginalization or neglect, or as result of war and violence. The schools, clinics, bridges or roads can be named after victims, leaders and/or episodes of violence or resistance struggles, even if naming alone might not be enough. While these reparations will not be capable of replacing some forms of individual reparations, they can strengthen the message of dignity and membership that must be communicated to victims, and also to the rest of the inhabitants of those regions or communities.

The contributions of development to repair the broad harms caused by conflict and marginalization are especially relevant when development is not just understood as economic growth, or only measured by per capita GDP. Even if this traditional thinking is still in the mindsets of important development actors, there is a growing consensus that development is more than economic growth, and that many fundamental aspects of what development is are missed if measured only in terms of economic activity.

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<sup>58</sup> Eventually, depending on the nature of the specialized victim-centered health or psychosocial care services, they can be expanded to victims of other types of violence. However, the possibilities for doing this might vary according to the context. Victims of sexual violence committed during the 2007-2008 post-electoral violence in Kenya expressed great concern about improving services for current victims of sexual violence (direct observation of the author meeting victims in Nairobi, May 2014). In a different context, victims of political repression in Chile opposed firmly the attempts of the government to expand the Comprehensive Reparations in Health Care Program to current victims of domestic violence. The political nature of the violations and the higher degree of ideologization of victims in Chile might explain the different attitude.

The Human Development approach<sup>59</sup> is based on the notion that “people are the real wealth of a nation. The basic objective of development is to create an enabling environment for people to live long, healthy and creative lives.”<sup>60</sup> Uvin proposes a higher level of integration between development and human rights, which derives from a “rights based approach to development.”<sup>61</sup> He warns, though, about the risks of making this approach a mere conceptual repackaging by government, donors and aid agencies, and proposes concrete ways that such a notion demands that those involved in development policies and aid integrate into their work the recognition of “beneficiaries” as “right bearers”; as people who have a legitimate claim to rights, and who are entitled to enforceable mechanisms. This should involve a baseline evaluation about the conditions of rights enjoyed by targeted populations so that later assessments of their improvement can be made; adoption of non-retrogression rules to guarantee that development interventions don’t affect existing rights; and also acknowledging that a rights based approach implies recognizing the political nature of poverty, marginalization and abuse, and hence the need to confront elites and governments, including of rich countries, to promote a development to which the whole population is entitled.

#### **6. When there is resistance to acknowledging wrongdoing and calling reparations as such**

Another form of synergy between reparations and development may occur when the government and development agencies don’t want to acknowledge the commission of massive human rights violations. Governments may want to avoid acknowledgment of responsibility, and aid agencies may not want to get involved in internal politics. These are clearly negative conditions in which to talk about accountability and reparations to victims, as well as for a rights based approach to development. Not recognizing the gross violations of human rights committed, and the responsibility of the state to address them, denies people’s nature as right bearers. A development policy that does not recognize profound injustices committed in a country brings us back to development work as charity, not as a right. However, does this position mean that nothing can be done for victims of those violations?

One possibility is to adopt an incremental strategy. This could include support efforts for relief to victims, or assistance projects that may provide opportunities for social and economic improvements to people in those countries, making sure that in some way victims are included in the targeted population. When implementing policies for improving health care for the entire population, it could be advisable to include services for providing psychosocial support and gynecological care to address the needs of survivors of sexual violence. Targeting female heads of household can be a way to address the needs of war widows, or spouses of those disappeared. Prioritizing educational coverage for orphans may also benefit affected families in this way. Finally, social programs can be directed to areas affected by the conflict and that are also subsumed in poverty and marginalization. In its first stage of implementation, a conditional cash transfer program to overcome poverty in Peru, “Juntos”, used areas identified by the

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<sup>59</sup> This idea, spearheaded by the Human Development Reports published every year by the UNDP since 1990, and enriched by the contributions of Amartya Sen, Martha Nussbaum and other scholars, has been gaining increasing support.

<sup>60</sup> Opening words of the 1990 Human Development Report (UNDP 1990).

<sup>61</sup> Peter Uvin, “Human Rights and Development,” Kumarian Press - Bloomfield, 2004.

report of the Truth and Reconciliation Commission as one of its criteria to identify which locations to concentrate the programs,<sup>62</sup> but was not considered part of the Comprehensive Reparations Plan. In Nepal, a relief program has been implemented with World Bank funding. Between 2009 and 2010 it has provided cash payments and other benefits to more than 26,000 people, of which 20,000 were victims of severe violations of human rights, but registered them under the ambiguous category of “conflict affected persons”. The program provided some tangible benefits to those registered, who were effectively in need. It is an example of actual implementation in a short period of time, which is remarkable, considering the lack of action or long delays common to most reparations programs recommended by truth commissions. However, the lack of a clear definition based on the notion of victims of human rights violations and violations of humanitarian law has led to the exclusion of some categories of victims, such as those who have suffered sexual violence or torture but are not disabled, as well as to the initial unequal treatment of the relatives of those disappeared, while including those who suffered property damages. Moreover, some victims have expressed that the interim payments are not adequate to address the consequences of that they suffered, a feeling that is reinforced by the lack of implementation of other efforts in regards to truth and accountability, even though they were part of the commitments defined by the peace agreement.<sup>63</sup> Despite these shortcomings, the recognition that there are conflict affected persons, who are registered, offers an opportunity to insist on the need to provide reparations that this time can acknowledge their condition as right bearers.

This approach is not risk free, as there are many possibilities for manipulation; for example, to avoid complying with victims’ right to a remedy, or to implement programs in ways that exclude certain categories of victims. In Sierra Leone, after several grants from the UN Peace Building Fund that enabled registration of more than 30,000 victims, an interim cash payment for them, urgent health care intervention for few dozens and some community reconciliation ceremonies, the momentum and political pressure for implementing the broader reparations program recommended by the Truth and Reconciliation Commission has been waned, which leads to question if the implementation of interim measures without strengthening victims organizations had reduced the possibilities that reparation will be ever implemented.<sup>64</sup> Despite these risks, such an approach, in certain contexts, can provide some tangible, immediate support to victims. A further step can be included, following a rights based approach, including the involvement of local organizations and promoting their participation. This timid approach, however, needs to be conscious of its own limitations. In the long run, the goal should be to strengthen people’s capacity to demand their rights, including victims demanding accountability and reparations that involve acknowledgment of responsibility, which could be even more effective than if imposed via foreign NGOs, governments or aid agencies.<sup>65</sup> For that reason, it must remain very clear

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<sup>62</sup> Ramón Díaz, Ludwig Huber, Oscar Madalengoitia, Raphael Saldaña, Carolina Trivelli, Rosana Vargas and Ximena Salazar, “Análisis de la implementación del Programa Juntos en las regiones de Apurímac, Huancavelica y Huánuco,” Instituto de Estudios Peruanos, Universidad Peruana Cayetano Heredia – Lima, 2009) 26.

<sup>63</sup> ICTJ, “From Relief to Reparations: Listening to the voices of victims,” ICTJ – New York, 2011. See also Ruben Carranza, “Relief, Reparations and the Root Causes of Conflict in Nepal,” ICTJ – New York, 2012.

<sup>64</sup> Suma and Correa, *supra* 19.

<sup>65</sup> Uvin makes a very relevant point on the advantages of strengthened local organizations over international ones in the political struggle for human rights and development as a contribution for democratic accountability.

that what is provided is mere relief or social services, and that the assistance program won't be used to affirm that the state has provided reparations, or that has complied with its obligations towards victims.

## Conclusion

There are strong connections between transitional justice and human development, as the ends of transitional justice, especially in regards to recognizing victims of human rights violations as right bearers, encouraging civic trust in societies divided by conflict, and strengthening the democratic rule of law are shared goals with a notion of human development.<sup>66</sup> A society recovering from armed conflict needs to include these three goals as part of its development strategy if it wants that development to be sustainable. If not, marginalization of a portion of the population will remain or be deepened, pockets of poverty may remain obstacles for overall development, and the stability and confidence needed for investment and growth will be seriously hampered.

Reparations and reconstruction cannot be viewed separately. Reconstruction and development policies aimed to guarantee social, economic and cultural rights would be partial if the conditions and rights of victims of the worst violations are not addressed. They would not necessarily guarantee stability, peace or reconciliation, if victims perceive that they have been left out. Reparations would not be effective if they do not assume an approach of responding to the current socioeconomic and psychosocial consequences of past violence. They would not be effective either if they are not accompanied by some development measures to improve services that can guarantee victims' accessibility to reparations, as well as a broader sense of legitimacy and shared benefit of the reparations effort. Recognizing that victims are entitled to reparations, and that reparations for many victims demand providing conditions of wellbeing that affirm their dignity and membership, development policies should be aimed at guaranteeing those conditions to them. Development policies in post conflict countries should focus on guaranteeing those rights, especially in the most devastated regions and communities. This is precisely the important role that development policies should play: addressing the condition of poverty of marginalized populations that was an important component of the conflict and that is a requirement for a sustained peace, by progressively responding to their social and economic rights. Transitional justice measures can help point out certain priorities for a long-term agenda of reconstruction and development, and can promote the reform of institutions that could improve mechanisms for social participation and inclusion or marginalized communities, but can hardly be tasked with addressing all the consequences of historical and recent injustices. Some of the focus of development and reconstruction policies should be guaranteeing access to education to all children, health care, as well as infrastructure and support for local economic activities, making sure that proper consultation and involvement of local partners in the definition, implementation and evaluation of the policy is ensured.

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International cooperation and assistance should keep in mind that the final constituency that must hold governments is the country's population (Uvin, *supra* 61).

<sup>66</sup> De Greiff, Pablo, "Articulating the Links Between Transitional Justice and Development: Justice and Social Integration," in Pablo de Greiff and Roger Duthie, *supra* 30.

People know their needs and their communities, and are essential guides in designing the better allocation of certain services they are entitled to.

Additionally, there are many ways that a reparations program can benefit from the lessons derived from development policies. Reparation policies need to be able to measure their impact, invest in the long term and consider the wellbeing of victims, and not just pretend that they have been successful by just having provided certain measures to a number of victims.<sup>67</sup> The mere disbursement of funds, which in many contexts is the main focus of reparations, as derived from the legal tradition of individual or judicial reparations, is not enough. Moreover, the focus on compensation through one-time cash payments faces resistance also among policymakers, as they are afraid of the impact on the national budget of such sudden expense. Listening to victims' current needs and assuming reparations as a concrete message helps to find responses that can be more adequate for them in the long term, as well as make more sense to the economic reconstruction of the country.

Looking at reparations from a development perspective helps to strengthen an approach to reparations as a future-oriented process in terms of recognizing the dignity and membership of victims. Measures guaranteeing the enjoyment of some degree of social and economic rights to all the inhabitants of the marginalized, or most affected areas of the country, may help reparations have a stronger impact for victims, and will provide fairness also to non-direct victims living in similar conditions. It is clear that reparations should not consist only in the satisfaction of social and economic rights that victims are already entitled to,<sup>68</sup> but when the impact of the violations affects the ability to exercise those rights, making connections is indispensable. Additionally, reparations need to be implemented together with policies that can address other forms of discrimination, abuse, or marginalization beyond the limited scope of civil and political rights.

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<sup>67</sup> Such types of reporting are frequent when states present their record of compliance to human rights obligations at the Universal Periodic Review of the Human Rights Committee. It is also of concern using those standards to affirm the success of some projects funded by the UN Peace Building Fund, as has happened in the case of reparations projects in Sierra Leone. See Mohamed Suma and Cristián Correa, *supra* 19.

<sup>68</sup> This has been affirmed, among others, by the Inter American Court of Human Rights, which didn't consider reparations a fund created for the support of victims if it was not expressly acknowledged as a response of the responsibility of the state, neither a series of other programs of social nature available to the victims on housing, productive projects, and other assistance consisting of groceries and cash. IACHR, *González et al. (Cotton Field) v. Mexico*, Judgment of November 16, 2009, series C 205, paragraphs 529, and 554 to 560.